

**Building the Invisible Wall Against Legal Immigration:
The Trump Administration’s Revocation of Work
Authorization for H-4 Visa Holders**

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I. INTRODUCTION

In December 2017, President Donald Trump's administration announced plans to remove a rule granting employment authorization to dependent spouses of H-1B visa holders. The revocation of the work authorization will detrimentally impact nearly a hundred thousand recipients, mainly women, and people of color. Commonly known as H-4 EAD, the Obama administration created the rule in 2015 to allow accompanying spouses of H-1B visa holders the ability to lawfully work in the United States. This Note discusses the Trump administration's overall restrictions on the H-1B visa, the most common work visa for foreign workers pursuing employment in the United States, as well as the economic benefits of the visa program. In the wake of Canada's new progressive approaches for recruiting highly skilled foreign workers, this Note also compares Canada's immigration regulations with the United States. Lastly, this Note discusses the devastating effects the H-4 EAD revocation will have on the women relying on it as well as possible legal remedies for them in light of the current tumultuous immigration environment.

II. HISTORY OF THE H-1B VISA PROGRAM

Donald Trump built his successful 2016 presidential campaign on proposing stricter immigration regulations, which included promises to tighten border security and to keep U.S. jobs in the hands of citizens. Since his inauguration, many of President Trump's propositions are now coming to fruition. The Trump administration's plans to revoke the employment authorization for spouses of H-1B visa holders goes against the very purpose of the H-1B visa program. The Immigration Act of 1990 ("the Act") established the H-1B visa. At the signing of the Act, President George H.W. Bush stated, "[the Act] will promote a more competitive economy, respect for the family unit, and swift punishment for drugs and crime. Immigration is not just a link to America's past, it's also a link to America's future."¹ During the height of the internet boom and rapid growth of technological advances, the 1990s saw the crucial need for highly skilled workers.² Accordingly, the Act made substantial modifications and new additions to the Immigration and Nationality Act of 1965, which codifies the nation's immigration and naturalization laws.³ The Act increased the number of immigrants that could enter into the country

¹ Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 FORDHAM INT'L L. J. 328, 328 (1990).

² John Bound et al., *Understanding the Economic Impact of the H-1B Program on the U.S.* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 23153, 2017).

³ Leiden & Neal, *supra* note 1, at 328.

every year and, more importantly, created the H-1B visa,⁴ which has since become the largest and most common employment visa for foreign nationals working in the United States.

Employment-based visas are just one of the many visa categories for entry into the United States.⁵ Specifically, employment-based visas are divided into five categories based on distinct levels of skill sets: priority workers, professionals holding advanced degrees, skilled workers, certain special immigrants, and investors who invest in a commercial enterprise.⁶ The H-1B program falls into the “specialty occupation” category, dictated by the Immigration and Nationality Act sections 212(n) and 214.⁷ The H-1B is a category of non-immigrant temporary work visa that is available to foreign nationals for up to six years and requires at least a bachelor’s degree or its equivalency in a specialized field.⁸ Through the 1990s, H-1B workers became an essential source of labor in the technology sector,⁹ to such a degree that in 2000, the U.S. Department of Commerce estimated that 28% of U.S. computer programmer jobs were H-1B visa holders.¹⁰ Essentially, the H-1B program aims to support employers to run their businesses successfully,¹¹ thus positively contributing to the economy. However, for the foreign national, the H-1B visa is the most desired work visa because of its “dual intent,” meaning that although H-1B visa holders are categorized as temporary non-immigrants under the Immigration and Nationality Act, they may apply for permanent resident status,¹² commonly known as the “Green Card,” providing them the ultimate pathway to naturalization.

There are several federal government agencies overseeing the H-1B visa program, each with distinct decision-making roles. For foreign nationals seeking entry into the United States with any visa, the Department of State

⁴ Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990).

⁵ Leiden & Neal, *supra* note 1, at 329.

⁶ *Id.* at 330.

⁷ 8 U.S.C. § 1182(n) (2011); 8 U.S.C. § 1184 (2011).

⁸ ILONA BRAY, U.S. IMMIGRATION MADE EASY 374, 377 (2017) (Other common occupations of H-1B visa holders include accountants, architects, artists, librarians, physical therapists, or even hotel managers); Yova A. Borovska, *My Company Wishes to Hire Foreign National Workers-Now What? Navigating the U.S. Visa Alphabet Soup*, 41 EMP. REL. L. J. 35, 35 (2016). Foreign workers of Science, Technology, Engineering, and Mathematics (“STEM”) or other specialized occupations commonly use H-1B, where most H-1B visa holders are computer scientists. Bound et al., *supra* note 2, at 18.

⁹ Bound et al., *supra* note 2, at 7.

¹⁰ *Id.*

¹¹ Ilona Bray, *H-1B or TN Visa: Which Should a Canadian or Mexican Choose?*, NOLO, <https://www.nolo.com/legal-encyclopedia/h-1b-tn-visa-which-should-canadian-mexican-choose.html> (last visited Feb. 17, 2020).

¹² *Id.*

determines whether the applicant is eligible or if they pose a national security concern.¹³ The U.S. Customs and Border Protection (“CBP”) of the Department of Homeland Security (“Homeland Security”) then determines admission eligibility.¹⁴ The U.S. Citizenship and Immigration Services (“USCIS”) oversees and approves each H-1B visa based on its merits. Despite the program’s immensity, the government limits the number of approved H-1B visas, keeping the cap at 85,000 per fiscal year.¹⁵ In 2017, 199,000 H-1B petitions were filed within just five days of the opening of the application process,¹⁶ showing its tremendous desirability. However, it is not easy to qualify for an H-1B. The foreign national must already have a job offer from an employer, must hold a college degree or its equivalent, be offered the prevailing wage for their position, and file a Labor Condition Application with the U.S. Department of Labor.¹⁷ The Labor Condition Application ensures that employers pay their foreign workers a fair wage and that U.S. workers are not adversely affected by such foreign workers.

Despite the many government agencies supervising the H-1B, the visa program has been criticized with accusations of fraud and abuse. These genuine concerns make the H-1B one of the most statutorily revised visas in immigration law.¹⁸ The revisions, such as the increase of anti-fraud measures and adjustments of the annual cap, are meant to advance what the H-1B visa seeks to achieve. During his 2011 State of the Union address, President Barack Obama emphasized the need to retain American-educated foreign students to

¹³ *H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the Comm. on the Judiciary H.R.*, 112th Cong. 112–23 (2011) [hereinafter Cong. Hearing].

¹⁴ *Id.* at 7.

¹⁵ Borovska, *supra* note 8, at 37; Michelle Mark, *The Trump Administration Targeted H-1B Visas Again – Here’s Why the Program is So Controversial*, BUS. INSIDER (Mar. 21, 2018, 12:17 PM), <https://www.businessinsider.com/trump-signs-order-targeting-h-1b-visa-program-2017-4>.

¹⁶ Mark, *supra* note 15.

¹⁷ BRAY, *supra* note 8, at 378. (The LCA is a form of ‘labor attestation’ which requires employers to “document wages, working conditions, and the absence of a strike or lockout, and they are required to notify bargaining representatives (or make conspicuous posting of notice to employees) if they wish to file an application”); Leiden & Neal, *supra* note 1, at 333.

¹⁸ Some of the statutory changes to the H-1B visa were the American Competitive and Workplace Improvement Act in 1998, which increased the annual cap. Under the Clinton administration, the petition fees increased in 2000. After the 2001 terrorist attacks of September 11, the annual cap decreased back to 65,000 in 2002. In 2004, President George W. Bush signed the H-1B Visa Reform Act, which allocated for H-1B visas to those foreign workers who graduated from U.S. institutions, thus increasing the cap to 85,000. More importantly, the H-1B Visa Reform Act created additional mandatory fees for anti-fraud measures and also expanded the Department of Labor to investigate alleged labor attestation violations. These reforms to the H-1B program show the many changes. See Kevin Miner & Sarah K. Peterson, *High Stakes for High-Skilled Immigrants: An Analysis of Changes Made to High-Skilled Immigration Policy in the First Year of the Trump Administration in Comparison to Changes Made During the First Year of Previous Presidential Administrations*, 44 MITCHELL HAMLINE L.R. 970, 975–77 (2018).

avoid economic competition: “[students] come here from abroad to study in our colleges and universities. But as soon as they obtain advanced degrees, we send them back home to compete against us. It makes no sense.”¹⁹ Thus, the statutory and regulatory changes to the H-1B program over the years show the evolution of the program for its improvement. Despite the modifications, criticisms against the H-1B visa persist. Critics of the visa argue that foreign workers are displacing U.S. citizens, whereas advocates argue that the visa fails to retain highly skilled workers and that the increased government regulations hinder talented foreign workers.²⁰

In the last few years since President Trump’s election, the H-1B visa program has become more controversial and the main topic of debate for employment-based immigration law. With the worry of foreign workers “taking jobs” from American people, President Trump advocated for curbing the H-1B applicant pool and eliminating its lottery system.²¹ More so, critics, including the President, argue that U.S. companies exploit the H-1B program by hiring foreign workers at lower wages.²² Today, President Trump’s promise to restrict the H-1B visa program is becoming a reality.

III. WORK AUTHORIZATION FOR SPOUSES OF H-1B VISA HOLDERS

This Note focuses on the derivatives of H-1B visa holders, i.e. dependent individuals like spouses or children, who accompany the H-1B principle on an H-4 visa.²³ In February 2015, under the Obama administration, USCIS issued a rule which authorized H-4 visa holders to work in the United States using the Employment Authorization Document (“EAD”).²⁴ Prior to 2015, derivatives

¹⁹ *Obama’s Second State of the Union (Text)*, N.Y. TIMES (Jan. 25, 2011), <https://www.nytimes.com/2011/01/26/us/politics/26obama-text.html> (President Obama maintains that foreign students raise national productivity and act as complements to college-educated native workers).

²⁰ Miner & Peterson, *supra* note 18, at 978.

²¹ Mark, *supra* note 15.

²² During his presidential campaign, President Trump said, “The H1B program is neither high-skilled nor immigration: these are temporary foreign workers, imported from abroad, for the explicit purpose of substituting for American workers at lower pay.” *Id.*

²³ IVAN VASIC, *THE IMMIGRATION HANDBOOK: A PRACTICAL GUIDE TO UNITED STATES VISAS, PERMANENT RESIDENCY AND CITIZENSHIP* 93 (2008) (stating children under the H-4 visa must be under 21 years old); *H-4 Classification for Families of H1B Petitioners*, MURTHY LAW FIRM (Jan. 21, 2011), <https://www.murthy.com/2011/01/21/h-4-classification-for-families-of-h1b-petitioners/>; Employment Authorization for Certain H-4 Dependent Spouses, U.S. CITIZENSHIP AND IMMIGR. SERV., (2017), <https://www.uscis.gov/working-united-states/temporary-workers/employment-authorization-certain-h-4-dependent-spouses> [hereinafter USCIS EAD FOR H-4 DEPENDENT SPOUSES].

²⁴ Miner & Peterson, *supra* note 18, at 984.

relying on their H-4 visa status could not legally work in the United States.²⁵ The Congressional Research Service states, “[t]he 2015 Federal Register notice establishing work authorization for certain H-4 spouses referred to three anticipated benefits: reducing personal and financial burdens on H-1B and H-4 nonimmigrants, reducing disruption to U.S. businesses, and attracting and retaining highly skilled workers.”²⁶ According to USCIS, the EAD aims to attract and retain highly skilled foreign workers in an effort to minimize disruption to businesses who may suffer as a result of H-1B visa holders leaving the United States due to their spouse’s inability to work.²⁷ The work authorization, popularly known as H-4 EAD,²⁸ officially went into effect on May 26, 2015.²⁹

Since 2015, the number of approved applications for H-4 EAD totaled 90,946.³⁰ Females comprise 84,935 of the approved applications, meaning that 9 out of 10 of H-4 EAD recipients are women, with the vast majority originating from Asia.³¹ For many of these women, H-4 EAD increases the financial security of their immigrant households and provides them a “sense of purpose.”³² For example, Kavya Joseph is an Indian-born woman who worked at an accounting firm in India before her marriage.³³ After her marriage, her husband moved to the United States on an H-1B visa with Kavya following her husband on an H-4 visa.³⁴ Before getting the H-4 EAD, Kavya could not legally work despite her qualifications and experience. “I was trying to engage myself in other hobbies,’ she said, ‘but that didn’t give me a self-satisfaction. I was

²⁵ JILL H. WILSON, CONG. RESEARCH SERV. WORK AUTHORIZATION FOR H-4 SPOUSES OF H-1B TEMPORARY WORKERS: FREQUENTLY ASKED QUESTIONS, 3 (CRS Report 2018), <https://fas.org/sgp/crs/homesecc/R45176.pdf>.

²⁶ *Id.* See generally, USCIS EAD FOR H-4 DEPENDENT SPOUSES, *supra* note 23.

²⁷ WILSON, *supra* note 25, at 3.

²⁸ Sabrina Siddiqi, *Trump Plans to Rescind Work Permits for Spouses of Immigrants on H-1B Visas*, GUARDIAN (July 27, 2018), <https://www.theguardian.com/us-news/2018/jul/27/h1b-visas-work-permits-donald-trump-rescind-immigrants>.

²⁹ *Save Jobs USA v. U.S. Dep’t of Homeland Sec.*, 105 F. Supp. 3d 108, 111 (D.D.C. 2015).

³⁰ WILSON, *supra* note 25 at 4.

³¹ U.S. CITIZENSHIP AND IMMIGR. SERV. REP., I-765 APPLICANTS FOR EMPLOYMENT AUTHORIZATION FOR H-4 NON-IMMIGRANTS BY GENDER, FISCAL YEARS 2015-2018 (2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/I-765_Applicants_for_Employment_Authorization_for_H-4_Non-Immigrants_by_Gender_for_FY2015-FY2018.pdf; *Protecting Work Authorization for H-4 Visa Holders, Vast Majority of Whom from India*, NEWS INDIA TIMES (Dec. 7, 2018), <http://www.newsindiatimes.com/protecting-work-authorization-for-h-4-visa-holders-vast-majority-of-whom-from-india>.

³² Siddiqi, *supra* note 28.

³³ *Id.*

³⁴ *Id.*

getting lazier day by day, sitting at home, but helpless at the same time.”³⁵ However, after the H-4 EAD, Kavya gained work authorization.³⁶ Kavya’s story is all too similar for the thousands of women relying on H-4 EAD. Since its establishment, the number of H-4 EAD recipients continues to grow, thus the more women relying on it to support their families.

A. *Save Jobs USA v. Department of Homeland Security*

In April 2016, shortly after USCIS implemented H4-EAD, Save Jobs USA, an organization of former technology workers at Southern California Edison,³⁷ filed a lawsuit against the Homeland Security.³⁸ Save Jobs USA argued that Homeland Security exceeded its authority under the Immigration and Nationality Act by establishing work authorization for H-4 visa holders,³⁹ specifically arguing that Homeland Security violated the Administrative Procedure Act (“APA”) for acting “arbitrarily and capriciously” when the agency concluded that H-4 EAD would only have “minimal labor market impacts” on U.S. born individuals.⁴⁰ Save Jobs USA further argued that the Department of Labor failed in certifying that the new rule would not “adversely affect wages and working conditions” of U.S. born individuals.⁴¹ Save Jobs USA members claimed that foreign workers replaced them as a result of the H-1B program, and thus the organization feared further employment competition as a result of H-4 EAD.⁴² The D.C. Circuit Court denied Save Jobs USA’s motion for a preliminary injunction, ruling that the purported injuries were not evident enough to justify emergency relief and that it was “just as likely that H-4 visa holders will apply for jobs in retail, in finance, or not apply for jobs at all . . .” rather than solely tech jobs.⁴³ Thus, the organization’s fear that H-4 visa holders would steal their tech jobs had not occurred. The court further noted that H-4 EAD had no impact on the number of H-1B visa holders because the annual cap remained the same.⁴⁴ Hence, the fear that H-4 EAD would increase the number of H-1B visa holders was untrue.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Save Jobs USA v. U.S. Dep’t of Homeland Sec.*, 105 F.Supp.3d 108, 110 (D.D.C. 2015); *Save Jobs USA v. U.S. Department of Homeland Security*, IMMIGR. REFORM L. INST. (Jan. 1, 2016), <https://www.irli.org/single-post/2016/01/01/Save-Jobs-USA-v-US-Department-of-Homeland-Security>.

³⁸ Miner & Peterson, *supra* note 18, at 1000.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Save Jobs USA*, 105 F.Supp.3d at 110–16.

⁴³ *Id.* at 113.

⁴⁴ *Id.* at 114.

Following the lawsuit, the Department of Justice, under the Trump administration, successfully filed a motion asking for a six-month stay in the litigation to “evaluate whether to continue to defend the validity of the rule and to potentially engage in further rulemaking on the issue.”⁴⁵ In September 2018, Save Jobs USA filed a motion to conduct briefing and oral argument.⁴⁶ The group argued:

A year and a half now passed since the court placed this case in abeyance and a proposed rule still has not been submitted to the Office of Management and Budget. Even if DHS moves forward, a final rule is still likely years away. Meanwhile, the unlawful H-4 Rule remains in place, injuring Save Jobs USA and other American workers.⁴⁷

The U.S. Court of Appeals for the District of Columbia Circuit issued two per curiam orders stating that the case shall be removed from abeyance but denied Save Job USA’s motion for the court to expedite its decision.⁴⁸ Early 2019 saw the longest government shutdown in U.S. history, creating greater delays in the case.

IV. THE TRUMP ADMINISTRATION’S RECOVATION OF H-4 EAD

In December 2017, in light of the new presidential administration and months of litigation against H-4 EAD, Homeland Security announced plans to revoke H-4 EAD to follow President Trump’s “Buy American and Hire American” executive order signed in April 2017.⁴⁹ The executive order directed federal administrative agencies to review and propose changes to the H-1B program and urged companies to offer jobs to U.S. citizens first before foreign nationals.⁵⁰ As of the writing of this Note, USCIS and Homeland Security have not yet published a final decision on the removal of H-4 EAD. However, Homeland Security has included the H-4 EAD rule removal in both the Fall 2018 Regulatory Agenda and Spring 2019 Regulatory Agenda.⁵¹

⁴⁵ Miner & Peterson, *supra* note 18, at 1001.

⁴⁶ Saurabh, *H4 Visa EAD 2018 News – Lawsuit Status, Trump Administration Impact*, REDBUS2US, <https://redbus2us.com/h4-ead-latest-news-updates-rule-removal-timeline> (last updated Oct. 7, 2019).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ OFFICE OF INFO. & REG. AFF., OFFICE OF MGMT. & BUDGET, REMOVING H-4 DEPENDENT SPOUSES FROM THE CLASS OF ALIENS ELIGIBLE FOR EMPLOYMENT (2018); Siddiqi, *supra* note 28.

⁵⁰ Mark, *supra* note 15.

⁵¹ OFFICE OF INFO. & REG. AFF., OFFICE OF MGMT. & BUDGET, AGENCY RULE LIST (Fall 2018); OFFICE OF INFO. & REG. AFF., OFFICE OF MGMT. & BUDGET, AGENCY RULE LIST (Spring 2019); Saurabh, *supra* note 46; Dimo R. Michailov, *USCIS Starts Rulemaking Process to Take Away H-4*

In early 2018, several members of Congress wrote letters to the administration, urging it to reconsider its plans to revoke H-4 EAD.⁵² In response, former USCIS director Lee Francis Cissna assured the legislators that the agency would follow APA notice and comment procedures, thus enabling the public an opportunity to provide feedback on any proposed revisions to H-4 EAD.⁵³ This response from USCIS is problematic because an opportunity to merely comment on the proposed revocation will likely not result in any change from the administration. No matter how persuasive of a comment, the comment section of the notice and comment procedure of the APA is not likely to change the actual course of the proposed rule.⁵⁴ In November 2018, U.S. Congresswomen, Anna Eshoo and Zoe Lofgren, introduced the *H-4 Employment Protection Act of 2018*.⁵⁵ This house bill directs the Secretary of Homeland Security to withdraw its plan to revoke H-4 EAD before the impending notice and comment period.⁵⁶ If H-4 EAD is indeed revoked, it is unclear what the gravity of the revocation will be. For example, will the hundreds of thousands of employed derivatives be stripped of their authorization to work, or will the revocation only prevent future applicants from applying for work authorization? Despite these uncertainties, USCIS continues to process applications for H-4 EAD, leading many law firms and immigration organizations to continue advising their H-4 visa holders to apply for work authorization while they still can.⁵⁷

The uncertainty of H-4 EAD leaves many of its recipients, like Kavya Joseph, in a state of nervous uncertainty. Kavya fears she will lose her job as a credit analyst in Washington, stating that it would “shatter [her] career completely,” while asking “Why would we end our career just because we moved to another country?”⁵⁸ Kavya is just one of the thousands of women expressing their concerns over the fate of H-4 EAD. As a response to the

EAD Work Authorization, CAP. IMMIGR. L. GROUP (Dec. 15, 2017), <https://www.cilawgroup.com/news/2017/12/15/uscis-starts-rulemaking-process-take-away-h-4-ead-work-authorization/>.

⁵² Letter from Members of Cong., Anna G. Eshoo et al., to Kirstjen M. Nielsen, Sec’y Homeland Sec. (Mar. 5, 2018), https://www.uscis.gov/sites/default/files/files/nativedocuments/Employment_Authorization_for_Certain_H-4_Nonimmigrants_-_Representative_Eshoo.pdf [hereinafter Cong. Letter I].

⁵³ *Will Take Feedback on Ending Work Permits For H-1B Holders’ Spouses: US*, NDTV (Nov. 09, 2018), <https://www.ndtv.com/indians-abroad/will-take-public-opinion-on-h-4-visa-revocation-proposal-us-1944951>.

⁵⁴ *Contra*, Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L.R. 601 (2018) (discussing the importance and benefits of the APA comment period as a way for the public to effectively condemn a government regulation.)

⁵⁵ H-4 Employment Protection Act of 2018, H.R.7150, 115th Cong. (2018).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Siddiqi, *supra* note 28.

impending revocation of the H-4 EAD, an online campaign called SaveH4EAD posted submissions from many women relying on H-4 EAD.⁵⁹ On the website, which also functions as a campaign against the revocation, women reliant on H-4 EAD post stories of their plight during the immigration process, how the work authorization drastically benefitted their families, the consequences that would follow from their inability to work, and even photographs of their families.⁶⁰ The sentiments of Kavya and the hundreds of women on SaveH4EAD show the vital and far-reaching benefits of H-4 EAD.

V. REVOCATION OF H-4 EAD: A NEGATIVE IMPACT ON THE U.S. ECONOMY

The current administration's policies and actions are greatly hindering the H-1B program's intended benefits for the U.S. economy and revoking H-4 EAD would negatively impact the already-bruised program. At the start of his presidency, President Trump said, "Right now, widespread abuse in our immigration system is allowing American workers of all backgrounds to be replaced by workers brought in from other countries to fill the same job for sometimes less pay. This will stop."⁶¹ President Trump's promises came to fruition in his executive order titled "Buy American and Hire American." Save Jobs USA, in their lawsuit against H-4 EAD, used Trump's similar reasoning, that H-1B workers displace U.S. born workers because companies exploit the program to hire cheaper sources of labor.⁶² However, the accuracy of President Trump and Save Jobs USA's rhetoric is worth examining. This section discusses the economic benefits of the H-1B program, while also exploring how the revocation of H-4 EAD will undoubtedly hurt the H-1B program. Ultimately, the purpose of the Act of 1990 would fail if H-4 EAD is revoked because it intended to increase the country's economic growth as well as increase the country's economic competitiveness on a global scale. Stripping work authorization from spouses of H-1B visa holders would start a domino effect of detrimentally impacting the H-1B program, which would in turn negatively impact companies benefiting from the program.

⁵⁹ SAVEH4EAD, <https://saveh4ead.wordpress.com> (last visited Nov. 12, 2018) [hereinafter SAVEH4EAD].

⁶⁰ *Id.*

⁶¹ Johana Bhuiyan & Andrea Castillo, *Immigrant Tech Workers Struggle to Get H-1B Visas Under Trump: 'I've Never Felt so Helpless,'* L.A. TIMES (Feb. 1, 2019, 4:00 AM), https://www.latimes.com/business/technology/la-fi-tn-h1b-workers-tech-trump-20190201-story.html?fbclid=IwAR13vcqbIN_AdIaR-69b6-9SJW0z-2ysH4kFzYurvs5u1x5E1bzXaN1TWRw.

⁶² *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F.Supp.3d 110, 110 (D.D.C. 2015).

A. Economic Benefits of the H-1B Program

There is a myriad of benefits that flow from having H-1B workers in the United States. For example, H-1B workers are essential for replacing and caring for the current aging population. The United States has a rapidly aging segment of the population (baby boomers) retiring out of the workforce.⁶³ This wave of retirement opens many job opportunities, which could be filled by foreign nationals, thus potentially increasing the need for further employment-based immigration.⁶⁴ For example, there is a shortage of health care workers to aid retiring baby boomers, leading to a strong demand for nurses.⁶⁵ Aside from the healthcare profession, there is also a demand for STEM workers and skilled tradespeople like electricians and plumbers.⁶⁶ Despite the strong demand for labor, there are not enough young people entering these professions.⁶⁷ Restricting the H-1B program further restricts the ability to fill these vital occupations, potentially hindering the economy at large.⁶⁸

During a 2011 House Judiciary Committee hearing before the Subcommittee on Immigration Policy and Enforcement, business immigration specialist Bo Cooper spoke at length about the benefits of the H-1B. Mr. Cooper testified, "H-1B's are used in obviously sparing numbers, when they are needed to fill an extremely hard to find skill set."⁶⁹ According to Cooper, one H-1B visa creates approximately 22 jobs for U.S. workers.⁷⁰ Cooper also refuted the argument that the H-1B is used by companies as a source of cheap labor. He stated, "When the economy is strong demand is high, when the economy drops it plunges. If the H-1B were a source of cheap labor the exact opposite would happen."⁷¹ Cooper further attacked the argument that companies only hire H-1B workers to cut costs by highlighting the exorbitant costs of employing an H-1B worker.⁷² Since 2002, employers have paid more than \$3 billion in mandatory government fees to petition to hire highly skilled foreign workers:

⁶³ *Why Immigration Packs an Economic Punch*, TRUECHAT (June 16, 2017), <https://truechat.org/makingcapitalismsustainable/6162017why-immigration-packs-an-economic-punch?rq=immigration%20>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See generally U.S. Citizenship and Immigration Services, Policy Memorandum: Adjudication of H-1B Petitioners for Nursing Occupations (Feb. 18, 2015), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015-0218_EIR_Nursing_PM_Effective.pdf.

⁶⁹ Cong. Hearing, *supra* note 13, at 17.

⁷⁰ *Id.* at 18.

⁷¹ *Id.*

⁷² *Id.* at 22.

Government filing fees alone are \$2320 for the initial petition, and \$1820 for the first three-year extension. If the employer is sponsoring the employee for a green card and additional extensions are necessary, filing fees for each additional extension are \$320. For an H-1B from India or China, the source of so many engineering graduates, two additional H-1B13 extensions could easily be necessary, so that the H-1B government filing fees through the process would total \$4780. This is putting aside the legal fees, which would typically run in the neighborhood of \$7000 through that process. It is also putting aside the legal and filing fees for the green card, which could easily range between \$10,000 and \$15,000, especially if the professional worker has a family.⁷³

In his closing remarks, Cooper stated, “if companies really are trying to save money by hiring H-1B visa holders, then they are not doing a very good job of it.”⁷⁴ There are also more benefits of hiring foreign nationals than just fulfilling vacant positions. A 2017 National Bureau of Economic Research (“NBER”) study indicated that highly skilled foreign workers contribute to innovation at the same rate as U.S. born workers.⁷⁵ The NBER study states that not only does the H-1B program fulfill in-need jobs, but that it also helps increase the wages of U.S. workers at a national level.⁷⁶

B. *H-1B Visa Program Under the Trump Administration*

As a departure from the Obama administration’s expansive immigration policies, the Trump administration has created strict hurdles that highly skilled foreign workers must overcome. Aside from plans to revoke H-4 EAD, these hurdles include temporary suspensions of premium processing for H-1B applications, a spike in Requests for Evidence (RFE), certain implementations

⁷³ *Id.*

⁷⁴ Cong. Hearing, *supra* note 13, at 23.

⁷⁵ Bound et al., *supra* note 2.

⁷⁶ *Id.* at 10;

When we aggregate at the national level, inflows of foreign STEM workers explain between 30% and 50% of the aggregate productivity growth that took place in the United States between 1990 and 2010. . . . the entry of H-1B visa holders actually increases the wages of Americans: A 1 percentage point increase in the foreign STEM share of a city’s total employment increased the wage growth of native college-educated labor by about 7–8 percentage points and the wage growth of non-college-educated natives by 3–4 percentage points.

see also Stuart Anderson, *New Evidence USCIS Policies Increased Denials of H-1B Visas*, FORBES (July 25, 2018, 12:12 AM), <https://www.forbes.com/sites/stuartanderson/2018/07/25/new-evidence-uscis-policies-increased-denials-of-h-1b-visas/#1af0891e5a9f>.

of interview requirements, and the elimination of a deference memorandum.⁷⁷ With increasing obstacles and new restrictions, employment-based immigration is currently under siege: “This is the other wall that America is building, RFE by RFE; it’s not a physical construct but far more potent and swift than the real one along the Mexico border.”⁷⁸ New constraints on the H-1B program likely discourages highly skilled foreign workers from seeking employment in the United States.⁷⁹ According to USCIS, the current processing time for the H-1B application is approximately five to ten months for applicants outside the country.⁸⁰ Long processing times not only discourage foreign workers, but also the U.S. companies that hire them as well.⁸¹ A process that used to take a couple of weeks for a temporary work visa now takes several months.⁸² An analysis conducted by the American Immigration Lawyers Association (“AILA”) shows that USCIS processing delays have increased by 46% over the last two fiscal years and 91% since 2014.⁸³ According

⁷⁷ Miner & Peterson, *supra* note 18, at 1022;

In October 2018, USCIS added yet another hurdle to the H-1B process. H-1B visa applications may now be denied without the department first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). Previously, USCIS would notify applicants that they lacked evidence and that the department was planning to refuse their application, thereby giving applicants the chance to address the problem and submit additional documents Notably, under the Trump administration, there has been a 45% increase in RFEs for H-1B visa applications, so the new USCIS ability to deny applications without RFE issuance could pose serious problems to foreign workers.

see also H-1B Visas Riskier Than Ever, as Canada Set to Welcome More Workers, CANADIM (Nov. 18, 2018), <https://www.canadim.com/h1b-riskier-canada-welcome-record-immigrants/> [hereinafter CANADIM] (To add to the increase of constraints, in September 2018, USCIS also temporarily suspended premium processing, which allowed an expedited application process.). *Id.*

⁷⁸ Nikhila Natarajan, *Despatches From an H1B Wasteland Amid India-US 2+2 Talks: How A Non-Immigrant Work Permit Has Occupied Frontlines of US Politics*, FIRSTPOST (Sept. 6, 2018), <https://www.firstpost.com/world/despaches-from-h1b-wasteland-amid-india-us-22-talks-how-a-non-immigrant-work-permit-has-occupied-frontlines-of-us-politics-5123591.html>.

⁷⁹ Bhuiyan & Castillo, *supra* note 61.

⁸⁰ CANADIM, *supra* note 77.

⁸¹ *Id.*

President Trump’s administration has recently announced that they intend to redefine the term “specialty occupation,” in order to improve the United States’ ability to attract the best and brightest foreign workers. It is unclear exactly what this new definition will look like, although judging from the impact the Trump administration has already had on foreign workers, it is likely to result in further restrictions.

Id.

⁸² Bhuiyan & Castillo, *supra* note 61.

⁸³ *AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration*, AM. IMMIGR. LAW. ASS’N (Jan. 30, 2019), https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays?utm_source=AILA%20Email&utm_medium=media.

to AILA, the delays have reached a “crisis level” as a result of “policies that inhibit efficiency.”⁸⁴ As such, these policies act as bricks in the Trump administration’s invisible wall against legal immigration.⁸⁵ Despite these “bricks” and plan to revoke H-4 EAD, President Trump tweeted in January 2019 that H-1B holders can “rest assured” that these upcoming changes would bring “simplicity” and “certainty” to their stays and even provide them a “potential path to citizenship.”⁸⁶ However, despite the touted simplicity and certainty, during its first year, the Trump administration had the lowest approval rates of H-1B petitions in the past decade.⁸⁷ Because of the recent changes, some companies have chosen not to consider foreign candidates until there is more certainty.⁸⁸ As the next section discusses, the effects of the tumultuous H-1B program are felt beyond U.S. borders.

C. *Losing the Battle of Worldwide Competitiveness*

The H-1B program’s new heightened measures and long delays have resulted in the inability to attract and retain highly skilled workers in the United States. Many American-educated foreign students are leaving to move to Canada where the path to work permits and citizenship are quicker and more promising,⁸⁹ validating President Obama’s previous fears. Furthermore, restrictions on employment-based visas like the H-1B are likely to result in an increase in foreign outsourcing by U.S. employers.⁹⁰ Since its establishment, foreign workers have been immensely attracted to the H-1B program for a variety of reasons. First, an H-1B visa holder may leave the United States as long as their visa is valid, a benefit in comparison to other work visas. The renewal of the visa every three years (for up to six years) also makes the visa one of the most coveted because of its long length of stay.⁹¹ More importantly, the H-1B visa’s “dual intent” is the essential reason why it is incredibly sought-after. The temporary nonimmigrant H-1B visa’s dual intent allows those visa holders to apply for permanent residency, thus paving a pathway to U.S. citizenship.⁹² However, the new restrictions on the program and recent plan to

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Donald Trump (@realDonaldTrump), TWITTER (Jan. 11, 2019, 6:40 AM), <https://twitter.com/realDonaldTrump/status/1083705208834834433>.

⁸⁷ Bhuiyan & Castillo, *supra* note 61.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Bound et al., *supra* note 2, at 3.

⁹¹ Bray, *supra* note 11; *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, USCIS (last updated Mar. 19, 2019), <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models>.

⁹² Bray, *supra* note 11.

revoke H-4 EAD dwindled the attractiveness of the program. Foreign workers are becoming less interested in the H-1B visa and are instead choosing more promising visas offered by other countries.⁹³

One neighboring country in particular, Canada, has gained favorability in recruiting highly skilled workers. Canada has intensified its efforts to recruit highly skilled workers by increasing immigration quotas and reducing processing times—a glaring difference from the current immigration policies in the United States.⁹⁴ In November 2018, Canada announced a three-year plan to welcome more than one million immigrants, with sixty percent being skilled workers and their families.⁹⁵ Canada’s plan called the Immigration, Refugee and Citizenship Canada (“IRCC”), “marks the highest immigration targets” in Canadian history.⁹⁶ Canada also recently established an expedited work-permit process for highly skilled workers.⁹⁷ This expedited process stands in contrast to USCIS’s own temporary suspension of premium processing for the 2019 fiscal year H-1B cap petitions.⁹⁸ More so, Canada’s Express Entry system processes the majority of skilled immigrant worker applications within just four months.⁹⁹ The foreign nationals under the Express Entry system also receive permanent resident status for themselves

⁹³ Anderson, *supra* note 76.

The proportion of H-1B petitions denied for foreign-born professionals increased by 41% increase from the 3rd to the 4th quarter of FY 2017, rising from a denial rate of 15.9% in the 3rd quarter to 22.4% in the 4th quarter . . . It is logical that the big increases in denials and Requests for Evidence did not happen immediately after Donald Trump took office. ‘It took some time to get people in to many of the key positions . . . Once we saw who was being appointed, a who’s who of stars in the anti-immigration world, no one was really surprised with what we’re seeing.’

Id.

⁹⁴ CANADIM, *supra* note 77.

⁹⁵ *Id.*

⁹⁶ *More than One Million: Canada Releases Increased Immigration Targets for 2019-2021*, CANADIM (Nov. 18, 2018), <https://www.canadim.com/canada-increases-immigration-targets> [hereinafter CANADIM II] (“In the plan, the government commits to increasing the yearly admissions to 350,000 by 2021, an increase in 50,000 from the previous two years!”).

⁹⁷ Mark, *supra* note 15.

⁹⁸ *USCIS Will Temporarily Suspend Premium Processing for Fiscal Year 2019 H-1B Cap Petitions*, USCIS (Mar. 20, 2018), <https://www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-fiscal-year-2019-h-1b-cap-petitions>.

⁹⁹ CANADIM, *supra* note 77.

and their families,¹⁰⁰ adding further incentive for foreign nationals to immigrate to Canada rather than the United States.¹⁰¹

Vikram Rangnekar, a computer scientist born in India, exemplifies an interesting case study of foreign nationals preferring Canada over the United States. Mr. Rangnekar found employment and secured an H-1B visa upon completion of his U.S. education.¹⁰² Even though his employer began processing his green card petition after he attained his H-1B visa, the government did not provide a timeline for when it would grant Mr. Rangnekar's legal permanent status.¹⁰³ Mr. Rangnekar was told waiting times could take as long as twenty to fifty years.¹⁰⁴ With his in-demand skills, Mr. Rangnekar pursued a more promising future in Canada with his family.¹⁰⁵ While there is no particular method of tracking how many foreign nationals move from the United States to Canada, in the first year of the Trump presidency "the number of tech professionals globally who got permanent residency in Canada ticked up almost 40 percent from 2016, to more than 11,000."¹⁰⁶ It is easy to see why many foreign nationals like Mr. Rangnekar embody this staggering statistic.

¹⁰⁰ *Id.* ("Canadian permanent resident status is equivalent to the US Green Card, giving holders the right to live and work anywhere in Canada, without any expiration date. As well, permanent residents gain access to Canada's free universal healthcare and social services.")

¹⁰¹

In 1967, Canada became the first country to adopt a points-based immigration system. The country regularly tweaks how it rates applicants based on national goals and research into what makes for successful integration: A job offer used to come with 600 points, but now it's worth just 200. Other factors like speaking fluent English or French—or, even better, both—have been given more weight over the years.

Karen Weise & Saritha Rai, *Engineers Are Leaving Trump's America for the Canadian Dream*, BLOOMBERG BUSINESSWEEK (Apr. 19, 2018), <https://www.bloomberg.com/news/features/2018-04-20/h-1b-workers-are-leaving-trump-s-america-for-the-canadian-dream>; see also *Comprehensive Ranking System (CRS) Criteria – Express Entry*, GOV'T CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/criteria-comprehensive-ranking-system/grid.html> (last updated Aug. 12, 2019).

¹⁰² Weise & Rai, *supra* note 101.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (Rangnekar also expressed his experience with xenophobic Americans. Canada and other countries like Australia may also bear anti-immigration and alt-right groups like those in the United States, but "[T]hey haven't gained the same traction as in the U.S. and Europe.") Romesh Ratnesar, *What an Immigrant Murder in Kansas says About America*, BLOOMBERG BUSINESSWEEK (May 11, 2017, 4:00 AM), <https://www.bloomberg.com/news/features/2017-05-11/what-an-immigrant-murder-in-kansas-says-about-america> (describing an incident where a white nationalist shot two Indian engineers in Olathe, Kansas before shouting, "Get out of my country.")

¹⁰⁶ Weise & Rai, *supra* note 101.

With evidence of Canada successfully attracting highly skilled workers from the United States, members of U.S. Congress grew worried regarding the threat to H-4 EAD. 130 members of Congress signed a letter to Homeland Security in early 2018, urging President Trump to maintain H-4 EAD, arguing that revocation will dissuade highly skilled workers, thus making the United States less economically competitive.¹⁰⁷ They wrote: “Providing work authorization for accompanying spouses helps U.S. employers recruit and retain highly qualified employees, putting U.S. policy on par with other countries—such as Canada and Australia—competing to attract talented foreign nationals.”¹⁰⁸ Top corporate leaders also expressed concerns over the impending H-4 EAD revocation. In a letter drafted to Homeland Security in August 2018, they wrote: “[O]ther countries allow these valuable professionals to work, so revoking their US work authori[z]ation will likely cause highly skilled immigrants to take their skills to competitors outside the US.”¹⁰⁹ According to one top Indian news establishment, the H-1B program’s cost advantage for Indian nationals has dwindled because technology firms sponsoring H-1B workers are threatening to work overseas.¹¹⁰ Thus, failing to attract and retain highly skilled workers harms the economy by causing U.S. companies to move those jobs overseas: “Most of the bigger US companies are readying for Plan B for months now, testing multiple other locations for nearshoring projects as the noose tightens around techie labour supply.”¹¹¹ In stark comparison to the United States, investments into Canadian startups have “skyrocketed” over the past year, which analysts attributed partly to the Trump administration’s immigration policies.¹¹² The effects of Trump’s

¹⁰⁷ Press Release, Office of Congresswoman Pramila Jayapal, Jayapal, Love Lead 130 in Bipartisan Support of Work Authorization of H-4 Dependent Spouses (May 16, 2018), <https://jayapal.house.gov/2018/05/16/jayapal-love-lead-130-bipartisan-support-work-authorization-h-4-dependent/> [hereinafter Cong. Letter II].

¹⁰⁸ *Id.*

¹⁰⁹ *Will Take Feedback on Ending Work Permits for H-1B Holders’ Spouses: US*, NDTV (Nov. 9, 2018, 10:41 PM), <https://www.ndtv.com/indians-abroad/will-take-public-opinion-on-h-4-visa-revocation-proposal-us-1944951> (Cisco Systems, AK Steel Corporations, American Airlines, and American Express were some of the companies whose CEOs signed the letter).

¹¹⁰ Nikhila Natarajan, *H1B and H4 Visa Feature in Donald Trump Admin’s Fall 2018 Regulatory Agenda as US Midterm Election Look: All You Need to Know*, FIRSTPOST (Oct. 18, 2018, 2:40 PM), <https://www.firstpost.com/world/h1b-and-h4-visa-feature-in-donald-trump-admins-fall-2018-regulatory-agenda-as-us-midterm-elections-loom-all-you-need-to-know-5402921.html>.

¹¹¹ *Id.*

¹¹² Zoë Henry, *Canada Courts Entrepreneurs as Trump Trims Immigration*, INC., <https://www.inc.com/zoe-henry/canada-courts-american-startups-trump-immigration.html> (last visited Jan. 5, 2019).

In particular, businesses are taking advantage of Canada’s recently introduced Global Skills program, a government initiative that allows tech workers to obtain work permits in just two weeks’ time, compared with the roughly six months it would take to obtain an H-1B visa stateside. The U.S.’s H-1B

presidential policies have already been shown to deter highly skilled foreign talent from seeking employment in the United States, thus hurting the U.S. economy and its competitiveness with the rest of the world. Revocation of H-4 EAD will only further hurt an already damaged program needed to support and grow the economic power of the United States.

VI. REVOCATION OF H-4 EAD: DISPROPORTIONALITY AFFECTING MINORITY WOMEN

The most detrimental consequence of H-4 EAD revocation is that it will drastically hurt the spouses relying on it, the vast majority of whom are minority women of color. Before the 2015 issuance of H-4 EAD, women on H-4 visas were unable to legally work and were forced to rely financially on their spouses. The employment authorization allows the once-reliant woman to better integrate into her community, decrease her financial burdens, and keep her family prosperous. As such, losing those positive consequences will leave a striking impact: “[T]here are different strategies immigrants’ spouses use to cope and survive the rules and regulations of immigration, such as illegal work, going to school, motherhood, alcoholism, or leaving their husbands.”¹¹³ If the government revokes H-4 EAD, it will force the women to be unemployed or leave their families for a chance at a career.¹¹⁴ Families may cope with a spouse’s inability to work in a variety of ways.¹¹⁵ Although some spouses may use the free time for child “rearing” and acquiring new skills,¹¹⁶ others may seek unauthorized work or even fall into substance abuse.¹¹⁷ Women who receive an EAD can keep their families unified and flourishing. The following

program is also capped at 85,000 visas, distributed through an annual lottery, whereas Canada's program does not (currently) have a cap.

Id. Additionally, the Trump administration’s intended tariffs on Chinese imports in hopes of thwarting China’s goal of “seizing economic leadership and advanced technology” will be futile with the administration’s current policies to hinder employment-based immigration: “If the goal is for the U.S. to ‘beat’ China in technologies such as artificial intelligence and low-emission and autonomous vehicles, then the *worst* possible thing to do is what the Trump administration is doing – making it as difficult as possible for high-skilled foreign nationals . . .” Anderson, *supra* note 76.

¹¹³ Marcela F. González, *Highly Skilled Immigration in the United States in an Age of Globalization: An Institutional and Agency Approach* 171 (2018) (unpublished Ph.D. dissertation, The City University of New York) (on file with CUNY Academic Works, The City University of New York).

¹¹⁴ Siddiqui, *supra* note 28.

¹¹⁵ González, *supra* note 113.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 173.

stories illustrate what is at stake for the women at risk of losing their H-4 EAD.¹¹⁸

A. *Critical Race Feminism: Plight of the Women Relying on H-4 EAD*

Critical Race Feminism is an emergent analysis of legal concerns facing women of different racial and ethnic minorities, as well as being of lower socioeconomic status.¹¹⁹ This analytical lens can be used to explore the intersectionality of immigrants' immigration status with their ethnicity, gender, and how those factors, compounded together, impact their ability to access public benefits.¹²⁰ Analogously, we can use this lens to examine how the recipients of H-4 EAD are further subjugated by the administration's revocation of their ability to work. Personal stories of the women relying on H-4 EAD show a uniquely pressing concern for women of color on a practical and legal level.

Anupama is a scientist with a bachelor's degree in biotechnology and a master's degree in environmental engineering.¹²¹ She received her employment authorization document in 2016, allowing her to work in her field.¹²² Anupama also began working part-time as a STEM teacher for preschool children in her local community.¹²³ Upon hearing the news of the government's plan to revoke H-4 EAD, Anupama wrote, "[t]he pain, the fear, the stress, the anxiety of losing the passion of my life is cruel & inhumane, I am working for the skills, the knowledge, education and my passion towards Research and Science I have in me."¹²⁴ If her EAD is revoked, her family will rely on a single income.¹²⁵

Shri worked as an assistant professor in India and, in 2009, she came to the United States with her husband and their three-year-old son.¹²⁶ She described her life before H-4 EAD as follows: "Staying at home, cooking, cleaning and being dependent for almost everything on my husband, I felt depressed and gained [a] lot of health issues."¹²⁷ After news of the H-4 EAD,

¹¹⁸ SAVEH4EAD, *supra* note 59.

¹¹⁹ CRITICAL RACE FEMINISM: A READER 1 (Adrien Katherine Wing ed., 2nd ed. 2003).

¹²⁰ See generally Kevin. R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, in CRITICAL RACE FEMINISM: A READER 385 (Adrien Katherine Wing ed., 2nd ed. 2003).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ SAVEH4EAD, *supra* note 59.

¹²⁶ *Id.*

¹²⁷ *Id.*

Shri wrote of her suicidal thoughts and fear of being unable to financially provide for her aging mother. Shri said, “Revoking my work permit will make me and my mom dependent on some one [sic] again. This is surely going to create lots of family issues and mental trauma for me.”¹²⁸

Aparna is a computer scientist with a degree from a university in India.¹²⁹ After her marriage, she moved to the United States.¹³⁰ Once her husband switched to the H-1B visa to lead a financial services company, she lost her ability to work:

Reality hit me hard when I paid a large amount of my sales proceeds towards tax to the US government more than what I would have paid in India due to differences in the tax laws between the two countries.[]I realized that as a H4 holder I was not allowed to open a bank account or a SSN or be part of any income generating avenues but when it came to taxes, I was treated on par with everyone else.[]The system was clearly working against H4 holders in all possible ways.¹³¹

After receiving her H-4 EAD, Aparna returned to work, and her health and family relations improved.¹³²

Sheeba is a data manager whose son with special needs requires constant medical attention.¹³³ She wrote “If I will [sic] get the chance to work, it is definitely going to be [sic] make huge differences in my [sic] and my family’s life, especially my son. I will be able to send him to private school, activities like swimming, yoga etc.”¹³⁴

Shree is a registered nurse who moved to the United States with her husband in 2012.¹³⁵ Before H-4 EAD, she sat idle despite having an in-demand

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ SAVEH4EAD, *supra* note 59. Aparna was on an L-2 visa, which is a visa for derivatives of L-1 visas, an intercompany transfer visa for foreign workers transferring to the United States from one subsidiary company or branch to the United States one. See *L-1B Intracompany Transferee Specialized Knowledge*, USCIS (Apr. 29, 2019), <https://www.uscis.gov/working-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge>.

¹³¹ SAVEH4EAD, *supra* note 59.

¹³² *Id.*

¹³³ *Id.* at 1.

¹³⁴ *Id.*

¹³⁵ SAVEH4EAD, *supra* note 59, at 1.

skillset.¹³⁶ She wrote, “I love taking care of people, that is my passion[] please dont [sic] stop me from doing that.”¹³⁷

H-4 EAD has even led to the creation of new small businesses, helping people like Shetal start her own business in 2017:

Luckily, soon enough, the H4EAD executive order was passed in 2015. That is when I regained my confidence and began building resources for my business. By January 2017, I was able to supply custom gifts and t-shirts to several local businesses and setup my own online shop. It has been a successful year so far and I am excited to have filed my first year of small business taxes as an LCC.¹³⁸

The stories of these women show their perseverance and a distinct desire to integrate into American culture. Their submissions reveal the crisis-level consequences that will result if H-4 EAD is revoked. The aforementioned letter to Homeland Security from members of Congress emphasized the “tremendous potential” accompanying spouses have and their positive contribution to American society: “It is an American value that everyone—regardless of gender—deserves to be able to use and enhance their skills, be financially self-sufficient, thrive mentally and physically, and pursue their dreams.”¹³⁹ Additionally, the letter recognized that women relying on H-4 EAD are more vulnerable due to their gender *and* race, stating the woman’s “inability to work widens an already existing gender inequality gap.”¹⁴⁰ The gender gap is already worse for women of color,¹⁴¹ who make up the vast majority of those relying on H-4 EAD. More so, the women relying on H-4 EAD are noncitizens lacking concrete political power, therefore their rights are limited, and they are more vulnerable to forms of exploitation.¹⁴² The lens of critical race feminism, intersectionality in general, is crucial in scrutinizing the “subordination facing immigrants.”¹⁴³ Female immigrants are further

¹³⁶ *Id.* See generally ANTHONY P. CARNEVALE, NICOLE SMITH & ARTEM GULISH, NURSING SUPPLY AND DEMAND THROUGH 2020 (Tracy Thompson & Barbara Minich eds., 2015), <https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Nursing-Supply-Final.pdf> (discussing the urgent need for nurses due to the estimated 1.6 million open positions in 2020).

¹³⁷ SAVEH4EAD, *supra* note 59.

¹³⁸ SAVEH4EAD, <https://saveh4ead.wordpress.com/page/3/> (last visited Oct. 8, 2019).

¹³⁹ Cong. Letter II, *supra* note 107.

¹⁴⁰ See *id.*

¹⁴¹ See Amanda Rossie Barroso, *The Wage Gap for Women of Color Widened in 2017*, NAT’L WOMEN’S L. CTR. (Sept. 17, 2018), <https://nwlc.org/blog/the-wage-gap-for-women-of-color-widened-in-2017/>.

¹⁴² Johnson, *supra* note 120, at 386.

¹⁴³ *Id.* at 391.

marginalized due to the inherent subordination of women in society.¹⁴⁴ Despite the bleak and uncertain future of H-4 EAD, critical race feminism is the most useful and important legal tool for defending H-4 EAD. The last section of this Note discusses how future defense of H-4 EAD may benefit from using aspects of critical race feminism.

B. Unpromising Pathway to Citizenship: Green Card Backlog

From the anti-immigrant hostility to the restraints on the H-1B program, the vicious green card backlog is one of the many factors preventing high-skilled foreign workers from flourishing in the United States. Some critics of H-4 EAD state that H-4 visa holders and their principal spouses should simply adjust their nonimmigrant status by applying for legal permanent status commonly called the “green card.” However, the process is monstrously long and arduous. More so, the process is exceptionally uncertain in the current political climate.¹⁴⁵ According to the Congressional Research Service, an H-1B principal and their H-4 spouse must rely on one source of income while waiting to obtain legal permanent residence, a wait time of up to ten years for Indian and Chinese nationals, who account for a high percentage of total H-1B visa holders.¹⁴⁶ “I will die before I get my green card,” said Varun Soundararajan, a Google software engineer, and also a father to a son with special needs.¹⁴⁷ Since there is never a guarantee that the government will grant the reapplication of an H-1B, the stakes are high for many like Mr. Soundararajan.¹⁴⁸ Recently, the 2019 federal government shutdown stalled a bill in Congress intended to help with the difficult path to permanent legal residence and citizenship.¹⁴⁹ This bipartisan bill, HR 392, would have helped foreign workers like H-1B visa holders by making the green card system operate on a first-come, first-serve basis as opposed to the current country-based system.¹⁵⁰ Thus, given the long delays and inability for Congress to resolve it, the suggestion to simply adjust status is ineffective and devalues the struggles foreign workers in the United States face.

C. Future Litigation and Legal Solutions

Once Homeland Security officially publishes its rule to revoke H-4 EAD, the recipients will likely sue. However, their odds of securing a judicial remedy are bleak. Under the Plenary Power Doctrine, the legislative and executive

¹⁴⁴ *Id.*

¹⁴⁵ Bhuiyan & Castillo, *supra* note 61.

¹⁴⁶ WILSON, *supra* note 25, at 3.

¹⁴⁷ Bhuiyan & Castillo, *supra* note 61.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

branches have historically held full and nearly limitless power over immigration law.¹⁵¹ While the constitutional rights of non-U.S. citizens are few and fragile, the Department of State recognizes that immigrants have certain rights under the law, like the right to seek legal help in instances of domestic abuse.¹⁵² The International Marriage Broker Regulation Act of 2005 (“IMBRA”) requires the U.S. government to inform immigrant fiancés and spouses of their legal rights if they become victims of domestic violence.¹⁵³ While IMBRA does not directly relate to H-4 EAD, the law recognizes how vulnerable immigrant spouses (mainly women) are when they immigrate to the United States. According to the Department of State, “Immigrants are particularly vulnerable because many do not speak English, are often separated from family and friends, and may not understand the laws of the United States.”¹⁵⁴ Under the Equal Protection Clause, legal permanent residents have more constitutional rights than any other noncitizen category of immigrants.¹⁵⁵ However, the plenary power of the two branches concerning immigration is nearly absolute. In *Harisiades v. Shaughnessy*, the Supreme Court upheld the constitutionality of the Alien Registration Act and the government’s removal of permanent resident status based on prior membership in the Communist Party.¹⁵⁶ This case is commonly understood as illustrating the government’s unfettered power over immigration. In 2018, the Supreme Court held in *Trump v. Hawaii* that President Trump’s “Travel Ban” executive order, restricting certain immigrants and permanent residents from entry into the United States from Muslim-majority countries, did not violate the Establishment Clause of the Constitution or the Immigration Nationality Act because he did not exceed his statutory authority, but acted within the deference afforded to the executive branch.¹⁵⁷ These precedents illustrate the

¹⁵¹ JON FEERE, PLENARY POWER: SHOULD JUDGES CONTROL U.S. IMMIGRATION POLICY?, CTR. IMMIGR. STUD. (Feb. 2009), <https://cis.org/sites/cis.org/files/articles/2009/back209.pdf>.

¹⁵² *Your Rights and Protections*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/rights.html> (last visited Oct. 10, 2019).

¹⁵³ Information on the Legal Rights Available to Immigrant Victims of Domestic Violence in the United States and Facts about Immigrating on a Marriage-Based Visa, U.S. CITIZENSHIP & IMMIGR. SERVS., [https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Battered%20Spouse%2C%20Child ren%20%26%20Parents/IMBRA%20Pamphlet%20Final%2001-07-2011%20for%20Web%20Posting.pdf](https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Battered%20Spouse%2C%20Child%20ren%20%26%20Parents/IMBRA%20Pamphlet%20Final%2001-07-2011%20for%20Web%20Posting.pdf) (last visited Oct. 10, 2019).

¹⁵⁴ *Id.*

¹⁵⁵ *Graham v. Richardson*, 403 U.S. 365, 371 (1971); Jennifer Whitlock, *Do Non-Citizens Have Rights Under the Constitution?*, GRAY L. PLLC (Jan. 30, 2017), <http://www.whitlockgray.com/2017/01/30/do-non-citizens-have-rights-under-the-constitution/> (Noncitizens generally have certain guarantees under the U.S. Constitution such as equal protection of the laws, freedom of speech, and due process of fair procedure.).

¹⁵⁶ *Harisiades v. Shaughnessy*, 342 U.S. 580, 595–96 (1952).

¹⁵⁷ *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

plenary power of Congress and the vast authority of the executive in comparison to the court's constrained power.

Given the historical and recent precedents, the legal rights of the spouses of H-1B visa holders appear extremely limited. Since H-4 visa holders are noncitizens and ineligible to vote, they cannot seek a remedy through the democratic process.¹⁵⁸ However, if they bring a suit against the government, their arguments would likely be analogous to the formal complaints argued in *Batalla Vidal v. Duke*, a recent case regarding Deferred Action for Childhood Arrivals (“DACA”) recipients. In *Batalla Vidal*, six recipients of DACA brought suit against the Homeland Security, challenging the Trump Administration's termination of the DACA program.¹⁵⁹ Nearly one million undocumented immigrants rely on DACA, a discretionary form of relief from deportation, for a renewable period of two years.¹⁶⁰ Astonishingly, the district court issued a preliminary injunction requiring USCIS to continue accepting DACA applications from recipients who had qualified for DACA previously.¹⁶¹ DACA recipients and H-4 EAD recipients share the same sense of reliance from their respective programs, showing a legitimate claim of entitlement. The plaintiffs in *Batalla Vidal* argued that the “[d]efendants’ arbitrary decision to terminate this established and successful program upends the lives of these individuals and threatens to destabilize their families, communities, and workplaces . . . necessitating this Court’s intervention to protect against imminent and devastating harm.”¹⁶² Similar to H-4 EAD recipients, the revocation of H-4 EAD threatens to destabilize immigrant families and workplaces. The plaintiffs further argued that DACA is a “longstanding agency policy” on which hundreds of thousands heavily relied.¹⁶³ Likewise, the Obama administration created H-4 EAD in 2015, three years after DACA in 2012.¹⁶⁴ H-4 EAD is now

¹⁵⁸ See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (emphasizing that “discrete and insular minorities” without normal protections of the democratic political process, therefore are given a heightened standard of judicial review).

¹⁵⁹ Second Amended Complaint, *Batalla Vidal v. Duke*, 295 F. Supp. 127 (E.D.N.Y. Sept. 19, 2017) (No. 1:16-cv-04756), <https://www.nilc.org/wp-content/uploads/2017/10/Ba-Vidal-v-Duke-2d-Amended-Complaint-2017-09-19.pdf>.

¹⁶⁰ *Id.* at 15. “The DACA Memorandum states that individuals who came to the United States as children, lack a serious criminal history, attend school or participate in the Armed Services, and meet other criteria may request . . . deferred action.” *Id.*

¹⁶¹ *Status of Current DACA Litigation*, NAT’L IMMIGR. L. CTR. (last updated June 7, 2019), <https://www.nilc.org/issues/daca/status-current-daca-litigation/>.

¹⁶² Second Amended Complaint, *supra* note 159, at 1–2.

¹⁶³ *Id.* at 2.

¹⁶⁴ *Id.* at 4; see also *Deferred Action for Childhood Arrivals (DACA)*, DEP’T HOMELAND SECURITY (Sept. 23, 2019), <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> (“The Obama administration chose to deploy DACA by Executive Branch memorandum—despite the fact that Congress affirmatively rejected such a program in the normal legislative process on multiple occasions. The constitutionality of this action has been widely questioned since its inception.”).

as longstanding as DACA was when the complaint was filed. As a result of DACA, the recipients are authorized “to enroll in colleges and universities, and to obtain jobs, driver’s licenses, bank accounts, and health insurance”¹⁶⁵ Likewise, revocation of H-4 EAD may deprive a long-standing property interest.¹⁶⁶ H-4 EAD recipients relied on H-4 EAD for financial and social independence. Not only does H-4 EAD allow its recipients to generate an income, but the work authorization entitles them to a social security number and their own bank account.¹⁶⁷ With the reliance on the second source of income and societal form of independence, there is a “legitimate claim of entitlement” protected by procedural due process.¹⁶⁸

Lastly, the plaintiffs in the *Batalla Vidal* case argued that President Trump’s animosity toward individuals of Latino and Mexican heritage show discriminatory intent,¹⁶⁹ rebutting Homeland Security’s argument that DACA exceeded Obama’s executive authority.¹⁷⁰ Trump’s antagonistic rhetoric on foreign workers and immigrants at large show a discriminatory intent as well. Much like DACA, revocation of H-4 EAD is substantially motivated by animus toward highly skilled foreign workers. Thus, there is a disparate impact on such individuals in violation of the Due Process and Equal Protection Clause.¹⁷¹ Revocation of H-4 EAD disproportionately disadvantages women of certain racial groups. Since the vast majority of H-4 EAD recipients are individuals from South Asian origin, there is a clear disparate impact in the government’s revocation of their work authorization. As previously discussed with critical race feminism, women immigrants are significantly more vulnerable because of their status and lack of legal rights. Despite the historical precedence of the executive’s unfettered power on immigration, the

¹⁶⁵ Second Amended Complaint, *supra* note 159, at 17.

¹⁶⁶ *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 283 (2018).

¹⁶⁷ SAVEH4EAD, *supra* note 59 (The story of Aparna emphasized the importance for women of H-4 EAD having their own bank account.); *Foreign Workers and Social Security Numbers*, SOC. SECURITY ADMIN. (July 2017), <https://www.ssa.gov/pubs/EN-05-10107.pdf> (“You need a Social Security number to get a job, collect Social Security benefits, and receive some other government services. . . . In general, only noncitizens authorized by the Department of Homeland Security (DHS) to work in the United States can get a Social Security number.”).

¹⁶⁸ *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 283 (2018).

¹⁶⁹ *Id.* at 278; *see also* Second Amended Complaint, *supra* note 159, at 18–19 (“A hallmark of Defendant Trump’s campaign and presidency has been unabashed nativism, in both words and deeds Defendant Trump and some members of his Administration have portrayed immigrants as imminent threats to the health, safety, and wellbeing of the United States.”).

¹⁷⁰ Second Amended Complaint, *supra* note 159, at 23.

¹⁷¹ *See Batalla Vidal v. Nielsen* 291 F. Supp. 3d 260, 274 (2018) (“Although the Equal Protection Clause by its terms applies to states, the Supreme Court has long recognized that the Due Process Clause of the Fifth Amendment generally prohibits racial discrimination by the federal government as well.”).

Batalla Vidal case shows the strongest legal path to help the H-4 EAD recipients.

VII. CONCLUSION

Revocation of the employment authorization document for H-4 visa holders will devastate its nearly one hundred thousand recipients, the majority of whom are women of color. As seen from the statutory and regulatory reforms of the H-1B program since its establishment in 1990, the program is constantly evolving to fulfill its intended economic goals. President Trump's rhetoric and policies have created a more divisive debate surrounding immigration than ever before seen in this country's history. Evidence of President Trump's animosity toward certain minority immigrant groups is apparent from his rhetoric and policies. The concerns regarding the displacement of U.S. workers with H-4 EAD are reasonable, but they must be handled with thoughtful reforms to the program. Instead of a complete revocation of H-4 EAD, a form of labor attestation similar to the Labor Condition Application for H-1B visas is a more appropriate policy alternative. A method of labor attestation is a way to curb the genuine concerns of the displacement of U.S. workers. Such a reform is rational as opposed to the extreme proposal to revoke H-4 EAD. More so, USCIS's assurance that the public will have the ability to comment per APA notice and comment period is not assuring due to the unlikelihood that any amount of comments could dissuade the administration. Lastly, the heart of immigration law in the United States is keeping families unified. Revoking H-4 EAD would separate families and compel H-1B visa holders to depart from the United States to work for competing countries, thus hurting the national economy. Revocation of H-4 EAD is just one of the many ways in which the current administration is constraining legal immigration. However, despite the uncertainty of Trump's administration and the difficult plight for the minority women relying on H-4 EAD, the perseverance of those women will prevail.¹⁷²

¹⁷² As of the writing of this Note, the U.S. Department of Homeland Security has not yet published the final rule to revoke the Employment Authorization Document for H-4 visa holders. The rule is pending review under the Office of Management and Budget and the U.S. Court of Appeals for the District of Columbia for *Save Jobs USA v. Department of Homeland Security* ruled that Save Jobs USA has standing to challenge the H-4 EAD program, remanding the case back to the district court.