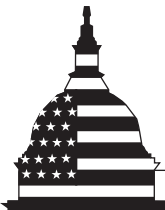


January 2011

H-1B VISA PROGRAM

Reforms Are Needed to Minimize the Risks and Costs of Current Program



G A O

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Why GAO Did This Study

Congress created the H-1B program in 1990 to enable U.S. employers to hire temporary, foreign workers in specialty occupations. The law capped the number of H-1B visas issued per fiscal year at 65,000. Since then, the cap has fluctuated with legislative changes. Congress asked GAO to assess the impact of the cap on the ability of domestic companies to innovate, while ensuring that U.S. workers are not disadvantaged. In response, GAO examined what is known about (1) employer demand for H-1B workers; (2) how the cap affects employer costs and decisions to move operations overseas; (3) H-1B worker characteristics and the potential impact of raising the cap; and (4) how well requirements of the H-1B program protect U.S. workers. GAO analyzed data from 4 federal agencies; interviewed agency officials, experts, and H-1B employers; and reviewed agency documents and literature.

What GAO Recommends

This report offers several matters for congressional consideration, including that Congress re-examine key H-1B program provisions and make appropriate changes as needed. GAO also recommends that the Departments of Homeland Security and Labor take steps to improve efficiency, flexibility, and monitoring of the H-1B program. Homeland Security disagreed with two recommendations and one matter, citing logistical and other challenges; however, we believe such challenges can be overcome. Labor did not respond to our recommendations.

View [GAO-11-26](#) or key components. For more information, contact Andrew Sherrill at (202)512-7215 or sherrilla@gao.gov.

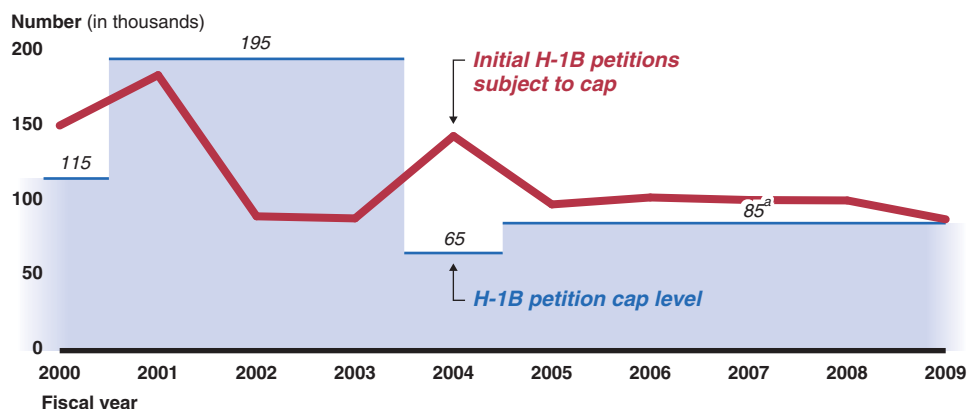
H-1B VISA PROGRAM

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What GAO Found

In most years, demand for new H-1B workers exceeded the cap: From 2000 to 2009, demand for new H-1B workers tended to exceed the cap, as measured by the numbers of initial petitions submitted by employers who are subject to the cap (see fig. 1). There is no way to precisely determine the level of any unmet demand among employers, since they tend to stop submitting (and the Department of Homeland Security stops tracking) petitions once the cap is reached each year. When we consider all initial petitions, including those from universities and research institutions that are not subject to the cap, we find that demand for new H-1B workers is largely driven by a small number of employers. Over the decade, over 14 percent of all initial petitions were submitted by cap-exempt employers, and only a few employers (fewer than 1 percent) garnered over one-quarter of all H-1B approvals.

Figure 1: Number of Initial Petitions for New H-1B Workers Submitted by Employers Subject to the Cap



Source: GAO analysis of Department of Homeland Security CLAIMS 3 data on initial petitions.

^aIncludes 20,000 visas allocated to workers graduating from U.S. master's programs or higher.

Most interviewed companies said the H-1B cap and program created costs, but were not factors in their decisions to move R&D overseas:

The 34 H-1B employers GAO interviewed reported that the cap has created some additional costs, though the cap's impact depended on the size and maturity of the company. For example, in years when visas were denied by the cap, most large firms reported finding other (sometimes more costly) ways to hire their preferred job candidates. On the other hand, small firms were more likely to fill their positions with different candidates, which they said resulted in delays and sometimes economic losses, particularly for firms in rapidly changing technology fields. Interviewed employers also cited costs due to the H-1B lottery process employed when the cap is reached—noting that it does not allow them to prioritize their candidates if they have submitted more than one petition or to make timely hires in response to business needs. On the other hand, most employers told us that the global

marketplace and access to skilled labor drive their decisions on whether to move R&D and other activities overseas, not the H-1B cap.

Limitations in agency data and systems hinder tracking the cap and H-1B workers over time: The total number of H-1B workers in the U.S. at any one time—and information about the length of their stay—is unknown, because (1) data systems among the various agencies that process such individuals are not linked so individuals cannot be readily tracked, and (2) H-1B workers are not assigned a unique identifier that would allow for tracking them over time—particularly if and when their visa status changes. Although information on the total H-1B workforce is lacking, data on approved petitions show that, since 2000, most people that were approved to be H-1B workers were born in China or India, were hired for technology positions, and increasingly held advanced degrees. System limitations also hinder the Department of Homeland Security from knowing precisely when and whether the annual cap has been reached each year, although this problem might be remedied through the agency’s data-modernization plan. Finally, data limitations, along with complex economic relationships, hinder our ability to estimate the potential impact raising the cap would have on U.S. worker wages and employment.

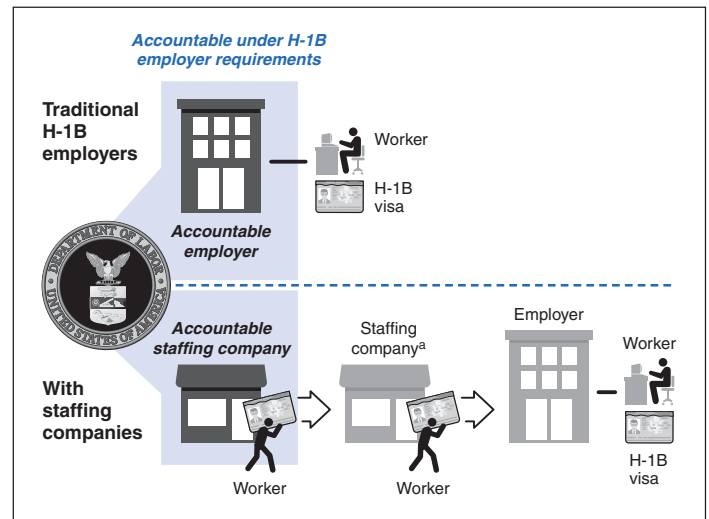
Restricted agency oversight and statutory changes weaken protections for U.S. workers: Elements of the H-1B program that could serve as worker protections—such as the requirement to pay prevailing wages, the visa’s temporary status, and the cap itself—are weakened by several factors. First, program oversight is fragmented and restricted. For example, the Department of Labor’s review of H-1B applications from employers is cursory and limited by law to only looking for missing information and obvious inaccuracies. Yet a recent Department of Homeland Security study reported that 21 percent of the H-1B petitions they examined involved fraud or technical violations.

Second, the H-1B program lacks a legal provision for holding employers accountable to program requirements when they obtain H-1B workers through a staffing company (see fig. 2). Officials from the Department of Labor’s investigative office reported receiving the bulk of their complaints from H-1B workers contracted by staffing companies.

Third, statutory changes made to the H-1B program have, in combination and in effect, increased the pool of H-1B workers beyond the cap and lowered the bar for eligibility. Specifically, these changes have increased the available exemptions to the cap; offered unlimited extensions on the visa while holders apply for

permanent residency; and broadened the job and skill categories for eligibility. Regarding the latter, over 50 percent of employers requesting H-1B workers between June 2009 and July 2010 categorized their prospective H-1B workers as receiving entry-level wages, although we cannot tell whether this trend reflects lower skill levels or other factors.

Figure 2: Limited Accountability for Employers Hiring H-1B Workers through Staffing Companies



Source: GAO review of Department of Labor information.

^aIn some cases there may be more than one staffing company involved in placing the H-1B worker.

Taken together, the multifaceted challenges identified in this report show that the H-1B program, as currently structured, may not be used to its full potential and may be detrimental in some cases. Although executive agencies overseeing the program can take steps to improve tracking, administration, and enforcement, the data we present raise difficult policy questions about key program provisions that are beyond the jurisdiction of these agencies. Such questions include the adequacy of the qualifications of foreign workers the U.S. admits through the program, the appropriateness of H-1B hiring by staffing companies, and the role of the program with respect to permanent residency. The H-1B program presents a difficult challenge in balancing the need for high-skilled foreign labor with sufficient protections for U.S. workers. As Congress considers immigration reform in consultation with diverse stakeholders and experts, and the Department of Homeland Security moves forward with its modernization efforts, this is an opportune time for Congress to re-examine key provisions of the H-1B program.

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Abbreviations

AC21	American Competitiveness in the Twenty-First Century Act of 2000
ADIS	Arrival Departure Information System
BFCA	Benefit Fraud and Compliance Assessment Program
BLS	Bureau of Labor Statistics
CLAIMS 3	Computer Linked Application and Management System, Version 3
CPS Employment and Training	Current Population Survey Labor's Employment and Training Administration
FDNS	Homeland Security's Directorate of Fraud Detection and National Security
Homeland Security	Department of Homeland Security
IT	information technology
Justice	Department of Justice
Labor	Department of Labor
LAN	local area network
LCA	Labor Condition Application
NAICS	North American Industry Classification System
R&D	research and development
State	Department of State
USCIS	Homeland Security's U.S. Citizenship and Immigration Services
US-VISIT	United States Visitor and Immigrant Status Indicator Technology
Wage and Hour	Labor's Wage and Hour Division

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Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

January 14, 2011

The Honorable Thad Cochran
The Honorable Daniel K. Inouye
United States Senate

The Honorable Harold Rogers
Chairman
The Honorable Norman D. Dicks
Ranking Member
Committee on Appropriations
House of Representatives

The current H-1B program, which permits U.S. employers to hire foreign workers in specialty occupations, was authorized in 1990.¹ The same law also placed a cap of 65,000 on H-1B visas issued per fiscal year beginning in fiscal year 1992. However, since then, the cap has fluctuated with legislative changes, reaching a peak of 195,000 in fiscal years 2001 to 2003. Today, the cap is set at 65,000 and continues to be a topic of debate. Proponents of raising the H-1B cap argue that doing so would allow companies to better fill an important and growing gap in the supply of U.S. workers, especially in the science and technology fields. Opponents of raising the cap argue that there is no skill shortage, that the H-1B program displaces U.S. workers and undercuts their pay, and that the cap is an essential tool to protect U.S. workers. Others argue that the skill criteria for the H-1B visa should be revised to better target foreign nationals whose talents are undersupplied in the domestic workforce.

This report responds to a congressional request that GAO assess the impact of the current H-1B visa cap on the ability of domestic companies to develop modern technology and perform innovative research and development (R&D) while ensuring that U.S. workers are not unfairly disadvantaged or displaced by H-1B visa holders.² With respect to H-1B employers, we examined what is known about (1) their demand for H-1B

¹Immigration Act of 1990, Pub. L. No. 101-649, § 205, 104 Stat. 4978, 5019-22 (codified at 8 U.S.C. § 1101(a)(15)(H)(i)(b)).

²H.R. Rpt. No. 110-862 at 132-133.

workers and (2) how the H-1B cap affects costs, offshoring,³ and R&D decisions for companies doing business in the United States. With respect to H-1B and U.S. workers, we examined what is known about (3) H-1B worker characteristics, (4) how raising the H-1B cap might affect the employment and wages of U.S. workers, and (5) how well H-1B program requirements ensure that U.S. workers are not displaced or otherwise disadvantaged by the program.

To address these questions, we drew upon a range of information sources. Specifically, to determine what is known about the demand for H-1B workers and their characteristics, we obtained and analyzed administrative data on employer applications for H-1B visas from the Department of Labor (Labor) for fiscal year 2002 through fiscal year 2009⁴ and from the Department of Homeland Security (Homeland Security) from fiscal year 2000 through fiscal year 2009; collected and analyzed data on the 150 H-1B employers with the greatest number of approvals in 2009; and analyzed data on visa issuances published by the Department of State (State).

To understand the impact of the cap on companies' costs and their decisions to offshore work and invest in R&D, we interviewed a nongeneralizable sample of 34 H-1B hiring companies spanning the country in six industrial sectors, with a range of sizes from a few workers based in one location to thousands of workers positioned around the globe.⁵ We also conducted interviews with representatives from immigration law firms, venture capital companies, industry advocacy organizations, and academic institutions, and conducted an extensive literature review.

To examine the impact of the H-1B program on domestic employment, we obtained data from Homeland Security on the long-run immigration

³Offshoring generally refers to the practice, by either U.S. companies or government entities, of replacing goods or services produced domestically with imported goods or services. See GAO, *International Trade: Current Government Data Provide Limited Insight into Offshoring of Services*, GAO-04-932 (Washington, D.C.: Sept. 22, 2004) and *Offshoring of Services: An Overview of the Issues*, GAO-06-5 (Washington, D.C.: Nov. 28, 2005).

⁴Data on employer applications for H-1B visas that were submitted to the Department of Labor prior to fiscal year 2002 were not readily available.

⁵Twenty-two companies were randomly selected from the 51,942 H-1B employers that received approved petitions in fiscal year 2008. An additional 12 H-1B hiring firms were selected based on referrals from industry contacts, because they were known leaders in key sectors of the economy, and other factors. See appendix I for more details.

outcomes of prospective H-1B workers that were approved to start work in H-1B status between January 1, 2004, and September 30, 2007, for whom data were available; analyzed Homeland Security data and Bureau of Labor Statistics' (BLS) Current Population Survey (CPS) data from 2009 to compare the wages of H-1B workers with those of U.S. citizens in three occupation groups; and analyzed CPS employment, unemployment, and earnings data for the top H-1B occupations.

To assess the effectiveness of the H-1B program's current protections for U.S. workers, we conducted site visits to Labor and Homeland Security processing centers for H-1B applications and to Labor's regional office that receives the highest number of H-1B-related complaints in the country; conducted interviews with agency officials from Labor, Homeland Security, the Department of Justice (Justice), and State involved with various facets of the program including complaint and fraud investigations, as well as with labor advocates and experts knowledgeable in this area; and obtained and analyzed agency data collected on complaints about the H-1B program.

To address all objectives, we reviewed relevant federal laws and regulations, articles, and the temporary immigration programs of several other countries that we selected based on our literature review and discussions with experts.

We conducted this performance audit from May 2009 through January 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

See appendix I for a detailed account of the objectives, scope, and methods for this report.

Background

The H-1B program enables companies in the United States to hire foreign workers for work in specialty occupations on a temporary basis. A specialty occupation is defined as one requiring theoretical and practical

application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher (or its equivalent) in the field of specialty.⁶

The law originally capped the number of H-1B visas at 65,000 per year, but the cap has changed several times pursuant to legislation. The American Competitiveness and Workforce Improvement Act of 1998 increased the cap to 115,000 for fiscal year 1999 and fiscal year 2000.⁷ The American Competitiveness in the Twenty-First Century Act of 2000 (AC21) further increased the limit to 195,000 for fiscal year 2001 through fiscal year 2003.⁸ In fiscal year 2004, the cap reverted to its original level of 65,000.

Over this period, statutory changes also allowed for certain categories of individuals and companies to be exempt from or to receive special treatment under the cap. In 2000, AC21 exempted all individuals being hired by institutions of higher education, as well as nonprofit and government-research organizations, from the cap.⁹ More recently, the H-1B Visa Reform Act of 2004 allowed for an additional 20,000 visas each year for foreign workers holding a master's degree or higher from an American institution of higher education to be exempted from the numerical cap limitation.¹⁰ In addition, in 2004, consistent with free trade agreements, amendments allowed for up to 6,800 of the 65,000 H-1B visas to be set aside for workers from Chile and Singapore.¹¹ Figure 1 depicts the cap levels over the last 20 years and important changes to provisions related to their application.¹² See appendix V for a list of selected H-1B program laws, with descriptions of key provisions.

⁶8 U.S.C. § 1184(i). Fashion models of distinguished merit and ability also qualify for H-1B visas and do not need to meet the definition of specialty occupation. This report will focus solely on the specialty workers.

⁷Pub. L. No. 105-277, tit. IV, § 411, 112 Stat. 2681, 2681-642.

⁸Pub. L. No. 106-313, § 102, 114 Stat. 1251, 1251.

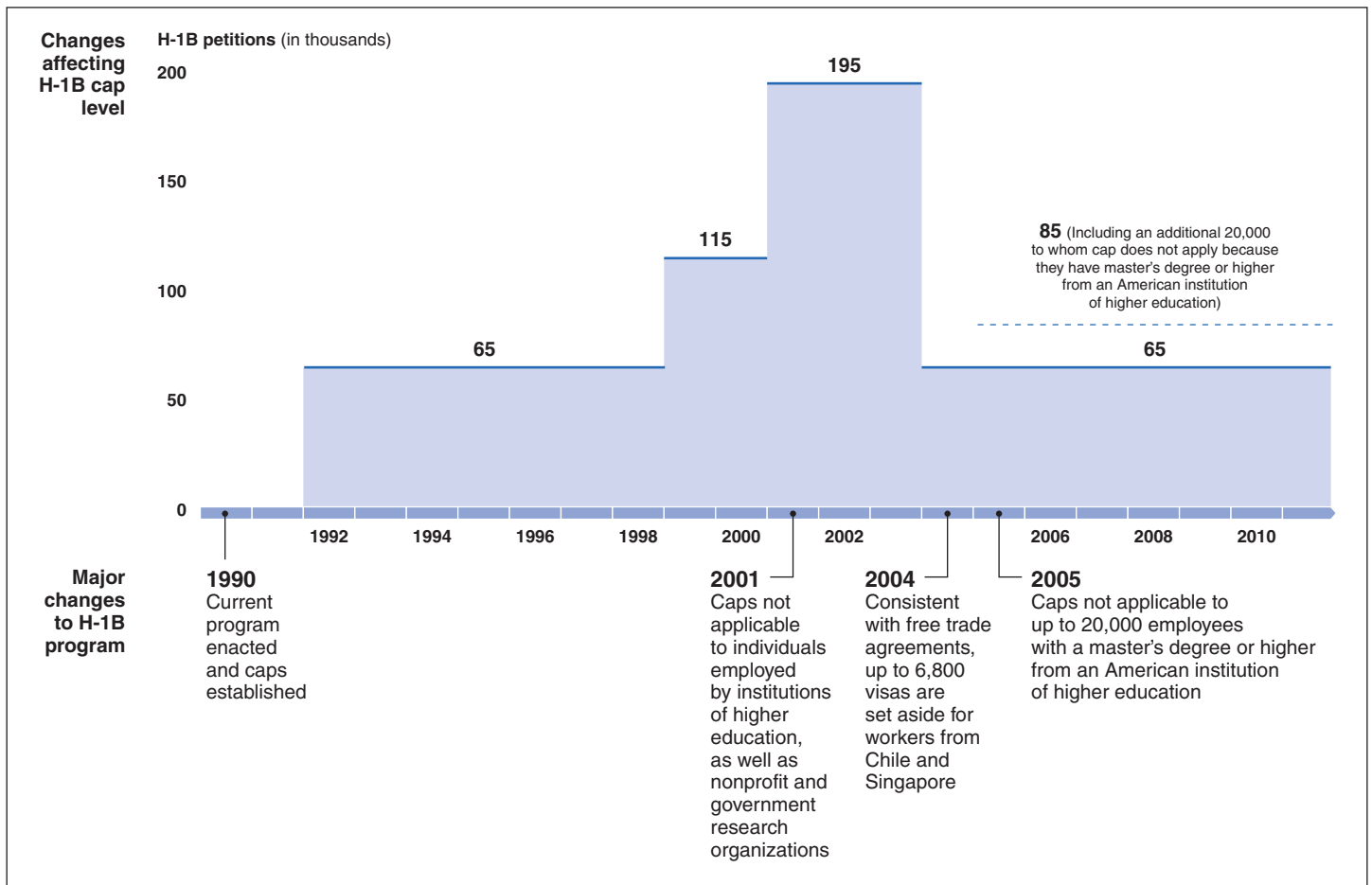
⁹§103, 114 Stat. 1252.

¹⁰Pub. L. No. 108-447, div. J, tit. IV, subtit. B, § 425(a), 118 Stat. 2809, 3356.

¹¹United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 402(a)(2)(B), 117 Stat. 909, 940 (2003), and United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, § 402(2), 117 Stat. 948, 970-71 (2003).

¹²Other changes to the program have occurred. For example, the 2000 legislation increased "visa portability" for H-1B workers, permitting them to change employers within their 6-year time period (sequential employment) once the new employer files an H-1B petition on their behalf. AC21, § 105, 114 Stat. 1253.

Figure 1: Legislative Changes Affecting H-1B Cap Level, by Fiscal Year



Source: GAO analysis of federal law.

Note: Unless otherwise indicated, changes are shown in the fiscal year when they became effective.

While the H-1B visa is not considered a permanent visa, H-1B workers can apply for extensions and pursue permanent residence in the United States. Initial petitions are those filed for a foreign national's first-time employment as an H-1B worker and are valid for a period of up to 3 years. Generally, initial petitions are counted against the annual cap. Extensions—technically referred to as continuing employment petitions—may be filed to extend the initial petitions for up to an additional 3 years. These extensions may be filed for extended employment; sequential employment (when an H-1B worker changes employers within his or her 6-year time period); or for concurrent employment (when an H-1B worker intends to work simultaneously for a second employer). Extensions do not

count against the cap. While working under an H-1B visa, an H-1B worker may apply for legal permanent residence in the United States. After filing an application for permanent residence, H-1B workers are eligible to obtain additional 1-year visa extensions until their green card is issued.¹³ To obtain such extensions, the green card application must be employment-based (i.e. not a green card sponsored by a family member). Employment-based green cards can take a number of years to obtain due to limits on the number of green cards issued to individuals from different countries and in particular employment categories.¹⁴

Program Administration

Labor, Homeland Security, and State each play a role in administering the application process for an H-1B visa. Labor's Employment and Training Administration (Employment and Training) receives and approves an initial application, known as the Labor Condition Application (LCA), from employers. Homeland Security's U.S. Citizenship and Immigration Services (USCIS) reviews an additional employer application, known as the I-129 petition, and ultimately approves H-1B visa petitions. For prospective H-1B workers residing outside the United States, State interviews these approved applicants and compares information obtained during the interview against each individual's visa application and supporting documents, and ultimately issues the visa. For prospective H-1B workers already residing in the United States, USCIS updates the workers' visa status without involvement from State.

Homeland Security's USCIS has the primary responsibility for administering the H-1B program, which includes responsibility for tracking the number of approved petitions against the established cap.¹⁵ Generally, Homeland Security accepts H-1B petitions in the order in which they are received. However, for those years in which USCIS anticipates that the number of I-129 petitions filed will exceed the cap, USCIS holds a "lottery" to determine which of the petitions will be accepted for review. For the lottery, USCIS uses a computer-generated random selection process to

¹³AC21 § 106(a) and (b), 114 Stat. 1253-54.

¹⁴The identification card that proves permanent resident status of an alien in the United States, a U.S. Permanent Resident Card, is commonly referred to as a "green card." It serves as proof that its holder, a lawful permanent resident, has permission to reside and work in the United States.

¹⁵Homeland Security is required to take necessary steps to maintain an accurate count of the number of aliens subject to the H-1B cap who are issued visas. 8 U.S.C. § 1184 notes.

select the number of petitions necessary to reach the cap. USCIS runs two lotteries—one for cases subject to the 65,000 cap, and another for the 20,000 visas available to foreign workers holding a master’s degree or higher from an American institution of higher education.

With regard to enforcement, Labor, Justice, and Homeland Security each have specific responsibilities. Labor’s Wage and Hour Division (Wage and Hour) is responsible for enforcing program rules by investigating complaints made against employers by H-1B workers or their representatives and assessing penalties when employers are not in compliance with the requirements of the program.¹⁶ Justice is responsible for investigating complaints made by U.S. workers who allege that they have been displaced or otherwise harmed by the H-1B visa program.¹⁷ Finally, Homeland Security’s Directorate of Fraud Detection and National Security (FDNS) collaborates with its Immigration and Customs Enforcement Office to investigate fraud and abuse in the program.

Employer Application Requirements

The application and approval process for an employer to hire an H-1B worker requires submission of an LCA and the I-129 petition. The employers must first submit the LCA to Employment and Training for certification.¹⁸ The LCA may reflect requests for one or more workers. On this form, employers must provide their company name, address, Employer Identification Number, and the rate of pay and work location for the anticipated H-1B workers among other information. Submission of the

¹⁶The Secretary of Labor may also initiate an investigation of any H-1B employer if the Secretary of Labor has reasonable cause to believe that the employer is not in compliance with the program. 8 U.S.C. § 1182(n)(2)(G). However, the authority is limited in that the Secretary of Labor must certify that reasonable cause exists and that the investigation was initiated for reasons other than Labor’s review of the employer’s application for completeness and obvious inaccuracies.

¹⁷U.S. workers (and others on their behalf) may file a complaint, known as a charge, to the Department of Justice’s Office of Special Counsel for Immigration Related Unfair Employment Practices, which will pursue discrimination charges alleging that an employer has given certain preferential treatment in hiring an H-1B worker. 8 U.S.C. § 1324b(b) and (c). Any aggrieved person or organization may also file a complaint with Labor against an employer. When Labor’s Wage and Hour Division finds the employer out of compliance with H-1B program requirements, it can assess fines and impose remedies such as payment of back wages to H-1B workers and disqualification from the program, depending on the specific violations, for from 1 to 3 years.

¹⁸By statute, Labor is required to conduct its review within 7 days and may only review applications for omissions and obvious inaccuracies. 8 U.S.C. § 1182(n)(1)(G)(ii) and 20 CFR 655.730(b). It has no statutory authority to verify the authenticity of the information.

LCA to Employment and Training also involves employers making four attestations: (1) that they will pay H-1B workers the amount they pay other employees with similar experience and qualifications or the prevailing wage; (2) that the employment of H-1B workers will not adversely affect the working conditions of U.S. workers similarly employed; (3) that no strike or lockout exists in the occupational classification at the place of employment; and (4) that the employer has notified employees at the place of employment of the intent to employ H-1B workers.¹⁹ These attestations are designed to protect both the jobs of domestic workers and the rights and working conditions of foreign temporary workers.

H-1B-dependent employers or employers found to have committed a willful failure or misrepresentation during the 5-year period preceding the filing of the LCA must make additional attestations on their LCA.²⁰ They must attest (1) that they did not displace a U.S. worker within the period of 90 days before and 90 days after filing a petition for an H-1B worker; (2) that they took good-faith steps prior to filing the H-1B application to recruit U.S. workers and that they offered the job to a U.S. applicant who was equally or better qualified than an H-1B worker;²¹ and (3) that they not place the H-1B worker with any other employer, unless they inquired and have no knowledge that, within the 90 days before and 90 days after the placement, the other employer has displaced or intends to displace a U.S. worker with the H-1B worker.

Unlike some other temporary visa programs, the H-1B program does not require employers to provide evidence that they have first “tested” the U.S. labor market by trying to hire a U.S. worker. Under other temporary visa programs, such as the H-2A program for temporary agricultural workers²² and the H-2B program for temporary nonagricultural seasonal or

¹⁹8 U.S.C. § 1182(n)(1)(A)-(D).

²⁰8 U.S.C. § 1182(n)(1)(E)(ii). H-1B-dependent employers are those with 25 or fewer total employees and more than 7 H-1B employees, 26 to 50 total employees and more than 12 H-1B employees, or with at least 51 total employees and at least 15 percent of them H-1B employees. 8 U.S.C. § 1182(n)(3)(A). H-1B-dependent employers are exempt from this requirement with respect to employees to whom they pay at least \$60,000 per year, as well as employees with a master’s degree or higher in a specialty related to their H-1B employment. 8 U.S.C. § 1182(n)(3)(B).

²¹H-1B employers are exempt from this requirement with respect to certain high-priority employees under 8 U.S.C. § 1153(b)(1).

²²8 U.S.C. § 1101(a)(15)(H)(ii)(a).

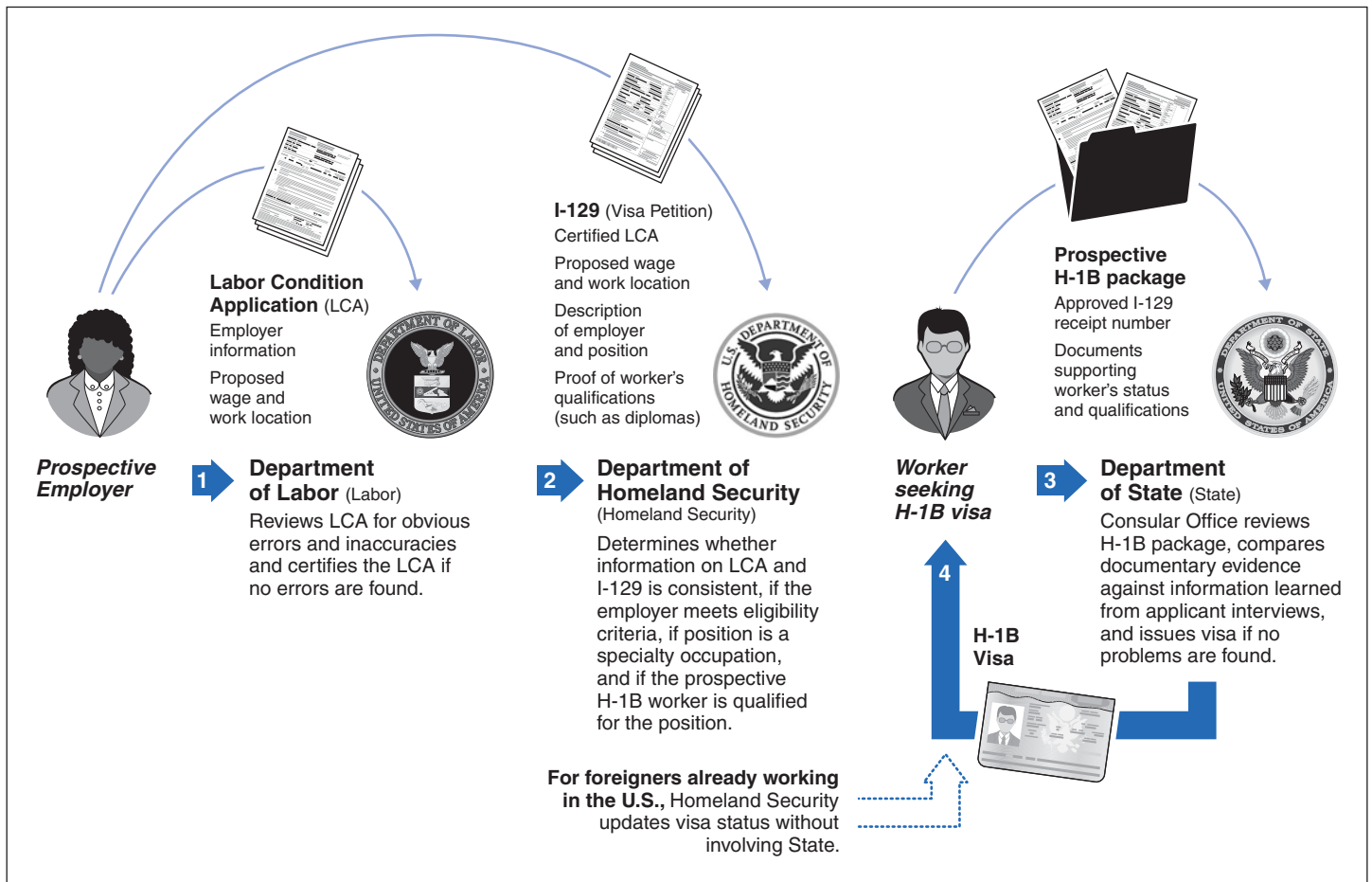
intermittent workers,²³ an employer must, for example document that it has conducted detailed recruitment efforts, advertised the job as specified, listed the job with its State Workforce Agency, and under certain circumstances, document why it did not hire applicants it rejected.²⁴ In the H-1B program, only those employers that are designated as H-1B-dependent or willful violators are subject to any type of labor market test. However, these employers need only attest, rather than demonstrate, that they took good faith steps to hire a U.S. worker.

Once Labor has approved the LCA, employers must submit the certified LCA to Homeland Security, along with the I-129, for additional review. The I-129, submitted by employers to Homeland Security for each prospective H-1B worker, must show the wage that will be paid, the location of the position, and the worker's qualifications, among other information. Figure 2 summarizes the steps required to obtain an H-1B visa.

²³8 U.S.C. 1101(a)(15)(H)(ii)(b).

²⁴20 C.F.R. §§ 655.1-655.119 (2009).

Figure 2: Process of Obtaining an H-1B Visa



Source: GAO analysis of agency procedures.

Demand for H-1B Workers Exceeded the Cap in Most Years and Was Largely Driven by a Small Number of Companies

Available data show that, while demand for H-1B workers by employers has fluctuated with the economy over the past decade, the demand for H-1B workers tended to exceed the cap, as measured by the numbers of initial petitions submitted by employers. In addition, although the vast majority of employers for which Homeland Security processed petitions were approved to hire just one worker, a small number of employers consistently garnered about 30 percent of all approved petitions.

In Most Years, Demand for H-1B Workers Exceeded the Cap, but Precise Measures of Demand Do Not Exist

Although a precise measure of demand for H-1B workers does not exist, a key proxy—the number of initial petitions for new H-1B workers submitted to Homeland Security annually—indicates that demand for H-1B workers tended to exceed the cap over the last decade.²⁵ As shown in figure 3, from 2000 to 2009, initial petitions for new H-1B workers submitted to Homeland Security by employers who are subject to the cap exceeded the cap in all but 3 fiscal years. If initial petitions submitted by employers exempt from the cap are also included in this measure, the demand for new H-1B workers is higher, since over 14 percent of all initial petitions across the decade were submitted by employers who are not subject to the cap.²⁶ However, the number of initial petitions submitted annually is likely to be an underestimate of demand for two reasons. First, employers subject to the cap may stop submitting initial petitions once they know the cap has been reached.²⁷ Second, according to Homeland Security officials, Homeland Security stops accepting petitions that are subject to the cap once the cap is reached.²⁸ Consequently, we cannot

²⁵Each submitted petition is for one H-1B worker. Thus, the number of petitions submitted to Homeland Security can be used as a proxy for the number of workers requested. However, this proxy has several limitations, which are detailed in appendix I.

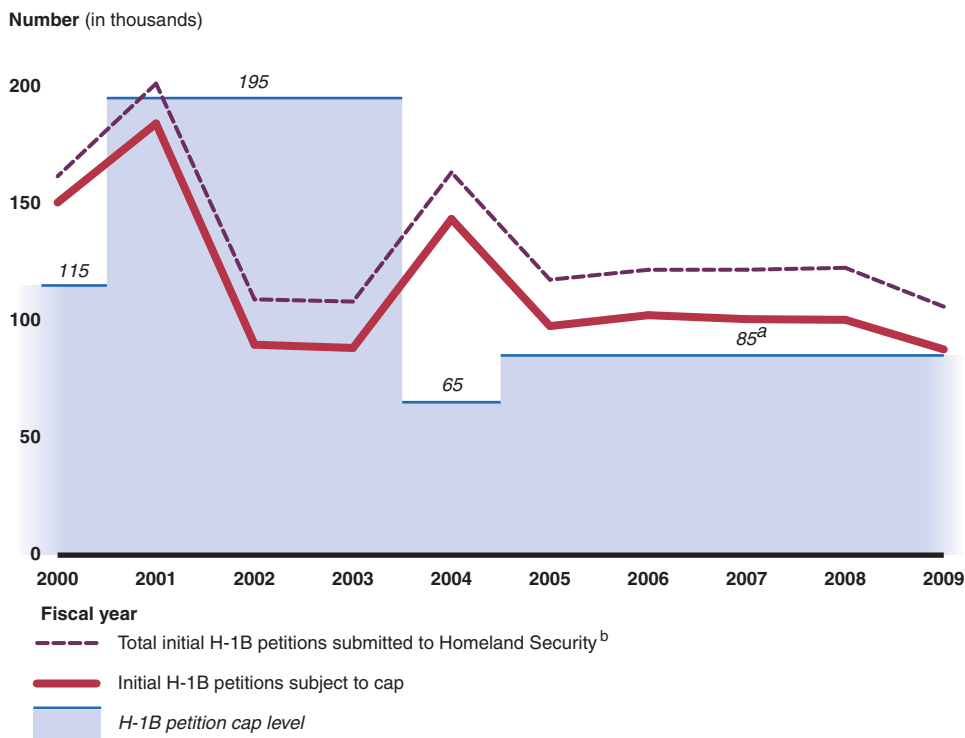
²⁶Initial petitions for new H-1B workers are counted against an annual cap (currently 65,000 for regular petitions and 20,000 since 2005 for petitions for those with graduate degrees from a U.S. institution of higher education), unless they are submitted by cap-exempt employers. Cap-exempt employers are universities, and nonprofit, or governmental research organizations. 8 U.S.C. § 1184(g)(5).

²⁷Reported numbers only reflect petitions entered into Homeland Security's Computer Linked Application Management System, Version 3 (CLAIMS 3) data system—processed by Homeland Security. At any point in a given year, when Homeland Security determines that submitted initial petitions that are subject to the cap will likely exceed the cap, the agency stops accepting these petitions, and does not enter them into its data system. For initial petitions that are subject to the cap and are submitted on the last day, Homeland Security holds a "lottery" to determine which to accept under the cap. Initial petitions that are subject to the cap and are not selected via the lottery are not entered into Homeland Security's data system, CLAIMS 3. For fiscal year 2008 and fiscal year 2009, the cap was reached very early in the filing season, after which requests subject to the cap were not entered into CLAIMS 3 or processed by Homeland Security. As a result, it is likely that the number of processed initial petitions subject to the cap is highly underestimated in these years.

²⁸This is true only for regular petitions not subject to the master's cap. In years in which the master's cap is reached first, after processed petitions subject to the master's cap exceed the 20,000 master's cap, Homeland Security adds unprocessed master's petitions into the universe of regular cap cases; therefore, in these years some master's petitions have two chances of being selected for processing. Homeland Security does not track the number of processed petitions that were eligible for the master's cap, but were ultimately counted against the regular cap.

precisely determine the level of any unmet demand among those employers who are subject to the cap.

Figure 3: Number of Initial Petitions for New H-1B Workers Submitted by Employers Relative to the Cap, FY 2000–FY 2009



Source: GAO analysis of Homeland Security CLAIMS 3 data.

^aIncludes 20,000 visas allocated to workers graduating from U.S. master's programs or higher.

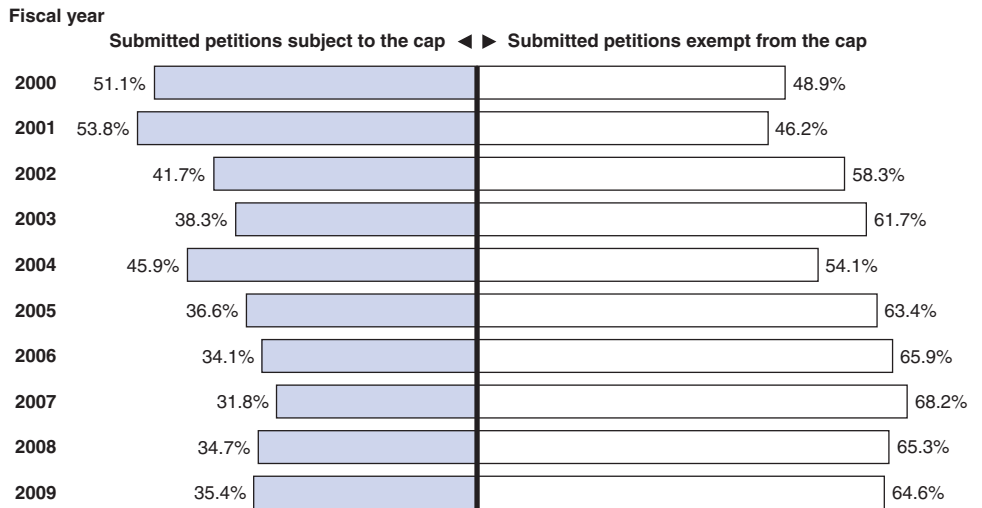
^bTotal initial petitions submitted to Homeland Security includes all initial petitions that were entered into Homeland Security's data system, including those from cap-exempt employers. Reported numbers only reflect petitions entered into Homeland Security's CLAIMS 3 data system and processed by Homeland Security, not the total number submitted which is likely higher in years when the cap is reached. Petitions submitted under the master's cap cannot be differentiated and are therefore included in these data.

When requests to extend H-1B workers' visas (i.e., extensions)²⁹ are included in the total count of submitted petitions, we found that submitted petitions not subject to the cap generally increased as a proportion of overall petitions submitted from fiscal years 2000 to 2009, and greatly exceeded those that were subject to the cap in the last half of the decade. As shown in figure 4, during this time period, the proportion of all submitted petitions that were not subject to the cap increased from 48.9 percent in 2000 to 64.6 percent in 2009. However, as noted previously, submitted petitions for H-1B workers subject to the cap are likely to be underestimated. Additionally, Homeland Security's data system does not enable us to determine which petitions for H-1B workers were subject to the 20,000 master's cap.³⁰

²⁹Continuing petitions, known as extensions, are not limited by and do not count against the annual cap with one exception—if the H-1B worker was initially approved to work for an employer that is not subject to the cap and the worker changes to an employer that is subject to the cap.

³⁰Our petition and employer-level analysis of petitions for H-1B workers processed by Homeland Security used data from its CLAIMS 3 Mainframe database, which does not allow us to determine which petitions for H-1B workers were subject to the master's cap. Homeland Security's CLAIMS 3 LAN database does track information related to H-1B workers graduating with a master's degree or higher from an American institution of higher education, but these two data systems are not linked.

Figure 4: Proportion of Total Submitted Petitions for H-1B Workers Subject to the Annual Cap, FY 2000–FY 2009^a



Source: GAO analysis of Homeland Security CLAIMS 3 data.

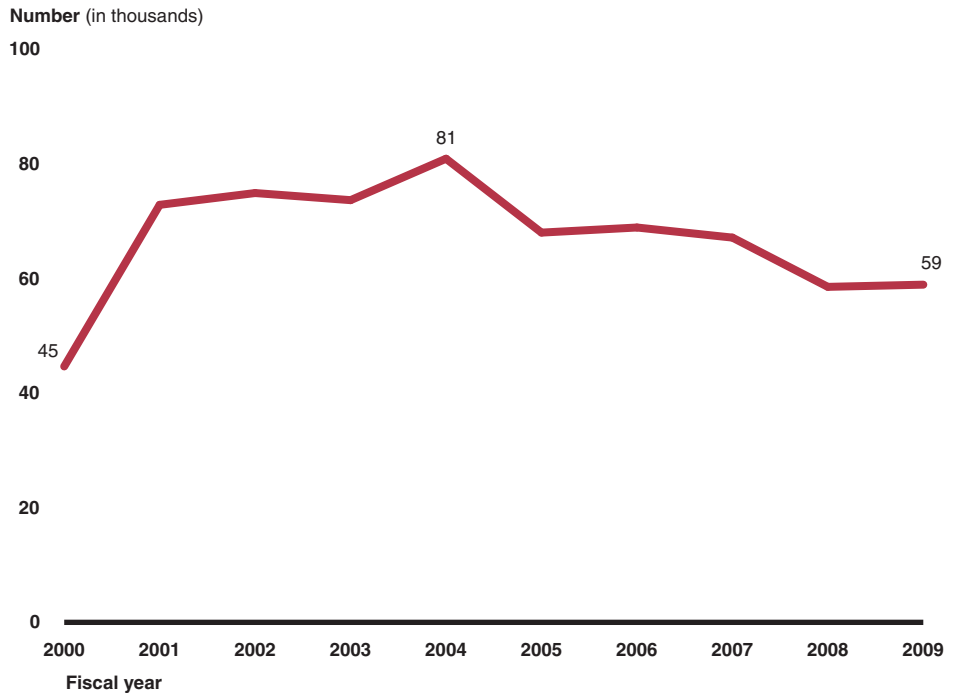
^aIncludes initial petitions and requests for visa extensions from employers exempt and not exempt from the cap. Submitted petitions that were submitted under the master's cap cannot be differentiated and are therefore included in these data.

Other Indicators of Demand for H-1B Workers

Another proxy of demand for H-1B workers is the number of employers that submitted petitions for H-1B workers to Homeland Security each year. As shown in figure 5, the overall number of employers submitting petitions for H-1B workers—both initial petitions and requests for visa extensions—fluctuated from 44,675 in fiscal year 2000 to 58,956 in fiscal year 2009 with a high of 80,945 in fiscal year 2004, showing much less annual fluctuation than the overall number of H-1B workers they requested.³¹ This proxy is also likely to underestimate demand because any additional employers submitting petitions for H-1B workers subject to the cap were not counted after the cap was reached.

³¹All employer-based analyses were restricted to petitions with valid Employer Identification Numbers. About 220,000 of 2.8 million petitions were excluded from our analysis due to missing or invalid Employer Identification Numbers.

Figure 5: Overall Number of Employers Submitting Petitions for H-1B Workers (Initial and Extensions) Processed by Homeland Security, FY 2000–FY 2009^a



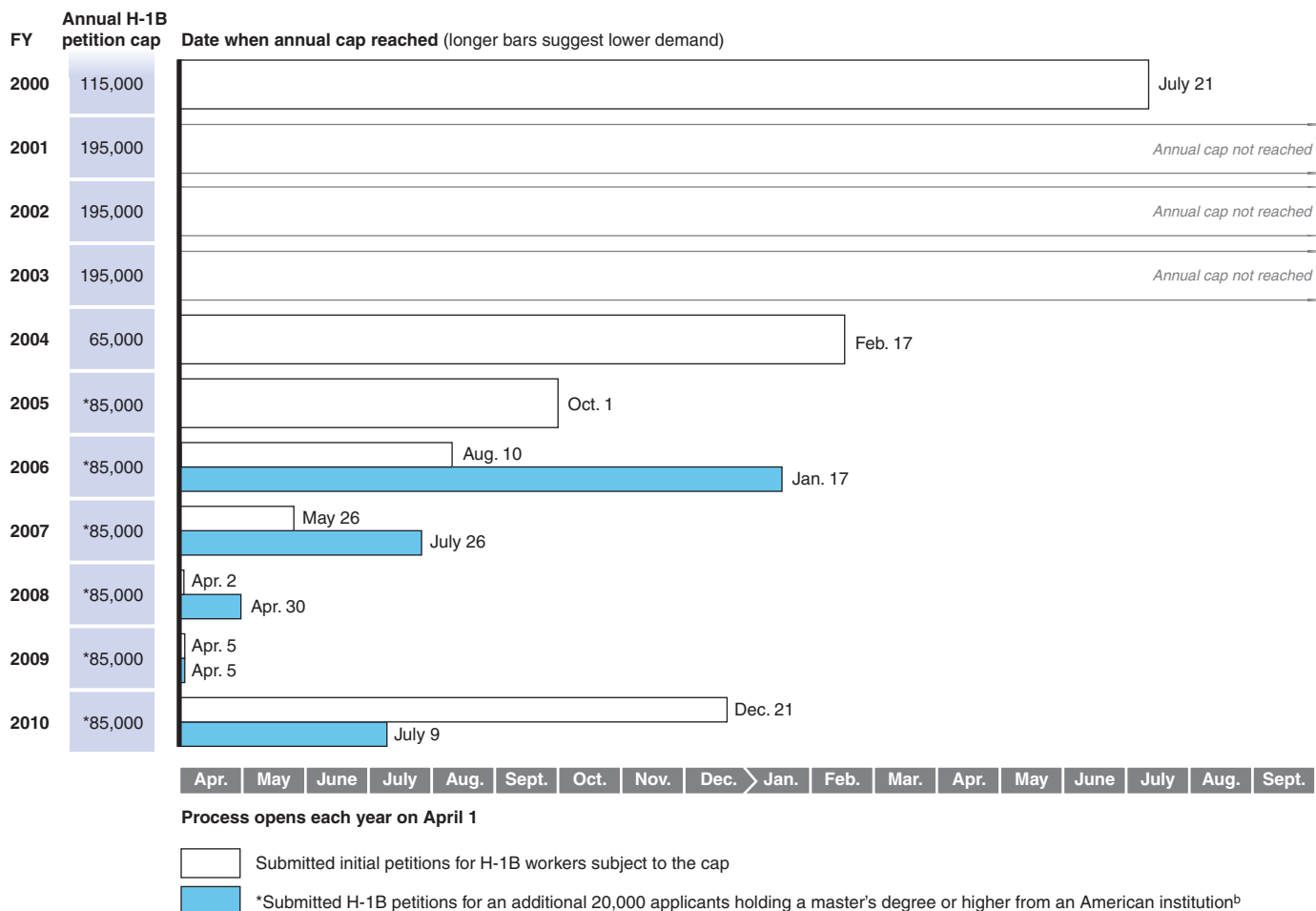
Source: GAO analysis of Homeland Security CLAIMS 3 data.

^aIncludes employers who submitted initial petitions and visa extensions and who were both exempt and not exempt from the cap. Employers who submitted petitions under the master's cap cannot be differentiated and are therefore included in these data. All employer-based analyses were restricted to petitions with valid Employer Identification Numbers. About 220,000 of 2.8 million petitions were excluded from our analysis due to missing or invalid Employer Identification Numbers.

The time it takes to reach the cap—the date on which Homeland Security stops processing initial petitions for new H-1B workers from employers subject to the cap—is another proxy for demand. Employers may submit petitions for new H-1B workers starting on April 1 of each year for the following fiscal year. In some years, the cap was reached within a few days of April 1, while in other years the cap was never reached. The time it takes to reach the cap is also affected by the cap level, which fluctuated over the last decade. However, from fiscal year 2005 to fiscal year 2009, the cap level remained constant at 65,000 for regular requests and 20,000 for master's requests. For fiscal year 2005 through fiscal year 2007, the cap was reached in October, August, and May, respectively, likely indicating lower demand for new H-1B workers than in fiscal years 2008 and 2009, when the cap was reached within a few days (see fig. 6). Although Homeland Security's CLAIMS 3 Mainframe data do not allow us to distinguish which submitted

initial petitions were eligible for but not counted against the master's cap, an indication of demand for that category of H-1B workers is how quickly the master's cap is reached. In fiscal years 2008 and 2009, the master's cap was reached in April, likely indicating a high level of demand for those H-1B workers in recent years. In fiscal year 2010, the master's cap was reached before the general 65,000 cap.

Figure 6: Time to Reach Annual Cap and Cap Level, Regular and Master's Cap, FY 2000–FY 2010^a



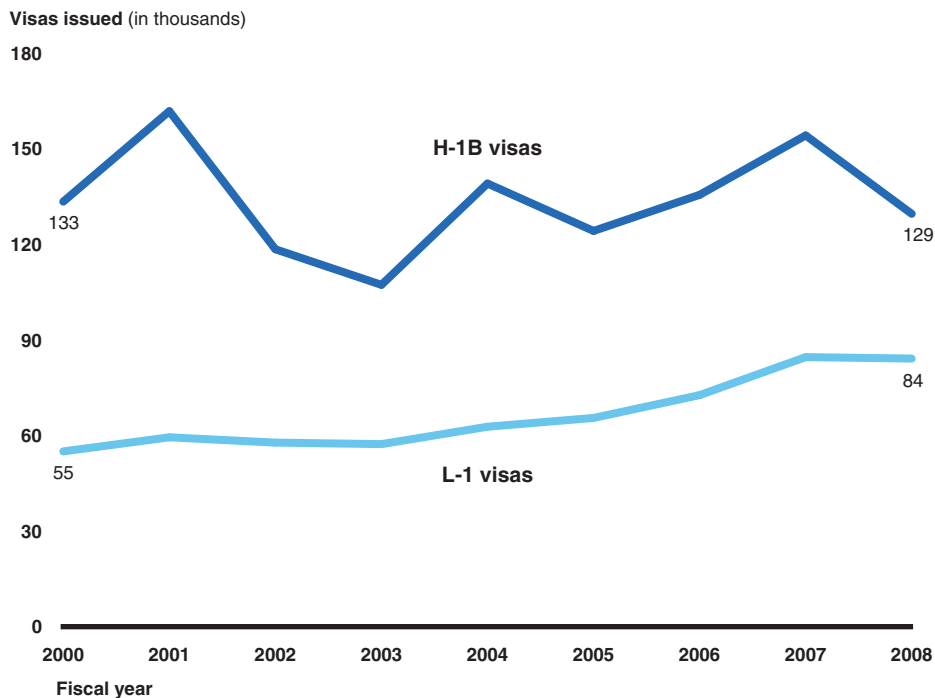
Source: GAO analysis of Homeland Security data.

^aThe cap filing period typically remains open for a total of a year-and-a-half—from April 1 preceding a given fiscal year until the end (September 30) of the following fiscal year (e.g., April 1, 2001, through September 30, 2002, for fiscal year 2002).

^bAccording to Homeland Security officials, the agency first began tracking the master's cap in fiscal year 2006. Therefore, there is not a separate bar for the master's cap for fiscal year 2005.

Finally, another potential indicator of demand, especially in years that the cap has been reached, might be requests for high-skilled workers via other visa programs, such as the L-1 visa for intracompany transfer of managers.³² From fiscal year 2000 to fiscal year 2008, the number of L-1 visas issued—which is not subject to a cap—increased by almost 53 percent, while the number of H-1B visas issued decreased slightly (see fig. 7).

Figure 7: L-1 and H-1B Visas Issued, FY 2000–FY 2008



Source: GAO analysis of State visa issuance data.

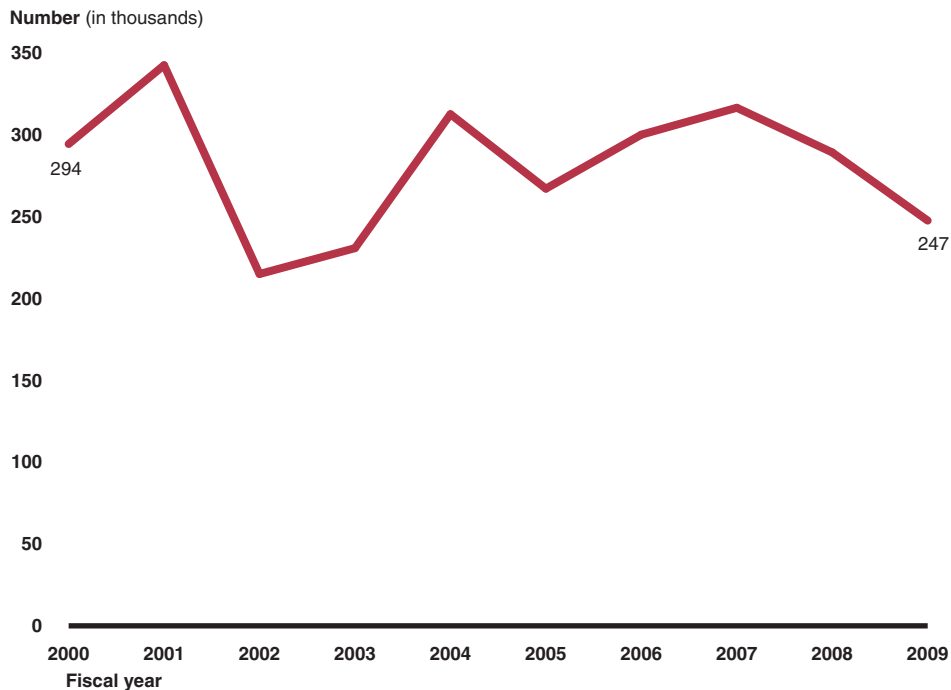
Influence of Economy on Demand

The economy was likely a key contributor to fluctuations in the demand for H-1B workers. As shown in figure 8, overall submitted petitions for H-1B workers (initial and extensions) went up and down, and ranged from a low of 214,654 in fiscal year 2002 to a high of 342,035 in fiscal year 2001 over the 10-year period. For example, in fiscal years 2002 and 2003 there

³²L-1 visas are issued to intracompany transferees who work for an international firm or corporation in executive and managerial positions or have specialized product knowledge. 8 U.S.C. § 1101(a)(15)(L). L-1 visa holders can stay in the United States for up to 5 or 7 years, depending on the type of services provided. 8 U.S.C. §1184(c)(2).

was a downturn in hiring within the technology industry; concurrently, the number of submitted petitions for H-1B workers—both initial and requests for visa extensions—dropped dramatically to 214,654 and 230,423, respectively, even though the cap was increased to 195,000 for these years. In subsequent years, the number of submitted petitions increased as the economy rebounded, such that submitted petitions reached 316,065 in fiscal year 2007.

Figure 8: All Submitted Petitions for H-1B Workers (Initial and Extensions), FY 2000–FY 2009^a



Source: GAO analysis of Homeland Security CLAIMS 3 data.

^aIncludes initial petitions and requests for visa extensions from employers exempt and not exempt from the cap. Reported numbers only reflect petitions entered into Homeland Security’s CLAIMS 3 data system and processed by Homeland Security, not the total number submitted which is likely higher in years when the cap is reached.

While the Vast Majority of Employers Were Approved for Just One H-1B Worker, a Small Set of Employers Garnered Over One-Quarter of All H-1B Approvals

Most employers that submitted petitions to Homeland Security were approved, and most were approved for one H-1B worker, but a small percent of employers garnered over one-quarter of all H-1B approvals between fiscal year 2000 and fiscal year 2009. Over the 10-year period, about 94 percent of all submitted petitions (initial and extensions) were approved, with a high of 97 percent in fiscal year 2006 and a low of 84 percent in fiscal year 2009.³³ With respect to the number of approved workers per employer, 68 percent of employers were approved for 1 H-1B worker and about 99 percent of all employers with approved petitions (627,922) were approved for 100 or fewer workers. However, over the decade, less than 1 percent of all employers with approved petitions were approved to hire almost 30 percent of all H-1B workers.

Further, according to Labor’s application data, between 3 and 5 percent of all employers were categorized as being either H-1B-dependent or willful violators between fiscal year 2002 and fiscal year 2008.³⁴ However, Labor does not require employers to report (and therefore Labor’s data do not indicate) the proportion of H-1B workers that comprise each employer’s workforce.

Among the top H-1B-hiring employers—those approved for large numbers of H-1B workers—are employers that function as “staffing companies,” (i.e., employers that apply for H-1B workers but ultimately place these workers at the worksites of other employers as part of their business model, many of which also outsource work overseas).³⁵ Some foreign-owned information technology (IT) services firms have publicly stated that their ability to provide IT services to U.S. customers depends in part on access to significant numbers of H-1B and L-1 visa workers. Ultimately, the prevalence of these employers participating in the H-1B visa program is difficult to know because there are no disclosure requirements and Homeland Security does not track such information. However, using publicly available data on H-1B-hiring employers we learned that at least

³³As noted earlier, Homeland Security does not enter petitions that are subject to the cap and submitted after the cap is reached into its data system, CLAIMS 3. Because our analysis is based on requests entered into its data system, we cannot determine approval rates for all submitted petitions.

³⁴LCA data for these years do not allow for these two categories to be analyzed separately.

³⁵Such employers are also referred to as third-party contractors or placing employers. Employers at which staffing companies place H-1B workers are referred to as placement employers.

10 of the top 85 H-1B-hiring employers in fiscal year 2009 participate in staffing arrangements, of which at least 6 have headquarters or operations located in India. Together, in fiscal year 2009, these 10 employers garnered nearly 11,456 approvals, or about 6 percent of all H-1B approvals. Further, 3 of these employers were among the top 5 H-1B-hiring companies, receiving 8,431 approvals among them.³⁶

Most Interviewed Companies Said the H-1B Cap and Program Created Costs, but Were Not Factors in Their Decisions on R&D and Offshoring

To better understand the impact of the H-1B cap and program on H-1B employers, GAO interviewed 34 companies—including individual structured interviews with 31 companies and group discussions with 3 companies—about how the H-1B program affects their costs of doing business, their R&D activities, and their decisions about whether to locate work overseas.³⁷ These companies reported that the H-1B cap created various costs, but those costs varied depending on the size³⁸ and maturity of the company. While many companies said that access to skilled labor is a significant factor in locating their R&D labs, few said that the H-1B cap was an important factor in their decisions about locating activities (either R&D or other skilled work) abroad, with the exception of IT services firms.

Depending on Their Size and Maturity, Some of the Interviewed Companies Said the Cap Resulted in Hiring Delays and Costs Associated with Uncertainty

Many of the 34 companies we spoke with cited a range of direct and indirect costs associated with the H-1B cap and program features, including staffing uncertainties, legal and administrative fees, and other costs. However, the nature and extent of some costs varied with the type of firm.

³⁶For additional information on H-1B employers, please refer to appendix IV.

³⁷This selection of 31 firms constitutes a nongeneralizable sample and cannot be used to make inferences beyond the specific 31 firms selected. We also spoke with 3 additional companies as part of focus groups we conducted, consisting of H-1B employers and industry associations. See appendix I for more information on our focus groups and individual interviews.

³⁸We defined “large” firms as those with 1,000 or more employees in the United States, and “small” firms as those with fewer than 500 employees in the United States. Multinational firms are defined as those who indicated that they have branches or affiliates outside of the United States.

Costs of the H-1B Program

According to firms we interviewed, uncertainty in staffing due to the cap has imposed varied, and for some significant, costs to doing business, although they are difficult to quantify. Twenty-one of the 31 firms we interviewed individually reported that they had H-1B petitions denied due to the cap in years when the cap was reached early in the filing season. In these years, the firms did not know which, if any, of their H-1B candidates would obtain a visa, and several (7) firms said that this situation created uncertainty that interfered with both project planning and candidate recruitment. Two firms also said that delays in processing their petitions, such as requests for additional evidence, sometimes resulted in their candidates accepting other positions in the United States or abroad instead of waiting for a resolution. In addition, two firms mentioned that in order to get the petition application in before the deadline, they sometimes made job offers to candidates who required H-1B visas before they were certain of the need to hire them.

Firms cited other costs associated with acquiring H-1B hires, such as legal and administrative costs, and Homeland Security filing fees. For H-1B applications, the combined legal and filing fee costs among the 26 firms that reported this information to us ranged from an estimated \$2,320 to \$7,500 or more per petition.³⁹ However, several firms mentioned that petitions that generated additional requests for evidence from Homeland Security could result in higher legal costs, as well as additional administrative costs resulting from the staff hours required to collect extensive evidence. Several firms we spoke to also noted that Homeland Security filing fees have increased significantly in recent years—for example, Homeland Security fees for firms that are not exempt from the cap have risen from \$110 in fiscal year 2000 to \$2,320 in fiscal year 2009.⁴⁰

With regard to firms that eventually file applications for permanent residency for their H-1B workers, some employers we spoke with noted that their total legal and administrative costs for the duration of the

³⁹The median reported combined legal and filing fee cost was \$3,820.

⁴⁰This increase can be attributed, at least in part, to changes in the law. For example, in 2005, Homeland Security was required to begin collecting an additional \$500 fee to be used for fraud prevention and detection purposes. In addition, recent legislation established an additional fee of \$2,000 for petitions filed through September 30, 2014, for petitioners with 50 or more employees in the United States and more than 50 percent of those U.S. employees on H-1B or L visas. Act of August 13, 2010, Pub. L. No. 111-230, § 402(b), 123 Stat. 2485, 2487.

process are large. For example, one company official estimated the combined costs of the H-1B and green card process to be about \$16,000 over the duration of the process. Two respondents noted that they have such long-term costs in mind when considering H-1B candidates. While only a few respondents brought up the cost of sponsoring an H-1B worker for permanent residency, nearly all (30 out of 31) of the firms we spoke with indicated that they had sponsored at least some of their H-1B visa holders for permanent residency, and 8 said that they typically sponsor all H-1B visa holders whose job performance was satisfactory.

Experience of Large Firms with H-1B Program

In years when firms did not receive approvals for all of their H-1B petitions, most of the large, multinational firms we spoke with reported that they were generally able to hire their preferred candidates because the firms were skilled at navigating the immigration system. Specifically, 12 of the 14 large, multinational firms we spoke with reported having found a way to hire a job candidate denied an H-1B visa due to the cap. They did so, for example, by sending the candidate to work in an overseas office and subsequently bringing him or her in on an L-1 visa, or by extending the practical training period allowed under their student visa for an additional year. Some firms noted, however, that these alternatives can be very costly. For example, after H-1B visas for preferred job candidates fell through, nine companies said they had sometimes placed their job candidates temporarily overseas, and three mentioned that this process required the company to pay an “expatriate package,” with allowances for housing and living expenses. One company executive said hiring an employee on an expatriate package is often three times more costly than hiring the same employee in the U.S.—a point with which others we spoke with concurred.

Experience of Smaller Firms with H-1B Program

Of the 13 smaller H-1B employers we spoke with, 8 indicated that they had incurred significant business costs resulting from petitions denied due to the cap, delays in processing H-1B petitions, and other costs associated with the H-1B program. Six of the smaller companies we spoke with had petitions denied due to the cap, and of these, four indicated they did not have the resources or the infrastructure in place to pursue alternatives such as placing a desired employee abroad for a year. In addition, executives from four of the six small firms we spoke with who had petitions denied due to the cap told us that they had to delay or cancel projects, or hire second-choice employees, because they were unable to hire all of the employees for whom they sought H-1B petitions. Several firms in technology-intensive fields such as IT product development—both large and small—stressed that the product development cycles in their industries are extremely compressed, and in order to be competitive, they

frequently need to develop new products in a matter of months, not years. Some of these firms told us that any delay in hiring an essential employee can, therefore, result in significant losses. One founder of a technology company, who valued his 3-year-old firm at about \$100 million dollars, said a 3-month delay in product development could mean lost opportunities worth several million dollars.

Experience of Emerging Firms with Immigration System

To gain the perspective of entities that support and work with emerging technology companies (high-tech “start-up” firms), we spoke with venture capital and law firm representatives who reported that start-ups, in particular, often have less time and fewer resources for navigating the immigration system, and the impact of employee immigration problems on them can be substantial. Some founders of start-ups and venture capital firms with whom we spoke reported that the skills required by small firms and emerging companies in high-tech sectors are often extremely specialized, and sometimes these firms cannot readily find a “second-choice” employee in the U.S. labor market. For example, one start-up founder stressed that competition for “the best people” is fierce in “a high-growth, venture-backed business” where building “complex software faster and better than companies that are orders of magnitude larger” is critical to survival. In addition, foreign nationals seeking to found new companies in the United States can face a unique set of difficulties. Two lawyers we spoke with whose firms work with many emerging technology companies in Silicon Valley described cases in which entrepreneurs attempting to establish very early-stage technology start-ups were unable to obtain H-1B or other work visas for themselves and either relocated the project abroad or had to abandon the start-up.

Most Interviewed Companies Said the Cap Had Little Effect on R&D or Offshoring Decisions; However, Certain IT Services Firms Differed

When asked about how the H-1B cap affected their decisions on where to locate their R&D activities and other operations, 15 of the 28 companies who responded to these questions said the H-1B cap was not an important factor in their decisions on the location of these activities. The 20 firms we spoke with that conducted R&D were in a variety of industries—including semiconductor and electronics manufacturing, pharmaceutical companies, software publishing and financial services—and 7 of these 20 were in the manufacturing sector. Several firms that conducted R&D reported that their H-1B workers were essential to this work in the United States. Furthermore, access to skilled labor from around the world was very important to a number of the firms we interviewed; 15 of the companies we spoke with had R&D centers or labs overseas, and 8 of these firms told us that these centers or labs had been set up largely to access the skilled workforce in that country. However, only four said the H-1B cap was an

important determinant in the creation of these overseas centers. Respondents from several of the multinational companies we spoke with—whether headquartered in the United States or not—regarded their firms as global entities, and five said that their decisions to expand overseas are primarily driven by the pursuit of new markets. In addition, firms said many other factors are involved in such decisions, including the cost of labor; access to a workforce in a variety of time zones; language and culture; proximity to universities; and tax law.⁴¹

While the majority of company officials we spoke to said they had not moved work offshore due to the H-1B program or cap, several respondents from one group of companies—IT services firms⁴²—told us they have moved or would move work offshore as a result of the cap or changes in the administration of the H-1B program. One large IT services firm that had both an onshore staffing component and offshore outsourcing component⁴³ noted that in years when the H-1B cap prevented hiring all the foreign workers sought, the company could locate a larger portion of the work project overseas. Two IT staffing firms we spoke with—firms that place H-1B workers at the worksites of client companies—said their U.S. business relies heavily on the H-1B program because H-1B visa

⁴¹Academic research has also identified some of these factors as important drivers in private sector decisions about the location of R&D. See for example, Ashok Bardhan and Dwight Jaffee, “Globalization of R&D: offshoring innovative activity to emerging economies” in *Global Outsourcing and Offshoring: An Integrated Approach to Theory and Corporate Strategy*, Farok Contractor, Vikas Kumar, Sumit Kundu and Torben Pedersen, Eds. (Cambridge University Press, November 2010).

⁴²As noted earlier, personnel from IT services firms we spoke with describe their firms using different terms, including staffing firms, solutions firms, and consulting firms. According to industry representatives, a pure IT staffing firm (or “labor augmentation” firm) simply provides workers with the expertise necessary to staff a project, while an “IT solutions” firm takes responsibility for the deliverable product.

⁴³According to an industry organization representing the IT services industry, outsourcing firms that offshore work typically call themselves IT solutions firms in order to differentiate themselves from staffing firms. Others view them as a different business model—that is, one that uses onshore staff to provide access to a large, less expensive offshore labor force. An example might be an offshore outsourcing firm that takes over an IT help desk department, and uses its onshore component (staffed by H-1B workers) to establish relationships with and manage projects for the client company in the United States, while using the offshore component to staff the help desk. As such, several of the IT services firms we contacted that conducted offshore outsourcing could be considered a hybrid between an IT staffing and a solutions firm, at times providing IT staff to work at client sites, at times offshoring IT work to their overseas component, and at times providing both onshore and offshore work for a client.

holders are more willing to relocate around the country, and one noted that H-1Bs accept lower wages than U.S. workers.

Several executives at IT staffing firms we interviewed noted that, since issuance of a January 2010 Homeland Security memo,⁴⁴ Homeland Security is more aggressively enforcing a requirement that staffing firms be able to provide evidence of an employer-employee relationship with the H-1B worker they sponsor by, for example, having a contract with their clients in place.⁴⁵ Executives from staffing firms told us they often cannot have a contract in place because they provide labor on short notice to their client firms. As a result of the increased enforcement of this provision, executives at one staffing firm told us that they no longer hired H-1Bs for their staffing business, and executives at several other staffing firms reported that they had ceased hiring new H-1B workers, hiring instead only foreign nationals already in the country with a current H-1B visa.^{46,47} Executives at some companies who already had an offshore location reported expanding the portion of their work conducted overseas, and others reported that they had either opened an offshore location to access labor from overseas or were considering doing so.

⁴⁴The January 8, 2010, memorandum by Associate Director Donald Neufeld (commonly referred to as the “Neufeld Memo”). For more information on this memo, see our discussion of the fifth objective.

⁴⁵20 C.F.R. § 214.2(h)(4)(ii) (2009). This requirement, according to one executive at a staffing firm we spoke with, was not necessarily enforced in the past.

⁴⁶An H-1B visa transfer can be submitted at any point throughout the year, may not be subject to the cap, and—according to firm officials we spoke with—is typically processed much more quickly than a petition for an initial H-1B visa. Some said they were able to satisfy Homeland Security that they have a client contract in place before submitting the H-1B transfer petition because the client could meet the potential employee (unlike for foreign nationals applying for initial H-1B visas) and therefore was more willing to write the contract. Also, petitions for H-1B transfers could be submitted throughout the year, allowing staffing firms to submit the petitions at the time they were arranging the work contract with the client company. Like petitions for initial H-1B visas, H-1B transfer petitions involve firms submitting LCAs prior to requesting the transfer.

⁴⁷One staffing firm reported that another important source of employees is the spouses of current H-1B visa holders, who can petition for a change in visa status to H-1B once they are offered a job.

Some researchers have noted that some IT services firms that conduct offshore outsourcing and employ large numbers of H-1B workers⁴⁸ offer engineering and R&D services.⁴⁹ Although 3 of the 10 IT services firms we spoke with described themselves as conducting R&D, 2 of the 3 noted that this R&D involved innovation while on-the-job. Some experts we spoke with also noted that learning and technological innovation is often attained on the job or through informal collaboration, as opposed to through formal R&D efforts. Thus, while the movement of IT services work offshore in response to the H-1B cap may not result in the direct transfer of formal R&D, it may nonetheless result in movement of innovation offshore.

Companies Also Cited Various Concerns about the Petition Review Process and Suggested Some Program Modifications

Companies we spoke with reported several concerns with the H-1B petition adjudication process, including the amount of paperwork required and the level of evidence requested during this process. Companies and experts we spoke with suggested several program modifications that could remedy some of these reported problems.

Increasingly burdensome adjudication process: Eighteen of the firms we spoke with maintained that the review and adjudication process had become increasingly burdensome in recent years, with many of these firms complaining about the amount of paperwork they needed to provide as part of the adjudication process. Further, eight firms—of all sizes and across a range of industries—complained that the number of requests for additional evidence from Homeland Security increased significantly in recent years. Relatedly, in prior work, we suggested that Congress consider streamlining the H-1B approval process by eliminating the

⁴⁸For a discussion of IT services firms that conduct offshore outsourcing and employ large numbers of H-1B workers, see Ron Hira, “U.S. immigration regulations and India’s information technology industry,” *Technological Forecasting and Social Change*, vol. 71, issue 8 (October 2004): 837-854.

⁴⁹Some researchers have noted that while many of the large offshore outsourcing firms started out in the “lower end” of the IT services market (for example, business process outsourcing, quality assurance, and design verification), some of these firms now offer engineering services and R&D services to their clients, and are seeking to expand the “higher value” portion of their business. For example, see Rafiq Dossani, “A Decade After Y2K: Has Indian IT Emerged?,” in *Re-examining the Service Revolution*, D. Brexnitz and J. Zysman, Eds. (Yale University Press, forthcoming in 2011); and Ron Hira, “The Globalization of Research, Development, and Innovation,” in *Manufacturing a Better Future for America*, Richard McCormack, Editor (Washington, D.C.: Alliance for American Manufacturing, 2009).

separate requirement that employers first submit an LCA to Labor for review and certification, since another agency (USCIS) subsequently conducted a similar review of the LCA.⁵⁰ Three years after our recommendation, in 2003, USCIS was moved under the newly formed Homeland Security; however, Congress has not taken action to streamline the process.

Inconsistencies in the adjudication process: Executives at several companies we spoke with provided examples of what they viewed as inconsistencies in the adjudication process. For example, one company executive noted that the petitions it sends to one of Homeland Security's two processing centers are often processed more efficiently than the petitions it sends to the other processing center. Another executive noted that at times, "decisions on approving or denying the H-1B visa applications seem arbitrary." This executive provided an example of a USCIS adjudicator who decided that the project for which the company sought an H-1B worker did not require "specialty education," but the executive felt that if the adjudicator had contacted the client firm, they could have easily seen that a specialist was required. Other firms noted that some adjudicators ask for evidence that seems unnecessary. For example, an immigration lawyer at a multinational pharmaceutical company said that agency requests for evidence do not always appear to be "thoughtful," and cited a Request for Evidence that demanded a review of the qualifications of an applicant who had received a science degree from Oxford University.

Adjudication process not customized for different employers: Several companies we spoke with complained that the adjudication process is the same for all H-1B employers, irrespective of the employer's track record with the H-1B program. For example, the Immigration Policy Manager for a large, household-name Fortune 100 company recounted being asked to provide photographic evidence of its headquarters as part of the Request for Evidence in the petition review process. As another example, the Chief Executive Officer of a small software application developer who had been using the H-1B program for over 10 years recounted the frustration of interviewing 60 U.S. candidates before finding 3 candidates through international hiring, and then facing a vetting process that questioned his effort to hire a U.S. citizen. At the same time,

⁵⁰GAO, *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, HEHS-00-157 (Washington, D.C.: Sept. 7, 2000).

Homeland Security staff we spoke with reported having to review large stacks of paperwork to adjudicate a single petition.

Experts we spoke with suggested that Homeland Security consider creating a risk-based adjudication process whereby businesses are ranked on their experience with the program and past compliance issues. Such a process could permit well-vetted businesses with a strong track-record of H-1B regulatory compliance access to a streamlined process for petition approval and reduced requests for evidence, thus reducing the burden to firms of providing evidence, and would permit Homeland Security investigators to focus their investigative efforts efficiently.

Rigidities in the lottery system: Several company executives, industry representatives, and academic researchers we spoke with cited examples of what they viewed as rigidities in the lottery system, especially in years when the H-1B cap is hit early. Several industry representatives told us that the lottery process does not allow their clients to rank their top choices; as a result, firms do not necessarily receive approval for the most desired H-1B candidates. Several companies we spoke with also raised the issue that the annual allotment period does not allow firms to make their hiring decisions in response to business needs throughout the year, especially during years when the cap is hit early in the year. Some company executives and researchers we spoke with suggested the following:

- a more efficient system would permit employers to rank their applications so that they are able to hire the best qualified worker for the job in highest need; and
- to allow more flexible hiring of H-1B workers, Homeland Security consider distributing the allocation of H-1B permits throughout the year (such as quarterly) rather than annually.

Visas for emerging technology companies: Entrepreneurs and venture capital firms we interviewed said that program rules can inhibit many emerging technology companies and other small firms from using the H-1B program to bring in the talent they need, constraining the ability of these companies to grow and innovate in the United States. For example, for the earliest stage ventures, when the person who needs the H-1B visa is the entrepreneur, there is sometimes no “firm” in existence yet that can meet legal criteria for employing H-1Bs. While it is not necessarily the role of the H-1B program to provide work visas for foreign entrepreneurs, several parties we spoke with discussed the risk of the United States losing its

advantage in high-tech entrepreneurship if U.S. immigration policy undermines the ability and interest of new entrepreneurs to move to high-tech communities like Silicon Valley. Some venture capital firms and businesses we spoke with suggested that, in order to promote the ability of entrepreneurs to start businesses in the United States, Congress should consider creating a visa category for entrepreneurs, available to persons with U.S. venture backing.⁵¹

Agency officials expressed reservations about the feasibility of GAO's past recommendation and the suggestions from experts and company executives on improving the application process. Homeland Security officials believed that Labor would be better suited to review the LCA because Labor has specialized knowledge about the computation of prevailing wages. Labor officials, however, conceded that their review of the LCA is limited by statute, as discussed above. In regard to the potential adoption of a customized adjudication process, Labor officials noted that a strong track record of compliance with program rules does not guarantee future compliance. Homeland Security officials also noted that establishing a system for employers to rank their submitted petitions in order of priority might increase the likelihood of fraud if it also increased incentives for employers to submit applications for hypothetical workers in order to capture a larger proportion of those selected for the lottery. State officials raised questions about the logistics required for allocating H-1B petitions throughout the year—for example, whether or how employers would be permitted to resubmit petitions after receiving a denial in one quarter, and whether such a system might result in more employers being denied access to H-1B workers during peak seasons.

Homeland Security officials also noted two efforts currently under way to streamline the application process for prospective H-1B employers. Homeland Security is in the process of developing a product that would allow it to use data from a private data vendor to automatically download

⁵¹For example, the Start-Up Visa Act, introduced by Senators Kerry and Lugar (S. 3029) and Representatives Maloney and Watson (H.R. 5193) in the 111th Congress was an effort to expand the E-B5 visa to immigrant entrepreneurs who, among other things, have investment capital available from a sponsoring U.S. venture capital or angel investor of at least \$100,000 in an equity financing of not less than \$250,000. The E-B5 visas are authorized under 8 U.S.C. §1153(b)(5) and generally are available currently to investors with at least \$1,000,000 of personal capital available to invest in the United States. However, some parties we spoke with noted that it would be useful to have a venture backing requirement with a relatively low threshold so that the visa would be available to early-stage innovators.

certain data on employers and update those data over time so that in the future, employers may not have as heavy a burden in filing their petitions. This product is currently being tested. Second, Homeland Security is currently preparing a proposed rule, which is being reviewed and considered within the agency, to allow employers to submit requests for H-1B slots before submitting an LCA. This rule would spare employers that were not chosen in the lottery from having to file an LCA and could also reduce workloads for Labor. The officials did not know whether and when a proposed rule would be published for comment and finalized.

Although Data Limitations Preclude Knowledge of the Total H-1B Workforce and Precise Tracking of the Cap, Characteristics of Those Approved to Be H-1B Workers Are Known

Data on the total number of H-1B workers in the United States are not available because of limitations in agency data. In addition, although Homeland Security is responsible for tracking the number of H-1B petitions approved under the cap or the number of H-1B visas issued,⁵² it cannot precisely do so. However, Homeland Security is currently taking steps to address these limitations. Data on the annual cohort of people approved to be H-1B workers (referred to as “approved H-1B workers” in this report) offer some information on the characteristics of likely H-1B workers, including their countries of birth, occupations, and education levels.

Limitations in Agency Data Systems Hinder Tracking the Cap and H-1B Workers Over Time, Though Homeland Security Is Working to Improve Its Systems

Although Homeland Security generally tracks the flow of likely H-1B workers into the United States on an annual basis, it cannot determine the size of the cumulative H-1B workforce because several agencies or departments manage data on this population over time, and the systems that capture the data are not easily linked. H-1B petition approvals are captured in Homeland Security’s CLAIMS 3 data system, as are changes in visa status for approved H-1B workers who are already residing in the country at the time of approval. However, visas for H-1B workers living abroad at the time of approval are captured by a data system that is administered by State and not linked to CLAIMS 3. Further, information on visa holders who actually enter or exit the United States is tracked via

⁵²8 U.S.C. § 1184 note.

Homeland Security's United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program, which is not systematically linked to CLAIMS 3. Because these data systems do not use a unique, person-centric identifier for H-1B workers, Homeland Security cannot determine, for example, how many approved H-1B workers living abroad actually received an H-1B visa and/or ultimately entered the country.⁵³ Similarly, Homeland Security does not track H-1B workers after their visas expire, and cannot readily determine if and when H-1B workers apply for or are granted legal permanent residency, leave the country, or remain in the country on an expired visa. The fact that electronic records from different systems are not linked also results in unnecessary duplication of efforts. For example, according to State officials, while State has some capacity to query Homeland Security's CLAIMS 3 database, its consular posts cannot import data from CLAIMS 3 to their own data system, so State contractors re-enter information from CLAIMS 3 manually into State's data system.

Further, although Homeland Security is responsible for tracking the number of H-1B petitions approved under the cap and the number of H-1B visas issued, it does not maintain precise information on this. To implement the statutory cap on H-1B visas, Homeland Security must take the necessary steps to maintain an accurate count of the number of aliens subject to the annual cap who are issued visas or otherwise provided nonimmigrant status by the Immigration and Nationality Act.⁵⁴ However, according to Homeland Security officials, the department's current processes do not allow them to determine precisely when approvals reach the number set by the cap. Instead, they stop accepting initial petitions for new H-1B workers that are subject to the cap when they estimate that the number of approved petitions is approaching the mandated limit. In fiscal year 2005, Homeland Security's Office of Inspector General found that USCIS exceeded the 65,000 cap limit by about 7,000 approved petitions and recommended the agency maintain more precise control over the number of H-1B visas issued.⁵⁵ Although the recommendation was closed by the Office of Inspector General in 2006,

⁵³ Attempts have been made to estimate the number of H-1B workers residing in the United States, but challenges to doing so include statutory changes in the numeric cap and inability to track H-1B workers after they enter the country.

⁵⁴ 8 U.S.C. § 1184(g).

⁵⁵ Specifically, the OIG recommended the agency count visas issued and changes from another visa type to an H-1B until they reach the cap limit. See Department of Homeland Security, Office of Inspector General, *USCIS Approval of H-1B Petitions Exceeded 65,000 Cap in Fiscal Year 2005*, OIG-05-49 (September 2005).

Homeland Security officials concede they still cannot precisely count, in an ongoing manner, petitions accepted under the cap despite several changes in how the agency accepts, monitors, controls, and forecasts receipts for submitted petitions subject to the cap. Further, officials noted that as long as the process of submitting and adjudicating H-1B petitions remains the same, they are unlikely to be able to provide a precise count of petitions accepted under the cap.

The capability to better track the cumulative H-1B workforce and petitions accepted under the annual cap may develop with the eventual completion of Homeland Security's program to modernize business processes and information systems, although challenges remain. Homeland Security's "Transformation Program" is a multiprogram, multiyear effort, ongoing since 2005, that includes a plan to implement an electronic I-129 petition, with a unique identifier for each H-1B worker. Using this identifier, Homeland Security would likely be able to share data with State and other external partners.⁵⁶ Homeland Security officials reported, for example, that they are currently working with agencies that include Justice and State to create a cross-reference table of agency identifiers for individuals applying for visas. Ultimately, the table would capture each record for the same person and employer from all partner agency programs, such that records for a specific individual can be merged under one unique person-centric identifier. When this occurs, it will be possible to identify who is in the United States at any one point in time under any and all visa programs. USCIS plans to develop internal guidance for the electronic I-129 petition over the next 2 years. However, according to previous GAO reports, Homeland Security's Office of Inspector General, and Homeland Security officials, the agency faces challenges finalizing and moving ahead with implementation of the program.⁵⁷

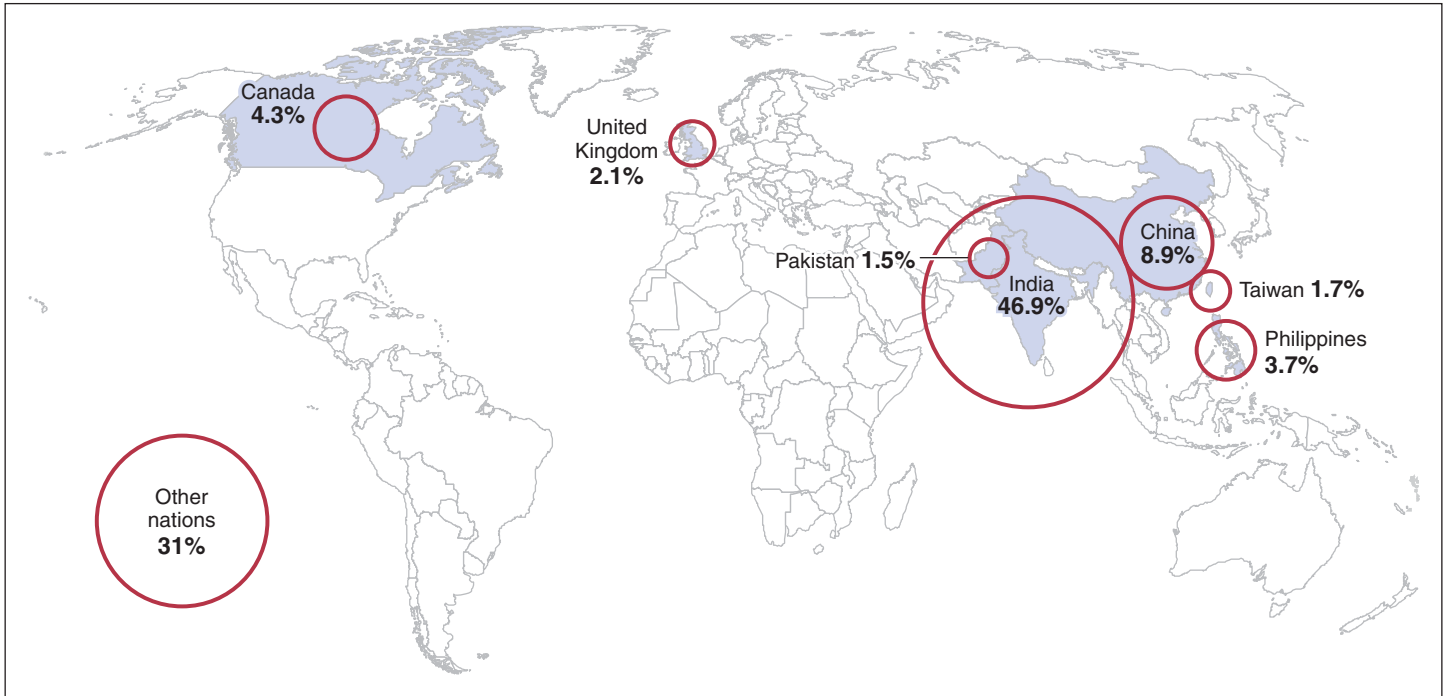
⁵⁶According to Homeland Security Officials, I-129 form modifications are included in the USCIS Transformation Program's overall form redesign initiative. Homeland Security anticipates accepting electronic I-129 applications as a part of the Transformation Program's Increment 1 Release B, which is scheduled to begin deployment in 2012.

⁵⁷See GAO, *Homeland Security: Despite Progress, DHS Continues to Be Challenged in Managing its Multi-Billion Dollar Annual Investment in Large-Scale Information Technology Systems*, GAO-09-1002T (Washington, D.C.: Sept. 15, 2009).

Most Approvals for H-1B Workers Were for Workers from India or China and for Technology Positions

Between fiscal year 2000 and fiscal year 2009, the majority of approved H-1B workers (initial and extensions for both employers subject to the cap and cap-exempt employers) were born in Asia. Over the last decade, the top four countries of birth for approved H-1B workers were India, China, Canada, and the Philippines. Across all 10 years, about 64 percent of approved H-1B workers were born in these four countries, with the largest group from India (see fig. 9).

Figure 9: Country of Birth for Approved H-1B Workers, FY 2000–FY 2009^a

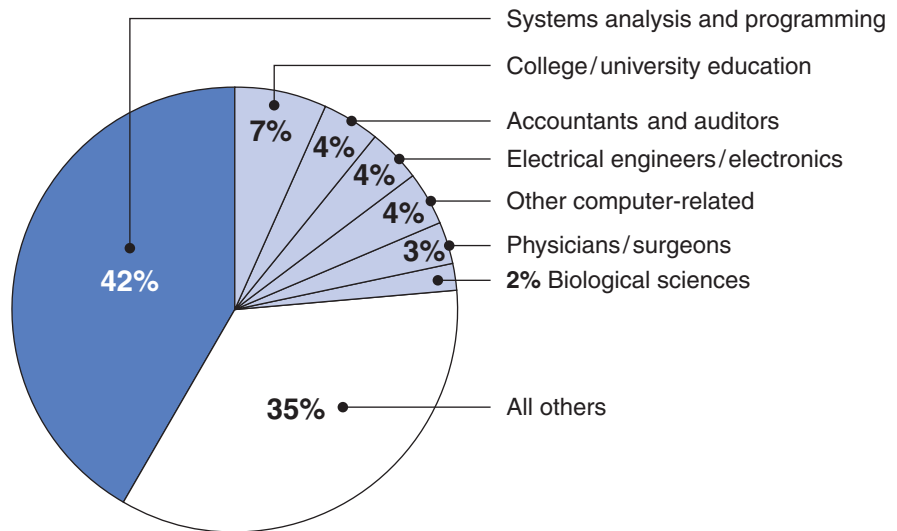


Source: GAO analysis of Homeland Security CLAIMS 3 data; National Atlas of the United States (base map).

^aIncludes both initial petitions and requests for visa extensions.

Over the same period, more than 40 percent of approved H-1B workers (initial and extensions for both employers subject to the cap and cap-exempt employers) were approved to fill occupations in systems analysis and programming. The next-highest occupational category was college and university education, which represented about 7 percent of H-1B approvals, as shown in figure 10.

Figure 10: Occupations Approved for H-1B Workers, FY 2000–FY 2009^a



Source: GAO analysis of Homeland Security CLAIMS 3 data.

^aIncludes both initial petitions and requests for visa extensions.

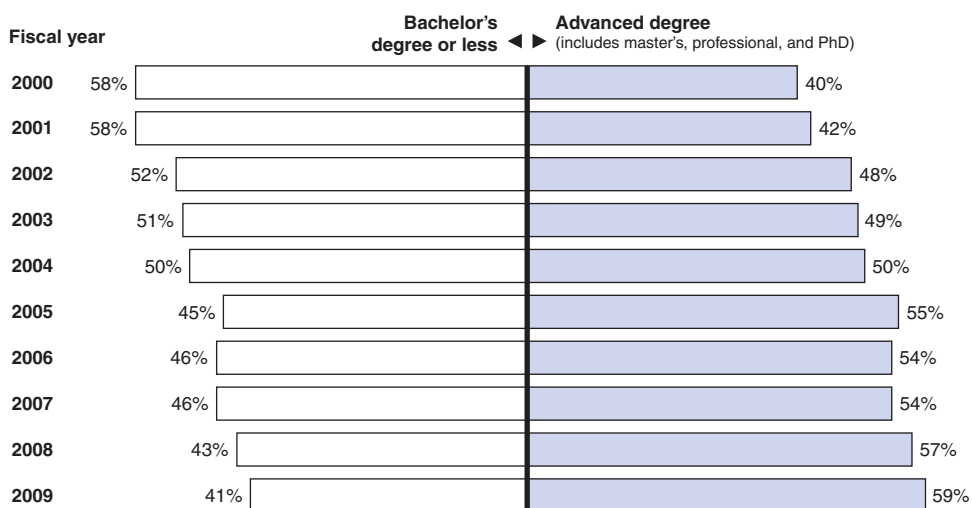
Many Approved H-1B Workers Were Already in the United States and Applied to Stay Permanently

As compared to fiscal year 2000, in fiscal year 2009, approved H-1B workers (initial and extensions for both employers subject to the cap and cap-exempt employers) were more likely to be living in the United States than living abroad at the time of their initial application, to have an advanced degree (master's, professional, or Ph.D.), and to have obtained their graduate degrees in the United States. From fiscal year 2000 to fiscal year 2009, the proportion of newly approved H-1B workers that were already living in the United States increased from 43 to 62 percent. Many of these workers are likely to have been on student or another visa status. In 2000, 40 percent of approved H-1B workers (initial and extensions) possessed an advanced degree (master's, professional, or Ph.D.), which increased to 59 percent by fiscal year 2009 (see fig. 11). One reason for this increase may be the H-1B Visa Reform Act of 2004, which allowed for an additional 20,000 approvals each year for foreign workers holding a master's degree or higher from an American institute of higher education.⁵⁸ Since then, the proportion of approved H-1B workers who graduated with a master's degree from an American institution of higher education

⁵⁸Pub. L. No. 108-447, div. J, tit. IV, subtit. B, § 425(a), 118 Stat. 2809, 3356.

increased from 29 to 36 percent of all approved workers—including initial petitions and visa extensions.⁵⁹

Figure 11: Educational Attainment of Approved H-1B Workers, FY 2000–FY 2009^a



Source: GAO analysis of Homeland Security CLAIMS 3 data.

Note: Bars do not always sum to 100 percent due to our exclusion of missing or invalid data.

^aIncludes both initial petitions and requests for visa extensions.

These findings are consistent with previously discussed findings that there has been an increase in the number of approved H-1B workers receiving advanced degrees from U.S. universities, as well as those who are already residing in the United States at the time of H-1B visa approval. This in turn suggests that, in general, the approved H-1B population may include more recent graduates, who are younger and more highly educated, as compared to their U.S. citizen counterparts in similar occupations. In turn, the U.S. citizen population in similar occupations may include older, more experienced workers.

Finally, data on a cohort of approved H-1B workers whose petitions were submitted between January 1, 2004, and September 30, 2007, (including initial petitions from both employers subject to the cap and cap-exempt employers) indicate that a substantial proportion subsequently applied for permanent

⁵⁹According to Homeland Security officials, the agency first began tracking petitions submitted under the master's cap in fiscal year 2006.

residence in the United States. Specifically, from a cohort of 311,847 approved H-1B petitions, we were able to obtain unique matches for 169,349 petitions from Homeland Security's US-VISIT data. Of these, GAO found that 56,454 of the individuals listed on these H-1B petitions had submitted a petition for permanent residence by 2010. Thus, at least 18 percent of the total cohort had applied for permanent residence by 2010.⁶⁰ Further, about half of those that applied had been approved for permanent residence by 2010, 45 percent were still pending, and just 3 percent had been denied.

The Impact of Raising the H-1B Cap on the U.S. Workforce Is Difficult to Forecast Due to Complex Economic Factors

The Impact of Raising the Cap Is Difficult to Estimate

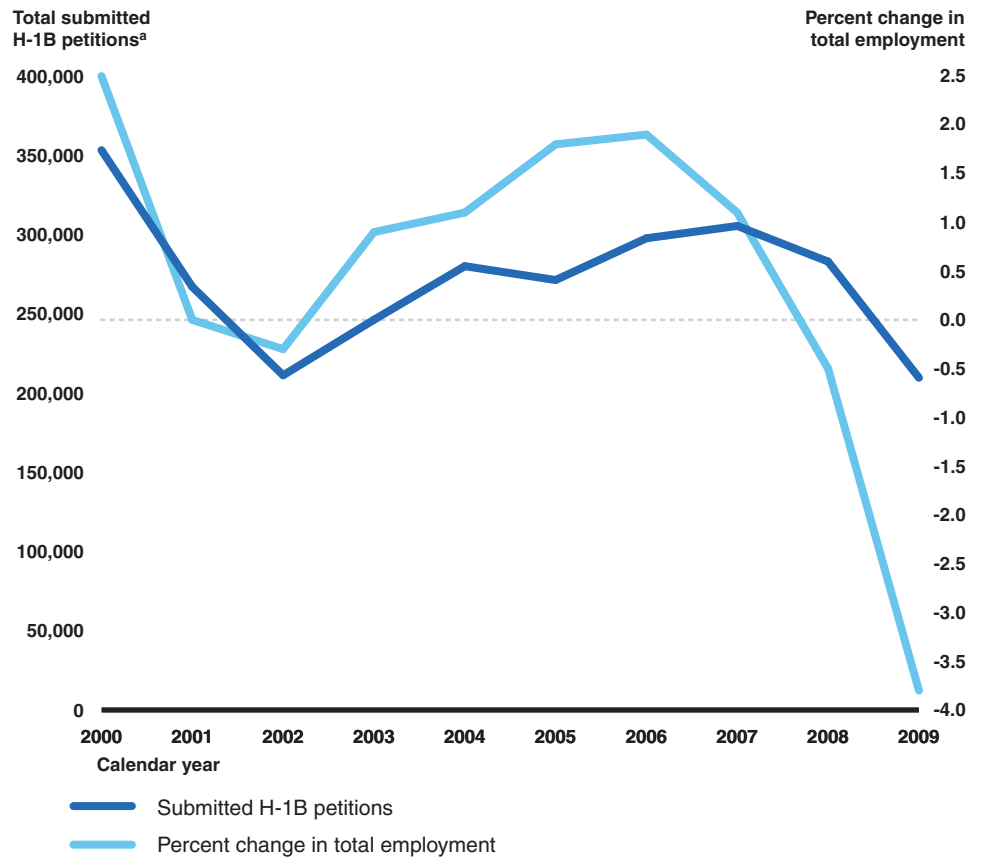
In addition to lack of data on the total H-1B workforce previously discussed, the potential impact that raising the H-1B cap would have on the wages and employment of U.S. workers is difficult to estimate because of complex economic relationships. On the one hand, if the H-1B program successfully provides needed skills for the U.S. economy, economic theory suggests that the program should contribute to long-run economic growth, which is beneficial for all workers. For example, additional skilled labor could increase innovation and productivity, potentially leading to improved competitiveness of U.S. businesses, higher wages in aggregate, and lower prices on goods and services purchased by American consumers. On the other hand, certain groups of U.S. workers may experience lower wages and employment as a result of the inflow of H-1B workers. Furthermore, changes in the wages and employment of both U.S. workers and H-1B workers reflect both changes in demand for labor and changes in the supply of labor, making it difficult to determine the effect

⁶⁰We could not analyze the remaining petitions in the cohort because we could not obtain a unique match for the individual listed in the petition between the data in CLAIMS 3 and the US-VISIT system. More information about the US-VISIT data and how GAO matched the data is available in appendix I.

that changes in the number of H-1B workers would have on outcomes for U.S. workers.

Although demand for H-1B workers seemed to fluctuate in concert with broad economic indicators, relationships still cannot be inferred. As shown in figure 12, the number of submitted H-1B petitions has generally followed overall employment growth in the U.S. economy. This appears consistent with economic theory that suggests that businesses require additional labor during periods of economic growth, so employers will likely submit more H-1B petitions during these periods. At the same time, wage rates and employment levels for U.S. workers generally rise during periods of economic growth. Therefore, the number of H-1B petitions tends to rise when wages and employment for U.S. workers are rising (although the number of approvals is limited by the H-1B cap), and to fall when wages and employment for U.S. workers are falling. However, this relationship does not reveal what the wage rates and employment rates of U.S. workers would have been in the absence of H-1B workers.

Figure 12: H-1B Submitted Petitions and Aggregate Employment Growth, 2000–2009



Source: GAO analysis of Homeland Security CLAIMS 3 data and CPS data.

^aTotal submitted H-1B petitions represent the number of petitions submitted in that calendar year. For example, 353,000 petitions were submitted in calendar year 2000. Percent change in total employment for a given year is the percent change in the number of workers employed between the previous calendar year and the current calendar year. Estimated change in total employment has 95 percent confidence intervals of within +/- 0.5 percentage points.

Due to these complex economic relationships, coupled with limitations in data on the total H-1B workforce discussed previously, we did not attempt to forecast the impacts of prospective changes in the H-1B cap on the U.S. labor force.

Employment and Earnings Picture Was Mixed for Professions Absorbing H-1Bs

While GAO did not attempt to forecast the impacts of prospective changes in the H-1B cap, we examined 10 years of retrospective data on the employment, unemployment, and earnings of U.S. workers in the three occupations that absorbed the largest proportion of H-1B workers relative to the stock of U.S. workers in these occupations.⁶¹ The three occupations with the highest number of H-1B approvals relative to the number of U.S. workers in that occupation were (1) systems analysts, programmers, and other computer-related workers;⁶² (2) electrical and electronics engineers; and (3) college and university educators. For example, among systems analysts, programmers, and other computer-related workers aged 18 to 50, the number of approved H-1B petitions (initial and extensions) was 10 percent of the total stock of U.S. citizen workers in private sector jobs in this occupation in calendar year 2008.⁶³

Our analysis of these three occupations generally revealed a mixed earnings and employment picture for U.S. workers in professions absorbing H-1Bs. (See appendix III for additional details.)

- With respect to median earnings, we found that U.S. workers in all three occupations, in every year, had significantly higher median earnings levels compared to all professional U.S. workers.

⁶¹From the five occupations that absorbed the largest numbers of H-1B approvals, we selected the three occupations that absorbed the largest proportion of H-1B approvals relative to the stock of U.S. workers in that occupation in 2008. We made this comparison by comparing data on U.S. workers from the March 2009 CPS, which asks about employment and earnings from calendar year 2008, to H-1B petitions (both initial and continuing) submitted in calendar year 2008.

⁶²In order to compare the CPS U.S. workforce occupations to the H-1B beneficiary occupations, we combined some occupational categories in both CLAIMS 3 and CPS to better align the CPS and USCIS data. The occupation “systems analysis, programming, and other computer-related occupations” includes five CPS occupational groups: (1) computer scientists and systems analysts; (2) computer programmers; (3) computer software engineers; (4) database administrators; and (5) operations research analysts. In CLAIMS 3, the occupation “systems analysis, programming, and other computer-related occupations” includes two occupational groups: (1) occupations in systems analysis and programming and (2) other computer-related occupations—database administrators, database design analysts, and microcomputer support specialists. See appendix I for more details.

⁶³H-1B petitions in this occupation are approximately 10 percent of the total number of U.S. workers aged 18 to 50 years old, in the private sector, in this occupation. Note that if U.S. workers in the government sector and self-employed workers are included, H-1B petitions would then be approximately 9 percent of the total number of U.S. workers in this age group and occupation.

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- With respect to real earnings growth, systems analysts, programmers, and other computer-related workers had significantly higher real earnings growth⁶⁴ compared to all professional workers; in contrast, for electrical and electronics engineers, real earnings growth was not significantly different from that for professional workers, and for college and university educators, real earnings growth was relatively flat over the decade.
 - Unemployment rates for both (1) systems analysts, programmers, and other computer-related workers and (2) electrical and electronics engineers were relatively cyclical; in contrast, the unemployment rate for college and university educators was somewhat less sensitive to business cycle fluctuations over the decade.
 - Employment levels (i.e., the number of workers employed) for electrical and electronics engineers declined significantly over the decade; employment levels for systems analysts, programmers, and other computer-related workers were essentially unchanged; and employment levels for college and university educators grew significantly over the decade.

H-1B and U.S. Citizen Workers: Salary Differences

To examine more closely whether H-1B workers are being paid salaries that are comparable to U.S. workers, we examined data on salaries for the three occupations that absorbed the largest proportion of H-1B workers relative to the stock of U.S. workers in 2008,⁶⁵ and compared this to data

⁶⁴Real earnings are adjusted for inflation and indexed to 2009 dollars.

⁶⁵As noted earlier, because of differences in the occupational categories in CLAIMS 3 and CPS data on U.S. workers, five of the occupational categories for U.S. workers are grouped together. Computer programmers, computer scientists and systems analysts, computer software engineers, computer support specialists, and operation research analysts are grouped into the category “systems analysis, programming, and other computer-related occupations.”

on the reported salaries listed by the employer on H-1B petitions.⁶⁶ A comparison of median annual salaries reveals that for systems analysts, programmers, and other computer-related workers—the largest of the three occupational categories we examined—H-1B workers tended to earn less than U.S. workers; however, some of the salary gap appears to be explained by differences in ages, which may reflect differences in the extent of their work experience.⁶⁷ As shown in table 1, which summarizes the median reported earnings of H-1B and U.S. workers by age and occupation, among systems analysts, programmers, and other computer-related workers, differences in median reported earnings between H-1B workers aged 20 to 29 and U.S. workers of the same age were not statistically significantly different, and the same was true for workers aged 30 to 39; however, H-1B workers aged 40 to 50 had median reported earnings that were significantly lower than the median earnings of U.S. workers in this occupation. Among electronics and electrical engineers, we did not find significant differences in median earnings of approved H-1B workers and U.S. workers, overall and within the age groups we examined. Among college and university educators, differences in reported earnings between H-1B workers and U.S. workers were not statistically significant except among younger age groups in which the H-1B workers had higher reported earnings than U.S. workers in the same age category; however, we could not account for all factors that might affect salary levels. (See the discussion “Limitations of Wage Comparisons” in appendix I for more information.) For all groups, differences in other factors, such as skill level, might explain some of the remaining salary differences; however, a lack of data on these factors precludes our analysis of them. In addition, differences in factors such as

⁶⁶Table 1 restricts the analysis to U.S. workers in full-time, private sector employment. Including self-employed and government workers increases the estimated number of U.S. workers in each occupation, with the largest increase in college and university educators. Including government workers and the self-employed does not qualitatively change most of the results presented in table 1, with the following exceptions: for the occupation “systems analysts, programmers, and other computer-related occupations,” there is no longer a statistically significant difference between the wages of H-1B workers and U.S. workers, in the age categories 20 to 39 or 40 to 50. For the occupation “college and university educators,” when government and self-employed workers are included in the analysis, there is a statistically significant difference between the wages of H-1B workers and U.S. workers in the age category 40 to 50, with the median U.S. worker earning about \$10,000 more than the median H-1B worker.

⁶⁷See appendix II for the age distributions of approved H-1B workers and U.S. citizens in these occupations, which show that H-1B workers in (1) systems analysis, programming, and other computer-related occupations and (2) electrical and electronics engineers were generally younger than their U.S.-citizen counterparts.

geographic location, size of firm, and industry, as well as level of education, which may also affect salary differences, are not controlled for here due to data limitations.⁶⁸ For example, if certain groups of workers are more heavily concentrated in high-cost parts of the country, this will be reflected in the median wage. (For additional analyses comparing U.S. workers with approved H-1B workers, see appendix II.)

Table 1: Median Reported Salaries of Approved H-1B Workers and Estimated U.S. Worker Median Salaries in Selected Occupations, 2008

Age Group	Electrical/electronics engineering occupations			Systems analysis, programming, and other computer-related occupations			Occupations in college and university education		
	H-1B	U.S. workers	Significant difference	H-1B	U.S. workers	Significant difference	H-1B	U.S. workers	Significant difference
18 - 50	\$80,000	\$80,000	no	\$61,000	\$70,000	yes	\$48,000	\$44,000	no
20 - 39 ^a	80,000	75,000	no	60,100	65,000	yes	47,237	35,000	yes
20 - 29	73,000	^b	^b	60,000	58,000	no	42,000	30,000	yes
30 - 39	86,900	^b	^b	70,000	70,000	no	48,500	^b	^b
40 - 50	85,000	95,000	no	77,063	84,000	yes	51,905	52,500	no

Source: GAO analysis of U.S. self-reported earnings from Labor's CPS data and H-1B earnings reported by their prospective employers from USCIS CLAIMS 3 data.

Note: The CPS sample is restricted to U.S. citizens in full-time, private sector employment. Estimated median salaries for U.S. workers have 95 percent confidence intervals ranging from +/- 5 to +/- 50 percent of the estimate itself. When the difference between the estimated U.S. worker median is significantly different from the corresponding median salary for H-1B, it is noted in the table

^aTests for differences in medians are shown for the broader age group, 20 to 39 years, because we could not produce reliable estimates for the smaller age groups—i.e., for 20 to 29 years and 30 to 39 years—for all occupations, due to small sample size in CPS-based estimates.

^bIndicates that sample size was too small to produce reliable CPS-based estimates.

In an attempt to better understand these results, we interviewed academic researchers and labor advocates who have studied the impact of H-1B workers on particular segments of the workforce. These experts and advocates provided examples of several specific segments of the workforce for which they believe the H-1B program has had negative impacts.

Because H-1B workers tend to be younger (with less potential work experience) than their U.S. counterparts who tend to be older (with more

⁶⁸GAO did not present analysis of wage rates by occupation within different geographic areas or within education levels because of small sample size constraints in the analysis of CPS data.

potential work experience), some labor advocates we spoke with argued that the H-1B program detrimentally impacts older IT professionals. Several researchers and labor advocates have stated that technology companies seek to replace older, American IT workers with cheaper, younger workers that are freshly supplied through the H-1B program in order to lower costs, and that IT companies have no incentive to retain and retrain older workers with the latest skills, since the H-1B program provides ready access to young workers with cutting-edge training. While companies could use any young, skilled workers to lower their labor costs in this manner, advocates argue that the H-1B program facilitates the practice of displacing older IT workers because it provides an inflow of new workers in IT fields that is much larger than would otherwise be available to U.S. employers. The analysis presented here does not provide a test of this theory because it does not identify what the wages of older U.S. IT professionals would have been in the absence of the H-1B program, nor does it account for the myriad factors affecting wage, for which we lack data.

Three researchers we spoke with expressed concern about the disincentives that U.S. students face in entering science, technology, engineering, and mathematics (STEM) fields.⁶⁹ For example, one disincentive is the duration of postdoctoral positions. Data show that since the 1960s, postdoctoral positions—which are generally exempt from the H-1B cap—have increased in length, with the largest increase in biological sciences.⁷⁰ One researcher posited that the increasing length of postdoctoral positions, especially in the biomedical fields, is due in part to the presence of large numbers of foreign nationals who are willing to work in these low-paid positions for many years. For foreign nationals, these postdoctoral positions may offer an entrée into the U.S. labor market, and the salaries may also compare well to the opportunities available in their home countries.

⁶⁹Using National Science Foundation data, the Congressional Research Service reports that the percentage of doctorates in the sciences that were earned by foreign students on temporary visas rose from 23 percent in 1997 to 32 percent in 2006, and the percentage of doctorates in engineering that were earned by foreign students on temporary visas rose from 41 percent in 1997 to 59 percent in 2006. Further, in 2007, 57 percent of postdoctoral students in the biological sciences were foreigners on temporary visas.

⁷⁰According to a National Academy of Sciences study, the average length of postdoctoral positions in the biological sciences increased from an average of 24 months for cohorts graduating prior to 1965 to an average of 46 months for cohorts graduating in the early 1990s.

Testimonial evidence also suggests that U.S. software programmers, particularly those seeking IT consulting jobs, may have been detrimentally affected by the significant presence of H-1B workers and, in particular, by the presence of certain staffing companies. One labor advocate we spoke with stated that staffing companies that farm out H-1B IT workers to other companies are abundant in the Northeast region of the country, and their presence has dramatically reduced the availability of jobs for U.S. software programmers in that region. Labor investigators we spoke with also noted the concentration of H-1Bs in the IT consulting industry, particularly in the Northeast region. These investigators noted that the bulk of the complaints they receive in this region pertain to staffing companies. In addition, Labor investigators told us that some staffing companies at times will pass an open position amongst themselves, rather than making a job opening known to the workforce at large. For example, if one staffing company is contacted with a request for a software programmer and does not have a worker with the appropriate skillset, this firm may—unbeknownst to the firm that is seeking the worker—“subcontract” the job out to a second staffing company who does have a worker with the appropriate skillset—and the first staffing company might take a cut of the wages received.

Limited Agency Oversight and Coordination and Changes to the H-1B Program Have Weakened U.S. Worker Protections

Responsibility for Worker Protection Is Limited and Dispersed among the Many Administering Agencies, and Hampered by Restrictions on Their Ability to Collaborate

Responsibility for the protection of workers with regard to the H-1B visa program is shared by four departments and their respective divisions. By virtue of their specific and often cordoned responsibilities, however, there is only nominal sharing of the kind of information that would allow for better employer screening or more active and targeted pursuit of program abuses. Once a visa-holder is employed, divisions within Labor, Homeland Security, and Justice may pursue enforcement of the H-1B program requirements in accordance with their broader responsibilities for

enforcing labor or immigration laws. However, their work is largely complaint-driven, and information sharing among them, or with offices that must screen H-1B applications, is also limited. Table 2 summarizes agency oversight responsibilities and limitations, which are further elaborated in the following pages.

Table 2: Summary of Agency Oversight Responsibilities and Limitations for the H-1B Program

Agency division	Role	Limitations
Labor—Employment and Training Administration	Application review: Reviews employer LCA	Limited by statute to review only for missing information and obvious inaccuracies.
Homeland Security—U.S. Citizenship and Immigration Services	Application review: Reviews employee H-1B petition form (I-129) and decides if petition can be approved	Does not receive information from Labor’s Employment and Training Administration or Wage and Hour Division.
State—Bureau of Consular Affairs	Application review: Interviews prospective H-1B nonimmigrants with approved petitions and may issue visas to H-1B candidates living abroad	Limited ability for interviewers (consular officials) to question applications previously approved by Labor and Homeland Security.
Labor—Wage and Hour Division	Enforcement: Investigates complaints regarding compliance with program rules as to wages and working conditions	Limited by <ul style="list-style-type: none"> • prohibitions on officials initiating investigations based on information received from Labor or Homeland Security officials; • limited access to LCA database (iCERT); and • lack of subpoena authority for employer records.
Homeland Security—Directorate of Fraud Detection and National Security	Enforcement: Conducts random investigations of H-1B employers through site visits to verify information supplied in the LCA and I-129 petitions.	The Administrative Site Visit and Verification Program was initiated after a “Benefit Fraud and Compliance Assessment” (BFCA) found 21 percent fraud in H-1B program; however, Homeland Security is continuing to evaluate this program for effectiveness.
Justice—Office of Special Counsel	Enforcement: Investigates complaints (known as charges) related to acts of employment such as hiring and firing	Reluctance of workers to file complaints for fear of employer retaliation. Workers’ lack of awareness of their employers’ intention to hire H-1B workers. Limited agency information sharing.

Source: GAO review of agency information.

Limited and Dispersed Application Review

Labor’s Employment and Training Administration. While Employment and Training reviews the LCA form submitted by a petitioning employer, this review is limited by law to looking for missing information and obvious inaccuracies.⁷¹ For example, an employer may have failed to checkmark all the boxes for attesting to his or her

⁷¹8 U.S.C. § 1182(n)(1)(G)(ii).

willingness to comply with program requirements. While Labor’s review catches some administrative errors made by applicants, it does not check the validity of the information on the LCA. Consequently, the review is not intended to identify potential employer violations such as work sites that do not exist or lack of compliance with the attestations made on the LCA. This review is primarily conducted electronically with officials reviewing the information flagged by the electronic system as problematic. Any greater scrutiny by Employment and Training is limited by law.

Homeland Security’s U.S. Citizenship and Immigration Services.

Adjudicators with USCIS conduct a review of both the employer’s application and the foreign worker as a job candidate. Specifically, Homeland Security reviews two documents for consistency: the LCA submitted originally to Labor for review, and the I-129 petition, which is submitted by businesses to Homeland Security and generally contains correlating information.⁷² In addition to reviewing for consistency, USCIS adjudicators explained that they take steps to verify the facts provided for both the employer and the prospective worker—for example, by requesting additional information from the employer. USCIS’s adjudicators do not receive information regarding suspicious or problematic employers from Labor’s Employment and Training Administration that Labor analysts may have become aware of during their review of the LCA because Labor does not have a formal mechanism for sharing such information with Homeland Security.

Department of State. State plays a role in the H-1B program by interviewing and potentially issuing visas to H-1B candidates living abroad, whose petitions were approved by Homeland Security. State conducts its own review of the H-1B petitioner and documentation pertaining to his or her employer by comparing information gleaned from interviews against basic information in the LCA and I-129 petition, such as the name of the petitioner and the foreign worker. However, official department guidance instructs consular officials not to question the petition approvals made by Homeland Security when making their decision on the visa application without having obtained new evidence.⁷³ State guidance stipulates that a

⁷²The LCA form requires additional information to the I-129 regarding the prevailing wage source and check boxes for attestations to U.S. worker protections.

⁷³State’s guidance for consular officers specifically states: “Consular officers do not have the authority to question the approval of H petitions without specific evidence, unavailable to Homeland Security at the time of petition approval, that the beneficiary may not be entitled to status. Disagreement with DHS’s interpretation of the law or the facts, however, is not sufficient reason to ask DHS to reconsider its approval of the petition.”

petition can only be sent back when there has been a clear error committed in adjudicating the I-129 petition or new evidence is submitted that contradicts Homeland Security adjudicators' decisions. Officials noted that there is a high threshold for the identification of a clear error and this rationale is almost never used. State has, however, recommended 1,744 revocations in fiscal year 2009 based on new evidence. As a general rule, State consular officers treat information provided to and reviewed by Homeland Security on business establishments, relationships, and individual qualifications as bona fide.

Limited Enforcement

Labor's Wage and Hour Division. Labor's Wage and Hour investigates H-1B complaints primarily related to improper wage payments and failures to notify workers that a company intends to hire an H-1B worker. However, its ability to enforce worker protections with regard to the H-1B program is limited.⁷⁴ Although the Secretary of Labor has authority to initiate investigations, Wage and Hour reported that it had never initiated an investigation under this authority. Officials explained that they rarely proactively investigate companies for H-1B violations, and that they may generally only act on formal complaints.⁷⁵ Moreover, by law, investigations can only be initiated from information obtained from an aggrieved or credible party outside of Labor.⁷⁶ Further, Labor officials told us they have interpreted this restriction to include information from Homeland Security as well. As a result, Labor's Wage and Hour could not initiate a complaint based on any information it might receive from Homeland Security, such as information on potential abuses that Homeland Security might glean from its review of the I-

⁷⁴Specifically, Wage and Hour Division can only initiate H-1B-related investigations as a result of one of four circumstances: (1) Wage and Hour receives a complaint from an aggrieved person or organization; (2) Wage and Hour receives specific, credible information from a knowledgeable source (other than an aggrieved party) that an employer willfully failed to meet certain LCA conditions, engaged in a pattern or practice of failures to meet such conditions, or committed substantial failure to meet such conditions that affects multiple employees; (3) Wage and Hour conducts random investigations of employers who (within the last five years) were found by the Secretary of Labor to be willful violators of the H-1B program provisions; (4) the Secretary of Labor personally certifies that there is reasonable cause to believe that an employer is in violation and then approves commencement of an investigation. 8 U.S.C. §§ 1182(n)(2).

⁷⁵While Wage and Hour annually conducts approximately a half dozen random investigations into H-1B employers identified as willful violators, these investigations concern employers already identified as problematic and at maximum have included seven investigations per fiscal year with none in 2009. Wage and Hour does not conduct proactive or random investigations of H-1B employers that are in good standing.

⁷⁶8 U.S.C. § 1182(n)(2)(ii) and (iii).

129 petition. In a prior report, GAO suggested that Congress remove these legal restrictions, but Congress has yet to take action.⁷⁷

While the majority of complaints received by Labor have been reported by H-1B workers, very few complaints are filed. In 2009, only 664 out of 51,980 companies approved to hire new or extending H-1B workers had complaints against them. According to agency officials, H-1B workers are likely to be reluctant to file complaints against employers for fear that the company might be disbarred, which in turn could result in the complainant and fellow H-1B workers at the company losing their jobs and potentially having to leave the United States. Further, investigators told us that even after an H-1B worker files a complaint, the H-1B worker may not cooperate in the investigation for fear of similar repercussions. In these instances, investigators are sometimes unable to complete the investigation. The relatively small number of H-1B-related complaints in 2009 nevertheless resulted in Labor requiring companies to pay over \$10 million in unpaid wages to 1,202 workers and \$739,929 in civil monetary penalties (see table 3).

Table 3: H-1B Complaints, Violations, Back Wages, and Fines Assessed by Labor’s Wage and Hour Division, FY 2000–FY 2009

Fiscal year	Number of complaints received	Number of complaints resulting in investigations	Number of cases with violations ^a	Number of violations found	Amount due in back wages (in millions)	Number of employees due back wages	Civil monetary penalties assessed	Number of disbarments of H-1B employers
2000	123	117	54	375	\$ 1.2	226	\$ 21,000	3
2001	209	192	37	164	.6	135	17,750	7
2002	249	238	105	977	3.7	817	48,350	7
2003	158	148	121	711	4.0	550	128,890	19
2004	172	158	117	561	4.2	376	114,125	14
2005	184	173	90	733	5.1	593	86,100	17
2006	231	214	107	1,000	4.6	823	328,050	16
2007	299	291	133	1,026	6.4	657	324,325	13
2008	319	304	155	1,829	8.2	1162	362,750	17
2009	664	555	152	2,834	11.0	1202	739,929	13

Source: Labor’s Wage and Hour.

^aCases with violations includes the number of cases in which Labor found the employer was in fact in violation of the program requirements. Each case may include multiple violations that were not originally included in the complaint, therefore making the number of cases with violations at times higher than the number of complaints.

⁷⁷GAO, *H-1B Visa Program: Labor Could Improve Its Oversight and Increase Information Sharing with Homeland Security*, GAO-06-720 (Washington, D.C.: June 22, 2006).

Labor's ability to enforce worker protections under the program is also hampered by obstacles cited by officials at both headquarters and in Wage and Hour's Northeast Regional Office, which receives the greatest number of H-1B complaints:

First, with the introduction in June 2009 of the automated "iCERT" system maintained by Employment and Training, Wage and Hour stated that they can no longer access the database of LCAs. Prior access had allowed investigators to quickly assess the accuracy of the attestations made by an employer. Without this access, officials stated that they must request the LCA from the employer, which can increase the time and resources required to conduct an investigation. Employment and Training reported that improved access to the iCERT System is under development and planned for implementation in April 2011.

Second, Wage and Hour has limited ability to persuade employers to cooperate with investigations. The fine it can levy against employers for not cooperating is far less than the potential penalty for a finding of noncompliance with the terms of the program.⁷⁸ Investigators noted that when employers do not cooperate, it can take them months to obtain the requested paperwork, which essentially stalls the time-sensitive investigation.

Third, Wage and Hour lacks subpoena authority to obtain such records directly from the employer. In contrast, Wage and Hour, as well as Employment and Training, have subpoena power for other labor protection programs they administer, such as under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.⁷⁹ According to Wage and Hour officials, subpoena power increases cooperation from companies and is the most effective way to speed up investigations, since companies could face harsh penalties, such as debarment, for not cooperating. The Department of Justice also has subpoena power for its investigations related to the H-1B program.⁸⁰ Justice officials we spoke with noted that while they rarely have to invoke subpoena power in their investigations, generally employers are aware of

⁷⁸The maximum fine Wage and Hour can levy for noncompliance in investigations is \$1,000.

⁷⁹29 U.S.C. §§ 161 and 1862(b)

⁸⁰8 U.S.C. § 1324b(f)(2).

the subpoena power and are therefore more likely to comply with Justice's requests for records.

Homeland Security's Directorate of Fraud Detection and National Security. In its capacity to investigate immigration fraud, FDNS has recently introduced some proactive enforcement for the H-1B program through several random investigations into temporary visa programs. Through a Benefit Fraud and Compliance Assessment (BFCA), Homeland Security examined 246 H-1B petitions for possible violations.⁸¹ The BFCA found that 21 percent of H-1B petitions involved fraud or technical violations. Examples of fraud include cases in which businesses listed on the LCA and I-129 did not exist; educational degrees were found to be fraudulent; signatures were forged on supporting documents; and H-1B workers were performing duties or receiving payment significantly different from those described in the applications.

As a result of the high rate of fraud identified in the BFCA, Homeland Security launched what it calls its Administrative Site Visit and Verification Program—an ongoing initiative to visit work sites of H-1B-hiring companies considered to be at a higher risk for abusing the program, according to officials. During fiscal year 2010, USCIS oversaw 14,433 H-1B site inspections, which resulted in 1,176 adverse actions. Such actions can include the revocation or denial of benefits, and may involve referral of a case for criminal investigation.⁸² FDNS is continuing to evaluate this initiative and refine the indicators it uses to identify groups of high-risk companies.

Department of Justice's Office of Special Counsel. Justice's Office of Special Counsel also conducts investigations; but its enforcement abilities are also limited. Justice's jurisdiction limits it to pursue charges related to unfair immigration-related employment practices, such as discriminatory hiring or firing.⁸³ For example, such charges generally allege that an H-1B worker was hired in place of a U.S. worker, or that a company is using

⁸¹The USCIS H-1B Benefit Fraud and Compliance Assessment, published in September 2008, specifically reviewed 246 of the 96,827 approved, denied, or pending I-129 petitions filed between October 1, 2005, and March 31, 2006.

⁸²According to officials, cases referred for criminal investigation may include examples such as fraud conspiracies, cases involving individuals from special interest countries, and attorney or document preparer fraud.

⁸³8 U.S.C. § 1324b(a)(1).

discriminatory hiring practices that put U.S. workers at a disadvantage, such as explicitly advertising for an H-1B worker.

Justice receives and investigates few charges related to the H-1B program (at most 70 per year over the last 5 years with the number decreasing) and reported that their ability to enforce the law depends on the willingness and ability of U.S. workers to complain.⁸⁴ Justice officials explained that the low number of charges they receive is likely because U.S. workers are often unaware that an employer intends to or did hire an H-1B worker. For example, although employers are supposed to post a public statement declaring their intention to hire an H-1B worker, the statement might be posted in a lunch room where it may or may not be seen by affected employees. Further, Labor investigators reported that many of the companies they investigate do not comply with requirements to post notice. In contrast, Labor requires applicants for other temporary visa programs, such as the H-2A program, to display such postings on a centralized Web site that is managed by Labor.⁸⁵ Justice officials noted that the lack of a centralized Web site makes it difficult for U.S. workers to learn that U.S. employers are hiring H-1B workers and also for Justice to monitor the compliance of companies with antidiscrimination law, especially those operating offshore.

Justice informally shares information on a periodic basis with Labor and Homeland Security when it receives information about potential abuse that does not fall under its jurisdiction. However, there is no formal mechanism in place to exchange information with these other agencies, although officials explained that some attempts to arrange information-sharing agreements between Justice and these agencies have been made in the past. When Justice has referred cases that fell within Labor's jurisdiction, Justice officials told us they were not generally made aware of the outcomes of these referrals. Although Justice accepts referrals from other agencies, officials reported only receiving one referral from Labor related to the H-1B program.

⁸⁴ Although Justice investigates few H-1B cases, in its technical comments, Justice indicated that H-1B cases sometimes represented a significant percent of investigations (i.e., 29, 14 and 10 percent of cases in 2006, 2007 and 2009, respectively).

⁸⁵ H-2A job postings from the last 30 days are made public by Labor at <http://icert.doleta.gov/>.

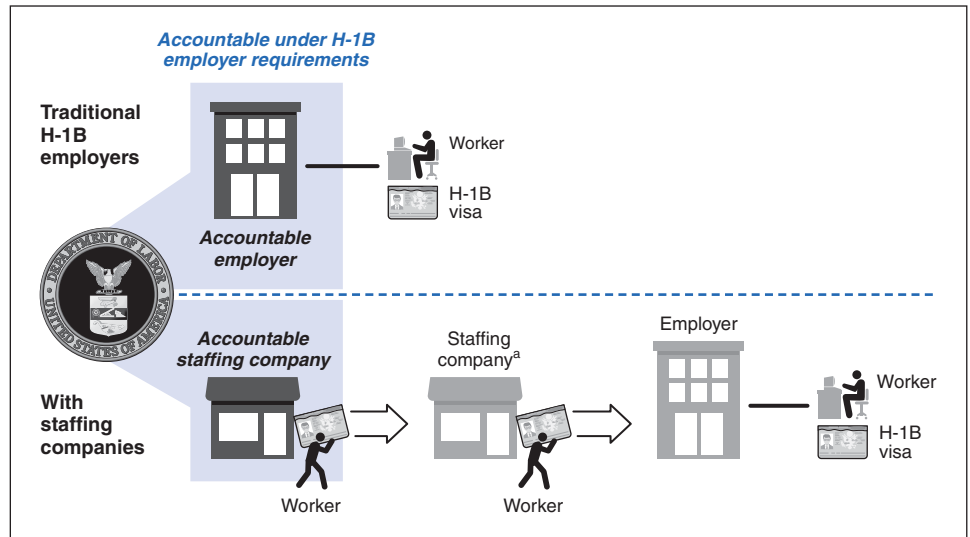
Department of State. If or when State officials learn of an employer potentially violating program requirements, unlike other agencies, State may act as an aggrieved party on behalf of an H-1B worker and file a formal complaint with Wage and Hour regarding the business. For example, agency officials noted that during consular interviews with spouses of H-1B workers attempting to enter the United States, the consular official may uncover potential abuses by the H-1B worker's employer and will then file a complaint with Wage and Hour. However, such incidents are limited in number, with an average of 160 recommendations per year since 2005.

Lack of Accountability Provisions for Staffing Companies Also Hinders Enforcement

The laws governing the H-1B program do not include explicit provisions to hold employers that obtained the H-1B worker through a staffing company accountable to the program requirements that are applicable to the employer who applied for H-1B visas on behalf of foreign workers.⁸⁶ As previously noted, some staffing companies complete and submit to Labor an LCA as the employing company, but then contract the H-1B worker out to another employer. At times, that employer may contract the H-1B worker out again, creating multiple middlemen according to officials (see fig. 13). Regardless of where the H-1B worker is ultimately employed, Wage and Hour officials told us that only the staffing company, as the employer who has petitioned for the visa and made the attestations to comply, is technically accountable and ultimately liable for complying with program requirements. They explained that the contractual relationship itself does not transfer the obligations of the contractor for worker protection to any subsequent employers. Especially in instances in which multiple middlemen are involved, it is difficult to expect the staffing companies themselves to be accountable for the actions of an employer up to three or four employers removed.

⁸⁶If an employer-employee relationship exists between a staffing company and an H-1B worker, the staffing company may submit an LCA and is thus statutorily bound by program requirements.

Figure 13: Accountability for Types of Employers under the H-1B Program

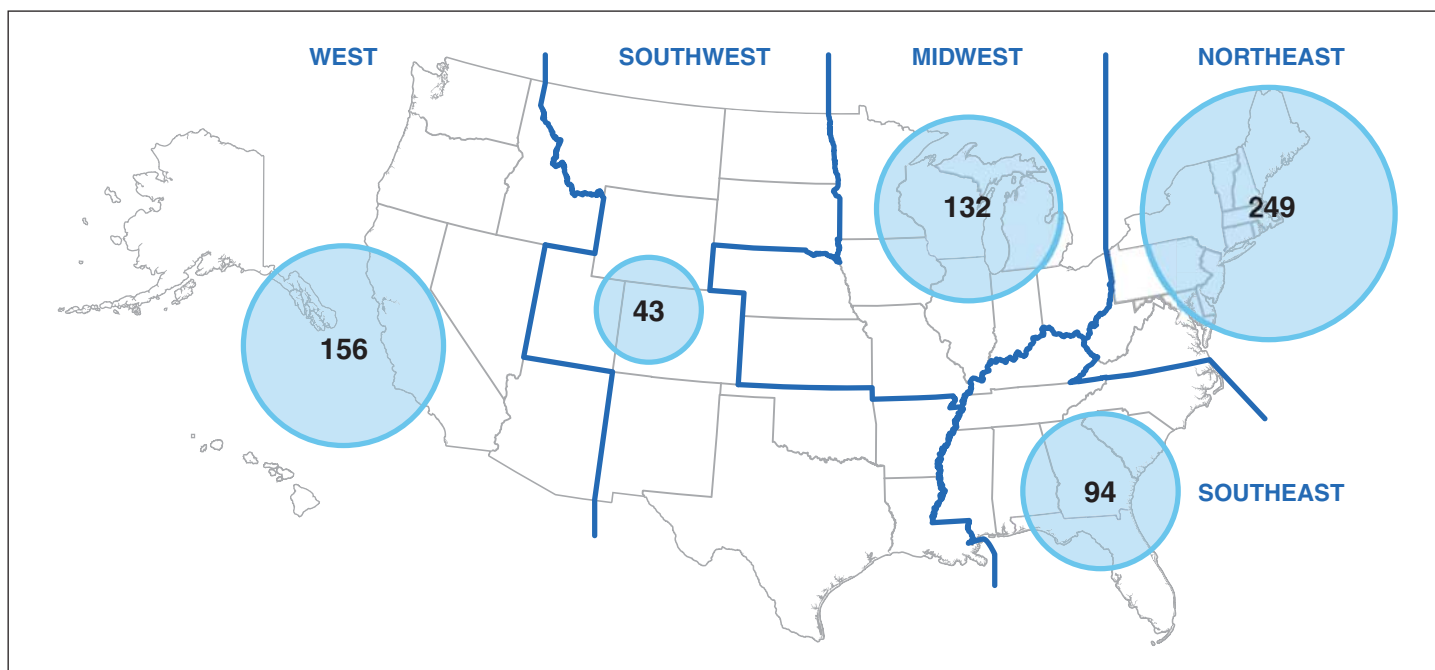


Source: GAO review of Labor information.

^aIn some cases there may be more than one staffing company involved in placing the H-1B worker.

Wage and Hour investigators reported that a large number of the complaints they receive were related to the activities of staffing companies. In fact, investigators from the Northeast region—the region that receives the highest number of H-1B complaints (see fig. 14)—said that nearly all of the complaints they receive involve staffing companies and that the number of complaints are growing. However, the precise number of complaints related to staffing companies is not known because Labor does not track this information in its complaint data. The most frequent type of violation resulting from a complaint is that the employer failed to pay the required wage rate. Other frequent violations identified as a result of complaints include the failure of the employer to post notice that they intend to hire an H-1B worker and the failure to comply with the attestations made in the LCA (see table 4).

Figure 14: Wage and Hour H-1B Program Investigations by Region, FY 2006–FY 2009



Sources: GAO analysis of Labor Wage and Hour data; National Atlas of the United States (base map).

Note: This map reflects the number of complaints investigated, not the number of complaints received.

Table 4: Most Common H-1B Violations Identified by Wage and Hour, FY 2009

Violation ^a	Number of cases in which violations occurred	Number of occurrences
Failure to pay employee required wage rate	114	977
Failure to post notice of LCA filings for 10 days in two locations at each place of employment where H-1B will be employed	39	315
Failure to comply with the attestations made in the LCA	34	170
Required or accepted payment of the additional petition fee by employee	34	78
Failure to maintain documentation as required	28	180
Failure to make available for public examination any of the required records	23	290
Willfully failed to pay employee required wage rate	10	63
Misrepresented rate of pay on LCA	9	33
Misrepresented place of intended employment on LCA	6	24
Failure to provide H-1B worker copy of LCA	7	7

Source: Labor's Wage and Hour Division.

^aThese categories were determined by Labor's Wage and Hour Division officials. Because categories could not be aggregated by larger topics due to potential duplication, additional violations, such as misrepresenting facts on the LCA, may occur more frequently but are not reflected in this table.

Complaints received by Wage and Hour pertaining to staffing companies generally relate to the payment of H-1B workers, according to investigators. Officials told us that the most common complaint associated with staffing companies pertained to unpaid “benching”—when a staffing company does not have a job placement for the H-1B worker and does not pay them. In these instances, a staffing company sometimes asks the H-1B worker to conduct their own job search or to take an unpaid leave until the company identifies a client. For example, one investigator described how one employer maintained a house for its unemployed H-1B workers, and instructed them to conduct their own Internet searches for a job placement. In another case, Wage and Hour found that a staffing company forced employees to go on leave when it did not have jobs for them and boarded them in a guesthouse while they were unemployed. At times, employees are unaware of their right to receive payment during these “benched” time periods which, according to one complainant, lasted as long as 13 months. Investigators said that the problem of unpaid benching has become more severe with the economic downturn as staffing companies have fewer jobs in which to place H-1B workers. Instead, they may “stockpile” the workers in anticipation of an economic recovery.

In investigating complaints related to staffing companies, investigators often identify additional violations of the attestations on the LCA. For example, Labor officials noted that in 90 percent of their investigations related to staffing companies, the hiring company did not post notice of the filing of the LCA indicating the intention to hire an H-1B worker. In some instances, according to these officials, the subsequent employer may not even know that the contracted worker is an H-1B worker, much less be aware of any requirements associated with the visa—such as the requirement for employers to post notice of their filing of an LCA. In addition, in some instances workers procured by staffing companies were either not working for the employer listed or not performing the duties described on the LCA.

Some attempts have been made to control the use of staffing companies in other visa programs and in the H-1B program. For example, the L-1 Visa Reform (Intracompany Transferee) Act of 2004 essentially barred staffing companies—whose main revenue source is providing labor-for-hire—from receiving L-1 visas.⁸⁷ However, according to experts we interviewed, some

⁸⁷Pub. L. No. 108-447, div. J, tit. IV, subtit. A, § 412, 118 Stat. 2809, 3351 - 52 (codified at 8 U.S.C. § 1184(c)(2)(F)).

staffing companies avoided this legal restriction by differentiating themselves from staffing companies by describing themselves as “IT solutions” companies. In addition to providing labor-for-hire, such companies sell the development of a product, and therefore are not barred from the use of L-1 visas. Additionally, in January 2010, Homeland Security issued a memo on determining when there is a valid employer-employee relationship between a staffing company and an H-1B worker for whom it has obtained an H-1B visa.⁸⁸ Whether there is such a relationship depends largely on the right of a staffing company to control the manner and means by which the H-1B nonimmigrant works. However, officials indicated that it is too early to know if the memo has improved compliance with program requirements.⁸⁹

Changes to Program Legislation Have Diluted Worker Protections

Ability to Seek Permanent Residency While on Temporary Visa and Extension Periods

Changes to the H-1B program over time have weakened U.S. worker protections related to the (1) temporary nature of the program, (2) pool of H-1B workers eligible for H-1B status, and (3) cap.

Since the 1990s, the law has allowed H-1B workers to pursue permanent residency in the United States and to remain in the country for an unlimited period of time while their permanent residency application is pending. The Immigration Act of 1990 removed the requirement that H-1B visa applicants have a residence in a foreign country that they had no intention of abandoning.⁹⁰ In addition, H-1B workers were able to apply for permanent status⁹¹ and eventually to obtain an unlimited number of annual extensions

⁸⁸This memo is commonly referred to as the “Neufeld Memo.”

⁸⁹On February 18, 2010, USCIS’s Office of Public Engagement hosted a collaboration session in connection with the Neufeld Memo. At that session, which was attended by approximately 40 stakeholders in person and more than 600 via telephone, various concerns about the memorandum were raised.

⁹⁰Pub. L. No. 101-649, § 205(e)(1), 104 Stat. 4978, 5022.

⁹¹Pub. L. No. 101-649, § 205(b)(2), 104 Stat. 4978, 5020. This was known as the dual intent provision because the H-1B visa is temporary but the worker’s intent is to become a permanent resident.

as long as they file an LCA for permanent residency at least 1 year prior to submitting the final application for an extension of the H-1B visa.⁹²

As a result of these legislative changes, the number of H-1B workers in the workforce has likely increased. As noted elsewhere in this report, many H-1B workers apply for green cards. In fact, among a cohort GAO reviewed, at least 18 percent applied for green cards within 6 years or less of the start date of their H-1B visas. Although the employment-based permanent residency applications take a number of years for a decision, the amount of time varies by home country, with approvals of employment-based permanent visas for skilled-worker categories taking the longest for citizens from China, India, and Mexico.⁹³ An H-1B worker from one of these countries could remain in the United States for over a decade before obtaining a green card.

Broadened Criteria for Worker Qualifications

Legislative changes have broadened the skill requirements for H-1B workers. The original H-visa program, established under the Immigration and Nationality Act in 1952, authorized visas for aliens with a residence in a foreign country that the alien had no intention of abandoning, who were of distinguished merit and ability, and were coming to the United States to perform temporary service of an exceptional nature requiring such merit and ability.⁹⁴ However, in 1990, besides removing the foreign residence requirement, the original language was replaced with language authorizing H-1B visas for aliens coming temporarily to the United States to perform services in a “specialty occupation.”⁹⁵ A specialty occupation was defined as one that required a theoretical and practical application of a body of highly specialized knowledge, and at a minimum, a bachelor’s or higher degree in the specific specialty (see app. V). This increased the pool of eligible workers to include a wider range of skill levels.

⁹²AC21 § 106(a) and (b), 114 Stat. 1253-54 and AC21§104(c). Such annual extensions are available when 365 or more days have elapsed since the H-1B worker submits an LCA for permanent status. The initial H-1B extension application is submitted 3 years after the initial application is approved and extends the temporary program limit to 6 years. Thus, the practical effect is that an H-1B worker seeking to remain in the United States while waiting for a green card must apply for the green card prior to their fifth year as an H-1B worker.

⁹³Permanent visa classes include employment-based preferences, family-sponsored, and diversity immigrant categories, with only employment-based preferences being used as comparison in this report.

⁹⁴Ch. 477, § 101(a)(15)(H)(i), 66 Stat. 163, 166.

⁹⁵Pub. L. No. 101-649, § 205(c), 104 Stat. 4978, 5021.

Labor’s application data show that H-1B workers are often not paid wages associated with the highest skills in their fields. Specifically, these data show that over half (54 percent) of the workers with approved LCAs from June 2009 through July 2010 were categorized as entry-level positions and were paid at the lowest pay grades allowed under the prevailing wage levels (see table 5). This pay grade is designated for jobs needing a basic understanding of duties and the ability of the worker to perform routine tasks that require limited judgment. In comparison, 6 percent of approved applicants whose wages were reported on the LCA were paid within the top pay grade designated for workers that requires sufficient experience and a high level of independent judgment. However, such data do not, by themselves, indicate whether H-1B workers are generally less skilled than their U.S. counterparts, or whether they are younger or more likely to accept lower wages.

Table 5: Frequency of Wage Levels Reported on Approved LCAs, June 1, 2009–July 30, 2010

Wage level reported on LCA	Number of records	Percentage of total wage levels reported
I: Entry Level (basic understanding of duties and perform routine tasks requiring limited judgment)	130,528	54%
II: Qualified (have good understanding of occupation and perform moderately complex tasks that require limited judgment)	69,806	29
III: Experienced (experienced with special skills or knowledge and sound understanding of occupation)	26,731	11
IV: Fully Competent (competent with sufficient experience and will require a high level of independent judgment)	14,617	6
Total reported	241,682	100%

Source: Labor’s Employment and Training Administration.

In contrast to the H-1B visa program, temporary visa programs in other countries take steps to identify foreign workers with skills that are in short supply.⁹⁶ For example, Australia has a system in which applicants receive

⁹⁶We did not conduct an independent legal analysis of foreign laws. Rather, we relied upon secondary source materials.

Exemptions to the Cap and Alternative Visas

points for certain types of qualifications that are in short supply in the Australian economy. Those with the highest number of points are granted visas to enter. The United Kingdom uses a committee comprised of five independent economists to identify shortages in particular occupations. Canada has a pilot temporary program under way that also attempts to identify specific jobs where shortages exist and skills are needed.

The U.S. permanent visa program also does more to assure that the skills of the foreign worker are not readily available state-side by, in most cases, requiring the employer who sponsors the green card applicant to attest that it was not able to find a comparably skilled U.S. applicant.

While providing employers greater access to foreign labor, exemptions to the H-1B cap and the existence of other visa programs for temporary workers have increased their numbers far beyond the cap. With universities, nonprofit organizations that conduct research, and governmental research organizations able to hire an unlimited number of H-1B workers through exemptions, many more H-1B workers have entered the United States each year than the annual numeric limit of 65,000 imposed by the cap. For example, 87,519 workers (initial and extensions) in 2009 were approved for visas to work for 6,034 cap-exempt companies. In addition, company executives reported that as an alternative to the H-1B visa, companies use the L-1 visa—which allows foreign workers to relocate to a company's U.S. office after having worked abroad for the company for at least 1 year. As previously noted, between 2000 and 2008, the number of foreign workers issued L-1 visas—which are not subject to a cap—has increased by more than 50 percent. As noted earlier, Homeland Security currently does not have the capability to determine the cumulative H-1B workforce, such that the effect on U.S. workers can be assessed. Whether or not Homeland Security's Transformation Program will address this problem remains to be seen.⁹⁷

Conclusions

In creating the H-1B visa program, Congress sought to strike a difficult balance between satisfying the needs of a wide variety of businesses for high-skilled foreign labor while protecting access to jobs and appropriate compensation for U.S. workers. The initial temporary nature of the program and the annual cap were key tools to protect U.S. workers. Over its history, however, Congress has made numerous changes to the

⁹⁷20 C.F.R. § 656.17(g) (2009)

program, including broadening the eligibility requirements and allowing for exemptions to the cap and for H-1B workers to pursue long-term residency. The result is that, today, the number of H-1B workers approved to enter the United States each year greatly exceeds the numeric limit established by the cap, and the majority of applicants are categorized as entry-level. Moreover, a substantial proportion appears to remain in the country beyond the 6-year visa period in pursuit of permanent residency. Homeland Security, faced with challenges in administering a program managed in part by four different federal agencies, has difficulty tracking the cap and cannot readily determine how many H-1B workers are currently in the United States or how many stay after their visas expire. Lack of information on the total H-1B workforce makes it impossible to understand the long-term impact of the program and leaves the program vulnerable to fraud and abuse—a known issue in this program.

Restrictions on agencies' abilities to enforce program requirements and coordinate with one another widen the risk of fraud and abuse, and undermine efforts to enforce worker protections. Restrictions on sharing and leveraging information between and within federal agencies likely inhibit the pursuit of worker allegations of abuse and allow some labor abuses to go undetected. The involvement of staffing companies, whose share of H-1B workers is not precisely known but is likely not trivial, further weakens enforcement efforts because the end-user of the H-1B worker is not liable for complying with labor protection requirements.

At the same time, many members of the business community we interviewed cited their own frustrations with the ability of this program to serve their needs for high-skilled labor. The one-size-fits-all application process wastes business and government resources in compiling and reviewing paperwork on well-vetted companies with years of experience in the program. The lottery system does not permit companies to prioritize their candidates, and as a result, coveted H-1B slots may not be allocated to companies' top candidates. The annual application cycle hinders flexibility in hiring, prompting some companies to prematurely petition for candidates instead of holding out for better ones in years when the cap is hit early. Moreover, start-up companies, which some argue are the backbone of innovation in the United States, cannot use the H-1B visa for their employees until their company is fully established.

In an era when companies are competing in a global market for cutting-edge skills, the H-1B program plays an important role. As currently structured, however, the program may not be used to its full potential and may be detrimental in some cases. Some improvements can be made

through executive actions by the agencies overseeing the program. However, balancing the needs of the economy for high-skilled foreign labor and protecting the employment and wages of current U.S. workers is a policy matter for Congress. Certainly there are no easy solutions, but data we present suggest that the program may continue to fall short and raise difficult policy questions. Such questions include the appropriateness of the current qualifications for H-1B workers, the use of H-1B visas as a bridge to permanent residence, the involvement of staffing companies in the H-1B program, and exemptions from the cap. As Congress considers immigration reform in consultation with diverse stakeholders and experts, and as Homeland Security moves forward with its modernization efforts, this is an opportune time for Congress to review the goals and purpose of the H-1B program and re-examine its key provisions.

Matters for Congressional Consideration

To ensure that the H-1B program continues to meet the needs of businesses in a global economy while maintaining a balance of protections for U.S. workers, Congress may wish to consider reviewing the merits and shortcomings of key program provisions and making appropriate changes as needed. Such a review may include, but would not necessarily be limited to

- the qualifications required for workers eligible under the H-1B program,
- exemptions from the cap,
- the appropriateness of H-1B hiring by staffing companies,
- the level of the cap, and
- the role the program should play in the U.S. immigration system in relationship to permanent residency.

To reduce duplication and fragmentation in the administration and oversight of the H-1B application process, consistent with past GAO matters for congressional consideration, consider eliminating the requirement that employers first submit a Labor Condition Application (LCA) to the Department of Labor for certification, and require instead that employers submit this application along with the I-129 application to the Department of Homeland Security's U.S. Citizenship and Immigration Services for review.

To improve the Department of Labor's ability to investigate and enforce employer compliance with H-1B program requirements, consider granting the department subpoena power to obtain employer records during investigations under the H-1B program.

To help ensure the full protection of H-1B workers employed through staffing companies, consider holding the employer where an H-1B visa holder performs work accountable for meeting program requirements to the same extent as the employer that submitted the LCA form.

Recommendations for Executive Action

Based on our review, we are making four recommendations.

We are making the following two recommendations to the Secretary of Homeland Security:

To help ensure that the number of new H-1B workers who are subject to the cap—both entering the United States and changing to H-1B status within the United States—does not exceed the cap each year, U.S. Citizenship and Immigration Services should take steps to improve its tracking of the number of approved H-1B applications and the number of issued visas under the cap by fully leveraging the transformation effort currently under way, which involves the adoption of an electronic petition processing system that will be linked to the Department of State's tracking system. Such steps should ensure that linkages to the Department of State's tracking system will provide Homeland Security with timely access to data on visa issuances, and that mechanisms for tracking petitions and visas against the cap are incorporated into U.S. Citizenship and Immigration Services' business rules to be developed for the new electronic petition system.

To address business concerns without undermining program integrity, U.S. Citizenship and Immigration Services should, to the extent permitted by its existing statutory authority, explore options for increasing the flexibility of the application process for H-1B employers, such as

- allowing employers to rank their applications for visa candidates so that they can hire the best qualified worker for the jobs in highest need;
- distributing the applications granted under the annual cap in allotments throughout the year (e.g. quarterly); and

-
- establishing a system whereby businesses with a strong track-record of compliance with H-1B regulations may use a streamlined application process.

We are making the following two recommendations to the Secretary of Labor:

To improve the transparency and oversight of the posting requirement on the Labor Condition Application (LCA), as part of its current oversight role, the Employment and Training Administration should develop and maintain a centralized Web site, accessible to the public, where businesses must post notice of the intent to hire H-1B workers. Such notices should continue to specify the job category and worksite location noted on the LCA and required by statute on current noncentralized postings.

To improve the efficiency and effectiveness of its investigations of employer compliance with H-1B requirements, the Employment and Training Administration should provide Labor's Wage and Hour Division searchable access to the LCA database.

Agency Comments and Our Evaluation

The Departments of Homeland Security, Justice, Labor, and State were provided a draft of this report for review and comment. The Departments of Homeland Security and Justice provided written responses to one or more of our recommendations, which appear in appendixes VI and VII of this report. Labor and State did not provide a written response to our recommendations. In addition, Homeland Security, Justice, and Labor provided technical comments, which have been incorporated into the report where appropriate.

In brief, the Department of Justice expressed support for our recommendation that Labor develop and maintain a Web site where businesses post notice of their intent to hire H-1B workers. In addition, Justice offered two more recommendations that build on our findings regarding the lack of a labor market test for most H-1B employers and the

limited use of its complaint process by U.S. workers.⁹⁸ However, Homeland Security did not agree with the two recommendations we made pertaining to Homeland Security's U.S. Citizenship and Immigration Services, nor did it agree with one matter for congressional consideration.

The recommendation in our draft report on improving H-1B cap management emphasized that Homeland Security should leverage its transformation effort by reaching an agreement with State to ensure that, by linking data systems, it would have real-time information on the number of visas approved under the cap. In response, Homeland Security cited as evidence of its intentions the work already under way to develop an electronic exchange of visa and immigration data with State. However, in our review of the department's memorandum of agreement and letter of intent with State that discuss such exchanges, we did not find specific references to improving cap management with State's visa data. Further, Homeland Security added that data to be exchanged with State may only slightly improve cap management because State's data (1) do not include individuals already in the United States who are seeking to change their visa status, and (2) will be too old to assist Homeland Security with cap management, since it is typically months after Homeland Security approves petitions that State issues visas to individuals residing outside of the United States.

We understand that, for individuals already residing in the United States, Homeland Security does not depend on State, but has its own data on changes in visa status for approved H-1B workers. We also acknowledge that for individuals residing outside of the United States, there is some lapse in time between Homeland Security's approval of an H-1B petition and State's issuance (or decision not to issue) a visa. Nevertheless, we maintain that possessing timely and accurate information on petitions and visas that count against the cap for all individuals—both within and outside the United States—could provide a more reliable basis for ongoing monitoring with respect to the annual visa cap. Improved tracking would in turn provide Homeland Security the information it needs to reduce the potential for

⁹⁸Specifically, Justice recommended that (1) before seeking to hire an H-1B visa holder, all employers should be required to "test" the labor market to determine whether qualified U.S. workers are available and to hire any equally or better qualified U.S. workers who apply, and (2) the Department of Labor should display information about worker protections and the Office of Special Counsel's contact information on all H-1B educational material and the centralized database for H-1B postings. See appendix VII for Justice's comments.

exceeding the visa cap and ensure that, in high-demand years, only 65,000 visas are issued. In response to Homeland Security's comments, we clarified our recommendation with respect to the steps it should take, including the importance of incorporating better tracking mechanisms in the business rules to be developed for the new electronic petition system.

With regard to our recommendation that U.S. Citizenship and Immigration explore options for increasing the flexibility of the application process for H-1B employers within its statutory authority, Homeland Security raised several concerns about the feasibility of our suggested options and noted one initiative under way that may expedite the application process for employers. We continue to believe that additional efforts are warranted to more fully explore the potential benefits and costs of these options.

- Homeland Security said it believes that current law does not allow the department to exempt petitioners with track records of H-1B compliance from evidentiary requirements. However, we believe there may be additional opportunities to streamline the application process for businesses by not requiring them to resubmit evidence that they have already provided, without exempting petitioners from evidentiary requirements. Homeland Security noted its own initiative—the Validation Instrument for Business Enterprises (VIBE) system—is intended to reduce the need for petitioners to submit certain documentation by providing the department with the means to verify the petitioners' information through an independent source, but acknowledged in its technical comments that the system will not necessarily reduce the burden of providing supporting documentation for petitioners in the immediate future.
- Homeland Security noted that implementation of a beneficiary ranking process would be extremely complicated and resource intensive and would decrease flexibility for employers. We continue to believe that such obstacles could be surmountable through technology. For example, petitioner-level electronic accounts—as planned in the electronic petition system slated for 2012—could allow employers to manage, and possibly change, their rankings without necessarily decreasing their flexibility. Homeland Security also stated that implementing a quarterly cap allocation is neither warranted nor feasible. Again, we believe that distributing the annual cap in allotments throughout the year might be feasible with an electronic petition system. For example, quarterly allocations of visas could be administered by creating an electronic queue whereby petitions that were not selected in one lottery round would have priority in the next. An automated cap management system that combines electronic tracking and queuing might reduce, for federal managers

themselves, the level of complexity involved in managing the program. Homeland Security also expressed concern that a ranking system might encourage petitioners to over-submit petitions in an attempt to increase their chances of obtaining H-1B workers. The department is, nevertheless, considering a similar option that would allow petitioners to request visa slots prior to submitting an LCA. Whether or not petitioners would over-submit in response to either option is a matter that we believe should be further studied or tested. In summary, we believe that Homeland Security's ongoing Transformation Project—currently in its development phase—affords the opportunity to explore creative and thoughtful solutions to the challenges of administering the H-1B program. Such an examination could weigh the potential costs and risks associated with the options we outlined against their potential benefits in savings for taxpayers and petitioners—with the ultimate goal of supporting legitimate business needs while not compromising worker protections.

Homeland Security disagreed with our asking Congress to consider transferring the review of the LCA from Labor to U.S. Citizen and Immigration Services, citing internal lack of expertise in wage and labor determinations and Labor's role in enforcing labor violations. While we recognize Labor's expertise, Labor officials told us that, unless its legal authority is expanded to allow for verification of employer attestations, the Employment and Training Administration's review can only ensure that employers have completed the form's questions and check-box questionnaire and that there are no obvious inaccuracies. We maintain that such a limited review could be readily subsumed in Homeland Security's petition adjudication process because it too reviews the LCA. We are not recommending that Labor's enforcement role, carried out by its Wage and Hour Division, be transferred to Homeland Security. Further, we do not believe that Labor's enforcement efforts would be compromised by transferring the LCA approval process to Homeland Security, especially in light of challenges Wage and Hour faces with gaining access to LCA information from the Employment and Training Administration, as identified in this report.

We are sending copies of this report to the Secretaries of Homeland Security, Labor, and State, the Attorney General, appropriate congressional committees, and other interested parties. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staffs have any questions about this report, please contact me at (202) 512-7215 or sherrilla@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix VIII.



Andrew Sherrill
Director, Education, Workforce,
and Income Security

Appendix I: Objectives, Scope, and Methods

We conducted our work in response to a House report that accompanied the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009. The House report directs GAO to examine the impact of the H-1B visa cap on the ability of domestic companies to develop modern technology and perform innovative scientific research and development (R&D), while ensuring U.S. workers are not unfairly displaced or otherwise disadvantaged by H-1B visa holders. To do this, in agreement with cognizant Hill staff, GAO addressed five objectives. Specifically, with respect to H-1B employers, we examined what is known about (1) their demand for H-1B workers and (2) how the H-1B cap affects their costs, R&D, and offshoring decisions. With respect to H-1B and U.S. workers, we examined what is known about (3) H-1B worker characteristics, (4) how raising the H-1B cap might affect employment and wages of U.S. workers, and (5) how well H-1B program requirements ensure that U.S. workers are not displaced or disadvantaged by the program.

This appendix provides a detailed account of the data sources used to answer these questions, the analyses we conducted, and any limitations we encountered. The appendix is organized into four sections. Section 1 describes the key information sources we used for the report. Section 2 describes our methods for comparing the characteristics and wages of U.S. workers with those of approved H-1B workers (which are presented in the report and in appendix II). Section 3 describes our methods for analyzing employment levels, unemployment rates, and wages of U.S. workers in those occupations with the highest concentration of approved H-1B workers. Section 4 describes our methods for analyzing the long-term immigration outcomes of a cohort of H-1B approved H-1B workers.

Section 1: Information Sources

Our information sources included electronic data from datasets administered by the Departments of Labor, Homeland Security, Justice, and State, and by private vendors. Details on the scope and purpose of these data are described below. For each of the datasets described above, we conducted a data reliability assessment of selected variables by conducting electronic data tests for completeness and accuracy, reviewing documentation on the dataset, interviewing knowledgeable officials about how the data are collected and maintained and their appropriate uses, or completing all of these. For the purposes of our analysis, we found the

variables that we reported on from these datasets to be sufficiently reliable.¹

In addition to electronic data, our information sources included interviews with a nonprobability sample of H-1B employers, site visits, and reviews of agency documentation and pertinent literature. Details on the scope and purpose of these information sources are also described below.

Department of Labor Data

Labor Condition Application Data

To obtain information on the characteristics of employers requesting H-1B workers and the positions they sought to fill over the past decade, we analyzed two administrative datasets containing information from the Labor Condition Application (LCA) filed by prospective H-1B employers to the Department of Labor (Labor).

First, we analyzed the Efile H-1B Disclosure Data managed by Labor's Employment and Training Administration (Employment and Training). These data included all the applications filed electronically from 2002 through 2009.² We analyzed the data from a total of 2,451,785 applications to determine (1) the number of unique companies that submitted applications each year; (2) the total number of H-1B workers these companies requested each year; (3) the number of applications that were certified or denied; and (4) the number of companies that were either H-1B dependent (i.e., those with 15 percent or more of their workforce comprised of H-1B workers) or willful violators.

Second, we obtained and analyzed more recent data on LCAs that were filed from June 2009 through July 2010, which were processed through Labor's new iCERT system. Unlike Labor's data from previous years, the iCERT data contained detailed information on the prospective H-1B worker's skill level, which is specified by the employer on the LCA. We

¹In several instances, we identified inconsistencies with the reporting of particular data fields. In these instances, we took steps to address these inconsistencies using criteria to create decision rules. For example, a given H-1B employer might have reported different industry codes on their H-1B petition applications in a given year. When this occurred, we used the industry code that the employer most frequently listed on its petitions. In other instances, when it was not possible to apply a decision rule, we did not include the data in our analysis.

²Prior to 2002, these data are not available electronically.

received data including the skill level listed on 258,847 LCAs that were filed between June 2009 and July 2010. The iCERT data also contain a variable indicating whether the petitioning employer was H-1B dependent. We obtained and tabulated this variable for the top 150 H-1B hiring companies (which we defined as those requesting the highest number of H-1Bs in 2009).

Wage and Hour Complaint Data

To understand trends in H-1B complaints received by Labor's Wage and Hour Division (Wage and Hour) and their outcomes over time, we analyzed extracts from Wage and Hour's Investigative Support and Reporting Database. Specifically, for fiscal year 2000 to fiscal year 2009, we obtained the number of complaints received, the number of complaints resulting in investigations, the number of cases found to have violations, and the prevalence of specific types of violations. We also requested and received additional data from Wage and Hour on the outcomes of these investigations including the total back wages due to employees, the number of employees that were due to receive back wages, the total civil monetary penalties assessed to violators, and the number of disbarments of H-1B employers. To identify potential regional variations, for fiscal year 2006 to fiscal year 2009, we collected and reviewed the number and nature of complaints investigated by region. To more fully understand the extent and impact of the most common types of violations alleged in complaints that Wage and Hour investigated, for fiscal year 2009, we analyzed the number of cases involving each type of violation, the number of times each violation occurred,³ and the number of employees impacted.

Current Population Survey Data

To determine the characteristics of U.S. workers in select occupations over the past decade, we analyzed Current Population Survey (CPS) data. The CPS Basic Monthly Survey—a survey of about 50,000 households that is conducted by the Bureau of Labor Statistics (BLS)—provides a comprehensive body of information on the employment and unemployment experience of the nation's population. The March Annual Social and Economic CPS supplement is one source of detailed information on income and work experience in the United States. We used both the basic monthly CPS survey data and published estimates based on these surveys over the past decade to produce annual estimates for the 10-year period. We used the March 2009 Annual Social and Economic supplement to produce some additional estimates in this report. A more complete description of the surveys, including sample design, estimation,

³For each case, a violation can occur multiple times.

and other methodology can be found in the CPS documentation prepared by Census and BLS.⁴

We used the March 2009 supplement data to produce estimates for U.S. citizens' longest held job in the previous year, highest degree attained, age, and wages.⁵ For this analysis, we restricted the population to those U.S. citizens who were full-time wage and salary workers (excluding self-employed) aged 18 to 50 and working for private employers (excluding government). We estimated median salaries for this population by age and education level for three occupations of interest: (1) systems analysis, programming, and other computer-related occupations; (2) electrical/electronic engineering; and (3) college and university educators. The occupation and salary information used was for the longest held job in 2008. We compared these median estimates to median salaries reported on 2008 H-1B worker petitions for similar occupations and age groups.

We used CPS's basic monthly survey data to examine how the proportion of H-1B to U.S. citizen workers changed over the last decade for these same five occupations of interest. Specifically, for 2000 to 2009, we computed yearly averages from the 12 monthly CPS surveys from each of the years. For these estimates, we restricted the population to U.S. citizen full-time adult workers.⁶ Although the occupational categories are the same as those used for the March 2009 supplement analysis, the occupation was for the job held by the U.S. worker the prior week. Additional details of this analysis are presented in Sections 2 and 3 of this appendix.

Because the CPS is a probability sample, based on random selections, the sample is only one of a large number of samples that might have been drawn. Since each sample could have provided different estimates, confidence in the precision of the particular sample's results is expressed as a 95 percent confidence interval. This is the interval that would contain the actual population value for 95 percent of the samples that could have been drawn. The 95 percent confidence intervals provided in this report

⁴See BLS, *Technical Paper 66: Design and Methodology - Current Population Survey and Current Population Survey, 2009 Annual Social and Economic (ASEC) Supplement*. Electronic versions are available at <http://www.census.gov/prod/2006pubs/tp-66.pdf> and <http://www.census.gov/aptd/techdoc/cps/cpsmar09.pdf>.

⁵The most recently available March supplement is from 2009, which asks about earnings and education for the past year (2008).

⁶For this population, we did not exclude government workers and self-employed workers.

were developed from standard error estimates that were either provided by BLS for the underlying estimate (for median weekly wages), or computed using formulas and methods described in CPS documentation.⁷

Consistent with the CPS documentation guidelines, we do not produce annual estimates from the basic monthly CPS data files for populations of less than 35,000, or estimates based on the March supplement data for populations of less than 75,000.

Department of Homeland Security Data

Data on H-1B Petitions Filed by Employers

To help analyze trends in demand for and characteristics of H-1B workers and employers over the last decade, we used administrative data collected by Department of Homeland Security's (Homeland Security) U.S. Citizenship and Immigration Services (USCIS) reflecting information supplied by prospective H-1B employers on the I-129 form, the form that is used to petition for an H-1B worker. These data, known as the Computer Linked Application Information Management System, Version 3.0 (CLAIMS 3) provide detailed information on the characteristics of prospective H-1B employers and workers. We used two versions of these data—CLAIMS 3 Mainframe and CLAIMS 3 Local Area Network (LAN)—because they contained different variables.

Using the CLAIMS 3 Mainframe database from fiscal years 2000 through 2009, for each fiscal year we determined

- the number of H-1B initial petitions and extensions submitted by all employers, employers subject to the cap, and cap-exempt employers;
- the number of H-1B petitions approved or denied by Homeland Security, by initial petitions and extensions;

⁷For estimates based on the 2009 March supplement CPS survey, standard errors are described in appendix G of <http://www.census.gov/aptd/techdoc/cps/cpsmar10.pdf>. For estimates based on averages on basic monthly CPS surveys, standard error computation is described in the BLS Employment and Earnings publications (see <http://www.bls.gov/opub/ee/empearn200912.pdf>).

- the total number of companies and the total number of cap-exempt companies that submitted and had approved H-1B petitions, by initial petitions and extensions;
- the characteristics of companies that were approved by Homeland Security to hire H-1B workers, including their industry codes and the number of workers they requested; and
- the characteristics of workers that Homeland Security approved as H-1Bs, including whether or not the workers were residing in the United States at the time of application; their countries of birth, education level, age, rate of pay, occupation, industry, and the location of their prospective place of employment.⁸

Because the CLAIMS 3 Mainframe database does not distinguish or contain data on petitions subject to the master's cap, we also obtained and analyzed data from the CLAIMS 3 LAN database from fiscal years 2004 through 2009 to determine the number of approved H-1B petitions for workers who graduated with a master's degree or higher from an American institution of higher education.⁹

To understand how the number and demographic characteristics of approved H-1B workers compared to U.S. citizen workers over the last decade, we used USCIS's CLAIMS 3 Mainframe H-1B approval data for 2008¹⁰ for five key occupations: (1) systems analysis, programming, and other computer-related occupations;¹¹ (2) electrical/electronic engineering;

⁸We did not include H-B3 (fashion models) in these analyses, but included all other types of approved H-1B workers.

⁹According to Homeland Security officials, this variable was not available in the CLAIMS 3 Mainframe data and was only available from fiscal year 2006 onward because, prior to that year, this information was not tracked.

¹⁰In order to compare characteristics of H-1B workers to U.S. citizen workers by occupation, we matched data from Homeland Security's CLAIMS 3 database with information from CPS's March supplemental data. We used the most recently available March supplement (i.e., from 2009), which asks about earnings and education for the past year (2008). We selected 2008 CLAIMS 3 data to most closely match the CPS data time frames. See Section 2 for more details on this analysis.

¹¹The occupational categories for "systems analysis and programming" and "other computer-related occupations" were combined into one category for the purposes of this analysis. "Other computer-related occupations" includes database administrators, database design analysts, and microcomputer support specialists. See Section 2 for additional details on the occupational codes.

(3) college and university educators; (4) accountants, auditors, and related occupations; and (5) physicians and surgeons. These analyses are described in detail in Section 2.

Finally, we used CLAIMS 3 Mainframe data for fiscal year 2009 to identify the 150 employers with the highest number of approved H-1B petitions, and we collected additional data on these employers as described below in the “Data from Private Vendors” section.

Limitations of H-1B Petition Data

While the CLAIMS 3 data provided a variety of information on approved H-1B workers, these data had several limitations with respect to understanding demand for and characteristics of H-1B workers. Most importantly, they did not provide information on how many H-1B workers, whose petitions were approved, were actually working in the United States in any particular year. Therefore, although the CLAIMS 3 data are informative about approved H-1B petitions and about some characteristics of the workers listed on those petitions, these characteristics may not be indicative of the characteristics of all H-1B workers in a given year. For example:

- Of the H-1B petitions submitted in fiscal year 2008 and approved, we do not know the proportion that began work in 2008. Some may not have started work until 2009; others may not have started work at all.
- An individual H-1B worker could be represented in multiple petitions filed by different employers in the same year.
- An individual H-1B worker could be represented in multiple petitions filed by the same employer in the same year prior to March 2008.
- USCIS’s CLAIMS 3 data can only provide information on the *flow* of new H-1B workers into the U.S. workforce, not about the stock of all H-1B workers in those occupations. In other words, they can provide information on the number of H-1B workers whose petitions were submitted and approved for fiscal year 2008, but not on the number of H-1B workers that were actually employed in the United States in 2008.

Because of these uncertainties, we do not know how well the characteristics of approved H-1B workers whose petitions were submitted in any year would approximate the characteristics of the population of H-1B workers actually employed in that year. Further, because of these limitations we do not know the number of new H-1B workers actually entering the U.S. workforce in any given year.

United States Visitor and
Immigrant Status Indicator
Technology (US-VISIT) Data

To examine the long-term immigration outcomes for H-1B workers, we obtained data from Homeland Security's US-VISIT Arrival Departure Information System (ADIS) database, which were matched against H-1B petition data. US-VISIT data are collected on noncitizens at the point of entry into the United States and contain other immigration information, including the dates of entry into and exit from the country; the date a petition to convert to permanent residency was submitted (if one was submitted) and the status of that petition (approved, denied, or pending); the person's country of citizenship; and country from which their entry visa was issued. For a summary of the methods used and any limitations encountered in conducting data matches and related analysis, see Section 4 of this appendix.

Department of Justice
Data
Complaint Data

To understand trends in the number of complaints (known as charges) that are filed with the Department of Justice (Justice) regarding the H-1B program over time, we obtained data on the number of H-1B-related charges Justice received from fiscal year 2006 through March 2010. Specifically, we analyzed information on all inactive cases,¹² including on whether the matter was Justice-initiated or complaint-driven, the number of charges per fiscal year, initial investigation and completion dates, the alleged violation committed by the company cited in the charge, and the outcome of each charge. For cases that were resolved from fiscal year 2006 to March 2010, we analyzed summaries provided by Justice describing the nature and resolution of all cases on which Justice took action.

Department of State Data

Data on Visa Issuances

To determine the number of H-1B and L-1 visas issued from 2000 to 2009, we reviewed and compiled data on visa issuances published by the Department of State (State).

Data from Private Vendors

To learn more about the top 150 H-1B hiring companies in fiscal year 2009 (beyond the information available in agency administrative databases), we gathered additional information on these companies through Mergent Online and LexisNexis's Dossier databases. We used these databases to

¹²Due to the sensitivity of Justice's ongoing investigations, we were only provided information on cases which were no longer active.

obtain information on country of incorporation, country of operations (location), primary North American Industry Classification System (NAICS), number of employees, net income, operating income, total assets, and business description for each company. For several companies for which neither database had available information or we wanted additional information (i.e., a more detailed business description), we downloaded and saved information from company Web sites.

Data Reliability

For each of the datasets described above, we conducted a data reliability assessment of selected variables by conducting electronic data tests for completeness and accuracy, reviewing documentation on the dataset, or interviewing knowledgeable officials about how the data are collected and maintained and their appropriate uses. For the purposes of our analysis, we found the variables that we reported on from these datasets to be sufficiently reliable. In several instances, we identified inconsistencies with the reporting of particular data fields. In these instances, we took steps to address these inconsistencies by using criteria to create decision rules. For example, a given H-1B employer might have reported different industry codes on their H-1B petition applications in a given year. When this occurred, except if a company had multiple industry codes listed the same number of times, we identified the industry that the employer most frequently listed on the petition. If more than one industry code appeared the same number of times, the company was double counted to reflect equally relevant industries. In other instances, when it was not possible to apply a reasonable decision rule, we did not include the data field in our analysis.

Interviews with H-1B Employers

To determine how the H-1B cap and program affects the costs, R&D, and offshoring decisions of firms doing business in the United States, we spoke to a nongeneralizable sample of 34 companies that employed H-1B workers in fiscal year 2008. For 31 of these companies, we conducted structured interviews with representatives of the company. For the remaining 3 companies, we spoke with a company representative in two separate focus groups.

Of the 31 firms with whom we conducted structured individual interviews, 22 were selected randomly from a stratified sample of all H-1B hiring firms in fiscal year 2008. The universe of H-1B hiring firms (excluding nonprofits and universities) was stratified into three groups according to the number of approved H-1B petitions. Anticipating a high refusal rate from companies we asked to participate in the structured interview, we over-

sampled for each of these groups. Ultimately, of the 150 companies we contacted, 22 agreed to speak with us.¹³ The following table summarizes the population of companies and the number of companies contacted.

Table 6: H-1B Employers Randomly Selected for Interview by GAO

Description	Population	Contacted	Participated
Large (100+ H-1B approvals)	185	50	5
Medium (10-99 H-1B approvals)	2,983	40	11
Small (1-9 H-1B approvals)	48,774	60	6
Total	51,942	150	22

Source: GAO.

The remaining firms with which we conducted additional structured interviews were selected by GAO based on referrals from industry contacts. Some of these firms were chosen because they were known leaders in key sectors of the economy, while others were chosen because they represented firms from sectors that were difficult to contact and whom we expected would not be well represented by the random sample (including one start-up company and one small H-1B-dependent staffing firm). Ultimately, we conducted structured individual interviews with 9 additional firms selected based on referrals from industry contacts, for a total of 31 individual interviews; and we conducted focus group interviews with 3 additional firms selected based on referrals from industry contacts. This selection of a total of 34 firms constitutes a nongeneralizable sample and cannot be used to make inferences beyond the specific firms selected.

The firms we spoke with were located throughout the country and reflected six industrial sectors and a range of sizes (from a few workers based in one location to thousands of workers positioned around the globe). Through these interviews, we spoke with key executives in a variety of technology-intensive industries, including information technology (IT); semiconductor manufacturing and other manufacturing and engineering firms; and pharmaceuticals and biotechnology. Regarding technology-intensive industries, we spoke with representatives of several large multinational companies, including four of the top U.S.-based H-1B

¹³The high refusal rate was consistent with a past GAO review of the H-1B program, which endeavored to speak with private businesses about their experiences with the program (see GAO, *H-1B Foreign Workers: Better Tracking Needed to Help Determine H-1B Program's Effects on U.S. Workforce*, [GAO-03-883](#) (Washington, D.C.: Sept. 10, 2003).

employers (i.e., U.S.-based companies that were among the top 50 companies with the highest number of approved H-1B petitions), as well as several small and emerging technology companies who use H-1B workers for highly specialized positions. We also spoke with 10 IT services firms, including three large (meaning they employed at least 100 H-1B workers) foreign-owned H-1B staffing and outsourcing companies, and several smaller IT staffing and consulting firms. In addition, we spoke with companies in several other sectors, including two financial organizations, a health care provider, and a consumer retail firm.

To develop our structured interview questionnaire, we took several steps. First, we conducted two focus groups with H-1B employers and representatives of major industry organizations. In these focus groups, we tested preliminary versions of our interview questions, and used the discussion to revise the questions. We also conducted six tests of the structured interview with individual companies. The responses from the three companies that participated in our focus groups were not included in the tabulated results based on interviews with individual firms, because the structure of our individual firm interviews differed significantly from the structure of our focus groups. However, the responses from all six of our test interviews were included in our tabulated results of company interviews.

To analyze the data we collected from the company interviews, we conducted a content analysis of company responses. This analysis involved coding the interview responses and conducting frequency analyses of the topics and themes that were raised by the company representatives. Two analysts coded the responses. Any discrepancies in coding were discussed and resolved before finalizing the resulting data set.

During our interviews, employers and experts offered a number of suggestions for how the program could be improved. Although it was not possible to publish all of the suggestions, those that are mentioned in the report were chosen on the basis of the following factors: (1) frequency of suggestion, (2) feasibility, (3) potential for economic efficiency, and (4) corroboration with other information sources.

Site Visits, Interviews, and Review of Documentary Evidence

To understand the (1) H-1B certification, adjudication, and enforcement processes; (2) the responsibilities of each agency involved; (3) the effectiveness of the H-1B program's protections for U.S. workers; and (4) the reliability of the datasets we used, we conducted three site visits and conducted numerous interviews with agency officials, labor advocates, and

academics. To understand the processing of applications, we visited Labor's LCA processing center in Illinois and Homeland Security's I-129 processing center in California. We also conducted interviews with State's Kentucky Service Center, where I-129 petitions that have been approved by Homeland Security are entered into a State database that is accessible to consular offices around the world. To understand investigations related to approved H-1B visa holders, we visited Labor's Wage and Hour Division's Northeast Regional Office in Philadelphia, the regional office that had received the highest number of H-1B-related complaints in the country. In addition, we conducted interviews with officials from Labor, Homeland Security's USCIS and US-VISIT offices, State, and Justice with regard to their roles in all phases of the H-1B program. We also reviewed agency documentation and the laws and regulations related to the H-1B program.

To deepen our understanding of the role of the H-1B program for businesses in specific segments of the economy, and the impact of the H-1B program on U.S. workers, we interviewed a number of academics and business advocates. Specifically, we interviewed leading academics in the areas of business, economics, demography, international relations, and labor relations. To better understand the specific issues facing start-up companies and high-tech organizations, we conducted interviews with venture capital companies and immigration law firms that work with start-up companies. To better understand the specific issues facing firms in the IT staffing and services industry, we interviewed industry advocacy organizations.

We also conducted an extensive review of the academic literature, which included articles and studies on the impact of migration on U.S. workers, trends in international business, and trends in the education of foreign students in science and technology fields.

Finally, to address all objectives, we reviewed relevant federal laws and regulations; news media articles, and the temporary immigration programs of several other countries that we selected based on our literature review and our discussions with experts.

Table 7 provides a summary of how the information sources described were used to answer each of the reporting objectives.

Table 7: Summary of Information Sources by Objective

	Objective 1: Demand for H-1B workers and characteristics of H-1B employers	Objective 2: Impact of the H-1B cap and program on employers	Objective 3: Characteristics of approved H-1B workers	Objective 4: Employment and wages of the U.S. workforce in H-1B- intensive industries	Objective 5: Effectiveness of protections for U.S. workers
Department of Labor data					
LCA data	X				
Wage and Hour Division complaint data					X
CPS data			X	X	
Department of Homeland Security data					
H-1B employer petition data	X		X	X	
U.S-VISIT data			X		
Department of Justice complaint data					
					X
Department of State data on visa issuances	X				
Mergent Online data	X				
LexisNexis Dossier database	X				
Structured interviews with H-1B employers		X			
Site visits, interviews, and reviews of documentary evidence	X	X	X	X	X
Relevant laws and regulations	X	X	X	X	X

Source: GAO.

Section 2: Methods for Comparing U.S. and H-1B Workers

As part of our examination of the impact of the H-1B program on domestic employment, we used data from the 2009 March supplement of the CPS to estimate the number of U.S. citizen workers in 2008, their age distribution, and their education levels for five occupational categories¹⁴ that received the most H-1B approvals in fiscal year 2009. Ideally we would have compared U.S. workers to actual H-1B workers; however, data on actual H-1B workers do not exist. The data we analyzed (CLAIMS 3), as explained above, pertain to prospective H-1B workers (those whose petitions were submitted in a given year and approved by Homeland Security).

To help ensure that we were comparing workers in the same occupational categories, we had to combine some occupational categories in the CPS to better match those in the CLAIMS 3 data, as shown in table 8.

Table 8: Crosswalk from USCIS to Related CPS Occupation Codes

USCIS occupations		Related CPS occupations ^a			
		2003-2009		2000-2002	
USCIS code(s)	USCIS occupational title	CPS codes	CPS occupational title	CPS codes	CPS occupational title
030 and 039	Systems analysis, programming, and other computer-related occupations ^b	1000, 1010, 1020, 1060, 1220	Computer scientists and systems analysts, computer programmers, database administrators, and operations research analysts	064, 229, 065	Computer systems analysts and scientists, computer programmers, operations and systems researchers and analysts
003	Electrical/electronic engineers	1410	Electrical and electronic engineers	055	Electrical and electronic engineers
160	Accountants, auditors, and related occupations	0800	Accountants and auditors	023	Accountants and auditors

¹⁴The occupation “systems analysis, programming, and other computer-related occupations” includes five CPS occupational groups: (1) computer scientists and systems analysts; (2) computer programmers; (3) computer software engineers; (4) database administrators; and (5) operations research analysts. In CLAIMS 3, the occupation “systems analysis, programming, and other computer-related occupations” includes two occupational groups: (1) occupations in systems analysis and programming and (2) other computer-related occupations—database administrators, database design analysts, and microcomputer support specialists.

USCIS occupations		Related CPS occupations ^a			
		2003-2009		2000-2002	
090	Occupations in college and university education ^c	2200	Postsecondary teachers	113, 114, 115, 116, 117, 118, 119, 123, 124, 125, 126, 127, 128, 129, 133, 134, 135, 136, 137, 138, 139, 143, 144, 145, 146, 147, 148, 149, 153, 154	Categories 113-154, all of which appear here, are different types of “postsecondary teachers”
070	Physicians and Surgeons	3060	Physicians and surgeons	084	Physicians

Source: Basic Monthly CPS, 2009, and USCIS.

^aRelated CPS codes and titles changed in 2003.

^bSee footnote 14 for details on how “other computer-related occupations” was defined.

^cH-1B workers at universities may be employed in positions other than teaching.

Limitations of Wage Comparisons

In addition, we compared salaries of U.S. workers with those of H-1B workers, although this comparison had limitations. Specifically, we compared the CPS median salary estimates for the 2009 March supplement to median salary figures reported in CLAIMS 3 salary data for the approved H-1B workers whose petitions were submitted in 2008 for three of the occupations of interest overall and by age group. Although several of the comparisons we were able to make did show a statistically significant difference between the CLAIMS 3 H-1B workers’ median salary and the “comparable” CPS estimate, these analyses have several limitations:

- Within each occupational group, there can be variation in the types of jobs and work performed. Our data do not account for these subtleties. Therefore, it is possible that H-1B workers may have been working in relatively more or less sophisticated jobs than U.S. workers within the same occupational group. For example, H-1B workers and U.S. workers in the occupation “college and university education” may have different fields of education and work in different types of institutions.
- The measures of median annual salaries for U.S. citizens could include bonuses, but the median annual salaries reported in the CLAIMS 3 database most likely do not. Neither median salary includes noncash benefits such as health insurance or pensions.

- CPS salary reported in the 2009 March supplement was for the longest held position actually worked in 2008, as reported by workers themselves (or knowledgeable members of their household). In contrast, the salaries reported in the CLAIMS 3 database are reported by prospective H-1B employers and reflect what the employer intends to pay the H-1B worker in fiscal year 2008 or fiscal year 2009, a time period covering October 1, 2007, through September 30, 2009.
- We identified patterns in the H-1B worker salary data that raise concerns about the validity of that data. Specifically, the frequency distributions we ran on the salaries of H-1B workers in the five key occupations showed that employers reported a number of very low and very high salaries for the “annual rate of pay” on the petition application. We had no basis for determining whether the high and low salaries were data entry errors, estimated payments for an employment period of more or less than a year, or were very high or low for some other reason. To minimize the influence of these outliers, we used median salary rather than mean.

In light of these limitations, caution should be used in interpreting differences found in comparing estimated 2008 median U.S. citizen worker salaries and the median salaries for H-1B worker petitions submitted in 2008.

Section 3: Analysis of Employment and Wages of U.S. Workforce

To determine how raising the H-1B cap might affect the employment and wages of U.S. workers, we examined labor market indicators (employment levels, unemployment rates, and usual weekly earnings) of U.S. workers in three occupations approved to receive the largest proportion of approved H-1B petitions relative to the total U.S. workforce in those occupations: (1) systems analysis, programming, and other computer-related occupations; (2) electrical and electronics engineers; and (3) college and university education. For this analysis, we relied on three sets of published CPS estimates of annual averages based on data collected through CPS basic monthly surveys: (1) median weekly earnings (at last week’s primary job) of full-time wage and salary workers by detailed occupation and sex, 2000 to 2009 annual averages; (2) employed persons by detailed occupation and sex, annual averages 2000 to 2009; and (3) unemployment levels and rates by detailed occupation, 2000 to 2009 annual averages. These data were provided to us by staff at BLS.

In addition to presenting estimates of the employment levels, unemployment rates, and median usual weekly earnings for each occupational group, we also calculated and presented estimates of the

change over the decade in the unemployment rate and median usual weekly wage for each occupational group, and the growth rate relative to year 2000 for the employment level for each occupational group.¹⁵

In order to better understand trends identified in our analysis and the specific issues facing workers in segments of the economy that may not be apparent from national labor force statistics, we also spoke with several labor advocates who work with and advocate for computer scientists and computer programmers, as well as academic researchers who do research on the U.S. science, engineering, and technology workforce.

Section 4: Analysis of Long-Term Immigration Outcomes of H-1B Workers

To examine the long-term immigration outcomes of H-1B workers, GAO obtained data from Homeland Security's US-VISIT ADIS database. The ADIS data provided was based on matching ADIS data with 302,550 records from Homeland Security's CLAIMS 3 database¹⁶ submitted by GAO to US-VISIT for this purpose. The CLAIMS 3 records used for matching consisted of approved initial H-1B petitions that were valid to start work in H-1B status between January 1, 2004, and September 30, 2007.

Matched Data Received from US-VISIT

US-VISIT matched the submitted records by first name, last name, and date of birth to the ADIS data system. US-VISIT's matching returned a total of 5,091,369 event records from the ADIS system, containing information about 375,641 persons in the ADIS system. These event records, which US-VISIT provided GAO, contained data on the following events for foreign nationals: entry into the country; exit from the country; petition to convert to permanent residence status (I-485); and status of petition to convert to permanent residence (approved, denied, or pending.) Each event record has an associated event date. US-VISIT also provided the following identifying information: ADIS person identifier, first name, last name, date of birth, country of citizenship, country of issuance, I-94 number, and CLAIMS 3 receipt number, where available.

¹⁵In order to calculate the median usual weekly earnings for the combined category of "systems analysis, programming, and other computer-related occupations" we calculated the weighted average of the median usual weekly earnings for each of the occupational groups, using the number of full-time wage and salary workers employed in each detailed occupation as the weight.

¹⁶See our discussion of the CLAIMS 3 data above.

How GAO Determined Reliable Matches

GAO took a number of steps to identify reliable matches between CLAIMS 3 and ADIS data. We determined that the match was reliable if at least one of the following three conditions held: (1) the ADIS person had an H-1B visa status at some point during their history; (2) the CLAIMS 3 receipt number in the CLAIMS 3 data matched at least one of the CLAIMS 3 receipt numbers recorded in the ADIS system; (3) the I-94 number recorded with the petitioners' I-129 form matched at least one of the I-94 numbers on file in the ADIS system. In the case of one-to-many and many-to-many matches, we selected the match that met criteria 2 or 3 over criteria 1. We determined that 169,349 records met these criteria.

There are various reasons why a visa might not be used or a beneficiary might not be in the ADIS system for an approved H-1B petition. For example, an H-1B visa might not be used for an approved petition when the employer decides not to offer the beneficiary the job; the beneficiary decides not to accept the job; or the beneficiary obtains a different U.S. visa status, such as through marriage, student visas, or other work visas.¹⁷ An H-1B visa might be used, but the beneficiary would not be in the ADIS system for several reasons. First, the ADIS system became fully operational in January 2004; those who were already in the United States at the time they submitted their H-1B petition (such as students enrolled in U.S. universities) and did not enter or exit the country after January 2004 may not have been entered in the ADIS system. In addition, some beneficiaries who entered the United States by land may have entered the country without going through an official border station where they submit an I-94 form. Finally, a beneficiary's record may not be in the ADIS system due to data quality problems. For example, if an H-1B beneficiary changed their name through marriage and subsequently had an I-485 submitted on their behalf, US-VISIT may at times be unable to link the I-485 submission to the H-1B beneficiary due to the name change.

We conducted this performance audit from May 2009 through January 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

¹⁷H-1B petitioners are permitted to apply for other visas while their H-1B visa status is open.

Appendix II: Characteristics of U.S. and H-1B Workers in Five Occupational Groups

This appendix provides additional analyses of the characteristics of U.S. and approved H-1B workers in five occupational groups between 2000 and 2009.

For H-1B-Heavy Occupations, the Proportion of H-1B-Approved Workers Generally Decreased over Time

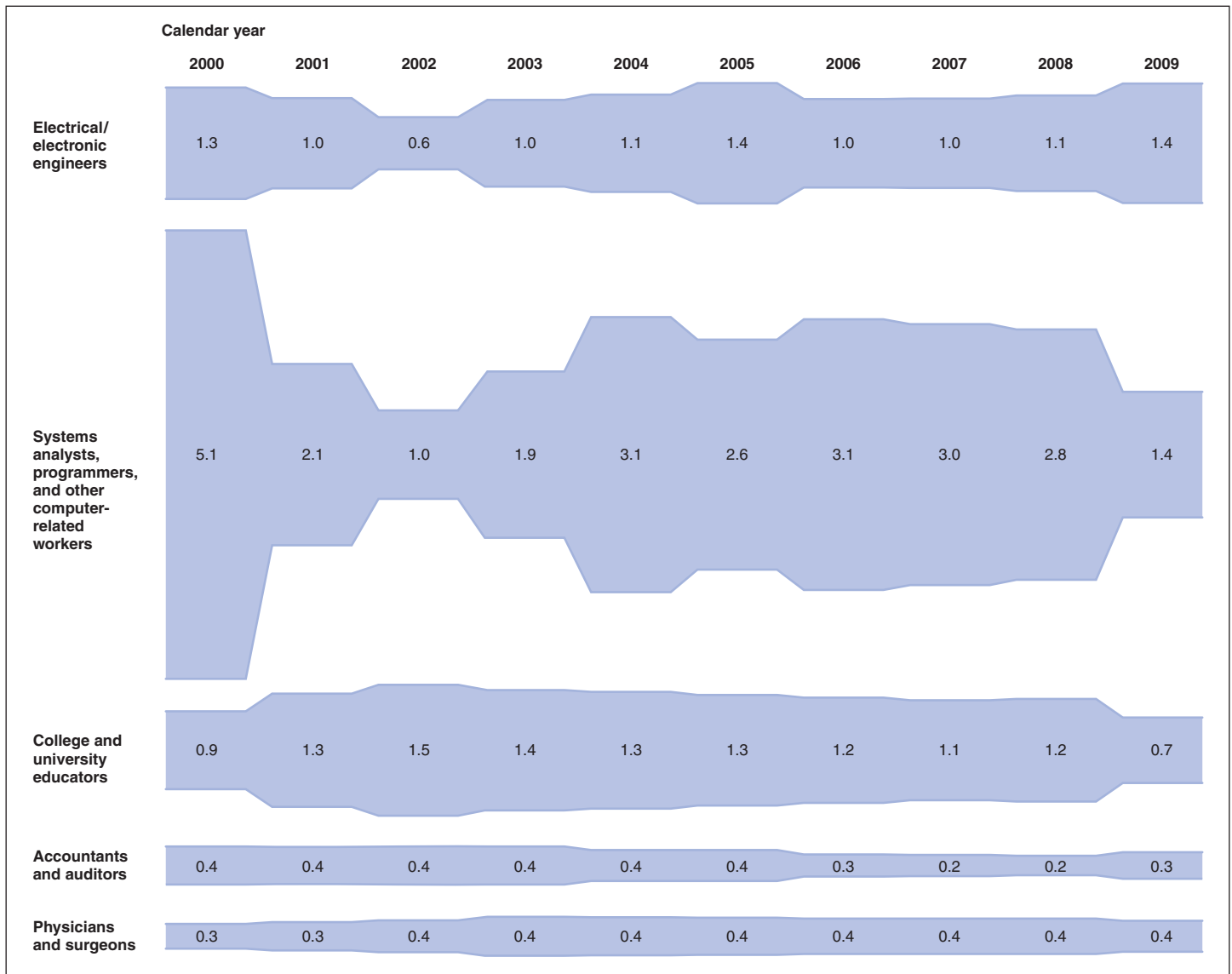
For five occupational groups with large numbers of approved H-1B workers over the last decade, we compared newly approved H-1B workers¹ with the stock of U.S. citizen workers in those occupations and found that the relative number and proportion of newly approved H-1B workers varied over the decade for all five occupations, but decreased overall. The five occupations we examined and that represent occupations with the highest concentration of newly approved H-1B workers included (1) systems analysts, programmers, and other computer-related workers; (2) electrical and electronics engineers; (3) accountants and auditors; (4) college and university educators; and (5) physicians and surgeons.

Despite some fluctuations over time, the overall number of newly approved petitions for H-1B workers across these five occupational groups declined from 137,371 in 2000 to 44,946 in 2009, and the proportion relative to estimates of U.S. citizen workers fell from about 2.5 percent to less than 1 percent between 2000 and 2009. For specific occupations, as shown in figure 15, the highest proportion of newly approved H-1B workers as compared to U.S. citizen workers was in the systems analysis, programming, and other computer-related occupations, averaging about 3 percent across the decade, while the lowest proportion was in the accounting occupations and physicians and surgeons occupations, averaging less than 1 percent. Further, for electrical and electronics engineering and systems analysis, programming, and other computer-related occupations, the declines in the proportion of newly approved H-1B workers as compared to U.S. citizen workers seem to coincide with the economic downturn of 2002.

¹For this comparison, we included H-1B workers whose initial petitions were submitted each specific calendar year and were approved as of October 2009. Calendar year 2009 only includes data up through October.

Appendix II: Characteristics of U.S. and H-1B Workers in Five Occupational Groups

Figure 15: Flow of Newly Approved H-1B Worker Petitions as a Proportion of the Estimated Total Stock of U.S. Citizen Workers by Occupation, 2000–2009



Source: GAO analysis of Homeland Security CLAIMS 3 data and CPS data.

Note: As noted previously, the cumulative number of H-1B workers in the United States at any one point in time is unknown. Thus, this comparison is based on the number of newly approved H-1B workers (initial petitions) as a proportion of U.S. citizen workers in the occupations of interest—not the total number of H-1B workers as a proportion of U.S. citizen workers in the occupations of interest. For example, in fiscal year 2000 there were about 116,231 newly approved H-1B worker petitions in the systems analysis/computers occupations, as compared to an estimated total stock of 2,290,612 U.S. citizen workers. Estimated percents displayed in this figure have 95 percent confidence intervals that are within +/- 0.25 percentage points of the estimate itself.

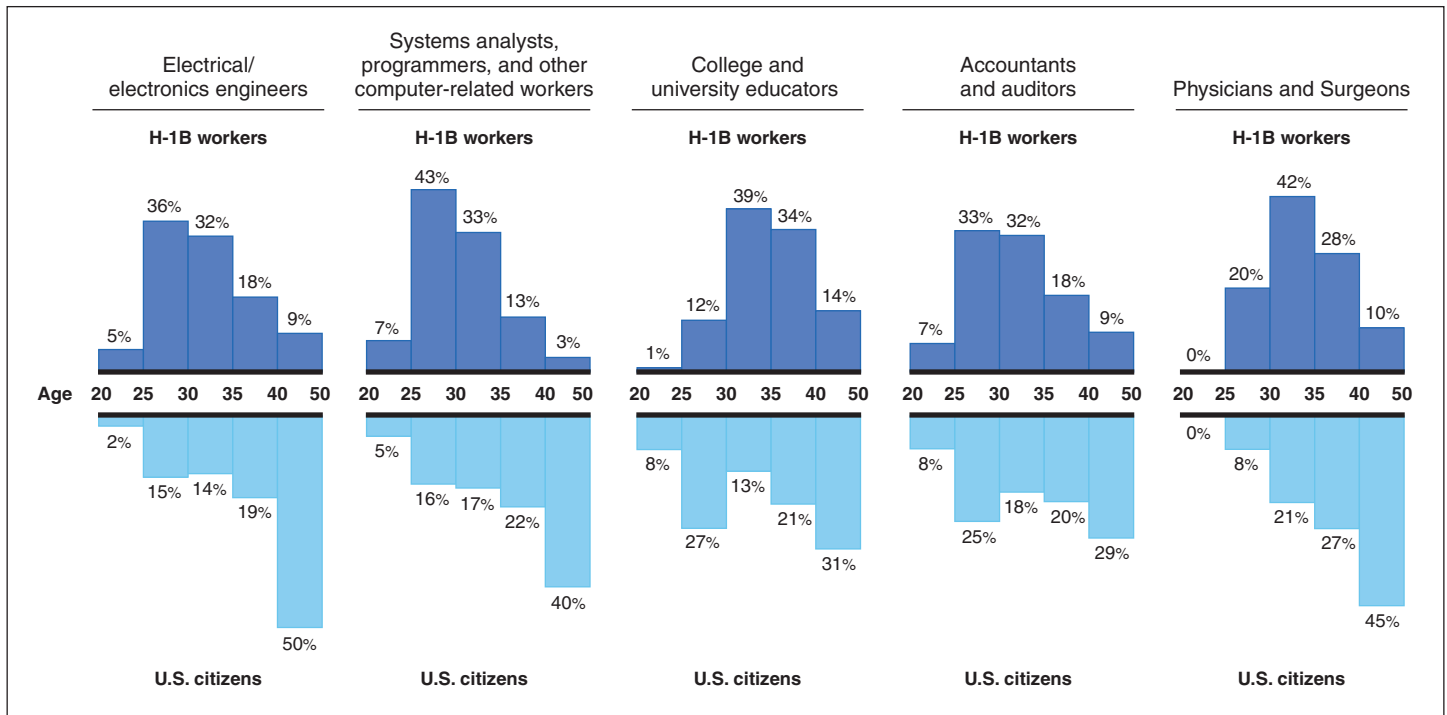
We did not examine potential reasons behind this relative decline in the proportion of H-1B workers over time; however, fluctuations in the economy and H-1B cap were likely contributing factors.

**For H-1B-Heavy
Occupations, Approved H-
1B Workers Were Younger
and More Educated
Relative to U.S. Citizen
Workers**

In 2008, approved H-1B workers (initial and extensions) were generally younger and more educated as compared to their U.S. citizen counterparts in similar occupations, although this varied by the particular occupation (see fig. 16).²

²In order to compare characteristics of H-1B workers to U.S. citizen workers by occupation, we compared data from Homeland Security's CLAIMS 3 database with information from CPS's March supplemental data. The most recently available March supplement is from 2009, which asks about earnings and education for the past year. We selected 2008 CLAIMS 3 data to most closely match the CPS data time frames. The occupation "systems analysis, programming, and other computer-related occupations" includes five CPS occupational groups: (1) computer scientists and systems analysts; (2) computer programmers; (3) computer software engineers; (4) database administrators; and (5) operations research analysts. In CLAIMS 3, the occupation "systems analysis, programming, and other computer-related occupations" includes two occupational groups: (1) occupations in systems analysis and programming and (2) other computer-related occupations—database administrators, database design analysts, and microcomputer support specialists.

Figure 16: Age of Approved H-1B Workers (Initial and Extensions) and Estimated Age of the Stock of U.S. Citizen Workers in Select Occupations, 2008



Source: GAO analysis of Homeland Security CLAIMS 3 data and CPS data.

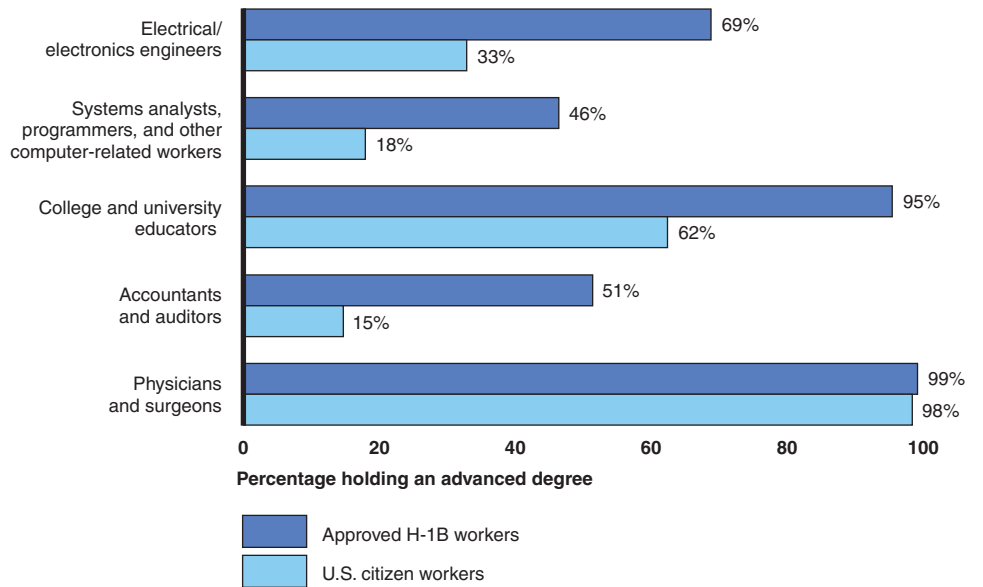
Note: Estimates for U.S. workers are based on Current Population Survey (CPS) data. Percentage estimates have 95 percent confidence intervals of +/- 13 percentage points or less.

In these five occupations, we generally found that a higher percentage of approved H-1B workers had earned an advanced graduate degree (including master's, Ph.D., or professional degree) than U.S. citizen workers, as shown in figure 17. Across the five occupations, 56 percent of approved H-1B workers had graduate degrees, as compared to an estimated 29 percent of the total stock of U.S. citizen workers.³ For this comparison, all U.S. citizen estimates are for the population of U.S. citizens aged 18 to 50 years old in private, full-time employment, excluding those in government employment and the self-employed.

³Graduate degree category includes degrees that are master's, Ph.D., or professional.

Appendix II: Characteristics of U.S. and H-1B Workers in Five Occupational Groups

Figure 17: Proportion of Approved H-1B Workers (Initial and Extensions) and Estimated U.S. Citizen Workers with Advanced Degrees in Select Occupations, 2008



Source: GAO analysis of Homeland Security CLAIMS 3 data and CPS data.

Note: Estimates for H-1B workers are based on approved petitions. Estimates for U.S. workers are based on CPS data. CPS percentage estimates for electrical engineering, electronics, and related occupations and for university and college education have 95 percent confidence intervals of within +/- 12 percentage points of the estimate itself. CPS percentage estimates for other occupations shown have 95 percent confidence intervals of within +/- 4 percentage points of the estimate itself. Estimates are for the population of U.S. citizen workers, aged 18 to 50, in full-time private employment (excluding those working in government and the self-employed).

Appendix III: Labor Force Trends for U.S. Workers in Selected Occupations

This appendix presents analyses of median earnings growth, unemployment rates, and employment levels for the three occupations with the highest proportion of approved petitions for H-1B workers over the past decade.

A Retrospective View Shows a Mixed Employment and Earnings Picture for Professions Absorbing H-1Bs

To shed light on the U.S. workforce most likely to have been affected by the H-1B program over the past decade, we reviewed 10 years of data on the employment, unemployment, and earnings of U.S. workers in the three occupations¹ with the largest proportion of approved H-1B petitions relative to the stock of U.S. workers over the past decade. We found that U.S. workers in all three occupations, in every year, had significantly higher median earnings levels compared to U.S. workers in all professional occupations. We also found that one of the three occupations—systems analysts and computer programmers—had significantly higher earnings growth compared to all professional U.S. workers. However, unemployment rates were cyclical for two groups and employment levels varied among the three groups (i.e., declining for electrical and electronics engineers, growing for college and university educators, and remaining essentially unchanged among systems analysts and computer programmers).

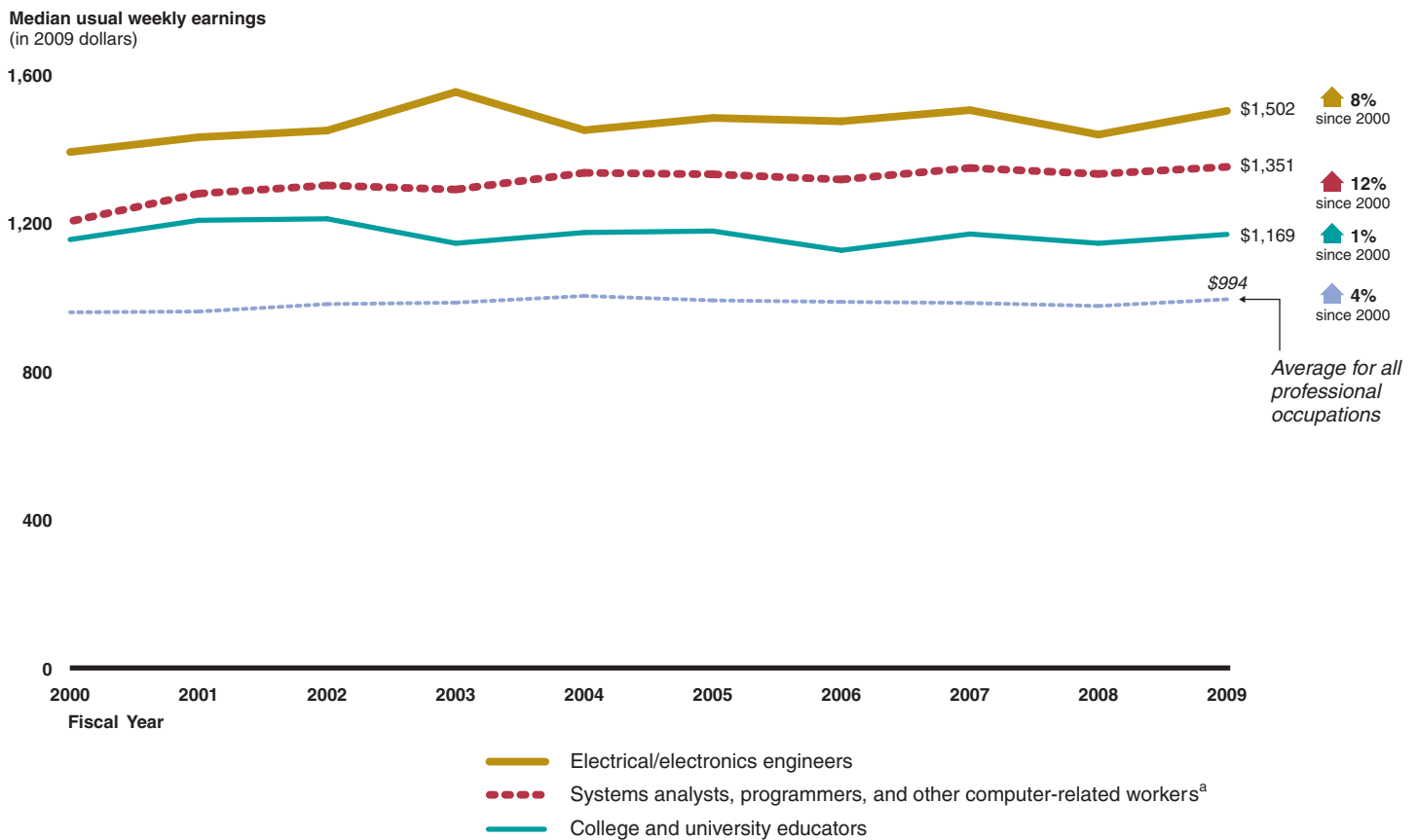
Earnings and Earnings Growth among Selected Occupations

Real earnings growth among systems analysts, programmers, and other computer-related U.S. workers was relatively strong over the decade—12 percent—and was significantly larger than real earnings growth among all professional workers over the decade, which was about 4 percent. Among electrical and electronics engineers, real earnings growth was about 8 percent over the decade; however, the difference between this increase and that of all professional workers was not statistically significant. Among college educators, real earnings did not grow significantly over the decade. As can be seen in figure 18, in every year over the past decade all three occupations had median weekly earnings levels that were

¹In order to compare the CPS U.S. workforce occupations to the H-1B beneficiary occupations, we combined some occupational categories in both CLAIMS 3 and CPS to better align the CPS and CLAIMS 3 data. The occupation “systems analysis, programming, and selected other computer-related occupations” includes five CPS occupational groups: (1) computer scientists and systems analysts; (2) computer programmers; (3) computer software engineers, (4) database administrators; and (5) operations research analysts. In CLAIMS 3, the occupation “systems analysis, programming, and selected other computer-related occupations” includes two occupational groups: (1) occupations in systems analysis and programming and (2) other computer-related occupations—database administrators, database design analysts, and microcomputer support specialists.

significantly higher than the median earnings among all professional workers. However, real earnings growth among college and university educators was essentially flat over the decade.

Figure 18: Median Usual Weekly Earnings in Constant 2009 Dollars among U.S. Workers in Occupations with Large Numbers of H-1B Petitions, 2000–2009



Source: GAO analysis of data from the CPS provided by the Bureau of Labor Statistics.

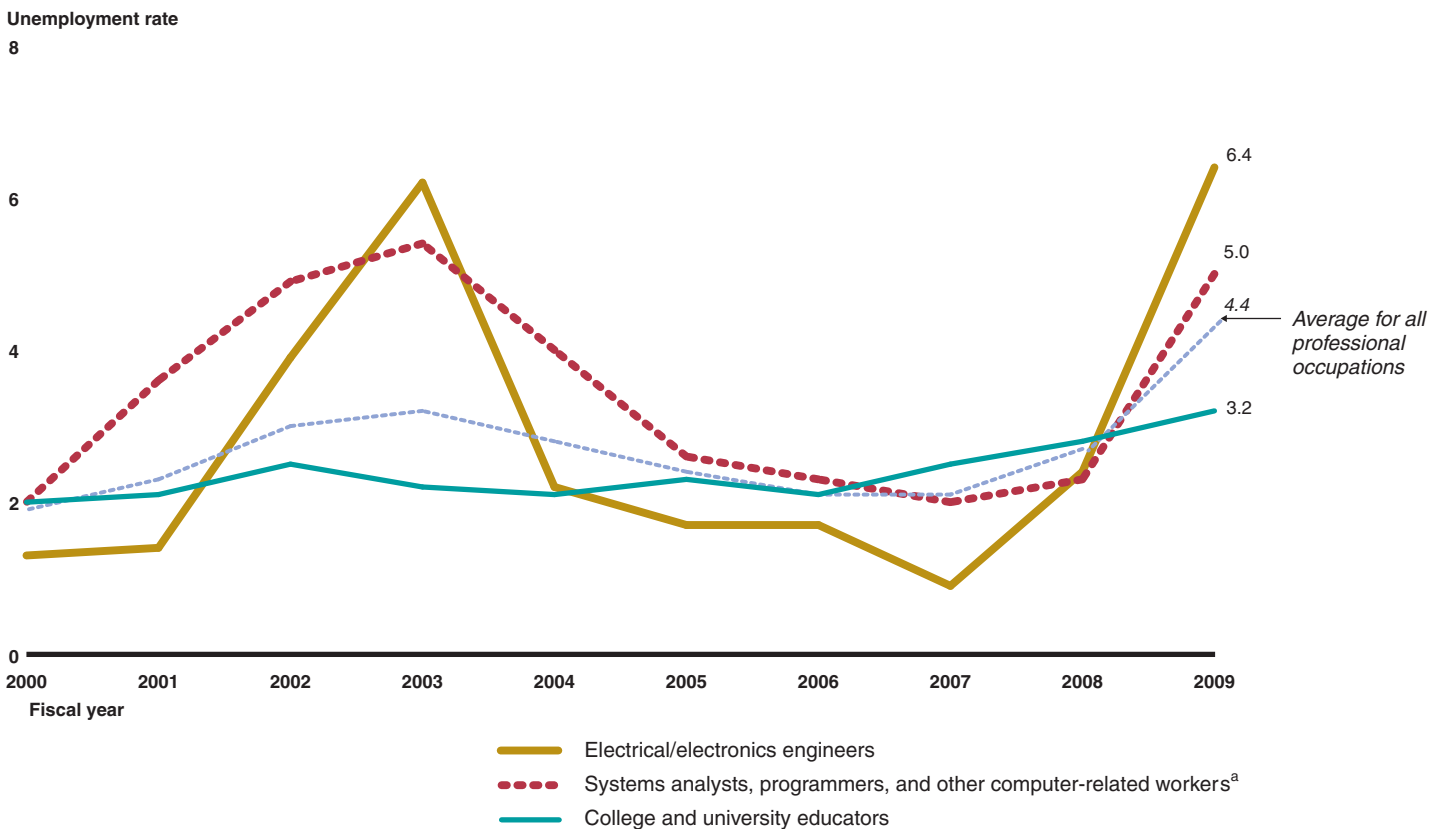
^aThe occupation “systems analysis, programming, and other computer-related workers” includes five CPS occupational groups: (1) computer scientists and systems analysts; (2) computer programmers; (3) computer software engineers; (4) database administrators; and (5) operations research analysts. The central tendency for wage shown here is a weighted average of the median wage for each of these five occupations. Estimated median earnings have 95 percent confidence intervals within +/- 1 percent of the estimate itself for all professional occupations; within +/- 3 percent for systems analysis, programmers, and other computer-related occupations; within +/- 11 percent for electrical and electronics engineers; and within +/- 6 percent for college and university educators.

Rates of Unemployment among Selected Occupations

Unemployment rates among (1) electrical and electronics engineers and (2) system analysts, programmers, and other computer-related workers showed greater cyclical variation than did the unemployment rate for all

U.S. workers in professional occupations. In contrast, the unemployment rate among college and university educators was somewhat less sensitive to business cycle fluctuations, and in most years was close to or lower than the unemployment rate for all professional occupations (see fig. 19).

Figure 19: Unemployment Rate among U.S. Workers in Occupations with Large Numbers of H-1B Petitions, 2000–2009



Source: GAO analysis of data from the CPS provided by the Bureau of Labor Statistics.

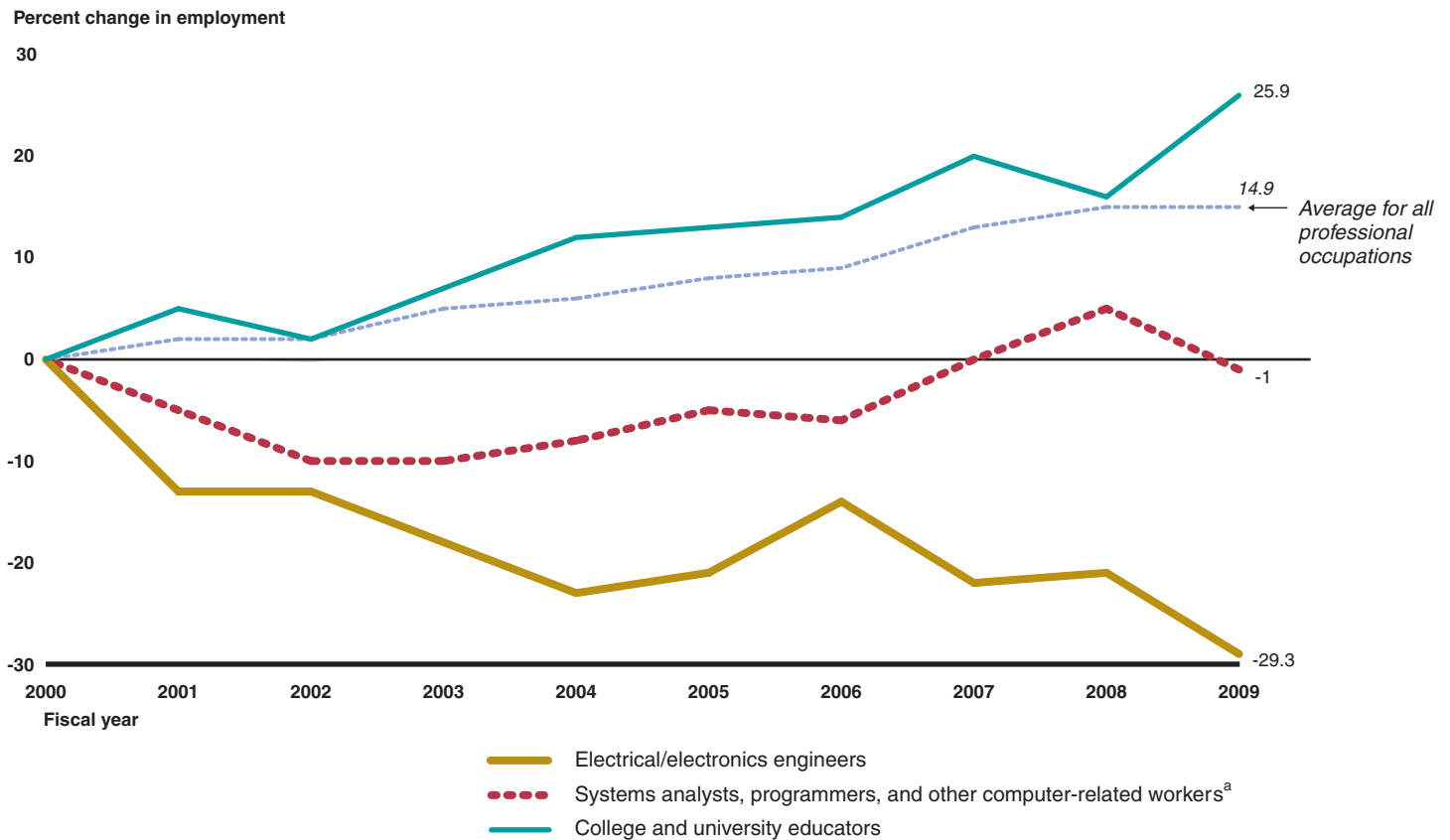
^aThe occupation “systems analysis, programming, and other computer-related workers” includes five CPS occupational groups: (1) computer scientists and systems analysts; (2) computer programmers; (3) computer software engineers; (4) database administrators; and (5) operations research analysts. Estimated unemployment rates have 95 percent confidence intervals within +/- 0.3 percentage points for all professional occupations; within +/- 1.2 percentage points for systems analysis, programmers, and other computer-related occupations; within +/- 3 percentage points for electrical and electronics engineers; and within +/- 1.1 percentage points for college and university educators.

Employment in Selected Occupations

Employment among electrical and electronics engineers declined by 29 percent over the decade, and there was no significant change in the level of employment among systems analysts, programmers, and other computer-related workers. In contrast, employment grew by 15 percent

among all professional occupations over the past decade. Employment among college and university educators grew by 26 percent over the decade (see fig. 20).

Figure 20: Percent Change in U.S. Worker Employment Since 2000 in Occupations with Large Numbers of H-1B Petitions, 2000–2009



Source: GAO analysis of data from the CPS provided by the Bureau of Labor Statistics.

^aThe occupation “systems analysis, programming, and other computer-related workers” includes five CPS occupational groups: (1) computer scientists and systems analysts; (2) computer programmers; (3) computer software engineers; (4) database administrators; and (5) operations research analysts. Estimated percent changes in employment relative to 2000 have 95 percent confidence intervals within +/- 2 percentage points for all professional occupations; within +/- 7 percentage points for systems analysis, programmers and other computer-related occupations; within +/- 15 percentage points for electrical and electronics engineers and for college and university educators.

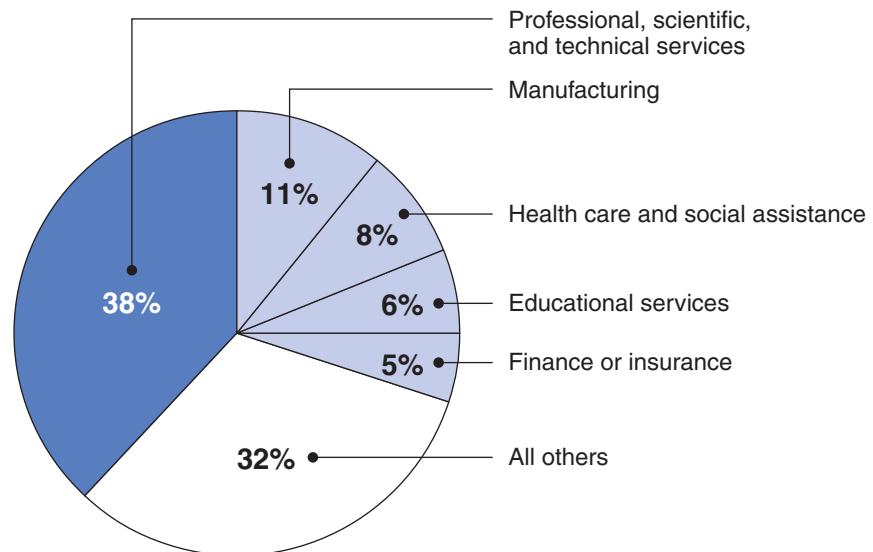
Appendix IV: Characteristics of H-1B Employers

This appendix provides additional analyses of H-1B employers in fiscal year 2000 through fiscal year 2009 and more detailed analyses of the top 150 H-1B hiring companies in fiscal year 2009.

Many Employers Approved for H-1B Workers Were in Scientific, Professional, and Technical Services

Over a third of employers approved to hire H-1B workers between fiscal year 2000 and fiscal year 2009 were employers that provided scientific, professional, or technical services (see fig. 21). For example, in fiscal year 2009, at least 38 percent of employers approved to hire one or more H-1B workers indicated that they were in one industry—the professional, scientific, and technical services industry. Services within this industry include legal services; accounting, bookkeeping, and payroll services; architectural, engineering, and specialized design services; computer services; consulting services; and research services. Also in fiscal year 2009, the manufacturing, health care and social assistance, educational services, and finance and insurance sectors received the next-highest share of one or more H-1B approvals—that is, 11, 10, 7, and 6 percent of companies approved to hire H-1B workers, respectively.

Figure 21: Industries of Employers Approved to Hire H-1B Workers, FY 2000–FY 2009



Source: GAO analysis of Homeland Security CLAIMS 3 data.

Many Employers Approved for H-1B Workers Were Located in High-Technology Corridors

While H-1B hiring employers were located throughout the continental United States in fiscal year 2009, they tended to be concentrated in several high-technology pockets of the country such as Silicon Valley, Southern California, and the Tri-State area of New York, New Jersey, and Connecticut (see fig. 22).

Figure 22: Location of Cities with High Numbers of Approved H-1B Petitions, FY 2009



Source: GAO analysis of Homeland Security CLAIMS 3 data; National Atlas of the United States (base map).

The Vast Majority of Top 150 H-1B Employers Operated in the United States

For the 150 employers with the largest number of approved petitions in fiscal year 2009 (representing 26 percent of all approvals in fiscal year 2009), and for which we were able to obtain additional publicly available information (133 employers), we found that the majority of employers operated in the United States, although 7 operated in India and 2 in the United Kingdom.

GAO also reviewed data from Labor’s LCAs on the top 150 employers of H-1Bs in fiscal year 2009, including whether the employer is H-1B-dependent; whether the employer is a willful violator; and the number of

petitions requested at each of the four possible skill levels. As indicated in table 9, among the 150 companies for which Labor provided data, 24 were H-1B dependent, and 9 of which were also deemed “willful violators.” The remaining 126 firms were neither H-1B dependent nor willful violators. In addition, on average, these firms indicated that they would pay workers at the prevailing wage for skill-level one 52 percent of the time; the prevailing wage for skill-level two 30 percent of the time; the prevailing wage for skill-level three 12 percent of the time; and the prevailing wage for skill-level four 6 percent of the time.

Table 9: Select Characteristics of the Top 150 H-1B Employers, FY 2009

Characteristic^a	Total
Publicly traded	66
Private	68
Missing	16
Subsidiaries	58
Incorporated in a Foreign Country	7
Location of employer	
USA	123
India	7
United Kingdom	2
Missing	18
H-1B Dependent	24
Willful Violators	9
Proportion of time employers, on average, will pay prevailing wage at each skill level	
Skill level one	52%
Skill level two	30%
Skill level three	12%
Skill level four	6%
Number of employees ^b	
Median	16,151
10,000 or fewer	48
Over 10,000	80
Over 100,000	12
Over 200,000	8
Over 500,000	1

Source: GAO analysis of Mergent Online and LexisNexis’s Dossier databases and Labor data.

^aDue to missing data on some characteristics, the data presented does not always represent 150 companies.

^bFor the 128 employers for which information on the number of employees was available, the dates associated with the employer counts for employees ranged from December 2004 to June 2010, although most dates were in fiscal year 2009.

Many of the Top 150 H-1B Employers Were in the Manufacturing or Educational Services Industry

Regarding industry, we found that, similar to the universe of all H-1B hiring employers, most of the top H-1B employers were in the professional, technical, and scientific services industry, although many were also in the manufacturing industry or the educational services industry.¹ While the top 150 H-1B-hiring employers spanned a range of industries, these employers were distinctly concentrated in a few, more specific industry groups, including electronic computer manufacturing; software publishing; custom computer programming services (firms that write, modify, and test software for clients); computer systems design services; and colleges, universities, and professional schools.

In terms of the type of employers, a relatively large number (44 of the 150 employers) were universities, compared to 6 percent of H-1B hiring employers in fiscal year 2009. We also found that at least 33 employers could be categorized as information technology (IT) services—those that either provide staff or full project teams to other companies for IT projects (see table 10).²

Table 10: Characteristics of the Top 150 H-1B Employers, FY 2009

Characteristic ^a	Total
Industry ^b	
Professional, scientific, technical services	33
<i>Custom computer programming services</i>	<i>12</i>
<i>Computer systems design services</i>	<i>8</i>
<i>Other</i>	<i>13</i>
Manufacturing	33
<i>Electronic computer manufacturing</i>	<i>6</i>
<i>Other</i>	<i>27</i>

¹The information presented in this section on the top 150 H-1B hiring employers for fiscal year 2009 is based on the most recently available information from Mergent Online and LexisNexis’s Dossier databases, as of June 2010. Characteristic information was not available for all employers.

²The IT services firms we spoke with describe themselves using different terms, including IT services firms, staffing firms, solutions firms, or consulting firms. According to an IT industry organization, a pure IT staffing firm (also known as a third-party contractor) is not responsible for an end product, but is solely responsible for providing their client with the expertise (staff) needed to work on a project. A pure IT solutions firm takes responsibility for the deliverable product. Many firms are a hybrid of these two models. To the extent that IT solutions firms serve as intermediaries in staffing workers at other companies, these firms may also be referred to as “third-party contractors.”

Appendix IV: Characteristics of H-1B Employers

Characteristic^a	Total
Educational services	28
<i>Colleges, universities, and professional schools</i>	<i>23</i>
<i>Other</i>	<i>5</i>
Information services	13
<i>Software publishing</i>	<i>5</i>
<i>Other</i>	<i>8</i>
Finance and insurance	10
Health care and social assistance	8
Other industry	6
Missing	19
Type of employer ^b	
Institutions of higher education	44
Financial institutions	13
IT services	33

Source: GAO analysis of Mergent Online and LexisNexis's Dossier databases.

^aDue to missing data on some characteristics, the data presented do not always represent 150 companies.

^bThe industry numbers are based on the North American Industry Classification System codes, and the types of employers are based on GAO's analysis of company descriptions.

Appendix V: Selected H-1B Program Laws

This appendix provides a chronological list of major laws and descriptions of certain key provisions related to the H-1B program. Laws identified may contain additional provisions related to the H-1B program not described here, and there may be additional laws not included here that have made various changes in the H-1B program. This is not intended to be an exhaustive summary of all laws and provisions related to the H-1B program.

Selected laws	Description of key provisions
Immigration and Nationality Act, ch. 447, §§ 101(a)(15)(H) and 214(c), 66 Stat. 163, 168 and 189-90 (1952).	<ul style="list-style-type: none"> Authorized H-1B visas for aliens with a residence in a foreign country that the alien had no intention of abandoning, who were of distinguished merit and ability, and were coming to the United States to perform temporary service of an exceptional nature requiring such merit and ability.
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 102, 100 Stat. 3359, 3474-80.	<ul style="list-style-type: none"> Makes it an unfair immigration-related employment practice for most employers to discriminate against any individual (other than an unauthorized alien) with respect to hiring, recruitment, firing, or referral for fee because of such individual's origin or citizenship status. States that it is not an unfair immigration-related employment practice to hire a U.S. citizen or national over an equally qualified alien. Requires that complaints of violations be filed with the Special Counsel for Immigration-Related Unfair Employment Practices (established by the act) within the Department of Justice. Authorizes the Special Counsel to (1) investigate complaints and determine (within 120 days) whether to bring such complaints before a specially trained administrative law judge and (2) initiate investigations and complaints. Permits private actions if the Special Counsel does not file a complaint within such 120-day period.
Immigration Act of 1990, Pub. L. No. 101-649, § 205, 104 Stat. 4978, 5019-22.	<ul style="list-style-type: none"> Removed requirement that alien have a residence in a foreign country and no intention of abandoning it, and revised statute to authorize H-1B visas for aliens coming temporarily to the U.S. to perform services in a "specialty occupation," which was defined as one that requires, at a minimum, theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). Established the LCA process, to be administered by Labor, that requires employers to make certain attestations.^a Limited the number of H-1B visas that could be issued during a fiscal year to 65,000 beginning in fiscal year 1992. Limited the period of authorized admission as an H-1B nonimmigrant to 6 years. Established "dual intent" provision, under which H-1B visa holders could also pursue permanent residency. Assigned responsibility to Labor to enforce program rules by investigating complaints made by H-1B workers or their representatives against employers, and by making referrals to Justice and imposing civil monetary penalties where it finds a failure by the employer to meet certain required conditions or the misrepresentation of material fact.

Appendix V: Selected H-1B Program Laws

Selected laws	Description of key provisions
Immigration Technical Corrections Act of 1991, Pub. L. No. 102-232, tit. III, § 303(a)(7)(B)(iii), 102 Stat. 1742, 1747.	<ul style="list-style-type: none"> • Restricted Labor to reviewing LCAs only for completeness and obvious inaccuracies. • Required Labor, if an LCA is complete and has no obvious inaccuracies, to certify it within 7 days
American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, div. C, tit. IV, §§ 411-418, 112 Stat. 2681-641, 2681-642 – 2681-657.	<ul style="list-style-type: none"> • Temporarily raised the cap on H-1B visas for fiscal years 1999 to 2001 to a high of 115,000; returned the cap to 65,000 for the following years. • Defined “H-1B-dependent employer” as employer that has <ul style="list-style-type: none"> • 25 or fewer full-time equivalent employees in the U.S. and employs more than seven H-1B nonimmigrants; • 26 to 50 full-time equivalent employees in the U.S. and employs more than 12 H-1B nonimmigrants; or • At least 51 full-time equivalent employees in the U.S., of whom at least 15 percent are H-1B nonimmigrants. • Required H-1B-dependent employers and those that committed a willful failure or misrepresentation during the 5 years preceding filing of an LCA^b to include additional attestations. <ul style="list-style-type: none"> • Provided that H-1B-dependent employers and such willful violators are not required to make these additional attestations with respect to H-1B nonimmigrants receiving annual wages of at least \$60,000 or those with a master’s or higher degree (or its equivalent) in a specialty related to the job. • Required that H-1B workers waiting for final adjudication of their requests for permanent residence status be given 1-year extensions of their H-1B visas until their requests have been adjudicated. • Provided Labor increased authority to investigate and enforce program compliance and assess civil monetary penalties against employers found to be in violation of certain program requirements. • Required that steps be taken to maintain accurate count of the number of aliens issued H-1B or other nonimmigrant visas.^c
American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, §§ 102-106, 114 Stat. 1251, 1251-55.	<ul style="list-style-type: none"> • Temporarily raised the cap on H-1B visas for fiscal years 2001 to 2003 to 195,000; cap returned to 65,000 for the following years. • Exempts an alien from the H-1B cap if he or she is employed (or has received an offer of employment) at <ul style="list-style-type: none"> • an institution of higher education or its related or affiliated nonprofit entity; • a nonprofit research organization; or • a governmental research organization. • Created increased portability of H-1B visas by authorizing H-1B workers to accept new employment upon the filing by the prospective employer of a new petition on his or her behalf. The H-1B worker’s employment authorization may be extended until the petition is adjudicated.
United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 402(b)(2)(B), 117 Stat. 909, 940 (2003) and the United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, § 402(1), 117 Stat. 948, 970-71.	<ul style="list-style-type: none"> • Created a new nonimmigrant classification available each fiscal year to up to 1,400 professionals from Chile and 5,400 professionals from Singapore, known as H-1B1. These H-1B1 visas count against the H-1B cap.

Appendix V: Selected H-1B Program Laws

Selected laws	Description of key provisions
H-1B Visa Reform Act of 2004, Pub. L. No. 108-447, div. J, tit. IV, subtit. B, §§ 422, 424 and 425(a) 118 Stat. 3353, 3353-56.	<ul style="list-style-type: none"> • Provided Labor increased authority to initiate investigations in cases where the Secretary personally certifies there is reasonable cause and approves the investigation. Information providing the basis for the investigation must originate outside Labor unless it was lawfully obtained in the course of another Labor investigation. In addition, receipt of information submitted to Justice or Labor to secure employment of an H-1B worker cannot provide the basis for such investigation. • Exempted the first 20,000 petitions received for individuals who have earned a master’s degree or higher from a U.S. institution of higher education. • Raised the fee imposed on most employers when filing an H-1B visa petition to \$750 or \$1,500 and imposed an additional fraud prevention and detection fee of \$500.
Pub. L. No 111-230.	<ul style="list-style-type: none"> • Increased the fees by \$2,000 for petitions filed between August 13, 2010, and October 1, 2014, if the petitioner has 50 or more employees in the U.S. and more than fifty percent of those U.S. employees are in H-1B or L nonimmigrant status.

Source: GAO.

^aRequired attestations were as follows: (1) employer will pay H-1B workers the employer’s actual wage for the position or the prevailing wage in the area, whichever is higher; (2) employer will provide working conditions for H-1B employees that will not adversely affect the working conditions of workers similarly employed; (3) no strike or lockout exists in the course of a labor dispute in the occupational classification at the place of employment; and (4) the employer has provided notice that it is filing an LCA application to the bargaining representative (if any) of its employees in the occupational classification and area for which aliens are sought, or if there is no bargaining representative, by posting notice of the filing in conspicuous locations at the place of employment.

^bAdditional attestations include the following: (1) employer did not and will not displace a U.S. worker it employs within 90 days before and 90 days after filing any visa petition supported by the LCA; (2) employer will not place the nonimmigrant with any other employer where he or she performs duties at a worksite owned, operated, or controlled by that other employer and there are indicia of an employment relationship between the nonimmigrant and other employer unless it has inquired whether the other employer has displaced or intends to displace one of its U.S. workers within 90 days before or 90 days after the placement; and (3) employer has taken good faith steps, prior to filing the LCA, to recruit in the United States using procedures that meet industrywide standards and offering compensation at least as great as that required to be offered to H-1B nonimmigrants, U.S. workers for the job and has offered it to any U.S. worker who applies and is equally or better qualified for it.

^cThis responsibility was originally assigned to the Attorney General but was later transferred to Homeland Security. Pub. L. No. 109-13, div. B, tit. IV, § 406, 119 Stat. 320.

Appendix VI: Comments from the Department of Homeland Security

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

November 30, 2010

Andrew Sherrill
Director
Education, Workforce, and
Income Security Issues
441 G Street, NW
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Sherrill:

RE: GAO-11-26, Draft GAO Report: H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program, (130916)

Thank you for the opportunity to review and comment on the Government Accountability Office (GAO) draft report entitled, "H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program." The Department of Homeland Security (DHS) appreciates the opportunity to review and respond to the Government Accountability Office (GAO) subject report.

To ensure that the number of new H-1B workers who are not cap-exempt and who seek to enter the United States each year does not exceed the statutory cap, GAO recommends that the Secretary of Homeland Security direct U.S. Citizenship and Immigration Services (USCIS) to take the following steps:

Recommendation 1: To improve its tracking of the number of approved H-1B applications and the number of issued visas under the cap by fully leveraging the transformation effort currently underway, which involves the adoption of an electronic petition processing system that will be linked to the Department of State's tracking system. Homeland Security should consider entering into a Memorandum of Understanding with the Department of State, or modifying their existing agreement, to ensure that by linking electronic data systems, both agencies will have real-time information on the number of visas that have been approved under the cap.

Response: Non-concur. USCIS has been working within DHS, and collaborating with the Department of State (DOS), to establish an appropriate data exchange framework, including the Consular Consolidated Database (CCD), that would support retrieval of case data. The existing data-sharing Memorandum of Understanding (MOU) between DHS and DOS is sufficient without

modification. However, USCIS and the DOS Bureau of Consular Affairs did draft and sign a more specific Letter of Intent (LOI) to establish electronic visa, immigration, and citizenship data exchanges. This LOI complies with the existing MOU and documents the intent to continue the existing data-sharing relationship and establish electronic visa, immigration, and citizenship data exchanges through the USCIS Transformation Program, the DOS Global Visa System, Global Citizenship Services, and Consular Case Management Service projects.

Even if electronic data sharing is established, it will still be difficult to maintain an exact count of petitions for visa issuance while timely adjudicating petitions. USCIS believes that implementing this recommendation may only slightly improve cap management. First, DOS visa data will not include individuals already in the United States seeking to change their nonimmigrant status. Second, most real-time visa data will be too old for cap management use. While most non-exempt petitions are filed and approved between April and September, it is typically months later when DOS issues the relating visas. For example, USCIS received more than enough petitions in the first few days of each filing season to meet the FY08 and FY09 caps. Those petitions requested October 1 employment start dates. USCIS held the random selection process in April and receipted and approved the petitions shortly thereafter. The approved beneficiaries needing nonimmigrant visas did not appear at the consulates to obtain the H-1B visa until months later. By that time, most H-1B cap petitions had already been adjudicated.

Recommendation 2: To ensure business concerns without undermining program integrity, USCIS should to the extent permitted by its statutory authority, explore options for increasing the flexibility of the application process for H-1B employers, such as:

- Allowing employers to rank their applications for visa candidates so that they can hire the best qualified worker for the jobs in highest need;
- Distributing the applications granted under the annual cap in allotments throughout the year (e.g. quarterly); and
- Establishing a system whereby businesses with a strong track-record of compliance with H-1B regulations may use a streamlined application process.

Response: Non-concur. USCIS does not believe that the recommendation to allow employers to rank beneficiaries is feasible. Such a practice would lead to an extremely complicated cap management process. Allowing for ranking of beneficiaries would also require complex file intake and adjudication processes. These processes would be time-consuming and resource-intensive. It would actually decrease flexibility for employers because employers would have to submit a list of ranked petitions at the beginning of the cap season and could not later add beneficiaries or change rankings. Finally, as USCIS stated in previous meetings with GAO, the implementation of a beneficiary ranking process could create significant vulnerabilities as it might encourage petitioners to submit additional petitions for individuals they have no intention of hiring in an attempt to increase the chances of obtaining a cap number for a particular individual.

USCIS also does not believe that quarterly cap allocation is warranted or feasible for the H-1B program. H-1B specialty occupations are not as affected by seasonal demands as the H-2B classification. Furthermore, maintaining an accurate quarterly cap would be even more complex and problematic than maintaining the annual cap. Under quarterly allotment, petitions could be filed beginning in April, July, October, and January. It is possible that

beginning in October, caps for the first, second, and third quarters could all be open at the same time, thereby tripling the complexity of cap management.

USCIS does not believe that current law allows us to exempt petitioners with track records of H-1B compliance from evidentiary requirements. However, the Agency is developing our Validation Instrument for Business Enterprises (VIBE) system. VIBE is an adjudicative tool that will provide officers with the means to verify through an independent information provider the petitioner's business information. In September 2009, USCIS awarded Dun & Bradstreet the contract to serve as the independent information provider. Once USCIS fully implements VIBE, we anticipate that it will reduce the need for petitioners to submit duplicative paper documentation to establish their current level of business operations. This will, in turn and over time, reduce the number of Requests for Evidence (RFEs) USCIS issues to otherwise eligible petitioners.

Draft Matters for Congressional Consideration 2: To reduce duplication and fragmentation in the administration and oversight of the H-1B application process, consistent with past GAO matters for congressional consideration, consider eliminating the requirement that employers first submit a Labor Condition Application (LCA) to the Department of Labor (DOL) for certification, and require instead that employers submit this application along with the I-129 application to the Department of Homeland Security's U.S. Citizenship and Immigration Services for review.

Response: Non-concur. USCIS does not believe that eliminating the requirement for employers to first submit an LCA to DOL is either desirable or practicable. The LCA is an attestation of standards to which the employer must adhere. By completing and signing the LCA, the employer:

- Agrees to several issues regarding an employer's responsibilities, including the wages, benefits, and working conditions provided to U.S. workers and the nonimmigrant workers; and
- States that at the time of filing there is no strike or lockout in the course of a labor dispute at the place of employment.

USCIS reviews the H-1B petition, the certified LCA, and the petitioner's supporting evidence to determine if:

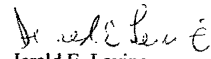
- The job meets the requirements of a specialty occupation;
- The qualifications of the prospective H-1B worker meet the statutory and regulatory requirements; and
- The content of the certified LCA corresponds with the petition under review.

USCIS does not re-adjudicate the DOL's determinations on the LCA; it relies on DOL's expertise to make these findings. USCIS does not believe that it has the necessary expertise to make wage and labor determinations. Moreover, it is DOL, not USCIS, that has the authority to enforce any violations of the LCA.

**Appendix VI: Comments from the Department
of Homeland Security**

Thank you for the opportunity to comment on this Draft Report. We look forward to working with you on future Homeland Security issues.

Sincerely,



Jerald E. Levine
Director
Departmental Audit Liaison Office

Appendix VII: Comments from the Department of Justice



U.S. Department of Justice
Civil Rights Division

Office of Special Counsel for Immigration-Related
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Main (202) 616-5594
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November 23, 2010

Andrew Sherrill
Director, Education, Workforce, and Income Security Issues
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Sherrill,

Thank you for the opportunity to review the final draft of the Government Accountability Office (GAO) report, *H1-B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program*. The report was reviewed by the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), which participated in the GAO review. This letter constitutes the Department's formal comments. I request that the GAO include this letter in the final report.

GAO Recommendation that the Department of Labor Develop and Maintain a Centralized Website, Accessible to the Public, Where Businesses Must Post Notice of Their Intent to Hire H-1B Workers

The Department of Justice supports this recommendation, and believes the website would help U.S. workers determine if they have been impermissibly replaced by H-1B visa holders and identify employers who may be engaged in a pattern or practice of discrimination against U.S. workers.

Before Seeking to Hire an H-1B Visa Holder, all Employers Should be Required to "Test" the Labor Market to Determine Whether Qualified U.S. Workers Are Available and to Hire any Equally or Better Qualified U.S. Workers Who Apply

The Department of Justice notes that only a small number of employers are currently required to "test" the labor market for qualified U.S. workers prior to seeking an H-1B visa and to hire any equally or better qualified U.S. workers who apply for the job.¹ At present, an

¹ Specifically, prior to applying for an H-1B non-immigrant visa, such employers must attest that they have made a good faith effort to recruit U.S. workers using procedures that meet industry-wide standards, and that they will offer the job for which they are seeking H-1B non-immigrants to all U.S. workers who apply and have qualifications equal to or better than the H-1B non-immigrants sought.

Appendix VII: Comments from the
Department of Justice

employer is subject to this requirement only if the employer is submitting a labor condition application (LCA) to employ an H-1B non-immigrant who earns less than \$60,000 annually and does not possess a master's or other higher degree, and the employer is either a H-1B dependent entity² or a willful violator.³

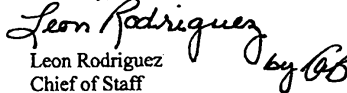
Although this issue is mentioned in the draft report, the GAO does not propose any recommendations to address this deficit. To ensure that U.S. workers are not disadvantaged by the H-1B program, the Department of Justice believes that all employers be required to provide attestations that they have first "tested" the labor market and hired any equally or better qualified U.S. workers when they submit an LCA to employ an H-1B non-immigrant.

The Department of Labor Should Display Information about Worker Protections and OSC's Contact Information on all H1-B Educational Material and the Centralized Database for H1-B Postings

The Department of Justice believes that greater awareness about the anti-discrimination provision of the Immigration and Nationality Act, 8 U.S.C. § 1324b, and OSC's enforcement of worker protections against citizenship status discrimination, will help ensure that U.S. workers who may have been discriminated in favor of H1-B visa holders are able to vindicate their rights. Therefore, it recommends that the Department of Labor display information about worker protections available under the anti-discrimination provision and OSC's worker hotline number on all H1-B educational material and on the centralized database for H1-B postings, if the database is implemented.

The extensive efforts that your staff has put into this report and the opportunity to work with the GAO on these important issues are appreciated.

Sincerely,


Leon Rodriguez
Chief of Staff

² Pursuant to 20 C.F.R. 655.736(a)(1), an H-1B dependent employer is determined by calculating the number of full-time employees relative to the number of H-1B visa holders employed. Depending on the total numbers of employees, a company will be deemed H-1B dependent if it has between 15% and 28% H-1B visa holders on staff.

³ A willful violator is an employer that meets all of the following standards:

- (i) A finding of violation by the employer is entered in either of the following two types of enforcement proceedings:
 - (A) A Department of Labor proceeding under section 212(n)(2) of the INA (8 U.S.C. 1182(n)(2)(C)); or
 - (B) A Department of Justice proceeding under section 212(n)(5) of the INA (8 U.S.C. 1182(n)(5)).
- (ii) The Department of Labor and/or Department of Justice finds that the employer has committed either a willful failure or a misrepresentation of a material fact during the five-year period preceding the filing of the LCA; and
- (iii) The findings of the agencies are entered on or after October 21, 1998. 20 CFR §655.736.

Appendix VIII: GAO Contact and Staff Acknowledgments

GAO Contact

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Staff Acknowledgments

Michele Grgich (Assistant Director) and Erin Godtland (Economist-in-Charge) managed this engagement. Core team-members included: Nisha Hazra, Melissa Jaynes, and Jennifer McDonald (Education, Workforce and Income Security); and Hiwotte Amare and Rhiannon Patterson (Applied Research and Methods). In addition, the following people made significant contributions to this work: James Bennett and Susan Bernstein (Education Workforce, and Income Security Issues) and Susan Baker, Melinda Cordero, Namita Bhatia-Sabharwal, Mark Ramage, and Shana Wallace (Applied Research and Methods) and Ashley McCall (Library and Information Services). Stakeholders included: Barbara Bovjberg (Education, Workforce, and Income Security); Tom McCool (Applied Research and Methods); Ronald Fecso (Chief Statistician); Sheila McCoy and Craig Winslow (General Counsel); Richard Stana and Mike Dino (Homeland Security and Justice); Loren Yager and Jess Ford (International Affairs and Trade); and Muriel Forester (Strategic Planning and External Liaison). Referencers included Jamie Whitcomb (lead), Alison Grantham, and Karen Brown (Education, Workforce, and Income Security) and DuEwa Kamara and Courtney LaFountain (Applied Research and Methods).

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