

WORKFORCE IMPROVEMENT AND PROTECTION ACT OF
1998

JULY 29, 1998.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 3736]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill
(H.R. 3736) to amend the Immigration and Nationality Act to make
changes relating to H-1B nonimmigrants, having considered the
same, report favorably thereon with an amendment and rec-
ommend that the bill as amended do pass.

CONTENTS

	<i>Page</i>
The Amendment	2
Purpose and Summary	6
Background and Need for the Legislation	7
Hearings	23
Committee Consideration	23
Vote of the Committee	23
Committee Oversight Findings	25
Committee on Government Reform and Oversight Findings	25
New Budget Authority and Tax Expenditures	26
Congressional Budget Office Cost Estimate	26
Constitutional Authority Statement	27
Section-by-Section Analysis and Discussion	27
Agency Views	34

Changes in Existing Law Made by the Bill, as Reported	Page 35
Additional Views	41

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Workforce Improvement and Protection Act of 1998”.

SEC. 2. TEMPORARY INCREASE IN SKILLED FOREIGN WORKERS; TEMPORARY REDUCTION IN H-2B NONIMMIGRANTS.

Section 214(g) of the Immigration and Nationality Act (8 U.S.C. 1184(g)) is amended—

(1) by amending paragraph (1)(A) to read as follows:

“(A) under section 101(a)(15)(H)(i)(b), subject to paragraph (5), may not exceed—

- “(i) 95,000 in fiscal year 1998;
- “(ii) 105,000 in fiscal year 1999;
- “(iii) 115,000 in fiscal year 2000; and
- “(iv) 65,000 in fiscal year 2001 and any subsequent fiscal year; or”;

(2) by amending paragraph (1)(B) to read as follows:

“(B) under section 101(a)(15)(H)(ii)(b) may not exceed—

- “(i) 36,000 in fiscal year 1998;
- “(ii) 26,000 in fiscal year 1999;
- “(iii) 16,000 in fiscal year 2000; and
- “(iv) 66,000 in fiscal year 2001 and any subsequent fiscal year.”;

(3) in paragraph (4), by striking “years.” and inserting “years, except that, with respect to each such nonimmigrant issued a visa or otherwise provided nonimmigrant status in each of fiscal years 1998, 1999, and 2000 in excess of 65,000 (per fiscal year), the period of authorized admission as such a nonimmigrant may not exceed 4 years.”; and

(4) by adding at the end the following:

“(5) The total number of aliens described in section 212(a)(5)(C) who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1999) under section 101(a)(15)(H)(i)(b) may not exceed 5,000.”.

SEC. 3. PROTECTION AGAINST DISPLACEMENT OF UNITED STATES WORKERS.

(a) IN GENERAL.—Section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)) is amended by inserting after subparagraph (D) the following:

“(E)(i) Except as provided in clause (iv), the employer has not laid off or otherwise displaced and will not lay off or otherwise displace, within the period beginning 6 months before and ending 90 days following the date of filing of the application or during the 90 days immediately preceding and following the date of filing of any visa petition supported by the application, any United States worker (as defined in paragraph (3)) (including a worker whose services are obtained by contract, employee leasing, temporary help agreement, or other similar means) who has substantially equivalent qualifications and experience in the specialty occupation, and in the area of employment, for which H-1B nonimmigrants are sought or in which they are employed.

“(ii) Except as provided in clause (iii), in the case of an employer that employs an H-1B nonimmigrant, the employer shall not place the nonimmigrant with another employer where—

“(I) the nonimmigrant performs his or her duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and

“(II) there are indicia of an employment relationship between the nonimmigrant and such other employer.

“(iii) Clause (ii) shall not apply to an employer’s placement of an H-1B nonimmigrant with another employer if the other employer has executed an attestation that it satisfies and will satisfy the conditions described in clause (i) during the period described in such clause.

“(iv) This subparagraph shall not apply to an application filed by an employer that is an institution of higher education (as defined in section 1201(a) of the

Higher Education Act of 1965), or a related or affiliated nonprofit entity, if the application relates solely to aliens who—

“(I) the employer seeks to employ—

“(aa) as a researcher on a project for which not less than 50 percent of the funding is provided, for a limited period of time, through a grant or contract with an entity other than the employer; or

“(bb) as a professor or instructor under a contract that expires after a limited period of time; and

“(II) have attained a master’s or higher degree (or its equivalent) in a specialty the specific knowledge of which is required for the intended employment.”.

(b) DEFINITIONS.—

(1) IN GENERAL.—Section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)) is amended by adding at the end the following:

“(3) For purposes of this subsection:

“(A) The term ‘H–1B nonimmigrant’ means an alien admitted or provided status as a nonimmigrant described in section 101(a)(15)(H)(i)(b).

“(B) The term ‘lay off or otherwise displace’, with respect to an employee—

“(i) means to cause the employee’s loss of employment, other than through a discharge for cause, a voluntary departure, or a voluntary retirement; and

“(ii) does not include any situation in which employment is relocated to a different geographic area and the employee is offered a chance to move to the new location, with wages and benefits that are not less than those at the old location, but elects not to move to the new location.

“(C) The term ‘United States worker’ means—

“(i) a citizen or national of the United States;

“(ii) an alien lawfully admitted for permanent residence; or

“(iii) an alien authorized to be employed by this Act or by the Attorney General.”.

(2) CONFORMING AMENDMENTS.—Section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)) is amended by striking “a nonimmigrant described in section 101(a)(15)(H)(i)(b)” each place such term appears and inserting “an H–1B nonimmigrant”.

SEC. 4. RECRUITMENT OF UNITED STATES WORKERS PRIOR TO SEEKING NONIMMIGRANT WORKERS.

Section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)), as amended by section 3, is further amended by inserting after subparagraph (E) the following:

“(F)(i) The employer, prior to filing the application, has taken, in good faith, timely and significant steps to recruit and retain sufficient United States workers in the specialty occupation for which H–1B nonimmigrants are sought. Such steps shall have included recruitment in the United States, using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H–1B nonimmigrants under subparagraph (A), and offering employment to any United States worker who applies and has the same qualifications as, or better qualifications than, any of the H–1B nonimmigrants sought.

“(ii) The conditions described in clause (i) shall not apply to an employer with respect to the employment of an H–1B nonimmigrant who is described in subparagraph (A), (B), or (C) of section 203(b)(1).”.

SEC. 5. LIMITATION ON AUTHORITY TO INITIATE COMPLAINTS AND CONDUCT INVESTIGATIONS FOR NON-H-1B-DEPENDENT EMPLOYERS.

(a) IN GENERAL.—Section 212(n)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(2)(A)) is amended—

(1) in the second sentence, by striking the period at the end and inserting the following: “, except that the Secretary may only file such a complaint respecting an H–1B-dependent employer (as defined in paragraph (3)), and only if there appears to be a violation of an attestation or a misrepresentation of a material fact in an application.”; and

(2) by inserting after the second sentence the following: “Except as provided in subparagraph (F) (relating to spot investigations during probationary period), no investigation or hearing shall be conducted with respect to an employer except in response to a complaint filed under the previous sentence.”.

(b) DEFINITIONS.—Section 212(n)(3) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(2)), as added by section 3, is amended—

(1) by redesignating subparagraphs (A), (B), and (C) as subparagraphs (B), (C), and (E), respectively;

(2) by inserting after “purposes of this subsection:” the following:

“(A) The term ‘H-1B-dependent employer’ means an employer that—

“(i)(I) has fewer than 21 full-time equivalent employees who are employed in the United States; and (II) employs 4 or more H-1B nonimmigrants; or

“(ii)(I) has at least 21 but not more than 150 full-time equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 20 percent of the number of such full-time equivalent employees; or

“(iii)(I) has at least 151 full-time equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

In applying this subparagraph, any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer. Aliens employed under a petition for H-1B nonimmigrants shall be treated as employees, and counted as nonimmigrants under section 101(a)(15)(H)(i)(b) under this subparagraph.”; and

(3) by inserting after subparagraph (C) (as so redesignated) the following:

“(D) The term ‘non-H-1B-dependent employer’ means an employer that is not an H-1B-dependent employer.”.

SEC. 6. INCREASED ENFORCEMENT AND PENALTIES.

(a) IN GENERAL.—Section 212(n)(2)(C) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(2)(C)) is amended to read as follows:

“(C)(i) If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B) or (1)(E), a substantial failure to meet a condition of paragraph (1)(C), (1)(D), or (1)(F), or a misrepresentation of material fact in an application—

“(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per violation) as the Secretary determines to be appropriate; and

“(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 1 year for aliens to be employed by the employer.

“(ii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an application, or a violation of clause (iv)—

“(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$5,000 per violation) as the Secretary determines to be appropriate; and

“(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 1 year for aliens to be employed by the employer.

“(iii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an application, in the course of which failure or misrepresentation the employer also has failed to meet a condition of paragraph (1)(E)—

“(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$25,000 per violation) as the Secretary determines to be appropriate; and

“(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 2 years for aliens to be employed by the employer.

“(iv) It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer’s compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.”.

(b) **PLACEMENT OF H-1B NONIMMIGRANT WITH OTHER EMPLOYER.**—Section 212(n)(2) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(2)) is amended by adding at the end the following:

“(E) Under regulations of the Secretary, the previous provisions of this paragraph shall apply to a failure of another employer to comply with an attestation described in paragraph (1)(E)(iii) in the same manner as they apply to a failure to comply with a condition described in paragraph (1)(E)(i).”.

(c) **SPOT INVESTIGATIONS DURING PROBATIONARY PERIOD.**—Section 212(n)(2) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(2)), as amended by subsection (b), is further amended by adding at the end the following:

“(F) The Secretary may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date that the employer is found by the Secretary to have committed a willful failure to meet a condition of paragraph (1) or to have made a misrepresentation of material fact in an application. The preceding sentence shall apply to an employer regardless of whether the employer is an H-1B-dependent employer or a non-H-1B-dependent employer. The authority of the Secretary under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).”.

SEC. 7. PROHIBITION ON IMPOSITION BY IMPORTING EMPLOYERS OF EMPLOYMENT CONTRACT PROVISIONS VIOLATING PUBLIC POLICY.

Section 212(n)(2) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(2)), as amended by section (6), is further amended by adding at the end the following:

“(G) If the Secretary finds, after notice and opportunity for a hearing, that an employer who has submitted an application under paragraph (1) has requested or required an alien admitted or provided status as a nonimmigrant pursuant to the application, as a condition of the employment, to execute a contract containing a provision that would be considered void as against public policy in the State of intended employment—

“(i) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$25,000 per violation) as the Secretary determines to be appropriate; and

“(ii) the Attorney General shall not approve petitions filed by the employer under section 214(c) during a period of not more than 10 years for H-1B nonimmigrants to be employed by the employer.”.

SEC. 8. IMPROVING COUNT OF H-1B AND H-2B NONIMMIGRANTS.

(a) **ENSURING ACCURATE COUNT.**—The Attorney General shall take such steps as are necessary to maintain an accurate count of the number of aliens subject to the numerical limitations of section 214(g)(1) of the Immigration and Nationality Act who are issued visas or otherwise provided nonimmigrant status.

(b) **REVISION OF PETITION FORMS.**—The Attorney General shall take such steps as are necessary to revise the forms used for petitions for visas or nonimmigrant status under clause (i)(b) or (ii)(b) of section 101(a)(15)(H) of the Immigration and Nationality Act so as to ensure that the forms provide the Attorney General with sufficient information to permit the Attorney General accurately to count the number of aliens subject to the numerical limitations of section 214(g)(1) of such Act who are issued visas or otherwise provided nonimmigrant status.

(c) **REPORTS.**—Beginning with fiscal year 1999, the Attorney General shall provide to the Congress not less than 4 times per year a report on—

(1) the numbers of individuals who were issued visas or otherwise provided nonimmigrant status during the preceding 3-month period under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act;

(2) the numbers of individuals who were issued visas or otherwise provided nonimmigrant status during the preceding 3-month period under section 101(a)(15)(H)(ii)(b) of such Act; and

(3) the countries of origin and occupations of, educational levels attained by, and total compensation (including the value of all wages, salary, bonuses, stock, stock options, and any other similar forms of remuneration) paid to, individuals issued visas or provided nonimmigrant status under such sections during such period.

SEC. 9. GAO STUDY AND REPORT ON AGE DISCRIMINATION IN THE INFORMATION TECHNOLOGY FIELD.

(a) **STUDY.**—The Comptroller General of the United States shall conduct a study assessing age discrimination in the information technology field. The study shall consider the following:

(1) The prevalence of age discrimination in the information technology workplace.

(2) The extent to which there is a difference, based on age, in promotion and advancement; working hours; telecommuting; salary; and stock options, bonuses, or other benefits.

(3) The relationship between rates of advancement, promotion, and compensation to experience, skill level, education, and age.

(4) Differences in skill level on the basis of age.

(b) REPORT.—Not later than October 1, 2000, the Comptroller General of the United States shall submit to the Committees on the Judiciary of the United States House of Representatives and the Senate a report containing the results of the study described in subsection (a). The report shall include any recommendations of the Comptroller General concerning age discrimination in the information technology field.

SEC. 10. GAO LABOR MARKET STUDY AND REPORT.

(a) STUDY.—The Comptroller General of the United States shall conduct a labor market study. The study shall investigate and analyze the following:

(1) The overall shortage of available workers in the high-technology, rapid-growth industries.

(2) The multiplier effect growth of high-technology industry on low-technology employment.

(3) The relative achievement rates of United States and foreign students in secondary school in a variety of subjects, including math, science, computer science, English, and history.

(4) The relative performance, by subject area, of United States and foreign students in postsecondary and graduate schools as compared to secondary schools.

(5) The labor market need for workers with information technology skills and the extent of the deficit of such workers to fill high-technology jobs during the 10-year period beginning on the date of the enactment of this Act.

(6) Future training and education needs of companies in the high-technology sector.

(7) Future training and education needs of United States students to ensure that their skills at various levels match the needs of the high-technology and information technology sectors.

(8) An analysis of which particular skill sets are in demand.

(9) The needs of the high-technology sector for foreign workers with specific skills.

(10) The potential benefits of postsecondary educational institutions, employers, and the United States economy from the entry of skilled professionals in the fields of engineering and science.

(11) The effect on the high-technology labor market of the downsizing of the defense sector, the increase in productivity in the computer industry, and the deployment of workers dedicated to the Year 2000 Project.

(b) REPORT.—Not later than October 1, 2000, the Comptroller General of the United States shall submit to the Committees on the Judiciary of the United States House of Representatives and the Senate a report containing the results of the study described in subsection (a).

SEC. 11. EFFECTIVE DATE.

The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to applications filed with the Secretary of Labor on or after 30 days after the date of the enactment of this Act, except that the amendments made by section 2 shall apply to applications filed with such Secretary before, on, or after the date of the enactment of this Act.

PURPOSE AND SUMMARY

H.R. 3736 would temporarily increase the quota for “H-1B” non-immigrants and would add protections for American workers to the H-1B program.

BACKGROUND AND NEED FOR THE LEGISLATION

I. The H-1B Nonimmigrant Worker Program

A. INTRODUCTION

“H-1B” visas are available for workers coming temporarily to the United States to perform services in a specialty occupation.¹ Such an occupation is one 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 speciality (or its equivalent) as a minimum for entry into the occupation in the United States.”²

The total number of aliens who may be issued visas or otherwise provided nonimmigrant status as H-1B workers during any fiscal year may not exceed 65,000.³ The period of authorized admission is up to 6 years.⁴ Thus, a total of 390,000 aliens may work in the U.S. at any one time. In fiscal year 1997, the 65,000 cap was reached for the first time on September 1.⁵ In fact, 5,099 aliens approved in September had to wait until October 1997 (the beginning of the new fiscal year) until they could work. In fiscal year 1997, the cap was reached on May 11.⁶

Aliens seeking most temporary visas have to show that they have a residence in a foreign country which they have no intention of abandoning. This is not the case with H-1B visas. In fact, many employers use the H-1B visa as a “try-out” period for aliens for whom they are considering petitioning for permanent residence. If an employer does decide to seek permanent resident status for an alien, the alien can work for the employer as an H-1B alien during the multi-year period usually required to receive the labor certification needed as a prerequisite for permanent residence. In fiscal year 1996, a total of 18,441 aliens adjusted from H-1B status to legal permanent resident status.⁷

As to the country of origin of H-1B nonimmigrants, in fiscal year 1998 (through March), 44% of petitioned-for aliens came from India, 9% came from the People’s Republic of China, 5% came from the United Kingdom, 3% came from the Philippines, and 3% came from Canada.⁸ As to the occupations performed by H-1B nonimmigrants, in fiscal year 1996, 41.5% were computer-related,⁹ 19.5% were therapists, 4.9% were other medicine/health professionals, 2.9% were college/university faculty, 2.5% were registered nurses, 2.4% were accountants/auditors, and 2.3% were physicians.¹⁰ In fiscal years 1992–95, computer-related positions had

¹Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (hereinafter cited as “INA”).

²INA sec. 214(i)(1).

³INA sec. 214(g)(1)(A).

⁴INA sec. 214(g)(4).

⁵U.S. Immigration and Naturalization Service data. The number of aliens issued visas or otherwise provided nonimmigrant status as H-1B workers in 1992 was 48,645, in 1993 was 61,591, in 1994 was 60,279, in 1995 was 54,178, and in 1996 was 55,141. *Id.*

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹The Department of Labor considers computer-related occupations to include systems analysis/programming, software systems engineering, computer systems technical support, data communications and networks, computer system user support, and certain other occupations.

¹⁰U.S. Department of Labor data (based on approved applications).

never surpassed 25.6%, and therapists reached a high of 53.5% in 1995.¹¹

As to the wages of H-1B nonimmigrants, in fiscal year 1997, 3.1% were paid less than \$25,000, 75.9% were paid between \$25,000 and \$50,000, 16% were paid between \$50,000 and \$75,000, and 4.9% were paid more than \$75,000.¹²

B. THE ATTESTATION PROCESS

Because the need of employers to bring H-1B aliens on board in the shortest possible time, the H-1B program's mechanism for protecting American workers is not based on a lengthy pre-arrival review of the availability of suitable American workers (such as the labor certification process necessary to obtain most employer-sponsored immigrant visas). Instead, an employer files a "labor condition application" making certain basic attestations (promises) and the Secretary of Labor then investigates complaints alleging non-compliance.¹³

There are four attestations:

(1) The employer will pay H-1B aliens wages that are the higher of 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, and the employer will provide working conditions for H-1B aliens that will not adversely affect those of workers similarly employed.

(2) There is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(3) At the time of the filing of the application, the employer has provided notice of the filing to the bargaining representative of the employer's employees in the occupational classification and area for which the H-1B aliens are sought, or if there is no such bargaining representative, the employer has posted notice in conspicuous locations at the place of employment.

(4) The application will contain a specification of the number of aliens sought, the occupational classification in which the aliens will be employed, and the wage rate and conditions under which they will be employed.¹⁴

The Secretary of Labor must accept an employer's application within seven days of filing unless it is incomplete or obviously inaccurate.¹⁵ Departmental investigations as to whether an employer has failed to fulfill its attestations or has misrepresented material facts in its application are triggered by complaints filed by aggrieved persons or organizations (including bargaining representatives).¹⁶ Investigations shall be conducted where there is reasonable cause to believe that a violation has occurred.¹⁷

¹¹ *Id.*

¹² *Id.*

¹³ INA sec. 212(n).

¹⁴ INA sec. 212(n)(1).

¹⁵ *Id.*

¹⁶ INA sec. 212 (n)(2)(A).

¹⁷ *Id.*

An employer is subject to penalties for failing to fulfill the attestations—for willfully failing to pay the required wage, for there being a strike or lockout, for substantially failing to provide notice or provide all required information in an application—and for making a misrepresentation of material fact in an application.¹⁸ Penalties include administrative remedies (including civil monetary penalties not to exceed \$1,000 per violation) that the Secretary of Labor determines to be appropriate and a bar for at least one year on the Attorney General's ability to approve petitions filed by the employer for alien workers (both immigrant and nonimmigrant).¹⁹ In addition, the Secretary of Labor must order an employer to provide an H-1B nonimmigrants with back pay where wages were not paid at the required level, regardless of whether other penalties are imposed.²⁰

Between 1992 and 1997, the Secretary of Labor received 250 complaints and launched 158 investigations. Of the 103 investigations that have become final, a violation was found in 90. Civil monetary penalties of \$205,500 have been assessed. In 71 investigations, \$1,940,506 in back wages were found to be due to 430 H-1B nonimmigrants.²¹

C. LABOR DEPARTMENT CONCERNS ABOUT THE H-1B PROGRAM

In 1995, then Secretary of Labor Robert Reich stated that:

Our experience with the practical operation of the H-1B program has raised serious concerns * * * that what was conceived as a means to meet temporary business needs for unique, highly skilled professionals from abroad is, in fact, being used by some employers to bring in relatively large numbers of foreign workers who may well be displacing U.S. workers and eroding employers' commitment to the domestic workforce. Some employers * * * seek the admission of scores, even hundreds of [H-1B aliens], especially for work in relatively low-level computer-related and health care occupations. These employers include "job contractors," some of which have a workforce composed predominantly or even entirely of H-1B workers, which then lease these employees to other U.S. companies or use them to provide services previously provided by laid off U.S. workers.²²

Responding to such concerns, the Department of Labor promulgated a set of final rules which went into effect on January 19, 1995.²³ Instead of targeting job contractors or companies relying to an excessive degree on H-1B aliens, the regulations imposed what many (including this Committee) considered to be burdensome new requirements on all employers of H-1B aliens.²⁴ The National Association of Manufacturers sought to overturn the regulations on various procedural and substantive grounds. The U.S. District

¹⁸ INA sec. 212(n)(2)(C).

¹⁹ *Id.*

²⁰ INA sec. 212(n)(2)(D).

²¹ U.S. Department of Labor data.

²² *Nonimmigrant Visas: Hearings Before the Subcomm. on Immigration of the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (Sept. 28, 1995).

²³ 59 Fed. Reg. 65646 (Dec. 20, 1994).

²⁴ See H.R. Rep. No. 104-469, 104th Cong., 2d Sess., pt. 1, at 147-49 (1996).

Court for the District of Columbia declared on procedural grounds many portions of the regulations invalid and void.²⁵

The Department of Labor's Office of Inspector General conducted an audit of the H-1B program. Its report, issued in 1996, was generally critical of the program. The report found that correct wages were not always being paid:

The employer's attestation to * * * pay the prevailing wage is the only safeguard against the erosion of U.S. worker's [sic.] wages.

For 75 percent * * * of all cases where the non-immigrant worked for the petitioning employer * * * the employer did not adequately document that the wage level specified on the [application] was the correct wage. * * * Therefore, although the employers are attesting that they have adequately documented the wage to be paid the alien, most do not. For these cases we are unable to determine the full extent to which H-1B nonimmigrants are being paid less than the prevailing wage.

Nevertheless, many employers paid the aliens less than the * * * wage they certified they would pay, whether the wage rate was adequately documented or not. Of the * * * cases where the employers adequately documented the wage paid, 19 percent of the aliens were paid less than the wage specified on the [application].²⁶

The report also criticized job contractors, or "job shops":

We found that 6 percent of the * * * H-1B aliens * * * were contracted out by the petitioning employer to other employers. Some of the petitioning employers operate job shops—companies which hire predominantly, or exclusively, H-1B aliens then contract out these aliens to other employers. The current H-1B law does not prohibit this practice; however, there is a concern that these job shops are paying the H-1B aliens less than prevailing wage, making contracting out with job shops more appealing to the U.S. employer.

Our sample of * * * cases also included six petitions for another job shop contractor. * * * For five of the six cases, the employer established the same prevailing wage—\$27,000—for all jobs even though the jobs were located in four different States. It is highly unlikely that the prevailing wage was the same for this job in all four locations.²⁷

In 1998, Acting Assistant Secretary of Labor Raymond Uhalde stated that:

In practice * * * employers do not have to demonstrate any type of employment need or domestic recruitment prior to getting a temporary foreign worker. In addition,

²⁵*National Association of Manufacturers v. U.S. Department of Labor*, Civ. Action No. 95-0715 (D. D.C. July 22, 1996).

²⁶Office of Inspector General, U.S. Department of Labor, *Final Report: The Department of Labor's Foreign Labor Certification Programs: The System is Broken and Needs to Be Fixed* 21 (May 22, 1996).

²⁷*Id.* at 25-27.

the Labor Department has limited authority to enforce the minimum standards that employers must adhere to * * *.

[R]eform of the H-1B program is needed because it does not provide the needed balance between timely access to the international labor market and adequate protection of U.S. workers' job opportunities, wages and working conditions.

Greater protections for U.S. workers are needed because many employers use the H-1B program to employ not the "best and brightest," but rather entry-level foreign workers. Minimum education and work experience qualifications for H-1B jobs are quite low—a 4-year college degree and no work experience, or the equivalent in terms of combined education and work experience. While some H-1B jobs are high-paying jobs, the education and work qualifications result in nearly 80% of H-1B jobs paying less than \$50,000 a year.

The H-1B program is broken in several respects. First, current law does not require any test for the availability of qualified U.S. workers in the domestic labor market. Therefore, many of the visas under the current cap of 65,000 can be used lawfully by employers to hire foreign workers for purposes other than meeting a skills shortage. Second, current law allows a U.S. employer to lay off U.S. workers and replace them with H-1B workers. . . . Third, current law allows employers to retain H-1B workers for up to 6 years to fill a presumably "temporary" need.²⁸

D. MEDIA REPORTS OF ABUSES IN THE H-1B PROGRAM

In 1993, correspondent Lesley Stahl of "60 Minutes" criticized the use of the H-1B program by job contractors:

When any American company needs programmers, the body shops can often deliver employees all the way from Bombay for rates that are so cheap, Americans just across town can't compete. This is an employment agreement between one foreign programmer and an India-based body shop called Blue Star. It tells her she'll be assigned to Hewlett-Packard in California, that her salary of \$250 a month will be paid back in India, and that she'll receive \$1,300 a month for living expenses in the United States. Total that up and it comes to less than \$20,000 a year—nowhere near what Hewlett-Packard would have to pay an American. But Hewlett-Packard never actually hired her; they merely made a deal with the body shop and paid the body shop a flat hourly rate.

The companies have a built-in system of deniability. They take a "see no evil, hear no evil" approach. It's the body shops that have all the responsibility because the foreign workers remain their employees. It's the body shops that pick the programmers, then get them their visas and

²⁸Hearings Before the Subcomm. on Immigration of the Senate Judiciary Comm., 105th Cong., 2nd Sess. (Feb. 25, 1998) (hereinafter cited as "Senate Hearing").

assign them to the American companies where they'll work. It's a way of insulating the American firms. As an executive told us, "We don't want to know what the body shops are doing."²⁹

Numerous articles in major newspapers have documented employers laying off American workers and replacing them with H-1B aliens—usually from job contractors or by outsourcing.³⁰

II. *The State of the Labor Market for Information Technology Workers*

There is a widespread belief that the United States is facing a severe shortage of workers who are qualified to perform skilled information technology jobs. This belief has been fostered, in part, by a number of studies designed to document a shortage of information technology workers, including *Help Wanted: The IT Workforce Gap at the Dawn of a New Century*, *America's New Deficit: The Shortage of Information Technology Workers*, and *Help Wanted 1998: A Call for Collaborative Action for the New Millennium*.

In 1997's *Help Wanted*, the Information Technology Association of America reported the results of a survey it had sent to a randomly selected sample of 2,000 large and mid-size information technology and non-information technology companies, asking "How many vacancies does your company have for employees skilled in information technology?"³¹ Two hundred and seventy one companies responded.³² Based on the survey results, ITAA estimated that there are approximately 191,000 vacancies for information technology workers at large and mid-size American companies.³³ The survey found that 82% of information technology companies expected to increase (and only 2% expected to decrease) the number of information technology workers they employed in the coming year; as did 56% (and 3%) of non-information technology companies.³⁴ Fifty percent of responding information technology companies said that a lack of skilled/trained workers would represent the companies' most significant barrier to growth over the next 12 months.³⁵

Help Wanted also found that "[t]he rising compensation of [information technology] workers indicate the high demand for these individuals, as employers are bidding up their wages."³⁶ The study reported increases in annual compensation between 1995 and 1996 for various information technology professions of from 12 to 19.7%.³⁷ The study also noted that the number of bachelor degrees

²⁹ *60 Minutes* (CBS television broadcast, Oct. 3, 1993).

³⁰ See, e.g., Gary Hoffman, *Troy Firm in Middle of Jobs Fight*, Detroit News, Feb. 28, 1996; Jim Landers, *Engineers, Programmers Battle "Body Shopping,"* Dallas Morning News, Oct. 30, 1995; William Branigin, *White-Collar Visas: Importing Needed Skills or Cheap Labor?*, Wash. Post, Oct. 21, 1995.

³¹ *Help Wanted* at 9, 15.

³² *Id.* at 55.

³³ *Id.* at 16, 49.

³⁴ *Id.*

³⁵ *Id.* at 21.

³⁶ *Id.* at 17.

³⁷ *Id.* at 18–19.

awarded in computer science at American universities fell by 43% from 1986 to 1994, from 42,195 to 24,200.³⁸

In conclusion, *Help Wanted* found that “[c]lear evidence exists that the demand for skilled [information technology] workers is far outstripping the current supply of such workers.”³⁹ The report worried that, among other things, “in the absence of sufficient [information technology] workers we can expect to see slower growth in the [information technology] industry and in non-[information technology] companies that need such workers than we would have seen otherwise” and that “[a]s companies scale back their plans for growth and make related adjustments, we can anticipate slower job growth and less wealth creation than we would have seen.”⁴⁰

Also in 1997, the U.S. Department of Commerce’s Office of Technology Policy issued *America’s New Deficit*. The study first noted that the U.S. Department of Labor’s Bureau of Labor Statistics estimated that between 1994 and 2005, over one million new computer scientists and engineers, systems analysts, and computer programmers will be needed to fill 820,000 newly created jobs and replace 227,000 workers leaving the fields.⁴¹ The number of systems analysts will grow from 483,000 to 928,000, the number of computer engineers and scientists will grow from 345,000 to 655,000, and the number of computer programmers will grow from 537,000 to 601,000.⁴²

The study found that “there is substantial evidence that the United States is having trouble keeping up with the demand for new information technology workers.”⁴³ It stated that “[t]he strongest evidence that a shortage exists is upward pressure on salaries. The competition for skilled [information technology] workers has contributed to substantial salary increases in many [information technology] professions.”⁴⁴ For example, it cited the salary data cited in *Help Wanted* and noted Computerworld’s annual survey findings that in 11 of 26 positions tracked, average salaries increased more than 10% from 1996 to 1997.⁴⁵ The study also noted the findings of *Help Wanted* of 191,000 unfilled information technology jobs and a decrease in computer science graduates, and noted that some companies are using overseas talent pools to find

³⁸*Id.* at 39 (Eighty-four percent of the information technology companies responding to ITAA’s study stated that a bachelor’s degree was the highest level of education completed by most of the information technology workers they hired. *Id.* at 40.)

³⁹*Id.* at 21.

⁴⁰*Id.* at 5–6.

⁴¹*America’s New Deficit* at 5.

⁴²*Id.* The Office of Technology Policy updated the study in January 1988 to account for new data from the Bureau of Labor Statistics. BLS reported that between 1996 and 2006, the United States will need more than 1.3 million new workers in the three occupations to fill 1,134,000 newly created jobs and replace 244,000 departing workers. Systems analysts are expected to increase from 506,000 to 1,025,000, computer engineers and scientists are expected to increase from 427,000 to 912,000, and computer programmers are expected to increase from 567,000 to 697,000.

The new BLS data also indicates that the computer and data processing services industry will have the fastest job growth of any industry between 1996 and 2006—108%. *U.S. Department of Labor, Bureau of Labor Statistics, News* (Dec. 3, 1997). In addition, the three occupations with the fastest employment growth over these years will be (1) database administrators, computer support specialists, and all other computer scientists—118%, (2) computer engineers—109%, and (3) systems analysts—103%. *Id.*

⁴³*America’s New Deficit* at 1.

⁴⁴*Id.* at 11.

⁴⁵*Id.*

information technology workers.⁴⁶ It did add a caveat, stating that “the information and data [are] inadequate to completely characterize the dynamics of the [information technology] labor market.”⁴⁷

America’s New Deficit noted with concern that “[s]ince information technology is an enabling technology that affects the entire economy, our failure to meet the growing demand for [information technology] professionals could have severe consequences for America competitiveness, economic growth, and job creation.”⁴⁸ More specifically:

[C]omputer-based information systems have become an indispensable part of managing information, workflow, and transactions in both the public and private sector. Therefore, a shortage of [information technology] workers affects directly the ability to develop and implement systems that a wide variety of users need to enhance their performance and control costs. * * *

High-tech industries, particularly leading-edge electronics and information technology industries, are driving economic growth. * * * These industries are [information technology] worker intensive and shortages of critical skills would inhibit their performance and growth potential.

Shortages of [information technology] workers could inhibit the nation’s ability to develop leading-edge products and services, and raise their costs which, in turn, would reduce U.S. competitiveness and constrain economic growth.

The shortage of [information technology] workers could undermine U.S. performance in global markets. * * * The United States is both the predominant supplier of and the primary consumer for [computer software and computer services].⁴⁹

Help Wanted 1998 was issued by ITAA and the Virginia Polytechnic Institute and State University, with the latter having developed and conducted the survey, analyzed the results and authored the report.⁵⁰ The report was designed, in part, to verify the results of *Help Wanted*, improve the methodology used, and obtain more detailed information.⁵¹

The study surveyed a random sample of 1,493 American information technology and non-information technology companies (of which 532 responded), and included smaller companies than did the original *Help Wanted*.⁵² The study extrapolated the response to a question similar to the one asked in *Help Wanted* to find that there are 346,000 vacancies in three core information technology professions (systems analysts, computer scientists and engineers, and computer programmers)—129,000 in information technology

⁴⁶*Id.* at 1, 11, 15.

⁴⁷*Id.* at 35.

⁴⁸*Id.* at 2.

⁴⁹*Id.* at 19–21.

⁵⁰*Help Wanted 1998* at 6.

⁵¹*Id.*

⁵²*Id.* at 7.

companies and 217,000 in non-information technology companies.⁵³ This represents 10% of total employment in these professions.⁵⁴ Of responding companies, 85% said it was “very difficult” or “somewhat difficult” to hire programmers (78% for systems analysts and 84% for computer scientists and engineers).⁵⁵

In March of 1998, the U.S. General Accounting Office issued a report criticizing the methodology of *Help Wanted* and *America’s New Deficit*.⁵⁶ GAO found that “Commerce’s report has serious analytical and methodological weaknesses that undermine the credibility of its conclusions that a shortage of [information technology] workers exists.”⁵⁷ Specifically, GAO found that:

The Commerce report cited four pieces of evidence that an inadequate supply of [information technology] workers is emerging—rising salaries for [information technology] workers, reports of unfilled vacancies for [information technology] workers, offshore sourcing and recruiting, and the fact that the estimated supply of [information technology] workers (based on students graduating with bachelor’s degrees in computer and information sciences) is less than its estimate of the demand. However, the report fails to provide clear, complete, and compelling evidence for a shortage or a potential shortage of [information technology] workers with the four sources of evidence presented.⁵⁸

As to rising salaries, GAO found that “although some data show rising salaries for [information technology] workers, other data indicate that those increases in earnings have been commensurate with the rising earnings of all professional specialty occupations.”⁵⁹ Further:

[The wage increases cited in *America’s New Deficit*] may not be conclusive evidence of a long-term limited supply of [information technology] workers, but may be an indication of a current tightening of labor market conditions for [information technology] workers. According to BLS data, increases have been less substantial when viewed over a longer period of time. For example, the percentage changes in weekly earnings for workers in computer occupations over the 1983 through 1997 period were comparable to or slightly lower, in the case of computer systems analysts and scientists, than the percentage changes for all professional specialty occupations. * * * What is uncertain is

⁵³ *Id.* at 9 (If information technology workers were considered more broadly, the survey estimated 606,000 vacancies. *Id.* at 11.). The study did state that “even if 346,000 qualified applicants * * * appeared today, in all probability immediate positions would not be available—to translate this number to an absolute would be misleading.” *Id.* at 12.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.* at 17.

⁵⁶ U.S. General Accounting Office, Health, Education, and Human Services Division, *Information Technology: Assessment of the Department of Commerce’s Report on Workforce Demand and Supply*, GAO/HEHS-98-106R (March 20, 1998)(hereinafter cited as “GAO Report”).

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 6–7.

⁵⁹ *Id.* at 7.

whether the recent trend toward higher rates of increase will continue.⁶⁰

As to ITAA vacancy statistics, the “survey response rate of 14 percent is inadequate to form a basis for a nationwide estimate of unfilled [information technology] jobs.”⁶¹ GAO noted that “[i]n order to make sound generalizations, the effective response rate should usually be at least 75 percent. * * * Furthermore, ITAA’s estimate of the number of unfilled [information technology] jobs is based on reported vacancies, and adequate information about those vacancies is not provided, such as how long positions have been vacant, whether wages offered are sufficient to attract qualified applicants, and whether companies consider jobs filled by contractors as vacancies. These weaknesses tend to undermine the reliability of ITAA’s survey findings.”⁶²

As to offshore sourcing, “although the report cites instances of companies drawing upon talent pools outside the United States to meet their demands for workers, not enough information is provided about the magnitude of this phenomenon.”⁶³

Finally, the report “used only the number of students earning bachelor’s degrees in computer and information sciences when it compared the potential supply of workers with the magnitude of [information technology] worker demand.”⁶⁴ Further:

Commerce identifies the supply of potential [information technology] workers as the number of students graduating with bachelor’s degrees in computer and information sciences. Commerce’s analysis of the supply of [information technology] workers . . . did not consider (1) the numerical data for degrees and certifications in computer and information sciences other than at the bachelor’s level when they quantify the total available supply; (2) college graduates with degrees in other areas; and (3) workers who have been, or will be, retrained for these occupations. * * *

[T]here is no universally accepted way to prepare for a career as a computer professional. * * * According to the National Science Foundation, only about 25 percent of those employed in computer or information science jobs in 1993 actually had degrees in computer and information science. Other workers in these fields had degrees in such areas as business, social sciences, mathematics, engineer-

⁶⁰ *Id.* Robert Lerman, Director of the Human Resources Policy Center of the Urban Institute, has stated that:

[The data cited by Help Wanted] are inconsistent with other private surveys as well [as] with public data sources. A survey conducted by Deloitte & Touche Consulting Group revealed that salaries for computer network professionals rose an average of 7.4% between 1996 and 1997. Coopers and Lybrand found average salary increases at 500 software companies were 7.7% in 1995 and almost 8% in 1996.

Senate Hearing.

⁶¹ GAO Report at 7.

⁶² *Id.* at 8. Robert Lerman also criticized ITAA’s use of vacancy figures. He noted that:

In any industry with a rising demand and/or high turnover, the presence of vacancies does not necessarily demonstrate a shortage of workers. A vacancy simply means the firm has an open position it has not yet filled. Vacancies as a proportion of employment will depend on the employer’s turnover rate, how long it takes to fill a vacancy, and the extent to which the company is growing.

Senate Hearing.

⁶³ GAO Report at 7.

⁶⁴ *Id.*

ing, psychology, economic, and education. The Commerce report did not take this information into account in any way in estimating the future supply of [information technology] workers.”⁶⁵

GAO concluded by stating that “the lack of support presented in this one report should not necessarily lead to a conclusion that there is no shortage. Instead, as the Commerce report states, additional information and data are needed to more accurately characterize the [information technology] labor market now and in the future.”⁶⁶

Dr. Norman Matloff, professor of computer science at the University of California at Davis, argues that if a shortage of information technology workers exists, it is of industry’s own making and that companies often favor foreign workers for illegitimate reasons.

Dr. Matloff first makes the point that information technology industry hiring practices are not consistent with a worker shortage. Employers currently are able to reject the vast majority of applicants for information technology positions. For instance, Microsoft only hires 2% of programmer applicants.⁶⁷

Dr. Matloff then argues that if the information technology industry is having any trouble locating sufficient information technology workers, it is because it overspecifies hiring criteria and passes over most viable candidates:

Employers are over-defining [programming] jobs, insisting that applicants have skills in X and Y and Z and W and so on. But what really counts in programming jobs is general programming talent, not experience with specific software skills. Even Bill Gates has described Microsoft hiring criteria thusly: “We re not looking for any specific knowledge because things change so fast, and it’s easy to learn stuff. You’ve got to have an excitement about software, a certain intelligence * * * It’s not the specific knowledge that counts.” Studies show that programmers can become productive in a new software technology in a month or so (this is confirmed by my own personal experience, in 25 years of keeping up with technological change in the industry). Thus employers are (some deliberately, some unwittingly) creating an artificial labor “shortage.”⁶⁸

The group most affected by this phenomenon seems to be older workers. Dr. Matloff finds that mid-career programmers have great difficulty finding work because they “often lack the most up-to-date software skills” and employers “like to hire new or recent college graduates, because they work for lower salaries, and they generally are single and thus can work large amounts of overtime without being constrained by family responsibilities.”⁶⁹ Matloff states further that:

⁶⁵ *Id.* at 5–6 (footnote omitted).

⁶⁶ *Id.* at 2.

⁶⁷ *Immigration and America’s Workforce for the 21st Century: Hearing Before the Subcomm. On Immigration and Claims of the House Judiciary Comm.*, 105th Cong., 2nd Sess. (April 21, 1998) (statement of Norman Matloff)(hereinafter cited as “House Hearing”).

⁶⁸ *A Critical Look at Immigration’s Role in the U.S. Computer Industry* (Internet document dated May 19, 1997).

⁶⁹ *House Hearing*.

Many employers like * * * recent graduates not for their skills, but rather because they are cheaper, with foreign nationals being even cheaper still. * * * If one hires a young graduate because he/she has specific skills, he/she will be cast aside in a few years when those same skills become obsolete. The comments by employers regarding new graduates are tantamount to an admission of rampant age discrimination. * * *⁷⁰

There is much anecdotal evidence to support the contention that age discrimination against information technology workers is prevalent. Many American workers focused on age discrimination when they responded to the San Francisco Examiner's solicitation of views regarding the information technology worker shortage. Two examples follow:

At job fairs many older people, myself included, are rudely treated by young recruiters. * * * In one blatant case, I saw a recruiter from a major local computer manufacturer and software firm refuse to talk to anyone who looked over 35. Resumes from older people were tossed in one pile. Resumes from younger people were put in another. * * * I watched for a while and wished I'd had a hidden video camera.⁷¹

I think the general problem is one of there not being enough young, and/or inexpensive workers. I have been having an increasingly difficult time of finding any employment since my late forties. I have many friends who are in their fifties who are well-educated, obviously experienced, and are quite computer literate, who are having similar difficulties. * * * I believe that age discrimination is rampant in this country, especially in the computer industry. It's the dirty little secret that industry won't own up to.⁷²

In addition, Dr. Matloff points to two telling statistics. First, there is a 17% unemployment rate for computer programmers over the age of 50.⁷³ Second, only 19% of computer science graduates are still working in software development 20 years after getting their degrees—compared to 52% for civil engineers 20 years after graduating.⁷⁴

As to declines in college enrollment in computer science, Dr. Matloff notes that if *Help Wanted* had looked past 1994, it would have noted a dramatic increase in computer science enrollment—the 27th annual survey of the Computer Research Association's Taulbee Survey of Ph.D.-granting departments of computer science and computer engineering in the United States and Canada reported a 40% increase in 1996–97 in undergraduate enrollment and a 39% increase in 1997–98.⁷⁵ This has caused its own problems. It was recently reported that “[l]ured by high-tech riches, students

⁷⁰*A Critical Look*

⁷¹San Francisco Examiner Internet page (April 19, 1998).

⁷²*Id.*

⁷³*House Hearing.*

⁷⁴*Id.* Robert Lerman found that “[n]early 200,000 of the 540,000 people working as computer programmers in 1989 had left the [information technology] area by 1993.” Senate Hearing.

⁷⁵*House Hearing.*

are flooding into college computer-science courses, and Texas universities can't seem to keep up with the onslaught."⁷⁶

Why can foreign workers be cheaper when employers are required to pay at least the prevailing wage to H-1B aliens? First, as the Department of Labor's Inspector General found, many employers do not pay the prevailing wage. Even when the prevailing wage is paid, it can often be less than what comparable American workers are making. Since H-1B aliens typically do not work in unionized fields, there is rarely a union contract available to help set the prevailing wage. In such circumstances, a "prevailing wage" is a very crude measure of what comparable American workers actually earn, as workers of widely varying skills and circumstances are conflated into one or two wage levels. For instance, those H-1B aliens visas who do have "hot" programming skills only have to be paid the prevailing wage for generic programmers.

In conclusion, after pondering the existence of a shortage, Robert Lerman, Director of the Human Resource Policy Center of the Urban Institute, wrote that:

Government policy makers should be cautious about short-term efforts to expand the supply of workers, especially by increasing the number of immigrant visas. Given the boom and bust cycles often observed in these fields, by the time the government acts to increase supply, the market may have already shifted from an excess demand to excess supply stage. Expanded immigration may have another counterproductive impact. It may deter prospective students from choosing an information technology career when they hear that potential immigrants entering the field will gain special access to visas.⁷⁷

III. The Bill

It is in the nation's interest that the quota for H-1B aliens be temporarily raised. First, unless Congress acts, employers will not be able to employ new H-1B nonimmigrants until the beginning of fiscal year 1999 (October 1, 1998). This delay would be extremely detrimental to large numbers of employers. If a university wanted to use the H-1B program to hire an alien as a professor or a teaching assistant, the alien could not start work until October, a month after most academic years begin. If a computer software developer wanted to use the H-1B program to hire an alien to devise its next generation software, it would have to delay the project for months.

Second, it is possible that there currently exists a significant shortage of information technology workers. The Committee recognizes that the evidence for such a shortage is inconclusive. However, because the success of our economy is so indebted to advances in computer technology, the Committee is willing to give industry the benefit of the doubt, to accept claims that there is a shortage and that it can only be alleviated through an increase of foreign workers through the H-1B program.

⁷⁶Freeman, *Colleges Scramble to Adjust to Computer Science's Rise*, Wall St. Journal, July 1, 1998.

⁷⁷Senate Hearing.

However, the increase in the H-1B quota should be of relatively brief duration. There will be a bumper crop of American college graduates skilled in computer science beginning in the summer of 2001. These students have been enticed into the field in the last two years by the brightening opportunities in this boom or bust profession. The law of supply and demand is clearly working—the opportunities spawned by a tight labor market are bringing fresh entrants into the field, just as the profession was shunned by many students during the downsizing of the early 1990s. If there is a labor shortage justifying an increased number of H-1B non-immigrants, the shortage—and the justification—should not last past the graduation dates of these students. Thus, Congress should not imperil the future careers of these young Americans by expanding the H-1B quota indefinitely.

The bill expands the H-1B quota for only three years. If a shortage exists at the end of this period recommending a further increase in the H-1B quota, Congress can then act. The bill increases the quota for fiscal year 1998 to 95,000 (a 46% increase). This is approximately the figure required to meet the need for H-1B non-immigrants for the entire year based upon usage in the first seven months. As demand is expected to rise for the next few years, the quota for fiscal year 1999 is raised to 105,000 (a 62% increase), and the quota for fiscal year 2000 is raised to 115,000 (a 77% increase). The quota then reverts back to 65,000.

The bill requires the GAO to submit to Congress a report on the high-technology/information technology labor market by the end of fiscal year 2000. It also requires the GAO to submit a report on age discrimination against older information technology workers. These reports will aid future Congresses in their deliberations as to whether increased H-1B quotas will still be justified at the beginning of the 21st century.

The maximum duration of stay for aliens granted H-1B status in a fiscal year after the 65,000 level has been reached is limited to four years. This provision is another attempt to limit the time frame over which the increased H-1B quota granted by this bill is played out. Even so, an alien granted one of the additional H-1B visas in September 2000 will be able to work and affect the labor market until September 2004.

The bill limits the maximum number of H-1B slots that can be granted to non-physician health care workers to 5,000 in any fiscal year. The rationale for the bill is a shortage of information technology workers. Therefore, it makes sense to ensure that the bulk of the new numbers will go to alleviate this shortage. In past years, physical and occupational therapists made up an extremely high percentage of H-1B aliens. Given that there is now no claimed shortage of therapists in the domestic labor market, such heavy usage is no longer justified.

Despite the limitations described above, the bill still dramatically increases the supply of H-1B nonimmigrants. If future Congresses choose to maintain the 115,000 quota, up to 590,000 H-1B aliens will be working in the United States at any one time. This is an increase of 200,000 foreign workers over current law. Because the bill is so dramatically increasing the supply of foreign workers without there being firm evidence of a domestic labor shortage, it

is imperative that we build into the H-1B program adequate protections for U.S. workers.

The most simple, most basic protection that can be given to an American worker is a guarantee that he or she won't be fired by an employer and replaced by a foreign worker. More broadly stated, an employer should not in the same instance fire an American worker and bring on a foreign worker when the American worker is well qualified to do the work intended for the foreign worker. The H-1B program currently contains no such guarantee.

The bill contains such a guarantee in the form of a new "no-lay off" attestation. This provision has long been sought by the Administration,⁷⁸ and is specifically permitted by the General Agreement on Trade in Services,⁷⁹ a multilateral agreement negotiated during the Uruguay Round of GATT. The bill provides that an employer can not lay-off or otherwise displace an American worker and, within a set period (stated in GATS) either before or after the lay-off, apply for or petition for an H-1B nonimmigrant who has substantially equivalent qualifications and experience as the American worker in the American's specialty occupation and for employment in the same geographic area.

The issue of layoffs is not merely theoretical. There has been a recent wave of layoff announcements by high-tech firms. For example, Motorola has announced it will lay-off 15,000 workers and Compaq Computer Corporation has announced it will lay-off 15,000 at recently acquired Digital Equipment Corporation. The Wall Street Journal recently reported that:

[T]he past couple of weeks have seen a steady drumbeat of layoff announcements in industry sectors that until recently have complained about personnel shortages. In Silicon Valley, layoffs have occurred at Seagate Technology, Inc., Silicon Graphics, Netscape Communications Corp., Apple Computer Inc., Sybase Inc. and others. Some firms have cut hiring plans; help-wanted advertising has slumped since the start of this year. Elsewhere, high-tech giants are shedding staff. Last week, Xerox Corp. announced the layoff of 9,000 people.⁸⁰

Even more disturbing are the reports that have appeared in many major newspapers of employers actually firing American workers and going to H-1B "job shops" for their replacements. Well-known employers have been cited for this abuse.

The bill extends the reach of the no-lay off attestation to encompass firms that contract with job shops for H-1B aliens. This is necessary because while the job contractor petitions for (and is the employer of) the aliens, it is often the firm contracting for the aliens (though never "employing" them) that has laid off American workers. Also, by its very nature, the job contractor may never hire any American workers which it could lay off. The no-lay off attestation must be designed so that it cannot be evaded by an employer who fires American workers and replaces them with H-1B aliens

⁷⁸ See letter from Robert Reich, Secretary of Labor, to Romano Mazzoli, Chairman, Subcomm. on International Law, Immigration and Refugees, House Judiciary Comm. at 1 (Sept. 23, 1993).

⁷⁹ H.R. Doc. No. 316, v. 1, 103rd Cong., 2nd Sess. 1588-1620 (1994).

⁸⁰ Bernard Wysocki, *The Outlook: Even High Tech Faces Problems with Pricing*, Wall. St. Journal, April 13, 1998, at A1.

who are technically employees of the job contractor. The bill thus provides that the contracting firm, as well as the job contractor, must execute a no-lay off attestation.

The bill provides an exemption from the no-lay off attestation for institutions of higher education to the extent that they seek to employ H-1B aliens as professors under temporary contracts, or as researchers on projects, a majority of whose funding is provided by an outside entity. Universities are unique employers. Typically, a university will look for researchers—usually doctoral students or post-doctoral students—in order to perform research funded by particular grants. When the grants are exhausted, the research is concluded and the researchers go their separate ways. Depending on the other grants secured by the university, other research projects with different personnel will commence. In order for the H-1B program to be usable by universities, the program has to allow for this method of hiring and firing.

The bill also endeavors to protect American workers by ensuring that companies at least make an attempt to locate qualified American workers before petitioning for foreign workers under the H-1B program. H.R. 3736's recruitment attestation requires that a company in good faith recruit American workers "using procedures that meet industry-wide standards" and then offer jobs to those Americans who apply and have qualifications equal to or better than the foreign worker sought. The primary goal of this attestation is to target those companies who totally fail to recruit American workers and those who only make a pretense of recruiting American workers.

The attestation is not designed to require an employer to duplicate the highly regulated and lengthy recruitment process required of a company in order to procure labor certification for a prospective permanent resident. All a company wanting to petition for H-1B aliens has to do is that which is common practice in the company's industry. The Committee envisions Department of Labor officials sitting down with leading firms and industry associations to learn what are common recruiting practices in various industries. The Department is not to prescribe its own preferred recruitment techniques. Of course, the Department may later be called upon to determine whether a particular employer has utilized the accepted recruiting practices.

One reason that there has been so little policing of the H-1B program is that the federal government can only investigate if an aggrieved party has filed a complaint. Foreign workers themselves rarely file complaints, most being afraid of losing their jobs by reporting abuses. H.R. 3736 allows the government to check to see that employers are complying with the program without the necessity of first having received complaints. However, the bill grants the government this power only in situations where abuse is especially likely.

The bill follows the path taken by H.R. 2202, the immigration reform bill passed by the House of Representatives in the 104th Congress. H.R. 2202 allowed for government-initiated investigations only of H-1B-dependent employers. That is precisely what H.R. 3736 does. H-1B dependent employers have an unusually large percentage of their workforces made up of foreign workers—from

15% to 100%. These companies often do nothing but contract their foreign workers out to other companies—often after the other companies have laid off American workers. H-1B-dependent companies have been accused of a disproportionate share of H-1B abuses.

The bill also allows the Department of Labor to conduct random inspections of an employer for five years after it has determined that the employer has committed a willful violation of an attestation or has made a misrepresentation of a material fact on an application.

Penalties for violators of the H-1B program are increased under the bill. While current law provides for civil monetary penalties of up to \$1,000 per violation, the bill increases the maximum penalty to \$5,000 per violation for willful violations. The bill also provides for a penalty of up to \$25,000 per violation when an employer commits a willful violation and violates the no lay-off attestation.

HEARINGS

The Committee's Subcommittee on Immigration and Claims held one day of hearings on "Immigration and America's Workforce for the 21st Century" on April 21, 1998. Testifying in regard to the H-1B visa program were John Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor; Carlotta Joyner, Director, Education and Employment Issues, Health, Education, and Human Services Division, U.S. General Accounting Office; Harris Miller, President, Information Technology Association of America; Dr. Norman Matloff, Department of Computer Science, University of California at Davis; Daniel Sullivan, Senior Vice President for Human Resources, QUALCOMM; William Payson, The Senior Staff; Darryl Hatano, Vice President for International Trade and Government Affairs, Semiconductor Industry Association; Peggy Taylor, Director, Department of Legislation, AFL-CIO; and Dr. Richard Lariviere, Vice President of International Programs, University of Texas at Austin.

COMMITTEE CONSIDERATION

On April 30, 1998, the Subcommittee on Immigration and Claims met in open session and ordered reported the bill H.R. 3736, by a voice vote, a quorum being present. On May 20, 1998, the Committee met in open session and ordered reported favorably the bill H.R. 3736 with amendment by a recorded vote of 23 to 4, a quorum being present.

VOTE OF THE COMMITTEE

Voice votes

Eleven amendments were adopted by voice vote. These were: (1) an amendment by Mr. Smith of Texas to clarify that in order to fulfill the recruitment attestation, an employer would only have to offer employment to American workers who had the same qualifications as, or better qualifications than, any of the H-1B aliens sought; (2) an amendment by Mr. Watt to provide that the no-lay off attestation does not apply to an institution of higher education, or a related or affiliated non-profit entity, when applying for H-1B

nonimmigrant status for an alien whom the employer seeks to employ as a researcher on a project 50% or more of which is funded by other entities or as a professor or instructor under a time-limited contract; (3) an amendment by Mr. Berman penalizing an employer who intimidates or otherwise discriminates against an employee because the employee disclosed information about, or cooperated in an investigation of, the employer's violation of the terms of the H-1B program; (4) an amendment by Mr. Gallegly limiting to four years the maximum duration of the H-1B visas made available by this bill (over and above the 65,000 provided by current law); (5) an amendment by Mr. Jenkins reducing the number of H-1B visas the bill allocates for non-physician health care workers from 7,500 to 5,000; (6) an amendment by Ms. Lofgren requiring the Attorney General to maintain an accurate count of aliens issued H-1B visas or otherwise provided H-1B status (including by revising petition forms) and to issue periodic reports to Congress on H-1B nonimmigrants and their characteristics, (7) an amendment by Ms. Lofgren requiring the Comptroller General to conduct a study assessing age discrimination in the information technology field, (8) an amendment by Ms. Lofgren requiring the Comptroller General to conduct a study of the labor market for information technology workers, (9) an amendment by Ms. Lofgren penalizing an employer who requires an H-1B alien to sign an employment contract that would be considered void against public policy in the State of intended employment, (10) an amendment by Ms. Lofgren making offsetting cuts to the H-2B nonimmigrant work visa program, and (11) an amendment by Mr. Watt to clarify that the H-1B quota would return to 65,000 in fiscal year 2001 and subsequent years.

Recorded votes

There were two recorded votes (one on an amendment and one on final passage) during the Committee's consideration of H.R. 3736, as follows:

1. Amendment offered by Mr. Rogan to strike the no-lay off attestation and the recruitment attestation. Defeated 7-24.

AYES	NAYS
Mr. Canady	Mr. Hyde
Mr. Inglis	Mr. Sensenbrenner
Mr. Goodlatte	Mr. McCollum
Mr. Bryant	Mr. Gekas
Mr. Chabot	Mr. Coble
Mr. Cannon	Mr. Smith (TX)
Mr. Rogan	Mr. Gallegly
	Mr. Buyer
	Mr. Barr
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Pease
	Ms. Bono
	Mr. Conyers
	Mr. Berman
	Mr. Boucher

Mr. Nadler
 Mr. Scott
 Mr. Watt
 Ms. Jackson-Lee
 Ms. Waters
 Mr. Meehan
 Mr. Delahunt
 Mr. Rothman

Mr. Frank received unanimous consent to have the record indicate that he would have voted against the Rogan amendment had he not been unavoidably detained on the floor of the House of Representatives.

2. Vote on Final Passage: Adopted 23–4.

AYES	NAYS
Mr. Hyde	Mr. Bryant
Mr. McCollum	Mr. Cannon
Mr. Gekas	Mr. Rogan
Mr. Coble	Mr. Rothman
Mr. Smith (TX)	
Mr. Gallegly	
Mr. Canady	
Mr. Goodlatte	
Mr. Chabot	
Mr. Barr	
Mr. Jenkins	
Mr. Graham	
Ms. Bono	
Mr. Conyers	
Mr. Frank	
Mr. Nadler	
Mr. Scott	
Mr. Watt	
Ms. Lofgren	
Ms. Jackson-Lee	
Ms. Waters	
Mr. Delahunt	
Mr. Wexler	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 3736, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 4, 1998.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3736, the Workforce Improvement and Protection Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts for this estimate are Mark Grabowicz and Mary Maginniss.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 3736—Workforce Improvement and Protection Act of 1998

CBO estimates that implementing this legislation would cost less than \$1 million over the next two years, assuming the appropriation of the necessary amounts. The bill would affect direct spending and receipts, so pay-as-you-go procedures would apply, but the net effects would be less than \$500,000 a year. H.R. 3736 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no impact on the budgets of state, local, or tribal governments.

H.R. 3736 would change the number of nonimmigrant (temporary) visas available for certain workers and make other changes to current laws relating to the employment of nonimmigrants. The bill also would direct the General Accounting Office (GAO) to prepare two reports relating to the information technology industry. Finally, H.R. 3736 would provide for new and increased civil penalties for employers that violate certain laws relating to hiring non-immigrant labor.

H.R. 3736 would increase the number of nonimmigrant visas available for certain skilled workers by 30,000 in fiscal year 1998, by 40,000 in 1999, and by 50,000 in 2000. By these same amounts, the bill would decrease the number of visas available for unskilled laborers from 1998 through 2000. CBO expects that the number of visas granted to skilled workers would increase by the full amounts permitted by the bill over the 1998–2000 period, but that the num-

ber of visas granted to unskilled laborers probably would decrease by much smaller amounts or not at all because of lower demand for unskilled workers. (The current annual cap on unskilled workers is 66,000, but only about 20,000 visas will be issued in 1998; thus, the bill's 1998 cap of 36,000 would not affect the number of visas granted to unskilled laborers.)

Assuming enactment of the bill by the end of July, CBO estimates that the net increase in visas issued would average about 30,000 a year over the 1998–2000 period. The fee for each visa is \$85, so enacting the bill would increase fees collected by the Immigration and Naturalization Service (INS) by about \$2.5 million in each of fiscal years 1998 through 2000. (The effects on the number of visas issued and INS collections and spending in fiscal year 1998 could be significantly smaller if the bill is after July 31.) We expect that the INS would spend the fees (without appropriation action), mostly in the year in which they are collected, so enacting H.R. 3736 would result in a negligible impact on net spending by the INS.

H.R. 3736 would require GAO to prepare, no later than October 1, 2000, a report assessing age discrimination in the information technology industry and a report on the labor market for that field. Based on information from the agency, CBO estimates that GAO would spend about \$900,000 over the next two years to conduct the two studies, assuming appropriation of the necessary amounts.

The bill's provisions relating to new and increased civil penalties could result in increased collections of civil fines. These fines are classified as revenues (governmental receipts), but we estimate that any such increase would be less than \$500,000 annually.

The CBO staff contacts for this estimate are Mark Grabowicz and Mary Maginniss, both of whom can be reached at 226–2860. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article 1, section 8, clause 4 of the Constitution.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The Act may be cited as the “Workforce Improvement and Protection Act of 1998.”

Section 2. Temporary increase in skilled foreign workers; temporary reduction in H-2B nonimmigrants

Section 2 of the bill amends section 214(g)(1)(A) of the Immigration and Nationality Act to temporarily increase the maximum number of aliens who may be issued visas or otherwise provided “H-1B” nonimmigrant status under section 101(a)(15)(H)(i)(b) of the INA from the current 65,000 per fiscal year. For fiscal year 1998, the maximum number is 95,000. For fiscal year 1999, it is 105,000, and for fiscal year 2000, it is 115,000. In fiscal years 2001 and beyond, the maximum number returns to 65,000.

Section 2 amends section 214(g)(1)(B) of the INA by making off-setting cuts in the “H-2B” nonimmigrant visa program under section 101(a)(15)(H)(ii)(b) of the INA. The bill decreases the maximum number of aliens who may be issued visas or otherwise provided nonimmigrant status under the H-2B program from the current 66,000 per fiscal year to 36,000 in fiscal year 1998, 26,000 in fiscal year 1999, and 16,000 in fiscal year 2000. In fiscal years 2001 and beyond, the maximum number returns to 66,000.

Section 2 amends section 214(g)(4) of the INA by providing that the period of authorized admission for aliens issued visas or otherwise provided nonimmigrant status under the H-1B program in fiscal years 1998, 1999, and 2000, after the 65,000 level has been reached, may not exceed four years. As under current law, the period of authorized stay for the first alien up to the 65,000th alien may not exceed six years.

Section 2 adds a new section 214(g)(5) to the INA providing that no more than 5,000 aliens who seek to enter the United States for the purpose of performing labor as health care workers other than physicians (described in section 212(a)(5)(C) of the INA) may be issued visas or otherwise provided nonimmigrant status under the H-1B program in fiscal years 1999 and beyond.

Section 3. Protection against displacement of United States workers

Section 3(a) of the bill adds a new section 212(n)(1)(E) to the INA adding a fifth “attestation” that an employer must make when filing an application with the Secretary of Labor for an alien to be admitted or provided status as an H-1B nonimmigrant. The employer must state that it has not laid off or otherwise displaced and will not lay off or otherwise displace, within the period beginning 6 months before and ending 90 days following the date of filing of the application or during the 90 days immediately preceding and following the date of filing of any visa petition (with the Immigration and Naturalization Service) supported by the application, any United States worker (including a worker whose services are obtained by contract, employee leasing, temporary help agreement, or other similar means) who has substantially equivalent qualifications and experience in the specialty occupation, and in the area of employment,⁸¹ for which H-1B nonimmigrants are sought or in which they are employed.

The employer must also state that it will not place the non-immigrant with another employer where (1) the nonimmigrant performs his or her duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer, and (2) there are indicia of an employment relationship between the non-immigrant and such other employer, unless the other employer has itself executed an attestation that it (the other employer) would be considered to have satisfied the terms of the “no-lay off” attestation described in the paragraph immediately preceding this one if the

⁸¹The term “area of employment” has the same meaning as does “area of intended employment,” which is defined in section 655.715 of title 29 of the Code of Federal Regulations. The terms mean the area within normal commuting distance of the place of employment (worksites or physical location where work is actually performed) where the H-1B nonimmigrant is or will be employed. If the place of employment is within a Metropolitan Statistical Area, any place within the MSA is deemed to be within normal commuting distance of the place of employment.

H-1B nonimmigrants were considered to be its (the other employers) employees.

An employer that is an institution of higher education or a related or affiliated nonprofit entity does not have to agree to or comply with this fifth attestation in cases where it seeks to employ a nonimmigrant who has attained a master's or higher degree (or its equivalent) in a specialty occupation the specific knowledge of which is required for the intended employment, and where the intended employment is (1) as a researcher on a project for which not less than 50% of the funding is provided, for a limited period of time, through a grant or contract with an entity other than the employer, or (2) as a professor or instructor under a contract that expires after a limited period of time.

Section 3(b) of the bill contains definitions applicable to section 212(n) of the INA. The term "layoff or otherwise displace" with respect to an employee, means to cause the employee's loss of employment, other than through a discharge for cause,⁸² a voluntary departure, or a voluntary retirement, and does not include any situation in which employment is relocated to a different geographic area and the employee is offered a chance to move to the new location, with wages and benefits that are not less than those at the old location, but elects not to move to the new location.

The term "United States worker" means a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien authorized to be employed by the INA or by the Attorney General.

Section 4. Recruitment of United States workers prior to seeking nonimmigrant workers

Section 4 of the bill adds a new section 212(n)(1)(F) to the INA adding a sixth "attestation" that an employer must make when filing an application with the Secretary of Labor for an alien to be admitted or provided status as an H-1B nonimmigrant. The employer must state that prior to filing the application, it has taken, in good faith, timely and significant steps to recruit and retain sufficient United States workers in the specialty occupation for which H-1B nonimmigrants are sought. Such steps shall have included recruitment in the United States, using procedures that meet industry-wide standards and offering compensation that is as least as great as that required to be offered to the H-1B nonimmigrants sought, and offering employment to any United States worker who applies and has the same qualifications as, or better qualifications than, any of the H-1B sought.

An employer does not have to agree to or comply with this sixth attestation in cases where it seeks to employ a nonimmigrant who is an alien of extraordinary ability, an outstanding professor or researcher, or a multinational executive and manager (all as described in section 203(b)(1)(A)-(C) of the INA).

⁸² Discharge for cause shall be considered to mean discharge for either employee misconduct or inadequate performance. See *Kohler v. Ericsson, Inc.*, 847 F.2d 499 (9th Cir. 1988). For purposes of this attestation, discharge because of business or economic reasons (such as pursuant to a reduction in force, a plant closing, or a corporate merger or reorganization) should not be considered discharge for cause. The preceding two sentences override any definition of the term in any employment agreement or contract.

Section 5. Limitation on authority to initiate complaints and conduct investigations for non-H-1B-dependent employers

Section 212(n)(2)(A) of the INA provides that the Secretary of Labor shall investigate complaints respecting an employer's violation of (failure to meet the terms of) one or more of the attestations it has made in an application or misrepresentation of a material fact in an application. Complaints may be filed by any aggrieved person or organization (including a bargaining representative).

Section 5(a) of the bill amends section 212(n)(2)(A) by specifying that the Secretary of Labor can only file a complaint as to an H-1B-dependent employer and only where there appears to be a violation of an attestation or a misrepresentation of a material fact in an application. In addition, the Secretary of Labor can only conduct an investigation of an employer in response to a complaint (except as provided in section 6(c) of the bill).

Section 5(b) of the bill defines the term "H-1B-dependent employer." An employer is H-1B-dependent if it (1) has fewer than 21 full-time equivalent employees in the United States and employs four or more H-1B nonimmigrants, (2) has between 21-150 full-time equivalent employees in the United States and employs H-1B nonimmigrants in a number that is equal to at least 20% of the number of such full-time equivalent employees, or (3), has 151 or more full-time equivalent employees in the United States and employs H-1B nonimmigrants in a number that is equal to at least 15% of the number of such full-time equivalent employees. Any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer. Aliens employed under an H-1B petition shall be treated as employees of an employer.

Section 6. Increased enforcement and penalties

Section 212(n)(2)(C) of the INA provides for penalties for an employer of H-1B nonimmigrants who has willfully failed to meet a condition of the first attestation (payment to H-1B nonimmigrants of the required wage), failed to meet a condition of the second attestation (no strike or lockout taking place), substantially failed to meet a condition of the third (proper notice provided) or fourth (application contains specified information) attestations, or has made a misrepresentation of a material fact in an application. If the Secretary of Labor, after notice and opportunity for a hearing, has found such a violation, (1) the Secretary shall notify the Attorney General and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per violation) as the Secretary determines to be appropriate, and (2) the Attorney General shall not approve petitions filed with respect to that employer under section 204 of the INA (petitions for permanent resident status) or section 214(c) of the INA (petitions for status as nonimmigrant under section 101(a)(15)(H) of the INA—including status as H-1B nonimmigrant—and under sections 101(a)(15)(L), (O), or (P)(i) of the INA) during a period of at least one year for aliens to be employed by that employer.

Section 6(a) of the bill amends section 212(n)(2)(C) to provide for three levels of violations and related penalties. The first level is

similar to the violations and penalties described above, except that there is no penalty for willful failure to meet a condition of the first attestation, and penalties are added for a failure to meet a condition of the fifth attestation (no-lay off) and for substantial failure to meet a condition of the sixth attestation (recruitment).

The second level of penalties applies to an employer who has willfully failed to meet a condition of any of the six attestations, has made a willful misrepresentation of a material fact in an application, or has intimidated, threatened, restrained, coerced, blacklisted, discharged, or in any other manner discriminated against an employee (or former employee or applicant for employment) because the employee has disclosed information to the employer or to any other person that the employee reasonably believes evidences a violation of section 212(n) of the INA, or any rule or regulation pertaining to section 212(n), or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of section 212(n) or any rule or regulation pertaining to section 212(n). In any such case, (1) the Secretary of Labor shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$5,000 per violation) as the Secretary determines to be appropriate, and (2) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) of the INA during a period of at least one year for aliens to be employed by the employer.

The third level of penalties applies to an employer who has willfully failed to meet a condition of any of the six attestations or has made a willful misrepresentation of a material fact in an application, in the course of which failure or misrepresentation the employer has also failed to meet a condition of the fifth attestation (no-lay off). In any such case, (1) the Secretary of Labor shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$25,000 per violation) as the Secretary determines to be appropriate, and (2) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) of the INA during a period of at least two years for aliens to be employed by the employer.

Section 6(b) of the bill adds a section 212(n)(2)(E) of the INA providing that the provisions of section 212(n)(2)—including the penalties contained in subparagraph (C)—apply to a failure of an “other” employer to comply with the (no-lay off) attestation required of it. *See* section 3 of the bill.

Section 6(c) of the bill adds a section 212(n)(2)(F) of the INA providing that the Secretary of Labor may, on a case-by-case basis, subject an employer—whether or not H-1B-dependent—to random investigations for a period of up to five years, beginning on the date that the employer is found by the Secretary to have committed a willful failure to meet a condition of any of the six attestations or to have made a misrepresentation of material fact in an application. In such an instance, no complaint needs to have been filed. *See* section 5 of the bill.

Section 7. Prohibition on imposition by importing employers of employment contract provisions violating public policy

Section 7 of the bill adds a section 212(n)(2)(G) of the INA providing that if the Secretary of Labor finds, after notice and opportunity for a hearing, that an employer who has submitted an application for an H-1B nonimmigrant has requested or required an alien admitted or provided status as a nonimmigrant pursuant to the application, as a condition of the employment, to execute a contract containing a provision that would be considered void as against public policy in the State of intended employment, (1) the Secretary shall notify the Attorney General of such finding, and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$25,000 per violation) as the Secretary determines to be appropriate, and (2) the Attorney General shall not approve petitions filed by the employer for H-1B nonimmigrants to be employed by the employer during a period of not more than 10 years.

Section 8. Improving count of H-1B and H-2B nonimmigrants

Section 8(a) of the bill provides that the Attorney General shall take such steps as are necessary to maintain an accurate count of the number of aliens who are issued H-1B or H-2B visas or otherwise provided H-1B or H-2B status.

Section 8(b) of the bill provides that the Attorney General shall take such steps as are necessary to revise the forms used for petitions for visas or nonimmigrant status under the H-1B and H-2B programs so as to ensure that the forms provide the Attorney General with sufficient information to permit the Attorney General accurately to count the number of aliens who are issued H-1B or H-2B visas or otherwise provided H-1B or H-2B status.

Section 8(c) of the bill provides that the Attorney General shall provide to the Congress not less than four times per year (beginning in fiscal year 1999) a report on (1) the number of aliens who were issued H-1B visas or otherwise provided H-1B status during the preceding three month period, (2) the number of aliens who were issued H-2B visas or otherwise provided H-2B status during the preceding three month period, and (3) the countries of origin and occupations of, educational levels attained by, and total compensation (including the value of all wages, salary, bonuses, stock, stock options, and any other similar forms of remuneration) paid to, aliens issued H-1B or H-2B visas or otherwise provided H-1B or H-2B status during the preceding three month period.

Section 9. GAO study and report on age discrimination in the information technology field

Section 9(a) of the bill provides that the Comptroller General of the United States shall conduct a study assessing various aspects of age discrimination in the information technology industry and by employers of information technology workers including (1) the prevalence of age discrimination, (2) the extent to which there is a difference, based on age, in promotion and advancement, working hours, telecommuting, salary, and stock options, bonuses and other benefits, (3) the relationship between rates of advancement, pro-

motion, and compensation to experience, skill level, education, and age, and (4) differences in skill level on the basis of age.

Section 9(b) of the bill provides that not later than October 1, 2000, the Comptroller General shall submit to the House and Senate Judiciary Committees a report containing the results of the study, including any recommendations as to how to reduce age discrimination.

Section 10. GAO labor market study and report

Section 10(a) of the bill provides that the Comptroller General shall conduct a labor market study investigating and analyzing (1) the overall shortage of available workers in high-technology, rapid-growth industries, (2) the multiplier effect of growth in high-technology industry on growth in low-technology jobs, (3) the relative achievement rates of United States and foreign students in secondary school in a variety of subjects, (4) the relative performance, by subject area, of United States and foreign students in postsecondary and graduate schools as compared to secondary schools, (5) the labor market need for workers with information technology skills and the extent of the deficit of such workers to fill high-technology jobs during the 10 year period beginning on the date of enactment of the bill, (6) future training and education needs of companies in the high-technology sector, (7) future training and education needs of United States students to ensure that their skills at various levels match the needs of the high-technology and information technology sectors, (8) an analysis of which particular skill sets are in demand, (9) the needs of the high-technology sector for foreign workers with specific skills, (10) the potential benefits to postsecondary educational institutions, employers, and the United States economy from the entry of skilled professionals in the fields of engineering and science, and (11) the effect on the high-technology labor market of the downsizing of the defense sector, the increase in productivity in the computer industry, and the deployment of workers dedicated to the Year 2000 Project.

Section 10(b) provides that no later than October 1, 2000, the Comptroller General shall submit to the House and Senate Judiciary Committees a report containing the results of the study.

Section 11. Effective date

The amendments made by this bill shall take effect on the date of enactment and shall apply to applications filed with the Secretary of Labor on or after 30 days after the date of enactment, except that the amendments made by section 2 of the bill shall apply to applications filed with the Secretary before, on, or after the date of enactment.

AGENCY VIEWS

THE WHITE HOUSE,
Washington, DC., April 30, 1998.

Hon. LAMAR SMITH, *Chairman, Subcommittee on Immigration, Judiciary Committee,*
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Today, your Subcommittee will mark-up H.R. 3736, the "Workforce Improvement and Protection Act of 1998" which is intended to address the growing demand for skilled workers in the information technology (IT) industry by enacting a temporary increase in the annual cap on the number of visas for temporary foreign "specialty" workers under the H-1B program, while also effecting reforms to the H-1B program that would help target their usage to industries and employers that are actually experiencing skill shortages.

The Administration believes that the first step in increasing the availability of skilled workers *must* be raising the skills of U.S. workers and helping the labor market work better to match employers with U.S. workers. Therefore, substantial additional efforts by industry to increase the skill level of U.S. workers and needed improvements in the H-1B visa program are necessary prerequisites for the Administration to support any short-term increases in the number of visas for temporary foreign workers.

We are pleased that H.R. 3736 is consistent with one of our primary objectives, insofar as it conditions a temporary increase in the H-1B cap on the enactment of meaningful reforms to the H-1B visa program. Your bill would help ensure that U.S. workers would not lose their jobs to a temporary foreign worker and that qualified U.S. workers would have the opportunity to fill a job before a temporary foreign worker is hired. Moreover, your bill modestly expands enforcement authority to help prevent employer abuses of the H-1B program. These reforms will effectively target H-1B visas to industries experiencing skill shortages.

Unfortunately, H.R. 3736 does not contain any provision for additional training opportunities for U.S. workers. Training is a vital component of our strategy to address the longterm demand for highly skilled U.S. workers and to enhance the international competitiveness of important U.S. industries. An effective training strategy would also work to reduce the demand for H-1B visas. We are also concerned that the increase in the annual number of H-1B visas reflected in this bill is too large, although we agree that the increase should last for only three years.

For these reasons, the Administration believes that this legislation would substantially improve the current H-1B program and, with the addition of meaningful training provisions and a modest reduction in the level of increase in the annual H-1B visa cap, would garner the Administration's support. Modifications to the H-1B program that appropriately protect U.S. workers will also reinforce the Administration's strong support for legal immigration. We look forward to working with the Congress on these and other specific provisions in the bill.

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

Sincerely,

BRUCE REED,
Assistant to the President for Domestic Policy.

GENE B. SPERLING,
Assistant to the President for Economic Policy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

IMMIGRATION AND NATIONALITY ACT

* * * * *

TITLE II—IMMIGRATION

CHAPTER 1—SELECTION SYSTEM

* * * * *

GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND
INELIGIBLE FOR ADMISSION; WAIVERS OF INADMISSIBILITY

SEC. 212. (a) * * *

* * * * *

(n)(1) No alien may be admitted or provided status as **【a nonimmigrant described in section 101(a)(15)(H)(i)(b)】** *an H-1B nonimmigrant* in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer—

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as **【a nonimmigrant described in section 101(a)(15)(H)(i)(b)】** *an H-1B nonimmigrant* wages that are at least—

(I) * * *

* * * * *

(E)(i) Except as provided in clause (iv), the employer has not laid off or otherwise displaced and will not lay off or otherwise displace, within the period beginning 6 months before and ending 90 days following the date of filing of the application or during the 90 days immediately preceding and following the date of filing of any visa petition supported by the application, any United States worker (as defined in paragraph (3)) (including a worker whose services are obtained by contract, employee leasing, temporary help agreement, or other similar means) who has substantially equivalent qualifications and experience in the specialty occupation, and in the area of employment, for

which H-1B nonimmigrants are sought or in which they are employed.

(ii) Except as provided in clause (iii), in the case of an employer that employs an H-1B nonimmigrant, the employer shall not place the nonimmigrant with another employer where—

(I) the nonimmigrant performs his or her duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and

(II) there are indicia of an employment relationship between the nonimmigrant and such other employer.

(iii) Clause (ii) shall not apply to an employer's placement of an H-1B nonimmigrant with another employer if the other employer has executed an attestation that it satisfies and will satisfy the conditions described in clause (i) during the period described in such clause.

(iv) This subparagraph shall not apply to an application filed by an employer that is an institution of higher education (as defined in section 1201(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity, if the application relates solely to aliens who—

(I) the employer seeks to employ—

(aa) as a researcher on a project for which not less than 50 percent of the funding is provided, for a limited period of time, through a grant or contract with an entity other than the employer; or

(bb) as a professor or instructor under a contract that expires after a limited period of time; and

(II) have attained a master's or higher degree (or its equivalent) in a specialty the specific knowledge of which is required for the intended employment.

(F)(i) The employer, prior to filing the application, has taken, in good faith, timely and significant steps to recruit and retain sufficient United States workers in the specialty occupation for which H-1B nonimmigrants are sought. Such steps shall have included recruitment in the United States, using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H-1B nonimmigrants under subparagraph (A), and offering employment to any United States worker who applies and has the same qualifications as, or better qualifications than, any of the H-1B nonimmigrants sought.

(ii) The conditions described in clause (i) shall not apply to an employer with respect to the employment of an H-1B nonimmigrant who is described in subparagraph (A), (B), or (C) of section 203(b)(1).

* * * * *

(2)(A) The Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives) [.] except that the Secretary may only file such a complaint respecting an H-1B-dependent employer (as defined in paragraph

(3)), and only if there appears to be a violation of an attestation or a misrepresentation of a material fact in an application. Except as provided in subparagraph (F) (relating to spot investigations during probationary period), no investigation or hearing shall be conducted with respect to an employer except in response to a complaint filed under the previous sentence. No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

* * * * *

[(C) If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), a substantial failure to meet a condition of paragraphs (1)(C) or (1)(D), a willful failure to meet a condition of paragraph (1)(A), or a misrepresentation of material fact in an application—

(i) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per violation) as the Secretary determines to be appropriate, and

(ii) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 1 year for aliens to be employed by the employer.]

(C)(i) *If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B) or (1)(E), a substantial failure to meet a condition of paragraph (1)(C), (1)(D), or (1)(F), or a misrepresentation of material fact in an application—*

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 1 year for aliens to be employed by the employer.

(ii) *If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an application, or a violation of clause (iv)—*

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$5,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 1 year for aliens to be employed by the employer.

(iii) *If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an application, in the course of which failure or misrepresentation the employer also has failed to meet a condition of paragraph (1)(E)—*

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$25,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 2 years for aliens to be employed by the employer.

(iv) *It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.*

(D) *If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.*

(E) Under regulations of the Secretary, the previous provisions of this paragraph shall apply to a failure of another employer to comply with an attestation described in paragraph (1)(E)(iii) in the same manner as they apply to a failure to comply with a condition described in paragraph (1)(E)(i).

(F) The Secretary may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date that the employer is found by the Secretary to have committed a willful failure to meet a condition of paragraph (1) or to have made a misrepresentation of material fact in an application. The preceding sentence shall apply to an employer regardless of whether the employer is an H-1B-dependent employer or a non-H-1B-dependent employer. The authority of the Secretary under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(G) If the Secretary finds, after notice and opportunity for a hearing, that an employer who has submitted an application under paragraph (1) has requested or required an alien admitted or provided status as a nonimmigrant pursuant to the application, as a condition of the employment, to execute a contract containing a pro-

vision that would be considered void as against public policy in the State of intended employment—

(i) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$25,000 per violation) as the Secretary determines to be appropriate; and

(ii) the Attorney General shall not approve petitions filed by the employer under section 214(c) during a period of not more than 10 years for H-1B nonimmigrants to be employed by the employer.

(3) For purposes of this subsection:

(A) The term “H-1B-dependent employer” means an employer that—

(i)(I) has fewer than 21 full-time equivalent employees who are employed in the United States; and (II) employs 4 or more H-1B nonimmigrants; or

(ii)(I) has at least 21 but not more than 150 full-time equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 20 percent of the number of such full-time equivalent employees; or

(iii)(I) has at least 151 full-time equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

In applying this subparagraph, any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer. Aliens employed under a petition for H-1B nonimmigrants shall be treated as employees, and counted as nonimmigrants under section 101(a)(15)(H)(i)(b) under this subparagraph.

(B) The term “H-1B nonimmigrant” means an alien admitted or provided status as a nonimmigrant described in section 101(a)(15)(H)(i)(b).

(C) The term “lay off or otherwise displace”, with respect to an employee—

(i) means to cause the employee’s loss of employment, other than through a discharge for cause, a voluntary departure, or a voluntary retirement; and

(ii) does not include any situation in which employment is relocated to a different geographic area and the employee is offered a chance to move to the new location, with wages and benefits that are not less than those at the old location, but elects not to move to the new location.

(D) The term “non-H-1B-dependent employer” means an employer that is not an H-1B-dependent employer.

(E) The term “United States worker” means—

(i) a citizen or national of the United States;

(ii) an alien lawfully admitted for permanent residence;

or

(iii) an alien authorized to be employed by this Act or by the Attorney General.

* * * * *

ADMISSION OF NONIMMIGRANTS

SEC. 214. (a) * * *

* * * * *

(g)(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)—

[(A) under section 101(a)(15)(H)(i)(b) may not exceed 65,000, or

[(B) under section 101(a)(15)(H)(ii)(b) may not exceed 66,000.]

(A) under section 101(a)(15)(H)(i)(b), subject to paragraph (5), may not exceed—

- (i) 95,000 in fiscal year 1998;
- (ii) 105,000 in fiscal year 1999;
- (iii) 115,000 in fiscal year 2000; and
- (iv) 65,000 in fiscal year 2001 and any subsequent fiscal year; or

(B) under section 101(a)(15)(H)(ii)(b) may not exceed—

- (i) 36,000 in fiscal year 1998;
- (ii) 26,000 in fiscal year 1999;
- (iii) 16,000 in fiscal year 2000; and
- (iv) 66,000 in fiscal year 2001 and any subsequent fiscal year.

* * * * *

(4) In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 [years.] years, except that, with respect to each such nonimmigrant issued a visa or otherwise provided nonimmigrant status in each of fiscal years 1998, 1999, and 2000 in excess of 65,000 (per fiscal year), the period of authorized admission as such a nonimmigrant may not exceed 4 years.

(5) The total number of aliens described in section 212(a)(5)(C) who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1999) under section 101(a)(15)(H)(i)(b) may not exceed 5,000.

* * * * *

ADDITIONAL VIEWS

We thank the Chairman of the Committee and the Chairman of the Subcommittee on Immigration and Claims for their work in addressing a serious concern for U.S. employers: the ability to continue to have access to skilled foreign professionals. The increased need for skilled foreign professionals needs to be viewed in the context of a robust U.S. economy and the lowest U.S. unemployment rate in 40 years. Specifically, the expanding economy, and the tremendous growth in the high-technology industry, combined with declining enrollment by U.S. students (BA, MA and grad students) in high-tech fields (65,000 in 1983 v. 35,000 in 1997) has resulted in an increased need for foreign professionals in certain specialty occupations.

The "Workforce Improvement and Protection Act of 1998" will raise the cap on the number of H-1B employment visas issued to highly skilled foreign professionals hired by American businesses. High technology businesses and research universities vitally need this program to recruit foreign talent, especially where an insufficient number of highly skilled Americans is available to fill current job openings. One recent report states that the computer industry has 340,000 unfilled jobs, while American universities produce only 130,000 computer science graduates a year. In order to compete globally, American businesses and universities need the ability to freely hire foreign talent to fill some of these positions. As the committee knows, the problem is that the current cap of 65,000 H-1B visas was reached in May 1998, five months before the end of the fiscal year. Consequently, the Immigration and Naturalization Service (INS) will no longer issue H-1B visas for the remainder of this year.

H-1B professionals are often key employees in companies and organizations engaged in new and exciting development, expansion and discovery projects. These projects, when brought to fruition, have the potential to create many new jobs for American workers. Business groups have stated that for every position held by an H-1B professional there may be five or more new jobs created that will be held by U.S. workers, thereby generating a *net gain* to the United States. However, if H-1B workers are not allowed to enter the United States, or the program becomes too burdensome for employers to undertake, the jobs created by H-1B workers will be sent abroad where the foreign professional can work, resulting in a net loss to the U.S. economy.

American businesses often use H-1B professionals in positions that utilize their unique skill and experience to develop new products, embark on new research and development projects and share their knowledge with other employees. Often, many other jobs held by U.S. workers, and sometimes the entire success of a small start-up company, are dependent upon H-1B professionals. For example:

A manufacturer of test equipment for the data storage industry in Fremont, California, had been recruiting internationally for a staff scientist with expertise in magnetic recording technology. This person would be responsible for developing state-of-the-art research for the company to develop new technologies and products to grow. They eventually found a foreign Ph.D. physicist with this expertise. However, delays in the H-1B process caused him to decline the offer. Shortly thereafter, due to a severe financial loss, the company had to lay off 50 U.S. workers. Further, because the community of scientists in this field is small, the company believes that its inability to obtain a visa in a timely manner will hurt their chances of bringing in other key physicists.

In Colorado, a government contractor hired several H-1B engineers with expertise in the decommissioning and decontamination of former nuclear weapons facilities. Their expertise is being used in the cleanup of several Department of Energy facilities that formerly were used in this nation's nuclear weapons complex.

Agouron Pharmaceuticals Inc., in La Jolla, California, is a rapidly growing pharmaceutical company whose first major product, VIRACEPT, is a potent drug in the treatment of HIV and AIDS. The company currently employs 473 researchers, and 25 of them are H-1Bs. Agouron also has plans to offer employment to several other researchers who will require H-1Bs, in order to continue to extend their research and development programs for new drugs in the fight against AIDS.

Ingersoll-Rand's Torrington Manufacturing Development Center in Connecticut employs ten Ph.D. researchers on H-1Bs who perform critical research on heat distortion control and the optimization of heat treatment processes for the manufacture of a bearing product line. Torrington is the largest supplier of bearings to Ford Motor Company.

Smiths Industries in Grand Rapids, Michigan, an aerospace and defense systems engineering company, conducted a nationwide search for a senior software engineer and received only one application. The company hired an H-1B professional to undertake critical work on the Airbus 320 Flight Management System project, so that other Smiths engineers can focus on U.S. government defense projects.

Two schools in Manhattan and California, devoted to working with children with cerebral palsy, have used the H-1B category to bring in several teachers from Hungary who have been trained in a special technique called "conductive therapy" that currently is unavailable in the United States. Parents of U.S. children helped by these teachers call their children's progress "miraculous."

Often, H-1B professionals already are here. They are graduates of our colleges and universities who are undergoing periods of "practical training" in their specialties in the United States. If unable to get H-1B visas, these individuals would be required to go abroad, and would be unable to contribute their talents to U.S. companies. Instead, they would be hired by those companies' competitors outside of the United States. Or, the U.S. companies that need their skills will move their operations or projects abroad, including the jobs that go with them, where the individual can work.

H.R. 3736 properly raises the cap on the number of H-1B visas available to American businesses expanding their ability to compete globally. We support raising the present cap from 65,000 to 95,000 for 1998, and to 115,000 by the year 2000.

H.R. 3736 also directs tough enforcement action where it is needed—against those who abuse the program at the expense of American workers. Under the bill, employers who willfully violate the H-1B program face fines that are five times higher than current law. Furthermore, it authorizes additional penalties up to \$25,000 on top of those penalties. It also permits the Department of Labor to engage in spot inspections of known violators for a period of up to five years. These important enforcement provisions are necessary and appropriate.

However, we want to voice our opposition to other provisions in the bill. Given the agreement among the committee that at least a temporary increase in the number of H-1B professionals is desirable, our difference of opinion arises as to whether other, permanent changes, should also be made to this program. What H.R. 3736 purports to give with one hand it takes away with the other by imposing a new regulatory structure on businesses that hire H-1B employees. We have serious concerns that these new regulatory requirements may render the program unusable to a large number of American businesses.

H.R. 3736 in its present form increases the Labor Department's authority to initiate investigations on its own. Currently, a complaint surrounding any business is required to commence a Department of Labor investigation. This present system of enforcement gives any "aggrieved party" including government representatives, competitors and the H-1B employees themselves, authorization to file a complaint with the Department of Labor. Giving the Labor Department free reign absent any complaint is unwise and potentially unworkable because it would discourage businesses from employing H-1B professionals. Business groups oppose this provision because it would subject those with a higher percentage of H-1B professionals to significantly increased investigations and costs without requiring the Labor Department to implement clearer enforcement guidelines. Further, the Labor Department has a history of not promulgating clear and consistent regulations in this area. Eight years after Congress instituted Labor Department involvement in the H-1B program, there are still no final regulations.

Even more troubling, this bill adds two new regulatory requirements in the form of layoff and recruitment attestation clauses. At first blush, these attestation clauses appear to be reasonable safeguards that provide protection for American workers so they will not lose their jobs to H-1B employees. In reality, these new requirements will add onerous and unnecessary burdens on American businesses. A vast array of employers oppose the layoff attestation because it would place them under the scrutiny of the Department of Labor every time they have to make decisions regarding their personnel. This alone would effectively eliminate the use of H-1Bs by many employers. We believe that these added attestations and increased Department of Labor authority are overly burdensome and unnecessary.

The first attestation, the “no layoff” provision, would require employers to attest that they have not laid-off or otherwise displaced a U.S. worker, including a worker employed under a third-party contract, employee leasing arrangement or temporary help arrangement, before hiring an H-1B worker with “substantially equivalent” qualifications in the same occupation as the laid-off worker.

Such an attestation on its face seems reasonable. Employers should not be able to lay off U.S. workers and replace them with H-1B nonimmigrants who will work for less. But the fact is that *current* law in the H-1B program, as enacted by Congress in 1990, already prohibits an employer from paying an H-1B nonimmigrant less than it pays its U.S. workers. Therefore, current law already is designed to prevent “cheap foreign labor” from depressing the wages of U.S. workers. Thus the incentive to lay off a U.S. worker is absent.

Further, there is a lack of evidence that there are widespread cases of companies laying off U.S. workers and hiring H-1B replacements. In fact, in the past seven years the Department of Labor has cited only one specific example of a U.S. company laying off Americans and replacing them with individual H-1B visa-holders. And even in this case, the Department of Labor did not have specific evidence that it involved a deliberate one-for-one replacement by the original employer. Although anecdotes abound, often it is the same cases that are reported over and over, making the problem seem much larger than it actually is.

The bigger issue, however, is the new intrusion of the government into the personnel decisions of American employers. The provisions in this bill would have a substantial impact on American employers with regard to major decisions such as terminating unprofitable projects, undertaking or ending contractual arrangements or mergers and acquisition, that would have an impact on their personnel, for fear that such actions may prohibit their ability to obtain H-1B workers for projects whose skills would create new American jobs. The language of the “no layoff” clause does not relate to direct replacement of American workers. Rather, it relates broadly to layoffs, effectively preventing companies who have laid off workers for valid business reasons, from hiring H-1B workers on new projects if they are in the same “occupation” (to be defined by the Department of Labor) as any of the U.S. workers.

American employers who would have a difficult time complying with such provisions include universities and research institutions (both non-profit and for-profit) whose projects are often dependent on grant funds. They would be limited in their flexibility in choosing and ending research projects. When these grants expire or a research avenue proves ineffective, professors and researchers are often “laid off,” until new projects are designed and funded.

With the broad occupational categories used under this provision, a cancer researcher studying a particular aspect of the disease whose job position is terminated because his or her project has ended would prevent an organization from hiring another cancer researcher on an H-1B visa for another, completely different project.

The motion picture industry, whose work is by its very nature temporary, also would be severely affected by this provision. In

order to continue to provide the world with the highest standards in entertainment, the movie industry must be able to recruit the best talent in the world. This includes such supporting positions as digital animators, computer programmers and software engineers who enable some of the unbelievable technical achievements in today's motion pictures. With this layoff attestation, production companies that finish work on one film and discharge those workers would be prevented from hiring an H-1B professional to work on the next film.

For large companies that operate multiple independent divisions, all of those divisions would be treated as a single employer under this provision. This would mean that the decision of one division to layoff U.S. workers at a facility in a metropolitan area, could prevent another division from hiring an H-1B worker at another facility in the same area. Given that often these divisions do not have human resources offices that are coordinated, or even that communicate with one another, the manager signing the Department of Labor's form may not even be aware of the layoff in the other division, thus leading to an unintentional misrepresentation and potential penalties. To deal with this problem, such large companies would have to invest large sums in generating the infrastructure to track all personnel movements among all of their various divisions, a cost that not many companies will be willing to undertake.

As stated above, many employers could not in good conscience sign this attestation, because of the uncertainties of future activities. They would simply be locked out of the H-1B program.

To the extent that the layoff attestation provisions are unworkable for American employers, the recruitment attestation provisions in this bill are an anathema. H-1B professionals are not just filling shortage occupations. The H-1B category was created to allow the United States to recruit and retain in the United States foreign-born individuals with specific, unique, rare or otherwise needed skills whose presence would help U.S. employers develop new ideas, projects, research or markets, create new jobs and expand our economy. By requiring U.S. employers to first attempt to recruit in the U.S. for persons to fill a job *created* to utilize the talents of someone foreign born, would at best be pointless, and at worst be a sham. Further, the time required to undergo that recruitment would create significant delays, extending over several months, in the ability of employers to utilize the skills of these individuals in a timely manner.

This provision could force employers wishing to hire an H-1B worker to undertake a recruitment program that would meet the satisfaction of the Department of Labor, and prove, again, to the satisfaction of the Department of Labor, that it has not improperly rejected any equally qualified U.S. workers for the position to be offered to the H-1B individual. This provision would further inject the government's judgement in the hiring decisions of American employers. It would require employers to attempt, prior to filing any application for an H-1B, to determine its compliance with a set of regulations, yet to be proposed, that would lay out what the Department of Labor believes are "timely and significant steps" to recruit and retain U.S. workers, and whether those steps met "indus-

try standards,” and whether any “qualified” U.S. workers had applied.

Many employers have indicated that they would rather forego the H-1B program altogether, than submit to such government dictated scrutiny of their hiring practices. Since employers will have no way of knowing what the Department of Labor’s definitions of these terms will be, nor whether they have actually complied, most companies could not confidently sign this attestation not knowing whether the Department of Labor will, in six months time assess a fine based upon totally inappropriate criteria to the industry, or their company.

This attestation will further remove the H-1B program from the real world. In the real world, employers have project deadlines. They often suffer lost revenues because of the current timing of the H-1B process. What if an employer has only recruited for one or two weeks, but there is an urgent need for a particular individual? Also in the real world, employers have specific criteria for their job openings, which often are company-specific. How can the Department of Labor know the intricacies of an individual business to make this kind of determination?

These attestation provisions require much more than merely “checking off a box.” To ensure compliance, the government would be allowed to micro-manage the human resource policies of American businesses. These additional attestations would seriously harm American employers ability to recruit the best-qualified people and seek out the talent necessary to maintain American superiority against foreign competitors, and could force U.S. companies to move jobs overseas where high tech workers are available.

Current law already contains safeguards to protect American workers. Presently all H-1B employers must attest that:

They are paying the foreign professional a wage that is the higher of what is typically paid in the region for that type of work (“prevailing wage”), or what the employer pays its existing employees with similar experience and duties;

The working conditions of its American workers are not adversely affected;

There is no strike/lockout at the worksite, or in the occupation for which the foreign professional is sought;

It has posted notice to current employees that it is seeking to hire an H-1B professional.

H.R. 3736 would properly increase the cap on H-1B professionals. However, the added attestations and Department of Labor-initiated investigation provisions will not benefit American businesses and universities. It will not protect the American workforce: it will hurt the global competitiveness of American employers. Finally, we are most concerned that in the end these added regulations will *cost* American jobs instead of *protecting* them.

JAMES E. ROGAN.
CHRIS CANNON.

FURTHER ADDITIONAL VIEWS

On May 20, 1998, the House Judiciary Committee favorably reported H.R. 3736, as amended, by a vote of 27–4. The bill would increase the number of H1–B visas available for the next three fiscal years, thereby responding to the concern raised by the information technology industry that there is a critical shortage of highly skilled workers. At the same time, the bill would add important reforms to the H1–B visa program, including requiring employers to attest that they have made good faith efforts to recruit U.S. workers and have not laid off qualified U.S. workers prior to applying for H1–B visas. By adding these reforms, the bill addresses the concerns raised by U.S. workers who fear being displaced by temporary foreign workers. The strong bi-partisan vote in favor of the bill reflects the belief by most members of the Committee that the bill strikes the appropriate balance between these competing concerns.

Although the new reforms go a long way towards protecting U.S. workers, the bill does not complete the task. We believe that it is essential that the final version of H.R. 3736 include provisions to enable U.S. workers to be trained and educated to meet the needs which would be temporarily addressed by passage of H.R. 3736. During consideration of H.R. 3736, Rep. Zoe Lofgren was prepared to offer an amendment which would have assessed a \$250 user fee each time an employer filed an H1–B application. Sixty percent of the funds collected from application of this new fee would have been used to increase funding for the Mathematics, Engineering and Science Achievement (“MESA”) Program administered by the National Science Foundation (42 U.S.C. 1861 et seq.). The remaining 40% of collected funds would have been used to increase funding for training and related activities under the Job Training Partnership Act (29 U.S.C. 1501 et seq.). These existing federal programs have excellent records of success and we believe that increasing funding for them through an H1–B user fee account is an appropriate approach to training and educating U.S. workers.

Because Rep. Lofgren's amendment would have been subject to a point of order, Rep. Lofgren could not offer her amendment in Committee. However, it became clear during the discussions about Rep. Lofgren's proposed amendment that there was nearly unanimous, bi-partisan support for inclusion of a training and education provision in the final version of H.R. 3736. Accordingly, we would urge the adoption of an amendment on the House Floor which establishes a user fee funded program to educate and train U.S. workers to meet industry demands and to reduce dependency on temporary foreign workers in the future.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
RICK BOUCHER.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MARTY MEEHAN.
WILLIAM D. DELAHUNT.
ROBERT WEXLER.

FURTHER ADDITIONAL VIEWS

I am appreciative of the efforts of my colleagues to work on a bipartisan basis on H.R. 3736, The Workforce Improvement and Protection Act. While I voted to report this legislation favorably out of the Judiciary Committee, I continue to be concerned, as I expressed during the Judiciary Committee mark-up, that the language as drafted in the bill relative to recruitment and layoff will prove to be unworkable. I remain confident that reasonable persons working in good faith will be able to create sound, practical and useful refinements to this language as the legislative process goes forward. I look forward to playing a productive role in that process.

ZOE LOFGREN.

