

Annotated Agenda for DPC/NEC Meeting on H-1B Visas
April 9, 1998

The purpose of this meeting is to identify the key components of legislative proposals and decide our priorities.

I. H-1B reforms previously endorsed by the Administration

- a. “Recruit and retain”
What, precisely, would we be requiring an employer to do?
- b. No lay-off provision
How do we respond to the argument from industry that hiring/firing is too decentralized to allow for fair use of a no lay-off provision?
- c. Reduced maximum stay from six to three years
Given that we are proposing a temporary increase in the cap, do we want to continue to advocate for limiting the maximum stay to three years?
- d. Other issues related to these reforms
 - (i) Occupational classification
How would we recommend defining who is laid-off or who must be recruited? Based on “occupation” or skill attainment?
 - (ii) Job contractors
Do we want to include a provision that ensures that both end-employers and contractors make the requisite attestations?
 - (iii) Prevailing wage
Abraham uses the current definition of “wage” but allows employers to use outdated wage data. Kennedy defines “wage” to include benefits and other compensation, which Labor says they do not have reliable data on. What do we recommend?

II. Enhanced enforcement

The DOL has proposed that they be given greater authority to ensure that employers comply with the standards of hiring H-1B workers.

Which are the most important?

- A. Independent authority to investigate
- B. subpoena authority
- C. ability to conduct audits
- D. increase penalties (from \$5000 to \$10,000)

III. **Application fee**

Should there be an application fee? How much?

IV. **Training**

- a. Regional skills alliances
- b. NSF's Advanced Technological Education program.
- c. Scholarships or Loans?

V. **Other concerns**

a. Concerns of the Academic community

Many in the academic community are concerned about the "recruit and retain" and "no lay-off" provisions because of the temporary nature of many research grants.

b. Increased enforcement authority by the Office of Special Counsel

OSC wants the legislation to provide for a cause of action to a U.S. worker who is replaced by an H-1B worker OR who is denied employment in favor of an H-1B worker.

VI. **Overall priorities**

How do we rank reforms vs. training vs. enforcement?

From: Ingrid M. Schroeder on 04/08/98 06:06:11 PM

Record Type: Record

To: Julie A. Fernandes/OPD/EOP

cc:

Subject: LRM IMS 288: Views S1723 Abraham/Hatch Substitute

----- Forwarded by Ingrid M. Schroeder/OMB/EOP on 04/08/98 06:06 PM -----



Debra J. Bond

04/08/98 06:04:11 PM

Record Type: Record

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

cc: See the distribution list at the bottom of this message

Subject: LRM IMS 288: Views S1723 Abraham/Hatch Substitute

Below are our comments. Please let me know if you need anything further on this. Thanks--

Page 25, H-1B Ceiling: We should recognize Abraham's efforts to reduce the cap increase and also make it temporary (sunsets after 2002). We support this provision as a short-term solution.

Page 27, Section 4, part (a), SSIG increase of \$50 million: We recognize and agree with the intent of providing a long-term training solution. However, the SSIG program has met its purpose to encourage states to establish state student financial aid programs. Given that all states now have such a program and most far exceed the required match, there is no longer a need for SSIG. The SSIG program is also duplicative of the Federal Student Financial Aid program. The Administration has proposed elimination of this program in the Budget for the last three years. Therefore, we recommend deleting this provision.

Although an H-1B user fee is not included in the Abraham bill, at the staff level we would support a fee that recovers the cost of administering the program. In addition, we would support financing the Regional Skills Alliances within existing training resources.

Page 28, Section 4, part (b) Data Bank/Training: No objection to this provision since it is just an authorization. Although given DOL already has such programs, the provision is unnecessary.

\$8 million to establish and improve a data bank on the Internet to facilitate job searches is unnecessary given DOL already has such a program (Job Bank and Talent Bank).

\$10 million to provide training in information technology for unemployed workers is unnecessary given existing training resources within DOL.

Page 29, Section 5, Enforcement: This section increases penalties for willful violations, which we support. The random inspection authority and the no layoff provision should be stronger to apply to all participants in the H-1B program, not just willful violators (what is provided in the bill is a

start). We tentatively agree with the narrow construction of the attestation to the specific place of employment and in the specific employment opportunity. However, we would like more information on what kind of burden a full no-layoff provision would impose and whether it is feasible within a large company given many are decentralized.

Page 33, section (e) labor condition applications: We believe that the applications should be filed with and approved by DOL given it is the agency that will enforce the attestations and is knowledgeable about the labor market. We oppose the provision.

Page 34, section (f) prevailing wage considerations: We are in agreement with the Hathaway fix that is provided in the bill, given the Administration has supported such a legislative fix in the past. However, the section on employer prevailing wages is too vague to be able to protect the worker or adequately enforce the provision. We oppose the provision as drafted, but would be open to revised language that allows use of surveys outside DOL within limits on the source of the data (reasonable, professional, widely accepted - - for example state wage surveys).

Page 35, section (g) posting requirement: We support this provision.

The remainder of the bill is fine.

Message Copied To:

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

LEGISLATIVE REFERENCE DIVISION

ECONOMICS , SCIENCE , AND GENERAL GOVERNMENT BRANCH

TO:

Julie Fernandes

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

DATE: 4/8/98

NUMBER OF PAGES (including this cover sheet):

7

COMMENTS:

Additional agency cmts on S. 1723

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

LRM ID: IMS288
Act

SUBJECT: OMB Request for Views on S1723 American Competitiveness
Act

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

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TO:

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

FROM:

4/8/98 (Date)
LISA ASERKOFF (Name)
Dept of Education (Agency)
401-6296 (Telephone)

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

___ Concur

___ No Objection

___ No Comment

___ See proposed edits on pages ___

___ Other: ___

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



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

LRM ID: IMS288

Our comments address only Sec. 4 of S. 1723, the Education and Training in Science and Technology Section, amending the State Student Incentive Grant provisions in the Higher Education Act.

Generally speaking, we oppose Sec. 4 of this bill because it is inconsistent with the Administration's budget and Higher Education Act reauthorization proposals which propose terminating the SSIG program.

We also have the following comments on specific aspects of the bill language:

1. The bill limits the new SSIG technology grants to full-time students. While we understand the urgent need for math, engineering, and computer science graduates to enter the workforce as soon as possible, the limitation provides a disincentive for older workers who work, as well as part-timers from entering these technical fields.

The bill allows graduate students in math, engineering, and computer science to obtain the new grants. It is longstanding policy that the more limited grant aid be focused on undergraduate education and training. In addition, the incentives should be to provide a financial incentive to attract individuals into these technical areas thereby increasing the number in these fields rather than rewarding those already on this career track.

2. Both the Senate and House have included in their higher education reauthorization proposals new SLEAP/LEAP proposals which could be used for similar purposes.

3. Section 4(c) of the bill states that, "The Secretary shall make allotments and grants shall be awarded under this section in the same manner, and under the same terms and conditions, as (1) the Secretary makes allotments and grants awarded under this subpart (other than this section), and (2) are not inconsistent with this section."

Section 4(a) of the bill states that, the Secretary allots grants for students pursuing Mathematics, Computer Science, and Engineering degrees to enable States "to pay not more than 50 percent of the amount of grants awarded to low-income students in the States." The limiting of grants to low-income students is in direct conflict with one of the overall student eligibility requirements for the program--"substantial financial need." See Section 415C(b)(4) of the HEA.

Section 4(b) states that the Mathematics, Computer Science, and Engineering grants are to go only to students enrolled on a "full-time basis." Currently, SSIG funds may go to students who are enrolled on less than a full-time basis. See 415C(b)(7) of the HEA.

Are these provisions waived in the case of the Mathematics, Computer Science, and Engineering grants? The comparability provision seems to see that the Department and states must administer these special grants in a comparable manner to the other provisions...unless the provisions are in conflict. If this is the intent, the drafting is incredibly awkward. These special grants should be administered like the other grants under SSIG.

LRM ID: IMS268
Act

SUBJECT: OMB Request for Views on S1723 American Competitiveness

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TO: Ingrid M. Schroeder Phone: 305-3883 Fax: 305-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 305-3454

FROM: April 8, 1998 (Date)
Anita Eisenstadt (Name)
National Science Foundation (Agency)
703-306-1060 (Telephone)

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

☐ Concur☐ No Objection☐ No Comment☐ See proposed edits on pages _____☐ Other: _____☒ FAX RETURN of 2 pages, attached to this response sheet

NATIONAL SCIENCE FOUNDATION

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



Office of the
General Counsel

MEMORANDUM

TO: Ingrid M. Schroeder, Legislative Analyst, OMB
FROM: Anita Eisenstadt, Assistant General Counsel *AK*
DATE: April 8, 1998
SUBJECT: LRM #IMS288; OMB Request for Views on S.1723, the
American Competitiveness Act

Thank you for the opportunity to comment on the amended version of S.1723, as reported from the Senate Judiciary Committee. NSF has the following comments on the bill:

- NSF supports the provisions of the bill revising the method of computing prevailing wage levels for scientists and engineers employed by institutions of higher education, related or affiliated non-profits, and non-profit or Federal research institutes. The bill would restore the pre-Hathaway practice of determining prevailing wages for these employers. As NSF has previously noted, the Department of Labor final rule on Hathaway is too narrow in scope because it excludes non-profit research institutes, for-profit FFRDCs, excludes many Federal agencies, and places onerous requirements on others Federal agencies.
- S.1723's definition of lay-off is a significant improvement over the definition contained in the Kennedy bill. While NSF supports lay-off protection for U.S. workers, the lay-off definition in the Kennedy bill was too broad in scope and could preclude most employers from every using the H-1B visa program. The lay-off definition in the Kennedy bill included expiration of temporary appointments, completion of post-doctorate studies, discontinued Federal funding of a grant, contract, or cooperative agreement, as well as dismissal for poor job performance or poor attendance. The term "dismissal for cause" only covers terminations for employee misconduct. S.1723's definition of lay-off more fairly and accurately describes this term while still providing a remedy for abuse of the system.
- Current predictions indicate that INS is likely to reach the cap placed on H1-Bs by May of this year. Reaching the cap so

early in the year could be disruptive to universities and colleges' process for hiring scientists for the upcoming academic year. S. 1723 would temporarily increase this cap and alleviate this concern of the academic community.

• S.1723 requires NSF to undertake a study and report on high-technology labor market needs. NSF believes that such a study could be helpful. As currently written, the bill would require NSF to fund the National Academy of Sciences (NAS) to conduct the study. NSF asks that the reference to NAS be deleted from the bill so that NSF retains the flexibility to determine which is the most appropriate entity to conduct the study, consistent with principles of peer review. Accordingly, we would recommend revising the first paragraph of Section 7(a) of the bill to read as follows:

"(a) STUDY-The National Science Foundation shall undertake a study involving representatives from academia, government, and business, using sound analytical methods, to assess the labor market needs for workers with high technology skills during the ten year period beginning on the date of enactment of this Act. The study shall include, but not be limited to, the following issues:"

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

H1B
4/9/98

Six - to - Three - give away

No lay-off

- an important piece

but is it workable > related to enforcement

Karen - There are industry standards w/in large companies to enforce/follow no lay-off provisions.

Examples
from Karen

Is there a way to target enforcement of no lay-off provisions to employers who lay-off largest # of workers.

⊗ Practicability of no lay-off provisions ?

Beefing
up the
minimum
wage

Does Kennedy language do what we want?

SEH: This would be a good outcome

BUT/gives flexibility on enforcement

→ DOL - need lang. on what they need

working w/
Commerce

→ Incumbent workers ?

~~have~~ interplay w/ the recruit & retain

NSF to look @ Science language in Kennedy bill.

Enhanced enforcement:

- ① independent auth
- ② subpoena authority
- All else is 3rd

A country
Disadvantaged

Why not just

More important to

→ Do we want to try to target # over 65,000 to
a certain skill of workers (?)
or classes of workers (?)

Give the
industry
something.

Special program only for IT workers (w/certain skills)
w/ higher cost (+)
(+) easier to use (administratively)

other groups will yell.

→ DOL to put together SPECS (+) pros & cons on This.

Political
juice

application
fee same for both

- ① over 65K separate category for IT only
- ② H1D would be for certain skill level w/in IT

Training

What do we need in the legislature (?)

Down on loans/scholarships

Up on Regional Skills Alliances

[Fee to pay for targeted increase in an existing program]

→ Call for an event w/ POTUS and Labor to announce partnership.

Overall priorities

Reforms

Eng. — ok to get

Training (easy)

the heart of
the battle
emphatic defense
of the reforms.

Commerce: must emphasize training

INGRID M. SCHROEDER

03/25/98 11:03:50 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: James J. Jukes/OMB/EOP, Darlene O. Gaymon/OMB/EOP

Subject: LRM #IMS274 - LABOR Qs and As on LABOR Testimony on H-1B Nonimmigrant Employment Based Visa Program for Skilled Workers

Total Pages: _____

LRM ID: IMS274

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

Wednesday, March 25, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: James J. Jukes (for) Assistant Director for Legislative Reference

OMB CONTACT: Ingrid M. Schroeder
PHONE: (202)395-3883 FAX: (202)395-3109

SUBJECT: **LABOR Qs and As on LABOR Testimony on H-1B Nonimmigrant Employment Based Visa Program for Skilled Workers**

DEADLINE: **4pm Thursday, March 26, 1998**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: The attached Qs and As were prepared in response to a February 25, 1998, hearing before the Senate Judiciary Committee where Labor (Uhalde) testified.

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WARNATH_S

LRM ID: IMS274 **SUBJECT:** LABOR Qs and As on LABOR Testimony on H-1B Nonimmigrant Employment Based Visa Program for Skilled Workers

**RESPONSE TO
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MEMORANDUM**

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 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

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_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

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1 - Question: How many cases of willful (failure-to-pay) violations of the H-1B program has the DOL established for fiscal year 1997? What was the total number of visas involved in these willful violations in 1997? What is the percentage of visas involved in these willful violations as a percentage of the total number of H-1B visas issued in 1997?

Answer: The Department of Labor operates within the narrow constraint of investigating complaints from potentially aggrieved parties alleging violations of the H-1B requirements; the Department does not conduct random compliance inspections nor targeted investigations of likely violators. The Department was initially so constrained by regulation. When the Department promulgated new regulations which broadened this authority, the change was challenged in a lawsuit. Although the regulation was not invalidated, the Department has continued to operate within the pre-existing boundaries.

In addition, H-1B nonimmigrant workers have significant incentives not to lodge such complaints (and seldom do), even where violations – including serious violations – may be occurring. We believe this is so because the workers are entirely dependent on their employer to remain legally and work in the U.S., and, in many cases, eventually sponsor the worker for permanent residency. We believe that these factors account for the relatively low number of worker complaints received (in several nonimmigrant programs, not just H-1B) and the unusually large portion of complaints received from business competitors and other parties.

Further, in its enforcement of the H-1B requirements, the Department exercises considerable discretion and caution in characterizing violations uncovered as willful depending not just on the actual nature of the violation (and the associated burden of proof), but in consideration of all the circumstances, including such matters as the prior compliance history of the employer, the explanation of the cause of the violations, the employer's willingness to remedy the violations and commitment to future compliance, and like factors. Another factor that is considered in cases where there are multiple violations is whether there are other potentially debarring violations – such as misrepresentation of a material fact in the employer's labor condition attestation – that mitigate against undertaking to prosecute a willful failure-to-pay violation if remedy can be obtained.

In this important context – and recognizing that there are cases involving potential willful (and non-willful) failure-to-pay violations under the H-1B program which arose in FY 1997 that remain open and under investigation – there were three (3) cases of willful failure-to-pay violations closed in FY 1997, each involving one employee, and representing a tiny percentage of H-1B admissions during that year.

However, for the reasons discussed above, it is the Department's view that the numbers and proportions of willful (and non-willful) failure-to-pay violations found under the H-1B program are not in any way indicative of the level of compliance among H-1B employers. Given the constraints on the Department's enforcement authority, there simply are no data that can be used with any degree of reliability which indicate the extent to which H-1B employers comply with their obligations under the program, or that H-1B nonimmigrant employees are not victims of violations.

2 -- Question: How many willful violations (failure-to-pay) has the DOL established in the H-1B program since FY 1991? What is the average number of such violations per year? What is the

percentage of visas involved in these willful violations as a percentage of the total number of H-1B visas issued since FY 1991?

Answer: In the same context and for the same reasons as discussed with respect to the first set of questions, since FY 1991, the Department's closed, complaint-based H-1B investigations have found eight (8) cases of willful failure-to-pay, which averages to about one-per-year and represent a tiny fraction of H-1B admissions. However, it must be restated that these data do not reliably indicate the level of compliance (or violations) in the H-1B program.

3 - Question: What is the average underpayment of wages per employee involved in the cases of willful violations DOL found in 1997?

Answer: In the H-1B cases closed during FY 1997 that found willful failure-to-pay required wages, the average underpayment of wages per employee was \$15,450.

4 - Question: How many cases on non-willful violations (failure-to-pay) has the DOL established in the H-1B program in FY 1997? What is the average underpayment of wages per employee involved in the cases of non-willful violations in 1997? What was the total number of visas involved in these non-willful violations in FY 1997? What is the percentage of visas involved in these non-willful violations as a percentage of the total number of H-1B visas issued in FY 1997? What is the average underpayment of wages per employee involved in these cases of non-willful violation?

Answer: In FY 1997, there were ten (10) cases closed in which non-willful failure-to-pay the required wage was cited as a violation, involving 29 workers with an average underpayment of wages per worker of \$3,257. Again, this represents a tiny portion of all H-1B workers admitted, but does not provide a reliable indicator of the extent of compliance (or violations) in the H-1B program.

5 -- Question: Please list all of the cases documented by the Department of Labor since 1991 of American companies who laid off U.S. workers and replaced them with workers on H-1B visas who were paid lower wages than the U.S. workers they replaced. Please provide a table with a year-by-year tabulation of the number of such layoffs each year, from 1991 through 1998 to date. Please also indicate whether there was any enforcement action or settlement agreement involving any of the cases described above.

Answer: The Department has no such list because – despite our continuing efforts to change the situation – it is, remarkably, entirely legal for a U.S. employer to lay-off its U.S. workers and replace them with H-1B nonimmigrant workers. Under current law, employers wanting to recruit and employ H-1B nonimmigrant workers do not have to test the U.S. labor market to try to fill their employment needs with qualified, available, interested U.S. workers. U.S. employers wanting to recruit and hire H-1B nonimmigrant workers are perfectly free to fire their U.S. workers and replace them with H-1B nonimmigrant workers that they hire directly or obtain through employee leasing or contract. This is simply wrong. It is bad immigration policy, bad public policy, and the Administration has been trying to see it changed – without success – for nearly five years.

Because these reasonable, obvious and necessary requirements are not in current law, the Department has no authority nor reason to look into situations where U.S. workers have been displaced by H-1B nonimmigrants -- nothing to enforce, no list. The Department is aware, however, primarily through press reports, of several instances in which such lay-off and replacement has occurred, including at least one case where a complaint alleging discrimination in the replacement of U.S. workers was filed. An example of a lay-off occurrence in the computer

field involved Syntel, Inc., a Michigan company with a workforce that, in 1995, was more than 80 percent H-1B nonimmigrants, in this case computer analysts from India. Among its business operations, Syntel contracts to provide computer personnel or services to other businesses. In its operations in New Jersey, Syntel contracted with American International Group, Inc. (AIG), a large insurance company, to provide computer services in the place of nearly 250 AIG employees, which AIG laid off. In fact, AIG's laid-off U.S. workers were required to train their H-1B nonimmigrant replacements, employees of Syntel, during their last few weeks on the job. Displacing laid-off U.S. workers was then, and remains perfectly legal under the H-1B program.

6 - Question: In your testimony, you stated that 26% of the people using H-1B visas are physical and occupational therapists. But the Senate Immigration Subcommittee has been advised by the Immigration and Naturalization Service that it cannot report on the number of individuals who actually are admitted or who receive H-1B visas annually by occupation. This information is not kept track of in INS computers.

A) What is the basis of your claim that 25% of those entering are physical therapists?

Answer: I believe I stated, and certainly I meant to state, that 26% of the jobs certified by the Labor Department for H-1B are physical and occupational therapists. Although the INS does not keep track of visas by occupation, the Labor Department does keep track of jobs certified by occupation. During Fiscal Year 1997, the Department certified 103,097 job openings under the 3-digit occupational code "076 - Therapists." For all occupations, the Department certified just under 400,000 job openings in Fiscal Year 1997, hence, the 25.9% figure cited for the number of therapists.

B) The Senate Immigration Subcommittee has received information from the Department of Labor's Employment and Training Administration with regards to the difference between openings certified in the H-1B program and the number of workers who are actually admitted to the country. ETA stated "the number of openings certified bears little resemblance to the actual number of foreign workers admitted." Please explain to the committee why the number of applications certified bears little resemblance to the number of workers admitted.

Answer: The number of job openings certified is not directly relevant to the number of workers actually admitted. The DOL certifies jobs encompassed in employer-filed labor condition attestations (LCAs). There is nominal cost and minimal effort involved in filing an LCA, and there is no limit to the number of jobs the Labor Department can certify for H-1Bs in any one year. Issuance of the actual H-1B visas is done by INS.

Employers often file a single LCA for multiple jobs and/or LCAs for various locations. This is particularly true when the employer-applicant is a job contractor, as is often the case in applications for therapists and computer professionals.

Also, we know that a number of employers, job contractors in particular, file anticipatory labor condition applications for 50 or more workers in a particular geographic area. They may not currently have a contract to provide services in that area, but file the application in case the need should arise at some point in the future. For example, a job contractor employing therapists filed a labor condition application for a large number of therapists to be employed in, according to the employer, "the State of Texas, see attached list." Attached to the application form was a listing of every city and county in the State of Texas.

C) Please detail for the committee for the most recent year available how many more labor condition applications are received as compared to the number of individuals actually admitted on H-1B visas. Please explain why these applications outnumber actual admissions and therefore are not a reliable indicator of how many people enter in particular occupations in any given year. Do

postings and contracting play an important role in this?

Answer: In Fiscal Year 1997, the Department received 180,739 labor condition applications of which 162,363 were certified. The total number of job openings certified on those 162,363 applications was 398,324. As noted in the previous response, a number of employers, job contractors in particular, file a single LCA for multiple jobs and/or LCAs for various locations.

D) Does the Department of Labor know how many individuals actually entered the United States on H-1B visas as physical therapists, fashion models, or any other specific occupation in 1996 and 1997? If so, what is the exact count for these 2 years?

Answer: The INS does not keep track of the occupations of individuals admitted under H-1B visas, so it is not known how many individuals actually enter the country on H-1B visas for any given occupation. Neither does the INS keep track of the number of valid H-1B visas outstanding at any given time. H-1B visas are valid for a maximum six years (if renewed after the initial three-year period), and a maximum of 65,000 new visas can be issued annually. However, we do not know how many H-1B visa holders are currently in the country, nor do we know their occupations.

7 - Question: What is the chief source of complaints received by DOL regarding possible violations of the H-1B program?

Answer: The most common source of complaints alleging H-1B violations is from H-1B workers. However, for reasons explained in response to an earlier question, there are relatively few such complaints and – like in other nonimmigrant programs – a higher-than-usual portion of complaints received from other parties, including business competitors.

8 -- Question: Please list all the potential sources from which complaints may be received by the Department of Labor for the H-1B program.

Answer: Under the law, a complaint may be entertained from a potentially aggrieved party. As a practical matter, this includes H-1B or U.S. workers (or their union), competing business, or other governmental agencies.

9 - Question: Please provide evidence of documented cases to the Committee regarding the statement that an individual on an H-1B [visa] is unlikely to issue a complaint.

Answer: We do not have evidence documenting cases that did not arise because H-1B workers face serious disincentives to file complaints against their employer.

As pointed out in an earlier answer, the disincentives faced by nonimmigrant workers – and not just H-1B workers – include the fact that they are entirely dependent on their employer's "good graces" to remain legally, and to continue to work, in the U.S. for the duration of their temporary admission, and to obtain extension of such temporary stay (as under the H-1B program) which must be sought by their employer. Further, if an H-1B worker has any ambition to prolong his/her stay in the U.S. beyond the allowable limit as a nonimmigrant (six years under the H-1B program), the individual is also dependent on the employer to "sponsor" them for permanent residency. [About half of employment-based immigrants convert from H-1 status.] These are indeed powerful incentives not to do anything to "rock the boat" in the employment relationship.

This question involves things that do not happen; it is, of course, difficult to empirically prove why

something does not occur. However, there have been cases in our H-1B investigations where H-1B employees interviewed have expressed fear of deportation as a reason for their reluctance to cooperate or refusal to file a complaint alleging violations. Such occurrences are not documented for what we hope are obvious reasons.

10 - Question: Does the term "best and brightest" appear in the statute with regard to the H-1B program?

Answer: It does not. However, the predecessor to the H-1B program – the H-1 program – allowed for the temporary entry of foreign workers "of distinguished merit and ability...." This clearly implied that the original intent of the program was to bring the "best and the brightest" from abroad, and not entry-level employees for which the H-1B program is commonly used. Further, the legislative history regarding the H-1B amendments to the Immigration Act of 1990 and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 is rife with references to the "best and the brightest" by advocates of the amendments. In fact, a representative of Microsoft Corporation on page 6 of his testimony for the Committee's recent hearing referenced the "best and brightest" and a representative of the University of Michigan on page 5 of his testimony referenced the "best academic talent in the world" as reasons for supporting S. 1723.

11 -- Question: In the private sector, all other things being equal, would one expect that an employee with two years and one day experience be paid the same as an employee with 15 years experience?

Answer: It is seldom true that one ever finds "all other things being equal." But, in response to the hypothetical question, if all other things were indeed equal, one would commonly expect that an individual with greater experience would be placed in a job requiring greater skills and having greater autonomy, and therefore commanding higher wages. Certainly it is not true that all other things are equal when comparing a U.S. worker of less – or more – experience with an individual who may not legally work in the U.S. without authorization to enter (or, more commonly remain) under conditions designed to prevent unfair competition with U.S. workers. Although an employer attests to provide certain wage and working conditions on the LCA, as discussed in previous responses, an H-1B employee has reasons to be reluctant to complain if violations or abuses should occur.

As stated, if all other things were indeed equal, one would commonly expect greater experience to be reflected in higher wages. Perhaps it is for this reason that some employers appear to prefer – and use the H-1B program – to hire and train inexperienced entry-level workers over hiring, or retaining and retraining more experienced workers who would earn higher wages.

12 - Question: In the private sector, all other things being equal, would one expect that an employee who had a university grade point average of 4.0 to be paid the same as an employee who had a university grade point average of 2.5?

Answer: Again, it is seldom true that one ever finds "all other things being equal." But, in response to the hypothetical question, if all other things were indeed equal, one could expect a record of higher educational achievement to be reflected in somewhat higher wages. And, again, it is certainly not true that all other things are equal when comparing a U.S. worker of less – or more – educational achievement with an individual who may not legally work in the U.S. without authorization to enter (or, more commonly remain, particularly in the case of foreign students)

under conditions designed to prevent unfair competition with U.S. workers. Again, although the employer attests to wage and working conditions on the LCA, it is obvious (as discussed in previous responses) that an H-1B employee will be reluctant to complain if violations or abuses occur.

Both of these questions appear to relate to provisions in S. 1723 which would substantially change the way "prevailing" wages are determined for the H-1B program, and – in our view – effectively repeal the existing prevailing wage requirement.

In this regard, it should be clearly pointed out that there is nothing in the H-1B program requirements that in any way prevent an employer from paying higher wages to employees – whether U.S. or H-1B workers – who have greater experience, or greater educational achievement. The only constraint is that an employer may not pay any H-1B nonimmigrant employee – whether average or truly outstanding – LESS than the wage paid to similarly-employed U.S. workers. If this were allowed, it would clearly undercut the wages and working conditions of such U.S. workers.

Message Sent To:

Debra J. Bond/OMB/EOP
Steven M. Mertens/OMB/EOP
Daniel J. Chenok/OMB/EOP
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Evan T. Farley/OMB/EOP
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

LEGISLATIVE REFERENCE DIVISION

ECONOMICS , SCIENCE , AND GENERAL GOVERNMENT BRANCH

TO:

Julie Fernandes

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

DATE: 4/8/98

NUMBER OF PAGES (including this cover sheet):

93

COMMENTS:

Additional agency cmts on S.1723

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

LRM ID: IMS288
Aut

SUBJECT: OMB Request for Views on S1723 American Competitiveness

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

If your response to this request for views is short (e.g., concurring 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: 385-3883 Fax: 385-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 385-3454

FROM: 4/8/98 (Date)
James Taylor (Name)
HHS (Agency)
202-690-7773 (Telephone)

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

☐ Concur☐ No Objection☐ No Comment☐ See proposed edits on pages _____☐ Other: _____☒ FAX RETURN of 1 pages, attached to this response sheet

We cannot give final HHS clearance at this time as we have not heard from all reviewers.

NIH COMMENTS ON S. 1723

We have reviewed the current version of S. 1723. We are pleased that this version addresses issues related to foreign scientists and researchers working on H-1B visas that have been of long-standing concern to the NIH. Further, it is our observation that these issues are addressed with respect to narrowly defined groups, circumstances, and categories and the legislation does not invite broad interpretation and extension to other groups, circumstances, and categories.

- NIH had previously expressed concern about the definition of "laid-off" in earlier proposed legislation, in which legislation would require that American workers could not be laid off in order to hire foreign workers. This version of S. 1723 addresses our concern that "laid-off" not be construed to include circumstances where scientists or researchers leave an institution at the normal termination of a grant or contract or circumstances in which scientists or researchers leave a post or position at the end of their pre-determined post-doctoral training period.
- NIH had repeatedly expressed to concern to DOL that legislative and rulemaking attempts to provide relief from the "Hathaway" ruling did not include Federal agencies and Federally Funded Research and Development Centers (which includes the NIH facility at Frederick MD) along with colleges and universities. (This relief would allow covered organizations to determine prevailing wage, and thus the wage to be paid to foreign scientists, using only like organizations rather than including the private sector in the determination. Such practice results in a wage determination much higher than the salaries paid to U.S. counterparts working in the same organization.) This version of S. 1723 addresses this concern by identifying "institution(s) of higher education," "related or affiliated nonprofit entity," and "nonprofit or Federal research institute or agency" as organizations that "shall only take into account employees at such institutions, entities, and agencies" in determining prevailing wage.
- Previous versions of proposed immigration reform legislation had reduced the visa period from six to three years; the Department of Labor had supported this reduction in visa period. NIH was concerned that, because of the long-term nature of scientific research, three years would not allow the completion of research projects and the research process would be disrupted. This version of S. 1723 does not contain such a provision.

We hope these comments are useful.

Recruit & Retain

H1B Visas

No definition

Kennedy language includes "according to industry standards" steps for recruit & retain defined by industry standards.

Could issue regs (?)

how do you figure this out?

No one has talked through how this would work.

Nurses bill sets out

steps in the statute that define recruit & retain.

Industry standards locks in the status quo.

Spectrum of what we are asking:

do something - - - - - do the same as before - - - - - do more.

Occupational classification:

Directory of Occupational Titles

Special standards for job contractors (?)

Does this have trade implications (?)

→ National interest visas (?)

EB1 and EB2 . . . no Labor market test

Labor: we could come up w/ a list 4 steps employees would need to come up with.

→ Maybe we could come up w/ a subset of things from permanent program.

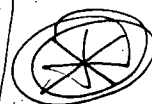
Maybe come up w/ 6 and they must do 3 out of the 6.

Industry: ① this is the same as labor certifi-
② breadth of occupational classification
③ They do not want Govt. second guessing any hiring decisions that they make.

Way to define occup. classification in performance terms.

INS

turnaround time @ INS for H1B



No lay-off provision

Limited in time

9-10 mo. period surrounding events - H1B application

⊗ This also boils down to defining the occupational classification.
Industry

- ① can't keep track of who they lay off
- ② don't want firing decisions second-guessed.

Are university/fellowship arrangements outside this?

But do we want to encourage this type of employment (contingent work agreements) in non-university environment?

Con 4
this? Labor and university folks have been through this before

OMB and Treasury (decentralized)
sympathetic to the industry

→ Good cause exemption for no lay-off provision?
Does

→ Get from DOL the list of occupational categories that they currently use.

Industry wants → broader categories (lower wages)

⊕
→ more narrow categories (easier to replace, etc.)

No decision about how to define occupational classification.

Performance requirement

Cause (?) Gets us in the business of 2nd guessing hiring/firing decisions.
Like anti-discrimination laws.
Is that O.K. (?)

Regs say "or otherwise" but ^{DOL has} ~~have~~ never done an investigation pursuant to Will be sued.
Want to get this done through legislation
(investigate w/out a complaint).

Current Population Study.

Labor Dpt. could do an assessment

BLS is on its way, through Occ Emp. Statistics Survey (goes to 1.2 mill. employers.)

need to be aligned / collects wage data for lots of occupations nationally.

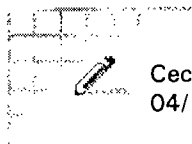
Fringe benefit — different.

Just starting to pilot test

X Could this assessment of HSB need be done regionally (rather than by employer)
Certify occupation that can use HSB program.

- * Need better data collection on INS on who uses H1B visas
- * Can we put limits on who uses (priorities)
w/in 65,000

NSF → where \$ would go.



Cecilia E. Rouse
04/14/98 09:58:38 AM

Record Type: Record

To: Julie A. Fernandes/OPD/EOP

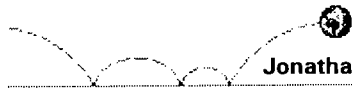
cc:

Subject: NYT article

Did you see this? (And a reminder: the Podesta meeting is in 239 at 11).

-- Ceci

----- Forwarded by Cecilia E. Rouse/OPD/EOP on 04/14/98 09:57 AM -----



Jonathan Orszag

04/14/98 09:42:21 AM

Record Type: Record

To: Cecilia E. Rouse/OPD/EOP

cc:

Subject: NYT article

Help Wanted

PALO ALTO, Calif. -- T. J. Rodgers, founder of Cypress Semiconductor, is angry, and he is not a man to hide his feelings. An entire wall of his office is proudly decorated with framed lawsuits filed against his company by rivals. Today what Mr. Rodgers is angry about is immigration -- the lack of it.

Silicon Valley has a huge shortage of computer engineers, and each year it makes up for that shortage by trying to cream off the best brains from around the world and bring them here. But the Clinton-Gore team, caving in to organized labor, has been trying to limit their entry, even though there are not enough Americans to fill these high-tech jobs.

"For every foreign engineer you let me bring into this country and put to work at Cypress, I will guarantee you five new jobs locally to manufacture a microchip, sell the chip, ship the chip, market the chip and administrate the chip," says Mr. Rodgers. "Do I want to take away jobs from Americans? Heck no. If I could hire all the engineers I need locally, I'd love to do it. But I can't. They're just not here. So if we don't bring them here, they will still be engineers in their home countries, only instead of working for us they will be working for Hitachi or Samsung, and they will compete with us from overseas and take away our wealth."

The facts: Since 1990, there has been a cap of 65,000 H-1B visas per fiscal year (Oct. 1 to Sept. 30) for foreigners coming into America for high-tech and other specialty jobs. In 1997, the 65,000 cap was reached a month before the end of the fiscal year, and this year the cap will be reached in May, so there will be a huge shortage. Senator Spencer Abraham of Michigan, the grandson of Lebanese immigrants, has sponsored a bill, the American Competitiveness Act, that would lift the cap to 95,000, but also increase spending on high-tech education for low-income students in America. It's a good bill, and it just passed the Judiciary Committee by 12 to 6, despite Administration opposition.

The crazy thing is that a computer engineer working in India makes \$6,000 a year, and one in Silicon Valley makes \$60,000 a year. So this is a case of American business not wanting to move high-paying U.S. jobs to lower-paying countries, but just the opposite. This is because in the high-tech business there is a real advantage to having your knowledge team together in one place -- and right now the place that is the core of this knowledge industry is America. But 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. 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.

Personally, I favor a very liberal approach to all legal immigration and refugee asylum. Any Haitian who has the guts and energy to build a boat from milk cartons and sail to our shores is someone I'd never turn back. But in the case of high-tech workers, it's so obvious that they are the key to the future. One only hopes the Senate will ignore the Administration and approve the increase.

"Look," says Mr. Rodgers, "the winners and losers in the information age will be differentiated by brain power. But we have Senators, like Ted Kennedy, who don't see that. They want to send back the first-round draft choices of the intellectual world so that they can compete against us in their homelands. Four out of my ten vice presidents are immigrants. Some 35 percent of my engineers are immigrants. My V.P. of research -- the guy who designs my most advanced chips -- is from Cuba."

Would you like the jobs in your country depending on only the engineers your country could produce, or would you like to have access to the top 10 percent of all engineers in the world? We are the only country that really has that access today. Japan, Switzerland, Germany -- they have no tradition of immigration, and that will be a huge disadvantage.

"It takes 2 percent of Americans to feed us all, and 5 percent to make everything we need," notes Mr. Rodgers. "Everything else will be service and information technology, and in that world humans and brains will be the key variable. Any country that would limit its brain power to a single select group from that country alone is going to self-destruct."

Op-Ed

The New York Times
ON THE WEB

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April 14, 1998

FOREIGN AFFAIRS / By THOMAS L. FRIEDMAN

Help Wanted

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United Steelworkers of America and USS Division of USX Corporation (Production and Maintenance Employees)

Section 13M — Interplant Job Opportunities

 An employee of a steel plant who has been on layoff for 60 days and who has two or more years of continuous service as of the layoff, and who is not eligible for a pension or social security, shall be given priority over other applicants (new hires, including probationary employees) for job vacancies at other steel plants located within an agreed-upon geographical region (and specified in the agreement) that are covered by an agreement between USS and the International Union, in accordance with, inter alia, the following:

vacancies under this provision include only those that are not filled from the particular plant;

an employee must specify the plant(s) at which he would accept employment;

an employee who accepts employment at another plant under this provision continues to accrue continuous service for seniority purposes at his home plant;

an employee who is recalled to work at his home plant shall have an option to stay or return (unless Management directs him to return to his home plant).

Priority in the filling of job vacancies in steel plants located in areas covered by more than one region shall be given to employees (subject to certain qualifications) who have applied for employment in the region from which laid off but who have not received such employment.

The job vacancies to which such employees shall be eligible shall only be those that are not filled from the particular plant or the particular region in accordance with this Section.

Local Union 1245, International Brotherhood of Electrical Workers and Pacific Gas and Electric Company

Title 206 — Demotion and Lay Off Procedure

When a demotion or displacement is made in a classification at a Company headquarters, the employee with the least service in the classification shall be demoted to the next lower classification, and if the employee is subject to further demotion, then the employee (provided he has three years of service) may elect the following:

to displace that employee in the same classification and department within the Demotion Area who has the least service, or if no such election is available;

to displace that employee in the same classification in the Demotion Area who has the least service, or if no such election is available;

To displace that employee in the same classification in the Demotion Unit who has the least service, or if no such election is available;

To displace that employee in the same classification and department in the System who has the least service, or if no such election is available;

To displace that employee in the same classification in the System who has the least service.

United Auto Workers and General Motors

Appendix K — Memorandum of Understanding (MOU) Concerning Jobs Security (JOBS) Program

The JOBS Program establishes Secured Employment Levels (SELs) at each bargaining unit for skilled and non-skilled employees. SEL levels are generally equal to the number of active employees with one or more years of seniority and on roll in the unit, group, or corporate-wide entity.

No employee within the SEL will be laid off as a result of any event except those specified in the MOU (including volume related declines, acts of God, sale of all or part of the business).

A protected employee whose regular job is eliminated may be 1) placed in a training program; 2) used as a replacement to facilitate the training of another employee; 3) placed in a job opening at another GM plant, provided there is no employee on layoff from that plant with seniority recall rights 4) given a nontraditional assignment within or outside the bargaining unit; 5) placed in an existing opening; or 6) given other assignments consistent with the MOU.

**COLLECTIVE BARGAINING AGREEMENTS PROVIDING FOR
SYSTEM-WIDE OR INTER-PLANT RIGHTS
IN THE CASE OF JOB DISPLACEMENT**

Association of Flight Attendants and United Airlines

Section 21 — Reduction in Personnel

Any reduction in flight attendants who have completed probation occurs in inverse order of system classification seniority. Furloughed flight attendants are recalled in order of system classification seniority. If vacancies do not exist at the domicile from which the flight attendant was furloughed, or if the domicile no longer exists, then to the extent possible:

a choice of more than one domicile will be made available;

vacancies shall be provided in Domestic domiciles to flight attendants furloughed from Domestic domiciles, and in International domiciles to flight attendants furloughed from International domiciles;

vacancies shall be offered in seniority order to those being recalled and eligible.

Association of Flight Attendants and USAirways

Section 18 — Filling of Vacancies

All flight attendant vacancies shall be posted at all flight attendant domiciles.

The most senior flight attendant bidding shall be awarded the vacancy.

Whenever a flight attendant at a domicile is displaced for any reason, the flight attendant shall be the most junior at that domicile.

When a flight attendant is displaced from a domicile for any reason, then the flight attendant is permitted to displace the most junior flight attendant at the domicile of his/her choice, provided he/she has greater system seniority than such flight attendant.

FAX TRANSMISSION

U.S. DEPARTMENT OF COMMERCE
Office of the Secretary
Office of Policy and Strategic Planning
14TH & CONSTITUTION AVENUE, NW, RM 5835
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FAX: (202) 482-4636

To: Julie Fernandez

Date: 4/18/98

Fax #: 202-456-5581

Pages: 4 , including this cover sheet

From: Michael Damm

Subject: DoC Recommendations for H-1B Program Reform
and the Regional Skills Alliances

COMMENTS:

Attached



UNITED STATES DEPARTMENT OF COMMERCE
Office of the Secretary
Washington, D.C. 20230

April 16, 1998

MEMORANDUM FOR: Cecilia Rouse

Special Assistant to the President for Economic Policy
National Economic Council

Julie Fernandez

Special Assistant to the President for Domestic Policy
Domestic Policy Council

FROM:

Eric Biel

ERB
Acting Director, Office of Policy and Strategic Planning
Department of Commerce

Kent Hughes

KH
Associate Deputy Secretary
Department of Commerce

Kelly Carnes

KCC
DAS, Technology Policy
Department of Commerce

Michael Daum

MD
Senior Policy Advisor
Department of Commerce

SUBJECT: Department of Commerce Recommendations for H-1B Program
Reform and the Regional Skills Alliances

Building on the discussions at the DPC-NEC meeting held last Thursday, the Department of Commerce has developed a list of recommendations that we would like the working group to consider in its formulation of the Administration's position.

A. "H-1C" Program

- Authorize for 4 years beginning in FY1998
- Number of individuals authorized under H-1C
 - Up to 25,000 in FY1998
 - Up to 25,000 in FY1999
 - Up to 25,000 in FY2000
 - Up to 15,000 in FY2001

- Employer eligibility - Open to companies whose number of H-1B and "H-1C" employees in the prior year constitutes no greater than half of their U.S. based workforce.

Employee eligibility - B.S., M.S., or Ph.D. in math, science, engineering or other technical disciplines in an IT occupation as defined by BLS

- DoC recommended reforms to the H-1B program (see below) would also apply to the "H-1C" program

B. (\$500) Fee for H-1B and H-1C Applications for Administration, Enforcement, & Training

C. Training initiatives

- Expand NSF's Advanced Technical Education (ATE) program
- Create Regional Skills Alliances
 - Jointly administered by DoL, DoEd, and DoC, because each agency represents a different set of key stakeholders
 - Authorized at \$50 million per year for five years
 - Funded through H-1B and H-1C fees
 - The federal grant must be matched at a minimum of a 2:1 ratio by the consortia of stakeholders receiving the award
 - The government grant would stimulate the formation and administration of the consortia but would not pay for training
 - Receiving the grant would not preclude consortia members from using other federal funds for training
 - Grants awarded on the basis of an open merit-based competition for up to 3 years
 - Focus on the current and future needs of a region's employers, not just focus on skills that are in short supply at a given time
 - Outside existing programs to preserve its identity as a new Presidential initiative

D. Enforcement

- "H1-B dependent" company is defined as having 20% non-immigrants in its workforce, 15% for employers with less than 150 employees
- Secretary of Labor can initiate spot inspections without a complaint being filed at H-1B dependent companies (the "or other" clause)

E. Reforms

- Attempts to Recruit and Retain U.S. Workers Prior to Applying for H1-B Employees
 - Prior to filling out a certification application, the employer has to have demonstrated that it made a good faith effort to recruit and/or retain U.S. workers based on industry

or attest?

not that difficult
from H1B.
Take out BA

taken
out
1st
steps

match

standards. The employer would self-certify on the certification application form that it has taken three of 6 or 7 specified actions to recruit and/or retain U.S. workers for the position (list can be provided). If the employer is a job contractor, the worksite of the customer where the H1-B and "H1-C" employees would be placed would also have to self-certify on the certification application form that it has taken three of 6 or 7 specified actions to recruit and/or retain U.S. workers for the position.

- The Secretary of Labor would be allowed to initiate spot inspections for verification at H-1B dependent companies

Prevailing Wage

- If there is no BLS information available for a given occupation, then private, generally accepted academic and industry surveys can be used. These surveys must be statistically valid for the locality they are covering and be no greater than three years old. DoL would review the surveys. Funding for reviews would come from H-1B fees.

F. Collection of Additional Information

Number of individuals who transfer from other visa programs to the H-1B or H-1C program each year by program

Number of H-1B and H-1C non-immigrant visa holders who ask for a renewal

- Number of H-1B or H-1C non-immigrant visa holders who go on to apply for permanent immigration status each year
- For each person brought in on a H-1B or H-1C visa, the sponsoring employer as well as the employer at the job site must be provided
- For each person brought in on a H-1B or H-1C visa, that person's occupation as defined by the BLS must be provided

No. It goes the other way around.
overwhelming majority

WSJ
on Monday

Higher Ed.
mtg. tomorrow

2pm FRI.

~~Boasveldt~~

4/16/98

H1B - Leg.

House side - Hearing Tues.

Immigration subcommittee

That may slip a day or two
(b/c some not back)

Labor / AFL / ITAA / Norm Matloff / Texas Instruments
GAO

Smith has made an offer to Watt (@ staff level)
to do a bipartisan bill.

← Similar to Kennedy/Finstein piece

H1B reforms are similar

Enforcement

Training (?) - Doesn't know

Smith's folks don't like the fee.

Want training funded through
direct appropriation

Temporary increase

(phase out over 3 yrs.)

is open (Kennedy or less)

Watt's folks will talk to Zoe Lofgren



Senate - MM wants to sit down w/ Abraham's people
Not as anxious b/c wants to see where
House process is going.

Hold-off until we see if House process helps
them.

[Rep. leadership has asked for House bill to
hit the floor by mid-May.]



off wants to make the week of May 11th
"High-tech week"



AFL - focus on what we could set, given the cap
will likely go up
Reforms (+ leverage on the training side)

H2A/H2B

provision that would permit 3^d party
complaints (unions)

Limit for job contractors

[Recruit language — on limiting 2 of H2B
workers that an employer
can have.]

No lay-off

GAO report in Kennedy bill

What are we asking to be included in this report

Training

* → Employers need to put some \$ on the table
Focus on incumbent worker training (fee or matching)
(so not scholarships or BA stuff)

[Spatial mismatch btwn incumbent workers and demand]

Link training to existing shortages as they occur

Seed \$

training \$ available but only get it if you match it
(the company)

**THE FOLLOWING PRINCIPLES GOVERN CONTRACTUAL ARRANGEMENTS
ALLOWING FOR DISPLACED WORKERS AT ONE FACILITY TO APPLY FOR
VACANCIES AT ANOTHER FACILITY OF THE SAME EMPLOYER**

**1. Employees Who Would Otherwise be Deprived of Work Are Allowed to
Apply for Jobs at Other Locations**

The governing principle of the "displaced worker mobility" programs at issue is that the company, usually through a collective bargaining agreement, agrees that when employees are displaced, they will have the opportunity to apply for jobs at other locations, subject to the specific requirements of the program, before the employer hires new employees. For example, an employee at an AT&T facility in Michigan whose job has been eliminated may apply for a vacancy in Texas, and if qualified, will receive the job in lieu of a new hire. The job does not have to be identical to the one from which the employee has been displaced. By virtue of this system, the employer assumes an obligation to fill vacancies from a workforce that is geographically coextensive with the employer's facilities before hiring new workers.

2. Triggering Event

The employer reduces its workforce, eliminates a position, closes a facility or location, or takes other action that causes employees to lose their jobs.

3. Employee Qualifications

This type of program normally applies to all "regular" (permanent) employees, whether full-time or part-time. Employees on certain types of leave, such as vacation, jury duty, sick leave, or leaves of less a specified duration, are eligible to participate. Often, a minimum amount of service — one year, for example — is required for participation. Probationary employees are usually not eligible to participate.

**4. This System Does Not Substitute for Other Established Procedures for Filling of
Vacancies but Takes Precedence Over Hiring from the Street**

Collective bargaining agreements normally have detailed procedures for the filling of vacancies by seniority by active employees at a particular location. These procedures, whatever these procedures are, take precedence over arrangements for inter-plant mobility. Thus, only if a vacancy at a particular plant is not filled by an employee at that plant/location, can a displaced worker from another plant/location fill the position. However, placement of the company's displaced workers takes precedence over hiring a new employee.

5. **Registration of Qualified Employees**

Employees who are dislocated and who qualify for this program are placed on a list of qualified employees; they are required to keep the employer informed of their address.

6. **Posting of Vacancies**

The employer circulates to every location a notice of any vacancies throughout the system that arise, along with the grade, title, wage rate, qualifications, etc.

7. **Employees Apply**

Employees who are eligible for this program submit written applications for these vacancies. Sometimes there is a limit to the number of active applications an employee can have at any given time.

8. **No Promotions**

Employees are not normally eligible to apply for positions that have a higher grade/salary, but can apply for downgrades.

9. **Selection on the Basis of Seniority**

The company selects the most senior displaced worker for the position, assuming that the worker is qualified for the job. The worker has a short period of time in which to accept the job, and may be ineligible for continued participation in the program if he/she declines the offer.

Sometimes the company divides its facilities into regions. It then selects the most senior employee within the region before selecting an employee outside the region.

10. **Wage Rates of the Receiving Facility Apply**

The employee receives the wage rate applicable to the new job at the new location. This may involve a different schedule of wage increases than applied to the worker at the former location, and can even involve a wage reduction, which is usually phased in over a period of time. Where seniority is computed system/Company wide, there is no loss of seniority. Sometimes, where seniority is computed on a plant-wide basis, the transferred employee is treated as a new employee at that plant for the purposes of seniority.

11. **Transfer Back**

Many programs allow the employee to transfer back to the original location.

FAX TRANSMISSION

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Fax: 202/637-5323

To: Cecilia Raus

Date: April 16, 1998

Fax No.: 202/456-5802

Pages: 4, including this cover sheet.

From: Deborah Greenfield

COMMENTS:

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James LaSala
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Robert E. Wages
Edward L. Fire
R. Thomas Buffenbarger

DG:ls
opeiu #2, afl-cio
Attachment
cc: Karen Tramontano (via fax)

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

April 16, 1998

MEMORANDUM FOR SALLY KATZEN AND ELENA KAGAN

FROM: KERRI-ANN JONES

*Kerri-Ann Jones
Acting Director*

SUBJECT: Impact of H-1B Reform Proposals on the Research Community

This note deals with H-1B reform proposals of greatest importance to the research community, which include the following:

1. Recruit and retain requirements
2. Definition of "lay off"
3. Prevailing wage determination
4. Duration of stay
5. Training fees

In addition, a possible H-1D category, specifically for scientists, mathematicians and engineers is presented.

- Is there any other visa category for scientists?*
1. **Recruit and retain.** Young and intermediate age scientists are often selected for temporary employment to introduce new techniques or instrumentation, developed abroad, to U.S. laboratories. These scientists are selected for their specific training and/or skills, which are matched to specific research needs.

*Academic exchange (?)
Could put in language about 8 yrs employ < 50 years as a postdoc or higher, no recruit & retain.*

S.1878 specifies that measures must be taken to recruit U.S. workers prior to seeking H-1B workers. An exception is made for "aliens of extraordinary ability, or aliens who are outstanding professors and researchers." This exception is not useful for the circumstances described above or for international scientific collaborations, in which it is often the staff of the outstanding professor who participate.

S. 1723 is silent on this issue.

Conclusions and Recommendations. OSTP believes that requiring government-funded research institutions to perform labor market testing will seriously compromise one of the most important mechanisms for bringing new, specialized scientific and technical information to our country.

2. **Definition of "lay off."** Participation in many scientific projects is for limited duration, based on the support provided for training or technology introduction.

*lay-off language in Kennedy
does include voluntary separation, implies ?*

The termination of such participation is expected and is part of the normal research cycle.

language?
How to contact
plus?

S. 1878's definition of "laid off" might be interpreted to apply to these situations. An insert stating that this is NOT the case would be a necessary clarification.

S. 1723's definition of "lay off" takes into account expiration of a grant, contract or other agreement, which would cover the concerns about customary term employment in the research setting. It also contains language more clearly defining similar employment, further lessening the possibility of a misinterpretation of lay off.

Conclusions and Recommendations. OSTP strongly prefers the S. 1723 definition of lay off.

NO.

3. Prevailing Wage Determination. S. 1878 is silent on prevailing wage rates.

S. 1723 would amend current law to provide a means by which the prevailing wage level for employees of an institution of higher education, or a related or affiliated nonprofit entity, or a nonprofit or Federal research institute or agency, would take into account employees at such institutions, entities and agencies in the area of employment.

Conclusions and Recommendations. National Science and Technology Council member agencies have worked with OMB and DOL for many years to resolve this issue. S. 1723 would return to the pre-Hathaway method for prevailing wage determination in the publicly-funded research community, which we would view as a satisfactory outcome.

NO.

4. Duration of Stay. S. 1878 cuts the duration of the H-1B visa from 6 to 3 years

S. 1723 is silent on this issue.

X **Conclusions and Recommendations.** Three years is not sufficient time in which to complete certain research projects. Some flexibility would be required to accommodate longer stays.

5. Training Fees. S. 1878 establishes a fee to be paid by the employer to be used, in part, to endow a loan program and provide grants for training U.S. workers.

S. 1723 recognizes the need to encourage and equip more American young people to enter technical fields such as mathematics, engineering and computer science by authorizing a grant program for low-income students and training for unemployed Americans.

Conclusions and Recommendations. OSTP supports the principle that the competitiveness of the U.S. workforce can be improved by increased education and

training. We believe, however, that it would be inappropriate and wasteful to divert monies from the core missions of institutions whose primary focus is education and knowledge creation, in order to establish a new program with attendant administrative costs. We would encourage the use of funds gained from the fee for enhancements and more efficient use of existing educational and curriculum development programs and increased funding for programs in two-year community colleges.

It may be that it will become more appropriate to establish a visa category for scientific and technical workers, rather than seeking to fit the needs of diverse occupations with the H1-B visa. The paragraphs below provide for that.

ESTABLISHMENT OF H-1D NONIMMIGRANT CATEGORY FOR SCIENTISTS, MATHEMATICIANS AND ENGINEERS

(1) Section 101(a)(15)(H)(I)(8U.S.C.1101(a)(15)(H)(I) is amended – (A) by inserting after subsection (i)(c), the following:

(i)(d) scientist, mathematician or engineer who has attained at least a master's degree or equivalent in a scientific discipline, and who is coming temporarily to the United States to teach, train, or conduct research, ~~or~~

OK ✓ (i)(e) scientist, mathematician or engineer who has attained at least a master's degree or its equivalent in a scientific discipline, and who is coming temporarily to the United States to participate in a cooperative joint scientific activity carried out under an Agreement between the Federal Government and the alien's Government.

7 This creates a new H-1D non-immigrant visa category that will include foreign scientists, mathematicians and engineers coming to the United States to teach, train or conduct research in an institution of higher education (as defined in section 1201(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity, or a nonprofit or Federal research institute or agency; or to participate in bona fide international collaborative science projects.

H-1D visas are removed and subtracted from the H-1B category.

How many ?
what is your demand ?

STATEMENT OF SECRETARY OF LABOR ROBERT B. REICH
before the
SUBCOMMITTEE ON IMMIGRATION
OF THE SENATE JUDICIARY COMMITTEE

September 28, 1995

Mr. Chairman and Members of the Subcommittee:

Let me begin today, Mr. Chairman, by expressing my sincere appreciation to you for affording me this opportunity to share my views regarding the H-1B nonimmigrant visa program. This category of visas, as you know, allows the temporary admission of foreign "professionals" for employment in "specialty occupations" in the United States. This visa program is seriously flawed in its current form, I believe, and urgently requires improvement.

I would also like to acknowledge the Members of the full Committee, whose presence demonstrates their interest in reform of the Nation's immigration system.

Let me first attempt to state, as clearly as possible, what I see as the fundamental policy goal for employment-based immigration. Since work-

related temporary visas and work-related immigration are closely intertwined, in ways I will try to explain, it is impossible to discuss today's immediate topic without engaging the more fundamental question of what purpose our employment- or skill-based immigration policy is meant to serve. And on that question, I believe, there is great potential for an emerging bipartisan consensus, and for progress toward meaningful reform. There is great promise in some of the ideas you have recently put forward, Mr. Chairman, which parallel many of the proposals of the U.S. Commission on Immigration Reform.

This nation of immigrants always has and always will welcome new members into the American family, though at a different pace and in different ways to suit the times. This Administration shares the conviction of many in Congress that continued immigration both honors the heritage of our past and helps ensure the vitality of our future. There are many good reasons for welcoming a particular person. But one reason, often advanced, strikes me as troublesome.

Some say a primary purpose of immigration policy should be to suit the convenience of U.S.-based employers, who prefer to select from the whole world's workforce, not just the American workforce, when assembling the

human resources needed to face global competition. Employment-based immigration to fill skill shortages, as well as the temporary admission of selected skilled foreign workers, is sometimes unavoidable. But I firmly believe that hiring foreign over domestic workers should be the rare exception, not the rule. And I believe such exceptions should be even rarer, and more tightly targeted on gaps in the domestic labor market, than is generally the case under current policy.

If employers must turn to foreign labor, this is a symptom signaling defects in America's skill-building system. Our system for giving employers access to global labor markets should be structured to remedy such defects, not acquiesce in them. And it should progressively diminish, not merely perpetuate, firms' dependence on the skills of foreign workers.

One idea contained in both your own draft legislation and in the Jordan Commission's report, Mr. Chairman, strikes me as highly promising in this regard -- requiring that employers make a meaningful contribution to the training of U.S. workers, so that skill-based immigration will become ever less necessary over time. Our immigration policy should embody the commitment that humanitarian, cultural, and family goals, and not employers' dissatisfaction with the domestic workforce, must govern how we enlarge our American

community. My colleagues in the Administration and I are eager to work with Congress to encode this commitment into law.

In short, our immigration policy must provide real incentives for businesses to commit themselves to American workers and develop the domestic workforce for the high-skill jobs and high-performance workplaces of the future, while at the same time providing a safety valve of access to foreign labor markets to meet skill demands that the U.S. workforce cannot supply in sufficient quantity or with sufficient speed. Our primary public policy response to skills mismatches due to changing technologies and economic restructuring must be to prepare the U.S. workforce to meet new demands. Importing needed skills should usually be a short-term response to meet urgent needs while we actively adjust to quickly changing circumstances.

In light of the increasingly global economy and workforce – and the serious danger that rapid changes in our economy and social policy will leave many working people in this country behind – the Nation's immigration policy must carefully balance these imperatives. In recent years, our immigration system has tilted towards expanding employment-based immigration and to favoring higher-skilled workers, giving progressively more weight to employers' desire to tap global labor markets. However, as our immigration

system has evolved within this overall framework, it has treated particular issues in quite different ways. For example, criteria governing access to immigrant workers vary depending on the preference category, and these criteria differ from those which apply to various employment-based nonimmigrant categories. Similarly, the manner in which the basic policy goals are implemented in law for employment-based nonimmigrants differ significantly among the various programs, some of which lack any meaningful labor market protections.

With this broader context thus established, and my hopes for bipartisan consensus once again affirmed, let me turn to the need for reform of our employment-based nonimmigrant system, and especially the H-1B nonimmigrant program.

Employment-based Nonimmigrant Program Reform

Any reform of our legal immigration system must also address the nonimmigrant programs which allow temporary entry of individuals to the U.S., in many cases for employment purposes. While many acknowledge this need, few proposals have yet been offered. The Subcommittee's draft legal immigration reform bill does not contain any provisions affecting employment-

based nonimmigrant programs. We would again urge that it be expanded to include such provisions, for two main reasons.

First, many more foreign workers legally enter the U.S. for temporary employment than enter as permanent employment-based immigrants. These "temporary" workers often legally stay employed here for many years, and in practice some stay on, illegally, for much longer. Over the three years from fiscal year 1992 to 1994 (the last full year for which data are available), fewer than 150,000 workers were given permanent status as employment-based immigrants. In that same three-year period, however, nearly 570,000 workers - nearly four times as many -- were "temporarily" admitted as employment-based nonimmigrants. (This latter figure excludes traders and investors admissible under our international treaty obligations, and intra-company transferees.) All of these nonimmigrants can work in the U.S. and have impacts -- both positive and negative -- on our labor markets. Given the relative numbers and the fact that many nonimmigrant workers are tied to one employer as a condition of admission, the temporary nonimmigrant workforce has to be considered a very significant factor in our workforce development policies.

The second reason that the nonimmigrant programs must be encompassed

in legal immigration reform is that most petitions for permanent employment-based immigrants are filed by employers on behalf of temporary foreign workers during or after a period in nonimmigrant status -- which often follows completion of their education at U.S. colleges and universities. As you heard in our earlier testimony, of the current employment-based immigrants who are subject to the Department of Labor-administered permanent labor certification process, we estimate that over 90 percent are already in the U.S. and about two-thirds are already working -- sometimes illegally -- for the employer which files the immigrant petition on their behalf. Nonimmigrant foreign students and workers already in the U.S. (many of whom were previously foreign students) are predominantly those whom U.S. employers subsequently seek for permanent residency for employment purposes. In fiscal year 1994, more than one-half of those granted permanent resident status are known to have adjusted from nonimmigrant status as foreign students or "professional" workers admitted as H-1s or under directly related temporary entry provisions.

In other words, our employment-based immigrant selection system mostly deals with decisions about which foreign students and workers will be allowed to remain to live and work permanently in the U.S., not who will be allowed to enter to work in the U.S. The actual employment-based immigrant selection

occurs much earlier in the process, when students are admitted to our universities and when employers seek temporary nonimmigrant workers from abroad. A coherent employment-based immigration policy must recognize these facts and, therefore, address real deficiencies in the nonimmigrant programs through which the first-level selection is really made.

Again, in our recent testimony before the Subcommittee, we offered several suggestions to establish a workable framework for reform of the multiplicity of diverse and inconsistent employment-based nonimmigrant programs that currently exist. I hope that the Committee finds this perspective useful, and I would renew our offer to continue to work with you as our ideas are considered.

H-1B Nonimmigrant Program

While I have stressed that our current system of employment-based immigration needs reform, including both the permanent and various nonimmigrant programs, the most urgent candidate for reform is the H-1B nonimmigrant program.

To briefly recap, the H-1B program allows the admission of up to 65,000 workers each year (to stay for as long as six years), ostensibly to meet short-

term, high-skill employment needs in the domestic labor market. In principle, this can be an appropriate purpose, consistent with the overall goals of our employment-based immigration policy. Our experience with the practical operation of the H-1B program has raised serious concerns, however, that what was conceived as a means to meet temporary business needs for unique, highly-skilled professionals from abroad is, in fact, being used by some employers to bring in relatively large numbers of foreign workers who may well be displacing U.S. workers and eroding employers' commitment to the domestic workforce. Some employers -- though a minority of those who use the H-1B program -- seek the admission of scores, even hundreds of foreign workers, especially for work in relatively low-level computer-related and health care occupations. These employers include "job contractors," some of which have a workforce composed predominantly or even entirely of H-1B workers, which then lease these employees to other U.S. companies or use them to provide services previously provided by laid off U.S. workers.

Many employers, to be sure, do use the H-1B nonimmigrant program for its stated purpose: to provide U.S. businesses with timely access to the "best and the brightest" in the international labor market to meet urgent but generally temporary business needs. I hope it is clear that we recognize the need for

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such use of the program. But reform of the H-1B program is needed because its actual operation is out of synch with its primary purpose and design, in at least three important respects.

First, it has become increasingly evident that the H-1B program is being utilized by some as the basis for building businesses which are dependent on the labors of foreign workers, in some cases in unfair competition with U.S. workers and those U.S. businesses that employ mostly domestic workers.

As you may know, access to the international labor market through the H-1B program does not require any test of the domestic labor market for the availability of qualified U.S. workers, because the program is supposed to be used to meet urgent, short-term employment needs. The growth of "job contractors" with work forces composed predominantly or even entirely of H-1B workers, which then lease these employees to other U.S. companies or use them to provide services previously provided by laid off U.S. workers, is cause for serious concern. Let me give you two cases in point from our enforcement experience.

In the computer field, Syntel, Inc. is a Michigan company with a workforce that is more than 80 percent H-1B nonimmigrants, in this case computer analysts from India. Among its business operations, Syntel contracts

to provide computer personnel or services to other companies. In its operations in New Jersey, Syntel contracted with American International Group, Inc. (AIG), a huge insurance company, to provide computer services in the place of nearly 250 U.S. workers, which AIG laid off. In fact, the laid off U.S. workers were required to train their H-1B nonimmigrant replacements during their last few weeks of employment. Displacing laid-off workers was perfectly legal under the rules that then existed for the H-1B program, and that still exist today.

In this case, the desire to cut labor costs led Syntel beyond the wide limits of what current law permits and into actual illegality. In carrying out its contracts in the State of New Jersey, our Wage and Hour Division found Syntel had willfully underpaid its Indian computer programmers by nearly 20 percent below the wage they were required under the law to be paid -- about \$34,000 per year instead of the prevailing wage rate of more than \$41,000 per year. As a result of this case, Syntel agreed to pay nearly \$78,000 in back wages to 40 H-1B employees and take other steps to develop U.S. workers to reduce its dependence on a nonimmigrant workforce. This is but one of 19 enforcement cases involving H-1B workers in computer-related occupations where we have found more than \$200,000 in back wages owing to 89 H-1B nonimmigrant

workers, mostly employed by contractors.

In the health care field, Rehab One is a Michigan company which went into the business of providing temporary physical therapists -- in this case, exclusively H-1B workers from Poland -- to health care facilities primarily in Texas. Our investigation of a complaint against Rehab One resulted in the company agreeing to pay more than \$460,000 in back wages to 54 therapist employees. The company had actually paid its Polish therapists as little as \$500 per month during certain periods though it was required to pay a prevailing wage of as much as \$2,800 per month. This is but one of fourteen enforcement cases involving employers of H-1B physical and occupational therapists, nearly all of which are contractors, in which we found nearly \$2 million in back wages owing to nearly 400 temporary foreign workers in these occupations.

These cases, which some might perceive as examples of enforcement "successes" as envisioned by the program's design, merely illustrate the potential -- unfortunately, the unknowably large potential -- for the kinds of abuse that inflicts real competitive harm on skilled U.S. workers.

The second reason that the H-1B program needs to be reformed is that it has also become increasingly evident that employers commonly use the H-1B

program as a form of transitional or probationary employment, either to accommodate foreign students who have started working for a U.S. employer during or just after completing their education at a U.S. institution, or as a way-station for foreign workers to be employed in the U.S. while awaiting adjudication of a permanent immigrant petition. I have already noted that most employment-based immigrants are already working in the U.S. when they gain permanent status -- in fiscal year 1994, 42 percent of these were already working in H-1 status alone. While non-immigrant programs have many potentially valid purposes, there is no consensus that providing a holding pattern for aspiring employment-based immigrants is among them. Yet that has become a significant aspect of the programs' operation.

The third reason that justifies immediate reform of this program is that it simply does not provide the needed balance in our employment-based immigration system between timely access to the international labor market and adequate protection of U.S. workers' job opportunities, wages and working conditions. I have already noted that the H-1B program does not require any test for the availability of qualified U.S. workers in the domestic labor market. What is more, a U.S. employer can now lay off U.S. workers and replace them with H-1B workers. I simply do not believe this is right. Moreover, the H-1B

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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. I do not know if any members of this Committee can explain the rationale of this policy to struggling U.S. workers. I know that I cannot.

Mr. Chairman, two years ago I asked the Congress to amend the conditions which still regulate access to the international labor market through the H-1B nonimmigrant program. Unfortunately for many U.S. businesses and workers, the Congress has yet to act on these proposals -- but another important opportunity is now before you, and I am most grateful for the opportunity to tell you personally how important it is to the working people of this country that you not miss this opportunity.

The amendments I requested in 1993 were carefully designed to assure continued business access to needed high-skill workers in the international labor market while decreasing the H-1B program's susceptibility to misuse to the detriment of U.S. workers and the businesses which employ them. Briefly stated, the two amendments I proposed would require employers which seek access to temporary foreign "professional" workers to attest that:

- (1) they have not laid off or otherwise displaced U.S. workers in the

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occupations for which they seek nonimmigrant workers in the periods preceding and following their seeking such workers; and,

- (2) in certain circumstances, they have taken timely and significant steps to recruit and retain U.S. workers in these occupations.

These amendments were modeled on similar provisions applicable to the temporary admission of foreign registered nurses (this program has just expired), and are targeted especially to those employers which seek to obtain relatively low-skilled "professional" workers.

As we laid out in our recent testimony, enactment of these amendments is increasingly critical. Abuses of this program have become increasingly well-documented. There appears to be a trend of growth of companies which are predominantly or entirely dependent on nonimmigrant workers and are thus able to compete unfairly with U.S. companies which employ mostly U.S. workers. The nonimmigrant registered nurses (H-1A) program has recently expired and some foreign nurses will now be entering under the H-1B program, which has significantly lesser protections for U.S. workers than the predecessor program. Finally, I think all would agree that in nearly all situations it is entirely unreasonable that -- as a matter of public policy -- an employer in this country not only does not have to test the domestic labor market for the availability of

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qualified U.S. workers before gaining access to foreign workers, but is actually able to lay off U.S. workers to replace them with temporary foreign workers, either in their own employ or through contract. As I have emphasized, this is exactly what is happening now. Our public policy tolerates it, perhaps encourages it. This must change.

In addition to the amendments I proposed in 1993, I would also urge enactment of another amendment that would reduce the allowable period of stay under the H-1B program from six to three years to better reflect the "temporary" nature of the presumed employment need. It is difficult to imagine why these changes would be hard to swallow for businesses which want to use the H-1B program for the purposes for which it was intended.

Further, Mr. Chairman, if this and other employment-based nonimmigrant programs are actually meant to serve as "probationary" employment situations to transition foreign students and temporary workers into the permanent labor force as employment-based immigrants, then the programs ought to be redesigned to reflect that purpose, and we should abandon the fiction that they are intended to meet specific, urgent, short-term demands.

Mr. Chairman, I also want to briefly discuss the treatment of the H-1B program under H.R. 2202, which is now being marked up by the House

Judiciary Committee. The only provision of H.R. 2202 which modifies current law affecting nonimmigrant categories (Title VIII, Section 806) makes a number of changes in the H-1B program. While still evolving, these provisions generally would weaken protections for U.S. workers. However, one of the changes in the program currently being considered would require employers filing H-1B applications to attest that they have not laid off workers with substantially similar qualifications and experience in the specific employment for which an H-1B nonimmigrant is being sought during limited time periods unless the employer pays an actual wage to each nonimmigrant that is at least 110 percent of the mean of the last wage earned by the laid off employees. In addition, a "job contractor" would have to attest that it will not place an H-1B worker with another employer unless the other employer has executed an attestation that it is complying and will continue to comply with this requirement in the same manner as it applies to the contractor.

This proposed change represent a welcome effort to implement one of the modifications in the H-1B program which I previously requested -- to prevent U.S. workers from being laid off or otherwise displaced by nonimmigrants -- and I applaud the intent. But it is considerably weaker than the change I requested, because it provides a means of circumventing the essential

protection. This provision would allow a U.S. employer to lay off U.S. workers and replace them with foreign workers in the same job so long as the employer paid the foreign workers a little more than it had paid its U.S. workers. The bill does not prohibit an employer from laying off U.S. workers to replace them with nonimmigrant workers during certain time periods, it merely provides a modest disincentive to doing so. So it goes in the right direction, but not nearly far enough. Further, H.R. 2202 does not include the additional change to the H-1B program I asked for -- a requirement that certain H-1B employers attest to taking timely and significant steps to recruit and retain U.S. workers in the jobs for which they are seeking foreign workers. In addition, the proposed changes in H.R. 2202 need to be consistent with U.S. international obligations in the General Agreement on Trade in Services under the World Trade Organization.

While we have a number of serious concerns about the changes to the H-1B program contained in H.R. 2202 -- and, as I have said, would like to see any reform legislation address more nonimmigrant programs, and in the broader context of the array of nonimmigrant programs for which the Department has responsibility -- we find promise in the general framework provided in the bill and have been working with the Committee and interested parties to address our

concerns and attempt to fashion H-1B amendments which the Administration could endorse. We look forward to working with you in the Senate to this same end.

Permanent Employment-based Immigration Changes

Mr. Chairman, I would also ask your indulgence today to briefly comment on proposals contained in the Subcommittee's draft reform bill -- which generally reflect the recommendations of the Commission on Immigration Reform -- to change the "labor certification" process used to admit or, more commonly, adjust individuals to permanent immigrant status for employment reasons. Our earlier testimony before the Subcommittee raised several important questions and suggestions regarding the proposed new labor certification systems set out in the draft bill. The larger point, however, merits emphasis: We share the view that reform is required, and we support a shift towards an immigration system which relies more on market-type incentives to discourage employers from abandoning the domestic workforce in favor of foreign labor. A fee levied on employers sponsoring skill-based immigrants, with the proceeds dedicated to building the skills of American workers, forges an admirably direct and efficient link between the problem of skill shortages,

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and the only valid long-term solution, which is investment in the U.S. workforce. While we have some important concerns about the draft bill's approach, we want to work with you to further. I know you are anxious to move ahead with the bill; we are prepared and eager to help.

Conclusion

Mr. Chairman, let me conclude by repeating that reform of the employment-based nonimmigrant programs, and the H-1B program in particular, is so integral and essential to effective reform of our entire system of legal immigration that it should be included in any such legislation.

I appreciate the interest shown by the Subcommittee Members and staff in our views, and their thoughtful consideration. The Department looks forward to continuing to work closely and cooperatively with you and your staff as the legislation moves forward.

In this regard, I understand that you will be spending some time today hearing testimony regarding the perceived need for nonimmigrant program reform to import new agricultural "guestworkers." While I have not addressed this subject in my testimony today, the President and I strongly oppose such a new guestworker program. I will follow-up this hearing with a further

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statement of our views and rationale on this important subject.

Mr. Chairman, that concludes my statement. Thank you again for inviting me to testify today, and I will be pleased to respond to the Members' questions.



Office of the Attorney General
Washington, D. C. 20530

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
Attorney General



WILLIAM DALEY
Secretary of Commerce



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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