

# IMPORTING THE FLAWLESS GIRL

Kit Johnson\*

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## ABSTRACT

*Fashion model visas have never been the subject of scholarly treatment, much less a focused analysis. In fact, they have been the subject of considerable confusion in Congress and have become a polarizing issue in public debate. Clarity is important, because the granting of visas to fashion models has an undeniably positive*

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\* Visiting Assistant Professor at the University of North Dakota School of Law, J.D. 2000, University of California, Berkeley, School of Law. I am very grateful to Eric E. Johnson for his comments and to Stephen Legomsky for his insights. I also thank Jan Stone for her unparalleled research assistance. This Article benefited from presentations at the UC Berkeley School of Law, the University of Oklahoma School of Law, Elon University School of Law, Golden Gate University School of Law, Phoenix School of Law, and the William H. Bowen School of Law at the University of Arkansas at Little Rock. I'm grateful to everyone at those schools who provided feedback. © 2012 Kit Johnson. Konomark—Most rights sharable. See [konomark.org](http://konomark.org).

*economic impact on a major U.S. industry. Moreover, fashion model visas have the unique potential to serve as levers to affect important aspects of social policy and to address public health concerns.*

*This Article begins by examining what it takes to be a fashion model and why the U.S. fashion industry wants and needs foreign models. I then discuss the business of modeling including, in particular, what models do and how they are paid. Next, I take an in-depth look at the visa system for fashion models, examining the congressional history behind current law. I also look at congressional efforts to change that law, efforts that have been pilloried despite the substantial economic benefit at stake.*

*Taking this into account, I examine ways in which fashion model visas could be changed. I propose creating a new visa to capture the economic benefits of allowing one category of fashion models easy entry into the United States. I also propose modifying the regulations governing visas for another category of fashion models in order to address social ills and health problems stemming from anorexia and abuse. Doing so would help reform aspects of the modeling industry that have been consistently attacked. Such restrictions would not only benefit the foreign models themselves, but could affect positive change for U.S. models and the wider public.*

*You know you want to be her,  
She's a Flawless Girl (Flawless Girl)  
All the boys say when they meet her,  
She's a Flawless Girl (Flawless Girl)  
She's at the forefront of every trend,  
Never less than 5 foot 10  
And if you use our products, then  
You can be a Flawless Girl.  
A Flawless Girl<sup>1</sup>*

## I. THE NEED FOR FOREIGN MODELS

The fashion model is a rare specimen.

There are about 313 million people currently living in the United States.<sup>2</sup> Few have the right stuff to be a fashion model. Roughly 10.5 million are females of the right age—between 15 and 19.<sup>3</sup> Of those, less than five percent, or some 500,000, are tall enough at minimum height of 5'9". An even smaller percentage won't be too tall (anyone over 6').<sup>4</sup> Perhaps two percent of those women will be thin enough to model, weighing between 105 and 115 pounds.<sup>5</sup>

<sup>1</sup> *Phineas & Ferb: Attack of the 50 Foot Sister* (Disney Channel broadcast Feb. 21, 2009).

<sup>2</sup> U.S. Census Bureau, *U.S. Population Clocks*, <http://www.census.gov/main/www/pop-clock.html> (last visited Mar. 23, 2012).

<sup>3</sup> Data from the U.S. Census indicates 10,490,000 girls ages 15 to 19 live in the United States. U.S. Census Bureau, *Table 1. Population by Age and Sex: 2008*, [http://www.census.gov/population/socdemo/gender/2008gender\\_table1.xls](http://www.census.gov/population/socdemo/gender/2008gender_table1.xls) (last visited Mar. 23, 2012).

<sup>4</sup> Pediatric growth charts for girls aged two to twenty indicate less than five percent of girls will reach heights of 5'9" to 6'. See, e.g., Nat'l Ctr. for Health Statistics in collaboration with the Nat'l Ctr. for Chronic Disease Prevention and Health Promotion, *2 to 20 years: Girls Stature-For-Age and Weight-For-Age Percentiles* (2000), <http://www.cdc.gov/growthchart>. Using the data from footnote 3 and sticking with the rounded five percent figure would result in an estimated 524,500 females in this height category.

<sup>5</sup> It is difficult to obtain statistics regarding weight among this population. Certainly, some will fall into this category naturally, such as prepubescent teens who have just hit a growth

That works out to about 10,000 women who have the right combination of height, weight, and age to be models. And that's before we get to the ability to walk in 12-inch high-heeled platform shoes shaped like armadillos.<sup>6</sup>

Beyond age, height, weight, and keen balance, fashion models must meet even more requirements.<sup>7</sup> They must have long legs in proportion to their body.<sup>8</sup> They must have the ability to take criticism and direction, and they must have a lot of self-confidence, yet not a lot of modesty.<sup>9</sup> They must have good skin without tattoos or piercings.<sup>10</sup> And they must be able and willing to move to New York City—the location of most American design houses, fashion magazines, and ad agencies, as well as the must-attend New York Fashion Week.<sup>11</sup> Models also have to be punctual.<sup>12</sup> It helps, as well, if they have something of a winning personality—or at least not too much of a losing one.<sup>13</sup> And,

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spurt. See, e.g., *PICTURE ME: A MODEL'S DIARY* (Strand Releasing 2010) (comments of Caitriona Balfe at 56:00); Mary Egbula, *Fashion news: Michael Kors Says Models Should Be at Least 16*, *DROP DEAD GORGEOUS DAILY*, Apr. 3, 2010, <http://dropdeadgorgeouslydaily.com/2010/04/fashion-news-michael-kors-says-models-should-be-at-least-16/> (hereinafter "DDGD"). Another means of estimating this population would be to consider the fact that roughly one percent of the U.S. female population suffers from anorexia. See, e.g., Sarah-Anne Schumann & John Hickner, *Suspect an eating disorder? Suggest CBT*, 58 *J. FAM. PRAC.* 265 (2009) (0.9 percent); *Body Image and Nutrition: Fast Facts*, *TEEN HEALTH & THE MEDIA*, <http://depts.washington.edu/thmedia/view.cgi?section=bodyimage&page=fastfacts> (last visited Mar. 23, 2012) ("Studies indicate that . . . as many as 1 in 100 females between the ages of 12 and 18 have anorexia.") (citing *Eating Disorders Among Adults – Anorexia Nervosa*, NAT'L INST. MENTAL HEALTH, [http://www.nimh.nih.gov/statistics/1EAT\\_ADULT\\_ANX.shtml](http://www.nimh.nih.gov/statistics/1EAT_ADULT_ANX.shtml)). One indicator of anorexia is a body mass index or BMI of less than 17.5. See Schumann & Hickner, *supra*. Any female between 5'9" to 6' weighing 105–115 would have a BMI of 15–17. See, e.g., *Body Mass Index: A Useful Tool*, *OPT FOR HEALTHY LIVING*, <http://www.optforhealthyliving.org/images/bmi.htm> (last visited Mar. 23, 2012). Thus, I've used a very rough estimate of two percent for women in this category—one percent as defined by anorexia and an additional one percent for the growth spurt category.

<sup>6</sup> Armadillo shoes were part of Alexander McQueen's Spring/Summer 2010 collection. See Alexander McQueen, *Runway Archive: Women's Spring/Summer 2010*, [http://www.alexandermcqueen.com/int/en/corporate/archive2010\\_ss\\_womensp.aspx](http://www.alexandermcqueen.com/int/en/corporate/archive2010_ss_womensp.aspx) (last visited Mar. 23, 2012). Another typical burden might be a three-foot wide hat with a large dark veil, which was part of Alexander McQueen's work for Givenchy's Spring 1999 line. See *Givenchy Haute Couture by Alexander McQueen — 1999*, <http://photographicpictures.tumblr.com/post/3454005176/givenchy-haute-couture-by-alexander-mcqueen-1999> (last visited Mar. 23, 2012).

<sup>7</sup> ROGER TALLEY, *THE PROFESSIONAL'S GUIDE TO MODELING: A COMPREHENSIVE LOOK AT THE BUSINESS OF BEING A MODEL* 9 (2007); see also BEN BARRY, *FASHIONING REALITY: A NEW GENERATION OF ENTREPRENEURSHIP* 39–40 (2007).

<sup>8</sup> TALLEY, *supra* note 7, at 9.

<sup>9</sup> *Id.*; *PICTURE ME*, *supra* note 5, at 6:58 (Express campaign caster: "You can't just be pretty. You have to have what it takes in yourself.")

<sup>10</sup> TALLEY, *supra* note 7, at 9; see also BARRY, *supra* note 7, at 34–38 ("Allison").

<sup>11</sup> TALLEY, *supra* note 7, at 9, 53.

<sup>12</sup> See, e.g., *America's Next Top Model: The Girls Go On Go-See Adventures* (CW television broadcast Nov. 28, 2007) (disqualifying three contestants for tardiness); *PICTURE ME*, *supra* note 5, at 12:49 (interview with Susan Ziff).

<sup>13</sup> *PICTURE ME*, *supra* note 5, at 6:58 (Express campaign caster: "She's a sweetie. That goes a long way in our work."); *America's Next Top Model: Roberto Cavalli* (CW television broadcast Dec. 1, 2010) (highlighting comments from photographer Fredrico de Angeles and IMG executive Ivan Bart about how easy it was to work with runner-up Chelsey Hersley).

of course, on top of all this, the fashion model must be beautiful.<sup>14</sup> But being merely beautiful is not enough; a model must be beautiful in a way that translates to photographs and runways.<sup>15</sup>

The number of young women in the United States who satisfy all of these criteria is hard to quantify. It may be just a thousand or so.<sup>16</sup> It is not hard, therefore, to see why the U.S. immigration system has come under considerable pressure to let in throngs of fashion models from beyond our borders.

While small in numbers, models loom large in our cultural milieu. There's a curious sort of symmetry in modeling's exclusionary underpinnings. For after the modeling industry has funneled humanity, wherever found, to its narrowest point, the process of rejection meets its perfect complement in a process of replication. The idealized vision of the rare female form is amplified exponentially—over thousands of magazine pages, hundreds of hours of television, and terabytes' worth of internet traffic. Beyond that, there is the vast acreage of billboards—oversized depictions of ethereal thinness—hovering over intersections, crowding into bus-stop shelters, and jostling into malls.

This bottleneck of beauty undoubtedly has a hand in shaping our collective psyche, skewing our ideas of what women ought to look like. And the distortion has gotten more acute over the years as the fashion industry has increasingly narrowed the criteria for aspiring models. While the models of 1965 were thinner than just eight percent of U.S. women, models today are thinner than 98 percent of U.S. women.<sup>17</sup> In the opinion of many, the flood of all-but-unattainable images has led to a culture of self-loathing, which in turn has bred a pandemic of anorexia and bulimia.<sup>18</sup>

Ironically, the unattainability of corporeal perfection is every bit the problem for the modeling agencies that it is for the masses. Agencies scour the

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<sup>14</sup> TALLEY, *supra* note 7, at 9.

<sup>15</sup> Devotees of the CW television series *America's Next Top Model* will no doubt recall the countless lovely contestants who were unable to translate their beauty to film or the catwalk. See, e.g., *America's Next Top Model: The Girl Who Is a Visual Orgasm* (CW television broadcast Feb. 10, 2004) (eliminating Xiomara Frans for consistently poor photos); *America's Next Top Model: The Girl Who Makes a Disclaimer* (CW television broadcast Oct. 5, 2005) (eliminating Sarah Rhoades for her poor runway walk); see also PICTURE ME, *supra* note 5, at 39:26 (interview with Kevin Krier, fashion show producer: "You don't want just a dead piece of wood on the runway. She's got to walk. She's got to move. And you want someone who's going to be able to move and to transfer your vision onto the runway."); *id.* at 39:26 (Nicole Miller, designer: "The one thing I look for, always, is the walk. I just have to have a girl that walks well.").

<sup>16</sup> Modeling agencies represent from a couple of dozen to a hundred or so models at a time. TALLEY, *supra* note 7, at 33.

<sup>17</sup> *National Eating Disorders Association Unveils Powerful & Provocative Ad Campaign*, <http://www.nationaleatingdisorders.org/in-the-news/news-release-detail.php?release=29&title=National%20Eating%20Disorder%20Association%20Unveils%20Powerful%20&%20Provocative%20Ad%20Campaign> (last visited Mar. 23, 2012).

<sup>18</sup> See, e.g., Roberta P. Sied, *Too "Close to the Bone": The Historical Context for Women's Obsession with Slenderness*, in *FEMINIST PERSPECTIVES ON EATING DISORDERS* 3, 9 (Patricia Fallon et al. eds. 1994); Glenn Waller Shaw & Julie Shaw, *The Media Influence on Eating Problems*, in *WHY WOMEN? GENDER ISSUES AND EATING DISORDERS* 44–54 (Bridget Dolan & Inez Gitzinger eds., 1994); Nanci Hellmich, *Do Thin Models Warp Girls' Body Image?*, USA TODAY (Sept. 26, 2006, 8:47 AM), [http://www.usatoday.com/news/health/2006-09-25-thin-models\\_x.htm](http://www.usatoday.com/news/health/2006-09-25-thin-models_x.htm).

world in an endless search for recruits, traveling across South America, Europe, and anywhere else there is a chance to hit the jackpot of finding all the right attributes aligned in a single person.<sup>19</sup>

Once foreign models are found, the question for their employers becomes how to get them into the United States. Enter immigration law and an important question: How do we want immigration law to encourage, enable, restrict, and/or shape the business of modeling?

In this Article, I examine the basics of how the modeling industry works, discussing what models do, how they are paid, and the unique aspects of the relationship between American agencies and overseas models. I take a close look at the current visa structure for foreign models and the history behind it, revealing the congressional wrangling over the treatment of fashion models. I also take a close look at the 2005 and 2007 proposals to change fashion model visas, efforts that were subject to a torrent of ridicule that ultimately defeated attempts at change. I then explain how the fashion model visa merits unique treatment given its substantial economic importance, and I discuss how ridicule of fashion modeling has its origins in the devaluation of traditionally female work. Finally, I make the case for altering visas for fashion models to serve multiple goals: (1) bolstering American economic growth, (2) addressing public health concerns over pathological thinness, and (3) protecting foreign models from systematic exploitation.

## II. HOW THE MODELING INDUSTRY WORKS

Before jumping into how foreign fashion models are brought into the United States, it's important to understand the basics of how the modeling industry works. I begin with a discussion of the various types of models working in the United States, then explain how fashion models are hired and how foreign fashion models differ from their U.S. counterparts.

### A. *The Place of Fashion Models within Modeling*

The focus of this Article is on fashion models. The term “fashion model” refers to editorial fashion models<sup>20</sup>—models who appear in advertising campaigns for high-end products, in magazine spreads about fashion, and in runway shows.<sup>21</sup> The most recognized names in modeling all fall into this category: Twiggy, Lauren Hutton, Iman, Paulina Porizkova, Cindy Crawford, Naomi Campbell, Kate Moss, and Daria Werbowy, to name a few.<sup>22</sup>

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<sup>19</sup> TALLEY, *supra* note 7, at 34. One particularly famous endeavor along these lines is the Elite Model Look, a worldwide contest sponsored by Elite Model Management that has launched the careers of such famed models as Giselle Bündchen and Linda Evangelista. See BARRY, *supra* note 7, at 31; ELITE MODEL WORLD, <http://www.elitemodel-world.com> (last visited Mar. 23, 2012).

<sup>20</sup> TALLEY, *supra* note 7, at 8.

<sup>21</sup> *Id.*

<sup>22</sup> See Jenna Gabriel Gallagher, *Best Models of All Time*, HARPER'S BAZAAR, Apr. 2009, at 162–65, available at <http://www.harpersbazaar.com/fashion/fashion-articles/famous-models-0409>.

The category of fashion modeling is also defined by what it does not include. There are many distinct activities that, combined, both account for the vast majority of modeling and are not performed by editorial fashion models. One ubiquitous category is commercial print models, who appear in a range of advertising materials—everything from a regional retailer’s circular to Land’s End catalogs.<sup>23</sup> These models often look very different from editorial fashion models, instead appearing as “idealized versions” of certain characters, such as the grandmother,<sup>24</sup> the mom-on-the-go, or the stoic outdoorsman.<sup>25</sup> These kinds of models may also work in the production of stock photography, meaning photos taken without a specific end-use in mind.<sup>26</sup> For example, a photographer may take a stock photo of an earnest-looking woman in front of a computer screen, a photo which could find its way to a legal database website or an article in a parenting magazine on working moms.<sup>27</sup> There are also specialty models such as hand models for close-ups of products being used, artists’ models who pose nude for students in fine arts classes, “glamour” models who pose for pin-up calendars, and fitness models whose work is generally limited to magazines like *Men’s Health* or *Shape*. Fitness models are not to be confused with fit models, who serve as size models for designers creating new fashion lines. There are also beauty models who are usually limited to head and shoulder shots, promotional models who appear at trade shows, and plus-size models.<sup>28</sup>

Despite the breadth of work undertaken by models, the category of fashion modeling is set apart by its prestige and the amount of money tied up in it. Most importantly for our purposes here, editorial fashion models are the only category of models explicitly covered by current immigration laws.<sup>29</sup>

#### B. *How Fashion Models are Booked and Paid*

The process of hiring a model necessarily begins when a client needs a model.<sup>30</sup> That client might be *Marie Claire* magazine, looking to do a spread about up-and-coming London designers.<sup>31</sup> It might be designer Marc Jacobs, looking for models to walk in his show at New York Fashion Week.<sup>32</sup> It might

<sup>23</sup> TALLEY, *supra* note 7, at 11.

<sup>24</sup> Consider one of my favorites, the Land’s End grandmother: [http://bringatrailer.com/wp-content/uploads/2010/07/Land\\_\\_s\\_End\\_4x4\\_1.jpg](http://bringatrailer.com/wp-content/uploads/2010/07/Land__s_End_4x4_1.jpg) (last visited Mar. 23, 2012).

<sup>25</sup> TALLEY, *supra* note 7, at 11.

<sup>26</sup> *Id.*

<sup>27</sup> Jacob Cass has published a wonderfully funny blog post about the most cliché stock images used in web design, which includes “The Call Center Woman/Man” and “Group Of Business People.” Jacob Cass, *Top 7 Most Cliché Stock Images Used in Web Design*, JUST CREATIVE DESIGN (Sept. 30, 2008, 9:00 AM), <http://justcreativedesign.com/2008/09/30/top-7-most-cliche-stock-images-used-in-web-design/>.

<sup>28</sup> TALLEY, *supra* note 7, at 9–14. As for promotional models, who could forget Christina Applegate’s infamous portrayal of a car show model? *Married With Children: Kelly Bounces Back* (FOX television broadcast Oct. 28, 1990).

<sup>29</sup> See Immigration & Nationality Act, § 101, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006) [hereinafter INA].

<sup>30</sup> TALLEY, *supra* note 7, at 15.

<sup>31</sup> *British Invasion*, MARIE CLAIRE, Feb. 2011, at 60–63.

<sup>32</sup> See, e.g., PICTURE ME, *supra* note 5, at 26:00 (booking for Mark Jacobs’s runway show).

be the retail chain Express, looking for a model to represent the company in a magazine and billboard campaign.<sup>33</sup>

The client calls modeling agencies—such as Ford Models,<sup>34</sup> IMG,<sup>35</sup> Elite Model Management,<sup>36</sup> or Next<sup>37</sup>—to tell them the type of model they are looking for and any requirements they have for the upcoming job.<sup>38</sup> For example, the client might only want blonde models or only models with edgy looks.<sup>39</sup> The modeling agencies then match the client's requests against the models on their roster.<sup>40</sup> The agencies contact the matches and tell them about the potential job.<sup>41</sup> The contacted models who are interested then attend a “go-see” or “casting,”<sup>42</sup> where the client or client's representative chooses which models to hire. The photographer may be the one to choose the model, subject to client confirmation.<sup>43</sup> For magazine spreads, the photo editor may choose the model.<sup>44</sup> For a fashion show, the show's producer may be responsible for hiring models for a range of designers being showcased at their event.<sup>45</sup> Alternatively, the designers themselves may choose the models.<sup>46</sup> Regardless of who makes the decisions, many more models will show up than will ultimately be booked.<sup>47</sup>

The amount paid by the client for the booked model will be negotiated between the client and the agency.<sup>48</sup> The agency typically receives two fees: a rate negotiated for the model's work, plus a 20 percent service charge for supplying potential models to the initial casting call and backup models on the day of the shoot.<sup>49</sup>

The amount of money paid for the model's work varies. One estimate puts modeling rates for fashion-magazine editorial print work at \$100–250 an hour<sup>50</sup> while another estimates a \$100 flat rate for a day's work.<sup>51</sup> Newer mod-

<sup>33</sup> *Id.* at 6:58 (filming a casting session for Express).

<sup>34</sup> FORD MODELS, <http://www.fordmodels.com> (last visited Mar. 23, 2012).

<sup>35</sup> IMG MODELS, <http://www.imgmodels.com> (last visited Mar. 23, 2012).

<sup>36</sup> ELITE MODEL MGMT., <http://www.elitemodel.com> (last visited Mar. 23, 2012).

<sup>37</sup> NEXT MODELS, <http://www.nextmodels.com> (last visited Mar. 23, 2012).

<sup>38</sup> TALLEY, *supra* note 7, at 15.

<sup>39</sup> Sara Ziff has discussed castings that specified “no ethnic girls.” Ashlea Halpern, *Exclusive Video: Sara Ziff's Picture Me Mini-Series, Part Three*, NEW YORK MAG. (Sept. 21, 2010, 6:15 PM), [http://nymag.com/daily/fashion/2010/09/exclusive\\_video\\_sara\\_ziffs\\_pic\\_2.html](http://nymag.com/daily/fashion/2010/09/exclusive_video_sara_ziffs_pic_2.html) [hereinafter “Ziff, *Part Three*”].

<sup>40</sup> TALLEY, *supra* note 7, at 15.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; PICTURE ME, *supra* note 5.

<sup>43</sup> TALLEY, *supra* note 7, at 25.

<sup>44</sup> *Id.*

<sup>45</sup> BARRY, *supra* note 7, at 140–52 (discussing his pitch regarding model hiring to Robin Kay, president of the Fashion Design Council of Canada who organizes Toronto Fashion Week); *see also* PICTURE ME, *supra* note 5, at 39:26 (interview with Kevin Krier, fashion show producer).

<sup>46</sup> PICTURE ME, *supra* note 5, at 39:26 (interview with Nicole Miller, designer).

<sup>47</sup> TALLEY, *supra* note 7, at 15.

<sup>48</sup> *Id.* at 32–33; ASHLEY MEARS, PRICING BEAUTY: THE MAKING OF A FASHION MODEL 21–22, 46 (2011).

<sup>49</sup> TALLEY, *supra* note 7, at 32. Note this service fee is not the same thing as the commission, although both typically are 20 percent.

<sup>50</sup> *Id.* at 52.

els are paid less than experienced models.<sup>52</sup> Pay also varies by the employer. Prestigious magazines tend to pay very little, recognizing that the “tear sheet”—literally a sheet torn from the published magazine—will be more valuable to the model than money.<sup>53</sup> Models walking in runway shows may receive even less, being paid only in “trade,” meaning clothing.<sup>54</sup> The financial bright spot for fashion models is advertising campaigns, which can be quite lucrative.<sup>55</sup>

After the model completes the work she is hired for, the client pays the agency, and the agency forwards the model her earnings, minus the agency’s commission (typically 20 percent) and minus expenses advanced by the agency.<sup>56</sup> “Expenses” for models can be quite high. One model put it this way:

I’ve been modeling two years, been working really hard. I am in huge debt on my credit card because I’ve been paying for my own food and clothes and travel. And I’m still in debt to every single one of my agencies. They fly you over. They charge you for your plane ticket. So that goes on your debt. Then, they, when you first get here, they hire you a driver to get you to your apartment. That goes on your debt. Your apartment goes on your debt. They have to make copies of your book, right? That goes on your debt. They have to send out the copies. That goes on your debt. They have to, pick their noses. That goes on your debt.<sup>57</sup>

The carrot dangling in front of models, encouraging them to continue in the face of mounting debts, is the chance to “get lucky [and] hit it big”<sup>58</sup> with an international ad campaign, which can pay over \$100,000.<sup>59</sup> But even booking a campaign isn’t a guarantee of a model’s financial success. The client may

<sup>51</sup> MEARS, *supra* note 48, at 32, 46.

<sup>52</sup> PICTURE ME, *supra* note 5, at 1:07:15; TALLEY, *supra* note 7, at 45.

<sup>53</sup> TALLEY, *supra* note 7, at 27; *see also Fashion News: Guess How Much Models Get Paid to Work for Vogue?*, DROP DEAD GORGEOUS DAILY (Dec. 1, 2010), <http://dropdeadgorgeousdaily.com/2010/12/fashion-news-guess-how-much-models-get-paid-to-work-for-vogue/>.

<sup>54</sup> Ashlea Halpern, *Exclusive Video: Sara Ziff’s Picture Me Mini-Series, Part One*, NEW YORK MAG. (Sept. 13, 2010, 3:20 PM), [http://nymag.com/daily/fashion/2010/09/exclusive\\_video\\_sara\\_ziffs\\_pic.html](http://nymag.com/daily/fashion/2010/09/exclusive_video_sara_ziffs_pic.html) [hereinafter “Ziff, Part One”] (interview with Barbora); *see also* Jenna Sauers, *Everything You Ever Wanted to Know about Fashion Week, But Were Afraid to Ask*, JEZEBEL (Sept. 9, 2010, 5:56 PM), <http://jezebel.com/5634188/everything-you-ever-wanted-to-know-about-fashion-week-but-were-afraid-to-ask>.

<sup>55</sup> PICTURE ME, *supra* note 5, at 25:20; TALLEY, *supra* note 7, at 33.

<sup>56</sup> TALLEY, *supra* note 7, at 52; Jenna Sauers, *Models Sue Agency for \$3.75 Million*, JEZEBEL (Nov. 26, 2010, 1:00 PM), <http://jezebel.com/5698562/models-sue-agency-for-375-million>.

<sup>57</sup> PICTURE ME, *supra* note 5, at 15:01 (interview with Sena Cech). While Ms. Cech was discussing the costs imposed on U.S. models working in Europe, the same costs come into play for foreign models working in the United States. *See also* TALLEY, *supra* note 7, at 31 (noting the range of expenses charged to models including housing, airfare, pictures, portfolios, and mailing).

<sup>58</sup> PICTURE ME, *supra* note 5, at 14:25 (voice over by Sara Ziff).

<sup>59</sup> Sara Ziff, the central focus of PICTURE ME, received \$112,000 for one campaign. PICTURE ME, *supra* note 5, at 17:25. Polish model Anna Jagodzinska was slated to receive \$172,550 for a campaign put on by creative agency Grey Paris, \$60,000 for work for H&M, and \$15,000 from J. Crew. *What Models Really Get Paid*, MESSY NESSY CHIC (Dec. 7, 2010, 6:56 am), <http://messynessychic.com/2010/12/07/what-models-really-get-paid/> (hereinafter “Messy”). She is currently suing her former agency, Next, for holding onto those and other sums earned. *Id.*

have agreed to pay the model a substantial sum, but the client may then delay paying the agency.<sup>60</sup> The agency is unlikely to pay the model until the client's check clears, or, if the agency does, the model will be charged interest on the outstanding sum.<sup>61</sup> The unfortunate fact of the matter is that agencies knowingly book models with client companies that are in dire financial straits or are outright insolvent.<sup>62</sup> And agencies may be reluctant to seek payment from such clients out of a concern for future bookings of different models.<sup>63</sup> When the agencies do resort to legal action or outsourced debt collection, the model is considered responsible for the resulting costs.<sup>64</sup>

### C. *How Foreign Models Differ from U.S. Models*

American-born models are never considered employees of their modeling agency. The model is instead an independent contractor<sup>65</sup> who has entered into a commission-based contract with an agency.<sup>66</sup> If the agency books a model for work, a percentage of the model's income from that job goes to the agency.<sup>67</sup> As independent contractors, U.S. models are solely responsible for paying their own income, Social Security, and Medicare taxes.<sup>68</sup>

In contrast, U.S. modeling agencies are forced to have a much closer relationship with their foreign models. Agencies are the visa sponsors for foreign models.<sup>69</sup> They are also the employers of the foreign models<sup>70</sup> or must at least "function" as a model's employer.<sup>71</sup>

If the agency files as an employer, it engages foreign models as employees, and then "may hire, pay, fire, supervise, or otherwise control the work of any such" model.<sup>72</sup> If the agency no longer wants to represent the foreign model, it can fire the model, but it must also notify the U.S. Citizenship and Immigration Services (USCIS) of the termination so that the USCIS may revoke the model's visa.<sup>73</sup> At that point, the agency is only on the hook for the reasonable costs of transporting the foreign model home.<sup>74</sup>

The agency's obligations are not that different if it chooses to file as a functional employer: It must contractually "guarantee the wages and other

<sup>60</sup> TALLEY, *supra* note 7, at 52; Messy, *supra* note 59.

<sup>61</sup> Messy, *supra* note 59.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> TALLEY, *supra* note 7, at 86; Sauers, *supra* note 56.

<sup>66</sup> It is possible, though somewhat uncommon in editorial fashion modeling, for models to be represented by more than one agency at a time and thus to have multiple contracts in play at any given time. TALLEY, *supra* note 7, at 31, 33.

<sup>67</sup> *Id.* at 30–31.

<sup>68</sup> *Id.* at 86.

<sup>69</sup> *Id.* at 31, 34.

<sup>70</sup> 8 C.F.R. § 214.2(h)(4)(ii) (2011).

<sup>71</sup> *Id.* § 214.2(h)(2)(F)(1).

<sup>72</sup> *Id.* § 214.2(h)(4)(ii).

<sup>73</sup> Mariana R. Ribeiro, *Not So Model Behavior: How Fashion Modeling Agencies Can Protect Themselves from Violating U.S. Immigration Laws*, FASHION MODELS MAG., Oct. 6, 2009, available at <http://www.gunster.com/news/not-so-model-behavior-how-fashion-modeling-agencies-can-protect-themselves-from-violating-u-s-immigration-laws/>.

<sup>74</sup> *Id.*

terms and conditions of employment” and “provide an itinerary of definite employment and information on any other services planned for the period of time requested,” which is typically three years (the maximum visa stay).<sup>75</sup> That last bit can prove tricky. Certain events occur with regularity—such as New York’s Fashion Week—but many jobs are booked last-minute and so cannot be included on an itinerary three years in advance.<sup>76</sup> Yet failure to provide a detailed itinerary may result in denial of the visa application on the basis that it is for purely “speculative” employment.<sup>77</sup>

Modeling agencies, of course, would rather treat every model—home-grown or international—as an independent contractor. The issue is money. Employees require all sorts of taxes: state, federal, social security, Medicare, unemployment, and worker’s compensation. As a result, immigration attorneys who represent modeling agencies have argued that agencies are not “traditional employers” and the USCIS should take this into consideration when evaluating visa petitions for foreign fashion models.<sup>78</sup> But the Director of the USCIS, Alejandro Mayorkas, has rejected this attempt to put greater distance between modeling agencies and their foreign workers, saying that “language matters.”<sup>79</sup> “The regulation speaks of an employer . . . . We cannot disregard it.”<sup>80</sup>

### III. FASHION MODEL VISAS TODAY

At present, fashion models are admitted into the United States as nonimmigrants, meaning they are entitled to remain in the United States temporarily as opposed to indefinitely.<sup>81</sup>

The very top fashion models (think Gisele Bündchen) enter by way of O-1 visas, available to aliens with “extraordinary ability” in business.<sup>82</sup> The benefits

<sup>75</sup> 8 C.F.R. § 214.2(h)(2)(F)(1).

<sup>76</sup> Remarks from Wilhelmina Models at the USCIS stakeholder engagement concerning Artists, Entertainers, and Models in the ‘O’ and ‘P’ Nonimmigrant Classifications (Apr. 13, 2011) (notes on file with author) [hereinafter “Models Remarks”]; see also *Artists, Entertainers, and Models in the ‘O’ and ‘P’ Nonimmigrant Classifications*, U.S. CITIZENSHIP & IMMIG. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=5443ac8ec3d2f210VgnVCM100000082ca60aRCRD&vgnnextchannel=61ca6ec2ac3ee210VgnVCM100000082ca60aRCRD> (last updated Jun. 17, 2011).

<sup>77</sup> Model Remarks, *supra* note 76; see *Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)* (dated Apr. 1, 2011), U.S. CITIZENSHIP & IMMIG. SERVS., [http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20\(H-1B\)/Decisions\\_Issued\\_in\\_2011/Apr012011\\_06D2101.pdf](http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20(H-1B)/Decisions_Issued_in_2011/Apr012011_06D2101.pdf).

<sup>78</sup> See Models Remarks. *supra* note 76.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., Kit Johnson, *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915, 925 (2011).

<sup>82</sup> Matter of Ford Models, Inc., EAC 92 171 50797 (AAU Oct. 16, 1992) cited in 70 No. 6 Interpreter Releases 180 (Feb. 8, 1993). The O visa applies to aliens of “extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim.” INA § 101(a)(15)(O). In *Matter of Ford Models*, the AAU specified that models can be admitted under this category only insofar as it relates to “business,” not the “arts.”

to being in the O category include the lack of any numerical limits on the number of O admissions per year as well as the absence of a need to file a labor-condition application, which will be discussed in greater detail below.

Most models, however, must enter on an H1B visa. The statutory basis for the H1B is as follows:

(H) an alien (i)(b) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) *or as a fashion model*, who meets the requirements for the occupation specified in section 214(i)(2) *or, in the case of a fashion model, is of distinguished merit and ability*, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1).<sup>83</sup>

The ins and outs of how fashion models came to be included in the H1B category are significant because of how that congressional history has been characterized during later efforts at change. The placement of fashion models in the H1B group has recently been described as a “technical glitch.”<sup>84</sup> But that characterization is not accurate. In fact, putting models into the H1B category was a considered legislative move that was consistent with the historical treatment of fashion models as foreign workers.

#### A. H1B History

The H1B visa evolved from the H1 visa. The history of the H1 visa dates back to 1952 when Congress centralized U.S. immigration law into one federal statute, the Immigration and Nationality Act (INA).<sup>85</sup> The INA created an H1 visa for nonimmigrants 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.”<sup>86</sup>

From 1952 to 1990, foreign fashion models, along with countless other nonimmigrant workers, came to the U.S. under this H1 visa. But then came the Immigration Act of 1990, the most significant immigration reform in decades.<sup>87</sup> The Act splintered the H1 visa into three parts. Many of the temporary workers previously covered by the H1 visa category were transferred into a new H1B visa category while others found themselves subject to the new O or P visas.<sup>88</sup> Yet none of the new visa categories covered fashion models.

The H1B category created by the 1990 Act centered on the type of work nonimmigrants would perform in the U.S.<sup>89</sup> as opposed to the H1 focus on the merit and ability of the nonimmigrant worker.<sup>90</sup> The new H1B visa was limited

<sup>83</sup> INA § 101(a)(15)(H)(i)(b) (emphasis added) (emphasis omitted).

<sup>84</sup> Emily P. Walker, *House Panel Creates ‘Model’ Visa Designation*, CONG. Q., May 14, 2008.

<sup>85</sup> Immigration & Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

<sup>86</sup> *Id.* at § 101(a)(15)(H)(i), 66 Stat. 163, 168.

<sup>87</sup> Paul Wickham Schmidt, *Overview of the Immigration Act of 1990*, in UNDERSTANDING THE IMMIGRATION ACT OF 1990 1 (Paul Wickham Schmidt ed. 1991); *see generally* Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978.

<sup>88</sup> Act of Nov. 29, 1990, § 205, 104 Stat. at 5020.

<sup>89</sup> *Id.*

<sup>90</sup> Immigration & Nationality Act of 1952, § 101(a)(15)(H)(i), 66 Stat. at 168.

to nonimmigrants working in “specialty occupations,”<sup>91</sup> which were defined as positions requiring 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.”<sup>92</sup> Fashion models, of course, could meet neither requirement.

The 1990 Act also introduced a new concept to temporary work visas—labor certification. The Act required employers looking to bring foreign nationals to the U.S. under H1B visas to submit a labor certification to the Department of Labor, stating that: (1) the wages for the H1B employee would be the greater of either the actual wages at the place of employment or the prevailing wages in the area for the position; (2) the working conditions of the H1B employee would not adversely affect the working conditions of U.S. workers similarly employed; (3) there was no strike or lockout; (4) notice was provided to employees and unions about the labor certification; and (5) the employer publicly displayed the specific number of the H1B hires, their wages, and working conditions.<sup>93</sup> The secretary of labor was tasked with establishing a system for dealing with labor certification filings and complaints<sup>94</sup> as well as certifying the employers’ attestations to the attorney general as part of the visa application process.<sup>95</sup>

In addition to redefining acceptable temporary labor and adding the labor certification requirement, the 1990 Act imposed a numerical limit of 65,000 as the maximum number of H1B visas that could be issued in any given fiscal year.<sup>96</sup> And it limited the duration of the H1B visa to six years.<sup>97</sup>

The legislative changes in 1990 created instant problems for fashion models. Fashion models had previously been considered to be of “distinguished merit and ability” under the old H1 category. But under the new law, they were not part of an H1B “specialty occupation.”<sup>98</sup> Moreover, fashion models did not fall naturally into any of the other visa categories that had been created by the 1990 Act. They did not, for instance, easily slide into the newly created O visa for persons of “extraordinary ability in the sciences, arts, education, business, or athletics . . . [as] demonstrated by sustained national or international acclaim,” nor did they qualify for the new P visa for internationally recognized athletes and entertainers.<sup>99</sup> Immigration law had sashayed right on past foreign fashion models, leaving them with no straightforward way into the United States.

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<sup>91</sup> Act of Nov. 29, 1990, § 205, 104 Stat at 5020.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 5021.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 5021–22.

<sup>96</sup> *Id.* at 5019.

<sup>97</sup> *Id.*

<sup>98</sup> *See, e.g.,* David Kidwell, *Visa Pact Protects Models, Photographers*, MIAMI HERALD, July 21, 1991, at 3.

<sup>99</sup> Act of Nov. 29, 1990, 104 Stat. 4978, 1523–24.

*B. When Models Re-Joined the Picture*

Just eight months after the passage of the 1990 Act, Senator Ted Kennedy of Massachusetts and Senator Alan Simpson of Wyoming set about creating a legal fix that would provide a path for bringing foreign models back into the country.<sup>100</sup> Kennedy and Simpson, who were both members of the Senate's Immigration and Refugee Affairs Subcommittee, started out by trying to delay the implementation of the 1990 Act's provisions governing O and P visas for artists and entertainers.<sup>101</sup> In the interim, the lawmakers suggested that those subject to the new O and P visas as well as fashion models (now subject to no visa) should be admitted under the H1B category.<sup>102</sup> In order to accomplish this, the senators folded their proposed changes into Senate Bill 1620, the Immigration Technical Corrections Act of 1991, a comprehensive immigration law package that was designed to affect much more than just fashion model visas.<sup>103</sup>

Senator Kennedy referred to Senate Bill 1620 as a "noncontroversial," "extremely important" "technical corrections package."<sup>104</sup> He emphasized the last-minute nature of the 1990 Act,<sup>105</sup> which had, in fact, been passed with only hours left in the legislative session.<sup>106</sup> "Inevitably," he said, "drafting errors and technical oversights occurred."<sup>107</sup> He wanted the bill to correct those errors.<sup>108</sup>

Senator Simpson, the co-sponsor, made similar comments on Senate Bill 1620. He too said the proposal was "truly technical" and designed to correct "errors committed because much of the law was drafted in the wee hours of the 101st Congress."<sup>109</sup> He emphasized that the bill was developed in conjunction with both Democrats and Republicans on the House Immigration Subcommittee, and that provisions deemed controversial or non-technical by any of the

<sup>100</sup> See 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); see also 137 CONG. REC. 11799-01 (1991); 137 CONG. REC. 13612-02 (1991).

<sup>101</sup> 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); see also 137 CONG. REC. 11799-01 (1991); 137 CONG. REC. 13612-02 (1991).

<sup>102</sup> 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); 137 CONG. REC. 11799-01 (1991); 137 CONG. REC. 13612-02 (1991).

<sup>103</sup> See 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); see also 137 CONG. REC. 11799-01 (1991). The legislative history has some additional twists and turns. The senators' proposal regarding fashion model visas was also floated as a stand-alone amendment, whose stated purpose was the "delay [of] implementation of new legislation affecting visas for artists and entertainers ('O' and 'P' visas)." 137 CONG. REC. 11315-01 (1991) (Amendment No. 932). When that didn't work, the legal provisions were tacked on as an amendment to the separate Armed Forces Immigration Adjustment Act. 137 CONG. REC. 13612-02 (1991); 137 CONG. REC. 6908-04 (1991).

<sup>104</sup> 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); see also 137 CONG. REC. 11799-01 (1991).

<sup>105</sup> 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); see also 137 CONG. REC. 11799-01 (1991).

<sup>106</sup> Johnson, *supra* note 81 at 925.

<sup>107</sup> 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); see also 137 CONG. REC. 11799-01 (1991).

<sup>108</sup> 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); see also 137 CONG. REC. 11799-01 (1991).

<sup>109</sup> 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); see also 137 CONG. REC. 11799-01 (1991).

participating staffs had been removed.<sup>110</sup> The senators' amendment was adopted into the bill's text, which passed the Senate, but the measure failed to win approval in the House Subcommittee on International Law, Immigration, and Refugees, leaving it effectively dead.<sup>111</sup>

In late September 1991, the senators continued their work to provide a pathway to America for foreign fashion models with a new measure, Senate Bill 1776.<sup>112</sup> With this new bill, they no longer sought temporary consideration of fashion models under the H1B category.<sup>113</sup> Rather, they proposed characterizing "fashion modeling" as "a specialty occupation" so as to permanently include fashion modeling within the H1B visa category.<sup>114</sup> Kennedy called this proposal "remedial legislation."<sup>115</sup> He emphasized that remedial legislation was needed because the new O and P visas went considerably beyond what was discussed in conference reports at the time and substantially changed existing law—despite a general belief that the changes were noncontroversial, had been discussed with all the affected groups, and would not greatly alter existing procedures and practices.<sup>116</sup> Regarding affected groups, Kennedy noted that he'd met with "representatives of organized labor and those representing the fields of the arts, culture, entertainment and athletics"<sup>117</sup> to use Senate Bill 1776 to broker a compromise "between the interests of organized labor and the foreign artists, performers and athletes who come each year to the United States, bringing their talents, their art, their performances to share with American audiences."<sup>118</sup> Yet Senate Bill 1776 failed as well.<sup>119</sup>

<sup>110</sup> 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); *see also* 137 CONG. REC. 11799-01 (1991).

<sup>111</sup> 137 CONG. REC. 11315-01 (1991) (Amendment No. 932); *see also* 137 CONG. REC. 11799-01 (1991).

<sup>112</sup> 137 CONG. REC. 13979-02 (1991); *see also* Kidwell, *supra* note 98.

<sup>113</sup> *See* 137 CONG. REC. 13979-02 (1991); *see also* Kidwell, *supra* note 98.

<sup>114</sup> 137 CONG. REC. 13979 (1991); *see also* Kidwell, *supra* note 98.

<sup>115</sup> 137 CONG. REC. 13979 (1991).

<sup>116</sup> *Id.*

<sup>117</sup> Specifically, Kennedy consulted:

[(a)] organized labor, represented by the Department for Professional Employees, AFL-CIO . . . Actors' Equity Association; American Federation of Musicians; American Federation of Television and Radio Artists; American Guild of Musical Artists; International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada; International Brotherhood of Electrical Workers; National Association of Broadcast Employees and Technicians; Screen Actors' Guild, and the Writers' Guild of America-East; [and (b)] the arts community . . . the American Symphony Orchestra League; OPERA America; Dance/USA; American Arts Alliance; Association of Performing Arts Presenters; International Society of Performing Arts Administrators; National Association of Performing Arts Managers and Agents; Western Alliance of Arts Administrators; North American Folk Music and Dance Alliance; Columbia Artist Management Inc.; International Creative Management Inc.; the Recording Industry Association of America; the League of American Theaters and Producers; Ringling Bros. and Barnum & Bailey Circus, and the Big Apple Circus.

137 CONG. REC. 13982 (1991). While fashion insiders were not listed among Kennedy's contacts, contemporaneous news reports indicate that they were among those consulted. *See* Kidwell, *supra* note 98.

<sup>118</sup> 137 CONG. REC. 13982 (1991).

<sup>119</sup> 137 CONG. REC. 18248 (1991).

In November 1991, Kennedy pushed yet another proposal that would provide visas for foreign fashion models. In an amendment to the House bill that would ultimately become law, Kennedy made no further attempt to define “fashion modeling” as a “specialty occupation,” but simply entered fashion models into the H1B category in a wholesale manner so that H1B visas would cover those coming to perform services in a specialty occupation *or* as a fashion model.<sup>120</sup> Once again, this change was couched inside a larger amendment concerning O and P nonimmigrant visas.<sup>121</sup>

This final Kennedy amendment was approved in the Senate by a voice vote.<sup>122</sup> Early the next day, the House approved the Senate’s amendments and cleared the bill for the White House.<sup>123</sup> President George H.W. Bush signed the bill and it became law on December 12, 1991.<sup>124</sup>

In the end, we can say that Congress’ inclusion of fashion models in the H1B visa category was a conscious, debated choice. It was the result of continuing efforts by Senator Kennedy and various supporters throughout the 1991 legislative session. Congress could have included models within either the O or P visa categories but chose not to. The placement of foreign models in the H1B visa category was consistent with the historical understanding that foreign models may well be of “distinguished merit and ability” while not being “extraordinary” (as required of O visa holders) or performers at an “internationally recognized level” (as required of P visa holders).

### C. *Distinguished Merit and Ability*

When fashion models were returned to the H1B visa category in 1991, they were returned with the previously jettisoned language of “distinguished merit and ability.” In this section, I discuss how federal regulations have built upon this statutory language to set parameters on the eligibility of foreign models, their work, and their agencies.

#### 1. *The Models*

Foreign models must be of “distinguished merit and ability” in order to qualify for an H1B visa.<sup>125</sup> This means the model must be “prominent in the field of fashion modeling.”<sup>126</sup> “Prominence” under the regulations means “a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling.”<sup>127</sup>

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<sup>120</sup> 137 CONG. REC. 18509 (1991).

<sup>121</sup> *Id.*

<sup>122</sup> See 137 CONG. REC. 18506 (1991).

<sup>123</sup> See 102 H. RES. 3040 (1991), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d102:HR03049:@@D&summ2=m&>; see also 137 CONG. REC. 11485 (1991).

<sup>124</sup> Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 207, 105 Stat. 1733.

<sup>125</sup> 8 C.F.R. § 214.2 (h)(1)(i) (2011).

<sup>126</sup> *Id.* § 214.2 (h)(4)(i)(C).

<sup>127</sup> *Id.* § 214.2 (h)(4)(ii).

A model's visa application must be accompanied by documents proving prominence, such as affidavits from present or former employers or recognized experts that certify the recognition and distinguished ability of the model, describe the model's recognition and ability in factual terms, and "set forth the expertise of the affiant and the manner in which the affiant acquired such information."<sup>128</sup> The regulations also allow proof of "prominence" through submission of documentation showing the model meets at least two of the following criteria:

(1) Has achieved national or international recognition and acclaim for outstanding achievement in his or her field as evidenced by reviews in major newspapers, trade journals, magazines, or other published material; (2) Has performed and will perform services as a fashion model for employers with a distinguished reputation; (3) Has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized experts in the field; or (4) Commands a high salary or other substantial remuneration for services evidenced by contracts or other reliable evidence.<sup>129</sup>

One author has suggested that between 12 and 20 tear sheets from major overseas magazines may be sufficient to demonstrate prominence;<sup>130</sup> however, that appears to be an overly optimistic view for visa applicants. In 2008, the Administrative Appeals Office ("AAO") issued a written opinion discussing the issue of "prominence."<sup>131</sup> The AAO concluded that tear sheets showed only that the model seeking to enter the U.S. had met the second of the four criteria above; that is, that she "had performed or would perform as a fashion model for employers with a distinguished reputation."<sup>132</sup> The AAO was not impressed by the three supporting letters from individuals in the modeling field that were submitted with the model's visa application.<sup>133</sup> These letters provided only "general statements" indicating that the proposed beneficiary was a "working model" without supporting factual statements establishing "recognition" or evidence of the ability to command a high salary.<sup>134</sup> Thus, supporting letters with detailed factual statements are necessary, in addition to tear sheets, to meet H1B's thresholds.

## 2. *The Work*

It is not enough to establish that the model is of distinguished merit and ability (as established by proving "prominence").<sup>135</sup> The model must also be coming to the United States to perform services that require a fashion model of

<sup>128</sup> *Id.* § 214.2 (h)(4)(vii)(A)(1).

<sup>129</sup> *Id.* § 214.2 (h)(4)(vii)(C).

<sup>130</sup> TALLY, *supra* note 7, at 90–91.

<sup>131</sup> *U.S. Citizenship & Immigration Servs., Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)* (dated Mar. 31, 2008), U.S. CITIZENSHIP AND IMMIG. SERVS., [http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20\(H-1B\)/Decisions\\_Issued\\_in\\_2008/Mar312008\\_02D2101.pdf](http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20(H-1B)/Decisions_Issued_in_2008/Mar312008_02D2101.pdf).

<sup>132</sup> *Id.* at 3.

<sup>133</sup> *Id.* at 4.

<sup>134</sup> *Id.* at 3.

<sup>135</sup> 8 C.F.R. § 214.2 (h)(1)(i) (2011).

prominence.<sup>136</sup> There are two ways an applicant can prove this. The first involves proving that the work involves “events or productions which have a distinguished reputation.”<sup>137</sup> Walking in New York Fashion Week, for instance, would probably fall under such a category. In the alternative, it must be established that the model will be working “for an organization or establishment that has a distinguished reputation for, or record of, employing prominent persons.”<sup>138</sup> This is, of course, far easier to prove, assuming the model is represented by, and for visa purposes employed by, one of the big-name fashion agencies.

### 3. *The Agencies*

The petitioner for a fashion model visa is the model’s employer, which is the model’s U.S. fashion agency.<sup>139</sup> As the petitioner, the agency is responsible for gathering and submitting all of the required documentation regarding the model’s prominence and the prominence of the model’s work.<sup>140</sup> The agency must also file copies of any written contracts with the model-beneficiary or provide a summary of the terms of any oral agreement under which the model-beneficiary will be employed.<sup>141</sup>

In addition, the agency must file a labor condition application (“LCA”) with the Department of Labor.<sup>142</sup> In the LCA, the agency must state that: (1) the foreign model’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 model will not adversely affect the working conditions of U.S. models similarly employed; (3) the agency is not experiencing a strike or lock-out; (4) the agency 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.<sup>143</sup> That final obligation is generally handled with the creation of a public access file, meaning a file that is open to public inspection including, but not limited to, by disgruntled former models and the agency’s biggest competitors.<sup>144</sup>

Finally, of course, there are fees and costs associated with visa petitions.<sup>145</sup> The agency will almost certainly add these amounts to the foreign model’s debt.

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<sup>136</sup> *Id.* § 214.2 (h)(4)(i)(C).

<sup>137</sup> *Id.* § 214.2 (h)(4)(vii)(B).

<sup>138</sup> *Id.*

<sup>139</sup> TALLEY, *supra* note 7, at 90–91.

<sup>140</sup> Ribeiro, *supra* note 73; *see also* 8 C.F.R. § 214.2 (h)(4)(vii).

<sup>141</sup> 8 C.F.R. § 214.2 (h)(4)(vii)(A)(2).

<sup>142</sup> *Id.* § 214.2 (h)(2)(b)(1).

<sup>143</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 205, 104 Stat. 4978 (1990).

<sup>144</sup> Ribeiro, *supra* note 73; 20 C.F.R. § 655.700 (d)(2)(iii) (2011).

<sup>145</sup> Ashley Mears has estimated visa costs to run \$1,800. MEARS, *supra* note 48, at 66. Others place the estimate at far more than double that figure. *See, e.g., H1B Fees For H1B Visa Filing*, H1B VISA SUPPORT, [http://www.h1bvisa.info/h1b\\_visa\\_fees\\_http://www.h1bvisa.info/h1b\\_visa\\_fees\\_](http://www.h1bvisa.info/h1b_visa_fees_http://www.h1bvisa.info/h1b_visa_fees_) (last visited Mar. 23, 2012) (estimating H1B visa expenses to run some \$5,545).

#### 4. Duration

Foreign models who are lucky enough to obtain a visa may remain in the United States for three years.<sup>146</sup> Their stay can be extended for a maximum of three additional years for a total of no more than six years.<sup>147</sup>

### IV. BEAUTY AND THE GEEK

Returning foreign models to their historical H1 category eliminated the problem of needing to characterize them as either “extraordinary” within the meaning of O visas or as internationally recognized performers under P visas. Nonetheless, the move was not without consequences. H1B visas are used for employment categories other than modeling. And since all H1B visas are subject to one numerical cap, models have been pitted against other foreign workers for increasingly scarce H1B visa slots.

The largest group of H1B applicants has historically been tech workers, with companies like Microsoft and Infosys filing the most H1B applications.<sup>148</sup> From 1990 to 1996, the cap did not present a significant concern, because it was never reached.<sup>149</sup> But demand for H1B visas shot up dramatically in 1997 with the dot-com boom and the concomitant demand for skilled technology labor from overseas.<sup>150</sup> At that point, the cap effectively set off a yearly race among immigration attorneys to obtain what they could of the coveted H1B slots.<sup>151</sup> The USCIS accepts H1B applications starting on April 1 of any given year for a fiscal year that starts October 1 of that same year.<sup>152</sup> Currently, immigration lawyers scramble to file H1B applications on April 1, often filling the visa allotment before the start of the fiscal year’s October start.<sup>153</sup>

The rampant demand for H1B visas prompted Congress in 1998 to pass the American Competitiveness and Workforce Improvement Act.<sup>154</sup> This legislation temporarily increased the available number of H1B visas for FY1999 and FY2000 from 65,000 to 115,000.<sup>155</sup> Then, in 2000, Congress extended the program with the American Competitiveness in the Twenty-First Century Act,<sup>156</sup> which increased the number of available H1B visas to 195,000 for FY2001,

<sup>146</sup> 8 C.F.R. § 214.2 (h)(9)(iii)(A)(3).

<sup>147</sup> *Id.* § 214.2 (h)(15)(ii)(B)(1).

<sup>148</sup> *Beauty and the Geek*, THE ECONOMIST, June 19, 2008, at 85.

<sup>149</sup> Peter H. Schuck & John E. Tyler, *Making The Case For Changing U.S. Policy Regarding Highly Skilled Immigrants*, 38 FORDHAM URB. L.J. 327, 342 (2010).

<sup>150</sup> Tom Abate, *Tech Firms Scramble for Visas: Monday Key in Race for Limited — and Controversial — H1-B Permits for Foreign Workers*, S.F. CHRON., Apr. 1, 2007, at B1; Suzette Brooks Masters & Ted Ruthizer, *Does the U.S. Need to Import Professional Workers?*, USA TODAY, Sept. 1, 2000, at 18.

<sup>151</sup> David Grunblatt, *The Immigration Practitioner: April Fools and H-1B Filing Madness*, N.J. LAW., Mar. 24, 2008; see also *infra* Table 1.

<sup>152</sup> *Infra* Table 1.

<sup>153</sup> *Id.*

<sup>154</sup> American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

<sup>155</sup> *Id.*

<sup>156</sup> American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251; Grunblatt, *supra* note 151.

FY2002, and FY2003.<sup>157</sup> But in FY2004, the 65,000 cap returned, and so did the race for visas.<sup>158</sup>

TABLE I

H1B Fiscal Year	H1B Filing Date	Date H1B Quota Cap Reached	H1B Cap	Model Visa Applications Approved by USCIS <sup>159</sup>
FY2000	4/1/1999	3/21/2000	115,000	85
FY2001	4/1/2000	Not reached	195,000	408
FY2002	4/1/2001	Not reached	195,000	374
FY2003	4/1/2002	Not reached	195,000	649
FY2004	4/1/2003	10/1/2003	65,000	721
FY2005	4/1/2004	10/1/2004	65,000	585
FY2006	4/1/2005	8/10/2005	65,000	556
FY2007	4/1/2006	5/26/2006	65,000	436
FY2008	4/1/2007	4/2/2007	65,000	273
FY2009	4/1/2008	4/7/2008	65,000	193
FY2010	4/1/2009	12/21/2009	65,000	189
FY2011	4/1/2010	1/26/2011	65,000	
FY2012	4/1/2011	11/23/2011	65,000	

The H1B fiscal year cap was met on or prior to the start of the fiscal year in 2004–2009. And, in fact, 2008 and 2009 were so competitive that the program was oversubscribed just days after opening.<sup>160</sup> The USCIS had to conduct a lottery to allocate the visas among first filers on a random basis.<sup>161</sup> In 2010 and 2011, no doubt in relation to the U.S. economic downturn, the H1B visas were slower to fill. Yet in both cases, the cap was met just months into the

<sup>157</sup> Grunblatt, *supra* note 151.

<sup>158</sup> *Id.* The return to the 65,000 cap was a passive one: Congress allowed the temporary increases included in the American Competitiveness in the Twenty-First Century Act to lapse. According to one commentator, Congress didn't take action to again increase the H1B cap "because of the perceived backlash that could result by increasing the number of H1B specialty occupation workers in a weakened economy." Sheela Murthy, *Impact of September 11, 2001 on U.S. Immigration*, MD. B.J., Mar.-Apr. 2004, at 3, 10.

<sup>159</sup> USCIS, Petition for a Nonimmigrant Worker (I-129) with a Fashion Model with National or International Acclaim and Recognition (H-1B3) Receipts and Approvals for Fiscal Years 1992 to 2010, Mar. 3, 2011 (on file with author); USCIS Reaches Fiscal Year 2012 H-1B Cap, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f0a78614e90d3310VgnVCM100000082ca60aRCRD&vgnnextchannel=b56db6f2cae63110VgnVCM1000004718190aRCRD> (last visited Mar. 23, 2012). These numbers reflect only the visa applications approved by the USCIS and not the visas ultimately issued by the Department of State.

<sup>160</sup> See Table 1.

<sup>161</sup> Grunblatt, *supra* note 151.

fiscal year.<sup>162</sup> The number of visas approved for fashion models went from a high of 721 in 2004 down to 189 in 2010.<sup>163</sup>

The H1B visa race has had different effects on the technology sector and the modeling industry. Technology companies have been hindered by the visa race mostly in terms of numbers; they have not hired as many individuals as they would like because of the total cap.<sup>164</sup> But such companies do fare better than the fashion industry because their hiring needs are foreseeable. The fashion industry's labor demands are quixotic. It is nearly impossible to predict the various shoots and runway shows that will need staffing in the next year, much less the three years out envisioned by the current visa system.<sup>165</sup> What's more, next year's elite models are often yet to be discovered. Consider Canadian model Coco Rocha. When she first crossed the desk of a casting director in 2005, his reaction was, "What trailer park did she come from?"<sup>166</sup> A year later, the same casting director "desperately wanted to book her."<sup>167</sup> His about-face was occasioned by the fact that multiple designers were optioning or booking Coco for their runway shows, generating buzz, and driving up interest in her services.<sup>168</sup> The "information cascade"<sup>169</sup> leading to a desire to hire a particular foreign model is not foreseeable or predictable in a way that would allow for working within the visa cycle.

#### V. THE UGLY AMERICAN BILL

The niche interest in immigration law to ease the visa system governing foreign models didn't go unnoticed on Capitol Hill. In 2005 and 2007, a Democratic Congressman from New York, Anthony Weiner (yes, *that* Anthony Weiner),<sup>170</sup> proposed amending the INA to move fashion models from the H1B

<sup>162</sup> See Table 1.

<sup>163</sup> *Id.* The number of visas fashion models actually secured are lower than the number of visa applications approved by USCIS. Models got just 349 visas in 2007, which was close to half of the annual numbers from 2000–2005, which ranged from 614 to 790. *Beauty and The Geek*, *supra* note 148; see also H.R. REP. NO. 110-699, at 3 (2008).

<sup>164</sup> Fred Barnes, *Five Easy Pieces*, WKLY. STANDARD, June 2, 2008 ("In 2007, Microsoft was unable to hire one-third of the foreign-born workers it had jobs for, Bill Gates told Congress in March.").

<sup>165</sup> See *supra* notes 75–77 and accompanying text.

<sup>166</sup> Ashley Mears, *How Supermodels Are Like Toxic Assets*, 3QUARKSDAILY (July 12, 2010), <http://www.3quarksdaily.com/3quarksdaily/2010/07/how-supermodels-are-like-toxic-assets.html>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Mears describes the concept of the information cascade in this way:

Faced with imperfect information, individuals make a binary choice to act (to choose or not to choose Coco) by observing the actions of their predecessors without regard to their own information. In such situations, a few early key individuals end up having a disproportionately large effect, such that small differences in initial conditions create large differences later in the cascade.

*Id.*; see also CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 87 (2002).

<sup>170</sup> The congressman's work concerning visas for foreign models pre-dated, by more than four years, the "sexting" scandal that would eventually lead him to withdraw from public life. See, e.g., *Weiner Scandal: Timeline of Events*, BALTIMORE SUN, June 17, 2011, at 8A.

category into either the O or P visa category so as to alleviate the group's competition for the scarce H1B visas.<sup>171</sup> Many things in Congress slip under the radar. This didn't. Congressman Weiner's effort was painted as an insult to American looks, and it attracted expressions of outrage from his fellow lawmakers as well as pundits and press all around.

Detractors implied that the legislative effort was at best frivolous or at worst a womanizing ploy. I take a somewhat different view. The sharp tone of the public rejection of Congressman Weiner's proposals evidences not only layers of gender bias but also touches upon deep-seated tensions inherent in the question of whether foreign labor drives U.S. economic growth or marginalizes native labor. I conclude, further below, that there would be marked economic benefits to a new, easier-to-obtain foreign model visa.

#### A. *A New Classification for Models*

Congressman Weiner's 2005 proposal involved removing fashion models from the H1B visa category and moving them to the O category,<sup>172</sup> which is often referred to as the "outstanding" visa category. The O visa may be garnered by a nonimmigrant of:

extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim . . . and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability.<sup>173</sup>

Congressman Weiner's proposal did not involve the admission of purely "extraordinary" models. You will recall they have been allowed in under the O category since 1992.<sup>174</sup> Rather, Congressman Weiner took the existing standards and regulations governing H1B foreign model visas and simply dropped them into the O category, as follows:

a fashion model who is of distinguished merit and ability and who is seeking to enter the United States temporarily to perform fashion modeling services that involve events or productions which have a distinguished reputation or that are performed for an organization or establishment that has a distinguished reputation for, or a record of, utilizing prominent modeling talent.<sup>175</sup>

Representative Weiner coupled this with a proposed yearly visa limit for fashion models of 1,000.<sup>176</sup>

The 2005 proposal went nowhere. It was referred to the House Committee on the Judiciary and languished there.<sup>177</sup> But the story in the press had legs. The Washington Post derisively said the bill would "make it easier for beauties

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<sup>171</sup> H.R. 4354, 109th Cong. (2005); H.R. 4080, 110th Cong. (2007).

<sup>172</sup> H.R. 4354.

<sup>173</sup> INA § 101(a)(15)(O).

<sup>174</sup> See *supra* note 82 and accompanying text.

<sup>175</sup> H.R. 4354 (internal quotation marks omitted).

<sup>176</sup> *Id.*

<sup>177</sup> *Bill Summary & Status*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04354:@@X> (2005–2006). *Bill Summary & Status*, LIBR. CONGRESS, H.R. 4354, 109th Cong., <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04354:@@X> (2005–2006).

from Brazil, Russia, the Czech Republic and other far-flung locales to strut their skinny little butts on our runways” because “there aren’t enough gorgeous glamazons on these shores already.”<sup>178</sup> The same story emphasized that Congressman Weiner was a bachelor and gave mere lip service to his position that the new bill would “end a shortage that makes American modeling agencies lose business internationally.”<sup>179</sup> The piece concluded, “What a guy! Bet those gals are soooooo grateful.”<sup>180</sup>

Despite the ribbing, Congressman Weiner made a second proposal to change the treatment of foreign model visas in 2007.<sup>181</sup>

In his 2007 proposal, Congressman Weiner again suggested removing fashion models from the H1B category.<sup>182</sup> This time, however, he proposed moving them to the P as opposed to the O visa category.<sup>183</sup> As mentioned previously, the P visa covers internationally recognized performers—athletes and entertainers.<sup>184</sup> Congressman Weiner’s proposal included the same definition for models as in his prior draft.<sup>185</sup> That is, he focused on the “distinguished merit and ability” of the model coupled with the “distinguished reputation” of the event to be worked at or employer to be worked for.<sup>186</sup> He kept the 1,000 admission cap.<sup>187</sup> And this time he changed the duration of the model visa to a maximum 10-year stay, up from six years.<sup>188</sup>

Congressman Weiner’s renewed efforts were approved of by the Fashion Model Fairness Project, a lobbying organization formed by a consortium of top modeling agencies, which spent \$200,000 over 2006 and 2007 to support the creation of a new visa category for models.<sup>189</sup> The Fashion Model Fairness Project retained Morrison Public Affairs Group to represent it, a company that is headed by Bruce Morrison, the congressman at the epicenter of negotiations surrounding the Immigration Act of 1990.<sup>190</sup>

Industry approval aside, negative press regarding the proposal started rolling out even before it came up for a vote in committee. The press, in reporting on the bill, clamored to describe Congressman Weiner as “single, handsome and 43.”<sup>191</sup> Congressman Lamar Smith of Texas, then-ranking member on the

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<sup>178</sup> Amy Argetsinger & Roxanne Roberts, *Reliable Source: Notes on Newsmakers*, WASH. POST, Dec. 21, 2005.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> H.R. 4080, 110th Cong. (2007).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> INA § 101(a)(15)(P)(i); *see also* INA § 214(c)(4).

<sup>185</sup> H.R. 4080.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *See* H.R. REP. NO. 110-699, at 13 (2008).

<sup>189</sup> *See* Jennifer Fermino, *Weiner Hails Bid For Foreign Honey Money*, N.Y. POST, June 13, 2008, at 17; Lisa Hoffman, *CIA Trolls Facebook Looking For Recruits*, SEATTLE POST-INTELLIGENCER, Jan. 27, 2007, at B5; *Annual Lobbying by Fashion Model Fairness Project*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/clientsum.php?year=2007&lname=Fashion+Model+Fairness+Project&id=> (last updated Jan. 23, 2012).

<sup>190</sup> Johnson, *supra* note 81, at 924.

<sup>191</sup> Nicole Gaouette, *Favored Immigrants Getting Help*, L.A. TIMES, Apr. 27, 2008, at A-18.

House immigration subcommittee, said in April 2008 that he could picture Congressman Weiner:

in a posh downtown New York City hotel celebrating the passage of this bill surrounded by hundreds of energized, wildly ecstatic fashion models. And you know for a fact he's going to have an annual celebration. It's almost too much to bear. . . . But not too much to oppose the bill.<sup>192</sup>

On May 8, 2008, the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law approved the measure by a voice vote of 20–3.<sup>193</sup> The subcommittee described the inclusion of fashion models in the H1B category as “inadvertent misclassification.”<sup>194</sup> It noted that models, like performing artists and athletes, used to fall under the 1952 H1 category, but that performing artists and athletes were culled out and into the P category in 1990.<sup>195</sup> The bill, it was said, would correct that misclassification.<sup>196</sup>

The subcommittee further noted that having fashion model visas available was ultimately an issue of money.<sup>197</sup> It cited the ease with which photo shoots, in particular, could be moved from the United States to overseas locations.<sup>198</sup> It also fingered financial losses associated with such production flight, including lost tax revenue, idled American workers, and business losses.<sup>199</sup> Any semblance of economically nuanced discussion was lost, however, when the bill hit the Gotham tabloids.

“Bring On Hotties From Overseas,” ran one headline.<sup>200</sup> “WEINER HOT FOR EMIGRE MODEL BABES,” declared another.<sup>201</sup> Even more cutting was this vivid summons: “Give me your torrid, your pure, your totally smokin’ foreign babes.”<sup>202</sup>

Steve King, a Republican Congressman from Ohio argued that the bill should be called the “Ugly Americans Bill.”<sup>203</sup>

“It’s based on the premise that there aren’t enough attractive people in the United States,” Congressman King said.<sup>204</sup> “Is it possible our schools aren’t producing enough young adults that can navigate a runway? I think not.”<sup>205</sup>

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<sup>192</sup> *Id.* (internal quotation marks omitted).

<sup>193</sup> Sara Lubbes, *Bill Would Set Aside Visas for Foreign Models*, CONG. Q., May 8, 2008; Walker, *supra* note 84.

<sup>194</sup> H.R. REP. NO. 110-699, at 3 (2008).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 3, 4.

<sup>197</sup> *Id.* at 4.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Jo Piazza & David Saltonstall, *Weiner: Bring On Hotties From Overseas*, N.Y. DAILY NEWS, June 11, 2008, at 3 (emphasis omitted).

<sup>201</sup> Jennifer Fermino, *Weiner Hot For Émigré Model Babes – Seeks Bill To Give Them 1,000 Visa Slots*, N.Y. POST, June 12, 2008, at 5 (emphasis omitted).

<sup>202</sup> Piazza & Saltonstall, *supra* note 200.

<sup>203</sup> Emily Heil & Elizabeth Brotherton, *Heard on the Hill*, ROLL CALL, May 12, 2008 (internal quotation marks omitted); Walker, *supra* note 84.

<sup>204</sup> Walker, *supra* note 84 (internal quotation marks omitted).

<sup>205</sup> Lubbes, *supra* note 193 (internal quotation marks omitted).

Famed American supermodel Janice Dickinson agreed: “Forget trying to bring in new meat. Let’s divvy it up between the Americans on American soil, please.”<sup>206</sup>

The fact that Weiner was then-single did not help the cause or abate the fury of its detractors. Weiner was criticized for “working hard to increase his dating pool.”<sup>207</sup>

Congressman Weiner’s bill, despite a ringing endorsement from committee, was never brought up for a vote in the House or Senate. In 2009, Congresswoman Sheila Jackson-Lee’s proposed Save America Comprehensive Immigration Act of 2009 included a similar provision that would have moved fashion models from the H1B to the O visa category.<sup>208</sup> But like bellbottoms, the idea of legislative help for foreign models never truly came back in style. In 2010, yet another comprehensive immigration reform package was put together for consideration; this one did not include a provision for O or P visas for fashion models.<sup>209</sup>

### B. *The High Heeled and the Well Heeled*

The story of Congressman Weiner’s bill, at its essence, is a tale about gender and economics. Much of the negative publicity surrounding Congressman Weiner’s model visa proposals can be summed up by the words of one web commenter who typed: “MODELS? REALLY?!?”<sup>210</sup>

Journalists and commentators alike took the position that the question of foreign fashion models was inherently silly, and, by extension, so were the would-be beneficiaries of potential reform, who were mocked with denigrating language.<sup>211</sup>

Inherent in these comments is a position that the work done by fashion models has little value, with the implication being that any law concerning them is not worthy of serious consideration. The reality is quite different.

#### 1. *Value*

Jobs that are primarily filled by women tend to be valued less than those primarily filled by men—an issue that has been the rich subject of academic literature.<sup>212</sup> The comparative worth theory, for instance, posits that “the value of work performed in predominantly female jobs—by male and female workers

<sup>206</sup> Piazza & Saltonstall, *supra* note 200.

<sup>207</sup> Fermino, *supra* note 201. It’s worth noting again that these comments pre-dated, by more than two years, the scandal that would eventually lead the congressman to withdraw from public life. *See, e.g., Weiner Scandal*, *supra* note 170.

<sup>208</sup> Save America Comprehensive Immigration Act of 2009, H.R. 264, 111th Cong. § 1403 (2009).

<sup>209</sup> Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. (2010).

<sup>210</sup> Dorothy Parvaz, Editorial, *Snark Attack*, SEATTLE POST-INTELLIGENCER, June 14, 2008, at B5.

<sup>211</sup> Argetsinger & Roberts, *supra* note 178; Gaouette, *supra* note 191.

<sup>212</sup> Professor Martha Chamallas, in particular, has carefully explored concepts of devaluation and comparative worth. *See* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 755–77 (2001) [hereinafter “Chamallas I”]; MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 187–92 (2d ed. 2003) [hereinafter “Chamallas II”].

alike—is systematically underrated, given the relative skill, effort, and responsibility involved.”<sup>213</sup> Alternately stated, the theory claims that any given job is viewed as more or less desirable and important based on whether the majority of the job holders are male or female, regardless of other factors.<sup>214</sup>

Devaluation bias has been traditionally used to discuss pay disparities in female-dominated work such as child care, clerical services, and nursing.<sup>215</sup> But it is also appropriate to explain the outcry against Congressman Weiner’s 2007 proposal regarding foreign model visas. Modeling, while not an exclusively female job, is predominantly conducted by, and certainly associated with, women. The critics of Weiner’s proposal consistently derogated the work of modeling, dismissing it as nothing more than the strutting of “skinny little butts”<sup>216</sup> by “new meat.”<sup>217</sup> This inherent bias colored the discourse so thoroughly that it was impossible to conduct a real analysis of the potential economic benefits of a refashioned foreign model visa.

After removing these blinders, it is apparent that foreign models have the potential to generate income for scores of American workers.

Consider just one photo shoot for a L’Oreal print ad.<sup>218</sup> People start arriving at 4:00 a.m. From 5:00 a.m. to 3:00 p.m., the model is in the hands of makeup artists and hair stylists. The first photo is taken at 4:30 p.m., after the photographer and lighting technicians work to position the model and shoot under optimal lighting conditions. The shoot lasts two hours. Afterwards, the digital photos are uploaded to a computer where the art director and computer specialists go to work smoothing out the model’s face to eliminate acne, freckles, and creases. All-in-all, some 25 people are involved for more than 15 hours of work, just one of whom is a model.

Similarly, in terms of New York City’s Fashion Week, perhaps 15 models will be hired to showcase each designer’s new line.<sup>219</sup> But backstage will be filled with journalists, hairdressers, makeup artists, photographers, dressers, celebrity-wrangers, and event organizers.<sup>220</sup> Of course, the event also employs janitors, coat-checkers, security personnel, and those who put up and pull down the tents.<sup>221</sup> And there is money in the sheer numbers who attend—some 230,000 according to the mayor’s office—adding generously to hotel and restaurant revenues.<sup>222</sup>

<sup>213</sup> Chamallas I, *supra* note 212, at 765; Chamallas II, *supra* note 212, at 188.

<sup>214</sup> Chamallas I, *supra* note 212, at 766; Chamallas II, *supra* note 212, at 189.

<sup>215</sup> See, e.g., Chamallas II, *supra* note 212, at 188.

<sup>216</sup> Argetsinger & Roberts, *supra* note 178.

<sup>217</sup> Piazza & Saltonstall, *supra* note 200.

<sup>218</sup> The shoot is described in detail by Canadian fashion agent Ben Barry. BARRY, *supra* note 7, at 80–82.

<sup>219</sup> Mears, *supra* note 166.

<sup>220</sup> PICTURE ME, *supra* note 5, at 27:17; Ashlea Halpern, *Exclusive Video: Sara Ziff’s Picture Me Mini-Series, Part Two*, NEW YORK MAG. (Sept. 15, 2010), at 3:48, [http://nymag.com/daily/fashion/2010/09/exclusive\\_video\\_sara\\_ziffs\\_pic\\_1.html](http://nymag.com/daily/fashion/2010/09/exclusive_video_sara_ziffs_pic_1.html) [hereinafter “Ziff Part 2”]; Jo Piazza, *Working Fashion: The Man Who Carves Ice*, METROPOLIS (Feb. 9-16, 2011), <http://blogs.wsj.com/metropolis/tag/working-fashion/>.

<sup>221</sup> Piazza, *supra* note 220.

<sup>222</sup> Paola Messana, *New York Fashion Week Kicks Off in New Digs*, LAREDO SUN, Sept. 9, 2010, <http://laredosun.us/notas.asp?id=10447>. One report, commissioned by the producers of New York Fashion Week and the City of New York, determined that the “the total economic

Ensuring that visas don't present a hurdle to the staffing of domestic fashion events—from photo shoots to fashion shows—is a big-money issue. And the small-scale level of the reform proposed by Congressman Weiner (just 1,000 visas in the context of over 40 million annual nonimmigrant entries)<sup>223</sup> suggests that the bill had the potential to effect positive change without stepping into the quagmire of large-scale immigration reform.<sup>224</sup>

## 2. *Interchangeability*

Putting aside issues of overall economic value, one of the reasons Congressman King opposed the reclassification of foreign model visas was because he felt that modeling could be done by any young person in the United States.<sup>225</sup> As such, his critique was a form of the classic argument against the importation of cheap foreign labor.<sup>226</sup> The concern that temporary worker visas could lead to the influx of cheap foreign labor is hardly new. Since the Immigration Act of 1990, there has been heated debate over whether immigrants—H-1B beneficiaries, in particular—do more to benefit the U.S. economy or to take jobs away from U.S. workers.<sup>227</sup> Microsoft's Bill Gates, for instance, has been vehement in his position that foreign worker visas stimulate the U.S. economy and are necessary to fill gaps in the U.S. workforce.<sup>228</sup> By contrast, the Washington Alliance of Technology Workers takes the position that foreign labor lowers wages and comes at the cost of U.S. jobs.<sup>229</sup>

In the context of modeling, empirical evidence indicates some modeling positions cannot easily be filled by any one of a number of interchangeable U.S. females. For instance, consider Forbes' 2010 ranking of top modeling

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impact on the neighborhood” of just one season of New York Fashion Week (there are two a year) was \$20.9 million. Eric Wilson, *Fashion Week's Impact, by the Numbers*, ON THE RUNWAY (Sept. 6, 2011, 3:35 PM), <http://runway.blogs.nytimes.com/2011/09/06/fashion-weeks-impact-by-the-numbers/>. “On an annual basis, the study estimated that impact to be \$41 million, including \$6 million spent on hotels, \$7 million in stores and \$9 million in restaurants.” *Id.*; Press Release, Mercedes-Benz Fashion Week, Fordham Report: Mercedes Benz Fashion Week Generates Over \$40 Million in Annual Economic Activity for Lincoln Square Community (Sept. 6, 2011), available at <http://www.mbfashionweek.com/FILE/20204.pdf>.

<sup>223</sup> Department of Homeland Security, Table 25, Non-immigrant Admissions by Class of Admission: Fiscal Years 2001–2010, available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/table25d.xls> (39.38 million nonimmigrant entries in 2008).

<sup>224</sup> Steven T. Dennis, *Baby Steps Used for Immigration Bills*, ROLL CALL (May 20, 2008 12:00 AM), [http://www.rollcall.com/issues/53\\_140/-25254-1.html](http://www.rollcall.com/issues/53_140/-25254-1.html).

<sup>225</sup> Lubbes, *supra* note 193; Piazza & Saltonstall, *supra* note 200.

<sup>226</sup> See Dennis, *supra* note 224.

<sup>227</sup> See, e.g., Constantine S. Potamianos, *The Temporary Admission of Skilled Workers to the United States Under the H-1B Program: Economic Boon or Domestic Work Force Scourge?*, 11 GEO. IMMIGR. L.J. 789, 789 (1997).

<sup>228</sup> See, e.g., Sam Goldfarb, *Immigration cap is taking “best, brightest,” Gates says*, SEATTLE TIMES, Mar. 8, 2007, at E1.

<sup>229</sup> *Id.*

earners:<sup>230</sup> only one of the bunch is U.S.-born, and she is ranked 10th out of 10.<sup>231</sup>

Moreover, as the work of sociologist Ashley Mears uncovers, it is not easy to answer the question of “how, among the thousands of wannabe models worldwide, is any one 14 year-old able to rise from the pack?”<sup>232</sup> The answer lies, she says, in a peculiar form of groupthink tied to the sociality of established players and the specific mechanics of the hiring process.<sup>233</sup> It is an unpredictable process hinging on “aesthetic preference, unknown consumer demand, and quick turnover.”<sup>234</sup> How could one theoretically direct such a process toward creating more modeling stars among Americans?

The fact is, the fashion industry is all about change and the next big thing. Hence, the ubiquitous what’s-hot-what’s-not fashion analysis.<sup>235</sup> As a result, inability to bring the model *de jour* to the U.S. would not result in the use of a U.S. model substitute. Rather, it would result in moving a photo shoot overseas<sup>236</sup> where, if needed, “New York’s skyline or California’s hills can be easily photoshopped in later.”<sup>237</sup>

## VI. CHANGING THE FACE OF THE FLAWLESS GIRL

So, what should U.S. immigration law do with respect to fashion models? It seems to me there are three discrete categories of fashion models who should be allowed visas into the United States, and the visa structure should treat all three separately. First, there is the category of über famous models, ones with long-lasting celebrity such as Gisele Bündchen, whose international star status has earned them the ability to be wherever work takes them around the world. Second, there is the category of hot-right-now it-girls, who embody a signature look for the moment, one that photographers and producers believe they cannot do without. Third, there is the category of foreign workers with the right size, height, and looks to do the job on runways and in work-a-day shoots.

The first category of models—the ultra-elite celebrimodels—are currently covered adequately by the O visa. No change is needed in the law for them. For the second and third categories, however, a careful look at the law and the realities surrounding the modeling industry suggest that rethinking visas in these areas would be beneficial along axes of economics, public health, and individual integrity.

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<sup>230</sup> Steven Bertoni & Keren Blankfeld, *The World’s Top-Earning Models*, FORBES.COM (May 13, 2010, 9:00 AM), <http://www.forbes.com/2010/05/12/top-earning-models-business-entertainment-models.html>.

<sup>231</sup> *Id.* The 10th ranked earner is American-born Carolyn Murphy. Heidi Klum, ranked number 2, is a naturalized U.S. citizen, but there is no question that her fame far preceded her USC status.

<sup>232</sup> Mears, *supra* note 166.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> See, e.g., *So Now! So Over!*, PEOPLE STYLE WATCH, Feb. 2007, at 62.

<sup>236</sup> H.R. REP. NO. 110-699, at 4 (2008); Emily Heil & Anna Palmer, *Heard on the Hill*, ROLL CALL, Nov. 12, 2007.

<sup>237</sup> *Beauty and the Geek*, *supra* note 148.

A. *The P(x) Visa for Models of the Moment*

The P visa currently fills a place in the regulatory structure between the rare air of O-visa nonpareil and the demand-meeting proletarians brought in under the H1B classification. Athletes with an “internationally recognized level of performance” are able to gain P visas,<sup>238</sup> as are entertainers who are “recognized internationally as being outstanding in the discipline for a sustained and substantial period of time.”<sup>239</sup>

Just as there are athletes and entertainers who are worth allowing into the United States, but who aren’t exactly O-visa material, so too are there models who, while not interchangeable with other workers, are nonetheless not so wildly famous as to be in the O-visa category. In particular, this in-between status fits the kind of model who has achieved a niche-fame among photographers and ad agencies. Coco Rocha, described above, is an example. When Rocha was hot, people putting together photo shoots were not amenable to substitutes. If a person such as Rocha during her halcyon days is not admitted into the United States, her employment will happen—just somewhere else. Thus, from an economic standpoint, it makes sense for such models-of-the-moment to be admitted into the United States without numerical limit. The economic realities seem to be that no American jobs are lost with such an entry, since an American model would not be hired as a substitute. But American jobs will be lost with the denial of a visa, since makeup artists, hairstylists, assistants, and various production workers lose employment opportunities if the shoot moves offshore.

I propose that fashion models thus receive a specifically tailored subcategory of P visa. This P(x) visa would be available to a “model who has a particular, individualized demand on account of international recognition.”

B. *An H1(x) Visa for Artisan Models*

The third category of models who should be, and currently are, given admittance to the United States are regular fashion models who, while without fame or substantial recognition, nonetheless have the right attributes of height, weight, and beauty to fill the jobs created in runway shows and ordinary editorial fashion shoots. We can call these models “artisans”—they have a degree of skill and talent that sets them apart from the general population, but they form a semi-homogeneous group where individuals are ready substitutes for one another. This is the category of workers who have historically come into the country under an H1B visa. While there are legitimate arguments for allowing models in this category into the United States in greater numbers than has previously been the case, especially when models have competed with tech workers for sometimes scarce visa slots, there are reasons to be more circumspect in opening the spigot to indiscriminate granting of these visas. One reason is the desire to preserve employment opportunities for U.S. citizens—the perennial rationale cited in immigration policy. But I see another, more urgent set of concerns, ones regarding public health and individual safety and dignity.

<sup>238</sup> INA §§ 101(a)(15)(P)(i)(a), 214(c)(4)(A).

<sup>239</sup> *Id.* §§ 101(a)(15)(P)(i)(b), 214(c)(4)(B).

I propose that artisan models be reallocated to an H1(x) visa category, one without numerical limitations. They would continue to be defined by “distinguished merit and ability,” yet the regulations implementing the statute and defining “ability” would be changed to add certain weight and age requirements. These changes have the potential to curb abuses of models themselves and to curb harm accruing in the general public health.

### 1. Size

There is no question that the modeling industry currently survives on overly thin models. The body mass index (BMI) for most models—the relationship between their height and weight—places them in an “underweight” or even definitionally anorexic category.<sup>240</sup> The size of models has adverse consequences for the models themselves, as well as those who view the models in the pages of magazines, billboards, and websites.<sup>241</sup> I propose addressing these problems with the foreign model visa itself, limiting the visa’s availability to models with a normal, as opposed to underweight, BMI. Forcing foreign fashion models to meet healthier standards should have positive spillover effects on the U.S. modeling market, since it would stop U.S. models from having to compete with foreign models to achieve unhealthy weights. The move might even empower U.S. models to take a stand against their agencies’ dieting expectations.<sup>242</sup>

Models are actively pressured by their agents and prospective clients to maintain an underweight status.<sup>243</sup> Model Amy Lemons was told by her agent to eat one rice cake a day.<sup>244</sup> If that didn’t work, she was told, she should limit herself to half a rice cake.<sup>245</sup> Lemons, who is now an outspoken advocate for change on model health and safety issues, has recounted seeing models dip cotton balls into juice and consume them backstage at runway shows in an effort to maintain weight.<sup>246</sup>

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<sup>240</sup> As discussed *supra* at note 5, any female between 5’9” to 6” weighing 105–115 would have a BMI of 14–17. And a BMI of less than 17.5 is an indicator of anorexia.

<sup>241</sup> See, e.g., Sied, *supra* note 18, at 6–11; Shaw & Shaw, *supra* note 18, at 44–54; Nanci Hellmich, *supra* note 18.

<sup>242</sup> The idea of empowering models is not a new one. Recently, Sara Ziff joined forces with Fordham University’s Fashion Law Institute to form a nonprofit group, the Model Alliance, “to give models a voice in the workplace and to organize for better working conditions,” including conditions related to diet and weight. Sara Ziff *Working to Form a Model Alliance*, THE HUFFINGTON POST (May 25, 2011, 7:20 PM), [http://www.huffingtonpost.com/2010/12/22/sara-ziff-model-alliance\\_n\\_800152.html](http://www.huffingtonpost.com/2010/12/22/sara-ziff-model-alliance_n_800152.html); see also Ashley Mears, Op-Ed, *Poor Models. Seriously.*, N.Y. TIMES (Sept. 14, 2011), <http://www.nytimes.com/2011/09/15/opinion/its-fashion-week-poor-models.html>.

<sup>243</sup> Interestingly, France has proposed making it a crime, punishable by up to three years in prison and a hefty fine, to encourage “excessive thinness” and avoiding nutrition for prolonged periods. Susan Sachs, *French Bill Targets Those Who Glamorize Thinness*, GLOBE & MAIL, April 16, 2008, at A3.

<sup>244</sup> Ziff, *Part Three*, *supra* note 39.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*; see also Chris Wilson, *Inside the Mind of a Fashion Week Model*, GAWKER (Sept. 10, 2009 2:19 PM), <http://gawker.com/5356631/inside-the-mind-of-a-fashion-week-model> (“Karolina . . . used to starve herself so much that she’d have dreams of chasing pizzas.”); *Adriana Lima Explains Extreme Pre-Victoria’s Secret Show Diet*, PEOPLE, Nov. 21, 2011, at

French model Isabelle Caro, anorexic from the age of 13, was told by her agency to lose 20 pounds.<sup>247</sup> At 24, following the death of a young Brazilian model due to anorexia,<sup>248</sup> Caro posed nude for an anti-anorexia campaign to show her horribly emaciated frame.<sup>249</sup> Despite her conscious understanding of her condition, she later died from anorexia complications.<sup>250</sup>

The health consequences for models are substantial. Short of death, anorexia can affect fertility, bone growth, bone density, dentition, cardiac function, and brain function.<sup>251</sup> And model thinness isn't just destructive for the models. Psychiatrists and social scientists have consistently concluded that overly thin models play a role in the public health problems of anorexia and bulimia.<sup>252</sup> Women and girls see models as the idealized vision of contemporary beauty and want to mimic that ideal, something that can only be accomplished through deprivation—as the models themselves can attest to.<sup>253</sup> In the words of supermodel Kate Moss, “Nothing tastes as good as skinny feels.”<sup>254</sup>

Organizers of the 2006 Madrid Fashion Week responded to this cycle of deprivation by instituting the “first ever ban on overly thin models.”<sup>255</sup> They stated that models could participate in the show only if they had a BMI of 18.5 (the lowest “normal” BMI number) or greater.<sup>256</sup> With this new policy, almost 40 percent of the models who had been pegged to work in the show were barred, including Spain's own most famous model, Esther Cañadas.<sup>257</sup>

Italy soon followed the Spain model, with organizers of Milan Fashion Week requiring models to have a BMI of at least 18.5.<sup>258</sup> In a subsequent

28 (“Nine days before [NYC's Victoria's Secret fashion show], she stops eating solids and gets by on protein shakes, and 12 hours before, she stops drinking liquids entirely.”).

<sup>247</sup> Jerome Taylor, *Isabelle Caro, the Face of Anorexia, Dies at 28*, INDEPENDENT (London), Dec. 31, 2010. Coco Rocha, discussed *supra* at notes 166–68 and accompanying text, had just 108 pounds on her 5'10" frame when she was told to lose weight. Amy DiLuna, *At Size 4, Fashion Week Model Coco Rocha, 21, is Latest of Many Women Considered Fat by Industry*, N.Y. DAILY NEWS, Feb. 16, 2010.

<sup>248</sup> Larry Rohter, *Burst of High-Profile Anorexia Deaths Unsettles Brazil*, N.Y. TIMES, Dec. 30, 2006, at A4.

<sup>249</sup> Taylor, *supra* note 247; *see also* “No Anorexia” Ad Campaign image. The image itself can be found here: <http://images.elephantjournal.com/wp-content/uploads/2011/02/isabelle-caro.jpg> (last visited Feb. 9, 2012).

<sup>250</sup> Taylor, *supra* note 247.

<sup>251</sup> Norman P. Spack, *Medical Complications of Anorexia Nervosa and Bulimia*, in THEORY AND TREATMENT OF ANOREXIA NERVOSA AND BULIMIA: BIOMEDICAL, SOCIOCULTURAL, AND PSYCHOLOGICAL PERSPECTIVES 5–19 (Steven Wiley Emmett ed. 1985); *see also Health Consequences of Eating Disorders*, NATIONALEATINGDISORDERS.ORG, <http://www.nationaleatingdisorders.org/nedaDir/files/documents/handouts/HlthCons.pdf> (last visited Mar. 23, 2012).

<sup>252</sup> *See, e.g.*, Seid, *supra* note 18, at 9; Shaw & Shaw, *supra* note 18, at 44–54; Hellmich, *supra* note 18.

<sup>253</sup> *See, e.g.*, Jean Kilbourne, *Still Killing Us Softly: Advertising and the Obsession with Thinness*, in FEMINIST PERSPECTIVES ON EATING DISORDERS, *supra* note 18, at 395, 398.

<sup>254</sup> DiLuna, *supra* note 247 (internal quotation marks omitted).

<sup>255</sup> Barry, *supra* note 7 at 197.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Sachs, *supra* note 243.

move, they added a requirement that models obtain health certificates showing that they don't suffer from eating disorders.<sup>259</sup>

The Madrid and Milan examples are good ones. The U.S. immigration law should follow suit. The H1(x) visa for fashion models should require a BMI of 18.5 or greater. One of the principal benefits of using a BMI indicator is that it turns exclusively on height and weight. Thus, it is administratively simple both for applicants to establish and for the USCIS to meter. While more in-depth medical analysis could be used to evaluate a model's physical and psychological health with heightened accuracy,<sup>260</sup> BMI is a convenient and practical proxy.

Adding a BMI requirement to the fashion model visa would be a radical change from how those visas have been handled to date. But such a requirement is hardly without precedent in immigration law. The United States has a long history of excluding immigrants and nonimmigrants alike on health-related grounds.<sup>261</sup> At present, the law excludes those who have a "communicable disease of public health significance"<sup>262</sup> as well as those with a "physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to . . . welfare of the alien or others."<sup>263</sup> While people may debate whether anorexia falls into the first category,<sup>264</sup> there is no doubt that it falls within the second. As a result, including a BMI requirement for foreign models can be viewed as a straightforward extension of current health-related exclusion grounds.

It is easy to anticipate the arguments that would be lodged against such a proposal. They would be the same responses that the industry has already made to the withering criticism over the size of models.

One objection would be that increasing the variety of sizes among models would create an administrative nightmare for producers of runway shows. Currently, runway models almost uniformly fit into clothes sized to measurements of 34-24-34.<sup>265</sup> The sameness of the models' sizing has multiple benefits. For one, it eliminates, or at least reduces, the need to hand-tailor outfits to individual models. One fashion show producer put it this way: "I have over *forty* shows to oversee. I work with *hundreds* of designers. I don't have time to relay

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<sup>259</sup> *Id.* In contrast, Canada and the U.K. have chosen not to use BMI indicators as gateways to the catwalk, "saying the index was not necessarily the best indicator of good health." *Toronto Fashion Week Organizers Refuse BMI Restrictions*, CBC NEWS (Can.) (Oct. 26, 2007), <http://www.cbc.ca/news/health/story/2007/10/26/toronto-fashion.html>.

<sup>260</sup> This in-depth analysis was considered and rejected by the British Fashion Council. *See MODEL HEALTH CERTIFICATES FEASIBILITY STUDY, FINAL REPORT TO THE BRITISH FASHION COUNCIL*, 15 AUGUST 2008.

<sup>261</sup> *See, e.g.*, Mark C. Weber, *Opening the Golden Door: Disability and the Law of Immigration*, 8 J. GENDER RACE & JUST. 153, 155-57 (2004).

<sup>262</sup> INA § 212(a)(1)(A)(i).

<sup>263</sup> *Id.* § 212(a)(1)(A)(iii)(I).

<sup>264</sup> At present, this category is limited to active tuberculosis, infectious-stage syphilis, chancroid, gonorrhea, granuloma inguinale, leprosy, and lymphogranuloma venereum. *See Form I-693 Report of Medical Examination and Vaccination Record*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/files/form/i-693.pdf> (last visited Mar. 23, 2012).

<sup>265</sup> BARRY, *supra* note 7, at 152.

different sizes to *each one* and they *certainly* don't have time to hand tailor each outfit."<sup>266</sup>

A second benefit to uniform model sizing concerns the focus of fashion. Models in runway shows are the backdrop to the main event of the fashion itself. The sameness of the models' physiques coupled with the alteration of their hair into uniform or only subtly varying styles ensures that the models become "hazy and identical," serving as "walking hangers," leaving the clothing front and center.<sup>267</sup> Having a mish-mash of women of varying shapes and sizes would, the argument goes, take the focus off of the clothes and result in a show without a "'high-fashion' feel."<sup>268</sup>

Similar complaints abound in the print context. Magazines note that they are constrained by the sample sizes they receive from designers.<sup>269</sup> A model who can't fit into such a sample thus wouldn't be able to do the job of modeling the clothes on hand. Moreover, by using a "normal" model, the magazine would lose out on the allure, prestige, and fantasy created by using a flawless girl. And those lost intangibles would quickly translate into hard currency shortfalls in advertising dollars.<sup>270</sup>

The concerns of the fashion industry are not trivial, but there are indications that using models with a BMI of 18.5 or greater would not have the catastrophic consequences supposed. Take the uniformity of the runway. It would still be possible to achieve uniformity by hiring models with near-uniform measurements out of the category of models who have a healthy BMI. The standard measurements would increase, but there would be no concomitant requirement to hire outside of the new norm. Thus, runway versions of clothing could be created to a new standard without the problems of either unnecessary tailoring or loss of a uniform look. Indeed, the Council of Fashion Designers of America has already considered whether to raise the current sample size from a 0 to a 4.<sup>271</sup>

The concerns regarding print modeling are even easier to address. For one, if sample sizes increase for runway shows, the sizes sent to magazines will also increase. But more to the point, magazine models are routinely pinned, stitched, or just plain taped into the clothes they are photographed in.<sup>272</sup> Pinning happens, in part, because there is a general lack of uniformity in sizing throughout the fashion industry,<sup>273</sup> and more frequently because designers send sample

<sup>266</sup> *Id.* at 151 (internal quotation marks omitted).

<sup>267</sup> *Id.* at 86–87.

<sup>268</sup> *Id.* at 152.

<sup>269</sup> *Id.* at 154.

<sup>270</sup> *Id.*

<sup>271</sup> DiLuna, *supra* note 247.

<sup>272</sup> See PICTURE ME, *supra* note 5, at 1:15:05; *America's Next Top Model: Natural Beauty* (CW television broadcast Oct. 1, 2008); TINA FEY, BOSSYPANTS 151 (2011) (discussing how her magazine looks have been held together "with a thick piece of white elastic and some safety pins. Don't ever feel inadequate when you look at magazines. Just remember that every person you see on a cover has a bra and underwear hanging out a gaping hole in the back. Everyone. Heidi Klum, the Olsen Twins, David Beckham, everybody."); MEARS, *supra* note 48, at 100 (discussing photo shoot where too-tight pants were cut open and taped to her calves).

<sup>273</sup> TIM GUNN WITH KATE MOLONEY, TIM GUNN: A GUIDE TO QUALITY, TASTE, & STYLE 38–42 (2007).

clothes to magazines that are smaller than even the runway norm.<sup>274</sup> Given the prevalence of pinning, there is little to suggest that working with a model of a healthy BMI would in any way interfere with the ability of magazines to showcase the latest styles.

The final and most complex objection centers on the intangibilities of high fashion—whether a healthy model can sufficiently project the allure and prestige necessary to drive successful advertising campaigns. It is this conundrum that inspired the title for this Article, a reference to an episode of a children’s television show, *Phineas and Ferb*.

In the show, a teenage girl named Candace goes to an open casting event for her favorite cosmetics company, Flawless Girl, only to be turned away because she is “two inches too ugly.”<sup>275</sup> Where does Candace find consolation after this setback? In an armful of those Flawless Girl cosmetic products. When a growth elixir causes her to shoot up to 50 feet tall, Candace is actively pursued by the cosmetics doyen that earlier spurned her, who is thrilled to note that girls could never live up to the expectations set by a 50-foot model. Candace rejects the new offer to represent Flawless Girl, which she astutely notes is nothing more than a plot to make money by encouraging people to feel bad about themselves.

It is not possible to say with certainty that increasing the BMI of models would have no effect on the allure and prestige of fashion industry. It is, after all, a deliberate effort to make the idealized image of the model more, not less, attainable. And attainable in a healthier way. Nonetheless, females in a healthy BMI range who meet all of the other criteria modeling agencies look for<sup>276</sup> would continue to be rarities. They would still be significantly thinner than the average woman and thus theoretically capable of driving successful ad campaigns.

Moreover, there is historical evidence to support the concept that models with a healthy BMI can drive sales. After all, remember Cindy Crawford, Claudia Schiffer, and Elle MacPherson? If they showed up at an agency today looking like they did in their heyday, they would be told to lose weight.<sup>277</sup> But they certainly sold countless magazines, clothing, and products.

Adding a BMI requirement to the fashion model visa has the potential to change the overly-thin face of the modeling industry, and, in turn, to benefit not only models’ health but also the health of fashion consumers. An additional requirement could help cement these potential benefits: one tied to age.

## 2. Age

The modeling industry not only relies on thin models, it relies on *young* thin models. The connection between size and age is direct—depravation may

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<sup>274</sup> See Sophie Borland & Tamara Abraham, *Vogue Editor’s Attack on Fashion Houses that Force Magazines to Use Size-Zero Models*, MAILONLINE.COM (June 13, 2009), <http://www.dailymail.co.uk/femail/article-1192751/Vogue-editor-Alexandra-Shulman-attacks-fashion-houses-force-magazines-use-size-zero-models.html>.

<sup>275</sup> *Phineas and Ferb*, *supra* note 1.

<sup>276</sup> See *supra* notes 7–15 and accompanying text.

<sup>277</sup> *The O’Reilly Factor: Are Models Too Thin?* (Fox television broadcast Sept. 21, 2006) (interview with Robin Hazelwood).

not be required for a 13-year-old to maintain the traditional underweight form of today's model, but it is required for a 20-year-old. Moreover, the problems facing young models are myriad, including forgone education and sexual exploitation. I propose addressing these concerns with additional requirements for foreign model visas based on age, limiting the visa to those 18 or older.

Many models begin working at 14.<sup>278</sup> Even 12 and 13-year-olds are not beyond the pale.<sup>279</sup> The average age of the working model may rest in the 17-to-19 range, while those working into their 20s are "old."<sup>280</sup> As a result, models who can lie about their age often do so, maintaining, as one said, the age of "18 up until I was 20 and a half."<sup>281</sup>

Models under the age of 17 are often encouraged by their agencies to drop out of school, having been told that their small window of modeling time will pass before they complete their education.<sup>282</sup> For those who try to keep up with their studies while traveling around the world, it is often a losing battle.<sup>283</sup>

The age-education dilemma appears to fall disproportionately on foreign fashion models. As one American said:

I finished high school. I find a lot of the European girls don't, but I really wanted to get my education out of the way first. Um, I find that it's a lot of the Eastern European girls [who don't complete high school], and they just get picked up when [they're] really young, and the agencies tell you it's best to do it when you're young, which it is. But they don't prioritize school so much when you're in Europe, whereas I feel like America puts so much importance on it.<sup>284</sup>

At least part of the explanation for the U.S.-Eastern European educational divide is straightforward. Many Eastern-European models are plucked from relative poverty. Sara Ziff's documentary *Picture Me* is rife with such examples. Katia Kokoreva of Russia talked about how her parents made roughly \$300 a month, but as a model, she could make \$80 for one day of work.<sup>285</sup> Diana Dandoe talked about her ability to purchase shoes that would amount to one or two months' salary back in her home country of Romania.<sup>286</sup> Similarly, Tanya D. of Belarus talked about how modeling allowed her to escape a life where her whole family lived in one small room.<sup>287</sup>

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<sup>278</sup> Sara Ziff started at 14. Ziff Part Two, *supra* note 220, at 2:10; *see also* PICTURE ME, *supra* note 5, at 1:00:00 (Tanya D.). Many of the aspiring models featured on the E! Network's new show *Scouted* are equally young. *See, e.g., Scouted: Gillian & Jennifer* (E! television broadcast Nov. 28, 2011) (following 15-year-old Gillian on her quest to be represented by NYC modeling agency One Management).

<sup>279</sup> Heather Marks was scouted at 12. PICTURE ME, *supra* note 5, at 57:01. Amy Lemons started at 13. Ziff Part Three, *supra* note 39, at 1:20. In PICTURE ME, one model discussed a 12-year-old working the Calvin Klein runway in Paris who was "so freaking innocent. She was like coloring in books backstage." PICTURE ME, *supra* note 5, at 57:05.

<sup>280</sup> Ziff Part One, *supra* note 54, at 1:20 (Barbora).

<sup>281</sup> *Id.* at 1:13 (Siri Tollerød).

<sup>282</sup> PICTURE ME, *supra* note 5, at 58:41.

<sup>283</sup> *Id.* at 57:01 (Heather Marks).

<sup>284</sup> Ziff Part One, *supra* note 54, at 2:42 (Ali).

<sup>285</sup> PICTURE ME, *supra* note 5, at 13:55.

<sup>286</sup> *Id.* at 13:53.

<sup>287</sup> *Id.*

Despite the short-term financial gains that may result from choosing modeling over education, the long-term consequences can be dire. Katia Kokoreva talked about the end of her modeling career in these terms:

Ok, I'm 25. I never study anything. I don't have my own house. All I have is, like, these old pictures and [a] full, like, closet full of clothes, expensive clothes, that you either get as a present from designers or you buy it on your own, like shoes. . . . But it's not really what you need in life.<sup>288</sup>

It is very troubling that so many young women, and foreign women in particular, are being encouraged to trade education in for a shot at the “winner-take all market” where ultimately only “a handful of people reap very lucrative and visible rewards while the bulk of contestants barely scrape by meager livings before they fade into more stable and far less glamorous careers.”<sup>289</sup> One possible solution to the problem would be for the United States to predicate foreign model visas on completion of a secondary education.

Such a requirement would not be immune from criticism. After all, not every country provides free secondary education in the same way that the United States does. While valid, this criticism is not insurmountable. It would be possible for the USCIS to create a schedule of countries with sliding scale recommendations on educational requirements. For example, models from the U.K. or Germany might be required to complete secondary education while models from Somalia might not be subject to the same restriction. Yet the creation and maintenance of such a scale does face fairness and feasibility problems.

More concerning would be the disparate impact such a regulation would have on poor models. It would effectively eliminate what amounts to their only real option for personal and familial betterment.

Age, it turns out, is a good substitute for education without the baggage of administrative difficulties or cultural judgment. It's already a restriction in some locations—for example, models must be 16 or older to work in Paris.<sup>290</sup> Closer to home, states often regulate the age at which one can work. And an age restriction on model visas would have the unique potential to benefit foreign as well as domestic models.

Take size. If, as the above anecdotal information suggests, American models are willing to put off their careers until after completing high school, an age limit in the visa category would ensure that they would not be competing for modeling work with pre-pubescent foreigners. This has tremendous potential to help drive up the baseline BMI for all models. It is very difficult for an 18-year-old to look the same as a 12-to-14-year-old without deprivation.<sup>291</sup> But if the 18-year-old American is competing against an 18-year-old foreigner with a required BMI of over 18.5, it is just possible that the end result will be an increased BMI across the modeling industry. American designer Michael Kors

<sup>288</sup> *Id.* at 109:44.

<sup>289</sup> Mears, *supra* note 166.

<sup>290</sup> E-mail from Ashley Mears, Assistant Professor, Boston University, to Kit Johnson, Visiting Assistant Professor of Law, University of North Dakota (May 23, 2011) (on file with author); *Job d'été*, AUJOURDHUI.FR, <http://etudiant.aujourd'hui.fr/etudiant/info/job-d-ete.html> (last visited Mar. 23, 2012) (“Il est légal de travailler à partir de 16 ans.”).

<sup>291</sup> PICTURE ME, *supra* note 5, at 56:00; DDGD, *supra* note 5.

has already acknowledged this age-size connection, pledging, at a Harvard University panel called “Health Matters: Weight and Wellness in the World of Fashion,” not to hire models under the age of 16.<sup>292</sup>

An age requirement might also help tackle the rampant sexual abuse of models. Models are routinely placed in compromising situations. Consider fashion shows—models change backstage in the presence of hundreds of onlookers, including photographers who do not hesitate to snap shots of the models in various stages of undress.<sup>293</sup> Models also report a range of physical attacks and coerced sexual contact, often at the hands of their photographers.<sup>294</sup> An age limit might not be the ideal solution to the sexual and power dynamics of modeling, but it would certainly work to keep underage models from experiencing this type of abuse in the United States.

Age is, of course, an imperfect requirement. It would in no way prevent the fashion industry from hiring underage American models, nor would it prevent young foreign models from entering the international modeling market. And it might even frustrate U.S. fashion shows and fashion shoots intent on using the next “it” model if she is underage,<sup>295</sup> effectively nullifying the economic benefits inherent in having a fashion model visa that is less susceptible to numerical vagaries. But the question to ask is whether an age limitation, coupled with a size requirement, might have such far-reaching beneficial effects so as to be worth these particular challenges. I believe it does.

## VII. CONCLUSION

Fashion models are more than just pretty faces. They are a valuable part of the American workforce, and the visas available to foreign fashion models merit serious academic consideration. I have endeavored to provide that.

I conclude that the current visa system works for the most famous of foreign fashion models, those eligible for O visas. In other ways, however, the visa system is lacking. The H1B visa is inadequate to deal with the latest it-girl models, and the H1B fails to realize its full potential with regard to artisan models, who lack such particularized demand.

A new P(x) visa is needed for “models of the moment”—those riding meteoric trendiness, but who do not have the requisite level of renown required for an O visa. Such a P(x) visa would not be subject to a quota. Instead, the visa would have the threshold limitation of being available only to models of “particular, individualized demand on account of international recognition.” This

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<sup>292</sup> DDGD, *supra* note 5.

<sup>293</sup> PICTURE ME, *supra* note 5, at 45:00; *see also* Ziff Part Two, *supra* note 220, at 3:36 (Anja Rubik).

<sup>294</sup> PICTURE ME, *supra* note 5, at 22:43 (Cameron Russell); *id.* at 36:60 (Sena Cech detailing story of a famous photographer who, during a casting call, asked her to get naked, got naked himself, and asked his assistant to take photographs of her holding his penis).

<sup>295</sup> Indeed, in 2011 the Council of Fashion Designers of America asked its members to pledge to hire only models 16 and older for its fashion shows. Jenna Sauers, *Another Underage Model Breaks the Rules, Slips On to the Catwalk*, JEZEBEL (Sept. 23, 2011 4:30 PM), <http://jezebel.com/5843336/rules-are-violated-and-another-underage-girl-slips-on-to-the-catwalk?popular=true>. Despite the pledge, a 14-year-old model (and the then-face of Prada) was booked by Marc Jacobs for his runway show. *Id.*

would allow the United States to capture the economic benefits from photo shoots centered around a particular it-girl model—production activity that would, absent a model visa, be moved overseas.

As for more ordinary “artisan models,” I conclude that there is an enormous, unrealized potential to benefit the individual health and safety of U.S. and foreign models, and the public health generally, by tweaking the regulations that govern this visa. I propose adding age and height/weight-ratio restrictions as part of the definition of “ability” to work as a foreign model in the United States. These changes, interrupting the push for underweight models, could change the face of the mythic flawless girl, forcing the fashion industry to present, literally, a picture of health.

To all the world, the fashion industry carries a mall-haul of glamour and prestige. As it comes torn out of the pages of a magazine, it seems to float on high heels striding across a shiny runway in the center of the room. But a more perspicacious lens reveals an industry that stands upon the systematic of exploitation of minors and pushes women and girls to teeter on the edge of malnourishment in order to retain their places in front of the softboxes and strobes. We should use the potential inherent in the visa system to better lives within our borders and without.