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U.S. Visa Options and Strategies for the Information Technology Industry

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U.S. Visa Options and Strategies for the Information Technology Industry

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I. Introduction

The last two years saw rapid and dramatic changes in U.S. immigration and visa law, changes driven in large measure by the needs of the Information Technology (IT) industry. Until the recent economic downturn and events of September 11, the growth of the IT industry had resulted in a shortage of qualified workers in the United States for an ever-increasing number of new IT positions. Despite the recent economic downturn, the IT industry remains heavily dependent upon foreign labor, and will doubtless continue to be so in the future. For that reason, for an IT company to effectively compete, it must have the capability to tap foreign resources when necessary. Traditionally, non-immigrant business visas have provided the U.S. IT industry with a variety of methods of access to skilled foreign IT professionals. The H-1B visa,¹ the O-1 visa,² and the TN Category of the North American Free Trade Agreement (NAFTA)³ have been, and likely will continue to be,

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¹ Immigration and Nationality Act of 1952 § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2000) [hereinafter INA]. The INA is the primary federal law governing visas and immigration and has been amended numerous times since its creation in 1952. The Immigration and Naturalization Service [hereinafter INS] is responsible for promulgating regulations, which are found in Title 8 of the Code of Federal Regulations [hereinafter C.F.R.], and for enforcing the INA.

² INA § 101(a)(15)(o); 8 C.F.R. § 214.2(o).

³ North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296, 612 app.

the three principal vehicles for obtaining IT expertise from abroad.

Until recently, U.S. immigration law severely restricted American employers' access to large numbers of foreign workers. For example, the annual cap Congress places on the number of H-1B visas issued by the INS was so low that it thwarted IT employers' attempts to hire an adequate supply of IT workers.⁴ In part as a result of this pressure, on October 17, 2000, then President Clinton signed the American Competitiveness in the 21st Century Act of 2000 (AC21),⁵ which, among other things, raised the cap for H-1B visas (discussed below) and otherwise liberalized the rules regarding H-1B visas.⁶

This article illustrates the nexus between the IT industry and U.S. visa and immigration law. In particular, it is intended to assist both practitioners as well as those in the IT industry in understanding the opportunities, challenges, and strategies attendant to the various non-immigrant categories, and specifically how they relate to the IT industry. Part II describes the growth, evolution and present state of the IT industry.⁷ Part III provides an overview of the non-immigrant categories most often used in the IT industry as well as visa options and strategies for the IT industry.⁸ Part IV discusses the major provisions of AC21 and, in particular, its impact on the IT industry.⁹

II. Meeting the Visa Needs of the IT Industry

A. *The Growth of the IT Industry*

Since 1995, "IT has been a major factor in the productivity gains of the U.S. economy."¹⁰ During the year 2000, U.S.

1603.D.1 (entered into force on Jan. 1, 1994) [hereinafter NAFTA].

⁴ Julekha Dash & Patrick Thibodeau, *Election Politics Stall H-1B Hike*, COMPUTERWORLD, Sept. 11, 2000, at 95 [hereinafter *Election Politics*] (showing that the H-1B cap was reached every year from 1997–2000), available at http://www.computerworld.com/cwi/story/0,1199,NAV47_STO49916,00.html.

⁵ American Competitiveness in the 21st Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (codified in various sections of 8 U.S.C.) [hereinafter AC21].

⁶ *Id.*

⁷ See *infra* notes 10–71 and accompanying text.

⁸ See *infra* notes 72–162 and accompanying text.

⁹ See *infra* notes 163–97 and accompanying text.

¹⁰ Mitch Betts, *Washington Roundup*, COMPUTERWORLD, June 19, 2000, at 16,

spending on information and communications technology constituted almost nine percent of the Gross Domestic Product.¹¹ Several factors acted as catalysts for the growth of the IT industry. As new technologies developed, the need for specialized technical expertise generated substantial growth in the IT industry. IT has increased worker productivity, meaning employees work fewer hours to produce a given level of goods and services in the economy. Also, IT has reduced design costs through the use of computer modeling and reduced the need for businesses to carry excess inventory by providing timely information about customer demand.¹² As of April 2001, the total U.S. IT workforce was approximately 10.4 million.¹³

In 1998, the Bureau of Labor Statistics projected rapid rates of employment growth in IT occupations between 1996 and 2006.¹⁴ The IT occupations considered in the projection were database administrators, computer support specialists, and all other computer scientists, computer engineers, and systems analysts.¹⁵ Systems analysts were predicted to have the largest margin of net job growth at 520,000 new jobs between 1996 and 2006.¹⁶ Computer programmers were predicted to have the smallest net job growth at 129,000.¹⁷ The predicted growth figures for IT

available at http://www.computerworld.com/storyba/0,4125,NAV47_STO45970,00.html.

¹¹ Press Release, Information Technology Association of America, ITAA Praises Senate Passage of H-1B Bill (Oct. 3, 2000), at <http://www.ita.org/news/pr/chron.cfm> (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹² Betts, *supra* note 10, at 16.

¹³ Executive Summary, ITAA, When Can You Start? Building Better Information Technology Skills and Careers (April 2001), available at <http://www.ita.org/workforce/studies/01execsumm.htm>. For a discussion of the growth of the IT industry in 2000, see Patrick Thibodeau, *Despite Economy, H-1B Visa Record Set*, COMPUTERWORLD, Oct. 29, 2001, at 1, available at http://www.computerworld.com/storyba/0,4125,NAV47_STO65124,00.html.

¹⁴ The Editor's Desk, *Abundant Career Opportunities Projected in Information Technology*, MONTHLY LABOR REVIEW, Oct. 28, 1998, at <http://stats.bls.gov/opub/td/1998/oct/wk4/art03.htm> [hereinafter *BLS Employment Projections*] (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

occupations were much higher than the average projected growth for all occupations.¹⁸ Employment growth of computer programmers was predicted to increase more slowly than that of other computer professionals as a result of consolidation of systems and applications.¹⁹ Although the recent decline in the worldwide business cycle and global markets precipitated a slowdown in IT hiring and massive layoffs in many industries related to or servicing IT, the INS approved a record 138,000 petitions for H-1B visas by the end of July 2001.²⁰

B. IT "Specialty Occupations"—The Government's View

The rapid and continuous growth of the IT industry forces a constant evolution of occupational titles and job descriptions that both the government and industry use in describing, classifying, and regulating the industry. Businesses have expanded the use of Internet technologies, triggering an increased demand for skilled professionals to develop and support World Wide Web applications, applications that did not exist five years ago.²¹ Consequently, a study released by the ITAA in April 2000²² expanded the definition of IT to include areas such as web design and technical writing.²³ On the other hand, computer programmers are slowly losing their status as specialty IT workers.²⁴ User access to PCs has contributed to the devolution of the computer programmer because adept users take over many of the

¹⁸ *Id.* See also *The High Tech Worker Shortage and Immigration Policy: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Dr. Robert I. Lerman, Director, Human Resources Policy Center, Urban Institute and Professor of Economics, American University) [hereinafter *Lerman Statement*], available at <http://www.senate.gov/~judiciary/lerman.htm>.

¹⁹ *BLS Employment Projections*, *supra* note 14, ¶ 3.

²⁰ *Id.* ¶ 2.

²¹ *Id.*

²² Executive Summary, ITAA, *Bridging the Gap: Information Technology Skills for a New Millennium* (Apr. 10, 2001), <http://www.ita.org/workforce/studies/hw00execsumm.htm> [hereinafter *ITAA Study*] (on file with the North Carolina Journal of International Law and Commercial Regulation).

²³ Julekha Dash & Margaret Johnston, *Report: Half of IT Job Openings Will Go Unfilled This Year*, *COMPUTERWORLD*, April 11, 2000, at http://www.computerworld.com/cwi/story/0,1199,NAV47_STO43827,00.html (on file with the North Carolina Journal of International Law and Commercial Regulation).

²⁴ *Lerman Statement*, *supra* note 18.

programmers' traditional tasks by using spreadsheet and database programs.²⁵

How a particular position is categorized is of critical importance in assessing whether a particular job will meet the requirements for a particular type of visa. An IT employer in search of a visa for a foreign high-tech worker must consider the status of the IT occupation and whether it will qualify as a "specialty occupation" for the H-1B visa²⁶ or whether it appears on the list of occupations for TN status.²⁷ Generally, an "IT worker" is any individual engaged in IT-related work, predominantly information technology development and support activities.²⁸ However, a number of specific sub-sets fall within that broad category.

The definitive source on job classifications is the U.S. Department of Labor's *Dictionary of Occupational Titles* (DOT).²⁹ The DOT was last revised in 1991,³⁰ creating difficulties in fitting the fast-moving, real-world IT positions into the static framework of the DOT. Nevertheless, the DOT remains the principal text in classifying and categorizing particular jobs. The classifications for occupations in systems analysis and programming recognized by the DOT, and thus referenced by the INS in assessing eligibility for a particular visa, include the following: Software Engineer,³¹ Chief Computer Programmer,³² Systems Programmer,³³ Systems Analyst,³⁴ Computer Programmer,³⁵ Programmer-Analyst,³⁶ and

²⁵ *Id.*

²⁶ See *infra* notes 80–82 and accompanying text (discussing qualifications for the H-1B visa).

²⁷ See *infra* notes 125–33 and accompanying text (discussing the qualifications for TN status).

²⁸ ITAA Study, *supra* note 22.

²⁹ EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, 1 *DICTIONARY OF OCCUPATIONAL TITLES* (4th ed. 1991) [hereinafter DOT]. Section 030 of the DOT covers "Occupations in Systems Analysis and Programming." *Id.* at 43–44.

³⁰ *Id.*

³¹ *Id.* § 030.062-010, at 43.

³² *Id.* § 030.167-010, at 44.

³³ *Id.* § 030.162-022, at 44.

³⁴ *Id.* § 030.167-014, at 44.

³⁵ *Id.* § 030.162-010, at 44.

³⁶ *Id.* § 030.162-014, at 44.

Programmer, Engineering and Scientific.³⁷ Specifically, the DOT describes the jobs at issue as follows:

- Software Engineers and Chief Computer Programmers work with software or program design and development.³⁸
- Systems Programmers focus on the analysis of a computer's operating system and its capabilities.³⁹
- Systems Analysts work with an organization's entire computer system and use computer technology to meet the individual needs of an organization by studying business, scientific, or engineering data processing problems and designing new solutions using computers.⁴⁰
- Computer Programmers create and maintain computer programs using specifications developed by systems analysts.⁴¹
- Programmer-Analysts have greater responsibility for independent software design.⁴²
- Programmer, Engineering and Scientific requires extensive scientific or engineering knowledge.⁴³

Hardware engineering includes the most general descriptions of Electrical Engineer and Electronics Engineer, and narrower descriptions such as Controls Designer, Integrated Circuit Layout Designer, and Computer Systems Hardware Analyst.⁴⁴ Support analysis, administration, and network management includes the categories of User Support Analyst, Technical Support Specialist, Network Control Operator, and Supervisor, Network Control Operations, but all of these occupation descriptions seem to fall short of the real-world complexities that these positions can

³⁷ *Id.* § 030.162-018, at 44. *See also* AM. IMMIGRATION LAWYERS ASS'N, THE DAVID STANTON MANUAL ON LABOR CERTIFICATION 143-45 (Josie Gonzalez et al. eds., 2d ed. 1998) [hereinafter STANTON MANUAL] (describing in full the various IT-related job classifications and their treatment in the labor certification context).

³⁸ DOT, *supra* note 29, § 030.062-010, at 43.

³⁹ *Id.* §030.162-022, at 44.

⁴⁰ *Id.* §030.167-014, at 44.

⁴¹ *Id.* §030.162-010, at 44.

⁴² *Id.* §030.162-014, at 44.

⁴³ *Id.* §030.162-018, at 44.

⁴⁴ STANTON MANUAL, *supra* note 37, at 144.

involve.⁴⁵ Database Administrator and Database Design Analyst are used for computer occupations involving the layout and management of computer databases.⁴⁶

Finding the appropriate DOT classification for the particular IT job can be of critical importance, especially with respect to jobs (or individuals) that perhaps are on the margin in terms of their visa eligibility. It would be helpful to H-1B employers and immigration practitioners if the INS were more flexible with the parameters of exactly what constituted a “specialty” occupation for H-1B status, by assimilating new occupational titles generated by the IT industry into the occupational categories; however, the government has not traditionally been quick to respond to such real-world changes.

C. *The IT Industry’s Demand for Foreign Employees*

Given the current economic downturn, the future labor needs of the IT industry are uncertain. Nevertheless, given past trends, it is likely that whatever the rate of growth, the IT industry will generally remain heavily dependent upon foreign labor. A September 2000 article in *Computerworld* noted, “[t]he rapid proliferation of the Internet, the preponderance of fast-growing start-ups and the rush to build e-commerce arms for established businesses are quickly draining the available pool of information technology talent in the U.S.”⁴⁷ This dynamic is unlikely to change.

Smaller non-IT companies with fifty to ninety employees comprised the largest segment of the economy and needed one million IT workers in 2000, 70% of the total demand for all new IT employees.⁴⁸ Last year, the South had the largest number of IT workers overall.⁴⁹ The Midwest had the largest demand for IT employees, 35% of the total, while the West comprised 28% of the

⁴⁵ *Id.* at 144–45.

⁴⁶ DOT, *supra* note 29, § 030.062-010, at 43.

⁴⁷ Joanie Wexler, *Foreign Affairs*, COMPUTERWORLD, Sept. 11, 2000, available at http://www.computerworld.com/cwi/story/0,1199,NAV47_STO48990,00.html (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁴⁸ ITAA Study, *supra* note 22.

⁴⁹ *Id.*

total demand.⁵⁰ “Fifty percent of all jobs are in two positions that exist in almost every organization—technical support and network administration.”⁵¹ It is estimated that one-third of all new positions during 2001 would be technical support jobs, with employers in search of IT workers with skills in troubleshooting, customer service, hardware and software installation, and systems operation and maintenance.⁵² E-business and interactive media along with all web-related jobs account for 13% of all new IT positions.⁵³ Database development and software engineering represent 20% of all new IT positions.⁵⁴

D. The H-1B Visa: Workhorse of the IT Industry

The H-1B visa has been the principal vehicle for the IT industry to tap foreign labor.⁵⁵ The INS approved 81,262 H-1B non-immigrant petitions submitted during the first five months of Fiscal Year 2000, authorizing the workers named in the petitions to begin working during the period from October 1, 1999 to February 29, 2000.⁵⁶

In June 2000, the INS published a report that presented information on the characteristics of those specialty occupation workers who were approved for H-1B non-immigrant status during the first five months of 2000.⁵⁷ The report revealed a clear correlation between the H-1B visa and the IT industry, demonstrating the importance of the H-1B visa to IT employers.⁵⁸ Although the H-1B visa encompasses a range of specialty occupations, the most frequently used categories relate to the IT

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See U.S. IMMIGRATION AND NATURALIZATION SERVICE, CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H-1B): OCTOBER 1999 TO FEBRUARY 2000 (June 2000), <http://www.ins.gov/graphics/services/employerinfo/report2.pdf> [hereinafter SPECIALTY OCCUPATION WORKERS] (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁵⁶ *Id.* at 1.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2.

industry.⁵⁹ Nearly 54% (42,563) of the total H-1B petitions are computer-related occupations.⁶⁰ Architecture, Engineering, and Surveying (including computer and systems engineers), the second most frequent occupation group, account for more than 13% (10,385) of the total H-1B petitions.⁶¹ Aliens working as Systems Analysts or Programmers constitute more than 47% (37,686) of the approved H-1B petitioners (nearly 89% of the persons within the computer-related field work as Systems Analysts or Programmers).⁶² Approximately 56% of all H-1B workers hold the equivalent of a bachelor's degree and about 31% hold a master's degree.⁶³ According to the INS report, persons born in India comprised nearly 43% (34,381) of successful H-1B petitioners, far exceeding petitioners from China, the next leading country of origin.⁶⁴ Indians constituted approximately 37% (19,209) of the H-1B petitions subject to the cap, but 51% (15,172) of the H-1B petitions not subject to the cap.⁶⁵

The INS lists 102 companies with more than sixty INS-approved petitioners as the leading employers of H-1B workers.⁶⁶ These leading employers filed 13,940 petitions of the total 81,262 petitions approved during the first five months of Fiscal Year 2000.⁶⁷ IT companies claimed the majority of approved H-1B petitions.⁶⁸ Motorola led all employers with 618 H-1B visa petitions approved during the five-month period, followed by Oracle with 455 and Cisco Systems with 398.⁶⁹ Other major

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 3.

⁶² *Id.*

⁶³ *Id.* at 5.

⁶⁴ *Id.* at 2.

⁶⁵ *Id.*

⁶⁶ U.S. IMMIGRATION AND NATURALIZATION SERVICE, LEADING EMPLOYERS OF SPECIALTY OCCUPATION WORKERS (H-1B): OCTOBER 1999 TO FEBRUARY 2000 (June 2000), <http://www.ins.gov/graphics/services/employerinfo/h1top100.pdf> [hereinafter LEADING EMPLOYERS] (on file with the North Carolina Journal of International Law and Commercial Regulation).

⁶⁷ *Id.* at 2.

⁶⁸ SPECIALTY OCCUPATION WORKERS, *supra* note 55, at 2.

⁶⁹ LEADING EMPLOYERS, *supra* note 66, at 1.

corporations on the list include Intel (367), Microsoft (362), and Sun Microsystems (182).⁷⁰ Several IT user companies are on the list, including Merrill Lynch & Co. (87), Nationwide Insurance Co. (85), and The Goldman Sachs Group Inc. (75).⁷¹

III. Visa Options and Strategies for the IT Industry

A. *Non-Immigrant Versus Immigrant*

Practitioners and IT employers should be familiar with the key distinction between immigrant and non-immigrant visas. An immigrant visa entitles the holder to present himself to a U.S. immigration inspector for entry into the United States as a permanent resident.⁷² Admission as a permanent resident gives the individual the right to permanently reside in the United States as an immigrant, with almost all the rights of U.S. citizens (except for certain rights, such as the right to vote or serve on a jury).⁷³ An individual's status as a permanent resident is evidenced by the possession of an alien resident card commonly (and erroneously) referred to as the "green card."⁷⁴

A non-immigrant visa holder, by contrast, is an individual who is coming to the United States as a temporary visitor.⁷⁵ There are a variety of non-immigrant visa categories, each identified by a different letter (for example, the H-1B Specialized Worker Visa and the O-1 Extraordinary Worker Visa).⁷⁶ While permanent residents (i.e., immigrants) are allowed to remain in the United States permanently, non-immigrants are only admitted for a temporary amount of time and for a specific purpose, such as to work for a specific employer or to attend school.⁷⁷ The period of

⁷⁰ *Id.*

⁷¹ *Id.* at 2.

⁷² INA § 101(a)(16), 8 U.S.C. § 1101(a)(16) (2000).

⁷³ *Id.* § 101(a)(20), 8 U.S.C. § 1101(a)(20).

⁷⁴ "Immigrant" is defined as "every alien" except those listed within the various non-immigrant categories set forth in the statute. *Id.* § 101(a)(15) (Supp. IV 1998). The green card, which is no longer green, is also known as a Permanent Resident Card.

⁷⁵ See INA §§ 212, 214, 8 U.S.C. §§ 1182, 1184 (INA § 212 describes inadmissible aliens while INA § 214 describes the admission of non-immigrants).

⁷⁶ INA § 101(a)(15)(a)-(v), 8 U.S.C. § 101(a)(15)(a)-(v).

⁷⁷ INA § 214(a), 8 U.S.C. § 1184(a).

time and the purpose are particular to each visa. For example, the maximum amount of time an individual can remain in the United States with an H-1B visa is six years⁷⁸ (with one exception, discussed below in Section IV(B)(5)), while an O-1 visa holder can remain indefinitely.⁷⁹ The three principal non-immigrant business visas commonly used in the IT industry are the H-1B, O-1, and TN visas.

B. The H-1B Visa: Temporary Professional Workers

1. "Specialty" Occupations

The H-1B visa category allows a U.S. employer to hire certain foreign nationals in "specialty occupations."⁸⁰ A specialty occupation is one that requires "theoretical and practical application of a body of highly specialized knowledge" along with at least a bachelor's degree or its equivalent.⁸¹ For example, architecture, engineering, mathematics, accounting, and law are considered specialty occupations.⁸² The H-1B category is particularly useful for employing highly skilled foreign employees, especially in engineering, science, and technology related fields.

2. The Labor Condition Attestation

The H-1B visa is unique in that it requires pre-approval by the U.S. Department of Labor (DOL) before the INS will consider a visa petition. This pre-approval is known as the Labor Condition Application (LCA).⁸³ The LCA is a three-page form that contains attestations by the employer about the nature of the job to be held

⁷⁸ INA § 214(g)(4), 8 U.S.C. § 1184(g)(4).

⁷⁹ An O-1 visa holder initially receives a visa for a period of time "not to exceed 3 years." 8 C.F.R. § 214.2(o)(6)(iii) (2001). However, an O-1 visa holder may extend the visa indefinitely in "increments of up to one year," if the visa holder continues to extend and maintain O status through certain filings with the INS. § 241.2(o)(12)(ii).

⁸⁰ *Id.* § 214.2(h)(4)(i)(A). Specifically, the H-1B category is reserved for persons in specialty occupations, fashion models of distinguished merit and ability, or persons providing services related to Department of Defense cooperative research and development projects or co-production projects. *Id.*

⁸¹ *Id.* § 214.2(h)(4)(ii).

⁸² *Id.*

⁸³ INA § 212(n)(1), 8 U.S.C. § 1182(n)(1) (2001).

by the H-1B alien. The LCA requires the employer to attest: (1) that it will pay H-1B aliens prevailing wages or actual wages, whichever are greater, including a requirement to provide benefits on the same basis as they are provided to U.S. workers, (2) that it will provide working conditions that will not adversely affect the working conditions of U.S. workers similarly employed, (3) that there is no strike or lockout at the place of employment, (4) that it has publicly notified the bargaining representative or, if there is no bargaining representative, the company's employees, by posting at the place of employment or by electronic notification, and (5) that it will provide copies of the LCA to each H-1B non-immigrant employed under the LCA.⁸⁴ In addition, the employer must attest that it is not "H-1B dependent," generally meaning that the employer does not have a disproportionately high number of H-1B workers among its workforce.⁸⁵ Employers who are H-1B dependent must make additional attestations designed to protect U.S. workers.⁸⁶

3. *The H-1B Petition Process*

Once the LCA is certified by the U.S. Department of Labor, the U.S. employer must file an H-1B petition on INS Form I-129 (Petition for a Non-Immigrant Worker) with the INS Regional Service Center that has jurisdiction over the location where the foreign employee will be employed.⁸⁷ Petitioners should attempt to file the petition no more than six months and no less than forty-five days before the proposed employment will begin or the extension of stay is required.⁸⁸ If the petition is approved, it may be valid for a maximum initial period of three years.⁸⁹ An individual may generally not remain in the United States in H-1B

⁸⁴ Temporary Employment in the U.S. of Non-Immigrants Under H-1B Visas, 65 Fed. Reg. 80110, 80111 (Dec. 20, 2000) (to be codified at 20 C.F.R. pts. 655 and 656). On December 20, 2000, the Department of Labor [hereinafter DOL] published new regulations that dramatically changed the LCA Form (Forms ETA 9035 & ETA 9035CP). These DOL Interim Final H-1B Regulations (including DOL commentary) can also be found online at <http://www.access.gpo.gov>.

⁸⁵ *Id.* at 80112.

⁸⁶ *Id.* at 80110.

⁸⁷ 8 C.F.R. § 214.2(h)(2)(i)(A) (2001).

⁸⁸ *Id.* § 214.2(h)(9)(i)(B).

⁸⁹ INA § 214(k)(3), 8 U.S.C. § 1184(k)(3) (2001).

status for more than an aggregate period of six years.⁹⁰ A complete H-1B petition consists of Form I-129, H Supplement, approved LCA from the DOL, Form I-129W, a support letter from the company documenting the nature of the job and the employee's qualifications, filing fees, and supporting documentation.⁹¹

If the foreign employee is outside the United States, the foreign employee will apply for the H-1B visa at the appropriate U.S. consulate (except for Canadians, who are visa exempt).⁹² Foreign employees already in the United States, either in H-1B status for another employer or in another valid non-immigrant status, may apply for an extension⁹³ or change of their non-immigrant status.⁹⁴ The spouse and unmarried minor children of an H-1B beneficiary may be granted "H-4" visa status.⁹⁵ H-4 status entitles the family members to remain in the United States for the duration of the H-1B petition but does not authorize employment in the United States.⁹⁶

4. *Strategically Defining the "Specialty" Worker*

Given that qualification for the H-1B visa is predicated on the job being a "specialty" occupation, properly classifying and describing the position is of great importance. Employers attempting to obtain H-1B status for foreign computer systems analysts should be aware that the INS frequently refuses to consider computer programmers as H-1B specialty occupations.⁹⁷ Practitioners should avoid categorizing the H-1B beneficiary as a computer programmer in the individual's job description, work

⁹⁰ INA § 214(g)(4), 8 U.S.C. § 1184(g)(4).

⁹¹ INA § 214(k)(3), 8 U.S.C. § 1184(k)(3).

⁹² 22 C.F.R. § 41.2 (2001). Canadians are visa-exempt, unless they seek entry on an "E" visa. *Id.* § 41.2(m).

⁹³ 8 C.F.R. § 214.2(h)(15) (2001).

⁹⁴ *Id.* § 214.2(h)(2)(i)(D).

⁹⁵ *Id.* § 214.2(h)(9)(iv).

⁹⁶ *Id.* § 214.2(h)(9)(iv). The term "H-4" commonly refers to a visa issued to a spouse or unmarried child of an H-1B visa holder.

⁹⁷ A. James Vázquez-Azpiri, *Through the Eye of a Needle: Canadian Information Technology Professionals and the TN Category of NAFTA*, 77 INTERPRETER RELEASES 805, 813 (2000).

experience, or educational background. This aversion to computer programmers is peculiar to the INS; Canadian and Mexican authorities do not have the same problem with computer programmers in the TN category of NAFTA.⁹⁸ The INS has been reluctant to view computer programmers as professional employees because of concerns about the education of the programmers.⁹⁹ According to the *Occupational Outlook Handbook*, a source upon which the INS relies for determinative occupation information, the majority of computer programmers hold four-year degrees in computer science, but 41.3% of computer programmers in the United States do not hold baccalaureate degrees.¹⁰⁰ Generally, qualifying IT workers within the H-1B category is less difficult than qualifying for a TN or O-1 visa.¹⁰¹

C. The O-1 Visa: "Extraordinary Ability"

1. Who Qualifies?

The O-1 visa is available to aliens with "extraordinary ability," as demonstrated by sustained national or international acclaim in the "sciences, arts, education, business, or athletics."¹⁰² In order to prove to the INS that the alien has such "extraordinary ability," the INS requires certain specific categories of information which demonstrate that the applicant is one of a small percentage who have risen to the very top of his or her field.

To qualify for O status, the petitioner must demonstrate that the beneficiary has exhibited sustained national or international acclaim for achievements in his or her field of expertise.¹⁰³ Specifically, the alien must show that he or she has received a "major, internationally recognized award, such as the Nobel Prize."¹⁰⁴ In the event this (admittedly difficult) evidentiary

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BULLETIN 2520, OCCUPATIONAL OUTLOOK HANDBOOK 115 (2000).

¹⁰¹ See *infra* notes 121–22, 143–44 and accompanying text.

¹⁰² 8 C.F.R. § 214.2(o)(1)(ii)(A)(1) (2001).

¹⁰³ *Id.* § 214.2(o)(3).

¹⁰⁴ *Id.* § 214.2(o)(3)(iii)(A).

threshold is impossible to reach, the alien must show at least three of the following forms of documentation:

- Evidence of a nationally or internationally recognized prize or award for excellence in the alien's field of endeavor;¹⁰⁵
- Evidence of the alien's membership in an association in his or her field of expertise which requires outstanding achievements of its members;¹⁰⁶
- Published material in professional or major trade publications or major media about the alien, concerning the alien's work in his or her field;¹⁰⁷
- Evidence of the alien's participation on a panel, or individually, as a judge of others in his or her field;¹⁰⁸
- Evidence of scientific, scholarly, or business related contributions of the alien of major significance in his or her field;¹⁰⁹
- Evidence of authorship of scholarly articles in the alien's field which have been published in professional journals or other major media or the display of artistic work in exhibitions or showcases;¹¹⁰
- Evidence of employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation;¹¹¹
- Evidence of a high salary or other remuneration commanded by the alien or evidence of commercial successes in the performing arts;¹¹² or
- Other comparable evidence that does not fit exactly into one of the categories listed above.¹¹³

¹⁰⁵ *Id.* § 214.2(o)(3)(iii)(B)(1).

¹⁰⁶ *Id.* § 214.2(o)(3)(iii)(B)(2).

¹⁰⁷ *Id.* § 214.2(o)(3)(iii)(B)(3).

¹⁰⁸ *Id.* § 214.2(o)(3)(iii)(B)(4).

¹⁰⁹ *Id.* § 214.2(o)(3)(iii)(B)(5).

¹¹⁰ *Id.* § 214.2(o)(3)(iii)(B)(6).

¹¹¹ *Id.* § 214.2(o)(3)(iii)(B)(7).

¹¹² *Id.* § 214.2(o)(3)(iii)(B)(8).

¹¹³ *Id.* § 214.2(o)(3)(iii)(C).

2. *The O-1 Petition Process*

The alien must seek entry to work in his/her area of expertise.¹¹⁴ An O-1 petition may be approved for an initial period of three years, and extensions may be granted in one-year increments.¹¹⁵ The accompanying spouse and children of an O-1 visa holder qualify for non-immigrant O-3 visa status.¹¹⁶ O-3 visas are valid for the period of time specified by the INS, which as a practical matter is usually the duration of the status of the principal beneficiary.¹¹⁷ Family members may not engage in employment in the United States while in dependent non-immigrant visa status.¹¹⁸

3. *Making the IT Worker "extraordinary"*

IT employers disenchanted by the H-1B process and in search of an alternative visa solution often look to the O-1 visa for certain aliens who arguably have extraordinary ability. Many high-end IT professionals (in the computational intelligence field, for example) have numerous publications to their credit, serve on academic or similar boards of peer review, or have other credits that will make the O-1 category feasible. A study released by the ITAA in April 2000 expanded the definition of IT worker to include web design and technical writing.¹¹⁹ The possible inclusion of web design or a similarly artistic occupation as a type of IT job position may open the door to possible O-1 visa status. Even where an alien will not be a clear-cut candidate for O-1 status, creative lawyering can sometimes create an "extraordinary" IT worker. For example, a web designer could achieve national or international acclaim for designing a website or graphic and thus arguably qualify for O-1 status, or a technical writer may receive national recognition in the field of science or education and therefore might qualify for O-1 status as an author.¹²⁰ O-1 petitions are complicated, however, and should be used with caution and only where the credentials of the

¹¹⁴ *Id.* § 214.2(o)(6)(iii).

¹¹⁵ *Id.* § 214.2(o).

¹¹⁶ *Id.* § 214.2(o)(6)(iv).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ ITAA Study, *supra* note 22.

¹²⁰ *Id.*

applicant are so strong as to warrant a plausible O-1 petition.

D. *The TN Category of NAFTA*

1. *Who Qualifies?*

The Trade NAFTA (TN) category of the North American Free Trade Agreement (NAFTA) “permits the temporary entry of professional citizens of one NAFTA state party into the territory of another.”¹²¹ The United States, Canada, and Mexico comprise the state parties to NAFTA.¹²² Specifically, each state party must permit the temporary entry of “a business person seeking to engage in a business activity at a professional level in a profession set out in Appendix 1603.D.1. [of NAFTA].”¹²³ The TN category is the method used most often by Canadian IT professionals to obtain employment in the United States.¹²⁴

2. *The Process for Entry in the TN Category*

An exclusive list of sixty-three professions with corresponding minimum educational credentials and alternative experiential requirements appears in Appendix 1603.D.1 of NAFTA.¹²⁵ For entry in the TN category, a citizen of either Canada or Mexico must be coming to the United States to work “in” one of the sixty-three professions enumerated in the Schedule to NAFTA.¹²⁶ A person attempting to enter the United States to work in an unlisted profession may not enter in TN status, despite INS recognition of his or her job as a profession or a specialty occupation in the context of a different non-immigrant status.¹²⁷

Unlike the H-1B and O-1 visa categories, an applicant for TN status “need not file, and obtain approval of, a non-immigrant petition with an INS Service Center before entering the [United States].”¹²⁸ Processing of an application takes place upon

¹²¹ Vázquez-Azpiri, *supra* note 97, at 809.

¹²² NAFTA, *supra* note 3, 32 I.L.M. at 297.

¹²³ *Id.* at 809.

¹²⁴ Vázquez-Azpiri, *supra* note 97, at 806.

¹²⁵ NAFTA, *supra* note 3, app. 1603.D.1, 32 I.L.M. at 668–70.

¹²⁶ Vázquez-Azpiri, *supra* note 97, at 809.

¹²⁷ *Id.*

¹²⁸ *Id.*

presentation of the application by the applicant at a port of entry or pre-flight inspection station.¹²⁹ Canadian TN applicants are not required to file a Labor Condition Application (LCA) with the Department of Labor; however, Mexican nationals entering the United States in TN status must obtain approval of an LCA, which is similar to the H-1B LCA process.¹³⁰ Unlike the H-1B visa, the TN category does not impose a maximum period of stay.¹³¹ A professional may hold TN status indefinitely.¹³² There is also no fiscal year limitation on the number of Canadian nationals who may be admitted in the TN category; however, a limit of 5,500 is imposed on Mexican citizens entering under the TN category.¹³³

3. *TN Versus H-1B: Advantages and Disadvantages*

The TN category resembles the H-1B visa in that both categories pertain to the admission of persons of professional standing who will perform professional-level work. Upon closer examination, the advantages of the TN category appear to create a “preferential” status guaranteed by NAFTA.¹³⁴ For practitioners, the TN category has certain major advantages to the H-1B:

- **Speed.** Processing for the TN category application generally takes no longer than three hours at a port of entry or pre-flight inspection station.¹³⁵ By contrast, H-1B petition processing times can take ninety days or more at some Service Centers.¹³⁶
- **Cost.** Filing fees for TN applications are currently only \$50.¹³⁷ As of December 31, 2001, aggregate filing fees

¹²⁹ 8 C.F.R. § 214.6(e)(2) (2001). The regulations provide that U.S. Class A ports of entry, U.S. airports handling international traffic, and U.S. pre-clearance/pre-flight stations may accept TN applications for admission. *Id.*

¹³⁰ Vázquez-Azpiri, *supra* note 97, at 809–10. *See* 8 C.F.R. § 214.6(d)(2)(i).

¹³¹ Vázquez-Azpiri, *supra* note 97, at 810.

¹³² *Id.*

¹³³ 8 C.F.R. § 214.6(d)(7)(i); Vázquez-Azpiri, *supra* note 97, at 810.

¹³⁴ Vázquez-Azpiri, *supra* note 97, at 809.

¹³⁵ *Id.* at 809–10.

¹³⁶ *Id.* at 810.

¹³⁷ 8 C.F.R. § 103.7(b)(1) (2001). On Dec. 21, 2001, the INS imposed a new filing fee structure, to take effect on Feb. 19, 2002. INS, List of INS Application and Petition Fee Increases, at <http://www.ins.usdoj.gov/graphics/formsfee/feechart.htm> (last modified Jan. 14, 2002) (on file with the North Carolina Journal of International Law and

for H-1B applications are \$1,110.¹³⁸ Because TN applications require less paperwork and time to prepare than H-1B petitions, legal fees for TN matters are generally less as well.

- No LCA Requirement. The H-1B, unlike the TN category for Canadian nationals, requires the approval of a Labor Condition Application and imposes a maximum stay of six years.¹³⁹
- No “Cap.” Another advantage for the Canadian national obtaining TN status is the absence of a limitation on the number of Canadian nationals who may be admitted in the course of a fiscal year.¹⁴⁰ The H-1B cap for each fiscal year has historically thwarted the attempts of IT employers to select talented professionals from foreign markets. Reaching the cap each year became commonplace as the American economy grew, leaving both IT professionals and IT employers scrambling to fill the gap between supply and demand.¹⁴¹

For these reasons, the IT industry has an understandable preference for Canadian IT professionals entering in TN status (as opposed to H-1B status) because the process of obtaining visas for employees is much less time consuming and expensive.¹⁴²

One disadvantage of the TN category is the strict requirement that a person must be working in one of sixty-three enumerated professions.¹⁴³ Officials at the ports of entry regularly reject TN applicants who do not fit within the list.¹⁴⁴ As a result, IT professionals presently encounter great difficulty when seeking

Commercial Regulation).

¹³⁸ INA § 214(c)(9), 8 U.S.C. § 1184(c)(9) (2000); 8 C.F.R. §§ 103.7, 214.6(f) (2001). For a chart of the various INS filing fees, see 8 C.F.R. § 103.7 (2001).

¹³⁹ INA §§ 212(n)(1), 214(g)(4), 8 U.S.C. §§ 1182(n)(1), 1184(c)(9) (2000); Vázquez-Azpíri, *supra* note 97, at 810. Certain extensions are now available under H-1B. See discussion *infra* Part IV(B).

¹⁴⁰ Vázquez-Azpíri, *supra* note 97, at 810.

¹⁴¹ *Id.*

¹⁴² *Id.* at 806, 809–10.

¹⁴³ *Id.* at 819.

¹⁴⁴ See *id.* at 819 (stating that “officers . . . insist that an applicant’s proposed job title and description mirror exactly that of the [listed professions]”).

admission in TN status. The H-1B visa lacks this rigidity.

4. *The TN Category: Literalism Bars the Door*

Employers often regard the TN visa as an easier avenue for foreign workers, as there is not the formal and lengthy application process associated with the H-1B. Employees share this misconception. However, the TN visa can often prove as or more difficult to obtain than the H-1B, in large measure due to the fact that the specific job must be enumerated in NAFTA in order to qualify. As the following examples indicate, INS inspectors often rely on the literal language of NAFTA in order to bar entry to otherwise qualified individuals.

a. *Engineer*

Engineers pose a good example of the difficulties of literalism in the TN context. The generic job title "engineer" is enumerated in NAFTA, but there are thousands of types of engineers, from motor vehicle engineers, to civil engineers, to computer software engineers. In the IT context, a common problem with the TN category is convincing the INS that the applicant's particular occupation title or discipline is a true engineering discipline.¹⁴⁵ This is especially difficult when the specialization is relatively new or emerging.¹⁴⁶ For example, applications for software engineering have been denied because no state presently requires such a license and few educational institutions offer software engineering degree courses or majors.¹⁴⁷ The INS reasoned, therefore, that the discipline of software engineering was not a true engineering profession, unlike civil engineering, for example.¹⁴⁸

While NAFTA does not technically require that the license or degree correspond with the profession in which admission is sought, the INS has often taken this position in practice.¹⁴⁹ In October 2000, INS headquarters advised the field inspectors that a software engineer may qualify as an "engineer" under NAFTA, and that "it is reasonable" to require a degree in engineering for

¹⁴⁵ *Id.* at 810.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 811.

the TN category.¹⁵⁰ Implementation and acceptance of this interpretation, however, has not been uniform.

b. Computer Systems Analyst

A similar dilemma occurs with Computer Systems Analysts. For a Canadian applicant to be admitted as a Computer Systems Analyst, the applicant must have a baccalaureate degree or a post-secondary diploma.¹⁵¹ If the applicant only holds a post-secondary diploma then “three years of experience must also be shown.”¹⁵² As with the H-1B visa petition, using the term “programmer” when applying for entry as a computer systems analyst may create difficulties. This term alone may flag a denial because the INS Inspector’s Field Manual states forcefully that the computer systems analyst category does not include programmers.¹⁵³ Despite the fact that the INS Administrative Appeals Office has held that computer programming is a professional endeavor, the attitude that programmers are not “professionals” prevails among INS officers and is exhibited commonly in the H-1B petition process.¹⁵⁴ Again, the literalism of NAFTA often compels applicants to conform the realities of their profession to fit the preconceived vision an INS Inspector may have about the applicant’s job.

c. Scientific Technician/Technologist

Applications in the occupation of Scientific Technician/Technologist are also closely scrutinized. An IT employer must be careful to present thorough and detailed evidence that the applicant’s capabilities include the required “theoretical knowledge of an IT-related engineering discipline, as well as the

¹⁵⁰ Memorandum from Johnny N. Williams, Western Regional Director, to Western District Directors on Guidance for Processing Applicants Under the North American Free Trade Agreement (Aug. 1, 2000) (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹⁵¹ Vázquez-Azpiri, *supra* note 97, at 813.

¹⁵² *Id.*

¹⁵³ The INS Inspector’s Field Manual is reprinted in GORDON ET AL., IMMIGRATION LAW AND PROCEDURE (rev. ed. 1992). The INS officers are likely to rely on the Manual as the primary source of guidance because a series of manuals will eventually replace INS Operations Instructions. See 77 INTERPRETER RELEASES 93–95 (2000).

¹⁵⁴ Vázquez-Azpiri, *supra* note 97, at 813.

requisite problem-solving or research abilities.”¹⁵⁵

d. Management Consultant

Management Consultant is another difficult category for IT professionals, because INS inspectors commonly regard it as a “last resort” of creative lawyers to find a TN category for individuals who do not otherwise qualify. Consequently, Management Consultant applicants are often given a thorough review in the TN process. The most common defect in these applications is failing to describe the specific scope of duties to be performed.¹⁵⁶ The key is establishing the proper relationship between the applicant and the U.S. entity.¹⁵⁷ One must focus the scope of duties on observing the workings of the U.S. entity and suggesting how to improve the workings of the company,¹⁵⁸ and avoid the impression that the applicant will have any level of executive or managerial authority or involvement in the decision-making processes of the U.S. entity.¹⁵⁹ Management Consultants usually only present successful cases in the IT field where the applicant has well documented and appropriate past experience in the field.

5. Difficulties of the TN Category

The enumerated list of TN professions presents special difficulties for IT professionals. First, the itemized list hinders IT workers from applying to fill IT professions which may be emerging or relatively new, or which might legitimately combine the duties of two or more professions.¹⁶⁰ INS inspectors use the literalism of the language of the schedule of professions to limit entry of individuals who should otherwise qualify. Ironically, the TN inspection process also creates the opposite problem of literalism for TN applicants: the application of unfettered discretion by INS inspectors. Unlike the H-1B visa (which is approved through a purely paper review process at INS, without

¹⁵⁵ *Id.* at 814.

¹⁵⁶ *Id.* at 816.

¹⁵⁷ *Id.* at 817.

¹⁵⁸ *Id.* at 816.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

the opportunity for interview or inspection on the merits), the TN application is conducted in person, which allows the inspectors to cross-examine and interrogate TN applicants. As a result, the INS inspectors are permitted a far larger measure of discretion in rejecting TN applicants (either on the merits or for subjective reasons) than would be the case for other non-immigrant applicants. Without a doubt, the process of application review at the border or port of entry invites both literalism and subjectivity on the part of INS officers. This has proven to be the largest hurdle to TN admission.¹⁶¹ Subjectivity and discretion are difficult if not impossible to eliminate in the inspections process generally and will certainly not be limited by statute or regulation after the events of September 11. However, liberalization of TN categories and greater instruction for INS inspectors on the various jobs that are properly classified within the enumerated list of TN professions is possible and would greatly enhance the process. While the American Immigration Lawyers Association (AILA) has proposed to INS that the Temporary Entry Working Group exercise its authority to expand the list of IT-related professional categories included in NAFTA, the outcome remains to be seen.¹⁶²

IV. The American Competitiveness in the 21st Century Act of 2000

In addition to an understanding of the various non-immigrant visa categories and their applicability to the IT industry, practitioners and others involved in human resources for the IT field, need to be knowledgeable about the dramatic recent immigration legislation which affects the options and strategies available.

A. Background

On October 17, 2000, President Clinton signed into law S. 2045, the American Competitiveness in the 21st Century Act of 2000 (AC21).¹⁶³ AC21 dramatically illustrates the nexus between

¹⁶¹ *Id.*

¹⁶² *Id.* at 821; *Minutes of AILA's INS HQ Adjudications Liaison Meeting* (Sept. 21, 1999), 18 AILA MONTHLY MAILING NO. 10 (AILA, Washington, D.C.), Nov. 1999, at 973-74.

¹⁶³ AC21, *supra* note 5.

the IT industry and U.S. immigration and visa policy; it was, ultimately, legislation by and for the IT industry. In spirit, AC21 was driven by the need for U.S. employers, principally in the IT sector, to have greater flexibility and efficiency in hiring foreign workers. The principal provisions of AC21, increased availability of H-1B visas, so-called "portability," and extensions of H-1B status for long-pending Adjustment of Status applications, underscore these goals. The new law also reallocates funding to allow for more comprehensive training of U.S. workers with high-tech skills. The end result was intended to relieve U.S. companies in urgent need of skilled high-tech employees, stimulate the creation of new jobs, and aid the growth of U.S. companies. In light of the downturn in the U.S. economy, especially in the IT sector, many of these benefits appear somewhat anachronistic.¹⁶⁴ While perhaps the impact of AC21 has been somewhat different than anticipated due to the changing economic situation, the legislation has had a major effect on the use of the H-1B visa and has assisted the IT industry, in large part due to the flexibility it has given the U.S. labor market.

B. Major Effects of AC21

1. Raising the H-1B Cap

The most anticipated reform of AC21 was to raise the annual cap on the number of H-1B visas issued by the INS. Prior to AC21, employers and immigration practitioners would become concerned in late spring or early summer that the cap would soon be reached, and thus no new H-1B visas would be available. Inevitably, this resulted in a mad scramble to file H-1B visa petitions as the cap approached, as well as an anxious wait to see whether a particular petition would be reviewed before the cap was reached. AC21 eliminated this unproductive and stressful exercise. Section 102(a) of AC21 increased the H-1B cap to 195,000 annually for Fiscal Years 2001 through 2003.¹⁶⁵ The 115,000 cap for Fiscal Year 2000 was reached in the 1999 and 2000 fiscal years (although, as discussed below, it was not reached

¹⁶⁴ Angelo A. Paparelli & Janet J. Lee, *A Moveable Feast: An Analysis of Adjustment of Status Portability Under AC21*, 6 BENDER'S IMMIGR. BULL. 577 (2001).

¹⁶⁵ AC21, *supra* note 5, § 102(a).

for 2001), and a 107,500 cap was set for Fiscal Year 2001 until AC21 was passed in October, raising the 2001 cap by almost 90,000.¹⁶⁶

2. *Certain Visas Do Not Count Against the Cap*

Not only did AC21 raise the overall cap, but it also changed the mathematics used to set it. Section 103 of AC21 provides that employees of higher education institutions, nonprofit research organizations and government research organizations are not to be counted toward the H-1B cap.¹⁶⁷ As a result of these exemptions, between 6,000 and 10,000 H-1B visas previously used by higher education associations will be made available for use.¹⁶⁸ The counting rules set forth in § 103 provide that H-1B beneficiaries who have already been counted toward a cap in the six years prior to the filing of a new petition are not to be counted again, and where multiple petitions are filed for a single individual, that individual is only to be counted once toward the cap.¹⁶⁹ Therefore, if an H-1B non-immigrant is outside of the United States at the time of filing, regardless of whether he or she held H-1B status prior to departure, the counting rules prevent the INS from counting the non-immigrant against the H-1B cap.¹⁷⁰

3. *Portability of H-1B Status—H-1B Employees Can Begin New Employment When Amended H-1B Petitions are Filed with the INS*

In addition to reform of the cap, AC21 radically amended the flexibility of the H-1B visa category by making employment available upon filing of a new H-1B petition. Pursuant to § 105, H-1B non-immigrants may now accept new employment upon the filing of a new petition by a new employer, subject to the final approval of the petition, rather than approval of the amended

¹⁶⁶ *Election Politics*, *supra* note 4, at 95.

¹⁶⁷ AC21, *supra* note 5, § 103.

¹⁶⁸ AILA, Section-by-Section Analysis of S. 2045, the American Competitiveness in the 21st Century Act as Passed by Congress, *available to subscribers at* <http://www.aila.org> [hereinafter AILA Analysis] (last visited Dec. 3, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹⁶⁹ AC21, *supra* note 5, § 103; AILA Analysis, *supra* note 168.

¹⁷⁰ AILA Analysis, *supra* note 168.

petition.¹⁷¹ Eligibility for this provision of AC21 requires that the individual be lawfully admitted to the United States and that the petition be “nonfrivolous.”¹⁷² The individual also must not have engaged in any unauthorized employment in the United States before the filing of such petition (although, given the uncertainty of whether an individual must be “in status,” the meaning of this latter requirement is somewhat uncertain).¹⁷³ If the petition is denied, work authorization ceases.¹⁷⁴ This so-called “portability” promotes the mobility of skilled foreign workers by allowing the beneficiary of an H-1B to change employers immediately upon the filing of a new petition by the new employer. Increased portability alleviates the problems for H-1B non-immigrants and employers caused by delays in the INS change-of-employer petition processing.¹⁷⁵

4. *Limitation on Per Country Ceiling for Approved I-140 Immigrant Petitions*

Section 104(a) of AC21 provides that if, on a quarterly basis, the number of visas available in all the employment-based preferences exceeds the number of immigrants qualified to receive the visas, then the overflow of visas may be allocated without regard to per-country ceilings.¹⁷⁶ Persons born in visa backlogged countries like India and mainland China will have access to any unused employment-based immigrant visas even if the per-country quota (just under 10,000 annually) has been reached.¹⁷⁷ As many IT workers are natives of India or China and have immigrant petitions pending, this provision was joyously received.

¹⁷¹ AC21, *supra* note 5, § 105 (codified at INA § 214(m), 8 U.S.C. § 1184(m)); AILA Analysis, *supra* note 168, at 2.

¹⁷² AC21 *supra* note 5, § 105 (codified at INA § 214(m), 8 U.S.C. § 1184(m)).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ AILA Analysis, *supra* note 168, at 2.

¹⁷⁶ AC21, *supra* note 5, § 104(a) (codified at INA § 202(a), 8 U.S.C. § 1152(a)).

¹⁷⁷ AILA Analysis, *supra* note 168, at 2. A full discussion of the visa preference system is beyond the scope of this article. Suffice it to say that prior to AC21, nationals from certain foreign countries with a large number of immigrants—China and India, to give just two examples—could wait years for their visa numbers to become “current,” meaning that they could apply for their immigrant visa to enter the United States as a permanent resident.

5. *H-1B Extension for Aliens with Pending Green Card Petitions*

An additional benefit to the IT industry is that aliens in H-1B status may now extend their H-1B status beyond the six-year maximum in certain circumstances.¹⁷⁸ AC21 permits one-year extensions for aliens who have filed either an Adjustment of Status or I-140 Immigrant Worker petition with INS, provided their Labor Certification or I-140 was filed at least 365 days before the extension is requested.¹⁷⁹ Extensions will be permitted until a decision is made on the person's permanent resident status.¹⁸⁰ Importantly, however, this new provision does not provide any relief for those affected simply by long-pending Labor Certification applications. To be eligible for any relief, either the I-485 or I-140 must be filed, which presupposes that a Labor Certification was not necessary or has already been approved. In addition, as a practical matter, given the lack of regulatory guidance, INS adjudication of these types of cases has been haphazard.

6. *Change of Employment for Lengthy Adjudications of Adjustment Applications*

In addition to the extensions of H-1B status permitted under § 106, that section also provides that an approved I-140 Immigrant Worker petition (the petition which allows the applicant to file for Adjustment of Status, which is the last procedure necessary to obtain permanent residency) shall remain valid when the alien changes jobs, provided that (1) the I-485 "Application to Adjust Status" application has been filed and unadjudicated for 180 days or more and (2) the new job is in the "same or similar occupational classification as the job for which the certification was issued."¹⁸¹ As with H-1B portability, the 180-day adjustment portability brings reality back into the process. Previously an applicant's adjustment application could have been imperiled if the applicant changed jobs prior to ultimate adjudication (a process which could

¹⁷⁸ AC21, *supra* note 5, § 106.

¹⁷⁹ *Id.* § 106(b).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* § 106(c) (codified at INA § 204(j), 8 U.S.C. § 1154(j)). No more guidance on what constitutes "similar" job classifications is provided in the statute. *Id.*

take years), essentially locking the individual into that job for fear of losing the opportunity to obtain a green card. Now the individual can change jobs, provided the occupation is substantially the same.

7. *Reallocation of Funds*

Finally, § 110 of AC21 improves the use of funds collected from the H-1B fee.¹⁸² Funds will be used for the training and education of U.S. workers in high-tech fields, where the need is most urgent.¹⁸³ Scholarships, grants, and training programs will be established in an attempt to increase the number of U.S. workers with the requisite skills for jobs in the IT industry.¹⁸⁴ Although theoretically beneficial to U.S. workers, this provision, funded through a new \$1,000 filing fee on all new H-1B petitions, is essentially a punitive tax on H-1B employers generally, and thus the IT industry in particular.

C. *Practical Effect of AC21 on the IT Industry*

1. *Raising the Cap*

The most significant impact of AC21 on the IT industry is the temporary increase in H-1B visa allotments from 107,500 to 195,000 annually for Fiscal Years 2001 through 2003.¹⁸⁵ The value of Congress' raising the cap was immediately felt. Despite the economic downturn, the INS reported in November 2001 that it had approved 163,200 H-1B visa applications for Fiscal Year 2001.¹⁸⁶ This number exceeded by more than 48,000 the number of H-1B visas that otherwise would have been available in 2001 had the cap not been raised. Nor did this number include approximately 29,000 applications that the INS was unable to adjudicate by September 30 (the end of the fiscal year), nor approximately 30,000 applications filed between March 2000 and

¹⁸² *Id.* § 110.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* § 102 (codified at INA § 214(g)(1)(A)(iv)-(vii), 8 U.S.C. § 1184(g)(1)(A)(iv)-(vii)).

¹⁸⁶ Carrie Johnson, *Requests for Skilled Worker Visas Fell Short of Limit*, WASH. POST, Nov. 6, 2001, at E12.

September 30, 2000 (i.e., applications filed at the end of the previous federal fiscal year which were subsequently adjudicated under the new fiscal year).¹⁸⁷

The November 2001 numbers were consistent with increased usage of the H-1B visa over the last several years. Demand for H-1B status has been rising steadily since 1996, and the H-1B visa cap has been reached every year from 1997 through 2000.¹⁸⁸ The increased cap was necessary if only to prevent flight of some in the IT industry to more employer-friendly (and less costly) jurisdictions. It was reported that prior to October 2000, some IT employers, anxious for skilled high-tech employees, were on the verge of moving jobs out of the United States. An Employment Policy Foundation survey of forty-two Fortune 500 companies found that more than fourteen of the companies surveyed would move jobs out of the United States if H-1B workers were unavailable.¹⁸⁹ Forty-five percent of the companies stated that the cap prevented them from hiring the people they needed.¹⁹⁰ It is, of course, speculative as to whether the cap would have been reached again in Fiscal Year 2001 if the economy had not slowed down. Nevertheless, the number of H-1B visas approved in excess of the previous cap, especially given the economic climate, vividly illustrates the importance of this facet of the AC21 legislation.

The reallocation of funds, again, funded through a de facto tax on H-1B employers, impacts the IT industry in that it attempts to create a pool of workers in the United States with the skills necessary to fill high-tech jobs.¹⁹¹ While some IT employers and employees may ultimately benefit from the increased availability of IT workers in the United States, they will be punished in the short term through the H-1B "tax" occasioned by the lack of such workers now.

2. *Portability and Status*

Without question, the single greatest day-to-day impact of AC21 has been on the use of H-1B portability. Again, prior to

¹⁸⁷ *Id.*

¹⁸⁸ *Election Politics*, *supra* note 4, at 95.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ AC21, *supra* note 5, §§ 110, 111; AILA Analysis, *supra* note 168.

AC21, an employee in H-1B status could only change jobs and begin work with his or her employer upon the *approval* by INS of a new petition. Given that approval of H-1B petitions could often take up to three months, this rule had a chilling effect on the labor market. As a result of AC21, an employee may now begin working upon the *filing* of such a petition.

While this has had a profound impact on labor market flexibility, the portability provisions of AC21 have generated much uncertainty as well. For example, what does it mean for a petition to be "filed"? The Regulations provide that an application is properly filed when the appropriate form, properly signed and executed, with the filing fee attached, is physically received and time-stamped to show actual receipt by the INS officer.¹⁹² Interpretations have varied as to whether filed therefore means receipt by INS or the date that the petition was submitted to a reputable courier or the U.S. Postal Service. The plain language of § 105 seems to indicate that filing means filing, not receipt by the INS, or issuance of an approval notice. However, in the absence of more specific regulatory guidance, the exact meaning is unclear. As a practical matter, many employers are comfortable beginning employment for such workers on the day the new petition is filed with the INS, while some more cautious employers adopt a policy of waiting for an actual Receipt Notice from the INS evidencing its receipt of the petition.

This issue becomes particularly acute with respect to status. For example, an individual is deemed to be out of status when he or she ceases work with his or her sponsoring H-1B employer. Must the new H-1B petition be filed before the employee ceases work with the previous employer and is thus technically out of status? Similarly, what about situations in which an employee is terminated? Upon termination, an employee is also out of status, as their H-1B status is also deemed to have been terminated. Would this individual be deemed ineligible for portability? Nowhere does AC21 provide that an individual has to be in status to be eligible for portability. The statute only provides that the alien must have been "previously issued a visa or otherwise provided non-immigrant status under § 101(a)(15)(h)(i)(b)."¹⁹³ In

¹⁹² 8 C.F.R. §103.2(a)(7)(i) (2001).

¹⁹³ AC21, *supra* note 5, § 105(a) (codified at INA § 204(m), 8 U.S.C. § 1184(m)).

fact, this language clearly implies that to be eligible for H-1B portability, the employee does not have to have been in H status at all, but only “issued a [H-1B] visa.”¹⁹⁴ As a result of this ambiguity, some Service Centers of INS have informally adopted a reasonableness standard whereby an H-1B petition is approvable pursuant to portability if the new petition is filed within a “reasonable” time of the expiration or termination of employment with the previous employer.¹⁹⁵

3. *Portability and Travel*

A related issue arises concerning the permissibility of travel while an H-1B petition is being adjudicated. In order to enter the United States and be granted H-1B status, a foreign employee must generally have an H-1B visa in his or her passport. H-1B visas, like most employment-related visas, are annotated with the sponsoring employer’s name. Many times, the foreign employee will be queried upon arrival by an INS inspector about the employer and the nature of the employment. Problems often arise when an individual has filed a timely petition and begun work for a new employer pursuant to portability, but does not have, and is ineligible to receive, a new visa stamp properly annotated with his or her new employer. This can create confusion and suspicion upon inspection, which can result in the employee being held for further questioning, or even denied admission. The U.S. State Department has taken the position that an H-1B employee is admissible without a new visa, provided the alien meets the following requirements:

- (1) The applicant is otherwise admissible;
- (2) The applicant has a valid passport and visa (even if it is the original visa with the prior employer’s name);
- (3) The applicant has the prior form I-94 or a copy thereof or a

¹⁹⁴ *Id.*

¹⁹⁵ In an answer to a question regarding guidance on AC21 posed by the AILA, liaisons from the Texas Service Center (TSC) of INS noted: “TSC has received no guidance on AC21 and will continue to apply a ‘reasonable period of time’ standard for favorable adjudication of H-1B petitions where there is a prolonged gap between leaving an employer and filing/accepting employment with a new petitioner.” See Answers as Amended June 18, 2001, AILA/TSC June 11, 2001 Liaison Meeting, available to subscribers at AILA InfoNet, <http://www.aila.com>, Doc. No. 01061933 (on file with the North Carolina Journal of International Law and Commercial Regulation).

form I-797 showing the original petition's validity dates;
and

- (4) The applicant has a dated filing receipt or other evidence that a new petition was filed in a timely fashion.¹⁹⁶

As a result of this guidance, an employee who has filed an H-1B petition pursuant to portability only should need to obtain a new visa abroad in the event that the original visa (i.e., the visa stamp naming the original employer) has expired. However, given increased scrutiny occasioned by September 11, whether the INS will respect this State Department policy, especially in marginal cases or in areas requiring inspectors to exercise any positive discretion, is subject to considerable doubt.

D. AC21—Great Advances, Unanswered Questions

The impact of AC21 has been dramatic and has certainly liberalized and rationalized the incredibly bureaucratic and byzantine H-1B visa world. Raising the cap and portability, the two most significant developments of the legislation, have been of inestimable value both to U.S. businesses and to foreign workers. Despite these significant developments, however, the real meaning of AC21 is yet to be determined. The INS has issued explanatory memoranda,¹⁹⁷ but has yet to implement any regulatory framework that will deliver clear guidance to the still vague statute. Implementation of the new statute has also been uncertain and contradictory. It also remains to be seen what impact the events of September 11 will have on the structure and spirit of AC21. Generally, it is anticipated that INS will more stringently enforce and interpret existing regulations in the future. In cases where any discretion is called for, it is not likely to be liberally given. Whether this will prove true in the implementation of AC21 is still unclear.

¹⁹⁶ State Dept. Cable, Re: New H-1(B) Provisions (Feb. 14, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation).

¹⁹⁷ Memorandum from Michael D. Cronin, INS Acting Executive Associate Commissioner, Office of Programs, to Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, on Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (June 19, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation).

V. Conclusion

Although the atmosphere that gave rise to AC21 has dissipated, the legislation has not proven valueless. Far from it. Many of the reforms of AC21—H-1B portability, the 180-day portability of those in the adjustment process, etc.—are of arguably greater value in an economic downturn than in a booming economy. Overall, AC21 has brought a needed liberalization to what is generally regarded as an unnecessarily difficult, inflexible, and arbitrary process. Although the reforms of AC21 were brought about principally to assist the IT industry in its hiring practices, its most lasting benefits will likely be to the overall U.S. labor market.

Ironically, what was generally regarded as the most critical aspect of AC21 when it was enacted in October 2000—raising the cap on the number of permitted applicants—may in the end prove to be less important to the industry than its other provisions. Two years ago, when the IT industry was expanding at a breakneck rate, it was feared by some that the new AC21 cap would not be high enough. It no longer appears likely that the cap will be a problem anytime in the near future. The cap will not be reached in 2001 nor, if economic conditions persist, will it likely be reached next year.

That being said, the H-1B cap—indeed the entire H-1B program—will likely be more controversial than ever before. Economic momentum and optimism occasioned enactment of AC21; recession and pessimism could lead to its rollback. In November 2001, House Rep. Tom Tancredo (R.-Col.) introduced legislation that would roll back the cap to 65,000 per year, and perhaps even lower, in the event U.S. unemployment rises.¹⁹⁸ Other draft legislation would subject H-1B visa holders—and likely immigrants generally—to increased scrutiny.¹⁹⁹ Without question, some tightening of U.S. immigration law will come out of the events of September 11. The impact that legislation will have on American business is unknown.

What *is* known is that the defining argument in the field of immigration law over the next several years will be about the

¹⁹⁸ Johnson, *supra* note 186.

¹⁹⁹ See *Money Line News Hour with Lou Dobbs* (CNN television broadcast, Nov. 7, 2001) (transcript available at 2001 WL 19274769).

relative priorities of the hiring needs of U.S. business and the security needs of the American public. All things considered, as a recession threatens the U.S. economy and anti-immigrant (or, minimally, pro-security) sentiment increases in the wake of September 11, the IT industry and U.S. immigration and visa law share a common uncertainty.