Mistreatment and Exploitation of Skilled Foreign Workers Through H- Visa Precarity

ISHA VAZIRANI[†]

The Department of Homeland Security (DHS) announced that beginning on May 26, 2015, certain H-4 dependents of H-1B nonimmigrants would be eligible to apply for an Employment Authorization Document (EAD). The H-4 EAD program was the target of several threats and changes under the Trump Administration, which made it increasingly difficult for H-4 EAD holders to maintain uninterrupted employment authorization. These difficulties prompted several lawsuits against the U.S. Citizenship and Immigration Services (USCIS), under DHS. USCIS favorably settled one such class-action lawsuit. Still, the H-4 EAD program remains only precariously in place because it was never officially codified and exists within a system of skilled immigration into the United States that has continually exploited highly skilled foreign workers, the majority of whom come from the economically disadvantaged Global South. This Note examines the instability propagated by the H-1B visa category to show that the system of skilled immigration into the United States subjects workers to precarity as a result of their transient H-1B status, increased employer control over workers' immigration status, and the potential for wage theft. Additionally, many recent threats to the H-4 EAD and the program's vulnerability to future manipulation indicate EAD holders' susceptibility to further abuse.

[†] J.D. Candidate 2023, University of California College of the Law, San Francisco (formerly UC Hastings); Articles Editor, *Hastings Law Journal*. My heartfelt thanks to Professor Veena Dubal for guidance and feedback as I worked on this Note. Many thanks also to the *Hastings Law Journal* editors for all their work in preparing this Note for publication. And huge thanks to my family, for everything.

TABLE OF CONTENTS

INTRODUCTION

In 2015, the Department of Homeland Security (DHS) enacted the H-4 EAD program, which allows spouses of H-1B nonimmigrants with immigrant intent to obtain authorization to work pursuant to an Employment Authorization Document (EAD) issued separately from their H-4 visa status.[1] The program has the potential to improve the lives of numerous H-4 dependents, the overwhelming majority of whom were women from the Global South, while also preying upon their labor and placing them within the context of a racist, exploitative system of skilled immigration into the United States.[2] The Trump Administration threatened the H-4 EAD in what appears to have been an effort to slow the immigration of skilled workers into the United States. Without officially rescinding the rule enacting the H-4 EAD, DHS under Trump made changes to the EAD adjudication process that made it difficult for H-4 spouses of H-1B workers to maintain employment.[3] Those changes prompted several lawsuits by nonimmigrant plaintiffs against DHS with mixed results. While gaps in work authorization among H-4 EAD holders are no longer a matter of course, and while the Trump Administration's proposed rule to revoke the H-4 EAD has been withdrawn, measures allowing for such a program have never been codified and can therefore be easily changed.[4]

In this Note, I argue that the system of skilled immigration into the United States subjects workers from the Global South to precarity and exploitation due to their transient nonimmigrant status, increased employer control over nonimmigrant workers' immigration status, and potential for wage theft. In addition, the government's recent actions slowing H-4 EAD adjudication and the fact that the H-4 EAD has not been codified opens up H-4 EAD holders to further mistreatment within an already exploitative system. While the government's recent actions have affected numerous visa categories, this Note primarily focuses on H- nonimmigrants under the H-1B and H-4 visa categories.

---

1. *H-4 EAD Fact Sheet*, SIDLEY AUSTIN LLP 1, https://www.sidley.com/~/media/documentation/h4-ead-fact-sheet.pdf (last visited Jan. 28, 2023); Arun Kumar, *A Timeline and History of H-4 EAD*, THE AM. BAZAAR (Jan. 27, 2021, 8:51 AM), https://www.americanbazaaronline.com/2021/01/27/a-timeline-and-history-of-h-4-ead-443996/.

2. *See* David J. Bier, *The Facts About H-4 Visas for Spouses of H-1B Workers*, CATO INST. (June 16, 2020, 10:28 AM), https://www.cato.org/blog/facts-about-h-4-visas-spouses-h-1b-workers.

3. Stuart Anderson, *USCIS Finds New Way To Stop H-1B Spouses from Working*, FORBES (June 10, 2019, 12:03 AM), https://www.forbes.com/sites/stuartanderson/2019/06/10/uscis-finds-new-way-to-stop-h-1b-spouses-from-working/?sh=74786dd75c89; *Practice Alert: Proposed H-4 EAD Rescission Rule Withdrawn from Review at OMB*, AM. IMMIGR. LAWS. ASS'N (Jan. 28, 2021), https://www.aila.org/infonet/practice-alert-proposed-h-4-ead-rescission#:~:text=On%20January%2025%2C%202021%2C%20the,which%20is%20an%20office%20within [hereinafter *Proposed H-4 EAD Recission*].

4. Courtland C. Witherup & Suzan Kern, *USCIS Settles Major Federal Lawsuit: Good News for E, H and L Spouses*, HUNTON ANDREWS KURTH LLP (Nov. 19, 2021), https://www.huntonimmigrationlawblog.com/2021/11/articles/business-immigration/uscis-settles-major-federal-lawsuit-good-news-for-e-h-and-l-spouses/; Andrew Moriarty, *H-4 Work Authorization Act Priority Bill Spotlight*, FWD.US (Apr. 26, 2022), https://www.fwd.us/news/h-4-work-authorization/.

H-1B status is temporary and dependent on employment. The visa category itself fails to provide a path to citizenship, indicating a focus on productivity rather than stability for H-1B workers and their families.[5] Additionally, requiring employers to petition for H-1B status on behalf of their employees gives employers immense control over the validity of their employees' immigration status and discourages workers from seeking recourse against potential abuse.[6] Furthermore, H-4 spouses of H-1B workers eligible for an EAD have seen their ability to work in the United States threatened, delayed, and effectively invalidated by changes to DHS's adjudication processes, subjecting them to heightened personal and professional instability.[7] Litigation against DHS following these changes brought some relief to the H-4 EAD population.[8] Still, the program must be protected through codification to protect EAD holders from further future vulnerability.

Mistreatment of skilled foreign workers is firmly established within the H-1B and H-4 EAD programs. Part I of this Note examines how the H-4 EAD program perpetuates the abuse of skilled foreign workers by discussing the H-1B category in Part I.A, the H-4 and H-4 EAD programs in Part I.B, and *Save Jobs USA v. United States Department of Homeland Security*,[9] the lawsuit filed by American IT workers in response to the rule enacting the H-4 EAD, in Part I.C. Part II discusses subsequent threats to the H-4 EAD under the Trump Administration, and Part III focuses on the legal resistance to those threats. Part IV then explores the need to protect the H-4 EAD from future threats through codification, as well as the strengths and weaknesses of past proposals to codify the program.

I. THE H-4 EAD PROGRAM

A. THE H-1B

H-1B is a nonimmigrant visa category created in 1990 amidst the Cold War impetus to compete in technological innovation on a global scale[10] through the

5. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations (July 21, 2022) [hereinafter *H-1B Specialty Occupations*]; *The Immigration Concept of Dual Intent*, TEMPLE UNIV., https://isss.temple.edu/international/h-1b-temporary-employees/immigration-concept-dual-intent (last visited Jan. 28, 2023).

6. Seiko Ishikawa, The Racialization and Exploitation of Foreign Workers by the Law (Sept. 2017) (M.A. thesis, City University of New York), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=3361&context=gc_etds.

7. Humaa Siddiqi, *Building the Invisible Wall Against Legal Immigration: The Trump Administration's Revocation of Work Authorization for H-4 Visa Holders*, 29 TRANSNAT'L L. & CONTEMP. PROBS. 193, 205–06 (2020).

8. Witherup & Kern, *supra* note 4.

9. 105 F. Supp. 3d 108 (D.D.C. 2015).

10. *See* Jack Robertson, *Closer Look: 'Deemed' Visas Are a Cold War Holdover*, EETIMES (Nov. 12, 2002), https://www.eetimes.com/closer-look-deemed-visas-are-a-cold-war-holdover/?utm_source=eetimes&utm_medium=related content; *see also* BIPART. POL'Y CTR., IMMIGRATION IN TWO ACTS (2015),

expansion of the Immigration and Nationality Act of 1965.[11] This classification allows foreign nationals to temporarily perform work in "specialty occupations"—jobs requiring a bachelor's degree or higher.[12] Specialty occupations held by H-1B workers often include those in science, technology, math, and engineering (STEM) disciplines.[13] An initial H-1B petition is typically valid for up to three years; H-1B visa holders can then petition to extend their status for a maximum period of stay totaling six years.[14] Pursuant to the American Competitiveness in the Twenty-First Century Act, H-1B visa holders with an approved I-140 (Immigrant Petition for an Alien Worker), which commences the Legal Permanent Resident application process, are eligible for additional extensions of H-1B status until their Priority Date is current, indicating that they have reached the front of the Legal Permanent Residence line.[15]

The H-1B is among the most sought-after immigration categories, partly due to its unique dual-intent nature, allowing H-1B employees to legally indicate immigrant intent while on nonimmigrant status.[16] H-1B applicants are not required to indicate a "residence in a foreign country" that they will maintain, as is the case with several other nonimmigrant visa categories.[17] The H-1B visa category also allows foreign nationals to concurrently begin the process toward obtaining Legal Permanent Residence, which is entirely distinct from H-1B status.[18] H-1B visa status itself may not form the basis for Legal Permanent Residence.[19] The overwhelming majority of H-1B workers are from India (74.5% of total H-1B approvals for fiscal year 2019) and China (11.8% of total H-1B approvals for fiscal year 2019), the world's two most populated countries with per capita GDP of $2,072.20 and $10,143.80, respectively.[20]

---

https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/BPC-Immigration-Legislation-Brief.pdf.

11. Bart Perkins, Sarah K. White & Sharon Florentine, *The H-1B Visa: Facts, Requirements, Processes*, CIO (Feb. 25, 2021, 2:00 AM), https://www.cio.com/article/228027/h-1b-visa-requirements-processes-and-faqs.html.

12. *H-1B Specialty Occupations*, *supra* note 5.

13. AM. IMMIGR. COUNCIL, THE H-1B VISA PROGRAM AND ITS IMPACT ON THE U.S. ECONOMY 2 (July 15, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_and_its_impact_on_the_us_economy.pdf.

14. *H-1B Specialty Occupations*, *supra* note 5.

15. *Extending H1B Status Beyond the 6-Year Statutory Limit*, MYATTORNEYUSA, http://myattorneyusa.com/extending-h1b-status-beyond-the-6-year-statutory-limit (last visited Jan. 28, 2023); 8 U.S.C. § 1184.

16. *The Immigration Concept of Dual Intent*, *supra* note 5.

17. *Id.*

18. *Id.*

19. *See I-140, Immigrant Petition for Alien Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/i-140 (July 11, 2022); Dobrina Ustun, *Extending H1B Status Beyond the 6-Year Statutory Limit: What Options Do You Have?*, USTUN L. GRP., PLLC (Apr. 13, 2021), https://ustunlawgroup.com/extending-h1b-status-beyond-the-6-year-statutory-limit-what-options-do-you-have/.

20. *H-1B Petitions by Gender and Country of Birth Fiscal Year 2019*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 21, 2020), https://www.uscis.gov/sites/default/files/document/data/h-1b-petitions-by-gender-country-of-birth-fy2019.pdf; *GDP per Capita (Current US$) – India*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=IN (last visited Jan. 28, 2023); *GDP per Capita (Current US$) –*

Employers petition for H-1B status for employees by filing form I-129 (Petition for a Nonimmigrant Worker).[21] As part of an I-129 petition, employers are required to file a Labor Condition Application certified by the Department of Labor indicating the prevailing wage[22] for the H-1B employee and attesting that the employer will pay the H-1B worker a salary equal to or higher than the prevailing wage.[23]

Under the Immigration Act of 1990 and the American Competitiveness in the Twenty-First Century Act, Congress limited the number of H-1B petitions that may be issued per fiscal year through the H-1B Cap at 85,000 new H-1B visas per fiscal year (65,000 for bachelor's degree holders and an additional 20,000 for holders of master's degrees or higher).[24] Applications are selected for adjudication through a lottery.[25] Historically, the limit on new H-1B visas has been reached within days of the opening of the application submission period—long before the end of the fiscal year.[26] Recently, a registration system was implemented, allowing employers to register H-1B applicants and later submit complete petitions for only the employees who were selected.[27]

The H-1B program remains controversial. But the pervasive allegation that H-1B workers are "stealing" jobs from Americans is unfounded, as H-1B workers supplement the American workforce rather than upend it, while making tremendous contributions to technological development and the U.S. economy.[28] H-1B workers are critical to American innovation within the STEM fields.[29] They play key roles in healthcare and have helped develop and maintain many of the technologies used by the public on a daily basis. In fact, eight companies that ultimately worked on treatments and vaccines against the coronavirus (Gilead Sciences, Moderna Therapeutics, GlaxoSmithKline, Inovio, Johnson & Johnson Pharmaceuticals, Regeneron, Vir Biotechnology, and Sanofi) received

---

China, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN (last visited Jan. 28, 2023).

21. *H-1B Application Process: Step by Step Guide*, VISANATION (Sept. 17, 2022), https://www.immi-usa.com/h1b-application-process-step-by-step-guide/; *see H-1B Program*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/immigration/h1b (last visited Jan. 28, 2023); AM. IMMIGR. COUNCIL, *supra* note 13, at 1–5.

22. "The required wage rate must be the higher of the actual wage rate (the rate the employer pays to all other individuals with similar experience and qualifications who are performing the same job), or the prevailing wage (a wage that is predominantly paid to workers in the same occupational classification in the area of intended employment at the time the application is filed)." *Labor Condition Application (LCA) Specialty Occupations with the H-1B, H-1B1 and E-3 Programs*, FLAG.DOL.GOV, https://flag.dol.gov/programs/lca (last visited Jan. 28, 2023) [hereinafter *Labor Condition Application*].

23. *Id.*; *see* AM. IMMIGR. COUNCIL, *supra* note 13, at 7.

24. AM. IMMIGR. COUNCIL, *supra* note 13, at 2.

25. *Id.* at 4.

26. *Id.*

27. *H-1B Electronic Registration Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process (Apr. 25, 2022).

28. Frank Gogol, *The True Economic Impact of H1B Visa Holders*, STILT, https://www.stilt.com/blog/2020/06/the-true-economic-impact-of-h1b-visa-holders/#Final_Thoughts (Aug. 23, 2022).

29. AM. IMMIGR. COUNCIL, *supra* note 13, at 1, 6–8.

over 3,000 H-1B approvals for scientists between fiscal years 2010 and 2019.[30] H-1B workers also contribute over $27 billion toward Social Security and Medicare and spend over $76 billion at American businesses per year.[31] They complement American workers by filling employment gaps within the STEM fields.[32] Unemployment rates for H-1B-heavy occupations have historically been lower than the overall unemployment rate, indicating a demand for labor exceeding supply, and therefore that American workers are not prevented from obtaining employment in such industries due to the employment of H-1B workers.[33]

For all its benefits to technological development and the United States economy, the H-1B program has allowed for the large-scale exploitation of foreign workers as a result of the temporariness of H-1B status, employers' control over employees' status, and the potential for wage theft by employers due to misclassification of H-1B employees on Labor Condition Applications. H-1B status is temporary and tied to employment; H-1B visa holders must maintain H-1B-eligible employment in order to maintain lawful status in the United States.[34] The practice of linking immigration status to employment so directly, which the H-1B program does by requiring that employers themselves petition for their employees, gives employers immense control and leverage over H-1B visa holders.[35] H-1B nonimmigrant workers are therefore especially susceptible to abuse and exploitation by their employers due to their reliance on their employers for their ability to remain in the United States.[36] Employers' management of their foreign national workers' immigration status places control of H-1B employees' careers disproportionately in the hands of employers. An H-1B worker's ability to start a new job, accept a promotion, or relocate may be adversely affected by their employer's management of their immigration status. The skilled immigration system's requirement that valid H-1B status be dependent on employment takes advantage of workers, as it places productivity over stability for H-1B workers and their families.[37] H-1B workers also lack control over their own careers, because their ability to move between companies or their freedom to shop around for the best job for their own goals is limited by

30. Kamalika Roy, Natalia Solenkova & Parth Mehta, *A Wasted Opportunity During a Pandemic: The Foreign Medical Graduates in the USA*, 23 J. IMMIGRANT & MINORITY HEALTH 1364, 1364–65 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8317478/; David J. Bier, *Skilled Immigrants Searching for Coronavirus Cures at U.S. Companies*, CATO INST. (Mar. 12, 2020, 11:59 AM), https://www.cato.org/blog/skilled-immigrants-searching-coronavirus-cures-us-companies#_edn1.

31. Gogol, *supra* note 28.

32. *Id.*

33. AM. IMMIGR. COUNCIL, *supra* note 13, at 6.

34. *H-1B Specialty Occupations*, *supra* note 5.

35. Sarah Emerson, *Exclusive Survey Reveals Discrimination Against Visa Workers at Tech's Biggest Companies*, ONEZERO (Feb. 24, 2020), https://onezero.medium.com/visa-workers-at-techs-biggest-companies-speak-out-about-discrimination-298c9fa686b6.

36. Ishikawa, *supra* note 6.

37. *See H-1B Specialty Occupations*, *supra* note 5.

employers' management of holders' H-1B status.[38] The control that the H-1B program places in the hands of employers allows for continual exploitation by employers, as H-1B employees are unable to manage their own immigration processes.

The Labor Condition Application requirement of H-1B petitions further allows for exploitation by employers by enabling the lowering of H-1B workers' wages. Employers are required to file Labor Condition Applications certifying that the wage paid to H-1B employees meets or exceeds the prevailing wage, which the Department of Labor (DOL) sets for each occupation.[39] H-1B employers must meet or surpass that prevailing wage in order to protect American workers from being undercut by cheaper foreign labor.[40] However, employers appear to routinely misclassify H-1B workers as having a lower wage level than that which corresponds with their actual skill level, thus providing the basis for a lower wage than what the prevailing wage would dictate if employees were paid commensurate with their actual skill level based on experience and education.[41] In fiscal year 2019, 60% of the H-1B positions certified by the DOL were certified at the two lowest prevailing wage levels.[42] Sixty percent of the H-1B positions certified for the top thirty H-1B employers were also certified at the two lowest prevailing wage levels.[43] USCIS data demonstrates that almost 70% of approved H-1B petitions for fiscal year 2019 were for beneficiaries over the age of thirty, indicating that these workers likely possess over six years of experience.[44] Additionally, in fiscal year 2019, 65% of approved H-1B petitions were for beneficiaries with either master's, doctorate, or professional degrees; it is reasonable to assume that these especially highly educated workers can fill positions at prevailing wage levels three or four to correspond with their higher education levels.[45] Uber, one of the top thirty H-1B employers, serves as an example of such potential misclassification, as almost half of its H-1B applications for "senior software engineers" were classified under prevailing wage level two when a "senior" position appears to warrant a higher skill level.[46] This extensive wage theft and misclassification of H-1B workers constitutes

38. *See id.*

39. *Labor Condition Application*, *supra* note 22; *see* AM. IMMIGR. COUNCIL, *supra* note 13, at 2; *H-1B Department of Labor Wage Requirements*, UNIV. OF WASH. OFF. OF ACAD. PERS., https://ap.washington.edu/ahr/visas/admin-resources/h1b/h1b-eligibility/wage-requirements/ (last visited Jan. 28, 2023).

40. AM. IMMIGR. COUNCIL, *supra* note 13, at 2; *see also Labor Condition Application (LCA)*, U.S. DEP'T. OF LAB.: ELAWS ADVISORS, https://webapps.dol.gov/elaws/h1b/glossary.aspx?word=lca#:~:text=Labor%20condition%20application%20(LCA)%2C,not%20more%20than%20three%20years (last visited Jan. 28, 2023).

41. DANIEL COSTA & RON HIRA, H-1B VISAS AND PREVAILING WAGE LEVELS 13–14 (2020), https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/.

42. *Id.* at 3.

43. *Id.*

44. *See* U.S. DEP'T OF HOMELAND SEC., CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS 9 tbl.5 (2020); *H-1B Specialty Occupations*, *supra* note 5.

45. U.S. DEP'T OF HOMELAND SEC., *supra* note 44, at 10; COSTA & HIRA, *supra* note 41, at 12–13.

46. COSTA & HIRA, *supra* note 41, at 12.

exploitation.[47] Foreign workers cannot reasonably be expected to make complaints regarding such abuse; their immigration status is tied to their employment, and while the law prohibits employers from retaliating against employees who submit complaints to the DOL,[48] the precarity created by temporary immigration status can reasonably be said to create incentives to absorb such abuse.

In addition, H-1B workers often face racism and discrimination both in their workplaces and during the course of their daily lives, while the temporary, employment-dependent nature of their H-1B status leaves them particularly vulnerable to abuse. For instance, recent lawsuits filed by H-1B visa holders have shed light on instances of caste discrimination in Silicon Valley.[49] Additionally, a poll conducted by *OneZero* showed that at least 50% of surveyed H-1B employees at seventeen technology companies answered "often" or "very often" when asked if they "'experience additional pressure to perform at work' because of their status."[50] In the same survey, two-thirds of H-1B workers at Uber, which saw over 900 of its H-1B applications approved in 2019, claimed to have experienced some degree of workplace discrimination, and one H-1B worker in the technology industry described feeling unable to "speak up because that may lead to . . . losing [their] job and . . . right to live in this country."[51] Alex, an H-1B worker interviewed by *OneZero* stated that he believed "H-1B employees tend to tolerate more bullshit from managers because they cannot move to another company that easily, and they cannot just rage-quit," indicating the unique challenges H-1B workers face when mistreated in the workplace.[52] The temporariness of H-1B status and the control that employers exert over H-1B employees' lives and livelihoods discourages these workers from reporting instances of workplace discrimination and mistreatment.

B. THE H-4 AND THE H-4 EAD

Spouses and children of nonimmigrants with H-1B classification joining the principal H-1B visa holder in the United States are eligible for H-4 visa classification.[53] H-4 classification is only valid so long as the principal H-1B

47. Press Release, Econ. Pol'y Inst., New EPI Report Reveals Wage Theft on a Grand Scale in the H-1B Visa Program (Dec. 9, 2021), https://www.epi.org/press/new-epi-report-reveals-wage-theft-on-a-grand-scale-in-the-h-1b-visa-program/.

48. *Retaliation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/retaliation (last visited Jan. 28, 2023).

49. Derek Arthur, *California Workplace Discrimination System Sheds Light on Caste System*, NPR (Oct. 12, 2020, 5:00 AM), https://www.npr.org/2020/10/12/922936053/california-workplace-discrimination-system-sheds-light-on-caste-system.

50. Emerson, *supra* note 35.

51. *Id.*; *Uber H1B Visa*, COMPARABLY, https://www.comparably.com/companies/uber/h1b-visa (last visited Jan. 28, 2023).

52. Emerson, *supra* note 35.

53. U.S. DEP'T OF STATE, 9 FAM 402.10-14(A) TEMPORARY WORKERS AND TRAINEES – H VISAS, DERIVATIVE CLASSIFICATION AND VALIDITY (2021), https://fam.state.gov/FAM/09FAM/09FAM040210.html#M402_10_14_A.

visa is valid; H-4 dependents' ability to legally remain in the United States is therefore dependent on a principal H-1B holder maintaining H-1B-eligible employment.[54] H-1B dependents on H-4 status may not be employed in the United States without separate authorization issued by USCIS.[55] Dependents of H- workers have been admitted into the United States since 1970, and H-4 dependents of H-1B workers have been admitted since the creation of the H-1B category in 1990.[56] While there is no limit on the number of H-4 visas that may be issued in a given year, the 85,000 limit on new H-1B visas provides an indirect limit.[57]

A 2015 DHS rule allows some H-4 spouses to apply for employment authorization; eligibility is dependent on immigrant intent and thus excludes many H-4 spouses—particularly those recent to the United States—from the opportunity to pursue careers of their own.[58] On February 24, 2015, USCIS announced that, effective May 26, 2015, employment authorization eligibility would be extended to H-4 dependents of H-1B nonimmigrants who have indicated intent to remain in the United States by pursuing Legal Permanent Resident status.[59] The DHS changed its regulations to allow H-4 spouses with a valid EAD to accept employment in the United States.[60] USCIS set eligibility as follows:

> Eligible individuals include certain H-4 dependent spouses of H-1B nonimmigrants who:
>
> - Are the principal beneficiaries of an approved Form I-140, Immigrant Petition for Alien Worker; or
> - Have been granted H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 as amended by the 21st Century Department of Justice Appropriations Authorization Act. The Act permits H-1B nonimmigrants seeking lawful permanent residence to work and remain in the United States beyond the six-year limit on their H-1B status.[61]

H-4 spouses eligible for an EAD are required to file form I-175, (Application for Employment Authorization), submit a filing fee of $380, and

54. U.S. DEP'T OF STATE, 9 FAM 402.10-14(B) TEMPORARY WORKERS AND TRAINEES – H VISAS, VERIFYING THE PRINCIPAL IS MAINTAINING STATUS (2021), https://fam.state.gov/FAM/09FAM/09FAM040210.html#M402_10_14_B.

55. U.S. DEP'T OF STATE, 9 FAM 402.10-14(C) TEMPORARY WORKERS AND TRAINEES – H VISAS, EMPLOYMENT IN UNITED STATES BY H-4 DEPENDENT PROHIBITED (2021), https://fam.state.gov/FAM/09FAM/09FAM040210.html#M402_10_14_C.

56. Bier, *supra* note 2.

57. *Id.*

58. Press Release, U.S. Citizenship & Immigr. Servs., DHS Extends Eligibility for Employment Authorization to Certain H-4 Dependent Spouses of H-1B Nonimmigrants Seeking Employment-Based Lawful Permanent Residence (Feb. 24, 2015), https://www.uscis.gov/archive/dhs-extends-eligibility-for-employment-authorization-to-certain-h-4-dependent-spouses-of-h-1b.

59. *Id.*

60. *Id.*

61. *Id.*

include sufficient supporting evidence with the application.[62] Unlike other immigration categories, EADs are not initially eligible for automatic renewal pursuant to a pending petition.[63]

The stated objective of the H-4 EAD is to allow businesses to "keep their highly skilled workers . . . [and provide] more economic stability and better quality of life for the affected families."[64] H-4 EAD recipients have described the relief of being able to enter the workforce following a period of employment ineligibility after entering the United States; being able to maintain employment allows dependent spouses to contribute to their families' finances and find structure outside of the home.[65] A 2018 national survey of H-4 EAD holders indicates that many H-4 EAD holders themselves are highly skilled; over 50% of H-4 EAD recipients have a master's degree, 35% have a bachelor's degree, and 48% work in "computer-related" occupations.[66] It is reasonable to assume, considering their education level, that H-4 EAD recipients are likely often working alongside H-1B employees in "specialty" occupations, and contributing greatly to American innovation and the economy.

The introduction of the H-4 EAD brought American immigration policy closer to the immigration policies of countries with more reliable immigration systems. Canada and Australia, for instance, already had similar programs in place for dependent family members of skilled workers when the H-4 EAD was created.[67] At the time the H-4 EAD was enacted, the United States was having difficulty retaining skilled workers, as many chose to work in countries with immigration systems with a clearer paths to citizenship, which the H-1B category importantly does not provide.[68] The H-4 EAD was meant to help the United States retain such workers and their skills over countries that offer more viable immigration benefits.

But for all the relief that the H-4 EAD provides, the H-4 and H-4 EAD programs subject spouses of H-1B nonimmigrants to additional personal and professional instability due to the H-1B-dependant character of H-4 status.[69] H-4 status is tied to the H-1B status of a principal nonimmigrant and is based on

62. *Id.*

63. Susannah Nichols, *Updated: Settlement Changes USCIS Recognition of Work Authorization for H-4 and L-2 EADs*, ENVOY (May 27, 2022), https://resources.envoyglobal.com/blog/settlement-changes-uscis-recognition-of-work-authorization-for-h-4-and-l-2-eads; *see also* Meagan E. Dziura & Melina V. Villalobos, *USCIS Revises Policy Regarding Employment Authorization for H-4, L-2, and E Dependent Spouses*, OGLETREE DEAKINS (Nov. 18, 2021), https://ogletree.com/insights/uscis-revises-policy-regarding-employment-authorization-for-h-4-l-2-and-e-dependent-spouses/.

64. U.S. Citizenship & Immigr. Servs., *supra* note 58.

65. Siddiqi, *supra* note 7, at 198–99, 202, 211–14.

66. Emily Neumann, *Results from Emily Neumann, 2018 National H-4 EAD Study*, IMMIGRATIONGIRL 3–4 (2018), http://immigrationgirl.com/wp-content/uploads/2019/03/2018-National-H-4-EAD-Survey-by-Emily-Neumann.pdf.

67. Andrew Moriarty, *H-4 EAD Is Smart Policy That Should Be Preserved*, FWD.US (Sept. 14, 2022), https://www.fwd.us/news/h4ead/; Bier, *supra* note 2.

68. Bier, *supra* note 2.

69. *See* Moriarty, *supra* note 4.

the relationship between the principal and the dependent.[70] Because H-1B status is tied to employment, an H-4 dependent's status is also tied to the principal's employment.[71] For instance, if a principal loses H-1B status due to job loss, H-4 status may be jeopardized, leading to the possibility of having to leave the United States and the personal and professional turmoil associated with such resettlement.[72] Because EAD validity is contingent on H-4 validity, H-4 EAD holders face the possibility of losing work authorization upon the loss of their H-1B spouse's employment.[73] The interconnectedness of labor and valid immigration status within families subjects families from the Global South to precarity, as it makes the constant, unbroken performance of highly skilled labor the core of a family's stability.[74]

Even death of an H-1B principal can leave an H-4 dependent vulnerable. In 2017, Srinivas Kuchibhotla, an Indian national on valid H-1B status, was shot and killed in Olathe, Kansas, by a white man who shouted "get out of my country" before firing.[75] The fatal shooting threatened Kuchibhotla's widow's ability to remain in the United States, because she was on H-4 status dependent on her marriage to an H-1B principal.[76] She fortunately obtained an H-1B visa,[77] which is indicative of both the specialty occupations commonly held by H-4 EAD holders and of the precarity perpetuated by the system—she simply shuffled from one unstable category to another, and the stability in her immigration status did not become significantly greater despite her clear qualifications for highly skilled employment.[78]

C. SAVE JOBS USA

The H-4 EAD was directly threatened by litigation soon after it was announced, indicating the program's vulnerability, given that it has not been codified and the prevalence of anti-EAD sentiment. In 2015, Save Jobs USA, a group of IT workers claiming to have lost their jobs to H-1B workers, sued DHS,

70. *Employment Authorization for Certain H-4 Dependent Spouses*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/employment-authorization-for-certain-h-4-dependent-spouses (Nov. 12, 2021).

71. Bier, *supra* note 2.

72. *Id.*

73. *Id.*

74. *See id.*

75. Imran Qureshi, *Kansas Shooting: Indian IT Workers Worry for Safety*, BBC NEWS (Mar. 2, 2017), https://www.bbc.com/news/world-asia-india-39128428.

76. Jonah Engel Bromwich, *Killing in Kansas Bar Put Victim's Widow at Risk of Deportation*, N.Y. TIMES (Sept. 13, 2017), https://www.nytimes.com/2017/09/13/us/widow-deported-indian-kansas.html.

77. Zofeen Maqsood, *Every Week Green Card Backlog Law Is Delayed More People May Be Dying in Line: Sunayana Dumala*, THE AM. BAZAAR (Nov. 19, 2019), https://www.americanbazaaronline.com/2019/11/19/every-week-green-card-backlog-law-is-delayed-more-people-may-be-dying-in-green-card-line-sunayana-dumala-439435/.

78. Chris Fuchs, *Widow of Kansas Shooting Victim Temporarily Lost Resident Status*, NBC NEWS (Sept. 12, 2017, 4:01 PM), https://www.nbcnews.com/news/asian-america/widow-kansas-shooting-victim-temporarily-lost-residency-status-n800846.

alleging that DHS violated the Administrative Procedure Act (APA) when it "issued a final rule that [would] allow certain H-4 visa holders to apply for employment authorization."[79] Save Jobs USA contended that the H-4 rule would result in more competition for its members, that DHS did not have statutory authority to allow H-4 spouses to be issued work authorization, and that DHS's rule was "arbitrary and capricious in light of the Congressional policy of restricting H-4 visas to residency only."[80] Save Jobs USA criticized the H-1B program for creating competition for IT positions and asserted that granting employment authorization to spouses of H-1B workers would further create competition.[81] It sought a preliminary injunction in the U.S. District Court for the District of Columbia to prevent the DHS rule from taking effect until the merits challenge to the rule could be heard.[82]

The court denied the motion on the basis that Save Jobs USA did not demonstrate that its proclaimed injuries were sufficiently certain to warrant emergency relief, its "highly speculative" losses were not great enough to warrant emergency relief, and its purported harm was not "imminent," as the rule had not taken effect at the time of the suit.[83] The D.C. Circuit held the case in abeyance due to the change in presidential administrations and the Trump Administration's stated intention to issue a rule potentially rescinding the H-4 EAD rule.[84]

In 2019, after denying another request by DHS to delay its decision, the D.C. Circuit reversed, holding that Save Jobs USA had sufficiently demonstrated that the H-4 EAD rule would subject its members to increased competition and had standing to challenge the rule.[85] The case was remanded to the lower court for further proceedings.[86] Intervenors from Immigration Voice, a nonprofit advocating for the removal of employment-related restrictions on skilled noncitizen workers, requested that the district court wait to decide the case, while Save Jobs USA opposed the request to delay a decision and asked the court to enjoin the H-4 EAD rule.[87] Despite stating that it would possibly rescind the H-4 EAD rule, DHS opposed Save Jobs USA's request, arguing that Save Jobs USA did not have sufficient basis for an injunction.[88] Instead of challenging the H-4 EAD rule itself, DHS argued that enjoining the rule would

79. Save Jobs USA v. U.S. Dep't of Homeland Sec., 105 F. Supp. 3d 108, 110 (D.D.C. 2015).

80. *Id.* at 110–11.

81. *Id.* at 110.

82. *Id.* at 111–12.

83. *Id.* at 114–15.

84. Save Jobs USA v. U.S. Dep't of Homeland Sec., 942 F.3d 504, 508 (D.C. Cir. 2019), *rev'g* 210 F. Supp. 3d 1 (D.D.C. 2016).

85. *Id.* at 506; Leslie Dellon, *Government Takes Surprising Position To Preserve H-4 Work Permits – For Now*, IMMIGR. IMPACT (May 13, 2020), https://immigrationimpact.com/2020/05/13/h1b-worker-spouse-h4-law suit/#.YkCksjfMLPY.

86. *Save Jobs USA*, 942 F.3d at 512.

87. Dellon, *supra* note 85.

88. *Id.*

effectively substitute the court's authority for the agency's and that Save Jobs USA had not sufficiently shown that harm was imminent, as statements made by its members were by that time five years old.[89] By doing so, DHS did not advocate in favor of the H-4 EAD program; it simply indicated its soon-fulfilled desire to retain control over it.[90] Therefore, in addition to indicating how vulnerable the H-4 EAD program is to anti-EAD sentiment, *Save Jobs USA* effectively set the stage for subsequent governmental abuse of H-4 EAD holders, as DHS later did exercise immense control over the H-4 EAD program by changing EAD adjudication processes and making it impossible for EAD holders to maintain employment.

II. SUBSEQUENT THREATS TO THE H-4 EAD

Save Jobs USA in 2015 marked the start of anti-H-4 EAD advocacy, but it was by no means the only threat to the H-4 EAD. DHS's maneuvers in the *Save Jobs USA* litigation further legitimized the agency's mistreatment of H-4 EAD holders without formally ending the program. Notably, the most potent, immediate, and bruising threats were realized through rulemaking by the Trump Administration.[91] The Trump Administration's method of addressing legal immigration has been described as building an "invisible wall" against immigration—using the rulemaking process and other executive tools to build an intangible barrier, but one far more potent, immediate, and difficult to circumvent than any physical barrier between the United States and Mexico.[92] In April 2017, President Trump signed the Buy American and Hire American executive order into law, which sought to "create higher wages and employment rates for workers in the United States, and to protect their economic interests . . . by rigorously enforc[ing] and administer[ing]" immigration laws."[93] It directed agencies to "advance policies to help ensure H-1B visas are awarded to the most-skilled or highest-paid beneficiaries."[94] The order stated that the Administration had a stake in "protect[ing] [the] economic interests" of American workers and preventing fraud and abuse in the U.S. immigration system.[95] However, the order's effects can be seen as perpetuating abuse of the immigrant population and making way for devastating changes in the process of obtaining an EAD.

89. *Id.*

90. *Id.*

91. Siddiqi, *supra* note 7, at 206.

92. *Id.*

93. *Buy American and Hire American: Putting American Workers First*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/archive/buy-american-and-hire-american-putting-american-workers-first (Feb. 8, 2021) [hereinafter *Buy American and Hire American*]; Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017).

94. *Buy American and Hire American*, *supra* note 93; Exec. Order No. 13788, 82 Fed. Reg. 18837, 18839 (Apr. 18, 2017).

95. Exec. Order No. 13788, 82 Fed. Reg. 18837, 18837–38 (Apr. 18, 2017).

The order intentionally put skilled immigration in the United States under a microscope and allowed the qualifications of H-1B and H-4 nonimmigrants to be questioned. It rescinded, in part, a prior memorandum directing adjudicators of nonimmigrant petitions to defer to prior determinations of eligibility except in specific, limited circumstances.[96] Instead, the order directed adjudicators to "thoroughly review the petition and supporting evidence to determine eligibility for the benefit sought" and placed the burden of proof for establishing eligibility on the petitioner.[97]

USCIS's actions from March 2019 onwards inflicted immense harm on H-4 EAD recipients amidst an already damaging system. A proposed rule revoking the H-4 EAD created anxiety among H-4 EAD holders and their families as they anticipated losing a source of income.[98] Changes to the H-4 and EAD adjudication processes limited the ability of H-4 spouses to work while the proposed rule remained under review.[99] DHS announced plans to revoke the H-4 EAD rule in 2017 but delayed proposing such a rule, pushing its removal into the fall 2018 and spring 2019 regulatory agendas.[100] In February 2019, DHS submitted a proposed rule, Removing H-4 Spouses from the Class of Aliens Eligible for Employment Authorization, for review.[101] The rule was not approved during President Trump's time in office and was withdrawn on January 25, 2021.[102] The H-4 EAD was thus never completely revoked during the Trump Administration, but DHS still utilized innovative methods—mainly changes to EAD adjudication processes—to restrict the issuance of valid EADs.[103]

Initially, H-4 and H-4 EAD applications filed concurrently with H-1B extension applications were typically processed expeditiously when the principal H-1B petition contained an application for Premium Processing, guaranteeing a response from USCIS within fifteen calendar days.[104] This courtesy expedition allowed families to receive the results of the adjudication of

96. Elizabeth Przybysz, *USCIS Issues Policy Guidance on Deference to Previous Petition Decisions*, LANER MUCHIN (May 21, 2021), http://www.lanermuchin.com/newsroom-fastlaner-uscis_issues_policy_guidance_on_deference_to_previous_petition_decisions.

97. U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-08-751, POLICY MEMORANDUM: RESCISSION OF GUIDANCE REGARDING DEFERENCE TO PRIOR DETERMINATIONS OF ELIGIBILITY IN THE ADJUDICATION OF PETITIONS FOR EXTENSION OF NONIMMIGRANT STATUS (2017), https://www.uscis.gov/sites/default/files/document/memos/2017-10-23-Rescission-of-Deference-PM602-0151.pdf [https://web.archive.org/web/20220126212141/https://www.uscis.gov/sites/default/files/document/memos/2017-10-23-Rescission-of-Deference-PM602-0151.pdf].

98. *Anupama's Story*, SAVEH4EAD (Mar. 7, 2018), https://saveh4ead.wordpress.com/.

99. Anderson, *supra* note 3.

100. Siddiqi, *supra* note 7, at 200.

101. *Proposed H-4 EAD Recission*, *supra* note 3.

102. *Id.*

103. Anderson, *supra* note 3.

104. Stuart Anderson, *Lawsuit Alleges USCIS Has Acted in Bad Faith Against H-1B Spouses*, FORBES (Oct. 6, 2020, 12:05 AM), https://www.forbes.com/sites/stuartanderson/2020/10/06/lawsuit-alleges-uscis-has-acted-in-bad-faith-against-h-1b-spouses/?sh=7e05474c3724.

their H-1B, H-4, and H-4 EAD petitions at or near the same time, and instances of gaps in work authorization for EAD holders were minimal.[105] EAD holders could thus maintain employment without disturbance.[106] March 2019 changes to the H-4 EAD adjudication process ended the courtesy expedition of EAD applications and subjected them to regular processing times; those regular processing times were further prolonged by additional requirements and DHS inaction.[107] Beginning on March 22, 2019, USCIS only accepted a new form I-539 (Application to Extend/Change Nonimmigrant Status), which is required for filings to extend or convert to H-4 status.[108] This new form contained a provision that required I-539 applications to submit biometrics as part of the application.[109] Applications to extend H-4 status for spouses would not be processed without biometrics following the receipt of an I-539 application by USCIS.[110] The addition of a biometrics requirement corresponded with the end of USCIS's policy of expediting I-539 petitions filed concurrently with H-1B petitions as a courtesy, and processing times for I-539 petitions rose significantly following the implementation of the biometrics requirement. [111]

Processing times remain high, a "legacy of Trump administration policies."[112] At the time of writing, the estimated processing time at the Vermont Service Center for an extension of stay for H-4 dependents with an I-765 is seven and a half months.[113] In the California Service Center, the estimated processing time for a change of status for H-4 dependents with an I-765 is nine months.[114] For an H-4 EAD to be valid, the applicant must hold valid H-4 status;[115] consequently, though it uses a separate form, H-4 EAD processing is linked to I-539 processing. Additionally, because USCIS does not accept applications to extend status more than six months before status is due to expire, gaps in work authorization for EAD recipients became commonplace in the months following the implementation of the biometrics requirement until it became "mathematically impossible" for spouses of H-1B workers to remain employed

105. Anderson, *supra* note 3.

106. Stuart Anderson, *USCIS Taking Two Years To Process Many Applications for H-1B Spouses*, FORBES (Feb. 9, 2021, 1:36 AM), https://www.forbes.com/sites/stuartanderson/2021/02/09/uscis-taking-two-years-to-process-many-applications-for-h-1b-spouses/?sh=3b5d2ad33276.

107. Anderson, *supra* note 104.

108. *New Version of Form I-539 Required Starting March 22, 2019*, INT'L STUDENT & SCHOLAR SERVS. (Mar. 6, 2019), https://global.upenn.edu/isss/news/new-version-form-i-539-required-starting-march-22-2019; *see also* Anderson, *supra* note 106.

109. Anderson, *supra* note 106.

110. *Id.*

111. *See id.*; *see also Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://egov.uscis.gov/processing-times/ (last visited Jan. 28, 2023) (providing current processing times and indicating lengthy processing times following the March 2019 changes to form I-539).

112. Anderson, *supra* note 106.

113. *Check Case Processing Times*, *supra* note 111.

114. *Id.*

115. *See Employment Authorization for Certain H-4 Dependent Spouses*, *supra* note 70; *H4 Visa EAD FAQs | Common H4 EAD Questions Answered*, VISANATION (Sept. 15, 2022), https://www.immi-usa.com/h4-ead-faq/.

without interruption.[116] These changes in processing times had devastating consequences for the careers of EAD holders, many of whom were young and likely building their careers in "specialty occupations" in fields that they were highly educated in. Those EAD holders saw the prospects for career advancement diminish greatly for reasons entirely unrelated to their job performance or aptitude.[117] The gaps in work authorization also affected EAD holders' abilities to contribute to their families' finances and created outdated family structures, while two-income households are increasingly the norm.[118] Within a system that is already exploitative and forces H-1B nonimmigrants and their families to endure disproportionate hardships, H-4 EAD holders were further treated as though their labor were expendable by the unfathomably slow processing of H-4 EAD petitions. H-4 EAD holders faced the possibility of gaps in their work authorization, leading to abuse in the form of professional instability and the potential loss of income.

The biometrics requirement itself presented a substantial challenge to H-4 EAD applicants. Under the new rule, applicants were required to personally provide biometric information at an application support center.[119] These centers were closed to in-person matters from March 18, 2020, to July 13, 2020, causing a backlog in biometrics appointments when it was unclear why biometrics were needed at all other than to delay adjudication of petitions, since H-4 dependents had all provided biometrics previously for immigration purposes, "either at a consulate or in the United States."[120] The freeze in adjudicating H-4 EAD petitions until biometrics were provided, an already redundant requirement, in the face of drastically changed circumstances during the COVID-19 pandemic prompted further uncertainty among H-4 EAD holders regarding their work authorization status.

The Buy American and Hire American executive order's changes to the skilled immigration system and directives to DHS also allowed for a sharp increase in the number of Requests for Evidence (RFEs) issued by USCIS in

116. *Check Case Processing Times*, *supra* note 111; Anderson, *supra* note 106; Memorandum of Points and Authorities in Support of Plaintiff's Motion for a Preliminary Injunction at 8, Gona v. U.S. Citizenship & Immigr. Servs., No. 20-cv-3680 (D.D.C. Feb. 25, 2021) [hereinafter *Gona* Motion for a Preliminary Injunction].

117. *See* Anderson, *supra* note 106.

118. Julie Sullivan, *Comparing Characteristics and Selected Expenditures of Dual- and Single-Income Households with Children*, U.S. BUREAU OF LAB. STATS. (Sept. 2020), https://www.bls.gov/opub/mlr/2020/article/comparing-characteristics-and-selected-expenditures-of-dual-and-single-income-households-with-children.htm.

119. Anderson, *supra* note 106; *USCIS Temporarily Closing Offices to the Public March 18-April 1*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 17, 2020), https://www.uscis.gov/news/alerts/uscis-temporarily-closing-offices-to-the-public-march-18-april-1 [hereinafter *USCIS Temporarily Closing Offices*]. The Biden Administration has suspended the biometrics submission requirement for certain applicants filing Form I-539, which will apply through May 17, 2023. *USCIS Temporarily Suspends Biometrics Requirement for Certain Form I-539 Applicants*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants (May 13, 2021).

120. Anderson, *supra* note 106; *USCIS Temporarily Closing Offices*, *supra* note 119.

processing nonimmigrant petitions.[121] These RFEs further slowed processing times, as gathering information necessary to respond to an RFE takes significant time.[122] Increased RFEs also put the community affected by the new regulations further on edge with the growing threat of denial, making noncitizen workers and their families increasingly uncertain about their ability to remain in the United States.

The gaps in work authorization created by Trump Administration rulemaking had devastating implications for many EAD recipients, most of whom were women of color from the Global South. H-4 EAD recipients relying on the program to support their families and pursue their own career goals faced stark mistreatment when the program was threatened with revocation and effectively invalidated, making gaps in work authorization inevitable.[123] Like their H-1B spouses, these EAD holders contribute to the United States economy and technological innovation, but their ability to work was thwarted by the Trump Administration in response to anti-H-1B and EAD advocacy.[124] The manipulation of H-4 EAD adjudication processes to restrict the ability EAD recipients to maintain employment abuses an already marginalized population facing precarity in their lives and prevents EAD recipients from maintaining control over their own careers and livelihoods.

The system of skilled immigration in the United States is deeply flawed. It treats workers from the Global South as expendable, allows for deflation of their salaries, and refuses to provide a clear, workable path to citizenship, while keeping families in immigration limbo for years. And it does so by tying legal status to employment, thereby making it unlikely that workers will draw attention to salary disparities along with other racist abuse that they experience in the workplace for fear of retaliation and the threat of losing legal status. In the context of this exploitative system, H-4 spouses of H-1B employees have experienced further trauma as the government has found different ways to restrict employment short of explicitly revoking work authorization altogether, but nonetheless making it increasingly difficult to survive in the United States.[125]

---

121. *RFEs and H-1B Denials Rose Sharply Under Trump, New Stats Show*, BERRY APPLEMAN & LEIDEN LLP (July 27, 2018), https://www.bal.com/bal-news/rfes-and-h-1b-denials-rose-sharply-under-trump-new-stats-show/.

122. Stuart Anderson, *The Story of How Trump Officials Tried To End H-1B Visas*, FORBES (Feb. 1, 2021, 12:56 AM), https://www.forbes.com/sites/stuartanderson/2021/02/01/the-story-of-how-trump-officials-tried-to-end-h-1b-visas/?sh=ebff845173fc.

123. *Shri's Story*, SAVEH4EAD (Feb. 28, 2018), https://saveh4ead.wordpress.com/.

124. *See* Gogol, *supra* note 28.

125. The biometrics requirement associated with H-4 petitions was temporarily suspended starting on May 17, 2021. In addition, pursuant to a January 2023 settlement in *Edakunni v. Mayorkas*, USCIS will adjudicate I-539 (H-4) and I-765 (EAD) petitions filed with I-129 (H-1B) petitions together. This settlement agreement is valid for two years. While the terms of the agreement will greatly mitigate the risk of a gap in work authorization, the prior threats to the program had a significant negative impact on the lives and livelihoods of numerous nonimmigrant workers and their families. They are also indicative of the ease with which the program can be changed to further a political agenda, at the expense of the welfare of already marginalized H-4 nonimmigrants. Press Release, U.S. Citizenship & Immigr. Servs., USCIS Temporarily Suspends Biometrics Requirement for

III. LITIGATION IN RESPONSE TO THREATS TO THE H-4 EAD

Those affected by the changes to H-4 EAD adjudication processes responded to the threats to their work authorization with legal resistance. While several lawsuits filed against DHS and its subagency USCIS did not result in positive outcomes for EAD holders, one consequential lawsuit led to a settlement effectively eliminating gaps in work authorization.[126] In *Kolluri v. United States Citizenship & Immigration Services*, the plaintiffs challenged USCIS's prohibition on automatic extension of H-4 EADs.[127] Specifically, they argued that DHS violated the APA by acting in bad faith and failing to adhere to the factors set in *Telecommunications Research & Action Center v. FCC* (*TRAC*) by unreasonably delaying adjudication of H-4 EAD petitions.[128] The plaintiffs requested a preliminary injunction forcing their H-4 EAD applications to be adjudicated within seven days of the court's order, which the district court denied, citing mootness considerations.[129] The district court further noted that because H-4 dependents did not fall within the "class of aliens whose eligibility . . . is based on an employment authorization category that does not require adjudication of an underlying application," DHS not granting automatic EAD extension upon filing an EAD extension petition was not "arbitrary and capricious."[130] The court also found that there was little evidence of "bad faith" by DHS, and that analysis of the *TRAC* factors weighed in the agency's favor.[131] *Kolluri* was therefore unsuccessful in addressing the problems posed by changes to EAD processing, yet a subsequent suit built on *Kolluri*, *Gona v. United States Citizenship & Immigration Services*, asserted that USCIS acted in bad faith when

---

Certain Form I-539 Applicants (May 13, 2021), https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants; Stuart Anderson, *USCIS Settles Lawsuit That Should Help H-IB and L-1 Visa Spouses*, FORBES (Jan. 21, 2023), https://www.forbes.com/sites/stuartanderson/2023/01/21/uscis-settles-lawsuit-that-should-help-h-1b-and-l-1-visa-spouses/?sh=3c798b0c216a; Edakunni v. Mayorkas, No. 21-cv-00393 (W.D. Wash. dismissed pursuant to settlement agreement Jan. 24, 2023).

126. Witherup & Kern, *supra* note 4.

127. Kolluri v. U.S. Citizenship & Immigr. Serv., No. 20-CV-02897, 2021 U.S. Dist. LEXIS 9004, at *1 (N.D. Tex. Jan. 17, 2021).

128. *Id.* at *16–24. The *TRAC* factors are:

> (1) the time agencies take to make decisions must be governed by a rule of reason[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by delay[;] and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (internal quotation marks and citations omitted).

129. *Kolluri*, 2021 U.S. Dist. LEXIS 9004, at *11–12.

130. *Id.* at *14–15.

131. *Id.* at *22–23.

delaying adjudication of petitions in light of new evidence of how processing occurs.[132]

In *Gona*, the plaintiff, an IT professional working on the Maryland Department of Human Services' IT infrastructure, asserted that USCIS did not have a "first in, first out" system of adjudicating petitions, as had previously been accepted was the case.[133] Rather, it had a "first in, first assigned" system that allowed cases to go unmonitored even after biometrics were collected.[134] The complaint noted that in several cases, biometrics had been taken, but cases had remained untouched for up to seven months.[135] The complaint also stated that USCIS had the resources to act on the applications stuck in the pipeline—the team adjudicating I-539 petitions in the Nebraska Service Center grew substantially between 2018 and 2020, as did corresponding teams across the country.[136] The plaintiff alleged:

> At the end of the day, the agency has the resources to adjudicate these cases immediately, but . . . chose[] not to . . . . The Trump administration elevated individuals in the agency who were sympathetic to its anti-immigrant agenda. The administration failed to kill the H-4 EAD legally and used bureaucratic inertia to harm H-4s . . . .[137]

In *Gona*, the court once again denied the plaintiff's motion for a preliminary injunction forcing adjudication of her case within seven days of a court order, finding that she did not sufficiently demonstrate likelihood of success on the merits.[138]

The most consequential and successful lawsuit prompted by the adjudication of numerous H-4 EAD petitions is *Shergill v. Mayorkas*, a class-action lawsuit filed in the Western District of Washington.[139] *Shergill* challenged DHS's policy of issuing EADs separate from H-4 status altogether, asserting that regulations permit H-4 spouses to work "incident to status."[140] The suit, like its predecessors, also challenged DHS's policy of not granting automatic extensions of EADs pursuant to a pending I-765 petition.[141] USCIS settled the suit, declaring that spouses of E and L immigrants and nonimmigrants are authorized to work incident to status and without an additional application, and making E, H, and L spouses eligible for automatic extension of work authorization pursuant to a pending I-765 application to renew an EAD.[142]

---

132. *Gona* Motion for a Preliminary Injunction, *supra* note 116, at 2, 4; Anderson, *supra* note 106.

133. *Gona* Motion for a Preliminary Injunction, *supra* note 116.

134. *Id.* at 2.

135. *Id.* at 1, 19.

136. Anderson, *supra* note 106.

137. *Id.* (referring to the redundant biometrics requirement).

138. Gona v. U.S. Citizenship & Immigr. Servs., No. 20-cv-3680, 2021 U.S. Dist. LEXIS 35083, at *14 (D.D.C. Feb. 25, 2021).

139. Witherup & Kern, *supra* note 4.

140. *Id.*

141. *Id.*

142. *Id.*

IV. PROTECTING THE H-4 EAD

While the Biden Administration does not appear hostile toward the H-4 EAD program, indicated by the withdrawal of the prior Administration's proposed rules revoking H-4 EADs,[143] the exploitative system of skilled immigration into the United States from the Global South stands as firmly as it did when the H-1B program was originally implemented. As to the H-4 EAD program, the rule enabling EADs to be issued remains only precariously in place, as it was never codified.[144] EADs can be revoked quickly and easily if a future presidential administration wishes to do so, destabilizing the work authorization of so many women of color, already vulnerable due to their immigration status.

In 2018, the 115th Congress introduced the Immigration Innovation Act of 2018, which would codify the regulation making H-4 spouses of some H-1B nonimmigrants eligible for work authorization and requiring the H-4 spouse's employer to attest that they will pay them more than the prevailing wage for their occupation in their locality or the wage paid to other employees with similar qualifications.[145] This would make the payment standard applied to H-4 spouses similar to that applied to H-1B nonimmigrants.[146] While codification would make it more difficult to revoke EADs, this policy is certainly problematic with regard to H-4 spouses' salaries; H-4 spouses would be more reliant on their employers for the validity of their immigration status and would be subject to the same prevailing wage-based abuses that plague the H-1B apparatus.[147]

In addition, this bill would not protect H-4 EAD recipients from DHS actions that can make it virtually impossible to maintain employment pursuant to an EAD. Meanwhile, the slow processing times that have plagued the program and made gaps in employment authorization common have been addressed through the *Shergill* class-action settlement granting automatic EAD extension to H-4 spouses filing for renewal of an EAD.[148] The bill also would not grant automatic work authorization pursuant to status, which the *Shergill* settlement afforded to some visa categories but not the H- visa categories.[149] These flaws ensure that new EAD applicants—H-4 spouses who recently decided to apply for work authorization, H-4 spouses of H-1B holders with newly approved I-140s, or spouses of H-1B holders seeking a change of status to H-4 and a new EAD—are still vulnerable to the long processing times associated with new H-

143. Frank Gogol, *Biden Administration Withdraws Proposal To Revoke H4 EAD*, STILT (Aug. 24, 2022), https://www.stilt.com/blog/2021/02/biden-administration-withdraws-proposal-to-revoke-h4-ead/.

144. Moriarty, *supra* note 4.

145. Immigration Innovation Act of 2018, S. 2344, 115th Cong. § 102 (2018); JILL H. WILSON, CONG. RSCH. SERV., R45176, WORK AUTHORIZATION FOR H-4 SPOUSES OF H-1B TEMPORARY WORKERS: FREQUENTLY ASKED QUESTIONS 6 (Apr. 24, 2018).

146. WILSON, *supra* note 145, at 6.

147. COSTA & HIRA, *supra* note 41.

148. Witherup & Kern, *supra* note 4.

149. *Id.*; Immigration Innovation Act of 2018, S. 2344, 115th Cong. § 102 (2018).

4 petitions. This hinders such individuals' ability to become employed and contribute to their families' finances and standard of living in a timely manner.

Previous iterations of the 2018 bill would have better addressed these deficiencies. Bills introduced by the 113th and 114th Congresses would have granted employment authorization to spouses of all H-1B and L nonimmigrants.[150] These bills did not contain provisions regarding prevailing wage attestation by employers, giving H-4 EAD holders more flexibility in their employment and less dependence on formalization of the H-1B nonimmigrant's intent to remain in the United States through the Legal Permanent Resident process, but fewer of the limited protections that prevailing wage attestation may provide.[151]

It is clear that codification is necessary to ensure that the H-4 EAD process is more reliable and secure. The fact that many H-4 EAD holders have advanced degrees and work in well-compensated occupations ensures that codification of the regulations allowing for the program would be economically prudent. The increased employment security that codification would provide would make the H-4 EAD process less abusive of EAD recipients. Codification must also ensure that other markers of exploitation are addressed. H-4 spouses should be granted automatic work authorization pursuant to status, removing DHS's ability to use slow processing times to make it impossible for H-4 spouses to maintain employment without interruption. Through codification, the government must also address prevailing wage misclassification, the lack of a clear path to citizenship, and dependence on employers for valid immigration in order to bring the systemic abuse and mistreatment of foreign workers to an end.

Codification of the H-4 EAD program and addressing the abuses associated with the system of skilled immigration into the United States fit well into the current Administration's policy agenda. The economic benefits associated with the skilled immigration system are well-documented and extensive.[152] They fit well into the "Build Back Better" agenda.[153] In addition, the current Democratic majority in the House may be precarious, and the need for immigration reform is imminent, as the window of opportunity may be closing. Codification of the H-4 EAD program and legislation addressing skilled immigration more broadly may be a legitimate possibility for only a short time; it is vital that Congress acts quickly to protect H-1B beneficiaries and their family members.

150. *S. 169 (113th): I-Squared Act of 2013*, GOVTRACK (Jan. 29, 2013), https://www.govtrack.us/congress/bills/113/s169/summary; *S. 153 (114th): I-Squared Act of 2015*, GOVTRACK (Jan. 13, 2015), https://www.govtrack.us/congress/bills/114/s153/summary; WILSON, *supra* note 145, at 6.

151. *See* WILSON, *supra* note 145, at 6.

152. *See, e.g.*, Gogol, *supra* note 28.

153. *See The Build Back Better Framework*, THE WHITE HOUSE, https://www.whitehouse.gov/build-back-better/ (last visited Jan. 28, 2023).

CONCLUSION

The system of skilled immigration into the United States has allowed for the mistreatment of numerous foreign workers, many of whom are from the Global South, and whose immigration status leaves them uniquely vulnerable and unlikely to formally complain about instances of mistreatment. The H-1B is especially sought after and forms the basis for the recently threatened H-4 EAD; yet it allows for the mistreatment of skilled foreign workers through its temporariness, the control it grants employers, and the potential for wage theft. The H-4 EAD has recently been effectively revoked; while a settlement allowed EAD holders to access the immigration benefits that had been withheld, the program remains vulnerable without codification. These layers of abuse uniquely affect skilled foreign workers and their families from the Global South and must be addressed in order to create a just system of immigration in the United States.

* * *