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Friend or Foe of the U.S. Labor Market: Why Congress Should Raise or Eliminate the H-1B Visa Cap

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FRIEND OR FOE OF THE U.S. LABOR MARKET: WHY CONGRESS SHOULD RAISE OR ELIMINATE THE H-1B VISA CAP

I. INTRODUCTION

On April 2 and April 3, 2007, the United States Citizenship and Immigration Service (USCIS) received over 123,000 applications from employers seeking to hire H-1B (specialty) workers in the United States.¹ The H-1B visa category is a “vehicle through which qualified aliens may seek admission to the United States on a temporary basis to work in their fields of expertise.”² It allows U.S. employers, mainly information technology (IT) companies, to recruit and hire foreign workers possessing special skills and training for up to six years.³ Because Congress has implemented a 65,000 annual cap on admission of H-1B workers in the United States,⁴ April 2 and 3, 2007 were the first and only days the USCIS accepted applications for H-1B workers for fiscal year 2008.⁵

Because the number of applications exceeded the congressionally mandated cap of 65,000, the USCIS was forced to create a lottery,⁶ leading to the rejection of thousands of timely submitted applications.⁷ As a result of the immediate fulfillment of the cap, many U.S. employers were unable to hire employees with sufficient training and experience to meet their needs.⁸ Furthermore, many aliens, residing in the United States and attending U.S. educational institutions in anticipation of being placed in U.S. jobs, have been and will be forced to leave the country when their F and J educational visas expire.⁹ Finally, companies that experience labor

1. Robert Pear, *High-Tech Titans Strike Out on Immigration Bill*, N.Y. TIMES, June 25, 2007, at 1. Also note that April 1, 2007 was a Sunday and thus acceptance of applications did not begin until April 2.

2. U.S. DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H-1B): FISCAL YEAR 2005 (2006), available at http://www.uscis.gov/files/nativedocuments/H1B_FY05_Characteristics.pdf [hereinafter 2005 H-1B CHARACTERISTICS].

3. 8 U.S.C.S. § 1184(g)(4) (2009).

4. 8 U.S.C.S. § 1184(g)(1)(A)(vii) (2009).

5. Pear, *supra* note 1. See also Arnold Schwarzenegger et al., *Governor Schwarzenegger Leads Multi-State Push for Immigration Reform to Protect Skilled Workforce*, STATE NEWS SERVICE, Sept. 11, 2007.

6. Chris O'Brien, *How many H-1B workers? Counts vary*, SAN JOSE MERCURY NEWS, July 15, 2007, at Science and Tech Section (“[T]he immigration service conducts a lottery to award the visas.”).

7. Hilary Potkewitz, *Professional Visas Sell Out on First Day*, CRAIN'S NEW YORK BUSINESS.COM, Apr. 4, 2007, <http://www.newyorkbusiness.com/apps/pbcs.dll/article?AID=/20070404/FREE/70404007/1064/newsletter01>.

8. See discussion *infra* Part VI.

9. U.S. DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *Services and Benefits: Student Visas*, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=27bc6138f898d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=48819c7755cb9010VgnVCM10000045f3d6a1RCRD> (“The ‘F’ visa is reserved for nonimmigrants wishing to pursue

shortages later in the year will not be able to obtain sufficiently skilled workers until the next fiscal year, even if they are diligent enough to submit their applications on time.¹⁰

The legitimacy of the H-1B cap and of the H-1B visa category as a whole has been an issue since 1990 when Congress first implemented the cap.¹¹ Until 2004, Congress had taken the necessary steps to increase and/or decrease the cap according to the anticipated annual demands for H-1B workers throughout the U.S. labor force.¹² For example, after the cap was exhausted for fiscal year¹³ 1998, Congress raised the cap to 115,000 for fiscal year 1999.¹⁴ In 2000, during the IT boom, Congress increased the cap again to 195,000 for fiscal years 2001–2003.¹⁵ However, since 2004, Congress has refused to increase the 65,000 cap, despite the growing labor demand for H-1B workers.¹⁶ For fiscal years 2004–2007, H-1B application

academic studies and/or language training programs.”); U.S. DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *Services and Benefits: Exchange Visitors*, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=a4ac6138f898d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=48819c7755cb9010VgnVCM10000045f3d6a1RCRD> (“The ‘J’ visa is for educational and cultural exchange programs designated by the Department of State, Bureau of Consular Affairs.”).

10. Stuart Anderson, *Should Congress Raise the H-1B Cap?*, Testimony of Stuart Anderson, Executive Director: National Foundation for American Policy before the House Subcommittee on Immigration, Border Security, and Claims (Mar. 30, 2006) at 3, available at <http://www.nfap.com/researchactivities/articles/Testimony033006.pdf> (“Even when new hires are not lost, waiting several months for key personnel is expensive and can cost firms dearly in the marketplace.”); *H-1B Professionals and Wages: Setting the Record Straight*, NATIONAL FOUNDATION FOR AMERICAN POLICY (Mar. 2006) at 2, available at <http://www.nfap.com/researchactivities/articles/NFAPPolicyBriefH1BProfessionalsAndWages0306.pdf> [hereinafter NFAP, *Setting the Record Straight*] (“In recent years, Congress has failed to increase sufficiently the annual limit on H-1B visas for foreign-born professionals, regularly leaving U.S. companies unable to hire key personnel for many months.”).

11. See Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. J.L. REFORM 815 (2003) [hereinafter Matloff, *On the Need for Reform*].

12. See sources cited *infra* notes 14–19.

13. Senate.gov, Glossary - “Fiscal Year,” http://www.senate.gov/reference/glossary_term/fiscal_year.htm (last visited Jan. 4, 2009) (defining “fiscal year” as “the accounting period for the federal government which begins on October 1 and ends on September 30. The fiscal year is designated by the calendar year in which it ends.”).

14. Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, 2-20 IMMIGRATION LAW AND PROCEDURE § 20.04, at 1 (Matthew Bender & Co., Inc., 2008). See also Steven A. Clark & Vincent W. Lau, IMMIGRATION PRACTICE MANUAL § 5.1.5 (Mass. Continuing Legal Educ., Inc., 2004).

15. Gordon, Mailman & Yale-Loehr, *supra* note 14, at 1. See also Clark & Lau, *supra* note 14. But see Carolyn Lochhead, *Immigration Bill Would Add Visas for Tech Workers*, S.F. CHRON., Mar. 10, 2006. While this Note does not focus on the political reasons for Congress refusing to increase the cap, Lochhead notes that “with the high tech crash and the revelation that some of the Sept. 11, 2001 hijackers had entered the country on student visas, the political climate for foreign workers darkened, and Congress quietly allowed the number of H-1B visas to plummet back to 65,000 a year.” *Id.*

16. Gordon, Mailman & Yale-Loehr, *supra* note 14, at 1.

submissions reached the cap on February 18, 2004, November 23, 2004, August 10, 2005 and May 26, 2006, respectively, moving closer to the opening date of April 1.¹⁷ In 2007, H-1B applications reached the cap for fiscal year 2008 on the first day H-1B season opened, April 2, 2007.¹⁸ These statistics clearly show that, while the demand for H-1B visas has continued to increase since 2003, Congress refuses to adjust the cap to meet the demands of the labor force.¹⁹

Critics and advocates of the H-1B program “have staked out seemingly irreconcilable positions” on increasing the cap and the H-1B program in general.²⁰ Critics question the existence of a labor shortage in the IT sector²¹ and contend that the system displaces American workers from U.S. jobs.²² They assert that the program lacks proper administrative safeguards,²³ allowing U.S. employers to abuse the system and mistreat non-citizens.²⁴

Meanwhile, supporters of the H-1B program and a cap increase argue that the program enables the United States to remain competitive in the global economy,²⁵ and prevents the off-shoring of U.S. jobs to other countries.²⁶ These advocates argue three main points on the state of the labor market. First, that there is truly a shortage of highly skilled workers as evidenced by the annual demand for H-1B visas.²⁷ Second, that there is no fixed number of jobs available in the U.S. labor market, and both compensation and the availability of jobs are based on other factors within

17. *Id.*

18. See Potkewitz, *supra* note 7 (noting that USCIS accepted applications on April 2 and April 3 because the statute requires the acceptance period to last at least two days).

19. See *Indian IT Companies to Acquire More US Firms*, PRESS TR. INDIA, Aug. 15, 2007 (noting that the H-1B cap is not “likely to be raised from the current ceiling of 65,000 anytime soon”).

20. Todd H. Goodsell, *On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 BYU J. PUB. L. 153, 154 (2007).

21. See generally Matloff, *On the Need for Reform*, *supra* note 11.

22. See Simone M. Schiller, *Does the United States Need Additional High-Tech Work Visas or Not? A Critical Look at the So-Called H-1B Visa Debate*, 23 LOY. L.A. INT’L & COMP. L. REV. 645, 650 (2001) (“H-1B workers are taking jobs from Americans and giving them to foreigners.”). See also John Miano, Testimony of John Miano before the Subcommittee on Immigration, Border Security, and Claims, House Judiciary Committee (Mar. 23, 2006) at 1 [hereinafter Miano, Testimony before Subcommittee on Immigration] (“After eleven years, Congress has yet to close the loophole allowing direct replacement of U.S. workers by H-1B workers.”).

23. Miano, Testimony before the Subcommittee on Immigration, *supra* note 22 at 1 (“Congress has established the labor certification process as a ‘rubber stamp’ operation that has no value The data collection and reporting are not adequate to monitor the H-1B program.”).

24. See generally Norman Matloff, *Debunking the Myth of a Desperate Software Labor Shortage*, Testimony to the U.S. House Judiciary Committee Subcommittee on Immigration (Apr. 21, 1998) at Sec. 9.2–9.4, available at <http://heather.cs.ucdavis.edu/itaa.real.html> [hereinafter Matloff, *Debunking the Myth*] (discussing problems with prevailing wage difficulties in enforcement and indentured servitude).

25. See discussion *infra* Part VI.

26. *Id.*

27. *Id.*

the labor market,²⁸ thus making the shortage debate moot. Finally, that preventing foreigners, especially foreign students enrolled in colleges and universities in the United States, from entering the U.S. workforce, is “detrimental to our economic success in the future because we will lose valuable intellectual capital.”²⁹

This Note argues that the current cap of 65,000 is inadequate for the present U.S. labor force and that the existence of the cap itself is an inappropriate and unnecessary element of the H-1B category. Part II of this Note describes the H-1B category, its requirements and the safeguards implemented by Congress to protect U.S. and foreign workers. Part III examines the legislative history of the H-1B category as well as its current state. Part IV addresses the leading arguments made by critics who oppose raising the H-1B visa cap. Part V lays out some of the most compelling arguments for increasing or abolishing the cap entirely and explains why industries other than the IT sector are suffering due to the H-1B cap. Finally, Part VI of this Note sets forth the most logical solutions for reforming the H-1B category.

II. WHAT IS THE H-1B VISA CATEGORY?

The H-1B visa category, designed to bring the world’s “best and brightest”³⁰ to the United States, is an employment-based nonimmigrant visa “that allows skilled aliens in certain ‘specialty occupations’ to work in the United States.”³¹ The USCIS defines “specialty occupation” as “an occupation that requires (a) theoretical and practical application of a body of highly specialized knowledge, and (b) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”³² Employers are “required to pay H-1B workers either the same rate as other employees with similar skills and qualifications or the ‘prevailing wage’ for that occupation and location, whichever is higher.”³³ The initial stay for an H-1B worker in the United States is three years but can be extended to a maximum of six years.³⁴ While the H-1B category applies across a wide spectrum of professions and benefits citizens of a broad range of nations, approximately

28. See Anderson, *supra* note 10, at 12–13.

29. Michael R. Traven, *Restricting Innovation: How Restrictive U.S. Visa Policies Have the Potential to Deplete our Innovative Economy*, 34 CAP. U. L. REV. 693, 695 (2006).

30. Matloff, *On the Need for Reform*, *supra* note 11, at 818.

31. Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1674 (2000).

32. 8 U.S.C.S. § 1184(i)(1) (2009).

33. John Miano, *The Bottom of the Pay Scale: Wages for H-1B Computer Programmers*, CTR. FOR IMMIGR. STUD., Dec. 2005, at 1, available at <http://www.cis.org/articles/2005/back1305.html> [hereinafter Miano, *The Bottom of the Pay Scale*]. See also 8 U.S.C. § 1182(n).

34. 8 U.S.C. § 1184(g)(4).

40% of H-1B visas approved each year are in computer-related occupations,³⁵ and approximately 42% of the H-1B workers entering the United States each year come from India.³⁶

The H-1B visa category is important to the U.S. labor market because of the long regulatory delays for green cards.³⁷ Such delays “make it virtually impossible to hire an individual directly on a green card,”³⁸ and without availability of the H-1B visa, “skilled foreign nationals, particularly graduates of U.S. universities, could not work or remain in the United States.”³⁹ The H-1B category also permits dual intent, meaning that, contrary to various other nonimmigrant visa categories, H-1B workers coming to work in the United States are not required to avow their intent to leave the United States once their visa has expired. Rather, dual intent permits H-1B workers to pursue avenues for permanent residence.⁴⁰

One of the main critiques of the H-1B visa category is that it promotes or allows the displacement of U.S. workers from employment.⁴¹ In order to curb this risk, Congress has implemented various safeguards to protect U.S. workers. Some of the safeguards include the annual cap, a requirement for each applying employer to file a Labor Condition Application (LCA) with the Department of Labor (DOL), the designation of employers as “H-1B dependent” and the addition of various fees to the application process.⁴²

III. HISTORY AND LEGISLATIVE BACKGROUND OF THE H-1B VISA CAP

The H-1B category was established through the Immigration Act of 1990.⁴³ It was a spin-off of the previous H-1 category and was designed to

35. 2005 H-1B CHARACTERISTICS, *supra* note 2, at 2; U.S. DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H-1B): FISCAL YEAR 2004 (2006), at 2, *available at* http://www.uscis.gov/files/nativedocuments/H1B_FY04_Characteristics.pdf; U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H-1B): FISCAL YEAR 2003 (2004), at 2, *available at* <http://www.uscis.gov/files/article/FY03H1BFnlCharRprt.pdf>.

36. *Id.*

37. NFAP, *Setting the Record Straight*, *supra* note 10, at 3. *See also* USCIS.gov, Processing Times, <https://egov.uscis.gov/cris/jsps/ptimes.jsp>. Green Card visa processing times for employment-based immigration range from 2–5 years depending on where the employer is located. The process is two parts: I-140 Applications must be approved and then I-485 applications are filed when a visa becomes available. The processing time for I-140 Applications filed at either the Texas or Nebraska Service Center is approximately 16 months and I-485 processing time varies between 18 and 30 months.

38. NFAP, *Setting the Record Straight*, *supra* note 10, at 3.

39. *Id.*

40. Matloff, *On the Need for Reform*, *supra* note 11, at 815.

41. *See* discussion *infra* Part IV.

42. *See* discussion *infra* Part III.

43. U.S. DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, REPORT ON H-1B PETITIONS: FISCAL YEAR 2005, ANNUAL REPORT

“make conditions for granting the visa more precise; add some protections for the domestic workforce; and allow dual-intent status so that employers could simultaneously sponsor the worker for a green card.”⁴⁴ The protections implemented for the domestic workforce included capping the amount of H-1B visas issued annually at 65,000 (subject to increases by Congress) and requiring every applying employer to file an LCA with the DOL.⁴⁵

During the high-tech boom of the 1990s, an industry association known as the Information Technology Association of America (ITAA) produced a series of statistical reports “asserting burgeoning gaps and shortages of information-technology workers” in the American workforce.⁴⁶ The United States Department of Commerce affirmed the findings of these reports in 1997.⁴⁷ Despite criticism, the release of the ITAA reports, along with various other publications claiming a labor shortage, convinced the Clinton administration to enact the America Competitiveness and Workforce Improvement Act of 1998 (ACWIA 98).⁴⁸ The ACWIA 98 temporarily increased the cap for fiscal year 1999 to 115,000 and also implemented further safeguards to protect American workers.⁴⁹

Specifically, the ACWIA 98 created a new employer category called “H-1B dependent” employers, who employ workforces consisting of at least 15% H-1B workers. These employers are subject to more intensive regulations and penalties. ACWIA 98 requires H-1B dependent employers to make a good faith effort to recruit U.S. workers “using procedures that meet industry-wide standards and offering compensation that is at least as

(2006), available at http://www.uscis.gov/files/nativedocuments/H1B05Annual_08_7.pdf [hereinafter 2005 USCIS H-1B ANNUAL REPORT].

44. Matloff, *On the Need for Reform*, *supra* note 11, at 818.

45. *Id.* at 819.

46. Michael S. Teitelbaum, *Do We Need More Scientists?*, THE PUBLIC INTEREST 42 (2003). See generally Help Wanted: The IT Workforce Gap at the Dawn of a New Century, Information Technology Association of America, Arlington, Virginia, 1997, available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/8e/3e.pdf; Help Wanted 1998: A Call for Collaborative Action for the New Millennium, Information Technology Association of America and Virginia Polytechnic Institute and State University, Mar. 1998, available at <http://www.cs.washington.edu/homes/lazowska/press/itaa/WFRpt2.doc>.

47. See *America's New Deficit: The Shortage of Information Technology Workers*, Office of Technology Policy, U.S. Department of Commerce (1997), chart at 3, available at http://findarticles.com/p/articles/mi_qa3797/is_199802/ai_n8804905 (asserting that “between 1994 and 2005 over one million new computer scientists, engineers, systems analysts, and programmers would be required” to fill 820,000 newly created jobs and replace 227,000 workers leaving the fields). See also Enid Trucios-Haynes, *Immigration Symposium: Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L.J. 967, 1006 (2002).

48. See 2005 USCIS H-1B ANNUAL REPORT, *supra* note 43, at 1; Matloff, *On the Need for Reform*, *supra* note 11, at 824–25.

49. Gordon, Mailman & Yale-Loehr, *supra* note 14, at 1. See also Clark & Lau, *supra* note 14.

great as that required to be offered to H-1B nonimmigrants”⁵⁰ Additionally, such employers “must also not have conducted layoffs of American workers for a certain period before filing an H-1B petition, and must not do so for another time period after filing.”⁵¹ Finally, the ACWIA 98 also created the H-1B Nonimmigrant Petitioner Fee account “to fund training and education programs administered by the Department of Labor and the National Science Foundation.”⁵²

In addition to enacting regulations to protect U.S. workers, the ACWIA 98 mandated certain federal administrative agencies to perform studies to keep Congress apprised of the domestic labor demand. Specifically, ACWIA 98 requires the Attorney General to notify Congress, on a quarterly basis, of the number of aliens issued H-1B visas during the preceding three months and to issue annual reports specifying the countries of origin and occupations of, educational levels attained by, and compensation paid to, H-1B employees.⁵³ Further, the ACWIA 98 mandated the National Academy of Sciences to conduct (1) a study “assessing the status of older workers in the information technology field” and (2) a study over the course of the subsequent ten years assessing the “labor market needs for workers with high technology skills.”⁵⁴ Despite these measures, none of these mandates have been properly complied with, with the exception of the National Academy of Sciences ten-year report due sometime in 2009.⁵⁵

In anticipation of the projected increase in the U.S. workforce’s demand for foreign specialty workers, Congress expanded the H-1B category even further with the American Competitiveness Act of 2000 (ACA) and the untitled Public Law 106-311.⁵⁶ The ACA temporarily increased the H-1B

50. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, div. C, tit. IV, 412(a) (Title IV of this act is known as the American Competitiveness and Workforce Improvement Act) [hereinafter ACWIA 98]. *See also* Matloff, *On the Need for Reform*, *supra* note 11, at 825.

51. David C. Yang, *Globalization and the Transnational Asian “Knowledge Class”*, 12 *ASIAN L.J.* 137 (2005), *citing* Hahm, *supra* note 31, at 31.

52. 2005 USCIS H-1B ANNUAL REPORT, *supra* note 43, at 1. *See also* ACWIA 98, *supra* note 50 at 414(b). Employers were required to pay a fee of \$500 for each H-1B application to be put into the account for the purposes of training U.S. workers and for low-income scholarship programs, grants for mathematics, engineering and science enrichment courses, reform activities and duties on petitions. *Id.*

53. 2005 USCIS H-1B ANNUAL REPORT, *supra* note 43, at 1. *See also* ACWIA 98, *supra* note 50 at 414(b).

54. *Id.*

55. 2005 USCIS H-1B ANNUAL REPORT, *supra* note 43, at 1 (noting that the Attorney General’s quarterly reports for 2002–2005 were not provided until 2006 due to “the transition to the Department of Homeland Security”). Also, it is unlikely that the Academy of Sciences will issue a timely report because no such study is listed on the Academy of Sciences’ website as pending. *See generally* <http://www8.nationalacademies.org/cp/> (last visited Jan. 4, 2009).

56. *See* 2005 USCIS H-1B ANNUAL REPORT, *supra* note 43 at 1; Matloff, *On the Need for Reform*, *supra* note 11, at 826.

cap to 195,000 for fiscal years 2001–2003.⁵⁷ In addition to the cap increase, the ACA added a number of other provisions to the H-1B category: (1) exempting foreign workers employed at an institution of higher education or nonprofit entity from the cap;⁵⁸ (2) increasing portability opportunities for H-1B workers to switch employers during their tenure in the United States;⁵⁹ and (3) allowing extensions of H-1B status beyond the six-year limit while such alien's permanent residence application is being adjudicated.⁶⁰ In addition, to further protect U.S. workers, Public Law 106-311 raised the H-1B Nonimmigrant Petitioner Fee from \$500 to \$1,000.⁶¹

Various additional regulations have passed since the ACA, but none have increased the cap. In December 2004, Congress passed the Omnibus Appropriations Act for Fiscal Year 2005, which included the H-1B Visa Reform Act of 2004 (RA 2004), raising the H-1B Nonimmigrant Petitioner Fee to \$1,500 and implementing a new Fraud Prevention and Detection Fee of \$500 with each new H-1B application.⁶² The RA 2004 also added an exemption to the H-1B cap for 20,000 additional H-1B visas for aliens who earn a master's degree or higher from a U.S. institution.⁶³ In addition to the 65,000 cap for regular H-1Bs, the cap for fiscal year 2008 for an additional 20,000 aliens earning master's degrees or higher from U.S. universities was reached on April 30, 2007.⁶⁴

In 2005, a number of bills were proposed to Congress seeking to implement further safeguards to protect American and foreign workers. Examples include the Defend the American Dream Act of 2005 (DADA),⁶⁵ and the USA Jobs Protection Act of 2005 (JPA).⁶⁶ The DADA proposed to set more definite guidelines for wage determination,⁶⁷ a stricter notice requirement for employers seeking H-1B employees,⁶⁸ an increase in the

57. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251, 2000 Enacted S. 2045, 106 Enacted S. 2045 (Oct. 17, 2000), at 102 (amending 8 U.S.C. 1184(g)(1)(A)).

58. *Id.* at 103 (amending 8 U.S.C. 1184(g)).

59. *Id.* at 105 (amending 8 U.S.C. 1184). Portability permits H-1B workers to move to another H-1B qualifying employer during the pendency of their H-1B stay in the United States. *Id.* See generally Gordon, Mailman & Yale-Loehr, *supra* note 14 (noting that portability allows H-1B employees to switch employers during the pendency of their stay in the United States).

60. American Competitiveness in the Twenty-First Century Act of 2000, *supra* note 57 at 106 (amending 8 U.S.C. 1184(g)(4)).

61. Nonimmigrant Worker Visa Fee Increase, 106 Pub. L. 311, 114 Stat. 1247, 2000 Enacted H.R. 5362 (Oct. 17, 2000).

62. Omnibus Appropriations Act, Pub. L. No. 108-447, 118 Stat. 209, div. J, tit. IV, 426(a) (Dec. 8, 2004); 2005 USCIS H-1B ANNUAL REPORT, *supra* note 43 at 1.

63. Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004, 70 Fed. Reg. 23,775 (May 5, 2004) at 23,776.

64. O'Brien, *supra* note 6.

65. H.R. 4378, 109th Cong., 1st Sess. (Nov. 17, 2005).

66. H.R. 3322, 109th Cong., 1st Sess. (July 18, 2005).

67. H.R. 4378, 109th Cong., 1st Sess. (Nov. 17, 2005) at Sec. 2.

68. H.R. 4378, 109th Cong., 1st Sess. at Sec. 4.

petition fee⁶⁹ and creation of a private right of action for U.S. workers displaced by H-1B employees.⁷⁰ The JPA sought to “prevent unintended United States job losses” and to “increase the monitoring and enforcement authority of the Secretary of Labor” over the H-1B and other immigration programs.⁷¹ Neither bill passed Congress.⁷²

In July 2006, Congress considered the American Innovation and Competitiveness Act for enactment.⁷³ Buried in this expansive immigration bill were provisions “nearly doubling the H-1B skilled-worker temporary visas to 115,000— with an option of raising the cap 20 percent more each year.”⁷⁴ This bill never became law and was referred to a congressional committee.⁷⁵ In June 2007, the Senate submitted S. 1639, a comprehensive immigration reform bill known as The Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 (IRA 2007) to the floor.⁷⁶ Among other immigration reforms, the IRA 2007 proposed increasing the cap to 115,000 for fiscal year 2008 and to 180,000 after that.⁷⁷ In exchange for the cap increase, the bill proposed several restrictions on the H-1B program. First, it proposed eliminating “dual intent” for H-1B non-immigrants, preventing H-1 workers and their employers from seeking permanent residence status while in the United States.⁷⁸ Second, it proposed subjecting all employers to burdensome rules currently applied only to “willful violators” or H-1B dependent employers.⁷⁹ Such regulations would include requiring employers to make substantial efforts to locate U.S. workers with the necessary skill sets to fill the position.⁸⁰ Finally, IRA 2007 proposed the implementation of a \$5,000 “training fee” for each H-1B application. The “training fee” funds were to

69. *Id.* at Sec. 8.

70. *Id.* at Sec. 10.

71. H.R. 3322, 109th Cong., 1st Sess. (July 18, 2005).

72. GovTrack.us, H.R. 4378 [109th]: Defend the American Dream Act of 2005, <http://www.govtrack.us/congress/bill.xpd?bill=h109-4378> (confirming the bill was never passed and was referred to the Senate Judiciary Committee on Immigration, Border Security and Claims on Feb. 6, 2006); GovTrack.us, H.R. 3322 [109th]: USA Jobs Protection Act of 2005, <http://www.govtrack.us/congress/bill.xpd?bill=h109-3322> (confirming the bill was never passed and was referred to the Senate Judiciary Committee on Immigration, Border Security and Claims on Aug. 23, 2005).

73. GovTrack.us, S. 2802 (109th): American Innovation and Competitiveness Act of 2006, <http://www.govtrack.us/congress/bill.xpd?bill=s109-2802>.

74. Lochhead, *supra* note 15.

75. GovTrack.us, S. 2802 (109th): American Innovation and Competitiveness Act of 2006, <http://www.govtrack.us/congress/bill.xpd?bill=s109-2802>.

76. Stephen Yale-Loehr and Ted J. Chiappari, *The Senate Immigration Reform Bill: The Case of the Twitching Toe*, 12-13 BENDER'S IMMIGR. BULL. 9 (July 1, 2007), appearing in N.Y.L.J., June 25, 2007.

77. *Id.* at 4.

78. *Id.*

79. *Id.*

80. *Id.*

be allocated for educating and training U.S. workers.⁸¹ The bill never became law.⁸²

In somewhat of a response to the defeat of IRA 2007, in August 2007 Congress passed, and President Bush signed into law, the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act (Competes Act),⁸³ which authorized “funding of \$43.3 billion . . . for [science, technology, engineering, and mathematics] research and education programs at the federal level, including scholarship and grant programs.”⁸⁴ The Competes Act was viewed as addressing the “long term challenges of building the pipeline for tech talent, although changes in immigration policies, including increasing the cap on H-1B visas, would help U.S. tech employers tackle the short term skills gap.”⁸⁵ While the Competes Act aims to meet the long-term challenges of the shortage of IT workers, it is unlikely to work in the short term; thus, U.S. employers still call for an increase in the cap.⁸⁶

Recent reports and studies continue to document the increasing need for IT workers in the United States workforce. Specifically, the DOL publishes an annual Occupational Outlook Handbook (OOH) listing U.S. job positions, describing the education requirement, average earnings, and job outlook in the field.⁸⁷ For computer/technology related fields in 2006–2007, the OOH listed the outlook for most categories as expecting to increase “much faster than average.”⁸⁸ Furthermore, the DOL lists software publishers, scientific and technical consulting services, and computer

81. *Id.*

82. S. 1639, 110th Cong., 1st Sess. (June 29, 2007); GovTrack.us, AGjobs Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=s110-1639> (Noting that as of October 20, 2007, “this bill is in the first stage of the legislative process where the bill is considered in committee and may undergo significant changes in markup sessions.”).

83. The America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act, H.R. 2272, 110th Cong. (Aug. 9, 2007).

84. *Congress Pushes for More Tech Education, R&D Programs*, TECHWEB, Aug. 2, 2007.

85. *Id.* (internal citations omitted).

86. *Id.* at 84.

87. Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook 2008/2009, www.bls.gov (last visited Jan. 4, 2009).

88. Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook 2008/2009: Computer Software Engineers, <http://www.bls.gov/oco/ocos267.htm#outlook> (last visited Jan. 4, 2009); Department of Labor, Occupational Outlook Handbook 2008/2009: Computer Support Specialists and Systems Administrators, <http://www.bls.gov/oco/ocos268.htm#outlook> (last visited Jan. 4, 2009); Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook 2008/2009: Computer Systems Analysts, <http://www.bls.gov/oco/ocos287.htm> (last visited Jan. 4, 2009); Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook 2008/2009: Computer Scientists and Database Administrators, <http://www.bls.gov/oco/ocos042.htm> (last visited Jan. 4, 2009). *But see* Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook 2008/2009: Computer Programmers, <http://www.bls.gov/oco/ocos110.htm> (last visited Jan. 4, 2009). Computer Programmer is the only computer-related occupation where job growth is expected to be lower than average. *Id.*

systems design and related services in its top ten industries with the fastest wage and salary employment growth for 2004–2014.⁸⁹

While the hype has quieted since the enactment of the Competes Act, interest groups will continue to mobilize, attempting to influence Congress for the next proposed immigration reform bill. Meanwhile, the U.S. labor market is suffering at the hands of the H-1B cap,⁹⁰ putting U.S. jobs at risk to off-shoring⁹¹ and putting the United States in danger of losing its most valuable resource in the twenty-first century, intellectual capital.⁹²

IV. DEBUNKING ARGUMENTS AGAINST AN INCREASE IN THE CAP AND AGAINST THE H-1B VISA CATEGORY IN GENERAL

A. THE LABOR SHORTAGE

One of the leading arguments against the H-1B category is that the IT industry's "claim of a desperate labor shortage [is] invalid and was devised to hide the industry's real goal— to use the H -1B program as a source of cheap labor."⁹³ Various software experts have published studies and have appeared before Congress to support their claims that no labor shortage exists.⁹⁴

In order to refute the IT industry's "labor shortage" claims as unreliable, critics refer to various other studies conducted around the time the ITAA reports were released.⁹⁵ However, the studies cited by critics point mainly to methodological problems in the data and analysis of the ITAA reports, rather than actually providing data counter-indicative of the

89. Department of Labor, Bureau of Labor Statistics, Industries With the Fastest Growing Wage and Salary Employment Growth, 2004-14, <http://www.bls.gov/emp/empfastestind.htm> (last visited Jan. 4, 2009).

90. See discussion *infra* Part V.

91. See discussion *infra* Part V.B.

92. See discussion *infra* Part V.A.

93. See generally Matloff, *On the Need for Reform*, *supra* note 11, at 816 (arguing that the central issue behind the IT Industry's claims of the shortage is money). See also Trucios-Haynes, *supra* note 47, at 967; Teitelbaum, *supra* note 46.

94. See Matloff, *On the Need for Reform*, *supra* note 11, at 833. See also Matloff, *Debunking the Myth*, *supra* note 24.

95. See generally Matloff, *On the Need for Reform*, *supra* note 11, at 833–39 (citing a study by economist Robert Lerman, "pointing out various methodological problems in the ITAA report" at 835; a paper by Bureau of Labor Statistics researcher Carolyn Veneri, pointing out problems with the ITAA's analysis of its data at 835–36; a statement by the Department of Commerce (DOC) in 1999, reversing its position on the conclusiveness of the ITAA data at 836; a 1999 report issued by The Computer Research Association (CRA), noting additional "problems with the analyses of unemployment rates" at 836; a 2000 congressionally-commissioned National Research Counsel Report (NRC), noting a "'tightness' rather than a 'shortage'" in the IT labor market at 839; an analysis by the University of Pennsylvania's Wharton School, expressing a "general puzzlement at the lack of good indicators in the data of a shortage" but noting that the industry's claim was made in good faith at 839; and the IT Workforce Data Project, "a four-part series on the IT labor force," "finding that one could not conclude from the data that there was a shortage" at 837–38).

ITAA conclusions.⁹⁶ In addition, proponents of the H-1B visa contend that the debate regarding the labor shortage is irrelevant because “the number of jobs available in America is not a static number”⁹⁷ Rather, the labor market grows “based on several factors, including labor force growth, technology, education, entrepreneurship, and research and development.”⁹⁸ Thus, prohibiting an increase in the entrance of highly skilled workers in the IT sector stifles the growth of that industry for both foreign and native workers.

Critics also claim that the apparent labor shortage is actually a result of U.S. employers’ “pickiness.”⁹⁹ They assert that IT employers “have no shortage of incoming resumes,”¹⁰⁰ that only approximately 2% of applicants actually are hired,¹⁰¹ and that most employers reject a majority “of the applicants they invite for in-house interviews.”¹⁰² While IT companies admittedly are selective,¹⁰³ certain IT positions require particular skill sets.¹⁰⁴ Without certain training or skills required by the position, an applicant will not be considered for it. Critics argue that, “good generic programming ability, not skills in particular programming languages, is what counts,”¹⁰⁵ and that “workers are available, but not always at a price employers are willing to pay.”¹⁰⁶ On the other hand, it seems unfair to place the burden and expense on employers to train under-qualified employees in the specific skill sets required for the position when there are workers available who are already trained. The issue is an ongoing circular debate.

B. PAYING H-1B WORKERS THE PREVAILING WAGE

Critics assert that IT companies pay foreign workers less than comparable American workers.¹⁰⁷ They occasionally refer to a 2004 report by John Miano for the Center on Immigration Studies (CIS Report), which asserts that wages paid to H-1B workers in computer programming occupations are significantly lower than wages paid to U.S. workers in the

96. *Id.* See also Trucios-Haynes, *supra* note 47, at 1007. The NRC Report “found that there is no formula to adopt the necessary number of H-1B visas.” A 1999 study by the National Science Foundation “found that there is no adequate information to answer the question of whether there is a shortage of information technology workers, but only inferential information.” *Id.*

97. NFAP, *Setting the Record Straight*, *supra* note 10, at 3.

98. *Id.* at 3–4.

99. Matloff, *On the Need for Reform*, *supra* note 11, at 843.

100. *Id.*

101. *Id.* at 845.

102. *Id.* at 844 and Tables 2 and 3.

103. *Id.* at 845 (“When asked [the author’s] citing of a low 2 percent hiring rate, Microsoft admitted that it is ‘very, very selective.’”).

104. *Id.* at 846.

105. *Id.* at 864.

106. *Id.* at 847.

107. *Id.* at 816.

same occupation and state.¹⁰⁸ Specifically, the CIS Report asserts that the difference between wages paid to U.S. workers and wages paid to H-1B workers in fiscal year 2004 was over \$18,000 per worker, on average.¹⁰⁹ The CIS Report notes that some of the largest IT companies in the United States paid their H-1B workers much less than the prevailing wage, including Motorola (\$19,584), EMC Corporation (\$15,004), eBay (\$14,493) and IBM (\$12,681).¹¹⁰

However, the CIS Report is misleading for a number of reasons. First, the data utilized in this report does “not reveal what employers *actually pay* individuals on H-1B visas.”¹¹¹ The CIS Report data was taken from the LCAs filed with the Department of Labor in 2003. However, the wage data provided by employers on LCAs does not necessarily reflect what salary the H-1B holder actually receives.¹¹² Rather, the prevailing wage reported on the LCA is a “minimum requirement and is usually lower than what the H-1B visa holder actually receives,”¹¹³ making the CIS Report inherently flawed.¹¹⁴ For example, when employers complete the wage amount question on the LCA application, they may fill in the number that is the current prevailing wage as listed in the OOH, rather than the wage that they will actually pay the employee. Second, many of the other big name employers do, in fact, pay their workers “the premium wages one would expect for ‘highly skilled workers.’”¹¹⁵ For example, Apple is listed as paying its H-1B workers over \$19,000 higher than the U.S. prevailing wage, with Sun Microsystems, Intuit and Qualcomm not far behind.¹¹⁶ Third, these statistics do not strengthen the argument that employers abuse the system intentionally. Rather, the real problem lies with the law’s ineffectiveness in ensuring that H-1B workers are paid the prevailing wage.¹¹⁷ Finally, various studies contradict critics’ findings of abuse and find, rather, that most employers pay H-1B workers more than U.S.

108. Miano, *The Bottom of the Pay Scale*, *supra* note 33, at 6.

109. *Id.* See also, Miano, Testimony before Subcommittee on Immigration, *supra* note 22, at 10.

110. Miano, Testimony before Subcommittee on Immigration, *supra* note 22, at 13–14 Table 2.

111. NFAP, *Setting the Record Straight*, *supra* note 10, at 9.

112. See *id.*

113. *Id.*

114. Miano, Testimony before Subcommittee on Immigration, *supra* note 22, at 13–14 Table 2.

115. *Id.* at 14.

116. *Id.* at 13, Table 2.

117. See Miano, *The Bottom of the Pay Scale*, *supra* note 33, at 8. See discussion on the LCA *infra* Section V. See also Susan Martin, B. Lindsay Lowell & Phillip Martin, *U.S. Immigration Policy: Admission of High Skilled Workers*, 16 GEO. IMMIGR. L.J. 619, 632 (2002) (referring to Lindsay Lowell, *Information Technology Companies and U.S. Immigration Policy: Hiring Foreign Workers*, INSTITUTE FOR THE STUDY OF INTERNATIONAL MIGRATION, SCHOOL OF FOREIGN SERVICE, GEORGETOWN UNIVERSITY (2000), available at <http://riim.metropolis.net/Virtual%20Library/2000/wp00S4.pdf>. Studies show that “employers are, by and large, good actors and their need for highly skilled foreign workers is legitimate.” *Id.*

workers.¹¹⁸ Such studies take into account factors such as age,¹¹⁹ the benefits H-1B workers receive, and the expenditures U.S. employers incur in obtaining the H-1B visa.¹²⁰ In addition, even though H-1B workers are not from the United States, they “are still smart people,” and “if [employers] try to fool with them,” these workers can and will simply go elsewhere because of the labor demand.¹²¹ Therefore, the assertion that U.S. employers are “taking advantage” of foreign H-1B workers is simply not reasonable.

C. DISPLACEMENT OF AMERICAN WORKERS

Critics also argue that H-1B workers displace American workers,¹²² especially older workers, women and minorities.¹²³ “Older workers are perceived as being more expensive than younger ones,”¹²⁴ and thus “when employers exhaust the supply of young American workers, they turn to hiring younger H-1Bs in lieu of older Americans.”¹²⁵ Some companies acknowledge that while “they would prefer to hire an American to avoid the paperwork and lawyer’s fees involved in sponsoring a foreign worker’s visa,” some managers “don’t hire many Americans because recruiting them is time consuming; most of the resumes they receive from their human resources department[s] are for foreign workers.”¹²⁶

Yet Congress has implemented a number of safeguards in the H-1B visa category to prevent displacement of U.S. workers. One example is the ACWIA 98 legislation,¹²⁷ wherein Congress directed the National Research Council to study this issue of displacement of older American workers.¹²⁸ The report, released in late 2000, confirmed that “older IT workers indeed faced major obstacles in finding work in the field, even during boom times.”¹²⁹ Congress has made attempts to curb the H-1B effect on older

118. NFAP, *Setting the Record Straight*, *supra* note 10, at 5 (referring to research by Paul E. Harrington, associate director for the Center for Labor Market Studies at Northeastern University).

119. *See id.* at 5–7.

120. *Id.* at 6–7 and Table 1.

121. Hahm, *supra* note 31, at 1697 n.170 (quoting “a foreign-born engineer who interviews prospective hires”).

122. Schiller, *supra* note 22, at 650.

123. Carrie Kirby, *On the Sidelines; H-1B Leaves Minority Workers on Sidelines, Groups Say*, S.F. CHRON., Oct. 19, 2000 at B1 (“Many African Americans, Latinos, women, older workers and other groups underrepresented in the high-tech industry say the H-1B program . . . is short-circuiting their opportunities.”).

124. Matloff, *On the Need for Reform*, *supra* note 11, at 887.

125. *Id.*

126. Kirby, *supra* note 123, at B1.

127. ACWIA 98, *supra* note 50.

128. *See id.* at 656; *see also* Matloff, *On the Need for Reform*, *supra* note 11, at 826.

129. Matloff, *On the Need for Reform*, *supra* note 11, at 826.

workers by funding the training of older American workers in the technology field with an extra fee imposed on H-1B visa applications.¹³⁰

In addition, there is evidence that “failure to raise the H-1B ceiling is what will deprive Americans of jobs in the high-tech industry.”¹³¹ A number of the largest IT firms in the United States employing U.S. and foreign workers such as Sun Microsystems,¹³² Google,¹³³ Intel,¹³⁴ Oracle and Computer Associates were either partly or totally founded by foreigners.¹³⁵ For example, “James Gosling, a Canadian national, developed the Java platform that transformed computer software development.”¹³⁶ Non-U.S. employers create thousands of jobs in the United States, thus weakening the correlation between immigration and displacement of U.S. workers.

D. BODY SHOPPING

Critics argue that many U.S. employers abuse the H-1B program, specifically with the use of “body shopping.” Body shopping is the name given to the practice whereby placement agencies bring H-1B visa workers into the United States and “then contract the workers out to other companies on a work-for-hire basis, in an attempt to avoid statutory wage requirements.”¹³⁷ The advantage of body shopping for employers is that they can pay the employees lower wages by allowing the contracting employer to claim it never hired any H-1B workers, and the body shopping company to say it never fired any U.S. employees.¹³⁸ While body shopping is a large problem in the United States for various reasons discussed more fully below, body shopping is likely a result of, rather than a justification for, the cap.

There are a multitude of problems with the practice of body shopping. “[B]ody shops circulate lists of available H-1B workers to employers, placing them in direct competition with U.S. workers seeking similar jobs.”¹³⁹ Body shopping also leads to abuse of foreign workers. For example, since companies contract out their H-1B workers, sometimes not all of the workers have work assignments. Instead of paying the workers the

130. ACWIA 98, *supra* note 50, at 652; *see also* Matloff, *On the Need for Reform*, *supra* note 11, at 825. It is argued, however, that this plan failed because the money was used to train workers in alternate fields. Matloff, *On the Need for Reform*, *supra* note 11, at 826.

131. Schiller, *supra* note 22, at 650.

132. *Id.* at 651.

133. Traven, *supra* note 29, at 693.

134. Anderson, *supra* note 10, at 1.

135. *See* Editorial, *Review and Outlook: Jobs and Immigrants*, WALL ST. J., Aug. 26, 2005, at A12.

136. Schiller, *supra* note 22, at 651.

137. Goodsell, *supra* note 20, at 156.

138. *Id.* at 168. *See also* Miano, Testimony before Subcommittee on Immigration, *supra* note 22, at 17.

139. Miano, *The Bottom of the Pay Scale*, *supra* note 33, at 4.

prevailing wage as they are required to do, body shopping agencies “bench” the H-1B workers by not paying them or “pay[ing] them a reduced rate when they have no actual work.”¹⁴⁰ In addition, body shopping adds to the problem of displacement of U.S. workers¹⁴¹ because the H-1B workers are paid lower wages and are thus more attractive to employers.

Some studies claim that the top twenty H-1B employers in the United States, with the exception of Oracle, are body shoppers.¹⁴² In addition, the same studies estimate that two-thirds of the H-1B workers “in computer programming occupations are going to employers in the . . . [body shopping] industries.”¹⁴³ If body shopping is actually as prevalent as some critics assert, then body shopping employers frustrate the aims of the H-1B program by abusing foreign workers, displacing U.S. workers and using up much needed visas otherwise available for legitimate employment positions. Thus, those opposing an increase in the visa cap argue that by banning the practice of body shopping or limiting the number of H-1B visas a single employer can have, a great majority of visas will open up, quashing the necessity of increasing the cap.¹⁴⁴

Instead, however, the H-1B cap may be the cause of body shopping in the United States, and if the cap is abolished, the practice of body shopping will likely decline or disappear altogether. In 2003, once the cap reverted to 65,000 from 195,000,¹⁴⁵ employment placement agencies and consulting firms such as MindTree and Wipro, two of the largest body shoppers, began “scrambling to build teams of visa-ready people.”¹⁴⁶ They were forced to anticipate what skills their clients would need in the next few years and thus make efforts to mobilize enough H-1B visas to “manage a supply imbalance that was expected to emerge”¹⁴⁷ Thus, the 65,000 cap created a high demand for H-1B visas, which led employment and recruiting agencies to obtain as many H-1B workers as possible for themselves and their clients.¹⁴⁸ In turn, as a result of these agencies hoarding H-1B visas, it is likely that the abusive body shopping practices developed because the

140. Miano, Testimony before Subcommittee on Immigration, *supra* note 22, at 18.

141. *Id.* at 18.

142. Goodsell, *supra* note 20, at 168 (citing Miano, Testimony before Subcommittee on Immigration, *supra* note 22). These body shopping companies include Wipro Ltd., Infosys Technologies, Syntel, HPS America, IBM Global Service India, Tata Consultancy Services, Satyam Computer Services, Patni Computer Systems, Mphasis Corporation, Intelligroup, eBusiness Application Solutions, iGate Mastech, HCL Technologies America, Tata Infotech, Enterprise Business Solutions, Cognizant Technology Solutions, Rapidigm, IntelliQuest Systems and Jags Software. *Id.*

143. Miano, Testimony before Subcommittee on Immigration, *supra* note 22, at 9.

144. Goodsell, *supra* note 20, at 171.

145. Saritha Rai, *Cap on U.S. Work Visas Puts Companies in India in a Bind*, N.Y. TIMES, Oct. 1, 2003 at W1.

146. *Id.*

147. *Id.*

148. *Id.*

agencies could not afford to pay H-1B workers who were not assigned to jobs. Therefore, raising or abolishing the cap will reduce the pressure to mobilize a supply of H-1B visas, thus eliminating the practice of body shopping altogether.

E. PROBLEMS WITH THE LCA

The LCA is the principal means through which the Department of Labor “regulates” the H-1B visa category. The avowed purpose of the LCA process is to assist the employer in determining whether “there ‘are not sufficient workers who are able, willing, qualified . . . and available’ and that the employment of the non-citizen ‘will not adversely affect the wages and working conditions of workers in the United States similarly employed.’”¹⁴⁹ Many critics argue that the current LCA system “is grossly inefficient and, at worst, irrational”¹⁵⁰ because it is not sufficient to accomplish its purpose.¹⁵¹ Further, critics argue that the LCA “does not tell what happens beyond the labor condition process,” and thus is inadequate to monitor and protect H-1B workers once they disappear into the U.S. interior.¹⁵²

Prior to filing its H-1B petition, the U.S. employer must undergo a four-step labor certification process in order to sufficiently complete the LCA. The first and most troubling step of the labor certification process is to establish the wage requirement for the position to be filled and to acknowledge that the employer will pay the H-1B employee the required wage rate.¹⁵³ The “wage rate” is defined as “the greater of the actual wage rate . . . or the prevailing wage”¹⁵⁴ One of the greatest criticisms of the LCA is the way “wage rate” is defined in the statute.¹⁵⁵ The statutory definition of “actual wage” is the “rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors.”¹⁵⁶ To determine the prevailing wage,

the employer shall base the prevailing wage on the best information as of the time of filing the application [T]he employer is not required to use any specific methodology to determine the prevailing wage and may

149. Trucios-Haynes, *supra* note 47, at 979–80 (citing IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. § 1182(a)(5)(i) (2000)).

150. Trucios-Haynes, *supra* note 47, at 986.

151. *See generally id.*

152. Miano, Testimony before Subcommittee on Immigration, *supra* note 22, at 6.

153. 20 C.F.R. 655.731 (2009).

154. 20 C.F.R. 655.731(a) (2009).

155. *See generally* Miano, *The Bottom of the Pay Scale*, *supra* note 33.

156. 20 C.F.R. 655.731(a)(1) (2009).

utilize a [state employment service agency], an independent authoritative source, or other legitimate sources of data.¹⁵⁷

Allowing an employer to base its determination of wage on either the wage amount paid to similar employees or by the “best information,” without requiring any “specific methodology,” gives employers too much freedom in designating the wage rate for the position.¹⁵⁸ Studies show that the value of prevailing wages claimed in LCA applications is not representative of the actual prevailing wage of a given occupation.¹⁵⁹ Further, there is no actual person evaluating the employer’s asserted wage rate.¹⁶⁰ Thus, only if the employee makes a complaint will the wage rate be subject to scrutiny.¹⁶¹

The remaining requirements of an employer under the labor condition process include that the employer assert: (1) “that the employment of H-1B non-immigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment;”¹⁶² (2) that “there is not at that time a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;”¹⁶³ and (3) that “the employer has provided notice of the filing of the labor condition application to the bargaining representative of the employer’s employees . . . or, if there is no such bargaining representative, has posted notice of filing in conspicuous locations in the employer’s establishment(s) in the area of intended employment”¹⁶⁴ Again, like the determination of the wage rate, the LCA requires only a statement by the employer of the truthfulness of the application.¹⁶⁵ There is no administrative review of any of the statements until a complaint of abuse is made.¹⁶⁶ Further, unless the employer is an H-1B dependent, there is no requirement that the employer make any attempt to recruit U.S. workers for the position.¹⁶⁷ Many of the problems asserted by critics of the H-1B visa, including failure of employers to pay the prevailing wage,¹⁶⁸ displacement of U.S. workers for

157. 20 C.F.R. 655.731(a)(2) (2009) (emphasis added).

158. Miano, *The Bottom of the Payscale*, *supra* note 33, at 15 (“Employers should be required to use a standard wage source produced by the federal government when making prevailing wage claims for LCAs. Allowing employers to pick from nearly any wage source is not a valid measure of the prevailing wage.”).

159. Miano, Testimony before Subcommittee on Immigration, *supra* note 22, at 10–11.

160. Miano, *The Bottom of the Payscale*, *supra* note 33, at 4 (“Unfortunately, the LCA system has been nothing more than a paper-shuffling process. The Department of Labor does not actually verify the data within an LCA or make approval judgments based upon its contents.”).

161. Kirby, *supra* note 123, at B1 (“The Department of Labor does not verify the salary information on visa applications unless a complaint is filed.”).

162. 20 C.F.R. 655.732 (2009).

163. 20 C.F.R. 655.733 (2009).

164. 20 C.F.R. 655.734 (2009).

165. Miano, *The Bottom of the Payscale*, *supra* note 33, at 4.

166. Kirby, *supra* note 123, at B1.

167. See Goodsell, *supra* note 20, at 159.

168. See discussion, *supra* Part IV.B.

lower paid H-1B employees¹⁶⁹ and abuse by body shopping agencies,¹⁷⁰ are a result of the failure of the LCA system to act as a safeguard. As a result, the LCA process is in dire need of reform, and any H-1B reform legislation will need to include LCA reforms in addition to an increase in the cap.

V. SUPPORTING ARGUMENTS FOR INCREASING THE CAP

In addition to the high demand for workers, proponents remind us that the H-1B visa enables the world's best and brightest to come to the United States, allowing it to maintain its status as a leading innovative economy.¹⁷¹ "In today's knowledge-based economy, capturing value from intellectual capital and knowledge-based assets has gained even more importance. Global competition is no longer for the control of raw materials, but for this productive knowledge."¹⁷² If the cap remains at 65,000 and companies are not able to hire the workers they need, there will be severely detrimental effects on the U.S. economy. More companies will begin off-shoring their operations to more immigration-friendly nations such as Canada, Germany and the United Kingdom, or to countries where labor is less expensive.¹⁷³ Furthermore, fewer foreign nationals will enroll in U.S. universities because they will have no hope of remaining in the United States after graduation.¹⁷⁴ While all agree that the H-1B category needs reform, proponents argue that the protections mandated by the USCIS are taken seriously and that critics over-exaggerate the abuse of the category.¹⁷⁵

A. THE LOW CAP DEPRIVES THE U.S. OF MUCH-NEEDED INNOVATIVE TALENT

Proponents of raising the cap argue that preventing foreign students who attend U.S. universities from accepting positions in the United States "will be detrimental to our economic success because the United States will

169. See discussion *supra* Part IV.C.

170. See discussion *supra* Part IV.D.

171. Deborah Rothberg, *H-1B Increase Quietly Passes First Hurdle*, EWEEK, May 31, 2006, <http://www.eweek.com/article2/0,1759,1969617,00.asp> (quoting Bill Gates referring to a 2006 Immigration Reform Bill that was passed by the Senate but not the House, "By passing comprehensive immigration reform legislation today that makes prudent adjustments to the annual H-1B visa and green card caps for high skilled employees, the U.S. Senate has taken a critical step forward in its important work to ensure that our nation remains the global leader in technology innovation.").

172. Vivek Wadhwa et al., *Intellectual Property, the Immigration Backlog, and a Reverse Brain-Drain: America's New Immigrant Entrepreneurs, Part III* (Sponsored by the Duke University School of Engineering, New York University, Harvard Law School and Ewing Marion Kauffman Foundation) (Aug. 2007) at 2 [hereinafter Wadhwa et al., *America's New Immigrant Entrepreneurs*].

173. See discussion *infra* Part V.B.

174. Anderson, *supra* note 10, at 2 ("[T]he availability of H-1B visas is important, otherwise skilled foreign nationals, particularly graduates of U.S. universities, could not work or remain in the United States.").

175. See generally NFAP: Setting the Record Straight, *supra* note 10.

lose valuable intellectual capital.”¹⁷⁶ Some allege that U.S. visa policies, specifically Congress’s refusal to raise the H-1B cap, “are primarily to blame for the decline in international student enrollment in U.S. academic institutions.”¹⁷⁷ Thousands of foreign students enter the United States each year on F, M and J visas to attend U.S. universities.¹⁷⁸ Not only is their attendance at these universities beneficial to the economy by injecting capital through tuition and living expenses,¹⁷⁹ but their creative ideas are also crucial to our modern economy, which focuses on innovation.¹⁸⁰ The cap prevents many of these graduating students from being placed in jobs in the United States, forcing them to return to their home countries.¹⁸¹ Thus, “instead of maximally retaining foreign talent . . . U.S. immigration policies have expelled such individuals back to their home countries, where they have contributed to local workforces’ ability to compete on a national basis with the [United States].”¹⁸²

In addition to the loss of a well-educated workforce, the H-1B cap prevents the United States from being credited for the innovation of valuable intellectual property. In 2006, foreign nationals residing in the United States filed 25.6% of the international patent applications.¹⁸³ “Foreign nationals and foreign residents contributed to more than half of the international patents” filed by multi-national companies such as Qualcomm, Merck & Co., General Electric, Siemens and Cisco in 2006.¹⁸⁴ Furthermore, “41% of the patents filed by the U.S. government had foreign nationals or foreign residents as inventors or co-inventors.”¹⁸⁵ In addition, 16.8% and 13.7% of international patent applications from the United States had an inventor or co-inventor with a Chinese or Indian-heritage name, respectively.¹⁸⁶ Finally, one study shows that “for every 100 international students who receive science or engineering Ph.D.’s from American universities, the nation gains 62 future patent applications.”¹⁸⁷ It is clear

176. Traven, *supra* note 29, at 695.

177. *Id.*

178. *Id.* at 697 (“A significant number of students attending U.S. universities, both in undergraduate and graduate programs, are international students. In the 2002–2003 school year alone, nearly 600,000 foreign students were enrolled in U.S. academic institutions.”).

179. *See generally id.* at 698–99. *See also id.* at 713 (F and M student visas) and 715–17 (J exchange visitor visas).

180. *Id.* at 701 (“The number of workers in the creative class is directly related to the importance that the U.S. economy has placed on creativity.”).

181. *See Review and Outlook, supra* note 135.

182. Yang, *supra* note 51, at 154.

183. Wadhwa et al., *America’s New Immigrant Entrepreneurs, supra* note 172, at 3.

184. *Id.* at 4.

185. *Id.*

186. *Id.*

187. Stuart Anderson, *The Debate Over Immigration’s Impact on U.S. Workers and the Economy*, NATIONAL FOUNDATION FOR AMERICAN POLICY (July 2006) (citing Gnanajaraj Chellaraj, Keith E. Maskus, and Aiditya Matoo, *The Contribution of Skilled Immigration and*

from these statistics that the U.S. economy is dependent on the innovative ideas of foreigners. “‘Economists worry about another place owning the very next big thing’ – the next ground breaking technology ‘If the heart and mind of the next great thing emerges somewhere else because the talent is there, then we will be hurt.’”¹⁸⁸ If the H-1B cap remains at this current unsatisfactory level, it will prevent the admission of foreign workers with new ideas.¹⁸⁹

B. OFF-SHORING

Proponents of the H-1B visa argue that the visa cap threatens to set the United States behind in innovation and science and actually increases layoffs of U.S. workers because it encourages off-shoring.¹⁹⁰ If employers in the United States cannot hire foreign workers with the experience and training required, “then companies who are trying to remain globally competitive are left with only one solution: shifting those operations off-shore.”¹⁹¹ Many U.S. companies “concede that the uncertainty created by Congress’ inability to provide a reliable mechanism to hire skilled professionals has encouraged placing more human resources outside the United States to avoid being subject to legislative winds.”¹⁹²

While the practice of off-shoring began mainly with the working class, commonly with apparel workers, and then moved into areas like customer service (as with American Express), a number of IT industry leaders such as IBM have begun the practice of off-shoring some of their technical support positions and software jobs.¹⁹³ Companies are finding that “knowledge-based endeavors,” such as technical support positions and software jobs, “require relatively little overhead costs beyond a basic telecommunications infrastructure.”¹⁹⁴ Moreover, information-based productive activities involve far less complex issues of coordination by virtue of the ability of

International Graduate Students to U.S. Innovation (Mar. 17, 2005)), available at <http://www.nfap.com/researchactivities/studies/EDO0706.pdf>.

188. June Kronholz, *Under a Cloud: For Dr. Sengupta, Long-Term Visa Is a Long Way Off—Rules Limit Entry, Prospects Of Foreign-Born Scientists Despite Demand for Them—Latest in Weather Satellites*, WALL ST. J., June 27, 2006, at A1 (quoting Dan Siciliano, Stanford University economist).

189. See generally Traven, *supra* note 29.

190. See generally Tracy Halliday, *Current Public Law and Policy Issues: The World of Offshoring: H-1B Visas Can be Utilized to Curb the Business Trend of Offshoring*, 25 HAMLINE J. PUB. L. & POL’Y 407 (2004).

191. *Id.* at 426.

192. NFAP, *Setting the Record Straight*, *supra* note 10, at 3. See also Hahm, *supra* note 31, at 1692 (“This uncertainty and confusion [of visa caps arbitrarily determined by the legislature failing to accurately predict the needs of the industry] will inevitably result in the high-tech firms moving overseas, closer to the ready source of skilled human capital.”).

193. Halliday, *supra* note 190, at 408–09.

194. Yang, *supra* note 51, at 153.

work products to “move unencumbered by the limits of time and space as bits and pixels in global communication networks.”¹⁹⁵

Most recently, Microsoft Corp. announced the plan to open a large software development center in Vancouver to enable it to “recruit and retain highly skilled people affected by immigration issues in the [United States].”¹⁹⁶ The stated benefits for companies engaging in off-shoring are plentiful and include cheaper labor (which benefits consumers), economic efficiency and the ability to bring new job opportunities to third world nations.¹⁹⁷ However, off-shoring has many disadvantages including the loss of American jobs, which forces more people into unemployment and hurts the U.S. economy.¹⁹⁸ Other disadvantages include the risk of abuse of workers in foreign countries who are forced to work for low wages¹⁹⁹ and most relevant, the risk of the United States “losing its leading role in innovation.”²⁰⁰ If the cap remains low, then foreigners who make up a significant portion of U.S. university science graduates, and “who have been extremely helpful to U.S. technological success” will no longer be able to come to the United States with their creative and innovative ideas,²⁰¹ thus depriving the United States of the vital brain power needed to remain a leading intellectual influence in the global realm.

As more and more U.S.-educated foreign students are forced to leave the United States after graduation for lack of available visas, they return to their home countries, which become “attractive locales for off-shoring.”²⁰² The cap on the H-1B visa “has resulted in a highly educated class of knowledge workers in Asian countries that is acculturated to U.S. business

195. *Id.*

196. Todd Bishop, *Microsoft Plans to Open Software Center in B.C.*, SEATTLE POST-INTELLIGENCER, July 6, 2007 at 1.

197. Halliday, *supra* note 190, at 414–15.

198. *Id.* at 416.

199. *Id.* at 418.

200. *Id.* at 418.

201. *Id.* at 419.

202. Yang, *supra* note 51, at 154. *But see* Wadhwa et al., *America’s New Immigrant Entrepreneurs*, *supra* note 172, at 2. Adding to the off-shoring problem is that “the number of skilled workers waiting for visas [green cards] is significantly larger than the number that can be admitted to the United States. This imbalance creates the potential for a sizeable reverse brain-drain from the United States to the skilled workers’ home countries.” *Id.* Therefore, it can be argued that increasing the visa cap for H-1B workers, who will eventually seek permanent residence status in the United States, without *also* increasing the limit on employment-based immigration, will still worsen the backlog on permanent residence applications and thus will not prevent knowledge-based H-1B workers from returning back to their countries of origin after their six-year terms are expired if they cannot obtain green cards. Under these facts, increasing the H-1B visa cap alone will not likely solve the off-shoring problem. *See also* Scott Duke Harris, *Now Playing in Immigration Politics, the ‘Reverse Brain Drain’*, SAN JOSE MERCURY NEWS, Aug. 22, 2007 (“The tight cap on permanent visas may force entrepreneurs back home to create rival companies in China, India and elsewhere. To avoid the possibility of a ‘reverse brain drain,’ they urged immigration reform to allow skilled immigrants to stay, thus protecting the U.S. competitive advantage.”).

practices and prepared to conduct business on global terms.”²⁰³ Thus, U.S.-trained talent returns to its home countries where U.S. companies have established operations for cheaper wages and less overhead.²⁰⁴

C. THE LOW CAP ON H-1B VISAS HURTS HIRING PRACTICES OF U.S. COMPANIES

The impact of the low visa cap has been felt by large and small companies alike. Companies argue that the current cap “considerably hampers . . . hiring practices.”²⁰⁵ Google, whose co-founder Sergey Brin came from the Soviet Union as a young boy,²⁰⁶ reported that in 2007 the low H-1B cap “prevented more than 70 candidates from receiving H-1B visas.”²⁰⁷ Further, Google’s Executive Vice President of People Operations, Lazlo Bock, testified before the House Judiciary Subcommittee on Immigration in June 2007 that failing to increase the visa cap could be disastrous for the U.S. economy because, “unfortunately, many . . . valued employees become frustrated with the inefficiencies in the immigration system, give up because of the up to five-year waits, and either move home or seek employment in more welcoming countries, countries that are direct economic competitors to the United States.”²⁰⁸ Even Bill Gates reported that “the visa pinch is hurting [Microsoft’s] ability to complete new projects.”²⁰⁹ Smaller institutions are also affected by the cap. For example, Oklahoma State University reported in 2007 that 223 of its faculty and staff (more than 10% of the school’s total) were in the United States on H-1B visas and that “if [they] are going to do the best research and development, [they] need to have the best and brightest minds.”²¹⁰ Thus, if Congress refuses to increase or eliminate the cap, the frustration of U.S. IT companies will continue, leading to higher American job losses due to off-shoring, and the IT sector of the economy will continue to be stifled. Therefore, Congress should take action towards rectifying these issues.

203. Yang, *supra* note 51, at 154.

204. *Id.* (“The combination of capability and lower costs makes off-shoring attractive for U.S. corporations.”).

205. Colleen Taylor, *Google Puts Weight Behind H-1B Visa Reform*, ELECTRONIC NEWS, June 11, 2007.

206. Pear, *supra* note 1, at 1.

207. Taylor, *supra* note 205.

208. *Id.*

209. Allan Murray, *High-Tech Titans Unite on Lifting Visa Caps*, WALL ST. J., June 14, 2006, at A2 (quoting Bill Gates, “We have product meetings where someone will say: ‘This is when it will get done with immigration changes, and this is when it will get done without.’”).

210. Editorial, *Minds Field; Expansion of Visa Program Needed*, OKLAHOMAN, July 10, 2007 at 6A.

VI. SOLUTIONS TO THE PROBLEM: PROPOSED REFORMS TO THE H-1B CATEGORY

Any reforms implemented by Congress to the H-1B category should focus on meeting the goals of the statute, i.e. bringing the best and brightest minds to the United States, preventing displacement of U.S. workers, providing U.S. employers with adequately trained employees, and protecting H-1B workers from labor abuses. Possible reforms to the H-1B category include eliminating the cap entirely and, instead, setting up a sliding scale limiting the number of H-1B workers a company may hire based on the percentage of employees at the company; continuing to offer the option of permanent residency to H-1B workers, making LCA applications readily available to the public; and imposing stricter penalties for labor or fraud violations. These proposed reforms are discussed more fully below.

A. ELIMINATE THE CAP ENTIRELY

Since the H-1B program was designed to allow the United States to remain at the forefront of the global economy, “the program ought to maximize its potential economic benefits by increasing its efficiency and flexibility, the ability to easily adapt to the fast changing global economy.”²¹¹ Arbitrary caps do not promote efficiency and flexibility, but rather hinder American companies in the “unpredictable, fast-paced, and fiercely competitive global high-tech labor markets of the twenty-first century.”²¹² The amount of H-1B visas issued each year should either be controlled by the labor market²¹³ or by percentage limits, rather than strict numerical caps. Regarding the labor market as the determining factor for H-1Bs, proponents note that in 2002 and 2003 the labor market controlled the demand for H-1B visas.²¹⁴ In both of those years, the H-1B cap was set at 195,000;²¹⁵ however, fewer than 80,000 visas were issued in either of those years, leaving 230,000 H-1B visas unused.²¹⁶ Thus, employers “did not hire

211. Hahm, *supra* note 31, at 1692.

212. *Id.* at 1679 (citing Gabrielle M. Buckley, Immigration and Nationality, 32 INT’L LAW. 471, 484 (1998) (noting that the 65,000 cap was “randomly chosen without regard to American business’ need for or actual use of these visas.”).

213. The idea of allowing the labor market to control the H-1B cap was first introduced by Jung S. Hahm in his note for the Cornell Law Review in 2000. Mr. Hahm based his ideas on Professor Howard Chang’s free trade approach to immigration policy which can be found at Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and Optimal Immigration Policy*, 145 U. PA. L. REV. 1147 (1997). See Hahm, *supra* note 31, at 1695. See also *Review and Outlook*, *supra* note 135 (“Congress would be better off removing the cap altogether and letting the market decide.”).

214. See Anderson, *supra* note 10, at 4.

215. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251, 2000 Enacted S. 2045, 106 Enacted S. 2045 (Oct. 17, 2000) at 102 (amending 8 U.S.C. 1184(g)(1)(A)).

216. See Anderson, *supra* note 10, at 4.

more H-1Bs just because the cap was higher.”²¹⁷ Instead, employers requested H-1B employees according to their need.

A sliding scale percentage may work equally as well. For example, Congress should limit H-1Bs for small companies (10–25 employees) to 30% of their employees; for medium employers (25–200 employees) to 15%; and for large employers (201–1000+ employees) to 5%. This will effectively eliminate body shopping and the inflexible deadline of April 1 for H-1B applications. It will also protect U.S. workers from displacement. Both the labor market determinate and the sliding scale will also allow the United States to retain valuable intellectual capital by allowing foreign students to remain in the United States after graduation and by allowing U.S. companies facing a labor shortage to recruit foreign employees. Either method will also appease companies’ hiring needs, preventing many U.S. companies from moving offshore.

B. DO NOT TAKE AWAY OPPORTUNITIES FOR PERMANENT RESIDENCY FOR H-1B WORKERS

As mentioned in Part III, dual intent allows workers in the United States on nonimmigrant visas, such as the H-1B, to apply for permanent resident status while in the United States.²¹⁸ If awarded permanent resident status, employees and their families are able to stay in the United States indefinitely.²¹⁹ One of the main goals of U.S. immigration and the H-1B category is to bring the best and brightest to the United States. If these employees are forced to leave after their six-year stay is completed, the immigration purpose is defeated and the United States not only deprives itself of valuable brain power, but also allows other countries to compete with the U.S. economy. Therefore, Congress should not eliminate the dual intent option for H-1B workers.

C. PUBLISH LCA APPLICATIONS

LCA applications should be published on the DOL website, in a manner similar to job openings on employment websites. Currently, employers are required to post their LCAs in two or more conspicuous locations at each place of employment where any H-1B employee will be employed for thirty days.²²⁰ This requirement is inadequate. The DOL already has the capability

217. *Id.*

218. Matloff, *On the Need for Reform*, *supra* note 11, at 815.

219. U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES: Now that You are a Permanent Resident, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=fe17e6b0eb13d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=4f719c7755cb9010VgnVCM10000045f3d6a1RCRD>.

220. 20 CFR 655.734(a)(1)(ii)(A) (2009).

to publish LCA applications on its website.²²¹ An automatic electronic posting requires minimal administrative cost and can be done efficiently with little cost to the government.²²² Posting LCAs on the DOL website will allow more U.S. workers to discover available job opportunities. If the burden of recruiting U.S. workers is one of the main reasons that U.S. companies hire foreign workers instead of U.S. workers,²²³ published LCA applications will bring U.S. workers directly to employers, eliminating the recruitment need and expense for employers.

In addition to advertising job openings, published LCAs will allow the public to monitor companies that submit a high number of LCAs. If a company's hiring practices are disclosed, it will pay more attention to the number of H-1B applications it submits, and it will have to answer to the public's scrutiny, curbing the need for government regulation.²²⁴

D. IMPLEMENT STRICTER PENALTIES FOR ABUSE

As a further check on U.S. employers and body-shopping agencies, the government should create stricter penalties, including criminal penalties, for willfully providing false information on LCA applications. Criminal penalties for fraud will work in conjunction with the publicly available LCAs mentioned above. Employees and the public can compare the information reported on LCAs to the actual practices of employers. If there are serious and fraudulent discrepancies, the public will report such discrepancies to the authorities.

VIII. CONCLUSION

The expiration of the 2008 cap on the first day of the application window is clear evidence that the current cap of 65,000 is inadequate for the current U.S. labor market. Furthermore, the arbitrary cap itself is damaging to U.S. companies seeking the world's best talent and the brightest employees. Not only does the cap threaten the United States' position as the world's leading possessor of intellectual capital, it also threatens U.S. jobs and continued growth of the U.S. labor market, especially in the IT industry. Congress should reform the H-1B category as soon as possible by taking into consideration the issues and recommendations discussed herein. In light of the current economic crisis in the United States and throughout the rest of the world, the U.S. economy is at risk of falling behind other nations and allowing important ideas to fall into the wrong hands.

221. See Welcome to the Foreign Labor Certification LCA Online System, http://www.lca.doleta.gov/eta_start.cfm?actiontype=home&CFID=2094816&CFTOKEN=19539236.

222. Examples of electronic posting websites include Monster.com, Craig's List and online newspaper classifieds.

223. Kirby, *supra* note 123, at B1.

224. O'Brien, *supra* note 6.

Congress's first priority should be to secure valuable intellectual capital and keep it within the United States. Eliminating or at least increasing the H-1B visa cap will be one important step in the right direction.

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