106TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
106–692

TECHNOLOGY WORKER TEMPORARY RELIEF ACT

JUNE 23, 2000.—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

DISSENTING VIEWS

[To accompany H.R. 4227]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4227) to amend the Immigration and Nationality Act with respect to the number of aliens granted nonimmigrant status described in section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, to implement measures to prevent fraud and abuse in the granting of such status, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Technology Worker Temporary Relief Act".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

TITLE I—NUMERICAL LIMITATIONS ON H–1B NONIMMIGRANTS; INCREASED PORTABILITY OF H–1B STATUS

SEC. 101. TEMPORARY INCREASE IN ACCESS TO H–1B NONIMMIGRANTS.

(a) ELIMINATING NUMERICAL LIMITATION FOR FISCAL YEAR 2000; CONDITIONING INCREASES FOR FISCAL YEARS 2001 AND 2002.—Section 214(g)(1)(A) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(1)(A)) is amended to read as follows:

"(A) under section 101(a)(15)(H)(i)(b), may not exceed—

"(i) subject to paragraph (5), 107,500 in fiscal year 2001;

"(ii) subject to paragraph (5), 65,000 in fiscal year 2002; and

"(iii) 65,000 in each succeeding fiscal year; or".

(b) CONDITIONS ON INCREASES.—Section 214(g) of the Immigration and Nationality Act (8 U.S.C. 1184(g)) is amended by adding at the end following:

"(5)(A) The numerical limitations in clauses (i) and (ii) of paragraph (1)(A) shall not apply to an alien described in subparagraph (B).

"(B) An alien is described in this subparagraph if—

"(i) the alien, disregarding clauses (i) and (ii) of paragraph (1)(A), otherwise is eligible to be issued a visa or provided nonimmigrant status under section 101(a)(15)(H)(i)(b); and

"(ii) the employer petitioning under subsection (c)(1) with respect to the alien demonstrates in the petition that, with respect to the taxable year preceding the taxable year in which the petition is filed, there was a net increase (as compared with the taxable year prior to such preceding taxable year) in the median of the total wages (including cash bonuses and similar compensation) paid to full-time equivalent United States workers (as defined in section 212(n)(4)(E)) who are on the employer's payroll on the last day of the taxable year.

"(C) In making the determination under subparagraph (B)(ii)—

"(i) 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; and

"(ii) the Attorney General shall disregard workers who ceased employment with an employer by reason of the employer's having sold, or otherwise legally transferred for consideration, the assets of a division or other severable portion of the employer's business to another person before the end of the employer's previous tax year.".

(c) EFFECTIVE DATES.—

(1) ELIMINATING NUMERICAL LIMITATION FOR FISCAL YEAR 2000.—The amendment made by subsection (a), to the extent that it eliminates the numerical limitation under section 214(g)(1)(A)(iii) of the Immigration and Nationality Act, as in effect on the day before the date of the enactment of this Act, shall take effect on the date of the enactment of this Act.

(2) CONDITIONING INCREASES FOR FISCAL YEARS 2001 AND 2002.—In all other respects, the amendments made by this section shall take effect on October 1, 2000, without regard to whether or not proposed or final regulations to carry out such amendments have been promulgated.

SEC. 102. INCREASED PORTABILITY OF H–1B STATUS.

(a) IN GENERAL.—Section 214(c) of the Immigration and Nationality Act (8 U.S.C. 1184(c)) is amended by adding at the end the following:

"(10)(A) A nonimmigrant alien described in subparagraph (B) who was issued a visa (or otherwise provided nonimmigrant status) under section 101(a)(15)(H)(i)(b) may change employers upon the filing by the prospective employer of a petition under paragraph (1) on behalf of the alien to obtain authorization for the change. Employment authorization shall continue for such alien until such petition is adjudicated. If the petition is denied, such employment authorization shall cease.

"(B) A nonimmigrant alien described in this subparagraph is a nonimmigrant alien—

"(i) who has been lawfully admitted into the United States;

"(ii) on whose behalf an employer has filed a nonfrivolous petition described in subparagraph (A) before the date of the expiration of the period of stay authorized by the Attorney General for the alien; and

"(iii) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to petitions filed before, on, or after such date.

TITLE II—NEW REQUIREMENTS ON PETITIONING EMPLOYERS; PETITION FILING FEE REDUCTION FOR LOCAL EDUCATIONAL AGENCIES

SEC. 201. MINIMUM SALARY REQUIREMENT.

(a) IN GENERAL.—Section 212(n)(1)(A) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)(A)) is amended—

(1) by striking "and" at the end of clause (i);

(2) by redesignating clause (ii) as clause (iii); and

(3) by inserting after clause (i) the following:

"(ii) is offering and will offer during the period of authorized employment to H–1B nonimmigrants wages that are at least equal to an annual salary of $40,000 (including cash bonuses and similar compensation), except if the employment in question is as a public or private elementary or secondary school teacher or if the employer is an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965)

or a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization; and".

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

"(6) For purposes of paragraph (1)(A)(ii), in the case of any fiscal year beginning in a calendar year after 2000, the dollar amount contained in such paragraph shall be increased by an amount equal to—

"(A) the dollar amount; multiplied by

"(B) the cost-of-living adjustment determined under section 1(f)(3) of the Internal Revenue Code of 1986 for the calendar year in which the fiscal year begins by substituting 'calendar year 1999' for 'calendar year 1992' in subparagraph (B) of such section.".

SEC. 202. SUBMISSION OF DATA ON H–1B NONIMMIGRANTS AFTER EMPLOYMENT COMMENCEMENT.

(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 (G) the following:

"(H) The employer will electronically submit to the Secretary, not later than 30 days after the date on which an H–1B nonimmigrant commences employment with the employer, data in an electronic format containing information about the nonimmigrant, including the following:

"(i) The foreign state of which the nonimmigrant is a citizen or national.

"(ii) The academic degrees obtained by the nonimmigrant.

"(iii) The nonimmigrant's job title.

"(iv) The date on which employment commenced.

"(v) The nonimmigrant's salary or wage level.".

(b) REQUIREMENT ON SECRETARY.—Not later than 30 days after the receipt of data from an employer that is provided in accordance with section 212(n)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)(H)), as inserted by subsection (a), the Secretary of Labor shall make such data available on the Internet.

SEC. 203. FEE TO ENABLE MORE EFFICIENT PAPERWORK PROCESSING.

(a) IMPOSITION OF FEE.—Section 214(c) of the Immigration and Nationality Act (8 U.S.C. 1184(c)), as amended by section 102, is further amended by adding at the end the following:

"(11)(A) In addition to any other fees authorized by law, the Attorney General shall impose a processing fee on an employer filing a petition under paragraph (1)—

"(i) initially to grant an alien nonimmigrant status described in section 101(a)(15)(H)(i)(b); or

"(ii) to obtain authorization for an alien having such status to change employers.

"(B) The amount of the fee shall be $200 for each such petition.

"(C) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 286(t).".

(b) ESTABLISHMENT OF ACCOUNT; USE OF FEES.—Section 286 of the Immigration and Nationality Act (8 U.S.C. 1356) is amended by adding at the end the following:

"(t) H–1B PROCESSING FEE ACCOUNT.—

"(1) IN GENERAL.—There is established in the general fund of the Treasury a separate account, which shall be known as the 'H–1B Processing Fee Account'. Notwithstanding any other provision of law, there shall be deposited as offsetting receipts into the account all fees collected under section 214(c)(11).

"(2) USE OF FEES.—50 percent of the amounts deposited into the H–1B Processing Fee Account shall remain available to the Attorney General until expended to carry out duties under section 214(c)(1) related to petitions made for nonimmigrants described in section 101(a)(15)(H)(i)(b) and to decrease the processing time for such petitions. 50 percent of the amounts deposited into the account shall remain available to the Secretary of Labor until expended for decreasing the processing time for applications under section 212(n)(1) and for carrying out section 212(n)(2).".

SEC. 204. QUALIFICATIONS FOR PHYSICAL THERAPISTS.

(a) IN GENERAL.—Section 214(i)(2) of the Immigration and Nationality Act (8 U.S.C. 1184(i)(2)) is amended—

(1) by striking "(A)" and inserting "(i)";

(2) by striking "(B)" and inserting "(ii)";

(3) in subparagraph (C), by striking "(ii)" and inserting "(II)"

(4) by striking "(C)(i)" and inserting "(iii)(I)";

(5) by striking "(2)" and inserting "(2)(A)"; and

(6) by adding at the end the following:

"(B) In the case of a position in a specialty occupation that requires an alien to perform services as a physical therapist, the requirements of this paragraph also include a requirement that the alien have completed a degree recognized by body or bodies approved for the purpose by the Secretary of Education as equivalent (or more than equivalent) to the education and training received by a person completing a master's degree from an accredited program of physical therapy in the United States.".

(b) APPLICABILITY.—The amendment made by subsection (a)(6) shall not apply to any alien who has full State licensure to practice in the occupation of physical therapist before the date of the enactment of this Act.

SEC. 205. REDUCTION OF PETITION FILING FEE FOR LOCAL EDUCATIONAL AGENCIES.

Section 214(c)(9)(B) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(9)(B)) is amended by striking "petition." and inserting "petition, except that the amount of the fee shall be $100 for an employer that is a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)).".

SEC. 206. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to section 204(b) and subsection (b), the amendments made by this title shall take effect on the date of the enactment of this Act and shall apply to petitions filed under section 214(c), and applications filed under section 212(n)(1), of the Immigration and Nationality Act on or after October 1, 2000.

(b) REQUIREMENTS FOR SPECIALTY OCCUPATION.—The amendments made by paragraphs (1) through (5) of section 204(a) shall take effect on the date of the enactment of this Act and shall apply to petitions filed under section 214(c), and applications filed under section 212(n)(1), of the Immigration and Nationality Act on or after the earlier of—

(1) October 1, 2000; and

(2) the date on which final regulations are promulgated to carry out the amendments made by section 303.

TITLE III—NONCOMPLIANCE PROVISIONS FOR H–1B NONIMMIGRANTS

SEC. 301. REQUIRING SPECIALTY OCCUPATION WORKERS AND FASHION MODELS TO OBTAIN STATUS AS AN H–1B NONIMMIGRANT.

Section 214(g) of the Immigration and Nationality Act (8 U.S.C. 1184(g)), as amended by section 101 of this Act, is further amended by adding at the end the following:

"(6) Notwithstanding any other provision of this Act, any alien admitted or provided status as a nonimmigrant in order to provide services in a specialty occupation described in subsection (i)(1) (other than services described in subparagraph (H)(ii)(a), (O), or (P) of section 101(a)(15)) or as a fashion model shall have been issued a visa (or otherwise been provided nonimmigrant status) under section 101(a)(15)(H)(i)(b).".

SEC. 302. REQUIRING FULL-TIME EMPLOYMENT.

(a) IN GENERAL.—Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)) is amended by striking "or (P))" and inserting "or (P)), not less than 35 hours per week (except if the employer is an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965) or a related or affiliated nonprofit entity),".

(b) CONFORMING AMENDMENTS.—Section 212(n)(2)(C)(vii) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(2)(C)(vii))is amended—

(1) in subclause (I), by striking "a full-time" and inserting "an";

(2) by striking subclause (II);

(3) in subclause (III), by striking "subclauses (I) and (II)" and inserting "subclause (I)"; and

(4) by redesignating subclauses (III) through (VI) as subclauses (II) through (V), respectively.

SEC. 303. REQUIREMENTS FOR SPECIALTY OCCUPATION.

Section 214(i) of the Immigration and Nationality Act (8 U.S.C. 1184(i)), as amended by section 204 of this Act, is further amended—

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

"(B) attainment of a bachelor's degree (or higher degree) in the specific specialty as a minimum for entry into the occupation in the United States.";

(2) by amending paragraph (2)(A)(iii) to read as follows:

"(iii)(I) completion of a bachelor's degree (or higher degree) that is not described in paragraph (1)(B), (II) experience in the specialty equivalent to the completion of the degree described in paragraph (1)(B) for the occupation, and (III) recognition of expertise in the specialty through progressively responsible positions relating to the specialty."; and

(3) by adding at the end the following:

"(3) For purposes of this subsection, the term 'bachelor's degree (or higher degree)' includes a foreign degree that is a recognized foreign equivalent of a bachelor's degree (or higher degree).".

SEC. 304. NONCOMPLIANCE FEE.

(a) IMPOSITION OF FEE.—Section 214(c) of the Immigration and Nationality Act (8 U.S.C. 1184(c)), as amended by sections 102 and 203, is further amended by adding at the end the following:

"(12)(A) In addition to any other fees authorized by law, the Attorney General shall impose a noncompliance fee on an employer filing a petition under paragraph (1)—

"(i) initially to grant an alien nonimmigrant status described in section 101(a)(15)(H)(i)(b); or

"(ii) to obtain authorization for an alien having such status to change employers.

"(B) The amount of the fee shall be $100 for each such petition.

"(C) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 286(u).".

(b) ESTABLISHMENT OF ACCOUNT; USE OF FEES.—Section 286 of the Immigration and Nationality Act (8 U.S.C. 1356), as amended by section 303 of this Act, is further is amended by adding at the end the following:

"(u) H–1B NONCOMPLIANCE ACCOUNT.—

"(1) IN GENERAL.—There is established in the general fund of the Treasury a separate account, which shall be known as the 'H–1B Noncompliance Account'. Notwithstanding any other provision of law, there shall be deposited as offsetting receipts into the account all fees collected under section 214(c)(12).

"(2) USE OF FEES TO COMBAT FRAUD.—

"(A) ATTORNEY GENERAL.—

"(i) PROGRAMS TO ELIMINATE FRAUD.—20 percent of amounts deposited into the H–1B Noncompliance Account shall remain available to the Attorney General until expended for programs and activities to eliminate fraud by employers filing petitions under section 214(c)(1) with respect to status under section 101(a)(15)(H)(i)(b) and aliens who are the beneficiaries of such petitions.

"(ii) REMOVAL OF ALIENS.—20 percent of amounts deposited into the H–1B Noncompliance Account shall remain available to the Attorney General until expended for the removal of H–1B nonimmigrants (as defined in section 212(n)(4)(C)) who are deportable under section 237(a)(1)(A) by reason of having been found to be within the class of aliens inadmissible under section 212(a)(6)(C).

"(B) SECRETARY OF STATE.—40 percent of amounts deposited into the H–1B Noncompliance Account shall remain available to the Secretary of State until expended for programs and activities to eliminate fraud by employers and aliens described in subparagraph (A).

"(C) JOINT PROGRAMS.—20 percent of amounts deposited into the H–1B Noncompliance Account shall remain available to the Attorney General and the Secretary of State until expended for programs and activities conducted by them jointly to eliminate fraud by employers and aliens described in subparagraph (A).".

SEC. 305. ADDITIONAL REQUIREMENTS ON PETITIONING EMPLOYERS.

Section 214(c) of the Immigration and Nationality Act (8 U.S.C. 1184(c)), as amended by sections 102, 203, and 304 of this Act, is further amended by adding at the end the following:

"(13) The Attorney General may not approve any petition under paragraph (1) filed by an employer with respect to an alien seeking to obtain or having the status of a nonimmigrant under section 101(a)(15)(H)(i)(b) unless the employer satisfies the following requirements:

"(A) The employer—

"(i) is an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965), or a governmental or nonprofit entity; or

"(ii) maintains a place of business in the United States that is licensed in accordance with any applicable State or local business licensing requirements and is used exclusively for business purposes.

"(B) The employer—

"(i) is a governmental entity;

"(ii) has aggregate gross assets with a value of not less than $250,000—

"(I) in the case of an employer that is a publicly held corporation, as determined using its most recent report filed with the Securities and Exchange Commission; or

"(II) in the case of any other employer, as determined as of the date on which the petition is filed pursuant to regulations promulgated by the Attorney General; or

"(iii) provides documentation of business activity pursuant to regulations promulgated by the Attorney General.".

SEC. 306. REQUIRING FILING OF W–2 FORMS.

(a) IN GENERAL.—Section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)), as amended by section 202 of this Act, is further amended by inserting after subparagraph (H) the following:

"(I) The employer will, with respect to each employee who is an H–1B nonimmigrant, annually submit to the Secretary of Labor a copy of the most recent statement under section 6051 of the Internal Revenue Code of 1986. Such submission may be made by electronic means.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to applications filed under section 212(n)(1) of the Immigration and Nationality Act on or after October 1, 2000, but only with respect to statements made under section 6051 of the Internal Revenue Code of 1986 on or after January 1, 2001.

SEC. 307. EFFECTIVE DATE.

Except for the amendment made by section 306, the amendments made by this title shall take effect on the date of the enactment of this Act and shall apply to petitions filed under section 214(c), and applications filed under section 212(n)(1), of the Immigration and Nationality Act on or after the date on which final regulations are promulgated to carry out such amendments.

TITLE IV—EXTENSION OF PROVISIONS FROM THE AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998

SEC. 401. PROTECTION OF UNITED STATES WORKERS IN CASE OF H–1B DEPENDENT EMPLOYERS.

Section 212(n)(1)(E)(ii) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)(E)(ii)) is amended by striking "2001," and inserting "2002,".

SEC. 402. ADDITIONAL INVESTIGATIVE AUTHORITY.

Section 413(e)(2) of the American Competitiveness and Workforce Improvement Act of 1998 (as contained in title IV of division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999; Public Law 105–277) is amended by striking "2001." and inserting "2002.".

SEC. 403. REQUIREMENT TO ISSUE REGULATIONS.

The Secretary of Labor shall promulgate final regulations fully implementing all provisions of the American Competitiveness and Workforce Improvement Act of 1998 (as contained in title IV of division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999; Public Law 105–277). Such regulations shall take effect on or before September 1, 2000.

TITLE V—STUDIES AND REPORTS

SEC. 501. STUDIES AND REPORTS BY COMPTROLLER GENERAL.

(a) RECRUITMENT OF UNDERREPRESENTED GROUPS.—

(1) IN GENERAL.—The Comptroller General of the United States shall conduct a study on the measures taken, by employers who have filed an application under section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)), to recruit, for the employment for which H–1B nonimmigrants are sought by the application, qualified United States workers who are a member

of an underrepresented group. The study shall include an examination of the extent to which these employers—

(A) recruit at—

(i) institutions of higher education with substantial numbers of students who are a member of an underrepresented group;

(ii) historically black colleges and universities;

(iii) community colleges; and

(iv) vocational and technical colleges; and

(B) advertise in publications reaching members of an underrepresented group.

(2) RECOMMENDATIONS.—If the Comptroller General of the United States determines, based on the study under paragraph (1), that modifications to the provisions of the Immigration and Nationality Act relating to H–1B nonimmigrants are appropriate in order to increase recruitment by employers described in paragraph (1) of members of an underrepresented group, the Comptroller General shall include such recommendations in the report submitted under paragraph (3).

(3) REPORT.—Not later than December 31, 2000, the Comptroller General of the United States shall submit to the Committees on the Judiciary of the United States House of Representatives and of the Senate a report containing the results of the study under paragraph (1).

(4) DEFINITIONS.—For purposes of this subsection:

(A) The term "member of an underrepresented group" includes United States workers who are African American, Hispanic, female, or an individual with a disability.

(B) The terms "H–1B nonimmigrant" and "United States worker" have the meaning given such terms in section 212(n)(4) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(4)).

(b) TRAINING INCUMBENT WORKERS.—

(1) IN GENERAL.—The Comptroller General of the United States shall conduct a study on the measures taken, by employers who have filed an application under section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)), continually to train and update the existing skills of incumbent employees, and to promote such employees where possible.

(2) REPORT.—Not later than December 31, 2000, the Comptroller General of the United States shall submit to the Committees on the Judiciary of the United States House of Representatives and of the Senate a report containing the results of the study under paragraph (1).

(c) COMPLIANCE WITH PROVISIONS DESIGNED TO ENSURE ACCURATE COUNT OF H–1B NONIMMIGRANTS.—

(1) IN GENERAL.—The Comptroller General of the United States shall conduct a study to determine the degree of compliance by the Attorney General with the requirements of section 416 of the American Competitiveness and Workforce Improvement Act of 1998 (as contained in title IV of division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999; Public Law 105–277).

(2) REPORT.—Not later than December 31, 2000, the Comptroller General of the United States shall submit to the Committees on the Judiciary of the United States House of Representatives and of the Senate a report containing the results of the study under paragraph (1).

PURPOSE AND SUMMARY

H.R. 4227 would temporarily increase the quota for "H–1B" nonimmigrants and would add protections for American workers and add anti-fraud measures to the H–1B program.

BACKGROUND AND NEED FOR THE LEGISLATION

I. THE H–1B NONIMMIGRANT WORKER PROGRAM

"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 ap-

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

plication 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 fiscal year 2000 may not exceed 115,000.[3] The period of authorized admission is up to 6 years.[4] In fiscal year 1997, the old 65,000 cap was reached for the first time on September 1.[5] In fiscal year 1998, the 65,000 cap was reached on May 11.[6] In fiscal year 1999, a new 115,000 cap was reached on August 16.[7] In March 2000, the Immigration and Naturalization Service reported that the cap is likely to be reached before the end of the fiscal year after the adjudication of unadjudicated H–1B petitions already on file.[8] In fiscal year 2001, the cap will be 107,500, and in fiscal year 2002 and future years, the cap will be 65,000.[9]

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 and for INS processing. The percentage of H–1B nonimmigrants who later adjust status to permanent residence reached a high of 47% for those starting work under the H–1B program in 1993, with the percentage falling in later years because of increased processing delays for adjustment of status.[10]

As to the country of origin of H–1B nonimmigrants, the INS estimates based upon a review of a sample of petitions that 47.5% of petitioned-for aliens come from India, 9.3% come from the People's Republic of China, 3.2% come from the United Kingdom, 3% come from Canada, and 2.7% come from the Philippines.[11] As to the occupations performed by H–1B nonimmigrants, the INS found in its review that 61.6% are in computer-related fields (53.3%/systems analysis and programming, 4.9%/electrical and electronics engineering, 3.4%/other computer related occupations), 3% are for college/university faculty, and 2.8% are for accountants and auditors.[12] In fiscal years 1992–95, computer-related positions had

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[2] INA sec. 214(i)(1).
[3] INA sec. 214(g)(1)(A).
[4] INA sec. 214(g)(4).
[5] U.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.*
[9] INA sec. 214(g)(1)(A).
[10] Lowell, *H–1B Temporary Workers: Estimating the Population* 15, appendix table 1B (2000).
[11] U.S. Immigration and Naturalization Service, *Characteristics of Specialty Occupation Workers (H–1B)* 1 (2000). INS sampled 4,217 H–1B workers approved from May 11, 1998 to July 31, 1999.
[12] *Id.* at 2.

never surpassed 25.6%, and therapists reached a high of 53.5% in 1995.[13]

The INS found in its review that 1.5% of H–1B nonimmigrants have a high school diploma or an associate's degree, 56.8% have a bachelor's degree, 30.7% have a master's degree, 2.5% have a professional degree, and 7.6% have a doctorate degree.[14]

As to the wages paid to H–1B nonimmigrants, the INS found in its review that the median is $45,000, with half of the workers expected to earn between $38,900 and $55,000.[15] The median wage is $54,000 for electrical and electronics engineers, $47,000 for systems analysts and programmers, and $49,400 for nonimmigrants in other computer-related occupations.[16]

The INS found in its review that 60.3% of H–1B petitions are for aliens who lived outside the United States at the time their petitions were submitted to the INS, while 22.9% adjusted status after holding student visas.[17]

Because of 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 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" with the Department of Labor making certain basic attestations (promises) and the Department then investigates complaints alleging noncompliance.[18]

Prior to enactment of the American Competitiveness and Workforce Improvement Act of 1998, there were 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.[19]

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[13] U.S. Department of Labor data.
[14] *Characteristics of Specialty Occupation Workers* at 3.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 4.
[18] INA sec. 212(n).
[19] INA sec. 212(n)(1).

The Department of Labor has to accept an employer's application within 7 days of filing unless it is incomplete or obviously inaccurate.[20] Departmental investigations as to whether an employer has failed to fulfill its attestations or has misrepresented material facts in its application were triggered by complaints filed by aggrieved persons or organizations (including bargaining representatives).[21] Investigations were conducted where there was reasonable cause to believe that a violation has occurred.[22]

An employer was 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.[23] Penalties included administrative remedies (including civil monetary penalties not to exceed $1,000 per violation) that the Department of Labor determined to be appropriate and a bar for at least 1 year on the INS' ability to approve petitions filed by the employer for alien workers (both immigrant and nonimmigrant).[24] In addition, the Department of Labor had to order an employer to provide H–1B nonimmigrants with back pay where wages were not paid at the required level, regardless of whether other penalties were imposed.[25]

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.[26]

II. 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.[27]

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[20] *Id.*
[21] INA sec. 212 (n)(2)(A).
[22] *Id.*
[23] INA sec. 212(n)(2)(C).
[24] *Id.*
[25] INA sec. 212(n)(2)(D).
[26] U.S. Department of Labor data.
[27] *Nonimmigrant Visas: Hearing Before the Subcomm. on Immigration of the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995).

Responding to such concerns, the Department of Labor promulgated a set of final rules which went into effect on January 19, 1995.[28] 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.[29] The National Association of Manufacturers sought to overturn the regulations on various procedural and substantive grounds. The U.S. District Court for the District of Columbia declared on procedural grounds many portions of the regulations invalid and void.[30]

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.
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> . . . .
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> For 75 percent . . . of all cases where the nonimmigrant 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].[31]

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.
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> . . . .
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> 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—

[28] 59 Fed. Reg. 65646 (Dec. 20, 1994).
[29] See H.R. Rep. No. 104–469, 104th Cong., 2nd Sess., pt. 1, at 147–49 (1996).
[30] *National Association of Manufacturers* v. *U.S. Department of Labor*, Civ. Action No. 95–0715 (D. D.C. July 22, 1996).
[31] Office 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).

> $27,000—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.[32]

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, 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.[33]

III. 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—

[32] *Id.* at 25–27.
[33] *Hearing Before the Subcomm. on Immigration of the Senate Judiciary Comm.*, 105th Cong., 2nd Sess. (1998) (hereinafter cited as "*Senate Hearing*").

> 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.
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> . . . .
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> 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 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."[34]

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.[35]

IV. 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?"[36] Two hundred and seventy one companies responded.[37] 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.[38] 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.[39] 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 month.[40]

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[34] *60 Minutes* (CBS television broadcast, Oct. 3, 1993).

[35] *See, e.g.*, Cohn and Roche, Jr., *Indentured Servants for High-Tech Trade*, Balt. Sun, Feb. 21, 2000; Hoffman, *Troy Firm in Middle of Jobs Fight*, Detroit News, Feb. 28, 1996; Landers, *Engineers, Programmers Battle "Body Shopping"*, Dallas Morning News, Oct. 30, 1995; Branigin, *White-Collar Visas: Importing Needed Skills or Cheap Labor?*, Wash. Post, Oct. 21, 1995.

[36] *Help Wanted* at 9, 15.

[37] *Id.* at 55.

[38] *Id.* at 16, 49.

[39] *Id.*

[40] *Id.* at 21.

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."[41] The study reported increases in annual compensation between 1995 and 1996 for various information technology professions of from 12 to 19.7%.[42] The study also noted that the number of bachelor degrees awarded in computer science at American universities fell by 43% from 1986 to 1994, from 42,195 to 24,200.[43]

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."[44] 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."[45]

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.[46] 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.[47]

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."[48] 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."[49] 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 in-

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[41] *Id.* at 17.
[42] *Id.* at 18–19.
[43] *Id.* at 39.
[44] *Id.* at 21.
[45] *Id.* at 5–6.
[46] *America's New Deficit* at 5.
[47] *Id.* The Office of Technology Policy updated the study in January 1998 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.*
[48] *America's New Deficit* at 1.
[49] *Id.* at 11.

creased more than 10% from 1996 to 1997.[50] 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 information technology workers.[51] It did add a caveat, stating that "the information and data [are] inadequate to completely characterize the dynamics of the [information technology] labor market."[52]

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's competitiveness, economic growth, and job creation."[53] 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. . . .
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> . . . .
>
> 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.
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> . . . .
>
> 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].[54]

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.[55] The report was designed, in part, to verify the results of *Help Wanted*, improve the methodology used, and obtain more detailed information.[56]

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

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[50] *Id.*
[51] *Id.* at 1, 11, 15.
[52] *Id.* at 35.
[53] *Id.* at 2.
[54] *Id.* at 19–21.
[55] *Help Wanted 1998* at 6.
[56] *Id.*

the original *Help Wanted*.[57] 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 companies and 217,000 in non-information technology companies.[58] This represents 10% of total employment in these professions.[59] 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).[60]

In March 1998, the U.S. General Accounting Office issued a report criticizing the methodology of *Help Wanted* and *America's New Deficit*.[61] 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 exits."[62] 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.[63]

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."[64] 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

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[57] *Id.* at 7.

[58] *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.

[59] *Id.* at 9.

[60] *Id.* at 17.

[61] 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 (1998) (hereinafter cites as "*GAO Report*").

[62] *Id.* at 2.

[63] *Id.* at 6–7.

[64] *Id.* at 7.

> and scientists, than the percentage changes for all professional specialty occupations. . . . What is uncertain is whether the recent trend toward higher rates of increase will continue.[65]

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."[66] GAO noted that:

> In 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.[67]

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."[68]

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."[69] 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

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[65] *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.

[66] *GAO Report* at 7.

[67] *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.

[68] *GAO Report* at 7.

[69] *Id.*

> science. Other workers in these fields had degrees in such areas as business, social sciences, mathematics, engineering, psychology, economics, and education. The Commerce report did not take this information into account in any way in estimating the future supply of [information technology] workers."[70]

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."[71]

Late in 1999, a study sponsored by the United Engineering Foundation and the Alfred P. Sloan Foundation assessed the demand for information technology workers. The study concluded that "spot shortages may exist, and strong demand can be seen for some kinds of people, but on the whole there is no compelling evidence to suggest a national shortage of [information technology] workers, either now or in the near future."[72]

The report looked at indicators such as the facts that unemployment among experienced information technology professionals has been rising since 1997 and that there was a lack of any consistent evidence of unusually strong wage growth for such workers that would be consistent with a shortage.[73] The study concluded that:

> [While i]t may seem contradictory . . . we suggest that (1) there is no general national shortage of workers, (2) many employers still can't find the people they seek, and (3) some persons with IT training and experience have difficulty finding work. How can this be?
>
> One answer may be that there are signs of a strong preference for recent graduates in the IT job market. Young workers have been trained in current technology, are probably more likely than others to be willing to work the long hours and give the total commitment that some IT employers want, and they cost less.[74]

The report noted that over one third of those trained in information technology professions are not employed in those fields.[75]

Another study released in 1999, this time funded by the National Science Foundation, concluded that:

> There is no way to directly answer the question of whether there is a shortage of IT workers because there are no adequate definitions or adequate data to directly count either supply or demand.
>
> Other sources of information are inferential and less reliable than the direct counting approach. Indeed, there are credible reasons for doubting virtually any piece of evidence that is currently available.

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[70] *Id.* at 5–6 (footnote omitted).
[71] *Id.* at 2.
[72] IT Workforce Data Project, *Assessing the Demand for Information Technology Workers* 1 (1999).
[73] The study cited Computerworld's 1999 salary survey which indicated that salaries for information technology workers had increased by only about 4–5% in each of the last 2 years. *Id.* at 3.
[74] *Id.* at 4.
[75] *Id.*

> The inferential evidence does not easily allow one to distinguish between a shortage and a tightness in the IT labor market. . . .
>
> The statistical indicators based on Federal data, the regional and occupation-specific data studies, the methodologically challenged advocacy studies, and the qualitative evidence almost all suggest either a tightness or a shortage.
>
> It is likely that there are spot shortages, both in specific geographic regions and in specific occupations. In a field experiencing rapid growth and rapid technological change, it would be surprising if there were not such shortages.[76]

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 are able to reject the vast majority of applicants for information technology positions. For instance, Microsoft only hires 2% of programmer applicants.[77]

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."[78]

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."[79] Matloff states further that:

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[76] Freeman & Aspray, *The Supply of Information Technology Workers in the United States* 68 (1999).

[77] *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. (1998) (statement of Norman Matloff) (hereinafter cited as "*1998 House Hearing*").

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

[79] *1998 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. . . .[80]

There is much anecdotal evidence to support the contention that age discrimination against older 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.[81]
>
> 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.[82]

In addition, Dr. Matloff points to two telling statistics. First, there is a 17% unemployment rate for computer programmers over the age of 50.[83] 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.[84]

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 Computing 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

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[80] *A Critical Look*

[81] San Francisco Examiner Internet page (April 19, 1998).

[82] *Id.*

[83] *1998 House Hearing.* Professor Laura Langbein of the American University has found that for each additional year of age, the length of unemployment for an engineer increases by 3 weeks. Langbein, *An Analysis of Unemployment Trends Among IEEE U.S. Members* 8 (1999).

[84] *1998 House Hearing.* 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.

a 39% increase in 1997–98.[85] This has caused its own problems. It was recently reported that "[l]ured by high-tech riches, students are flooding into college computer-science courses, and Texas universities can't seem to keep up with the onslaught."[86]

It has also been argued that American workers from groups underrepresented among information technology workers, such as African-Americans, Hispanics, and women, are being hurt by the H–1B program. An article in Hispanic Engineer magazine recently stated that:

> Hispanics and African Americans . . . some advocates argue . . . are being unfairly locked out of many lucrative and fast-growing high-technology professions by companies that would rather hire foreign workers, who can be brought here at lower cost.
>
> . . . .
>
> Whether or not high-tech firms are actively avoiding hiring Hispanics and Blacks may be an open question. But this much is clear: many firms are ignoring requirements to file reports with the Federal Government detailing the racial makeup of their work forces.
>
> Of some 1,500 high-tech firms required to file such forms, a review by [the Coalition for Fair Employment in Silicon Valley] found only 253 in compliance. Worse, many of those that complied filed reports revealing the stark bottom line of the Digital Divide: few Hispanics or Blacks were working in high-technology firms, the hottest sector of the American economy.
>
> "It's amazing," [John Templeton, co-convenor of the Coalition for Fair Employment in Silicon Valley] says. "Companies will advertise for workers in newspapers in India. But they won't advertise in Oakland."[87]

Why can foreign workers be cheaper when employers are required to pay at least the prevailing wage to H–1B aliens? 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 addition, potentially self-serving industry-conducted wage surveys can be used to demonstrate the prevailing wage. The point can also be made that if the number of H–1B nonimmigrants becomes sufficiently large, the general wage level can be depressed even if the foreign workers are paid comparably to American workers.

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[85] *1998 House Hearing.* In 1998–99 and 1999–2000, undergraduate enrollment stayed relatively flat. Computing Research Association data.

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

[87] Fletcher, *Obstacles to Bridging the Digital Gap*, Hispanic Engineer, April-May 2000, at 21, 24.

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.[88]

V. FRAUD IN THE H–1B PROGRAM

At a hearing held by the Subcommittee on Immigration and Claims, it was found that widespread fraud exists in the H–1B program.[89] Inspector General Jacquelyn Williams-Bridgers of the State Department testified that "[w]e have been increasingly faced with more [fraud] allegations and cases recently in the H–1B areas."[90] Most strikingly, a special investigation conducted by the U.S. Consulate at Chennai, India, examined 3,247 suspect H–1B petitions forwarded by the INS and found that 45% of the cases could not be authenticated and 21% were identified as outright fraudulent.[91] Because of a lack of resources, most of these petitions would have been rubber stamped had it not been for this special investigation.

Cases were disclosed at the hearing in which H–1B petitions were filed on behalf of paper or front companies and in which falsified educational credentials or claims of job experience were submitted on behalf of unqualified applicants. INS field investigations of suspect H–1B petitioners have identified "mail drop" addresses where no legitimate business activity takes place and numerous instances of companies filing fraudulent petitions in exchange for payments by unqualified applicants. For instance, John Ratigan, a retired consular officer, stated that:

> In China, the method of operation has remained fairly constant for more than a decade. Small, essentially sham companies are set up, in the US and in China. . . . The US and foreign corporations which facilitate these transactions are usually nothing more than a P.O. box, an abandoned building or a fictitious address and a single telephone number, often shared by dozens or even hundreds of these collapsible corporations. An H or L visa petition is filed by the US company requesting that a visa be granted to the foreigner who is to be smuggled. The petition is routinely approved. . . .

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[88] *Senate Hearing.*
[89] *Nonimmigrant Visa Fraud: Hearing before the Subcomm. on Immigration and Claims of the House Judiciary Comm.*, 106th Cong., 1st Sess. (1999).
[90] *Id.* at 17.
[91] *Id.* at 21 (testimony of William Yates, Director of Immigration Services, INS).

> A similar system of small, shell corporations was and apparently continues to be used in Russia as well.[92]

Similarly, William Yates, Director of Immigration Services at the INS, stated that "[e]xamples of fraud associated with the requesting company include instances where: the company is non-existent and/or operating from a post office box, residence, apartment, or many companies are sharing one of the above."[93]

In many cases, H–1B nonimmigrants turn out not to be highly skilled workers. Inspector General Williams-Bridgers stated that "[w]hat we are increasingly seeing are cases where . . . individuals . . . enter the U.S. on the premise that they will assume a highly technical job only to find that the individuals are low skilled workers, slated for employment as janitors or nurse's aides or store clerks in companies that have handsomely paid the brokers."[94] Jill Esposito, Post Liason Division, Visa Office, U.S. State Department, reported an instance where:

> The company that had filed a petition turned out to be the donut shop owned by the applicant's sister and brother-in-law in the United States. The donut shop supposedly needed her skills as a "comptroller" to "direct the financial activities of the company.". . . The donut shop will never be referred to as just that, but always as the "corporate body" or "petitioning firm."[95]

This can be accomplished through falsified educational credentials or job experience. William Yates found that:

> Beneficiary fraud involves the falsification of either the education or prior job experience of the petitioner. This information is difficult for INS to verify as it originates from foreign sources and the format or form for submission by foreign businesses and schools is not standardized. These documents are easily falsified. . . . The employer may not know that the information is false.[96]

State Department witnesses made a case for more resources for anti-fraud efforts. Nancy Sambaiew, Deputy Assistant Secretary for Visa Services, stated that "for every fraud scheme we detect, another better one can emerge. That is why we must continue to seek improvements in our methods and resources."[97] Inspector General Williams-Bridgers stated that:

> Overseas consular offices and antifraud units continue to face staffing shortages. High-fraud posts are not able to attract enough experienced consular officers, or enough full-time, experienced antifraud officers because these posts are generally in undesirable locations and have heavy workloads. In addition, no correlation exists between the fraud level of a post and whether that post has a full-time antifraud officer. . . .
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> . . . .

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[92] *Id.* at 43.
[93] *Id.* at 23.
[94] *Id.* at 10.
[95] *Id.* at 32–33.
[96] *Id.* at 23.
[97] *Id.* at 28.

> We also found that posts were not adequately monitoring their nonimmigrant visa operations for fraud.
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> . . . .
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> [W]eaknesses can often be attributed to the overall lack of full-time antifraud officers at posts. Antfraud responsibilities are often ancillary and therefore officers have little time to focus on antifraud work. As a result, there have been several instances of malfeasance. . . .
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> . . . .
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> Fraud involving the H–1 visa program often involves large scale and complex operations. Joint investigations and the creation of task forces are particularly useful and often necessary when dealing with H–1 visa fraud. Moreover, the magnitude of the smuggling operations usually associated with these fraud cases requires significant investigative resources.[98]

VI. THE AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998

The American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA")[99] raised the annual H–1B cap to 115,000 for fiscal years 1999 and 2000 and 107,500 in 2001. The cap then falls back to its pre-ACWIA level of 65,000.[100]

The primary protections for American workers contained in ACWIA focused on "job contractors" or "job shops", those employers most likely to abuse the H–1B program. Two new attestations—the no-layoff/non-displacement attestation and the recruitment attestation—apply principally to job contractors/shops, defined in the bill (for larger companies) as those employers 15% or more of whose workforces are composed of H–1B nonimmigrants.[101] These businesses, designated as "H–1B-dependent", are subject to the attestations in those instances where they petition for aliens without masters degrees in their specialties or who will not be paid at least $60,000 a year.[102] Other employers do not have to comply with the new attestations unless they have been found to have willfully violated the rules of the H–1B program.

The no-layoff attestation prohibits an employer from laying off an American worker from a job that is essentially the equivalent of the job for which an H–1B alien is sought (involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same areas of employment) during the period beginning 90 days before and ending 90 days after the employer files a visa petition for the alien.[103] If an H–1B dependent employer places an H–1B nonimmigrant with another employer and the alien works at the other employer's worksite and there are indicia of an employment relationship between the alien and the other employer, the H–1B dependent employer must inquire with the other

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[98] *Id.* at 11, 13–14.

[99] Title IV of Division C of H.R. 4328, "Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999", Pub. L. No. 105–277, 112 Stat. 2681–641. The Act was enacted on October 21, 1998.

[100] ACWIA sec. 411(a) (codified at INA sec. 214(g)(1)(A)).

[101] ACWIA sec. 412(a)–(b) (codified at INA sec. 212(n)(1)(E)–(G), (n)(3)(A)).

[102] ACWIA sec. 412(b) (codified at INA sec. 212(n)(3)(B)).

[103] ACWIA sec. 412(a)–(b) (codified at INA sec. 212(n)(1)(E), (n)(4)(B)).

employer as to whether the other employer will displace any American workers with the alien (and receive assurances that it will not).[104] Regardless of this inquiry, if it turns out that the other employer has so laid off an American worker, the placing employer is subject to penalty (not the "other" employer with whom the nonimmigrant is placed).[105] The recruitment attestation requires an employer to have taken good faith steps to recruit American workers (using industry-wide standards) for the job an H–1B alien will perform and to offer the job to any American worker who applies and is equally or better qualified than the alien.[106] The attestations sunset at the end of fiscal year 2001.

The Labor Department enforces all aspects of the program except in instances where an American worker claims that a job should have been offered to him or her instead of an H–1B nonimmigrant. In such cases, an arbitrator appointed by the Federal Mediation and Conciliation Service will decide the issue.[107]

The Labor Department is able to investigate an employer using the H–1B program without having received a complaint from an aggrieved party in certain circumstances where it receives specific credible information that provides reasonable cause to believe that the employer has committed a willful failure to meet conditions of the H–1B program, has shown a pattern or practice of failing to meet the conditions, or has substantially failed to meet the conditions in a way that affects multiple employees.[108] This authority sunsets at the end of fiscal year 2001. In addition, the Labor Department may subject an employer to random investigations for up to 5 years after the employer is found to have committed a willful failure to meet the conditions of the H–1B program.[109] The number of complaints filed with the Secretary of Labor has increased to 135 in 1999, and to 96 through April of fiscal year 2000.[110]

An employer must offer an H–1B alien benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as the employer offers to American workers.[111] However, universities and certain other employers only have to pay the prevailing wage level of employees at similar institutions.[112]

Potential penalties include back pay, civil monetary penalties of up to $1,000 per violation (up to $5,000 per willful violation, and up to $35,000 per violation where a willful violation was committed along with the improper layoff of an American worker), and debarment from the H–1B program for from 1 to 3 years.[113] Whistleblower protection is provided to employees.[114] Employers cannot levy penalties (as opposed to liquidated damages) against H–1B nonimmigrants for leaving their employment.[115] Employers cannot

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[104] ACWIA sec. 412(a) (codified at INA sec. 212(n)(1)(F)).
[105] ACWIA sec. 413 (c) (codified at INA sec. 212(n)(2)(E)).
[106] ACWIA sec. 412(a) (codified at INA sec. 212(n)(1)(G)).
[107] ACWIA sec. 413(b) (codified at INA sec. 212(n)(5)).
[108] ACWIA sec. 413(e) (codified at INA sec. 212(n)(2)(G)).
[109] ACWIA sec. 413(d) (codified at INA sec. 212(n)(2)(F)).
[110] *The Status of Regulations Implementing the American Competitiveness and Workforce Improvement Act of 1998: Hearing Before the Subcomm. on Immigration and Claims of the House Judiciary Comm.*, 106th Cong., 2nd Sess. (2000) (statement of John Fraser, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor).
[111] ACWIA sec. 413(a) (codified at INA sec. 212(n)(2)(C)(viii)).
[112] ACWIA sec. 415 (codified at INA sec. 212(p)).
[113] ACWIA sec. 413(a) (codified at INA sec. 212(n)(2)(C)(i)–(iii)).
[114] ACWIA sec. 413(a) (codified at INA sec. 212(n)(2)(C)(iv)–(v)).
[115] ACWIA sec. 413(a) (codified at INA sec. 212(n)(2)(C)(vi)).

"bench" H–1B nonimmigrants (place them without pay in non-productive status due to lack of work or for other reasons).[116]

A $500 fee per alien is charged to all employers except universities and certain other institutions.[117] The funds go principally for scholarship assistance for low-income students studying mathematics, computer science, or engineering, for Federal job training services, and for administrative and enforcement expenses.[118] The fee will sunset at the end of fiscal year 2001.

The INS is directed to maintain an accurate count of H–1B nonimmigrants and to provide Congress with detailed information on the aliens.[119]

The National Science Foundation is directed to conduct studies on the status of older workers in the information technology field and on the labor market needs for workers with high technology skills.[120] Various Federal entities, including the Federal Reserve System and cabinet agencies, are directed to report the results of any reliable studies on the impact of the increased H–1B cap on national economic indicators, including inflation and unemployment, that warrant action by Congress.[121]

VII. EVENTS TAKING PLACE AFTER PASSAGE OF THE AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998

The new attestations contained in the American Competitiveness and Workforce Improvement Act have never been implemented because the Office of Management and Budget has yet to approve final regulations written by the Labor Department.[122]

According to an audit performed by KPMG Peat Marwick, in 1999 the INS approved between 21,888 and 23,385 petitions in excess of the statutory cap of 115,000.[123] Despite the increases in the H–1B cap, the increased quota itself will be reached before the end of fiscal year 2000.

VIII. H.R. 4227, THE TECHNOLOGY WORKER TEMPORARY RELIEF ACT OF 2000

A. The H–1B Cap

It is in the nation's interest that the cap on H–1B visas be temporarily lifted. First, unless Congress acts, at some point in fiscal year 2000 employers will not be able to get approval for new H–1B nonimmigrants to start work until the beginning of fiscal year 2001 on October 1, 2000. 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

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[116] ACWIA sec. 413(a) (codified at INA sec. 212(n)(2)(C)(vii)).
[117] ACWIA sec. 414(a) (codified at INA sec. 214(c)(9)).
[118] ACWIA sec. 414(b) (codified at INA sec. 286(s)).
[119] ACWIA sec. 416.
[120] ACWIA secs. 417–18(a).
[121] ACWIA sec. 418(b).
[122] See letter from Jacob Lew, Director, Office of Management and Budget, to Lamar Smith, Chairman, House Judiciary Committee, Subcommittee on Immigration and Claims (May 12, 2000).
[123] INS Office of Public Affairs, *INS Statement on KPMG's Report on H–1B Processing* (April 6, 2000).

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 in recent years 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.

Section 101 of the bill removes the cap on H–1B visas for fiscal years 2000 through 2002, returning the program to the uncapped state in which it existed prior to the Immigration Act of 1990. It is the committee's belief that under present economic conditions the market should determine how many foreign skilled workers American employers need. Arbitrary limits set by Congress are just that—arbitrary. The program is uncapped for only 3 years. Economic conditions may be quite different by 2003 and Congress should re-evaluate the H–1B program at that time. Additionally, the reports required by the American Competitiveness and Workforce Improvement Act will have been delivered to Congress by this time, and may contain information causing Congress to rethink the H–1B program.

If the program is going to be uncapped, it is more important than ever that it contain adequate safeguards to protect American workers and prevent widespread fraud. The bill contains a number of provisions with these goals in mind.

B. American Worker Safeguards

The bill is designed to ensure that American workers are not adversely affected by the H–1B program. Sections 401 and 402 of the bill extend the new attestations and additional Department of Labor investigative authority contained in ACWIA through fiscal year 2002. If the H–1B program is to be uncapped through 2002, these expiring worker protection provisions should also be extended. Section 403 of the bill requires that the Department of Labor promulgate final regulations fully implementing all provisions of ACWIA so that they are in effect on or before September 1, 2000. It is inexcusable that ACWIA's vital safeguards for American workers are not yet in effect, 18 months after enactment of ACWIA.[124] Once the H–1B program is uncapped, it is especially important that these provisions be implemented.

Section 101 of the bill provides that the additional visas made available over and above current law in fiscal years 2001 and 2002 will only be available to employers who can demonstrate that in the tax year prior to the year in which they file H–1B petitions, they increased the median of the wages paid to their American workers (over the previous year). The bill is designed to benefit those employers who are using the H–1B program to continue their growth and to continue to be able to provide new and better opportunities for their American workers. Employers that are cutting the salaries of their American employees should not be rewarded with

[124] See *The Status of Regulations Implementing the American Competitiveness and Workforce Improvement Act of 1998: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong., 2nd Sess. (2000).

more H–1B visas than are available under current law. These companies are reducing, not expanding, opportunities for American workers.

Section 201 of the bill provides that employers must pay H–1B nonimmigrants at least $40,000 a year (unless working at universities or public or private elementary or secondary schools). The H–1B program is designed to allow employers to bring "the best and the brightest" into the United States and to fill positions critical to the employers' success. Presumably, workers meeting such a description would be paid $40,000 at the very least, considering that:

> college graduates in 1999 with degrees in computer engineering started out earning a median of $46,200 ($45,000 with degrees in electrical and electronics engineering, $45,000 with degrees in for computer science, $40,300 with degrees in computer programming and $40,000 with degrees in information sciences),[125] and
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> in 1997, computer engineers had a median wage of $58,386, with those in the 90th percentile earning $88,858 ($59,155/$88,338 for electrical and electronics engineers, $49,546/$85,384 for systems analysts, $45,760/$83,782 for data base administrators, and $47,029/$87,027 for computer programmers).[126]

When commercial employers pay H–1B nonimmigrants less than $40,000, the risk is too great that they are using the H–1B program for cheap labor and not for access to extraordinary individuals.

Section 204 of the bill provides that employers can only petition for physical therapists who have completed degrees equivalent to the education and training received by physical therapists receiving master's degrees from American schools. The master's degree is the benchmark for training physical therapists at American universities. The lack of this requirement in the H–1B program has led to foreign physical therapists having a much lower pass rate than American physical therapists in licensure exams.

Section 501 of the bill requires the General Accounting Office to conduct a study of the measures taken by employers using the H–1B program to recruit for these jobs qualified American workers from underrepresented groups such as African-Americans, Hispanics, women, and individuals with a disability. The GAO shall submit a report to Congress by December 31, 2000, containing the results of the study and any recommendations as to modifications to the H–1B program that should be made to increase recruitment of members of these groups. Since individuals from these groups are already underrepresented in "high tech" jobs, it is crucial to ensure that they are not further disadvantaged by any expansion of the H–1B program and that employers using the H–1B program are making strenuous efforts to recruit them.

Section 501 also requires the GAO to conduct a study on the measures taken by employers using the H–1B program to continually train and update the existing skills of their present employees, and to promote these employees whenever possible. Employers

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[125] National Association of Colleges and Employers, *Salary Survey: A Study of 1998–1999 Beginning Offers* 4–5 (1999).

[126] Bureau of Labor Statistics, U.S. Department of Labor, *1997 National Occupational Employment and Wage Estimates*.

should only rely upon the H–1B program when they cannot adequately fill positions with their current American employees. Employers should make concerted efforts to retrain their current employees to maximize the occasions in which these employees can meet their always changing needs. It is imperative for Congress to know to what extent employers are following these maxims.

C. Anti-Fraud Measures

Section 301 of the bill provides that nonimmigrants working in specialty occupations utilize the H–1B program. This provision is designed to eliminate the use of "B–1" business visitor visas in lieu of H–1B visas.[127] Under this practice, aliens coming to the United States to perform work in the specialty occupations normally reserved for H–1B nonimmigrants can use B–1 visas as long as they are paid from sources outside the United States. This practice enables employers to avoid the safeguards (and any numerical cap) of the H–1B program, and should not be allowed.

Section 302 of the bill provides that H–1B nonimmigrants must work full-time (unless employed at universities). Currently, employers can petition for part-time workers. Companies doing this are often marginal operations that have trouble meeting the salary and other requirements of the H–1B program. In addition, part-time workers are not necessarily able to support themselves and will be tempted to engage in unauthorized employment. Universities, however, often share H–1B nonimmigrants, with the aliens working multiple part-time jobs at different institutions.

Section 303 of the bill eliminates the provision of current law that allows petitioned-for aliens to substitute work experience for a college degree. Current law encourages the use of overstated and wholly specious claims of work experience in H–1B petitions, as described at the May 5, 1999, hearing of the Subcommittee on Immigration and Claims. Requiring that H–1B nonimmigrants have (verifiable) college degrees will assure that only well-qualified true professionals will come here under the program. They will be able to rely on work experience in a specialty if they have college degrees unrelated to that specialty. The rare alien of extraordinary achievement who does not have a college education can use an "O" temporary visa.[128]

Section 304 of the bill requires petitioning employers to pay a fee of $100 that will be earmarked for H–1B anti-fraud work and split evenly between the INS and the State Department. As indicated at the Subcommittee on Immigration and Claim's hearing of May 5, 1999, the anti-fraud efforts of the Department of State and INS with respect to the H–1B program often falter for lack of resources. The anti-fraud fee will provide more funding for field investigations and joint inter-agency anti-fraud projects. It will also provide funding to pay for the deportation of aliens who were admitted to the country based on fraudulent H–1B applications.

Section 305 of the bill requires that non-governmental petitioning employers who do not have assets of at least $250,000 provide documentation of their business activity. Under current law, there are no minimum requirements for employers filing H–1B pe-

[127] See U.S. State Department Foreign Affairs Manual sec. 41.31 n.8.
[128] See INA sec. 101(a)(15)(O).

titions. As described at the Subcommittee on Immigration and Claim's hearing of May 5, 1999, numerous petitions are filed by questionable companies that have few, if any, assets, often "front" companies set up solely to apply for H–1B visas. Other petitions are filed by marginal companies whose level of business activity is insufficient to pay the promised salary to an H–1B alien. While the INS petition review process occasionally identifies such problems, many questionable petitions are still approved. Requiring additional documentation for companies that cannot meet a quite low minimum assets requirement will ensure that H–1B visas are not used by fraudulent companies or those that cannot hope to meet the requirements of the H–1B program.

Section 306 of the bill requires that employers utilizing the H–1B program submit to the Department of Labor each year the "W–2" wage withholding statements for their H–1B employees. This provision will help ensure that H–1B aliens are actually being paid the wage rate promised by their employers.

Section 202 of the bill requires that employers utilizing the H–1B program provide to the Department of Labor in electronic form specified information about each H–1B alien employed (including country of origin, academic degree, job title, start date and salary level). The Department of Labor shall then make such data available on the Internet. While much of this data is publically disclosed under the current program, it is inaccessible to persons not able to visit an employer's worksite or Department of Labor headquarters.[129] The H–1B program will become more transparent when information on the use of the program becomes widely accessible to the public. This will increase the confidence of the American people in the program and make it easier to ascertain that employers are meeting the requirements of the H–1B program.

D. Miscellaneous Provisions

Section 102 of the bill provides that an H–1B nonimmigrant is authorized to accept new employment upon the filing by the new employer of a new petition. Employment authorization will continue for such alien until the new petition is adjudicated. Currently, an alien working on an H–1B visa can only work for the company that petitioned for him or her. To work for another employer, the alien would have to have that employer file its own H–1B petition and wait until it is approved. This obviously puts the alien at a severe bargaining disadvantage against his or her employer. Allowing H–1B aliens to more easily move among employers will decrease the opportunities to abuse these workers.

Section 203 of the bill imposes a $200 fee on H–1B petitions that will be used by the INS and the Department of Labor to expedite processing of H–1B petitions and applications and to ensure that employers are meeting the requirements of the H–1B program.

Section 205 of the bill reduces the $500 fee added by ACWIA to $100 for employers that are local educational agencies.

HEARINGS

The committee's Subcommittee on Immigration and Claims held 3 days of relevant oversight hearings on May 5 and August 5, 1999,

[129] See INA sec. 212(n)(1).

and on May 25, 2000. During the May 5, 1999, hearing, "Nonimmigrant Visa Fraud," testimony was received from Michael Bromwich, Inspector General, U.S. Department of Justice; Jacquelyn L. Williams-Bridgers, Inspector General, U.S. Department of State; William A. Yates, Director of Immigration Services, U.S. Immigration and Naturalization Service; Gary Bradford, Assistant Director, Texas Service Center, U.S. Immigration and Naturalization Service; Nancy Sambaiew, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, U.S. Department of State; Jill Esposito, Post Liaison Division, Visa Office, Bureau of Consular Affairs, U.S. Department of State; John Ratigan; Lynn Shotwell, American Council on International Personnel; and Mark Mancini.

During the August 5, 1999, hearing, "the H–1B Temporary Professional Worker Visa Program and Information Technology Workforce Issues," testimony was received from Austin Fragomen, Chairman, American Council on International Personnel; David Smith, Director, Public Policy Department, AFL–CIO; Crystal Neiswonger, Immigration Specialist, TRW Inc. (on behalf of the National Association of Manufacturers); Gene Nelson; John Miano, the Programmers Guild; Alison Cleveland, Associate Manager of Labor Policy, U.S. Chamber of Commerce; Paul Kostek, President, Institute of Electrical and Electronics Engineers-USA; and Charles Foster.

During the May 25, 2000, hearing, "the Status of Regulations Implementing the American Competitiveness and Workforce Improvement Act of 1998," testimony was received from John Fraser, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor; John Spotila, Administrator, Office of Information Policy and Regulatory Affairs, U.S. Office of Management and Budget; John Templeton, Co-Convener, Coalition for Fair Employment in Silicon Valley (accompanied by Kevin Hinkston, Co-Convener, Coalition for Fair Employment in Silicon Valley); and Frank Brehm, the Programmer's Guild.

COMMITTEE CONSIDERATION

On April 12, 2000, the Subcommittee on Immigration and Claims met in open session and ordered favorably reported the bill H.R. 4227, as amended, by a voice vote, a quorum being present. On May 17, 2000, the committee met in open session and ordered favorably reported the bill H.R. 4227 with amendment by a recorded vote of 18 to 11, a quorum being present.

VOTES OF THE COMMITTEE

One amendment was adopted by voice vote. The amendment, offered by Ms. Jackson Lee, reduced the H–1B filing fee for local educational agencies from $500 to $100.

There were four recorded votes during the committee's consideration of H.R. 4227, as follows:

1. Amendment offered by Mr. Smith of Texas on behalf of himself, Ms. Jackson Lee and Mr. Goodlatte. The amendment was designed to ensure that H–1B visa applications are processed expeditiously by adding a dedicated $200 fee for processing and by eliminating the bill's requirement that the State Department verify for-

eign degrees of petitioned-for aliens. The amendment was also designed to ensure that the unlimited visas made available by the bill for 2001 and 2002 would be available when employers need them by eliminating the bill's requirements that 1) regulations implementing the American Competitiveness and Workforce Improvement Act of 1998 first be issued (The amendment does require the Department of Labor to issue regulations implementing the provisions of ACWIA by September 1, 2000.), and that 2) employers seeking visas not available under current law must show that they have increased the size of their U.S. workforces over the prior year. The amendment eliminated the bill's requirement that the names of H–1B nonimmigrants be posted on the Department of Labor's Internet site. The amendment allowed H–1B workers to move to new employers before the new employers' petitions are approved by the INS. The amendment required the GAO to perform studies on 1) the recruitment of members of underrepresented groups by employers utilizing the H–1B program, 2) the efforts of these employers to retrain their current workforces, and 3) INS's performance in compiling information about H–1B visas issued. The amendment provided that the $40,000 minimum salary for H–1B workers be indexed for inflation. Finally, the amendment eliminated the bill's provision switching some responsibilities under the H–1B program from INS to the State Department. Adopted 24–7.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas	X		
Mr. Coble			
Mr. Smith (TX)	X		
Mr. Gallegly			
Mr. Canady	X		
Mr. Goodlatte			
Mr. Chabot			
Mr. Barr		X	
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease	X		
Mr. Cannon	X		
Mr. Rogan	X		
Mr. Graham	X		
Ms. Bono	X		
Mr. Bachus		X	
Mr. Scarborough	X		
Mr. Vitter	X		
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren		X	
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt	X		
Mr. Wexler		X	
Mr. Rothman		X	
Ms. Baldwin	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Weiner		X	
Mr. Hyde, Chairman	X		
Total	24	7	

2. Amendment offered by Mr. Hyde exempting H–1B workers who will be public or private elementary or secondary school teachers from the $40,000 salary floor. Adopted 15–13.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Gallegly			
Mr. Canady	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr		X	
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease	X		
Mr. Cannon	X		
Mr. Rogan	X		
Mr. Graham	X		
Ms. Bono	X		
Mr. Bachus	X		
Mr. Scarborough			
Mr. Vitter	X		
Mr. Conyers		X	
Mr. Frank		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan			
Mr. Delahunt		X	
Mr. Wexler		X	
Mr. Rothman			
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Hyde, Chairman	X		
Total	15	13	

3. Amendment offered by Ms. Waters that would have made the issuance of all H–1B visas conditional on a number of employers entering into a contract with a recruiting firm to recruit minorities for high-tech jobs. One thousand minorities would have to be hired in California, Virginia, an Massachusetts. By unanimous consent Ms. Waters modified her amendment to add North Carolina and raise the required total to 1500 minority hires. By unanimous consent, Ms. Waters also modified her amendment to strike reference to any specific States. Defeated 12–17.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease	X		
Mr. Cannon		X	
Mr. Rogan			
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler	X		
Mr. Rothman			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	12	17	

4. Vote on Final Passage. Adopted by a vote of 18–11. Mr. Rothman would have voted nay but had to miss the vote.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Sensenbrenner	X		
Mr. McCollum	X		
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Gallegly	X		
Mr. Canady	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Barr			
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease	X		
Mr. Cannon	X		
Mr. Rogan			
Mr. Graham	X		
Ms. Bono	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter			
Mr. Conyers		X	
Mr. Frank			
Mr. Berman		X	
Mr. Boucher	X		
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee	X		
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt		X	
Mr. Wexler		X	
Mr. Rothman			
Ms. Baldwin			
Mr. Weiner		X	
Mr. Hyde, Chairman	X		
Total	18	11	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII 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 FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the H.R. 4227, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 12, 2000.

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. 4227, the Technology Worker Temporary Relief Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz (for federal costs), who can be reached at 226–2860, Shelley Finlayson (for the state and local impact), who can be reached at 225–3220, and John Harris (for the private-sector impact), who can be reached at 226–2618.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Democratic Member

H.R. 4227—Technology Worker Temporary Relief Act.

SUMMARY

H.R. 4227 would increase the number of nonimmigrant (temporary) visas, known as H–1B visas, available for certain skilled foreign workers and would establish two new fees that must be paid by employers of these workers. The bill would make several other changes to current laws relating to the employment of skilled foreign workers, including placing additional conditions on employers that hire such workers. In addition, it would direct the General Accounting Office (GAO) to conduct three studies on issues relating to skilled foreign workers.

CBO estimates that implementing H.R. 4227 would cost about $1 million in fiscal year 2001, assuming the availability of appropriated funds. In addition, we estimate that the bill would decrease net direct spending by $12 million over the 2000–2005 period. Because H.R. 4227 would affect direct spending, pay-as-you-go procedures would apply.

H.R. 4227 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the costs of complying with these mandates would be very small and would not exceed the threshold established in that act ($55 million in 2000, adjusted annually for inflation).

H.R. 4227 would create several new private-sector mandates for businesses that hire H–1B visa holders. These mandates include new restrictions on H–1B holders' salaries and working conditions, new processing and noncompliance fees, and new reporting requirements. CBO estimates that the total costs of these mandates would exceed the annual threshold established in UMRA for the private sector ($109 million in 2000, adjusted annually for inflation). The bill would also benefit such businesses by easing current legal limits on the number of H–1B visas that may be issued over the next

few years. CBO will provide a more detailed estimate of the impact of this legislation on the private sector in a separate statement.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 4227 is shown in Table 1. The costs of this legislation fall within budget functions 150 (international affairs), 250 (general science, space, and technology), 500 (education, training, employment, and social services) and 750 (administration of justice).

TABLE 1. Estimated Budgetary Effects of H.R. 4227, the Technology Worker Temporary Relief Act

	By fiscal year, in millions of dollars					
	2000	2001	2002	2003	2004	2005
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	0	1	0	0	0	0
Estimated Outlays	0	1	0	0	0	0
DIRECT SPENDING						
Net Spending of Visa Fees Under Current Law						
Estimated Budget Authority	0	0	0	0	0	0
Estimated Outlays	-39	-9	72	36	9	0
Proposed Changes						
INS Administrative Fees						
Estimated Budget Authority	-4	-8	-14	-6	-9	-11
Estimated Outlays	-4	-8	-14	-6	-9	-11
H-1B Petitioner Fees						
Estimated Budget Authority	-18	-34	0	0	0	0
Estimated Outlays	-18	-34	0	0	0	0
New Fees						
Estimate Budget Authority	0	-54	-59	-36	-38	-42
Estimated Outlays	0	-54	-59	-36	-38	-42
Department of State Fees						
Estimated Budget Authority	-2	-3	-5	0	0	0
Estimated Outlays	-2	-3	-5	0	0	0
Total Change in Visa Fee Collections						
Estimated Budget Authority	-24	-99	-78	-42	-47	-53
Estimated Outlays	-24	-99	-78	-42	-47	-53
Additional Spending from Visa Fees						
Estimated Budget Authority	24	99	78	42	47	53
Estimated Outlays	6	63	94	61	55	52
Net Change in Direct Spending						
Estimated Budget Authority	0	0	0	0	0	0
Estimated Outlays	-18	-36	16	19	8	-1
Net Spending of Visa Fees Under H.R. 4227						
Estimated Budget Authority	0	0	0	0	0	0
Estimated Outlays	-57	-45	88	55	17	-1

BASIS OF ESTIMATE

For this estimate, CBO assumes that H.R. 4227 will be enacted by August 1, 2000. The bill would affect direct spending, beginning soon after enactment. In addition, implementing the bill would have a minor impact on discretionary spending in 2001.

Spending Subject to Appropriation

Based on information from GAO, CBO estimates that the studies concerning skilled foreign workers required by the bill would cost about $1 million in fiscal year 2001, assuming appropriation of the necessary funds.

Direct Spending

CBO estimates that enacting the bill would decrease direct spending by about $12 million over the 2000–2005 period. Those changes would result from increased collections of visa fees, net of additional spending from collected funds.

H.R. 4227 would remove the cap on the number of H–1B visas available for fiscal year 2000 and would exempt most individuals from the caps for fiscal years 2001 and 2002. The current cap for 2000 (115,000 visas) was reached in March. Based on the application rate from October of 1999 to February of 2000 and the anticipated demand for H–1B visas under the bill's conditions, CBO estimates that H.R. 4227 would increase the number of applications for these visas by about 40,000 for the remaining part of fiscal year 2000, by 72,500 in fiscal year 2001, and by 115,000 in fiscal year 2002. Table 2 shows the number of visas authorized by current law and the estimated application levels under H.R. 4227.

TABLE 2. Number of H–1B Visas Authorized Under H.R. 4227

	2000	2001	2002
H–1B Visas Authorized Under Current Law	115,000	107,500	65,000
Estimated Additional Applications Under H.R. 4227	40,000	72,500	115,000
Estimated Total H–1B Visa Applications Under H.R. 4227	155,000	180,000	180,000

INS Administrative Fees. The administrative fee for these visas is $110 each, which is paid when an application is submitted. This fee must be paid by H–1B applicants, by H–1B nonimmigrants who want to change employers, and by H–1B nonimmigrants who want to extend their stay in the United States beyond the initial period of authorization (usually three years). CBO estimates that almost all of the additional persons receiving visas under H.R. 4227 over the 2000–2002 period would change employers or extend their stay during the 2003–2005 period. Thus, enacting the bill would increase fees collected by the INS by about $4 million in fiscal year 2000 and by $53 million over the 2000–2005 period.

We expect that the INS would spend the fees (without appropriation action), mostly in the year in which they are collected. Thus, eliminating the cap on H–1B visas would result in a small net budgetary impact in each year due to increase collections of INS administrative fees.

H–1B Petitioner Fees. In addition to the INS administrative fees collected under this bill, most employers of the affected workers must pay a petitioner fee of $500 per worker hired by October 1, 2001. Like the administrative fee, this fee must be paid for H–1B applicants, for H–1B nonimmigrants who want to change employers, and for H–1B nonimmigrants who want to extend their stay in the United States beyond the initial period of authorization. CBO estimates that the INS would collect additional petitioner fees of $18 million in fiscal year 2000 and $34 million in 2001.

The additional petitioner fees could be spent without further appropriation by the Department of Labor (DOL) to help train domestic workers for jobs in the technology sector, by the National Science Foundation for certain scholarship and science education initiatives, and by DOL and INS for administrative expenses. Because spending of the petitioner fees would lag behind the collections, CBO estimates that this provision would have a net negative effect on outlays in fiscal years 2000 and 2001, a net positive effect in 2002 through 2004, and a net effect of zero over the 2000–2005 period.

New Fees. In addition to the fees paid under current law, H.R. 4227 would impose two new fees on employers that hire H–1B workers, a processing fee of $200 and a compliance fee of $100, to be paid for H–1B applicants and for H–1B nonimmigrants who want to change employers. CBO expects that the INS would not be prepared to collect the fees until fiscal year 2001. These new fees would be collected from the additional visa applicants allowed by the bill, and from expected applicants under current law. CBO estimates that enacting H.R. 4227 would result in new fee collections of $54 million in 2001 and $229 million over the 2001–2005 period.

As above, collections would be available for spending without further appropriation. The INS, DOL, and the Department of State would spend those collections to improve the operation of the H–1B visa program. We expect spending of these new fees to lag behind the collections by a few years, so this provision would have a net negative effect of about $10 million over the 2000–2005 period.

Other Effects. Allowing more H–1B workers to enter the United States also would increase the amount of fees collected by the Department of State for these visas. That fee is currently set at $45 per person. CBO estimates that the State Department would collect and spend an additional $10 million over the 2000–2002 period, and that the net budgetary impact would be around $1 million or less each year.

Individuals classified as nonimmigrants are ineligible for most federal public benefits, with a few exceptions that include emergency Medicaid services. Given that H–1B visa recipients are skilled workers admitted for employment, CBO expects that any increase in costs for emergency medicaid services would not be significant.

PAY-AS-YOU-GO CONSIDERATIONS

The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays that are subject to pay-as-you-go procedures are shown in Table 3. For the purposes of enforcing pay-as-you-go procedures, only the effects in the current year, the budget year, and the succeeding four years are counted.

TABLE 3. Estimated Impact of H.R. 4227 on Direct Spending and Receipts

	By Fiscal Year, in Millions of Dollars										
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Changes in outlays	-18	-36	16	19	8	-1	0	0	0	0	0
Changes in receipts	Not applicable										

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 4227 would require employers of H–1B visa holders, including state and local governments, to (1) pay two new fees (a processing fee of $200 per worker and a compliance fee of $100 per worker); (2) employ H–1B workers full time, for at least 35 hours per week; (3) pay a minimum salary of $40,000 to each such worker, except education and research workers; and (4) report specified employment information. These requirements would be intergovernmental mandates as defined in UMRA. However, based on the relatively small number of H–1B workers expected to be hired by state and local governments who are not exempted from the salary requirement, CBO estimates that the costs to state and local governments would be very small and would not exceed the threshold established in UMRA ($55 million in 2000, adjusted annually for inflation).

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 4227 would create several new private-sector mandates for businesses that hire H–1B visa holders. These mandates include new restrictions on H–1B holders' salaries and working conditions, new processing and noncompliance fees, and new reporting requirements. CBO estimates that the total costs of these mandates would exceed the annual threshold established in UMRA for the private sector ($109 million in 2000, adjusted annually for inflation). The bill would also benefit such businesses by easing current legal limits on the number of H–1B visas that may be issued over the next few years. CBO will provide a more detailed estimate of the impact of this legislation on the private sector in a separate statement.

PREVIOUS CBO ESTIMATE

On April 10, 2000, CBO transmitted a cost estimate for S. 2045, the American Competitiveness in the Twenty-First Century Act of 2000, as ordered reported by the Senate Committee on the Judiciary on March 9, 2000. That legislation would authorize the appropriation of $20 million annually over the 2001–2006 period for after-school technology programs, would extend the $500 petitioner fee through fiscal year 2002, and would not establish any new fees for employers of H–1B nonimmigrants. The two cost estimates reflect these three major differences.

ESTIMATE PREPARED BY:

Federal Costs:
INS—Mark Grabowicz (226–2860)
NSF—Kathleen Gramp (226–2860)
DOL—Christina Hawley Sadoti (226–2820)
State Department—Sunita D'Monte (226–2840)

Impact on State, Local, and Tribal Governments: Shelley Finlayson (225–3220)
Impact on the Private Sector: John Harris (226–2618)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

June 21, 2000

H.R. 4227—Technology Worker Temporary Relief Act.

SUMMARY

H.R. 4227 would create several new private-sector mandates for businesses that hire H–1B visa holders. H–1B workers are skilled foreign workers admitted temporarily to the United States to work for domestic employers. Those mandates include new restrictions on H–1B holders' salaries and working conditions, new processing and noncompliance fees, and new reporting requirements. CBO estimates that the costs of those mandates would exceed the annual threshold established in the Unfunded Mandates Reform Act (UMRA) for the private-sector ($109 million in 2000, adjusted annually for inflation). The bill would, however, benefit such businesses by easing current legal limits on the number of H–1B visas that may be issued.

PRIVATE-SECTOR MANDATES CONTAINED IN BILL

H.R. 4227 would create several new private-sector mandates for businesses that hire H–1B visa holders. Those mandates would require all employers of H–1B visa holders to observe new restrictions on H–1B holders' salaries and working conditions, to pay new processing and noncompliance fees, and to comply with new reporting requirements. The bill would also extend a current mandate on "H–1B-dependent" employers.

Several provisions in H.R. 4227 would modify the conditions under which businesses may legally hire H–1B visa holders. First, the bill would require employers to hire H–1B holders on a full-time basis only. H–1B employees would have to work for at least 35 hours per week. Second, the bill would require employers to pay all new H–1B employees wages of at least $40,000 per year (excluding certain education and research workers). Businesses seeking H–1B visa holders for positions in physical therapy would be required to hire persons with at least master's (or equivalent) degrees or state licenses.

Other provisions in H.R. 4227 would require employers to pay two new fees for each petition to hire an H–1B visa holder that they submit to the Immigration and Naturalization Service (INS). Employers of current H–1B visa holders who wished to extend their stay and employers who hire H–1B visa holders currently employed by other businesses would also be required to pay those fees. The bill would create a new $200 processing fee and a new $100 compliance fee for each petition.

H.R. 4227 would also require all employers of H–1B visa holders to make certain notices and certifications to the federal govern-

ment. The bill would require businesses with less than $250,000 in assets to provide the government with documentation of their business activities when petitioning for permission to hire H–1B visa holders. In addition, H.R. 4227 would require all employers to provide the Department of Labor with a copy of their H–1B employees' W–2 tax forms and with certain employee personal and employment data.

The bill would extend a current mandate for "H–1B-dependent" employers. (An H–1B-dependent employer is a business where at least 15 percent of the employees have H–1B visas.) The American Competitiveness and Workforce Improvement Act of 1998 prohibits any H–1B-dependent employer from hiring any H–1B visa holder within 90 days of firing a non-H–1B employee from a similar position. That mandate is scheduled to expire on October 1, 2001, but H.R. 4227 would extend the mandate for an additional year.

ESTIMATED DIRECT COST TO THE PRIVATE SECTOR

CBO estimates that the total costs to the private sector of complying with the various mandates in H.R. 4227 would exceed the annual threshold established in UMRA for the private sector ($109 million in 2000, adjusted annually for inflation) for each of the first five years following enactment. The most costly mandates would be the wage requirement and the new fees.

Based on data on recent recipients of H–1B visas provided by the INS, CBO estimates that employers would have to spend over $200 million per year in order to comply with the requirement to pay all H–1B visa holders wages of at least $40,000 per year. This estimate accounts for only those H–1B visas that would be issued under the current statutory caps. CBO estimates that private-sector employers would have to pay over $40 million per year beginning in 2001 because of the new processing and noncompliance fees.

CBO cannot estimate costs for the remaining mandates because there is very little available information regarding employers of H–1B visa holders. CBO expects, however, that the cost of the mandates that would require employers to make certain notices and disclosures to the federal government would be relatively small in relation to the costs of the other mandates. In the case of the W–2 and business activities mandates, businesses would not need to expend significant amounts of effort to gather and present the information required for those disclosures. CBO cannot estimate the cost of the mandate on employers that hire H–1B visa holders for positions in physical therapy because published INS data is not sufficiently detailed. Although UMRA is unclear about how to measure costs associated with extending an existing mandate that has not yet expired, CBO expects that the cost of extending the prohibition on firing current employees would be low because, according to government sources, there are very few H–1B-dependent employers.

BASIS OF ESTIMATE

CBO's estimates for the costs of the private-sector mandates in H.R. 4227 are based primarily on data collected and published by the INS. Those data come from employers' petitions for permission to hire such workers. Those petitions contain, among other things,

wage or salary information and the type of work that the H–1B visa holder would perform. Data on personal characteristics, including information on H–1B visa holders' academic and professional backgrounds, comes from the H–1B visa holders themselves, who are required to demonstrate their qualifications before they may be hired. Data on employers of H–1B visa holders are scarce. Employers make attestations that they meet eligibility requirements for participation in the H–1B program to the Department of Labor, but those attestations contain very little information about employers other than their names.

To estimate the direct cost of the mandate requiring employers to pay H–1B visa holders at least $40,000 per year, CBO first used information collected by the INS concerning H–1B visas issued from October 1999 to February 2000 to estimate the proportion of H–1B visa holders who earn less than $40,000 per year and the average amount by which those workers' earnings fall short of $40,000. The INS data contains information about salary distributions and the number of visas issued for each of nearly twenty broadly defined occupations. CBO used those data to estimate for each occupation the proportion of individuals earning less than $40,000 and the average amount by which those individuals' earnings fall short of $40,000.

Next, CBO used the current statutory caps to estimate the number of H–1B visa holders in the United States for whom the mandate would apply for years 2001 through 2005. Last revised in 1998, the number of H–1B visas that may be issued for each year currently stand at 107,500 for 2001 and 65,000 for each subsequent year. Because H–1B visas are valid for three years, the number of H–1B visa holders for whom the mandate would apply would be 107,500 in 2001, but 172,500 in 2002, 237,500 in 2003, and 195,000 in 2004 and 2005.

Based on those figures and the INS data, CBO estimates that the number of H–1B visa holders earning less than $40,000 would be roughly 29,000 in 2001, 46,000 in 2002, 63,000 in 2003, and 52,000 in 2004 and 2005. Further, CBO estimates that the amount that employers would have to spend to pay those workers at least $40,000 per year would be approximately $210 million in 2001, increasing to roughly $470 million in 2003 before falling back to $390 million for the next two years.

These estimates, however, are subject to a number of limitations. First, they are based on limited salary data for a single six-month period in which the INS issued 74,000 H–1B visas. Second, the estimates depend heavily on the estimated proportion of H–1B workers earning less than $40,000 and their estimated average earnings for each occupation. Third, CBO attempted to account for the bill's exemption for H–1B workers employed by colleges and universities, but limitations in the data made such accommodation difficult. Different sample periods and different assumptions would produce different results. CBO's estimates also do not take into account the adjustments that employers could make in response to the mandate. Many employers could choose to change their hiring practices or increase H–1B employees' wages relative to other compensation while leaving total compensation largely unchanged.

CBO's estimates for the costs of the new processing and compliance fees are based on data relating to the number of H–1B visas

issued between October of 1999 and February of 2000. Estimates for the numbers of H–1B visa holders who extend their stays in the United States and who switch employers are also based on recent historical data. A more complete discussion of the collections from these fees may be found in CBO's federal cost estimate for H.R. 4227.

PREVIOUS CBO ESTIMATE

On March 9, 2000, CBO issued an estimate for S. 2045, which would extend two existing private-sector mandates on employers of H–1B visa holders. The only mandate found in both bills is the extension of the requirement that prevents H–1B-dependent employers from firing current employees within 90 days of hiring an H–1B visa holder.

ESTIMATE PREPARED BY:

John Harris (226–2949)

ESTIMATE APPROVED BY:

David H. Moore
Deputy Assistant Director for
Microeconomics and Financial Studies Division

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII 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 AND DISCUSSION

Section 1. Short title; table of contents

This Act may be cites as the "Technology Worker Temporary Relief Act."

TITLE I—NUMERICAL LIMITATIONS ON H–1B NONIMMIGRANTS; INCREASED PORTABILITY OF H–1B STATUS

Section 101. Temporary increase in access to H–1B nonimmigrants

Section 101 of the bill amends section 214(g)(1)(A) of the Immigration and Nationality Act to eliminate any numerical cap on the number of aliens who may be issued visas or otherwise provided "H–1B" nonimmigrant status under section 101(a)(15)(H)(i)(b) during fiscal years 2000, 2001, and 2002. In future fiscal years, the cap will be 65,000. However, only those visas available under current law in 2001 and 2002 (107,500 and 65,000, respectively) will be available to an employer unless it can show that with respect to the taxable year preceding the taxable year in which the petition is filed, there was a net increase (as compared with the prior tax year) in the median of the total wages (including cash bonuses and similar compensation) paid to full-time equivalent United States workers on the employer's payroll on the last day of the taxable year. United States workers are those workers defined in section 212(n)(4)(E) of the INA, and include citizens or nationals of the United States, or aliens who are lawfully admitted for permanent residence, admitted as refugees, granted asylum, or otherwise au-

thorized to be employed. Any group treated as a single employer under subsections (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer. Workers shall be disregarded who ceased employment with an employer by reason of the employer's having sold, or otherwise legally transferred for consideration, the assets of a division or other severable portion of the employer's business to another person before the end of the employer's previous tax year.

The elimination of the numerical cap on H–1B visas shall take effect on the date of enactment. The other provisions of this section shall take effect on October 1, 2000, without regard to whether or not proposed or final regulations to carry out such amendments have been promulgated.

Section 102. Increased portability of H–1B status

Section 102 of the bill creates a new section 214(c)(10) of the INA providing that an H–1B nonimmigrant is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant, and that the employment authorization shall continue for such alien until the new petition is adjudicated, if the nonimmigrant has been lawfully admitted into the United States, the new employer has filed a nonfrivolous petition before the date of expiration of the authorized period of stay, and the nonimmigrant has not been employed without authorization before the filing of the petition for new employment. This section shall apply to petitions filed on, or after, the date of enactment.

TITLE II—NEW REQUIREMENTS ON PETITIONING EMPLOYERS; PETITION FILING FEE REDUCTION FOR LOCAL EDUCATIONAL AGENCIES

Section 201. Minimum salary requirement

Current law requires that an employer petitioning for an H–1B visa must attest that it is offering and will offer during the period of authorized employment to the H–1B nonimmigrant wages that are the greater 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. Section 201 of the bill amends section 212(n)(1)(A) of the INA to require that the employer may not provide wages that are lower than the equivalent of an annual salary of $40,000 (including cash bonuses and similar compensation), unless the employment in question is as a public or private elementary or secondary school teacher or if the employer is an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965) or a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization. The $40,000 minimum salary is indexed for inflation.

Section 202. Submission of data on H–1B nonimmigrants after employment commencement

Section 202 of the bill creates a new section 212(n)(1)(H) of the INA to require that an employer electronically submit to the Secretary of Labor, not later than 30 days after the date on which an

H–1B nonimmigrant commences employment with the employer, data in an electronic format containing information about the nonimmigrant, including the foreign state of which the nonimmigrant is a citizen or national, the academic degrees obtained by the nonimmigrant, the nonimmigrant's job title, the date on which employment commenced, and the nonimmigrant's salary or wage level. Not later than 30 days after the receipt of data from the employer, the Secretary shall make such data available on the Internet.

Section 203. Fee to enable more efficient paperwork processing

Section 203 of the bill creates a new section 214(c)(11) of the INA imposing a $200 processing fee on an employer filing a petition to initially grant an alien H–1B nonimmigrant status or to obtain authorization for an alien having such status to change employers. A new section 286(t) of the INA is added creating an "H–1B Processing Fee" account in the general fund of the Treasury into which shall be deposited as offsetting receipts all fees collected. Fifty percent of the amounts deposited in the account shall remain available to the Attorney General until expended to process more expeditiously H–1B petitions. The other 50% of the amounts deposited shall remain available to the Secretary of Labor until expended for decreasing the Labor Department's processing time for H–1B applications and for carrying out the Department's responsibilities to investigate complaints regarding employers' noncompliance with the requirements of the H–1B program.

Section 204. Qualifications for physical therapists

Section 204 of the bill amends section 214(i)(2)(B) of the INA, requiring that aliens seeking to be H–1B nonimmigrants to perform services as physical therapists must have completed a degree recognized by a body or bodies approved for the purpose by the Secretary of Education as equivalent or more than equivalent to the education and training received by a person completing a master's degree from an accredited program of physical therapy in the United States. This amendment shall not apply to an alien who has full State licensure to practice in the occupation of physical therapist before the date of enactment.

Section 205. Reduction of petition filing fee for local educational agencies

Section 205 of the bill amends section 214(c)(9)(B) of the INA to provide that employers who are local educational agencies (as defined in section 14101 of the Elementary and Secondary Education Act of 1965) should only pay a $100 fee per petition for scholarships and job training, and not the $500 required of other employers.

Section 206. Effective date

Section 206 of the bill provides that, subject to section 204(b), the amendments made by title II shall take effect on the date of enactment and shall apply to H–1B petitions and applications filed on or after October 1, 2000.

TITLE III—NONCOMPLIANCE PROVISIONS FOR H–1B NONIMMIGRANTS

Section 301. Requiring specialty occupation workers and fashion models to obtain status as an H–1B nonimmigrant

Section 301 of the bill creates a new section 214(g)(6) of the INA requiring that any alien admitted or provided status as a nonimmigrant in order to provide services in a specialty occupation described in section 214(i)(1) of the INA or as a fashion model have been issued a visa or otherwise been provided nonimmigrant status under the H–1B program (except if the alien has been issued a visas or otherwise provided nonimmigrant status under the "H–2A", "O", or "P" visa programs). This provision shall not be construed to affect the granting of nonimmigrant status under section 101(a)(15)(L) of the INA. This provision does not alter the current operation of the L visa program in any way.

Section 302. Requiring full-time employment

Section 302 of the bill amends section 101(a)(15)(H)(i)(b) of the INA to require that H–1B nonimmigrants must be coming to the United States to perform services not less than 35 hours per week (unless the employer is an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 or a related or affiliated nonprofit entity).

Section 303. Requirements for specialty occupation

Section 303 of the bill amends section 214(i) of the INA to provide that the specialty occupation in which an H–1B nonimmigrant will work must require attainment of a bachelor's degree (or higher degree) in the specific specialty (or an equivalent foreign degree) as a minimum for entry into the occupation in the United States. Under current law, work experience can be substituted for the attainment of such a degree. Section 303 also provides that an alien who completes a bachelor's degree (or higher degree), but not one in the specific specialty in which he or she will work, can still perform services in that specific specialty under the H–1B program if the alien has experience in the specialty equivalent to the completion of a degree in the specialty and recognition of expertise in the speciality through progressively responsible positions relating to the specialty.

Section 304. Noncompliance fee

Section 304 of the bill creates a new section 214(c)(12) of the INA imposing a $100 noncompliance fee on an employer filing a petition to initially grant an alien H–1B nonimmigrant status or to obtain authorization for an alien having such status to change employers. A new section 286(u) of the INA is added creating an "H–1B Noncompliance" account in the general fund of the Treasury into which shall be deposited as offsetting receipts all fees that are collected. Twenty percent of the amounts deposited in the account shall remain available to the Attorney General until expended for programs and activities to eliminate fraud by employers filing H–1B petitions and aliens who are the beneficiaries of such petitions, and 20% shall remain available to the Attorney General until expended for the removal of H–1B nonimmigrants who are deportable under section 237(a)(1)(A) of the INA by reason of having been found to

be within the class of aliens inadmissible under section 212(a)(6)(C) of the INA for having, among other things, procured a visa by fraud or willfully misrepresented a material fact. Forty percent of the amounts deposited in the account shall remain available to the Secretary of State until expended for programs and activities to eliminate fraud by employers and aliens. Twenty percent of the amounts deposited in the account shall remain available to the Attorney General and the Secretary of State until expended for programs and activities conducted by them jointly to eliminate fraud by employers and aliens.

Section 305. Additional requirements on petitioning employers

Section 305 of the bill creates a new section 214(c)(13) of the INA providing that the Attorney General may not approve any H–1B petition unless the employer maintains a place of business in the United States that is licensed in accordance with any applicable State or local business licensing requirements and is used exclusively for business purposes (unless the employer is an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965), or a governmental or nonprofit entity). In addition, the Attorney General may not approve any H–1B petition unless the employer has aggregate gross assets with a value of not less than $250,000, or provides documentation of business activity pursuant to regulations promulgated by the Attorney General (unless the employer is a governmental entity). Whether a business has assets of $250,000 or greater is determined using its most recent report filed with the Securities and Exchange Commission if it is publically held. If it is not publically held, this will be determined by regulations promulgated by the Attorney General.

Section 306. Requiring filing of W–2 forms

Section 306 of the bill adds a new section 212(n)(1)(I) of the INA providing that an employer must, with respect to each H–1B worker, annually submit to the Secretary of Labor a copy of the most recent "W–2" wage withholding statement, by electronic means if preferred. This amendment applies to H–1B applications filed on or after October 1, 2000, but only with respect to W–2 statements made on or after January 1, 2001.

Section 307. Effective date

Section 307 of the bill provides that except for the amendment made by section 306, the amendments made by title III shall apply to H–1B petitions and application filed on or after the date on which final regulations are issued to carry out such amendments.

TITLE IV—EXTENSION OF PROVISIONS FROM THE AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998

Section 401. Protection against displacement of United States workers in case of H–1B dependent employers

Section 212(n)(1)(E)–(G) of the INA provides that H–1B dependent employers (generally, employers 15% or more of whose workforces are composed of H–1B nonimmigrants) and employers who have been found to have committed a wilful violation of the H–1B program must make certain attestations if they apply for H–

1B visas for aliens who will be "non-exempt" H–1B nonimmigrants. These requirements apply to H–1B applications filed before October 1, 2001. Section 401 of the bill extends the applicability of these requirements to applications filed before October 1, 2002.

Section 402. Additional investigative authority

Section 212(n)(2)(G) of the INA provides authority for the Secretary of Labor to investigate certain allegations that an employer is violating the terms of the H–1B program even though the allegations do not come from an aggrieved person or organization. The authority ceases to be effective on September 30, 2001. Section 402 of the bill extends the authority through September 30, 2002.

Section 403. Requirement to issue regulations

Section 403 of the bill requires that the Secretary of Labor promulgate final regulations fully implementing all provisions of ACWIA. The regulations must take effect on or before September 1, 2000.

TITLE V—STUDIES AND REPORTS

Section 501. Studies and reports by the General Accounting Office

Section 501 of the bill provides that the Comptroller General of the United States shall conduct a study on the measures that employers using the H–1B program have taken to recruit, for the jobs for which H–1B nonimmigrants are sought, qualified United States workers who are members of underrepresented groups, including African-Americans, Hispanics, females, and individuals with a disability. The study shall include an examination of the extent to which these employers recruit at institutions of higher education with substantial numbers of students who are a member of an underrepresented group and at historically black colleges and universities, community colleges, and vocational and technical colleges, and the extent to which they advertise in publications reaching members of underrepresented groups. Not later than December 31, 2000, the Comptroller General shall submit to the Committees on the Judiciary of the United States House of Representatives and of the Senate a report containing the results of the study. If the Comptroller General determines that modifications to the H–1B program are appropriate in order to increase recruitment by employers of members of underrepresented groups, the Comptroller General shall include such recommendations in the report.

Section 501 also provides that the Comptroller General shall conduct a study on the measures that employers using the H–1B program have continually taken to train and update the existing skills of incumbent employees, and to promote such employees where possible. Not later than December 31, 2000, the Comptroller General shall submit to the Committees on the Judiciary of the United States House of Representatives and of the Senate a report containing the results of the study.

Section 501 also provides that the Comptroller General shall conduct a study to determine the degree of compliance by the Attorney General with the requirements of section 416 of ACWIA requiring the Attorney General to maintain an accurate count of the number of aliens who are issued H–1B visas or otherwise provided H–1B

nonimmigrant status and to provide the Committees of the Judiciary of the United States House of Representatives and the Senate with specified information on the use of the H–1B program and on H–1B nonimmigrants and employers. Not later than December 31, 2000, the Comptroller General shall submit to the Committees on the Judiciary of the United States House of Representatives and of the Senate a report containing the results of the study.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) 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 italics, existing law in which no change is proposed is shown in roman):

IMMIGRATION AND NATIONALITY ACT

* * * * * * *

TITLE I—GENERAL

* * * * * * *

DEFINITIONS

SECTION 101. (a) As used in this Act—

(1) * * *

* * * * * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

(A) * * *

* * * * * * *

(H) an alien (i)(b) subject to section 212(j)(2), who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) [or (P))] *or (P)), not less than 35 hours per week (except if the employer is an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965) or a related or affiliated nonprofit entity),* in a specialty occupation described in section 214(i)(1) or as a fashion model, who meets the requirements for the occupation specified in section 214(i)(2) or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1), or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 212(m)(1), and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 212(m)(2) for the facility (as defined in section 212(m)(6)) for which the alien will perform the services; or

(ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of the Internal Revenue Code of 1954 and agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

* * * * * * *

TITLE II—IMMIGRATION

* * * * * * *

CHAPTER 2—QUALIFICATIONS FOR ADMISSION OF ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

* * * * * * *

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 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 an H–1B nonimmigrant wages that are at least—

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the application, [and]

(ii) is offering and will offer during the period of authorized employment to H–1B nonimmigrants wages that

are at least equal to an annual salary of $40,000 (including cash bonuses and similar compensation), except if the employment in question is as a public or private elementary or secondary school teacher or if the employer is an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965) or a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization; and

[(ii)**]** *(iii)* will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

* * * * * * *

(E)(i) * * *

(ii) An application described in this clause is an application filed on or after the date final regulations are first promulgated to carry out this subparagraph, and before October 1, **[**2001**]** *2002*, by an H–1B-dependent employer (as defined in paragraph (3)) or by an employer that has been found, on or after the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998, under paragraph (2)(C) or (5) to have committed a willful failure or misrepresentation during the 5-year period preceding the filing of the application. An application is not described in this clause if the only H–1B nonimmigrants sought in the application are exempt H–1B nonimmigrants.

* * * * * * *

(H) The employer will electronically submit to the Secretary, not later than 30 days after the date on which an H–1B nonimmigrant commences employment with the employer, data in an electronic format containing information about the nonimmigrant, including the following:

(i) The foreign state of which the nonimmigrant is a citizen or national.

(ii) The academic degrees obtained by the nonimmigrant.

(iii) The nonimmigrant's job title.

(iv) The date on which employment commenced.

(v) The nonimmigrant's salary or wage level.

(I) The employer will, with respect to each employee who is an H–1B nonimmigrant, annually submit to the Secretary of Labor a copy of the most recent statement under section 6051 of the Internal Revenue Code of 1986. Such submission may be made by electronic means.

* * * * * * *

(2)(A) * * *

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(C)(i) * * *

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(vii)(I) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H–1B nonimmigrant designated as **[**a full-time**]** *an* employee on the petition filed under section 214(c)(1) by the em-

ployer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

[(II) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H–1B nonimmigrant designated as a part-time employee on the petition filed under section 214(c)(1) by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay such a nonimmigrant for such hours as are designated on such petition consistent with the rate of pay identified on such petition.**]**

[(III)**]** *(II)* In the case of an H–1B nonimmigrant who has not yet entered into employment with an employer who has had approved an application under this subsection, and a petition under section 214(c)(1), with respect to the nonimmigrant, the provisions of **[**subclauses (I) and (II)**]** *subclause (I)* shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States pursuant to the petition, or 60 days after the date the nonimmigrant becomes eligible to work for the employer (in the case of a nonimmigrant who is present in the United States on the date of the approval of the petition).

[(IV)**]** *(III)* This clause does not apply to a failure to pay wages to an H–1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

[(V)**]** *(IV)* This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to an H–1B nonimmigrant an established salary practice of the employer, under which the employer pays to H–1B nonimmigrants and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if—

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this Act to remain in the United States.

[(VI)**]** *(V)* This clause shall not be construed as superseding clause (viii).

* * * * * * *

(6) For purposes of paragraph (1)(A)(ii), in the case of any fiscal year beginning in a calendar year after 2000, the dollar amount contained in such paragraph shall be increased by an amount equal to—

(A) the dollar amount; multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) of the Internal Revenue Code of 1986 for the calendar year in which the fiscal year begins by substituting "calendar

year 1999" for "calendar year 1992" in subparagraph (B) of such section.

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ADMISSION OF NONIMMIGRANTS

SEC. 214. (a) * * *

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(c)(1) * * *

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(9)(A) * * *

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(B) The amount of the fee shall be $500 for each such [petition.] *petition, except that the amount of the fee shall be $100 for an employer that is a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)).*

* * * * * * *

(10)(A) A nonimmigrant alien described in subparagraph (B) who was issued a visa (or otherwise provided nonimmigrant status) under section 101(a)(15)(H)(i)(b) may change employers upon the filing by the prospective employer of a petition under paragraph (1) on behalf of the alien to obtain authorization for the change. Employment authorization shall continue for such alien until such petition is adjudicated. If the petition is denied, such employment authorization shall cease.

(B) A nonimmigrant alien described in this subparagraph is a nonimmigrant alien—

(i) who has been lawfully admitted into the United States;

(ii) on whose behalf an employer has filed a nonfrivolous petition described in subparagraph (A) before the date of the expiration of the period of stay authorized by the Attorney General for the alien; and

(iii) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.

(11)(A) In addition to any other fees authorized by law, the Attorney General shall impose a processing fee on an employer filing a petition under paragraph (1)—

(i) initially to grant an alien nonimmigrant status described in section 101(a)(15)(H)(i)(b); or

(ii) to obtain authorization for an alien having such status to change employers.

(B) The amount of the fee shall be $200 for each such petition.

(C) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 286(t).

(12)(A) In addition to any other fees authorized by law, the Attorney General shall impose a noncompliance fee on an employer filing a petition under paragraph (1)—

(i) initially to grant an alien nonimmigrant status described in section 101(a)(15)(H)(i)(b); or

(ii) to obtain authorization for an alien having such status to change employers.

(B) The amount of the fee shall be $100 for each such petition.

(C) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 286(u).

(13) The Attorney General may not approve any petition under paragraph (1) filed by an employer with respect to an alien seeking to obtain or having the status of a nonimmigrant under section 101(a)(15)(H)(i)(b) unless the employer satisfies the following requirements:

(A) The employer—

(i) is an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965), or a governmental or nonprofit entity; or

(ii) maintains a place of business in the United States that is licensed in accordance with any applicable State or local business licensing requirements and is used exclusively for business purposes.

(B) The employer—

(i) is a governmental entity;

(ii) has aggregate gross assets with a value of not less than $250,000—

(I) in the case of an employer that is a publicly held corporation, as determined using its most recent report filed with the Securities and Exchange Commission; or

(II) in the case of any other employer, as determined as of the date on which the petition is filed pursuant to regulations promulgated by the Attorney General; or

(iii) provides documentation of business activity pursuant to regulations promulgated by the Attorney General.

* * * * * * *

(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—

[(i) 65,000 in each fiscal year before fiscal year 1999;

[(ii) 115,000 in fiscal year 1999;

[(iii) 115,000 in fiscal year 2000;

[(iv) 107,500 in fiscal year 2001; and

[(v) 65,000 in each succeeding fiscal year; or**]**

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

(i) subject to paragraph (5), 107,500 in fiscal year 2001;

(ii) subject to paragraph (5), 65,000 in fiscal year 2002; and

(iii) 65,000 in each succeeding fiscal year; or

* * * * * * *

(5)(A) The numerical limitations in clauses (i) and (ii) of paragraph (1)(A) shall not apply to an alien described in subparagraph (B).

(B) An alien is described in this subparagraph if—

(i) the alien, disregarding clauses (i) and (ii) of paragraph (1)(A), otherwise is eligible to be issued a visa or provided nonimmigrant status under section 101(a)(15)(H)(i)(b); and

(ii) the employer petitioning under subsection (c)(1) with respect to the alien demonstrates in the petition that, with respect to the taxable year preceding the taxable year in which the petition is filed, there was a net increase (as compared with the taxable year prior to such preceding taxable year) in the median of the total wages (including cash bonuses and similar compensation) paid to full-time equivalent United States workers (as defined in section 212(n)(4)(E)) who are on the employer's payroll on the last day of the taxable year.

(C) In making the determination under subparagraph (B)(ii)—

(i) 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; and

(ii) the Attorney General shall disregard workers who ceased employment with an employer by reason of the employer's having sold, or otherwise legally transferred for consideration, the assets of a division or other severable portion of the employer's business to another person before the end of the employer's previous tax year.

(6) Notwithstanding any other provision of this Act, any alien admitted or provided status as a nonimmigrant in order to provide services in a specialty occupation described in subsection (i)(1) (other than services described in subparagraph (H)(ii)(a), (O), or (P) of section 101(a)(15)) or as a fashion model shall have been issued a visa (or otherwise been provided nonimmigrant status) under section 101(a)(15)(H)(i)(b).

* * * * * * *

(i)(1) For purposes of section 101(a)(15)(H)(i)(b) and paragraph (2), the term "specialty occupation" means an occupation that requires—

(A) theoretical and practical application of a body of highly specialized knowledge, and

[(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.**]**

(B) attainment of a bachelor's degree (or higher degree) in the specific specialty as a minimum for entry into the occupation in the United States.

(2)*(A)* For purposes of section 101(a)(15)(H)(i)(b), the requirements of this paragraph, with respect to a specialty occupation, are—

[(A)**]** *(i)* full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

[(B)**]** *(ii)* completion of the degree described in paragraph (1)(B) for the occupation, or

[(C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.**]**

(iii)(I) completion of a bachelor's degree (or higher degree) that is not described in paragraph (1)(B), (II) experience in the specialty equivalent to the completion of the degree described in paragraph (1)(B) for the occupation, and (III) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

(B) In the case of a position in a specialty occupation that requires an alien to perform services as a physical therapist, the requirements of this paragraph also include a requirement that the alien have completed a degree recognized by body or bodies approved for the purpose by the Secretary of Education as equivalent (or more than equivalent) to the education and training received by a person completing a master's degree from an accredited program of physical therapy in the United States.

(3) For purposes of this subsection, the term "bachelor's degree (or higher degree)" includes a foreign degree that is a recognized foreign equivalent of a bachelor's degree (or higher degree).

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CHAPTER 9—MISCELLANEOUS

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DISPOSITION OF MONEYS COLLECTED UNDER THE PROVISIONS OF THIS TITLE

SEC. 286. (a) * * *

* * * * * * *

(t) H–1B PROCESSING FEE ACCOUNT.—

(1) IN GENERAL.—There is established in the general fund of the Treasury a separate account, which shall be known as the "H–1B Processing Fee Account". Notwithstanding any other provision of law, there shall be deposited as offsetting receipts into the account all fees collected under section 214(c)(11).

(2) USE OF FEES.—50 percent of the amounts deposited into the H–1B Processing Fee Account shall remain available to the Attorney General until expended to carry out duties under section 214(c)(1) related to petitions made for nonimmigrants described in section 101(a)(15)(H)(i)(b) and to decrease the processing time for such petitions. 50 percent of the amounts deposited into the account shall remain available to the Secretary of Labor until expended for decreasing the processing time for applications under section 212(n)(1) and for carrying out section 212(n)(2).

(u) H–1B NONCOMPLIANCE ACCOUNT.—

(1) IN GENERAL.—There is established in the general fund of the Treasury a separate account, which shall be known as the "H–1B Noncompliance Account". Notwithstanding any other provision of law, there shall be deposited as offsetting receipts into the account all fees collected under section 214(c)(12).

(2) USE OF FEES TO COMBAT FRAUD.—

(A) ATTORNEY GENERAL.—

(i) PROGRAMS TO ELIMINATE FRAUD.—20 percent of amounts deposited into the H–1B Noncompliance Account shall remain available to the Attorney General until expended for programs and activities to eliminate fraud by employers filing petitions under section 214(c)(1) with respect to status under section 101(a)(15)(H)(i)(b) and aliens who are the beneficiaries of such petitions.

(ii) REMOVAL OF ALIENS.—20 percent of amounts deposited into the H–1B Noncompliance Account shall remain available to the Attorney General until expended for the removal of H–1B nonimmigrants (as defined in section 212(n)(4)(C)) who are deportable under section 237(a)(1)(A) by reason of having been found to be within the class of aliens inadmissible under section 212(a)(6)(C).

(B) SECRETARY OF STATE.—40 percent of amounts deposited into the H–1B Noncompliance Account shall remain available to the Secretary of State until expended for programs and activities to eliminate fraud by employers and aliens described in subparagraph (A).

(C) JOINT PROGRAMS.—20 percent of amounts deposited into the H–1B Noncompliance Account shall remain available to the Attorney General and the Secretary of State until expended for programs and activities conducted by them jointly to eliminate fraud by employers and aliens described in subparagraph (A).

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SECTION 413 OF THE AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998

SEC. 413. CHANGES IN ENFORCEMENT AND PENALTIES.

(a) * * *

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(e) ADDITIONAL INVESTIGATIVE AUTHORITY.—

(1) * * *

(2) SUNSET.—The amendment made by paragraph (1) shall cease to be effective on September 30, [2001] *2002*.

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DISSENTING VIEWS

We strongly dissent from H.R. 4227, the "Technology Worker Temporary Relief Act," which we believe constitutes a dangerous step backward in our immigration policy. In trying to balance the needs of the high-tech community and American workers, the bill does a disservice to both groups. With regard to protecting U.S. workers, H.R. 4227 does not provide any funds to re-train U.S. workers or to educate America's children to take on the jobs of the 21st century's new economy. As for the high-technology industry's need to meet a short-term labor shortage, H.R. 4227 imposes significant new restrictions that make it far more difficult for American employers to utilize the H–1B program. The bill also fails to take any action to address the very important issue of permanent visas for highly skilled and long-time immigrants and their families.

H.R. 4227 does not have the support of the administration, which has brought forward a far more promising legislative proposal.[1] In addition, the committee-reported legislation is either outright opposed by, or lacking in support from, a wide range of groups and companies with an interest in H–1B and immigration policy. These include American Business for Legal Immigration ("ABLI");[2] Computer and Communications Industry Association;[3] American Immigration Lawyers Association;[4] Lutheran Immigration and Refugee Service;[5] Empower America;[6] National Conference of Catholic

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[1] See H–1B Visa Proposal of President Clinton *attached* to letter from Gene Sperling, Director, National Economic Council and Assistant to the President for Economic Policy, to Rep. John Conyers, Jr., House Judiciary Committee (May 11, 2000) (hereinafter, "*Administration Proposal*"). The President's proposal contains five key objectives: (1) raising the cap on H–1B visas for FY2001–2003 to 200,000 visas per year; (2) dedicating 40%, 45% and 50% of the H–1B visas in FY2001, 2002 and 2003, respectively, to highly educated workers; (3) increasing the fee from $500 to $2,000 per application for most employers and $3,000 per application for "H–1B Dependent" employers; (4) allocating the vast majority of additional revenue to the Labor Department and the National Science Foundation for the education and training of U.S. workers; and (5) providing equitable treatment for certain Central Americans and Haitians residing in the United States and updating the Registry Date to provide permanent resident status to long-time immigrants of the United States. The *Administration Proposal* is similar in many respects to H.R. 3983, "Helping to Improve Technology Education and Achievement Act of 2000," introduced by Reps. David Dreier (R–CA) and Zoe Lofgren (D–CA), and discussed below.

[2] "Employer Groups Call Smith Technology Worker Bill Insufficient and Shortsighted," *ABLI News Release* (undated) (expressing their "disappointment" and "dissatisfaction" with H.R. 4227). ABLI is a wide ranging coalition, including American Electronics Assoc., Biotechnology Industry Organization, Business Roundtable, Compaq Computer Corp., Computer and Communications Industry Assoc., Dell Computer Corp., Electronic Industries Alliance, Hewlett-Packard, IBM, Information Technology Assoc. of America, Intel Corp., Microsoft Corp., Motorola, Oracle Corp., Semiconductor Equipment and Materials International, Semiconductor Industry Assoc., Sun Microsystems, Technology Workforce Coalition, Telecommunications Industry Assoc., Texas Instruments and U.S. Chamber of Commerce.

[3] Letter from Ed Black, President and CEO of the Computer and Communications Industry Assoc., to the Hon. J. Dennis Hastert (June 6, 2000) (hereinafter, "*CCIA Letter*").

[4] Letter from Jeanne Butterfield, Executive Director of the American Immigration Lawyers Assoc., to Members of Congress (May 10, 2000).

[5] Letter from Merrill Smith, Washington Representative of the Lutheran Immigration and Refugee Service, to Members of Congress (May 5, 2000).

[6] *H–1B Plus and Immigration Reform*, Statement of Jack Kemp, Empower America (May 16, 2000).

Bishops;[7] National Council of La Raza;[8] and National Immigration Forum.[9] The AFL–CIO is also opposed to H.R. 4227.[10]

Under current law, H–1B visas (available for a 3-year period and subject to an extension of up to 6 years) are available for workers coming temporarily to the United States to perform services in "specialty occupations."[11] H–1B specialty occupations require both theoretical and practical application of a body of "highly specialized knowledge"[12] and attainment of a bachelor's degree or higher degree in the specific specialty, or its equivalent through work experience.[13] In 1998, Congress increased the number of H–1B visas available from 65,000 to 115,000 visas per year.[14] Pursuant to the 1998 law, employers pay a $500 fee for each H–1B worker they sponsor, which principally goes to the Labor Department for job training and the National Science Foundation for scholarships and grants.[15] (An additional $110 filing fee goes to the INS for administration of the H–1B program.[16]) Employers wishing to sponsor an H–1B employee must attest that (i) they will pay the nonimmigrant the prevailing compensation for that occupation; (ii) they will provide conditions for the nonimmigrant that do not cause the working conditions of other employees to be adversely affected; and (iii) there is no strike or lockout.[17] In addition, so-called "H–1B dependent employers" (companies whose workforce includes at least 15% H–1B workers) must attest that they have attempted to recruit U.S. workers and that they have not laid off U.S. workers 90 days prior to or after hiring any H–1B worker.[18]

H.R. 4227 nominally eliminates the current 115,000 cap on H–1B visas, but in its place interposes several new hiring and employment requirements. First, the legislation includes new salary requirements on employers, such that H–1B employees' income level must exceed $40,000 per year,[19] and the employer must have increased the median compensation of its non H–1B workers in the most recent year.[20] Second, the bill imposes several new business

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[7] Letter from The Most Reverend Nicholas DiMarzio, Chairman of the National Conference of Catholic Bishops' Committee on Migration, to Senators (May 3, 2000).

[8] Letter from Raul Yzaguirre, President and CEO of National Council of La Raza, to Senators and U.S. Representatives (Apr. 27, 2000).

[9] Letter from Frank Sharry, National Immigration Forum, to Members of Congress (May 2, 2000).

[10] Letter from Peggy Taylor, Director, AFL–CIO's Department of Legislation, to Chairman Henry Hyde, House Judiciary Committee (May 9, 2000) (H.R. 4227 "lacks critical components of constructive H–1B reform"). AFL–CIO has not expressed its support for any H1–B legislation.

[11] 8 U.S.C. § 1101(a)(15)(H)(i)(B).

[12] For a position to qualify as a specialty occupation, it must be in the "theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology and the arts." 8 C.F.R. § 214.2(h).

[13] Currently, foreign workers must show at least 12 years of related professional experience to document equivalence to a bachelor's degree.

[14] Pub.L. 105–277 (Oct 21, 1998). The new 115,000 H–1B visa ceiling was reached months before FY 1999 ended and the FY 2000 ceiling was reached in mid-March, over 6 months before the end of the fiscal year.

[15] 8 U.S.C. § 1356.

[16] 8 C.F.R. § 103.7(b).

[17] 8 U.S.C. § 1182(n).

[18] *Id.* The attestation provisions for H–1B dependent employers pursuant to the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA") were due to sunset in FY 2001. Pub. L. 105–277. H.R. 4227 extends these provisions through FY 2002. H.R. 4227, § 401.

[19] *Id.* at § 201. This does not apply to employees at higher education institutions and affiliated non-profits, non-profit and governmental research organizations, and elementary and secondary schools.

[20] *Id.* at § 101.

mandates by requiring that eligible employers have at least $250,000 in gross assets,[21] and that employers submit paperwork to the Department of Labor concerning the H–1B worker's country of origin, academic degree, job title, start date and salary level for posting on the Internet.[22] Finally, the bill imposes more stringent work requirements on prospective H–1B employees by requiring that they be employed "full time;"[23] eliminating the ability of workers to use their foreign work experience to replace the bachelor's degree requirement;[24] and by prohibiting persons employed in a specialty occupation from qualifying for an appropriate status other than H–1B.[25] H.R. 4227 provides only a very modest increase in H–1B fees paid by employers—increasing them by $300,[26] and none of the increased fees are allocated to worker training or to education.[27] In addition, the legislation contains several studies—relating to the recruitment of under represented groups by H–1B employers; training, education, and promotion of incumbent employees; and the INS's compliance with the requirement that they accurately count H–1B nonimmigrants.[28]

We offer these dissenting views because H.R. 4227 fails to bridge the twin goals of meeting the high-technology industry's labor shortage, while ensuring that American workers receive education and training necessary to compete in the new high-technology economy. Moreover, the bill does not address the problems with our permanent immigration system, particularly access to employment-based visas and the law's unfair treatment of Central Americans, Haitians and long-time immigrants deserving of lawful permanent residence. We also have grave concerns about the elimination of the cap. It is not only misleading, because of onerous new eligibility requirements, but creates a poor precedent by appearing to prefer temporary worker visas to family and employment-based permanent visas. The following is a more detailed summary of our concerns with the legislation.

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[21] *Id.* at § 305. In addition, to the gross asset requirement, employers must maintain a place of business in the United States and be licensed in accordance with State or local licensing requirements. If the employer cannot demonstrate $250,000 in gross assets, it must provide documentation per INS regulations to show its legitimate business activities.

[22] *Id.* at § 202.

[23] *Id.* at § 302. "Full time" is defined as not less than 35 hours per week. This does not apply to higher education institutions and related non-profits, governmental, and non-profit research institutions.

[24] *Id.* at § 303.

[25] *Id.* at § 301. For example, a business visitor or intra-company transferee who is a professional would be required to enter the country in H–1B status rather than in a visa category specifically created for such purposes. Foreign nationals are still eligible to apply for the following statuses in lieu of H–1B status: Agricultural workers, persons of "extraordinary ability or achievement," and performing athletes or entertainers.

[26] *Id.* at § 203.

[27] The Labor Department and INS each are to receive $100 per petition to improve the processing of applications. The remaining $100 is to be allocated to the INS and State Department to increase their efforts in combating fraud in the H–1B program.

[28] *Id.* at § 501. Additionally, the bill allows foreign nationals currently employed in H–1B status to change employers upon the filing of an H–1B petition by their new employer, rather than waiting until the petition is adjudicated, as required under current law. H.R. 4227, § 103. It requires foreign nationals performing services as physical therapists to have a degree recognized by the Secretary of Education as equivalent to a master's degree from an accredited U.S. physical therapy program. *Id.* at § 204. Employers also must provide the Labor Department with a copy of the annual W–2 form for their H–1B workers. *Id.* at § 306. Finally, H.R. 4227 extends the non-displacement attestation of ACWIA and the Labor Department's authority to initiate an investigation based on "credible evidence" through FY 2002. *Id.* at §§ 401–402.

I. H.R. 4227 FAILS TO OFFER ANY FUNDS TO RE-TRAIN U.S. WORKERS AND EDUCATE FUTURE WORKERS

First and foremost, we cannot support H.R. 4227 because it totally ignores the issue of preparing American workers and citizens (including minorities) for the growing high-technology economy.[29] There is a widespread consensus that we need to teach our children the skills to fill high-technology positions in the future.[30] The U.S. Department of Education recently found that secondary school students in the United States, when compared with students in other countries, have among the poorest skills in math and science. The Third International Mathematics and Science Study, the most comprehensive and most rigorous international comparison of students to date, tested students on their mathematics and science skills, and found that American students at the end of their secondary education were at a stark disadvantage compared to their peers abroad. U.S. students scored lower in math and science than students in almost every other country in the world. What passes as a ninth-grade math curriculum in the United States is being taught to sixth-graders in many foreign countries.[31]

A recent Labor Department report found that these deficiencies were mirrored in our adult labor force, concluding:

> In many instances, there is a mismatch between the skills jobs require and those that applicants possess. More than 20 percent of adults read at or below the fifth-grade level. A 1996 American Management Association survey of mid-size and larger business found that 19 percent of the job applicants taking employer-administered tests lacked the math and reading skills necessary for the jobs for which they are applying. That percentage increased to almost 36 percent in 1998—probably reflecting tighter labor markets and the rapidly rising demand for skills.[32]

In particular, women and minorities also are vastly under-represented in high-technology fields.[33]

It is for these reasons that we are so disappointed that H.R. 4227 contains no funding for increased training or education. H.R. 4227 pales in comparison to both the administration's proposal and the Dreier-Lofgren H–1B bill (H.R. 3983) in terms of education and training. The administration's proposal increases fees by $1,500 for

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[29] The Majority refused to even consider an amendment offered by Rep. Nadler (D–NY) and Rep. Conyers (D–MI) to increase accessibility to education and training in high-technology fields. The amendment would have directed grants to educational institutions and computer technology firms to train members of under represented groups. It also would have provided incentives for teachers to obtain information technology certifications to enable them to teach math and science skills to our children.

[30] *Highlights from TIMSS*, National Center for Education Statistics, U.S. Dept. of Education, NCES–1999081 (Apr. 16, 1999).

[31] *Id.*

[32] *Future Work: Trends and Challenges for Work in the 21st Century, Executive Summary: A Report of the U.S. Department of Labor reported in* Daily Labor Report, BNA, Inc., No. 170, p. E–1 (Sept. 2, 1999).

[33] See Letter to Democratic Leader Richard Gephardt from The Coalition for Fair Employment in Silicon Valley *printed in Roll Call* on May 4, 2000. The Majority defeated an amendment offered by Rep. Waters (D–CA) that would have added a pilot program requiring employers hiring H–1B workers to engage a recruiting firm to hire American workers from minority communities and to prohibit the issuance of H–1B visas until 1,000 minority employees are hired by such recruiting firms to fill high-technology positions.

most employers [34] and allocates 50% of the revenue to the Department of Labor to provide training for U.S. workers and 30% of the revenue to educational programs to teach our children computer science, math and engineering.[35] In terms of training, the Department of Labor, in consultation with the Department of Commerce, will fund innovative private-public partnerships to train American workers. The preponderance of funding will go to education and training for incumbent and dislocated workers and a smaller proportion will go to youth opportunity programs.[36] The administration also would use the increased H–1B fees to fund a variety of activities directed at educating our children.[37]

Similarly, H.R. 3983 would increase fees by $500, allocating 90% of the additional revenue to existing K–12 math, computer science, engineering and science-related enrichment initiatives and regional skills alliances designed to train current workers. This would include badly needed funds for, among other things, Stafford Loan Forgiveness Program, Upward Bound Math/Science Program, National Science Foundation Scholarships, and Regional Skills Alliances Job Training.

It is H.R. 4227's total failure to provide any increased funding for education or training that accounts for a large degree of its opposition. Thus, Sandra Boyd, ABLI Chair and a representative of the National Association of Manufacturers, criticized H.R. 4227 as being shortsighted because "[h]iring foreign professionals to help fill the need [for employees] is a limited, but important short-term solution to a much longer-term challenge: ensuring that our schools are producing Americans prepared to work in an information rich economy." [38] Similarly, Jim Jorgenson, CEO of AllAdvantage.com, has written "[w]e have some serious reservations about [H.R. 4227]. . . . The lack of skilled workers can not simply be addressed by increasing visa caps. We must also increase educational opportunities for U.S. students and workers to grow the domestic pool of talent." [39]

As recently as June 6, 2000, two of our leading high-technology executives, Bill Gates of Microsoft, and Andrew Grove of Intel, reiterated these concerns in a hearing before the Joint Economic Committee. As reported by *Congress Daily*:

> Both Grove and Gates said Congress should not only increase the availability of H–1B visas for skilled foreign

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[34] The administration's proposal includes a $2,000 application fee for most employers, except that "H–1B Dependent" employers, as defined in current law, are required to pay $3,000 per application. See *Administration Proposal*.

[35] The remaining 20% of the fees are allocated to the INS and Labor Department for improving application processing, reducing backlogs, and increasing enforcement of employer-based immigration programs. *Id.*

[36] Special emphasis will be put on funding innovative projects that focus on groups under-represented in the information technology industry, such as women, minorities, and Americans with disabilities. *Id.*

[37] These activities include National Science Foundation programs for scholarships for low-income students in computer science, math and engineering; Graduate Research Fellowships and merit-based scholarships; the Department of Education's Teacher-Loan Forgiveness, Upward Bound and Graduate Assistance in Areas of National Need programs; and programs for, and better coordination of economic dislocation and assistance through the Department of Commerce's Community Economic Adjustment program. *Id.*

[38] "Employer Groups Call Smith Technology Worker Bill Insufficient and Shortsighted," *ABLI News Release* (undated).

[39] Letter from Jim Jorgenson, CEO of AllAdvantage.com, to House Speaker Dennis Hastert (May 10, 2000).

workers, but also focus on ways of better preparing students to seek high tech careers. Grove said dealing with the issue of the high tech worker shortage with H–1B visas alone would be like "bailing out a [sinking] boat with a cup." He said math and science education had reached a "state of emergency" in the United States, and that he would favor Federal assistance in teacher certification and training in these areas. When asked whether he would support higher H–1B visa fees to support education and training programs, Gates said, "Fees would not be an issue in our case."[40]

II. H.R. 4227 IMPOSES SIGNIFICANT NEW RESTRICTIONS THAT MAKE IT FAR MORE DIFFICULT TO HIRE H–1B WORKERS

As noted above, H.R. 4227 includes at least seven onerous new restrictions relating to the hiring of H–1B and related workers. These include the following:

- The employee's salary must exceed $40,000 per year.
- The employer must have increased the median compensation of its non-H–1B employees in the most recent year.
- The employer must have gross assets in excess of $250,000.
- Information concerning the employee's country of origin, academic degree, job title, start date and salary level must be submitted to the Labor Department for posting on the Internet.
- The employee must be employed full time.
- The employee may not use work experience to replace the bachelor's degree requirement.
- Employees employed in specialty occupations may no longer be permitted to qualify for an appropriate status other than H–1B status.

Thus, although the bill appears to liberalize the availability of H–1B visas, in actuality, the legislation will make it far more difficult for employers to utilize the H–1B program than under current law. By and large, the new employment restrictions are either unnecessary and duplicative of the requirements of current law, or create dangerous new roadblocks to meeting our high-technology employment needs. Given this Majority's dubious track record in enacting immigration laws benefitting immigrants or employers, as well as the delay in considering this measure, we are not surprised that H.R. 4227 does not represent a real or meaningful effort to respond to the Nation's present needs with regard to temporary or permanent immigration.[41]

As a general matter, we would note that the new hiring restrictions represent a significant retrenchment from current law. ABLI and over 400 other organizations state in a recent letter that:

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[40] *Intel Head Differs With Industry Over Tax, Privacy Issues*, National Journal's Congress Daily (June 6, 2000).

[41] In 1996, subcommittee chairman Lamar Smith (R–TX) spear headed numerous dangerous and anti-immigration legal changes, including a decrease in employment-based immigration and a 30% decrease overall in legal immigration. CRS Report for Congress, *Immigration: Analysis of Major Proposals to Revise Family and Employment Admissions* (Feb. 14, 1996). Moreover, in a recent letter to committee members, Rep. Smith acknowledged his own view that: "Today there is still no objective, credible study that documents a shortage of American high-tech workers." Letter from Rep. Lamar Smith to committee members (Apr. 27, 2000).

"H.R. 4227 imposes burdensome new requirements on the H–1B program that would make the program unusable for many employers."[42] The American Immigration Lawyers Association has written that: "H.R. 4227 . . . is worse than current law. It would make the H–1B program unworkable. It poses too many restrictions on the program and does not meet the needs of U.S. employers for access to highly educated foreign professionals."[43] These concerns have been echoed by the Computer and Communications Industry Association, which has written: "[W]e do not support H.R. 4227 and we will not support this legislation if it is brought to the floor of the House of Representatives. . . . CCIA has serious concerns about H.R. 4227 as a legislative vehicle to address employers concerns, and if it is brought to the House floor, we will urge Members to vote against this bill."[44]

In terms of specific concerns with the hiring restrictions, we would note that the new $40,000 minimum salary requirement has been derided by the business community, as seen in ABLI's statement that "[i]t will be difficult for some employers to meet this wage threshold, particularly in start-up operations where compensation often relies heavily on stock options."[45] It also has been noted that the minimum income requirement may be unnecessary[46] and could pose particular problems for businesses in lower cost of living and wage geographic areas as well as for less lucrative but important specialty occupations.[47] The bill's requirement that the employer must have increased the median wages paid to its non-H–1B workers before they can hire more H–1B workers appears to be unnecessary since it is largely redundant of existing prevailing wage requirements in the law.[48] The same concerns lie with the new $250,000 asset requirement—this is purportedly designed to crack down on so-called "job shops," but is again redundant of anti-fraud requirements already in place,[49] and would merely serve to prevent legitimate small businesses and start up companies from hiring H–1B workers.

With regard to H.R. 4227's requirement that personal information concerning H–1B workers be posted on the Internet, in our view this constitutes an unprecedented and inappropriate infringement on workers' privacy. Much of this information is already submitted to the Labor Department and INS, which has the appro-

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[42] Letter from ABLI and over 400 organization to Members of Congress (June 6, 2000).

[43] *Talking Points, Why H.R. 4227 is Worse than Current Law!*, American Immigration Lawyers Assoc. (undated).

[44] *CCIA Letter*.

[45] *Summary of REVISED "Technology Worker Temporary Relief Act*," American Business for Legal Immigration (undated).

[46] An arbitrary salary floor does not take into account differences in wages among different locations (*e.g.*, Quincy, Illinois as compared to Los Angeles, California). The Labor Department, by regulation, has a mechanism for ensuring that H–1B workers are not paid below the prevailing wage for the position. The system takes into account location and the type of occupation. 18 U.S.C. § 1182(n); 20 C.F.R. § 655.731.

[47] The salary requirement rests upon the incorrect supposition that all H–1B workers are in high-tech fields demanding exorbitant amounts of money. H–1B workers include architects, scientists, physical therapists, artists, theologians, and archivists. See *Characteristics of Specialty Occupation Workers (H–1B): October 1999 to February 2000*, Report by the U.S. Immigration and Naturalization Service, table 2 (May 2000). CCIA has also noted that the minimum income requirement could constitute a violation of our General Agreement on Trade in Services ("GAS"). *CCIA Letter*.

[48] 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731 (employers' requirement to pay H–1B workers at least the prevailing or actual wage, whichever is greater).

[49] 8 U.S.C. § 1182(n)(1) (requirements for H–1B dependent employers).

priate enforcement authority, but no evidence has been proffered which indicates that such sensitive information need be posted on the Internet.[50] We would further note that the bill's new full-time work requirement also significantly narrows the flexibility of both high-technology employers and their employees and may well violate the Family and Medical Leave Act and other labor laws, in addition to provisions in the 1998 H–1B law mandating equal treatment for H–1B and other workers.[51]

As for the bill's prohibition on foreign nationals using work experience to substitute for a bachelor's degree, no credible policy rationale has been proffered for this requirement. Under current law, a U.S. telecommunications company currently can hire a telecommunications specialist from abroad who has more than 12 years of experience but no bachelor's degree. H.R. 4227 bans this practice, enabling our foreign competitors to hire such highly experienced individuals. Concerns also have been raised regarding H.R. 4227's prohibition on persons employed in a specialty occupation from being permitted to qualify for an appropriate immigration category other than H–1B status. Under this provision, employers and foreign nationals would lose the flexibility to choose the most appropriate visa category based on the entirety of the circumstances. Such a requirement artificially inflates the utilization of H–1B visas and unnecessarily imposes the H–1B program's restrictions on employers who have not historically needed H–1B workers.[52]

To the extent the Majority is seeking to use these new restrictions to respond to concerns regarding fraud and unnecessary use of H–1B visas, there are far more effective means of doing so which do not punish the high-technology community. Both the administration's proposal and the Dreier-Lofgren bill (H.R. 3983) pursue more reasonable increases in H–1B visas while simultaneously setting aside visas for highly skilled and educated workers. In particular, the administration and H.R. 3983 advocate an increase in H–1B visas to 200,000 per year, while reserving visas for certain highly educated persons. Since INS estimates that 40% of H–1B visas go to individuals holding a master's degree or higher.[53] The administration proposes that in FY 2001 we set aside 40% of H–1B visas for advanced degree holders, with modest increases in the following 2 years,[54] as well as 10,000 visas for institutions of high-

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[50] The American Immigration Lawyers Association notes: "The provision is an invasion of privacy and would target these individuals for the attention of extremists. Employers already submit this information to the INS and Department of Labor, and must notify employees of the occupation, salary and job location of the H–1B nonimmigrant. Internet posting is unwarranted." *Section-by-Section Summary of the "Technology Worker Temporary Relief Act" (H.R. 4227) as passed by the House Judiciary Committee, with Comments*, (hereinafter "*AILA Summary*") American Immigration Lawyers Assoc. (May 31, 2000). CCIA has written that the requirement "would be an invitation for employment agencies to steal away our companies key hires." *CCIA Letter*.

[51] 8 U.S.C. § 1182(n)(2)(C)(viii); see also *AILA Summary*. As ABLI has observed, "[t]his provision will virtually eliminate concurrent employment. It is also troubling that it eliminates the ability of employers to offer a shorter work week to H–1B employees seeking a better balance of career and family." *Summary of REVISED "Technology Worker Temporary Relief Act*," American Business for Legal Immigration (undated).

[52] Individuals who would otherwise choose to enter the country as an intra-company transferee, treaty investor, treaty trader, international exchange visitor or other appropriate status would be required to use the H–1B category. Further, the provision would forbid most business visitors who are professionals from using the business visitor visa.

[53] *Characteristics of Specialty Occupation Workers (H–1B): October 1999 to February 2000*, Report by the U.S. Immigration and Naturalization Service, table 4 (May 2000).

[54] *Administration Proposal*. The administration recommends setting aside 45% of visas in FY 2002 and 50% in FY 2003.

er education and other research institutions. Similarly, the Dreier-Lofgren bill would set aside 60,000 visas each year for persons holding master's degrees or the equivalent, and 10,000 visas for institutions of higher learning.[55] Both of these approaches seek to raise the cap to account for continued growth in the H–1B category, while providing for set-asides designed to ensure that our economy's needs for the most highly educated and skilled workers can be met and that jobs requiring less preparation are available to U.S. workers currently acquiring the necessary skills to fill them.

III. H.R. 4227 IGNORES THE PROBLEM OF PERMANENT VISAS

The legislation reported by the committee is also deficient in that it ignores opportunities to update and modernize our permanent employment based visa system, or to utilize immigrants who already reside in our country to help fill employment needs.

A. Updating and Modernizing our Permanent Employment-Based Visa System

It is unfortunate that the Majority has chosen to totally ignore the problem of permanent employment-based visas. This is in stark contrast to the Dreier-Lofgren bill which addresses several such issues—"over subscription;" INS processing delays; and outdated technologies. The "over subscription" problem stems from the fact that there are 140,000 employment-based visas available each year (including spouses and children).[56] These visas are divided into five preference categories, and within each category, there is a limited number of visas available to every country in the world, regardless of demand or population. Even though we have never used all 140,000 visas in a year, backlogs of up to 5 years have developed for skilled professionals from certain countries with strong scientific/engineering educational programs that produce individuals with skills sought by U.S. employers. Under current law, if these workers cannot reach the last stage of processing their green cards before their H–1B stay expires, they must be terminated and sent home or relocated to the company's overseas facilities, even though such workers already have an approved labor certification and INS immigrant petition. H.R. 3983 responds to this issue by allowing unused visa numbers to roll over from one category/country to another to help clear up the backlogs regardless of the per-country limits, and by extending the time in H–1B status beyond 6 years for workers caught up in this situation.[57]

A related problem concerns INS processing delays. This derives from the fact that 140,000 employment-based visas are available each year but frequently cannot be fully used. For example, in FY 1999, we used less than 40,000 visas because of INS processing delays although demand was much greater. H.R. 3983 responds by allowing unused visas from FY 1999 and FY 2000 numbers to be recaptured for use in future years.[58] In terms of responding to outdated government technologies, H.R. 3983 requires INS and the Labor Department to establish a web-based system that will allow

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[55] H.R. 3983, § 201.
[56] 8 U.S.C. § 1151(d).
[57] H.R. 3983, § 101 and § 203.
[58] *Id.* at § 101.

employers and other petitioners to check the status of a petition online; establishes a Technology Advisory Committee ("TAC") made up of industry and government agencies; and requires INS and the Labor and Commerce Departments to consult with the TAC and prepare a feasibility study on on-line filing by January 1, 2001.[59]

B. Fair Treatment for Immigrants Already Residing in the United States

In our view, if we are going to consider opening U.S. borders to hundreds of thousands of foreign nationals who do not live here to fill employment needs under the H–1B program, the very least we can do is address existing inequities faced by persons who already live and work here and have family ties in this country. Unfortunately, the Majority has again ignored two very reasonable proposals for doing so in the context of H–1B legislation—providing immigration parity for Central American and Haitian immigrants, and extending the registry date from 1972 to 1986 for certain long-term immigrants.[60] Enactment of both of these proposals would not only provide compassion and fairness for the affected immigrants, but would serve our own national and economic interests.

Immigration Parity for Central Americans and Haitians—Immigration parity for Central Americans and Haitians is needed to correct unfair and discriminatory provisions enacted by the Majority in the last two Congresses.[61] In 1996, Congress changed a provision of immigration law (known as "Suspension of Deportation") that offered a means for certain immigrants who have been in the United States for many years to remain here permanently if they can demonstrate that deportation would have harmful effects on themselves or derivative family members.[62] The 1996 law made this form of relief from deportation much more difficult to obtain, and the law was applied retroactively—meaning persons who had met the standards of the old rules now had to make their case based on the new, more difficult rules. The largest groups of immigrants affected by this change came to America after fleeing civil wars in Central America. For the most part, these immigrants have been living for many years in various temporary statuses, and expected to use the suspension of deportation provision of law to gain their permanent residence.

One year later, in 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), offering relief from the punitive 1996 law for Cubans and Nicaraguans and, to a far lesser extent, certain Guatemalans and Salvadorans.[63] In 1998,

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[59] *Id.* at § 103. The study must address how 98% of immigrant petitions can be adjudicated within 3 months and 98% of nonimmigrant petitions within 1 month. H.R. 3983 also requires the Labor Department to take internet recruitment efforts into account for labor certification and similar activities. *Id.* at § 102.

[60] The Majority used a procedural point of order to block consideration of an amendment offered by Reps. Conyers and Berman (D–CA) which would have amended H.R. 4227 to include both immigration parity and an extended registry date.

[61] Parity legislation in the form of H.R. 2722, the "Central American and Haitian Adjustment Act of 1999" was introduced by Reps. Christopher H. Smith (R–NJ) and Luis V. Gutierrez (D–IL) on August 5, 1999. In the Senate, counterpart legislation (S. 1590) was introduced by Sens. Richard J. Durbin (D–IL) and Edward M. Kennedy (D–MA) on September 15, 1999.

[62] Sec. 244(a)(1), 66 Stat. 163, Immigration and Nationality Act (May 1, 1995) *amended by* the Illegal Immigration Reform and Responsibility Act of 1996, Sec. 304, Pub. L. 104–208, 110 Stat. 3009 (Sept. 30, 1996).

[63] Pub. L. 105–100, 111 Stat. 2193 (Nov. 19, 1997) *amended by* Pub. L. 105–139, 111 Stat. 2644 (Dec. 2, 1997). By passing NACARA in 1997, Congress created an opportunity for Cubans

Congress passed the Haitian Refugee Immigration Fairness Act ("HRIFA")[64] to correct the fact that Haitian refugees were left out of NACARA; however, this law continued to leave many Haitians behind, in part because it did not take into account certain special circumstances of the Haitian refugees.[65] Thus, additional legal protection needs to be extended to qualified persons from El Salvador, Guatemala, Honduras,[66] and Haiti to grant them the same opportunity to adjust to permanent residence as was offered to them prior to the 1996 immigration law, and which Cubans and Nicaraguans received under the 1997 NACARA legislation.

Many of the individuals who would be covered under such a proposal came to the United States at a time when our asylum system was crippled by political bias, and they have a history of being treated unfairly by a hostile bureaucracy. Like the Cubans and Nicaraguans covered by NACARA, they have fled civil conflict that affected their home countries, they have resided for a long time in the United States, and their lives are now deeply rooted in America, with families, jobs and community ties.[67]

Parity legislation also is needed to provide workers for our own economy and to stabilize the emerging democracies of Central America. Remittances—money sent home by immigrants in the United States—represent a significant source of income for the

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and Nicaraguans to gain permanent residence if they had been present continuously in the United States since December 1, 1995. If these individuals do not have characteristics that would disqualify them for permanent residence, such as having committed certain crimes, they qualify for permanent residence under NACARA. NACARA set a deadline of March 31, 2000 for Nicaraguans and Cubans to apply. By contrast, the path to permanent residence laid out in the 1997 law for Salvadorans and Guatemalans included not just a screening for disqualifying characteristics, but also a process in which they must prove they should not be deported. Furthermore, several requirements narrowed the pool of those potentially eligible to apply. First, persons from Guatemala and El Salvador had to be in the United States prior to 1991. Even then, only persons who had registered as a class member in the *American Baptist Churches* lawsuit (which challenged the political bias against Salvadorans and Guatemalans in the asylum system in the 1980's), or for Temporary Protected Status, or who applied for asylum, were eligible to apply. Only if a person falls into one of these categories do they move on to the next step: applying for "Suspension of Deportation" (now known as "Cancellation of Removal"). This is a process in which persons must prove continuous residence in the United States for seven or more years, and that they or their U.S. citizen or permanent resident spouse, parent, or children would suffer "extreme hardship" if they were deported. In this process, the INS can decide that they agree or disagree with a persons's claim that they would suffer extreme hardship. While regulations guiding the decision-making process have been written to ease the burden of proving extreme hardship, the process is still complicated, and many may not get through it.

[64] Pub.L. 105–277 (Oct. 21, 1998).

[65] HRIFA permits Haitians to apply for permanent residence, but contains conditions that exclude certain Haitians, even if they resided in the United States by the cutoff date. Among other things, the law did not explicitly make allowances for the special needs of Haitians in the United States, including language and cultural barriers which make advising them of their legal rights difficult and the inability of many Haitians to pay the substantial filing fees. Further, though HRIFA was signed into law a year later than NACARA, Haitians were given the same deadline to apply, March 31, 2000, which is particularly problematic given the requirement that regulations needed to be finalized first (and which did not occur until March 23, 2000).

[66] Hondurans endured a somewhat similar history as the other groups. Many Hondurans came to the U.S. in the 1980's and early 1990's when the country was affected by the civil wars that tore apart the region. Yet, Hondurans have not been included in any relief legislation that has benefitted similarly situated groups. (Hondurans have been granted temporary relief from deportation until July 5, 2000, due to the devastation in their country caused by Hurricane Mitch in 1998.)

[67] Take the recently reported case of Ms. Pierre who used a doctored passport to leave Haiti and entered the United States on January 8, 1993, after her boyfriend had been dragged from their house in Port-au-Prince by agents of the Haitian dictatorship. In Florida, she built a solid life, scrubbing hotel room toilets and bathing people in nursing homes to earn a living. She married a Haitian immigrant and they have two children who are both U.S. citizens. Ms. Pierre is to be deported because she entered the country with a false immigration document. If she was Nicaraguan or Cuban, she would be eligible for permanent residence status. Rick Bragg, *Haitian Immigrants in U.S. Face a Wrenching Choice*, N.Y. Times, p. A1 (Mar. 29, 2000).

countries from which these war refugees have come.[68] Losing this income would be devastating for Central American economies struggling to recover from civil wars and, more recently, from Hurricane Mitch. In addition, unless we enact parity legislation, these countries would be forced to absorb more workers at a time when unemployment is high, which could destabilize the young and fragile democracies of the region, contrary to our foreign policy interests.

Updating the Registry Date—Updating the registry date to 1986 is necessary to protect long-term immigrants who have become valuable employees and family members in America, and to correct the punitive and unfair procedures adopted by the INS and by the Majority.[69] The notion of an immigration law registry is based on our long-held principle that immigrants who have come here without proper documents should be given an opportunity to adjust to permanent residence status and solidify their family and economic ties if they have been here a long time and have nothing in their background that would disqualify them from immigrant status. While the registry date has been updated six times since 1929, it has not been changed since 1986.

An important reason for updating the registry date is that a substantial portion of immigrants who would benefit are those who were eligible to apply for legalization in the mid-1980's under a separate provision of the Immigration Reform and Control Act of 1986 ("IRCA"), but were unable to due so because of INS misinterpretations of the law.[70] Had their applications been processed properly and in a timely manner, many, if not most of these immigrants would already be citizens.[71] Instead, they have been fighting the immigration bureaucracy for more than a decade and are now threatened with an unfair and painful deportation.[72]

In 1996, Congress compounded the problem when it stripped away the courts' authority to grant relief for most of the wronged legalization applicants.[73] In our view, it makes little sense to con-

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[68] In 1997 alone, it is estimated that Salvadorans in the U.S. sent back an estimated $1.2 billion.

[69] Corrective legislation in the form of the "Date of Registry Act," was introduced as H.R. 4138 by Reps. Sheila Jackson Lee (D–TX) and Luis Gutierrez (D–IL) on March 30, 2000. A Senate counterpart, S. 2407, was introduced by Sens. Harry Reid (D–NV) and Edward Kennedy (D–MA) on April 12, 2000.

[70] In addition to updating the registry date, IRCA included a "legalization program" giving certain persons who resided in the U.S. illegally before 1982 the opportunity to adjust to lawful permanent resident status. Undocumented immigrants had one year to apply. Many missed out on the opportunity to legalize through no fault of their own, because INS regulations issued by the Reagan administration misinterpreted the law and judged them not to be eligible for legalization if they had traveled outside the United States after May 1, 1987 without obtaining advance permission to do so.

[71] People such as Francisca Escobar continue to suffer the uncertainty and unfairness of the inability to apply for legalization under the 1986 law. Ms. Escobar is a 55 year old Los Angeles seamstress from Guatemala who, in 1981, escaped with her children from Guatemala's civil war. Ms. Escobar had been eligible for permanent residence status under the 1986 law. Antonio Olivo, *Another Chance at Amnesty*, Los Angeles Times, p. B–2 (Apr. 28, 2000).

[72] Several class-action lawsuits were filed against the INS by immigrant assistance organizations on behalf of their clients, challenging INS regulations which prohibited eligible applicants from applying for legalization. In each of these lawsuits, the courts agreed with the plaintiffs that the INS had misinterpreted the law. The largest of these lawsuits are known as "*Catholic Social Services*" and "*League of United Latin American Citizens*." Court decisions in these cases came near the end of the 1-year application period. When the courts tried to extend the application period to allow immigrants time to apply, the INS contested the courts' jurisdiction over these lawsuits. In 1993, the Supreme Court finally ruled that the courts did have jurisdiction over the legalization lawsuits. *Reno* v. *Catholic Social Services*, 509 U.S. 43 (1993).

[73] Section 377, Pub.L. 104–208 (Sept 30, 1996), as amended by Pub.L. 104–302 (Oct. 11, 1996) (the Illegal Immigration Reform and Immigration Responsibility Act). This provision stripped

tinue to spend limited enforcement resources to pursue the removal of immigrants who have lived and worked in this country for more than a decade. There will be no benefit to the U.S. should, in the end, these immigrants revert to undocumented status and lose their work permits (or be removed from the country). American employers will lose legal, productive workers, immigrant families will be torn apart, and broken families will weaken communities where immigrants live.

Extending immigration parity for Central Americans and Haitians and updating the registry date has drawn support from the Clinton administration as well as a wide range of groups. For example, Jack Kemp, co-director of Empower America and former Republican vice-presidential candidate, has declared that an H–1B "Plus" proposal that includes these immigration reforms constitutes a stronger approach because it "emphasizes two principles: First, supporting workers already here, on the job, and paying taxes and making our economy grow . . . [and] second, supporting family reunification by allowing more close family members of citizens and permanent residents to get visas to join their relatives here in America."[74] These views are shared by conservative groups such as Americans for Tax Reform, Center for Equal Growth, Club for Growth, and the National Retail Federation.

On the other side of the ideological spectrum, the Lutheran Immigration and Refugee Service has written: "A more comprehensive [H–1B] bill could be a stronger bill, vindicating both economic interests and humanitarian concerns."[75] The National Council of La Raza agrees, arguing that by supporting legislation providing for Central American and Haitian parity and updating the registry date, Congress "can prevent the further suffering of immigrants at the hands of bureaucratic entanglements and immigration policies that are not serving the nation's economic interest. . . . It would be an extremely negative signal to the Hispanic community if the H–1B bill were the only immigration-related legislation passed by the Congress."[76] The National Immigration Forum supports this view as well, noting, "[w]hile [H–1B] legislation would begin to ease the worker shortage in the high technology sector, it ignores the fact that a labor shortage exists across *all* skill levels. No less an authority on our economy than Alan Greenspan has discussed these labor shortages, and suggested we change our immigration laws in order to stabilize and expand our workforce."[77] These views are shared by groups such as the United States Catholic Conference, the Arab-American Institute, the National Asian Pacific American Legal Consortium, the National Coalition for Haitian Rights, and the Dominican-American National Roundtable. Finally, the AFL–CIO's Executive Council recently announced its

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the courts of jurisdiction over the claims of immigrants who were denied access to the legalization provision, unless they could show—more than a decade after the fact—that they actually attempted to apply for legalization but had their application and fee refused.

[74] *H–1B Plus and Immigration Reform*, Statement of Jack Kemp, Empower America (May 16, 2000).

[75] Letter from Merrill Smith, Washington Representative of the Lutheran Immigration and Refugee Service, to Members of Congress (May 5, 2000).

[76] Letter from Raul Yzaguirre, President and CEO of National Council of La Raza, to Senators and U.S. Representatives (Apr. 27, 2000).

[77] Letter from Frank Sharry, National Immigration Forum, to Members of Congress (May 2, 2000).

support of efforts to provide Central American and Haitian immigration parity and update the registry date.[78]

CONCLUSION

We urge the Majority to consider a far more careful and measured approach to the issue of H–1B visas in particular, and our permanent employment-based immigration policies in general, than they have to date. We would be willing to join them on a bipartisan basis if they take the following concerns into account. First, H–1B fees need to be increased concurrent with any increase in the cap to provide funding to educate and train U.S. workers who have been left behind, particularly dislocated workers, minorities, and women who are all vastly under-represented in the information technology industry. Second, the eligibility requirements for hiring an H–1B worker cannot be made so severe that employers in urgent need of hiring such a worker in the short term would be unable to do so. Third, the bill needs to update our employment-based permanent immigration system in order to provide equitable treatment under the law to certain Central Americans and Haitians and other long-time immigrants deserving of permanent resident status. Absent consideration of such changes, we must oppose H.R. 4227.

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[78] *Executive Council Actions*, AFL–CIO (Feb. 16, 2000) found on *www.aflcio.org*.