

H-1B VISAS, ENFORCEMENT, OUTSOURCING AND U.S. WORKERS: AN H-1B PRIMER

EXECUTIVE SUMMARY

H-1B professionals fill key niches in the U.S. labor market and enhance the ability of U.S. companies to compete globally for talent and markets. H-1B visa holders keep jobs and innovations inside the United States and, the evidence indicates, do not lead to the elimination of U.S. jobs through “outsourcing” or other means. Despite this, Congress has not increased the H-1B cap for years, resulting in companies exhausting the supply of visas before even the start of the past four fiscal years, causing them to go without needed skilled professionals or being forced to hire individuals outside the United States or risk losing them to foreign competitors. Without sufficient H-1B visas outstanding international students and researchers and engineers from abroad cannot work in the United States, particularly since the typical wait time for an employment-based green card is 5 years or more.

Proportion and Education Level of H-1Bs. New H-1B professionals accounted for only 0.07 percent of the U.S. labor force in 2006. Contrary to assertions that H-1B visa holders are not highly skilled, official data show 57 percent of recent new H-1B professionals earned a master’s degree or higher, according to the Department of Homeland Security. When companies recruit, often on college campuses, they find qualified Americans and many foreign nationals. In 2005, U.S. universities awarded 55 percent of Masters degrees and 67 percent of PhDs in electrical engineering to foreign nationals, according to the American Association of Engineering Societies.

Impact on U.S. Professionals. There is little evidence native information technology (IT) workers are harmed by the entry of H-1B professionals. A study by Madeline Zavodny, a research economist at the Federal Reserve Bank of Atlanta, concluded, “None of the results suggest that an influx of H-1Bs . . . lower contemporaneous average earnings. Indeed, many of the results indicate a positive, statistically significant relationship.” This would mean H-1B employment is actually associated with better job conditions for natives because H-1B professionals are complementary to native professionals.

U.S. IT Professionals Doing Well Economically. U.S. professionals in information technology (IT) are doing well economically and are among the best-compensated workers in the world. “Software engineers have the best jobs in America,” according to a 2006 *Money* magazine survey. American professionals in “computer and mathematical” occupations are at virtual full employment, with a low annual unemployment rate of 2.4 percent in 2006. U.S. salaries in computer and math occupations increased by 2.4% between May 2004 and May 2005.

Low Rate and Number of Unemployed Programmers. The current low unemployment rate of 2.8 percent in the category of programmers means fewer than an estimated 17,000 computer programmers nationwide are unemployed, with the vast majority facing “frictional” unemployment, simply between jobs, or located in the wrong geographic area or possessing the wrong skill set. There is no evidence this rate would be lower even if the U.S. stopped the entry of all H-1B professionals.

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No evidence of Increased H-1B Abuses. In examining DOL enforcement data, one does not see escalating H-1B abuse, as some allege, but modest problems that are addressed through agency enforcement. In fact, the back wages owed to H-1B employees via enforcement actions actually declined from FY 2005 to FY 2006, covering only \$4.6 million in back wages, a small total in the context of an economy with a GDP of over \$12 trillion.

Companies Paying \$300 Million to Fund Anti-Fraud Efforts. In the past two years, to combat potential fraud in H-1B and L-1 visas companies have paid more than \$300 million in government-imposed fees to fund a State Department/DOL/DHS effort.

Most H-1B Cases Are Paperwork Violations With the Back Wages Owed Small. In DOL investigations, approximately 90 percent are found to be paperwork offenses or misread employer obligations, not “willful” violations, and of these dozen or so willful violations each year none have been committed by companies with household names. Back wages were owed to fewer than 1 percent (0.28 percent) of the individuals who received H-1B status between FY 1999 and FY 2002. In examining all DOL final agency actions of alleged abuse between 1992 and 2004, the average amount of back wages owed to an H-1B employee was only \$5,919 – that is about the amount of money U.S. employers typically pay in H-1B legal and government-imposed fees, undermining claims of significant abuse and vast underpayment.

H-1B Visas Not Significant for Outsourcing. Official government information obtained by the National Foundation for American Policy demonstrates that data widely reported in the media have wrongly implied that 10 “outsourcing” companies are using up most H-1B visas and leading to the loss of American jobs. In fact, the 10 companies most cited used less than 14 percent of new H-1B petitions approved in 2006 for initial employment, according to U.S. Citizenship and Immigration Services. Moreover, the new H-1B professionals hired in 2006 by these global companies totaled fewer than 15,000, representing 0.01 percent of the U.S. labor force and less than 4 percent of the approximately 440,000 people employed by these 10 companies worldwide. Such a small number and proportion of employees are not leading to a loss of large numbers of American jobs, particularly within the context of a U.S. economy producing employment for over 145 million people. In general, it is ironic to be concerned about “outsourcing” in the context of H-1Bs, since denying all companies access to talented foreign-born professionals here in America due to a lack of H-1B visas or by imposing new restrictions likely does more to encourage U.S. employers to build up human resources overseas than any other U.S. policy. Companies inevitably will follow the talent.

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S. 1035 Would Make H-1B Visas Virtually Unusable for Many Employers and Turn Tech Recruitment Practices Over to the Department of Labor. S. 1035, sponsored by Senators Richard Durbin (D-IL) and Charles Grassley (R-IA), contains a number of measures so extreme it will render H-1B visas virtually unusable for many employers. The bill ignores that existing law already subjects to more stringent labor rules companies with more than 15 percent of its workforce working on H-1B visas. The bill seeks to impose an onerous regime on all American high tech companies. In addition to making it difficult for U.S. companies to transfer into America their own employees (on L-1 visas), the bill would essentially force high tech company hiring and recruitment practices to adhere to Department of Labor requirements, stifling both innovation and the search for talent. While supporters of S. 1035 claim they are trying to protect H-1B visa holders from abuse, the group Immigration Voice, whose membership consists of current H-1B visa holders, has stated: "The bill makes it virtually impossible for employees to seek new jobs if they are on H-1B visas because of all the conditions and strings imposed on filing H-1B petitions by this legislation."

The Market Has Determined the Use of H-1B visas. When Congress raised the limit to 195,000 a year in FY 2002 and 2003, in both years fewer than 80,000 visas were issued against the cap, leaving 230,000 H-1B visas unused in those two years. Firms did not hire more H-1Bs just because the cap was higher. If, as critics allege, companies saved money because hiring H-1Bs is cheaper, then businesses should have used more H-1Bs when the economy worsened in 2002 and 2003, not fewer, as the data show.

Companies Would Send All Work Abroad If Only Wages Mattered. It is offensive (and incorrect) to argue, as some do, that the only reason a U.S. company would hire a foreign-born scientist or engineer is because he or she will work more cheaply. The National Science Foundation and other sources show foreign-born scientists and engineers are paid as much or more as their native counterparts. If companies simply wanted to obtain services based only on wages, then U.S. companies would move all of their work outside the United States, since the median salary for a computer software engineer is \$7,273 in Bangalore and \$5,244 in Bombay, compared to \$60,000 in Boston and \$65,000 in New York, according to the Seattle-based market research firm PayScale (2006).

There is Not a Fixed Supply of Jobs in America. Since 2003, the number of net new jobs in America has increased by over 8 million, according to the Department of Labor. The Bureau of Labor Statistics projects growth of 100,000 jobs a year in computer and math science occupations between 2004 and 2014, the highest of all white collar professional categories. Studies by the National Venture Capital Association and Duke University show that one in four high technology companies started since 1990 had an immigrant founder, creating hundreds of thousands of jobs and numerous innovations. From 1950 to 2000, employment in science and engineering

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occupations grew from fewer than 200,000 to about 4.8 million workers, according to the National Science Foundation.

H-1B Visa Holders Possess Labor Mobility. It is not true that H-1B visa holders are “indentured servants.” In fact, they change companies frequently and Congress made it easier for those in H-1B status to change jobs by allowing movement to another employer before all paperwork is completed. Data from the Department of Homeland Security show that in FY 2005 more H-1B applications were approved for “continuing” employment than for initial employment. While continuing employment also includes H-1B professionals receiving an “extension” to stay at the same employer for an additional three years, anecdotal evidence indicates most “continuing” employment involves an H-1B visa holder changing to a new employer. To the extent H-1B visa holders are reluctant to change jobs after beginning an application for a green card, the solution is to provide more employment-based immigrant visas and eliminate the current backlog.

U.S. Companies Spend Billions to Support Education. Though some argue companies should not be permitted to hire international students and other foreign nationals on skilled visas unless they do more to support U.S. education, U.S. businesses pay over \$91 billion a year in state and local taxes directed toward public education, while the mandated scholarship and training fees U.S. companies now pay for each H-1B professional hired are approaching \$2 billion since 1999. These fees have funded more than 40,000 scholarships for U.S. students in math and science through the National Science Foundation, hands-on science programs for 80,000 middle and high school students and 3,700 teachers, and training for more than 55,000 U.S. workers and professionals. In addition, many companies and company foundations already make education a central part of their community outreach and philanthropy.

Green Cards Not a Substitute for H-1Bs. Those who argue we should increase green cards but not H-1B visas present a false choice. It is perfectly legitimate for companies to hire individuals on H-1B visas as either a pathway to a green card or for short-term assignments, as has been done historically, just like Americans often go to other countries to work on a temporary basis.

CONTEMPORARY HISTORY OF H-1B VISAS: INCREASING REGULATION NOT MATCHED BY INCREASING NUMBERS

H-1B visas are temporary visas, good for up to 6 years, for foreign nationals to work in the United States on short-term projects or as a prelude to an employer-sponsored green card (permanent residence). Contrary to popular impression, Congress did not “create” an H-1B visa program in 1990. Individuals had long been permitted to come into the United States on H-1 temporary visas. Moreover, such professionals were not intended necessarily to be immigrants, as opposed to temporary entrants into the U.S. labor market.

Prior to 1990, going back to the 1950s, H-1s generally could not enter the United States if they intended to stay permanently. Congress changed the law in 1990 to allow “dual intent,” which allowed H-1B visa holders to intend to become permanent residents (green card recipients), while also placing an annual limit of 65,000. Until the law was expanded in 1970, H-1s could only enter the U.S. to fill jobs that were temporary or project-oriented.

By 1997, the 65,000 annual limit established by Congress in 1990 proved to be insufficient. Since that time employers have exhausted the supply of H-1B visas every year except during FY 2001 to FY 2003. In the past four years employers used up all the visas before the fiscal year even began. In 1998 and 2000 Congress passed short-term H-1B numerical increases that “sunset,” while in late 2004 Congress approved an exemption of 20,000 from the cap for recipients of an advanced degree from a U.S. university. (Earlier Congress approved an exemption from the numerical limit for those hired by universities and non-profit or government research institutes.)

With each revision in the law has come greater regulation and scrutiny for employers and, starting in 1998, high and escalating fees for hiring H-1B professionals.

1990

In addition to placing a 65,000 annual cap on H-1Bs, Congress placed numerous regulatory requirements on the use of the visas. Among the most notable:

- H-1B professionals must be paid the *higher* of the prevailing wage – determined by wage surveys – or the actual wage paid to similarly employed Americans.
- The Department of Labor had the authority to investigate any company upon which a complaint was filed for violating the statute.

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- Along with other rules, a variety of requirements also emerged related to posting the H-1B professional's wage requirements at worksites.

1998

In the 1998 American Competitiveness and Workforce Improvement Act, Congress provided a temporary increase in H-1B visas and significantly toughened enforcement rules related to H-1Bs. Congress directed much of its fire at firms that possess a significant portion of H-1B visa holders in their companies:

- A new \$500 fee levied on each new H-1B professional hired (and renewals) with the money going toward scholarships, job training and processing.
- The bill instituted new lay-off protections. Under the new law, a company that is H-1B dependent (15 percent or more of the company's employees are H-1B visa holders) must attest that it will not layoff an American employee in the same job 90 days before or after the filing of a petition for an H-1B professional. Such an H-1B dependent company acting as a contractor must attest that it similarly will not place an H-1B professional in *another company* to fill the same job held by a laid off American 90 days before or after the date of placement. And, in a provision that applies to *all* companies, regardless of their level of H-1B usage, if a U.S. employer commits a willful violation and underpays an individual on an H-1B visa and replaces an American worker, that employer will be hit with a 3-year debarment from all employment immigration programs and be slapped with a \$35,000 fine per violation. Note, none of these provisions would apply to any company that lays off employees and gives the work to a company overseas or to a company without H-1B professionals.
- The law also significantly increased penalties and added new violations, such as punishing employers for not offering the same health benefits to H-1B employees or by explicitly making it illegal to "bench" an H-1B visa holder, meaning the individual sits idle without pay waiting for an assignment.
- The bill increased by five-fold – to \$5,000 – fines for willful violators of the H-1B program and doubled the debarment period for such violations from one to two years.
- Congress also granted additional investigative authority to the Department of Labor. It gave DOL the authority to initiate "spot" investigations, without a complaint filed, of those found to have committed prior willful violations. Congress also gave DOL the authority to investigate suspected willful and serious violations of H-1B visas if it receives specific and credible evidence of such violations and receives a certification from the Secretary of Labor.

*H-1B Visas, Enforcement, Outsourcing and U.S. Workers: An H-1B Primer***2000**

In the American Competitiveness in the 21st Century Act, Congress passed a temporary increase in the level of H-1B visas, reaffirmed the enforcement provisions added in the 1998 legislation, and added other measures to the law:

- The fee on each H-1B professional hired (and renewals) was increased to \$1,000.
- H-1B portability was increased by allowing that an H-1B visa holder could start a new job upon the filing of an H-1B petition with another employer, no longer requiring such an application to be adjudicated before starting with another company.

2004

The L-1 Visa and H-1B Visa Reform Act (passed as part of Omnibus legislation on November 20, 2004) did not increase the 65,000 H-1B cap but exempted 20,000 from the numerical limit for those with a master's degree or higher from a U.S. university. Congress also made permanent previously temporary enforcement provisions, added additional fees, including new "anti-fraud fees," and tightened other aspects of the law pertaining to both H-1B and L-1 visas (intracompany transferees):

- The fee on each H-1B professional hired (and renewals) increased to \$1,500.
- A new \$500 "anti-fraud" fee was added to each H-1B visa (and renewals) and L-1 visa issued, with the fees split evenly among the Department of Homeland Security, the Department of Labor and the Department of State to combat fraud involving H-1B and L-1 visas. In effect, employers are funding enforcement actions against themselves. U.S. employers have paid more \$300 million into the "anti-fraud" account between March 2005 and April 2007.¹
- The law was tightened to mandate that an employer must pay an H-1B professional 100 percent of the prevailing wage, not 95 percent, as was permitted by DOL regulation to account for the imprecision of surveys.
- The law was changed to require that L-1 visa applicants under blanket petitions must work one year for the sponsoring employer, not the 6-month period that was permitted.
- The act also tightened the law on L-1B visas who enter due to "specialized knowledge," prohibiting such professionals from being supervised or controlled by any employer not affiliated with the sponsoring employer.

H-1B ENFORCEMENT: EVIDENCE INDICATES ABUSE IS SMALL, UNDERPAYMENT OF H-1B PROFESSIONALS IS LIMITED

In examining cross-sections of enforcement data from different years it is clear the extent of H-1B abuse is small. In fact, the data show the vast majority of cases investigated by the Department have involved only paperwork violations, not willful abuse, and that back wage payments were generally fairly small. In examining all DOL final agency actions between 1992 and 2004, one finds the average amount of back wages owed to an H-1B employee was only \$5,919 – that is about the amount of money U.S. employers typically pay in H-1B legal and government-imposed fees.² (See section in this analysis on H-1B Fees.) These figures also cast doubt on allegations of widespread underpayment of H-1B professionals, given that even among employers where suspicion of abuse was present the average underpayments have turned out to be relatively small.

While it is true the Department of Labor's enforcement of H-1Bs is primarily complaint-driven (though Congress has provided a mechanism for self-initiated DOL investigations), it is telling that among the cases investigated relatively few violations have been found to be labeled "willful" and/or result in debarment. DOL found employers either committed paperwork violations or misread employer obligations in a non-willful manner in almost 90 percent of the investigations in FY 2004. In fact, in FY 2004, DOL found willful violations in only 11 percent (15 of 136) of its investigations that became final.³

The proportion of H-1B professionals owed back wages is also small. Back wages were owed to less than 1 percent (0.28 percent) of the individuals who received H-1B status between FY 1999 and FY 2002. (A total of 1,323 individuals out of approximately 473,000 individuals.)

Finally, the aggregate total of back wages owed is almost infinitesimal placed in the context of a \$12 trillion economy. In FY 2005, only \$5.2 million in back wages were owed to H-1B professionals based on DOL investigations and the total dropped to \$4.6 million in FY 2006.⁴ Consistent with other years, in 86 percent of the cases investigated (104 of 121) in FY 2005 resulted in no civil monetary penalties being assessed. In FY 2006, no civil monetary penalties were assessed in 89 percent of the cases completed (14 of 133).⁵

The bottom line is that one does not see escalating abuse, as some allege, but modest problems that are addressed through agency enforcement. The data show it would be mistake to tar all companies with the faults of literally a few. Of the \$4.8 million owed in back wages in 2004, more than half (53 percent) came from findings against just 7 companies, none of whom are household names. Abuse does occur but the evidence indicates it is limited and of a character that can be handled within existing law and regulations.

U.S. IT WORKERS DOING WELL ECONOMICALLY

U.S. professionals in information technology (IT) are doing well economically and are among the best-compensated workers in the world. "Software engineers have the best jobs in America, according to a *Money* magazine survey," reported *Computerworld*. The May 2006 *Money* magazine survey ranked software engineer first based on salary, strong growth prospects and the potential for creativity.⁶ "There is a huge mismatch between perception and reality," according to Rice University Professor Moshe Vardi, who chaired a commission on software jobs for the Association for Computing Machinery. "There are more IT jobs now than there were six years ago at the height of the IT boom . . . The salary for application programmer has continued to increase every year since 2001."⁷

EARNINGS

In May 2005, Computer and Mathematical occupations had an average annual salary of \$67,000, based upon the BLS's Occupation and Employment Statistics Survey. Based on the difference between May 2004 and May 2005, salaries increased by 2.4%, slightly more than the 2.3% for all occupations. Programmers earned an average of \$67,400 after a 2.3% increase that matched the national average.⁸

At the higher end of the occupational grouping, computer and information scientists earned \$94,030 after a 6.8% increase and computer software engineers \$84,310 after a 2.6% increase.⁹

Two related engineering fields (not included in computer and mathematical occupations by BLS) are electrical engineers (\$76,060 with a 2.5% increase) and computer hardware engineers (\$87,170 with a 3.8% increase).¹⁰

UNEMPLOYMENT

The official BLS unemployment rate for those in "computer and mathematical occupations" was 2.4% in 2006 compared to 4.6% overall. Within this broad occupational category only 80,000 persons were unemployed.¹¹

BLS does not report estimates for more detailed occupation groups, due to a concern for the standard error of the estimates, but it is possible to use the same data source, the Current Population Survey, to estimate unemployment for smaller groups, albeit with lower reliability. If the smaller (and generally lower-skilled) occupation of programmer were reported, it would have a still low unemployment rate of about 2.8%, with an estimate of slightly less than 17,000 individuals unemployed.¹²

Could all of these 17,000 programmers be employed by expelling 17,000 non-citizen programmers with temporary visas? This seems highly unlikely. First, let's think about those who are unemployed. Some of the 17,000 are just

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between jobs – the "frictional" unemployment that is difficult to reduce. With the unemployment rate so low, this is likely to be a very large portion of total unemployment. Of those remaining, some are in the wrong geographic area or have the wrong set of skills for the jobs the H-1B holders are filling. Some are seeking employment in another occupation, but counted as unemployed programmers since it was their last job.

Let us also think about the H-1B programmers hired and the jobs they fill. Some of their jobs would not be filled within the United States if they were not hired. Some of them bring skills that complement and not substitute for other programmers – creating new jobs. Finally, we should note that economic complaints from programmers have persisted the past four years even during the 12-month periods when no new H-1B professionals entered America due to the annual H-1B cap (of 65,000) having been reached.

While it is possible some U.S. professionals would do better if they faced less competition, whether from H-1B professionals or Americans graduating from college, this would represent narrow economic self-interest as opposed to the welfare of the nation as a whole. Still, given the jobs and innovations created by foreign-born scientists and engineers, H-1B visa holders likely benefit even those narrow self-interests by adding value to the U.S. economy. In addition to fostering innovations and, if they become permanent residents, perhaps later starting businesses, while in the United States H-1B professionals are paying taxes and buying goods and services that create other jobs in the U.S. economy.

NOT A FIXED NUMBER OF JOBS

Key misconceptions about immigration and labor markets affect people's understanding of high-skilled migration. There still exists the "lump of labor" fallacy, or the belief only a fixed number of jobs exist in an economy, which would mean that any new entrant to the labor market would compete with existing workers for the same limited number of jobs. However, the number of jobs available in America is not a static number, nor is the amount of compensation paid to workers fixed. Both grow based on several factors, including labor force growth, technology, education, entrepreneurship, and research and development.

Since 2003, the number of net new jobs in America has increased by over 8 million, according to the Bureau of Labor Statistics.¹³ Within sectors, jobs increase or decrease from year to year based on product demand and other factors. The Bureau of Labor Statistics projects growth of 100,000 jobs a year in computer and math science occupations between 2004 and 2014, the highest of all white collar professional categories.¹⁴

It is also easy to ignore that people work today in companies, industries and jobs that did not even exist in the early 1990s. "When I was involved in creating the first Internet browser in 1993, I can tell you how many Internet jobs there were, there were 200. I can tell you how many there are now, there's two million now," said Marc

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Andreessen, a founder of Netscape. Studies by the National Venture Capital Association and Duke University show that one in four high technology companies started since 1990 had an immigrant founder, creating hundreds of thousands of jobs and numerous innovations.¹⁵

From 1950 to 2000, employment in science and engineering occupations grew from fewer than 200,000 to about 4.8 million workers, according to the National Science Foundation. The average annual growth rate of 6.4% contrasts with a 1.6% annual average growth rate for total employment.¹⁶

RESEARCH SHOWS NO NEGATIVE IMPACT ON NATIVE PROFESSIONALS

Critics make assertions about the wages of H-1B professionals not out of concern for the H-1B visa holders but because the critics believe the competition harms native workers. There is little evidence that native information technology (IT) workers are harmed by an openness towards H-1B professionals. A study by Madeline Zavodny, a research economist at the Federal Reserve Bank of Atlanta, found, "H-1B workers [also] do not appear to depress contemporaneous earnings growth." As to unemployment, the study concluded that the entry of H-1B computer programmers "do not appear to have an adverse impact on contemporaneous unemployment rates." The study also noted that some results "do suggest a positive relationship between the number of LCA [Labor Condition] applications and the unemployment rate a year later." Zavodny concluded: "None of the results suggest that an influx of H-1Bs as proxied by Labor Condition Applications filed relative to total IT employment, lower contemporaneous average earnings. Indeed, many of the results indicate a positive, statistically significant relationship." This would mean H-1B employment is actually associated with better job conditions for natives, according to the study, which could be because H-1B professionals are complementary to native professionals.¹⁷

RESEARCH ON THE WAGES OF FOREIGN-BORN PROFESSIONALS

Under the law, employers hiring H-1B professionals must pay the greater of the prevailing wage or "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question."¹⁸ Employers sponsoring individuals for an employment-based immigrant visa must also pay employees at least the market wage.

Research by Paul E. Harrington, associate director of the Center for Labor Market Studies at Northeastern University, shows foreign-born and native professionals earn virtually identical salaries in math and science fields. Salaries in computer or math sciences were actually higher for the foreign-born among bachelor degree holders and doctoral degree holders and the same for recipients of master's degrees. He found similar salaries for natives and foreign-born at all three levels in life sciences, as well as at the doctoral level in engineering, and a greater edge for natives at the bachelor and master's level for engineering.¹⁹

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National Science Foundation data indicate that foreign-born professionals actually earn more than their native counterparts when controlled for age and the year a science or engineering undergraduate, master's, or doctorate degree is earned. The National Science Foundation reports: "Because foreign-born individuals in the labor force who have S&E (science and engineering) degrees are somewhat younger on average than natives, controlling for age and years since degree moves their salary differentials in a positive direction—in this case, making an initial earnings advantage over natives even larger – to 6.7 percent for foreign-born individuals with S&E bachelor's degrees and to 7.8 percent for those with S&E PhDs."²⁰

Some have sought to use prevailing wage data filed with the Department of Labor to argue employers underpay H-1B visa holders. However, prevailing wage data do not necessarily reflect the salaries received by H-1B professionals. Under Section 212(n)(1) of the Immigration and Nationality Act, an employer hiring an individual in H-1B status must pay at least "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question" or "the prevailing wage level for the occupational classification in the area of employment, *whichever is greater*. . ." Therefore, any analysis that relies solely on prevailing wage data is inherently flawed.²¹

The wage data maintained by the Department of Labor are simply listings of the minimum an employer can pay an H-1B professional for a particular job. The data showing what an employer actually pays an H-1B visa holder are contained on the I-129 forms filed with U.S. Citizenship and Immigration Services (USCIS). Unlike the prevailing wage data at DOL, the forms filed with USCIS are not normally available to the public. To examine this issue, the National Foundation for American Policy asked a respected law firm to select a random sample of H-1B cases from among its client base. They represented different occupations but the vast majority of the H-1Bs were in high technology fields. Among the 100 randomly selected cases, *the average actual wage was more than 22 percent higher than the prevailing wage*. This is not meant to be definitive proof that actual wages are always, on average, 22 percent higher than prevailing wages. However, it does show, along with other evidence, that analyses utilizing prevailing wage data to claim H-1B professionals are underpaid are not reliable.²²

If companies simply wanted to obtain services based only on wages, then U.S. companies would move all of their work outside the United States, since the median salary for a computer software engineer is \$7,273 in Bangalore and \$5,244 in Bombay, compared to \$60,000 in Boston and \$65,000 in New York, according to the Seattle-based market research firm PayScale (2006).²³

PROPOSALS TO RESTRICT THE USE OF H-1B VISAS

As the earlier sections of this analysis demonstrated: 1) U.S. professionals are doing well economically and do not appear harmed by H-1B professionals; 2) enforcement data indicate to the extent abuse of H-1B visas occurs it is limited and of a character that can be handled within existing law and regulations; 3) the U.S. economy benefits from the entry of skilled immigrants, including those who first come on H-1B visas; and 4) if companies sought only employees with the lowest wages, they would transfer all their work to India or elsewhere, where wage could be one-tenth the rate.

Despite this evidence, some have argued for new restrictions on H-1B visas that would make the visas virtually unusable for many employers. The most notable example of such restrictive legislation is S. 1035, sponsored by Senators Richard Durbin (D-IL) and Charles Grassley (R-IA). In analyzing S. 1035 it becomes clear it would be better for employers and the nation to have no increase in H-1B visas rather than one accompanied by many of the provisions in the bill. In fact, the bill likely would do more to encourage employers to expand human resources outside the United States than any other proposal pending in Congress.

While supporters of S. 1035 claim they are trying to help American workers by “protecting” H-1B visa holders from abuse, the group Immigration Voice, whose membership consists of current H-1B visa holders awaiting green cards, understands the real goal is not to help H-1B professionals but to stop their entry into the United States. After analyzing the bill, Immigration Voice concluded: “The bill makes it virtually impossible for employees to seek new jobs if they are on H-1B visas because of all the conditions and strings imposed on filing H-1B petitions by this legislation. *This bill intends to drive down the usage of H1B program without actually lowering the quota by simply making it impossible to meet the terms and conditions for filing an H-1B.* The most disconcerting part of bill are harsher requirements on employers to hire anybody on an H-1B, the requirement to post a job on a DOL website for 30 days, investigations and audits for employers hiring employees on H-1B and many other such stringent requirements.”²⁴

Below is an analysis of the bill’s most problematic provisions.

S. 1035 EXPANDS CURRENT ATTESTATIONS TO ALL U.S. EMPLOYERS

Back in 1998, after much debate and consideration, Congress decided to enact measures (described in an earlier section) that would limit certain attestations to companies with more than 15 percent of H-1Bs on their workforce, so-called “H-1B dependent” companies. The attestations are on “recruitment” and “non-displacement” (no layoff of a U.S. worker within 90 days of hiring an H-1B professional for a job). Congress specifically limited the attestations to H-1B “dependent” companies (though 15 percent is likely too low a threshold for dependency)

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because it believed such measures would be exceedingly difficult for fast-moving tech companies to comply with, given the broad scope the Department of Labor would apply to terms like “essentially equivalent” jobs.²⁵

An analysis of the current statute by the law firm of Paul Hastings explains: “Employers must prove that job departures are voluntary and are not “constructive discharges”; they must demonstrate when discharges are performance related; they must demonstrate the nature of contract whose ending results in personnel changes; they must demonstrate when offers of different jobs within the same company are bona fide; they have to demonstrate (according to a highly subjective DOL regulatory standard) whether two jobs are “essentially equivalent”, requiring analysis of the job requirements, the typical characteristics of employees performing those jobs, etc.; they must assess and document what are relevant “areas of employment” for the displacement analysis; they must assess and document issues of “direct” versus “secondary” displacement; and far more.”²⁶

To burden U.S. tech companies in this way makes no sense unless the goal is to prevent them from using H-1B visas in the first place. By definition, with the exception of “H-1B dependent” companies, employers applying for H-1B visas already have 85 to 99 percent of their domestic payrolls filled with U.S. workers, so it’s clear they are regularly recruiting Americans. “The main problem with imposing a new recruitment attestation on all employers is not that companies are not recruiting U.S. workers – they obviously are – it’s the enormous time and effort of satisfying the Labor Department’s inevitable bureaucratic requirements and being exposed to the legal risk of failing to do so after the fact in a later audit,” said Warren Leiden, partner, Berry, Appleman and Leiden.²⁷

The bill also would expand the “no layoff” attestation in a manner to make it even more unworkable for all employers. It would expand the “non-displacement” attestation to 180 days from the current 90 days, which, again, now applies only to H-1B dependent employers. This means that a company would become liable under the sketchy definition of “essentially equivalent” job for any individual they dismissed over the previous half a year. In the days of flexible job functions and multiple locations such a provision would cause a responsible General Counsel to conclude his or her company is unlikely to be in compliance if they hire any H-1B professionals. The safer alternative would be to expand outside the United States rather than risk such legal liability. This and perhaps other provisions of S. 1035 may violate U.S. commitments under the General Agreement on Trade in Services (GATS).

Employers already are required to pay the higher of the prevailing or actual wages paid to similarly employed Americans and face debarment from the use of H-1B visas and a \$35,000 fine per violation if they dismiss an employee simply to hire an H-1B professional below the legally permissible wage. Moreover, if a company wishes to sponsor an individual for permanent residence it is at that stage the more elaborate recruitment requirements imposed by the Department of Labor must be satisfied.

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There is a significant disconnect between the rhetoric of the bill's sponsors and the actual language of the bill. Senators Durbin and Grassley have excoriated Indian companies for using H-1B visas for "outsourcing." But these firms, as H-1B dependent companies, must already comply with the recruitment and non-displacement attestations.

TURNING HIGH TECH COMPANY HIRING AND RECRUITMENT OVER TO THE DEPARTMENT OF LABOR

Perhaps as harmful as vastly expanding the scope of current attestations is another measure in S. 1035 involving company human resources policies. One could probably think of no better way to harm the engine of innovation in the tech corridors of Massachusetts, Texas, Washington, Silicon Valley and elsewhere in America than empowering the U.S. Department of Labor to become intimately involved in high tech company hiring and recruitment practices. Yet that is precisely what S. 1035 proposes.

The bill states no company can hire an H-1B visa holder unless they contact the Department of Labor 30 days ahead of time and place on the DOL website specific job announcements complete with wage, salary, position, "company hiring official," hours to be worked and other information. In addition, it states the Department of labor can later "require employers to provide other information in order to advertise available jobs."

Once this becomes a requirement of law it would mean that all tech company recruitment practices become open to DOL scrutiny if even one H-1B visa holder is hired, since a company would have to prove an H-1B was hired only after a specific job notice was placed 30 days prior on a U.S. government website. If this is intended not merely to act as a deterrent to hiring H-1B professionals, then the provision shows a lack of understanding for how companies hire individuals today, as opposed to, for example, 60 years ago. While it's possible that in the 1940s a local drugstore would put a sign in the store window to hire a kid for a specific job sweeping up after school, today global companies engage in constant recruitment and hiring across a variety of positions, experience levels and job types. When companies recruit, they seek the best talent, whether native or foreign-born. Companies would not be able to offer jobs to foreign nationals when recruiting off college campuses without first having anticipated and posted the jobs with the Department of Labor. Most U.S. companies battling for talent globally would wish their competitors were saddled with this type of bureaucratic baggage.

PROHIBITIONS ON OUTPLACEMENT FOR L-1 VISAS

In an apparent attempt to limit the flexibility of the U.S. labor market, the bill would prohibit the use of anyone on an L-1 visa to perform work at the site of another company. This severely limits U.S. companies from procuring the services of companies that use L-1 visa holders, while also constraining the use of a sponsoring company to

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utilize its own employees transferred within the company (on L-1 visas) as it sees fit. It also reflects a very 1950s view of companies performing all necessary functions internally. Today it is a rare company that does not have partners and contractors working closely with their own employees. This specialization creates value and jobs, not destroys them.

RESTRICTING MOVEMENT WITHIN THE GLOBAL ECONOMY

In another effort to burden businesses competing in the global economy the bill would no longer allow companies to use “blanket” petitions, which allow a less bureaucratic process for transferring into the United States employees on L-1 visas.²⁸ Those employees must have worked for the company at least one year. A blanket petition relieves a company from having to go through the immigration service for multiple petitions for the same job types. A blanket petition allows U.S. Citizenship and Immigration Services to pre-screen similar petitions from the same employer, one of the few areas of efficiency in an often bureaucratic immigration process.

RESTRICTIVE NEW WAGE REQUIREMENTS

The new wage requirements in S. 1035 seem designed, as with other provisions of the bill to prevent employers from using H-1B or L-1 visas. Under the bill, companies would not only have to meet the burden of current law by paying the higher of the prevailing or actual wage paid to similarly employed Americans. In addition, employers would have to pay at least the *median wage* for that occupational position or, perhaps even higher, the median salary for “skill level 2 in the occupational classification found in the most recent Occupational Employment Statistics Survey.”

As discussed earlier, H-1B visa holders are typically new hires, so it is perfectly reasonable when setting wages for employers to be able to take into account experience level, as the law now permits. (As noted, H-1B professionals are free to change jobs if they get a better job offer.) To explain with an example: A Member of Congress often employs more than a dozen people, many of whom have worked with the Member for years in some legislative capacity. One would not expect a Member to hire a new legislative staff person for the same wage as the median (or, for example, average) of all his or her legislative staff. However, the premise of S. 1035 is that if a Member of Congress does not pay all new hires the same as legislative staff who have worked for the Member for years, then the Senator or Representative is exploiting that new hire.

The same critique holds for the requirement in the bill to attach the same wage requirements cited above to employees transferred within the company on L-1 visas, many of whom may have worked for the company for only a year or so. Although Senator Durbin stated recently on the Senate floor that employers are using L-1 visas to get around current H-1B visa requirements, a Department of Homeland Security Office of Inspector General

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Report concluded no evidence exists that L-1 visas are being widely used to circumvent restrictions on H-1B visas for skilled professionals. “L-1 visa issuance . . . has abated in recent years,” notes the OIG report, with approved petitions declining by more than 20 percent between 2000 and 2005. “Another possible indication that L-1s are not widely used as alternatives to the H-1B is that in fiscal year 2004 the congressional numerical limit on H-1B status was significantly reduced, but no increase in L receipts or approvals was observed,” according to the Office of Inspector General report.²⁹

Claims of displacement related to L-1 visas have been exaggerated. The OIG report concluded, “While many of the claims that appear in the media about L-1 workers displacing American workers and testimony may have merit, they do not seem to represent a significant national trend.”³⁰ Given the scrutiny afforded this issue, if there were many more cases of U.S. workers alleged to have been displaced involving L-1 visas, then such cases would have come to light.³¹

Jobs and investment will be lost if international personnel cannot transfer into the United States. Companies will be more hesitant to invest in the United States if they know it will become difficult just to transfer in their own employees to work at U.S. operations. Given these new limitations on sending personnel in and out of the United States, the bill would encourage American companies to build up their resources overseas.

THE BOTTOM LINE ON S. 1035

As noted earlier, there is no evidence H-1B visa holders or L-1 intracompany transferees are systematically underpaid or exploited or that U.S. professionals are enduring tough times due to the entry of H-1Bs into the United States. As DOL data show, even among “willful” violators investigated by the Department of Labor – a highly stratified sample – the typical underpayment is no more than what companies pay anyway in various H-1B legal and government processing fees. Moreover, in addition to the \$1.75 billion that companies have paid since 1999 in H-1B training and scholarship fees, U.S. employers pay more than \$130 million a year in H-1B and L-1 “anti-fraud” fees administered by the Department of State, Department of Labor and Department of Homeland Security. These fees are specifically designed to enforce the existing statute.

Taken together, S. 1035 and amendments derived from it could only be interpreted as misguided aggression against the most innovative companies in America.

H-1Bs AND OUTSOURCING

Despite the additional requirements in the law on heavier users of H-1B visas and long-standing provisions permitting short-term assignments in the U.S., a campaign of sorts has emerged against so-called “outsourcing” companies using H-1Bs. These companies are headquartered or maintain a significant presence in India. A number of media outlets have reported on claims that focus on two contentions: 1) that the 10 “outsourcing” companies are using up most of the H-1B visas and 2) these companies are leading to the loss of countless American jobs. Some Members of Congress have joined this small chorus of criticism.

In general, it is ironic to be concerned about “outsourcing” in the context of H-1Bs, since denying all companies access to talented foreign-born professionals here in America due to a lack of H-1B visas or by imposing new restrictions likely does more to encourage U.S. employers to build up human resources overseas than any other U.S. policy. Simply put, companies will follow the talent.

A key reason for some of the hyperbole surrounding “outsourcing” companies is the use of Department of Labor data that vastly overstates actual usage of H-1B visas. Some background: To comply with DOL regulations on wages, a company must file labor condition applications for any geographic area an H-1B employee may work in. This will often result in firms that frequently send employees on short-term assignments to have many more DOL certifications (perhaps 10,000 or 15,000 more) than actual new H-1B professionals hired in a year. This explains figures in publications that showed some companies “requesting” between 7,200 and 22,590 H-1Bs each, though the actual use by these firms was far lower.³² (See Table 2 in the Appendix for a list of top H-1B employers.)

To shed light on this issue, the National Foundation for American Policy obtained U.S. Citizenship and Immigration Services information demonstrating that data widely reported in the media have wrongly implied that 10 “outsourcing” companies are using up most H-1B visas. In fact, the 10 companies cited used less than 14 percent of new H-1B petitions approved in 2006 for initial employment, according to U.S. Citizenship and Immigration Services. The 10 companies cited in these reports are Infosys Technologies, Wipro Technologies, Cognizant Technology Solutions, Patni Computer Systems, Mphasis, HCL America, Deloitte & Touche, Tata Consultancy Services, Accenture and Satyam Computer Services. Senators Grassley and Durbin wrote a letter to essentially this same group of companies, focusing only on those with headquarters in India.³³

The data NFAP obtained are for approved petitions for new hires (initial employment) by companies in 2006. Data published recently by *InformationWeek* listing the top 200 H-1B employers include both initial employment and continuing employment, which would include both renewals by that same employer and individuals who had been working on H-1B status for another employer. The list published in *InformationWeek* shows many U.S. universities, financial institutions and high tech companies in the broader list.³⁴

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As Table 1 shows the new H-1B professionals hired in 2006 by these global companies totaled fewer than 15,000, representing less than 4 percent of the approximately 440,000 people employed by these 10 companies worldwide. It would be hyperbole to claim such a small number and proportion of employees are leading to the loss of a large number of American jobs, particularly within the context of a U.S. economy producing employment for over 145 million people. In fact, it is not clear it is leading to the loss of any American jobs.

Table 1
New H-1Bs of Top “Outsourcing” Firms as a Proportion of Their Global Workforce

EMPLOYER	New H-1B Petitions Approved in 2006	Total Global Employment of Company (2006)	2006 New H-1Bs as Percentage of Company Global Workforce
WIPRO LTD.	3,143	53,700	5.9 %
INFOSYS TECHNOLOGIES LTD.	3,125	52,700	5.9%
TATA CONSULTANCY SERVICES LTD.	2,754	62,832	4.4%
SATYAM COMPUTER SERVICES LTD.	1,753	28,624	6.1%
PATNI COMPUTER SYSTEMS INC.	969	11,802	8.2%
COGNIZANT TECH SOLUTIONS U.S.	863	24,300	3.6%
HCL AMERICA INC.	652	24,000	2.7%
DELOITTE & TOUCHE LLP	545	30,000	1.8%
ACCENTURE LLP	519	140,000	0.37%
MPHASIS CORP.	445	12,000	3.7%
TOTAL	14,768	439,958	3.4%

Source: USCIS; National Foundation for American Policy; Company Annual Reports and Public Company Data: List of “Outsourcing” Firms based on list in report by the Economic Policy Institute (March 28, 2007 and *New York Times* (April 15, 2007) based on company filings with Department of Labor (which are different than USCIS data that include only petitions approved for individual employees). These are approved petitions for initial employment.

If these companies were not allowed to hire any H-1B visa holders in the United States, they would still service U.S. customers in India or elsewhere. They operate in America specifically because they are servicing U.S. customers that wish to contract with them and prefer certain work to be done in North America. While it’s true many of the H-1B professionals hired by these companies may come to America and then return home with valuable experience, the same could be said for Americans who go to work abroad and come back to the United States. We would not want other countries to prevent U.S. citizens from being hired abroad.

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While in this country, H-1B professionals on temporary assignments are paying U.S. taxes on their earnings and purchasing American goods and services, which creates jobs. Moreover, when they return to India or elsewhere they would have gained a natural proclivity for American products, which, in fact, can be seen in many parts of India today. Senator Durbin and others have stated that some H-1B professionals come to the United States to work for Indian companies and then return to India to work, implying this is a threatening proposition. But the small number of H-1Bs sponsored by Indian companies each year is less than 1 percent of the 1.6 million workers today in India's IT software and services sector.³⁵ While the U.S. work experience is certainly useful, it would still represent a tiny increase in India's IT capabilities even if all returned to India (some obtain permanent resident visas in the U.S. or could later go to Canada or the United Kingdom).

These Indian companies are also investing in the United States. The Mayor of Bloomington, Illinois recently praised Patni Computer Systems for creating a 10,000 square foot facility to accommodate 100 professionals. "Patni's new Regional Development Center brings new employment opportunities to the area, taking advantage of our regional talent pool. We are delighted that Patni chose Bloomington for its facility and appreciate the investment it represents in our local economy."³⁶

Finally, there is considerable debate concerning the premise that the United States is "losing" jobs to outsourcing. At the time of Senator John Kerry's famous admonition that U.S. executives are acting like "Benedict Arnold" by setting up facilities or joint ventures in other countries, the U.S. unemployment rate was 5.6 percent (February 2004). More than three years later, the unemployment rate is 4.5 percent (April 2007) and the number of net new jobs in the United States has increased by 7 million.

"While global software and IT service outsourcing displaces some IT workers, total employment in the United States increases as the benefits ripple through the economy," according to the economic consulting firm Global Insight in a report released by the Information Technology Association of America. "The incremental economic activity that follows offshore IT outsourcing creates over 257,000 net new jobs in 2005 and is expected to create over 337,000 net new jobs by 2010."³⁷

A 2006 report by the Duke Center for International Business Education and Research and Booz Allen Hamilton found that the number of jobs lost onshore per offshore project has dropped by 70 percent since 2005....90 percent of all R&D offshore implementations created no job losses on shore." The report concluded, "In the near term, contrary to various claims, fears about loss of high-skill jobs in engineering and science are unfounded." The research found that "In effect, offshoring is no longer about moving low-paid jobs elsewhere; but about sourcing highly skilled talent everywhere. What used to be an exercise in tactical labor cost savings is now a strategic imperative of competing for talent globally."³⁸

H-1B VISA HOLDERS POSSESS LABOR MOBILITY

While the Department of Labor is unlikely to catch all underpayment of wages, the greater protection for both H-1B professionals and other workers is the freedom to change employers and the competition for their services. A myth has been perpetuated that H-1B visa holders are “indentured servants.” This is far from the truth. A sampling of U.S. employers and immigration lawyers found that individuals on H-1B visas change companies frequently. A number of S&P 500 companies related that the majority of their H-1B hires first worked for other employers. Independent immigration attorneys confirmed this. H-1B visa holders are individuals who understand the marketplace, exchange information with others in the field, and are highly sought by employers. In fact, Congress made it easier for those in H-1B status to change jobs by allowing movement to another employer before all paperwork is completed.

Data from the Department of Homeland Security show that in FY 2005 more H-1B applications were approved for “continuing” employment than for initial employment. While continuing employment also includes H-1B professionals receiving an “extension” to stay at the same employer for an additional three years, anecdotal evidence indicates most “continuing” employment involves an H-1B visa holder changing to a new employer.³⁹

Critics do not explain why H-1B professionals who are said to be underpaid would remain en masse with their employers when they could seek higher wages with competing firms. Some argue that H-1B visa holders sponsored for green cards are reluctant to change employers because they will lose their place in the queue for labor certification and permanent residence. To the extent this problem persists the solution is to: 1) Streamline the labor certification process (progress has been made via DOL’s new PERM system); 2) Eliminate the labor certification backlog; 3) Reduce the employment categories that require labor certification; and 4) Expand the annual allotment of employment-based immigrant visas and address inequities caused by the per country limits. Major U.S. employers have supported such reforms, some of which were included in last year’s Senate immigration bill.

FOREIGN NATIONALS MAKE UP A LARGE PORTION OF U.S. SCIENCE AND ENGINEERING GRADUATES

In 2005, U.S. universities awarded 55 percent of Masters degrees and 67 percent of PhDs in electrical engineering to foreign nationals, according to the American Association of Engineering Societies.⁴⁰ Contrary to assertions that H-1B visa holders are not highly skilled, official data show 57 percent of recent new H-1B professionals earned a master’s degree or higher, according to the Department of Homeland Security.⁴¹

*H-1B Visas, Enforcement, Outsourcing and U.S. Workers: An H-1B Primer***THE MARKET HAS DETERMINED H-1B VISA USE**

The market has determined the use of H-1B visas. When Congress raised the limit to 195,000 a year in FY 2002 and 2003, in both years fewer than 80,000 visas were issued against the cap, leaving 230,000 H-1B visas unused in those two years. Firms did not hire more H-1Bs just because the cap was higher. If, as critics allege, companies saved money because hiring H-1Bs is cheaper, then businesses should have used more H-1Bs when the economy worsened in 2002 and 2003, not fewer, as the data show.

H-1B VISAS ISSUED AGAINST THE CAP BY YEAR

<u>Year</u>	<u>CAP*</u>	<u>#Issued</u>	<u>#Unused</u>
1992	65,000	48,600	16,400
1993	65,000	61,600	3,400
1994	65,000	60,300	4,700
1995	65,000	54,200	10,800
1996	65,000	55,100	9,900
1997	65,000	65,000	0
1998	65,000	65,000	0
1999	115,000	115,000	0
2000	115,000	115,000	0
2001	195,000	163,600	31,400
2002	195,000	79,100	115,900
2003	195,000	78,000	117,000
2004	65,000	65,000	0
2005	65,000	65,000	0
2006	65,000	65,000	0
2007	65,000	65,000	0

Source: Department of Homeland Security. *Does not include exemptions from the cap.

COMPANY TAXES AND H-1B FEES TO SUPPORT EDUCATION

U.S. businesses pay over \$91 billion a year in state and local taxes directed toward public education, while the mandated scholarship and training fees U.S. companies pay for each H-1B professional hired are approaching \$2 billion since 1999. These findings undermine the argument that companies should not be permitted to hire international students and other foreign nationals on skilled visas unless they do more to support education.⁴² U.S. companies can hire skilled employees they need, while also paying taxes and supporting efforts to enhance U.S. math and science education. American policymakers can also continue to seek improvement in education, while keeping America open to talented individuals from around the globe. It makes little sense to oppose increasing the annual level of green cards or H-1B visas for skilled foreign-born professionals in order to hold U.S. businesses responsible for the inadequate performance of U.S. public education. After all, it is elected officials, not companies, who are responsible for local, state and federal education policy. Moreover, changes to our schools will take years to have a major impact on overall student performance.

The figures show this argument against H-1B visas further falls apart when examining the already substantial taxes, fees, and charitable contributions made by U.S. companies. The Gates Foundation alone, funded by Microsoft stock, has contributed \$3 billion to U.S. public education since 1999. The H-1B fees paid by companies have funded more than 40,000 scholarships for U.S. students in math and science through the National Science Foundation, as well as hands-on science programs for 80,000 middle and high school students and 3,700 teachers. More than 55,000 U.S. workers have received training through the H-1B fees paid by companies.⁴³

EMPLOYER LEGAL AND PROCESSING FEES FOR H-1BS

Under the law, U.S. employers are obligated to pay H-1B professionals the same wage as “all other individuals with similar experience and qualifications for the specific employment in question.” But unlike with a native-born worker, the hiring costs to an employer do not end with the acceptance of a job offer. To hire a foreign national on an H-1B visa a U.S. employer must incur the following costs: approximately \$2,500 in legal fees; \$1,500 training/scholarship fee; \$1,000 “premium processing” fee (not required but routinely used to overcome long processing times); a new \$500 antifraud fee; a \$190 immigration service fee; around \$125 in additional incidental costs (Federal Express, etc.), and a \$100 visa fee. These combined costs total \$5,915.

While legal fees could be higher or lower depending on the law firm and the relationship with the employer, these figures do not include relocation costs, tax equalization, or additional in-house human resources costs associated with the extra work involved in employing foreign nationals. Nor do the costs include the approximately \$10,000 that can be incurred by sponsoring a foreign national for permanent residence (a green card). Critics rarely take into account that companies incur many additional expenses beyond simply the wages paid to H-1B visa holders.

FOREIGN-BORN SCIENTISTS AND ENGINEERS

In the debate over high skill immigration, it's easy to overlook that we are talking not just about numbers but people, particularly those who make unique contributions. A good example can be found at Houston-based Tanox, which employs 182 people. Tanox founder Dr. Nancy Chang came to America from Taiwan as an international student. After completing her degree at Harvard Medical School, she was hired on a visa by a U.S. pharmaceutical company. In 1986, with the help of venture capital, she co-founded Tanox with the goal of developing an asthma drug that focused on the allergy-related basis of asthma. At the time, this ran counter to the central belief in how asthma operated. The perseverance paid off in June 2003, when the Food and Drug Administration approved Xolair to treat those with asthma related to allergies. Today, Tanox is developing TNX-355, an antibody for the treatment of HIV/AIDS, and is in discussions with the FDA regarding clinical trials. Chang, who holds seven patents, said she is passionate about AIDS because, as a young researcher, she worked in one of the first laboratories to confront the disease. "As an international student, I came to the United States frightened and scared. But I found if you do well and if you have a dream, you will find people in America willing to help and give you an opportunity," said Chang.⁴⁴

H-1B visa holders are important to America's science and engineering base. At the 2004 Intel Science Talent Search, the nation's premiere science competition for top high school students, two-thirds of the finalists were the children of immigrants, according to interviews conducted by the National Foundation for American Policy. Even though new H-1B visa holders each year represent only 0.03 percent of the U.S. population, more of the Intel Science Talent Search finalists had parents who entered the country on H-1B visas than had parents born in the United States.⁴⁵ If critics had their way, most of the coming generation's top scientists would not be here in the United States today – because we never would have allowed in their parents.

CONCLUSION

It is a dim view of humanity to assume that opportunity for some must mean misery for others. H-1B professionals fill key niches in the U.S. labor market and enhance the ability of U.S. companies to compete globally for talent and markets. H-1B visa holders keep jobs and innovations inside the United States and, the evidence indicates, do not lead to the elimination of U.S. jobs through "outsourcing" or other means. Despite this, Congress has not increased the H-1B cap for years, resulting in companies exhausting the supply of visas before even the start of the past four fiscal years, causing them to go without needed skilled professionals or being forced to hire individuals outside the United States or risk losing them to foreign competitors. Without sufficient H-1B visas outstanding international students and researchers and engineers from abroad cannot work in the United States.

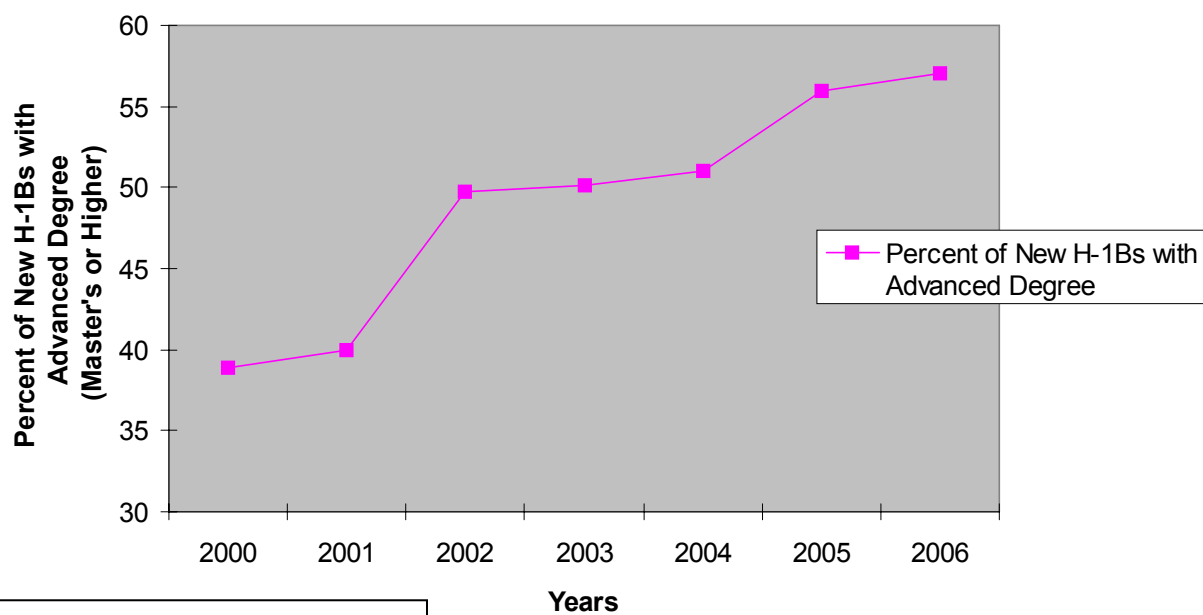
APPENDIX

Table 2
Top 20 Employers of New H-1Bs in FY 2006

EMPLOYER	New H-1B Petitions Approved in 2006
WIPRO LTD.	3,143
INFOSYS TECHNOLOGIES LTD.	3,125
TATA CONSULTANCY SERVICES LTD.	2,754
SATYAM COMPUTER SERVICES LTD.	1,753
MICROSOFT CORP.	1,297
PATNI COMPUTER SYSTEMS INC.	969
COGNIZANT TECH SOLUTIONS U.S.	863
I-FLEX SOLUTIONS INC.	695
HCL AMERICA INC.	652
LARSEN & TOUBRO INFOTECH LTD.	624
TECH MAHINDRA AMERICAS INC.	614
INTEL CORP.	613
DELOITTE & TOUCHE LLP	545
ACCENTURE LLP	519
POLARIS SOFTWARE LAB INDIA LTD.	497
MPHASIS CORP.	445
SYNTEL CONSULTING INC.	415
ERNST & YOUNG LLP	396
LANCESOFT INC.	394
Other	88,070 (80.3 percent)
TOTAL	109,614 (0.07 % of U.S. labor force)*

Source: USCIS; Explanatory note from USCIS: Employers were identified and counted on the basis of tax ID. The number of approved petitions for new workers is not identical with the number of workers on the job because workers are occasionally sponsored by more than one employer, the job offer may subsequently be withdrawn, the job offer may be declined, or the worker if residing outside the country, may be denied a visa. The total of 109,614 exceeds 65,000 regular plus 20,000 masters caps because it includes petitions for new workers exempted from the caps. Fiscal year of petition approval often is earlier than fiscal year of worker start date. For example, about 50,000 H-1B petitions were approved in FY 2006 for a start date in FY 2007. The reason is that many petitions were filed in April (beginning of cap season) and May by sponsors for workers beginning their employment in October---two different fiscal years. The same phenomenon occurred this year, offsetting last year's effect to an unknown extent, but rendering straight comparisons between petition approvals and employment starts in a fiscal year subject to error and misinterpretation. *The CIA Fact Book estimates the size of the U.S. labor force in 2006 at 151.4 million. The list in the table is for individuals who were hired on an approved H-1B petition for "initial employment" in 2006. Petitions approved for "continuing employment" would include both H-1B renewals by that same employer and individuals who had been working on H-1B status for another employer.

Figure 1
Increasing Education Levels for New H-1Bs Since 2000



Source: Dept. of Homeland Security

END NOTES

¹ Department of Homeland Security. The total to date is \$304 million. In FY 2005 (March-September): \$85.7 million; in FY 2006: \$133 million; in FY 2007 (October-April): \$85.9 million.

² NFAP calculation from Department of Labor data. Over the course of more than a dozen years, the cumulative total of back wages owed was approximately \$19 million. Placed in the context of a \$12 trillion U.S. economy this figure is not large. NFAP requested but did not receive individual case data for FY 2005 and FY 2006.

³ DOL data; CIA World Factbook, 2006. Back wages owed to 641 H-1B visa holders in 2004 is not a large number in the context of the U.S. labor force.

⁴ To put \$4.6 million in perspective, it is about what Roger Clemens will earn in a month pitching for the New York Yankees in 2007.

⁵ Examination of Department of Labor data.

⁶ Ellen Wulforst, "Survey: Software engineers top list of best jobs," *Computerworld*, April 13, 2006.

⁷ Brian D. Lee, "Computer science still a good career, leader of job migration task force says," *Stanford Report*, November 6, 2006.

⁸ Bureau of Labor Statistics. <http://www.bls.gov/oes>.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Bureau of Labor Statistics and additional analysis.

¹² Analysis using the Current Population Survey monthly outgoing rotation group files, assembled by the National Bureau of Economic Research.

¹³ Bureau of Labor Statistics. Data from January 2003 to April 2007.

¹⁴ <http://www.bls.gov/news.release/ecopro.t02.htm>

¹⁵ Copies of the studies can be found at: http://www.nvca.org/pdf/AmericanMade_study.pdf
http://memp.pratt.duke.edu/downloads/americas_new_immigrant_entrepreneurs.pdf.

¹⁶ National Science Board, Science and Engineering Indicators 2006.

¹⁷ Madeline Zavodny, "The H-1B Program and Its Effects on Information Technology Workers," Federal Reserve Bank of Atlanta, *Economic Review*, Third Quarter 2003.

¹⁸ Section 212(n)(1) of the Immigration and Nationality Act.

¹⁹ Paul E. Harrington, "Understanding & Responding to Imbalances in Engineering & IT Labor Markets," Presentation to Business Roundtable, September 15, 2004. Salary data are for 1999.

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²⁰ *Indicators in Science and Engineering: 2002*, National Science Foundation. Some of this difference results from the foreign-born being more likely to enter the job market in private sector companies, than in public or private universities, which pay less. Controlling for type of employer and occupation shows a negligible difference between foreign-born and native at the bachelor's, master's and PhD levels. Although many in the National Science Foundation data set may no longer be on an H-1B visa, others are, and the ones that are not would in the majority of cases have worked in that status for some period of time.

²⁰ 2003 National Survey of College Graduates, National Science Foundation.

²¹ For a more detailed discussion of the wage issues see *H-1B Professionals and Wages: Setting the Record Straight*, NFAP Policy Brief, National Foundation for American Policy, March 2006.

<http://www.nfap.com/researchactivities/articles/NFAPPolicyBriefH1BProfessionalsAndWages0306.pdf>

²² Ibid. While it is possible cases from a different law firm could yield somewhat different results, this law firm serves a diverse client base that appears typical of the employers petitioning for H-1B professionals.

²³ Ibid.

²⁴ Immigration Voice; emphasis in original.

²⁵ Unless otherwise noted the analysis is derived from the legislative text of S. 1035.

²⁶ Paul Hastings.

²⁷ Interview with Warren Leiden.

²⁸ L visas have been around since 1970 to allow U.S. companies to transfer executives, managers and personnel with specialized knowledge from their overseas operations into the United States to work. To qualify, L-1 beneficiaries must have worked abroad for the employer for at least one continuous year (within a three-year period) prior to a petition being filed.²⁸ This would prevent, for example, someone being hired overseas and immediately being sent to work in the United States. Also, based on USCIS regulations, an executive or manager is limited to seven years, while an individual with specialized knowledge can stay for five years.

²⁹ *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, Office of Inspector General, Department of Homeland Security, January 2006, p. 11-12. *Congressional Record*, May 8, 2007.

³⁰ Ibid., p. 11.

³¹ While the Office of Inspector General did raise some concerns, attorneys and company personnel familiar with this issue were surprised that the OIG failed to talk to any companies or their attorneys about adjudication of L-1 visas. If the OIG had done so, it would have found that rather than being too lenient, companies are frustrated by denials of L-1 visa petitions for seemingly capricious reasons due to adjudicators' poor understanding of international business or technology.

³² See, for example, "Parsing the Truths About Visas for Tech Workers," *The New York Times*, April 15, 2007, and the policy report: Ron Hira, *Outsourcing America's Technology and Knowledge*, Economic Policy Institute, March 28, 2007.

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³³ “Grassley, Durbin Ask for Details on Companies’ Use of H-1B Visas,” Press Release, Office of Senator Charles Grassley, May 14, 2007.

³⁴ <http://www.informationweek.com/news/showArticle.jhtml?articleID=199601616&pgno=2&queryText>

³⁵ http://www.nasscom.in/upload/5216/Indian_IT_Industry_Factsheet_Feb2007.pdf.

³⁶ “Patni Computer Systems Expands U.S. Operations,” Patni Computer Systems, Press Release, January 23, 2007.

³⁷ Global Insight, *The Comprehensive Impact of Offshore Software and IT Services Outsourcing on the U.S. Economy*, ITAA, 2005.

³⁸ Arie Y. Lewin and Vinay Couto, *Next Generation Offshoring, The Globalization of Innovation*, Duke University Fuqua School of Business and Booz Allen Hamilton, 2006. *Washington Post* columnist Robert Samuelson has written, “In a recent paper, Jacob Funk Kirkegaard of the Peterson Institute for International Economics reviewed many studies. His conclusion: “The heated public and political debate . . . has been vastly overblown.” For the United States, Kirkegaard examined a survey on “mass layoffs” from the Bureau of Labor Statistics to see how many stemmed from offshoring. The answer: 4 percent. That included both manufacturing and service jobs. In 2004 and 2005, the BLS counted almost 1 million workers fired in layoffs of 50 or more. . . . Only about 12 percent of layoffs stemmed from “movement of work” -- a category that would include offshoring. But two-thirds of those moves were domestic.” Robert Samuelson, “What Offshoring Wave?” *The Washington Post*, May 16, 2007.

³⁹ *Characteristics of Specialty Occupational Workers (H-1B): Fiscal Year 2005*, Department of Homeland Security, November 2006. In FY 2005, 148,938 petitions were approved for “continuing” employment and 117,536 for “initial” employment.

⁴⁰ American Association of Engineering Societies.

⁴¹ 2006 data. Department of Homeland Security; National Science Foundation.

⁴² See *U.S. Businesses Pay Over \$91 Billion a Year to Support Education...*, NFAP Policy Brief, May 2007. <http://www.nfap.com/pdf/0507brief-business-immigration.pdf>. The research staff of the National Taxpayers Union pointed out these two studies and the relevant figures on taxes: <http://www.taxfoundation.org/files/bp52.pdf>) and <http://www.taxfoundation.org/publications/show/2056.html>. The fee figures are derived from data from the Department of Homeland Security.

⁴³ Ibid.

⁴⁴ http://www.nvca.org/pdf/AmericanMade_study.pdf.

⁴⁵ Stuart Anderson, “The Multiplier Effect,” *International Educator*, Summer 2004. Available at www.nfap.com.

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