EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LEGISLATIVE REFERENCE DIVISION

ECONOMICS, SCIENCE, AND GENERAL GOVERNMENT BRANCH

TO: Julie Fernandes

FROM: INGRID SCHROEDER
phone: (202) 395-3883
FAX: (202) 395-3109

DATE: 4/28/98

NUMBER OF PAGES (including this cover sheet): 8

COMMENTS:

Additional cmts on H1B visas - more cmts expected

*I also emailed a bunch of cmts to you

Please call (202) 395-3454 to report any difficulties with transmission of this fax.

Department of Commerce View on the "Administration Offer" on H1-B Nonimmigrant Visa Program Reforms

The Department of Commerce has submitted on several occasions proposed language to the NEC/DPC interagency working group which has developed the "Administration Offer" on H1-B Nonimmigrant Visa Program Reforms. We are disappointed that our major concerns were not adequately addressed in the LRM. We do not wish to re-argue these issues through the OMB clearance process. While we are not going to hold up the "Administration Offer", we do not support it.

LRM ID: IM8309 **SUBJECT: H1B Temporary Immigrant Visa Program Reforms**

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

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(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: Ingrid M. Schroeder Phone: 395-3883 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: 4/28/98 (Date)
Jane Taylor (Name)
HHS (Agency)
202-690-7723 (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

____ Concur

____ No Objection

____ No Comment

____ See proposed edits on pages ____

____ Other: ____

✓ FAX RETURN of 1 pages, attached to this response sheet

Attached are comments we received from NIH. HHS cannot give final clearance on the draft proposal as we have not heard from all reviewers.

NIH has reviewed the draft proposal of the Administration intended for use during discussion with Members of Congress concerning reforming the H-1B Temporary Immigrant Visa Program. We offer the following comments.

* Section I(a)(E)-This section does not acknowledge legitimate use of the H-1B visa for the general purpose of bringing the "best and brightest" scientists to the U.S. to pursue international research collaborations for purely scientific reasons. We suggest that (E)(II) be reworded as follows:

  "...to the United States to participate in a cooperative scientific activity funded by the Federal Government and the alien's Government."

* Section I(a)(E)(I)(A)(ii)-This section would require "offering meaningful monetary incentives" to U.S. workers such as "paying above the prevailing wage, paying bonuses, or providing stock options." It may not be feasible for the U.S. government to offer such monetary incentives under the regular pay schedule.

* Section I(a)(F)(II)-We have previously communicated a concern about the interpretation of "laid off" in cases where 1) U.S. postdoctoral researchers leave at the conclusion of their term of employment; or 2) U.S. researchers leave an institution as a result of termination of a grant. We suggest adding the following to this subparagraph:

  "The term 'laid off' does not apply to loss of employment due to expiration of a research grant or pre-established term of employment."

* Section VI-This section establishes a fee for each position for which an application is filed for certification of a nonimmigrant temporary worker. This fee, not to exceed $250 for the next three years, would be paid to the Department of Labor for training of U.S. workers. We believe that it would not be in the taxpayers' interest for Federal agencies to pay such a fee, particularly since Federal agencies are not included on the list of entities defined in section VII (1) as eligible to receive any of such funds collected for the purposes of training its own U.S. workers. In addition, it does not seem appropriate to equate institutions of higher learning and private industry in this regard. We suggest that Federal agencies, colleges and universities be exempt from this fee and propose adding a section (i) as follows:

  "(i) Institutions whose primary purpose is education and the creation of knowledge shall be exempt from such fees."

* Section VII (a) and (g)(3)-These sections develop a training program and establish a National Alliance for High-Technology Skills that will recommend strategies for training U.S. workers. We note that the field of scientific research is included neither in making grants for the purpose of training nor as part of the Alliance. We suggest the inclusion of such expertise in these efforts by including science agencies among those whom the Secretary of Labor will consult regarding the training grants and membership of the Alliance.

We hope these comments are useful in developing consensus on the Administration position with regard to this issue.

LRM ID: IMS309 **SUBJECT:** H1B Temporary Immigrant Visa Program Reforms

**RESPONSE TO
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MEMORANDUM**

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TO: Ingrid M. Schroeder Phone: 395-3883 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: 4/28/98 (Date)
L. SOMERVILLE (Name)
ED (Agency)
401-8313 (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

X Other: Cmts noted on pp. attached

_____ FAX RETURN of _____ pages, attached to this response sheet

(E) Notwithstanding any other provision of law, all fees, as described in this paragraph as are designated by the Secretary of Labor in regulations shall be deposited as offsetting receipts into a separate account entitled "Temporary Worker Fee Account" in the Treasury of the United States. All deposits into the "Temporary Worker Fee Account" shall remain available until expended by the Secretary to reimburse any appropriation for expenses related to activities described in subparagraph (B)."

VII. Training

At the appropriate place, insert the following new section:

SEC. ___. REGIONAL AND INDUSTRY SPECIAL SKILLS TRAINING GRANTS.

(a) IN GENERAL.-- Amounts available for carrying out this section from the Temporary Worker Fee Account under paragraph (3)(A) of section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)) shall be used in accordance with the provisions of this section. From such amounts, the Secretary of Labor, in consultation with the Secretary of Commerce and the Secretary of Education, shall make competitive grants to eligible entities described in subsection (b), in order to enhance the capabilities of industries with significant skill needs to utilize the labor market in meeting their needs more effectively through--

(1) improving the job skills of American workers as necessary for employment in specific industries and occupations with significant skill needs;

(2) assessing and developing strategies to address significant skills needs at the local, State, regional, and national levels; and

~~(3) developing~~ regional skills alliances to facilitate coordination of activities at the local, State, and ~~regional levels in~~ developing strategies to meet such needs.

Gobbledy-gook, pure and simple

(b) ELIGIBLE ENTITIES.

(1) IN GENERAL.-- For the purposes of this section, an eligible entity is a consortium that consists of, but is not limited to, two or more of the following:

(A) employers;

(B) labor organizations;

(C) State or local governments;

(D) private industry councils;

(E) postsecondary educational institutions;

(F) nonprofit organizations representing businesses or industries; or

(G) nonprofit training organizations.

(2) ADDITIONAL REQUIREMENT.-- To the maximum extent practicable, each business, organization, or governmental unit that joins in forming an eligible entity under paragraph (1) shall be located in the same geographic region of the United States.

Same as what? Sounds like they all must be, e.g. in the North-east!

(c) GRANT LIMITATIONS.-- A grant may not be provided to any eligible entity under this section for more than two annual grant periods. Out of any grant made to an eligible entity, the portion to be used for creating, planning, and developing the alliance may not exceed $750,000 for any such annual grant period.

Odd order.

? But this doesn't capture eligible entities admin. funds, right?

means what?

(d) APPLICATION.-- The Secretary may provide a grant to an eligible entity under subsection (a) only pursuant to an application that is consistent with the provisions of this section and contains such information as the Secretary may deem reasonable. ? Means what. Why are extend current activities?

(e) USE OF AMOUNTS.-- In making grants under subsection (a), the eligible entity may, to the extent that such activities build upon and supplement on-going activities and will not duplicate or supplant current activities, provide for:

(1) an identification of local, State, regional, and national skills needs;

(2) an assessment of the extent to which workers in the United States [anywhere?] are being educated and trained in needed skills;

(3) the development of strategies to enhance the focus of training and education investments on industries with significant skill needs and rapidly expanding occupations;

(4) the provision of training or retraining for upgrading the skills of workers, including retraining incumbent workers for continued employment with an employer;

to whom?

(5) the provision of improved occupational information and projections;

what?

(6) an assessment of training and job skill needs for specific industries; and

(7) assistance in developing curriculum and training methods, and identification of and assistance in developing training providers.

(f) ADDITIONAL CRITERIA FOR GRANTS.-- In making grants under subsection (a), the Secretary shall provide that--

(1) a peer review process shall be utilized to recommend awards of grants;

(2) applications shall ensure that private industry councils and labor organizations in the areas to be served have collaborated in the development of such applications;

(3) preference be given to applications that demonstrate significant collaboration with major stakeholders in the State and local workforce development systems;

(4) with respect to any application, any amount of Federal funds to be used for training or retraining activities for incumbent workers as described in subsection (e)(4) shall be matched by an equal amount from non-Federal sources to be used for such purpose; and

(5) preference be given to applications for grants, based on the extent to which non-Federal ~~sources will provide amounts which~~ funds match a portion of the Federal funds to be made available for the grant.

(g) NATIONAL ALLIANCE FOR HIGH-TECHNOLOGY SKILLS.--

(1) ESTABLISHMENT.-- In order to complement the program of grants under this section, including the activities of regional skills alliances, a National Alliance for High Technology Skills shall be established within six months after the enactment of this Act, consisting of individuals who are representative of private industry, organized labor, work-force development systems, education, and government at the local, State, and national levels.

by whom?

to whom?

(2) RECOMMENDATIONS AND REPORT.-- The National Alliance shall develop and recommend strategies for the training of American workers to meet future demands for high-technology skills. The National Alliance shall prepare and submit an interim report to the President and to the Congress, including its findings and recommendations, not later than February 1, 2001, and a final report not later than September 30, 2003.

(3) MEMBERSHIP.-- The Secretary of Labor, in consultation with the Secretary of Commerce and the Secretary of Education, shall establish procedures relating to the appointment of members, the conduct of meetings and public hearings, and the provision of staff assistance and support resources for the National Alliance.

(4) LIMITATION.-- Out of the amounts available for use under this section, not more than $1,000,000 annually shall be available for carrying out the responsibilities of the Alliance under this subsection.

(h) DEFINITION.-- For purposes of this section:

(1) The term "Secretary" means the Secretary of Labor.

(2) The term "private industry council" means the entity described under section 102 of the Job Training Partnership Act, or similar entity under any successor Federal statute.

LRM ID: IMS309 **SUBJECT:** H1B Temporary Immigrant Visa Program Reforms

RESPONSE TO
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MEMORANDUM

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Please include the LRM number shown above, and the subject shown below.

TO: Ingrid M. Schroeder Phone: 395-3883 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: April 28, 1998 (Date)
Anita Eisenstadt (Name)
NSF (Agency)
703-306-1060 (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____________

✓ FAX RETURN of 2 pages, attached to this response sheet

NATIONAL SCIENCE FOUNDATION
4201 Wilson Boulevard
Arlington, VA 22230
(703) 306-1060

Office of the General Counsel

MEMORANDUM

TO: Ingrid M. Schroeder, Legislative Analyst, OMB

FROM: Anita Eisenstadt, Assistant General Counsel AE

DATE: April 28, 1998

SUBJECT: LRM #IMS309; H1-B temporary immigrant visa program reforms

Thank you for the opportunity to comment on the H1-B temporary immigrant visa program reforms. NSF strongly supports educating and training Americans to have the technical job skills needed for the 21st century. However, we believe that the international exchange of scientists is essential to the health of both U.S. science and international competitiveness. NSF has the following comments on the proposed reforms:

- The new recruit and retain requirements for both H1-Bs and Cs are quite burdensome for employers and impose an administrative burden and cost equal to or in excess of that required for hiring permanent workers. This seems inconsistent with streamlining Federal Government and reducing Governmental burdens.

    - The requirement to pay a greater monetary incentive is problematic. Federal agencies and state universities which operate with less flexibility in setting compensation will have a difficult time meeting this new requirement.

    - If a skills shortage exists for a particular occupation, the prevailing wage will shift up for all employers and it will be difficult for any one employer to demonstrate that he/she is now paying more than the new prevailing wage.

    - The monetary incentive requirement may result in U.S. workers shifting from one employer to another to take advantage of the employer's obligation to offer a higher wage than that paid to its other workers. This could be disruptive. This means that newer U.S.

workers will be paid greater salaries than previous hires with greater seniority.

- The cost of DOL administering the recruit and retain requirement will take away needed money from the training programs.

- The exception for outstanding researchers does not apply to the Federal Government (under current law and DOL's regulations, it applies to universities and private employers). The Federal Government should also have access to outstanding researchers.

- NSF is pleased that there is an exception carved out for international collaborative scientific projects in Section 212(n)(1)(E)(II). However, this carve out is too narrow to cover many types of international collaborative projects currently funded by NSF. The exemption should be revised to state as follows:

> "The recruitment requirements of this subparagraph shall also not apply to a scientist, mathematician or engineer who has attained at least a master's degree in a scientific or engineering discipline and who is coming temporarily to the United States to participate in a cooperative scientific activity that is carried out under an agreement between a Federal agency and its counterpart in the alien's country or with funding from a United States Government research program."

"The word "joint" should be eliminated because under several Science and Technology Agreements, the term "joint" is a term of art used to describe a subset of international collaborative projects.

- The definition of lay-off is too broad and encompasses many employment situations which are not lay-offs. As a partial solution to this, NSF endorses the NIH language which would exclude expiration of a research grant or pre-established term of employment. Termination for cause is a term of art and might only cover situations in which the employee engaged in misconduct (i.e. theft). Situations in which an employee is removed for poor job performance should not be considered a lay-off. These changes to the definition are extremely important. Under the current definition, few employers would be able to use H1-B visas.

- NSF is pleased that the training grant program is a competitive program.

If you have any questions, please feel free to call me at (703) 306-1060.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LEGISLATIVE REFERENCE DIVISION

ECONOMICS, SCIENCE, AND GENERAL GOVERNMENT BRANCH

TO:
Julie Fernandes

FROM: INGRID SCHROEDER
phone: (202) 395-3883
FAX: (202) 395-3109

DATE: 4/29/98

NUMBER OF PAGES (including this cover sheet): 3

COMMENTS:

More technical comments on "Administration Offer"

Please call (202) 395-3454 to report any difficulties with transmission of this fax.

INGRID

April 27, 1998

Draft Proposals Regarding Reform to the H-1B Visa Program

The Administration has committed to pursuing both reforms to the H-1B visa program and increased training opportunities for U.S. workers as part of any legislation that would temporarily raise the annual cap on H-1B visas. The following are some draft proposals for reform of the H-1B visa program.

I. **Recruitment and Non-displacement of United States Workers Prior to Seeking Nonimmigrant Workers**

(a) IN GENERAL -- Section 212(n)(1)of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)) is amended by inserting at the end the following new subparagraph:

(E)(i) The employer, prior to filing the application, has taken good faith, timely and significant steps to recruit and retain sufficient U.S. workers in the specialty occupation in which the non-immigrant whose services are being sought will be employed. Good faith steps to recruit and retain shall be defined as:

(a) the employer taking the following two actions in a manner reasonably designed to recruit and retain U.S. workers:

(I) widespread advertising of the relevant job openings to both current and prospective employees (e.g., through America's Job Bank, participation in job fairs, the Internet, employer newsletters and electronic communications, general circulation publications, professional journals and magazines); and

(II) offering meaningful monetary incentives to applicants (such as paying above the prevailing wage, paying bonuses, or providing stock options) above those already included in the base compensation package; or offering training subsidies, or a training program, that provides the means for its current employees to enhance their skills to qualify for jobs in the specialty occupation in which the nonimmigrant will be (or is) employed; and

(i)

(b) The employer did not receive applications from any U.S worker with at least substantially equivalent qualifications and experience to the temporary foreign worker offered employment; or (ii) offered employment to a U.S. worker with at least substantially equivalent qualifications and experience to the temporary foreign worker offered employment, but the offer of employment to the U.S. worker was refused; and

(c) Offering compensation at least at the amount required by subparagraph (A).

(E)(ii) The recruitment requirements of this subparagraph shall not apply to aliens with extraordinary ability, aliens who are outstanding professors and researchers, and certain multinational executives and managers described in section 203(b)(1). The recruitment requirements of this subparagraph shall also not apply to a scientist, mathematician, or engineer who has attained at least a master's degree or its equivalent in a scientific or engineering discipline, and who is coming temporarily to the United States to participate in a cooperative joint scientific activity carried out under an Agreement between the Federal Government and the alien's Government.

(F)(i) The employer --

(I) has not and will not -- within the 90-day period immediately preceding and the 90-day period immediately following the filing of the application, and within the 90-day period immediately preceding and the 90-day period immediately following the filing of any visa petition supported by the application -- lay off or otherwise displace any United States worker, including a worker obtained by contract, employee leasing, temporary help agreements, or ~~otherwise displace any United States worker, including a worker obtained by contract, employee leasing, temporary help agreement, or~~ other similar basis, who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant will be (or is) employed; and

(F)(ii) For purposes of this subparagraph, the term "laid off," with respect to an employee, means the employee's loss of employment, other than a discharge for cause or a voluntary departure or voluntary retirement. The term "laid off" does not apply to any case in which employment is relocated to a different geographic area and the affected employee is offered a chance to move to the new location with the same wages and benefits, but elects not to move to the new location.

(G) The employer offered compensation as required by subparagraph (A).

LRM ID: IMS309 **SUBJECT:** H1B Temporary Immigrant Visa Program Reforms

RESPONSE TO
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Anita Eisenstadt (Name)
NSF (Agency)
703-306-1060 (Telephone)

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____ Concur

____ No Objection

____ No Comment

____ See proposed edits on pages ____

____ Other: ____

✓ FAX RETURN of __ pages, attached to this response sheet

To: Julie Fernandes

NATIONAL SCIENCE FOUNDATION

4201 Wilson Boulevard
Arlington, VA 22230
(703) 306-1060

Office of the General Counsel

MEMORANDUM

TO: Ingrid M. Schroeder, Legislative Analyst, OMB

FROM: Anita Eisenstadt, Assistant General Counsel

DATE: April 29, 1998

SUBJECT: LRM #IMS309; H1-B temporary immigrant visa program reforms

I received some additional comments this morning concerning the impact of the proposed H1-B program reforms on NSF's Division of International Programs. Because some of NSF's international collaborative projects are based on less formal arrangements than a formal written agreement, NSF would like to suggest the following additional modification to the international collaborative excemption from the recruit and retain requirement:

" The recruitment requirements of this subparagraph shall also not apply to a scientist, mathematician, or engineer who has attained at least a master's degree or its equivalent in a scientific or engineering discipline, and who is coming temporarily to the United States to participate in a cooperative scientific activity that is carried out under an Agreement or * <u>other cooperative arrangement</u> between the Federal Government and the alien's Government or with funding from a United States Government research program."

A requirement for a formal written agreement would alter the way NSF conducts business with some of our foreign counterparts and impose an unnecessary administrative burden in some cases.

This sounds like a good rd.t.

April 29, 1998

URGENT

Urgent for Ingrid Schroedor, OMB

From: Greg Jonos, DOJ

Re: H1B visa language

Here is a staff comment from the Civil Rights Division. This has not been fully vetted w/in DOJ, so should not be represented as an "official" position. We're just sending it along for whatever consideration the WH types choose to give it.

Thanks.

To: Julie Fernandes

Subject: Administration Position Regarding H-1B Legislation

You have requested our comments regarding the Administration's Proposal for H-1B Legislation. In general, we believe that the Administration's Proposal does not contain sufficient safeguards for U.S. workers, and that it will allow employers to use the visa process to the detriment of available and qualified U.S. workers without fear of a penalty. Specific comments follow.

A. DOL approval of Employer Search for U.S. Workers

Before approval of the labor application, the employer must be required to establish, to DOL's satisfaction, that it has undertaken sufficient concrete steps to obtain U.S. workers. The current draft does not require DOL's approval of the employer's attempt at recruitment. Requiring employers to recruit, but providing no immediate review, will encourage shoddy recruiting. Similarly, the DOL should review, before approval of the application, the requirement that the employer not lay off or otherwise displace a U.S. worker. Otherwise, again, the proposed language does not contain sufficient safeguards to protect U.S. workers.

Further, the comparison between the qualifications and experience of U.S. workers and the temporary foreign worker at 8 U.S.C. § 1182(n)(1) is misplaced. The question should be whether the U.S. worker is qualified for the position, and not whether the U.S. worker's qualifications and experience match those of the foreign workers. If the U.S. worker is qualified for the position, the employer has no reason to seek a temporary foreign worker, despite the match between each worker's qualifications and experience. As written, it would be extremely difficult to establish that a U.S. worker matches a foreign worker by virtue of different language skills, education, training, etc. By providing the wrong comparison, the proposed provision favors the employer to the detriment of available and qualified U.S. workers.

B. Definition of Laid Off

The provision concerning the definition of "laid off" is too limited and provides loopholes for employers to evade liability. The definition states that a U.S. worker is not laid off if the employer requires that he or she relocate but retain the same benefits and wages. Thus, a U.S. worker could be sent to a less desirous employment location by an employer that intends to force the employee to quit, but the worker would have no redress even though the new visa holder is sitting in the U.S. worker's old desk.

C. Remedies

The provision concerning layoff protection to U.S. workers is weak and not sufficient. First, it provides only civil penalties. It does not provide a remedy to the injured U.S. worker, including back pay, reinstatement or instatement, benefits, attorney fees, and the other remedies typically provided in discrimination law suits. Further, it does not provide for jurisdiction when a single U.S. worker is the victim of labor fraud. Rather, it requires a pattern or practice. Thus, employers are free to ignore the applications of, or terminate, particular U.S. workers if doing so does not constitute a pattern or practice. This is wrong. Any aggrieved U.S. worker should have a viable make whole remedy available.

D. Summary

In short, we believe that the Administration should favor heightened worker protections in this legislation. Individual U.S. workers who are denied employment by employers that do not recruit in good faith should have an effective avenue of redress available, including make-whole relief. The current system, and the proposed reforms, do not provide the necessary relief U.S. workers are due when employers use them in the foreign worker application process. We have seen many instances in which U.S. workers apply for positions, interview (sometimes at considerable expense - financial or time-wise), and are rejected because the employer has already decided that no U.S. workers will be hired for the position. It is time for such workers to have an effective and available remedy.

OFFICE OF THE DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

FACSIMILE TRANSMISSION SHEET

DATE: April 23, 1998

TO: JULIE FERNANDEZ

FAX #: (202) 456-~~5558~~ VOICE #:
5581

FROM: JOHN T. MORTON
FAX #: (202) 514-6897 VOICE: (202) 514-9343

THIS TRANSMISSION CONTAINS 5 SHEETS <u>INCLUDING THIS SHEET</u>

****
MESSAGE

PLEASE PROVIDE COMMENTS. THANKS

(TOTAL NUMBER OF PAGES <u>INCLUDING</u> THIS)

TRANSMITTED BY: Denise Gaston

FOR VOICE COMMUNICATIONS WITH THIS OFFICE, PLEASE TELEPHONE (202-514-9343)

TO TRANSMIT TO THIS OFFICE VIA TELEFAX, PLEASE TELEPHONE (202-514-6897)

United States Department of Justice

Immigration and Naturalization Service
425 I Street, N.W., Washington, D.C. 20536

Facsimile Transmission Cover Sheet

TO: THERESA LOGUE
JOHN MORTON **Date:** 4/21/98

OFFICE: DOJ/DAG **Room:**

Phone No.:

Fax No.: 4-9077

FROM: JACKIE BEDNARZ

Office of the Executive Associate Commissioner, Policy and Planning

Room: 6038
Phone No.: (202) ~~514-3242~~ 5-8751
Fax No.: ~~(202) 305-0134~~

No. of Pages: Cover + 3

SUBJECT: H-1B DECISION PAPER CONSIDERED BY INS EXECUTIVE STAFF.

DISCUSSION: AS DISCUSSED WITH THERESA, INS HAS ADOPTED THE RECOMMENDATION HEREIN CONTINGENT UPON DOJ & DPC CONCURRENCE. I WILL TRY TO DISCUSS LATER W/ JOHN MORTON.

—JACKIE

OPTIONS FOR PROCESSING H-1B PETITIONS FILED AFTER REACHING THE 65,000 NUMERICAL LIMITATION

At the current rate of H-1B usage, the Service will reach the 65,000 numerical limitation (the cap) in late May or early June 1998. This paper presents options which the Service may consider in processing H-1B petitions filed or pending with the Service after the numerical limitation is reached.

The Service should notify the public when the numerical limitation has been reached and publicize whatever procedure is adopted to process H-1B petitions filed after that time. A notice published in the Federal Register would serve this purpose and minimize public inquiries.

Although current regulations require that the Service reject petitions filed after the cap is reached, a recently published proposed rule would allow the Service to adopt another mechanism to process cases in the event that the cap is reached before the end of the fiscal year. Unfortunately, it is unlikely that this rule will be finalized before this fiscal year's cap is reached. Legislation may soon be introduced that will raise the cap. Since there is no guarantee that the legislation will be enacted prior to the date on which the numerical limitation is reached, however, it behooves the Service to develop a policy to process petitions pending on, or filed, after that date.

When the cap was reached last fiscal year in September 1997, a different set of circumstances was faced. A decision was made to approve new cases and cases pending when the cap was reached, with a validity date of October 1, 1997, i.e. as of the beginning of the next fiscal year. The Service used fiscal year 1998 numbers for those cases since the aliens would not be permitted to work in the United States until the start of the new fiscal year. However, this policy is less appropriate, if at all, where the cap is reached in May or June.

OPTION 1

The Service holds petitions filed after the cap is reached in abeyance until October 1, 1998, the beginning of the new fiscal year.

Analysis

The adoption of this option will generate a substantial number of calls from the public as to the status of the petitions. Petitioners will eventually contact the Service and seek information as to the disposition of their cases. Given limited resources, the Service will have difficulty both keeping up with the correspondence and storing the petitions. Sufficient storage space is an acute problem at some INS Service Centers.

In addition, if the Service holds the petitions until next fiscal year, petitioners will not have access to the beneficiaries' services until the Service adjudicates the petitions and notifies the consular posts. In some cases, this may mean that beneficiaries will not be allowed to commence services for petitioning employers until November of December.

OPTION 2A

The Service would adjudicate petitions filed after the cap is reached and indicate on the approval notice that the petition is valid from October 1, 1998, regardless of the validity date requested by the petitioner. Approval notices would request that petitioners notify the Service to revoke petitions if beneficiaries' services were no longer needed due to the delay.

Analysis

In some cases, adoption of this option would affect the petitioner's need for the beneficiary's services, e.g in cases where a beneficiary's services are only needed for the duration of this fiscal year. It is also possible that the rate of monthly petitions might increase to the point that FY99's entire annual allotment would be exhausted as of October 1, 1999. How petitions would be handled under that scenario is not covered in this paper.

OPTION 2B

The Service would inform the petitioner that the cap has been reached and ask each petitioner so informed how the Service should dispose of the case, i.e. return the petition or approve it effective at the start of the next fiscal year.

Analysis

This option, while fostering good customer service, would be labor intensive, requiring a huge number of calls given the current 2300 cases per week. A great additional benefit to petitioners under this option is that beneficiaries could commence services on October 1, 1998, since adjudication and notice to petitioners, ports-of-entry, and/or consular posts would have already taken place. However, as discussed under the analysis of Option 2A, given that the current rate of 2300 petitions per week is already expected to amount to up to 46,000 petitions by the end of FY98 (approximately 70% of the FY99 allotment), it is possible that, if an increased natural rate and/or "land office" phenomenon were to happen, the FY99 petitions would be adjudicated before FY99 even begins. Without addressing how the FY00 allotment would be affected by this, we can predict that a "land office" scenario, under which the anxiety quotient of the business community and its representatives might rise dramatically, would result in far greater pressure than ever from this community to communicate directly with the Service on its cases and correspondingly render the "return or call" option less viable.

OPTION 3

The Service would return pending petitions and petitions filed after the cap has been reached with a notice informing the petitioner to refile the case on October 1, 1998, or resubmit it for immediate adjudication in order for the validity of the approved petition to begin on October 1, 1998. Alternatively, in a Federal Register notice describing the Service's policy, the public could be advised to indicate on the petition an alternate set of employment dates in case the cap is reached prior to adjudication.

Analysis

The adoption of this option will substantially increase costs to the Service to have centers return petitions and petitioners refile them.

RECOMMENDATION

The Service should adopt a combination of Option 2B and option 3. The Service should adopt 2B with respect to petitions pending when the cap is reached and option 3 for cases filed after the cap is reached. The adoption of option 2B is consistent with the Commissioner's customer service initiatives.

The key element in adopting the recommended option is the Federal Register notice, which should advise petitioners to provide an alternate employment period in the event the cap is reached while the petition is pending. This notice would also describe option 3 with respect to petitions filed after the cap is reached.

The Service should avoid a policy whereby petitions would be denied for lack of numbers. This procedure would eventually result in litigation requiring the Service to justify the accuracy of its tracking system. H:\jwb\h-1bcap

From: Ingrid M. Schroeder on 04/29/98 09:10:39 AM

Record Type: Record

To: Debra J. Bond/OMB/EOP, Steven M. Mertens/OMB/EOP, Julie A. Fernandes/OPD/EOP

cc: James J. Jukes/OMB/EOP
Subject: H1B - the debate continues

REP. SMITH MAY LINK SKILLS PRIORITY TO HIGH-TECH VISA BILL
Pulse of Congress/Insight
(NEWS 04/29/98; 29 lines)
Item Key: 11864
--- --- --- --- --- --- --- --- --- --- --- --- --- --- --- --- ---

REP. SMITH MAY LINK SKILLS PRIORITY TO HIGH-TECH VISA BILL

By Dan Carney, CQ Staff Writer

Rep. Lamar Smith, R-Texas, a vigorous advocate of more restrictive immigration policies, is threatening to limit visas for the unskilled relatives of U.S. citizens and permanent residents as his price for supporting a bill pushed by high-tech groups.

As chairman of the House Judiciary Subcommittee on Immigration, Smith plans to mark up draft legislation tomorrow increasing the number of H-1B temporary visas for high-tech workers from 65,000 a year to about 90,000. The bill is a priority for companies like Intel and Microsoft, which argue that America's dominance in the computer industry could be jeopardized if they cannot get enough skilled workers.

Smith says that if skill levels are so important, they should be a factor not just for employer-sponsored immigration, but family-sponsored immigration as well. His proposal, in addition to increasing H-1B visas, would give preference across-the-board to family-sponsored immigrants with at least a high-school education. That would mean, for example, a U.S. resident trying to bring in his wife would have a much easier time if she had at least a high-school diploma.

Immigrant groups say this proposal is "anti-family." And Spencer Abraham, R-Mich., Smith's Senate counterpart, promises to kill it in conference. Even high-tech companies are wary; they do not want to be seen as getting their people at the expense of someone's relative. Hoping to bypass Smith, they have been taking their case to leadership.

SHIMABUKUR_L @ A1
04/30/98 04:19:00 PM

Record Type: Record

To: Julie A. Fernandes

cc:
Subject: IMMIGRATION PANEL OKS INCREASING VISAS FOR HIGH-SKILLED ...

Date: 04/30/98 Time: 15:29
SImmigration panel OKs increasing visas for high-skilled foreign

WASHINGTON (AP) The House Judiciary immigration subcommittee voted Thursday to increase the number of highly skilled foreign professionals allowed to work in the United States.

Although they voted unanimously for the bill offered by the subcommittee chairman, Rep. Lamar Smith, R-Texas, Democrats and Republicans alike indicated their displeasure with key provisions and said they would seek to rewrite the bill when full Judiciary Committee takes it up, probably next week.

The bill was variously faulted for being too harsh on industry or not harsh enough and for failing to include money to train Americans for the high-tech jobs employers say they must look elsewhere to fill.

``Sounds like we're going to have a lot of amendments when we get to full committee,'' Smith said after hearing the complaints.

The information technology industry, which has been vigorously lobbying Congress to raise the visa ceiling for highly skilled workers, adamantly opposes Smith's bill. It is drawn far more narrowly than a Senate version but would add new mandates to ensure U.S. workers aren't harmed by the inflow of foreign talent.

``This is a bill only a Washington bureaucrat could love,'' said T.J. Rodgers, chief executive of Cypress Semiconductor.

Silicon Valley and other business interests have lined up in support of a bill by Sen. Spencer Abraham, R-Mich., which has been approved by the Senate Judiciary Committee.

Their main opposition to Smith's legislation stems from a provision that would require employers to attest that they are not displacing Americans with foreign labor. ``Amazingly, this is not currently a violation of the (visa) program,'' Smith said.

Business interests complain that the attestation and requirement that they make good-faith efforts to recruit Americans first are too onerous and would harm their efforts to fill vacancies.

The White House prefers the Smith bill over the Senate proposal. But the White House wants Smith to add one provision from Abraham's bill: money to improve education and training for Americans so they can take jobs in the booming high-tech sector.

Current law caps the H-1B program for highly skilled professionals at 65,000 visas annually. That cap will be hit in the coming weeks, months before the end of the fiscal year.

Smith's bill would add 30,000 more visas this year, with the ceiling rising to 105,000 next year and 115,000 in 2000 before reverting to the current level. Abraham's bill would boost the annual ceiling to 115,000 visas for the next five years.

In 1997, demand for the visas, which allow foreigners to remain here for up to six years, outpaced availability for the first time.

APNP-04-30-98 1529EDT

Debra Bond (OMB)

From: Ingrid M. Schroeder on 04/29/98 05:14:56 PM

Record Type: Record

To: Julie A. Fernandes/OPD/EOP

cc: Daniel J. Chenok/OMB/EOP, James J. Jukes/OMB/EOP
Subject: Re: LRM #IMS314 - NEC and DPC Report on HR3736 Workforce Improvement and Protection Act of 1998

---------------------- Forwarded by Ingrid M. Schroeder/OMB/EOP on 04/29/98 05:14 PM ---------------------------

Debra J. Bond 04/29/98 05:02:54 PM

Record Type: Record

To: Ingrid M. Schroeder/OMB/EOP@EOP

cc: Larry R. Matlack/OMB/EOP@EOP, Maureen H. Walsh/OMB/EOP@EOP
Subject: Re: LRM #IMS314 - NEC and DPC Report on HR3736 Workforce Improvement and Protection Act of 1998

Below are our comments on the NEC/DPC letter on Rep. Smith's bill. Please let me know if you have any questions regarding these comments. Thanks--

DRAFT -- NOT FOR RELEASE

April 30, 1998

The Honorable Lamar Smith
Chairman
Subcommittee on Immigration
Judiciary Committee
U. S. House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

ok

Today, your Subcommittee will mark-up H.R. 3736, the "Workforce Improvement and Protection Act of 1998" which is intended to address the growing demand for skilled workers in the information technology (IT) industry by enacting a temporary increase in the annual cap on the number of ~~**temporary**~~ visas for **temporary** foreign "specialty" workers under the H-1B program, while also effecting reforms to the H-1B program that would help target their usage to industries and employers that are actually experiencing skill shortages. **The Administration ~~agrees~~ with the intent of the bill, but would like to work with the committee ~~to address further~~ concerns regarding the H-1B program and training efforts for U.S. workers.**

~~**The Administration believes that the first step in increasing the availability of skilled workers**~~

~~must be raising the skills of U.S. workers and helping the labor market work better to match employers with U.S. workers.~~ **Fairness demands that any legislation to increase the number of H-1B visas for temporary foreign workers also includes provisions for training U.S. workers to increase their employment opportunities -- now, and in the future. Skilled workers are the economy's greatest resources. Training U.S. workers strengthens our international competitiveness, boosts income, and improves our standard of living. Unfortunately, H.R. 3736 does not contain any provision for additional training opportunities for U.S. workers. This training is a vital component of our strategy to address the long-term demand for highly skilled U.S. workers and to enhance the international competitiveness of important U.S. industries. An effective training strategy would also work to lessen the need for more H-1B visas. (moved from below)** Therefore, substantial additional efforts ~~by~~ **through partnership with various entities including** industry to increase the skill level of U.S. workers ~~and needed improvements in the H-1B visa program are~~ **is a** necessary prerequisites for the Administration to support any short-term increases in the number of visas for temporary foreign workers.

NO

In addition to improved training efforts, the Administration believes that substantive reform to the H-1B program is necessary in order to target the visas to employers with demonstrated skill shortages. We are pleased that H.R. 3736 is consistent with ~~one of our primary~~ **this** objective~~s~~, insofar as it conditions a temporary increase in the H-1B cap on the enactment of meaningful reforms to the H-1B visa program. Your bill would help ensure that no U.S. worker would lose their job to a similarly qualified temporary foreign worker and that every qualified U.S. worker would have the opportunity to fill a job before a temporary foreign worker. ~~Moreover, your bill greatly strengthens program requirements and enforcement to prevent employer abuses of the H-1B program.~~ **However, while H.R. 3736 increases enforcement authority against willful violators, it lacks the needed authority to verify applications in the absence of a complaint. This is an important reform given nonimmigrant temporary workers are entirely dependent on their employers to remain in the U.S. and thus unlikely to lodge a complaint against even a serious violation.**

NO

~~Unfortunately, H.R. 3736 does not contain any provision for additional training opportunities for U.S. workers. This training is a vital component of our strategy to address the long-term demand for highly skilled U.S. workers and to enhance the international competitiveness of important U.S. industries. An effective training strategy would also work to lessen the need for more H-1B visas.~~ We are also concerned that the increase **in visas** ~~reflected~~ in this bill is large and is not~~, in any event,~~ targeted to skill shortages being used to justify this change in policy (i.e., advanced degrees or significant practical experience in math, science, or engineering).

No

~~For these reasons, the Administration believes that this legislation would substantially improve the current H-1B program and, with the addition of~~ **Despite the improvements included in H.R. 3736, the Administration cannot support the bill as introduced. However, the Administration looks forward to working with your committee on changes that would address our concerns about** meaningful training strategies, **further reform to the H-1B program,** and a modest reduction in the level of increase in the annual cap~~, would garner the Administration's strong support~~. ~~We look forward to working with the Congress on these and other specific provisions in the bill.~~

NO

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Alexis Herman
Secretary of the Department of Labor

NO

[NOTE: While we understand the point that three Secretaries signed the Senate bill letter, we strongly suggest having Labor sign this letter given all of the concerns with the bill lie in the labor arena (training and enforcement).]

~~Bruce Reed~~
~~Assistant to the President for Domestic Policy~~

~~Gene B. Sperling~~
~~Assistant to the President for Economic Policy~~

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301-1600

Defense

April 29, 1998

MEMORANDUM FOR INGRID SCHROEDER, LEGISLATIVE REFERENCE DIVISION, OFFICE OF MANAGEMENT AND BUDGET

FROM: S.T. BRICK, DIRECTOR, LEGISLATIVE REFERENCE SERVICE, DEPARTMENT OF DEFENSE

SUBJECT: LRM ID: IMS309, H-1B Temporary Immigrant Visa Program Reforms

In response to your request for views, the legislative proposal regarding H-1B temporary immigrant visa program reforms begins to address the Department of Defense's concern with earlier proposals for reforming this program. The concern with earlier proposals was that they not only provided desired protections from abuses of the program but also precluded the program's legitimate use for access to the "best and brightest" researchers to help the U.S. retain its technological edge for economic and military competitiveness. This proposal begins to address that concern with the addition of the proposed paragraph (E)(II) and the omission of the earlier proposal to reduce the maximum term of the H-1B visa from six to three years.

However, the quick review of this new proposal suggests that there is at least one area where it can be improved. Specifically, the definition of "laid off" in the proposed paragraph (F)(II) should be revised to exempt finite-term appointments, such as the one-year or two-year appointments routinely made to postdoctoral scholars at institutions of higher education.

We hope that there will be further opportunities for input concerning the proposal as it goes through the legislative process so that we can more fully evaluate its potential impacts on the research enterprise.

OK.

To: Julie Fernandes

NATIONAL SCIENCE FOUNDATION
4201 Wilson Boulevard
Arlington, VA 22230
(703) 306-1060

NSF

Office of the General Counsel

MEMORANDUM

TO: Ingrid M. Schroeder, Legislative Analyst, OMB

FROM: Anita Eisenstadt, Assistant General Counsel AEl.

DATE: April 29, 1998

SUBJECT: LRM #IMS314; NEC and DPC Report on H.R. 3736 Workforce Improvement and Protection Act of 1998

Thank you for the opportunity to comment on the NEC and DPC Report on the H-1B program.

- NSF objects to the bill's recruitment requirements which require an employer to hire any qualified U.S. worker for every temporary skilled position even if the U.S. worker is less qualified than the foreign worker. In fact, this would make it more difficult for universities to hire temporary foreign professors than permanent professors. The exception for outstanding professors and researchers is far too narrow and would not even cover Federal agencies. Although NSF has expressed concerns with adding any recruitment requirement to the H1-B program, the Administration's proposal to require employers to hire U.S. workers with "substantially equivalent qualifications and experience" is preferable to the approach taken in H.R. 3736 which requires employers to hire less qualified U.S. workers.

- Furthermore, the bill does not provide an exemption from the recruitment requirement for international collaborative projects. This would preclude H1-Bs from being used as a visa vehicle for highly valuable international cooperative scientific activities. Such an exemption is essential.

- Unfortunately, the report actually endorses the bill's recruitment approach on the first page of the report when it supports the bill's requirement that "a qualified U.S. worker should always have the opportunity top fill a job before a foreign worker." NSF objects to this sentence in the report and requests that it be deleted. NSF also requests that a sentence be added to the report requesting an exemption to any recruitment requirement for international collaborative projects.

● NSF also opposes the definition of the lay-off in H.R. 3736 because it is too broad and would situations such as terminations of Federal research grants and expiration of temporary appointments. Language should be added to the report indicating that the lay-off definition needs further refinement.

If you have any questions, please feel free to call me at 703-306-1060.

From: Ingrid M. Schroeder on 04/29/98 04:42:13 PM

Record Type: Record

To: Julie A. Fernandes/OPD/EOP

cc:
Subject: OSTP comments

--------------------- Forwarded by Ingrid M. Schroeder/OMB/EOP on 04/29/98 04:41 PM ---------------------------

Rachel E. Levinson 04/29/98 04:35:17 PM

Record Type: Record

To: Ingrid M. Schroeder/OMB/EOP@EOP

cc: See the distribution list at the bottom of this message
Subject: OSTP comments

the following is being faxed right now

April 29, 1998

MEMORANDUM FOR JAMES JUKES
ASSISTANT DIRECTOR FOR LEGISLATIVE REFERENCE, OMB

FROM: ARTHUR BIENENSTOCK
ASSOCIATE DIRECTOR FOR SCIENCE

SUBJECT: LRM ID: IMS314 NEC and DPC REPORT ON H.R.3736

OST proposes that the following sentence be inserted in the Statement of Administration Position regarding H.R. 3736, the Workforce Improvement and Protection Act of 1998.

Paragraph 3, before last sentence, "However, we believe that more explicit provisions should be included that protect international collaborations between foreign scientists and engineers and science and technology programs supported by the Federal government.

Thank you.

Message Copied To:

Arthur Bienenstock/OSTP/EOP@EOP
Kerri A. Jones/OSTP/EOP@EOP
Duncan T. Moore/OSTP/EOP@EOP
David Heyman/OSTP/EOP@EOP
Lori A. Perine/OSTP/EOP@EOP

TO: INGRID SCHROEDER

LABOR + Commerce

Fax 395-3109

Phone 395-3883

FROM: MARK MORIN — LABOR

Phone 514-8065 ex 109

Cover plus 9 pages

DOL proposed changes to letter on H-1B

Peter

if done tonight

to: Lamar Smith

To: Julie Fernandes

cc: Mel Watt

Fax to both

Tina Hone

fax 225-1845

~~Greg~~ George Fishman

225-3672

TO: Lamar & Mel

original

a.m.

~~Attn: Lamar Smith~~

~~Fax~~

DOL COMMENTS MARKED 4/29 - 3PM

April 30, 1998

There reforms will effectively target H-1B visas to industries experiencing skill shortages.

The Honorable Lamar Smith
Chairman
Subcommittee on Immigration
Judiciary Committee
U. S. House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

Today, your Subcommittee will mark-up H.R. 3736, the "Workforce
Improvement and Protection Act of 1998" which is intended to address the
growing demand for skilled workers in the information technology (IT) industry by
enacting a temporary increase in the annual cap on the number of temporary visas
for foreign "specialty" workers under the H-1B program, while also effecting
reforms to the H-1B program that would help target their usage to industries and
employers that are ~~actually~~ experiencing skill shortages.

The Administration believes that the first step in increasing the availability of
skilled workers must be raising the skills of U.S. workers and helping the labor
market work better to match employers with U.S. workers. Therefore, substantial
additional efforts by industry to increase the skill level of U.S. workers and needed
improvements in the H-1B visa program are necessary prerequisites for the
Administration to support any short-term increases in the number of visas for
temporary foreign workers. We would like to work with you to further improve the enforcement provisions.

We are pleased that H.R. 3736 is consistent with one of our primary
objectives, insofar as it conditions a temporary increase in the H-1B cap on the
enactment of meaningful reforms to the H-1B visa program. Your bill would help
ensure that ~~no~~ U.S. worker would lose their job to ~~a similarly qualified~~ temporary
foreign worker and that ~~every~~ qualified U.S. worker would have the opportunity to
fill a job before a temporary foreign worker. Moreover, your bill ~~greatly strengthens~~
~~program requirements and~~ enforcement to prevent employer abuses of the H-1B
program. authority help modestly expands

Unfortunately, H.R. 3736 does not contain any provision for additional
training opportunities for U.S. workers. ~~This~~ Training is a vital component of our
strategy to address the long-term demand for highly skilled U.S. workers and to
enhance the international competitiveness of important U.S. industries. An
effective training strategy would also work to ~~lessen the need for more~~ reduce the demand for H-1B visas.
We are also concerned that the increase reflected in this bill is too large, ~~and is not, in~~
~~any event, targeted to skill shortages being used to justify this change in policy~~
~~(i.e., advanced degrees or significant practical experience in math, science, or~~
in the number of H-1B visas although we agree that the increase should last for only three years.

~~engineering)~~ H-1B visa provisions

For these reasons, the Administration believes that this legislation would substantially improve the current H-1B program and, with the addition of meaningful training ~~strategies~~ and a modest reduction in the level of increase in the annual cap, would garner the Administration's ~~strong~~ support. We look forward to working with the Congress on these and other specific provisions in the bill.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Modifications to the H-1B program that appropriately protect U.S. workers will reinforce the Administration's strong support of legal immigration.

Sincerely,

Bruce Reed
Assistant to the President for Domestic Policy

Gene B. Sperling
Assistant to the President for Economic Policy

LRM ID: IM8314 SUBJECT: NEC and DPC Report on HR3738 Workforce Improvement and Protection Act of 1998

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: Ingrid M. Schroeder Phone: 395-3883 Fax. 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: 4/29 (Date)
Beth VanHanswyk (Name)
DEC (Agency)
482-2725 (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

____ Concur

____ No Objection

____ No Comment

X See proposed edits on pages 1 + 2

____ Other: ____

X FAX RETURN of 2 pages, attached to this response sheet

To: Julie Fernandes
* please focus on change in paragraph #2

April 30, 1998

The Honorable Lamar Smith
Chairman
Subcommittee on Immigration
Judiciary Committee
U. S. House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

Today, your Subcommittee will mark-up H.R. 3736, the "Workforce Improvement and Protection Act of 1998" which is intended to address the growing demand for skilled workers in the information technology (IT) industry by enacting a temporary increase in the annual cap on the number of temporary visas for foreign "specialty" workers under the H-1B program, while also effecting reforms to the H-1B program that would help target their usage to industries and employers that are actually experiencing skill shortages.

NO. OK

The Administration believes that the first step in increasing the availability of skilled workers must be raising the skills of U.S. workers and helping the labor market work better to match employers with U.S. workers. ~~Therefore,~~ Substantial additional efforts by industry to increase the skill level of U.S. workers ~~and needed~~. are Improvements in the H-1B visa program are a necessary prerequisites for the Administration to support any short-term increases in the number of visas for temporary foreign workers.

We are pleased that H.R. 3736 is consistent with one of our primary objectives, insofar as it conditions a temporary increase in the H-1B cap on the enactment of meaningful reforms to the H-1B visa program. Your bill would help ensure that no U.S. worker would lose their job to a similarly qualified temporary foreign worker and that every qualified U.S. worker would have the opportunity to fill a job before a temporary foreign worker. Moreover, your bill greatly strengthens program requirements and enforcement to prevent employer abuses of the H-1B program.

Unfortunately, H.R. 3736 does not contain any provision for additional training opportunities for U.S. workers. This training is a vital component of our strategy to address the long-term demand for highly skilled U.S. workers and to enhance the international competitiveness of important U.S. industries. An effective training strategy would also work to lessen the need for more H-1B visas.

new ¶

We are also concerned that the increase reflected in this bill is large and is not, in any event, targeted to skill shortages being used to justify this change in policy (i.e., advanced degrees or significant practical experience in math, science, or engineering). The Administration is proposing to create a new H-1C visa category, authorized for four years, that would be open to individuals with a master's degree (or equivalent) in math, science or engineering, or a ~~bachelors degree in math, science or engineering~~ and five years work experience. We urge you to adopt this more targeted approach.

For these reasons, the Administration believes that this legislation would substantially improve the current H-1B program and, with the addition of meaningful training strategies, the new H1-C visa category, and a modest reduction in the level of increase in the annual cap, would garner the Administration's strong support. We look forward to working with the Congress on these and other specific provisions in the bill.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

NO

Sincerely,

Bruce Reed
Assistant to the President for Domestic Policy

Gene B. Sperling
Assistant to the President for Economic Policy

National Association of Computer Consultant Businesses

NACCB

IT'S TIME TO END TAX DISCRIMINATION AGAINST HIGH-TECH STAFFING FIRMS

- **NEED FOR ACTION.** In the past several years, a majority of Senators and a large number of Representatives have called for repeal of Section 1706 of the 1986 Tax Reform Act. Section 1706 singles out **only** the technical services industry and makes it uniquely difficult for that industry to hire computer and engineering professionals who want to work as independent contractors. By co-sponsoring S. 1924, the Technical Workers Fairness Act, also called the Mack-Kerry bill, and supporting similar House efforts, you can make Section 1706 repeal a reality in 1998. Particularly in view of the shortage of high-tech professionals expected to last for several years, there is an even greater reason to repeal this discriminatory and unfair tax law that discourages high-tech staffing firms from hiring independent contractors.

- **BACKGROUND ON SECTION 1706.** For businesses known as "technical services firms" who provide technical services to their customers, Section 1706 removed so-called "Section 530 employment tax safe havens" that otherwise apply to all other types of businesses using independent contractors. As a result, if a technical services firm hires a high-tech worker to perform services for that firm's customers as an independent contractor, then the firm must prove to the IRS that this worker is an independent contractor under the centuries-old "common law" employment test. Even if the firm shows a strong reason for hiring the worker as an independent contractor -- for example, the IRS approved the firm's practices in a prior audit, or the treatment conforms to industry practice or a court ruling, all of which are "safe havens" under Section 530 -- Section 1706 makes these reasons irrelevant for technical services firms.

- **HARM CAUSED BY SECTION 1706.** The harm to high-tech firms and workers caused by Section 1706 is more than theoretical. Technical services firms which use independent contractors -- even if they act in good faith -- can be severely penalized by the IRS and forced to pay "unpaid" employment taxes although the contractors have already paid these same taxes in full! In fact, some IRS auditors use Section 1706 to claim "incorporated" high-tech independent contractors are not legitimate. Left with only the common law employment test to prove a worker's status to the IRS, many high-tech firms will not hire any independent contractors. They do not want to "attract" an almost-certain IRS audit because the time and expenses to fight the IRS means that even "winning" the audit is really a "losing" situation.

- **SUPPORT FOR SECTION 1706 REPEAL.** Facts not known in 1986 have now led to a consensus to repeal Section 1706. Repeal supporters include the American Bar Association, the American Tax Policy Institute, and most major high-tech associations, including those composed of the computer and engineering professionals themselves. These groups have responded to a lengthy Treasury Department study (required by Congress in TAMRA of 1988 and issued in 1991) which found that tax compliance is actually better-than-average among technical services workers compared to other contractors in other industries. The study also found the scope of Section 1706 was "difficult to justify on equity or other policy considerations." Further, Section 1706 is the only occasion since the enactment of Section 530 that Congress has ever "cut back" on the safe haven protections in Section 530. In fact, in response to concerns about arbitrary and unpredictable IRS decisions in independent contractor audits, in the Small Business Job Protection Act of 1996 Congress expanded Section 530 protections and shifted the burden of proof from the taxpayer to the IRS -- but high-tech staffing firms were still left out. More recently, the Department of Labor's Bureau of Labor Statistics found that a substantial percentage of high-tech professionals are actually being forced to work as employees when their preference is to be independent contractors.

- **NOW IS THE TIME TO ACT.** As a Senator, you can join the bi-partisan cosponsorship of S. 1924. As a House Member, you can support similar efforts at repeal now being undertaken in the House.

National Association of Computer Consultant Businesses
1250 Connecticut Avenue, NW - Suite 700
Washington, DC 20036 202-637-6483 FAX: 202-331-4108

April 6, 1998

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20500

APRIL 30 '98

HERE'S THE INFO ABOUT THE MTG @ 11am.

THANKS FOR YOUR HELP!

FRANKLIN
x66030

Julie Fernandes
RM 217

THE WHITE HOUSE
WASHINGTON

OFFICE FOR WOMEN'S INITIATIVES AND OUTREACH

TO: Franklin Urteaga

FAX: 6-6023

DATE: 4/30

NUMBER OF PAGES (INCLUDING COVER SHEET): 9

FROM:
- ___ Audrey Tayse Haynes, Director
- ___ Sondra Seba, Agency Representative
- ___ Robin Leeds, Agency Representative
- _X_ Tania Lopez, Special Assistant to the Director
- ___ Other

NOTES:

There are 4 Women Coming

THE WHITE HOUSE
OFFICE FOR WOMEN'S INITIATIVES AND OUTREACH
OLD EXECUTIVE OFFICE BUILDING, ROOM 15
WASHINGTON, DC 20502
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NACCB
NATIONAL ASSOCIATION OF COMPUTER CONSULTANT BUSINESSES

March 30, 1998

Ms. Audrey Tayse-Haynes
Director, White House Office
For Women's Initiatives and Outreach
780 Jackson Place, NW
Washington, D.C. 20503

Dear Ms Tayse-Haynes:

On April 30, 1998, women owned companies of the National Association of Computer Consultant Businesses will gather in Washington to discuss important issues confronting the information technology (IT) staffing industry, such as the shortage of trained IT professionals. The NACCB is the largest trade association representing exclusively IT staffing businesses, comprised of over 365 companies with gross revenues last year of $5 billion. Among the items on this year's agenda is the creation of the NACCB education foundation for the education of IT professionals.

During a similar Washington conference last year, a delegation of NACCB women led by Meryl Natchez, president of Techprose, Inc., held a productive meeting with your predecessor, Betsy Myers. They were pleased to discuss the Clinton-Gore Administration's initiatives with women owned businesses and have made many decisions during 1997, well informed from the meeting with Ms. Myers.

Ms Natchez and others are eager to renew the working relationship with the Office for Women's Initiatives and Outreach and would like to meet with you on April 30th. I will be in contact with your scheduler to learn whether your schedule allows you to meet with a delegation of NACCB businesswomen during the 1998 conference. Please contact me if I may provide any additional information.

Sincerely,

Philip M. Skillman

Philip M. Skillman
Director, Congressional Relations

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Washington, DC 20036
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NACCB POSITION PAPER 98-2

NACCB

National Association of Computer Consultant Businesses

IT'S TIME TO END TAX DISCRIMINATION AGAINST HIGH-TECH STAFFING FIRMS

- **NEED FOR ACTION.** In the past several years, a majority of Senators and a large number of Representatives have called for repeal of Section 1706 of the 1986 Tax Reform Act. Section 1706 singles out only the technical services industry and makes it uniquely difficult for that industry to hire computer and engineering professionals who want to work as independent contractors. By co-sponsoring S. 1924, the Technical Workers Fairness Act, also called the Mack-Kerry bill, and supporting similar House efforts, you can make Section 1706 repeal a reality in 1998. Particularly in view of the shortage of high-tech professionals expected to last for several years, there is an even greater reason to repeal this discriminatory and unfair tax law that discourages high-tech staffing firms from hiring independent contractors.

- **BACKGROUND ON SECTION 1706.** For businesses known as "technical services firms" who provide technical services to their customers, Section 1706 removed so-called "Section 530 employment tax safe havens" that otherwise apply to all other types of businesses using independent contractors. As a result, if a technical services firm hires a high-tech worker to perform services for that firm's customers as an independent contractor, then the firm must prove to the IRS that this worker is an independent contractor under the centuries-old "common law" employment test. Even if the firm shows a strong reason for hiring the worker as an independent contractor -- for example, the IRS approved the firm's practices in a prior audit, or the treatment conforms to industry practice or a court ruling, all of which are "safe havens" under Section 530 -- Section 1706 makes these reasons irrelevant for technical services firms.

- **HARM CAUSED BY SECTION 1706.** The harm to high-tech firms and workers caused by Section 1706 is more than theoretical. Technical services firms which use independent contractors -- even if they act in good faith -- can be severely penalized by the IRS and forced to pay "unpaid" employment taxes although the contractors have already paid these same taxes in full! In fact, some IRS auditors use Section 1706 to claim "incorporated" high-tech independent contractors are not legitimate. Left with only the common law employment test to prove a worker's status to the IRS, many high-tech firms will not hire any independent contractors. They do not want to "attract" an almost-certain IRS audit because the time and expenses to fight the IRS means that even "winning" the audit is really a "losing" situation.

- **SUPPORT FOR SECTION 1706 REPEAL.** Facts not known in 1986 have now led to a consensus to repeal Section 1706. Repeal supporters include the American Bar Association, the American Tax Policy Institute, and most major high-tech associations, including those composed of the computer and engineering professionals themselves. These groups have responded to a lengthy Treasury Department study (required by Congress in TAMRA of 1988 and issued in 1991) which found that tax compliance is actually better-than-average among technical services workers compared to other contractors in other industries. The study also found the scope of Section 1706 was "difficult to justify on equity or other policy considerations." Further, Section 1706 is the only occasion since the enactment of Section 530 that Congress has ever "cut back" on the safe haven protections in Section 530. In fact, in response to concerns about arbitrary and unpredictable IRS decisions in independent contractor audits, in the Small Business Job Protection Act of 1996 Congress expanded Section 530 protections and shifted the burden of proof from the taxpayer to the IRS -- but high-tech staffing firms were still left out. More recently, the Department of Labor's Bureau of Labor Statistics found that a substantial percentage of high-tech professionals are actually being forced to work as employees when their preference is to be independent contractors.

- **NOW IS THE TIME TO ACT.** As a Senator, you can join the bi-partisan cosponsorship of S. 1924. As a House Member, you can support similar efforts at repeal now being undertaken in the House.

National Association of Computer Consultant Businesses
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April 6, 1998

NACCB POSITION PAPER 98-1B

NACCB

National Association of Computer Consultant Businesses

MODEST CHANGES IN THE H-1B VISA PROGRAM WILL HELP SOLVE THE NEED FOR MORE INFORMATION TECHNOLOGY PROFESSIONALS

- **NEED FOR ENACTMENT OF S. 1723.** There is a consensus that America does not have enough information technology ("IT") professionals to meet its needs. A source of more IT professionals is the H-1B visa program, but that program limits the entry of H-1B visa holders to 65,000 per year and other H 1B procedures delay the entry of these workers. Congress can help solve the skills shortage problem by enacting S. 1723 with some minor improvements.

- **NACCB'S POSITION ON SPECIFIC PROVISIONS OF S. 1723.**

- ***Temporary and Modest Increase in H-1B Cap.*** NACCB supports the 5-year increase in H-1B visas from 65,000 to 95,000, and the return to the 65,000 cap in 2003, as proposed in S. 1723. We urge the House to adopt similar provisions.

- ***Layoff Protection for U.S. Workers.*** NACCB agrees U.S. workers should not be replaced by "cheaper" H-1B workers. The best way to assure foreign workers are not hired below the prevailing wage to replace U.S. workers is to allow them to hold "portable" visas and easily change employers in a market where labor demand exceeds supply. This approach allows the prevailing wage to be set by the free market and not by survey data, and employers could not hope to retain below-market foreign labor they might be tempted to hire to replace laid-off U.S. workers. However, if Congress prefers the layoff protections in S. 1723 to "portable" visas, S. 1723 should be modified as follows: (1) Employers should be penalized only if they "knowingly" layoff a U.S. worker for replacement by a foreign worker. If a foreign worker is hired by happenstance or inadvertence to fill a job once held by a U.S. worker, no penalty should apply. (2) Employers should have to look back only 30 days -- not 6 months -- to see if they have laid-off U.S. workers in a job for which a foreign worker is about to be hired. (3) When the DOL interprets the layoff provision, it should be prevented from "second-guessing" an employer's reasonable layoff decisions. If an employer has a good reason why it has "laid off" a U.S. worker, the DOL must respect that decision. We appreciate Congress is no longer pursuing 1996 efforts to require anti-layoff "attestations" or target "job contractors" (that is, staffing firms) for more onerous regulations.

- ***Prevailing Wage Clarification.*** NACCB supports the provision in S. 1723 that allows prevailing wages to be established by published non-government surveys of industry, region or statewide wages for the occupational classification. This is a positive step towards market-driven wages. However, Congress should clarify in legislative history that if different valid surveys lead to different prevailing wages in the same area, the DOL cannot "second-guess" an employer's reliance on a valid survey.

- ***Changes to DOL Enforcement Powers.*** NACCB supports the increased penalties in S. 1723 (from $1,000 to $5,000) for willful violations of the H-1B rules, but only if Congress explains in legislative history that the term "willful" means the employer knew its conduct was illegal or showed reckless disregard for whether its conduct was illegal (the definition used in the Supreme Court's 1988 Richland Shoe Company decision). However, we believe the DOL should have authority to conduct "spot" inspections of prior willful violators only for the period (5 years) that the H-1B cap is increased -- and not indefinitely, as in S. 1723.

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April 9, 1998

April 27, 1998

How a Tax Law Helps Ensure Scarcity of Programmers

By DAVID CAY JOHNSTON

The Senate holds hearings this week on complaints of taxpayer abuse by the Internal Revenue Service, but the agenda does not include the role of Congress itself in creating taxpayer woes, particularly for tens of thousands of computer programmers.

But just ask Midge Johnson, a would-be programming entrepreneur, about a long-standing tax law that is pointed specifically at software professionals and prevents many of them from setting up freelance businesses. Lately, the IRS has been aggressively enforcing that law -- even as computer programmers are in such short supply that the Clinton Administration is pouring millions of dollars into Federal initiatives to train more of them.

Credit: Justin Lane for The New York Times

Midge Johnson of Lanham, Md., gave up her dream of running her own programming business.

It appears to be public policy in conflict with itself and it is making work life difficult for a category of citizens crucial to the digital economy.

"Why does Congress say that I can't go out and pursue the American dream and give my kids and grandkids things I couldn't have?" asked Mrs. Johnson, who did not find out about the law until two years ago, after quitting her job with the consulting firm of Booz Allen & Hamilton in hopes of starting her own software programming business. "And why," she asked, "is the IRS so busy enforcing this law that keeps me from being an independent contractor?"

Mrs. Johnson, of Lanham, Md., knows that programmers are in such short supply that they can earn up to several hundred dollars an hour writing code for hire, and many in Congress want to let tens of thousands of foreign programmers migrate to the United States. She calculated that if she were in business for herself she could double her income.

Everywhere Mrs. Johnson went in the suburbs of the nation's capital, she said, she was offered work fixing and customizing software -- but only if she would close her business and become an employee.

"They were afraid to do business with my company," Mrs. Johnson said. Two months ago, her bank account empty and creditors at the door, Mrs. Johnson gave up and took a job as a programmer, paying $69,000.

Mrs. Johnson and thousands of other computer programmers who want to work for themselves instead of being employees have run afoul of a 1986 law in which Congress decreed that most individual programmers cannot be entrepreneurs.

The law generally excludes programmers from statutes giving employers some flexibility to use independent contractors. Critics say that the IRS has recently stepped up its enforcement of the law in a way that effectively kills start-up programming businesses if their only employee is the founder.

The law, which was introduced by Senator Daniel Patrick Moynihan, Democrat of New York, was estimated to raise $60 million over five years, a figure based on a belief by a staff member of the Congressional Joint Committee on Taxation that employees cheat less on their taxes than independent contractors do. That was enough money to pay for a tax break, approved with Moynihan's support, that was sought by IBM for its overseas operations. Under the Gramm-Rudman deficit control act of the previous year, Congress was required to pay for any tax cuts with comparable revenue increases or spending cuts.

A year after the law regarding contractors was enacted, the Senator tried to repeal it, but his bill died. In 1994, Senator William V. Roth, Republican of Delaware, the sponsor of this week's hearings, wrote Moynihan saying the programmers should get relief. More than 60 other senators have written similar letters since 1994, but they have not voted to change the law.

Ginny Flynn, a spokeswoman for Roth, said that while the Senator believed that the law was unfair, he was not currently moving to change it because "despite the fact the programmers are treated differently from other people, this opens a Pandora's box of other independent contractor issues."

Programmers and their lawyers say that as a result of inaction by Congress, many corporations have revised their policies to explicitly forbid the hiring of programmers who are independent contractors.

In response, some people, like Mrs. Johnson, incorporated. They reasoned that if they were employees of their own corporations they would he treated by the IRS the way that many doctors and others are and could expand their enterprises.

But internal IRS documents show that in Alaska, California, Ohio, Minnesota, New York and New Jersey, IRS auditors as recently as last year hunted tor corporations created by computer programmers. They found scores of such companies and then disallowed them for tax purposes. The papers show that they were disallowed because they were less than a year old and had only one employee, the programmer who created the corporation.

Across the country, officials of high-technology temporary-help companies said the IRS audit tactic had caused many corporations to refuse to hire programmers unless they become employees, like Mrs. Johnson, or were employees of such temporary-help agencies.

Mary E. Oppenheimer, an IRS assistant chief counsel, said there was no national directive for auditors to hunt for incorporated programmers. However, she noted, Congress has directed the IRS to look at the economic substance of tax matters, not just their legal form.

In an earlier interview, Tom Burger, the director of employment taxes for the IRS, said one of the agency's difficulties "is that, and I need to pick my words carefully, Congress passes laws, often without asking us about them, and then tells us to enforce them."

The immediate effect of these audits is to force individual programmers like Mrs. Johnson to abandon their dreams of getting rich off their high-technology skills. But the broader impact is that small businesses started by one entrepreneur do not have a chance to grow into mighty enterprises that can create jobs and generate more taxes. "Who do you know who would hire someone who will bring with them trouble from the IRS?" asked Harvey J. Shulman, the Washington lawyer for the National Association of Computer Consultant Businesses, who made the audit documents available.

Shulman has challenged 52 such audits. "I prevailed in 50 cases and partially in another, but at a cost to clients of $50,000 or more, and that is just ridiculous," he said.

The association's 400 members, who had more than $5 billion of revenues last year, are mostly high-technology temporary-help agencies that hire programmers as employees and send them to companies on short-term assignments. They want the same flexibility to use contractors and individuals who have incorporated as other businesses do.

Don McLaurin, president of the Computer Consulting Group in Columbia, S.C., which hires programmers as employees and farms them out to companies for short-term projects, said the law and its enforcement "are having a devastating impact on the computer industry."

He said his business and his clients would benefit if he could use some independent contractors and some incorporated programmers.

"This is Catch-22," he said. "If you are not legitimate because you start out as a one-person corporation and you haven't been in business for a year, then how do you ever start your business? It is nonsensical."

Ed Myers, president of a company in El Segundo, Calif., that provides programmers to corporations, said that when his company was audited he and Shulman were able to defend the status of all but 3 of 50 workers as independent contractors.

"The auditor then said I had to give him two more people and I said, 'what do you mean?' and he said he had to have five people he could reclassify as employees because that was what his boss demanded and that if I would give him two more names he would close the audit.

"My first reaction was 'hell no,' because they are not truly employees," Myers said. "But my second reaction was that it makes no economic sense for me to fight this because it would cost another $50,000 or more, so I gave him two names."

The two programmers, he said, no longer speak to him.

Shulman said the association "is not asking for a special privilege in repealing this law; we are just asking that programmers and other technical-services workers be treated the same as every other worker in America instead of being singled out for discriminatory treatment."

Donna Steele Flynn, a former member of the House Ways and Means Committee staff who is now a tax specialist with Ernst & Young, said, "The only reason this hasn't gotten fixed is because the official Joint Tax Committee estimate in the past was that repeal of Section 1706 would cost a billion dollars in tax revenue over five years.

"There is a political will on both sides of the aisle, but in terms of importance and number of people, a billion dollars is a lot of money for a relatively small number of people."

However, Ms. Flynn added, the official estimate seems wildly inflated. She noted that when legislation was considered last year that would allow employers broad discretion over whether to treat workers in any industry as employees or independent contractors, the tax revenue loss for the entire economy was estimated at the same $1 billion over five years.

The IRS estimates that it collects 99.5 percent of taxes due from employees, but far less from those who work as independent contractors.

"Whether people cheat is a separate issue," Shulman said. He pointed to a

Treasury Department study that found that programmers were more compliant taxpayers than other independent contractors.

"The IRS wants people to be employees because it is easier to collect revenue, but the revenue they are collecting from employees is less than the revenue they would collect from independent contractors -- even if they cheat a little -- because they can make so much more," he said. "Basically the IRS is saying it would rather collect less revenue with less cheating than collect more revenue with more cheating. Does that make economic sense?"

E-MAIL

Short v. long

✓ support ~~Abraham~~

temporary increase

— opp. to ~~recruit~~ train U.S. workers.

Don't like Labor authority to investigate > Don't

* Voluntary departure is exempted

want "lay-off" defined to exclude

afraid that it doesn't cover those that they want to exempt.

House bill [go fly a kite]

HR 3736

Job Contractors

(*) more clearly defined

as different from those that are H1B dependent.

Debra J. Bond 04/30/98 01:15:43 PM

Record Type: Record

To: Barbara Chow/OMB/EOP, Cecilia E. Rouse/OPD/EOP, Julie A. Fernandes/OPD/EOP

cc: See the distribution list at the bottom of this message
Subject: H-1B Subcommittee Mark-up

I attended the subcommittee mark-up this morning of H.R. 3736, the "Workforce Improvement and Protection Act of 1998." The bill was favorably reported out by voice vote to the full Committee on Judiciary without amendment. [Chairman Smith (R/TX), Mr. Gallegly (R/CA), Mr. Jenkins (R/TN), Mr. Pease (R/IN), Mr. Cannon (R/UT), Mr. Bryant (R/TN), Mr. Rogan (R/CA), Mr. Watt (D/NC), Mr. Berman (D/CA), Ms. Lofgren (D/CA), and Mr. Wexler (D/FL) attended the hearing.]

Many members stated their intent to work with Chairman Smith prior to full Committee mark-up and offer amendments at that time. A description of the specific issues members want to address at Committee follows. Where the comments are limited to "opening remarks," no additional statements were made by the members. The Committee mark-up is expected next week.

Chairman Smith: Among other things he discussed the no lay-off, recruit and retain, and enforcement provisions during his opening remarks. He basically provided an overview of the bill.

Mr. Watt: He spoke about being a supporter of the free market, but recognized the need for an exception in this case given there appears to be a labor shortage. He has concerns about the visa number increase and the lack of a training component. (Opening remarks.)

During mark-up, he added support for a training provision to address the skills shortage funded by users of the program. He also raised whether it will be possible to include a training provision at the Committee level because of germaneness issues. Smith's attorney stated that it is a question. Smith stated that he would support such an amendment at the Committee level as being germane. Watt stated an intent to introduce a series of amendments at Committee including reversing the ramping up of the visa numbers so it instead ramps down from a high point in 1998 to a low point in 2000 (Smith's bill is 95,000 in 1998, 105,000 in 1999, and 115,000 in 2000).

Mr. Pease: He supports the bill but has some concerns. He specifically expressed "labor concerns" (no elaboration) and suggested an off-set with unskilled workers. He wants to find a way to increase the supply of US workers through an industry/government partnership funding system. He mentioned special circumstances for higher education. (Opening remarks.)

Ms. Lofgren: She stated that she did not support the bill as drafted but wanted the bill to move forward. She pointed out that the program was not designed to meet labor shortages but instead it is meant to bring in talent. She also has concerns about the administration of the existing program. (Opening remarks.)

During mark-up, Ms. Lofgren stated her intent to explore amendments in the following areas:

- a fee to support training, particularly disadvantaged youth. Specifically mentioned JTPA and MESA (Math, Engineering, Science Program);
  (NOTE: We are researching to learn more about MESA.)

- an off-set for the H-1B increase with H-2B visas (unskilled workers);
- setting a salary floor for H-1B workers;
- a carve-out for colleges and universities wages (presumably for prevailing wage determinations);
- an H-1C program geared at the best and brightest which is streamlined without the normal rigmarole;
- an analysis by GAO (similar to Senate bill);
- attestations -- doesn't believe workable -- suggested provisions from HR 2202 ("Immigration in the National Interest Act of 1995"; legal immigration bill in 1995);
- require INS and DOL to keep track of what they are doing so we will know who is in the country, what occupation they are employed in, and how much they are paid.
- require DOL study of possible age and gender discrimination in the high-tech industry; and,
- recruitment provision -- not workable as drafted (presumably referring to "industry standards"); needs to be more market driven.

Mr. Cannon: He stated that this is a very important bill, but that he has concerns. (Opening remarks.)

Mr. Rogan: Also stated that this is a very important bill. He stated concerns with including additional attestations and increasing DOL's enforcement authority. (Opening remarks.)

Mr. Berman: He plans to offer an amendment at Committee on protection for H-1B whistleblowers. (During mark-up.)

Message Copied To:

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April 23, 1998

Administration Position Regarding H-1B Legislation

The Administration has committed to pursuing both reforms to the H-1B visa program and increased training opportunities for U.S. workers as part of any legislation that would temporarily raise the annual cap on H-1B visas. The following represents the Administration's position on major reforms and training initiatives.

I. Recruitment and Non-displacement of United States Workers Prior to Seeking Nonimmigrant Workers

(a) IN GENERAL -- Section 212(n)(1)of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)) is amended by inserting at the end the following new subparagraph:

(E)(I) The employer, prior to filing the application, has taken good faith, timely and significant steps to recruit and retain sufficient U.S. workers in the specialty occupation in which the non-immigrant whose services are being sought will be employed. Good faith recruitment shall be defined as:

(a) That the employer took at least two of the following actions in a manner reasonably designed to attract U.S. workers:

(i) widespread advertising of the relevant job opening (e.g., through America's Job Bank, the Internet, general circulation publications, professional journals and magazines);
(ii) participation in job fairs;
(iii) provided meaningful monetary incentives (such as paying above the prevailing wage or paying bonuses and training subsidies not included in the base compensation package).

(b) With respect to internal applicants, that the employer has considered whether these applicants could be given additional training within a reasonable period of time to be able to fill the available position.

(c) The employer did not receive applications from any U.S worker or offered employment to any U.S. worker who has substantially equivalent qualifications and experience to the temporary foreign worker offered employment.

(E)(II) The recruitment requirements of this subparagraph shall not apply to aliens with extraordinary ability, aliens who are outstanding professors and researchers, and certain multinational executives and managers described in section 203(b)(1). The recruitment requirements of this subparagraph shall also not apply to a scientist, mathematician, or engineer who has attained at least a master's degree or its equivalent in a scientific or engineering discipline, and who is coming temporarily to the United States to participate in a cooperative joint scientific activity carried out under an Agreement between the Federal Government and the alien's Government.

(F)(I) The employer --

(a) has not, within the 90-day period prior to the filing of the application, laid off or otherwise displaced any United States worker (as defined in subparagraph (B)), including a worker obtained by contract, employee leasing, temporary help agreement, or other similar basis, who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant is intended to be (or is) employed; and

(b) will not lay off or otherwise knowingly displace, during the 90-day period following the filing of the application, or during the 90-day period immediately preceding and following the filing of any visa petition supported by the application, any United States worker, including any worker obtained by contract, employee leasing, temporary help agreement, or other similar basis who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant is intended to be (or is) employed.

(F)(II) For purposes of this subparagraph, the term "laid off," with respect to an employee, means the employee's loss of employment, other than a discharge for cause or a voluntary departure or voluntary retirement. The term "laid off" does not apply to any case in which employment is relocated to a different geographic area and the affected employee is offered a chance to move to the new location with the same wages and benefits, but elects not to move to the new location.

(G) The employer offered compensation as required by subparagraph (A).

(b) For purposes of this subsection, the term "United States worker" means --

(I) a citizen or national of the United States
(II) an alien lawfully admitted to the United States for permanent residence; or
(III) an alien authorized to be employed by this Act or by the Attorney General.

II. Wage Comparability

Section 212(n)(1)(A)(I) of such Act is amended by inserting "(including the value of benefits and additional compensation)" after "wages." Section 212(n)(1)(A)(I)(I) is amended by inserting "(including the value of benefits and additional compensation)" after "actual wage level."

III. Job Contractors

In the case of an employer that is a job contractor (within the meaning of regulations promulgated by the Secretary of Labor to carry out this subsection), the contractor will not place any H-1B employee with another employer unless such other employer has executed an attestation that the employer is complying and will continue to comply with the requirements of this paragraph in the same manner as they apply to the job contractor.

IV. Enforcement

(a) Independent Authority to Investigate

Section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)) is amended --

(I) in paragraph (2)(A), by striking the first sentence and inserting the following:

"The Secretary may conduct investigations pursuant to a complaint or, where there is no complaint, where the Secretary has reasonable cause to believe that:

(a) there is a pattern or practice of complaints by U.S. workers against the employer;

(b) an employer has filed H-1B visa petitions for more than 50 temporary foreign workers in any one year period;

(c) an employer is seeking to employ H-1B workers as more than 10% of its U.S. workforce; or

(d) an employer has laid off or otherwise displaced more than 10% of its U.S. workforce or 500 U.S. workers (whichever is fewer) in any one year period (or has announced the intent to make such a lay-off).

The Secretary shall establish a process for the receipt, investigation, and disposition of complaints or other cases of noncompliance with this section."

(II) in paragraph (2)(C), by inserting ", or that the employer failed to cooperate in the conduct of the Secretary's investigation or has intimidated, discharged, or otherwise discriminated against any person because that person has asserted a right or has cooperated in an investigation under this paragraph" after "a material fact in an application."

(III) in paragraph (2), by adding at the end the following new subparagraph:

"(E) The Secretary may issue subpoenas requiring the attendance and testimony of witnesses or the production of any records, books, papers, or documents in connection with any investigation or hearing, conducted under this paragraph. In conducting a hearing, the Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this paragraph, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall apply."

V. Sanctions

Section 212(n)(2)(C) is amended to read:

"If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B); a substantial failure to meet a condition of paragraphs (1)(C) or (1)(D); a willful failure to meet a condition of paragraph (1)(A); a violation(s) of paragraphs (1)(E) or (1)(F) that is willful, or reflects a pattern or practice of violations, or is a violation that affects a significant number of applicants, employees, or former employees; or a mis-representation of a material fact contained in (1)(A), (1)(B), (1)(C) or (1)(D) —

(i) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) as the Secretary determines to be appropriate,"

VI. Application Fee

(3)(A) The Secretary of Labor shall require payment of a fee by the employer for each position for which an application is filed under this subsection. The fee shall be in an amount prescribed by the Secretary of Labor, and shall be paid to the Department of Labor. . . .

(ii) During the period ending September 30, 2001, such a fee shall not exceed $250 for each position.

. . .

(v) It shall be unlawful for an employee to require, as a condition of employment by such employer, that the fee prescribed under this paragraph or any part of the fee, be paid directly or indirectly by the alien whose services are being sought.

(vi) Any person or entity that is determined, after notice and opportunity for an administrative hearing, to have violated clause (v) shall be subject to a civil penalty of $5,000 for each violation, to an administrative order requiring the payment of any fee described in this paragraph, and the disqualification for 1 year from petitioning for foreign skilled temporary workers under this subsection.

(vii) Any amount determined to have been paid, directly or indirectly, toward the filing fee described in paragraph (3)(A) by the alien whose services were sought, shall be repaid from the fund to such alien.

VII. Training

The Administration strongly supports the creation of Regional Skills Alliances and expansion of the National Science Foundation (NSF)'s advanced technical education programs. The Administration does not support providing scholarships or loans to individuals, including the expansion of the State Student Incentive Grant (SSIG) program.

VIII. New Visa Category Proposal

A new program (H-1C) that creates temporary visas for use only by non-immigrants with very high skill levels. In particular:

- The program would be authorized for four years beginning in FY1998.
- There would be a maximum of 25,000 visas for FY1998, FY1999, and FY2000, and a maximum of 15,000 visas for FY2001.
- Only employers whose number of H-1B and "H-1C" employees in the prior year constitutes no greater than one-half of their U.S. based workforce are eligible to apply.
- Only individuals with a minimum of a master's degree (or equivalent) in math, science, or engineering are eligible for an "H-1C" visa.
- Requires a $500 fee for each position for which an application is filed for training, enforcement, and administration of the program.
- The "H-1C" visas would be issued for a 3-year period, and renewable for an additional 3 years.
- All of the requirements of the "H-1C" visa program would be the same as would exist under the reformed H-1B program.

April 23, 1998

Administration Position Regarding H-1B Legislation

The Administration has committed to pursuing both reforms to the H-1B visa program and increased training opportunities for U.S. workers as part of any legislation that would temporarily raise the annual cap on H-1B visas. The following represents the Administration's position on major reforms and training initiatives.

I. <u>Recruitment and Non-displacement of United States Workers Prior to Seeking Nonimmigrant Workers</u>

(a) IN GENERAL -- Section 212(n)(1)of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)) is amended by inserting at the end the following new subparagraph:

(E)(I) The employer, prior to filing the application, has taken good faith, timely and significant steps to recruit and retain sufficient U.S. workers in the specialty occupation in which the non-immigrant whose services are being sought will be employed. Good faith recruitment shall be defined as:

w/in a reasonable period of time

(a) That the employer took at least two of the following actions in a manner reasonably designed to attract U.S. workers:

(i) widespread advertising of the relevant job opening (e.g., through America's Job Bank, the Internet, general circulation publications, professional journals and magazines);

(ii) participation in job fairs;

(iii) provided meaningful monetary incentives (such as paying above the prevailing wage or paying bonuses and training subsidies not included in the base compensation package).

(b) considered whether current employees could be given additional ~~reasonable~~ training to be able to fill the available position.

(b) That the employer has taken good faith steps designed to retain U.S. workers, such as providing training, flex time, job sharing, day care facilities, retention bonuses, or other similar measures to enable or encourage workers to remain with their employer.

w/respect to internal applicants, that the em

(c) The employer did not receive applications from any U.S worker or offered employment to any U.S. worker who has substantially equivalent qualifications and experience to the temporary foreign worker offered employment.

(E)(II) The recruitment requirements of this subparagraph shall not apply to aliens with extraordinary ability, aliens who are outstanding professors and researchers, and certain multinational executives and managers described in section 203(b)(1). The recruitment requirements of this subparagraph shall also not apply to a scientist, mathematician, or engineer who has attained at least a master's degree or its equivalent in a scientific or engineering discipline, and who is coming temporarily to the United States to participate in a cooperative joint scientific activity carried out under an Agreement between the Federal Government and the alien's Government.

(F)(I) The employer --

(a) has not, within the 90-day period prior to the filing of the application, laid off or otherwise displaced any United States worker (as defined in subparagraph (B)), including a worker obtained by contract, employee leasing, temporary·help agreement, or other similar basis, who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant is intended to be (or is) employed; and

(b) will not lay off or otherwise knowingly displace, during the 90-day period following the filing of the application, or during the 90-day period immediately preceding and following the filing of any visa petition supported by the application, any United States worker, including any worker obtained by contract, employee leasing, temporary help agreement, or other similar basis who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant is intended to be (or is) employed.

(F)(II) For purposes of this subparagraph, the term "laid off," with respect to an employee, means the employee's loss of employment, other than a discharge for cause or a voluntary departure or voluntary retirement. The term "laid off" does not apply to any case in which employment is relocated to a different geographic area and the affected employee is offered a chance to move to the new location with the same wages and benefits, but elects not to move to the new location.

(G) The employer offered compensation as required by subparagraph (A).

(b) For purposes of this subsection, the term "United States worker" means --

(I) a citizen or national of the United States
(II) an alien lawfully admitted to the United States for permanent residence; or
(III) an alien authorized to be employed by this Act or by the Attorney General.

II. <u>Wage Comparability</u>

Section 212(n)(1)(A)(I) of such Act is amended by inserting "(including the value of benefits and additional compensation)" after "wages." Section 212(n)(1)(A)(I)(I) is amended by inserting "(including the value of benefits and additional compensation)" after "actual wage level."

III. Job Contractors

In the case of an employer that is a job contractor (within the meaning of regulations promulgated by the Secretary of Labor to carry out this subsection), the contractor will not place any H-1B employee with another employer unless such other employer has executed an attestation that the employer is complying and will continue to comply with the requirements of this paragraph in the same manner as they apply to the job contractor.

IV. Enforcement

(a) Independent Authority to Investigate

Section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)) is amended --

(I) in paragraph (2)(A), by striking the first sentence and inserting the following:

"The Secretary may conduct investigations pursuant to a complaint or, where there is no complaint, where the Secretary has reasonable cause to believe that:

(a) there is a pattern or practice of complaints by U.S. workers against the employer;

(b) an employer has filed H-1B visa petitions for more than 50 temporary foreign workers in any one year period;

(c) an employer is seeking to employ H-1B workers as more than 10% of its U.S. workforce; or

(d) an employer has laid off or otherwise displaced more than 10% of its U.S. workforce or 500 U.S. workers (whichever is fewer) in any one year period (or has announced the intent to make such a lay-off).

The Secretary shall establish a process for the receipt, investigation, and disposition of complaints or other cases of noncompliance with this section."

(II) in paragraph (2)(C), by inserting ", or that the employer failed to cooperate in the conduct of the Secretary's investigation or has intimidated, discharged, or otherwise discriminated against any person because that person has asserted a right or has cooperated in an investigation under this paragraph" after "a material fact in an application."

(III) in paragraph (2), by adding at the end the following new subparagraph:

"(E) The Secretary may issue subpoenas requiring the attendance and testimony of witnesses or the production of any records, books, papers, or documents in connection with any investigation or hearing, conducted under this paragraph. In conducting a hearing, the Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this paragraph, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall apply."

V. Sanctions

Section 212(n)(2)(C) is amended to read:

"If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B); a substantial failure to meet a condition of paragraphs (1)(C) or (1)(D); a willful failure to meet a condition of paragraph (1)(A); a violation(s) of paragraphs (1)(E) or (1)(F) that is willful, or reflects a pattern or practice of violations; or a mis-representation of a material fact contained in (1)(A), (1)(B), (1)(C) or (1)(D) —

affects
or ~~reflects~~
a significant
#

(i) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) as the Secretary determines to be appropriate,"

VI. Application Fee

(3)(A) The Secretary of Labor shall require payment of a fee by the employer for each position for which an application is filed under this subsection. The fee shall be in an amount prescribed by the Secretary of Labor, and shall be paid to the Department of Labor. . . .

(ii) During the period ending September 30, 2001, such a fee shall not exceed $250 for each position.

. . .

(v) It shall be unlawful for an employee to require, as a condition of employment by such employer, that the fee prescribed under this paragraph or any part of the fee, be paid directly or indirectly by the alien whose services are being sought.

(vi) Any person or entity that is determined, after notice and opportunity for an administrative hearing, to have violated clause (v) shall be subject to a civil penalty of $5,000 for each violation, to an administrative order requiring the payment of any fee described in this paragraph, and the disqualification for 1 year from petitioning for foreign skilled temporary workers under this subsection.

(vii) Any amount determined to have been paid, directly or indirectly, toward the filing fee described in paragraph (3)(A) by the alien whose services were sought, shall be repaid from the fund to such alien.

VII. Training

The Administration strongly supports the creation of Regional Skills Alliances and expansion of the National Science Foundation (NSF)'s advanced technical education programs. The Administration does not support providing scholarships or loans to individuals, including the expansion of the State Student Incentive Grant (SSIG) program.

VIII. New Visa Category Proposal

A new program (H-1C) that creates temporary visas for use only by non-immigrants with very high skill levels. In particular:

- The program would be authorized for four years beginning in FY1998.
- There would be a maximum of 25,000 visas for FY1998, FY1999, and FY2000, and a maximum of 15,000 visas for FY2001.
- Only employers whose number of H-1B and "H-1C" employees in the prior year constitutes no greater than one-half of their U.S. based workforce are eligible to apply.
- Only individuals with a minimum of a master's degree (or equivalent) in math, science, or engineering are eligible for an "H-1C" visa.
- Requires a $500 fee for each position for which an application is filed for training, enforcement, and administration of the program.
- The "H-1C" visas would be issued for a 3-year period, and renewable for an additional 3 years.
- All of the requirements of the "H-1C" visa program would be the same as would exist under the reformed H-1B program.

Eric Biel — 482-8368 (tel)

Eric Biel
482-4636
(fax)

April 22, 1998

Administration Position Regarding H-1B Legislation

The Administration has committed to pursuing both reforms to the H-1B visa program and increased training opportunities for U.S. workers as part of any legislation that would temporarily raise the annual cap on H-1B visas. The following represents the Administration's position on major reforms and training initiatives ~~(with the Department of Commerce dissenting on Sections I and II)~~.

I. <u>Recruitment and Non-displacement of United States Workers Prior to Seeking Nonimmigrant Workers</u>

(a) IN GENERAL -- Section 212(n)(1)of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)) is amended by inserting at the end the following new subparagraph:

(E)(I) The employer, prior to filing the application, has taken good faith, timely and significant steps to recruit and retain sufficient U.S. workers in the specialty occupation in which the non-immigrant whose services are being sought will be employed. Good faith recruitment shall be defined as:

(a) That the employer took at least two of the following actions in a manner reasonably designed to attract or retain U.S. workers:

(i) widespread advertising of ~~all~~ the relevant job openings (e.g., through America's Job Bank, the Internet, general circulation publications, professional journals and magazines);

(ii) participation in job fairs;

(iii) provided meaningful monetary incentives (such as paying above the prevailing wage or paying bonuses and training subsidies not included in the base compensation package).

(iv) ~~to~~ considered whether current employees could be given reasonable training to be able to fill the available position, flextime, job sharing, daycare facilities, retention bonuses.

e has considered whether current employees have been considered

(b) That the employer has taken goo~~d~~ faith steps designed to retain U.S. workers, ~~such as operating an employer-financed~~ training program at the employer's facility or financing (or otherwise providing for) a training program ~~elsewhere~~ which provides the means for its employees to enhance ~~their~~ skills to meet ~~the~~ needs of the employer,

(c) The employer did not receive applications from any ~~qualified~~ U.S worker or ~~failed to~~ offered employment to any U.S. worker who ~~is comparably qualified~~ has substantially equivalent qualif. & experience to the temporary foreign worker offered employment.

(E)(II) The recruitment requirements of this subparagraph shall not apply to aliens with extraordinary ability, aliens who are outstanding professors and researchers, and certain multinational executives and managers described in section 203(b)(1).

or engineering

between 2 countries

The recruitment requirements of this subparagraph shall also not apply to a scientist, mathematician, or engineer who has attained at least a master's degree or its equivalent in a scientific discipline, and who is coming temporarily to the United States to participate in a cooperative joint scientific activity carried out under an Agreement between the Federal Government and the alien's Government.

~~supported by the Fed Govt or~~

(F)(I) The employer --

(a) has not, within the 90-day period prior to the filing of the application, laid off or otherwise displaced any United States worker (as defined in subparagraph (B)), including a worker obtained by contract, employee leasing, temporary help agreement, or other similar basis, who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant is intended to be (or is) employed; and

(b) will not lay off or otherwise knowingly displace, during the 90-day period following the filing of the application, or during the 90-day period immediately preceding and following the filing of any visa petition supported by the application, any United States worker, including any worker obtained by contract, employee leasing, temporary help agreement, or other similar basis who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant is intended to be (or is) employed.

~~or the expiration of a Federal grant or contract~~

(F)(II) For purposes of this subparagraph, the term "laid off," with respect to an employee, means the employee's loss of employment, other than a discharge for cause or a voluntary departure or voluntary retirement. The term "laid off" does not apply to any case in which employment is relocated to a different geographic area and the affected employee is offered a chance to move to the new location with the same wages and benefits, but elects not to move to the new location.

(G) The employer offered compensation as required by subparagraph (A).

(b) For purposes of this subsection, the term "United States worker" means --

(I) a citizen or national of the United States
(II) an alien lawfully admitted to the United States for permanent residence; or
(III) an alien authorized to be employed by this Act or by the Attorney General.

do we reference somewhere the prevailing wage (?)

II. Wage Comparability

Section 212(n)(1)(A)(I) of such Act is amended by inserting "(including the value of benefits and additional compensation)" after "wages." Section 212(n)(1)(A)(I)(I) is amended by inserting "(including the value of benefits and additional compensation)" after "actual wage level."

III. Job Contractors

In the case of an employer that is a job contractor (within the meaning of regulations promulgated by the Secretary of Labor to carry out this subsection), the contractor will not place any H-1B employee with another employer unless such other employer has executed an attestation that the employer is complying and will continue to comply with the requirements of this paragraph in the same manner as they apply to the job contractor.

IV. Enforcement

(a) Independent Authority to Investigate

Section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)) is amended --

(I) in paragraph (2)(A), by striking the first sentence and inserting the following:

"The Secretary ~~shall~~ may conduct investigations pursuant to a complaint or, where there is no complaint, where the Secretary has reasonable cause to believe that:

(a) there is a pattern or practice of complaints by U.S. workers against the employer;

(b) an employer has filed H-1B ~~applications~~ visa petitions for more than 50 or temporary foreign workers ~~(in a single SMSA)~~ ~~positions~~ in ~~a single year~~ any one year period.

500 or 10% whichever is fewer

(c) an employer is seeking to employ H-1B workers as more than 10% of its U.S. workforce; or

or % whichever is smaller

(d) an employer has laid off or otherwise displaced in any one year period more than 50 workers ~~in any one year period~~ (or has announced the intent to make such a lay-off). w/substantial equivalent

The Secretary shall establish a process for the receipt, investigation, and disposition of complaints or other cases of noncompliance with this section."

(II) in paragraph (2)(C), by inserting ", or that the employer failed to cooperate in the conduct of the Secretary's investigation or has intimidated, discharged, or otherwise discriminated against any person because that person has asserted a right or has cooperated in an investigation under this paragraph" after "a material fact in an application."

(III) in paragraph (2), by adding at the end the following new subparagraph:

"(E) The Secretary may issue subpoenas requiring the attendance and testimony of witnesses or the production of any records, books, papers, or documents in connection with any investigation or hearing, conducted under this paragraph. In conducting a hearing, the Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this paragraph, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall apply."

V. Sanctions

Section 212(n)(2)(C) is amended to read:

"If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B); or substantial failure to meet a condition of paragraphs (1)(C) or (1)(D); a willful failure to meet a condition of paragraph (1)(A); or a violation(s) of paragraphs (1)(E) or (1)(F) that is willful, or reflects a pattern or practice of violations, ~~or is a violation that affects multiple applicants, employees, or former employees~~ or a mis-representation of ~~a~~ material fact ~~in an application~~ another contained in (1)(A), (1)(B), (1)(C), or (1)(D)—

Conception OK

Figure out a way to do this

(i) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) as the Secretary determines to be appropriate,"

VI. Application Fee

(3)(A) The Secretary of Labor shall require payment of a fee by the employer for each position for which an application is filed under this subsection. The fee shall be in an amount prescribed by the Secretary of Labor, and shall be paid to the Department of Labor. . . .

(ii) During the period ending September 30, 2001, such a fee shall not exceed $250 for each position.

. . .

(v) It shall be unlawful for an employee to require, as a condition of employment by such employer, that the fee prescribed under this paragraph or any part of the fee, be paid directly or indirectly by the alien whose services are being sought.

(vi) Any person or entity that is determined, after notice and opportunity for an administrative hearing, to have violated clause (v) shall be subject to a civil penalty of $5,000 for each violation, to an administrative order requiring the payment of any fee described in this paragraph, and the disqualification for 1 year from petitioning for foreign skilled temporary workers under this subsection.

(vii) Any amount determined to have been paid, directly or indirectly, toward the filing fee described in paragraph (3)(A) by the alien whose services were sought, shall be repaid from the fund to such alien.

VII. Training

The Administration strongly supports the creation of Regional Skills Alliances and expansion of the National Science Foundation (NSF)'s advanced technical education programs. The Administration does not support providing scholarships or loans to individuals, including the expansion of the State Student Incentive Grant (SSIG) program, using funds derived from application fees.

VIII. New Visa Category Proposal

A new program (H-1C) that creates temporary visas for use only by non-immigrants with very high skill levels. In particular:

- The program would be authorized for four years beginning in FY1998.
- There would be a maximum of 25,000 visas for FY1998, FY1999, and FY2000, and a maximum of 15,000 visas for FY2001.
- Only employers whose number of H-1B and "H-1C" employees in the prior year constitutes no greater than one-half of their U.S. based workforce are eligible to apply.
- Only individuals with a minimum of a master's degree (or equivalent) in math, science, or engineering are eligible for an "H-1C" visa.
- Requires a $500 fee for each position for which an application is filed for training, enforcement, and administration of the program.
- The "H-1C" visas would be issued for a 3-year period, and renewable for an additional 3 years.
- All of the requirements of the "H-1C" visa program would be the same as would exist under the reformed H-1B program.

To: Julie
From: Artie B.

April 20, 1998

Administration Position Regarding H-1B Legislation
(based on DPC/NEC Deputies Meeting, April 17, 1998)

The Administration has committed to pursuing both reforms to the H-1B visa program and increased training opportunities for U.S. workers as part of any legislation that would temporarily raise the annual cap on H-1B visas. The following represents the Administration's position on major reforms and training initiatives (with the Department of Commerce dissenting on Sections I and II).

I. Recruitment of United States Workers Prior to Seeking Nonimmigrant Workers

(a) IN GENERAL -- Section 212(n)(1)of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)) is amended by inserting at the end the following new subparagraph:

(E)(i) The employer, prior to filing the application, has taken timely and significant steps to recruit and retain sufficient U.S. workers in the specialty occupation in which the non-immigrant whose services are being sought will be employed. Such steps shall include good faith recruitment in the United States using procedures that are standard practice within the industry (e.g., wide-spread advertising of all job openings (such as through America's Job Bank, the Internet, general circulation publications, professional journals and magazines, or job fairs), or providing meaningful monetary incentives (such as paying above the prevailing wage or paying bonuses and training subsidies not included in the base compensation package)), and offering compensation as required by subparagraph (A) and such good faith recruitment must be unsuccessful.

(ii) The recruitment requirements of this subparagraph shall not apply to aliens with extraordinary ability, aliens who are outstanding professors and researchers, and certain multinational executives and managers described in section 203(b)(1). The recruitment requirements of this subparagraph shall also not apply to a scientist, mathematician, or engineer who has attained at least a master's degree or its equivalent in a scientific or engineering discipline, and who is coming ~~temporarily to the United States~~ to participate in a cooperative joint scientific activity supported by the Federal Government or carried out under an Agreement between the Federal ~~Government and the alien's Government~~.

how much does this open the door

(b) WAGE COMPARABILITY -- Section 212(n)(1)(A)(I) of such Act is amended by inserting "(including the value of benefits and additional compensation)" after "wages." Section 212(n)(1)(A)(I)(I) is amended by inserting "(including the value of benefits and additional compensation)" after "actual wage level."

II. Non-displacement of United States Workers

Section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)), as amended by section 5, is amended by adding at the end the following new paragraph:

(4)(A) The employer --

(I) has not, within the 6-month period prior to the filing of the application, laid off or otherwise displaced any United States worker (as defined in subparagraph (B)), including a worker obtained by contract, employee leasing, temporary help agreement, or other similar basis, who has substantially equivalent qualifications and experience **[CHECK with BILL M.]** in the specialty occupation in which the nonimmigrant is intended to be (or is) employed; and

(ii) will not lay off or otherwise knowingly displace, during the 90-day period following the filing of the application, or during the 90-day period immediately preceding and following the filing of any visa petition supported by the application, any United States worker, including any worker obtained by contract, employee leasing, temporary help agreement, or other similar basis who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant is intended to be (or is) employed.

(B) For purposes of this subsection, the term "United States worker" means --

(I) a citizen or national of the United States
(ii) an alien lawfully admitted to the United States for permanent residence; or
(iii) an alien authorized to be employed by this Act or by the Attorney General.

(C) For purposes of this subparagraph, the term "laid off," with respect to an employee, means the employee's loss of employment, other than a discharge for cause or a voluntary departure or voluntary retirement <u>or the expiration of a Federal grant or contract</u>. The term "laid off" does not apply to any case in which employment is relocated to a different geographic area and the affected employee is offered a chance to move to the new location with the same wages and benefits, but elects not to move to the new location.

(D) If during the six month period prior to filing an application for an H-1B worker an employer of more than 100 U.S. employees lays-off more than 10% of its U.S. workforce or 500 people (whichever is fewer), the employer will not be eligible to apply for H-1B workers unless it demonstrates to the Department of Labor that it is not seeking employees through the H-1B program in the same specialty occupation(s) as those U.S. workers laid-off.

III. Job Contractors

In the case of an employer that is a job contractor (within the meaning of regulations promulgated by the Secretary of Labor to carry out this subsection), the contractor will not place any H-1B employee with another employer unless such other employer has executed an attestation that the employer is complying and will continue to comply with the requirements of this paragraph in the same manner as they apply to the job contractor.

IV. Enforcement

(a) Independent Authority to Investigate

Section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)) is amended —

(1) in paragraph (2)(A), by striking the first sentence and inserting the following: "The Secretary shall conduct an investigation where there is reasonable cause to believe that an employer has made a misrepresentation of a material fact on a labor condition attestation or has failed to comply with the terms and conditions of an application submitted under paragraph (1) or with the provisions of this section or any rule or regulation pertaining to this section. The Secretary shall establish a process for the receipt, investigation, and disposition of complaints or other cases of noncompliance with this section."; **[add some language on job shops??]**

(2) in paragraph (2)(C), by inserting ", or that the employer failed to cooperate in the conduct of the Secretary's investigation or has intimidated, discharged, or otherwise discriminated against any person because that person has asserted a right or has cooperated in an investigation under this paragraph" after "a material fact in an application."

(b) Subpoena Authority

(5) in paragraph (2), by adding at the end the following new subparagraph:

"(E) The Secretary may issue subpoenas requiring the attendance and testimony of witnesses or the production of any records, books, papers, or documents in connection with any investigation or hearing, conducted under this paragraph. In conducting a hearing, the Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this paragraph, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall apply."

V. Application Fee

"(3)(A) The Secretary of Labor shall require payment of a fee by the employer for each position for which an application is filed under this subsection. The fee shall be in an amount prescribed by the Secretary of Labor, and shall be paid to the Department of Labor. ...

"(ii) During the period ending September 30, 2001, such a fee shall not exceed $250 for each position."

"(v) It shall be unlawful for an employee to require, as a condition of employment by such employer, that the fee prescribed under this paragraph or any part of the fee, be paid directly or indirectly by the alien whose services are being sought." ....Institutions whose principal mission is education or knowledge creation (universities, Federal research laboratories, non-profit research institutes) shall be exempt from this requirement.

VI. Training

The Administration strongly supports the creation of Regional Skills Alliances and expansion of the National Science Foundation (NSF)'s advanced technical education programs. The Administration does not support providing scholarships or loans to individuals, including the expansion of the State Student Incentive Grant (SSIG) program using funds derived from application fees.

VII. New Visa Category Proposal

A new program (H-1C) that creates temporary visas for use only by non-immigrants with very high skill levels. In particular:

- The program would be authorized for four years beginning in FY1998.
- There would be a maximum of 25,000 visas for FY1998, FY1999, and FY2000, and a maximum of 15,000 visas for FY2001.
- Only employers whose number of H-1B and "H-1C" employees in the prior year constitutes no greater than one-half of their U.S. based workforce are eligible to apply.
- Only individuals with a minimum of a master's degree (or equivalent) in math, science, or engineering are eligible for an H-1C visa.
- Requires a $500 fee for each position for which an application is filed for training, enforcement, and administration of the program.
- The "H-1C" visas would be issued a 3-year period, and renewable for an additional 3 years.
- All of the requirements of the "H-1C" visa program would be the same as would exist under the reformed H-1B program.