# Who Really Let the Disney Tech Workers Down: Disney or the H-1B Visa Program?

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As reported by the New York Times on Friday, June 5, 2015, Disney layoffs and replacement by H-1B workers provided by HCL Americas (HCL) drew a flood of comments. Not less than 2,800 comments were received in response to the original New York Times article, *Pink Slips at Disney. But First, Training Foreign Replacements*, by Julia Preston. As expected, most of the comments raised concerns and suspicions about the H-1B visa program. The story traces its origin to a Senate Judiciary Committee hearing, presided by Senator Chuck Grassley (R-IA), on March 17, 2015, to examine whether employers were displacing American tech workers by hiring immigrants at lower wages on H-1B visas. As reported by the New York Times, after the hearing, former employees from several companies, including Disney, were prompted to contact Ms. Julia Preston, a national correspondent who has covered immigration law issues for The Times since 2006.

First and foremost, it is important to clarify that H-1B regulations do not allow U.S. employers to replace American workers with H-1B workers who could work at lower wages. The H-1B visa program has safeguards to address this issue. However, there are certain gaps in the program which allow such replacement using a different employer, commonly referred to as Independent Contractor(s). Rather than focusing on the safeguards in the H-1B program which are designed to protect the wages and working conditions of similarly employed U.S. workers (in cases where the employer wants to supplement its workforce through the employment of H-1B worker), Disney, like other U.S. employers in the past, utilized the loopholes in this nonimmigrant visa program to replace its' laid-off employees with H-1B workers through its independent contractor, HCL. This article will focus on such gaps in the H-1B regulations which could have deterred, if not prevented, the layoff of the Disney's tech employees.

As many are aware, the H-1B program applies to employers seeking to hire nonimmigrant aliens as workers in specialty occupations or as fashion models of distinguished merit and ability. A specialty occupation is one that requires the application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree or its equivalent. *The intent of the H-1B provisions is to help employers who cannot otherwise obtain needed business skills and abilities from the U.S. workforce by authorizing the temporary employment of qualified individuals who are not otherwise authorized to work in the United States.*

Clearly, Disney was not suffering from skills shortage, otherwise it would not have laid-off its tech employees to replace them with worker through its contractor, HCL. Had a skill shortage been the issue, Disney could always have supplemented its workforce by

hiring additional H-1B tech workers, and pay them wages equivalent to its other U.S. workers with similar experience and qualifications. The answer to the question why Disney took this step is known to everybody: "Cost Cutting".

The question next to ask is: How is it possible when the H-1B regulations clearly establishes certain standards in order to protect similarly employed U.S. workers from being adversely affected by the employment of the nonimmigrant workers. Specifically, the employers are required to attest to the Department of Labor (DOL), through Labor Condition Application (LCA), that they will pay wages to the H-1B nonimmigrant workers that are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question, or the prevailing wage for the occupation in the area of intended employment – *whichever is greater*.

If H-1B employers are required to pay the higher of either the actual wage or the prevailing wage, how did Disney benefit from replacing its own tech workers with H-1B workers of HCL?

*The answer to this question lies in the fact that H-1B regulations allow employers to create at least two groups/islands of workers at any employer's workplace and apply the regulations such as wages and working conditions to each specific group of workers without a bridge connecting them*.

Let's analyze the above proposition numerically. Assuming Disney currently has 500 tech workers working at its premises, it can easily create at least two groups of workers, one of 300 workers employed by Disney on its payroll, and other group of 200 employees employed by an Individual Contractor such as HCL. If Disney has an H-1B employees in its group of 300 employees, *it needs to provide only those employees with the wages and working conditions similar to other U.S. workers on its payroll*. Likewise, the Individual Contractor, HCL, who will have 200 of its employees working at Disney's worksite need to meet the wages and working conditions of the H-1B employee within this group, and within HCL, only. Thus, Disney could easily lay-off its employees[1] who are receiving a higher salary and have another H-1B worker sit at the same desk and perform same/similar kind of work at a less salary through its contractor as the contractor is only required to satisfy the wages and working condition among its own group of employees.

*Further, the missing connecting bridge or the loophole in the H-1B regulations is the absence of any <u>blanket</u> regulatory provision which could address the displacement of <u>any</u> U.S. workers by U.S. employer(s) through H-1B workers of employer's contractors at the employer's place(s) of employment*.

The regulations *only* require H-1B-dependent employers[2] and/or willful violators placing a *non-exempt* H-1B nonimmigrant worker(s) at a new place of employment to ensure that

[1] citing business reason(s) or for no reason at all, depending on the terms of the employment agreements.
[2] An employer is considered H-1B-dependent if it has:

they are not displacing any U.S. worker(s) directly (in their own workforce) or *secondarily (in the workforce of another employer at the place of employment)* within 90 days before or after an H-1B visa petition is filed.

It is important to analyze and emphasize two important points that are inherent in the regulations. First, this regulation applies only to H-1B-dependent employers and willful violators, not to all H-1B employers. In addition, the above-stated regulation is limited only to *non-exempt* H-1B nonimmigrant workers replacing a U.S. worker. The regulations define exempt H-1B worker as one who either: (a) earns $60,000.00 or more annually *or* (b) holds a Master's Degree or higher degree (or its equivalent) in a specialty related to the intended H-1B employment.

Thus, any H-1Bworker who will annually receive less than $60,000.00 and who holds an educational degree which is not a Master's degree (or its equivalent) in the related field of employment is classified as non-exempt, and only his/her replacing the U.S. worker would trigger the displacement inquiry. To put things in perspective, the employer can lay-off high salaried employees and replace them with H-1B workers through their contractor(s), and the contractor(s) could easily avoid the displacement inquiry by hiring someone, with similar kind of skill set, and by paying them $60,000.00 or somewhat higher. The other way to bypass the displacement inquiry is to hire someone with less salary than the laid-off employee if the prospective employee holds a Master's Degree or higher degree (or its equivalent) related to the position offered.

Based on the foregoing, it could be concluded that although there are some gaps in the H-1B nonimmigrant visa program, the H-1B regulations do contain specific safeguards which are designed to protect the wages and working conditions of similarly employed U.S. workers in cases where the employer wants to supplement its workforce through the employment of H-1B nonimmigrant worker. Unless the Congress amends the law or the Department of Homeland Security changes the regulations, which could address the above-detailed gaps in the regulations, the news of lay-off by the U.S. employers and replacement of laid-off workforce by H-1B workers, be it from India/China or any other country, through independent contractors will continue making news in the media, intentionally or unintentionally.

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- 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; or
- 26 - 50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or
- 51 or more full-time equivalent employees of whom 15 percent or more are H-1B nonimmigrant workers.