

THE DEPARTMENT OF HOMELAND SECURITY AND THE CONFUSING STATE OF PROSPECTIVE U.S. EMPLOYMENT FOR FOREIGN NATIONALS SEEKING ADVANCED DEGREES

CLAYTON LAING*

I. INTERNATIONAL STUDENT PARTICIPATION IN U.S. HIGHER EDUCATION INSTITUTIONS

The United States has historically been the country of choice for the largest number of international students, hosting close to 1.1 million of the 4.6 million international students enrolled worldwide in 2017.¹ In 2017, about two thirds of all international students received most of their educational funding from sources outside the United States and contributed nearly \$37 billion to the U.S. economy and created or supported more than 450,000 jobs.² The number of international students enrolled in U.S. colleges and universities has grown since the 1950s, when there were approximately 26,000 foreign students enrolled; however, it began to drop again for the first time in recent years in the fall of 2016.³ A national survey of staff at more than 500 U.S. higher education institutions revealed that survey participants attributed this decline to a combination of factors including visa delays and denials, the shifting social and political climate, and prospective students' concerns about securing a job in the United States after graduation.⁴ Exacerbating these concerns, the Department of Homeland Security (DHS) has recently been acting through different subordinate agencies in ways that seem to further complicate the picture, as one agency has altered immigration procedures to facilitate the acceptance of visa petitions for foreign nationals with advanced degrees, while another agency targets the major employers of these highly skilled foreign nationals with increased raids and immigration audits.⁵

* Clayton Laing, J.D. Candidate, 2020, Georgetown University Law Center; B.A. Economics, 2014, University of Miami. © 2019, Clayton Laing.

1. Jeanne Batalova & Jie Zong, *International Students in the United States*, MIGRATION POLICY INSTITUTE (May 9, 2018), <https://www.migrationpolicy.org/article/international-students-united-states>.

2. *Id.*

3. *Id.*

4. *Id.*

5. See, e.g., Laura D. Francis, *ICE Knocking on Doors of Companies Hiring Foreign Tech Students*, BLOOMBERG LAW (Aug. 13, 2019, 6:10 AM), <https://www.bloomberglaw.com/daily-labor-report/ice-knocking-on-doors-of-companies-hiring-foreign-tech-students>.

II. USCIS ACTIONS IMPROVE EMPLOYMENT PROSPECTS FOR FOREIGN NATIONALS WITH ADVANCED DEGREES

A. *Reversal of the H-1B Visa Allocation Order*

With the stated intention of better allocating slots to cases involving the most highly skilled foreign nationals, the DHS, through the United States Citizenship and Immigration Services (USCIS), recently issued a new final rule that has reordered the cap selection process for H-1B visas.⁶ H-1B visas, rooted in the H1 visa of the Immigration and Nationality Act of 1952 and specifically established by the Immigration Act of 1990, are non-immigrant visas that allow U.S. companies to temporarily employ skilled workers in certain specialty occupations. Current law allows for a total of 85,000 H-1B visas to be issued per fiscal year.⁷ The regular H-1B cap, made up of those who do not qualify for the master's degree exemption, consists of 65,000 spots, with the remaining 20,000 spots available to those candidates who have an advanced degree—a U.S. master's degree or higher—from eligible universities or institutions.⁸

Prior to the new change, a master's petition would have first been entered into a lottery specifically under the master's cap, with tens of thousands of petitioners contending for one of the 20,000 available spots.⁹ If the petition was not selected, it would then have been entered into the regular cap lottery with hundreds of thousands of other petitions for the 65,000 available spots.¹⁰ However, with the reorganization that is already in effect for fiscal year 2020, the master's petition is now entered along with all other petitions into the regular cap first, which leads to some master's petitions being selected without ever being entered into the master's cap.¹¹ All unselected master's petitions will then be entered into the master's cap lottery and will face much less competition given that some master's petitions will have already been selected in the regular cap.¹²

At the time that the final rule was issued, former USCIS Director L. Francis Cissna stated that the result of this reorganization process would be that “U.S. employers seeking to employ foreign workers with a U.S. master's or higher degree will have a greater chance of selection in the H-1B lottery in

6. *DHS Announces Final Rule for a More Effective and Efficient H-1B Visa Program*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jan. 30, 2019), <https://www.uscis.gov/news/news-releases/dhs-announces-final-rule-a-more-effective-and-efficient-h-1b-visa-program>.

7. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Mar. 19, 2019), <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models>.

8. *See id.*

9. *H-1B Master's Degree Exemption 2019-2020: Cap Eligibility Requirements (Updated 4/8/19)*, SGM LAW GROUP (Feb. 1, 2019), <https://www.immi-usa.com/h1b-2015-2016-masters-quota-determining-cap-eligibility>.

10. *Id.*

11. *Id.*

12. *Id.*

years of excess demand for new H-1B visas.”¹³ It is worth noting that there will likely always be excess demand; this year, employers submitted over 200,000 petitions for the 85,000 H-1B visas available for fiscal year 2020,¹⁴ and the 65,000 visa regular cap was reached on April 5, after opening on April 1.¹⁵ By reversing the previous order in which H-1B visas were allocated for selection within the lottery window, the USCIS is effectively increasing the number of H-1B visas that will be awarded to petitioners for beneficiaries with advanced degrees. During this first year of the new plan’s implementation, the USCIS selected eleven percent more cases with advanced degrees granted by American schools than it did in the year prior.¹⁶ This greatly increases the likelihood of employment in the United States for foreign nationals with advanced degrees, making pursuing an advanced degree from a U.S. institution more attractive.

B. *H-1B Electronic Registration*

As part of the same newly-implemented USCIS final rule, the agency will implement an electronic registration system with the hopes of increasing the efficiency and effectiveness of the H-1B visa petition submission process.¹⁷ Once the new system is functional, employers will no longer have to prepare and submit fully developed H-1B cases without assurance that their cases will be selected within the H-1B cap. Instead, all petitioners will annually register their beneficiaries online during the designated time period. The agency will then run the same kind of random, computerized selection process against the registrations, rather than against the filed H-1B petitions, and then it will notify the employers of the results. Only those employers whose registrations were selected will be eligible to prepare and file their H-1B cap-subject petitions. By not having to fill out and file countless petitions—many of which will ultimately not be selected—until receiving notice of selection through the electronic registration system, there will likely be much less wasted time and cost on the parts of the employer and beneficiary. Though unlikely to have as direct of an impact as reversing the allocation order, taking steps towards increasing efficiency and effectiveness while reducing financial and time costs for H-1B filings demonstrates an attempt to facilitate the ultimate goal of U.S. employment for foreign nationals seeking advanced degrees.

13. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, *supra* note 7.

14. Francis, *supra* note 5.

15. *USCIS Reaches FY 2020 H-1B Regular Cap*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Apr. 5, 2019), <https://www.uscis.gov/news/alerts/uscis-reaches-fy-2020-h-1b-regular-cap>.

16. *DHS Proposes Minimal Registration Fee for Petitioners Seeking to File H-1B Cap-Subject Petitions*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Sep. 3, 2019), <https://www.uscis.gov/news/alerts/dhs-proposes-minimal-registration-fee-petitioners-seeking-file-h-1b-cap-subject-petitions>.

17. *DHS Announces Final Rule for a More Effective and Efficient H-1B Visa Program*, *supra* note 6.

III. ICE ACTIONS PUT EMPLOYMENT PROSPECTS FOR FOREIGN NATIONALS SEEKING ADVANCED DEGREES INTO QUESTION

USCIS' aforementioned actions seem like a clear message of a desire by the United States to foster the ability of foreign nationals to live and work in the country upon obtaining their advanced degrees from U.S. institutions. However, another agency within the DHS is sending quite the opposite message by targeting employers in the fields of study with the highest volume of foreign nationals.

Recently, there have been exponentially increasing numbers of reports of Immigration and Customs Enforcement (ICE) "knocking on doors of companies hiring foreign tech students."¹⁸ Starting over the summer, ICE began conducting workplace site visits for F-1 visa students employed pursuant to the Optional Practical Training (OPT) program in the science, technology, engineering, and math (STEM) fields.¹⁹ These compliance checks are within the authority of the agency, though the actual exercise of that authority has only begun very recently.²⁰

The targeting of student workers in the STEM OPT program is especially worrisome for two reasons: 1) the sheer volume of foreign nationals seeking U.S. advanced degrees in the STEM fields; and 2) the connection of the STEM OPT program to the H-1B program and the possibility of disrupting this pipeline as a means of improperly controlling or limiting legal immigration. Of the 1.1 million international students enrolled in the United States in 2017, forty-eight percent were in STEM fields and were eligible for the extended 36-month OPT program.²¹ Additionally, sixty-two percent of the international graduate students—those seeking an advanced degree that would make them eligible for the H-1B master's cap—were enrolled in STEM fields.²²

The STEM OPT program is commonly used as a starting point in the path to the H-1B visa program, and there is worry that ICE could be "cutting the head of the snake off in the beginning" by targeting these international student workers before they get H-1B visas.²³ If ICE finds noncompliance at one of the site visits, those STEM OPT workers could potentially lose their F-1 student visas. A finding of misrepresentation could also render international students "inadmissible," meaning not only the loss of their student visa, but

18. Francis, *supra* note 5.

19. *Id.*

20. *Id.* This remains a disputed topic. ICE claims that the STEM OPT site visits have been occurring since the regulations went into effect in September 2016, but multiple attorneys claim they have heard of no such site visits for the past three years. Karine Wenger, of top international immigration law firm Fragomen, Del Rey, Bernsen & Loewy, claimed that "It looked like we were the guinea pigs" when her clients first experienced the visits in early July, 2019. *Id.*

21. Batalova & Zong, *supra* note 1.

22. Arthur Herman, *America's STEM Crisis Threatens Our National Security*, AMERICAN AFFAIRS Volume III, Number 1 (Spring 2019), <https://americanaffairsjournal.org/2019/02/americas-stem-crisis-threatens-our-national-security>.

23. Francis, *supra* note 5.

also the inability to apply for another visa of any type.²⁴ Regardless of what ICE actually finds, there is also concern that international students could be scared away just by the prospect of the site visits. Esther Brimmer, executive director and chief executive officer of NAFSA: Association of International Educators, commented “the imagery associated with raids is not the vision we want international students and scholars to think of when they consider the United States as an educational destination.”²⁵

IV. CONCLUSION

While the USCIS reorganizes its processes regarding master’s petitions to make H-1B visas easier to obtain by foreign nationals with advanced degrees, ICE amplifies its efforts in scrutinizing the employers most likely to immediately hire these same foreign nationals upon graduation, potentially diminishing one of the main pipelines for these master’s petitions. There will likely be significant economic impacts if DHS ultimately decides to move more in the direction of USCIS or ICE’s aforementioned actions. Nevertheless, DHS must establish more clarity as to its path forward with regards to these processes. For now, the current lack of direction and cohesion among its subordinate agencies is leaving advanced degree-seeking foreign nationals, higher education institutions, and the U.S. economy in a state of immigration policy limbo, just waiting to see what will happen next.

24. *Id.*

25. *Id.*