

The H-1B Visa Program: Its Contradictory Perception And Why the U.S. Must Increase The Visa Cap

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Since its inception under the Immigration Act of 1990, the H-1B visa has been a controversial program. The H-1B visa is a temporary work visa for non-immigrant workers in a specialty occupation and requires a higher degree or its equivalent.[1][2]#_edn1 This visa program is arguably the most important temporary work visa, and has been simultaneously portrayed as both as the means to a more competitive American workforce,[2][3]#_edn2 and as a device for usurping high-skill jobs and competitive pay from 'native-born' American workers.[3][4]#_edn3

This paper aims to address these two contradicting perceptions in order to ultimately show that the H-1B visa is a positive and necessary program that needs to be fully understood and promoted.

Part II of this paper will be an overview of the H-1B visa program, discussing the program's background and history in order to put the program into context. Part III will discuss the current effects and benefits of the H-1B visa program. It will also outline the persistent, increasing shortage of high-skilled workers in the information technology industry and how the H-1B can alleviate this need. Part IV will discuss ways in which employees and employers are circumventing the current H-1B system, for reasons ranging from exploitation by consulting firms, to innovative strategies by international entrepreneurs to hurdle obstacles the program creates for startups. Part VI will discuss proposed legislation to improve the H-1B program and prevent its exploitation. It will also support the argument for increasing the number of new H-1Bs issued each fiscal year. Finally, Part V will be a short conclusion, reaffirming the economic demand for an H-1B cap increase and the essential need for program reform.

History and Overview of the H-1B Program

The H-1 temporary worker visa program was established under the Immigration and Nationality Act of 1952.[4][5]#_edn4 Under this Act the H-1 visa allowed nonimmigrant[5][6]#_edn5 workers of 'distinguished merit and ability' to fill temporary positions.[6][7]#_edn6 Nonimmigrants on an H-1 had to maintain a foreign residence, and the H-1 required that both the worker and the job be temporary.[7][8]#_edn7 The Immigration Act of 1990 divided the H-1 visa into two different types of visas: the H-1A, which was designated to bring foreign-educated nurses in to fill a nursing shortage in the U.S., which was eliminated when it expired in 1995;[8][9]#_edn8 and the H-1B, the nonimmigrant work visa which remains in effect today. The Immigration Act of 1990 established the main features of the current H-1B nonimmigrant worker visa, and replaced the description for workers of 'distinguished merit and ability' with the term 'specialty occupation'. [9][10]#_edn9 A 'specialty occupation' is a theoretical and practical application of a body of highly specialized knowledge. [10][11]#_edn10 The Act of 1990 also removed the foreign residency requirement. The H-1B visa also allows an individual on this status to have 'dual intent,' meaning they can have both nonimmigrant and immigrant intent. This allows an H-1B visa holder to lawfully pursue U.S. Permanent Residence (a green card) while in the United States. [11][12]#_edn11

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The H-1B visa is valid for three years and is renewable once, for an additional three years.[12][13]#_edn12 To obtain an H-1B visa, a foreign national's potential employer must file a Labor Condition Application form (LCA) with the Department of Labor.[13][14]#_edn13 On the LCA, the employer must state that they pay the nonimmigrant worker local prevailing wage or the employer's actual wage for the position, whichever is higher, and offer them benefits on the same basis as for U.S. workers. They must provide the H-1B working conditions that will not adversely affect the conditions of workers similarly employed, not employ an H-1B worker where a strike is occurring, and provide verbal, electronic or written notice of the employer's intent to hire H-1B workers within 30 days of filing the LCA.[14][15]#_edn14 Additionally, if the employer's H-1B workers comprise more than 15 percent of their workforce, they are considered an H-1B dependent employer. H-1B dependent employers and willful violators of the H-1B rules[15][16]#_edn15 must attest to three elements addressing U.S. workers. First, that the employer will not displace any similarly employed U.S. worker within 90 days before or after applying for H-1B status. Second, that before hiring an H-1B worker from another employer, the new employer must make a bona fide inquiry as to whether that employer displaced any similarly employed U.S. worker within 90 days before or after the placement of the H-1B worker. And finally, that before applying for an H-1B worker, the employer took good faith steps to recruit U.S. workers at wages equal to the H-1B worker's.[16][17]#_edn16

Once the LCA is approved, the employer must then file an I-129 petition for a non-immigrant worker on behalf of the foreign national seeking a temporary work visa. [17][18]#_edn17 This petition must be filed before the April 1 deadline of the H-1B visa 'cap' season.[18][19]#_edn18 The current H-1B visa cap is set at 65,000 for the general H-1B category of special occupation,[19][20]#_edn19 and 20,000 for the advanced degree exemption, which are provided to the first 20,000 petitions filed on behalf of a beneficiary who has obtained a U.S. master's degree or higher.[20][21]#_edn20 Exemptions are available under the annual cap, due to the American Competitiveness in the Twenty-First Century Act (AC21), which was signed into the Immigration and Naturalization Act in 2000.[21][22]#_edn21 This Act provides exemptions for beneficiaries if they prove that they will work at an institution of higher education or related nonprofit entity, or at a nonprofit or government research organization.[22][23]#_edn22 The H-1B petitions for the 65,000 general category cap are chosen through a computer-generated, random selection lottery system. This year, the United States Citizenship and Immigration Services (USCIS) received nearly twice as many applications as the cap provided for, with approximately 124,000 applications being filed for the 2014 fiscal year.[23][24]#_edn23 The USCIS filing period lasted for only 5 days.[24][25]#_edn24

When the H-1B program was first introduced in 1990, long before the surge in demand for IT workers the U.S. labor market is currently experiencing,[25][26]#_edn25 the visa cap was at 65,000 - the same as it is today. In 1998 the cap was raised to 115,000.[26][27]#_edn26 In 2001 it was raised to 195,000 by the AC21 Act, which also provided exemptions for beneficiaries working in research and development.[27][28]#_edn27 However, in 2004, the cap reverted back to its 1990 levels of 65,000, where it remains today.[28][29]#_edn28

Why Do We Care?

The inability to fill high-skilled, technical jobs in the United States has been a concern for well over a decade, with a 2000 report from the United States General Accounting Office stating that:

The information technology (IT) industry, in particular, is a driving force behind current and future U.S. economic growth, and the Bureau of Labor Statistics projects that the demand for workers with certain IT skills will double over the next 10 years. Employers in the IT industry have expressed concerns about not being able to fill their many vacancies. To help U.S. employers in IT and other industries fill their needs for highly skilled workers, the H-1B visa program allows employers to temporarily (for up to 6 years) fill needs in specialty occupations with foreign workers.[29][30]#_edn29

In his numerous testimonies to Congress on immigration reform, business owner and senior academic Vivek Wadhwa has stated that we live in a 'knowledge economy'. [30][31]#_edn30 With over 200 of the current Fortune 500 businesses, including: eBay, Google, Intel, Oracle, IBM, Apple, Boeing, ATT and General Electric,[31][32]#_edn31 being founded by immigrants or their children,[32][33]#_edn32 high-skilled immigrant workers and entrepreneurs have proven to be a time-tested capstone of the U.S. economy's leading role in the global marketplace. Many studies have been conducted on this phenomenon, and several indicate that immigrant

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workers and entrepreneurs are likely to be more ambitious and averse to risk-taking than the rest of the general population.[33][34]#_edn33 This enthusiastic entrepreneurial spirit is particularly evident in the IT field. In a study conducted by Wadhwa through his research teams at Duke and UC-Berkeley, Wadhwa found that between 1995 and 2005, 52 percent of Silicon Valley's companies were started by immigrant entrepreneurs who originally came to the U.S. to study and work.[34][35]#_edn34 Since 2005 that number has gone down to 44 percent - a historically unprecedented drop.[35][36]#_edn35 As the limits of the H-1B visa program continue to prevent high-skilled workers from entering the U.S., technology projects remain at a standstill as crucial technical positions remain vacant. Microsoft, the largest employer of H-1Bs in the U.S., currently has over 6,000 unfilled jobs.[36][37]#_edn36 A recent survey of over 1,100 manufacturing executives by the National Association of Manufacturers' Manufacturing Institute and Deloitte shows that 67 percent of manufacturing companies face a 'moderate to severe' shortage of qualified workers.[37][38]#_edn37 This March, over 100 leaders of U.S. technology companies wrote a letter to President Obama, begging him to raise the H-1B cap in order to help fill thousands of open positions requiring highly skilled individuals.[38][39]#_edn38 Between IBM, Intel, Microsoft, Oracle and Qualcomm alone, there are currently a combined 10,000 openings in the United States.[39][40]#_edn39 The cap on the H-1B general category needs to be increased in order to ensure that the U.S. does not fall behind in a global economy driven by an IT dominated workforce.

Furthermore, by restricting the cap of advanced degree H-1Bs to 20,000, we are effectively forcing the world's best and brightest out of the United States as soon as they have graduated from our top institutions.[40][41]#_edn40 Since most students do not have graduation dates until June, they never even have a chance to file for an H-1B petition by the April 1st deadline.[41][42]#_edn41 As Senator Amy Klobuchar stated, 'under the current system we have been training our competition,' because many skilled immigrants were forced to return home after studying and working in the United States.[42][43]#_edn42 The total number of H-1Bs given - including both new visas and extensions given in both the general and advanced degree categories - peaked at slightly more than 330,000 H-1B visas in 2001.[43][44]#_edn43 As of 2010, even with an increase in student visas and an increase in H-1B visa petitions, the total dropped to roughly 193,000.[44][45]#_edn44 By restricting legal status opportunities for foreign students and high-skill workers, the U.S. is undermining its position in a global knowledge economy, where competitors such as Australia, the United Kingdom, and Canada each select over 60 percent of their immigrants on the basis of skills and education.[45][46]#_edn45

With so many high-skill jobs remaining vacant, misconceptions about the effects of H-1B workers may play a significant role in the policy decisions to restrict the visa cap. [46][47]#_edn46 Evidence indicates that the general populous, as well as several special interest groups, hold the mistaken belief that high-skill H-1B visa workers are a cause of the high unemployment rate because they receive lower wages than U.S. born workers.[47][48]#_edn47 In reality, the opposite is true. On average, H-1B workers earn more, cost their employers, and are more highly educated, than U.S. born workers.[48][49]#_edn48 Several studies have found that, contrary to popular belief, foreign IT professionals - those without U.S. citizenship and who are on an H-1B or other work visa - earn a salary premium when compared to IT professionals with U.S. citizenship.[49][50]#_edn49 In fact, a recent study shows that each H-1B visa holder helps create 1.8 American jobs, and that each U.S.-educated advanced degree green card holder creates 2.6 American jobs.[50][51]#_edn50 Both academics and business leaders, such as Bill Gates,[51][52]#_edn51 have addressed these misconceptions in order to inform Congress and the American public about the economic peril the U.S. exposes itself to by maintaining an inadequate cap on the H-1B visa program. Without significant increases and adjustments to this cap, we will continue to fall behind in the global knowledge economy.

Circumventing the System

Since the H-1B visa program's foundation, employers and employees alike have devised increasingly creative and effective ways to circumvent the requirements and restrictions of the H-1B visa program. Enormous international information technology consulting firms such as Tata Consulting, Infosys and Cognizant have found ways to manipulate H-1B LCAs and petitions in order to obtain a disproportionate amount of visas for on-site placement in the U.S. The biggest user of H-1B last year was Cognizant, an IT consulting firm based in New Jersey. They received 9,000 of the 65,000 new visas. [52][53]#_edn52 These firms are able to manipulate loopholes in this system because they are working the H-1B petition forms to show that the H-1B worker will have a direct employee-

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employer relationship with the consulting firm, meaning that they will be working on projects directly for the consulting firm itself.[53][54]#_edn53 In reality, these firms are obtaining H-1B visas for these foreign national workers and then are sourcing them out to other companies, such as banks, insurance firms, and health care companies at a premium rate.[54][55]#_edn54 They are then taking their own margin off of this rate and paying the actual H-1B worker after having taken their cut.[55][56] Sometimes there are several layers of firms taking a margin off of the original, premium rate that is billed to the client, before the remaining wage is paid to the actual worker.[56][57]#_edn56

This system is a form of 'body shopping,'[57][58]#_edn57 and runs against everything the H-1B visa is set up to protect. The purpose of the petition for an H-1B visa is to prove a true employee-employer relationship for the duration of the H-1B visa. [58][59]#_edn58 For example, an H-1B computer programmer would have a bank petition for their visa and then work directly for them throughout the three to possible six-year duration of their visa. The bank could help the worker apply for permanent residence, due to the dual intent capabilities of the H-1B, or the worker could have another employer petition to transfer their visa if they found another job at another company.[59][60]#_edn59 This apparent ability for the worker to be mobile and to change jobs, ostensibly an excellent quality in a visa, coupled with the loopholes that can be found in the petition for an H-1B[60][61]#_edn60, make it easy for consulting firms of all sizes to create the appearance of a direct employer-employee relationship.[61][62]#_edn61 This is one of the greatest disadvantages of the H-1B visa. Since high-skill workers under the H-1B visa have to be sponsored by an employer, they are often more or less indentured, tied to their job and vulnerable to abuse and exploitation from that employer.[62][63]#_edn62

The reality for the H-1B worker in these project based, questionable employer-employee situations, is that they will work on projects for different companies without the full rights and benefits the visa is meant to provide.[63][64]#_edn63 It also means that these workers will likely experience 'bench time'[64][65]#_edn64 when there is no project for their consulting firm to place them on. During 'bench time,' an H-1B worker is generally paid a fraction of what their petition claimed they would be paid, or they are not paid at all.[65][66]#_edn65 Because the consulting firm controls their visa and therefore their status in the United States, the firm is often able to manipulate the worker into working longer hours, for lower wages. Firms can also convince an H-1B worker that they are unable to transfer their visas or to go against the firm's decisions by exploiting the worker's vulnerability and fear of losing their visa. [66][67]#_edn66 Legislative steps have been taken, as early as 2010,[67][68]#_edn67 to restrict loopholes in the H-1B petitions but exploitation continues.[68][69]#_edn68 Tata Consulting employees in California recently took the global firm to court in a class action lawsuit and won,[69][70]#_edn69 but the struggle to protect the rights of H-1B workers continues.

Critics have the concept of body shopping as an argument to keep the H-1B cap lowered. The argument has been made that if body shopping were eliminated, it would free up more H-1Bs for correct use, therefore filling high-level job vacancies and removing any need to increase the cap. [70][71]#_edn70 Others argue that even with body shopping gone, high-skilled H-1Bs who are eager to work in the U.S. are filling the lowest-paid, systems analyst positions in order entry to the country,[71][72]#_edn71 and that this manipulation of the system still proves that there is no need to raise the H-1B visa cap. While both sides can agree that the practice of body shopping must be eliminated from the use of the work visa program, there is no clear evidence to support the claim that the removal of body shopping would be enough to end the shortage of high skilled workers in this country.[72][73]#_edn72

International entrepreneurs are another group who is circumventing the system created by the H-1B visa program. Their frustration with the immigration system became the impetus for a recently created startup called Blue Seed. The concept behind Blue Seed is to allow international technologists and entrepreneurs to create a collaborative, innovative environment onboard a large cruise ship, set 12 nautical miles off of the coast of San Francisco, in international waters. The location allows startup entrepreneurs from anywhere in the world to 'launch or grow their companies near Silicon Valley, without the need for a U.S. work visa.' [73][74]#_edn73 Blue Seed's entrepreneurial, legal gymnastics have attracted attention from around the world. Already 1455 entrepreneurs, from 472 startups in 70 countries have signed up to live onboard the ship,[74][75]#_edn74 with the majority of foreign interest coming from India.[75][76]#_edn75 This kind of talent, innovation, and entrepreneurial spirit could be thriving inside U.S. borders right now, helping to create intellectually fertile and economically supportive conditions that helped to build

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companies such as Google, Apple, and Intel. Instead, investors are paying hundreds of thousands of dollars a year[76][77]#_edn76 to support the growth of their startup in a sea vessel floating somewhere in the Pacific.

With the importance of science, technology, engineering and mathematics (STEM) jobs only increasing, a change must be made to allow the world's future technology leaders to feel at home in the U.S. once again. Every STEM job that is filled in the U.S. creates, on average, 2.6 other jobs in the labor market.[77][78] Directly and indirectly, studies have show there is only positive growth when more STEM workers, both foreign and U.S., take positions in the U.S. economy.[78][79]#_edn78 Bipartisan legislation, such as the Immigration Innovation Act of 2013 and the SKILLS Visa Act, has recently been introduced to Congress to address this urgent need. Additionally, bi-partisan legislation focused on addressing the immigration needs of entrepreneurs and start-ups such as the Startup Visa Act and Startup Act 3.0 is also pending.[79][80]#_edn79 This legislation will encourage innovation in the U.S. by allowing American companies and entrepreneurs to have access to the talented workers that they need through the H-1B visa program, while simultaneously investing in STEM education in the U.S. [80][81]#_edn80

Reform: I-Squared and the SKILLS Visa Act

Mounting concerns from the technology sector[81][82]#_edn81 and select economists[82][83]#_edn82 have become catalysts for congressional debate on H-1B visa reform. The introduction of far-reaching bipartisan legislation, such as the 'Border Security, Economic Opportunity, and Immigration Modernization Act of 2013', has helped to open the door to these discussions. This legislation represents the most significant opportunity for comprehensive immigration reform in the last 30 years,[83][84]#_edn83 and compelling legislation for H-1B reform is being introduced along with it.

In both the Senate and the House of Representatives, legislation has been introduced addressing the need for an increase in the H-1B cap. The 'Immigration Innovation (or I-Squared Act) Act of 2013,' which was introduced to the Senate in January of 2013, addresses the shortage of high-skilled STEM on one of immigration's most important issues: the hard H-1B cap. [84][85]#_edn84 It proposes to replace the hard cap with a market based 'H-1B escalator' that automatically adjusts the number of available visas depending on demand.[85][86]#_edn85 This would mean that instead of a hard H-1B visa cap of 65,000 per year, the newly proposed cap of 115,000 would increase by an additional 20,000 visas if the cap were met within the first 45 days.[86][87]#_edn86 If it takes longer to reach the cap, the number of additional visas is scaled down -15,000 more visas are released if the cap is hit on the 60th day, 10,000 if on the 90th, or 5,000 if on the 275th.[87][88]#_edn87 Conversely, if the initial cap of 115,000 is not met by the end of the fiscal year, then the number of visas left unused from the previous year lowers the next year's cap. [88][89]#_edn88

This proposal is a definite improvement to the current hard visa cap but, as the Brookings Institute points out, it only satisfies the issue of employer demand.[89][90]#_edn89 Brookings recommends the creation of an independent panel of experts in a 'Standing Commission on Labor and Immigration' to make real-time recommendations to Congress on H-1B cap levels based on local employment data, job projections, and insights from the business community.[90][91]#_edn90 This would be a more equitable and holistic solution, allowing H-1B visa cap levels to adjust to local labor market needs,[91][92]#_edn91 rather than allowing the proposed H-1B escalator to create potential loopholes for employers to manipulate in order to craft an artificial race to the cap.

In the House of Representatives, the 'Supplying Knowledge Based Immigrants and Lifting Levels of STEM Visa Act,' also known as the SKILLS Visa Act, was recently passed by the House Judiciary Committee. This Act would increase the H-1B visa cap for high-skilled workers from 65,000 to 155,000 and increase the special pool of visas for foreign graduates of U.S. universities to 40,000.[92][93]#_edn92 It would strengthen the H-1B visa by adding enhancing anti-fraud provisions to the program, and it would eliminate the per-country cap for employment-based green cards, allowing American employers to have access to the best talent.[93][94] Additionally, it would provide a major boon to the visa program by allowing H-1B spouses, many of which are high-skilled STEM graduates themselves, to work.[94][95]#_edn94 This would bring relief to many spouses of temporary immigrants, since many of them are educated women whose careers languished when their spouses came to work in the U.S.[95][96]#_edn95

Conclusion

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As a nation whose success has been built on diversity and innovation, there is no question that we must ensure that our immigration policies remain accessible and welcoming to the rest of the world. As an economy, we cannot afford to fall behind our competitors in **high-skill** workers and STEM leaders. Nor can we afford to hemorrhage international talent that has been educated in our very own university systems. It is imperative to our future as both a nation and an economy to pass legislation to increase the H-1B **visa cap**. We cannot wait for this need to become even more critical.

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[47][147]Id.

[48][148]USCIS Data 2001-2010, Freedom of Information Act request, <http://ftp.iza.org/dp6259.pdf>[149]pg. 8

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[50][151]http://www.aei.org/files/2011/12/14/immigration-and-american-jobs_144002688962.pdf[152], pg. 11

[51][153]Bill Gates: Testimony before the Committee on Science and Technology, U.S. House of Representative, <http://www.microsoft.com/en-us/news/exec/billg/speeches/2008/congress.aspx>[154]

[52][155]'Who's Hiring H-1B **Visa** Workers? It's Not Who You Might Think,' Martin Kaste, <http://www.npr.org/blogs/alltechconsidered/2013/04/03/176134694/Whos-Hiring-H1-B-Visa-Workers-Its-Not-Who-You-Might-Think>

[53][156]Xiang Biao: Global "Body Shopping" <http://press.princeton.edu/chapters/i8315.pdf>[157]

[54][158]<http://www.ilw.com/articles/2010/0129-neal.shtml>[159]

[55][160]This note comes from my own years of documented experience as an IT recruiting manager at the international staffing firm, Randstad Technologies. We had manipulated petitions from third-party vendors on file for our own records, and a 'cheat sheet' was even given out to new recruiters at these firms, so that they would know about to complete the government I-9 and I-129 forms without **raising** any red flags.

[56][161]Id.

[57][162]Xiang Biao: Global "Body Shopping" <http://press.princeton.edu/chapters/i8315.pdf>[163]

[58][164]http://www2.gtlaw.com/practices/immigration/compliance/pdf/H1B_Employer-EmployeeMemo01-08-10.pdf

[59][165]This is from my own Randstad Technologies notes.

[60][166]'Who's Hiring H-1B **Visa** Workers? It's Not Who You Might Think,' Martin Kaste, <http://www.npr.org/blogs/alltechconsidered/2013/04/03/176134694/Whos-Hiring-H1-B-Visa-Workers-Its-Not-Who-You-Might-Think>

[61][167]http://www2.gtlaw.com/practices/immigration/compliance/pdf/H1B_Employer-EmployeeMemo01-08-10.pdf

[62][168]<http://www.nytimes.com/2013/02/08/opinion/americas-genius-glut.html?ref=opinion>[169]; Please see the following transcript of an official email one of our Randstad Technology H-1B candidates received from her former employer. She was carbon-copied on it this email when it was sent to an immigration lawyer, after she attempted to

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give her notice to leave for a new employer in order to receive a better position, higher salary, and green card sponsorship:

Hi Andrew

Please request you to take immediate legal action against one of our contract resources Ms. Subhashini Sundareshan. She has a non-compete agreement with Westwater Corp and has violated this now.

I would also like the Immigration be informed about this and her visas be cancelled and have her deported at the earliest.

To avoid all of the above - I have informed Ms. Sundareshan to NOT to discuss this issue with any of client personnel or colleagues but to leave the position immediately.

Andrew - please write to me separately, I will give all the evidence for this case.

Regards,

Ravi Manchi

Westwater Corp

11 Penn Plaza

Fifth Floor

New York, NY 10001

[63][170] Xiang Biao: Global "Body Shopping" <http://press.princeton.edu/chapters/i8315.pdf>[171]

[64][172] <http://www.h1bplanet.com/h1b-layoffs-benchmark.php>[173]

[65][174] Id.

[66][175] Id. Also, see Randstad Technologies, Subashini Email.

[67][176] http://www2.gtlaw.com/practices/immigration/compliance/pdf/H1B_Employer-EmployeeMemo01-08-10.pdf

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[73][182] BLUE SEED Come aboard results, <http://blueseeds.co/come-aboard/results/>

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