



SHUTTING DOWN GLOBAL BUSINESS IN AMERICA: WHY THE H-1B CAP HURTS US ALL

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The [USCIS announced](#) that November 22, 2011 was the final receipt date for accepting H-1B petitions under the 65,000 cap of FY2012. The 20,000 advanced degree cap was reached even earlier on October 19, 2011. Any H-1B petitions filed after that date will get rejected. The new fiscal year started only on October 1, 2011 and the H-1B cap was reached less than 2 months later.

If a company now wishes to hire a badly needed engineer from abroad, it will need to wait till October 1, 2012 before this person can come on board. It is self evident that the cap hinders the ability of a company to hire skilled and talented workers in order to grow and compete in the global economy. The hiring of an H-1B worker does not displace a US worker. In fact, [research shows](#) that they result in more jobs for US workers.

What is particularly counterintuitive with the H-1B cap is that it completely negates the recent Administration's policy to encourage foreign entrepreneurs to create startup companies, resulting in job growth. On August 2, 2011, the Department of Homeland Security Secretary Napolitano Secretary Napolitano and United States Citizenship and Immigrant Services Director Mayorkas made dramatic announcements advising that foreign entrepreneurs could take advantage of the existing non-immigrant and immigrant visa system to gain status and permanent residency. According to the [DHS press release](#), these administrative tweaks within the existing legal framework would "fuel the nation's economy and stimulate investment by attracting foreign entrepreneurial talent of exceptional ability." In the [H-1B Question and Answers](#) accompanying the August 2, 2011 announcement, the USCIS appears to reaffirm the existence of the separate corporate entity, and its ability to

sponsor its owner or investor on an H-1B visa so long as an employer-employee relationship can be demonstrated between the company and the beneficiary. This may be established by creating a separate board of directors, which has the ability to hire, fire, pay supervise and otherwise control the beneficiary. There is nothing preventing such a board constituting foreign nationals or family members of the beneficiary.

In the experience of this author, the August 2, 2011 announcement fired the imagination of lots of entrepreneurs who had dreams of making it big in the US, notwithstanding the sluggish economy and the stubbornly high unemployment rate. With the convergence of social media, wireless technology and the cloud, [it has never been easier for anyone anywhere to be an entrepreneur](#) and also have access to the best infrastructure. Foreign students while still in their dorms have dreamed of starting Facebook-style ventures and being able to work for them under an H-1B visa. Many inquiries came in from people in other parts of the world with bold new ideas about how to go about this, and while the August 2, 2011 policy may yet not have seeped down into the rank and file of the immigration bureaucracy, it was possible to outright win the occasional H-1B visa for a client who was part of an interesting startup. All these entrepreneurial dreams have now been dashed with the announcement of the H-1B cap being reached on November 22, 2011 – and that too just before Thanksgiving. The August 2, 2011 policy will never be able to take fruition, at least until October 1, 2012, and allow entrepreneurs to thrive in the US and create jobs. While there are [other options for entrepreneurs](#), using a startup for an H-1B visa did not require huge sums of money or a close affiliation with a foreign entity. Unlike the Treaty Investor Visa, which only applies to nationals of countries that have a treaty with the US (and the dynamic BRIC countries are excluded), the H-1B visa was open to all nationals.

Mr. Mayorkas has also been receptive to initiating changes in the USCIS Adjudicators Field Manual and training manuals for the USCIS, based on suggestions by [Vivek Wadhwa](#) and other entrepreneurs. These suggestions intend to make USCIS examiners aware of some unique features of startups, especially those in stealth mode, which may lack extensive promotional materials and the like. The lack of an organizational structure in a startup ought not to dissuade the USCIS from granting an H-1B visa. While entrepreneurs may be able to avail of other green card categories, such as the National Interest Waiver, the H-1B visa allows the entrepreneur to quickly enter the US and be

able to work through his or her startup. After the announcement of the H-1B cap, unless one has been the subject of a prior approved H-1B petition, and thus been counted before in the past 6 years, the H-1B visa will not be available until October 1, 2012, and a person brimming with bright ideas may be better off setting up the startup in another country even if Mr. Mayorkas is willing to make changes in the AFM.

It is obvious that we need more H-1B numbers, but will Congress, which is in a stalemate, rush to the rescue of US employers and startups? Other factors have also contributed to the cap being reached so soon this year. Perhaps, certain parts of the economy have been ticking again, and employers were scrambling to fill positions with badly needed foreign skilled workers. Business immigration lawyers, after all, tend to see upticks and downturns in the economy faster than others! The wholesale denial of L-1B visas at the US Consulates in India may have probably forced companies to rely on the H-1B visa more than necessary. Note, though, that many prefer the L-1B to the H-1B since the spouse of an L-1 worker can also work in the US. The H-4 spouse, by contrast, is not allowed to partake in any activities that have the semblance of work, even if it is selling a work of art that was created as part of a hobby. The H-4 spouse has to obtain his or her own H-1B. Clearly, the [decline in L-1 approvals in India](#) has sucked up more H-1B numbers this year. Finally, the [B-1 in lieu of H-1B](#) visa was also placed under a lot of scrutiny this year, which robbed those who were assigned to the US on short term assignments easy flexibility and also forced them to use the H-1B visa.

[AILA President Eleanor Pelta](#) sums it all up very nicely, "During a time when job creation is the nation's number one priority, why are we still fiddling around with an outmoded quota system that ignores the importance of immigrants to the economic engine? The marketplace dictates the pace and type of demand by business for specialized workers. To be more competitive globally, we really should be smarter about our high skilled visa distribution so that it is related to market needs instead of pinned to a static limit that was determined by Congress in the last decade. Congress needs to be working on ways to make the visa system work for fueling the economy. The status quo is no longer acceptable."