



Navigating the Headwinds:

Mitigating Contention in India-US Business Engagement

Policy Report # 3

U.S. Immigration Reform:

Revisiting the Approach to Skilled Visa Provisions

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ICRIER Wadhvani Programme of Research Studies on India-US Relations and Policy Issues

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EXECUTIVE SUMMARY

By Hemant Krishan Singh and Aman Raj Khanna

On June 26, 2013, The United States Senate passed a far-reaching bill on immigration reform. The “Border Security, Economic Opportunity and Immigration Modernization Act”, or S.744, was proposed by a bipartisan group of Senators¹ to address deficiencies and resolve problems related to several areas, including the shortage of skilled workers within the US.

In the United States House of Representatives, another very different legislative proposal concerning high skilled immigration, H.R.2131,² has been cleared by the House Judiciary Committee. However, the Democrats as the minority party have also introduced an identical version of the Senate passed measure, H.R.15.

In this report, we largely focus on the controversial elements of the bill passed by the Senate. Among the many sweeping changes the bill proposes, several provisions contained in Title IV governing non-immigrant visas such as the H-1B and L-1 programmes have serious and potentially adverse implications, most importantly for US business interests, the US economy and society. At the same time, these provisions threaten the future prospects of the India-US economic relationship.

Among the unquestionably positive elements of the Senate bill with regard to non-immigrant visas is the robust expansion in the annual H-1B visa cap as well as the annual cap on employer sponsored green cards, both of which have been long sought by industry. Recognising the persistent and continuing shortage of skilled STEM³ workers, the H-1B cap would increase from the current level of 65,000 up to a range of between 115,000 to 180,000, to be determined by annual demand. This move, which will substantially enhance availability of H-1B visas, has been widely welcomed by both US and Indian industry.

The remaining provisions of Title IV, however, reflect a host of unsubstantiated biases, protectionist instincts and personal agendas of lawmakers to nullify some of the gains referred to above.⁴ These are largely aimed at discouraging ‘dependency’ on skilled non-immigrant guest workers with the stated objective of safeguarding American jobs and containing the perceived ‘exploitation’ of the non-immigrant visa programmes. Towards this end, the new provisions

¹ Referred to as the “Gang of Eight”, the sponsors of S.744 included Senators Charles Schumer (D-NY), John McCain (R-AZ), Marco Rubio (R-FL), Richard Durbin (D-IL), Robert Menendez (D-NJ), Lindsey Graham (R-SC), Michael Bennet (D-CO) and Jeff Flake (R-AZ).

² Sponsored by Congressmen Darrell Issa (R-CA) and Bob Goodlatte (R-VA).

³ STEM refers to Science, Technology, Engineering and Mathematics.

⁴ The harshest critics of the Indian IT industry in the US Senate include Senators Charles Schumer (D-NY), Richard Durbin (D-IL) and Chuck Grassley (R-IA).

place a number of highly restrictive conditions on the employment, deployment and salaries of foreign workers employed under the H-1B and L-1 visa programmes. These include:

1. Hiring restrictions on heavy users of the H-1B and L-1B programmes, progressively limiting all firms to a maximum US workforce composition of 50% of non-immigrant temporary workers within three years of the bill's entry into force.
2. Additional restrictions on H-1B and L-1B 'dependent employers', defined as those whose US-based workforce consists of 15 percent or more H-1B or L-1 employees, including:
 - a. Ban on outplacement of non-immigrant workers
 - b. Higher visa fees for additional H-1B and L-1B petitions
 - c. Strict recruitment conditions for hiring additional non-immigrant workers
 - d. Annual compliance and reporting requirements
 - e. New restrictions related to non-displacement of US workers by the sponsoring employer and/or clients for whom visa holders are performing work
3. A higher minimum wage requirement for non-immigrant workers, set at US mean wage for H-1B 'dependent employers', regardless of job function.

These constraining provisions of S.744 appear to be misguided, protectionist in nature and discriminatory in impact. The bill's several workforce-related restrictions aimed at discouraging reliance on temporary foreign workers, particularly targeting hiring practices in the IT services sector, are tightly drawn yet selectively directed in terms of their consequences. Indian IT service providers are placed at a decided disadvantage against their large, diversified US competitors who are better positioned to utilise exemptions included in the bill to escape some of its harshest restrictions. Together, these can make the prospect of hiring H-1B workers far too prohibitive for 'dependent employers', in spite of compelling evidence of a domestic skills shortage in the US labour market.⁵

Apart from legislating a non-level playing field, the cumulative impact of these restrictions can be expected to all but smother the operational mobility of the Indian IT services industry, thereby impeding its market competitiveness and ability to serve US businesses. The ban on outplacement for 'dependent employers' proposed by S.744 is a particularly egregious instance of loading the bases against Indian IT firms, imposing punitive costs for service providers and their client entities alike.

⁵ At its basic threshold, the bill imposes an additional fee of \$2500 for all H-1B and L-1 petitions and a \$500 fee for every H-1B or L-1 beneficiary a firm wishes to 'outplace'. There are higher financial burdens for 'dependent employers'. For those with 15-30% H-1B employees, higher minimum wages are set. Employers who are 30%-50% 'dependent' will need to pay the higher minimum wages as well as a visa filing fee raised to \$5000. For high volume employers (50% or higher), visa filing fees are further raised to \$10,000 per petition.

Furthermore, while the Senate bill makes long-term provisions to promote STEM education domestically through funds accumulated from a range of higher visa fees, there is ambiguity on how firms forced to slash their workforce to comply with the new H-1B limits are expected to replace employees in the short and medium term. In the light of a clear shortfall of adequately skilled workers sourced from within the US, this will result in significant disruptions for the Indian IT services industry which presently, by and large, relies on temporary work visas to staff its managerial and technical positions in the US. In turn, the workforce disruptions could have a significant detrimental impact on the operations and productivity of many of the US clients being assisted by Indian IT companies and their employees who are on H-1B or L-1 visas.

In retrospect, protectionist tendencies and populist reactions against “outsourcing” had already been gathering momentum in the US much prior to the financial crisis of 2008. Debate over how non-immigrant visas are being and should be used goes back to the 1990s, but in each past instance policymakers ultimately recognised both the reality of existing skilled labour shortages as well as the intrinsic value of global IT services companies.

More recently, these policy debates were again resurrected in the post-2008 recessionary environment. While unemployment in the tech services sector has steadily declined from a high of 8.3% in September 2009 to just 4% (which is regarded by the BLS as near full employment) in December 2013,⁶ the high number of H-1B petitions since 2010 remains controversial. Proponents of the Senate Bill view this as an indicator of excessive H-1B reliance, while the Indian IT industry sees this as indicative of a natural transition to a more efficient global delivery model. The H-1B jobs that would be impacted by S.744 are within the US economy and these contribute to tax and social security revenues.⁷

As a response to changing market conditions, globalisation can lead to the transfer of jobs overseas to economies with a comparative advantage. The Indian IT Industry, however, argues that the H-1B programme in this instance facilitated the offsetting of significant domestic talent shortages, thus allowing businesses to remain local to the US. Far from remedying perceived problems, the new and onerous restrictions on H-1B hires and outplacement could in fact revive offshoring, reversing recent trends in the US economy.

While India’s IT services industry has utilised non-immigrant visas, it has also contributed extensively to investment, job creation and local hiring in the US in the midst of an economic downturn.⁸ The political outcomes manifest in the contentious provisions of the Senate bill do not reflect a balanced recognition of this factor.

⁶Bureau of Labor Statistics (BLS), “Unemployment Rate - Nonagricultural Private Wage and Salary Workers, Professional and Technical Services” web. http://data.bls.gov/timeseries/LNU04034219?data_tool=XGtable Accessed on February 15, 2013.

⁷ According to the Indian IT industry body NASSCOM, Indian employees of Indian IT firms contribute approximately \$1 billion per annum to social security and over \$3 billion per annum to taxes. Tax contributions have grown rapidly as onshore presence grows, doubling from \$1.6 billion in FY 2006 to \$3.6 billion in FY 2011.

⁸ The most frequently cited figures by NASSCOM and others indicate that Indian IT firms, directly or indirectly, support 300,000 jobs in the US. Their total investment as of FY 2011 was \$5 billion, and is likely to have grown in light of subsequent acquisitions.

Ultimately, the proposed legislation threatens a highly rewarding and mutually beneficial engagement between India's \$100 billion IT services industry and its principal clients in the US market. This industry has been a significant driver of America's economic recovery, the continuing strength of US corporations in global markets, and India's own growth story. The restrictions contained in S.744 could erode all of these benefits, deprive US businesses of much needed IT expertise and weaken a pillar of the India-US business partnership. The anti-competitive ramifications of the bill will have adverse repercussions for American businesses and by extension the economy.

Enactment of a S.744-based immigration bill by the US Congress will trigger adverse reactions in India, holding back progress on bilateral trade and investment issues. It is also unlikely to benefit the climate for the long stalled BIT negotiations which should commence sometime this year.

In our recommendations, we suggest more carefully considered approaches towards skilled non-immigrant visa reform as it advances in the House of Representatives, to focus on market-driven policies and strengthened oversight and enforcement through the expanded Department of Labor (DOL) Review and Investigation Authority. We argue that enough checks and balances have been proposed to ensure compliance and oversight over the expanded H-1B cap. Draconian measures contained in S.744 can hardly be advanced as "reform" of a skilled labour deficit.

Significantly, the House of Representatives version of the bill addressing high skilled immigration (H.R.2131, "SKILLS Visa Act") avoids the restrictive and discriminatory elements of the Senate bill. This can potentially provide the basis for addressing Indian concerns.

House Speaker John Boehner ruled out voting on the consolidated Senate bill on November 13, 2013, indicating that the House of Representatives may consider and pass a series of smaller bills. Earlier this year, he has also rejected a comprehensive bill like S.744 even for conferencing purposes. However, whether immigration reform fits with the mid-term election year priorities of the Republicans remains to be seen.

The possibility of segmented bills being finessed by an omnibus House bill remains, as legislation related to high skilled immigration is tied directly to the fate of comprehensive immigration reform. Even as the House moves legislation on a piecemeal basis, Congress as a whole and the President can be expected to seek a broader package of immigration reforms. Mid-term election year pressures in 2014 could add to this prospect. It is critically important that H.R.2131 emerges largely intact through the process of any broader deal making.

Since the summer of 2013, it has been increasingly apparent that there is not enough of a constituency in Congress to address repeatedly expressed Indian concerns on the immigration bill, nor has there been any indication of an effort on the part of the Administration to mitigate these concerns.

If anything, the White House has remained silent on these issues, focusing instead on provisions related to green cards, creating new visa pathways for immigrant entrepreneurs and investors, and making key improvements to the H-1B programme, among other such changes. However, it

is difficult for the Administration to sustain its stock argument that Indians will benefit from more liberal STEM and green card provisions, when Indian IT services companies will in fact find doors closing on them on account of restrictions and exorbitant costs.

It is well recognised that the US Congress has authority over trade issues, and Congressional decisions tend to be largely driven by domestic factors. The equation between free trade proponents and protectionist constituencies is more often than not tilted towards the latter. Issues of concern to foreign partners of the United States, even those like India who enjoy relative importance in strategic terms, are prone to being bypassed or ignored.

Unfortunately, 2013 also witnessed the steady escalation of India-US contestation over trade and investment issues, including interjections by Congressional Committees and high profile initiatives by Congressional leaders, urging the US Administration to seek remedial measures from India on a host of complaints. The US International Trade Commission was tasked with undertaking an unprecedented enquiry into India's allegedly unfair trade, investment and industrial policies, which is still ongoing.

In raising complaints of economic nationalism on the part of India, US lawmakers need to recognise that support for economic openness is fast waning in the US itself, as the country increasingly turns inward. America's role as a protagonist of an open global economy must start at home with its own policies - in this instance, through upholding a liberal trade regime in IT services. This responsibility for preserving openness rests with the US Congress.

Timely interventions during the continuing Congressional consideration of high-skilled non-immigrant visa reform, taking forward the more balanced provisions of H.R.2131, can better achieve domestic policy objectives for the US, while averting deterioration of its business and investment climate as an open economy. Remedial steps in that direction would be a major step in steering India-US economic relations back on course. Conversely, inaction on India's concerns will disturb a mutually beneficial relationship between US companies and their long-standing Indian IT services partners, which is widely recognised to have driven business expansion, innovation and efficiency.

1. INTRODUCTION

In the spring of 2013, a bipartisan group of Senators referred to as the “Gang of Eight” sponsored an ambitious proposal to reform the US immigration system. Eschewing partisanship that had plagued past legislations, Senators Charles Schumer (D-NY), John McCain (R-AZ), Marco Rubio (R-FL), Richard Durbin (D-IL), Robert Menendez (D-NJ), Lindsey Graham (R-SC), Michael Bennet (D-CO) and Jeff Flake (R-AZ) framed a broad-based bill that sought to address a wide range of issues in the US immigration system.

The salient features of their bill included a path to citizenship for the nearly 11 million illegal immigrants in the United States, a more robust enforcement of border security and an overhaul of rules governing non-immigrant, guest-worker visa categories that are intended to supplement the US workforce.

The bill’s provisions on skilled visa reform, contained in Title IV of the measure, have been the subject of much controversy. As a sub-section of the bill, often seen as subordinate to the larger issues of immigrant naturalization and border security, the scope of the changes proposed in Title IV is both vast and ambitious. Most significantly, the bill includes long-sought measures that increase availability of skilled foreign workers, unequivocally supporting assertions of a domestic skills shortage by the US tech-industry and several lawmakers on both sides of the aisle. This is accomplished through provisions that raise the overall annual quota of H-1B visas and green cards while also creating new categories of visas for entrepreneurs, investors and exceptionally skilled aliens.

However, in addition to these measures, the bill contains provisions that create overall workforce limits while imposing significantly more stringent conditions on hiring of foreign workers through non-immigrant visas such as the H-1B and L-1. These were ostensibly included by the architects of the bill to safeguard American workers against potentially adverse outcomes from an increased inflow of foreign skilled workers, while also addressing existing concerns over the purported capacity for misuse of the current visa programs.

A sizeable segment of US business, led by the IT enabled services (ITeS) industry and their clients, have strongly protested against some of these measures. They have suggested that the restrictions are excessively harsh and even discriminatory as the criterion used by the bill selectively targets them, causing significant disruptions to business. Indian companies in particular are left at a disadvantage to their competitors in the US market.

These issues are significant, as not only are IT enabled services increasingly integral to the competitiveness of the US economy, but as India’s most successful export, they also form the backbone of a highly promising India-US economic relationship.

Upon being introduced before the Senate in April 2013, the “Border Security, Economic Opportunity and Immigration Modernization Act of 2013”, or S.744, was reviewed by the Judiciary Committee before being offered to the floor for debate. On June 27, 2013, the Senate passed an amended S.744 with a majority of 68-32 votes. Only 92 of the 500 amendments to the bill proposed in the Senate received consideration, largely due to filibusters. Most significantly, the bill’s most contentious provisions on skilled visas remained intact.

In the United States House of Representatives, another very different version of a bill addressing high-skilled immigration (H.R.2131, “Skills Visa Act”), which avoids the restrictive and discriminatory elements of S.744, has progressed through the Judiciary Committee. However, on October 2, 2013, House members of the Democratic Party introduced a bill, H.R. 15, in the House of Representatives that was closely based on the measure passed by the Senate. The Republican-led House has since been locked in an impasse on the issue over differences in approach to naturalization and border security.

With mid-term elections due in 2014, it is likely that some form of immigration reform may be passed this year that would include provisions on H-1B and L-1 visas, among many other issues. Even as the public debate has been dominated by the politically contentious naturalization and border-security aspects of the bill, the provisions on skilled visa reform have far-reaching implications for the US economy. As such, they merit deeper consideration by Congress as it advances its overall immigration agenda in the House of Representatives.

This paper seeks to revisit the bill’s provisions on skilled visa reform to better understand their implications and suggests adjustments which merit consideration.

2. THE GROWING IMPORTANCE OF STEM IN THE MODERN US ECONOMY

Historically, technological innovation has been a primary driver of US economic growth, by some estimates accounting for half of all growth over the past half-century.⁹ Traditionally this innovation had been focused in the manufacturing sector, giving the US significant technological advantages as the world's leading manufacturing powerhouse in a broad variety of goods from textiles to automobiles.

However, with the increasing globalization of its economy, US primacy in manufacturing has steadily ceded ground to competition from lower cost producers such as China. Even though the manufacturing sector's share of GDP measured by output has remained relatively stable over the past 50 years, this trend has only been made possible by the emergence and spectacular performance of the computer and electronics sub-sector. The concurrent development and proliferation of the internet has also been a game changer for the US economy. A 2011 report by McKinsey and Co. showed that the internet directly contributed to 3.8% of US GDP in 2009 and accounted for as much as 15% of all GDP growth between 2004-2009.¹⁰

These trends are representative of widely acknowledged shifts in the US economy where its competitiveness in the global context is increasingly led by technology-intensive industries.¹¹ The simultaneous and dramatic growth of the services sector, particularly finance and healthcare, has only further effected a transition in skill-level demand in the American labour market, to both support these industries and drive further innovation and economic growth. A report by the Brookings Institution suggested that the number of years of education demanded by the average US job is growing.¹² Degrees in Science, Technology, Engineering and Mathematics (STEM) in particular have come to be highly valued in the US economy.¹³

⁹ See Abramovitz, Moses. "Resource and Output Trends in the United States Since 1870." National Bureau of Economic Research. 1956. Available at nber.org/chapters/c5650.pdf; Solow, Robert. "A Contribution to the Theory of Economic Growth." The Quarterly Journal of Economics. 70(1). February 1956. Available at jstor.org/pss/1884513; Romer, Paul A., "Increasing Returns and Long Run Growth." Rochester Center for Economic Research. Working Paper No. 27. October 1985. Available at rcer.econ.rochester.edu/RCERPAPERS/rcer_27.pdf;

¹⁰ Matthieu Pélissier du Rausas et al., "Internet matters: The Net's sweeping impact on growth, jobs, and prosperity" McKinsey Global Institute, May 2011. Available at: http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters

¹¹ Lauren Dai, "The Comparative Advantage of Nations: How Global Supply Chains Change Our Understanding of Comparative Advantage" Harvard Political Review, June 25, 2013. Available at: <http://harvardpolitics.com/features/senior-theses-collection/the-comparative-advantage-of-nations-how-global-supply-chains-change-our-understanding-of-comparative-advantage/>

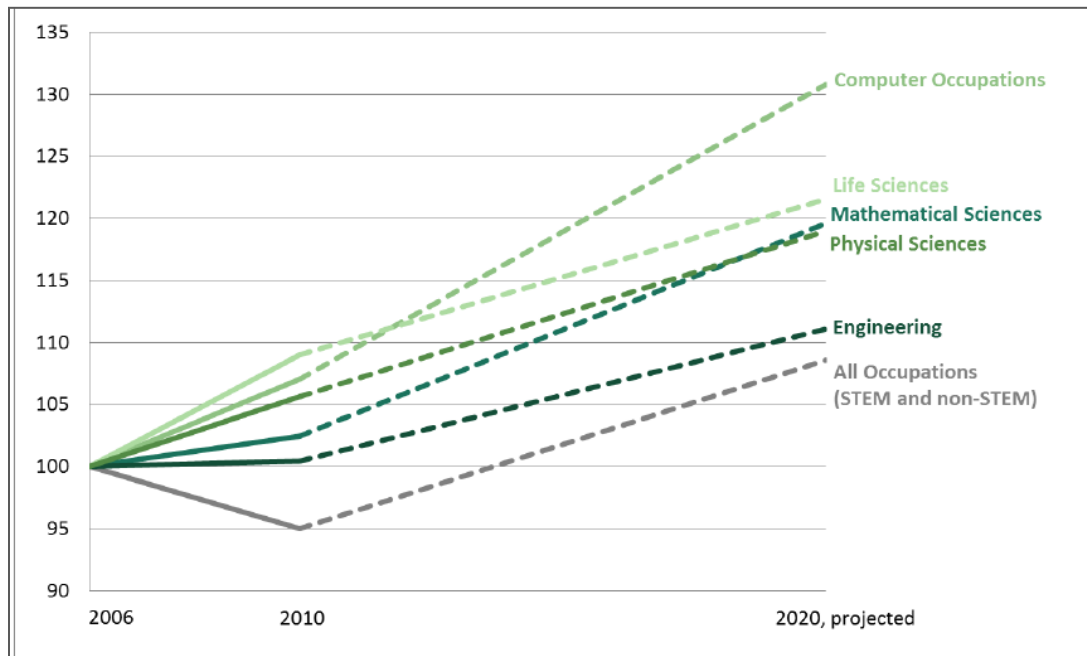
¹² Jonathan Rothwell and Alan Berube, "Education, Demand, and Unemployment in Metropolitan America" (Washington: Brookings Institution, 2011).

¹³ Koebler, Jason, "Demand, Pay for STEM Skills Skyrocket" US News, October 2011 <http://www.usnews.com/news/blogs/stem-education/2011/10/20/stem-competency-a-foundational-skill-jobs-expert-says>

The preservation of the competitiveness of American industry and exports is contingent upon continuous technological innovation and the adequate supply of these requisite skills to US industry at a globally competitive price. As such, the demand for STEM workers only continues to grow in the US economy.

Figure 1: Sustained Growth Projected for STEM Occupations

(Employment as a percentage of 2006 employment)



Source: U.S. Congress Joint Economic Committee¹⁴

These factors were instrumental in two significant developments relevant to the context of this discussion:

- i. The establishment of skilled guest-worker visa programs in the US
- ii. The emergence of the IT-enabled services industry

Each of these are discussed below.

2.1 *Non-immigrant Skilled visa programs in the US*

These programmes have allowed firms to import critical skills from abroad in the form of temporary skilled workers when faced with a deficit. Broadly, the two most significant visa categories in this regard are the H-1B and the L-1.

¹⁴“Stem Education: preparing for the Jobs of the Future,” U.S. Congress Joint Economic Committee, 2012, pp2

H-1B Visa

The H-1B visa was created by the US Congress in 1990 under the Immigration and Nationality Act, to enable US employers to hire temporary foreign workers in specialty occupations, defined as ones that require “*theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree, or its equivalent, as a minimum requirement.*”¹⁵

This visa has most notably satiated the excess demand for skilled workers in the rapidly expanding STEM fields. By some estimates, over 90% of H-1B applications are for jobs requiring high-level STEM knowledge.¹⁶

Since its inception, the annual cap on allocation of new H-1B visas has ranged from 65,000 to 190,000, varying more often than not in response to statutory changes rather than market conditions. Certain employers such as universities, non-profit research facilities associated with universities or government research facilities, are exempt from this cap. US Free Trade agreements (FTAs) with Chile and Singapore add an additional 1,400 and 5,400 visas respectively. The unused slots among these are made available to general applicants in addition to the annual cap in the following fiscal year. The annual number of H-1B visas issued consistently exceeds the number of capped visas.¹⁷

This visa is recognised as a *dual intent* visa, which implies that H-1B holders are permitted to simultaneously seek lawful permanent residence (green card) status in the US while being present in the country on H-1B status. Individuals on visas that do not make this important distinction (such as the B-1/B2 for tourism and business) can be denied admission into the US upon detection of intent to immigrate.

The duration of an H-1B visa is for three years, extendable to six years.

The L-1 Visa

L-1 visas are available to employees of an international company with offices in both the United States and abroad. The visa allows such foreign workers to relocate to the corporation's US office after having worked abroad for the company for at least one continuous year within the previous three prior to admission in the US.¹⁸ The US and non-US employers must be related in

¹⁵ “H-1B Visa Defined”, Harvard International Office, 2013, available at

<http://www.hio.harvard.edu/immigration/visatypes/h1b/>

¹⁶ Jonathan Rothwell and Neil G. Ruiz, “H-1B Visas and the STEM Shortage” Brookings Institution, May 10, 2013

<http://www.brookings.edu/research/papers/2013/05/10-h1b-visas-stem-rothwell-ruiz>

¹⁷ Office of Foreign Labor Certification, “OFCL Performance Data” Web.

<http://www.foreignlaborcert.doleta.gov/performance/cfm#stat>. Accessed February 12, 2013

¹⁸ US Citizenship and Immigration Services, “L-1B Intracompany Transferee Specialized Knowledge”

<http://www.uscis.gov/working-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge> Accessed February 16, 2013

one of four ways: parent and subsidiary; branch and headquarters; sister companies owned by a mutual parent; or 'affiliates' owned by the same or people in approximately the same percentages.¹⁹ The L-1 classification also enables a foreign company which does not yet have an affiliated US office to send an employee to the United States to help establish one, with additional requirements.

Spouses of L-1 visa holders are allowed to work without restriction in the US (using an L-2 visa), and the L-1 visa, like the H-1B may legally be used as a stepping stone to a green card under the doctrine of dual intent.²⁰

2.2 The emergence of the IT-enabled services industry and the Indian majors

The IT services industry provides services such as software support, computer systems design, and data processing facilities management to clients across a broad range of US industries. With cost-efficiencies achieved through specialisation, economies of scale and leveraging of a global talent pool, these firms allow their clients significant cost advantages with regard to IT functions while also enabling them to focus on their core competencies.

As a result of significant comparative advantages such as a large English-speaking and technically-skilled talent pool, cost-effectiveness of wages, low capital costs and so forth, India has emerged as a leading provider of IT services. Today Indian firms led by Infosys, TCS, Wipro and Tech Mahindra, among others, hold a 55% market share globally.²¹

Though initially focused on business process outsourcing, the spike in demand for IT services prior to the Y2K virus gave these industries a significant foothold towards a growing on-site presence in the US economy. With the concurrent growth proliferation of IT and a growing demand for IT services, these companies have become increasingly integral to the US economy since the early 2000s as their delivery model has evolved.

Like their counterparts in other parts of the world, mainstream providers in the US industry all leverage the global talent pool, relying on a mix of off-shoring and a rotating temporary worker model, to maximize competitiveness of their services.

The firms maintain the majority of their front-office activities within the US, in close proximity to their clients. A significant portion of the staff is in fact 'out-placed', i.e. deployed on-site to the client's premises, to facilitate closer coordination with the client, systems testing and effective feedback to the off-shore development staff.

The profitability of companies depends on technical expertise, innovative services, and effective marketing. As such, these companies rely heavily on STEM-trained professionals particularly with computing services, electronic engineering and information technology skills.

¹⁹ Ibid.

²⁰ Ibid.

²¹ "Why India is Irked by the US Immigration Bill", Knowledge@Wharton, University of Pennsylvania, July 8, 2013 <http://knowledgetoday.wharton.upenn.edu/2013/07/why-india-is-irked-by-the-u-s-immigration-bill/>

These firms have historically relied heavily on non-immigrant visas to support their workforce needs in the US. Cumulatively, the leading Indian Tech firms have been among the major subscribers to the H-1B visa programme between 2000-2010. Since FY 2011, Indian firms have consistently been the leading users of the H-1B.

3. THE US SKILL DEFICIT

Even as the demand for STEM skills continues to grow rapidly, there are mounting complaints from US companies that the domestic supply is insufficient to meet these demands. Studies suggest that even at the height of the recession, a third of US manufacturers were facing shortages of qualified professionals to staff their technical positions.²²

These sentiments were reiterated in a letter to President Obama dated March 14, 2013 written by executives of some of the top American technology companies, which affirmed that IBM, Intel, Microsoft and Oracle alone have a combined 10,000 high-skill job openings in the United States that they are struggling to fill.²³ The executives wrote: "One of the biggest economic challenges facing our nation is the need for more qualified, highly-skilled professionals, domestic and foreign, who can create jobs and immediately contribute to and improve our economy."²⁴

Critics of the H-1B programme led by American labour unions have strongly refuted these claims. They argue that each year American institutions produce a number of STEM graduates that not only is the largest in the world, but also exceeds the number of STEM job openings in the economy. They suggest that the primary motivation for high demand exhibited by tech employers is increasing profit margins by hiring foreign workers who are willing to accept relatively lower wages and work longer hours than their American counterparts.

Statistics, however, tell a different story while also confirming that this is a far more complex, multifaceted issue.

Demand from non-STEM employers

Data from US universities suggests that even though there are indeed adequate American born STEM graduates annually to potentially fill the tech-sector's STEM-based openings, for a variety of reasons they do not always wind up in the tech sector. Workforce analyses by industry group and US federal agencies have instead revealed that a high proportion of STEM graduates become employed by non-tech industries. A study by the Georgetown University's Center on Education and the Workforce finds that with increasing technology use across the economy, tech employers face competition for STEM graduates from a spectrum of other industries, including

²² Deloitte Consulting LLP, The Manufacturing Institute, and Oracle Corporation. "People and Profitability: A Time for Change." 2009. Available at deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_pip_peoplemanagementreport_100509.pdf.

²³ "Google, Facebook, Microsoft write to Obama for more H-1B visas" *Times of India*, March 19, 2013 http://articles.timesofindia.indiatimes.com/2013-03-19/job-trends/37843339_1_high-skilled-immigration-immigrant-visas-h-1b-visas

²⁴ Ibid

finance and manufacturing.²⁵ Further, the core STEM-competencies are highly valued in a variety of other, non-STEM job roles. Though the earnings in the STEM sector are among the highest relative to other jobs, graduates can be enticed by even superior earnings in the healthcare or other professional occupations, or sometimes choose alternate careers merely due to a ‘better fit’ with their interests and value systems.²⁶ The study found that immediately after graduation, 43% of all graduates with STEM degrees choose not to work in a STEM occupation.²⁷ After 10 years of employment, a further fifth of these workers choose to leave the field.²⁸ Though the US does certainly produce the highest number of STEM graduates annually in the world, it is evident that this number is small relative to the size of the population and demand in the US economy.

Labour Mobility

Bureau of Labor Statistics (BLS) data also indicates a low unemployment rate of between 3-4% for the software and IT services industry, which economists broadly consider as indicative of full employment in this sector. While the 4% rate implies that there are indeed a number of unemployed US citizens in search of work, their employment is more likely constrained by mobility and skill-set limitations.²⁹ Both the demand and supply of certain skills are never uniform and vary by region, creating localized mismatches between the availability and demand for certain skills by employers in the area. A 2012 study found that only 106 metropolitan areas accounted for 91% of all H-1B visas demanded in the US.³⁰ Demand was driven heavily by the presence of private STEM-dependent industries or research institutions. There are several factors such as home-ownership or binding ties to present location that prevent a worker laid off in Ohio, for example, from relocating, say to Southern California, to take advantage of job openings.

Qualitative Deficiencies

An exhaustive report by the Organization for Economic Cooperation and Development (OECD) points to a more serious trend. In conducting assessments of literacy, math skills and problem-solving using information technology for advanced nations of the world, the report suggests that the skill level of the American labor force is not merely slipping in comparison to that of its peers around the world, but has in fact fallen dangerously behind.³¹

²⁵ Carnevale, Smith and Melton “STEM” Georgetown University Center on Education and the Workforce, October 20, 2011

<http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/stem-complete.pdf>

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Wadhwa, Vivek, “It’s Not About Skills Shortages”, *Harvard Business Review*, June 24 2013

<http://blogs.hbr.org/2013/06/its-not-about-skills-shortages/>

³⁰ Ruiz, Wilson and Choudhury, “The Search for Skills: Demand for H-1B Immigrant Workers in US Metropolitan Areas” Brookings Metropolitan Policy Program, July 2012

<http://www.brookings.edu/~media/research/files/reports/2012/7/18%20h1b%20visas%20labor%20immigration/18%20h1b%20visas%20labor%20immigration.pdf>

³¹ OECD, “Time for the US to Reskill?: What the Survey of Adult Skills Says”, OECD Skills Studies, OECD Publishing 2013

<http://dx.doi.org/10.1787/9789264204904-en>

The report attributed the weak performance on failings of the initial schooling system as well as prevailing demographic factors, noting that trends closely followed socio-economic and racial disparities in the US.

If this report's findings are taken into account, it would imply that the problem may be more deep rooted than originally thought and requires a comprehensive review of the US education system and policy. Placing the burden of retraining of the worker population on industries creates further inefficiencies and promotes the loss of competitiveness that the US firms can ill afford at this juncture.

Aging of Baby Boomers

With increasing numbers of the 'baby boomer' generation reaching retirement age, the American workforce can expect to see dramatically declining workforce participation rates. By 2020, 25% of the US working population will be aged 55 or over. It is estimated that by 2008, the retirement eligibility among this demographic amounted to 13% of the workforce.³² However, a little less than half of these workers chose to retire, resulting in a 6% reduction in the total workforce.³³ In 2013, the number eligible for retirement is estimated to rise to 20% of the workforce.³⁴ While exact figures are unavailable, this group will include a significant number of those with STEM skills, thus further reducing the domestic availability of STEM skills.

At present, these trends have collectively manifested themselves as a scarcity of skilled STEM trained workers in the job market. Our earlier observations are corroborated by a May 2013 study conducted by the Brookings Institution, which concluded that vacancies in STEM occupations were harder to fill than other job openings.³⁵ The study found that nearly 43% of job requisitions for STEM occupations were reposted after a month as compared to only 32% of all postings for non-STEM jobs. The study also found that STEM jobs commanded higher wages as compared to other occupations comparing similar age groups, discounting claims of suppressed and inadequate wages as a major factor in turning away American workers from the sector.

In summary, a wide array of research findings, from research institutions as well as macroeconomic data, together provide compelling evidence of a skill shortage, thus adding credence to the complaints of the tech industry. This issue is compounded by a qualitative decline in the US adult skill level prompted by structural deficiencies in the US education system which will need to be addressed to resolve these problems in the long-term. However, it will take several years to implement solutions and for tangible results to emerge in the US labor market.

³² Tom Donahue. US Chamber of Commerce. "Statement of the US Chamber of Commerce on the Reauthorization of the America COMPETES Act." Testimony before the House Committee on Science and Technology. January 20, 2010. Available at uschamber.com/sites/default/files/testimony/100119_americancompetes.pdf

³³ Ibid.

³⁴ Ibid

³⁵ Jonathan Rothwell and Neil G. Ruiz, "H-1B Visas and the STEM Shortage" Brookings Institution, May 10, 2013 <http://www.brookings.edu/research/papers/2013/05/10-h1b-visas-stem-rothwell-ruiz>

In the short-term, this will place a heightened emphasis on skilled visa programs and immigration for bridging the STEM deficit faced by employers.

3.1 Inadequacies of the Visa caps

Even as the non-immigrant visas have emerged as increasingly important for US employers to meet their skill requirements, it has become equally apparent that the prevailing visa quotas are inadequate to meet the needs of US employers that were subject to the cap.

In response to frequent over-subscription in the preceding years, the American Competitiveness Act of 2000 temporarily increased the H-1B cap to 195,000 between FY 2000 – FY 2003. However since the expiry of this temporary measure in FY 2004, the cap reverted to 65,000 where it has remained there ever since. Congress did in the same year add a quota of 20,000 additional visas for professionals with advanced (Masters or higher) STEM degrees, bringing the total cap to 85,000.

Since FY 2003, the demand for H-1B visas has far exceeded the annual cap, as is evident from the significant oversubscription of the limited visas available and the rapid rate at which the visa caps have been exhausted (typically months before the fiscal year actually begins).³⁶

The USCIS begins accepting applications on the first business day of April, typically either the 1st or 2nd of the month. As the table below shows, since the annual cap was reset to 65,000 in 2003, the cap has been exhausted within months from the opening date. In 2007, 2008 and then again in 2013, the cap was achieved within mere days.

Table 1: Dates Annual Caps were Achieved 2003-2013

H-1B Visa Immigration Cap Dates, 2013		
<u>Year:</u>	<u>H-1B Cap Numbers</u>	<u>Date H-1B Cap Reached</u>
H-1B 2003 (FY 2004 cap)	85,000	October 1, 2003
H-1B 2004 (FY 2005 cap)	85,000	October 1, 2004
H-1B 2005 (FY 2006 cap)	85,000	August 10, 2005
H-1B 2006 (FY 2007 cap)	85,000	May 26, 2006
H-1B 2007 (FY 2008 cap)	85,000	April 3, 2007
H-1B 2008 (FY 2009 cap)	85,000	April 7, 2008
H-1B 2009 (FY 2010 cap)	85,000	December 21, 2009
H-1B 2010 (FY 2011 cap)	85,000	January 26, 2011
H-1B 2011 (FY 2012 cap)	85,000	November 22, 2011
H-1B 2012 (FY 2013 cap)	85,000	June 11, 2012
H-1B 2013 (FY 2014 cap)	85,000	April 5, 2013

³⁶ “H-1B Visa Program: Reforms are Required to Minimize the Risks and Costs of Current Programme” GAO Report to Congressional Committees, January 2011
<http://www.gao.gov/assets/320/314501.pdf>

As a result the USCIS has had to initiate a random selection process for the visas (commonly known as the lottery) as the basis to accept petitions. This has serious adverse implications for firms. Firstly, it prevents them from meeting their hiring needs, leaving the fulfillment of these goals to chance. Second, as the GAO noted in a report in 2011³⁷, the system has no provision to allow employers to rank their applications so that if a visa is allotted, it is to the best qualified worker that meets their greatest need.

3.2 Fall Out: Adverse impact on the US economy

In 2007, Microsoft chairman Bill Gates testified on behalf of the H-1B programme on Capitol Hill, warning of dangers to the economy if annual visa and green card allocations were not increased and employers were unable to import and retain skilled workers to fill critical job gaps at tech firms.³⁸

Indeed, with over 1.8 million new skilled jobs that BLS reports the US economy will create in the coming decade, the inadequate cap creates a serious bottleneck in access to global labour pools and thus poses a severe threat to the trajectory of US economic growth.

At the same time, the dearth of visas has created substantial inter-industry competition within the US economy. The IT services industry, as the largest consumer of visas in recent years among non-exempt employers, has faced the brunt of criticisms. Lawmakers have taken this a step further, drawing distinctions in the tech industry between IT services providers and ‘true innovators’, alluding to IT manufacturers.

These factors may have provided an impetus to protectionist tendencies, which we will analyze later in this report.

³⁷ “H-1B Visa Program: Reforms are Required to Minimize the Risks and Costs of Current Programme” GAO Report to Congressional Committees, January 2011

³⁸ Kronholz, June “Visa Window Opens; Scramble Is About to Begin” Washington Wire, *Wall Street Journal*, March 28, 2007 <http://blogs.wsj.com/washwire/2007/03/28/visa-window-opens-scramble-is-about-to-begin/>

4. CONCERNS ABOUT ABUSE OF PROGRAMMES

Concurrent to the growing popularity of H-1B visas, the perception that they are vulnerable to exploitation by employers to the detriment of American workers has remained a significant concern. Reports from as early as the year 2000 by the US Government Accountability Office (GAO) noted major inefficiencies in the enforcement of wage regulations in the programme.³⁹ While both the economy and industry have seen vast changes since that time, many similar concerns were echoed in the GAO's exhaustive report of January 2011 on uses of the visa programme that could potentially disadvantage the US worker population.⁴⁰

These allegations have been echoed by labor unions and several other quarters who claim that these programmes enable employers to hire foreign workers for cheaper wages even in sectors where adequate domestic workers are available. This allows employers to discriminate against American workers, rather than addressing true skill shortages in the economy.

In reality, US laws bar such blatant wage discrimination. The issue, rather, lies in the employer's ability to misrepresent information so that it results in the computation of a wage lower than that of American workers of a comparable skill level.

The current H-1B visa rules require visa beneficiaries to be paid wages that are equitable with American workers of similar skill within the same geographic area. However, there are two major deficiencies in the system in force, which critics of the programmes say enable employers to circumvent these rules:

- a. **Misuse of Private wage surveys** – The law requires employers to pay wages that are “equal to the prevailing market wage or the actual wage”. Even though the Bureau of Labor Statistics (BLS) has an extensive database of occupations adjusted to variations by location, at times there is no practical fit with the BLS wage category and the “actual wage” needs to be computed. The law permits employers to use private surveys to determine the actual wages for various job descriptions. Critics allege that an employer may choose to under-represent the actual wage for a prospective H-1B employee, paying them a wage that is less than commensurate with comparable professionals in other firms or geographic areas.
- b. **Exploitation of Geographic Wage Variations** – The US has significant geographic variations in the cost of living as a result of which salaries for the same job can vary

³⁹ “H-1B Foreign Workers, “Better Controls Needed to Help Employers and Protect Workers” Report to the Ranking Minority Member, Subcommittee on Criminal Justice, Drug Policy, and Human Resources, Committee on Government Reform, House of Representatives. Government Accountability Office, September 2010 <http://www.gao.gov/archive/2000/he00157.pdf>

⁴⁰ “H-1B Visa Program: Reforms are Required to Minimize the Risks and Costs of Current Programme” GAO Report to Congressional Committees, January 2011

widely, particularly between rural areas and major metropolitan areas. Critics of the programme claim that firms wishing to abuse the system can hire a foreign worker in a cheap location such as Akron, but send the worker to an office or client premises in a relatively expensive area such as New York for a substantial discount, despite prohibitions against such practices.

- c. ‘Bodyshopping’ – Staffing firms hire out or ‘outplace’ professionals with specialized skills to clients (purportedly with embellished credentials in many instances), billing them at highly cost-effective wage rates. Critics claim that these firms, however, retain a large portion of the salary as a fee, paying the professional only a reduced portion of the amount paid by the client. Reportedly, they tend to misrepresent skill levels as well as geographic disparities to offer lower wages.

Worker Immobility

Besides the reported capacity for misrepresentation, critics also point to other characteristics inherent to the H-1B programme that cause a disparity between H-1B workers and their domestic counterparts. Under the current rules, H-1B workers, particularly those awaiting their green cards, may face serious limitations to their mobility within the market, in terms of their ability to change employers. This is partly due to the fact that the stakes are presumably high for H-1B workers, who under the current rules have to leave the country within 60 days upon termination of their employment, unless they can find an alternative sponsor within this time period. Green-card applications on the other hand cannot be transferred from one employer to another without losing one’s place in line as determined by the ‘priority date’. As green card applicants, particularly from countries such as India and China, already face waiting periods of up to ten years for approval of their applications, they have little option but to remain with their employers over that period for fear of jeopardizing their priority date and being sent to the back of the line again. This, according to critics, potentially creates a scenario where, as a former US Secretary of Labor remarked, the H-1B employee “works scared and hard”⁴¹. Ostensibly, there is significant potential for exploitation by employers, who with the increased bargaining power that they enjoy under the circumstances, may choose to keep wages for such employees low. A study by Sankar Mukhopadhyay and David Oxborrow of the University of Nevada, Reno showed that workers received significant increases in wages averaging \$11,000 following the approval of their Green card, which allowed them to explore opportunities with other employers.⁴²

The potential abuse of visas, therefore, has been doubly a matter of concern for US lawmakers. In addition to the violation of laws, it poses a risk to American workers who may be placed at a disadvantage.

⁴¹ North, David, “Motivation for Hiring H-1B workers?” Center for Immigration Studies, August 2013
<http://cis.org/labor-shortage-not-reason-employers-want-alien-workers>

⁴² Mukhopadhyay, S. and Oxborrow, D. “Value of an Employment Based Greencard”. Department of Economics, University of Nevada Reno, Reno. Available at: http://business.unr.edu/faculty/sankarm/Greencard_Revised.pdf

4.1 The Role of the IT services Industry

The reliance of the IT services industry on H-1B workers has brought them under increasing scrutiny, including with regard to purported abuses of the wage law. The GAO's report back in 2000 stated that "workers approved for H-1B visas in IT-related occupations differed somewhat from other H-1B workers in that they were less likely to have an advanced degree, were younger, more likely to be from India, and less likely to be in the United States on another type of visa when approved for the H-1B program."⁴³

Even as the Industry's character bears progressively smaller resemblance to that time, the IT services industry remains among the most prolific employers of the H-1B programme.⁴⁴ With heightened competition for the limited annual number of H-1B visas available each year, this has increasingly pitted the IT services industry against other tech-based firms in the US.

Critics of the IT services industry's practices, which include several lawmakers instrumental in the framing of this bill, have expressed the view that by consuming a major portion of the limited quota of H-1B visas, the industry both denies availability of visas for 'true innovators' and contributes to an overall underutilization of the visa programme. At a Congressional hearing on immigration reform by the Senate Judiciary Committee, Sen. Durbin stated: "I think that is an abuse of what we're trying to achieve here. Most people would think, well, Microsoft needs these folks, and they'd be shocked to know that most of the H-1B visas are not going to companies like yours; they're going to these outsourcing companies."⁴⁵

While H-1B filings by the IT services sub-sector may have risen sharply since 2010, the overall unemployment rate in this sector has also steadily declined, from a high of 8.3% in September 2009, to a low of 4% in December 2013,⁴⁶ which is regarded by the BLS as an indicator of near full employment. Adding stringent and onerous conditions to the hiring of H-1B workers by the IT services industry carries the risk of a return to outsourcing and offshoring, reversing recent trends which have gone in the direction of onshoring.

⁴³ "H-1B Foreign Workers, "Better Controls Needed to Help Employers and Protect Workers" Report to the Ranking Minority Member, Subcommittee on Criminal Justice, Drug Policy, and Human Resources, Committee on Government Reform, House of Representatives. Government Accountability Office, September 2010
<http://www.gao.gov/archive/2000/he00157.pdf>

⁴⁴ According to USCIS statistics the leading Indian IT industry firms have consistently featured among the top 10 employers of H-1Bs over the past decade. In FY 2012, The top 25 Indian firms accounted for over 30% of new H-1B visas as per the NFAP Report: Stuart Anderson, "H-1Bs Essential to Attracting and retaining Talent in America", National Foundation for American Policy, May 2013. *Available at:*
<http://www.nfap.com/pdf/NFAP%20Policy%20Brief%20H-1B%20Visas%20May%202013.pdf>

⁴⁵ "TCS, Infosys, Wipro abusing H-1B visa system: US Senator" Hindu Business Line, April 23, 2013
<http://www.thehindubusinessline.com/news/international/tcs-infosys-wipro-abusing-h1b-visa-system-us-senator/article4646760.ece>

⁴⁶ Bureau of Labor Statistics (BLS), "Unemployment Rate - Nonagricultural Private Wage and Salary Workers, Professional and Technical Services" *Available at:* http://data.bls.gov/timeseries/LNU04034219?data_tool=XGtable
Accessed on February 15, 2013

Further, critics have noted that even as some of the heaviest users of guest worker visas, the Indian IT services and off-shoring industry sponsors a relatively small fraction of their workers for permanent residency, as seen in Table 2 below. This, they say, gives reason to believe that these firms have little interest in fostering their foreign workers and addressing serious skill shortages. They claim this is an indication that these firms employ the guest worker programs merely as a carousel for hiring expendable temporary labour which is easily replaced at the end of the visa term, thus allowing these firms to keep costs low.⁴⁷

Table 2: H – 1B Visa Immigration Yields for Offshore Outsourcing Firms, 2008

<u>Company</u>	<u>H-1B use rank</u>	<u>Approved H -1Bs</u>	<u>Certified PERMs of H-1B origin</u>	<u>H-1B Immigration yield</u>
Infosys Technologies Limited	1	4,559	237	5%
Wipro Limited	2	2,678	31	1
Satyam Computer Services Limited	3	1,917	10	1
Tata Consultancy Services Limited	4	1,539	0	0
Cognizant Tech Solutions US Corp.	7	467	332	71
Larsen & Tourbro Limited	9	403	11	3
IBM India Private Limited	10	381	0	0
Patni Americas Inc.	13	296	37	13
Terra Infotech Inc.	14	281	7	2
MPhasis Corporation	16	251	81	32

Source:http://www.computerworld.com/s/article/9128436/List_of_H_1B_visa_employers_for_2008 and US Department of Labor, Foreign Labor Certification Data Center.

The economic downturn of 2008 and widespread unemployment that followed brought the fear of job displacement to the forefront of political contention, while aggravating the negative perceptions of the IT services industry. A paper published in 2012 by the Cato Institute noted that “Since the onset of the recession of 2008–2009 and during the jobless recovery of 2010–11, public opinion about immigration further deteriorated. The idea that immigrants take American jobs, depress national wages, and threaten the US economy has become even more rooted, as often happens during economic recessions”.⁴⁸

In a December 10, 2011 episode of his weekly investigative news programme, former CBS news anchor Dan Rather reported the case of a US born worker at a major US corporation being informed of her imminent lay-off and being further coerced into training her lower wage replacements brought in from India under threat of being denied her severance pay.⁴⁹ With unemployment in the U.S economy at its highest in over three decades since the Carter

⁴⁷ Norman Matloff, “Immigration and the tech industry: As a labour shortage remedy, for innovation, or for cost savings?” *Migration Letters*, Volume: 10, No: 2, pp. 211 – 228, May 2013

⁴⁸ Peri, Giovanni. "Immigration, labor markets, and productivity." *Cato Journal* 32.1 (2012).

⁴⁹ Rather, Dan. "Dan Rather Reports – No Thanks for Everything." Online video clip. *YouTube*. YouTube, 10 December 2011. Web. 9 Sept. 2013.

administration, the heightened media scrutiny contributed substantially to increased public concerns and a consequent intensification of the political discourse on the issue.

The IT services industry has staunchly defended itself against these allegations. It has pointed to the US skill shortage as justification for its reliance on workers from abroad, while drawing attention to its efforts to recruit from within the US as well as support for green card reform.⁵⁰ It has also objected to reports of widespread misuse of visas, pointing to the tightly drawn visa restrictions as well as the fact that such anecdotal evidence is statistically unsubstantiated. Of 15,648 site visits conducted across a cross-section of employers of H-1B workers in FY 2011, a mere 7% resulted in USCIS notices of minor violations and less than 1 percent resulted in the discovery of serious fraud warranting criminal prosecution.⁵¹ The industry has also emphatically showcased the positive impact on the US economy and the competitive edge it provides to US majors in a global marketplace.

Even so, the IT services industry, especially the Indian majors, has largely been fighting a losing battle in terms of public and political perception. Labour unions and several lawmakers have repeatedly blamed its practices for the issues faced by the high skill visa programme, many elements of which have manifested themselves in the legislative proposals leading up to S. 744.

⁵⁰ "India's Tech Industry in the US" NASSCOM, 2012

⁵¹ Tsai, Orr and Lindt, "Mandatory Compliance Issues Employers are Ignoring" Presentation made at American Immigration Lawyers' Association (AILA) Conference, Nashville, June 2012.
<http://www.aila.org/content/default.aspx?docid=39951>

5. THE POLICY RESPONSE PROPOSED IN S.744

As discussed in the previous section, the prevailing circumstances created two broad objectives for the architects of the bill. The first of the two was to ensure that the US economy has access to the skilled workers it needs to fill key roles that drive innovation and entrepreneurship, while safeguarding the interests of American workers.

The second addressed concerns that the current system undermined the intent of the guest-worker visa programmes, which included implementing additional safeguards for American workers.

There were broadly four shortcomings that the bill's framers sought to address:

1. Deficiencies in the enforcement of wage rules, including oversight of employers, compliance checks and audits.
2. The qualitative underutilization of the limited annual quota of H-1B visas: global IT services companies crowding out applications from domestic technology product oriented firms.
3. The requirement to pay market level wages to H-1B workers possibly did not create sufficient incentive for companies to recruit and hire American workers instead.
4. The use of the H-1B programme in outsourcing of American jobs, where temporary foreign workers gain skills during their tenure and take the job back home with them.

Finally, despite the absence of any concrete evidence of technical violations of H-1B provisions, those crafting the bill were particularly mindful of the Indian IT services firms whose practices had garnered unfavorable public opinion.

Several among the consolidated provisions contained within Title IV of the Senate and House Bills were initially introduced in individual legislations by lawmakers.

Provisions of Title IV of S. 744 and H.R. 15

Title IV of the Border Security, Economic Opportunity, and Immigration Modernization Act contains an array of reforms to non-immigrant visa programs for both high and low skilled workers, while also creating a new set of visas for investors and low-skilled-non agricultural workers. The provisions in this title are identical in the House and Senate bills.

Title IV of the bill contains the following subtitles:

Subtitle A--Employment-based Nonimmigrant Visas

Subtitle B--H-1B Visa Fraud and Abuse Protections

- Chapter 1--H-1B Employer Application Requirements
- Chapter 2-- Investigation and Disposition of Complaints Against H-1B Employers
- Chapter 3--Other Protections

Subtitle C--L Visa Fraud and Abuse Protections

Subtitle D--Other Nonimmigrant Visas

Subtitle E--JOLT Act (the Jobs Originated through Launching Travel Act of 2013)

Subtitle F--Reforms to the H-2B Visa Program

Subtitle G--W Nonimmigrant Visas

Subtitle H--Investing in New Venture, Entrepreneurial Startups, and Technologies

A full comparison of the changes proposed by the bill to the current law can be found in the annexures to this paper. However, in summary, the salient features of Title IV relevant to the discussion in this paper are outlined below.

Firstly, the bill recognizes the impracticality of the current static quota systems for visas in striking a delicate balance between the two main objectives, specifically in ensuring that foreign temporary workers serve as a means to complement the existing American workforce, rather than as a substitute for it. Towards this end, the bill creates a new system of independent, market-linked dynamic visa quotas for skilled and unskilled workers. The number of visas available will fluctuate between a present maximum and minimum, based on the market demand for workers as expressed in the previous year.

The second segment comprises a series of measures that seek to regulate the use of temporary foreign workers with the dual intent of preventing abuse of the system and safeguarding the jobs of American workers in the same industry.⁵² These provisions can be broadly categorized as follows:

1. Additional restrictions on ‘dependent employers’ (defined as those whose workforce consists of 15 percent or more H-1B and L-1 employees) including.⁵³

⁵² S.744, Sec. 4101 (a) “Border Security, Economic Opportunity, and Immigration Modernization Act (Engrossed in Senate [Passed Senate]” Bill Text - The 13th Congress. Library of Congress. Available at: <http://thomas.loc.gov/cgi-bin/query/z?c113:S.744>:

⁵³ A Guide to S.744: Understanding the 2013 Senate Immigration Bill”. Immigration Policy Center – American Immigration Council. July 2013

- a. Prohibition on outplacement of H-1B and L-1 non-immigrant workers so that they cannot perform work for an entity other than the sponsoring employer. In other words, non-immigrant workers sponsored by dependent companies cannot be used to service clients
 - b. Higher visa fees for additional H-1B and L-1 petitions
 - c. Strict recruitment conditions for hiring additional non-immigrant workers
 - d. Strict non-displacement requirements
 - e. Annual compliance and reporting requirements.
2. Hiring restrictions on heavy users of the H-1B and L-1B programs, progressively limiting all firms to a maximum workforce composition of 50% of non-immigrant temporary workers within three years of the bill's enforcement.⁵⁴
 3. A higher minimum wage requirement for H-1B workers, set at a minimum of US mean wage for the industry for H-1B 'dependent employers.' Requiring 'dependent employers' to pay their visa holders more than their non-dependent competition would and perhaps effectively more than their US citizen workers as well.⁵⁵

The main features of these provisions are broadly described below.

5.1. Employment-based non-immigrant visas: S.744 provisions

New Market-Based H-1B Visa Limits

S.744 raises the annual cap on H-1Bs from the current level of 65,000 per annum to a range of between 115,000 and 180,000 annually that will vary by demand.⁵⁶ If the base is 180,000 and these visas are used up within 45 days, another 20,000 visas are issued. However the ceiling may not adjust upwards if the unemployment rate for the BLS "management, professional and related occupations" category averages 4.5% over the prior year.

S.744 increases the allocation for advanced STEM-degree holders from 20,000 to 25,000 per year.

Together, these provisions increase the availability of temporary foreign skilled workers in order for US tech firms to fill high-skilled positions in R&D etc.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ S.744, Sec. 4101 (a) "Border Security, Economic Opportunity, and Immigration Modernization Act (Engrossed in Senate [Passed Senate])" Bill Text - The 13th Congress. Library of Congress. Available at: <http://thomas.loc.gov/cgi-bin/query/z?c113:S.744>:

5.2. H-1B Fraud and Abuse Protections

New Definition of H-1B Dependent Employer (DE)

- For employers with 25 or fewer full-time “equivalent employees” who are employed in the US, those which employ more than seven H-1B nonimmigrants;
- For employers with between 26 and 50 full-time “equivalent employees” who are employed in the US, those which employ more than 12 H-1B nonimmigrants; or
- For employers with at least 51 full-time “equivalent employees” who are employed in the US firms where H-1B workers are at least 15 per cent of the full-time workforce.
- Exempt from H-1B-dependent employer classification:
 - Nonprofit institutions of higher education;
 - Nonprofit research organizations; and
 - Healthcare businesses in certain cases

New H-1B Skilled- Worker Dependent Employer (SWDE)

The bill creates a new concept of a *H-1B skilled worker dependent employer*, defined as employers where at least 15 percent of workforce in O*NET Job Zone 4 (“considerable preparation” needed) and Zone 5 (“extensive preparation” needed) positions are H-1B workers.⁵⁷

The new rule focuses on the number of H-1Bs relative to the skilled sub-population of a firm’s workforce. Thus firms that do not classify as dependent employers, may still find themselves classified as a SWDE if H-1Bs constitute a high proportion of the skilled component of their workforce. (See example in Annexure 1 of this report).

A higher minimum wage requirement for H-1B workers

The bill will introduce a new wage system that groups US wages into three tiers as opposed to the older four-tier system. It also establishes a wage-floor for H-1B ‘dependent employers’ that requires them to pay wages to all H-1B employees at a minimum of the second level, which is the equivalent of the average of all US wages for the worker’s job category as surveyed by the US Department of Labor.

Non-displacement of US workers

⁵⁷ The **Occupational Information Network (O*NET)** is a free online database developed under the sponsorship of the US Department of Labor/Employment and Training Administration (USDOL/ETA) through a grant to the North Carolina Employment Security Commission during the 1990s that contains occupational definitions to help students, job seekers, businesses and workforce development professionals to understand today’s world of work in the United States.

H-1B dependent employers will be expected to demonstrate that no US-born worker was displaced 180 days before and after the filing of a petition for an H-1B worker.

H-1B skilled dependent employers must certify that they did not displace a US worker in the 90 days prior and after the filing of an H-1B petition.

Recruitment Restrictions

Prior to filing a petition, H-1B skilled dependent employers have to attest that they offered the job to an equally or better qualified US worker.

Other firms will need to ensure this will include the posting of the job to a Department of Labor job-search portal for a minimum specified period.⁵⁸

Hiring restrictions on heavy users of the H-1B and L-1 programmes

Also referred to as the ‘50/50’ law, the provision proposes a maximum limit of 75% on the percentage of a company’s workforce that may be composed of H-1B and L-1 visa holders along with a schedule to progressively reduce this to 50% by the third year of the law’s implementation. In 2015, this limit will be set at 75% of the total workforce, reduced to 65% in 2016 and to 50% from 2017 onward.

Prohibition on outplacement of non-immigrant workers to client sites

This provision, widely regarded as the most targeted and punitive of the bill’s measures, prohibits any company categorized as "dependent" from "placing, outsourcing, leasing, or otherwise contracting for the services or placement" of an H-1B or L-1 worker with another employer.⁵⁹ Non-dependent employers also have to pay a \$500 fee for each outsourced non-immigrant employee.⁶⁰ Non-profits and healthcare providers, however, are exempt from the prohibition on outplacement if they are found to be dependent, but will be expected to pay the \$500 per employee fee.⁶¹

Higher visa fees for ‘dependent employers

The bill will impose substantially higher H-1B and L-1 visa petition fees on employers that already rely heavily on non-immigrant workers. Firms employing between 30 percent and 50 percent of their workforce cumulatively on non-immigrant visas will be charged a filing fee of \$5,000 for each additional H-1B or L-1 visa petition. Additionally, in the interim period leading up to 2017, all firms in excess of the 50 percent threshold will pay a visa fee of \$10,000 per additional visa application.

⁵⁸ S.744, “Border Security, Economic Opportunity, and Immigration Modernization Act (Engrossed in Senate [Passed Senate])” Bill Text - The 13th Congress. Library of Congress. Available at: <http://thomas.loc.gov/cgi-bin/query/z?c113:S.744>

⁵⁹ Ibid.

⁶⁰ A Guide to S.744: Understanding the 2013 Senate Immigration Bill”. Immigration Policy Center – American Immigration Council. July 2013

⁶¹ Ibid.

Other restrictions

‘Dependent employers’ will be required to meet additional restrictions in the process of hiring foreign workers through non-immigrant visas including:

1. They will be expected to demonstrate that no US-born worker was displaced 180 days before and after, as the direct result of the hiring of a foreign worker.⁶²
2. They will have to submit to annual Department of Labor compliance audits.⁶³
3. They will need to advertize a toll-free Department of Labor hotline to their employees for reporting any infraction of the new laws.⁶⁴

INVEST Visas

The bill proposes the creation of an additional set of visas with the aim of fostering investment and job-creation in the United States. These include:

1. X Visa – This non-immigrant visa will allow entrepreneurs temporary residency of up to three years in the US, provided that prior to the application, their businesses would have had to attract at least \$100,000 in investment, or have created no fewer than three jobs, while generating \$250,000 in annual revenue over a two year period.
2. EB-6 immigrant investor visa – This leads to Lawful Permanent Residence for entrepreneurs who have significant ownership in a US business that must have received either \$500,000 in investment or created five jobs while generating \$750,000 in annual revenue in the previous two years.

Y Visa

This will create a visa for non-immigrant alien retirees over the age of 55 who possess health insurance and invest (and maintain) at least \$500,000 in US residential real estate, of which at least \$250,000 must be for a US primary residence where such persons intend to reside for more than 180 days per year.

Relevant Measures for Employment-based Immigration from Title II

In addition to the measures put forward within Title IV, the bill makes relevant proposals in Title II that have implications for non-immigrants. These include:

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

1. Country-specific limits on employment-based immigrant visas will be eliminated and massive backlogs, particularly for applicants from India and China, will be cleared over seven years beginning in 2015.
2. Highly skilled or exceptionally talented immigrants, including multinational executives, those with an advanced degree in the STEM fields from a US university and physicians in underserved medical fields will be exempt from the annual world-wide cap.

5.3. A Broad Analysis of the Provisions

The bill's proposals will prove to be a bonanza at the individual level for skilled workers of foreign origin, particularly graduates of US educational institutions and those belonging to the STEM fields. It takes progressive short-term measures to address the critical deficiencies of the US Labour market. Most visible among these is the substantial expansion of the H-1B cap in order to increase the availability of skilled workers to employers. Exemptions for highly qualified professionals and physicians address innovation and workforce limitations for STEM industries as well as the healthcare system. The abolishing of backlogs in the Green Card waiting lists and important steps to facilitate portability among employers for workers awaiting permanent residency status without adverse repercussions to their priority status are other welcome changes.

At the same time, the bill proposes a series of measures that address past concerns on enforcement of visa rules by expanding the authority and capabilities of agencies under the Department of Labor and the DHS to conduct audits and compliance checks. Measures include greater compliance requirements for 'dependent' firms, along with stiffer fines and consequences for violations, not to mention additional restrictions on hiring in the form of the 'non-displacement' restrictions.

In the long term, the bill proposes important initiatives to promote STEM education among US students which will be critical to US self-sustainability and economic success.

The caveat lies in the fact that even as it increases the overall pool of guest-workers, the bill also substantially raises the hurdles for firms to access these workers. This begins with intensifying several onerous prerequisites in the recruitment process that must be fulfilled in order for a firm to hire workers on the H-1B. This is followed by a new wage system that increases the minimum wages that H-1B workers must be paid at all levels. While these provisions may adversely impact the employability of virtually all H-1Bs, it will be particularly severe for those who would normally qualify for a remuneration package at the bottom of any one of three new wage bands.

The consequences of the 'dependent employer' and new Skilled-worker dependent employer will be critical for firms to consider as most of the bill's most severe impacts are linked to these classifications.

These are explored in further detail in the following chapter.

6. IMPACT ON EMPLOYERS

The *H-1B dependent employer* (DE) and new *H-1B skilled worker dependent employer* (SWDE) classifications that can be expected to prove the most crucial litmus test for employers in the US hoping to engage H-1B workers.

While the first of the two classifications (DE) is not new, the magnitude of the new restrictions contingent upon it under the proposed provisions of S.744 confers unprecedented significance to this threshold for employers. In the meanwhile, the new SWDE classification lends itself to broadening the purview of these restrictions to include firms that may have otherwise avoided them under the criteria for a DE.

These restrictions are summarized in the table below (Table 3). (For a detailed explanation of the evolution of these classifications and a comparison refer to Annexes 1 and 2 of the paper)

In addition to the direct financial burden of higher wages and visa fees, the intensive audit and compliance requirements will translate into significant indirect costs for firms falling under either of these classifications. Describing these requirements as an “administrative nightmare”, analysts expect impacted firms to have to devote substantially greater investments into administrative and legal resources to both prepare and comply with these requirements.⁶⁵

Consequently, the bill transforms what has so far been an innocuous and primarily administrative benchmark into a critical threshold at which the bill’s most adverse ramifications for businesses that employ skilled non-immigrants are triggered. Therefore, the DE and SWDE classifications are central to our analysis of the bill’s deficiencies.

⁶⁵ “Visa Reform: Much ado about nothing, or a nuclear threat to the Indian sourcing model?” Recorded Webinar hosted by HfS Research and Wells Fargo Securities. June, 2013. Available at: <https://www3.gotomeeting.com/register/605013382>

Table 3: Additional Hardships for DEs and SWDEs

No.	Category	Non-DE or SWDE Employers	Additional Restrictions for DE or SWDE
1	Higher Wages	Firms must pay the greater of the <u>actual wage</u> paid to similar employees or the <u>prevailing wage</u>	DEs must pay at least 'Level-2' wages that are equal to the mean of all surveyed wages, raising the overall cost of employing H-1B workers
2	Non-displacement Restrictions	No non-displacement time restrictions unless they are displacing a public school teacher, a US worker at a federal, state or local govt. entity or filing the H-1B petition with intent to displace a specific US worker	DEs and SWDEs must demonstrate that no workers were displaced before and after the filing of H-1B applications
3	Recruitment Restrictions	Employers must use industry-wide recruitment standards	SWDEs compelled to offer the job to a US worker that is equally or better qualified
4	Outplacement Restrictions	Firms must pay a fee of \$500 for every worker that will be placed at a third-party site.	DEs prohibited from outplacing workers to client sites unless they are non-profit institutions of higher education, research organizations or healthcare business
5	Higher Filing Fees	Filing fees raised to \$1,250 for firms with 25 or fewer full-time employees and \$2,500 for firms with greater than 25 employees	Firms pay a higher fee of \$5,000 per application if portion of employees on H-1B and L-1 visas exceed 30% of the workforce
6	Mandatory Audits	DOL may conduct voluntary surveys of all employers	All DEs with greater than 100 employees will undergo a mandatory annual audit by the DOL

6.1 Evolution of the DE and SWDE Classifications

A compromise deal between Senators Schumer (D-NY) and Hatch (R-UT) in May, 2013 to gain the latter's support during the Senate Judiciary Committee's markup process was a crucial milestone in the evolution of these benchmarks as they stand today.⁶⁶

⁶⁶ Alexander Bolton and Jennifer Martinez, "Schumer and Hatch Strike Breakthrough Deal on H-1B Visas", *The Hill*, May 21, 2013. Available at: <http://thehill.com/homenews/senate/300989-schumer-and-hatch-strike-breakthrough-deal-on-h-1b-visas>

As an advocate of the technology industry, Sen. Hatch had held strong reservations against the industry-wide non-displacement and recruitment conditions proposed by the original draft of the bill. He echoed the opinion that these made the H-1B programme unworkable even as other provisions raised the annual ceiling to increase the availability of visas.⁶⁷ Industry representatives had feared that these provisions permitted far too much interference by the Labor Department in hiring decisions rather than relying on the employer's best judgment.

Amendments resulting from the deal (Hatch 10-17)⁶⁸ made several important changes to Title IV.⁶⁹ Two aspects particularly relevant to our current focus are:

1. The creation of the *skilled-worker dependent employer* category
2. A group of amendments to the non-displacement and recruitment restrictions previously intended to apply to all US employers so that they now applied only to employers who qualified as DE or SWDE

Although the deal did not entirely eliminate the non-displacement and recruitment conditions as part of the concessions for the tech industry, Sen. Hatch did succeed in raising the threshold for these restrictions to apply to DE employers.

However, the amendments also included the creation of the SWDE category, ostensibly to prevent dependent employers from diluting the ratio of H-1B workers in their workforce by hiring relatively low-skilled employees.

Together, these changes are especially relevant as together they tightened the visa dependency criterion, while adding additional gravity to the DE threshold.

6.2 Workforce Restructuring

Employers will devote serious efforts towards avoiding classification as either DE or SWDE in view of the adverse impacts on business costs and operations that ensue. This is a far greater imperative for firms which rely on the outplacement practice significantly in their business model. Falling under the ambit of the ban would require them to withdraw their workers from client locations in order to comply with the law, causing serious disruptions to ongoing projects and jeopardizing client relations and future business.

⁶⁷ Orrin G. Hatch, "Statement Before the Senate Committee on the Judiciary Executive Business Meeting", May 21, 2013. Available at: http://www.hatch.senate.gov/public/_cache/files/0c02a230-fd10-4d64-b051-b530fe66e6eb/Statement%20for%20immigration%20markup%205-21-13.pdf

⁶⁸ See: United States Senate Committee on the Judiciary, "S.744 Amendments", Hatch 10 – 17. Available at: <http://www.judiciary.senate.gov/legislation/immigration/amendments.cfm>

⁶⁹ For a summary of all changes made under these amendments, see: Federation for American Immigration Reform, "FAIR Summary of S. 744: Title IV—Reforms to Nonimmigrant Visa Programs; High Skilled Workers", May 29, 2013. Available at: http://www.fairus.org/DocServer/amnesty_2013_debate/FAIR_Summary_of_Gang-of-8_Nonimmigrant-Visa_Provisions._TitleIV_H-1B_6-6-13.pdf

For affected employers, all available options pertain to some form of workforce restructuring. This can be broadly divided into two groups of measures. The first pertains to hiring of additional US workers, possibly in combination with phasing out of some non-essential H-1B workers. The second pertains to other secondary strategies such as availing exemptions permitted under the language of the bill, retraining US workers or enlarging the US component of the workforce through acquisitions. Both these possible courses of action are discussed below.

Primary Course of Action – Enlarging the Proportion US Workers

For a firm faced with the possibility of being categorized as a DE or SWDE, recruitment of additional US workers would be the first and most attractive option with marginal variation depending on whether the firm classifies fundamentally as DE or SWDE. Firms that are SWDE, but do not qualify as DE, will focus on hiring skilled US workers that qualify under O*Net Job Zones 4 and 5. Firms that are DEs are highly likely to focus on both skilled and unskilled workers. However, due to a finite supply of US workers possessing appropriate skills and higher wage expectations in a tight market, the scope of this option as a solution is limited, especially for firms which require intensive restructuring to comply with the new requirements proposed by the bill and/or are faced with a relatively tighter labor market for skills specific to their industry.

Secondary Course of Action – Pursuit of Alternative Strategies

Firms that are unable to cover their requirements will consider a second course of action, which broadly entails any combination of:

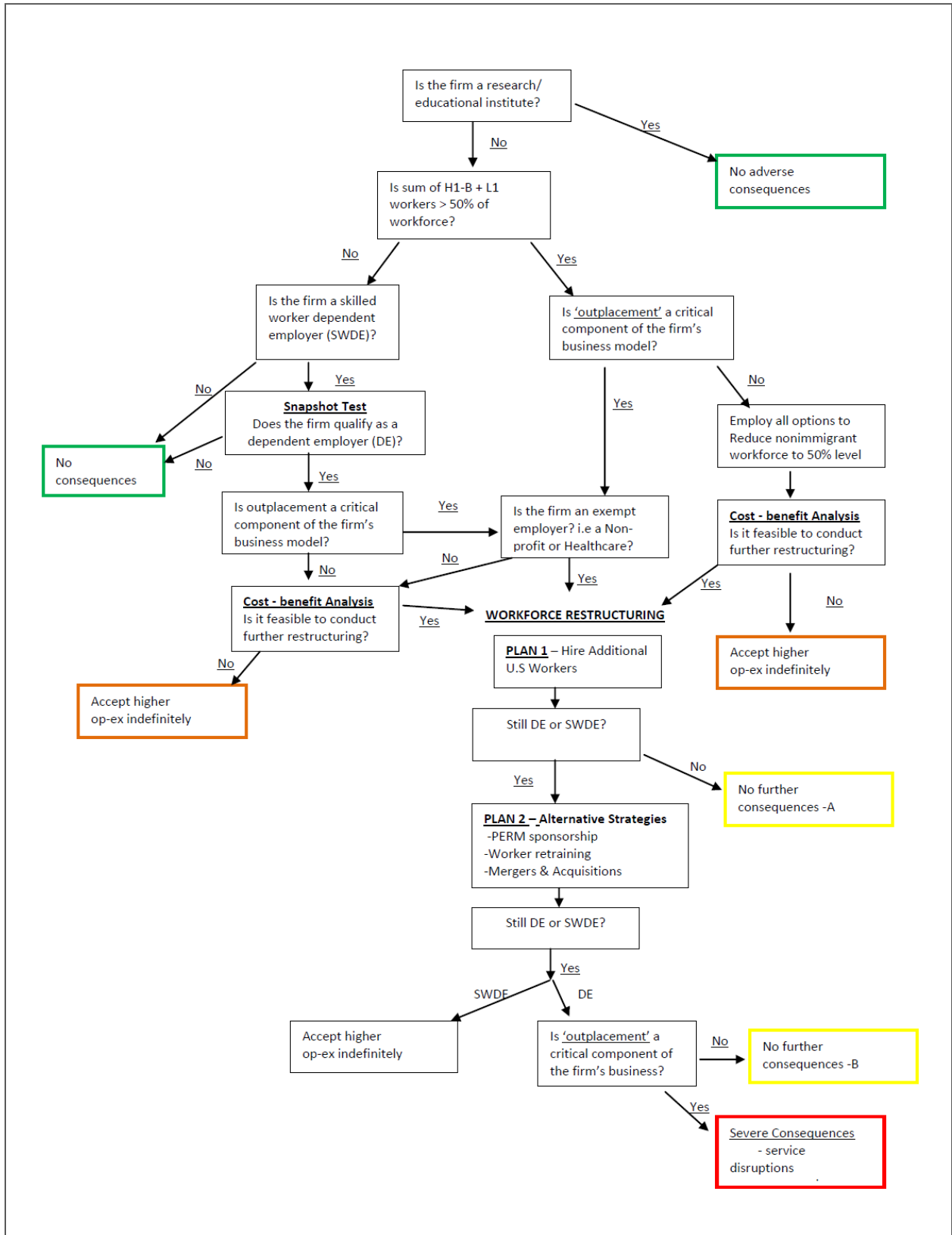
1. Intensive PERM sponsorship to avail the *covered employer* exemption
2. Implementation of retraining programs for US workers to meet their skill requirements
3. Strategic Mergers and Acquisitions of/with firms possessing large US workforces

For firms which do embark on this route, the preference among the three options would vary from case to case, based on firm-specific requirements. However, each of these options require substantial capital investments.

This will oblige individual firms to conduct an intensive cost-benefit analysis to determine whether embarking on this second course of action is even feasible in the short term, compared to the alternative of simply accepting the higher costs of business associated with the DE and SWDE classifications.

To better understand how various factors will impact firms and establish the outcomes, we have created a representative model (Figure 2).

Figure 2: How Businesses are impacted by the Provisions of S.744



The provisions consequently effect four distinct outcomes on employers of the H-1B programme:

1	No Consequences		
2	One-Time Capital Expenditure	Tier-1	Plan 1 Costs
		Tier-2	Plan 1 + Plan 2 Costs
3	Higher Op - Ex, Indefinite Timeframe	Tier-1	Accepted Higher Opex, No or Minimal Restructuring Costs
		Tier-2	Higher Opex Despite Restructuring Costs
4	Severe Consequences	Business disrupted, Revenue impacted severely	

The ultimate course of action and resulting outcomes will be determined by four broad considerations:

- 1. Existing workforce composition relative to the *dependent employer* threshold** This will determine the scope and intensity of restructuring required. Firms closer to the 15% margin will find it far easier to cope.
- 2. Market availability of suitable US workers**
This will determine the ease and cost of hiring US workers that meet the requirements of a firm's business to supplement or replace its H-1B workforce.
- 3. Relevance of 'outplacement' to the firm's business model**
Firms which rely on outplacement face far graver consequences of qualifying as DEs as a result of the ban on outplacement and have little option but to restructure. In contrast, firms which do not rely on outplacement may find it more feasible to accept higher costs and restrictions of the DE classification in the short term.
- 4. Capacity to pursue alternative strategies** (including training, green card sponsorship costs, merger and acquisitions)

The specific implications of these disparate outcomes, as well as the merits of the factors, are discussed in greater depth below.

6.3 Analyzing the adverse implications

There are likely to be several pitfalls and drawbacks that will create an unequal footing for employers in the US economy.

1. Bias against firms employing the outplacement practice

Outplacement practice is a key determinant for the severity of adverse outcomes for firms under the new rules proposed by S.744. Among firms that are unable to avoid the dependent classification with workforce restructuring, the impending ban on outplacement results in far graver consequences for firms that rely on this practice (such as disruption of business as well as loss of clients and revenue) as opposed to other firms which can expect higher operating costs and administrative burdens.

As the ban comes into force with immediate effect, firms that depend on outplacement do not have the luxury of accepting any alternative except a drastic reduction in their H-1B workforce down to 15% to ensure business continuity.

Ostensibly, the bill's architects have made the assumption that all firms that outplace workers but also have a high percentage of H-1B or L-1 workers are invariably abusing the H-1B visa programme by providing 'labor for hire' at lower wages. While this most visibly impacts the ITeS industry at the moment, with a worsening of the STEM deficit, additional industries who use the outplacement practice may also find themselves fall under the purview of this ban as they ramp up hiring of H-1Bs to supplement their workforces.

Further, the bill already includes several steps to eliminate the potential for fraud and abuse. These include more stringent wage laws that will make H-1Bs more expensive on average, additional non-displacement rules as well as safeguards against visa abuse and fraud that are intensified for 'dependent employers.' These are supplemented by the facilitation of greater oversight, tougher compliance requirements and the like. Collectively, these provisions are tightly drawn and make the hiring of H-1B workers not only tougher but also substantially more expensive (even discounting the higher visa fees), particularly for 'dependent employers.'

In the light of this series of measures that more than adequately dissuade frivolous hiring of H-1Bs in a manner that would potentially threaten the interest of the American workforce, the inclusion of the ban on outplacement is highly questionable.

2. The varying availability of specific skills

The market availability of US workers can vary significantly between specific skills and also by geography.

The availability of skill classifications within the broad STEM umbrella can vary greatly. In view of the prevailing unemployment rates, for instance, an offshore drilling firm setting up a new facility in early 2013 would have had a far easier time employing US – born ship engineers (with an unemployment rate of 15.8%) than say petroleum engineers who at an especially low

unemployment rate of 0.6% were already in extremely short supply in the domestic labour market.⁷⁰

This experience is magnified for businesses that require niche skills or ‘hot skills’ that see a sudden surge in demand when the industry experiences rapid success. For example, the success of the iPhone saw a surging demand for application developers familiar with Apple’s proprietary operating system. The ability to import labour is critical in such situations so as not to deflate the industry’s nascent success.

Further, the supply of specific skills is anything but uniform across the US and can vary significantly by region based on several factors such as demographics, quality of primary and high-school education, prevalence of universities etc. While availability of skills is an important consideration for businesses in choosing a location, they are also motivated by several other factors such as capital costs, tax rates, local wages, availability of raw material and the like. As a result, local mismatches can frequently occur between demand and availability, which can be magnified when very specific skill sets are taken into consideration. These are further compounded by immobility resulting from the labor’s inability or unwillingness to relocate. This is a particularly important factor in the US where the high rates of home ownership add binding ties that make it tougher for workers to relocate.

For example, as a result of the shale gas boom on the US Gulf Coast, Texas is expected to experience the second highest growth rate in the country for STEM jobs. However, the state also graduates a relatively lower number of students in STEM degrees.⁷¹

In a report from June, 2013, Fluor Corp, an engineering and construction conglomerate, was already experiencing serious challenges in finding appropriately skilled labour for its energy infrastructure construction projects in Texas.⁷² The report stated that the firm faced a pinch particularly in the supply of craft labor, such as welders, electricians and riggers which otherwise experienced some of the highest unemployment rates nationwide at 11.3% during the same

⁷⁰ “2012 Jobs Snapshot: Unemployment Rates by Occupation” Wall Street Journal, January 8, 2013. Available at: <http://online.wsj.com/news/articles/SB10001424127887323936804578229873392511426?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887323936804578229873392511426.html>

⁷¹ Courtni Kopeitz, Natalie Wall and Julia Taylor, “Supply and Demand Mismatch leaves STEM jobs unfilled”, STEMwire, October 3, 2012. Available at: <http://stemwire.org/2012/10/03/supply-demand-mismatch-leaves-stem-jobs-unfilled/>

⁷² Ben Kesling, “Fluor challenged by shortage of skilled labor amid US shale boom” *Hydrocarbon Processing*, June 25, 2013. <http://www.hydrocarbonprocessing.com/Article/3223288/Fluor-challenged-by-shortage-of-skilled-labor-amid-US-shale-boom.html>

period, according to statistics from BLS.⁷³ The firm's CEO added that they had experienced problems in getting workers to relocate on-site from as little as one state away.⁷⁴

In the light of an overall skill deficit, at times amplified by industry-specific requirements and localized deficiencies, the DE and SWDE classifications will create serious constraints to the ability of firms to hire the skilled-workers they need.

3. Giving conglomerates an edge over specialized firms

In the calculation for dependent and skilled-worker dependent employers, the bill relies on Section 414 of the Internal Revenue Service Code to determine a firm's total workforce in the US.⁷⁵ On this basis firms may count the workforces from other industry segments towards the calculation of their total workforce. This has adverse implications in this case as it allows diversified firms to count their American workers from unrelated, lower-skilled industries (which may not have such severe domestic workforce shortage issues) to leverage the workforce calculations for their more H-1B dependent practices.

Consider the example of two near identical firms A and B that provide expert geological analysis to the oil and natural gas industry. Outplacement to off-shore oil rigs is a key component of their business model. Both have a total workforce of 100, and 19 H-1Bs staffing some of their senior positions. Once the rules of S.744 are enforced, both can be ostensibly classified as Dependent Employers, thus disrupting the ability of some of their key H-1B staff to enter their clients' premises, besides hampering their ability to hire any additional H-1Bs should suitable US workers be unavailable.

However, firm B has a sister concern B2 that provides logistical support to offshore drilling rigs. B2 has 100 employees and 10 H-1Bs. As such, firm B's dependency will be calculated on the basis of the total H-1Bs and workforce of firms B+ B2.

Therefore, with 29 H-1Bs for a total workforce of 200, B and B2 both escape qualification under the Dependent Employer category.

However, while firm A is unable to send its key employees to clients and faces annual audits and so forth, Firm B, with an identical workplace breakout, escapes the additional restrictions.

⁷³ Bureau of Labor Statistics, "Labor Force Statistics from the Current Population Survey; Unemployed persons by industry, class of worker, and sex". Available at: <http://www.bls.gov/cps/cpsaat26.htm>. Accessed on March 7, 2014

⁷⁴ Ben Kesling, "Fluor challenged by shortage of skilled labor amid US shale boom" *Hydrocarbon Processing*, June 25, 2013. <http://www.hydrocarbonprocessing.com/Article/3223288/Fluor-challenged-by-shortage-of-skilled-labor-amid-US-shale-boom.html>

⁷⁵ See: Cornell University Law School, "26 U.S. Code § 414 - Definitions and special rules; Title 26 › Subtitle A › Chapter 1 › Subchapter D › Part I › Subpart B › § 414". Available at: <http://www.law.cornell.edu/uscode/text/26/414>

While this does not guarantee and advantage in evading the SWDE classification which pertains specifically to skilled workers, it will almost certainly benefit a firm toward avoiding the serious restrictions of the DE classification.

More importantly, it allows external, and unrelated factors to influence a market.

4. Disadvantaging firms with low capital availability

In a tight market for STEM skills, the pursuit of any of the three broad strategies (namely sponsoring additional PERM applications, retraining US workers or mergers and acquisitions) to reduce reliance on H-1B workers requires significant capital investments. Capital availability will be a key metric in determining a DE or SWDE's strategy and ability to reduce its workforce to acceptable levels. Therefore firms that are not profitable enough to undertake these costs are put at a distinct disadvantage as those that are more easily able to absorb these against their bottom line.

Other Concerns:

1. Adverse Impact of the SWDE classification on Small firms

Legislators recognized that the large majority of H-1B workers were of a higher skill level that under the O*Net descriptors, would fall under Job Zones 4 and 5, defined as ones requiring "considerable preparation" or "extensive preparation" respectively. As the DE definition relies on the number of H-1Bs as relative to the total workforce, lawmakers ostensibly feared that firms with large numbers of US workers in non-skilled positions could potentially continue to rely unduly on H-1Bs to staff skilled positions while evading the DE classification altogether. By further increasing scrutiny by a level to a firm's skilled-worker pool, the SWDE classification is intended to thwart such potential discrimination and ensure an additional level of protection for skilled American workers.

Broadly, the consequences associated with a SWDE are marginally lower than those that apply to a DE, in particular with regard to minimum wage norms and possibly outplacement.⁷⁶ However, the SWDE classification creates several more hurdles and carries the potential for adverse impact.

Foremost among these include the tremendous burden it places on all firms for calculating their dependency. The firms' human resource and legal departments would have to classify each and every employee according to O*Net standards, separate the skilled workers who qualify under Jobs Zones 4 and 5, and then calculate skilled worker dependency.

⁷⁶ The Senate bill's language under Section 421 OUTPLACEMENT.—Section 212(n)(1)(F) (8 U.S.C. 1182(n)(1)(F)) 1 explicitly bans outplacement for dependent employers, but does not specifically mention skilled worker dependent employers. This may be oversight, but has also been noted by other legal analysts. See: Gary Endelman and Cyrus D. Mehta: "Meet Our New Friend: Who is an "H-1B Skilled Worker Dependent Employer" in Senate Immigration Bill, S.744?"

Unlike the DE classification, which applies a graded standard with separate criteria for firms up to 25 employees, those with between 25 and 50 employees and ones with 51 or more employees, the SWDE allows for 15% H-1B employees regardless of number.

Table 4: Comparison of Restrictions for DE and SWDEs

Firm Size <i>By no. of full-time equivalent employees (FTEs)</i>	Dependent Employer (DE)		Skilled – Worker Dependent Employer (SWDE)	
	Rule for qualification as per S.744	Max H-1Bs allowed	Rule for qualification as per S.744	Max H-1Bs allowed
25 or fewer	At least 8 or more H-1B workers	7	15% or more of skilled workers (0 ^x Net zone 4 and 5) are H-1B workers	<u>Max - 3</u> 1 st at 7 th FTE 2 nd and 15 th FTE 3 rd and 21 st FTE
26 - 50	At least 13 or more H-1B worker	12		<u>Max- 7</u> 4 th at 27 th FTE 5 th at 34 th FTE 6 th at 41 st FTE 7 th at 47 th FTE
51 or more	15% of more of workforce composed of H-1B workers	7 upwards		7 upwards

Under a tight market for skilled labor, meeting the 15% benchmark poses a serious challenge for high-skill intensive firms across the board (which we address in the following sub-section). However, the marked difference between DE and SWDE standards at the lower numbers potentially puts smaller firms at a serious disadvantage. For example, consider a tech-startup firm with 24 full-time employees. The bill’s graded provisions under the DE criteria would allow the firm to hire as many as 8 H-1Bs before it would qualify as a DE. However under the blanket 15% criterion for a SWDE, the firm would only be allowed up to 3 skilled H-1B employees (provided all the remaining 21 employees were also skilled US workers) beyond which the bill’s more onerous restrictions on wages, recruitment or non-displacement would apply.

The implications would be particular severe for startups established after the bill comes into effect. The outright 15% clause would imply that:

- If any of the firm’s first six hires were H-1B skilled workers, it would qualify as an SWDE.

- In order to avoid qualifying as an SWDE, only the seventh of all skilled workers the firm hired could be an alien on an H-1B at a minimum.

These possible implications undermine the very principle of entrepreneurship and ‘attracting the best and brightest’ that the bill’s sponsors and the Obama administration have sought to advance.

2. Exemption for Covered Employers

Firms may find some consolation in the bill’s provisions for a ‘covered employer’, which exempts “intending immigrants”, defined as persons for whom an employer has initiated the green card process either through the Immigrant Petition for Alien Workers (Form I-140) or the Application to Register Permanent Residence or Adjust Status (I-485).⁷⁷ The bill directs that all such intending immigrants be counted as US workers in the calculation for determining whether an employer is a “dependent” employer.

To qualify for ‘covered employer’ status, according to the bill’s language, an employer must have sponsored at least 90 percent of its current employees who were beneficiaries of Labor Condition Applications in the year ending six months before the filing of an application or petition for which the number of intending immigrants is relevant.

That is to say, if an employer is filing a petition for an H-1B worker on April 10 2014, all approved labor status applications that were filed in the year ending six months prior i.e. October 10, 2012- October 10, 2013, would be relevant to this calculation. If the employer had obtained 200 approved LCAs during this one-year period, it should have sponsored 180 (90 percent) of them for green card status by April 10, 2014 to be considered a *covered employer*.

Legal experts have pointed out several drawbacks to this system:

1. The process of obtaining an LCA and further sponsoring them for permanent labor certification (PERM) comes with its own hardships.
 - a. The employer has to demonstrate that there were no minimally qualified US workers who applied for the job within a 60 day recruitment window, which is perhaps even more onerous than the condition for SWDEs which requires that no US workers were equally or better qualified.⁷⁸

⁷⁷ S.744 “Border Security, Economic Opportunity, and Immigration Modernization Act (Engrossed in Senate [Passed Senate])” Bill Text - The 13th Congress. Library of Congress. Available at: <http://thomas.loc.gov/cgi-bin/query/z?c113:S.744>:

⁷⁸ Gary Endelman and Cyrus D. Mehta: “Meet Our New Friend: Who is an “H-1B Skilled Worker Dependent Employer” in Senate Immigration Bill, S.744?”

- b.** The PERM certification involves substantial additional costs in terms of filing and legal fees. The overall and per-employee cost can certainly add up, particularly for firms already under the DE classification who may have to pay higher visa fees.
- 2.** The timeframe of the ‘look-back’ period with respect to the relevant application and the associated delays with the PERM process require firms to make a decision on sponsoring their H-1Bs rather quickly, approximately within 3 months of hiring so as to not adversely impact their ‘covered’ status. Most firms may choose to initiate the I-140 certification at the time of hiring. This largely eliminates the ability for firms to try out their employees before they make a permanent investment in them.
- 3.** The covered employer definition requires a labor-certification approval. This automatically precludes from the calculation any I-140 petitions that do not require a prior labor certification, i.e. for holders of advanced STEM degrees from US colleges, persons of extraordinary ability and outstanding researchers. Consequently, a firm gains no benefit in this calculation from hiring and sponsoring the very demographic that the bill seeks to encourage and has created several additional provisions to facilitate.

7. UNDERSTANDING THE DOWNSTREAM CONSEQUENCES:

7.1 *Domestic Consequences*

While IT firms and their clients have been among the most vocal opponents of the bill, there are adverse implications for the entire US private sector. These include:

Further Skill Shortages

In Chapter 3, we have extensively discussed how contemporary research strongly supports evidence of a labor market shortage of skilled workers, particularly in the STEM fields, in the US. That this gap will only grow in the near term is also inevitable. Demand for STEM skills is exploding, with STEM-based occupations growing nearly 20% in the decade leading up to 2018,⁷⁹ twice as fast as employments in any other occupations. Tech firms alone expect to add 650,000 new jobs in the US, with two thirds being in high-skilled positions.

Accounting for the burgeoning demand in other non-STEM fields, the US would have to increase its number of graduates anywhere from 20-30% to keep up. Data on educational trends, however, suggests that this is highly unlikely in the near term.⁸⁰ US per-capita graduation rates in STEM fields tend to be declining if at all, not to mention declining workforce participation from STEM-trained workers belonging to the baby-boomer generation as they continue to retire.

Enabling access for US firms to global talent pools to adjust for this demand is an imperative. The legislative response as seen in the Immigration Bill S.744 is a classic case of ‘one step forward and two steps backwards’ in this regard. Even as the bill raises the annual cap of H-1B visas, it is apparent that the plenitude of restrictions, conditions and resulting penalties serve to shackle the ability of firms to hire the skilled workers they need.

However, as we saw in our analysis, these restrictions serve as a barrier to market entry in any sector impacted by a skill shortage, which data has shown in large parts of the industry, extending beyond the traditional STEM-employers. These issues are further amplified due to locational labour-market mismatches. Data shows that a lot of future job growth in the US, especially that driven by the oil and natural gas industry, will likely come from areas where skills are not always in adequate supply.⁸¹ By placing an artificial cap on non-immigrant visa workers, the bill denies firms access to the workers they need to support this growth trajectory.

⁷⁹ Robert D. Atkinson and Merrilea Mayo, “Refueling the US Innovation Economy: Fresh Approaches to Science, Technology, Engineering and Mathematics (STEM) Education,” The Information Technology & Innovation Foundation, December 2010.

⁸⁰ Accenture Institute for High Performance, “Where Will All the STEM Talent Come From?” May 2012

⁸¹ Thomas Black and Shruti Singh, “Caterpillar’s Worker Hunt Means Welders Top Banking Pay” *Bloomberg BusinessWeek*, October 9, 2012. Available at:

Shackling the contribution of Startups

Perhaps even more concerning is the serious disadvantage that the bill's provisions place on startups. The measures preclude the market entry of small tech startups, by severely limiting their hiring choices in the early phases of growth. This poses a serious threat of undermining the very crux of US innovation and future success that the bill's sponsors are seeking to advance.

Stunting the Proliferation of the Remote Delivery Business Model

The emergence of the global or remote delivery business models, which are a fundamental part of the future business ecosystem, allows services-based businesses to break free of the geographic restrictions of having based in close proximity to the client. IT systems now permit this to be process to be broken up: while the bulk of a firm's workforce (the back-end) can be placed remotely to leverage locational advantages (such as lower wages and capital costs, or higher quality of living for its employees) and deliver the services, be it software, analytics or tax filings over the internet. However interfacing with a client company to fully understand its needs is still an integral component of this business model, and requires the temporary deployment of employees to the client site referred to as 'outplacing'.

Further, this practice is not the exclusive domain of offshoring firms alone. Within the US, rural locations provide distinct advantages in terms of costs for businesses. However, US firms have been largely hesitant to break their ties to urban centers, citing abundance of amenities and the advantages of agglomeration economies. The IT business has the potential to be transformative in loosening the traditional ties to geography, from enabling both IT in terms of proximity to potentially intensifying such localized labor-market mismatches.

Therefore, simply put, the proliferation of the IT sector is contingent upon the availability of adequate skills and ability to deploy this workforce as and where needed. The bills provisions put a hasty end to this nascent trend.

Devaluing the gains to the US Economy from the Indian ITeS Industry

The bill's targeting of Indian IT firms reflects a fundamental ignorance of the dynamics of the emerging IT-centric businesses, the contributions of this segment to the US firms or the adverse outcomes this could have on US economic. There are several issues with this approach.

First, there is no guarantee that the loss of the Indian IT firms will be their US competitor's gain. As a high percentage of Indian IT firms will likely qualify as DE or SWDE when the rule is enforced, the severe restrictions will selectively weed out several firms who are unable to make the adjustment to comply with the new law, particularly those that are less profitable and unable to make strategic acquisitions or finance retraining and PERM sponsorships. This 'thinning of the herd' within the IT services sector will have adverse outcomes for clients, not just from project disruptions but also due to reduced choice. The resulting seller's market would allow the

remaining ITeS providers to transfer increased costs of business to clients and possibly also result in an eventual deterioration in quality of services. Further, a survey conducted by HfS and Wells Fargo suggested that 24 percent of ITeS clients surveyed felt that it was either definite or highly likely that they would bring services back in-house if the measures of S.744 would come to pass. 55 percent of the respondents were unsure but would consider the option, while a mere 21 percent were definite they would not pursue this route.⁸²

Second, this deprives US firms of a competitive edge in an increasingly competitive globalized economy. Besides technical expertise and specialization, Indian IT firms provide U.S. firms the ability to leverage low-cost backend work, reducing overall cost and improving efficiency. Reports show that more firms from the US partner with Indian IT firms than any other nation to provide world-class services worldwide.⁸³ This is indeed a two-way technology and innovation driven partnership that was only set to grow pending the enforcement of the bill's measures. There is no question that US clients that rely on these India ITeS firms will take a hit on their bottom line.

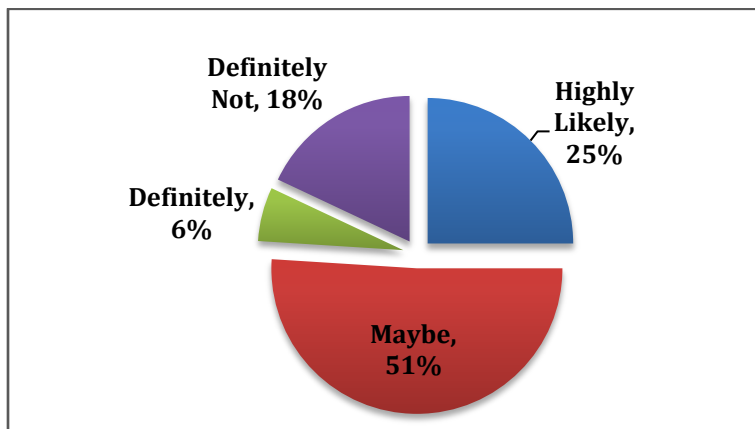
Third, even as they intend to increase the hiring of US workers, the restrictions in the bill are likely to result in a significant increase in off-shoring of jobs. A survey of ITeS clients found that 31 percent of respondents were highly likely or definite on the possibility of shifting a greater percentage of work offshore in response to the new rules.⁸⁴ Analysts at Gartner, a leading IT research and advisory firm in the US, further predict that firms may respond by offshoring as much as 90% of their work, up from the current industry average of 70%. Whether these jobs are originally held by Americans or foreign workers, it is far more beneficial to keep the jobs, along with the associated tax revenues, social security contributions and spending, within the US economy.

⁸² "Visa Reform: Much ado about nothing, or a nuclear threat to the Indian sourcing model?" Recorded Webinar hosted by HfS Research and Wells Fargo Securities. June, 2013. Available at: <https://www3.gotomeeting.com/register/605013382>

⁸³ Hemant K. Singh and Tincy S. Solomon, "BIT and Beyond: Advancing India-US Economic Relations", ICRIER, January 2013.

⁸⁴ "Visa Reform: Much ado about nothing, or a nuclear threat to the Indian sourcing model?" Recorded Webinar hosted by HfS Research and Wells Fargo Securities. June, 2013. Available at: <https://www3.gotomeeting.com/register/605013382>

Figure 3: Use of Offshoring in Response to S.744 - ITeS Clients



Source: HFS research and Wells Fargo Securities⁸⁵

Finally, this discounts the substantial contributions of the Indian IT industry to the US treasury and job growth. Within the US, it supports 300,000 jobs directly or indirectly and contributed over \$15 billion to the U.S. treasury in the past 5 years.⁸⁶ Their total investment in the U.S. economy as of FY 2011 was \$5 billion, and is likely to have grown in light of subsequent acquisitions.

While further sector-specific studies may be done, with the prevailing low unemployment rates and the low likelihood of US STEM graduates meeting demand, it can be surmised that the misplaced attempts to protect US workers only serve to exacerbate the adverse impact of the STEM shortage for US employers that the first segment of Title IV (the increase in visa caps) aims to achieve. They create barriers to entry for new firms and startups, and finally, in seeking to preclude the Indian IT services sector, may potentially diminish the overall competitiveness of the U.S. economy.

7.2 International Consequences

In crafting this legislation, US lawmakers have so far largely ignored the adverse foreign policy implications of the bill's provisions, according them, at best, marginal consideration after overriding domestic priorities. These measures, if enforced, along with the unfavorable outcomes that are likely to follow, will undermine the perception of the US as a desirable destination for foreign investment at the very least for the IT services sector.

⁸⁵ Ibid.

⁸⁶ Hemant K. Singh and Tincy S. Solomon, "BIT and Beyond: Advancing India-US Economic Relations", ICRIER, January 2013.

1. Impact on the Indian Economy

The Indian IT/ITES industry trade body NASSCOM has estimated that the bill may wipe out as much as a quarter of the industry's revenues in the US, which are currently estimated at \$45 billion, accounting for nearly 2.5% of India's GDP. A more conservative study by JP Morgan concluded that the bill, if passed in its current form, would cause a direct loss to India's IT sector of \$2.6 billion, but would cause the loss of approximately \$6 billion, or 0.4% of India's GDP, when downstream effects are factored in.⁸⁷

The importance that the Indian Government has accorded to the bill's adverse implications is evident from this issue being raised at bilateral meetings at the very highest levels. Following demarches made by Indian Commerce Minister Anand Sharma and Finance Minister P. Chidambaram with their counterparts, Prime Minister Manmohan Singh raised the issue with President Obama during their September 27, 2013 Summit meeting in Washington D.C.⁸⁸ He is said to have stressed that any restrictions on the movement of IT services will have an adverse impact on India.

Following this meeting, in his address to business leaders in New York later on the same day, the Indian Prime Minister warned that "the inability of IT companies to operate in the US market would not only affect our economy, but also the climate of opinion in India about the economic partnership with the US," while noting that India on its part had taken significant steps to address a number of tax-related concerns of US companies that have wholly-owned subsidiaries in India.⁸⁹

A punishing outcome for India's IT services industry is likely to invite an adverse response in India, undoing the recent progress made by the Indian government in addressing grievances of American businesses on issues ranging from tax policy to market access. As both the US and Indian governments look to revive economic growth, they can ill-afford the consequences of plunging economic relations into a gridlock and foregoing the mutual benefits of enhanced bilateral trade and investment.

2. Possible Infringement of US Commitments under GATS

As a member of the WTO, the US is bound by its commitments under the General Agreement on Trade in Services (GATS) that came into effect in January 1995. In addition to general obligations, the US chose to offer specific binding commitments with regard to the entry of

⁸⁷ Anirban Sen. "US Immigration Bill May Erode India's GDP By .4%." *LiveMint*, June 25, 2013, available at <http://www.livemint.com/Industry/T8a6cjcvm06z7vGU068RQN/US-immigration-Bill-may-erode-Indias-GDP-by-04.html>.

⁸⁸ "Prime Minister Manmohan Singh flags India's concerns over US immigration law changes" *Economic Times*, September 28, 2013
http://articles.economictimes.indiatimes.com/2013-09-28/news/42481611_1_immigration-laws-indian-it-concerns

⁸⁹ *Ibid.*

workers from other Member states under Mode 4, which guarantees both ease of entry (under applicable domestic law) and equitable competitive opportunity for these workers. Commitments in the US schedule relevant to the discussion specifically include:

- i.** Intra-corporate transfers of managers, executives and specialists for a period of up to 5 years (three years initially, with the possibility of a two-year extension);⁹⁰
- ii.** Assignment of Managers or executives engaged in establishing a commercial presence, with operations to begin within one year;⁹¹
- iii.** Entry of up to 65,000 persons annually (worldwide) who are engaged in “specialty occupations” as set out in 8 USC § 1101(a)(15)(H)(i). Entry is limited to three years and subject to compliance with labour certification requirements, including: (1) wages must be the greater of the actual wage paid by the employer to individuals with comparable qualifications, or the prevailing wage for the occupation; and (2) the employer must not have laid off or otherwise displaced workers in the subject occupation during the period 90 days prior to and 90 days following the filing of the visa petition.⁹²

The proposed provisions of Title IV of S.744 and its House companion bill HR. 15 may infringe upon specific US commitments in this regard and risk disputes and retaliation from other member states. A brief analysis of provisions of greatest concern is given in the table below.

⁹⁰ Jochum Shore & Trossevin, PC, “Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major US Trade Commitments” National Foundation for American Policy, June 2010
http://www.nfap.com/pdf/GATSLegalAnalysis_NFAPPolicyStudy_June2010.pdf

⁹¹ Ibid.

⁹² Ibid.

Table 5: Analysis of Potential GATS Violations in Title IV

Section	US Commitment under GATS	Potential Rationale for Violation
Wages	Wages for such temporary workers in "specialty occupations" to be the greater of the actual or prevailing wage	Proposed new wage benchmarks could potentially be higher (i.e., more restrictive) than both the actual and prevailing wage commitments made by the US under Article XX of GATS
Non-Displacement	Required certification of no layoffs or other displacements is to cover the period 90 days before and after the filing of the visa petition	By doubling the period from 90 to 180 days, the legislation would significantly increase the restriction on market access through H-1B visas, inconsistent with US commitments under Article XX of GATS
Outplacement	a. 90-day no-layoff commitment as above and b. General commitment to equitable market access	Violates layoff commitment as above and also US commitments to market access under Mode 3
Limitation on Percentage of H-1B and L-1 workers	Scheduled worldwide limitation of 65,000 on H-1B workers consistent with current US law	The 50/50 rule may be interpreted as an additional numerical limitation in excess of the US commitments under GATS
Restrictions on L-1 Personnel engaged in establishing a new office	Managers and executives and intra-corporate transferees provided initial entry of up to three years, with the possibility of a two-year extension with the onus of proving "the acquisition of physical premises for the entity that shall commence its business operations within one year of the date of entry of that person."	Certain criteria for granting and extending the L-1 visa, and the restriction on two or more L-1 visas in two years, are in excess of US commitments under GATS
Visa Fees	Members ensure that "all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner."	High visa fees, like a high tariff, could affect the provision of services through the presence of natural persons, in violation of Mode 4 commitments under Article XVI of GATS

It is clear that as it stands at present, S.744 is detrimental to US economic interests, whether in terms of addressing its skill shortage in critically important sectors, promoting entrepreneurship, creating a balanced investment climate, or in furthering ties with key US partners such as India.

To eliminate these adverse impacts, alternatives to the Senate Bill need serious consideration by the House of Representatives. The solution may lie with the House's very own bill on skilled visa reform known as H.R.2131.



8. ASSESSING THE ALTERNATIVE: H.R.2131 - THE SKILLS VISA ACT

Even as the Senate voted on S.744 in the late spring of 2013, the House of Representatives was working on its own parallel bill to address issues with skilled employment visas.

Introduced by House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) and House Judiciary Committee Chairman Bob Goodlatte (R-VA) before the House of Representatives on May 23, 2013, the SKILLS Visa Act, or H.R.2131, proposes to “spur job creation, economic growth, and American competitiveness by increasing and improving high-skilled immigration programs.”

The bill was passed by the House Judiciary Committee on June 28, 2013, a mere two days after S.744 was passed by the Senate. The bill has, however, lain dormant since, as Democratic members of the House subsequently introduced and are pursuing the passage of comprehensive immigration reform (H.R.15).

Like S.744, the SKILLS Visa Act addresses some of the salient issues with skilled immigration and visa programs, such as increasing the availability of skilled workers, improving enforcement of visa rules, and addressing immobility and backlogs.

Towards this end, H.R.2131 increases the annual cap for Green cards, while eliminating backlogs and allocating two new categories for aliens with advanced STEM degrees. Like the Senate bill, it raises the annual cap of H-1Bs, favouring a static level of 155,000 visas as opposed to an escalator system, while also increasing the number of exemptions for advanced STEM degrees to 40,000 annually. At the same time, it creates a provision that obligates a portion of visa fees collected towards STEM education and training programs for Americans. To enforce compliance with visa rules, it gives the DOL authority to conduct random audits and issue subpoenas, in addition to current investigatory powers.

H.R.2131 has received its share of criticism, particularly for its STEM-centrism, where most of the new sops are reserved exclusively for STEM-trained professionals.⁹³ The bill has also been called out for compromising on some forms of family-based immigration. For example, the bill eliminates the 65,000 green cards under the 4th preference category for siblings of US citizens, reallocating these to other categories.

However, the Skills Act particularly distinguishes itself from the Senate Bill S.744 in that it seeks to address the most pressing issues pertaining to skilled visa reform without prejudiced interventions such as the 50-50 workforce cap, ban on the outplacement practice, or other onerous restrictions on ‘dependent employers.’ As such, by avoiding the use of distinctions on

⁹³ Graduate Management Admission Council, “Summary of the Skills Visa Act (HR 2131)”. Available at: <http://www.gmac.com/about-us/government-outreach/skills-visa-act-hr-2131.aspx>

the basis of arbitrary benchmarks, H.R.2131 limits the scope for unequal outcomes for firms in the US market.

Significant of Provisions of H.R. 2131

- Increases Annual Number of Green Cards from 140,000 to 235,000 per year.
- Eliminates backlogs and country caps for employment-based green cards.
- Increases Annual H-1B cap to 155,000, plus an exemption for 40,000 holders of advanced STEM degrees.
- Creates three levels of prevailing wages that employers must pay H-1B and L-1 non-immigrants.
- Increases DOL authority for conducting random audits and issuing subpoenas.

Potential Concerns Expressed by Critics

- STEM-centric at the expense of graduates of other fields, as it provides additional green card quotas and exemptions reserved for STEM graduates and professionals.
- Compromises on some aspects of family-based immigration.
- Restricts opportunities for students under Optional Practical Training (OPT) by extending wage laws to OPT.

That there is room for improvement in the bill's provisions is undeniable, and if the bill should be progressed, it is inevitable that it may well undergo some changes. Nonetheless, H.R.2131 follows a more evenhanded approach to skilled visa reform from both business and international relations perspectives. In the coming months, if the House should choose a piecemeal approach to immigration reform, H.R.2131 provides a better foundation from which to carve out a balanced and effective legislation for skilled alien workers and their employers in the United States.

A detailed comparison between H.R.2131 and S.744 can be seen at Annexure 3 of this report.

9. CONCLUSIONS AND THE WAY FORWARD

9.1 Overall Impressions

The origins of Title IV of the Senate bill S.744 and its counterpart in the House H.R. 15 can in many ways be traced to the decline of the US as a global nuts and bolts manufacturing powerhouse, with the concurrent and growing prevalence of innovation and high-technology as the new hallmark of the US economy.

The increasing competition for STEM skills from non-traditional occupations has led to an overall shortage of STEM-trained workers to drive US innovation. At the same time, the increasing employment of skilled foreign talent to supplement the domestic workforce, while reaping tremendous rewards for the US, has presented a wide array of policy challenges. Foremost among these has been domestic concern about the system's propensity for misuse, leading to wage discrimination against the native workforce.

However, political compulsions and protectionist urges have yielded measures that are at cross-purposes with one-another. On one hand, the bill takes a stand on addressing the STEM shortage by expanding the annual cap of H-1B workers and substantially increasing avenues to lawful permanent residency for skilled STEM workers. On the other, the bill highly regulates access to this expanded pool of workers, raising both the number and intensity of restrictions on hiring H-1B workers by certain types of firms, Indian IT services firms in particular.

More specifically, the bill fails to ensure a uniform and universal impact across industries in the economy. A handful of loopholes and exceptions inserted in the bill's language to placate special interest lobbies undermine the bill's intent and contribute to its discriminatory character.

A discernible preoccupation with the purported abuses of the Indian IT services industry is where the bill's intent to address alleged misuse of the H-1B programme descends to protectionism. The outplacement clause, perhaps the bill's most exacting and narrow restriction, is targeted at a crucial Indian IT industry-specific practice which in fact optimizes efficiency and efficacy in the delivery of services to US clients. The bill's considerable safeguards against wage arbitrage and unbridled hiring of foreign nationals sufficiently eliminate the incentive for misuse. As such, the inclusion of such onerous restrictions is punitive and arguably unwarranted.

The bill's wage and fee provisions also add protectionist barriers by providing indigenous employers a significant cost advantage over Indian employers of non-immigrant workers.

The bill's provisions have significant international implications, first and foremost for India. Many of the leading firms within the global IT services industry also happen to be headquartered in India and form the backbone of the recent successes of the Indian economy. The bill's

measures effectively undermine one of the most promising of US partnerships, in terms of both strategic and economic value.

9.2 The Way Forward

The “Skills Visa Act”, or H.R.2131, being considered by the House prior to the introduction of the comprehensive immigration reform bill H.R. 15, presents a counterpoint to S.744. Even as it addresses several of the same pressing issues with regard to the H-1B cap, worker mobility, enforcement and oversight, the bill contains virtually none of the measures that are discriminatory or place an onerous burden on business, such as the outplacement clause, the DE and SWDE provisions, and visa fee hikes.

While the piecemeal bill’s perceived omission of some of the protectionist provisions may see resistance from some quarters, H.R.2131 presents a far better foundation to build upon and reconcile the objectives on skilled visa reform for both the House and Senate.

9.3 The current prospects of skilled visa reform in the U.S Congress

The impasse over the comprehensive immigration bill has carried into the New Year. Even so, despite the efforts of advocacy groups and the Indian government, Title IV remains one segment of the bill that has so far received little attention from either of the two US political parties. The US Administration and White House have shown a disinclination to act upon India’s requests to revisit aspects of the legislation, in view of the risks this would create for the “Path to Citizenship” measures which are part of the comprehensive bill.

Further, there is an evident lack of a constituency among US policymakers to address Indian concerns with the provisions of Title IV, even among members of the India Caucus in Congress. Of the 135 members of the India Caucus, 63 have not only supported the bill but have also co-sponsored H.R.15 in a measure of serious support.⁹⁴ According to House Democratic Leader Nancy Pelosi, so far 187 Congressmen are on board, including two Republicans, in the 435-member House. A further 28 Republican Congressmen have expressed their support for the path to citizenship provisions within the current bill.⁹⁵

In contrast, a small but growing number of US clients of Indian IT services companies as well as US firms with significant commercial interests in India, have urged US policymakers to consider changes to the bill as it advances in the House.

Going by current indications, Indian IT companies and the Indian government have an uphill task to ensure that their concerns regarding S.744 and H.R.15 will be addressed. Inattention to Indian concerns will have adverse consequences for India-US economic relations. India may

⁹⁴ Sirohi, Seema, “New US Law: Immigration Bill will decimate Indian IT companies” Economic Times, November 13, 2013 http://articles.economictimes.indiatimes.com/2013-11-13/news/44030944_1_h-1b-h1-b-india-caucus

⁹⁵ ibid.

well become less receptive towards the concerns of US business on trade and investment issues. After all, for all the regulatory constraints and difficulties of doing business in India which have recently been the subject of strong contestation by the US side, the Indian parliament has not passed legislation which creates discriminatory barriers against US companies operating in India.

ANNEXURES TO THE REPORT

Annexure 1: Understanding the Difference between the Dependent Employer (DE) and Skilled Dependent Employer (SWDE) classifications

According to the USCIS factsheet, an employer is considered H-1B-dependent if it has:

- 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; or
- 26 - 50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or
- 51 or more full-time equivalent employees of whom 15 percent or more are H-1B nonimmigrant workers

The Dependent Employer Classification therefore focuses on the number of H-1Bs as a proportion of a firm's total workforce (including both US and H-1B workers).

The new skilled-worker dependent employer classification is concerned only with the *skilled* portion of an employer's workforce, namely those that fit the definition of job zones 4 and 5 of O*Net. It seeks to ascertain the proportion of this skilled component of the workforce that is populated by H-1B workers.

As each tech-firm's workforce often includes a mix of lower-skilled or unskilled workers (mailroom workers, receptionists and so on), the skilled component is, in most cases, a subset of the firm's total workforce. At the same time, most H-1B workers in any STEM-associated business would classify under the job zones 4 and 5.

What the SWDE effectively does is dramatically lower the denominator in the dependency calculation (from total workforce to skilled workforce) while in most cases the numerator has little to no change (total H-1Bs to *skilled* H-1Bs).

Firms that have steered clear of the DE classification in the past, may suddenly find themselves falling under the ambit of the new SWDE classification, as the example below shows.

Example: The implications of the new *skilled-worker dependent employer* (SWDE) classification

A firm has a total of 10,000 full-time employees. Of these, 1,500 would be considered ‘skilled’ as per O*Net job zones 4 and 5. The firm has hired 600 H-1Bs at various high-skilled positions to supplement its workforce.

Total Workforce	10,000
<i>Skilled Employees*</i>	1,500
<i>H-1B Employees</i>	600

**Classifiable under O*Net job zones 4 and 5*

Ascertaining dependency

Dependent Employer:

H-1B dependency = Total H-1B Employees / Total full-time workforce

H-1B Dependency = 10,000/600 = 6%

Skilled-worker dependent employer:

=Total H-1B Employees/ Total Skilled employees

=600/1500 = 40%

As H-1Bs constitute a mere 6 percent of its total workforce, the firm is well clear of qualifying as a *dependent employer*. However, from the perspective of *skilled worker dependency*, the firm’s H-1B employees constitute 40% of its skilled workforce. As such, under the rules proposed by S.744, it would qualify as a ‘H-1B skilled worker dependent employer’ and be subject to additional hiring restrictions for additional H-1Bs.

Annexure 2: Enumerating the Costs of sponsoring an H-1B worker for PERM⁹⁶

According to a NFAP report, “in addition to paying the required wage, employers must pay legal and government fees for an H-1B that could reach \$9,540 for an initial petition and another \$9,540 for an extension, according to the American Council on International Personnel and Society for Human Resource Management.⁹⁷ The estimated cost to sponsor a foreign national all the way from an H-1B petition through the green card process for permanent residence could reach approximately \$50,000.”⁹⁸

Employer Cost for H-1B Visas	Amount
Attorney Fees	\$1,000 to \$3,000
Training and Scholarship Fee	\$1,500 (\$750 if fewer than 25 employees)
Anti-Fraud Fee	\$500
Application Fee	\$325
Consular Processing	\$190
Visa Fee	\$0 to 800 (based on reciprocity)
Premium process Fee	\$1,225 (optional)
Employers 50% of U.S. Workforce in H-1B/ L-1 Status	\$2,000
H-4 Dependent	\$740 to \$1,630
H-1B Extension (potentially all the same fees apply)	\$1,325 to \$9,540
Total H-1B Fees	\$2,575 to \$20,710
Total Cost to Sponsor Foreign national for Permanent Residence (Green Card)	\$8,300 to \$30,904 (not incl. family members)

Source: Stuart Anderson, “H-1Bs Essential to Attracting and retaining Talent in America”, National Foundation for American Policy, May 2013.

⁹⁶ As given in: Stuart Anderson, “H-1Bs Essential to Attracting and retaining Talent in America”, National Foundation for American Policy, May 2013. *Available at:*

<http://www.nfap.com/pdf/NFAP%20Policy%20Brief%20H-1B%20Visas%20May%202013.pdf>

⁹⁷ Ibid.

⁹⁸ Ibid.

Annexure 3: Comparison of S.744 and H.R.2131

COMPARISON OF BORDER SECURITY, ECOECONOMIC OPPORTUNITY, AND IMMIGRATION

MODERNIZATION ACT (S.744) AND SKILLS VISA ACT (H.R. 2131)

Annexure 3: Comparison of S.744 and H.R.2131⁹⁹

SELECT HIGH-SKILLED IMMIGRATION PROVISIONS			
<u>Provision</u>	<u>Current Law</u>	<u>Senate Bill - S.744</u>	<u>SKILLS Visa Act H.R. 2131 (introduced)</u>
Green Card Backlog (Employment)	<p>140,000 annual limit, which includes spouses and family members. Actual number of workers is approximately 65,000.</p> <p>Backlog is years for most employment-based green card applicants with employer sponsor who has tested local labor market; for example:</p> <p>Current EB3 backlogs are India 10½ years Rest of World 4½ years</p> <p>Current EB2 backlogs are China 4 years India 5½ years</p>	<p>Retains the 140,000 base, but reduces (or eliminates) the green card backlog through a number of exemptions, including:</p> <ul style="list-style-type: none"> • Exempting existing EB-1 immigrants from annual cap; • Exempting all PhDs from annual cap (not just STEM); • Exempting all advanced degree STEM holders from US universities; • Recapturing unused green cards from prior years (approx. 210k); • Exempting all family members of foreign workers; and • Eliminating the per-country limits. <p>Summary: This will reduce or, in many cases, eliminate the green card backlog for employment- based green card applicants. STEM graduates from US</p>	<p>Retains the 140,000 base. Creates a new visa category and allocates up to 55,000 additional green cards for:</p> <ul style="list-style-type: none"> • Graduates of US universities with PhD in STEM field; • Graduates of US universities with master’s degree in STEM field. <p>Allocates an additional 30,000 green cards evenly divided between (a) EB-2 (professionals with advanced degrees and persons with exceptional ability) and (b) EB-3 (professionals with a bachelor’s degree and others). Added at mark up: a set-a-side of 4,000 green cards for nurses.</p> <p>Eliminates the per-country limits for employment- based immigration.</p> <p>Summary: The legislation results in an increase</p>

⁹⁹ Adapted from analysis created by: US Chamber of Commerce: “Brief Summary of Certain High Skilled Green Card and Temporary Worker Program Reforms in the 113th Congress H.R. 2131 (House High Skilled bill) and S.744 High Skilled Provisions found in Title II (Green Cards) and Title IV (H-1B, L-1, F-1): Available at: http://immigration.uschamber.com/uploads/sites/400/summary_house_senate_high_skilled_comparison_table_8_5_2013.pdf

		universities will have a fast track to a green card.	of 85,000 employment based green cards per year. The legislation does not recapture any unused green cards from prior years. It is expected that green card backlogs will remain, particularly for EB-3 immigrants.
F-1 Student Dual Intent	Foreign students may not begin the green card process while in student status and must document intent to return home when beginning studies and whenever requesting updated student visa stamp.	Permits “dual intent” for foreign students so that an employer can start the green card process while the student is still in school or working pursuant to Optional Practical Training. This may allow certain graduates of US universities to avoid the H-1B visa category and move straight to a green card.	Permits “dual intent” for foreign students who are enrolled in course of study in a STEM field.
H-1B Cap Increase	Current H-1B base cap is 65,000 per year. Up to 20,000 US Master’s degree or higher (regardless of field) are exempt from the cap. Cap was hit in the first five days of FY 2014, and has been hit before the end of the fiscal year since FY1997 except FY2001-2003, when the cap was 195,000. H-1B workers at institutions of higher education or related or affiliated nonprofit entities, nonprofit research organizations or governmental research organizations are cap exempt.	Raises the H-1B cap by setting a new base of at least 115,000, which could adjust up to 180,000. If the cap is reached before the end of the first quarter of the fiscal year, additional visas (up to 20,000 depending on how early the cap is met) will be made available immediately, and the annual ceiling would be higher in the subsequent fiscal year. No increases to H-1B numerical limits can occur if national occupational unemployment in the “management, professional and related occupations” averaged > 4.5% in prior 12 months. In last 5 years, H-1B cap would not have risen in FY11, FY12, but would go up in FY10, FY13, FY14. Current Master’s degree exemption would be increased from 20,000 to 25,000 but limited to STEM grads.	Raises the H-1B annual limit to 155,000. The annual cap does not change from year to year. Increases the exemption for graduates of US universities with graduate degrees (Masters or above) to 40,000 for a total of 195,000 annually, but limits eligibility to STEM graduates.
H-1B Portability	No grace period under current law after ending H-1B	Creates a 60-day grace period for H-1B workers who lose their job to obtain H-	No provision in bill.

	employment.	1B status through another employer.	
Green Card Portability	A worker may change jobs or employers if the adjustment of status application (last stage) has been pending for at least 6 months.	Any employee who has an approved labor certification or immigrant petition may change jobs or employers without losing their place in line for a green card. Any employee with an approved immigrant visa petition may change jobs or employers without losing that eligibility, provided that the new job is in the same or a similar occupational classification.	Any employee who is the beneficiary of a labor certification, or an employment-based immigrant visa petition that was approvable when filed, shall retain his or her place in line (priority date).
Early Adjustment Filing	A worker may not file an adjustment of status application until the priority date is current.	A worker may file an adjustment of status application irrespective of whether a green card number is available (upon payment of \$500 fee). This ensures that if there is a green card backlog, an employee may file an adjustment of status application while waiting for the green card.	Provision added in mark up to allow worker to file adjustment of status application irrespective of whether a green card number is available (\$500 fee if visa number unavailable). Different language than Senate bill but is expected to cover most employment- authorized principals, and their dependents, filing for adjustment based on employment-based visa petition.
Wage Levels for H-1B Workers	4-tier wage levels based on job responsibilities and requirements for the position. The government publishes a wage survey that includes four tiers, ranging from entry-level up to fully competent. Level 1 wage is often at about the 15 th percentile of surveyed wages.	Collapses the current 4-tier wage level system into a new 3-tier system. <u>New Wage System:</u> Level 1 = mean of bottom 2/3 wages (but no less than 80 percent of Level 2) Level 2 = mean of all wages Level 3 = mean of top 2/3 of wages Dependent employers must pay the new Level 2 wage (mean wage for all workers in the classification), irrespective of the job responsibilities or requirements for the position.	Collapses the current 4-tier wage level system into a new 3-tier system. Also applies to TNs, F-1 students working on OPT (Optional Practical Training), and most L-1Bs (any L-1B in the US an aggregate period of 6 months over 24 months). <u>New Wage System:</u> Level 1 = mean of bottom 2/3 wages (but no less than 80 percent of Level 2) Level 2 = mean of all wages Level 3 = mean of top 2/3 of wages In mark up, the restrictions in the introduced bill were stricken that had limited level 1 wages solely to those hires who had earned a US degree

			<p>and had graduated less than 12 months before hire. In mark up, explicit access to private surveys was added, as an alternative to the 3 prevailing wage levels.</p> <p>In mark up, an exception to the prevailing wage requirement was passed that allows an employer to pay according to its internal wage scale in those circumstances where 80% of workers in the occupation in which the foreign H-1B, TN, F-1 OPT or L-1B worker is hired will be employed are American in the area of employment. In such a circumstance, the employer can pay the foreign worker in accordance with the “actual wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.” However, for any employer with more than 25 employees hiring an H-1B, TN or F-1 OPT hire, the “80% exception” explicitly requires that wages paid be no lower than the mean of the lowest one-half of wages surveyed (which is slightly higher than current level 1 wages but lower than current level 2 (new level 1) wages).</p>
Wage Levels for L-1 Transfers	Nothing in current law.	No provision in bill.	<p>Requires employer to pay L-1B workers the higher of the actual wage level or either a private wage survey wage level or the new three level prevailing wage system:</p> <p>Level 1 = mean of bottom 2/3 wages (but no less than 80 percent of Level 2) Level 2 = mean of all wages Level 3 = mean of top 2/3 of wages</p> <p>Obligations are triggered if employee will be in the US for a cumulative period in excess of 6</p>

			<p>months over a 3 year period.</p> <p>Employer may take into account currency in home country, employer-provided housing or allowance, transportation allowance, or other benefits as an incident of the assignment.</p> <p>Exception added in mark up if 80% of workers in the occupation in which L-1B will be employed are American in the area of employment, in which case the employer can pay according to its internal wage scale (“actual wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question”).</p>
Degree Evaluation	Nothing in current law.	No provision in bill.	Secretary of State shall verify the authenticity of any foreign degree.
Bona Fide Business	Nothing in current law.	No provision in bill.	<p>Requires H-1B employer to be licensed with any applicable State or local business licensing requirements.</p> <p>Requires H-1 employer to have gross assets of at least \$50,000.</p>
Subpoena Authority	Nothing in current law.	No provision in bill.	Secretary of Labor is authorized to issue subpoenas as may be necessary to ensure employer compliance.
B-1 in Lieu of H1B	Authorized by Department of State policy guidance (Foreign Affairs Manual).	No provision in bill.	Prohibits issuance of a B-1 visa if applicant will provide services in an H-1B specialty occupation.
Filing Fees for High Volume Users	If company has more than 50 employees in the US and more than 50 percent H-1B or L-1, employer is required to pay an additional \$2,250 for certain L-1 petitions and \$2000 for certain H-1B petitions.	<p>Eliminates the current level of “50/50” fees (imposed by PL 111-230, passed Aug 2010) and replaces with the following:</p> <ul style="list-style-type: none"> • For FY2015 through FY2024, company must pay additional \$5,000 per L-1 and H-1B application if more 	No provision in bill.

		<p>than 30 percent and less than 50 percent of company's employees are H-1B or L-1.</p> <ul style="list-style-type: none"> For FY2015 through FY2017, company must pay additional \$10,000 per L-1 and H-1B application if more than 50 percent and less than 75 percent of company's employees are H-1B or L-1. 	
50/50 Numerical Limitations	There are no numerical limits based on visa usage.	<p>If company employs more than 50 workers:</p> <ul style="list-style-type: none"> In FY2015, no more than 75 percent of the US workforce may be in H-1B or L-1 status. In FY2016, no more than 65 percent of the US workforce may be in H-1B or L-1 status. In FY2017, no more than 50 percent of the US workforce may be in H-1B or L-1 status. FY2017 and after, 50 percent limit on H-1B and L-1. 	No provision in bill.
Non-Displacement Attestation	<p>Nothing in current law for non-dependent companies.</p> <p>Dependent employer (more than 15 percent H-1B) must attest that it did not displace and will not displace an essentially equivalent US worker within the period 90 days before and after the filing of the petition. The employer does not have to attest if the H- 1B worker will be paid at least \$60,000 and/or has a master's or higher degree.</p>	<p>Every employer must attest that it is not:</p> <ul style="list-style-type: none"> displacing a public school teacher; displacing a US worker at a federal, state, or local government entity where the government entity directs and controls the work of the H-1B worker (excluding universities); filing the H-1B petition with the intent or purpose of displacing a specific US worker. <p>H-1B skilled worker dependent (more than 15 percent of skilled positions are filled by H-1B workers) must attest that that the employer did not displace and</p>	No provision in bill.

		<p>will not displace a US worker during period 90 days before or after the petition is filed.</p> <p>An employer that is dependent (with more than 15 percent H-1B workers in total) must attest that the employer did not and will not displace a US worker for 180 days before or after the petition is filed.</p>	
US Worker Recruiting Attestation	<p>Nothing in current law for non - dependent companies.</p> <p>Dependent employer (more than 15 percent H-1B) must attest that it has taken good faith steps to recruit and that it offered the job to any US worker who applied and was equally or better qualified. The employer does not have to attest if the H-1B worker will be paid at least \$60,000 and/or has a master's or higher degree.</p>	<p>All H-1B employers must document recruitment in the occupation using industry-wide standards, and all H-1B employers must advertise on the DOL Internet site for 30 days.</p> <p>Requires an employer that is an H-1B skilled-worker dependent (more than 15 percent of skilled positions are filled by H-1B workers) to attest that it offered the job to any US worker who applied and who was equally or better qualified for the job.</p> <p>Recruitment attestation applies at the time of initial hire and not for extensions of stay with the same employer.</p>	No provision in bill.
H-1B Third Party Placement (outplacement)	Nothing in current law.	<p>Every employer must pay a \$500 fee for each petition filed on behalf of an H-1B worker that will be placed at a third-party worksite.</p> <p>An H-1B dependent employer (more than 15 percent of the workforce composed of H-1B workers) may not place an H-1B worker at a third- party worksite.</p>	No provision in bill.
L-1 Third Party Placement	No restriction on placing an L-1 worker at a third-party site if the	Every employer must pay a \$500 fee for each	No provision in bill.

(outplacement)	employer will control and supervise the L-1 worker and the placement does not constitute labor for hire.	petition filed on behalf of an L-1 employee that will be placed at a third-party worksite. An L-1 dependent employer (more than 15 percent L-1) may not place an L-1 worker at a third party worksite.	
LCA Review	DOL may only review LCAs for “obvious errors or inaccuracies” DOL must certify LCA within 7 days.	LCA’s would be reviewed for completeness and “evidence of fraud or misrepresentation of material fact.” Bill would extend LCA processing time period from 7 to 14 days. However, and employer could proceed with an H-18 petition without waiting for LCA certification.	No provision in bill.
DOL Investigation Triggers	DOL may only investigate when: <ul style="list-style-type: none"> • There us a complaint from an aggrieved party • DOL receives specific, credible information from a reliable (i.e. known) source (other than DHS) • Secretary of DOL personally certifies that there is reasonable cause to believe employer is not in compliance. 	Removes most limitations on DOL’s ability to conduct an audit of an H- 1B employer. For example: <ul style="list-style-type: none"> • Allows DOL employee to be a “credible source,” which means that employees can initiate investigations. • USCIS Director shall provide information to the DOL regarding any information contained in the materials submitted by employers of H-1Bs as part of the adjudication process that indicates the employer is not complying with the law, and DOL may initiate an investigation based on receipt of that information. 	DOL may conduct random audits of H-1B or L-1 employers.
DOL Statue of Limitations	Complaint must be filed within 12 months of when the alleged violation occurred.	Complaint must be filed within 24 months of when alleged violation occurred.	No provision in bill.
DOL Fines for LCA Violations	Civil monetary penalties range from \$1,000 per violation, to \$35,000 per violation.	Doubles the existing fine structure fro most violations and clarifies that workers are entitled to pay back for any violations.	No provision in bill.
Mandatory DOL Audits	No mandatory DOL audits.	DOL may conduct voluntary surveys of all employers.	No provision in bill.

		DOL is required to conduct annual audits of any employer that has more than 100 employees, if more than 15 percent are H-1B or L-1 status.	
W-2 Submission	Nothing in current law.	An employer must file a W-2 individual wage report with USCIS on an H-1B employee's subsequent extension. Upon request from DHS, IRS and/or SSA may be asked to confirm whether the W-2 filed with USCIS matches the W-2 filed with IRS/SSA.	No provision in bill.
STEM Fee for Labor Certification or Immigrant Petition	Nothing in current law.	An employer would pay a \$1,000 fee with each labor certification, which shall go towards STEM education and training.	An employer would pay a \$1,000 fee with each labor certification, which shall go towards STEM education and training.
STEM Fee for H-1B and L-1 Petitions	No STEM-specific fund in current law.	An employer must pay a \$2,500 fee for each H-1B or L-1 petition, which shall go towards STEM education and training. This fee is reduced to \$1,250 for employers that have 25 or fewer employees.	An employer must pay a \$2,500 fee for each H-1B or L-1 petition, which shall go towards STEM education and training. This fee is reduced to \$1,250 for employers that have 25 or fewer employees.
Prohibition on H-1B/OPT Advertising	Nothing in current law.	An employer must not advertise that the position is only available to H-1B workers or that an individual who is in H-1B or OPT status will be given preference in the hiring process.	No provision in bill.
Disclosure of H-1B and L-1 Information	Annual report regarding country or origin, occupations, educational levels, and compensation paid to H-1B workers during prior fiscal year.	The Bureau of Immigration and Labor Market Research (in USCIS) will publish a report of both H and L information, including but not limited to: <ul style="list-style-type: none"> • A list of H-1B employers, the occupational classifications for the H-1B positions, and the number of H-1B workers the employer sponsors for a green card; • A list of all H-1B employers that are dependent, skilled-worker dependent, or subject to the 30 percent/50 percent fee; 	No provision in bill.

		<ul style="list-style-type: none"> • Gender breakdown by occupation and country of H-1B workers; • A list of employers with more than 15 percent of workers in L-1 status; and • Number of H-1B workers categorized by highest level of education. <p>The Bureau will survey employers on good faith recruitment and report on best practices and recommendations for recruiting steps that employers can take to maximize hiring American workers.</p>	
State Workforce Agency	Nothing in current law for H-1Bs. For green card sponsorship where Labor Certification is required, posting required on individual website of the state workforce agency of state where job site located.	For all H-1B positions (for which 30 day posting required on new DOL website), the Secretary of Labor shall facilitate the posting of the job on the internet website of the state labor or workforce agency where the position will be located.	For green card sponsorship where Labor Certification required, the Secretary of Labor shall facilitate the existing required posting at the state workforce agency on a single searchable DOL website.
<u>TECHNICAL AMENDMENTS</u>			
Dependent Employer Calculation	For purposes of identifying when H-1B dependent, exemptions for any H-1B with Masters or paid greater than \$60,000 (which includes a high percentage of H-1B workers).	When calculating H-1B or L-1 dependency, or whether an employer is subject to additional H-1B or L-1 fees, universities are excluded and foreign workers who are in the green card process (“intending immigrants”) are excluded from the calculation. However, an employer must file immigrant petitions for at least 90 percent of the workers who are the beneficiaries of approved DOL labor certifications. No exemptions based on salary or education level.	No change to definition of dependent employer.
H-1B Skilled Worker Dependent	Concept of “H-1B Skilled Worker Dependent” is not in current	More than 15 percent of total US workers who are in Job Zone 4 or 5 (O*NET) are in H-1B status. Employer may exclude	No change to definition of dependent employer.

	law.	<p>intending immigrants (see above) and universities are excluded altogether.</p> <p>Job Zone 4 (considerable preparation needed): most occupations require a bachelor's degree, with some exceptions. Position usually requires several years of experience. Examples include: accountants, sales managers, database administrators, teachers, chemists, and environmental engineers.</p> <p>Job Zone 5 (extensive preparation needed): most occupations require graduate degree or college degree and over 5 years experience. Examples include: librarians, lawyers, aerospace engineers, school psychologists, treasurers, and controllers.</p>	
US Workforce Calculation	Currently only applies to H-1B dependency.	Current law on H-1B dependency is applied to all related calculations: When calculating the total number of workers in the United States, all employees in any group treated as a single employer under section 414 of the Internal Revenue Code shall be counted.	No change to definition of dependent employer.
Effective Date		Clarifies that the new attestations and obligation regarding recruitment and non- displacement only apply to new hires and not existing employees.	New few obligations apply to labor condition applications and petitions filed after effective date, to workers issued visas or otherwise provided status after the effective date.

LIST OF ABBREVIATIONS:

BLS	Bureau of Labor Statistics
DE	Dependent Employer
DHS	Department of Homeland Security
DOL	Department of Labor
GAO	Government Accountability Office
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GOP	Grand Old Party (Republican)
IT	Information Technology
LCA	Labor Condition Application
OPT	Optional Practical Training
PERM	Program Electronic Review Management
R&D	Research and Development
STEM	Science, Technology, Engineering and Mathematics
SWDE	Skilled Worker Dependent Employer
USCIS	United States Citizenship and Immigration Services
WTO	World Trade Organization

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