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POLICY BRIEF

Labor Market Numerology: Arbitrary Congressional Limits on Temporary Worker Visas

by Benjamin Johnson*

The current numerical limits on visas for both high-skilled and seasonal workers prevent U.S. businesses from hiring the workers they need, while doing nothing to protect the jobs or wages of native workers. Labor rights are most effectively guaranteed by enforcing labor protections, not by imposing arbitrary numerical caps.

Less than halfway through the fiscal year, U.S. Citizenship and Immigration Services (USCIS) announced that the congressionally imposed annual caps on both H-1B visas for highly skilled foreign professionals and H-2B visas for non-agricultural seasonal workers had been reached.¹ The inadequacy of these caps calls into question the ability of Congress to predict years in advance the number of temporary workers that U.S. businesses legitimately will need on an annual basis. The current numerical caps on H-1B and H-2B visas – which are 65,000 and 66,000, respectively – were both set in 1990 as political compromises unrelated even to the labor-market projections of the time. Not surprisingly, they bear little relationship to economic reality 14 years later. Although these numerical limits may reflect political comfort levels, they do not respond to actual labor demand and do not safeguard the wages and jobs of American workers. Rather than periodically trying to guess what the “magic number” of temporary workers will be years from now, Congress should focus instead on vigorously enforcing the labor protections already included in temporary worker programs. These protections are explicitly designed to ensure that foreign workers, whatever their number, are a response to legitimate market demands and that their presence does not undermine the wages, working conditions, and employment opportunities of native workers. Imposing random limits on the number of foreign workers allowed to enter the country represents a kind of labor market numerology that has yet to accurately foresee the legitimate needs of U.S. companies and does nothing to protect against potential abuse of temporary worker programs.

The H-1B Program

Contrary to some recent media reports, most current H-1B visa holders do not work in high-technology occupations, such as computer programming, that have shed large numbers of jobs in recent years. According to data from the Bureau of Labor Statistics and the Department of Homeland Security’s Office of Immigration Statistics, as the number of high-tech jobs declined with the onset of the 2001 recession, so did the number of high-tech H-1B workers. Simultaneously, as job opportunities in education and healthcare continued to expand, so did the share of H-1B professionals working in those occupations.² This trend reinforces the conclusion of a report by the Immigration Policy Center, *The Global Battle for Talent and People*, that the demand for H-1B professionals rises and falls with economic conditions. As a result, arbitrary limits on H-1B visas serve only to prevent companies from hiring needed workers when business is good, while accomplishing nothing when business is slow.³

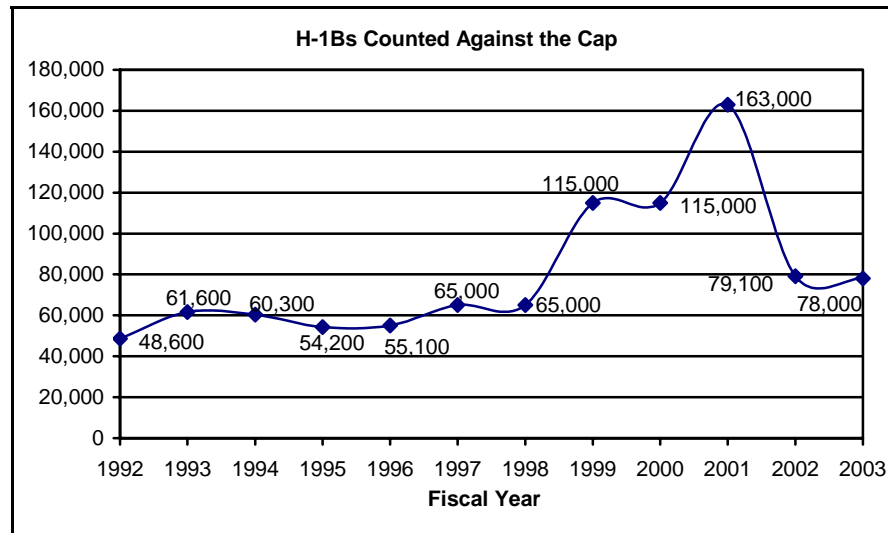
As the report discusses in detail, when Congress created the H-1B program in 1990 to respond to labor shortages and the need for specialty workers, the annual cap of 65,000 on the number of applications, though arbitrary, seemed more than sufficient. Indeed, demand for workers was low enough that the cap was not even reached during the first years of the program. But Congress didn’t anticipate the phenomenal growth of the high-tech sector during the 1990s. As a result, the growing demand for technology workers began to bump up against the arbitrary limits of the cap in Fiscal Year (FY) 1997. Congress responded belatedly by raising the H-1B cap to

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115,000 for FY 1999 and 2000, and 107,500 for FY 2001. But these caps also failed to anticipate the extent of U.S. economic growth and were reached well before the end of each fiscal year. Congress raised the cap again, to 195,000 for FY 2001, 2002, and 2003. However, due to the economic decline of the high-tech sector, demand for workers decreased and the cap was not met in any of those years. In FY 2004, the cap reverted to the original limit of 65,000, despite the fact that the technology sector remains a far larger part of the economy than in 1990, and even though the demand for many professionals outside of the high-tech sector has continued to grow.



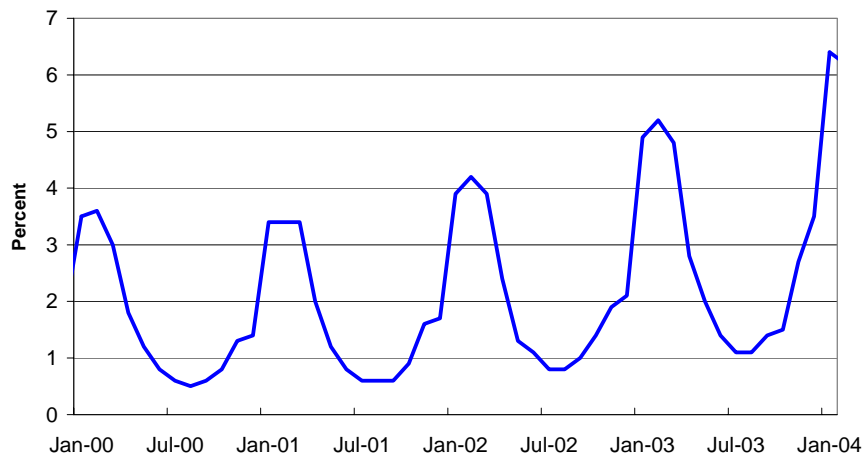
(Source: *The Global Battle for Talent and People*, Immigration Policy Focus (Vol. 2, Issue 2). Washington, DC: Immigration Policy Center, American Immigration Law Foundation, September 2003.)

The fluctuations in demand for H-1B professionals indicate that employers are not using the H-1B program to undercut native workers by hiring “cheaper” foreign workers during economic hard times. In fact, this is illegal. An employer wishing to fill a job with an H-1B professional must guarantee that the foreign worker will be paid either the “prevailing wage” for the job in that geographical area, or the wage the employer already pays employees for performing that kind of job, whichever is higher. The employer must also guarantee that hiring a foreign professional will not adversely affect the working conditions of U.S. colleagues. Employers who commit a willful violation of the rules are subject to three-year disbarment from employment immigration programs and a \$35,000 fine. Given these penalties, it is not surprising that few employers have abused the program. The Department of Labor determined that such violations had occurred in only 9 cases in 2001 and 7 cases in 2002.⁴

The H-2B Program

H-2B visa holders are made up of a diverse array of seasonal workers in resorts, hotels, restaurants, commercial fishing, summer camps, and minor league sports. It is difficult to quantify the demand for H-2B workers given that the jobs they fill are, by definition, not permanent or year-round, and are often concentrated in specific geographical areas such as resort and fishing towns. Therefore, average unemployment estimates by occupation or even by locale do not accurately reflect the demand for particular types of H-2B workers in specific areas at specific times of the year. For instance, data from the Bureau of Labor Statistics indicate that in the resort town of Nantucket, Massachusetts, unemployment rates over the last four years have fallen to around 1 percent or less during summer months and risen to between 3.4 and 6.4 percent in winter months. As a result, neither general unemployment figures for the occupations most common in resort towns, nor annual unemployment figures for Nantucket, capture the highly seasonal nature of labor demand in the local economy. Nevertheless, despite growing demand for H-2B workers over the past several years, Congress continues to impose an arbitrary cap of 66,000 that has remained unchanged since 1990.

**Nantucket, Massachusetts
Unemployment rate
January 2000-January 2004**



(Source: Bureau of Labor Statistics.)

As in the case of the H-1B program, this cap serves no purpose in terms of labor protection since it is illegal to use H-2B workers to undercut native workers. Under the H-2B program, employers wishing to hire a foreign worker must demonstrate that no U.S. workers are available for the position and that the employment of the foreign worker will not adversely affect the wage rate and working conditions of similarly employed native workers. In addition, the employer must demonstrate that the request for labor is a one-time occurrence, a seasonal need, a peak-load need, or an intermittent need. Therefore, the only function of the current numerical cap is to prevent employers from hiring workers for whom they have proven a legitimate need by successfully fulfilling the requirements of the H-2B process.

Focusing Effectively

The repeated failings of the annual caps imposed by Congress on temporary worker visas raise two important questions. Can Congress accurately predict how many foreign workers the U.S. economy will need years in advance? And, are random limits on the number of foreign workers who may enter the country each year necessary to protect the jobs and wages of native workers? The available evidence suggests that the answer to each of these questions is “No.” This, in turn, raises a third question. If Congress can not predict labor demand, and does not need to, then why is it trying? Common sense suggests that labor rights are most effectively guaranteed by crafting and enforcing labor protections, not by tinkering in an arbitrary fashion with the number of foreign workers allowed to enter the United States. However, in the case of the current limits imposed by Congress on temporary worker visas, common sense has not prevailed.

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Endnotes

¹ U.S. Department of Homeland Security, Press Office, “USCIS Announces New H-1B Procedures – Reaches Cap,” February 17, 2004; U.S. Department of Homeland Security, Press Office, “USCIS Announces New H-2B Procedures – Reaches Cap,” March 10, 2004.

² Office of Immigration Statistics, Department of Homeland Security, *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2002*, September 2003; Rachel Krantz, Marisa Di Natale & Thomas J. Krolik, “The U.S. labor market in 2003: signs of improvement by year’s end,” *Monthly Labor Review*, March 2004.

³ *The Global Battle for Talent and People*, Immigration Policy Focus (Vol. 2, Issue 2). Washington, DC: Immigration Policy Center, American Immigration Law Foundation, September 2003.

⁴ *ibid.*