

5-3130

LRM ID: IMS313 SUBJECT: OMB Request for Views 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 415-3130
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM:

5/4/98 (Date)
Peter Collins (Name)
USTR (Agency)
5-7271 (Telephone)

To: Julie Fernandez

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: See below
- ☐ FAX RETURN of 0 pages, attached to this response sheet

Bill could be viewed as inconsistent with U.S. WTO commitments. Major concern: ceiling of 7,500 on healthcare workers -- U.S. commitments allow for annual entry of 65,000 H-1-b workers with no sub-quotas by profession.

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LRM ID: IMS313 SUBJECT: OMB Request for Views on HR3796 Workforce Improvement and Protection Act of 1998

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UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

200 Constitution Avenue,
N.W.
Room S-1325
Washington, DC 20210

Confirmation:
202/219-6141

May 1, 1998/4:34pm

TO: CECI ROUSE
JULIE FERNANDEZ

DEPARTMENT/COMPANY:

FACSIMILE NUMBER: ~~6558~~ 558 /
2223

FROM: EARL GOHL

NUMBER OF PAGES INCLUDING COVER:

FACSIMILE REPLIES: CONGRESSIONAL AFFAIRS

202/219-5120

INTERGOVERNMENTAL AFFAIRS

202/219-5736

IMMEDIATE OFFICE OF THE ASSISTANT SECRETARY

202/219-5288

MESSAGE: ~~this is mark's first set..~~

Sorry - Julie -

Attached is some other stuff - FYI

SEC. 7. IMPOSITION AND USE OF FEE.

Section 214(c) (1) of the Immigration and Nationality Act (8 U.S.C. 1184(c) (1)) is amended by adding at the end the following:

"The Attorney General shall impose a special fee on each employer filing a petition to import an alien as a nonimmigrant described in section 101(a) (15) (H) (i) (b). The fee shall equal \$250 for each such nonimmigrant for whom a petition is filed. The Attorney General shall deposit all fees collected under the preceding sentence in a fund established for this purpose in the Treasury of the United States. All such amounts Of the amounts deposited, 80 percent shall be available, in such amounts and under such conditions as may be provided in advance in appropriations Acts, until expended to the Secretary of Labor for the purposes of carrying out providing training and related activities to assist in preparing workers for employment in industries with skill needs under part B of title IV of the Job Training Partnership Act (29 U.S.C. 1501 et seq.) and 20 percent shall be available until expended to the Secretary of Education to carry out High Hopes Partnership grants or a similar program authorized under the Higher Education Act of 1965 to assist in preparing students in low-income communities to prepare for, enter and successfully complete college. the minority science and engineering improvement programs under part B of title X of the Higher Education Act of 1965 (20 U.S.C. 1135b et seq.).".

SEC. 7. IMPOSITION AND USE OF FEE.

Section ~~214(e)(1)~~ ~~212(n)~~ of the Immigration and Nationality Act (8 U.S.C. ~~1184(e)(1)~~ ~~1182(n)~~) is amended by adding at the end the following paragraph:

"(3) The ~~Attorney General~~ ~~Secretary of Labor~~ shall impose a fee on each employer filing a petition to import an alien as an application under this subsection for certification of a nonimmigrant temporary worker described in section 101(a)(15)(H)(i)(b). The fee shall equal \$250 for each such nonimmigrant position for which an application is filed. The ~~Attorney General~~ ~~Secretary of Labor~~ shall deposit all fees collected under the preceding sentence in a fund established for this purpose in the Treasury of the United States. ~~All such amounts~~ Of the amounts deposited, 80 percent shall be available, ~~in such amounts and under such conditions as may be provided in advance in appropriations Acts,~~ until expended to the Secretary of Labor for the purposes of carrying out providing training and related activities to assist in preparing workers for employment in industries with skill needs under part D of title IV of the Job Training Partnership Act (29 U.S.C. 1501 et seq.) and 20 percent shall be available until expended to the Secretary of Education to carry out High Hopes Partnership grants or a similar program authorized under the Higher Education Act of 1965 to assist in preparing students in low-income communities to prepare for, enter and successfully complete college, ~~the minority science and engineering improvement programs under part B of title X of the Higher Education Act of 1965 (20 U.S.C. 1135b et seq.)~~."

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DISCRETIONARY APPROPRIATIONS FOR FISCAL YEAR 1998—COMPARISON OF CURRENT LEVEL WITH SUBALLOCATIONS PURSUANT TO BUDGET ACT SECTION 302(b)

(In millions of dollars)

	Revised 302(b) suballocations (March 1, 1998)				Current level reflecting action completed as of April 21, 1998				Difference			
	Discretionary		Mandatory		Discretionary		Mandatory		Discretionary		Mandatory	
	BA	O	BA	O	BA	O	BA	O	BA	O	BA	O
Agriculture, Rural Development	23,757	14,000	35,048	35,205	13,751	13,997	35,048	35,205	-6	-3	0	0
Commerce, Justice, State	31,280	25,555	522	532	31,280	28,955	522	532	0	3,400	0	0
District of Columbia	855	554	0	0	855	554	0	0	0	0	0	0
Energy and Water Development	20,732	20,879	0	0	20,732	20,880	0	0	0	1	0	0
Foreign Operations	31,008	13,079	44	44	13,147	13,079	44	44	-17,861	0	0	0
Interior	13,797	13,707	55	55	13,799	13,707	55	55	2	0	0	0
Labor, HHS & Education	80,328	76,123	206,611	209,167	80,547	76,102	206,611	209,167	215	75	0	0
Legislative Branch	2,275	2,251	92	92	2,251	2,251	92	92	-26	0	0	0
Military Construction	9,183	9,862	0	0	9,183	9,862	0	0	0	0	0	0
National Defense	247,512	244,199	197	197	247,512	244,199	197	197	0	-1	0	0
Transportation	11,772	37,179	658	655	12,711	37,204	698	655	939	25	0	0
Treasury-Postal Service	12,735	12,502	12,713	12,712	12,866	12,613	12,713	12,712	131	111	0	0
VA-HUD-Independent Agencies	66,395	79,877	21,332	20,061	68,703	60,089	21,332	20,061	2,308	112	0	0
Reserve/Offsets	2,953	470	0	0	0	0	0	0	-2,953	-470	0	0
Grand total	544,586	550,337	277,312	278,725	527,337	553,591	277,312	278,725	-17,249	3,254	0	0

BEA—COMPARISON OF CURRENT LEVEL TO DISCRETIONARY SPENDING LEVELS SET FORTH IN SEC. 251(c) OF THE BALANCED BUDGET AND EMERGENCY DEFICIT CONTROL ACT OF 1985

(In millions of dollars)

	Defense		Nondefense		Violent crime trust fund	
	BA	A	BA	A	BA	A
Statutory Caps ¹	269,000	267,124	253,906	285,686	5,500	4,833
Current Level	268,934	266,694	252,903	283,614	5,500	3,583
Difference	-66	-430	-603	-2,072	0	-1,250

¹ As adjusted pursuant to sec. 251(b) of the BBEDCA.

H-1B VISAS: THE STEALTH WAY OF TAKING U.S. JOBS FROM WORKERS PROGRAM

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Pennsylvania (Mr. KLING) is recognized for 5 minutes.

Mr. KLING. Mr. Speaker, I rise tonight, I understand the hour is late, but I think this is a very important issue.

We have a program which many Members of Congress are not familiar with. It is called the H-1B visa program. This program allows industries from this Nation to bring over mostly high-tech workers from other countries, 65,000 workers a year right now, for temporary jobs. They can stay here for 6 years.

This was a program that was established back in 1990 because we were being told that we had an anticipated shortage of scientists and of engineers. By the time this program was in place, the Berlin Wall had fallen and we did not have as much of a need in the defense industry for this kind of technical expertise.

But what ended up happening was many countries found out that they could go overseas, they could bring over computer programmers or re-programmers rather than train American workers, and we have seen throughout this country a propensity of what I would refer to as job shops, that is companies that are providing computer programmers to our industries. And our industries are laying off unbelievable numbers of American workers, and they are being replaced by these temporary foreign workers.

I think we are really headed down a tragic highway in this country. I would just want to point out to the Members

of the House that, as the technical and high-tech industry is beating the drum saying we have need to import workers, that we have really thousands upon thousands of students that are graduating from college every year, and we are just debating here on the floor of the House how we deal with the student loan program.

These students are graduating from college. They have large amounts of student loans to pay back and, in many instances, they find themselves waiting on tables because they cannot get jobs. They could be trained to take these jobs. They could be trained to do computer programming.

And, at the same time, we are hearing from the computer industry and many others that they have this high-tech labor shortage. The headlines across the Nation in our papers are telling a different story.

Let me just read something from the Wall Street Journal that just said, a steady drumbeat of layoff announcements in industry sectors that until recently have complained about personnel shortages. In the Silicon Valley, layoffs have occurred at Seagate Technology Incorporated, Silicon Graphics, Netscape Communications Corporation, Apple Computer Incorporated, Sybase Incorporated and others. Some firms have cut hiring plans; help wanted advertising has slumped since the start of the year. Elsewhere, high-tech giants are shedding staff.

Last week, again, according to the Wall Street Journal, Xerox Corporation announced the layoff of 9,000 people. Yet we want to import up to 95,000 workers a year from other countries and give them these jobs.

Something is wrong in America today. We have not had a debate as to the need for this.

The other difficulty is that here is a high-tech industry which prides itself on identifying and quantifying problems, yet they have not proven, according to the GAO, that, in fact, there is a shortage. The gentleman from Michigan (Mr. DINGELL) and myself asked the GAO to look into these claims, and we found out that the material that they are using to justify this claim is faulty.

Also, last week in the San Francisco Examiner, they ran an unprecedented series of letters from readers that are concerned about the alleged shortage of information technology workers. Their conclusion is that we are seeing age discrimination that is pushing into this high-tech sector, pushing many qualified American workers out of the marketplace. The employers want cheaper, more exploitable foreign workers.

And I would like to quote at length from some of these letters, because I think we here in Congress are too busy as we rush through our legislative schedule and we have not heard from these workers.

An older computer consultant has said, "At job fairs, many older people, including myself, are rudely treated by young recruiters from human resources. In one blatant case, I saw a recruiter from a major local computer manufacturer and software firm refuse to talk to anyone who looked like they were over 35. Resumes from older people were tossed in one pile, resumes from younger people were put on another pile with attached notes from a mini interview."

I would also like to talk about one worker who said he was being brought back to his former employer to do what

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he called really retroactive—he actually called it mentoring a foreign engineer who now does his job. So they laid him off, brought over foreign workers, and he had to train them to do his job.

There is a problem in America, Mr. Speaker, and we in Congress have to address it.

Mr. Speaker, I am also providing for the RECORD more detailed information regarding the H-1B program, which follows herewith:

H-1B PROGRAM

Origin of H-1B Program: It was established in 1990 to alleviate an anticipated shortage of scientists and engineers, particularly at the Ph.D. level. By the time it was in place, however, the Berlin Wall had fallen, there was an economic downturn, and downsizing was rampant in defense and other industries using these people. The main proponents of the program were the universities, the National Science Foundation and some industry groups.

Supposed to be a Temporary Program: The program is a high-tech, guestworker program. It allows 65,000 persons in "specialty" occupations to enter the U.S. for three years with one renewal for a total of six years to respond to "temporary" shortages. Then they are supposed to return home. Many, many H-1Bs are used by foreign students trying to stay in the country. Their employers use H-1Bs as a way to see if they want to sponsor the person permanently. So a large number of these people never go back home.

Approval is Quick and Easy: The employer certifies to the Labor Department that it needs a worker in a certain occupation (names are not required) and will pay the prevailing wage. There is no requirement to show that there is an actual shortage in that occupation. After the certification is received, a person's name is attached and INS and the State Department process the visa. Three years ago, this entire process could be done in about a month so employers loved it.

Misuse of H-1B: While in the H-1B status, however, they are indentured servants to their employers. The job they hold is for an occupation, not a certain person. They can be underpaid, forced to work seven days a week, etc., until they can obtain their green card or have to go back home.

Layoffs: In the meantime, another sub-industry of temporary workers developed in the information technology industry. Numerous temporary employment companies appeared which hired almost exclusively H-1Bs from India, Taiwan and the Philippines, paid them less than American workers and used them to replace American workers, particularly computer programmers. Three years ago, the Senate Judiciary Committee held hearings at which laid-off U.S. programmers appeared. Most had lost their jobs to foreign H-1Bs.

65,000 Limit: Until last year, the 65,000 limit was never reached. Then, suddenly, last year, it was reached at the end of August, and the cries of pain from the high-tech industry for raising the cap. There has been no analysis of why this happened.

"SHORTAGE" OF INFORMATION TECHNOLOGY WORKERS

There is no universally accepted definition of information technology (IT) workers or what training is required for the jobs. So industry defined IT worker broadly when trying to demonstrate a demand for IT workers and defined the training required very narrowly.

Demand for IT Workers: The Information Technology Association of America (ITAA)

and Commerce reports found that between 1996-2006 the US will require 1.3 million job openings because of growth and net replacements (1.1 million of which is for growth alone). That is a 14.5% increase.

"Shortage": ITAA and Commerce defined the pool of qualified IT workers as those who have obtained a Bachelor's degree in computer and information science. They did not consider degrees and certifications in computer and information science other than a B.A. degrees in other areas, or workers who could be retrained. In 1993, only 25% of those employed in IT actually had a B.A. in computer and information science. Other workers had degrees in business, social sciences, math, engineering, psychology, economics, and education.

Basis for ITAA's and Commerce's Conclusions and Response: (1) Wages for IT workers are going up, but no more than in any other professional field (the labor supply always tightens in a good economy), (2) there are unfilled jobs, but a response of only 14% of those surveyed is not sufficient to conclude that this is a nationwide problem (need at least 75% response to be credible), and (3) there is offshore recruiting occurring, but no information as to the extent or magnitude.

Response to survey: ITAA sent out a random sample of 2,000 large-sized, mid-sized, and non-IT companies, but only heard from 271 (14%). A 75% response is required to make credible extrapolations, or nationwide generalizations. Also, there is no information on these reported vacancies such as how long the jobs were open, wage being offered, and how the company is attempting to fill them.

Decrease in computer Science B.A. Candidates: There has been a decline since 1985 but that was the peak year. There had been a steady increase from 1970s and it has remained stable in the 1990s.

H-1-B VISAS: THE STEALTH WAY OF TAKING U.S. JOBS FROM U.S. WORKERS

Do you remember when we were promised that by passing NAFTA and GATT, Americans might lose low-wage jobs, but would definitely gain high-wage jobs? Well, they are changing their story . . . again.

The high technology industry is telling us that there is a shortage of information technology workers in the U.S. and an inability to ever meet the demand. The High Tech Industry wants to open the doors to temporary foreign professional workers by issuing something called H-1-B visas. Currently we issue up to 65,000 H-1-B visas per year. Increasing the number of these visas issued could quickly result in surplus labor and rapidly dropping wages.

A little over two years ago this same industry was laying off U.S. computer programmers by the hundreds and replacing them with cheaper foreign workers. Their story was Americans got paid too much and temporary foreign workers should be used to keep down wages or else the work would go abroad. Some jobs did go abroad, but the high technology industry is still unsatisfied. Our country's most highly skilled, sought-after, domestic technology workers have realized how valuable their knowledge is and have started shopping around for the best available wage packages. The industry, unwilling to pay the going wage for U.S. workers, has declared a labor shortage and is demanding more H-1-B visas to keep wages down.

High-Tech Corporate America would be the winner: it could make more money and continue to treat its workers with disdain, dumping them in every temporary downturn in the economy and refusing to invest in job training. The losers will be our young people who are looking for jobs in technology, older workers who may need retraining, and tax-

payors who will pay to train U.S. workers only to have them become surplus labor.

There may be a lot of posturing and panic, but there is no evidence of a shortage. Though industry and the Commerce Department have produced studies claiming there is a shortage, the General Accounting Office found that "serious analytical and methodological weaknesses" undermine the Commerce report's credibility. Every year, this country produces approximately 550,000 bachelor's degrees in science and engineering; 120,000 master's degrees; and 40,000 doctorates for a total of 810,000. Any one of these degrees could be used to develop a career in information technology. However, a degree is not absolutely necessary to succeed in this field. After all, Bill Gates dropped out of college and then created Microsoft.

Furthermore, an employer does not have to look for a U.S. worker before applying for an H-1-B worker. So even if there are hundreds of talented U.S. workers available, an employer can apply to hire a temporary foreign worker without any negative consequences.

It is too risky to raise temporary foreign worker quotas before anyone has clearly defined and quantified a problem. Once H-1-B visas are increased, it will be very hard to bring the number back down again. These temporary programs quickly become permanent ones that send negative signals to our own workers. They say—you can train, but we will still import our workers.

The technology industry appears to be booming and has been posting record earnings for several years. Let's allow America's most skilled workers to "boom" with it.

INFO TECH WORKER SHORTAGE? WHERE'S THE EVIDENCE?

DEAR COLLEAGUE: For months we have been bombarded with stories from the information technology industry about a terrible shortage of skilled professionals. They argue that Congress must expand the temporary foreign worker program to meet their needs. Three studies have been cited to prove the case—one by the Commerce Department and two by the Information Technology Association of America. Based on these reports, legislation to increase the number of foreign technical workers has already been introduced in the Senate and is expected soon in the House.

The problem is the reports are wrong. **Claim #1:** The Commerce Department found a shortage of information technology workers based on the (flawed) ITAA studies and its own back-of-the-envelope calculation that there will be 35,000 new jobs created annually in industry with only 25,000 new computer science college graduates each year.

Response: The General Accounting Office noted that "serious analytical and methodological weaknesses" undermine the Commerce report's credibility. Only 29% of IT workers have come from computer science, with graduates in math, science, social science, education and business filling the remaining positions.

Claim #2: In 1997, ITAA claimed 180,000 unfilled IT jobs. In January, ITAA claimed 346,000 unfilled jobs based on another survey—a claim that also got widespread press attention.

Response: GAO states that "to make sound generalizations, the effective response rate should usually be at least 75 percent." Because the first ITAA survey had only a 14 percent response rate, GAO found it "is inadequate to form a basis for a nationwide estimate of unfilled IT jobs." This second survey was done by a self-described marketing researcher with no experience in labor studies. Further, ITAA has never released the study so we can't evaluate the methodology. However, we know that the new ITAA study

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had a response rate of 36%—far too low for accurate projections.

Claim #3: The demand for IT workers will double in the next 10 years and there will not be enough of a supply of U.S. workers to meet it.

Response: Who says we can't meet it? The demand for IT workers doubled over the last 10 years and it was satisfied right here in the U.S. by people from a wide variety of educational backgrounds. At least half of the jobs require a two-year college degree or less. Let the demand double again. With well-planned policies of training and education and the natural market response of Americans looking for good jobs that pay well, we will meet that demand again.

What is the ITAA's excuse for these bad numbers? Their only response is to stop "arguing over methodology" so we can fix a problem that they can't even document. Could it be that foreign workers are cheaper, and they are trying to pull one over on Congress so they can cut their costs?

Before we invite thousands of foreign workers in to take American jobs, the industry owes us some straight answers.

RON KLINK.

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from North Carolina (Mr. JONES) is recognized for 5 minutes.

(Mr. JONES addressed the House. His remarks will appear hereafter in the Extensions of Remarks.)

The SPEAKER pro tempore. Under a previous order of the House, the gentlewoman from Texas (Ms. JACKSON-LEE) is recognized for 5 minutes.

(Ms. JACKSON-LEE addressed the House. Her remarks will appear hereafter in the Extensions of Remarks.)

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Texas (Mr. SESSIONS) is recognized for 5 minutes.

(Mr. SESSIONS addressed the House. His remarks will appear hereafter in the Extensions of Remarks.)

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from California (Mr. HORN) is recognized for 5 minutes.

(Mr. HORN addressed the House. His remarks will appear hereafter in the Extensions of Remarks.)

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from New Jersey (Mr. SAXTON) is recognized for 5 minutes.

(Mr. SAXTON addressed the House. His remarks will appear hereafter in the Extensions of Remarks.)

sion of this special order to speak about one of the most basic components of campaign finance reform that we have to deal with here in the present Congress and certainly throughout the country as well.

There has been a lot of talk, Mr. Speaker, about various ways and strategies to reinstitute a sense of fairness and confidence in our election laws among the American people. But while the discussions about limited campaign funds, about reporting requirements, about various strategies to disclose the campaign contributions and expenditures of candidates seems to be occupying the center of political debate on campaign finance reform, I believe there is a much more fundamental issue that we need to deal with, and that is known as the Paycheck Protection Act.

What happens today in a strategy to raise funds for various campaigns is that we have a number of organizations that have found creative ways to withdraw the wages of hard-working Americans and siphon those dollars off for political causes of various sorts. Now, this often occurs without the consent or even the knowledge of the wage earner, who is working hard to earn the cash to make all this possible.

It occurs in many different settings, but most generally the biggest culprit seems to be labor unions. Labor unions persuade prospective employees to join their organizations for a variety of very attractive causes. One would be agency representation and collective bargaining, for example. And while those are legitimate functions of labor unions, functions that I think most people would support and agree with, few people would agree that it is also a good idea to siphon a portion of a worker's wages associated with union dues or agency fees and divert those dollars toward political campaigns of various sorts, often campaigns that the union worker themselves, the wage earner themselves, do not support.

I want to offer a couple of examples that I think Members ought to consider. If we read today's headlines, for example, "Ex-Teamsters Official Indicted". This deals with just one labor union. There are several. And there are several that are very honorable and worthwhile organizations.

I am focusing on the one in yesterday's headline, being the Teamsters Union. This is in the Washington Times. "A Federal Grand Jury indicted the Teamsters former political director yesterday on charges of giving \$1.1 million in union funds to the Democratic Party, the AFL-CIO and liberal advo-

covering in that committee is just disclosure after disclosure after disclosure and additional revelations about money laundering schemes through the Teamsters Union.

Now, here we have an example of union dues that are being used and misused and laundered to benefit certain political campaigns.

There are some people, no doubt within these organizations, that support these particular political activities and political causes. And for them this money laundering scheme is certainly to their advantage and to their benefit. But the vast majority of union members and certainly Teamsters Union members do not approve of money laundering. They do not approve of having pension funds and other funds diverted toward political causes of various sorts without their knowledge and without their consent.

Now, these are matters of a very different nature than the general campaigns that myself or other Members of this Congress engage in, or at the State legislative level or county commissioners level, at a local level back home, or on an issue advocacy basis.

But those second kinds of campaigns that I mentioned are also the kinds of campaigns that receive political funds from union dues and from the wages of hard-working Americans without the consent or knowledge of the wage earner.

It does not seem to be too difficult a question to ask nor to answer in America as follows: Should anyone be forced or compelled to contribute their hard-earned wages to a political campaign they do not support? I think the answer is clearly no. It is hard to believe that there is anyone in America who would answer in the affirmative when given such a question.

The most recent national polls on the subject, and I am referring to this chart here on my right which shows where public opinion registers on this particular topic. A recent poll by John McLaughlin and Associates asked Americans across the country whether they approved or disapproved of a new Federal law that would protect workers paychecks. In other words, a law that would prevent any organization, corporations or labor organizations from siphoning off a portion of a wage earner's paycheck and directing it towards politics without the consent of the wage earner. Would Americans support a Federal law that would protect paychecks and protect them from such a travesty?

Among all voters, 80 percent of the American people have told us that they support a law to that effect. Looking

52. EXAMPLES OF U.S. WORKERS REPLACED BY H-1B NONIMMIGRANTS

Source: The Atlanta Journal and The Atlanta Constitution, Nov. 1995

Data processing employees of **Delta Air Lines** laid off when replaced through contract with **TransQuest** "which provides computer information services for Delta Air Lines, has 1,200 employees plus 250 contract workers, many of whom are here on H-1B visas."

"Accepting work wherever they can get it has become part of the job for many American computer programmers such as Downing. If he doesn't do it, thousands of foreign-born workers here on special work permits called H-1B visas will -- often for far less money.

Increasingly, Americans such as Downing are having to compete with overseas workers willing to work for less as U.S. firms look abroad to fill high-skill jobs and satisfy mounting cost-cutting pressures. Corporate cuts are forcing many highly skilled American workers to change their lives dramatically.

Meanwhile, many American firms are using retooled immigration laws at the expense of American workers."

Source: The Montgomery County Journal, Nov. 1995

Fannie Mae (the **Federal National Mortgage Association**) replaces U.S. software consultants with programmers from India working in the U.S. on H-1B visas who are employed by **Tata Consultancy Services, Inc.**

(The **National Association of Security Dealers** also reported as using **Tata** to hire H-1B programmers to replace at least 20 of its U.S. software consultants -- see below.)

"**Ramamathn R. Ramanan**, **Tata's** manager for the mid-Atlantic region, said in an interview that the company provides highly skilled

computer programmers to an industry that has at times scrambled to find qualified workers. He said Tata hires the best and brightest that India has to offer and brings them here, where even low salaries appear good by Indian standards.

'What may be considered a paltry salary in the U.S. is considered very good in India,' Ramanan said.

Although yearly income in India averages less than \$500, computer programmers there can earn as much as \$5,000 a year. So a worker from India who was employed in the United States and paid \$5 an hour would still earn more than \$10,000 a year, doubling the earnings available in India. Ramanan would not say how much Tata's workers are paid."

Source: Washington Post, Dec. 1995

National Association of Security Dealers displaces U.S. software professionals through contract with Tata Consultancy Services.

"One of the latest controversies over the H-1B program erupted last month after it was reported that the National Association of Security Dealers had laid off 30 contract computer programmers and hired an Indian firm, Tata Consultancy Services, to do the work. The government-chartered association, based in Rockville, Md., owns, operates and regulates the Nasdaq Stock Market. Tata, which has a regional office in Silver Spring, is part of a huge Indian conglomerate that company officials say produces everything from tea to computer software.

An NASD spokesman, Marc Beauchamp, said Tata would employ about 40 people on the project, half of them working here on H-1B visas and half at Tata's home office in Bombay. He denied that any full-time NASD employees were fired and said that 'fewer than 20 outside contractors could possibly be affected' by the move."

Source: New York Times, Aug. 1995

Sea-Land Services Inc. lays off U.S. computer specialists to replace them through contract with **Software Ventures International**, based in the Philippines.

"When Sea-Land Services Inc. asked Jessie B. Lindsay, a longtime computer programmer for the company, to sign form letters to Congress last winter supporting legislation to protect American shipping jobs from foreign competition she loyally agreed.

But a week later, Sea-Land, a unit of CSX Corporation, announced that it was shutting down her division in Elizabeth, N.J., laying off most of the 325 employees and sub-contracting the work to programmers in India and the Philippines. Mrs. Lindsay was offered a job at least temporarily in Charlotte, N.C., to make sure the transition went smoothly, but quit because she had a baby and was reluctant to move.

'I felt betrayed,' Mrs. Lindsay said. Her family faced that situation twice last winter. Her husband, William F. Lindsay, also left his programming job at the American International Group when it, a large insurance company, brought programmers from India to his office and began training them to replace the American workers."

Source: The Detroit News, Feb. 1996; The Daily Record, Morris County, N.J., (two articles) Sep. and Nov. 1994

American International Group (AIG) Inc. lays off 250 computer professionals to replace them via contract with **Syntel Inc.** of Troy, Michigan.

The Daily Record:

"American International Group Inc. said yesterday it is laying off 250 workers, including 130 at its largest New Jersey office here [Livingston Township].

The insurer said contractors will take over some backroom tasks in

place of the laid-off workers, a practice called outsourcing. The contractors will enable AIG, as the insurer is called, to avoid paying full-time salaries in an operation with an unpredictable workload.

'It's feast or famine,' said Joe Norton, an AIG spokesman.

Livingston will bear the brunt of the cuts; those losing their jobs were given 60-days notice yesterday. Next hardest hit will be some 60 workers in a Bedford, Mass., office, Norton said. In Manhattan, AIG plans to lay off about 40 people.

The workers losing jobs are mostly computer programmers, Norton said."

"[AIG] ... has earned a reputation for reacting fast to signs of runaway costs. Analysts and competitors said the computer operations in Livingston and the two other sites are probably efficient already. What probably prompted yesterday's move, they said, was AIG's discovery of new ways to run the computer operations more cheaply."

"... on Sept. 8 he was laid off along with 129 other workers at AIG's Livingston office. He was replaced by a foreign worker who came to this country on a nonimmigrant visa to work for a contractor under investigation by the U.S. Labor Department.

AIG laid off 250 workers altogether, mostly computer programmers."

"What made the layoffs bitter for Citarella and others was that AIG was replacing them with foreign workers through a process known as outsourcing.

AIG signed a contract with Syntel Inc., a Troy, Mich.-based company, to provide workers to perform a variety of computer programming functions.

Syntel pays the employees it provides to AIG, which saves by not having to pay full-time salaries or benefits.

Syntel supplied AIG with 100 foreign workers for its Livingston office, according to a Labor Condition Application obtained by the Daily Record from the U.S. Labor Department's Alien Certification Office in New York.

The workers come from abroad under an H-1B non-immigrant visa, which allows them to live and work in the United States for a maximum of six years."

"'It's total disillusionment with the American system,' said Citarella, who found himself training the person who would replace him."

The Detroit News:

"... She [Linda Kilcrease] and about 250 computer professionals not only lost their jobs, but were required to train their replacements in AIG's computing language and processes.

In Metro Detroit, some computer programmers say foreign contract workers and immigrants have driven down wages for computer programmers, engineers and scientists. One General Motors Corp. programmer, who asked not to be identified, said contract rates have fallen from about \$40-\$50 an hour to less than \$30."

Source: The Dallas Morning News, Oct. 1995

Data processing employees of IBM in Austin, Tx, laid off and replaced through contract with the company's "Indian joint venture" with **Tata Information Systems, Ltd.**

"Software programmers and computer engineers around the United States find their jobs at risk because companies are bringing in programmers from India, Russia and elsewhere to do the work for less. Much less.

Larry Richards is a 36 year-old Austin programmer who found this out last year while working at IBM. Mr. Richards saw several colleagues get pink slips when Indian engineers came to work in their place."

**UNITED STATES DEPARTMENT OF LABOR****FACSIMILE TRANSMISSION**

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

200 Constitution Avenue,
N.W.
Room S-1325
Washington, DC 20210

Confirmation:
202/219-6141

May 5, 1998/1:28pm

TO: CECI
JULIE

DEPARTMENT/COMPANY:

**FACSIMILE NUMBER: 5581 AND
2283**

FROM: EARL GOHL

NUMBER OF PAGES INCLUDING COVER:

FACSIMILE REPLIES: CONGRESSIONAL AFFAIRS	202/219-5120
INTERGOVERNMENTAL AFFAIRS	202/219-5736
IMMEDIATE OFFICE OF THE ASSISTANT SECRETARY	202/219-5288

MESSAGE: Attached are a summary of new stories on H-1B an

52. EXAMPLES OF U.S. WORKERS REPLACED BY H-1B NONIMMIGRANTS

Source: The Atlanta Journal and The Atlanta Constitution, Nov. 1995

Data processing employees of **Delta Air Lines** laid off when replaced through contract with **TransQuest** "which provides computer information services for Delta Air Lines, has 1,200 employees plus 250 contract workers, many of whom are here on H-1B visas."

"Accepting work wherever they can get it has become part of the job for many American computer programmers such as Downing. If he doesn't do it, thousands of foreign-born workers here on special work permits called H-1B visas will -- often for far less money.

Increasingly, Americans such as Downing are having to compete with overseas workers willing to work for less as U.S. firms look abroad to fill high-skill jobs and satisfy mounting cost-cutting pressures. Corporate cuts are forcing many highly skilled American workers to change their lives dramatically.

Meanwhile, many American firms are using retooled immigration laws at the expense of American workers."

Source: The Montgomery County Journal, Nov. 1995

Fannie Mae (the **Federal National Mortgage Association**) replaces U.S. software consultants with programmers from India working in the U.S. on H-1B visas who are employed by **Tata Consultancy Services, Inc.**

(The **National Association of Security Dealers** also reported as using **Tata** to hire H-1B programmers to replace at least 20 of its U.S. software consultants -- see below.)

"**Ramamathn R. Ramanan**, **Tata's** manager for the mid-Atlantic region, said in an interview that the company provides highly skilled

computer programmers to an industry that has at times scrambled to find qualified workers. He said Tata hires the best and brightest that India has to offer and brings them here, where even low salaries appear good by Indian standards.

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53. EXAMPLES OF APPARENT H-1B VISA ABUSE

Sources: U.S. Department of State, Fraud Prevention Programs, Bureau of Consular Affairs; Consular Officers at various U.S. Embassies and Consulates

The issue of fraud and fraud prevention in the employment-based nonimmigrant visa categories, including the H-1B program, are significant concerns of the agencies involved in border control. The Consular Officer in the field is usually the first U.S. government employee to deal directly with the visa applicant. He or she has the responsibility of handling *bona fide* cases expeditiously to meet the genuine needs of U.S. employers. However, the Consular Officer must also have the ability to take action against potential fraud or abuse of a visa category in order to protect U.S. workers.

Under the Immigration and Nationality Act (INA), as amended by the Immigration Act of 1990, applicants for H visas are no longer subject to the presumption under Section 214(b) that they are "intending immigrants." This recent change in the INA has proven to be a significant source of frustration for Consular Officers and, we believe has contributed to an increase in visa fraud and abuse.

The removal of Consular Officer's authority in this regard has made it apparent to unscrupulous employers, visa fixers and desperate aliens that once a petition is approved, not much can stand in the way of entry to the U.S. An unintended consequence has been a dramatic increase in fraud in the visa process involving the creation of "paper company" employers, phony jobs created for the purpose of immigration, the hiring of relatives for the purpose of immigration, and other such abuses.

The following reports were all received over the last few months:

Cable from a U.S. Consulate in North America:

"As a border post we receive a large number of H-1B applications from computer professionals who come to [the Consulate] ... from the U.S. just to get the visa. Recently we have begun to take a closer look at the jobs of H-1B

computer applicants and have found that many of the applicants tell us they believe their jobs could be filled by someone without a degree in mechanical engineering, computer science, or the like."

"What we see [here] ... are basically two kinds of computer H-1B's, the well-paid (more than \$40,000 a year) professional engaged in scientific or engineering applications, whose position clearly can be considered a specialty occupation, and the lower-paid (in the \$30,00 range) systems analyst or programmer whose job may not require a degree in engineering or computers. Unfortunately, all H-1B petitions for computer workers claim the position is a specialty occupation.... It is only when the applicant arrives at post and is queried about the qualifications necessary to perform the job that we learn that, in the opinion of the applicants themselves, many of these jobs do not require a degree. The number of H-1B petitions that fall into this category could be as many as 50 percent or higher of the total H-1B petitions for computer workers, i.e., many thousands of applicants."

Cable from a U.S. Consulate in North America:

"Over the past several months [this Consulate] ... has noted several frustrating themes regarding H-1B petitions. Below are examples of each of the patterns we have noticed."

"We received an application for a person who had been out of status in the US for two years after serving for 19 years in the Indian army. He was petitioned as a 'training administrator.' In fact he was going to be the night dispatcher for a taxi and limo service in New York City."

"We received an application for a person who had been out of status in the US for several years and had been employed in her brother-in-law's 7 employee copy shop as a 'front end manager.' Her duties consisted largely of making copies and taking orders."

"An applicant who owns the company that filed his H-1B promised to pay himself \$28,000/yr. His pay slips show he was paid \$12,650 for last year. He is allegedly supporting himself, his wife and two children on this salary."

"An applicant to be paid \$35,000 as a marketing analyst for a 3 person company presented tax returns showing the company had lost \$27,000 in 1995."

"An applicant applied with an INS-approved I-797 based on a Master's degree from Temple. At the interview the applicant presented only a sketchy transcript and no degree. When we called Temple, they confirmed he had dropped out of their program and had never received a degree."

"An applicant applied here and presented an equivalency statement that her Indian degree was equal to a U.S. bachelor's degree. Conoff [Consular Officer] noted, however, that the Indian degree the applicant received was a one year program that she graduated from at age 18."

"Three applicants appeared at [the Consulate] ... in October 1995, all had petitions approved to work as "Marketing Managers." However, none of the petitioning companies existed. Their phones had been disconnected and no documentation was submitted that would indicate that these companies had ever existed."

Cable from a U.S. Embassy in Eastern Europe:

"'White collar' visa fraud ... is characterized by business persons or professionals attempting to obtain U.S. visas in order to flee creditors or to engage in criminal activity in the U.S. This activity often includes embezzlement, money laundering, theft, drug and contraband smuggling, and occasionally assassination for hire."

"In another variation of 'white collar' ... visa abuse, post has noted that many recipients of ... L and H visas, once in the United States do not engage in salaried employment as specified in their petitions. Instead, they operate from home as purchasing agents ... receiving a commission for orders completed on behalf of non-U.S. clients."

"Fraud in the E-1 [treaty trader] category is similar to that surrounding H-1 and L-1 nonimmigrant visas. Often sham or OC-related [organized crime-related] companies will pursue E-1 visas after the beneficiary has had an H-1 or L-1 visa for one or two years."

Cable from a U.S. Consulate in Asia:

"The applicant applied for an H-1B visa on January 30, 1996. He is the beneficiary of an approved petition filed by [a fragrance company which] ... petitioned for his services as a financial analyst/cash manager."

"The interview was conducted in ... [the applicant's] native language, since his English is insufficient for either speaking or comprehension. [The applicant] ... is not a chartered accountant nor a CPA. He is a B COM graduate who was unable to present any evidence of his past job experience nor to answer any basic questions concerning his position duties for the petitioner."

"[The applicant's] ... job description as a 'financial analyst' was to be responsible for managing all finance functions within the company, reporting directly to the President on matters concerning the company's financial strategy, budget, investments and raising of capital. The financial analyst is to prepare financial reports, develop information to assess the present and future financial status of the company, devise financial analyses to project trends in the fragrance/cosmetics industry and prepare, with the accountant, income statements, balance sheets and cash-flow statements. The financial analyst is also responsible for budgetary analysis, the preparation of forecasts of the company's revenues and expenses, analyze fund distribution by employing cost-benefit analysis, assessing program trade-offs and exploring alternative funding methods. The analyst must research economic and financial developments affecting the company, be responsible for cash management and controlling the flow of cash receipts and disbursements to meet the company's business and investment needs."

"We ... were again disappointed in his lack of financial savvy. He could not explain how he would do budgetary analysis. He could not explain how a financial analyst does cash-flow planning. He mentioned 'loans' and when we asked him how loans tied into cash-flow planning, he could not explain. He could not explain what a program trade-off was nor what cost benefit analysis was. We note that he is to conduct economic and financial research, which he admitted he has never done. He could not name one single economic or business journal, magazine or other print resource he had ever consulted in order to prepare a 'financial analysis.'"

Cable from a U.S. Embassy in Middle East:

"Post is concerned that businesses are filing fraudulent H-1B petitions to aid [individuals] ... in jumping the immigration queue. ... We believe, however, that persons wishing to help their relatives leave [country] ... are having friends and family members create false job positions in order to allow them to enter the United States. We believe that petitioners shape job descriptions to match the skills and experience of the proposed beneficiary, never intending to actually hire the recipient of the H-1B visa."

"[An earlier cable]... describes the case of an Iraqi beneficiary of an H-1B petition who is 67 years old and retired. A poison pen letter received by post states that the beneficiary was hired as a favor to his brother in order that the beneficiary, and ultimately his immediate family, might immigrate to the United States. The case is similar in its circumstances to the cases of virtually all ... H-1B beneficiaries [from the country] processed by this post."

"In a typical case, a young woman trained as a medical doctor was the beneficiary of an H-1B petition so that she might work as a 'medical records technician,' or file clerk, in [a compatriot] ... doctor's [U.S.] medical practice. She and her husband planned to live with her parents in California. Her brother received his H-1B visa for a position as an engineer on the same day. Post has also seen H-1B petitions for landscape gardeners, ... [locally]-trained engineers who have not worked in several years and ... [locally]-trained computer programmers whose entire work experience has been in that country, not known for its high-tech computer capabilities."

Cable from a U.S. Embassy in Middle East:

"[A plastics company submitted a petition for] ... the position of mechanical engineer. ... Beneficiary received his bachelor's degree in mechanical engineering from the University of Technology in [a Gulf State] ... in 1994. Since his graduation he has worked part-time as a welder and as a senior mechanic in a welding shop. Beneficiary admits that he has no practical experience as a mechanical engineer. The petitioning company is owned by beneficiary's aunt's husband."

Memo from a U.S. Embassy in Far East:

"[Applicant] ... applied for an H-1B visa on the basis of his approved petition filed by [an investment company for] ... a Marketing Manager."

"During the interview [applicant] ... was unable to recall the names of his college classes despite the fact that he graduated only 1 1/2 years ago. He failed two of his classes and repeated both classes in a 1994 summer school but in the interview could not name the classes. He could not explain what marketing is, how it is done, or give one single example of a marketing strategy. [Applicant] ... denied taking any ethics or statistics classes, despite the fact that both appear on his transcript. He was unable to identify a bell curve, to explain standard deviation or even mean average, despite having taken (according to his transcript) classes in business statistics, elementary economics, math of investment, advanced economics, quantitative techniques in business and financial analysis."

"[Applicant] ... knew nothing about his potential employer. He incorrectly stated that the employer was a manufacturer with a factory and 100+/- employees. The employer is actually a marketing firm with only 5 employees. [Applicant] ... has never spoken with anyone from the company. He has no work experience whatsoever, no practical experience in marketing, no theoretical knowledge of marketing and has no qualifications or training for supervision (which would allegedly be his position)."

Memo from a U.S. Embassy in Far East:

"Many 'employment or placement agencies' use H petitions to bring specialized workers into the U.S. but do not have the jobs claimed. So individuals petitioned as Registered Nurses may end up working as baby sitters. All too often, the beneficiary is charged a placement 'fee' of five to ten times the average annual income in the ... [country]."

"Example: [Applicant's] ... husband admitted she never worked at the job for which she was petitioned. Instead, she worked part time as a baby sitter. She was pregnant, not covered by insurance from her 'employer', had a baby and suffered medical complications. As a public charge, all her medical expenses were paid by the U.S. taxpayers in N.Y."

"Some contractors or employment agencies that depend on a reserve of live bodies in order to respond immediately to job orders have the reputation of exploiting temporary workers with H visas. Workers often reapply in [certain Consulates] ... after they locate a 'real' job, showing income tax statements well below the prevailing wage promised by the original petitioners. They tell of long unpaid periods, part-time schedules and travel without expenses. Some physical therapists whose 'itinerary' was so convoluted the actual worksite could never be determined, found themselves out of work after an initial short-term contract ended or they failed to pass the test for their license."

Memo from a U.S. Consulate in Asia:

"[Applicant] ... appeared at this Consulate ... pursuant to an H-1B petition filed on his behalf by [an agricultural employer where he] ... would work as a Poultry Breeder/Nutritionist. [Applicant] ... claimed that he was a technical supervisor in the poultry breeding department of [a local hatchery] ..., and that he held a B.S. in Chemistry from [a local] ... University. During his interview, [applicant] ... stated that he has been a supervisor at [the local hatchery] ... for about 6 years, and that he supervises 20 employees."

"[The manager of the local hatchery] ... said that [the applicant] ... had worked as an unofficial trainee in the poultry breeding department for about six months in 1994. The manager said that [the applicant] ... watched the operation and sometimes performed some work, but he was not a salaried employee and he had no official duties. He did not supervise anyone. The manager said that [the applicant] ... had not been to the hatchery in over a year."

"[Different applicant] ... appeared at this Consulate pursuant to an H-1B petition filed on his behalf by [a computer services/consulting company].... The petition stated that [the applicant] ... would be employed as a 'software engineer' doing 'specialized software consulting' at [another firm].... Post also had on file an approved petition for [the applicant] ... filed by [yet another computer firm]...."

"Post has investigated [applicant's] ... employment history in depth and has found significant discrepancies between the experience claimed on the [two companies'] ... petitions, as well as between these claims and the information revealed during this investigation. In the statement [the first sponsoring company]

... submitted to INS in support of their petition, they claimed that [the applicant] ... held a bachelor's degree in engineering from [a local] ... University ..., and that he had over three years of professional experience as a specialized software engineer. [The applicant] ... claimed to have worked for [a local software company] ... from 1991 to 1993, and then for [another local software firm] ... from April 1993 to October 1994. He provided a letter purportedly signed by [the first company's] ... production manager and director confirming his dates of employment. Post called the telephone number listed on the letter head and reached [an machinery company] ... not a computer software company. No one there had ever heard of [the applicant] ..., [the first company] ..., or its supposed director and production manager. The Baroda directory assistance confirmed that there is no listing for [the company].... ...[P]ost ... visited the address [the applicant] ... had given for [the company]..., and found that it was a residential bungalow which had never been used for any type of business."

"[Another applicant] ... is the beneficiary of an F2A immigration petition filed by his wife.... H-1B petition approved ... based on job offer from [an engineering company].... [Applicant's] ... wife found the job listing and sent the company her husband's name. [Applicant] ... was hired without an interview. The I-129 states that he will work as an electrical engineer 'develop[ing] modification plans for variety of electrical machinery including industrial tools and hardware. For export market. Will perform tests to determine suitability for export. Will use test control apparatus to properly assess function. Will evaluate operational systems and recommend changes.' The petition claimed that he had been an 'engineer with [an Indian company] ... since June 1994.'"

"When he applied at the consulate for his H-1B visa ... he claimed that he was still working as a maintenance engineer for [the Indian company].... Conoff interviewed the assistant general manager in charge of personnel for [the company] ..., who said [the applicant] ... had been an apprentice engineer in the maintenance department from June 94 to June 95. He had not worked for the company since June 95. The assistant general manager stated in writing that [applicant] ... did not gain any experience while at [the company] ... which would qualify him to design modification plans or to use test control apparatus for export products."

"Conoff visited [this applicant] ... and learned that he has been unemployed

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"Conoff visited [this applicant] ... and learned that he has been unemployed

since leaving [this company] ... in June 95. ... [Applicant] ... admitted to Conoff that he cannot perform the job duties described in the I-129, but insisted that he would work very hard to learn once he got to the U.S."

"[A N.Y.] ... manufacturer and wholesale distributor of costume jewelry, filed a petition ... [for another applicant] ... as a computer programmer. According to the I-129 [the applicant] ... has been a computer programmer at [a local company] ... from January 93 to present...."

"Conoff contacted [the company] ... and learned from the assistant manager of personnel that [this applicant] ... was in fact a summer trainee for six months in 1993, and that she had not been employed by [the company] ... since then."

"[Another applicant] applied for the H-1B visa ... pursuant to a petition filed by [a food processing firm] ... which claimed that [applicant] ... was a Horticulturalist. The I-129 listed his duties as 'analyzing seed storing, processing and transporting technology and recommending horticultural related modifications according to seed identification.' [Applicant's] ... interviews revealed that he was a laboratory technician monitoring sugar cane processing in [a local sugar factory].... When asked about other responsibilities, such as his claimed expertise in disease prevention efforts, [applicant] ... stated he used pesticides. When asked to further elaborate, he stated he used 'whatever was available'."

"Interviews with Conoff revealed that [this applicant] ... never worked the areas described by the I-129 and has no expertise whatsoever in seed horticulture. Since his job with [the local sugar factory] ... ended in 1987 he has been farming his own sugar cane farm...."

"[A] ... personal computer circuits board manufacturer, stated on the I-129 that [another applicant] ... would serve as production manager in the company, in charge of inventory control and production planning, and directly supervise 10 employees. His only qualification is a bachelor's degree in engineering."

"During his interview, Conoff discovered that [this applicant] ... did not speak English. It is doubtful he will be able to directly supervise English-speaking employees. When asked how he got the job, [applicant] ... stated that friends in the United States knew he was graduating from college in 1995 and so

set up this job for him. Apparently, [the sponsoring company] ... is owned and operated by [a compatriot] ... and all twenty-five of the company's employees are [compatriots]...."

"[H-1B beneficiary] ... contacted the Consulate on March 26, 1996, claiming that in November 1994 he was hired by [a company in] ... Atlanta, GA to be a systems programmer on an 18 month contract. He was promised \$3000.00 per month, and began work in July 1995. He told Conoff that from July 1995 until his return to [his home country] ... in January 1996, he was actually paid only \$800.00 per month in salary plus \$200 for a 'housing allowance.' He presented his pay stubs as verification. [Applicant] ... claimed that when he demanded his full salary, he was told that if he did not stop his complaining he would be sent back to India as a warning to other employees. At the end of December 95 he was fired and given a one-way ticket [home]...."

Cable from a U.S. Consulate in North America:

"Generally speaking, it is very difficult to adjudicate H-1B petitions at a border post. Applicants use us because we are convenient and they may not wish to return to their country of nationality where their applications would be able to be scrutinized in light of prevailing trends and conditions in that country."

"We've also seen applicants with approved petitions to be a Pizza Hut Manager and a Gas Station Attendant. In the latter case an [applicant] ... had been working illegally at a gas station for its [compatriot] ... owner."

"... we are extremely frustrated at seeing case after case where it is obvious that the applicant is manipulating the system as a means to immigrate and that the applicant's real 'qualification' is a willingness to work for lower than the prevailing wage. ...[I]t was not Congress's intent to provide a source for cheap white collar labor for U.S. business or another quasi-category for immigration. And ... it was not their intent to provide a means for organized criminals from [a country] ... to immigrate to the U.S. with their ill-gotten wealth by filing petitions through paper companies."

Cable from a U.S. Consulate in North America:

"A large part of our NIV [nonimmigrant visa] load is dealing with such [H-1B] cases, usually applications made by persons proceeding from the United States, where they originally entered in some other status, and from where they now have emerged with petition approvals in hand."

"...[W]e see two broad categories: those who are coming from the United States with academic degrees earned there, and with petitions granted as a result of those qualifications, and those who emerge months or even years after an entry in 'B' status with a petition granted as a result of qualifications earned in a distant locale."

"A programmer-analyst was petitioned by an alleged software services company which claimed to have nine employees and profits of nearly 500,000 USD per year. Consulate employees attempted to verify the employer, but calls to the phone directory service and to the Chamber of Commerce in the town where the company was allegedly located found no business of any kind registered under the name of the employer. This is a pattern we have seen in several cases. ... In some cases, the petitioner has actually incorporated in a State, filed several petitions, and then apparently gone 'out of business,' having contracted out the services of any successfully petitioned temporary workers."

"A nursing home 'program director' listed among his credentials for classification a stint as a program director in a nursing home in [a foreign country].... Upon our request, Embassy ... checked him out and found that all his alleged experience was fabricated: the Director of the nursing home there was a family friend who had done the letters as a favor."

"A systems analyst came to the U.S. on a 'B' visa allegedly to attend a training session on new programs. She did not return. When she came here to apply, she revealed that she had married a legal permanent resident of the U.S. Post checked with the Consulate which had issued the original 'B' visa, which attempted to verify the applicant's employment back home. The company there could not be found. It appears the aim of the whole plan was to get to the U.S. and secure a status which would let the applicant 'jump the line' to settle in the U.S. far

**UNITED STATES DEPARTMENT OF LABOR****FACSIMILE TRANSMISSION****OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS**

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COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION
SENATOR EDWARD M. KENNEDY

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MESSAGE:

H-1B Committee Report
from Majority

The American Competitiveness Act

Mr. Hatch

The Committee on the Judiciary, to which was referred the bill (S. 1723) to amend the Immigration and Nationality Act to assist the United States to remain competitive by increasing the access of United States' firms and institutions of higher education to skilled personnel and by expanding educational and training opportunities for American students and workers and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

Contents

- I. Purpose
- II. Legislative History
- III. Discussion
- IV. Vote of the Committee
- V. Section by Section Analysis
- VII. Regulatory Impact Statement
- VIII. Changes in Existing Law

I. Purposes

In the Information Age, when skilled workers are at a premium, America faces a serious dilemma when employers find that they cannot grow, innovate, and compete in global markets without increased access to skilled personnel. The current shortage of such skilled personnel presents both a short term and a long term problem. The country needs to increase its access to skilled personnel immediately in order to prevent current needs from going unfilled. However, to meet these needs over the long term the American education system must produce more young people in key fields, and we must increase our other training efforts, so that more Americans can be prepared to keep this country at the cutting edge and competitive in global markets.

S. 1723 addresses both aspects of this problem. In order to meet immediate needs, the bill raises the current ceiling on the temporary hiring of skilled foreign nationals in specialty occupations. Under the Immigration and Nationality Act, employers are authorized to hire no more than 65,000 of these workers, a limit set in 1990. This ceiling is now proving inadequate in large measure due to the increase in the globalization of the U.S. economy and the growth of the U.S. economy generally and in certain industries in particular. For the first time, the ceiling was reached one month before the end of FY 1997 and is projected to be reached more than four months before the end of FY 1998. Without legislation, U.S. employers will not be able lawfully to hire skilled foreign nationals in the United States on H-1Bs for the remainder of FY 1998. Moreover, the extensive backlogs that will develop without legislative action will worsen the problem in each succeeding fiscal year.

S. 1723 also addresses the long term problem that too few U.S. students are entering and excelling in mathematics, computer science, engineering and related fields in sufficient numbers. It contains measures to encourage more young people to study mathematics, engineering and computer science, to disseminate information about the availability of jobs in these fields, and to train unemployed persons in these areas.

II. Legislative History

This legislation was introduced by Senator Abraham and is cosponsored by Senators Hatch, McCain, DeWine, Specter, Grams, Brownback, Santorum, Thurmond, Ashcroft, Smith (OR), Hagel, Bennett, Mack, and Coverdell.

A hearing was held on February 25, 1998 in the Committee on the Judiciary prior to the introduction of the legislation. The bill was not referred to subcommittee but was considered directly by the Committee on the Judiciary. It was marked up on April 2, 1998 and reported out of Committee with a favorable recommendation by a 12 to 6 vote.

III. Discussion

A. The Current Situation

1. Current Law

Under current law, the United States may issue up to 65,000 H-1B visas. These visas are valid for three years, after which they can be renewed for an additional three years, thus allowing a maximum stay of 6 years. Persons admitted under these visas cannot stay permanently unless they are sponsored by an employer for a separate permanent employment-based immigrant visa, for which there is a generally lengthy separate approval process.

In order to qualify for an H-1B visa, an individual must be in a "specialty occupation." According to the law:

"The term 'specialty occupation' means an occupation that requires --(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." To qualify for an H-1B visa a nonimmigrant must have "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation" or must possess "experience in the specialty equivalent to the completion of [a bachelor's or higher degree], and recognition of expertise in the specialty through progressively responsible positions relating to the specialty."

As this language suggests, Congress has never limited use of H-1B visas to the "best and brightest." In fact, the phrase "best and brightest" does not appear in the law. There are at least four reasons why an employer may choose to hire a foreign national on an H-1B visa: 1) the individual possesses unique knowledge or skills; 2) the person is an individual who can localize service or products based on their native knowledge of

the language or culture of the market in which the service or product will be sold; 3) the company is building a global workforce (for example it is planned that the person will work in the U.S. to gain experience for a period of years before being sent to work overseas for the employer); and 4) an employer finds an inadequate number of highly qualified U.S. workers available for positions that need to be filled. These four reasons encompass a wide variety of situations where hiring an H-1B worker can increase the productivity of an employer in almost any industry, and caution against new specific mandates or requirements likely to inadvertently harm many employers. It is worth noting that three of these four reasons have nothing to do with whether or not there is a shortage in a particular field.

2. The 1990 Act

Prior to 1990, there was no cap on H-1B visas, which previously were called H-1 visas. As part of a comprehensive package of immigration law reforms, the Immigration Act of 1990 added the 65,000 cap, a number that was essentially chosen arbitrarily in order to provide reassurance to critics of these visas that an unlimited supply of them would not be available, and despite contemporaneous expressions of concern that this limit would eventually have an adverse impact on American companies' and universities' access to skilled personnel and hence on their potential growth. "The [65,000] number was set without public hearings, is arbitrary, and was in no way arrived at by analyzing demand, labor shortages, business conditions, or skilled labor needed by firms to remain globally competitive," according to Professor Charles B. Keely of Georgetown University.

In addition, to respond to concerns about wages, the 1990 Act added a Labor Condition Attestation (LCA) was added to the program that required companies to attest they were paying individuals on H-1Bs the higher of the prevailing wage or actual wage paid to similarly employed Americans. Under that provision, in order to obtain approval for bringing somebody in on an H-1B visa, under the law an employer must file an application with the Secretary of Labor stating:

"The employer --is offering and will offer during the period of authorized employment to aliens admitted or provided status as a nonimmigrant described in section 101(a)(15)(H)(i)(b) wages that are at least --(I) the actual wage level paid by the employer to all other individuals with similar experience qualifications for the specific employment in question, or (II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available at the time of filing the application, and (ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed."

In order to secure enforcement of these requirements, the 1990 Act required the employer to provide notice of the fact that it is hiring a worker on an H-1B visa and the salary at which it is hiring the worker either to the collective bargaining representative of employees in the relevant occupational classification and area or, if there is none, to the employees themselves by posting this information at conspicuous locations at the place of employment. It also established a complaint mechanism for anyone who knew that these requirements were not being complied with to use, and authorized the

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Department of Labor to investigate these complaints and, if it found them meritorious, take appropriate action against violators, ranging from fines to debarment from use of H-1B visas.

3. *The Current Crisis*

The 65,000 cap on H-1B visas set in 1990 proved sufficient for a number of years. In 1997, however, for the first time companies bumped up against it a month before the end of the fiscal year. The situation this year is much worse: As of May 1998 and for the remainder of FY 1998, no foreign-born professional can be hired in America on a new H-1B petition, according to the Immigration and Naturalization Service, unless Congress acts to raise the cap. That is because there already are sufficient visas approved or pending applications for H-1B status to exceed the 65,000 cap on H-1B visas set in the Immigration Act of 1990. In turn, the backlog that will develop for fiscal year 1999 may mean the 65,000 allotment will be reached by January 1999, thereby preventing companies, universities, and other non-profits from using H-1B visas to gain access to skilled foreign-born professionals.

There has been some debate, principally among authors of various academic studies, about whether there is really a high tech worker shortage and if so what is the proper way of measuring it. In the real world, however, there does not seem to be serious disagreement on this point. Virtually no employers the Committee has contacted have related anything but a serious difficulty in finding skilled individuals to fill key positions. The employers have found that these unfilled positions are limiting their companies growth potential and ability to create more jobs, products, and services for Americans. This is not surprising since, for example, the unemployment rate among electrical engineers nationally is below 1 percent (0.4 percent).

We see other indicators of the tightness of the labor market. *ComputerWorld* reports that for many IT jobs annual salary increases were 10 to 20% annually in 1997. Salaries for certain IT occupations have risen more than 15% annually in recent years, according to William M. Mercer. "Starting salaries for Berkeley BSCS degree-holders averaged \$47,000 last spring, 17.5 percent higher than in 1995. The campus placement center is booked solid. I have witnessed industry recruiters outside our building wearing signs that read 'will trade pizza for a resume,'" according to Randy H. Katz, chair, Department of Electrical Engineering and Computer Sciences, UC Berkeley. The Federal Reserve's survey of economic conditions made public on March 19 stated "shortages of both skilled and entry-level workers worsened." Companies appear so desperate for workers they are even hiring teenagers part-time at \$50,000 a year, as *The Washington Post* reported in a March 1st front-page article. In 1996, spending for recruitment ads in newspapers totaled nearly \$5.8 billion, more than triple the \$1.9 billion spent in 1991, according to the Newspaper Association of America.

Andrew Grove, Chairman of the Intel Corporation, has stated that the issue is not so much a shortage of people, but restrictions in U.S. immigration law that prevent talented and highly qualified people from being hired off of U.S. university campuses and elsewhere. It is worth noting that in discussing the Midwest, Federal Reserve economist Richard E. Kraglic stated, "The region is not just running out of workers; it is

running out of potential workers." This is having a negative impact on economic growth, says economist Diane Swonk at First Chicago NBD. "We're slowing because we've run out of people to employ." The Hudson Institute estimates that the unaddressed shortage of skilled workers throughout the U.S. economy will result in a 5 percent drop in the growth rate of GDP. That translates into approximately \$200 billion in lost output, nearly \$1,000 for every American.

Those asserting that there is no shortage have relied heavily on a March 24 letter by the General Accounting Office (GAO) to two members of Congress. In this letter, however, GAO made it very clear that it was not asserting that there is no shortage and indeed that it did not perform an independent analysis of whether or not a shortage of high tech workers exist. Rather, the thrust of the letter was to raise questions about the methodology used by other studies in measuring whether there was a shortage and if so what its magnitude is. The U.S. Department of Commerce responded to the GAO letter by charging it contained "several inaccuracies." The Commerce Department states that it did, for example, discuss that graduates with degrees outside of the computer and information sciences can and do enter the IT field. The Virginia Tech researchers for ITAA responded that their survey's methodology was sound. The researchers said GAO made a mistake in evaluating the study's response rate, pointing out the actual response rate was 60%, not 36% as GAO reported, and that, moreover, there was little non-response bias in the survey. Phil Peters, a senior fellow of the Alexis de Tocqueville Institution, analyzed both sides and seriously questions the conclusions of the General Accounting Office.

Even taken on its own terms, the limitations of GAO's report counsel caution in vesting in GAO the responsibility of advising policy makers about the existence of a shortage--a project GAO itself did not claim to have undertaken, and that, particularly in specialized fields, it is very unlikely it possesses the tools to undertake because of the difficulty of the research involved, the creativity necessary, and the shortcomings of available government data, such as BLS wage data, in narrow fields and which GAO generally relies upon. This is particularly true when making an evaluation of how many highly skilled specialty workers should be admitted who will make up such a small percentage of the overall U.S. labor force annually.

At the end of the day, it seems almost impossible to continue to debate whether we need to raise the H-1B cap to address the current shortage of highly skilled workers in the face of the current facts concerning H-1B visa usage itself. The recent enormous increase in the use of H-1B visas --without any change in U.S. law --is itself very powerful evidence that employers need access to the individuals they are recruiting in this fashion in order to grow, prosper, and compete internationally. Between 1997 and 1998, the use of the visas increased by approximately 45%. Projecting this demand to continue at this pace through the end of FY 1998, 95,000 of these visas will be needed, or 30,000 more than current law allows. Unless Congress acts, the use of H-1B visas to hire foreign nationals, often foreign students recruited off U.S. college campuses, will become prohibited for months and even potentially a year or more at a time.

B. The Likely Consequences of a Failure to Act

1. The Impact on American Jobs

Artificially limiting companies' ability to hire skilled foreign professionals will stymie our country's economic growth and thereby partially atrophy its creation of American jobs. Thus, contrary to the claims of some critics of the H-1B program, American workers' interests are advanced, rather than retarded, by raising the H-1B cap.

A letter signed by the CEO's of fourteen of America's leading companies, including Microsoft's Bill Gates, Netscape's James Barksdale, and Texas Instruments' Thomas Engibous, put this point well: "Failure to increase the H-1B cap and the limits that will place on the ability of American companies to grow and innovate will also limit the growth of jobs available to American workers.... Failure to raise the H-1B cap will aid our foreign competitors by limiting the growth and innovation potential of U.S. companies while pushing talented people away from our shores.... [this] could mean a loss of America's high technology leadership in the world."

At a February 25 hearing, the Committee heard testimony that strongly indicates individuals on H-1B visas create many jobs in America. T.J. Rodgers, President and CEO of Cypress Semiconductor, testified that for every foreign-born engineer he can hire, he employs five other American employees in marketing, manufacturing, or related endeavors. Anant Agrawal, born in India, entered the country on an H-1B visa. When he started working at Sun Microsystems the company employed fewer than 300 people. Combining his talents with another engineer, he developed SPARC, a powerful microprocessor that proved to be a dramatic innovation in chip design, according to Sun Microsystems. Today, Sun employs more than 23,000 people, the majority of whom do work related to Agrawal's innovation.

Moreover, failure to raise the cap on H-1B visas will almost certain have the effect of causing some U.S. companies to push some of their operations offshore. The Committee believes it is essential to avoid this danger by removing the artificial limits on companies' access to skilled personnel created if too few H-1B visas available and resisting the call to impose regulations on their use that are so excessive that the effect is the same.

This danger is not fanciful speculation. According to ITAA, in 1997, more than 100,000 U.S. jobs in the information technology field were outsourced to India. Moreover, IT companies operating in both countries have told the Committee that an employee earning \$60,000 a year in the U.S. would only be paid \$6,000 a year in India. IT companies have also told the Committee that despite this salary differential, right now, on balance, most American companies would prefer to have their work done on-site, where they can better monitor the quality of what is being done, but that if they cannot get the people they need on-site, they will have the work done elsewhere.

Many of the concerns about H-1B visas revolve around the fear that individuals entering on H-1B visas "take" a job from an American worker. This fear, however, arises from the premise that there is a fixed number of jobs, competition for which is a zero-sum game. But this premise is plainly flawed. Just since passage of the 1990 act,

the number of U.S. jobs has increased by more than 12 million and the Internet, which was used by a few thousand specialists back in 1990, now is used by tens of millions and is a major source of jobs and innovation in America. Since 1960, the number of U.S. jobs has more than doubled from 65 million to over 130 million today. These figures are simply the application of the general principle that labor markets have demonstrated time and time again: additional people entering the labor force, whether native-born students out of school, immigrants, or nonimmigrants, expand job opportunities and create other jobs through innovation, entrepreneurship, and money spent on consumer items like food, clothing, and housing, as pointed out in the 1986 Economic Report of the President.

Moreover, looking at the particular case of individuals on H-1B visas, there is little evidence that they are harming the job prospects of native-born Americans. According to National Science Foundation data, there is no correlation between the percentage of foreign-born in a field and the unemployment rate in that field. The data show that fields with a high percentage of the foreign-born, such as computer science and engineering, have lower unemployment rates than fields with relatively few foreign-born, such as the geosciences and social sciences. And there is abundant evidence that the U.S. economy, its industries, and its universities, which are recognized as the best in the world, have all prospered from skilled foreign nationals and immigrants working side by side with native-born Americans.

Finally, it seems worth noting that in 1991, the annual ceiling of H-1Bs represented 0.055 percent of the U.S. civilian employment. In 1998, it is a smaller 0.05 percent given the growth of the labor force. The passage of the American Competitiveness Act will increase the annual flow of H-1Bs as a proportion of the U.S. civilian labor force in 1998 by approximately 0.023 percentage points. Even in particular industries, the expansion of the labor force will be tiny in percentage terms. It seems very unlikely that so minuscule a change in the composition of this country's workforce could have an appreciable negative impact on American employees.

2. Impact on American Salaries

It has also been suggested that raising the cap on H-1B visas will have a negative impact on salaries for Americans in the same occupations, and that in fact one reason employers may want to bring in H-1B workers is to economize on costs. But there are no data to support these concerns. For instance, there are additional legal costs to hiring an individual on an H-1B. Moreover, National Science Foundation data show that the typical foreign-born scientist and engineer earns more, not less, than his or her native-born counterpart, according to the Wall Street Journal. The 1996 worldwide salary survey conducted by *EE Times*, a publication that covers the electrical engineering field, provides further evidence of this. Among the findings of the survey: "American-born engineers earned a mean salary of \$66,000, fully \$1,400 below the total mean. Immigrants from India (\$74,400) and Hong Kong (\$76,800) pulled up the averages for foreign-born engineers. Newcomers from China at \$65,800 [only \$200 below the mean] lagged behind them. This illustrates a point made in earlier surveys....no evidence exists of immigrants dragging down overall salaries." The *EE*

Times survey stated that it found no evidence of exploitation. "Not a single one of the 137 non-U.S.-born engineers or managers earned under \$35,000. By contrast 28 American readers did."

Thus, what evidence we have suggests that American wages are not being undercut by H-1B workers, particularly in light of market forces and the role innovation plays in propelling the fields in question forward. There is also no evidence that companies maintain two wage scales for native-born and H-1B employees working side by side one another in the same occupations. Provisions in current law governing the hiring of H-1B workers, which require employers to pay H-1B workers the higher of prevailing or actual wages and to provide them working conditions that do not adversely affect the working conditions of others similarly situated, in fact forbid any such a practice. Moreover it would not work: especially given the fierce competition for skilled workers, an H-1B employee who is not being treated fairly can easily be petitioned by another employer and switch to work for that employer.

Indeed, the Committee understands that such job changes are fairly common among H-1B workers, since the occurrence of such job changes and the INS's difficulty in accounting for them artificially inflated the count of the number of H-1B visas in use last fiscal year and for a period of time prompted concerns that the cap had been reached well before it had in fact been hit. Finally, many H-1Bs are foreign students recruited off U.S. college campuses in the same process that companies hire native-born students so it would be unexpected if employers are creating different wage scales for the two groups. Indeed, at the Committee's hearing, Steven Levin of Texas Instruments testified that the situation is so competitive today that there are more companies recruiting at M.I.T. than there are graduates in high tech fields annually.

In his testimony, Levin also provided data on starting salaries for various fields that cast real doubt on the proposition that salaries in these areas are suffering from any kind of deflationary pressure. Although he noted that "starting salary . . . is heavily dependent on the education and work experience of each person offered employment" and that "the schools attended and the grade point average of a person also influences the starting salary," Levin testified that the average starting salary for engineers with a bachelor's degree and summer work experience at Texas Instruments is \$46,800. For a person with a master's degree and summer work experience it is \$54,000. For a Ph.D. with summer work experience it is \$76,200.

The Committee also heard similar testimony from Kenneth M. Alvares, vice president, Human Resources, at Sun Microsystems. He said the starting salaries it offers for recent college graduates is \$45,000 to \$55,000, though those with more experience could start at more than \$55,000. Microsoft testified to similar numbers. Alvares also testified that "of all the H-1B workers that Sun has hired, only a very small handful are actually recruited outside the U.S. and then brought in to the country. The vast majority of H-1Bs that Sun hires are already in the U.S. having graduated from U.S. schools —frequently at the top of their class."

In light of this lack of evidence that H-1B salaries are depressing the wages of Americans, the Committee rejects the idea of a new salary "floor" for individuals on H-1Bs. Such a "floor" chosen by Congress would be completely arbitrary and as such

would have negative and unintended consequences. The prevailing wage provisions in current law already require the individual on an H-1B to be paid at least the average paid to other similarly employed Americans.

3. *The Impact on Training Americans*

There is widespread agreement among Committee Members that more should be done about educating American young people for the jobs of tomorrow. Indeed, separate provisions of this legislation address that in a number of ways: through a scholarship program included in the bill to help students major in engineering, mathematics, and computer science, and through provisions for training the unemployed in information technology at authorized levels higher than those announced in a small IT initiative put forward by the Clinton Administration earlier this year.

It has been suggested, however, that raising the cap on H-1B visas will have a negative effect on training programs, because it will undermine employers' commitment to providing American workers the necessary training. This claim, however, is belied by the evidence that industries that use H-1Bs are already making very significant efforts to train Americans and indeed devote more of their own resources to worker training than those that do not use a significant number of H-1B visas. High tech firms spend \$911 per employee on training vs. \$300 per employee for non-high tech firms, according to the American Society for Training and Development. Michael Murray of Microsoft testified that his company alone spends over \$568 million annually on training and education. Sun Microsystems spends over \$50 million a year, not including the 20,000 volunteer hours Sun employees are contributing to link U.S. schools to the Internet in economically disadvantaged areas. Despite these expenditures, Microsoft and Sun today have 2,522 and 2,000 unfilled technical positions respectively. Similarly, Texas Instruments spends over \$100 million a year on training employees and has over 500 openings for skilled positions despite, like many companies, engaging in significant efforts to recruit on college campuses across the nation.

In addition, Silicon Valley entrepreneurs are themselves making \$200 million in charitable contributions to fund fellowships in science and engineering at Stanford University. And Silicon Valley executives this year helped pass a significant education reform package through the California state legislature. High tech executives in Virginia and in other states have similarly led efforts for educational reform.

III. *The Abraham-Hatch Substitute*

The Abraham-Hatch Substitute to S. 1723 addresses the various aspects of the current crisis. First, it makes the necessary temporary increases in the 65,000 cap on H-1B visas. It raises that cap by 30,000 to 95,000 for FY 1998. In 1999, 2000, 2001, and 2002, 10,000 visas would be subtracted from the 95,000, and those 10,000 would be allocated to a new H-1C category that would place a ceiling on physical therapists and other health care professionals. This new category is not an increase in physical therapists or other health care professionals but rather a ceiling. The creation of a new category, rather than a limitation within the H-1B category, was recommended by both the INS and State Department to ease and clarify administrative requirements for the

but what
about
incumbent
workers?

agencies and other affected parties. To avoid disruptions in 1999 through 2002, the bill also allows up to 20,000 H-2B visas to be made available to the H-1B category if the H-2B visas are unused in the previous fiscal year. If visas are unused in the H-1C category in a prior year, those visas will likewise be made available for use, if necessary, in the H-1B category. Unlike the bill as originally introduced, the Substitute makes the increases in the cap temporary, in order to provide an opportunity for Congress to reexamine this subject in five years. In addition, at the suggestion of Senator Kyl, the Substitute added a provision requiring a study and report on high tech, U.S., and global issues for the next ten years overseen by the National Science Foundation and done by a panel established by the National Academy of Sciences to be transmitted to the Judiciary Committees of both Houses by October 1, 2000, to assist the Congress in performing that reexamination. The Substitute also includes provisions greatly toughening penalties for willful violators, including a provision not contained in the legislation as originally introduced but developed with the assistance of Senator Grassley imposing an unprecedented \$25,000 fine and 2 year debarment for willful violations in the course of which an American worker is laid off. Second, the Substitute also authorizes \$50 million for the State Student Incentive Grant (SSIG) program to create approximately 20,000 scholarships for up to \$5000 a year for low-income students pursuing an associate, undergraduate, or graduate level degree in mathematics, engineering or computer science. The program provides dollar-for-dollar federal matching funds that will grow to \$100 million with state matching. The bill also authorizes \$10 million a year to train unemployed American workers in new skills for the information technology industry and \$8 million per year for an improved job database to match job skills and job openings in information technology.

but can
only investigate
original
attestations

IV. Other Possible Restrictions on H-1B Visas and the Committee's Reasons for Declining to Adopt Them

America has a very diverse economy. To attempt to micromanage the human resources policies of companies through prohibitions, undue restrictions or requirements on H-1B visas is likely to have unintended and harmful consequences on U.S. businesses, universities, and non-profit entities, as well as on the U.S. economy and the jobs for Americans that economy generates. In the absence of compelling, demonstrated offsetting benefits, adoption of such regulations would be unwise.

For these reasons, the Judiciary Committee declined to adopt a number of possible additional restrictions on H-1B visas proposed in a number of different quarters.

A. The Kennedy-Feinstein Amendment

Senators Kennedy and Feinstein proposed an amendment that contained a number of additional preconditions for hiring H-1B workers. The Committee's judgment was that for the most part, these preconditions were really solutions in search of a problem, but that their effect would have been to inject the U.S. government so far into the minutiae of the human resources policies of employers across America and render H-1B visas so cumbersome to use that most employers would simply refrain from hiring

H-1B workers.

1. Government-Approved Recruitment

One provision of the Kennedy-Feinstein amendment was a requirement that before they could hire an H-1B worker, employers would have to attest that they had previously taken timely and effective steps to hire a qualified American. The full text of this provision reads: "The employer, prior to filing the application, has taken timely, significant, and effective steps to recruit and retain sufficient United States workers in the specialty occupation in which the nonimmigrant whose services are being sought will be employed. Such steps include good faith recruitment in the United States, using procedures that meet industry-wide standards, offering compensation as required by subparagraph (A) [at least the prevailing wage], and offering employment to any qualified United States worker who applies or evidence that such good faith recruitment was unsuccessful." There is a minor exception that might apply to some individuals who are "aliens with extraordinary ability, aliens who are outstanding professors and researchers, and certain multinational executives and managers." No such definition is now used for H-1B employment, and individuals who would qualify on it would likely be eligible for other visas. Individuals with great promise or potential, but perhaps lesser years of experience, would be unlikely to qualify for that narrow exception.

This provision "requires businesses to engage in government approved process before they can hire any international workers," according to American Business for Legal Immigration (ABLI), a coalition of American businesses and associations. Such a requirement has enormous implications not simply for foreign nationals, but for how a U.S. employer recruits American employees. What it amounts to is a grant of power to the Department of Labor to pass in advance on the adequacy of the process through which any company that wishes to hire an H-1B worker engages in its ordinary recruitment of workers, most of whom are Americans. Any company that did not get such a pre-approval of its recruitment practices before hiring someone on an H-1B visa would face a serious risk of federal penalties.

The problems with this sweeping grant of power are compounded by the fact that even with respect to some of the more modest obligations it currently is charged with enforcing, the DOL has shown little ability to give employers uniform and predictable interpretations and guidelines under which to function. Moreover, the system the DOL has devised before it will issue the "labor certification" that employers must have in order to obtain a visa for a permanent worker now generally takes two years. DOL has suggested that the procedure for meeting this new mandate would not be nearly so cumbersome, but it has not described what it would be.

It is worth noting that in the context of permanent labor certifications, DOL has generally interpreted any "qualified" U.S. worker to be any worker who meets "minimum" criteria for the job as determined by the Department of Labor. The problem with this becomes more apparent if one uses a sports analogy. There are many people "qualified" to be a major league shortstop or second basemen. But to be most competitive teams try to hire the most qualified individual available for the job. Note

same
7-day
turnaround
time.

we don't say "qualified."
We say — "w/ substantially
equivalent qualifications
and experience."

that Congress has never barred Major League baseball teams from hiring foreign-born shortstops simply because native-born individuals exist who might have some qualifications as well. Surely a researcher who contributes to a cure for cancer or Alzheimer's or a computer engineer who prepares products for export markets or provides IT services to hospitals is no less important to America than a 20-year-old with a quick glove and a strong right arm. To remain competitive in global markets, the Committee believes hiring decisions must remain the realm of U.S. companies and universities, rather than federal bureaucrats.

Raymond J. Uhalde, acting assistant secretary for employment and training, U.S. Department of Labor, testified before the Judiciary Committee on February 25 that the prior recruitment attestation simply amounted to "checking a box." With all respect, the Committee believes this does not accurately characterize the mandate this attestation would impose on U.S. businesses and universities. Any U.S. employer that "checks a box" on an attestation risks severe financial penalties, debarment from the use of H-1B visas and potential public embarrassment if that attestation is proven false or is inadequately documented. In order to be certain of compliance with such an attestation, an employer would have to follow DOL regulations -- regulations that may not be forthcoming for a very long period of time if past experience is a guide -- that spell out specifically which type of recruitment practices are acceptable to the Department of Labor for all professional employees in the company, particularly those employed in positions remotely similar to those in which an individual on an H-1B might be hired. This amounts to micromanaging the human resources policies of U.S. companies and universities throughout America.

Universities have also pointed out the problems created by prior recruitment attestation. According to the Association of American Universities, the College and University Personnel Association, NAFSA: Association of International Educators, and the National Association of State Universities and Land Grant Colleges, as applied to university hiring, this provision requires a policy of autarky, or native self-sufficiency, at odds with their mission of opening up their students to global perspectives. Moreover, they are concerned that this legislative language does not allow for consideration of the relative ability of different individuals. They write, "American higher education and academic-based research are world-renowned for their quality. That quality is a direct result of a commitment to recruit the most talented researchers and professors in the world. One of the country's greatest advantages is the ability of its higher education institutions to attract exceptional talent without regard to national borders."

2. The "No Layoff" Attestation

The Kennedy-Feinstein Amendment also included a provision requiring employers to make a second new attestation as a condition of hiring an H-1B worker, this one concerning layoffs. This provision would have required an employer to state that it

"(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,

Use the
Permanent
Program
OR
J-Visa.

Maybe we should
think about a visa
category for
seniorists or
university professors
(senior back)
or 2-4 yrs. fellowships ???

temporary help agreement, or other similar basis, who has substantially equivalent qualifications and experience in the occupation classification for the position 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 the filing of any visa petition supported by the application, any United States worker, including any obtained by contract, who has substantially equivalent qualifications and experience in the occupation classification for the position for which the nonimmigrant is to be (or is) employed."

This provision is designed to forbid an employer from laying off an American worker in order to hire an H-1B worker with the same skills at a lower salary. Current law, however, already contains a prohibition designed to have the same effect. It forbids hiring H-1B workers at a salary below the higher of the prevailing or actual wage for people in that occupation. Moreover, there is no evidence that H-1B visas are in fact being used in this way. In response to a question from Senator Abraham at the February 25 hearing, DOL's Raymond Uhalde could cite in the past 7 years only one specific example known to DOL of a U.S. company laying off Americans and replacing them with individuals on H-1B visas, though it was not indicated whether the degree of evidence that this example involved a purposeful one-for-one replacement by the original employer. Mr. Uhalde also alluded to press reports of other cases but provided the Committee with no details. To date, the Department of Labor has also failed to respond to written follow-up questions on this and other points that were submitted by the Committee in March, despite repeated requests for its answers.

In order to address any possible instances in which this might occur, however, S. 1723 as amended includes severe penalties of any employer who commits a willful violation of the prerequisites for hiring H-1B workers during the course of which it lays off a U.S. worker. The bill makes these employers subject to a fine of \$25,000 per violation and a 2-year debarment from utilizing H-1B and all other employment-based immigrant visas. This narrowly targeted provision will penalize any employer who is truly guilty of the conduct giving rise to the concern.

By contrast, the provision contained in the Kennedy-Feinstein amendment was much broader. It would very likely would have required a company to adopt a policy that prohibits layoffs of almost any employee currently working for it if the employer wanted even to ensure the option that it could later hire an individual on an H-1B visa. This is because if the employer had in the previous six months laid off anyone in the same "occupational classification" as the H-1B worker it sought to hire, even at a job site on the other side of the country, or if it did so within 90 days of hiring the H-1B worker, it would be in violation of this provision even if these other decisions had nothing to do with the hiring of the H-1B worker. This problem is further compounded by the fact that "occupational classifications" are very broad. Companies may have hundreds or even thousands of individuals employed in the same classification. If, for example, a computer engineer is laid off anywhere in the

*Why would
DOL know about
this since it
is not illegal?*

*So not a
severe penalty
for simply
willfully laying
off a U.S. worker
in order to replace
w/ an H-1B
worker.*

country by XYZ company, that company would be prohibited from hiring any other computer engineer on an H-1B visa, anywhere else, regardless of the differences in job duties the individuals perform or how many new jobs or innovations this new person might create.

The Association of American Universities, the College and University Personnel Association, NAFSA: Association of International Educators, and the National Association of State Universities and Land Grant Colleges state: "There is no evidence that American researchers are being laid off in order for universities to hire foreign H-1B researchers." They also find "very problematic" the broad occupational classifications to which the prohibition on layoffs would apply, pointing out many people fall into these categories who perform completely different functions. Additionally, they are concerned that the expiration of a grant could be considered a layoff and prevent the hiring of a whole range of people in the same classification, no matter how beneficial these individuals might be to the campus. Finally, university officials have told the committee that the legislative language contained in the Kennedy-Feinstein amendment means that any university that changes its course offerings or replaces a department and in the process changes its workforce composition will essentially be prohibited from hiring any foreign national. Such universities essentially will be shut out from the use of H-1B visas, which will undermine the caliber of the nation's institutions of higher learning.

For similar reasons, this provision would likely have a severe negative effect on other industries, such as entertainment and biomedical research. The Motion Picture Association of America endorsed the American Competitiveness Act, writing that "to remain competitive in our global marketplace it is essential that our industry have timely access to foreign professionals when the need arises. From digital animators to computer programmers to software engineers, highly skilled technical employees play a critical role in the production of motion pictures." Yet given the relatively short project duration of motion picture production, many people may be working for periods of limited duration, after which they may be considered "laid off." Thus this provision could effectively prohibit the American entertainment industry from employing individuals on H-1Bs who could help in the production of animated and other films.

Representatives of the biomedical research community, both for-profit and non-profit, have also told the Committee that the prior recruitment and no-layoff attestations contained in the Kennedy-Feinstein language will prevent them from hiring talented researchers and limit their flexibility in choosing and ending research projects, concluding that if these provisions were to become law they could have a serious and negative impact on the development of potentially life-saving drugs in the United States.

Prohibiting or attempting to restrict layoffs in France and other countries has seriously harmed the functioning of those countries' economies. The Committee believes the real effect of a restriction of this sort will be either to limit American companies' access to foreign-born talent, which will help the companies' foreign competitors and thereby cost American jobs in the long run, or to drive U.S.

NO.
Don't
confuse
this w/ the
Permanent
Program.

companies to seek that talent by moving their facilities offshore, thereby eliminating American jobs in the short term and helping foreign governments interested in attracting more investment, research and other facilities to their nations.

3. Other Kennedy-Feinstein Provisions

a. Limit on Visa's Term

The Kennedy-Feinstein Amendment also contained a provision that would have limited the period of maximum stay for an individual on an H-1B to three years from the current six years. The Committee believes this would be unwise. Forcing individuals on H-1B visas to leave the country after three years would effectively give the benefit of any training they have received to the foreign competitors of U.S. companies.

So, should
their visas
ever expire?

b. Grant of Unfettered Investigative Authority to the Department of Labor

The Kennedy-Feinstein Amendment also contained another provision that would have granted the Department of Labor unfettered authority to investigate any employer of an H-1B employee without a complaint having been filed. The Committee believes the case has not been made for granting this authority to DOL. In FY 1997, DOL found only 3 cases of willful failure to pay the required wage rates in the H-1B visa program, involving 3 visa holders. Since 1990, it has found only 8 such violations, according to DOL.

Proponents of broader DOL authority have argued that this lack of identified willful violations is not significant, because it is explained not by the fact that these violations are not occurring but by the fact that individuals on H-1Bs are reluctant to file complaints for fear that their employer will retaliate against them. They also argue that a DOL Inspector General's report shows wider abuse of H-1Bs.

The claim that individuals on H-1Bs are afraid of filing complaints is belied several different ways. First, Harris Miller, president of the Information Technology Association of America, pointed out at the Committee's hearing that H-1B visa holders are not the only sources of complaints. The entire purpose of the requirement that employers post the fact that they are hiring an H-1B worker at a particular salary is to provide an opportunity for third parties to file complaints. Any interested party, including U.S. workers, may file a complaint which DOL must investigate. Competitors can also be a prime source of complaints, Miller noted, because no one would like to see their competition receive a competitive advantage by employing people at below market wages.

Second, despite the availability of these other possible complainants, the DOL told a researcher in 1995 that H-1B nonimmigrants themselves were the number one source of complaints filed, according to Empower America. Nor is this fact surprising, for the premise that underlies DOL's contention, that H-1B workers are akin to "indentured servants" and will therefore refrain from complaining, is incorrect. There is considerable mobility among H-1B visa holders, who are sophisticated and

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knowledgeable employees. If an individual finds a better offer at another employer, he or she may simply be petitioned for by that new employer, a process that (at least right now) takes only approximately one month. This is quite common according to attorneys and human resources professionals in the field; the Department of Labor has provided no information disproving this and has left the misleading impression in public testimony that a nonimmigrant cannot change employers. In fact, as noted above, INS counting of H-1Bs in 1997 was complicated by the fact that it was not counting "extensions" correctly --those H-1B visa holders who were employed by one U.S. employer and then hired by another U.S. employer.

Finally, numerous pro-immigration and immigrant rights organizations have endorsed S. 1723. These groups would be unlikely to have done so if they believed widespread mistreatment of individuals on H-1Bs was occurring in the United States.

The other argument offered in support of increased enforcement powers for DOL is a 1996 DOL Inspector General's audit report. Yet NAFSA: Association of International Educators published a thorough review of the audit report in a February 1998 report by legal scholar Steven Bell. NAFSA: Association of International Educators concluded: "The audit report is filled with a series of fundamental errors, including factually inaccurate statements of congressional intent, lack of knowledge of the Immigration and Nationality Act, seriously flawed statistical methodology, and incorrect measurements of both the permanent and H-1B temporary visa process *sufficient to render the report completely invalid as a tool for policy makers.*" [Emphasis added.] Bell found that the 28-page DOL report contained more than 24 errors of a factual or legal nature --nearly one a page.

An analysis by the American Immigration Law Foundation also called the DOL audit report "highly questionable." That analysis concluded: "The audit report performed by the Office of the Inspector General so lacks context and basic references to immigration law that its value as a useful guide to future legislation should be severely questioned."

A third analysis published in *Interpreter Releases* also found the DOL Inspector General's report to be fundamentally flawed as a vehicle for evaluating employment visa issues.

To give just one example: the DOL Inspector's General's report considers it an abuse of the H-1B program for an employer to obtain such a visa on behalf of an employee whom the employer may seek to hire permanently. In fact, however, Congress decided specifically in the 1990 Immigration Act to allow "dual intent" for H-1Bs, meaning that a nonimmigrant could enter on an H-1B petition without being prohibited by a consular officer even if it was concluded the nonimmigrant later intended to stay permanently in the U.S. by being sponsored for permanent residence by his or her employer.

Finally, it is worth noting that S. 1723 does grant the Department of Labor new authority to conduct investigations. The bill allows DOL to conduct spot inspections, without a complaint being filed, of employers who commit willful violations of the H-1B program. The probationary period in which such inspections can occur can last

is this counted as a renewal?

for up to five years at the discretion of the Secretary of Labor. This targets enforcement at known abusers rather than subjecting all employers to time-consuming and intrusive investigations. Georgetown University Professor Charles B. Keely writes, "Proposals to curtail use of temporary visas, especially the H-1B, are misdirected. More restrictive nonimmigrant visa policy, if unilaterally adopted by the United States, would ultimately be changed because such a policy will not alter competitive demands for international personnel movement."

B. Feinstein Three Year Amendment

The Committee defeated an amendment by Senator Feinstein to raise the cap on H-1B visas only for three years, rather than the five years included in the Abraham-Hatch substitute. It seemed unlikely that the need for these additional visas would have vanished in three years, (or two and a half years, considering that we are now more than halfway through the current fiscal year). Should that projection prove incorrect, however, the numbers available for H-1B visas in S. 1723 are ceilings, not mandatory admissions. If employers use fewer of these visas, they will simply go unused, as happened from 1990 through FY 1996. Insufficient numbers, on the other hand, hold great potential for disruption.

C. Occupational Limitations

Although no amendment to this effect was offered, some have suggested that any increase in the H-1B visas available should be limited to high tech workers. The Committee, however, was persuaded by the arguments of the ABLI coalition, which includes many high tech employers. ABLI wrote to the Committee and stated, "We oppose . . . separating 'high tech' workers from other H-1B recipients. Without appropriate knowledge of what constitutes a 'high tech' worker, imposing these distinctions will only serve to diminish the positive impact of the program. With the skills needed to compete in a global marketplace changing on an almost daily basis, today's high technology can quickly become yesterday's news. Creating a definition of 'high tech' worker is likely to put unreasonable constraints on the ability of American businesses to create jobs and generate economic growth."

In this connection, it seems worth noting that although it has variously been reported that according to the Department of Labor, in the past few years between 25 and 50 percent of those receiving H-1Bs were perhaps physical therapists, in fact the DOL's Office of Employment and Training Administration (ETA) has told the Committee that DOL does not know how many individuals are admitted on H-1Bs in which occupations in a given year. This is because this information would be kept not by DOL, but by INS, which issues the visas that confer admission. In fact, however, INS does not keep track of the occupations.

The information that DOL has, and that is the apparent source for the incorrect claims about physical therapists cited above, is salary information from the H-1B *approved certifications*. However, in a given year, there are as many six times as many positions certified by DOL, nearly 400,000, as there are H-1B admissions, 65,000.

ETA has told the Committee that an occupation like physical therapy could readily be disproportionately represented in the number of approved certifications without these certifications bearing any relationship to actual admissions. This is because the certifications may be geographically limited but the firm recruiting the physical therapist may have a national scope. If the recruiting firm does not know where the H-1B individual will work, it may file and receive a dozen or more certifications for different geographic locations for that therapist, even though they will all eventually in only one admission. In contrast, a university would likely only have one certified position for a researcher or professor.

Nevertheless, in order to address the issue of the use of H-1B visas by physical therapists, S. 1723 creates a separate temporary visa category for the use of physical therapists and other health care professionals, capped at 10,000 a year, starting in 1999. S. 1723 also requires the INS to collect and report data on the salaries and occupations of those admitted on H-1B visas.

D. H-1B Dependent Employers

A proposal adopted by the Committee last Congress granted the DOL expanded powers and imposed some new attestations on employers of whose workforce H-1B workers constituted more than 20%. This was an effort to target increased enforcement resources on this kind of employer because the rare examples of abuses were concentrated among these employers. The Committee has since become aware that these provisions would disproportionately affect small businesses. Moreover, on further reflection, the Committee has concluded that rather than targeting enforcement resources on certain kinds of employers, these resources should be targeted on employers with a record of violating the law. That is the approach S. 1723 currently takes.

Doesn't Smith's bill define H-1B dependent in a way that is sensitive to small businesses?

Conclusion

There are reasons to be concerned about the impact on America if the H-1B cap is not addressed. Thomas Friedman of the *New York Times* wrote recently, "If U.S. companies are told to put up 'No Vacancy' signs, they are inevitably going to move more knowledge operations overseas, and that will spur more innovation, wealth creation, and jobs over there." He points out many of those hired on H-1B visas are actually educated at American universities, noting "the idea that we would educate all these foreign computer engineers in U.S. universities and then send them home to compete with us is nuts."

Since 1990, the American economy has prospered and American companies have become world leaders in numerous fields. Foreign-born talent has played an important role in that success. The Committee believes that the American system of openness works and that imposing regulatory burdens that will, in effect, bar talented individuals from working in the United States simply because those individuals were not born in this country is not keeping with the American tradition of welcoming to our shores people who can make a contribution to our economy and society.

IV. Vote of the Committee

On April 2, 1998 with a quorum present, the Committee on the Judiciary considered S. 1723, the American Competitiveness Act. Senators Kennedy and Feinstein offered an amendment in the nature of as substitute, which was defeated by a 10 to 8 vote. A Feinstein amendment to lower the period of time the additional H-1B visas would be made available in the bill from 5 years to 3 years was defeated by a 10 to 8 vote. The Committee then approved an Abraham-Hatch substitute by unanimous consent and voted 12 to 6 on final passage to report the bill favorably to the Senate floor.

Recorded Votes

Vote on Kennedy-Feinstein Substitute Amendment

Yeas (8)

Leahy
Kennedy
Biden
Kohl
Feinstein
Feingold (by proxy)
Durbin
Torricelli

Nays (10)

Hatch
Thurmond
Grassley
Specter (by proxy)
Thompson
Kyl
DeWine
Ashcroft (by proxy)
Abraham
Sessions (by proxy)

Vote on Feinstein Amendment to end the increase in additional H-1B visas after 3 years.

Yeas (8)

Leahy

Kennedy

Biden

Kohl

Feinstein

Feingold (by proxy)

Durbin

Torricelli

Nays (10)

Hatch

Thurmond

Grassley (by proxy)

Specter (by proxy)

Thompson

Kyl

DeWine

Ashcroft (by proxy)

Abraham

Sessions (by proxy)

Vote on final passage of S. 1723

Yeas (12)

Hatch

Thurmond

Grassley (by proxy)

Specter (by proxy)

Thompson

Kyl

DeWine

Ashcroft (by proxy)

Abraham

Sessions (by proxy)

Kohl

Feinstein

Nays (6)

Leahy

Kennedy
Biden
Feingold (by proxy)
Durbin
Torrice

Section by Section Analysis

The Abraham-Hatch Substitute Amendment for the American Competitiveness Act S. 1723

Section 1

The Act may be cited as the "American Competitiveness Act."

Section 2. Findings:

The Act makes the following findings:

The National Software Alliance, a consortium of concerned government, industry, and academic leaders that includes the U.S. Army, Navy, and Air force, has concluded that "The supply of computer science graduates is far short of the number needed by industry." The Alliance concludes that the current severe understaffing could lead to inflation and lower productivity.

The U.S. Department of Labor projects that our economy will produce more than 130,000 information technology jobs in each of the next 10 years, for a total of more than 1.3 million.

The Hudson Institute estimates that the unaddressed shortage of skilled workers throughout the U.S. economy will result in a 5 percent drop in the growth rate of GDP. That translates into approximately \$200 billion in lost output, nearly \$1,000 for every American.

In FY 1997, U.S. companies and universities reached the cap of 65,000 on H-1B temporary visas a month before the end of the fiscal year. In FY 1998 the cap is expected to be reached as early as May if Congress takes no action. And it will be hit earlier each year until backlogs develop of such a magnitude as to prevent U.S. companies and researchers from having any timely access to skilled foreign-born professionals.

It is vital that more American young people be encouraged and equipped to enter technical fields, such as mathematics, engineering, and computer science.

If American companies cannot find home-grown talent, and if they cannot bring talent to this country, a large number are likely to move key operations overseas, sending those and related American jobs with them.

Inaction in these areas will carry significant consequences for the future of American competitiveness around the world and will seriously undermine efforts to create and keep jobs here in the United States.

Section 3. Increased Access to Skilled Personnel for United States Companies and Universities. Additional Numbers Sunset After 5 Years.

The Abraham-Hatch Substitute to S. 1723, which passed the Judiciary Committee 12 to 6, would increase the 65,000 cap by 30,000 to 95,000 for FY 1998. In 1999, 2000, 2001, and 2002, 10,000 visas would be subtracted from the 95,000, and those 10,000 would be allocated to a new H-1C category that would place a ceiling on physical therapists and other non-physician health care professionals. This new category is not an increase in physical therapists or other health care professionals but rather a ceiling. The creation of a new category, rather than a limitation within the H-1B category, was recommended by both the INS and State Department to ease and clarify administrative requirements for the agencies and other affected parties. In addition, to avoid disruptions in 1999 through 2002, the bill allows up to 20,000 H-2B visas to be made available to the H-1B category if the H-2B visas are unused in the previous fiscal year. If visas are unused in the H-1C category in a prior year, those visas also will be made available for use, if necessary, in the H-1B category. Also to avoid disruptions, the bill states that any H-1B petition filed in FY 1998, even if not approved until FY 1999, will be counted against the new FY 1998 cap called for in the legislation.

	H-1B Visas	H-1C Visas (New Category for Physical Therapists and Other Health Care Workers)
FY 1998	95,000 (current projected usage for FY 1998)	
FY 1999	85,000 (plus a maximum of 20,000 H-2B visas if unused in previous fiscal year)	10,000
FY 2000	Same as above	10,000*
FY 2001	Same as above	10,000*

FY 2002	Same as above	10,000*
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Note: *If H-1C visas are unused in a fiscal year, they will be made available to the H-1B category in the next year.

Section 4. Education and Training in Science and Technology

The intent of this section of the bill is to authorize \$50 million for the State Student Incentive Grant (SSIG) program to create approximately 20,000 scholarships a year for low-income students pursuing an associate, undergraduate, or graduate level degree in mathematics, engineering or computer science. The program provides dollar-for-dollar federal matching funds that will grow to \$100 million with state matching. The scholarships will be for up to \$5,000 each. The bill also authorizes \$10 million a year to train unemployed American workers in new skills for the information technology industry.

The \$50 million for the scholarships is intended to be on top of the current \$105 million authorized for the program. The legislative language in this bill strikes the \$105 million and inserts \$155 million. Although the intent is to authorize only \$50 million annually, because the Higher Education Act has not yet passed and been reauthorized in this fiscal year, the Congressional Budget Office is scoring the entire SSIG program as being reauthorized by the American Competitiveness Act. This has resulted in scoring of \$155 million annually for the scholarships in S. 1723, rather than \$50 million. This artificially inflates the bill's total scoring by CBO by \$105 million a year.

This section also authorizes \$10 million and \$8 million respectively per year for training unemployed individuals in information technology and an improved job database to match job skills and job openings in information technology.

Section 5. Increased Enforcement Penalties and Improved Operations

(a) **Increased Penalties for Violations of H-1B or H-1C Program.** The bill increases fines by five-fold for willful violators of the H-1B or H-1C program, from the current \$1,000 to \$5,000.

(b) **Spot Inspections During Probationary Period.** This section allows the Department of Labor to conduct spot inspections, without a complaint being filed, of employers who commit willful violations of the H-1B program after the passage of this act. The probationary period in which such inspections can occur can last for up to five years at the discretion of the Secretary of Labor based on the severity of the offense.

(c) **Layoff Protection for U.S. Workers.** Section 5 adds a significant ground for violation and fines for those failing to meet their statutory responsibilities. If an employer using the H-1B program is found liable for willfully failing to meet a condition of employment under the H-1B attestations (such as a failure to pay the required wage), or for making a willful misrepresentation of a material fact, the administrative judge investigating the case can also determine whether the employer has laid off U.S. workers in the same jobs and replaced them with H-1B workers in the same jobs. If so, the employer will be fined \$25,000 per violation and debarred from participating in the H-1B program and the permanent employment visa program for two years. The intent of this section is that this penalty be reserved for cases where the employer willfully underpays the required wage to an H-1B employee and in the course of that violation replaces a U.S. worker laid off from the same specific job with the individual on an H-1B visa whom the employer willfully underpaid.

(d) **Expedited Reviews and Decisions.** This subsection requires INS to adjudicate H-1B petitions within 30 days. The Committee finds that INS currently takes up to three months to adjudicate H-1B petitions in some regions. To remain competitive, U.S. companies must have the ability to obtain skilled foreign workers in as timely and efficient a manner as possible.

(e) **Determinations on Labor Condition Attestation To Be Made By Attorney General.** This subsection transfers authority for adjudication of Labor Condition Attestations (LCA) from the Secretary of Labor to the Attorney General. Enforcement authority with respect to LCAs will remain with the Secretary of Labor. Currently, employers file the LCA with the Regional DOL office. DOL merely checks the LCA for completeness. Absent a complaint, DOL does not investigate nor certify the accuracy of the information. Once certified, the LCA is then filed with the rest of the H-1B petition at the INS regional service center. The Committee believes the H-1B administrative process will be streamlined by moving LCA certification to the INS. A copy of the LCA would still be filed with DOL and DOL would retain all current enforcement authority. It is estimated that this transfer will eliminate one to three weeks processing time for employers seeking H-1B workers. Further, because of the large number of LCAs filed and the significant cuts in funding for alien labor certification programs, substantial resources are being diverted from DOL's processing of permanent labor certification applications to LCAs. This has contributed to significant backlogs for permanent labor certifications in some regions. Transferring LCA certification would add little burden to INS while freeing DOL resources to process permanent labor certification applications.

(f) **Prevailing Wage Considerations.** Under current law an employer must attest on a Labor Condition Attestation that an individual on an H-1B will be paid the greater of the actual or prevailing wage paid to similarly employed U.S. workers. The bill seeks to correct for the inaccuracies in the current Department of Labor use and calculation of prevailing wage data.

In Subsection (i)(1) the legislation provides that the prevailing wage level at Institutions of higher education and nonprofit research institutes shall take into account only employees at such institutions. The provision separates the prevailing wage calculations between academic and research institutions and other non-profit entities and those for for-profit businesses. Higher education institutions and nonprofit research institutes conduct scientific research projects, for the benefit of the public and frequently with federal funds, and recruit highly-trained researchers with strong academic qualifications to carry out their important missions. The bill establishes in statute that wages for employees at colleges, universities, nonprofit research institutes, and other nonprofit entities must be calculated separately from industry.

Subsection (i)(2) modifies the prevailing wage criteria for professional sports. The Committee finds that where there is a collective bargaining agreement (CBA), the minimum wage established therein should be considered to be the prevailing pay rate. Where no CBA exists, the prevailing wage should be the minimum salary mandated by the professional sports league which teams must pay players—foreign nationals as well as U.S. workers. The system currently employed to determine the prevailing wage for minor league professional sports uses a "mean wage." Because salaries for professional athletes vary greatly (up to 20 times difference between lowest and highest paid players), using the mean wage to calculate prevailing wage actually encourages the leagues to pay approximately fifty percent of the U.S. athletes a lower salary than similarly situated foreign national athletes. This current system is a disincentive to increase U.S. workers' salaries.

Subsection (i)(3) enables U.S. companies to use the same wage surveys generally relied upon in setting salaries for U.S. workers (whether they are regional, national, industry, or statewide surveys) to determine the prevailing wage for foreign workers. The Committee finds that companies are often unable to rely upon the market information used to determine wages for U.S. workers when calculating the prevailing wage for a foreign national simply because the survey does not meet DOL's requirement that the survey be limited to a specific geographical region or be cross-industry. In many occupations, salary is determined on a national, regional or industry basis. DOL would still have the ability to challenge the employer's prevailing wage determination based on these broader criteria. Employers attempting to use "sham" surveys to willfully underpay foreign workers would be subject to enhanced fines, inspections and debarment.

(g) Posting Requirement. This provision allows employers to post LCA in same manner as other job notices, including via electronic posting. For many companies, particularly those with remote employees, electronic posting provides notice to a greater number of employees than traditional posting on a bulletin board. The Committee believes that DOL regulations should reflect current business practices, including the use of technology to recruit and inform workers, to the extent possible.

Section 6. Annual and Quarterly Reports on H-1B Visas

This section requires quarterly reports on H-1B numbers. It also mandates annual reports on the occupations and compensation of aliens provided nonimmigrant status under such section during the previous fiscal year.

Section 7. Study

This section requires a study and report on high tech, U.S., and global issues for the next ten years overseen by the National Science Foundation and done by a panel established by the National Academy of Sciences to be transmitted to the Judiciary Committees of both Houses by October 1, 2000.

Section 8. Limitation on Per Country Ceiling with Respect to Employment-based Immigrants

This section modifies per country limits on employment-based visas to eliminate the discriminatory effects of those per country limits on nationals from certain Asian Pacific nations. Currently, in a given year there are employment-based immigrant visas available within the annual limit of 140,000, yet U.S. law prevents individuals born in particular countries from being able to join employers who want to sponsor them as permanent employees because those countries have reached their per country limit. This amounts to preventing an employer from hiring or sponsoring permanently in that year someone because he or she is Chinese or Indian, even though the individuals meets all the proper legal criteria set forth by the U.S. government. The bill would end this prohibition itself leaving intact the annual level of 140,000.

Section 8 also provides limited relief for nationals from countries who today have been adversely affected by the increasing demand for certain employment-based immigrant visas. The provision modifies the current caps on employment based visas for individuals from what are considered to be "over-subscribed" countries, while leaving intact the total limit on employment-based immigration. If there are still unused employment-based immigrant visas available after the employment-based visas issuable during any calendar quarter have been issued according to the per-country limitations, those visas may then be issued without regard to the country of origin of the recipient. They may be issued, however, only to the limit of the total number of employment-based visas available for each category. The intention of this provision is have no adverse impact on family immigration levels, particularly as it relates to the interaction of the per country limits on family and employment-based immigration.

The section also affords a one-time protection for those who have previously been adversely affected based upon their country of origin. The provision allows those with approved petitions, who cannot receive the immigrant visa because of the per country limit, to stay until such a visa becomes available. These immigrants would otherwise be forced to return home at the conclusion of their allotted time in H-1B status, disrupting projects and American workers. The provision enables these few individuals to remain in H-1B status until they are able to receive an

immigrant visa and adjust their status within the United States, thus limiting the disruption to American businesses.

Section 9. Academic Honoria

This section permits universities and other nonprofit entities to pay honoraria and incidental expenses for a usual academic activity or activities by visiting scholars and individuals holding similar visas.