



BEAUTY AND THE BEAST: DISNEY'S USE OF THE Q AND H-1B VISAS

Kit Johnson*

OVERTURE

The Walt Disney Company made national headlines in 2015 when its former information-technology employees went public with the news that they had been fired and asked to train their

* Associate Professor at the University of Oklahoma College of Law. I am extremely grateful for the invitation of the NYU Journal of Law & Liberty to participate in its February 27, 2018 symposium Freedom versus Fairness: The Tension Between Free Market and Populist Ideals in Labor, which provided the opportunity to develop this work. I also thank the University of North Dakota School of Law, my home institution at the time of the symposium event. I wish to express particular gratitude to Dr. Duncan Dickson for being generous with his time in talking with me about the Q visa and for sharing his comments on this project as well as on past work I've done on the subject. And I thank Eric E. Johnson and Ron Hira for their helpful feedback on drafts. © 2018 Kit Johnson. Konomark – Most rights sharable. See konomark.org.

replacements: foreign workers holding H-1B visas.¹ Disney's move was spotlighted during the 2016 presidential campaign as then-candidate Donald Trump railed against Disney's use of H-1B visas to employ people, "imported from abroad, for the explicit purpose of substituting for American workers at lower pay."²

What few appreciate is that Disney is not new to working the immigration laws to its advantage. Just at the Walt Disney World resort in Orlando, Florida, the company has employed student workers on J visas,³ vocational students on M visas,⁴ intra-company transferees from other parks around the world on L visas,⁵ Walt

¹ Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, N.Y. Times A1 (June 4, 2015). Initially, the workers went public – albeit in an anonymous way. See id. (“... former Disney workers were reluctant to be identified, saying they feared they could jeopardize their chances of finding new jobs with the few other local tech employers. Several workers agreed to interviews, but only on the condition of anonymity.”). Only months later, after filing lawsuits, did several laid-off employees go on-the-record with attributable quotes. See, for example, Julia Preston, *Lawsuits Claim Disney Colluded to Replace U.S. Workers with Immigrants*, N.Y. Times A12 (Jan. 26, 2016). Other companies that have undertaken similar layoffs have had employees sign separation agreements with non-disparagement provisions, which has inhibited employees from speaking out about similar employment practices. See, for example, Julia Preston, *Laid-Off Americans, Required to Zip Lips on Way Out, Grow Bolder*, N.Y. Times A16 (June 12, 2016).

² See Ted Johnson, *Donald Trump Zeroes in on Disney Layoffs in Bashing Guest Worker Visas* (Variety, Mar. 5, 2016) archived at <https://perma.cc/2KWC-LVCD>. Democratic candidate Bernie Sanders also took issue with Disney. See David Weigel, *In Disneyland's Shadow, Bernie Sanders Criticizes Disney's Business Practices* (Wash. Post, May 24, 2016), archived at <https://perma.cc/5SYS-J84Z> (“... in Florida, Disney replaced 250 workers with foreign workers using the H-1B visa program. They had tech workers train the people that were replacing them!”).

³ See Kit Johnson, *The Wonderful World of Disney Visas*, 63 Fla. L. Rev. 915, 941-44 (2011).

⁴ Telephone Interview with Dr. Duncan Dickson, Assistant Professor, Rosen College of Hospitality Management, U. of Central Fla., in Orlando, Fla. (Mar. 16, 2010) [hereinafter “Dickson interview”].

⁵ Id.; Interview with “Amelie,” Cast Member, Walt Disney World, in Orlando, Fla. (May 27, 2009).

Disney World alumni on short-term H-2B visas,⁶ trainees on H-3 visas,⁷ and treaty investors on E-2 visas.⁸ Disney even led a lobbying effort to create a new visa category uniquely applicable to overseas workers staffing its Epcot theme park's World Showcase attractions – the Q visa.⁹

This Article takes a particular look at two Disney visa stories. Part I examines the company's successful below-the-radar creation of the Q visa. Part II considers the public-relations fiasco that followed the firing of Disney IT workers and their replacement with H-1B visa-holders. Thinking about these two stories side-by-side pushes us to confront at least two questions: first, how do we feel about corporate users of the immigration system tailoring that system to fit their own needs? And second, how do we feel about corporate users of the immigration system making use of that system to replace U.S. workers with noncitizen labor?

⁶ *Walt Disney World International Program* (Revolvy), archived at <https://perma.cc/M5Q2-UFD2>.

⁷ Trainees work exclusively in culinary. Interview with Lydia Arledge, International Education Consultant, Walt Disney Co., in Greensboro, N.C. (Oct. 13, 2010).

⁸ Dickson interview (cited in note 4).

⁹ Johnson, 63 Fla. L. Rev. at 921-25 (cited in note 3).

I. BE OUR GUEST;¹⁰ THE Q-VISA STORY¹¹

The Q visa allows noncitizens to work in short-term service-industry jobs that involve sharing a foreign culture.¹² The Q grew up on the shores of the World Showcase Lagoon in the Epcot theme park at Walt Disney World.

Epcot—originally an acronym for “Experimental Prototype Community of Tomorrow” —was Walt Disney’s consuming vision in the later part of his life. In fact, building the Magic Kingdom — a Florida version of Disneyland in California—was his way of financing Epcot.¹³ Walt promised that Epcot “will always be introducing, and testing, and demonstrating new materials and new systems” and would be “a showcase to the world of the ingenuity and imagination of American free enterprise.”¹⁴

Following Walt’s death, the plans for Epcot morphed into a kind of permanent world’s fair. Half of the park hews close to Walt’s original vision, consisting of pavilions showcasing corporate-sponsored visions of utopian progress. The other half consists of pavilions showcasing foreign countries.¹⁵ The two halves, respectively, are Future World and World Showcase.¹⁶ Over the years, Epcot’s commitment to the former has waned. General

¹⁰ Be Our Guest is a song from the movie *Beauty and the Beast*. Angela Lansbury, *Be Our Guest*, *Beauty and the Beast* (Walt Disney Records, 1991).

¹¹ Much of the story of the creation of the Q visa is laid out in my prior article. See Johnson, 63 Fla. L. Rev. at 920-25 (cited in note 3). I take this opportunity to add additional details in order to provide a fuller account of the visa’s creation.

¹² See U.S. Citizenship and Immigration Services, *Q Cultural Exchange* (Jul. 14, 2015), archived at <https://perma.cc/LT28-HER5>.

¹³ Brian Krosnick, *Horizons: Why Disney Demolished Epcot’s Best Ever Attraction* *1 (Theme Park Tourist, June 26, 2015), archived at <https://perma.cc/F24R-K7AG>.

¹⁴ *Id.*

¹⁵ See *id.*

¹⁶ See *Epcot* (DISBoards.com), archived at <https://perma.cc/BF4L-7HH4>.

Electric's iconic Horizons pavilion closed in 1994.¹⁷ And in 2017, Disney closed Exxon's Universe of Energy, shuttered to make room for a roller coaster with a Guardians of the Galaxy theme.¹⁸

Epcot's World Showcase, meanwhile, has remained thematically undiluted over the decades. Arrayed around the World Showcase Lagoon are pavilions representing 11 different nations. Park visitors can "travel around the globe"¹⁹ by walking a 1.2 mile promenade²⁰ to tidy, diminutive versions of Mexico, Norway, China, Germany, Italy, the United States, Japan, Morocco, France, the United Kingdom, and Canada.²¹ As Disney describes the experience:

Guests can immerse themselves in the architecture, landscapes, streetscapes, attractions, shops and restaurants of 11 themed pavilions – each staffed by actual citizens from [the represented countries][.]²²

It's that last bit – "staffed by actual citizens" – that is of particular interest here. In fact, it goes to the great irony of Epcot. While World Showcase is the part of Epcot furthest from Walt's original vision, the reworking of the law that the Disney company accomplished to staff it arguably does more to "showcase ... the ingenuity and imagination of American free enterprise" than an Exxon or General Electric pavilion ever could.²³

¹⁷ Krosnick, *Horizons* at *5 (cited in note 13).

¹⁸ See Brooks Barnes, *Disney Vows to Give Epcot a Magical, Long-Overdue Makeover*, N.Y. Times B3 (July 15, 2017).

¹⁹ *Epcot* (Walt Disney World), archived at <https://perma.cc/483N-8RDL>.

²⁰ *Epcot Fun Facts* (AllEars.Net), archived at <https://perma.cc/T3PT-6C4Y>.

²¹ *World Showcase: DestiNations Discovered* (Walt Disney World), archived at <https://perma.cc/E3PZ-Q8AT>.

²² *Id.*

²³ Krosnick, *Horizons* at *1 (cited in note 13) (quoting Walt Disney).

When Disney executives first contemplated creating the World Showcase, they faced a hurdle: there was no clear path for them to hire noncitizen workers at those pavilions in the numbers they wanted.²⁴ That is, the company hoped to staff each pavilion in the World Showcase with citizens of the country represented so that park guests would have a truly immersive travel experience.²⁵ But no existing visa would have allowed Disney to easily and consistently fill park jobs in this way.²⁶

Initially, Disney's director of casting, Duncan Dickson,²⁷ worked with the United States Information Agency (USIA) to obtain a new J-visa²⁸ designation for "cultural ambassadors" to come and serve as cast members in the Epcot World Showcase.²⁹ Both Disney and the USIA were happy with this arrangement.³⁰ Congress, however, became concerned about whether USIA-approved J-visa programs were operating consistent with Congressional intent³¹ and tasked the General Accountability Office (GAO) to investigate.³² The GAO found problems with certain J-visa programs,³³ including those utilized by amusement parks.³⁴ The GAO report ended up leading

²⁴ See Johnson, 63 Fla. L. Rev. at 921-23 (cited in note 3).

²⁵ Id.

²⁶ Id.

²⁷ *Rosen College of Hospitality Management: Dr. Duncan Dickson* (U. of Central Fla.), online at <https://hospitality.ucf.edu/person/duncan-dickson/> (visited June 1, 2018).

²⁸ 8 U.S.C. § 1101(a)(15)(J).

²⁹ Dickson interview (cited in note 4).

³⁰ E-mail from Dr. Duncan Dickson to Kit Johnson (Feb. 27, 2018) (on file with author).

³¹ According to Dickson, the investigation of J-visa program abuses was a "crusade" spearheaded by Senator Alan Simpson (R-WY). Id.

³² Johnson, 63 Fla. L. Rev. at 922 (cited in note 3).

³³ Dickson acknowledges that some then-existing J-visa programs, other than Disney's, were "a bit sketchy." E-mail from Dr. Duncan Dickson to Kit Johnson (Feb. 27, 2018) (cited in note 30).

³⁴ Johnson, 63 Fla. L. Rev. at 922 (cited in note 3).

some members of Congress to call for the wholesale elimination of J visas.³⁵

For Disney, the threat to the J-visa program was a threat to the “integrity of World Showcase.”³⁶ Dickson, came up with an outside-the-box solution: Disney should craft its own visa, one that would allow it to staff Epcot as envisioned.³⁷

It was a remarkable insight. Dickson was not a lawyer. Yet he saw what even experienced lawyers sometimes fail to recognize: If the law does not help you, perhaps the law itself can be changed.³⁸

Dickson drew up some language.³⁹ He wanted a work visa – that was critical given that cast members staffing Epcot would be workers. But he didn’t want a “generic work visa” that would be applicable to every job in the country.⁴⁰ He just needed the visa to fit the roles he was looking to fill at World Showcase.⁴¹ It was a delicate balance between “want[ing] it to fit what we were doing at Epcot, yet look generic” and still be something “other people could use.”⁴² His draft emphasized work of a cultural-exchange nature.

In crafting the language, Dickson got help from legislative assistants to Florida Congressman Bill McCollum, whose district encompassed Walt Disney World.⁴³ He was also assisted by aides to

³⁵ *Id.*

³⁶ E-mail from Dr. Duncan Dickson to Kit Johnson (Feb. 27, 2018) (cited in note 30).

³⁷ Johnson, 63 Fla. L. Rev. at 923 (cited in note 3).

³⁸ As a law professor, I can attest that legal education focuses on lawsuits and litigation. And certainly, monumental changes in the law have happened because of litigation. But legislation is another powerful tool for change. And that’s perhaps something that we don’t emphasize enough in law schools.

³⁹ See Johnson, 63 Fla. L. Rev. at 923 (cited in note 3).

⁴⁰ Dickson interview (cited in note 4).

⁴¹ *Id.*

⁴² *Id.*

⁴³ E-mail from Dr. Duncan Dickson to Kit Johnson (July 19, 2011) (on file with author).

Connecticut Congressman Bruce Morrison, who chaired the immigration subcommittee of the House Judiciary Committee.⁴⁴ Dickson also sought legal advice. He consulted with Disney's immigration counsel⁴⁵ and with another well-known immigration attorney⁴⁶ to ensure his draft visa would be palatable to the American Immigration Lawyers Association (AILA), the leading advocacy group for immigration lawyers.⁴⁷

Once the structure was set and the language was drafted, Dickson had to rally congressional support for his proposal. Disney's Vice President of Congressional Affairs, Richard Bates, hired a former congressman, Tom Railsback, to usher Dickson through the halls and make introductions.⁴⁸ "Without Tom, we would have never gotten in to see the folks we needed to see," said Dickson.⁴⁹

Even with all of this support, Dickson needed something else: good timing and a bit of luck. Dickson floated his cultural exchange visa at a time when Congress was actively engaged in a large-scale overhaul of U.S. visa programs. While Dickson was pitching his cultural exchange work visa, other new visa proposals were also circulating. Among those that became law⁵⁰ were the O visa for individuals with "extraordinary abilities" in the sciences, arts, education, business, or sports; the P visa for athletes, artists, and entertainers; the H-1B visa for individuals in "specialty occupations";

⁴⁴ *Id.*

⁴⁵ Tom Raleigh of Akerman Senterfitt. See Johnson, 63 Fla. L. Rev. at 923 (cited in note 3).

⁴⁶ Ira Kurzban. See *id.*

⁴⁷ E-mail from Dr. Duncan Dickson to Kit Johnson (July 19, 2011) (cited in note 43).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), codified as amended at 8 U.S.C. §1101, et seq.

the R visa for religious workers; and the EB-5 visa for immigrant investors.⁵¹

Congressional negotiations over the various immigration proposals were tense but fruitful, resulting in the Immigration Act of 1990.⁵² It included Dickson's creation, codified at 8 U.S.C. § 1001(a)(15)(Q) and thereafter known as the "Q visa" or, more frequently, the "Disney visa."⁵³

The enactment of the Q visa was a huge moment for Walt Disney World, allowing Disney to staff its World Showcase at the levels it does today with "actual citizens" of the countries portrayed. This has no doubt helped propel Epcot to its ranking as the number six theme park in the world by attendance.⁵⁴

The Q visa has also helped Disney to increase authentic staffing at other areas of Walt Disney World.⁵⁵ For example, one part of Disney's Animal Kingdom Theme Park is a simulacrum of Africa

⁵¹ See Kit Johnson, *Importing the Flawless Girl*, 12 Nev. L. J. 831, 841-42 (2012) (discussing the creation of the O, P, and H-1B visas); Kit Johnson, *Buying the American Dream: Using Immigration Law to Bolster the Housing Market*, 81 Tenn. L. J. 829, 842 (2014) (discussing the creation of the EB-5 visa); see generally Sarah Lea Tobocman and Larry S. Rifkin, *Employment of Nonimmigrant Aliens After IMMACT90*, 66 Fla. Bar J. 48 (May 1992) (discussing the new visa provisions of IMMACT90, including R visas).

⁵² See Johnson, 63 Fla. L. Rev. at 925 (cited in note 3); Immigration Act of 1990, 104 Stat. at 4978 (cited in note 50).

⁵³ See Johnson, 63 Fla. L. Rev. at 925 (cited in note 3). Dickson himself calls it, justifiably, "my Q." Dickson interview (cited in note 4).

⁵⁴ Epcot's sixth-place ranking came from a 2016 attendance of 11,712,000. Ranked first was the neighboring Magic Kingdom with an attendance of 20,395,000. Ranked second through fifth were Disneyland (California), Tokyo Disneyland, Universal Studios Japan, and Tokyo Sea Disney. *Global Attractions Attendance Report *10* (Themed Entertainment Association, 2017), archived at <https://perma.cc/29GG-LVDE>.

⁵⁵ Johnson, 63 Fla. L. Rev. at 929 (cited in note 3).

where “Cast Members/villagers are dressed in colorful, authentic African costumes to add to the atmosphere.”⁵⁶

Notably, Q-visa regulations do not require employers to first prove the unavailability of domestic workers before bringing in international cultural exchange workers.⁵⁷ That makes sense, given the visa’s aim of bringing in workers to share a foreign culture—something few Americans would be able to do with authenticity.⁵⁸ And while there are no numerical restrictions on the number of Q visas that can be awarded annually,⁵⁹ only about 3,000 are regularly issued.⁶⁰ Disney is not the exclusive consumer of the Q visa, but it is the largest one.⁶¹ For fiscal year 2010, employment at Walt Disney World accounted for more than 69% of all Q-visa petitions.⁶²

⁵⁶ *Animal Kingdom – Africa* (DISBoards.com), archived at <https://perma.cc/FU2Y-7BYV>. Notably, Disney’s Animal Kingdom Theme Park is the seventh-ranked theme park in the world by attendance. *Global Attractions Attendance Report* at *10 (cited in note 54).

⁵⁷ See Johnson, 63 Fla. L. Rev. at 925-27 (cited in note 3).

⁵⁸ Of course there are some Americans who could engage in such cultural sharing—naturalized citizens, for one, or dual-citizen Americans raised overseas.

⁵⁹ Johnson, 63 Fla. L. Rev. at 927 (cited in note 3).

⁶⁰ Table 25. *Nonimmigrant Admissions by Class of Admission: Fiscal Years 2014 to 2016* (Dep’t of Homeland Security, Jan. 4, 2018), archived at <https://perma.cc/3QGE-DK47> (2014: 2,976; 2015: 2,988; 2016: 3,038). Q-visa recipients can work up to 15 months in the United States, and they can return to the United States with Q visas multiple times, so long as they live outside the United States for at least one year between trips. See Johnson, 63 Fla. L. Rev. at 932 (cited in note 3); 8 C.F.R. § 214.2(q)(2)(i), (ii).

⁶¹ See United States Citizenship and Immigration Services, *List of Companies Petitions for Nonimmigrant Workers on the International Cultural Exchange Program Fiscal Year 2010* (June 3, 2011) (on file with author).

⁶² *Id.* Disney was the direct sponsor of 1,063 Q-visa petitions that year. Other corporations and LLCs associated with Epcot accounted for another 559 Q-visa petitions. The combined filings accounted for 69.3% of the total 2,341 petitions filed that year.

The Q visa has also saved Disney a substantial amount of money—upwards of \$19 million a year.⁶³ Q-visa workers are paid less, on average, than their U.S. citizen counterparts; they require no health insurance or pension plans and are exempt from certain employment taxes; they pay to live on-site; and they reduce turnover costs in that they tend to leave their positions infrequently.⁶⁴

Despite the fact that Disney saves money by employing noncitizen Q-visa workers, few are up in arms over their hiring.⁶⁵ To the extent the story of the Q-visa's creation is known, it's seen as a lesson in creative problem solving—indeed Dickson, now a professor, has developed it into a case study for his students.⁶⁶ At a time when so many pundits and politicians are fuming over the displacement of U.S. workers, the Q visa flies under the radar. In part that may be because it's a small program. But, by and large, the Q-visa's uncontroversial nature is probably more because people generally just get it. Disney is creating imaginary worlds in its theme parks. That requires special talents few Americans are capable of providing. And if a few thousand international workers are a necessary part of creating that magic, they also have a positive ripple effect on the many Americans who also work for Disney. Tourists who visit World Showcase will likely also visit Disney World's many other parks (including other areas of Epcot itself) which are, often-as-not, staffed by Americans. And the money that pours into the

⁶³ Johnson, 63 Fla. L. Rev. at 931 (cited in note 3). The figures have been updated to reflect 2017 dollars.

⁶⁴ Id. at 930-32.

⁶⁵ Disney's staffing of the World Showcase with Q-visa workers did spawn a lawsuit by a pro se litigant. See id. at 933-35.

⁶⁶ Duncan Dickson, *Who Are We Building This For?* *2 (unpublished M.A. case study, School of Hotel Administration, Cornell University, 2001) (on file with author).

theme parks also flows to “backstage” workers—the lawyers, accountants, and IT workers behind the scenes.⁶⁷

Now when Disney seeks to replace those backstage workers with international labor, the goodwill and understanding can run dry. That’s our next story.

II. PUT OUR MAGIC TO THE TEST:⁶⁸ AN H-1B STORY

In October 2014, Disney announced that it would be “restructuring our global technology organization to support future innovation and new capabilities.”⁶⁹ Behind that phrasing—as warm as it was opaque—was the revelation that Disney would be outsourcing much of its IT.⁷⁰

In the end, about 250 of Disney’s tech workers lost their positions with 90-days notice.⁷¹ All were offered a “stay bonus” of 10 percent if they remained on the job for the full 90 days until their official termination.⁷² That bonus came with a hitch: the company demanded “continued satisfactory performance of your job duties,”⁷³ which turned out to mean that the workers had to train their replacements. That involved 30 days of job shadowing, 30 days of parallel working,

⁶⁷ See Alan Bryman, *The Disneyization of Society* 11, box 1.2 (SAGE Publications Inc., 2004) (providing a glossary of Disney language including the term “backstage”).

⁶⁸ “Put our magic to the test” is a lyric from the song *Be Our Guest* in the Disney movie *Beauty and the Beast*. Lansbury, *Be Our Guest* (cited in note 10).

⁶⁹ Sandra Pedicini, *Disney’s Technology Group Undergoing Restructuring* (Orlando Sentinel, Oct. 28, 2014), archived at <https://perma.cc/F5SA-VKCW>.

⁷⁰ See *id.*

⁷¹ Preston, *Pink Slips at Disney*, N.Y. Times at A1 (cited in note 1).

⁷² *Id.*

⁷³ *Id.*

and 30 days of monitoring.⁷⁴ The replacements these U.S. workers were training were all temporary workers from overseas.⁷⁵

Leo Perrero, one of the displaced workers, described the changeover to 60 Minutes:

Never in my life did I imagine, until this happened at Disney, that I could be sitting at my desk and somebody would be flown in from another county, sit at my same desk and chair, and take over what I was doing. It was the most humiliating and demoralizing thing I've ever gone through in my life.⁷⁶

Notably, there's no indication that the American employees were underperforming. Perrero was even commended for his "superior skills" and "outstanding" work, which the company acknowledged had saved it thousands of dollars, in a review that came *after* his notice of severance.⁷⁷

⁷⁴ Id. See also "60 Minutes" Examines H-1B visas Outsourcing American Jobs (CBS This Morning, Mar. 17, 2017), online at <https://www.youtube.com/watch?v=envbbUc4LhU&t=2s> (visited Oct. 3, 2018) (one employer, Northeast Utilities, called this sort of training "knowledge transfer.").

⁷⁵ Preston, *Pink Slips at Disney*, N.Y. Times at A1 (cited in note 1).

⁷⁶ "60 Minutes" Examines H-1B Visas Outsourcing American Jobs, CBS This Morning (cited in note 74). The CEO of Disney, Bob Iger, apologized for having the U.S. workers train their replacements and indicated that it was a mistake to ask them to do so. Id. Interestingly, when the University of California San Francisco Medical Center faced similar backlash for asking U.S. workers to train the H-1B based employees of the staffing company taking over its division, it too said it was a "mistake" to ask the workers to train their replacements. Bill Whitaker, *Are U.S. Jobs Vulnerable to Workers with H-1B Visas?*, (CBS News, Aug. 13, 2017), online at <https://www.cbsnews.com/news/are-u-s-jobs-vulnerable-to-workers-with-h-1b-visas-2/> (visited Oct. 3, 2018).

⁷⁷ Preston, *Pink Slips at Disney*, N.Y. Times at A1 (cited in note 1). Initial coverage did not identify Perrero by name.

The replacements Perrero and his cohorts trained had come to the United States on H-1B visas, which are temporary work visas for individuals in “specialty occupations.”⁷⁸

Interestingly, the H-1B visa was created in the same legislative push that spawned the Q visa: The Immigration Act of 1990.⁷⁹ The goal of the H-1B visa was “generally restrictive and reflect[ed] a desire to protect U.S. workers.”⁸⁰ Prior to 1990, there had been another work visa – the H1, around since 1952.⁸¹ That visa category was quite broad and applied to individuals of “distinguished merit and ability” who were coming to the U.S. to “perform temporary services of an exceptional nature requiring such merit and ability.”⁸²

Congressman Bruce Morrison who, as already noted, was the then-chair of the immigration subcommittee of the House Judiciary Committee, thought that the H1 visa was problematic because it “allowed entry for too many people who weren't vital to the U.S. economy.”⁸³ In addressing this line of criticism, the Immigration Act of 1990 split the H1 visa up into three parts: the H-1B visa for those in “specialty occupations”, the O visa for extraordinary applicants,

⁷⁸ 8 U.S.C. § 1101(a)(15)(H)(i)(b). This paper assumes the replacements were H-1B workers, which is consistent with the focus of relevant lawsuits and news coverage. I thank Professor Ron Hira for pointing out that it is nonetheless possible the new workers came to the United States not as H-1B workers but as intra-company transferees utilizing L visas or even temporary business visitors utilizing B-1 visas. See Email from Ron Hira to Kit Johnson (Feb. 27, 2018) (on file with author).

⁷⁹ See Johnson, 12 Nev. L. J. at 841–42 (cited in note 51) (discussing the creation of the H-1B visa).

⁸⁰ Tobocman and Rifkin, Fla. Bar J. at 48 (cited in note 51).

⁸¹ Johnson, 12 Nev. L. J. at 841 (cited in note 51).

⁸² Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(H)(i), 66 Stat. 163, 168 (1952).

⁸³ *How H-1B Visas Have Been Abused Since the Beginning*, (CBS News, Aug. 13, 2017), online at <https://www.cbsnews.com/news/how-h-1b-visas-have-been-abused-since-the-beginning/> (visited Oct. 3, 2018).

and the P visa for athletes and entertainers.⁸⁴ The H-1B “specialty occupation” was statutorily defined to require both “theoretical and practical application of a body of highly specialized knowledge and . . . a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”⁸⁵ The goal was to “clamp down on abuse and open the doors to truly exceptional people.”⁸⁶

In addition to splitting apart the old H1 visa, the 1990 Act also imposed a new requirement on employers looking to sponsor H-1B beneficiaries. All employers seeking to sponsor an H-1B worker must file a “labor condition application” (LCA) with the U.S. Department of Labor as a first step in the visa petition process.⁸⁷ The LCA requires that employers looking to sponsor H-1B workers attest that: (1) the foreign worker’s wages will be the greater of either actual wages at the place of employment or prevailing wages in the area for the position; (2) the working conditions of the worker will not adversely affect the working conditions of workers similarly employed; (3) the employer is not experiencing a strike or lock-out; (4) the employer provided notice to employees and unions about the labor certification; and (5) the agency displayed publicly the specific number of the foreign hires, their wages, and working conditions.⁸⁸

⁸⁴ Johnson, 12 Nev. L. J. at 841 (cited in note 51).

⁸⁵ Immigration Act of 1990 § 205, 104 Stat at 5020, codified at 8 U.S.C. § 1184(i)(1) (cited in note 50).

⁸⁶ *How H-1B Visas Have Been Abused Since the Beginning*, CBS News (cited in note 83).

⁸⁷ 8 U.S.C. §§ 1101(a)(15(H)(i)(b), 1184(n).

⁸⁸ Immigration Act of 1990 § 205(c)(3), 104 Stat. at 5021 (cited in note 50); see also United States Dep’t of Labor, *ETA Form 9035 & 9035E* (Oct. 31, 2018), archived at <https://perma.cc/T2US-HA2F>.

Notably, the LCA doesn't require an employer to first look for "able, willing, qualified" U.S. workers.⁸⁹ That's a hurdle that employers have to jump only if they're looking to sponsor a permanent, as opposed to temporary, worker—one who would arrive in the U.S. not on an H-1B visa but as a lawful permanent resident ("green card holder").⁹⁰

With the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA),⁹¹ Congress added still more requirements for employers who are "H-1B dependent."⁹² Whether a

⁸⁹ Compare Immigration Act of 1990 § 205(c)(3), 104 Stat. at 5021 (cited in note 50), with 8 U.S.C. § 1182(a)(5)(A)(i).

⁹⁰ See 8 U.S.C. § 1182(a)(5)(A)(i). To be sure, some temporary visa categories require looking for "able, willing, qualified" U.S. workers. See, for example, United States Citizenship and Immigration Services, *H-2B Temporary Non-Agricultural Workers* (June 11, 2018), archived at <https://perma.cc/7A3L-2SKA> (discussing this as a criterion for the H-2B visa for temporary non-agricultural workers). But this is not a criterion for the H-1B category.

⁹¹ American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat 2681 (1998).

⁹² See generally Donna S. Galchus, *The H-1B Visa Program: A Band-Aid Remedy?*, 34 Ark. Lawyer 20 (1999) (discussing changes under ACWIA); 20 C.F.R. 655.736(a); see also United States Dep't of Labor Wage and Hour Div., *Fact Sheet #62C* (July 2008) archived at <https://perma.cc/U37T-89S8>. These new hurdles were developed largely in response to coverage of H-1B "body shops" in the popular press. See Norman Matloff, *On the Need for Reform of the H-1B Non-immigrant Work Visa in Computer-Related Occupations*, 36 U. Mich. J. L. Reform 815, 819 (2003) (discussing a 1993 episode of 60 Minutes concerning Hewlett Packard); see also *48 Hours with Dan Rather: "Slamming the Door"* (CBS News, May 11, 1995), online at <https://www.youtube.com/watch?v=vW8r3Lo18M4&t=93s> (visited Oct. 3, 2018) (a 1995 report by CBS's 48 Hours concerning AIG). Notably, ACWIA added these hurdles while simultaneously increasing the total number of H-1B visas available from 65,000 to 115,000 for fiscal years 1999 and 2000. See Michael H. LeRoy, *Whites Versus Indians: Is the "Hire American" Preference in Executive Order 13,788 Constitutional?* *5 (unpublished manuscript, 2018) (on file with author) (discussing this legislative change as well as the subsequent American Competitiveness in the Twenty-First Century Act ("AC21"), Pub. L. No. 106-313, 114 Stat. 1251 (2000), which temporarily increased available H-1B

company is deemed H-1B dependent turns on the percentage of the company's workforce consisting of H-1B employees.⁹³ If a company is deemed H-1B dependent, then it is prohibited from displacing U.S. workers within a 180 day window, the timing of which is triggered, depending on the situation, by either the filing of the H-1B petition⁹⁴ or the placement of the H-1B worker.⁹⁵ Displacement includes both direct displacement (a company firing its own U.S. workers and replacing them with H-1B workers) and secondary displacement (a company using its H-1B workers to displace the U.S. workers of a second employer).⁹⁶ H-1B-dependent employers are also under an obligation to take "good faith steps to recruit U.S. workers" for the positions to be filled by H-1B workers.⁹⁷

Given these hurdles designed to prevent the H-1B system from negatively effecting American workers, how was it that Perrero and his colleagues were put in the position of training their replacements?

The requirements established in the 1990 Act posed no problem because Disney used a go-between—actually two of them: staffing

visas to 195,000 in fiscal years 2000, 2001, and 2002; subsequently, the category returned to its original 65,000 cap).

⁹³ An H-1B dependent employer has 25 or fewer full-time employees and at least eight H-1B workers, 26-50 full-time employees and at least 13 H-1B workers, or 51 or more full-time employees of whom 15% or more are H-1B workers. See 20 C.F.R. 655.736(a); see also DOL Wage and Hour Div., *Fact Sheet #62C* (cited in note 92).

⁹⁴ 20 C.F.R. § 655.738(c) (direct displacement); see also United States Dep't of Labor Wage and Hour Div., *Fact Sheet #62N* (August 2009), archived at <https://perma.cc/BHQ4-WHVB>.

⁹⁵ 20 C.F.R. § 655.738(d)(4) (secondary displacement); see also DOL Wage and Hour Div., *Fact Sheet #62N* (cited in note 94).

⁹⁶ 20 C.F.R. § 655.738.

⁹⁷ 20 C.F.R. § 655.739; see also United States Dep't of Labor Wage and Hour Div., *Fact Sheet #62O* (July 2009), archived at <https://perma.cc/3HXG-YVQA>.

firms HCL⁹⁸ and Cognizant.⁹⁹ Disney hired the staffing firms, and the staffing firms hired the workers.¹⁰⁰ The LCA requires an attestation by the employer of the incoming H-1B workers that those workers will not “adversely affect the working conditions of workers similarly employed.”¹⁰¹ This requirement is satisfied when “the employer affords working conditions to its H-1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees.”¹⁰² This was an attestation HCL and Cognizant could make, because they never employed Perrero or his co-workers.¹⁰³ Meanwhile, the law required Disney to make no such attestation because it was not the company applying for the visas.

⁹⁸ *About HCL Technologies*, archived at <https://perma.cc/JQ7R-YLKY>.

⁹⁹ *Cognizant*, archived at <https://perma.cc/8Z4T-7KGJ>.

¹⁰⁰ Professor Ontiveros calls this use of the H-1B visa the “outsourcing H-1B.” Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 Berkeley J. Empl. & Labor L. 1, 3 (2017) (contrasting the “outsourcing H-1B” with the “pure H-1B” where an international worker is hired directly by an employer and the “body shop worker” brought to the United States without a specific job in mind and hired out as short-term placements in contravention of H-1B regulations).

¹⁰¹ 20 C.F.R. § 655.732.

¹⁰² 20 C.F.R. § 655.732(a) (emphasis added).

¹⁰³ See *Moore v. Cognizant Technology Solutions*, 2016 WL 5943593, *3 (M.D. Fla. 2016) (Moore); *Perrero v. HCL America, Inc.*, *3 2016 WL 5943600 (M.D. Fla. 2016) (Perrero). In both orders, the court cited 20 C.F.R. § 655.732(a). Professor Ron Hira pointed out to me that this analysis would not necessarily work in every case given that HCL and Cognizant occasionally do hire U.S. workers through “rebadging,” where just-terminated employees of the client work for HCL or Cognizant as part of a project of knowledge transfer on a longer timeframe. Email from Ron Hira to Kit Johnson (Feb. 27, 2018) (on file with author) (noting that the “continuous hiring” of H-1B workers while simultaneously terminating equally qualified rebadged U.S. workers raises compliance questions).

The additional ACWIA requirements were not a problem either. HCL and Cognizant have been among the top H-1B sponsors in the United States,¹⁰⁴ and they self-identify as H-1B dependent.¹⁰⁵ So at first blush, one might think it would be a problem that HCL and Cognizant were displacing U.S. workers – which they clearly were, as that was the essence of the service they were providing to Disney. But HCL and Cognizant were able to take advantage of an exemption¹⁰⁶ added into ACWIA.¹⁰⁷ Crucial for Disney and its partners, all workers who are paid at least \$60,000 a year or who have a master's or higher degree (or equivalent) are exempt, and their hiring does not trigger the provisions about displacement.¹⁰⁸ It appears this provision applied here, with the new IT workers presumably having advanced degrees or receiving more than \$60,000 a year in compensation.¹⁰⁹

¹⁰⁴ Grace Donnelly, *37% of H-1B Visa Holders Work at These 20 Companies* (Fortune, Aug. 3, 2017), archived at <https://perma.cc/3UMR-M2DQ> (noting Cognizant received the most H-1B approvals in 2016; HCL was eighth). Notably, the salaries paid by these companies were not as high. *Id.* (Cognizant ranked eleventh and HCL ranked twelfth).

¹⁰⁵ See United States Dep't of Labor Wage and Hours Div., *Fiscal Year Data for WHD, H-1B* (Sept. 2018), archived at <https://perma.cc/6VM6-49H5> (Column AQ "H-1B Dependent" is marked "Y" for both employers). See also *Knowledge@Wharton: January 27, 2016* (Wharton Business Radio, Jan. 27, 2016) (Professor Ron Hira noting these companies "hire virtually no Americans" and "virtually all of their workforce are guest workers in the US.").

¹⁰⁶ 20 C.F.R. § 655.737; see also United States Dep't of Labor Wage and Hour Div., *Fact Sheet #62Q* (July 2008) archived at <https://perma.cc/S2VF-HGUB>.

¹⁰⁷ See Galchus, 34 Ark. Lawyer at 20 (cited in note 92); Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 Brandeis L. J. 967, 1009 (2002); *How H-1B Visas Have Been Abused Since the Beginning*, CBS News (cited in note 83).

¹⁰⁸ 20 C.F.R. § 655.737; see also DOL Wage and Hour Div., *Fact Sheet #62Q* (cited in note 106).

¹⁰⁹ From litigation documents, it is clear that the plaintiffs who sued Disney never alleged that the new workers did not earn \$60,000 nor had master's degrees. See *Moore*, 2016 WL 5943593 at *3; *Perrero*, 2016 WL 5943600 at *3. Finally, there are two things of

Two of the fired Disney workers filed federal lawsuits against Disney, HCL, and Cognizant.¹¹⁰ They argued that the three companies “colluded to break the law” by displacing American workers with H-1B workers.¹¹¹ In particular, they contended that (1) the companies did not comply with the legal requirement to show that the hiring of H-1B workers would “not adversely affect the working conditions” of other workers in similar jobs¹¹² and (2) the

note about the ACWIA H-1B exemption. First, the salary of \$60,000 a year was set in 1998. Adjusted for today’s dollars, that would be a threshold of \$90,000 annually. See Federal Reserve Bank of Minneapolis, *What is a Dollar Worth? Inflation Calculator App*, archived at <https://perma.cc/8UXL-YG68> (calculating inflation using Bureau of Labor Statistics monthly consumer price index data). Yet the statute makes no such adjustment, so the \$60,000 exemption creeps lower in real dollars with inflation. Second, technology workers with master’s degrees were not nearly so common in 1998 as they are today. See, for example, United States Dep’t of Labor Bureau of Labor Statistics, *BLS Releases New 1998-2008 Employment Projections, Table 3b* (Nov. 30, 1999), archived at <https://perma.cc/AE3J-4SU4> (identifying the five fastest growing occupations over retrospective 10-year study as computer engineers at 108% increase, computer support specialists at 102%, systems analysts at 94%, database administrators at 77%, and desktop publishing specialists at 73%). As Professor Ron Hira has noted, “Computer Occupations in particular have been a traditional path from working class to the middle class.” *Immigration Reforms Need to Protect Skilled American Workers, Hearing Before the Senate Committee on the Judiciary, 114th Cong., 1st Sess. at 14* (2015) (“Hira Testimony”) (statement of Ronil Hira, Associate Professor of Public Policy, Howard University).

¹¹⁰ See, for example, Verified Class Action Complaint against HCL Inc. and Walt Disney World, *Perrero v. HCL America, Inc.*, 2016 WL 297380 (M.D. Fla. 2016); see also Julia Preston, *Lawsuits Claim Disney Colluded to Replace U.S. Workers with Immigrants*, N.Y. Times A12 (Jan. 26, 2016). Other disgruntled workers filed complaints with the Equal Opportunity Employment Commission. See Paul Brinkmann, *Orlando Judge Tosses Disney IT Outsourcing Lawsuit* (Orlando Sentinel, Oct. 14, 2016), archived at <https://perma.cc/6JFN-SCP8>.

¹¹¹ Preston, *Lawsuits Claim Disney Colluded to Replace U.S. Workers with Immigrants*, N.Y. Times at A12 (cited in note 110).

¹¹² See notes 88-90 and accompanying text. This is one of the attestations employers must make in the LCA.

companies improperly displaced American workers.¹¹³ Those lawsuits failed to survive motions to dismiss for the reasons outlined above: namely, that no HCL/Cognizant workers were “adversely affected” and the new workers were exempt.¹¹⁴

As a matter of law, the court was correct. There are no legal barriers that would have prevented Disney from making the decision to hire staffing companies to take over one of its departments, and no hurdles that would prevent those staffing companies from utilizing H-1B workers.¹¹⁵ Obviously, as a corporation, Disney has a corporate responsibility to maximize shareholder value,¹¹⁶ something it sought to achieve through the wage savings obtained by moving from an

¹¹³ Julia Preston, *Judge Says Disney Didn't Violate Visa Laws in Layoffs*, N.Y. Times A17 (Oct. 14, 2016).

¹¹⁴ See *Moore*, 2016 WL 5943593 at *3; *Perrero* 2016 WL 5943600 at *3.

¹¹⁵ For this reason, I disagree with Professor Ron Hira, who has characterized the H-1B exempt category as a “loophole.” See, for example, *Knowledge@Wharton*, *January 16, 2017* (cited in note 105); Ron Hira, *Outsourcing in America* (The Hill, Mar. 16, 2015), online at <http://thehill.com/blogs/congress-blog/labor/235706-outsourcing-in-america> (visited Oct. 3, 2018) (“close the loopholes”); Hira Testimony at 1 (cited in note 109) (“mainframe-sized loopholes”). The law specifically contemplates and approves of this type of outsourcing. Companies that follow the law as written are not “taking advantage” but rather are complying with the law or, perhaps, maximizing their self-interest under the law. That is different from a “loophole.” Compare Hira Testimony at 1 (cited in note 109) (“employers are taking advantage of this business model”), with Jack Shafer, *Shut Your Loophole* (Slate, July 24, 2007), archived at <https://perma.cc/WR6K-DWZ7> (condemning the media’s use of the word loophole as “loaded, partisan word, one that implies wrongdoing and scandal where none exists”).

¹¹⁶ See, for example, Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 *Bus. Ethics Q.* 235, 236 (2002) (noting “value maximization,” which states that managers should make all decisions so as to increase the total long-run market value of the firm, has its roots in 200 years of research in economics and finance).

internally supported U.S. workforce to outsourcing an entire division to a company that staffed the department with foreign workers.¹¹⁷

That said, there is a palpable policy question here. The purpose of the H-1B visa is to fill gaps in the U.S. labor market,¹¹⁸ not to help employers save money on labor.¹¹⁹ But as many have pointed out, the H-1B program does not appear to be meeting its intended purpose. First, it is debatable¹²⁰ whether there is a shortage of American workers capable of filling “ordinary IT jobs.”¹²¹ Disney’s story of replacing American workers with staffing-company employees on

¹¹⁷ “60 Minutes” *Examines H-1B Visas Outsourcing American Jobs*, CBS This Morning (cited in note 74) (comments of 60 Minutes correspondent Bill Whitaker reporting that “The companies will all tell you that this is standard industrial procedure for helping to ... lower costs.”); Whitaker, *Are U.S. Jobs Vulnerable to Workers with H-1B Visas?*, CBS News (cited in note 76) (discussing IT layoffs at the University of California San Francisco Medical Center, including comments by Mukesh Aghi, president of the U.S.-India Business Council, that “Every company is out there to make money with the cheapest possible way itself.”).

¹¹⁸ See, for example, *Knowledge@Wharton*, January 16, 2017 (cited in note 105) (comments of Professor Ron Hira).

¹¹⁹ Whitaker, *Are U.S. Jobs Vulnerable to Workers with H-1B Visas?*, CBS News (cited in note 76) (“saving money on labor was not the law’s intended purpose.”)

¹²⁰ See, for example, Ron Hira, et al., *Bill Gates’ Tech Worker Fantasy: Column* (USA Today, July 27, 2014), online at <https://www.usatoday.com/story/opinion/2014/07/27/bill-gates-tech-worker-wages-reforms-employment-column/13243305/> (visited Oct. 3, 2018) (“None of us has been able to find any credible evidence to support the IT industry’s assertions of labor shortages.”).

¹²¹ See, for example, *Knowledge@Wharton*, January 16, 2017 (cited in note 105) (comments of Professor Ron Hira); see also *How H-1B Visas Have Been Abused Since the Beginning*, CBS News (cited in note 83) (citing comments of former U.S. Dep’t of Labor top immigration official Demetrious Papademetriou, who describes imported programmers as “run-of-the-mill people with a degree and some skills” as opposed to “truly skilled”). Importantly, the effect of the “outsourcing H-1B” isn’t limited to technology workers. Staffing firms have also been using the H-1B visa to develop outsourced accounting departments. See, for example, Michael Rapoport, *Accountants Jump into the Immigration Debate* (Wall Street J., June 7, 2017), online at <https://www.wsj.com/articles/accountants-jump-into-the-immigration-debate-1496750400> (accessed Oct. 12, 2018).

H-1B visas is just one among many in this vein.¹²² Second, empirical data indicates that when U.S. workers have been replaced by H-1B workers in the kind of wholesale departmental overhaul accomplished by Disney, the new noncitizen workers earn substantially less than their replaced American counterparts.¹²³ In sum, it seems that replacing American departments with H-1B-staffed divisions is about cutting costs at the expense of the U.S. workforce.¹²⁴ According to Professor Ron Hira, the H-1B program

¹²² Many other companies received national attention for letting U.S. workers go after hiring outsourcing companies that supply replacement H-1B labor. See, for example Julia Preston, *Toys 'R' Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*, N.Y. Times A1 (Sept. 30, 2015) (discussing displacement of American workers at Toys 'R' Us, Southern California Edison, New York Life Insurance Company, and Cengage Learning); Hira, *Outsourcing in America*, The Hill (cited in note 115) (discussing layoffs at Southern California Edison); *Are U.S. Jobs Vulnerable to Workers with H-1B Visas?*, CBS News (cited in note 76) (discussing IT layoffs at the University of California San Francisco Medical Center); Hira Testimony at 3 (cited in note 109) (Cargill, Harley Davidson, and Pfizer); Ontiveros, 38 Berkeley J. Empl. & Labor L. at 16 (cited in note 100) (Abbot Laboratories and Fossil).

¹²³ See, for example Ron Hira, *New Data Show How Firms Like Infosys and Tata Abuse the H-1B Program* (Working Economics Blog, Economic Policy Institute, Feb. 19, 2015), online at <http://www.epi.org/blog/new-data-infosys-tata-abuse-H-1B-program/> (visited Oct. 3, 2018) (noting that the American workers Southern California Edison, discussed in note 122, were paid an average of \$110,000, and were replaced by H-1B workers earning, on average, \$70,000 or \$65,000); see also Ontiveros, 38 Berkeley J. Empl. & Labor L. at 11 (cited in note 100) ("companies using H-1B workers have reported wage savings of between 20 and 40 percent after switching from using U.S. workers."); Thomas Bourveau et al., *H-1B Visas and Wages in Accounting: Evidence from Deloitte's Payroll*, at *17 (SSRN, June 13, 2018), online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101562 (visited Oct. 3, 2018) (finding, in a study of hacked Deloitte payroll data, that "compared to other matched peer new hires, H-1B visa employees are paid about \$9,000 (15%) less."); id. at *23 ("even when compared to low quality peer new hires, H-1B visa workers are underpaid in our sample. The magnitude of the H-1B wage discount on the starting salaries of new hires remains on the order of at least 10%.").

¹²⁴ See, for example, James Oliphant, *The Big Squeeze: This Election Year, It's All About the Money* (Reuters, Aug. 2., 2016), archived at <https://perma.cc/3ATT-93A9>

has been “perverted” from its original purpose.¹²⁵ Former Congressman Morrison expressed the same sentiment more bluntly: “The H-1B has been hijacked as the main highway to bring people from abroad and displace Americans.”¹²⁶

It’s important to emphasize that there is nothing *legally* impermissible about what Disney or other companies have done. Therefore, to the extent there are problems here, they are policy problems that require a change in the law.¹²⁷

(comments of a former IT worker at Northeast Utilities who trained the H-1B worker replacing him: “The sad part is that my job is still there... It didn’t go away. I went away.”).

¹²⁵ *Knowledge@Wharton*, January 16, 2017 (cited in note 105).

¹²⁶ *How H-1B Visas Have Been Abused Since the Beginning*, CBS News (cited in note 83).

¹²⁷ See, for example, *End H-1B visa Program's Abuse* (L.A. Times, Feb. 16, 2015), archived at <https://perma.cc/LD46-T3FG> (“In concept, the H-1B program is a good idea. It provides a short-term mechanism for companies to bring in workers from overseas when there's a shortage of job candidates with specific expertise. In practice, though, the system is a broken. Congress needs to fix it.”). Congress is currently contemplating a variety of bills related to these issues. See, for example, Protect and Grow American Jobs Act, H.R. 170, 115th Cong., 1st Sess. (2017) (increasing the base salary of H-1B exempt workers from \$60,000 to \$100,000, with increases every third fiscal year after passage in line with the Consumer Price Index); American Jobs First Act of 2017, H.R. 2233, 115th Cong., 1st Sess. (2017) (addressing the base salary of H-1B exempt workers by requiring employers to offer the greater of (1) “the annual wage that was paid to the United States citizen or lawful permanent resident employee who did identical or similar work during the 2 years before” the employer filed the current H-1B petition, and (2) \$110,000, a figure to be “annually adjusted for inflation”); see also H-1B and L-1 Visa Reform Act of 2017, S. 180, 115th Cong., 1st Sess. (2017); H-1B and L-1 Visa Reform Act of 2017 H.R. 1303, 115th Cong., 1st Sess. (2017); High-Skilled Integrity and Fairness Act of 2017, H.R. 670, 115th Cong., 1st Sess. (2017); Keeping American Jobs Act H.R. 1705, 115th Cong., 1st Sess. (2017). Naturally, there are also competing bills pending in Congress which would not restrict H-1B visa but expand them. See, for example, Immigration Innovation Act of 2018, S. 2344, 115th Cong., 2d Sess. (2018) (also known as “I-Squared,” seeking to increase the official H-1B cap from 65,000 to between 115,000 and 195,000, depending upon market conditions and existing demand, as well as provide work permits to spouses of H-1B recipients); Stopping Trained in America PhDs From Leaving the Economy Act of 2017, H.R. 2717, 115th

So are there problems? According to Disney, 120 of the American IT workers it let go were ultimately re-hired by the company in new positions.¹²⁸ That sounds positive, but there has been no data forthcoming about what new positions the workers took and how those positions compare to the prior work they were doing for Disney. Another 40 of the Disney IT workers retired or left the company, while 90 did not find new positions at Disney.¹²⁹ The *New York Times* reported on one of the workers who was not rehired, a woman named Dena Moore.¹³⁰ Moore was into her 50s when she was let go at Disney, making it hard for to start over even with her strong programming credentials.¹³¹ And with 13 grandchildren, Moore “confessed that one of the difficult losses was a pass that allowed her to take them to Disney World at no cost.”¹³²

Cong., 1st Sess. (2017) (also known as the “STAPLE Act,” seeking to exempt graduates from U.S. institutions of higher learning with PhD’s in STEM fields from H-1B numerical caps).

¹²⁸ Preston, *Pink Slips at Disney*, N.Y. Times at A1 (cited in note 1).

¹²⁹ Id.

¹³⁰ Preston, *Lawsuits Claim Disney Colluded to Replace U.S. Workers with Immigrants*, N.Y. Times at A12 (cited in note 110).

¹³¹ Id.; see also Oliphant, *The Big Squeeze*, Reuters (cited in note 124) (quoting an IT worker displaced at Northeast Utilities: “I wasn’t planning on retiring early. I wasn’t planning on making \$35,000 less. I’ve had to cut back a lot. I basically live paycheck to paycheck.”).

¹³² Preston, *Lawsuits Claim Disney Colluded to Replace U.S. Workers with Immigrants*, N.Y. Times at A12 (cited in note 110). Notably, in the wake of bad press regarding its layoff of these IT workers, Disney cancelled the planned laying off of 35 IT workers at Disney/ABC Television. See Julia Preston, *In Turnabout, Disney Cancels Tech Worker Layoffs*, N.Y. Times A12 (June 16, 2015).

FINALE

It is fascinating to study the relationship between Disney and immigration because our response to what Disney does is infused by our feelings about the company more generally.¹³³

To what extent should we embrace new immigration laws that are the product of lobbying? Disney's creation of the Q visa feels innovative, even ingenious. The company had a problem – wanting to create a specific feel/experience at World Showcase – and found a solution by changing the law. Sure, Disney did it for the money – both the additional money earned through attracting more tourists to their park and also the money saved by being able to hire less-expensive international workers. But maybe these types of gains are what our legislative process, lobbying included, is set up to accomplish: the creation of “something there that wasn't there before.”¹³⁴

In contrast, to what extent should we worry about immigration laws when they leave American workers vulnerable? The decision by Disney to fire its American IT workforce and replace them with outsourcing companies staffed by H-1B labor was entirely legal. But does that make it right, or desirable from a policy perspective? The action seems reminiscent of *Beauty and the Beast* villain Gaston and his lackey Lefou:

¹³³ For the record, we seem to like Disney a lot. According to a 2017 survey of 200,000 individuals, Disney holds an impressive 63% approval rating. *Most Loved Brands*, (Morning Consult Intelligence, 2017) online at <https://morningconsultintelligence.com/featured/2017/5/2/top-brands> (visited Oct. 3, 2018).

¹³⁴ “Something there that wasn't there before” is a lyric from *Something There*, a song from the Disney film *Beauty and the Beast*. Lansbury, *Be Our Guest* (cited in note 10).

Lefou: Is that fair?

Gaston: I don't care.¹³⁵

To what extent do we want the law to look out for American workers, even at the expense of the corporate bottom line? Certainly, if there is a legal way for companies to save money by hiring international workers, they will. That's a "Tale as old as time."¹³⁶

¹³⁵ *Gaston* is a song from the Disney film *Beauty and the Beast*. Josh Gad, *Gaston*, *Beauty and the Beast* (Walt Disney Records, 2017).

¹³⁶ Angela Lansbury, *Tale as Old as Time*, *Beauty and the Beast* (Walt Disney Records, 1991).