

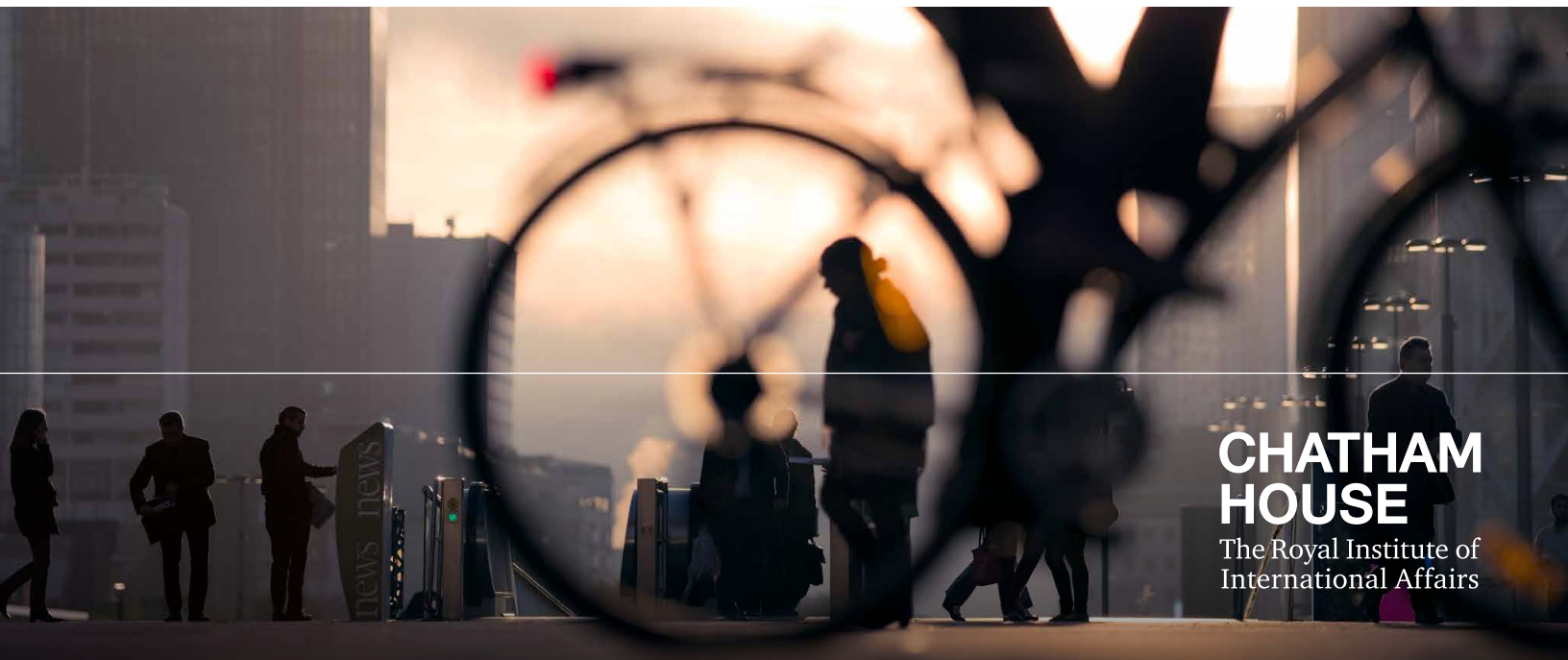
Research Paper

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Supporting the US Economy by Improving the Mobility of High-skilled Labour Across the Atlantic



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Summary

- The United States and the European Union are deeply integrated economically in terms of movement of goods, services and capital across the Atlantic, but this is not matched by the mobility of labour. Freer movement of high-skilled workers across the Atlantic has a potentially critical role to play in maintaining and strengthening the bilateral economic relationship.
- Both the US and EU seek to attract high-skilled labour through the use of temporary visa programmes. Various routes are available for highly skilled workers from the EU to temporarily work in the US (for instance, through the H-1B visa for foreign nationals in ‘specialty occupations’, as well as other visa categories for treaty traders and investors, intra-company transferees, and international students seeking work authorization in the US before or after graduation). The main ways for highly skilled workers from the US to temporarily work in EU member states are through EU-wide schemes that apply in 25 out of the 28 member states (for holders of EU Blue Cards or intra-company transferees); or via member states’ parallel national schemes.
- The experiences of US and EU employers and workers under the US H-1B programme and the EU’s Blue Card scheme differ greatly. The EU Blue Card scheme avoids many of the drawbacks of the H-1B visa. It does not have an annual cap on the number of visas issued. It also grants greater autonomy to the worker by not requiring the employer to sponsor long-term residence, by providing greater flexibility to switch employment, and by having a longer grace period for visa-holders to find new employment after dismissal.
- The US visa system hampers America’s economic growth. Restrictive policies such as an annual limit on the number of H-1B visas issued, and the associated uncertainty for employees and employers, hinder the ability of US companies to expand and innovate. The complex and costly visa application process is a particular burden for small and medium-sized enterprises. Problems around the timely availability of visas frustrate investors both from the US and from abroad (including from the EU). European firms face difficulties in acquiring visas for intra-company transferees, and not all EU member states have access to the treaty trader and treaty investor visa categories. At times, this impedes foreign direct investment and restricts US job creation. In addition, current policies hinder the economy’s retention of EU and other graduates of US universities. This is of particular concern given that skilled graduates have a critical role to play in addressing the US’s growing shortage of workers in the science, technology, engineering and mathematics (STEM) fields.
- Given the comparability of US and EU wages and labour markets, US concerns about foreign workers ‘stealing’ their jobs or depressing wages generally do not apply to EU citizens. On the contrary, a more open immigration policy for high-skilled workers – in particular for EU citizens – would benefit the US economy.

- Efforts to reform visa systems for high-skilled labour are under way in both the US and EU. In order to facilitate the movement of highly skilled workers across the Atlantic, this research paper recommends (1) creating a special visa for highly skilled EU citizens to work temporarily in the US; (2) extending the availability of treaty trader and investor visas to all EU member states; and (3) increasing efforts to eliminate fraud and abuse in the H-1B system. These measures could potentially help to create more investment, jobs and economic growth in the US.

1. Introduction

As the world's two largest economies – accounting for combined GDP of \$35 trillion in 2016¹ – the US and the EU share a trading and investment relationship of unparalleled breadth and depth. The value of trade in goods and services between the US and EU totalled approximately \$1.1 trillion in 2016.² The US and EU are also each other's most important sources of, and destinations for, foreign direct investment (FDI). Though transatlantic FDI flows have declined in recent years, they rebounded in 2015. In the same year, the US accounted for 37 per cent of all EU outward FDI stocks and held 41 per cent of total EU inward FDI stocks from the rest of the world.³ FDI underpins transatlantic 'foreign affiliate sales',⁴ which totalled \$5.5 trillion in 2015.⁵ In addition, FDI helps to drive the substantial trade that occurs across the Atlantic between parent companies and their subsidiaries or between various affiliates of multinational enterprises, thus greatly contributing to overall exports and imports between the US and EU.

This exceptionally developed relationship in terms of the movement of goods, services and capital is not matched by the mobility of high-skilled labour – that is, the temporary employment of highly skilled US workers in EU countries, and of EU citizens in the US. This suggests there are missed opportunities. A more integrated transatlantic economy requires further facilitation of high-skilled labour mobility.

The movement of highly skilled workers from the EU to the US, and vice versa, for temporary employment has economic benefits. For instance, it plays an important role in filling labour shortages, addressing skills gaps, fostering innovation, creating jobs and stimulating economic growth (particularly through its impact on services trade and FDI decisions).

There is no commonly agreed definition of what constitutes a 'high-skilled worker', but most definitions emphasize human capital (i.e. education or professional experience) while some focus on the worker's current occupation.⁶ For the purpose of this paper, high-skilled workers are held

¹ IMF (2017), World Economic Outlook Database, April 2017, www.imf.org/external/pubs/ft/weo/2017/01/weodata/weorept.aspx?sy=2016&ey=2016&scsm=1&ssd=1&sort=country&ds=.&br=1&pr1.x=53&pr1.y=8&c=111&s=NGDPD&grp=0&a=, www.imf.org/external/pubs/ft/weo/2017/01/weodata/weorept.aspx?sy=2016&ey=2016&scsm=1&ssd=1&sort=country&ds=.&br=1&pr1.x=70&pr1.y=9&c=998&s=NGDPD&grp=1&a=1 (accessed 25 Aug. 2017).

² US Census Bureau and US Bureau of Economic Analysis (2017), *U.S. International Trade in Goods and Services June 2017*, 'Exhibit 20. U.S. Trade in Goods and Services by Selected Countries and Areas - BOP Basis', www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf (accessed 25 Aug. 2017).

³ Eurostat (2017), 'Foreign direct investment statistics', http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_statistics (accessed 25 Aug. 2017).

⁴ In the US/EU context, 'foreign affiliate sales' consist of the sales of goods or services produced by the US-based affiliates of EU firms, and vice versa. For example, the sale of vehicles produced by the US-based factory of a German carmaker would meet this definition.

⁵ Hamilton, D. S. and Quinlan, J. P. (2017), *The Transatlantic Economy 2017: Annual Survey of Jobs, Trade and Investment between the United States and Europe*, Washington, DC: Center for Transatlantic Relations, http://transatlanticrelations.org/wp-content/uploads/2017/03/170223_FULL-BOOK-2.pdf (accessed 11 Jul. 2017).

⁶ Martin, P. (2012), *Attracting Highly Skilled Migrants: US Experience and Lessons for the EU*, CARIM-India Research Report 2012/01, San Domenico di Fiesole, Italy: Robert Schuman Centre for Advanced Studies – European University Institute, <http://cadmus.eui.eu/bitstream/handle/1814/23481/CARIM-India-RR-2012-01.pdf?sequence=1&isAllowed=y> (accessed 11 Jul. 2017).

to be professionals who have at least a bachelor's degree (or its equivalent) or who have relevant professional experience at a level comparable to higher-education qualifications.⁷

The exceptionally developed transatlantic relationship in terms of movement of goods, services and capital is not matched by the mobility of high-skilled labour.

This paper explores current policy approaches to the mobility of high-skilled labour on both sides of the Atlantic. It compares, in particular, the H-1B system in the US with the Blue Card system in the EU, as well as recent patterns of visa usage for highly skilled workers moving between the US and EU member states and vice versa. It finds that the EU Blue Card avoids many of the drawbacks of the H-1B visa. The US visa system hurts the domestic economy by constraining the ability of firms to grow and innovate, as well as by impeding FDI and consequently limiting job creation. Finally, the paper presents recommendations for strengthening the mobility of high-skilled labour across the Atlantic.

⁷ For the EU Blue Card definition of 'higher professional qualifications', see Article 2(g) of the Council Directive 2009/50/EC. For the H-1B requirements with respect to a 'specialty occupation', see Section 214(i)(1) of the Immigration and Nationality Act.

2. Overview of US Schemes for Highly Skilled Workers

There are several ways for highly skilled foreign professionals – including from EU member states – to temporarily work in the US:

H-1B visa (for foreign nationals in ‘specialty occupations’)

The H-1B visa is used to hire foreign workers in ‘specialty occupations’. To be eligible, applicants require specialized knowledge in their field and a bachelor’s or higher degree, or equivalent professional experience. To receive H-1B work authorization, a worker also needs to be sponsored by a US employer. There is no labour market test (i.e. to demonstrate the unavailability of a domestic worker before a foreign worker can be admitted). However, the employer must submit a ‘Labor Condition Application’ to the Department of Labor certifying, among other things, that it will pay the greater of the actual wage paid to similarly qualified workers or the ‘prevailing wage’ in the geographic area;⁸ and that working conditions will not adversely affect other similarly employed workers.⁹

The H-1B visa is issued for three years and can be renewed for an additional three years. If an H-1B visa-holder gets a new job offer, the worker may begin work with the new employer upon the filing of a petition for new H-1B employment. In the event of dismissal, an H-1B visa-holder was previously required to leave the US immediately. Since 17 January 2017, however, terminated H-1B workers have a 60-day grace period in which to seek new employment, change visa status or leave the country.¹⁰ The H-1B visa is a ‘dual-intent’ visa, which allows the foreign national to stay in the US temporarily for work or to seek lawful permanent residence. For adjustment of an H-1B worker’s status to lawful permanent residence, the employer must file a petition. An H-1B holder’s spouse and unmarried children under 21 years of age can seek admission under an H-4 visa, and certain spouses can apply for employment authorization as H-4 dependent spouses.¹¹

Currently, the annual number of H-1B visas is nominally capped at 65,000. In practice, the number of H-1B visas issued is more than double the official limit because of a number of exemptions.¹² For instance, up to 20,000 aliens who hold a master’s or higher degree from

⁸ U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), ‘H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models’, www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models (accessed 11 Jul. 2017). The prevailing wage rate is defined as ‘the average wage paid to similarly employed workers in a specific occupation in the area of intended employment’. See U.S. Department of Labor (2017), ‘Prevailing Wages’, www.foreignlaborcert.doleta.gov/pwscreens.cfm (accessed 11 Jul. 2017).

⁹ H-1B-dependent employers (employers that are above a certain threshold in terms of the share of their US workforce made up of H-1B visa holders) and employers that have been found to be wilful violators of the H-1B programme’s rules must meet additional attestation obligations.

¹⁰ U.S. Department of Homeland Security (2016), ‘Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers’, *Federal Register*, 81(223): pp. 82398–82492, www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled (accessed 11 Jul. 2017).

¹¹ U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), ‘Employment Authorization for Certain H-4 Dependent Spouses’, www.uscis.gov/working-united-states/temporary-workers/employment-authorization-certain-h-4-dependent-spouses (accessed 11 Jul. 2017).

¹² Wasem, R. E. (2016), *Temporary Professional, Managerial, and Skilled Foreign Workers: Policy and Trends*, CRS Report R43735, Washington, DC: Congressional Research Service, <https://fas.org/sgp/crs/homesec/R43735.pdf> (accessed 11 Jul. 2017).

a US university are exempt from the ceiling on H-1B visas. Additionally, the H-1B cap does not apply to foreign workers employed at universities, non-profit research facilities associated with universities, and government research organizations. The cap also does not apply to certain petitions that have previously been counted against it (e.g. in the case of an H-1B visa extension). In light of these exemptions, the total number of new H-1B visas issued in fiscal year 2016 (1 October 2015–30 September 2016) was 180,057.¹³ Most of these went to citizens from India (70 per cent of the total) and China (12 per cent).¹⁴

E-1 and E-2 visa (for treaty traders and investors)

Treaty trader (E-1) and treaty investor (E-2) visas are for citizens of more than 80 countries with which the US maintains treaties of commerce and navigation (E-1) or bilateral investment treaties (E-2).¹⁵ The appendix at the end of this paper lists the 19 and 23 EU member states, respectively, that are treaty countries for the E-1 and E-2 visas. Both the foreign employee and the employer must be nationals of the treaty country.¹⁶ The international trade being conducted or the investment involved must be substantial, though no minimum level is required.¹⁷ For an E-1 visa, over 50 per cent of the total volume of international trade must be between the US and the trader's treaty country. An E-1 or E-2 visa is usually issued for an initial period of two years (but can be issued with a validity of up to five years). It is renewable, and there is no limit to the number of extensions. However, as this is a non-immigrant visa, the recipient must intend to depart the US at the end of the visa's duration.¹⁸ A spouse and unmarried children under the age of 21 are eligible for an E-1 or E-2 visa, and a spouse can apply for work authorization.

L-1 visa (for intra-company transferees)

The L-1 visa is intended for intra-company transferees – to enable a US employer to transfer an executive, manager or employee with specialized knowledge from one of its affiliated foreign

¹³ The 180,057 H-1B visas in fiscal year 2016 refer to new visas issued by the State Department through consular offices. This figure differs from the number of H-1B petitions filed with and approved by the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS). As explained in more detail in Chapter 4 of this paper, USCIS announced that 199,000 H-1B visa petitions were entered into the lottery system for fiscal year 2018 to select petitions to meet the 65,000 general-category cap and the 20,000 cap under the advanced degree exemption. Petitions that are not subject to the cap do not have to go through the lottery. Thus, significantly more H-1B petitions are approved outside of the cap than under the numerical limit. Not all workers with approved H-1B petitions actually use the visa.

¹⁴ U.S. Department of State – Bureau of Consular Affairs (2016), 'Nonimmigrant Visa Issuances by Visa Class and by Nationality', FY2016 NIV Detail Table, <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY16%20NIV%20Detail%20Table.xls> (accessed 11 Jul. 2017).

¹⁵ U.S. Department of State – Bureau of Consular Affairs (2017), 'Treaty Countries', <https://travel.state.gov/content/visas/en/fees/treaty.html> (accessed 11 Jul. 2017).

¹⁶ The principal alien employer can be an individual, or otherwise an enterprise or organization at least 50 per cent owned by persons in the US who have the nationality of the treaty country. See 8 CFR [Code of Federal Regulations] 214.2(e)(3)(ii).

¹⁷ For definitions of 'substantial trade' and 'substantial amount of capital', see 8 CFR 214.2(e)(10) and 8 CFR 214.2(e)(14). Though no minimum investment amount is specified in the regulations, many law firms say that 'it is generally difficult to obtain an E-2 visa with an investment of less than \$100,000 to \$150,000'. See, for example, Hodkinson Law Group (2017), 'How Much to Invest for an E2 Visa', www.investorvisausa.com/how_much.html (accessed 11 Jul. 2017).

¹⁸ U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), 'E-2 Treaty Investors', www.uscis.gov/working-united-states/temporary-workers/e-2-treaty-investors (accessed 11 Jul. 2017).

offices to one of its offices in the US.¹⁹ This visa category also enables a foreign company that does not yet have an affiliated US office to send an employee to the US to help establish one. The transferee must have been working abroad for one continuous year within the three years prior to admission to the US. An L-1 visa is granted for a maximum initial stay of between one and three years, and can be extended in increments of up to two years. Depending on the visa subcategory, the maximum stay allowed is five or seven years. Intra-company transferees can be accompanied by a spouse and unmarried children under 21 years of age under an L-2 visa, and a spouse may apply for work authorization. Because the L-1 visa is a ‘dual-intent’ visa, it can be a stepping-stone to lawful permanent residence.

F-1 visa for students on Optional Practical Training

A more indirect route to obtaining a temporary work permit is for undergraduate and graduate students with F-1 visa status. Eligible students can apply for ‘Optional Practical Training’ (OPT) employment authorization before and after completing their academic studies. OPT employment authorization must be directly related to an F-1 student’s major area of study, and is usually granted with a validity of up to 12 months. However, students who have earned degrees in certain science, technology, engineering and mathematics (STEM) fields may apply for a 24-month extension to their post-completion OPT, giving them a total of up to 36 months of OPT.²⁰

OPT is part of the F-1 student status, which requires non-immigrant intent. There is no specific wage requirement for F-1 students on OPT. For the STEM OPT extension, however, the employer must attest that the practical training opportunity – including compensation – is commensurate with that of similarly situated US workers.²¹ Though the burden of proof regarding compensation is less stringent than that for the H-1B visa, a number of other requirements must be met to qualify for and maintain the STEM OPT extension.²²

Recent trends in visa usage by EU citizens

The L-1 visa is the most popular way for highly skilled EU citizens to enter the US labour market (see Figure 1). In the E-1 and E-2 visa categories, EU citizens accounted for 31 per cent and 38 per cent respectively of permits issued in fiscal year 2016. During the same period, a total of 8,927 H-1B visas were issued to workers from EU member states – representing only 5 per cent of all H-1B visas issued.

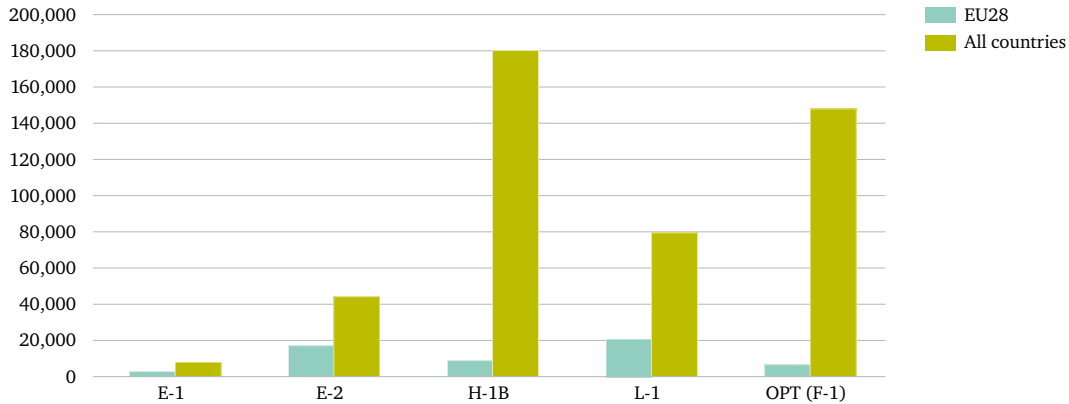
¹⁹ U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), ‘L-1A Intracompany Transferee Executive or Manager’ and ‘L-1B Intracompany Transferee Specialized Knowledge’, www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager, www.uscis.gov/working-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge (accessed 11 Jul. 2017).

²⁰ U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), ‘Optional Practical Training (OPT) for F-1 Students’, www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/optional-practical-training (accessed 11 Jul. 2017).

²¹ U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), ‘Optional Practical Training Extension for STEM Students (STEM OPT)’, www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/stem-opt (accessed 11 Jul. 2017).

²² Ibid.

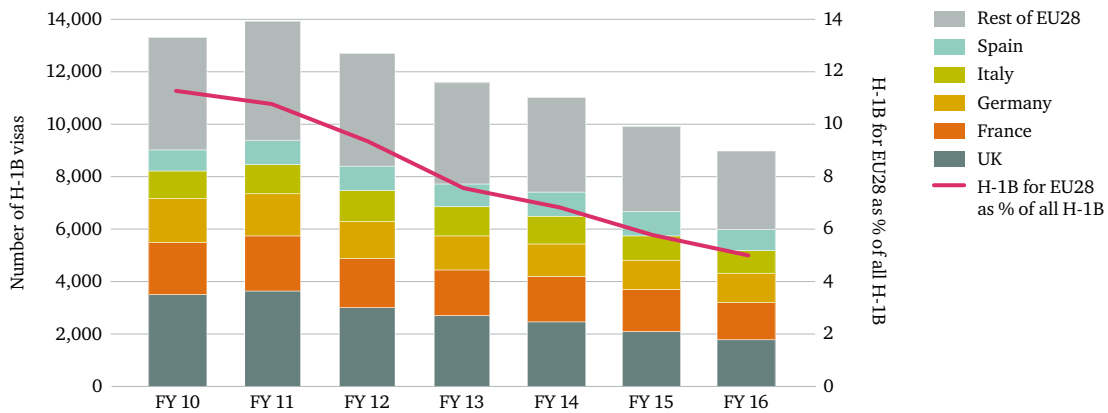
Figure 1: Temporary US visas issued to foreign nationals during US fiscal year 2016, and to foreign students on OPT during academic year 2015/16



Sources: For E-1, E-2, H-1B and L-1 visas for FY 2016: U.S. Department of State – Bureau of Consular Affairs (2016), ‘Nonimmigrant Visa Issuances by Visa Class and by Nationality’, FY2016 NIV Detail Table, <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY16%20NIV%20Detail%20Table.xls> (accessed 11 Jul. 2017). For OPT in academic year 2015/16: Institute of International Education (2016), ‘International Students by Academic Level and Place of Origin, 2014/15-2015/16’, *Open Doors Report on International Educational Exchange*, www.iie.org/Research-and-Insights/Open-Doors/Data/International-Students/Academic-Level-and-Place-of-Origin/2015-16 (accessed 11 Jul. 2017).

Over the last five years, the usage of H-1B visas by EU citizens has been declining (see Figure 2).²³ Among EU citizens, British, French and German nationals received the largest number of H-1B visas during this period.

Figure 2: Issuance of H-1B visas to EU28 citizens – fiscal years 2010 to 2016



Source: U.S. Department of State – Bureau of Consular Affairs (2016), ‘Nonimmigrant Visa Issuances by Visa Class and by Nationality’, FY1997-2016 NIV Detail Table, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-16_NIVDetailTable.xls (accessed 11 Jul. 2017).

²³ Given the difficulties involved in getting H-1B visas (especially in light of the lottery system for dealing with oversubscription), the use of other available visa categories – in particular the popular L-1 and E-2 visas – has increased. For instance, between fiscal year 2010 and fiscal year 2016, the share of EU citizens increased from 35 per cent to 38 per cent for the E-2 visa, and from 22 per cent to 26 per cent for the L-1 visa. See U.S. Department of State – Bureau of Consular Affairs (2016), ‘Nonimmigrant Visa Issuances by Visa Class and by Nationality’.

3. Overview of EU Schemes for Highly Skilled Workers

Highly skilled US citizens, like their non-EU counterparts, can work in the EU either under EU schemes (such as the EU Blue Card scheme and rules governing intra-company transfers) or under national schemes of the EU member states.

EU Blue Card

The EU Blue Card scheme, adopted in 2009, is an EU-wide work permit that allows high-skilled non-EU citizens to work in 25 of the 28 EU member states. It does not apply in Denmark, Ireland and the UK, which opted out of EU immigration rules, including the Blue Card scheme.²⁴

Applications for the EU Blue Card must be made to the authorities of the EU member state in which employment is sought. Depending on the member state, the application can be submitted by the employer or by the worker. An annual gross salary of at least 1.5 times the average gross annual salary in the EU member state concerned must be paid. For workers in occupations in which there is a shortage of suitable labour, EU member states have the possibility to set a lower salary threshold (at least 1.2 times the average gross annual salary in the member state concerned) to facilitate admission.

Some EU member states apply a labour market test, in which the employer must show that it has unsuccessfully searched for a national worker, EU citizen or legally resident non-EU citizen. Some EU countries set quotas to limit the number of non-EU citizens who can enter for highly skilled work.²⁵

The EU Blue Card is initially issued for a period of between one and four years. It can be renewed for the same period as long as the conditions are fulfilled, and there is no limit on the number of times it can be extended. The EU Blue Card holder must stay in the job for which the card was issued for the first two years, unless the national authorities give permission to change jobs. After the initial two years, the Blue Card holder may change jobs and/or employers in the member state concerned without needing to seek prior authorization – though different member states have different rules on this. After 18 months, the Blue Card holder may move to a different member state for a new high-skilled job. However, an application for a new EU Blue Card must be filed there. In the event of unemployment, the Blue Card holder has three months to find a new job. Otherwise, the EU Blue Card may be withdrawn and the individual may have to leave the country.

²⁴ European Commission (2016), 'Coming to the EU?', http://ec.europa.eu/immigration/who-does-what/what-does-the-eu-do/coming-to-the-eu_en (accessed 11 Jul. 2017).

²⁵ The quotas that member states may set are general, or per immigration scheme, but not per nationality of the applicants.

The EU Blue Card makes it easier for highly skilled workers to gain long-term residence status after five years. Periods of time spent in different EU countries can be aggregated to count towards the five-year requirement, instead of the worker having to reside and work legally in only one EU member state for this period. Blue Card holders can apply to bring their family to live with them in the country that issues the Blue Card, and dependants have access to the labour market.

Intra-company transfers

The Intra-Corporate Transfer Directive, adopted by the EU institutions in 2014, outlines the conditions of entry and residence for third-country nationals moving to the EU as a result of being transferred by their employer.²⁶ As with the EU Blue Card scheme, Denmark, Ireland and the UK have opted out of the Intra-Corporate Transfer Directive. The directive is applicable to managers, specialists and trainees. To ensure skills are specific, managers and specialists must have worked for the company for an uninterrupted period of between three and 12 months immediately prior to their transfer. In the case of trainees, the mandatory period is three to six months. The salary paid to the transferee must be at market level. The duration of the intra-company transfer is limited to three years for managers and specialists, and one year for trainees, beyond which the work permit cannot be renewed.

National schemes

While the EU Blue Card Directive co-exists with national schemes, the Intra-Corporate Transfer Directive does not allow EU member states to have their own national intra-company transfer work permit schemes.²⁷

Even though the number of EU Blue Cards issued has increased significantly, overall the national schemes attract more high-skilled workers than the EU Blue Card scheme does. A total of 17,106 EU Blue Cards were issued in 2015, whereas national schemes provided an entry route to 35,279 workers.²⁸ In several EU member states (e.g. Germany and Luxembourg), the Blue Card has become the main high-skilled workers' scheme. But in others (e.g. the Netherlands), national schemes are still dominant. This is largely because the EU Blue Card is still a relatively new scheme, and because in some member states national schemes are better known and have a lower salary threshold.²⁹

²⁶ See Directive 2014/66/EU of the European Parliament and of the Council. This directive was to be implemented into the legislation of the national EU member states with effect from 29 November 2016. However, not all states have implemented it yet.

²⁷ Ernst & Young (2016), 'EU implements European Intra Company Transfer Directive', www.ey.com/gl/en/services/people-advisory-services/hc-alert--eu-implements-european-intra-company-transfer-directive (accessed 11 Jul. 2017).

²⁸ For EU Blue Card: Eurostat (2016), 'EU Blue Cards by type of decision, occupation and citizenship [migr_resbc1]', last update: 19 October 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resbc1 (accessed 11 Jul. 2017). For national schemes: Eurostat (2016), 'First permits issued for remunerated activities by reason, length of validity and citizenship [migr_resocc]', last update: 15 November 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resocc&lang=en (accessed 11 Jul. 2017).

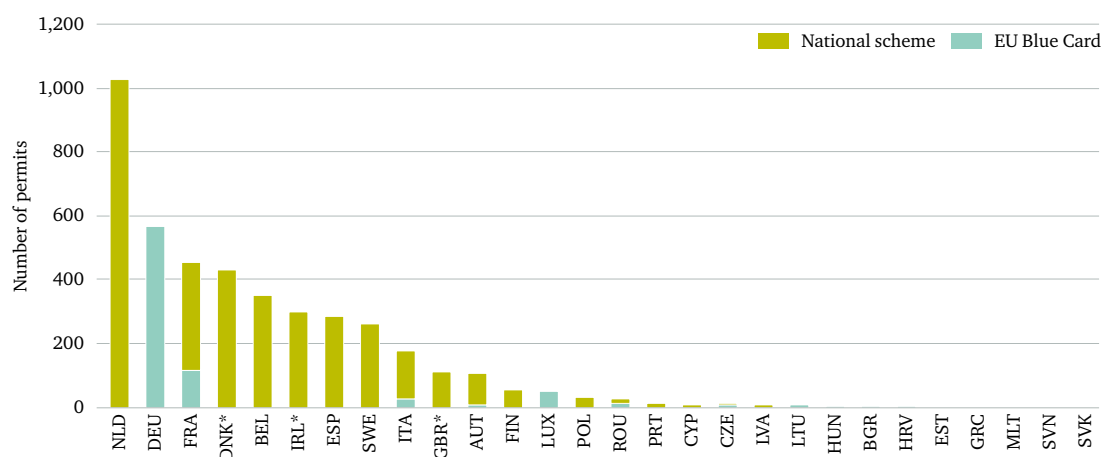
²⁹ Interview with official working on EU Blue Card scheme at European Commission Directorate-General for Migration and Home Affairs, 5 May 2017.

Recent trends in visa usage by US citizens

In 2015, a total of 4,323 US citizens were granted permits for high-skilled employment in the EU through the EU Blue Card scheme (822) and national schemes (3,501). Thus, national schemes for high-skilled employment play a more important role in aggregate for US citizens (accounting for 81 per cent of permits issued) than does the Blue Card (19 per cent). However, there are significant differences between individual countries in the visa route chosen. The Netherlands and Germany issued the most permits to US citizens in 2015. In the Netherlands, all permits were issued under the national scheme, whereas Germany granted only Blue Cards (see Figure 3). Almost 70 per cent of all EU Blue Cards for US citizens were issued by Germany – followed by France with 14 per cent.

Americans were granted approximately 5 per cent of the 17,106 EU Blue Cards issued in 2015. The US was the fifth most important country of origin for Blue Card recipients – after India, Russia, Ukraine and China.³⁰

Figure 3: EU Blue Cards and national permits for high-skilled US workers, 2015



Sources: For EU Blue Cards: Eurostat (2016), 'EU Blue Cards by type of decision, occupation and citizenship [migr_resbc1]', last update: 19 October 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resbc1 (accessed 11 Jul. 2017). For national schemes: Eurostat (2016), 'First permits issued for remunerated activities by reason, length of validity and citizenship [migr_resocc]', last update: 15 November 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resocc&lang=en (accessed 11 Jul. 2017).

Notes: The national scheme figures are not always directly comparable. There are methodological and administrative differences between the various EU member states. Moreover, the figures for permits under the national schemes are not always directly comparable to the number of EU Blue Cards issued. The difficulties in data comparability arise largely from differences in the definition of a high-skilled worker and data gaps. Denmark, Ireland and the UK (marked with “*”) opted out of the EU Blue Card scheme.

³⁰ Eurostat (2016), 'EU Blue Cards by type of decision, occupation and citizenship [migr_resbc1]'.

4. Comparison of H-1B Visa and EU Blue Card Scheme

Both the US H-1B visa and the EU Blue Card provide a temporary work permit for high-skilled professionals. Both schemes are employer-led, meaning that a foreign national's right to enter and remain is based on sponsorship by an employer. Both also provide a path to permanent residence. However, there are important differences between the US H-1B and EU Blue Card schemes. As this chapter shows, the EU Blue Card scheme, though not perfect, avoids many of the drawbacks of the H-1B scheme.

Maximum number of visas granted

The ceiling (with some exemptions) on the number of H-1B visas means that the US system is vastly oversubscribed. Each year, H-1B petitions can be filed starting on 1 April. Once sufficient petitions to meet the cap are received, the filing period is closed and does not open again until 1 April of the following year.³¹ Since the 2004 fiscal year, the cap has been reached every year. For fiscal year 2018, it took less than a week after petitions were accepted for the cap to be reached.³² In total, 199,000 H-1B visa petitions were received under the general-category cap (65,000 visas) and advanced degree exemption (20,000 visas). Given the imbalance between supply and demand, a random lottery was used to select petitions governed by the cap.

The random lottery is not based on the qualifications of the worker or the urgency of the employer's need to fill a position. The system creates unnecessary delays – as a job often cannot be filled if the visa petition is unsuccessful. Even if a petition submitted on the first possible filing date is successful in the lottery, the permitted employment start date is no earlier than 1 October of the same calendar year.

In contrast, there is no overall cap on the number of EU Blue Cards issued. Employers have much more certainty that employees can start working for them in a timely manner. EU member states may set an upper limit on the number of non-EU citizens who can enter their country for employment-based immigration in general, and on the number of EU Blue Cards issued in particular. However, only a few EU member states currently set quotas, and the limit is rarely reached.³³

By avoiding the cap, the EU Blue Card sidesteps the problems associated with oversubscription and the lottery of the H-1B system.

³¹ Only cap-exempt H-1B petitions can be filed throughout the year.

³² U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), 'USCIS Completes the H-1B Cap Random Selection Process for FY 2018', www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2018 (accessed 11 Jul. 2017).

³³ For instance, Cyprus and Greece have an annual quota for EU Blue Cards and Estonia sets a general annual quota on the number of work permits issued. Interview with official working on EU Blue Card scheme at European Commission Directorate-General for Migration and Home Affairs, 5 May 2017.

Shortcomings of employer-led system

The H-1B is available for a maximum period of six years (an initial stay of three years, plus a one-time extension of three years). This means that a foreign high-skilled worker in the US must either leave the country or adjust status after the period of authorized stay ends, for instance by having the employer petition for employment-based permanent residence (green card). In contrast, the EU Blue Card may be renewed indefinitely for the same period for which it was issued originally (one to four years, depending on the EU member state).

In the US, the employer must apply for the employee's green card – in other words, the foreign worker may not apply unilaterally for employment-based permanent residence. In contrast, the EU Blue Card holder does not require a sponsor for long-term residence status. There is thus a greater reliance on the visa sponsor in the US, which makes worker abuse harder to detect and address. As one study puts it, 'since many H-1B visa-holders hope to be sponsored by their employers for immigrant visas, they rarely complain, giving [...] few opportunities to investigate'.³⁴ As EU Blue Card holders do not depend on their employers to apply for long-term residence, they are more likely to speak out against abusive practices in the workplace or to bargain for salary increases.

In addition, the EU Blue Card is more portable (allowing workers to switch employers after two years without prior authorization from the national authority), thus giving greater autonomy to the worker. In contrast, under the H-1B visa, the subsequent employer must petition for a new H-1B permit.

In the event of unemployment, the grace period for the worker to seek new employment is longer under the EU Blue Card (three months) than under the H-1B visa (recently changed from 0 to 60 days).

Processing times and filing/application fees

The average processing time for an H-1B petition was 131 days in fiscal year 2016.³⁵ In order to reduce overall H-1B processing times, the U.S. Citizenship and Immigration Services (USCIS) temporarily suspended premium processing (an option for processing petitions within 15 calendar days, which was available for an extra fee) as of 3 April 2017 – though premium processing has since resumed for certain H-1B petitions.³⁶ The suspension of fast-track processing increases the period of uncertainty for many employers and workers.

³⁴ Martin (2012), *Attracting Highly Skilled Migrants: US Experience and Lessons for the EU*.

³⁵ U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2016), 'USCIS Processing Time Information – Historical Average Processing Time as of September 30 2016', <https://egov.uscis.gov/cris/ptAllFormsAverage.do> (accessed 11 Jul. 2017).

³⁶ U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), 'USCIS Will Temporarily Suspend Premium Processing for All H-1B Petitions', 3 March 2017, www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions (accessed 11 Jul. 2017). U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), 'USCIS to Resume H-1B Premium Processing for Certain Cap-Exempt Petitions', 24 July 2017, www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions (accessed 25 Aug. 2017).

For the EU Blue Card, the maximum amount of time authorities in member states have to make a decision on a complete application and give written notification to the applicant is 90 days. Some member states have set themselves shorter time limits – ranging from seven to 60 days.³⁷ The speed of the decision-making process – which benefits both the employer and employee – is a major advantage of the EU Blue Card.

The filing/application fees for the H-1B visa and the EU Blue Card also differ. Depending on the size and type of organization hiring the worker, H-1B filing fees can vary from \$960 to \$7,685.³⁸ In contrast, application fees for an EU Blue Card are different in each EU member state, ranging from €50 (approximately \$60) to €881 (approximately \$1,040).³⁹ The generally higher US filing fees can be more burdensome – especially for small and medium-sized enterprises (SMEs) – and in some cases are prohibitive.

Minimum salary and labour market test

As mentioned, there is no labour market test for the H-1B. The employer must only complete a Labor Condition Application, in which the employer attests that it is paying the prevailing wage. But the process for determining prevailing wages is not straightforward, and many loopholes exist.⁴⁰

In contrast, the salary threshold for the EU Blue Card (at least 1.5 times the average gross annual salary in the member state concerned, with the possibility to lower it to 1.2 times for workers in occupations in which there is a shortage of labour) is more straightforward to meet. However, the relatively high minimum salary requirement can hinder access for recent graduates. The EU Blue Card allows EU member states to apply a labour market test, and in 2015 approximately half had foreseen the legal possibility to do so.⁴¹ However, in reality the labour market test for high-skilled workers is not used much, and, when applied, rarely leads to a rejection.⁴² The labour market test for the EU Blue Card is thus no real hurdle, though a potential source of delays.

The speed of the decision-making process – which benefits both the employer and employee – is a major advantage of the EU Blue Card.

³⁷ European Commission (2014), *Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC*, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0287&from=EN> (accessed 11 Jul. 2017).

³⁸ Fees include a base processing fee of \$460, a fraud prevention and detection fee of \$500, an American Competitiveness and Workforce Improvement Act of 1998 fee of either \$750 or \$1,500 (when required), a fee based on Public Law 114-113 of \$4,000 (when required), as well as a premium processing fee of \$1,225 (optional). See U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services (2017), 'H and L Filing Fees for Form I-129, Petition for a Nonimmigrant Worker', www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker (accessed 11 Jul. 2017).

³⁹ European Commission (2016), 'EU Immigration Portal – EU Blue Card', http://ec.europa.eu/immigration/bluecard_en (accessed 11 Jul. 2017).

⁴⁰ Aobdia, D., Srivastava, A. and Wang, E. (2016), 'Does the H-1B Visa Program Hurt American Workers?', Kellogg Insight, 7 September 2016, <https://insight.kellogg.northwestern.edu/article/does-the-h-1-b-visa-program-hurt-american-workers> (accessed 11 Jul. 2017).

⁴¹ Germany and France – two of the EU's three most populous countries and largest economies – do not apply labour market tests. See European Commission (2016), *Commission Staff Working Document – Impact Assessment – Annexes to the Impact Assessment – Part 5*, http://eur-lex.europa.eu/resource.html?uri=cellar:5dffd125-2d87-11e6-b497-01aa75ed71a1.0001.02/DOC_3&format=PDF (accessed 11 Jul. 2017).

⁴² Interview with official working on EU Blue Card scheme at European Commission Directorate-General for Migration and Home Affairs, 5 May 2017.

Coherence of visa scheme

One major drawback of the EU Blue Card scheme is that it exists in parallel to the many national schemes. This can make it complex and confusing both for highly skilled workers and for their employers, who have to decide between ‘different administrative procedures for the same category of migrants’.⁴³ Further complicating the patchwork of EU Blue Card and national schemes is the fact that the EU Blue Card itself is not harmonized. Added to the proliferation of national schemes, this means that approximately 50 different admission schemes for highly skilled workers exist in the EU. Navigating this maze is challenging for employees and employers alike – particularly for SMEs. The creation of a harmonized approach in a single EU-wide scheme is thus being considered as part of efforts to reform the system.⁴⁴

⁴³ European Commission (2016), *Commission Staff Working Document – Impact Assessment – Annexes to the Impact Assessment – Part 6*, http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/directive_conditions_entry_residence_third-country_nationals_highly_skilled_employment_impact_assessment_part_6_en.pdf (accessed 11 Jul. 2017).

⁴⁴ See Chapter 6 of this paper for more information.

5. Economic Impact of US Visa System

Mobility of high-skilled labour benefits US economy

Highly skilled workers who come to the US for temporary work benefit the US economy and create American jobs. It is estimated that for every H-1B worker, 1.83 jobs are created for US-born citizens.⁴⁵ For smaller businesses in the technology sector and with fewer than 5,000 employees, the job-creating effects of hiring H-1B workers are estimated to be even larger – generating 7.5 additional positions per H-1B worker hired.⁴⁶

H-1B workers also contribute to the US economy as entrepreneurs and innovators.⁴⁷ More than half of America's start-up companies valued at \$1 billion or more were founded by foreigners. Entrepreneurs from the UK, Germany, France and Ireland were among the top 10 countries of origin in 2016.⁴⁸

While the H-1B visa scheme is often criticized for displacing domestic workers and lowering wages, these fears are often exaggerated. For instance, the Government Accountability Office found that H-1B professionals and US workers in the same occupations were not systematically underpaid, and that in some occupations and age groups H-1B workers earned more than their US counterparts.⁴⁹

In addition, visas for existing and potential investors and treaty traders facilitate investment and trade – and thus contribute to US economic growth and job creation. European firms and affiliates in the US employed approximately 4.1 million US workers in 2014.⁵⁰ The top five European employers in the US are the UK (British firms employed 1.1 million US workers in 2014), Germany (672,000), France (574,000), Switzerland (461,000) and the Netherlands (416,000).⁵¹ As Case study 1 shows, European firms – including SMEs – that have access to E-1 and/or E-2 visas contribute to the US economy.

⁴⁵ Zavodny, M. (2011), *Immigration and American Jobs*, Washington, DC: American Enterprise Institute and Partnership for a New American Economy, www.newamericaneconomy.org/wp-content/uploads/2011/12/NAE_Im-AmerJobs.pdf (accessed 11 Jul. 2017).

⁴⁶ National Foundation for American Policy (2008), *H-1B Visas and Job Creation*, NFAP Policy Brief, Arlington, VA: National Foundation for American Policy, www.nfap.com/pdf/080311h1b.pdf (accessed 11 Jul. 2017).

⁴⁷ Compete America, Partnership for a New American Economy, and U.S. Chamber of Commerce (2015), *Understanding and Improving the H-1B Visa Program*, www.uschamber.com/sites/default/files/chamber-competepnae_briefing_book_on_understanding_and_improving_h-1b_visas_4-24-2015.pdf (accessed 11 Jul. 2017).

⁴⁸ Anderson, S. (2016), *Immigrants and Billion Dollar Startups*, NFAP Policy Brief, Arlington, VA: National Foundation for American Policy, <http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf> (accessed 11 Jul. 2017).

⁴⁹ United States Government Accountability Office (2011), *H-1B Visa Program – Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Report GAO-11-26, Washington, DC: United States Government Accountability Office, www.gao.gov/assets/320/314501.pdf (accessed 11 Jul. 2017).

⁵⁰ Hamilton and Quinlan (2017), *The Transatlantic Economy 2017: Annual Survey of Jobs, Trade and Investment between the United States and Europe*.

⁵¹ Ibid.

Case study 1: Northern Star

Northern Star is an IT support, consultancy and management company started in 1997. Headquartered in London, the company opened an office in New York in 2015. Ashley Lukas, a UK citizen and now president of Northern Star LLC – the New York branch of the Northern Star Group – was issued an E-2 (treaty investor) visa to spearhead the New York operations. ‘Obtaining a US visa was perhaps one of the greatest challenges for Northern Star. The E-2 visa process took six months to complete – with bible-thick paperwork to file,’ he said. An excellent immigration lawyer facilitated navigation of the complex process.

Northern Star initially invested \$120,000 in its US operations. After one year, Northern Star LLC had a turnover of \$600,000 and employed four US citizens. The company plans to open an office in San Francisco in October 2017. In five years, Northern Star LLC intends to have 10 staff in the US. To address Northern Star LLC’s skills needs, the company would like to recruit other highly skilled foreign workers. Says Lukas: ‘To access the talent we need, we would benefit from greater predictability and better timely processing of visa applications. Improvements to the recognition of skills are also desirable. Otherwise, we cannot recruit and retain the best and brightest.’

Source: Author’s interview with Ashley Lukas, president of Northern Star LLC, on 26 May 2017.

Shortcomings of US visa system hamper America’s economic growth

The quantitative restriction on H-1B visas prevents the system from meeting the demands of the US economy. Especially in the STEM fields, there is a growing shortage of workers in the private sector. This scarcity of skilled workers hinders the ability of US firms to expand at home and increases their incentives to expand overseas. In one high-profile case, Microsoft decided to open a software development centre in Vancouver in response to not being able to hire enough H-1Bs in the US.⁵² Thirty-five per cent of US employers report having lost key talent as a result of the H-1B visa cap.⁵³ Not being able to bring in the talent they need hampers the ability of companies – especially SMEs – to grow and innovate in the US. In short, the fact that the H-1B visa cap results in the rejection of more than half of H-1B visa petitions under the lottery is damaging to productivity, job creation and economic growth.

Staffing uncertainties associated with the H-1B cap, legal costs, administrative fees and compliance expenses increase the cost of doing business. Filing and legal fees for a first-time H-1B visa typically cost an employer approximately \$3,500–12,000.⁵⁴ According to one estimate, the staff time that employers spend just filing H-1B visa petitions costs them \$18.7 million annually.⁵⁵ This time and money could otherwise go into developing their businesses and creating jobs.

The system puts a particular burden on SMEs. The H-1B cap penalizes them more than larger firms, as SMEs are less likely to be able to pursue alternative visa strategies (such as providing a year’s overseas placement to a foreign worker not selected in the H-1B lottery). SMEs also have

⁵² Finkle, J. and Dowd, A. (2007), ‘Microsoft expands in Canada amid U.S. visa crunch’, Reuters, 5 July 2007, www.reuters.com/article/us-microsoft-canada-immigration-idUSN0536902120070705 (accessed 11 Jul. 2017).

⁵³ Council for Global Immigration, Society for Human Resource Management, and Fragomen Worldwide (2016), *Employer Immigration Metrics – 2016 Survey Results*, <https://forms.shrm.org/forms/2016-cfgi-employer-immigration-survey> (accessed 11 Jul. 2017).

⁵⁴ Ibid.

⁵⁵ Batkins, S. and Collins, L. (2015), ‘The Costs of a Broken Immigration System on American Business’, American Action Forum, 9 April 2015, www.americanactionforum.org/research/the-costs-of-a-broken-immigration-system-on-american-business/ (accessed 11 Jul. 2017).

fewer resources to navigate the complicated immigration system. The high application costs and legal fees are major obstacles for SMEs in accessing the visa system. As one immigration lawyer puts it:

When the H-1B cap prevents the hiring of a foreign worker, large multinational companies are often able to temporarily place the employee in an overseas office. After a year, they can try to relocate the employee to the company's US office on an L-1 visa. However, SMEs generally don't have the infrastructure or resources to pursue such alternatives.

Naïanka M. Rigaud, Attorney, Erickson Immigration Group – interview with author, 10 July 2017

Given the difficult path to lawful permanent residence for high-skilled foreign workers in the US, America's visa policies are considered 'mostly unfavorable to economic growth', according to the Business Roundtable.⁵⁶ Most of the US's competitors – including the EU – make obtaining permanent residence easier for highly skilled workers, thus providing a competitive advantage over America in terms of attracting the best and brightest from abroad:

The current US visa system does not reflect the needs of the US economy. The cap on H-1B visas and other inefficiencies make it difficult for firms to obtain the visas they need for highly skilled workers from abroad. The H-1B visa is often a critical step to legal permanent residence. But the length it takes to get a green card creates a state of perpetual temporariness and insecurity for both the employee and employer. This drives key talent away. As a result, US innovation and competitiveness suffer.

Sameer Khedekar, Managing Partner, Pearl Law Group – interview with author, 29 June 2017

Under the US system, start-up companies cannot use the H-1B visa in the earliest-stage ventures (i.e. when the individual in need of the visa is the entrepreneur, and the firm may not yet exist and thus cannot meet the legal criteria for employing H-1Bs).⁵⁷ In contrast to the systems in other countries – for instance Chile, Singapore and the UK – the US does not have a separate visa for start-up companies, which are seen as critical to innovation and future job creation. This gap encourages foreign entrepreneurs with innovative ideas and access to venture capital to pursue start-up opportunities in other countries (see Case study 2). It risks putting the US at a competitive disadvantage in entrepreneurship, particularly in the high-tech field.

Case study 2: Claudio Carnino

Claudio Carnino is an Italian citizen and entrepreneur in the technology industry. With aspirations to go to the US, he made it all the way to the final round of interviews for a prestigious start-up accelerator programme in Providence, Rhode Island in 2010. But the rules under US visa schemes, which lack a special start-up category for foreign entrepreneurs raising outside funding, presented insurmountable hurdles.

'While the start-up accelerator wanted to give us seed funding, it decided not to support us in the end. The accelerator did not want to risk investing in a company whose founders might have to leave the US because of difficulties in securing long-term visas,' says Carnino.

⁵⁶ Business Roundtable (2015), *State of Immigration – How the United States Stacks Up in the Global Talent Competition*, Washington, DC: Business Roundtable, http://businessroundtable.org/sites/default/files/immigration_reports/BRT%20immigration%20report.pdf (accessed 11 Jul. 2017).

⁵⁷ United States Government Accountability Office (2011), *H-1B Visa Program – Reforms Are Needed to Minimize the Risks and Costs of Current Program*.

Together with the accelerator, Carnino explored various options to tackle US immigration law. But the H-1B visa was not a viable route because he had dropped out of university in his native Italy to found a start-up. Another setback followed when an accelerator programme in San Francisco also decided not to invest in the company over visa concerns.

Ultimately, Carnino was able to find a more hospitable environment in Chile, where he was supported by the government's start-up programme, raised funds and hired workers. After staying for two years, Carnino is now based in London. Looking back at his experience around US visa issues, he reflects: 'Our goal was to create a tech company in the US, which could have contributed to American innovation. We could have created US jobs and, by raising funds from around the world, could have brought investment to the US.'

Source: Author's interview with Claudio Carnino on 5 June 2017.

Problems regarding the timely availability of visas also harm employees and employers, and thus the larger US economy. According to an employer survey by the Council for Global Immigration, 74 per cent of US employers stated that their ability to obtain work visas in a timely and predictable fashion is critical to their firm's business objectives.⁵⁸

The timely availability of visas is also a crucial consideration in FDI decisions. The US Department of Commerce acknowledged in 2007 that while efforts to improve the visa process have traditionally focused on the needs of US-owned firms, existing and potential international investors face many of the same issues. It stated: 'Such investors are important to U.S. economic growth and job creation. Thus, efforts to address specific visa-related concerns associated with FDI need to be encouraged.'^{59, 60}

The E-1 visa for treaty traders and E-2 visa for treaty investors are not open to citizens from all countries – ineligible countries include India and China, but also a number of EU member states. As these visa schemes play a critical role in stimulating job creation and economic growth through international trade and investment in the US, the fact that only 18 out of 28 EU member states have full access to E-1/E-2 visas hurts the US economy.⁶¹

The denial rate for petitions for L-1B visas (one of the L-1 subcategories) to transfer foreign employees with specialized knowledge into the US has increased significantly in recent years. Between the 2012 and 2014 US fiscal years, India had by far the highest denial rate, at 56 per cent, compared with an average denial rate of 13 per cent for all other countries.⁶² Denial

⁵⁸ Council for Global Immigration, Society for Human Resource Management, and Fragomen Worldwide (2016), *Employer Immigration Metrics – 2016 Survey Results*.

⁵⁹ U.S. Department of Commerce (2007), *Visas and Foreign Direct Investment – Supporting U.S. Competitiveness by Facilitating International Travel*, <http://trade.gov/media/publications/pdf/visas07.pdf> (accessed 11 Jul. 2017).

⁶⁰ Regarding the timely availability of business-related visas, it should be noted that access to the Visa Waiver Program (VWP) is critical. Citizens of participating countries can travel to the US for tourism or business for stays of 90 days or less without first obtaining a visa if they meet certain requirements. However, the US does not extend visa-free travel to citizens of five EU member states (Bulgaria, Croatia, Cyprus, Poland and Romania). Another consideration is that because work visas are employer-specific, changes in a company's structure as a result of mergers and acquisitions can affect a foreign national employee's non-immigrant visa status. This is true for cross-border mergers and acquisitions, but also for domestic ones. The consequences depend upon the type of non-immigrant visa held. Employees holding an L-1 intra-company transferee visa may be seriously affected, but there could also be implications for holders of visas in the H-1B and E-1/E-2 categories.

⁶¹ No EU-wide scheme facilitates visas for investors, but many EU member states have special investor visas.

⁶² National Foundation for American Policy (2015), *L-1 Denial Rates Increase Again for High Skill Foreign Nationals*, NFAP Policy Brief, Arlington, VA: National Foundation for American Policy, <http://nfap.com/wp-content/uploads/2015/03/NFAP-Policy-Brief.L-1-Denial-Rates-Increase-Again.March-20151.pdf> (accessed 11 Jul. 2017).

rates for employees seeking transfer into the US from key EU member states were above this average: for French citizens the denial rate was 19 per cent, while for British and German nationals the denial rates were 16 per cent and 15 per cent respectively.⁶³ As a consequence, ‘companies become more likely to move work out of the United States – or to invest less in America in the first place – to avoid the difficulties of the U.S. immigration system’.⁶⁴

Finally, the US visa system impedes the retention of international students after graduation. While OPT offers the opportunity for temporary short-term employment, the difficulties involved in subsequently acquiring an H-1B visa, as well as the long path to an employment-based green card, induce recent graduates to leave the country.⁶⁵ In 2015, 45 per cent of full-time graduate students in science and engineering at US universities held temporary visas.⁶⁶ At a time when the US is trying to address its growing shortage of STEM workers, retaining these international students is critical. Of 87 US start-ups worth \$1 billion or more, according to one study, 20 were founded by foreign entrepreneurs who first came to the US as international students.⁶⁷ Five of those companies were founded by international students from EU member states.⁶⁸ Though EU citizens account for a small number of the full-time international students who pursue graduate or PhD degrees at US universities, they make important contributions. When they leave the country after graduation or on the completion of OPT, the US loses its significant investment in these highly skilled students – and their potential future contributions to US innovation, entrepreneurship and jobs growth. One University of Maine official describes the situation thus:

A significant percentage of our full-time graduate students in the STEM fields are international students. Only a few of them are from the EU, but they make a big impact. Maine’s economy – particularly the IT sector – needs highly skilled workers from abroad. Optional Practical Training and subsequently the H-1B visa allow international students to work in the US upon graduation, where they play a crucial role in ensuring Maine stays innovative... Having favourable visa policies will make the US more competitive in retaining these graduates and preventing a drain on the US economy.

Orlina Boteva, Director of the Office of International Programs, University of Maine (Orono) – interview with author, 18 July 2017

Overall, in a comparison of the immigration policies of 10 advanced economies and their impact on economic growth, the US ranks in ninth place. The Business Roundtable comes to the following conclusion: ‘The low annual limits on temporary visas (H-1B) and employment-based green cards for high-skilled foreign nationals, along with high denial rates for intracompany

⁶³ Ibid. The authors acknowledge that the high rate of denials is difficult to understand because there has been no change in the regulation on L-1Bs. In addition, it is also not true that countries with high denial rates tend to be those with the highest number of applicants – as Canadian nationals (with the second-highest number of petitions) experienced a denial rate of only 4 per cent between fiscal year 2012 and fiscal year 2014.

⁶⁴ Ibid.

⁶⁵ Meanwhile, other countries maintain policies aimed at encouraging international students to stay and work after graduation, which puts the US in ninth position out of 10 economies in the category ‘Retention of International Students Postgraduation’. See Business Roundtable (2015), *State of Immigration – How the United States Stacks Up in the Global Talent Competition*.

⁶⁶ National Science Foundation – National Center for Science and Engineering Statistics (2016), ‘Full-time graduate students in science, engineering, and health, by field - Tables 5 and 8’, *Survey of Graduate Students and Postdoctorates in Science and Engineering – Fall 2015*, <https://ncesdata.nsf.gov/datatables/gradpostdoc/2015/> (accessed 11 Jul. 2017).

⁶⁷ Anderson (2016), *Immigrants and Billion Dollar Startups*.

⁶⁸ Alexander Asseily (UK) – co-founder of Jawbone; John and Patrick Collison (Ireland) – co-founders of Stripe; Mario Schlosser (Germany) – co-founder of Oscar Health Insurance; Eric Setton (France) – co-founder of Tango; Renault Visage (France) – co-founder of Eventbrite. See Anderson (2016), *Immigrants and Billion Dollar Startups*.

transfers and the lack of visas for [...] entrepreneurs [...], make U.S. immigration policies “mostly unfavorable” to economic growth when compared to other advanced economies.”⁶⁹

Given the shortcomings of the US visa system, European firms face difficulties in hiring highly skilled workers in the US under the H-1B visa scheme, and in acquiring visas for intra-company transferees, treaty investors and traders. At times, this impedes FDI and thus US job creation:

There is a direct link between the challenges posed by the US employment-based immigration system and the reluctance of global investors to choose America over our competition. It’s all about uncertainty. For example, the random H-1B lottery system prevents employers from planning with certainty, and that frustrates investors whether from the United States, Europe or other areas. We make the case for reform every day: The US employment-based immigration system is misaligned with today’s business realities – harming employers and employees alike – which hurts job creation, innovation and ultimately the US economy.

Rebecca K. Peters, Director of Government Affairs, Council for Global Immigration – interview with author, 26 June 2017

⁶⁹ Business Roundtable (2015), *State of Immigration – How the United States Stacks Up in the Global Talent Competition*, p. 17.

6. Policy Considerations and Recommendations

Current initiatives for reform

Even though the EU Blue Card Directive was adopted only in 2009, it is already being revised to address some of the system's shortcomings, increase responsiveness to skills shortages and boost the contribution of foreign workers to the EU economy. Proposed improvements include increasing intra-EU mobility and abolishing the parallel national schemes. In June 2016, the European Commission released its proposal for a revised EU Blue Card Directive, which is now under discussion in the Council of the European Union and the European Parliament.⁷⁰ The European Commission estimates that the new EU Blue Card scheme would lead to a 'positive annual economic impact of between €1.4 billion to €6.2 billion from additional highly skilled workers coming to the EU to take up jobs'.⁷¹

In the US, the overhaul of visa schemes for highly skilled workers – alongside other efforts on immigration reform – has become a key topic for policymakers in the wake of President Donald Trump's election. In an April 2017 executive order entitled 'Buy American and Hire American', the president ordered the departments of State, Justice, Labor and Homeland Security to 'suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries'.⁷² Many advisers to President Trump, particularly US Attorney General Jeff Sessions, believe that the US system for highly skilled workers is flawed and are especially critical of the H-1B visa scheme. But given the large number of former business representatives in the Trump administration, divergent viewpoints might be raised. Radical changes to the H-1B programme would meet industry opposition, for instance from the technology sector.

The president's powers to change the visa system are in any case limited. While the president can implement directives that prevent abuse and fraud, such as increased random on-site inspections to ensure visa-sponsoring firms are adhering to the programme, the real power to change immigration law lies with Congress.⁷³ The overarching goals of major reform bills introduced in Congress are to prevent fraud and abuse, and to prevent foreign workers from undercutting US labour costs.

⁷⁰ European Commission (2016), *Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment*, http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/directive_conditions_entry_residence_third-country_nationals_highly_skilled_employment_en.pdf (accessed 11 Jul. 2017).

⁷¹ European Commission (2016), 'Delivering the European Agenda on Migration: Commission presents Action Plan on Integration and reforms 'Blue Card' scheme for highly skilled workers from outside the EU', press release, 7 June 2016, http://europa.eu/rapid/press-release_IP-16-2041_en.htm (accessed 11 Jul. 2017).

⁷² The White House – Office of the Press Secretary (2017), 'Presidential Executive Order on Buy American and Hire American', executive order, 18 April 2017, www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american (accessed 11 Jul. 2017).

⁷³ *National Law Review* (2017), 'Trump Administration's April 18, 2017 Executive Order on H-1B Process', 26 April 2017, www.natlawreview.com/article/trump-administration-s-april-18-2017-executive-order-h-1b-process (accessed 11 Jul. 2017).

Policy recommendations to increase transatlantic mobility of high-skilled labour

1. Introduce a special visa allowing highly skilled EU citizens to work temporarily in the US

The US and EU should consider a bilateral mobility agreement for highly skilled workers. This could be negotiated alongside or after a free-trade agreement such as the Transatlantic Trade and Investment Partnership (TTIP). However, at this point the future of TTIP is uncertain. Even if talks resume, efforts to increase transatlantic mobility for highly skilled workers would have to be negotiated separately and would require an act of Congress in the US.

The US's E-3 visa for citizens of Australia could serve as an example for a new category of permit. The E-3 visa is in many respects similar to the H-1B visa, but without many of the latter's drawbacks. A special visa, along the lines of the E-3 visa, for EU citizens temporarily working in the US in 'specialty occupations' should not be subject to the annual H-1B cap. If a separate annual quota is set, it should reflect employers' needs. Unlike an H-1B, a special visa for EU citizens should not limit the worker's stay to a maximum period of six years. As with the E-3 visa, it could be issued for an initial period of two years but be renewable indefinitely for up to two years per extension. In this way, the visa would provide predictability and flexibility.

In their efforts to reform the visa schemes for highly skilled foreign workers, US policymakers should consider giving greater reciprocity to EU nationals for three reasons. First, many of the perceived problems and abuses of the H-1B scheme do not implicate EU nationals. American concerns about low-wage foreign workers taking US jobs do not apply to Europeans given the comparability of wages. For instance, the median income of citizens from the UK on H-1B visas was significantly higher in 2002 (latest available data) than the median income of all H-1B recipients (\$68,000 versus \$53,000).⁷⁴

Second, the EU system treats US workers more favourably. As pointed out earlier, compared to their EU counterparts on H-1B visas, US workers on the EU Blue Card scheme can switch jobs more easily, have an easier path to long-term residence (as they do not require the employer as a sponsor), and have a longer grace period in which to find new employment in the event of dismissal.

Third, EU citizens are relatively under-represented in the H-1B visa programme. Though the number of EU citizens who receive H-1B visas is twice as high in absolute terms (8,927 in fiscal year 2016) as the number of US citizens who get visas under the EU Blue Card and national schemes combined (4,323 in 2015), it is lower relative to the total number of permits issued. While US citizens received more than 8 per cent of all EU Blue Cards and permits issued under the national schemes in 2015, EU citizens represented only 5 per cent of all H-1B recipients in fiscal year 2016.⁷⁵

⁷⁴ The last year for which data are available is fiscal year 2002. See U.S. Department of Homeland Security – Office of Immigration Statistics (2003), *2002 Yearbook of Immigration Statistics*, p. 95, www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2002.pdf (accessed 11 Jul. 2017).

⁷⁵ For H-1B visa: U.S. Department of State – Bureau of Consular Affairs (2016), 'Nonimmigrant Visa Issuances by Visa Class and by Nationality'. For EU Blue Card: Eurostat (2016), 'EU Blue Cards by type of decision, occupation and citizenship [migr_resbc1]'. For national schemes: Eurostat (2016), 'First permits issued for remunerated activities by reason, length of validity and citizenship [migr_resocc]'.

2. Extend availability of E-1/E-2 visas to all EU member states

The E-1 and, in particular, the E-2 visa are very popular among EU citizens. Almost twice as many EU professionals were on treaty investor (E-2) visas than on H-1B visas in fiscal year 2016.⁷⁶ However, 10 EU member states either have access to only one of the visa schemes or have no access at all. Those member states seek an expansion of the E-1/E-2 visa schemes for their citizens.⁷⁷ But given the EU's exclusive competence over a common commercial policy and FDI since the entry into force of the Lisbon Treaty in 2009, individual EU member states cannot simply negotiate a bilateral investment treaty with the US without the EU's approval.⁷⁸ Thus, another approach could be for the US to develop 'a non-immigrant investor visa within the E category that is available to international investors outside the bilateral treaty process'.⁷⁹

Because investor visas are generally associated with creating jobs in the US, they would not be subject to the same degree of criticism as H-1B or L-1 visas.⁸⁰ In addition, the relative size of FDI flows between the US and EU warrants the consideration of a special E visa that covers all EU member states. Seventy per cent of US FDI outflows globally went to Europe in 2016, while Europe accounted for 72 per cent of global FDI inflows into the US.⁸¹

3. Increase efforts to eliminate fraud and abuse in the H-1B visa system

Given the political backdrop in the US outlined at the beginning of this chapter, initiatives to establish a special US visa for highly skilled EU workers or expand access to the E-1/E-2 visa schemes to all EU member states would face obstacles. Proposals would likely be caught up in the ongoing initiatives to overhaul the H-1B visa scheme.

A more short-term solution to improve transatlantic mobility for legitimate and compliant EU employers and highly skilled workers could be based on current US efforts to better detect H-1B visa fraud and abuse – including increasing site visits, interviews and investigations of employers who use the H-1B visa programme.⁸² As long as these measures improve how the H-1B system functions and do not place a burden on compliant applicants, efforts to reduce abuse and fraud in the H-1B system should be welcome. By scrutinizing and penalizing the minority of those who misuse the system, the US authorities should make it easier for employers that use the system for its intended purpose to get access to the talent they need.

⁷⁶ U.S. Department of State – Bureau of Consular Affairs (2016), 'Nonimmigrant Visa Issuances by Visa Class and by Nationality'.

⁷⁷ See, for example, Hungary. Embassy of Hungary in Washington, DC (2017), 'Business and trade relations', <http://washington.kormany.hu/business-and-trade-relations> (accessed 11 Jul. 2017).

⁷⁸ According to Article 2(1) of the Treaty on the Functioning of the European Union, only the EU may legislate and adopt legally binding acts in areas within its exclusive competence. EU member states may do so themselves only if empowered by the EU.

⁷⁹ U.S. Department of Commerce (2007), *Visas and Foreign Direct Investment – Supporting U.S. Competitiveness by Facilitating International Travel*.

⁸⁰ *Ibid.*

⁸¹ Hamilton and Quinlan (2017), *The Transatlantic Economy 2017: Annual Survey of Jobs, Trade and Investment between the United States and Europe*.

⁸² U.S. Department of Homeland Security – U.S. Citizenship and Immigration Services, 'Combating Fraud and Abuse in the H-1B Visa Program', www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/combating-fraud-and-abuse-h-1b-visa-program (accessed 11 Jul. 2017).

7. Conclusions

Both the US and EU have visa schemes for highly skilled foreign workers. The EU Blue Card system has several advantages over the US's H-1B visa scheme. It is much easier for highly skilled US workers to work temporarily in the EU than it is for highly skilled EU nationals to work in the US.

The shortcomings of the US visa system – in particular, the cap and related uncertainties around the H-1B visa, obstacles to the retention of international students, high denial rates for intra-company transfers, the lack of a start-up visa for entrepreneurs, and limited access to the treaty trader and investor visas – hurt the US economy.

For more than a decade, the US Congress has tried to tackle H-1B visa reform. Following President Trump's calls for a complete review of the H-1B visa and a number of bills introduced in Congress aimed at reform of the programme, renewed efforts to modify the visa scheme are under way. In reforming the schemes available for highly skilled workers from abroad, policymakers will have to balance their desire to protect US workers from competition with the need not to hamper US innovation, entrepreneurship, investment, job creation and economic growth – all associated with the movement of highly skilled workers.

As many of the problems and abuses associated with the US visa system do not implicate EU citizens, US policymakers should give special consideration to a more open immigration policy for highly skilled professionals from the EU. This would ultimately benefit the US economy.

Appendix

Table 1: Overview of US treaty countries in the EU for E-1/E-2 visas

Country	Visa category		Date of treaty's entry into force
Austria	E-1	E-2	27 May 1931
Belgium	E-1	E-2	3 October 1963
Bulgaria		E-2	2 June 1994
Croatia	E-1	E-2	15 November 1882*
Czech Republic		E-2	1 January 1993
Denmark	E-1	E-2	30 July 1961 and 10 December 2008
Estonia	E-1	E-2	22 May 1926 and 16 February 1997
Finland	E-1	E-2	10 August 1934 and 1 December 1992
France	E-1	E-2	21 December 1960
Germany	E-1	E-2	14 July 1956
Greece	E-1		13 October 1954
Ireland	E-1	E-2	14 September 1950 and 18 November 1992
Italy	E-1	E-2	26 July 1949
Latvia	E-1	E-2	25 July 1928 and 26 December 1996
Lithuania		E-2	22 November 2001
Luxembourg	E-1	E-2	28 March 1963
Netherlands	E-1	E-2	5 December 1957
Poland	E-1	E-2	6 August 1994
Romania		E-2	15 January 1994
Slovakia		E-2	1 January 1993
Slovenia	E-1	E-2	15 November 1882*
Spain	E-1	E-2	14 April 1903
Sweden	E-1	E-2	20 February 1992
United Kingdom	E-1	E-2	3 July 1815

Notes: No treaties with Cyprus, Hungary, Malta, Portugal.

*According to the US State Department, '[t]he U.S. view is that the Socialist Federal Republic of Yugoslavia (SFRY) has dissolved and that the successors that formerly made up the SFRY - Bosnia and Herzegovina, Croatia, the Republic of Macedonia, Slovenia, Montenegro, Serbia, and Kosovo [] continue to be bound by the treaty in force with the SFRY and [sic] the time of dissolution.'

Source: U.S. Department of State – Bureau of Consular Affairs (2017), 'Treaty Countries', <https://travel.state.gov/content/visas/en/fees/treaty.html> (accessed 11 Jul. 2017).

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