Does Prevailing Wage only Come from the Government?

Q. Doesn't this amendment require employers to set their wage rates by going to the government to get prevailing wages?

A. No. This amendment does not change the current range of sources that may be used to ascertain the prevailing wage. Current law and regulations for the H-1B program provide that employers may use any one of the following sources to obtain the prevailing wage:

- Wage determination issued under the provisions of the Davis Bacon Act or Service Contract Act.
- Applicable wages rate from a Union Contract which was negotiated at arms length between a Union and an employer.
- State Employment Security Agency (SESA).
- Wage survey published by an independent authoritative source.
- Wage survey obtained from a legitimate source of wage information that meets certain specified standards.

Why can't Employers Hire Whoever they Want?

Q. Why shouldn't employers be permitted to hire whoever they want to hire?

A. Isn't the real question, "why shouldn't employers be delegated full authority to control U.S. immigration policy?" because that is what we are talking about here.

Our federal law -- for sound public policy reasons -- has, within the context of a free market, carefully crafted constraints or limitations on employers' hiring choices. For example, we don't tolerate in law employer hiring decisions based on race or religious affiliation. For these same reasons, we prohibit, in this very law we are discussing, the hiring of illegal immigrants.

Our legal immigration system does delegate to U.S. employers significant responsibilities in selecting both permanent and temporary entrants to the U.S. It is not at all unreasonable that those responsibilities include the national interest, including the interests of U.S. workers.

Legislative questions:

Need to craft language that

Kennedy is trying to develop a compromise.
We are looking for legislative language
adhere to our objectives + allay concerns of industry.

B/C of broad language
they are perceiving permutation of reform
that they don't like.

Identify where need more specificity
(provide more detail)

What aspects need more specificity about certain aspects of reforms that we have endorsed.

Q that arise.

Purpose/guidelines

What aspects of reforms need more specificity.

where do we have concerns.

1. recruit & retain — industry standards
2. Job Contractors
3. Enforcement
4. Training?
   a. New $ or not
   b. What form of training, once we have $

What is most important?

Our Agenda

Circumstances where Domestic Recruitment NOT Required

Q. Aren't there circumstances when an employer should not be required to recruit in the domestic labor market?

A. Of course, but rarely, and this amendment accommodates these circumstances. Employment-based immigration is a vehicle for bringing the world's best and brightest into our country to create jobs and improve our competitive edge. Nobel-level scientists, world-renowned business leaders, brilliant artists and artisans --- we must welcome these immigrants without hesitation. They enhance our economy, enrich our cultural life, create jobs for U.S. workers, strengthen our society. We are not suggesting that employers hiring such individuals must engage in domestic recruitment.

At the same time we acknowledge that there are legitimate purposes for employment-based immigration, we must also accept that there is a real and looming danger that allowing employers to hire foreign skilled workers -- both permanent and temporary -- can have an adverse effect on U.S. workers. Remaining globally competitive should not mean driving down the wages of U.S. workers and increasing their growing sense of insecurity in the workplace.

Floor Presentation: REQUIREMENT TO RECRUIT UNDER THE EMPLOYMENT-BASED IMMIGRATION PROGRAMS

This amendment would change current law to require U.S. employers seeking foreign "professional" workers to recruit for these positions in the domestic labor market.

Current law does not reflect this simple, common sense principle for foreign temporary workers -- and it should.

U.S. employers seeking access to the international labor market to meet their needs for skilled workers simply ought to be required to attempt to recruit U.S. workers for their jobs, and to be taking steps to develop U.S. workers to meet their long-term needs.

This should not be a hardship or additional burden, since most employers who use these immigration programs assure us that they are continuously recruiting for their job openings in the domestic labor market, and that they would prefer hiring U.S. workers.

This amendment is simple and straight-forward.

Employers applying for admission (or adjustment) of employment-based immigrants who are subject to labor certification are already required to recruit domestically, and offer the locally prevailing wage.

This amendment would merely assure that the employer offers at least the same wages and benefits it pays to similarly-employed U.S. workers.

Employers applying under the H-1B program would have to check another box on their application form attesting that they have and are taking steps to recruit and retain U.S. workers in the target job(s) -- which everyone assures us they are already doing.

In both cases, the employer-applicant would attest that it had recruited in the domestic labor using <u>industry-standard</u> -- not government imposed -- recruitment procedures.

In both cases, the employer would confirm that its recruitment offered the locally prevailing wage or the wage it actually pays similarly-employed workers, whichever is higher.

Employers hiring H-1B nonimmigrants are <u>already</u> required, under current law, to pay the nonimmigrant workers the higher of the "actual" or locally prevailing wage <u>so this amendment imposes no new wage obligation</u> in this program.

In both programs, this amendment merely assures that the employer recruits domestically offering the same wages and other compensation to U.S. workers that it would be obligated to pay to its foreign temporary workers. That's only fair to U.S. workers.

In both cases, the employer would be obligated to actually pay the foreign worker the wages and benefits offered in its domestic recruitment to assure that domestic wages and benefits are not undermined.

As I've said, such payment is already required for H-1B workers.

And the prospective employer of an H-1B nonimmigrant would attest that its domestic recruitment was unsuccessful -- in other words, that it could not find a qualified U.S. worker for the job -- <u>unless</u> the prospective H-1B employee would qualify as a "first preference" (or "priority worker") permanent immigrant. This is the problem employers tell us they face and this is the problem that this nonimmigrant program is intended to address.

Under this amendment, if the H-1B nonimmigrant sought by the employer would otherwise qualify as, for example, an "outstanding professor or researcher," the employer could still hire this individual as an H-1B even if its domestic recruitment found a qualified U.S. worker.

This amendment represents a more-than-reasonable accommodation of the concerns expressed by the business community, and it appropriately reflects legitimate concerns about protecting U.S. workers from unfair competition.

Questions have been raised about the scope of requiring employers to attest that they "have and are taking timely, significant and effective steps to recruit and retain" U.S. workers in these jobs, implying that this imposes substantial new obligations and burdens on employer-applicants.

But the amendment does not do so -- it lays out clear recruitment obligations in a manner that is entirely consistent with what the business community assures us they are already doing.

Questions have also been raised about requiring recruitment offering the higher of the prevailing or "actual" wage, and where the prevailing wage information will come from.

But, as I said, employers hiring H-1B nonimmigrants are already required, under current law, to pay these workers the higher of the "actual" or locally prevailing wage so this imposes no new wage obligation.

It merely says that the employer recruited domestically offering the same wages and other compensation that it would be obligated to pay to its foreign temporary workers.

It's only fair to U.S. workers that employers should not recruit domestically offering a lower wage than they would have to pay to a nonimmigrant worker.

It's only fair to U.S. workers that employers should have to pay foreign workers at a wage level that does not undermine domestic wages and benefits.

And this amendment does <u>not</u> establish any new prevailing wage system or program. Under current law, employers must ascertain and promise to pay (at least) the locally prevailing wage in both programs.

Employers can go to their State Employment Security Agency (SESA) to get the prevailing wage or, <u>under current law</u>, employers of H-1B workers can alternatively use an "independent authoritative source" or another "legitimate source" of prevailing wage data.

They are not required to come to the government to get this information, and nothing in this amendment would change that.

In simple, stark terms, we are short-changing the U.S. workforce and our own national interests if we don't expect employers to recruit in the U.S. for jobs for which they are seeking foreign workers.

I can think of no other way to see it, and urge your support for this amendment.

17. Problems with Provisions in S. 1394 and HR 2202

Q. Why do we need to add a "no layoff" provision when S. 1394 and HR 2202 already contain provisions against layoffs?

A. To the contrary, although portrayed by some as providing protection from layoffs of U.S. workers, S. 1394 in its current form provides absolutely no protection against employers laying off U.S. workers in order to hire foreign temporary workers. In fact, if we do not change current law, S. 1394 could be seen as an endorsement by the United States Senate of laying off U.S. workers in favor of foreign temporary workers.

A provision contained in HR 2202 which had also gained some support in the Judiciary Committee approaches the problem of laying off U.S. workers in another way which, I am sorry to report, is entirely inadequate in protecting U.S. workers. This provision is said to create a disincentive that will keep U.S. employers from hiring foreign temporary workers to replace laid off U.S. workers by requiring that any employer who engages in that practice pay the foreign worker at least 10% more than the wage paid the laid off U.S. worker.

This provision is plainly inadequate. Employers would be permitted to "buy a license" to lay off U.S. workers by giving higher wages to the foreign temporary workers who replace them. Further, the provision does not consider benefits or other forms of compensation. An employer can easily dodge the already weak disincentive by simply denying the foreign temporary worker any benefits.

Working families have a right to know that employers cannot use immigration law to take their jobs. Neither S. 1394, as currently written, nor this weak layoff disincentive in the House bill, provides working families with that assurance.

51. EXAMPLES OF SMALL BUSINESS COMPLIANCE WITH THE H-1B PROGRAM

Since the inception of the H-1B program there have been 11 cases accepted for investigation by the Department of Labor that resulted in finding full compliance with the employer's obligations under the program.

However, of the total 80 cases accepted for investigation based on complaints[5] that have been finally resolved, 69 (or 86 percent) resulted in a determination by the investigating agency that violations, of varying seriousness, had occurred.

(In another 73 cases, the Department of Labor received a complaint but did not find reasonable cause to initiate an investigation, usually because the complaint involved alleged behavior by the employer that is not addressed under the H-1B program -- i.e., failing to recruit U.S. workers for the job, or laying off a U.S. worker from the job.)

Examples of cases showing compliance by **small businesses** include:

* **Materials Modification, Inc.** of Virginia which designs mechanical components for scientific equipment and employed an H-1B nonimmigrant as a metallurgical engineer.

* **Green Leaf Medical Association** of Illinois which is a private medical practice office which employed an H-1B nonimmigrant as a research editor.

* **GIS Trans Ltd.** of Massachusetts which provides computer programming services and employed an H-1B nonimmigrant as a computer applications analyst.

[5] Another 33 cases remain under investigation or are being litigated at some stage.

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."

H-1B NONIMMIGRANT PROGRAM REFORMS ARE NEEDED

Background

The H-1B nonimmigrant program exists to allow U.S. employers access to relatively highly-skilled foreign temporary workers to meet short-term labor shortages. In fact, in a recent (May 1996) audit of the H-1B program, the Department of Labor's Inspector General found that, despite the legislative intent:

> *"... the [H-1B] program does not always meet urgent, short-term demand for highly-skilled, unique individuals who are not available in the domestic work force. Instead, it serves as a probationary try-out employment program for illegal aliens, foreign students, and foreign visitors to determine if they will be sponsored for permanent status."*

Nearly half the workers who are admitted as employment-based immigrants for permanent residency in the U.S. convert from H-visa nonimmigrant status. Thus, how the H-1B nonimmigrant program operates has important implications for permanent immigration.

Under current law, a U.S. employer need only complete a one-page form (copy attached) on which four boxes are checked to "attest" to certain past and future behaviors as the initial step in gaining the immigration benefit of being permitted to import a skilled foreign temporary worker. This "attestation" form must – by law – be processed by the Department of Labor within seven work days of receipt and – again, by law – can only be rejected by the Department if it is incomplete or contains obvious inaccuracies. The law does not allow delay in the processing of these attestation forms, and it does not allow any effort to look behind the *bona fides* of the employer's promises.

The four current attestations are that:

- The employer will pay the higher of the locally prevailing wage for the occupation, or the rate paid similar workers already employed;
- The employment of the nonimmigrant will not adversely affect similarly-employed U.S. workers;
- There is not a strike or lockout in progress affecting the occupational category; and,
- The employer's employees have been given notice of the intent to employ nonimmigrant workers.

The H-1B nonimmigrant program does not require any test of the U.S. labor market for the availability of qualified U.S. workers. What is more, a U.S. employer can now legally lay off U.S. workers and replace them with H-1B workers. The Administration does not believe this is right. Moreover, the H-1B program does almost nothing to encourage U.S. employers to develop domestic workers to perform the jobs for which they are seeking nonimmigrants, or to limit their dependency on a nonimmigrant workforce. It is quite difficult to discern the rationale for this policy, or to explain it to U.S. workers.

The Administration has long supported much-needed reforms to the H-1B nonimmigrant program to remedy these serious defects. Specifically, these reforms consist of adding to additional attestations to the H-1B application form:

- That the employer has taken timely and significant steps to recruit and retain U.S. workers in the job for which the H-1B nonimmigrant is sought; and,

- That, during specified periods surrounding the filing of the application and subsequent petition, the employer has not laid off or otherwise displaced any qualified U.S. worker from the same job category.

If U. S. employers are, under the law, to be delegated the right to decide when to import foreign workers to fill jobs in the U.S., then the people – through their elected government – have the right to decide under what conditions such authority should be conveyed. It simply makes sense that these conditions include trying first to fill the employment need in the U.S. labor market, and assuring that U.S. workers are not removed if the jobs are to be filled by foreign temporary workers. Neither of these simple, common sense requirements exist in current law.

Effects of Adding Two New Attestations

1. These Reforms Will NOT Cause Delays

Some employers contend that adding these requirements will substantially slow down the admission process for foreign temporary workers and add many bureaucratic requirements to approval of their application for H-1B nonimmigrant workers. This contention is simply untrue.

The Administration's proposed reforms would add two more boxes to be checked on the employer's application. The Labor Department would still be subject to the existing requirements of law that the application be processed within seven days and only rejected where incomplete or where there are "obvious inaccuracies." There would be no new pre-adjudication process that could cause delays in processing and approval. The employer would simply attest that it had tested the U.S. labor market in attempting to fill the job(s) and that, during certain times, it had not or would not lay off U.S. workers in the same job.

Employers in the information technology sector repeatedly state that they search exhaustively in the U.S. labor market to fill open jobs and that the tight IT labor market does not allow lay off or displacement of U.S. workers. Accordingly, attesting to these two common sense reforms would impose no additional burden on employers in this sector.

2. These Reforms Will NOT Cause Excessive Government Oversight of Employers' Hiring and Firing Decisions

Some employers contend that the real reason they oppose these reforms is because they would – after the application is approved and the nonimmigrants admitted – subject the employer's hiring and firing decisions to "second guessing" by the government. Such decisions are already subject to review in the context of enforcement of employment discrimination laws, including the anti-discrimination provisions of the immigration law. Where an employers' authority to import foreign workers is conditional, and where there are few impediments to the exercise of this authority by employers before the approval of the nonimmigrant admission, then employers' hiring and firing decision-making must be subject to scrutiny after-the-fact to ensure that the employer is not discriminating against U.S. workers in favor of hiring foreign temporary workers.

This is a straight-forward law enforcement issue. Employers that are delegated authority to decide to import foreign workers need to be accountable for abiding by the conditions attached; specifically, to give U.S. workers a legitimate first chance at the jobs for which foreign temporary workers are being sought if they are to gain the immigration benefit of importing foreign workers. Yet there are real limits on the government's law enforcement function. There are obvious resource limitations. Absent complaints alleging violations, the government must be highly selective in deciding where to invest scarce resources by targeting likely violators. And there are limits on the government's imposing artificial requirements around the conditions. For example, the employer attestation regarding recruitment of U.S. workers would be based on industry standard practices.

If the Administration's reforms are not implemented and the two new attestation elements are not added in to the H-1B program, then the Labor Department will not be able to assure that the intended purposes of the program are actually served., regardless of any new enforcement authority granted by Congress. The H-1B program exists to assure that U.S. employers can access the international labor market when they cannot find U.S. workers. Under current law, as the Inspector General has pointed out, the government is effectively powerless to assure that employers use the H-1B program for its intended purpose, and that purpose only.

Conclusion

Our national immigration policy does not confer *carte blanche* authority to U.S. employers to import foreign temporary workers so as to promote the interests of U.S. workers and protect them from unfair competition.

U.S. employers with a **real** need to reach into foreign labor markets to meet their employment needs at home will have made real efforts to fill their needs in the domestic labor market, and they will have made commitments to retain and retrain U.S. workers to meet their labor needs. These employers should not hesitate in saying that they have done so, even in a legally enforceable manner.

Attachment

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

April 7, 1998/12:25pm

TO: JULIE

DEPARTMENT/COMPANY: DPC

FACSIMILE NUMBER: 456-5581

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:

Domestic Recruitment Requirement for the H-1B Program

Q. Should recruitment of U.S. workers be required for the H-1B program?

A. We must give U.S. workers who have the skills and are willing, available, and qualified for high-wage, high-skill jobs a fair opportunity to be recruited for those jobs.

U.S. employers seeking access to the international labor market to meet their needs for skilled workers simply ought to be required to recruit U.S. workers for their jobs, and should be taking steps to develop U.S. workers to meet their long-term needs.

Most employers who use the H-1B program assure me that they are continuously recruiting for their job openings in the domestic labor market, and that they would prefer hiring U.S. workers. This change then should not impose any hardship or additional burden on these employers.

Employers applying for a foreign temporary worker under the H-1B program would have to check one additional box on their application form attesting that they have taken and are taking steps to recruit and retain U.S. workers--which employers assure us they are already doing. The employer-applicant would attest that it had recruited in the domestic labor market using industrywide standards--not government imposed--recruitment standards.

The Labor Department has estimated that as many as 90% or more of the foreign workers admitted permanently to the U.S. through employment-based immigration are already in the U.S. and most have worked as temporary foreign workers for the same employer who is applying for the worker to be admitted permanently to the U.S.

Employers often "game" the labor certification system by making it look as though they are genuinely recruiting when in fact they tailor job descriptions such that only the incumbent worker--the foreign temporary worker seeking to adjust to permanent status--can qualify for the job.

Why do we need a no-layoff provision?

Q. Why do we need a no-layoff provision?

A. Under the current H-1B program, employers can fire, permanently lay-off or otherwise displace their U.S. workers and replace them outright with foreign workers. The same jobs; the same work stations.

Our law permits, perhaps even encourages, this behavior by employers of foreign temporary workers. Rightfully so, public outrage at cases of widely publicized lay offs associated with the H-1B program are undermining confidence in our entire immigration system and adding to the growing sense of insecurity felt by U.S. workers. Simply, if employers are trying to find foreign workers to fill labor shortages caused by a breakdown in the nation's skill development system, there can be no legitimate justification for laying off or otherwise displacing U.S. workers to replace them outright with foreign workers.

This is simply an intolerable situation, betrays our trust with U.S. workers and their families, and undermines public confidence in our immigration system.

Won't a Higher Wage Requirement for Foreign Workers Solve it?

Q. Wouldn't we protect U.S. workers from layoffs if we simply made employers who laid off U.S. workers pay more to the foreign workers who replace them (e.g., a 10% wage premium)?

A. This provision is plainly inadequate. Employers would be permitted to "buy a license" to lay off U.S. workers by giving higher wages to the foreign temporary workers who replace them. Further, this alleged disincentive approach does not take into account benefits or other forms of compensation. An employer can easily dodge the already weak disincentive by simply denying the foreign temporary worker any benefits. While I share the purported goal of this amendment --- to keep employers from laying off U.S. workers in favor of foreign temporary workers --- this "license to lay off" provision simply avoids what must be done, and that is to prohibit employers from laying off U.S. workers in order to replace them with foreign temporary workers. Working families have a right to know that employers cannot use immigration law to take their jobs.

Additional Paperwork Burden for Employers?

Q. Won't a "no layoff" provision significantly add to the burden employers must go through in order to obtain foreign temporary workers?

A. No part of the H-1B program is burdensome. In the current application process, employers are required to check four boxes on a one-page form and sign it. This provision would put a fifth box on that form. Checking this box would constitute an attestation by the employer-applicant that it has not laid off or displaced qualified U.S. workers during limited time periods in those occupations for which they now want hire foreign workers. This does not impose burdensome new paperwork requirements, but it does help protect U.S. workers who have high-skill, high-wage jobs.

Similarly, in the permanent immigration program, the employer's application would contain a parallel attestation which could be subject to verification either through labor certification (or, if accepted, subsequent enforcement).

Time Period Covered

Q. What time period would be covered by the provision?

A. The "no-layoff" provision would apply to specified periods immediately preceding and following the application and petition for admission of the foreign workers.

Specifically, an employer would not be allowed foreign temporary workers if qualified U.S. workers had been laid off:

- within 6 months before or 90 days after the employer applied for H-1B workers; or
- 90 days before or after filing a visa petition for the worker.

Several of these time periods would often overlap, thus the total time period covered by this provision would usually be much less than the sum of these individual time periods. Most likely, the no layoff provision would cover a 9 to 10 month time period before the foreign worker starts employment.

Effect on Employers with Multiple Locations

Q. Won't it be very difficult for employers with multiple locations to comply with this provision? For example, if a firm is downsizing in San Antonio, requiring a layoff of workers there, but at the same time it is expanding in Houston and the firm does not have enough workers for that location, won't this amendment prohibit an employer from getting H-1B's for the Houston location?

A. If qualified workers about to lose their jobs in San Antonio are offered employment at the Houston location but decline, this provision would not prohibit the employer from getting foreign workers. The amendment exempts from the definition of "laid off" any case in which employment is relocated to a different geographic area and the affected employee is offered a chance to move to the new location with the same wages and benefits, but elects not to move to the new location.

It only makes sense that employers should offer to move laid off and qualified U.S. workers for new job opportunities in different locations before reaching overseas to fill these jobs.

. Just What are "Timely, Significant and Effective" steps?

Q. Isn't this amendment very broad? What actions by employers are required for them to take timely, significant and effective steps to recruit and retain U.S. workers?

A. This is not a broad amendment -- it spells out the steps that employers must take, or attest they have taken, which include:

- bona fide recruitment in the domestic labor market;
- offering the higher of the locally prevailing wage or the "actual wage" and benefits provided to similarly-employed U.S. workers; and
- using industry-standard, not government-imposed, recruitment procedures.

Evidence that Problem Merits Legislation

Q. Where is the evidence that this problem is sufficiently common to require action by the Senate?

A. It is very difficult to know how common a problem this is. Our law permits, even encourages, this behavior by employers of foreign temporary workers. Because laying off U.S. workers and replacing them with H-1B workers is not illegal, there is no mechanism, aside from public outrage and the press, for bringing incidences to our attention.

There ought to be a law. Simply, if employers are trying to find foreign workers to fill labor shortages allegedly caused by a breakdown in the nation's skill development system, there can be no legitimate justification for laying off or otherwise displacing qualified U.S. workers.

Can't Labor Deparment Fix through Enforcement?

Q. Why doesn't Labor Department enforcement adequately solve this problem?

A. Laying off U.S. workers and replacing them with foreign workers in NOT against the law. There is, quite simply, nothing to enforce. There needs to be -- it is an outrage.

Circumstances where such Layoffs Justified?

Q. Aren't there circumstances where it would be good for an employer to lay off a less qualified U.S. worker to hire a more qualified foreign worker?

A. Perhaps you could suggest some.

I can imagine that some businesses -- though they tell us that they are fully committed to training and developing U.S. workers and would always prefer to hire a U.S. worker -- would make the case that there are circumstances, perhaps even unusual circumstances, where a great social or economic benefit would derive from the entry and employment of a certain foreign worker even where qualified U.S. workers had been let go.

But we must recognize that in the cases we are aware of this is not at all what occurred and it is not what we should expect to happen if we don't fix this broken legal framework for legal admissions.

Recruitment

How Would Amendment Work?

Q. How would this amendment work?

A. This reform is simple and straight-forward. Employers applying for a foreign temporary worker under the H-1B program would have to check one additional box on their application form attesting that they have taken and are taking steps to recruit and retain U.S. workers --- which employers assure us they are already doing. The employer-applicant would attest that it had recruited in the domestic labor market using industrywide standard -- not government imposed -- recruitment procedures.

The employer would also confirm that its recruitment offered the locally prevailing wage or the wage it actually pays similarly-employed workers, whichever is higher. Employers hiring H-1B foreign temporary workers are already required, under current law, to pay these workers the higher of the "actual" or locally prevailing wage, so this reform imposes no new wage obligation. The reform I am proposing would merely establish that the employer recruited U.S. workers by offering the same wages and other compensation that it would be obligated to pay to its foreign temporary workers. That's only fair to U.S. workers.

There are certain circumstances in which I think we would all agree that an employer should not be required to test the domestic labor market. The Nobel-level scientists, the brilliant tenure-track professors, the top researchers in the world -- they should be admitted to the United States because they are unique and because there can be no dispute that they will improve our society and increase our competitiveness.

Thus, if the H-1B nonimmigrant would qualify under the permanent immigrant worker program as an individual with "extraordinary ability" or as "outstanding professor or researcher," the employer could still hire this individual and bring him into the U.S. as an H-1B workers without having to engage in domestic recruitment.

Why is Amendment Necessary?

Q. Why is it necessary to amend the H-1B program to require actions to recruit and retain U.S. workers.

A. We must give U.S. workers who have the skills and are qualified for high-wage, high-skill jobs a fair opportunity to be recruited for those jobs. Skilled, qualified U.S. workers should not be by-passed by employers who prefer to turn to the global labor market.

The H-1B program was originally conceived as a means to quickly meet employers' temporary needs for unique, highly-skilled professionals from abroad. But many employers use the program to bring into the United States relatively large numbers of foreign temporary workers with little or no formal training beyond a four-year college degree. In FY 1994, employers' applications for health therapists -- primarily physical and occupational therapists -- accounted for one-half (49.9%) of all H-1B jobs. Computer-related occupations accounted for almost one-quarter (23.9%) of these jobs. Almost two-thirds (65%) of H-1B jobs pay $40,000 or less, and almost three-out-of-four (73%) jobs pay $50,000 or less. These are jobs for which hundreds of thousands of U.S. workers could be easily qualified.

It should also be noted that this amendment would only require employers to attest that they have already taken such recruitment efforts -- which employers who use the program tell us they are already routinely doing.

Purpose of Prevailing Wage

Q. What is the purpose of establishing and requiring employers to pay the locally prevailing wage for the occupation in which immigrant workers will be employed?

A. The underlying purpose of establishing and requiring payment of the prevailing wage rate is to assure that U.S. workers' wages will not be depressed or undermined by using foreign labor. Requiring employers to pay at least the locally prevailing wage for the occupation may also remove some incentive to employ foreign workers because they can be obtained at substandard wages. Allowing employers to pay substandard wages to foreign workers would result in wage depression or stagnation and the possibility that the occupation(s) become dominated by foreign workers to the exclusion of U.S. workers.

Employers hiring H-1B foreign temporary workers are already required, under current law, to pay these workers the higher of the "actual" or locally prevailing wage, so this reform imposes no new wage obligation. Under the H-1B program, the proposed reform would merely establish that the employer recruited U.S. workers by offering the same wages and other compensation that it would be obligated to pay its foreign temporary workers. That's only fair to U.S. workers.

Won't Prevailing Wage Requirement Slow Hiring Process?

Q. Won't this amendment slow down business hiring while they wait for the government to provide prevailing wage information.

A. No. The amendment will not slow down hiring because it does nothing to limit the sources employers may already use to obtain and document the prevailing wage. These alternative sources are currently allowed under existing law governing the H-1B program, and include other "authoritative" or "legitimate" sources of prevailing wage information from private, non-governmental entities.

This reform does not establish any new prevailing wage system or program. Under current law, employers must ascertain and promise to pay (at least) the locally prevailing wage. Employers can go to their State Employment Security Agency (SESA) to get the prevailing wage in both the permanent and H-1B programs or, under the current H-1B law, employers can also rely on an "independent authoritative source" or another "legitimate source" of prevailing wage data. They are not required to go to the government to get this information under current law, and nothing in this provision would change that.

April 2, 1998

The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Today, your committee will mark-up S. 1723, the "American Competitiveness Act" which is intended to respond to the growing demand for skilled workers in the information technology (IT) industry by increasing the annual cap on the number of temporary visas for foreign "specialty" workers under the H-1B program. For the reasons outlined below, the Administration strongly opposes S. 1723.

The Administration believes that the first step in increasing the availability of skilled workers must be raising the skills of U.S. workers and helping the labor market work better to match employers with U.S. workers. Therefore, substantial additional efforts by industry to increase the skill level of U.S. workers and needed improvements in the H-1B visa program are necessary prerequisites for the Administration to support any short-term increases in the number of visas for temporary foreign workers. Since 1993, this Administration has sought reforms of the H-1B program, including requiring employers to make bona fide efforts to recruit and retain U.S. workers before hiring temporary foreign workers and prohibiting lay-offs of U.S. workers to replace them with temporary foreign workers. These reforms, if enacted, would help target H-1B usage to industries and employers that are experiencing skill shortages.

Regrettably, S. 1723, as introduced, emphasizes providing opportunities for foreign workers rather than providing for and protecting U.S. workers. For example, the bill includes a permanent, substantial increase in the annual number of H-1B visas, from 65,000 up to 115,000. Also, the bill does not require that employers recruit and retain U.S. workers before hiring temporary foreign workers, and it does not prohibit employers from laying-off U.S. workers in order to replace them with temporary foreign workers. Moreover, rather than strengthening program requirements and enforcement to prevent employer abuses of the H-1B program, S.1723 undermines some of the program's important enforcement provisions.

The Administration has reviewed the bill proposed by Senators Kennedy and Feinstein. We believe that the Kennedy-Feinstein approach is, on the whole, consistent with the objectives we have articulated. It constructively addresses both the short-term and long-term implications of the increasing demand for skilled workers by putting U.S. workers first, while addressing the labor market needs of our rapidly changing economy, and making fundamental reforms to the H-1B visa program.

The Administration wants to work with the Congress to address the growing demand for highly skilled workers, while effectively protecting and promoting the interests of U.S. workers and enhancing the international competitiveness of important U.S. industries.

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

Janet Reno
JANET RENO
Attorney General

William Daley
WILLIAM DALEY
Secretary of Commerce

Alexis M. Herman
ALEXIS HERMAN
Secretary of Labor

cc: Senator Patrick Leahy, Ranking Member
Senator Spencer Abraham, Chairman, Immigration Subcommittee
Senator Edward Kennedy, Ranking Member, Immigration Subcommittee
Members of the Senate Judiciary Committee