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IN ORDER TO HIRE THE BEST PERSON FOR THE JOB, WE HAVE TO DO WHAT?

A LOOK AT THE H-1B VISA PROGRAM: THE SHORT-TERM SOLUTION FOR CONTINUED AMERICAN COMPETITIVENESS IN THE GLOBAL HIGH-TECHNOLOGY MARKETPLACE

Brian John Halliday[*]

I. INTRODUCTION

In the last century of the United States' history, few questions have consistently remained a flashpoint of controversy and heated debate as the issues concerning the migration of foreign nationals to the United States. However, where one must begin to sort out the merits of the arguments, both pro and con, is a quandary. A mere overview of all aspects of the U.S.

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immigration laws, even absent editorial commentary, is a formidable task.[1] This Article will concentrate its scope on the issue of employment-based immigration to the United States, and particularly on the H-1B nonimmigrant visa category for aliens[2] in "specialty occupations."[3] The following illustrates the impact of this portion of the immigration law.

- Satish Appalakutty, a native of Bombay, earned a master's degree in computer management in India by age twenty-five.[4] Armed with this advanced educational credential, Mr. Appalakutty earned $3,000 per year in his home land.[5] However, since coming to the United States under the H-1B visa program, he now earns $50,000 per year as a consultant.[6] Despite his apparent good fortune, Mr. Appalakutty's future is uncertain. While he hopes to eventually obtain United States permanent resident ("green card") status, he finds himself living with three other Indian consultants in a two bedroom apartment, saving his money for the day he may have to return to India.[7]

- United States employers who utilize this visa program find themselves at odds with an element of the law that cuts-off the H-1B supply line after an arbitrary cap, predetermined by Congress, is reached.[8] This causes U.S. high-technology employers, large and small alike, great concern. A 300-employee Northwest software company finds that the limit impacts their growth and expansion.[9] A six-employee company which conducts medical research, some funded by federal grants, sees the cap as jeopardizing their ability to hire one key player for their operation.[10]

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1. One commonly referenced summary of U.S. immigration law, KURZBAN'S IMMIGRATION LAW SOURCEBOOK (1999 edition), written in the form of a concise outline, is a paperback as thick as a major metropolitan telephone directory.

2. The term "aliens," usually pertaining to non-U.S. citizens, is used pervasively throughout U.S. immigration law. However, many practitioners find the word to carry a cold and impersonal connotation. Therefore, wherever possible, this article will refer to non-U.S. citizens as nonimmigrants, foreign nationals, individuals and employees.

3. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1184(i)(1) (1998)).

4. *See* William Branigin, *Visa Program, High-Tech Workers Exploited, Critics Say; Visa Program Brings Charges of Exploitation*, WASH., July 26, 1998, at A1.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See* Keith Ervin, *Visas Haven't Eased Tech Hiring Hunt*, SEATTLE TIMES, Mar. 19, 1999, at C3.

9. *See id.*

10. *See id.*

- The limit even affects our nation's ability to educate our own students at post-secondary educational institutions in major metropolitan centers.[11] "It causes a lot of anxiety because it means some critical research projects are delayed . . . . It means that once the best candidates are found, we're not able to bring them in."[12]

This Article will examine the numerous claims of U.S. employers that they cannot fill professional-level job openings with home-grown U.S. workers, and the complaints of those who oppose the importation of foreign professional labor. By shedding some light on these broad questions, we should put into proper perspective the motivating elements behind our ever-changing United States immigration laws, separating the valid impetuses from the rhetoric. This should serve to paint a clearer picture of the actual state of affairs affecting our labor needs, and to suggest courses of action designed to stabilize and to correct the U.S. employment-based immigration system.

First, this Article will provide a cursory overview of the H-1B temporary professional specialty occupation visa program. Having laid this groundwork, we will then examine the various criticisms of the H-1B program, identifying the groups both supporting and opposing the issue, and their reasons for their positions. Finally, based upon this review of the political and economic climate affecting the evolution of the H-1B visa system, this article will propose recommendations for improving the system to better serve U.S. employers to compete effectively in the global economy, both in the long-term and the short-term. The reader will find that much of the existing law is sufficient to serve the needs of U.S. employers to compete effectively. However, the delegated agencies charged with administering these laws do so with great inefficiency, poor attitude and poor quality control. Thus, while some aspects of the process can certainly stand reasonable updating, many key areas of the controlling laws and regulations are quite satisfactory, if only they were properly implemented or enforced.

II. OVERVIEW OF THE H-1B NONIMMIGRANT VISA PROGRAM

The primary framework for the current immigration law of the United States was established by Congress in the Immigration and Nationality Act

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11. *See* Mae M. Cheng, *Colleges: INS Failing Professors / Visa Shortage Creates Woes at Universities*, NEWSDAY, June 13, 1999, at A8.

12. *Id.* (quoting Elizabeth Barnum, Assistant Dean for International Services of New York State University at Stony Brook).

of 1952[13] (INA or the Act). The Act has been amended several times since then, most notably by the Immigration Reform and Control Act of 1986 (IRCA),[14] the Immigration Act of 1990 (IMMACT90),[15] the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[16] and most recently by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA).[17]

Section 205 of the Act provided for the charter version of the H-1B visa category.[18] Prior to the Act being substantially revised by the Immigration Act of 1990, the H-1B visa category applied to a wide variety of nonimmigrant workers including professionals, "[c]ertain entertainers, athletes, artists and 'prominent' people . . . ."[19] IMMACT90's revisions to the Act restructured the immigration law by redefining the H-1B category to consist of nonimmigrant employees engaged in fashion modeling, certain projects for the Department of Defense[20] and "specialty occupations," defined as "occupation[s] that require[ ]— (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."[21] The other occupations that formerly qualified for H-1B classification were relegated to new sections of the Act created by IMMACT90.[22]

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13. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. 1101 (1998)) [hereinafter INA or The Act].

14. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. 1101 (1998)) [hereinafter IRCA].

15. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990)(codified at 8 U.S.C. 1101 (1998)) [hereinafter IMMACT90].

16. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (1996)(codified at 8 U.S.C. § 1101 (1998)) [hereinafter IIRIRA].

17. *See* American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, Title IV of Div. C, 112 Stat. 2681 (codified at 8 U.S.C. § 1101 (1998)) [hereinafter ACWIA].

18. *See* Angelo A. Paparelli & Mona D. Patel, *The Immigration Act of 1990: Death Knell for the H-1B?*, 68 INTERPRETER RELEASES 29, 29 (Jan. 14, 1991).

19. *Id.*

20. *See* INA § 101(a)(15)(H)(i)(a) (1998) (codified at 8 U.S.C. § 1101(a)(15)(H)(i)(b) (1998)). This article will not discuss the application of the H-1B visa category to fashion models or Department of Defense workers.

21. INA § 214(i)(1) (codified at 8 U.S.C. § 1184(i)(1) (1998)). Under the pre-IMMACT90 version of the INA, these jobs were referred to as "professional occupations." This article will often refer to jobs defined under this section of the INA interchangeably under both the old and new nomenclature.

22. *See* 8 U.S.C. § 1101(a)(15)(O) (1998) (referring to the category for persons of extraordinary ability); *see also* 8 U.S.C. § 1101(a)(15)(P) (1998) (referring to the category for athletes).

The regulations promulgated pursuant to the 1990 amendments to the Act created "labyrinthine requirements."[23] Among these is a requirement for H-1B employers to attest that the H-1B nonimmigrant will be paid at least ninety-five percent of the prevailing wage for the specialty occupation in question.[24] In addition, the H-1B employer was now required to attest that hiring the H-1B employee would not adversely affect working conditions of workers "similarly employed."[25] Finally, the 1990 amendments required H-1B employers to also attest that the nonimmigrant was being hired in the absence of any strike or lockout.[26] Collectively, these three attestations comprise the core underlying predicate for the H-1B visa category: the Labor Condition Application (LCA).[27] The H-1B category requires the employer to file the LCA with the Department of Labor (DOL), and have it certified prior to petitioning the Immigration and Naturalization Service (INS) for H-1B visa status for a particular nonimmigrant employee.[28] In addition, Congress wrote into the Immigration Act of 1990 an annual limit of 65,000 H-1B "visas"[29] that can be issued in a given fiscal year, and limited the maximum stay of an H-1B nonimmigrant in the United States to six years.[30]

The 1990 amendments to the Act were generally met with positive acclaim, insofar as they crafted the H-1B category to meet the technological explosion of the 1990s. An article analyzing the amendments noted that "editorial writers around the country have been quick to praise Congress and the President for legislation that many believe will enhance the ability of U.S. companies to compete successfully in the global economy."[31] While one can speculate whether the course of events in the U.S. economy and high-technology job market following the passage of the Immigration Act of 1990 were coincidental, opportunistic or abusive, the stage was now set for U.S. employers to hire foreign nationals with baccalaureate educations to fill professional-level positions when those jobs could not be filled by domestic labor.[32] Since this decade saw a

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23. Lorna Rogers Burgess, *H Nonimmigrants*, *in* 1999-00 IMMIGRATION & NATIONALITY LAW HANDBOOK, Vol. I, IMMIGRATION BASICS 203 (American Immigration Lawyers Assoc. ed., 1999).

24. *See* 20 C.F.R. § 655.731(a) (1998).

25. *See* 20 C.F.R. § 655.732(b) (1998).

26. *See* 20 C.F.R. § 655.733(b) (1998).

27. *See* 8 C.F.R. § 214.2(h)(ii)(B)(1) (1998).

28. *See id.*

29. This article will explain that the language in the Act concerning a Congressionally imposed cap on H-1B "visas" is a misleading characterization.

30. *See* Paparelli & Patel, *supra* note 18, at 29.

31. *Id.*

32. *See* Constantine S. Potamianos, *The Temporary Admission of Skilled Workers to the United States Under the H-1B Program: Economic Boon or Domestic Work Force Scourge?*, 11 GEO. IMMIGR. L.J. 789, 789 (1997).

dramatic increase in vacant professional-level positions, particularly in the high-technology sector, the role of the H-1B visa program became clear: if a U.S. employer cannot find U.S. workers[33] ready, willing, and able to fill a professional position, use the H-1B program to fill the position from the global labor market in order to remain competitive.[34] The decade of the 1990s has seen spectacular economic growth for the United States economy.[35] This growth has translated into the creation of hundreds of thousands of new specialty occupations in the United States.[36] Since there were not ample U.S. workers to fill these vacant jobs, employers relied heavily upon the H-1B visa program to fill these important positions.[37] In the U.S. Government's Fiscal Year 1996, the INS reported that the H-1B cap of 65,000 had been reached for the first time.[38] However, it turned out that the INS was mistaken; they miscounted the H-1B visas issued in Fiscal Year 1996.[39] Nonetheless, the incident sent shockwaves through H-1B reliant business community, and prompted the INS to develop a way to better count H-1B visas charged against the Congressionally imposed cap.[40] In Fiscal Year 1997, the H-1B visa cap was reached in late August, approximately five weeks before the end of the fiscal year.[41] This caused an immediate backlog of pending H-1B petitions at the INS already charged against the cap for the next fiscal year before Fiscal Year 1998 even began.[42] The country's economy continuing to voraciously consume H-1B visas to fill high-technology jobs, the INS announced the exhaustion of 65,000 H-1B visas for Fiscal Year 1998 on May 11, 1998—more than four and one-half months before the end of Fiscal Year 1998,[43] causing a

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33. *See* 29 C.F.R. § 501.10(u) (1998)(defining the term "U.S. worker" as a member of the U.S. labor pool who is either a U.S. citizen or permanent resident, i.e., "green card" holder).

34. In addition to the three employer attestations embedded in the LCA requirement for the H-1B category, there are many other safeguards built into the law to protect U.S. workers from being adversely affected by the hiring of H-1B foreign nationals to fill vacant professional jobs.

35. *See* Michael D. Towle, *Visa Entries Expanded to Fill High-tech Jobs More Skilled Workers Would Benefit Texas, Economist Says*, FORT WORTH STAR-TELEGRAM, Nov. 6, 1998, at 1.

36. *See id.* (reporting that 345,000 high-technology jobs remain open in the U.S.).

37. *See id.*

38. *See* H-1B Annual Limit Not Reached After All, INS Says, 73 INTERPRETER RELEASES 1184, 1184 (Sept. 9, 1996).

39. *See id.*

40. *See Annual H-1B Limit to be Reached This Year, INS Announces*, 73 INTERPRETER RELEASES 1137, 1137-38 (Sept. 9, 1996).

41. See *H-1B Cap Reached, INS and State Department Set Procedures*, 74 INTERPRETER RELEASES 1294, 1294 (Aug. 25, 1997).

42. See *INS Reports on H-1B Petition Grants in New Fiscal Year*, 74 INTERPRETER RELEASES 1935, 1935 (Dec. 16, 1997) (reporting that on October 1, 1997, the first day of Fiscal Year 1998, 8, 668 H-1B visa petitions had already been charged to the Fiscal Year 1998 H-1B visa cap).

43. *See* Fiscal Year 1998 Numerical Limitation Reached for H-1B Nonimmigrants, 63 Fed. Reg. 25,870-71 (1998).

Fiscal Year 1999 backlog of 17,000 H-1B petitions by the first week of September 1998.[44]

In response to combined pressure from H-1B employers fearing their H-1B supply line may be severed, and members of Congress concerned by the very real threat of high-technology jobs being moved overseas, lawmakers, spearheaded by Senator Spencer Abraham[45] (R-Mich.), introduced new H-1B legislation intended to increase the H-1B visa cap.[46] Senate Bill 1723,[47] dubbed the American Competitiveness Act, despite being introduced in March 1998,[48] met substantial resistence and was not expected to be signed into law before the end of the session. The wide-ranging impediments to the new legislation included: general opposition from restrictionists; dissatisfaction from the Clinton Administration of some of the bill's terms; budgetary appropriations issues necessary to keep the Government running; and distractions generated by the Monica Lewinsky scandal. In spite of these roadblocks, the 105th Congress reached a compromise acceptable to the Clinton Administration. Thus, the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) was folded into the 1999 omnibus appropriations bill[49] and signed into law by President Clinton on October 21, 1998.[50] The ACWIA provides for many changes to the H-1B visa program, most notably the following:

- A temporary increase in the number of H-1B visas available over the next three Fiscal Years.[51]

- New burdens and penalties for certain H-1B employers.[52]

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44. *See Congress Returns to Work, H-1B Relief for Remainder of Fiscal Year 1998 Unlikely*, 75 INTERPRETER RELEASES 1225, 1225 (Sept. 4, 1998).

45. Senator Abraham served as the chairman of the Senate Subcommittee on Immigration during the 105th Congress.

46. *See Lawmakers Introduce H-1B Overhaul Legislation, Other Bills*, 75 INTERPRETER RELEASES 357, 357 (Mar. 16, 1998).

47. *See id.*

48. *See id.*

49. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681.

50. *See State Department Issues Final Rule Providing Special Immigrant Status for NATO Civilians*, 75 INTERPRETER RELEASES 1726, 1727 (Dec. 21, 1998).

51. *See* ACWIA § 411 (increasing the H-1B cap to 115,000 for Fiscal Year 1999 and Fiscal Year 2000, then reducing the cap to 107,500 for Fiscal Year 2001, and returning to 65,000 for Fiscal Year 2002).

52. *See* ACWIA § 412 (creating new attestations required of certain H-1B employers relating to willful violators of the H-1B regulations, displacement of U.S. workers, and good-faith recruitment efforts).

- Modifications to enforcement provisions and monetary penalties.[53]
- An enhanced H-1B filing fee to fund scholarships and training endeavors for U.S. workers.[54]
- A more clearly defined method of counting H-1B visas against the cap.[55]
- A mandatory report to Congress on age discrimination in the computer science industry.[56]
- A mandatory report to Congress on the usage of foreign national personnel under the H-1B visa program.[57]

With the implementation of the ACWIA, and the subsequent promulgation of the related regulations, the H-1B visa program has evolved into its current state. Having laid this cursory groundwork, this Article will now examine the components of the H-1B visa program in its current form, as applied in real world hiring situations.

A. *The Prevailing Wage Requirement*

As stated above, U.S. employers are required to pay H-1B nonimmigrants "[t]he prevailing wage level for the occupational classification in the area of intended employment[.]"[58] Alternatively, the employer must pay the H-1B nonimmigrant "[t]he actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question[,]"[59] if the actual wage is higher than the prevailing wage.[60] Obviously, the object of such a requirement, which is codified in the DOL's regulations, is to prevent U.S. employers from hiring cheap foreign labor for wages unacceptable to U.S. workers. How the prevailing wage is determined is a study unto itself, and a source of much contention, particularly by the DOL.[61]

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53. *See* ACWIA § 413.
54. *See* ACWIA § 414.
55. *See* ACWIA § 416.
56. *See* ACWIA § 417.
57. *See* ACWIA § 418.
58. 20 C.F.R. § 655.730(d)(1)(ii) (1998).
59. 20 C.F.R. § 655.730(d)(1)(i) (1998).
60. *See* 20 C.F.R. § 655.730(d)(1) (1998).
61. The DOL has dwelled over the issue of the validity of data for prevailing wage determinations in microscopic detail, the current manifestation of which is set forth in GAL 2-98, the most recent of several General Administration Letters issued by the DOL on the issue of

There are several methods set forth in the DOL regulations for determining the prevailing wage for an H-1B specialty occupation. One of the most commonly used methods is asking the State Employment Security Agency (SESA)[62] in the state where the employee is to work, to determine the prevailing wage for the position.[63] This is accomplished by filing a short prevailing wage determination application form with the SESA, which usually lists: 1) the job title; 2) the duties for the position; 3) the Dictionary of Occupational Titles[64] (DOT) code for the position; 4) the minimum education and experience requirements for the job; and 5) the city where the H-1B employee will work. The SESA, in turn, determines what the prevailing wage should be, based on the criteria set forth in the application and the wage compensation data it has gathered in various surveys and databases. Unfortunately, a SESA prevailing wage determination is binding upon the H-1B employer once it is used to file an LCA.[65] The binding nature of this determination can be problematic in cases where the SESA determines a prevailing wage which is absurd due to error, or due to insufficient data on hand to produce an accurate sampling for a determination. Also, SESA determinations take time, and tend to delay the already slow H-1B process.[66]

Due to this bureaucratic uncertainty and inefficiency, as well as the risk involved, many employers and practitioners prefer to utilize a faster, more flexible and more predictable option—a wage survey. The DOL regulations permit H-1B employers to determine the prevailing wage by consulting a published wage survey that includes "the occupation within the area of intended employment published by an independent authoritative source . . . within the 24-month period immediately preceding the filing of the employer's application."[67] By consulting a wage survey, an employer immediately knows whether or not the salary being offered to the H-1B employee falls within the prevailing wage regulations. If the employee's

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prevailing wage since IMMACT90.

62. A State Employment Security Agency (SESA) is generally the state-level labor department. In Ohio, the SESA is the Ohio Bureau of Employment Services.

63. *See* 20 C.F.R. § 655.731(a)(2)(iii)(A) (1998).

64. The Dictionary of Occupational Titles (DOT) is the DOL's antiquated over-and under-inclusive attempt to classify and catagorize every occupation conceivable via a unique code designated to each occupation. For example, the DOT lists only six professional-level occupations with the word "computer" in the title. However, the DOT goes so far as to detail the duties, experience requirements and working conditions for four occupations with the word "worm" in the title: Worm-Farm Laborer, Worm Grower, Worm Packer, and Worm Picker.

65. *See* 20 C.F.R. § 655.731(a)(2)(iii)(A)(1) (1998).

66. The American Immigration Lawyers Association (AILA) posts reported processing times for various government agencies on their members-only website, www.aila.org. A recent tabulation from AILA's website in the first quarter of 1999 listed SESA prevailing wage determinations to take as little as two days in several states, to as long as eight weeks in Florida.

67. 20 C.F.R. § 655.731(b)(3)(iii)(B) (1998).

proffered wage is below prevailing wage, the employer can decide whether to forego hiring the foreign national, or to raise the employee's proffered salary. By consulting the wage survey, the employer can make these decisions without fear of being bound by an incorrect SESA wage determination.

Prevailing wage issues rarely arise, as most H-1B employers pay foreign nationals well above the prevailing wage.[68] This is due to the simple fact that a U.S. company will always be inclined to hire a U.S. citizen for a position, if possible, in order to avoid having to undergo the H-1B process. Thus, it logically follows that, when there are no available U.S. citizen candidates, the qualified foreign nationals are in a position to demand higher salaries. The U.S. employers have no choice but to offer competitive salaries, lest they risk losing the only qualified candidates they can find for vacant professional positions. This is an example of how U.S. employers are now being forced to consider not only the entire United States as a labor market, but the entire world.

B. *The Labor Condition Application Requirement*

The next step in the H-1B process is the LCA. The LCA is a short form, filed by the employer with the DOL regional office having jurisdiction over the H-1B employee's place of employment. On the LCA, the employer attests that it will pay the H-1B nonimmigrant the prevailing wage, by comparing the wage offered to the determined prevailing wage, in the geographic area of employment.[69] The regulations in this regard are very complex and require the employer to create and maintain a public file containing required documentation including: 1) the method by which the employer determined the H-1B employee's salary; 2) two notices of the H-1B employee's hire and salary which had to be posted in two conspicuous location for ten business days, in the event there is no collective bargaining representative to whom notice can be given;[70] and 3) evidence that all worksite employees were provided with specific instructions of how to file a complaint with the DOL relating to the H-1B employee.[71]

The scrupulous requirements of the LCA on the employer

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68. Employers who utilize the H-1B program generally do so out of necessity, and out of a sense of obligation to comply with the law. If they were not interested in doing so, they would not go to the time and expense of the H-1B process, nor would they be interested in creating the public records and filing damaging attestations with the Federal Government concerning matters such as prevailing wage.

69. *See* 20 C.F.R. § 655.731(a)(3) (1998).

70. Rarely would one encounter a circumstance where professional-level H-1B employees are unionized, and notice must be given to a collective bargaining representative.

71. *See* 20 C.F.R. § 655.734 (1998).

notwithstanding, it is interesting to note that the DOL itself violates an important component of its own regulations. Specifically, the DOL's regulations require it to "make a determination to certify or not certify the labor condition application within 7 working days of the date the application is received . . . ."[72] The American Immigration Lawyers Association's first quarter 1999 processing report of LCA processing times for all ten labor department regional offices indicates that only one regional office[73] was processing LCAs in seven days or less. Even though the DOL recently moved to an automated fax-and-scan system for adjudicating LCAs, with a purported processing time of as little as forty-eight hours,[74] the system quickly revealed its glitches. The DOL now [meaning, Summer 1999] processes LCAs in about two to four weeks—an improvement, but still not compliant with their own regulations. However, the new LCA system appears to be improving.

C. *The H-1B Petitioning Process*

Once the U.S. employer has properly determined the prevailing wage for the specialty occupation in question, and has obtained a certified LCA from the DOL, the employer is in a position to prepare and file the actual H-1B petition with the INS. The petition itself consists of two Department of Justice forms: Form I-129 and the H Classification Supplement.[75] Form I-129, *inter alia*, calls for information regarding the U.S. employer (including location and financial information); the current nonimmigrant visa status of the employee (if any); a brief description of the job; the dates of intended employment; and the salary offered.[76] The H Classification Supplement also calls for a description of the job being offered, the employee's current occupation, and a summary of the employee's employment history.[77]

The information called for on Form I-129 and the H Classification Supplement alone is not sufficient to satisfy the INS and DOL regulations for approval of H-1B visa status. Therefore, petitioning employers

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72. 20 C.F.R. § 655.730(b) (1998).

73. DOL Region X, which includes Alaska, Idaho, Oregon and Washington.

74. *See DOL Issues Notice of Proposed Rulemaking to Implement Changes to the H-1B Program*, 76 INTERPRETER RELEASES 37, 41 (Jan. 11, 1999).

75. *See* 8 C.F.R. § 214.2(h)(2)(D) (1998), 20 C.F.R. § 655.700(b)(2) (1998).

76. *See* Petition for Nonimmigrant Worker, Form I-129.

77. It is interesting to note that the H Classification Supplement, a form specifically intended for H-1B visa petitions, does not request information regarding the beneficiary's post-secondary education, a requirement for H-1B eligibility. However, the L Classification Supplement, a form intended for use in support of intracompany transferee petitions, *does* request the beneficiary's educational background. Ironically, educational background is irrelevant to L visa petitions which utilize the L Classification Supplement. It is as though the persons responsible for drafting the two forms confused the requirements between the two visa categories.

customarily include a letter of support with H-1B petitions. These letters usually describe the company, the specialty occupation being offered to the beneficiary, and the individual's qualifications for the position. Documentary evidence supporting the petition can be referenced in the letter and enclosed, or appended to the letter as exhibits. Documentary evidence required for the H-1B visa petition must include a certified LCA.[78] Other required evidence for an H-1B visa petition includes documentation which demonstrates that the beneficiary possesses the necessary licensure to perform the specialty occupation, a U.S.-issued baccalaureate degree, or its equivalent.[79] In addition, the petitioner's support letter usually includes corporate documentation to evidence the organization's legitimacy and financial viability (e.g. company product brochures, annual report, Form 10-K, etc.).

Once the H-1B employer has obtained the certified LCA, and has prepared, finalized and signed Form I-129 with H Classification Supplement and the supporting petitioner's letter, the company may file the petition with one of the INS's four regional service centers having jurisdiction over the H-1B nonimmigrant's intended place of employment.[80] The filed petition must be accompanied by the required filing fee.[81] Currently, the filing fee for an H-1B petition is bifurcated. There is a required base filing fee of $110.[82] However, as discussed *supra*, the ACWIA added a provision to the Act for an enhanced filing fee of an additional $500.[83] This $500 filing fee must come from the petitioning employer.[84] It cannot be paid by the beneficiary, nor can the beneficiary be required to reimburse the petitioner in any way.[85] The enhanced fee can be waived if the petitioning entity is "[a]n institution of higher education,"[86] "[a] nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education,"[87] or "[a] research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research or a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research."[88]

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78. *See* 20 C.F.R. § 655.730(b) (1998).
79. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C) (1998).
80. *See* 8 C.F.R. § 214.2(h)(2)(i)(A) (1998).
81. *See* 8 C.F.R. § 214.2 (h)(2)(i)(E) (1998).
82. *See* 8 C.F.R. § 103.7(b) (1998).
83. *See id.*
84. *See* 8 C.F.R. § 214.2(h)(19)(ii) (1998).
85. *See* ACWIA § 415.
86. 8 C.F.R. § 214.2(h)(19)(iii)(A) (1998).
87. 8 C.F.R. § 214.2(h)(19)(iii)(B) (1998).
88. 8 C.F.R. § 214.2(h)(19)(iii)(C) (1998).

Once the H-1B visa petition has been filed with the proper service center, the INS will process the case. Adjudication times at the INS vary greatly depending upon current workload, as well as the service center at which the case is filed. The Vermont Service Center and the Nebraska Service Center, which have jurisdiction over the Northeast and the rest of the northern tier of states, respectively, consistently have the faster adjudication times of the four INS service centers—generally somewhere in the vicinity of three to eight weeks.[89] However, the INS service centers in Texas and California, which handle cases from the Southeast and the Southwest, respectively, are notorious for having relatively slow processing times and extremely poor channels of communication.[90] In fact, INS headquarters in Washington, D.C., under pressure from Silicon Valley and other H-1B employers in the West, recently ordered the faster service centers to slow down their adjudication processes to permit the slower California Service Center to close the gap on H-1B adjudications before the cap on available visas for Fiscal Year 1999 was reached.[91] Therefore, an H-1B visa petition, from the prevailing wage phase to final approval, may take anywhere from one to four months.

In drafting the legislation from which the INS and DOL regulations governing the H-1B visa program are promulgated, Congress must satisfy the lobbying efforts of U.S. employers in dire need of foreign national professionals to fill open specialty occupations, as well as those constituents and anti-immigration organizations which view the H-1B program as detrimental to U.S. workers and associated wages. The result is the creation of laws with enforcement mechanisms intended to detect abuse of the program, and to punish the abusers. This was particularly apparent during the drafting and implementation of the ACWIA. In the realm of the H-1B program, the primary mechanism, delegated to the DOL, involves sanctions against employers for LCA violations.[92]

The Act, as amended, now provides for a fine of up to $1000 per

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89. This is an approximation based upon typical INS processing times for those jurisdictions over the last few years.

90. Each of the four service centers has a telephone number through which the public may reach an INS officer to inquire as to the status of a particular case. The lines are always busy. By pressing "redial" continuously for 15 to 30 minutes, one may usually get through to the Vermont or Nebraska service centers, remaining on hold for approximately another 15 to 30 minutes to reach a human. The Texas and California service centers, however, are virtually unreachable by telephone lest a caller is willing to spend, literally, hours redialing the contact number to get through to the INS. Even then, one must remain on hold for at least an hour before reaching an officer. To add insult to injury, all the INS telephone status lines are prone to cutting off callers, sometimes after they have waited patiently on the line for as much as an hour or more.

91. *See* Charles Piller, *The Cutting Edge Special Visa Law May Have Backfired for Tech Firms, Immigration: California Companies Seek Foreign Experts, but the Application Process Is Slower than in Other States*, LOS ANGELES TIMES, Apr. 5, 1999, at C1.

92. *See* ACWIA § 413(b)(1)(E)(i).

violation for an H-1B employer's failure to comply with the LCA requirements and attestations, including a penalty of $5000 per violation for an employer's willful failure to comply, or misrepresentation of fact.[93] Other sanctions against an employer violating the LCA regulations include the payment of back pay to the nonimmigrants adversely affected, and the possibility of the employer being barred for one year from being permitted to hire nonimmigrants in the H, L, O and P visa categories.[94] There are even additional attestations required of so-called "H-1B dependent employers."[95] These additional attestations require the employer to state that no U.S. worker is being displaced in favor of an H-1B employee from ninety days prior to filing the LCA, to ninety days after the H-1B visa petition is filed,[96] and that the H-1B employer has undertaken reasonable recruiting efforts in good faith to locate U.S. workers for the position.[97] Under the amended law, an H-1B dependent employer is one that:

> (1) has 25 or fewer full-time equivalent employees in the U.S. and employs more than seven H-1B nonimmigrants; (2) has 26-50 full-time equivalent employees in the U.S. and employs more than 12 H-1B nonimmigrants; or (3) has more than 50 full-time equivalent employees in the U.S., at least 15 percent of whom are H-1B nonimmigrants.[98]

While the lion's share of the H-1B enforcement provisions is incidental to the LCA requirements, and thus, comes under the charge of the DOL, it is also worth noting the INS's role in enforcement. Generally, the INS is responsible for acting as a gatekeeper and for mounting investigations, thus primarily engaging in enforcement activities regarding smuggling, fraud, terrorism, detention and the patrol of our borders.[99] However, the INS has been delegated enforcement and investigative powers concerning the employment of individuals[100] pursuant to the IRCA.

Under the IRCA amendments to the Act, the INS implemented what is commonly known as the "Form I-9" requirement. This law mandates that all U.S. employers verify that any person hired after the enactment of the law complete a Form I-9 to evidence that the new hire is authorized to

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93. *See id.*

94. *See* INA § 212(n)(2)(C) & (D) (codified at 8 U.S.C. §§ 1182(n)(2)(C) & (D) (1998)).

95. ACWIA § 412(b)(1) (amending 8 U.S.C. § 1182(n) (1998)).

96. *See* 8 U.S.C. § 1182(n)(1)(E) (1998).

97. *See* 8 U.S.C. § 1182(n)(1)(G) (1998).

98. *DOL Issues Notice of Proposed Rulemaking to Implement Changes to the H-1B Program*, 76 INTERPRETER RELEASES 37, 39 (Jan. 11, 1999).

99. *See* IMMIGRATION AND NATURALIZATION SERVICE OPERATIONS INSTRUCTIONS § 103.1 (1999).

100. "Individuals" meaning any human in the U.S., including United States citizens.

work in this country.[101] Employers who find themselves subject to an INS "employer sanctions"[102] investigation usually do not even know what a Form I-9 is. Those that do almost always have them filled out incorrectly, which in and of itself can be a chargeable offense under the INS's regulations.[103]

Although intended to place further controls on aliens in the United States, the IRCA foisted upon *all* U.S. employers this blanket employment verification measure, and U.S. employers are generally inept at complying with the ostensibly simple Form I-9 requirements. In fact, an immigration law journal published the following regarding an employer sanctions forgiveness amendment to the Act:

> This provision has become known as the "Sonny Bono" amendment, because Rep. Bono (R-Cal.), who is also a restaurant owner, was one of its sponsors. In one memorable exchange during a congressional hearing, Rep. Bono criticized the I-9 verification system, calling it a "lousy system" and one that "unfairly penalizes employers." He opined that most employers "have no clue" how to fill out the required paperwork, and are forced to waste time and resources fulfilling the verification requirements, worrying about employee fraud, and often having to defend their hiring practices. "All I wanna do is sell a plate of pasta," Rep. Bono said. "Why do I have to be the bad guy?"[104]

Notwithstanding Congress' discriminating forgiveness of unsophisticated U.S. employers for technical violations of the employer sanctions regulations, there exists no such latitude in the enforcement provisions inherent in the extremely complex and volatile H-1B visa program. One can only imagine Congress' reaction to pleas from employers for the relaxation of the H-1B requirements because the system is "lousy" and "unfair," that they "have no clue" how to prepare and file the required paperwork, and that all they want to do is sell high-technology products and services.[105]

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101. *See* INA § 274A (codified at 8 U.S.C. § 1324a (1998)).

102. This is the INS's jargon for an audit of an employer's Forms I-9, payroll and personnel records for compliance with the IRCA.

103. *See* INA § 274A(b) (codified at 8 U.S.C. § 1324a(b) (1998)).

104. Juan P. Osuna, *The 1996 Immigration Act: Employer Sanctions, Antidiscrimination and Work Verification*, 73 INTERPRETER RELEASES 1749, 1750 (Dec. 20, 1996).

105. To paraphrase the late Congressman Bono.

III. CRITICISMS OF THE H-1B PROGRAM

It is interesting to note the difference in approaches taken by pro-immigration and anti-immigration advocates in terms of commentary on the H-1B visa program, much of which was considered by Congress in amending the law. While there was no shortage of sources for statements opposing immigration and the H-1B program, it was difficult to find sound and logical data supporting those arguments.[106] The Federation for American Immigration Reform (FAIR) is a Washington, D.C. based "non-profit, public interest of concerned citizens who share a common belief that the unforeseen mass immigration that has occurred over the last 30 years should not continue."[107] FAIR's website[108] makes many broad statements in support of their beliefs that U.S. immigration, at all levels, should be stemmed. Under the heading "Do Employer-Sponsored Immigrants Fill Special Job Needs?,"[109] FAIR states that "[m]any Americans would find this idea—that American know-how and ingenuity must be imported from abroad—absurd, and a brief look at the facts about what business is actually doing with its part of the immigration system backs them up."[110] FAIR then cites a few 1996 INS statistics concerning employment-based immigration,[111] lists them by occupational grouping, and concludes "[i]t is hard to credit claims by big business that they can't

106. For example, the AFL-CIO has made numerous statements opposing the H-1B visa program unsupported by data. Therefore, the author telephoned the organization's toll free number to their Washington, D.C. headquarters. Upon doing so a gentleman (who answered the telephone "Tony Wang's Chinese Pizza") advised that he did not know why the AFL-CIO was opposed to the H-1B program, but that he knew that they were. Messages left at the organization's media and public relations desks were not returned. Also, the author's requests to have data supporting their argument mailed to the author remain ignored at the time of this writing.

107. *See* The Federation for American Immigration Reform (FAIR) Internet website entitled "About Us," <http://www.fairus.org/html/aboutus.html> (visited on June 1, 1999).

108. Until recently, FAIR's home page, www.fairus.org, featured a map of the world with large animated arrows originating from all parts of the globe, terminating in the contiguous United States with the word "FULL" flashing across the Great Plains. The Internet site has since been toned down.

109. FAIR (visited June 1, 1999) <http://www.fairus.org>.

110. *Id.*

111. The terms "immigration" and "immigrant" are not to be confused with nonimmigrants. In general, an immigrant is any non-citizen who has the authority to reside and work in the U.S. indefinitely. A nonimmigrant is a person who enters the U.S. for a temporary stay and must return to his or her home country once that stay has expired. The term "immigrant" is defined in the Act at INA § 101(a)(15) by exclusion by indicating that an immigrant is "any alien" who does not fall into any of the nonimmigrant categories defined in that section. This part of the FAIR website deals only with immigrants.

do without aliens in most of these occupations."[112] While FAIR cites INS employment-based immigration statistics and occupational breakdowns, one may fail to see how such headcounts support a conclusion that employment-based immigration is bad.

Insofar as the H-1B visa program is concerned, FAIR covers some ground. However, much of it is very confused, and almost none of it is supported by relevant data. FAIR's Internet resources feature a page entitled "An Engineer's Thoughts on H-1B."[113] It is the text of a two-paragraph, anonymous letter from an engineer who is having difficulty finding a job. He states "[m]y recent job hunting experience tells me that it is difficult to get any job as an engineer, even after possessing an engineering degree and job experience. [ ] If you can tell me why I can't even get any calls in this 'hot market' please let me know."[114] Clearly, this hardly rises to the level of a legitimate ground for opposing the H-1B visa program. Indeed, the hapless engineer did not even mention the H-1B program. Another FAIR reference to the H-1B visa program being unneeded is posted on their website, and is entitled "Sen. Harkin Defends American Worker."[115] This so-called defense of the U.S. worker and attack on the H-1B visa program amounts to a quotation from Senator Tom Harkin (D-Iowa), threatening to "have the whole bill read."[116] The Senator went on to say "[w]e'll be here for days. There is no need for that bill, and I do not want it in the omnibus."[117] No support is provided by FAIR, the anonymous engineer, or the Senator for their posture on these statements featured on FAIR's website.

The Executive Director of FAIR, Dan Stein, spoke before the International Operations and Human Rights Subcommittee of the House Committee on International Relations on February 25, 1998.[118] The statement was purportedly made "for the record of the hearing on a proposal to raise the 65,000 annual ceiling on H-1B temporary worker visas . . . [and] explains why this proposal is not based on actual need and

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112. FAIR (visited June 1, 1999) <http://www.fairus.org>.

113. *An Engineer's Thoughts on H-1B,* FAIR (visited June 1, 1999) <http://fairus.org>.

114. *Id.*

115. *See* Sen. Harkin Defends American Worker, FAIR (visited June 1, 1999) <http://www.fairus.org>.

116. *Id.* (quoting an except from an article by Martha Angle, Follow the Money (Oct. 14, 1998)).

117. *Id.* The bill to which the Senator referred was signed into law by President Clinton and is now the ACWIA.

118. Mr. Stein's statements before the Subcommittee, given during the congressional hearing on whether to increase the then-65,000 visa cap on the H-1B program, are memorialized on FAIR's website: *The Sham High-Tech Worker Shortage,* FAIR (visited June 1, 1999) <http://www.fairus.org>.

is not in the national interest."[119] Unfortunately, many of the points made by Mr. Stein confuse the H-1B visa program with the permanent labor certification application requirement for immigrant visa classification.[120] While Mr. Stein does point out that the long-term solution to the problem of a perceived domestic high-technology shortage of workers is to better educate United States citizens in our own educational system,[121] his statements do not support a call for the reduction of the H-1B visa cap in the short-term.

FAIR's statements aside, the H-1B visa program has been accused by other sources of being rife with abuse. Despite the enforcement mechanisms in the law specifically intended to deal with such issues, discussed *supra*, few formal complaints are brought by aggrieved U.S. and foreign national workers,[122] and the DOL admits to not being able to effectively enforce LCA provisions.[123] These accusations concern issues such as "benching," the practice of removing an H-1B worker from the payroll when his or her services are temporarily not required, the evolution of contract H-1B labor mills known as "job shops," prevailing wage violations and other violations of the LCA rules. These abuses will now be examined.

Virtually all the H-1B and LCA abuses introduced *infra* are incident to a cottage industry colloquially known as job shops.[124] Job shops are companies whose sole function is to hire personnel with skills in specified areas, and send those employees to perform services for the job shop's clients, usually at the clients' facilities.[125] The client pays the job shop a fee for the employee's services.[126] The job shop pays the employee a salary,

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119. *Id.*

120. The labor certification requirement for immigrant visa purposes is found at INA § 203(b)(3)(C), 8 U.S.C. § 1153(b)(3)(C) (1998). The process generally requires a test of the labor pool by advertising the intending immigrant's job in the local market. No such advertising is generally required for the H-1B program. Mr. Stein's statements to Congress, confusing this requirement with the H-1B nonimmigrant visa program, include: "employment ads frequently include positions for whom no employment action is intended"; and "current data on the H-1B program shows that only 42 percent of the labor market certifications under the program are computer related." *See The Sham High-Tech Worker Shortage*, FAIR (visited June 1, 1999) <http://www.fairus.org>.

121. *See id.*

122. *See* Branigin, *supra* note 4.

123. *See id.* (referring to the comments of John Fraser, Acting Chief of the DOL's Wage and Hour Division).

124. *See* Stuart Anderson, *Widespread Abuse of H-1Bs and Employment-Based Immigration? The Evidence Says Otherwise*, 73 INTERPRETER RELEASES 637, 637 (May 13, 1996).

125. *See Labor Certification, LCA Programs Do Not Protect U.S. Workers, Audit Finds*, 73 INTERPRETER RELEASES 653, 653 (May 13, 1996).

126. *See B-1 in Lieu of H-1 Visas: A Brouhaha Brews*, 69 INTERPRETER RELEASES 1495 (Nov. 23, 1992).

and takes a fee for placing the employee.[127] Frequently, the employee is required to enter into an adhesion contract with the job shop, which contains substantial penalties[128] for breaching the term of the employment contract, or for going to work for one of the job shop's clients.[129]

Indian nationals consume nearly half of the available H-1B visas in a given fiscal year—forty-four percent be specific.[130] The reason for this is economic. For example, an Indian computer professional in India, holding a master's degree, earns less than $3,000 per year.[131] However, in the United States, this same individual can earn $50,000 per year through a job shop under the H-1B program.[132] Therefore, it is easy to understand why there is such a tremendous influx of professionals coming to the U.S. to work on H-1B visas from countries such as India. This is the same rationale under which impoverished Mexican citizens illegally enter the U.S. to work: wages north of the Rio Grande are much higher than those in Mexico—so much higher, in fact, as to substantiate the risk of being caught and deported.[133] Just as a U.S. citizen is willing to relocate to another city or another state in pursuit of a better job or higher wages, so does the global labor pool, using whatever means available to better their lives. If one holds a degree and works in an occupation meeting the INS definition of a specialty occupation, the H-1B program can be a means to a better life.

Six out of the seven most ravenous users of the H-1B visa program[134]

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127. This contract labor industry has existed for years in the United States, and continues to be practiced by such well-known organizations as Area Temps, Manpower, Interim Personnel and Kelly Services. However, in the H-1B context, job shops are in the business of placing degreed computer programmers and engineers, as opposed to secretarial, administrative and factory assembly workers.

128. *See* Branigin, *supra* note 4. These penalties may be on the order of $10,000 to $20,000. *See id.*

129. *See id.*

130. *See Id.*

131. *See id.*

132. *See id.*

133. The INS reported having apprehended 3,679 illegal aliens between July 21 and August 30, 1996. This total included 3,590 Mexicans alone. The INS reported that these "apprehensions have freed up over $46 million in annual wages for U.S. workers." *INS Targets Worksites, Apprehends Over 3,600 Undocumented Workers*, 73 INTERPRETER RELEASES 1191, 1991-92 (Sept. 9, 1996). This translates into only about $12,500 per year, or $6 per hour, earned in the U.S. by each illegal alien caught during that period. According to a 1992 report, factory wages in Mexico were only about $1 per hour, or one-tenth the comparable wage in the United States. *See U.S., Canada and Mexico Propose Historic Free Trade Agreement*, 69 INTERPRETER RELEASES 1005, 1005 (Aug. 17, 1992). This puts into perspective the great differential between wages earned in the U.S. and in Mexico.

134. *See* Branigin, *supra* note 4. The six biggest users of the H-1B visa program are Mastech Systems Corp., Tata, Syntel, HCL America, ComputerPeople Inc. (U.S.-owned company), and Wipro, Indotronix. *See id.* (citing to data from the INS).

are companies that are either owned by Indian nationals, or which are subsidiaries of companies headquartered in India.[135] None of them manufacture or provide any entrepreneurial products or services; they are all job shops.[136] It should be noted that these organizations are not the high-technology employers who are lobbying Congress to relax the H-1B requirements so they can fill open professional positions and remain competitive. It is information technology companies like Sun Microsystems, Inc., Microsoft Corp., Texas Instruments, Inc., and non-high-technology employers from Nike and Adidas America to public schools, theaters and manufacturing concerns who feel the pain associated with a domestic professional labor shortage and are lobbying Congress for relief.[137] The job shops only exist to fill the needs of companies such as these, more quickly than the slow government bureaucracy will allow.[138] These U.S. employers are asking Congress to streamline the H-1B program to make it more workable, in order to allow them to be more competitive. The only benefit job shops can realize by relaxed H-1B requirements would be to hire and place more professionals, and make more money as a result of the increase in volume. The more the H-1B program is restricted or slowed, the greater the need for H-1B professionals from job shops.

Another important factor to recognize here is an easy way for a job shop to circumvent the H-1B process. Of the seven top users of the H-1B visa program, three of them are U.S. subsidiaries of companies headquartered in India.[139] The L visa program, as mentioned *supra*, exists to permit the transfer of personnel from related companies abroad to the United States.[140] By hiring a professional at the Indian company and employing him or her in India for at least one year,[141] the professional can then be transferred to work at the U.S. subsidiary for a period of five years as a specialized knowledge employee,[142] or for a maximum of seven years as a manager.[143] The L visa classification is devoid of any of the attestations associated with the LCA requirements of the H-1B visa

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135. *See id.*

136. *See id.*

137. *See* Ronald Rosenberg, *High-Tech SOS is Answered From Afar*, PORTLAND OREGONIAN, Mar. 14, 1999, at Business.

138. In fact, one could logically argue that job shops, in the H-1B sense, would cease to exist if the Federal Government could streamline the H-1B visa program to a point as to allow U.S. employers to hire foreign professionals as quickly as they could be provided by a job shop. Thus, it very well may be the Government's own bureaucracy which creates the need for job shops in the first place.

139. *See* Branigin, *supra* note 4.

140. *See* 8 C.F.R. § 214.2(l) (1998).

141. *See id.*

142. *See* 8 C.F.R. § 214.2(l)(12) (1998).

143. *See id.*

program. The U.S. employer is not bound by requirements to pay prevailing wage, to post notices at the job site, or to maintain a public file. There is no cap on L visas. Further, employers that would otherwise be classified as "H-1B dependent," and required to recruit and attest that they are not displacing U.S. workers, would sidestep those requirements altogether. Accordingly, the anti-immigration faction's attention on the H-1B program creating adverse employment and wage conditions for U.S. workers may be misplaced. The L visa program could easily be used to perpetrate the very evils anti-immigration groups fear—many of them legally. At least the H-1B program contains the necessary enforcement provisions to keep the program honest. It is the province of the INS and the DOL to enforce those provisions, and for Congress adequately to fund those agencies so they may do their jobs satisfactorily. As any child learns at a very young age, any rule without teeth is bound to be broken.

As introduced earlier, one of the practices job shops are accused of is benching: placing an H-1B employee in an inactive status at little or no compensation until the job shop employer can place the employee at a client's site.[144] Even before the implementation of the ACWIA, this practice violated H-1B regulations and the underlying LCA requirements in at least three regards.

First, placing an H-1B employee on inactive status amounts to a "material change[ ] in the terms and conditions of employment"[145] within the meaning of the INS's H-1B regulations. Under these rules, such a change in employment requires the H-1B employer to file an amended petition with the INS reflecting the change in employment.[146] Of course, by doing so, the INS would deny the amended petition because the H-1B and LCA regulations do not provide for the approval of an H-1B petition in such circumstances.

Secondly, benching an H-1B employee is a clear violation of the pre-ACWIA prevailing wage requirements of the LCA and H-1B regulations. Technically, however, an H-1B employee doing nothing is not a professional specialty occupation, nor does it have a corresponding prevailing wage. Thus, under the pre-ACWIA regulations, the practice of benching should have prompted the DOL to enforce the prevailing wage regulations, discussed *supra*, and the INS to revoke the H-1B visa petition.[147]

Thirdly, the INS recently issued an advisory opinion on a similar issue. An immigration attorney asked the INS whether an H-1B employer could legally continue to pay laid off H-1B employees their above-prevailing-

144. *See* Branigin, *supra* note 4.

145. 8 C.F.R. § 214.2(h)(2)(i)(E) (1998).

146. *See id.*

147. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) (1998).

wage salaries and provide benefits, while the U.S. employer assisted them in locating successive H-1B employment with another company through an outplacement service as part of a standard reduction in force severance policy provided to their employees.[148] Thomas W. Simmons, the Chief of the INS's Business and Trade Branch, responded to the attorney by indicating that an H-1B nonimmigrant's status in the U.S. is predicated upon providing services in a specialty occupation.[149] Once the services cease, the employee's H-1B status terminates and he or she must either depart the United States or change status.[150] Accordingly, under this rationale, a benched employee is not providing services in a specialty occupation, is not in status, and must depart the U.S.

The pre-ACWIA rules and policies on inactive H-1B employees notwithstanding, in the ACWIA, Congress muddied the H-1B waters further by implementing two provisions. First, section 413 of the ACWIA contains a "no benching" rule, which requires an H-1B employer to "pay H-1B nonimmigrants the required wage for the full hours specified on the H-1B visa petition even if the beneficiary is in a nonproductive status due to a decision by the employer.... Violation of this provision is considered a violation of the wage requirement and subject to the same penalties."[151] This regulation would seem to fly in the face of the INS's opinion that a nonproductive employee is no longer in H-1B visa status, regardless of compensation.

The second rule set forth by the ACWIA that confuses this INS policy is the requirement that H-1B employers "must offer H-1B nonimmigrants benefits and eligibility for benefits . . . on the same basis, and in accordance with the same criteria as are offered to U.S. workers."[152] Thomas Simmons' advisory opinion, which was issued *after* the ACWIA was signed into law, relies on the notion that an H-1B nonimmigrant's status is based upon the provision of services to the H-1B employer. Once the employee's services cease, the nonimmigrant's H-1B status terminates, despite the fact that the employer may be attempting to secure employment for the H-1B worker.[153] There would appear to be a fine line between a job shop placing an employee in an inactive status with full pay between work assignments, and a non-job shop laying-off an employee temporarily with full pay until new employment can be secured, a benefit the employer is

148. *See INS Discusses Status of H-1B and L-1 Nonimmigrants Who are Terminated,* 76 INTERPRETER RELEASES 378, 378 (Mar. 8, 1999).

149. *See id.*

150. *See id.*

151. AMERICAN IMMIGRATION LAWYERS ASSOC., *Section-by-Section Summary of the H-1B Legislation as of: October 13, 1998,* AILA MONTHLY MAILING, 1051, 1053 (Nov. 1998).

152. *Id.*

153. *See INS Discusses Status of H-1B and L-1 Nonimmigrants Who are Terminated,* 76 INTERPRETER RELEASES 378, 378 (Mar. 8, 1999).

providing to all of its laid-off employees. Thus, the INS would appear to be specifically instructing U.S. employers in the latter case to violate the "no benching" provision of the ACWIA, requiring payment of full salaries to temporarily inactive H-1B employees.

Mr. Simmons' advisory opinion also appears to conflict with proposed rulemaking by the DOL which acknowledges that an H-1B employer is required to comply with the Family and Medical Leave Act.[154] Naturally, an H-1B employee taking unpaid family leave would be in non-productive status, terminating his or her H-1B status according to Mr. Simmons' opinion. It would also violate the requirement that temporarily inactive H-1B employees continue to be paid, as required by the ACWIA. It would appear that Congress, the INS and the DOL should carefully draft these statutes, regulations and advisory opinions so that they do not run afoul of each other. Until that happens, U.S. employers of H-1B nonimmigrants must remain on guard.

The ACWIA also imposes a penalty of up to $1000 per violation for H-1B employers "for requiring an H-1B nonimmigrant to pay a penalty for leaving the employer's employ prior to a date agreed to by the nonimmigrant and the employer."[155] While it would appear to protect an H-1B employee from languishing as a sort of indentured servant of the H-1B employer,[156] such breach penalties and non-compete clauses are commonly utilized in all forms of contract employment, not only those relating to H-1B nonimmigrants. The ACWIA acknowledges that such contract provisions are subject to scrutiny under state law, as is the case with all employment contracts.[157] However, Congress is requiring the employment contracts for H-1B workers to be subject to the limits of state law, plus the penalties imposed by the ACWIA. Thus, an H-1B worker under contract is actually being granted *more* protection under the law, than a similarly situated U.S. worker. Accordingly, it may be possible for this provision to be tested for impeding the right of private parties to contract.

There are allegations that the H-1B visa program drives down the wages of U.S. workers in professional specialty occupations.[158] However, as referenced *supra*, convincing supporting data on these allegations is difficult to locate. David A. Martin of the AFL-CIO testified before the

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154. *See More on the DOL's Proposed Rule Implementing Changes to the H-1B Program*, 76 INTERPRETER RELEASES 105, 110 (Jan. 15, 1999).

155. AMERICAN IMMIGRATION LAWYERS ASSOC., *supra* note 151, at 1053.

156. H-1B visas are employer specific, i.e. they permit the nonimmigrant to work only for the H-1B employer in the job and location, and for the wage specified in the H-1B petition. Thus, even without this ACWIA provision, the H-1B employee is, in effect, an indentured servant.

157. *See* AMERICAN IMMIGRATION LAWYERS ASSOC., *supra* note 151, at 1053.

158. *See* FAIR (visited June 1, 1999) <http://www.fairus.org>.

House Subcommittee on Immigration and Claims on April 21, 1998.[159] On the AFL-CIO's behalf, Mr. Martin stated that "the H-1B program 'rigs the marketplace against U.S. workers'"[160] and that "[information technology] wages are not rising significantly to indicate a shortage."[161] The AFL-CIO did not support its allegations with any data, and Mr. Martin left the hearing to make a flight, thus making himself unavailable for questions.[162] Dr. Norman Matloff of the University of California at Davis also testified that there was not a shortage of high-technology professional workers, and stated that only two percent of applicants are hired into such positions.[163] Dr. Matloff also "stated that there is age discrimination in the information technology industry, and those employers want to hire new graduates and foreign nationals who are 'indentured servants.'"[164]

In response to these allegations, Mr. Harris Miller of the Information Technology Association of America testified that the shortage of high-technology professionals in the U.S. is very real "and cited numerous independent and industry surveys disputing allegations that there is no wage increase in the [information technology] occupations."[165] With regard to the age discrimination issue, Mr. Walter Payson of an organization for the professional workforce over fifty years of age, The Senior Staff, "acknowledged that there is a bias in this country against hiring older workers, but that many of these workers were only interested in part-time consultancy positions."[166]

Arguments and statements that a high-tech labor shortage in fact exists are legion.[167] One of the more informative proponents of this side of the H-1B debate is Randel K. Johnson, who made a statement before the Subcommittee on March 25, 1999 on behalf of the U.S. Chamber of Commerce.[168] Mr. Johnson cited to the DOL's Bureau of Labor Statistics

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159. *See* AMERICAN IMMIGRATION LAWYERS ASSOC., *Summary of House Immigration Subcommittee Hearing on Immigration Workforce Issues, available at* <http://www.aila.org>. (visited on May 27, 1999).

160. *Id.*

161. *Id.*

162. *See id.*

163. *See id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *See Hearings Before the House Judiciary Comm. Subcomm. on Immigration and Claims,* 106th Congress (Mar. 25, 1999) (statements of William T. Archey, Pres. of the American Electronics Assoc., and Randel K. Johnson, Vice-Pres., Labor and Employee Benefits, U.S. Chamber of Commerce); Ervin, *supra* note 8; Rosenberg, *supra* note 137.

168. *See Hearings Before the House Judiciary Comm. Subcomm. on Immigration and Claims,* 106th Congress (Mar. 25, 1999) (statement of Randel K. Johnson, Vice-Pres., Labor and Employee Benefits, U.S. Chamber of Commerce).

employment projections from 1996 to 2006.[169] According to Mr. Johnson, this U.S. Government study shows that "the fastest growing occupations were to be found in the computer and data processing services industry, which was expected to more than double its employment size to 2.5 million workers by 2006."[170] Mr. Johnson cited to employment growth rates in the information technology industry on the order of 103 to 118 percent in that period.[171] Mr. Johnson pointed out that a similar conclusion was reached by the Congressional Research Service.[172] Of additional service was Mr. Johnson's reference to a survey conducted in 1998 by Price Waterhouse Coopers in which seven out of ten respondents "ranked the 'Lack of skilled/trained workers' as a major potential barrier to their own company's growth over the next twelve months."[173] The statement continued, "[t]o put this ranking in perspective it was ranked significantly higher than other issues such as increased taxation, legislative/regulatory pressures, the lack of consumer demand, profitability/decreasing profit margins and lack of investment capital."[174]

Mr. Johnson noted a finding by the American Council of International Personnel which found "its 300 members alone spent over $350 million in support of higher education, . . . career development programs and K-12 pre-collegiate education."[175] He cited a survey by Training Magazine, conducted in 1998, which found that employers of 100 or more individuals "spent $60 billion on formal, structured training programs."[176] Perhaps Mr. Johnson's most convincing statement was the following conclusion: "Employers do not spend millions and billions of dollars for the fun of it. They are doing so because they cannot find the qualified workers they need."[177] Thus, it would seem apparent that H-1B employers' claims that they cannot locate ample and adequate professional labor to fill high-technology positions are supported by substantial, independent data, including studies and surveys conducted by the DOL, and commissioned by Congress itself.

Additional, support exists for the argument that a shortage of

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169. *See id.*

170. *Id.*

171. *See id.*

172. *See id.* (citing to a commissioned report dated August 8, 1997 entitled *The Education/Skill Distribution of Jobs: How is it Changing?).*

173. Randel K. Johnson, *Increasing Numbers of Skilled Immigrants*, STATEMENT OF THE U.S. CHAMBER OF COMMERCE, ON: IMPORTANCE AND SHORTAGES OF QUALIFIED WORKERS IN THE AMERICAN ECONOMY, TO: SUBCOMMITTEE ON IMMIGRATION AND CLAIMS OF THE HOUSE COMMITTEE ON JUDICIARY, Federal Document Clearing House, Inc. (Mar. 25, 1999).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

professional workers exists in the United States. Mr. Johnson's statement to Congress noted that the:

> San Diego Chamber [of Commerce] has indicated a shortage of workers in the technology field, specifically in engineering and electrical manufacturing . . . . The Richmond area is feeling shortages specifically in the manufacturing industries and in the teaching profession . . . . In Vermont, the Addison Chamber of Commerce is working closely with the education community and linking its efforts with the business needs in an effort to meet the shortage of workers in the technology fields. The New Jersey State Chamber of Commerce stresses the needs of the manufacturing and utility industries. Its efforts are to identify 'best practices' which describe ways that organizations are combating the problems associated with worker shortages across the state.[178]

An editorial in the Wall Street Journal last year points out that "Silicon Valley prefers to hire the best and the brightest, many of whom happen to be employed under our H1-b [sic] visa program."[179] In maligning Lamar Smith, a Republican Congressman from Texas, for his staunch opposition to relaxed H-1B regulations, the editor mentioned a spattering of quotations and studies supporting an increase in the number of H-1B visas issued each fiscal year.[180] The newspaper accused Congressman Smith of failing to see "economic realities,"[181] and concludes "Congress should loosen the quota. Lamar Smith should loosen up."[182]

The quota referred to in the editorial piece, of course, is the Congressionally imposed cap on H-1B visas. Since there is a perceived high-technology/professional labor shortage in the U.S., this ceiling on annually available H-1B visas is a source of much contention. The centerpiece of the ACWIA is its provision which raised the H-1B cap,[183] at least in the short-term. As discussed *supra*, the pre-ACWIA 65,000 visa cap was reached in each of the last three fiscal years—in Fiscal Year 1998 and Fiscal Year 1999, many months before the fiscal year ended. While lawmakers and employers wrangle over long-term solutions to the problem of the labor shortage,[184] the immediate fix is to fill these positions on

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178. *Id.*

179. *Review & Outlook (Editorial), Mr. Smith's Labors*, WALL ST. J., July 14, 1998, at A18.

180. Including the Price Waterhouse Coopers survey.

181. *Review & Outlook (Editorial), Mr. Smith's Labors*, *supra* note 179.

182. *Id.*

183. *See* ACWIA § 411.

184. These include Government-sponsored scholarships and training programs, as well as similar programs funded by the corporate sector. These will be discussed in some detail later in this article.

demand by hiring from the global labor market. Employers want to be able to fill these positions as needed and on demand, preferably with domestic labor. When there is no adequate domestic labor supply from which to draw satisfactory personnel, the only other source of labor is the non-U.S. labor market. When the H-1B cap is reached, however, this global labor pool is effectively cut-off, and U.S. employers feel it at their bottom line. Anti-immigration proponents, such as FAIR, who oppose the H-1B program as a threat to "American know-how and ingenuity,"[185] are in effect opposing the concept of the free market—in this case, the free global labor market.

Despite a slowdown ordered by INS headquarters in the processing of H-1B visas during Fiscal Year 1999,[186] and despite the provision in the ACWIA which nearly doubled the availability of H-1B visas for Fiscal Years 1999 and 2000, the 115,000-visa cap for Fiscal Year 1999 was officially reached on June 15, 1999,[187]—three and one-half months before the end of the fiscal year. This amounts to severing the professional labor supply lines of U.S. employers, and greatly concerns employers "as large as Microsoft and as small as Richland, [Washington's] six-employee XL Sci-Tech."[188] The founder of this six-employee company, Mr. Ben Peng, recruited a University of Akron post-graduate to work on two of XL Sci-Tech's medical research projects, "including one funded under a two-year federal grant."[189] Mr. Peng was concerned that the cap could cause his small company to lose this key person: "'If it's five months until I have this person, that's five months lost. If it's 12 months, I may not be able to have this person.'"[190] Sheri Lee, the Human Resources Director of Bsquare, a Bellevue, Washington software development firm which employs about 300 persons, "said the limit 'means we may not be able to fill positions. It impacts our ability to expand and grow as a company.'"[191]

Characterizing the H-1B cap as a limit on how many H-1B visas are issued each year is a misnomer. The limit actually applies to the number of persons who are "classified as H-1B nonimmigrants,"[192] not the number of visas issued. Thus, only H-1B beneficiaries either not in the United States, or in the United States,[193] but in a visa category other than H-1B, are

185. FAIR (visited June 1, 1999) <http://www.fairus.org>.

186. To allow slow INS processing centers to catch up to the faster ones.

187. *See* AMERICAN IMMIGRATION LAWYER'S ASSOC., INS Announces that H-1B Cap Reached, Procedures to Be Implemented for Impacted Cases; Relief for Certain Fs and Js, (June 15, 1999).

188. Ervin, *supra* note 8.

189. Ervin, *supra* note 8.

190. *Id.*

191. *Id.*

192. 8 C.F.R. § 214.2(h)(8)(i)(A) (1998).

193. Persons not in the United States do not have a U.S. immigration status because U.S.

subject to the cap. This created a problem for persons in the U.S. in another visa status who had H-1B petitions pending with the INS when the cap was reached.

One of the greatest sources of new, young talent in the high-technology labor force is United States colleges and universities.[194] William T. Archey, the President and C.E.O. of the American Electronics Association, stated before Congress:

> In 1996, 38 percent of all Master of Science degrees in computer science by U.S. universities were awarded to foreign nationals. And 46 percent of all Ph.D.s in computer science were awarded to non-U.S. citizens. These individuals have the requisite education and skills to make a major contribution to the global competitiveness of the U.S. high-technology industry by creating new jobs and products . . . . The technologies and other innovations produced by foreign nationals have helped industry reach its worldwide leadership position.[195]

Mr. Archey noted that the one way to meet the demand created by "the current high-tech labor shortage is to employ technically skilled foreign nationals, especially those educated in U.S. universities. . . . Unfortunately, these workers require H-1B visas . . . . The cap on skilled workers is a hindrance for the growing and dynamic high-technology industry."[196]

With so many H-1B candidates coming out of United States post-secondary colleges and universities, particularly those graduating in the month of June, and the recent history of the H-1B visa cap being reached in the summer, if not sooner, foreign national students with H-1B petitions pending at the INS when the cap is reached end up in an immigration status limbo. Students, who typically hold either F-1 or J-1 visa status, are accorded their student status not until a date certain, but for the duration of their student programs.[197] If the student graduates in June, his or her student status terminates in June. Thus, those students who have H-1B petitions pending when the cap is reached have a status problem. This is what practitioners refer to as being "stuck under the cap."

In the past, such students would not be permitted to work for their new U.S. employers until their H-1B petitions were approved after October

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immigration law cannot be applied beyond the territorial jurisdiction of the United States.

194. *See Hearings Before the House Judiciary Comm. Subcomm. on Immigration and Claims,* 106th Congress (Mar. 25, 1999) (statement of William T. Archey, Pres. of the American Electronics Assoc.).

195. *Id.*

196. *Id.*

197. *See* 8 C.F.R. § 214.2(f)(5) (1998).

1, the beginning of the next Fiscal Year,[198] and would be forced to depart the U.S. once their post-study "grace periods" expired.[199] For this reason, the INS imposed special rules when the Fiscal Year 1999 cap was reached, which allow students with H-1B petitions stuck under the cap, and their dependents, "to remain in the United States lawfully until their H-1b [sic] employment is effective."[200] However, the new INS rule is quite specific in noting that "*[t]hey may not work during this period*, although they are not precluded from receiving signing bonuses typically given to similar new employees of the petitioning company."[201] This is an interesting change of heart on the part of the INS for two reasons: 1) the regulations promulgated by the Act are generally adamant that only aliens with authorization to work may be permitted to take compensation while in the U.S.;[202] and 2) the immigration laws contain various safeguards against aliens becoming public charges in the U.S.[203] Thus, the INS does not loosely grant permission for foreign nationals in the U.S. to accept employment or to receive income. This is particularly contrary to the grain of the U.S. immigration laws when one considers that there is no reason to assume that an H-1B employer has agreed to pay a student stuck under the cap a bonus for agreeing to work for that company. The student/prospective H-1B employee could very easily be in the U.S. with no family support and no income for several months until the government approves the H-1B visa petition, and the employer is permitted to put the employee on the payroll.

In light of the fact that so many of the H-1B employees being hired by U.S. companies are being recruited straight out of baccalaureate and post-

198. Unless they have valid employment authorization from the INS, available to F-1 students as Optional Practical Training. *See* 8 C.F.R. § 214.2(f)(10)(ii) (1998).

199. The INS regulations provide for a 60-day period following the termination of an F-1 student's study or Optional Practical Training to depart the U.S. *See* 8 C.F.R. § 214.2(f)(5)(i) (1998).

200. UNITED STATES DEPT. OF JUSTICE IMMIGRATION AND NATURALIZATION SERV., Press Release from the INS Office of Business Liaison, *Attention Employers! H—1B Cap Issues—Fiscal Year 99*, (June 15, 1999).

201. *Id.* (emphasis in original).

202. The Foreign Affairs Manual at 9 FAM § 41.31 lists several notes which explain how certain individuals in particular occupations, and under particular circumstances, may enter the U.S. for short stays in a visitor status. The common mantra for each of these qualifications is the language "that no salary or remuneration will be paid from a U.S. source."

203. *See e.g.* 8 C.F.R. § 214.2(f)(9)(i) (1998) (discussing INS employment authorization for certain students who can show "that . . . employment is necessary to avoid severe economic hardship resulting from . . . emergent circumstances"); INA § 213A (setting forth requirements for an "affidavit of support," a binding contract under which sponsoring relatives of family-based immigrants are financially liable, in a legally enforceable sense, to the Government should their immigrating relatives consume any means-tested public benefit within five years of immigrating to the U.S.).

graduate programs at our own universities, most commentators, restrictionists and pro-immigration advocates alike, agree that a long-term solution to the shortage of qualified, professional workers in the United States is in the education of our own citizens.[204] A report to the President of the United States on this issue summed up the problem and the available solutions well:

> By virtual unanimity, chief executive officers of a cross-section of America's leading corporations have identified the need to strengthen the technological work-force as the single greatest challenge to U.S. competitiveness over the next decade. In its Interim Report to the President, the [President's Information Technology Advisory C]ommittee recommended increasing the number of H-1B visas as a short-term measure, but this solution is untenable for the long term . . . . A complete solution to the work-force problem would involve recruiting from underrepresented groups as well as nationwide excellence in K-12 education.[205]

In response to this demonstrated need for U.S. citizen graduates of our educational system to be competent to perform sufficiently in the specialty occupations currently being filled by foreign nationals via the H-1B visa program, Congress amended the Act to require the enhanced $500 H-1B filing fee discussed earlier.[206] This fee is supposed to be used for "job training, scholarships and grants, and enforcement of the H-1B program."[207] Six percent of the new fee goes to the DOL for enforcement and administration of the H-1B provisions under its charge, with the caveat that the agency brings its adjudication periods for LCAs into compliance with the seven-day requirement set forth by the DOL's own regulations.[208] Another 1.5% of the proceeds from the enhanced H-1B filing fee is to go into the coffers of the INS "to reduce H-1B processing time."[209]

The $500 fee is collectible both when a U.S. employer files an initial H-1B petition for a nonimmigrant, and when it files an amended petition

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204. *See Hearings Before the House Judiciary Comm. Subcomm. on Immigration and Claims*, 106th Congress (Mar. 25, 1999) (statement of William T. Archey, Pres. of the American Electronics Assoc.); Rick Boyd-Merritt, *People Problem*, ELECTRONIC ENG'G TIMES 1052, 1052 (Mar. 15, 1999); *The Sham High-Tech Worker Shortage*, FAIR (visited June 1, 1999) <http://www.fairus.org>.

205. Boyd-Merritt, *supra* note 204, at 1052 (quoting the report by the President's Information Technology Advisory Committee, Feb. 24, 1999).

206. *See* 8 C.F.R. § 103.7(b) (1998).

207. *New H-1B Fee Takes Effect, INS Publishes Regulations*, 75 INTERPRETER RELEASES 1690, 1690 (Dec. 14, 1998).

208. *See* AMERICAN IMMIGRATION LAWYERS ASSOC., *supra* note 151.

209. *See* AMERICAN IMMIGRATION LAWYERS ASSOC., *supra* note 151.

due to the employee having previously worked for another U.S. corporation under H-1B visa status.[210] This fee should produce a minimum of $53,187,500 per fiscal year to fund scholarships and training programs for high-technology high school and university programs in the United States.[211] Assuming an average tuition rate of $15,000 per year, this should fund one year of post-secondary education for 3,545 U.S. students per fiscal year. Assuming the scholarship program can continue to fund high-technology educations at this rate for four years,[212] the length of time required to graduate a government-subsidized specialty occupation worker under this program, the new H-1B enhanced fee could only fill approximately one-half of the vacant software-related jobs in the State of Washington alone.[213] Thus, when one considers all the vacant professional positions in all fields qualifying as specialty occupations in all fifty states, it becomes clear that the scholarship program, while a good idea in theory, will hardly put a dent in the high-technology labor shortage in this country.[214]

Also, it is important to bear in mind that the H-1B visa program concerns jobs requiring "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."[215] Thus, funding university scholarships at the baccalaureate-level or higher is consistent with the Act's own definition of the nature of an H-1B employee's qualifications. Using the scholarship program to fund training programs is not. Specifically, if an H-1B foreign national requires a bachelor's degree or better in a given field

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210. *See* AMERICAN IMMIGRATION LAWYERS ASSOC., *supra* note 151.

211. Calculated as follows: $500 less 7.5 percent ($37.50) for INS and DOL efficiency incentives = $462.50 per petition for the scholarship program. The figure assumes an H-1B visa cap of 115,000 in the fiscal year. This figure is the floor for such a program (assuming perfect economic efficiency) because H-1B employees changing employers will each generate an additional $462.50 for the fund.

212. Of course, it cannot, because the H-1B visa cap will be reduced incrementally to return to 65,000 by Fiscal Year 2002, discussed *supra*.

213. *See* Ervin, *supra* note 8 (referring to a 1998 survey commissioned by the Washington Software Alliance).

214. This assumes that U.S. workers with no relevant post-secondary education are being converted to professional specialty occupation employees via full-blown four-year baccalaureate programs. Alternatively, if the funds go toward training partially qualified U.S. workers instead, and assuming the same $15,000 cost per student annually, the number of new U.S. workers qualified for specialty occupations would increase proportionately. If one year of training is required, the program would produce four times as many qualified U.S. workers. If two years of training is required, the program would yield twice as many, etc. Of course, this would assume that less-than-four-year "training" programs would result in a U.S. worker with the same qualifications as a worker with a dedicated four-year bachelors degree in the field of endeavor in question. This article will go on to explain that the standards under the immigration laws do not necessarily permit this.

215. INA § 214(i)(1)(B) (codified at 8 U.S.C. § 1184(i)(1)(B) (1998)).

of expertise, so would a U.S. citizen. Thus, training programs not rising to the level of a four-year degree program could not possibly reduce U.S. employers' reliance on nonimmigrant professionals[216]. Although, there is a provision in the H-1B regulations for persons to qualify for the category if they do not possess a college degree,[217] the applicable regulation allows for persons with three years of relevant experience to be deemed to possess one year of post-secondary education.[218] Accordingly, an on-the-job training program would take twelve years to completely prepare an uneducated U.S. worker to be eligible to meet the minimum requirements of a professional specialty occupation.

H-1B nonimmigrants do not generally have an easy route to legal permanent residence or "green card" status in the United States. With a few exceptions, generally all persons wishing to immigrate, that is live permanently in the United States based on their employment, must obtain a labor certification from the DOL before petitioning the INS for immigrant status.[219] Labor certification amounts to a test of the local labor market for U.S. workers who are ready, willing and able to serve in the permanent position to be filled by the foreign national. It is here that the regulations governing immigrant and nonimmigrant visa status clash. H-1B nonimmigrant visa status was created as an avenue through which U.S. employers could quickly (the term is used loosely) obtain foreign national professionals who are the best and brightest.[220] However, if the employer wishes to keep this employee permanently, in order to have the DOL approve the requisite labor certification, the U.S. company must show that there are no U.S. workers available and *minimally* qualified to do the job.[221]

To put this in perspective, we will assume that a United States manufacturer of engineered products has just acquired a smaller company and wishes to operate it as a division. The target entity was formally owned by a European parent, and utilizes a German-based integrated computer hardware and software system known under the brand name SAP. The U.S. purchaser/employer has been using the American counterpart to SAP, known as Oracle. The U.S. employer recruits for a computer professional with "cross platform" experience to integrate the newly acquired SAP system with the existing Oracle systems,[222] in order to make the new

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216. Unless, of course, the U.S. candidates for the position already posses the requisite education, but less-than-cutting-edge expertise.

217. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (1998).

218. *See id.*

219. *See* INA § 203(b)(3)(C) (codified at 8 U.S.C. § 1153(b)(3)(C) (1998)).

220. *See Review & Outlook (Editorial), Mr. Smith's Labors, supra*, note 179.

221. *See* 20 C.F.R. § 656.24(b)(2) (1998).

222. This type of qualification frequently commands salaries upwards of $100,000 per year, and few U.S. workers possess the necessary skills and education for cross-platform applications.

division as profitable as possible, as quickly as possible. Assume that ten candidates are interviewed for the position, all of whom have the requisite education and experience for the job. However, the best candidate is a foreign national, and that candidate is hired under the rationale that he or she is the superior applicant. After some time, the employer is very happy with the H-1B employee and wishes to employ him or her permanently, thus requiring a labor certification in order to obtain a green card. However, the minimum requirements for the position are a Bachelor of Science degree in Computer Science, and two to four years of experience in both Oracle and SAP consulting, including cross-platform projects. Under the DOL's rule, a poor candidate (for example, one who has an unsatisfactory attitude, or who has not held a past job for more than a few months) who happens to possess the minimum education and experience requirements for the job, and who happened to be born in the U.S., upon applying for the position, would cause the DOL to deny the labor certification. It is not relevant that the U.S. worker may not be the best candidate for the job, or even an adequate one by standards other than meeting minimal education and experience requirements. If the U.S. worker possesses only the bare minimum requirements for the position, the rising star that the company recruited from abroad and who made the new division profitable by getting two unrelated computer systems to communicate with one another, cannot keep the job permanently. The result is that the U.S. employer loses the rising star because the DOL's mission is to protect U.S. workers.[223]

This contradiction in the immigration law has become exacerbated by a breakdown in the DOL's ability to timely and properly adjudicate labor certifications.[224] This breakdown, frequently referred to as an agency "meltdown"[225] by practitioners, is due to a number of factors, most notably drastic funding cuts to DOL labor certification programs.[226] Unlike the INS, which funds much of its own operations by levying filing fees for petitions and applications for immigration benefits, the DOL has no system in place to collect fees for the adjudication of labor certifications or LCAs. However, there has been a substantial improvement in labor certification adjudication processing times since the implementation of the automated LCA fax processing system in the Summer of 1999. Nonetheless, it is no picnic for a U.S. employer to obtain a green card for its best and brightest

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223. *See* AMERICAN IMMIGRATION LAWYERS ASSOC., *Agency in Meltdown: Department of Labor Puts Brakes on Business Immigration*, available to AILA members at <www.aila.org>, (visited on May 27, 1999).

224. *See id.*

225. *Id.*

226. *See id.* (noting that the federal budget for labor certification programs between 1993 and 1997 was cut by 59%).

H-1B employees; and frequently, it is difficult, if not impossible, to obtain a green card for an H-1B employee within the time he or she has remaining on his or her six-year H-1B clock.

One would logically assume that the immigration law provides for a simpler, expedited way to obtain permanent resident visa status on behalf of H-1B employees by virtue of the fact that comparable U.S. workers are so difficult to find. Actually, there is such a method, known as "Schedule A."[227] Schedule A is a list of occupations for which the DOL has pre-certified a shortage of qualified workers in the U.S.[228] While this would seem to be the answer for hard-to-find professionals from abroad to be able to become permanent assets to the U.S. employers who have put so much time, effort and money into securing them, Schedule A is treated as an orphan by the DOL and left to gather dust as an antiquity—not unlike the Dictionary of Occupational Titles discussed *supra*. With the exception of "[a]liens . . . of exceptional ability,"[229] for whom there are other avenues to obtain permanent residence without resorting to labor certification,[230] Schedule A acknowledges shortages of ample, qualified U.S. workers in the occupations of physical therapy[231] and certain professional nursing jobs.[232] It is well established that H-1B visa numbers are being used at an alarming rate.[233] Thus, it would seem to make sense to expand Schedule A. However, as AILA notes:

> [I]mplementation [by the DOL] of [fast-track labor certification] . . . programs has been inconsistent and unenthusiastic . . . . DOL also consistently has refused to certify "shortage" occupations under its current regulations, even when overwhelming evidence exists . . . . Further, despite a statutory mandate in 1990 to develop a "shortage occupations" pilot program, the Department [of Labor] never implemented such a program.[234]

Accordingly, it appears clear, perhaps due to inadequate funding or training of its personnel, that the DOL is either incapable or unwilling to perform its delegated functions in applying and executing the U.S. immigration law as mandated by Congress.

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227. 20 C.F.R. § 656.10 (1998).

228. *See id.*

229. 20 C.F.R. § 656.10(b) (1998).

230. *See* INA § 203(b)(1)(A) & (B) (codified at 8 U.S.C. §§ 1153(b)(1)(A) & (B) (1998)).

231. *See* 20 C.F.R. § 656.10(a)(1) (1998).

232. *See* 20 C.F.R. § 656.10(a)(2) (1998).

233. *See* AMERICAN IMMIGRATION LAWYER'S ASSOC., supra note 187.

234. AMERICAN IMMIGRATION LAWYERS ASSOC., Agency in Meltdown: Department of Labor Puts Brakes on Business Immigration (1999), available to AILA members at <www.aila.org> (visited on May 27, 1999).

As this article established previously, processing for business immigration benefits at the INS, the DOL and SESAs has been criticized by practitioners as a hindrance creating a rift between the real-world needs of this country's employers and the government agencies' ability to apply various aspects of the immigration laws pursuant to their respective congressional mandates. Delays associated with adjudications of immigration petitions, prevailing wage determinations, LCAs and labor certifications are not the only points of contention.[235] The INS has come under heavy fire by U.S. employers, practitioners, the media and members of Congress for, not only its inability to administer the immigration laws properly and efficiently,[236] but for its ineffective channels of communication. Practitioners have become so accustomed to communication breakdowns and "customer service" problems with the INS and other federal immigration-related agencies, that they understand the problem is attributable to mission overload.[237] The law simply changes too fast for the agencies to cope. However, mission overload has not allayed observations such as Senator Spencer Abraham's call for reformation of the structure of the INS:

> Sen. Abraham said that service concerns include inadequate attention to customer service, unequal priority and attention

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235. All of these agency operations occur within the United States, and thus are at least subject to various checks and safeguards against abuse such as the Constitution and the Administrative Procedure Act of 1946. However, judicial remedies such as these are rarely pursued by practitioners simply because they take too long to implement. A U.S. employer who needs to hire an individual for a critical project within the next three weeks is generally not willing to file an action in Federal court in order to obtain a desired outcome from an improper agency decision. It is also worth noting that a key operation in the immigration law, the processing of visa applications at U.S. embassies and consulates abroad, occurs solely outside the territorial boundaries of the United States, and thus, is outside the purview of the courts. *See Consular Nonreviewability—A Reexamination*, 64 INTERPRETER RELEASES 1012, 1012 (Sept. 4, 1987). Such extraconstitutional aspects of the U.S. immigration law, coupled with Congress' plenary power over the admission of aliens to the United States, make immigration law a practice area strategically diverse from almost all other areas of law.

236. *See Senate Holds Hearing on INS Reform*, 75 INTERPRETER RELEASES 877, 877-78 (June 29, 1998).

237. There are still aspects of the IMMACT90 amendments to the INA, now nearly ten years old, that have not yet been implemented by the various agencies. Each time Congress amends the Act, statutes must be drafted from the amendments, regulations must be promulgated from the statutes by the various agencies, and procedures must be implemented by agency adjudicatory personnel—almost none of whom have legal or paralegal training. Further, these "procedures" frequently require the development of legal forms, software, and highly technical hardware that sometimes does not even exist, e.g. the automated biometric scanning devices mandated by IIRIRA § 104(b)(2), which Congress demanded be in place and operational on the Mexican border by October 1, 1999. The INS recently issued a legal opinion explaining away that deadline. *See Legal Opinion Discusses New Biometric Border Crossing Cards*, 76 INTERPRETER RELEASES 594, 594-95 (Apr. 19, 1999).

> paid to the service side, a general "mission overload," and a lack of accountability. "Agency service has been all too frequently marred by long waits, lost files, rude treatment, and unanswered phones," he said, adding that basic information is "notoriously difficult" to get from the INS. Sen. Abraham said that the overall goals in providing immigration services and benefits should be: (1) to provide benefits in a timely, efficient, and courteous manner to those who qualify for them; (2) not to provide benefits to those who are unqualified to receive them, but to give an accurate explanation for the rejection; and (3) to refer for enforcement any criminal or other enforcement matters that come to attention in the course of granting benefits and services.[238]

In fact, former Commissioner of the INS, Gene McNary, has even called for the INS to be removed from the auspices of the Department of Justice and to "report directly to the President, either at the Cabinet level or as an independent agency."[239]

IV. ALTERNATIVES TO THE H-1B PROGRAM

While the H-1B visa category is the most broad-based vehicle by which to obtain foreign national professionals—hence its popularity among high-technology companies—it is not the only weapon in the U.S. employer's arsenal. Provided either the company and/or the foreign national meet certain criteria, there are other nonimmigrant visa categories through which U.S. employers may obtain the services of certain personnel. Some of these categories can be used in place of the H-1B category when the regulatory requirements are too onerous (either from a paperwork burden standpoint or by virtue of the long processing times involved), or when the government simply runs out of H-1B visas, as it has for the last three fiscal years—provided, of course, that the petitioner and beneficiary qualify for them.[240] The following are examples of some of the alternatives to the H-1B Visa Program.

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238. *Senate Holds Hearing on INS Reform*, 75 INTERPRETER RELEASES 877, 877-78 (June 29, 1998).

239. *Congressional Report Finds Widespread Problems at INS, Recommends Changes*, 70 INTERPRETER RELEASES 1198 (Sept. 13, 1993).

240. There are other employment-based nonimmigrant visa categories in addition to those listed in this section. However, they are not discussed here due to the fact that the categories almost never would be applied to persons otherwise classifiable as H-1B professionals.

1. *TN Visas Under the North American Free Trade Agreement (the NAFTA).*[241]

Under the NAFTA, citizens of Canada and Mexico are eligible to enter the U.S. to serve in certain identified professional occupations for a period of one year.[242] While the NAFTA is silent as to any limitation on the number of consecutive TN visas one may apply for, the INS usually will not permit application for TN visa status beyond the third or fourth renewal. This de facto limitation is not set forth in the NAFTA or the INS regulations. Rather, it appears to be grounded in the INS's own contention that renewal of TN visas for indefinite periods of years is inconsistent with the notion of TN status being accorded to nonimmigrants, i.e. a temporary visa status.

2. *L-1 Intracompany Transferee Visas.*

As discussed earlier, the L-1 visa category was established to permit larger companies with parents, affiliates, joint ventures and subsidiaries abroad to transfer key executive, managerial and specialized knowledge personnel into the United States.[243] The L-1A visa category, for executive and managerial personnel, provides for a maximum stay in the U.S. of seven years.[244] L-1B specialized knowledge personnel may remain in the U.S. for a maximum of five years.[245]

3. *E-1 Treaty Trader and E-2 Treaty Investor Visas.*

This is a visa category by which certain citizens of countries which have treaties of friendship, commerce and navigation with the United States may establish a U.S. operation, deemed to have the same nationality as its shareholders.[246] The E-1/E-2 company may then employ persons of the same nationality as the company in the United States under E visa status.[247] E nonimmigrants are not required to specify a finite limit to their intended stay in the U.S.,[248] in stark contrast to the way the INS treats the authorized stays of TN nonimmigrants.

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241. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 296, 612 (entered into force Jan. 1, 1994).

242. *See* 8 C.F.R. § 214.6 (1998).

243. *See* 8 C.F.R. § 214.2(l)(1)(i) (1998).

244. *See* 8 C.F.R. § 214.2(l)(12)(i) (1998).

245. *See id.*

246. *See* 22 C.F.R. § 41.51 (1998).

247. *See* 8 C.F.R. § 214.2(e)(3) (1998).

248. *See* 9 FAM § 41.51.14 (1998).

4. *F-1 Students.*

The F-1 student visa category permits foreign nationals to come to the U.S. to study at our academic institutions.[249] However, the F-1 student visa regulations also provide for two types of "practical training."[250] Curricular practical training permits F-1 students to "participate in a curricular practical training program which is an integral part of an established curriculum. Curricular practical training is defined to be alternate work/study, internship, cooperative education, or any other type of required internship or practicum which is offered by sponsoring employers through cooperative agreements with the school."[251] This type of practical training can be authorized by a designated official at the F-1 student's school by simply endorsing a form, without INS oversight.[252] In practice, this type of employment authorization is sometimes utilized beyond the scope authorized by the INS—either by universities which intentionally use its blanket employment authorization for foreign national students, or (more likely) by university officials who simply do not clearly understand the limitations on curricular practical training. The other type is optional practical training, which requires INS approval and issuance of an Employment Authorization Document.[253] Optional practical training is a blanket employment authorization and is valid for up to one year.[254]

5. *J-1 Exchange Visitors.*

The J-1 visa category is intended for exchange visitors who come to the U.S. to participate in some type of exchange program blessed by the United States Information Agency (USIA), a subdivision of the Department of State.[255] If the exchange program, under which the J-1 exchange visitor is in the U.S. involves the employment of the nonimmigrant, and the J-1 nonimmigrant's program is not that of a student, it is permissible to employ the J-1 foreign national within the terms of the exchange program in question.[256]

Each of the alternatives above have their limitations: TN

249. *See* 8 C.F.R. § 214.2(f)(1)(i) (1998).
250. 8 C.F.R. § 214.2(f)(10)(i),(ii) (1998).
251. *Id.*
252. *See id.*
253. *See id.*
254. *See id.*
255. *See* 8 C.F.R. § 274a.12(b)(11) (1998); 22 C.F.R. § 54.24 (1998).
256. Howard D. Shapiro, *Exchange Categories (J & Q), in* 1999-00 IMMIGRATION & NATIONALITY LAW HANDBOOK, Vol. I, IMMIGRATION BASICS 203 (American Immigration Lawyers Asso'n eds., 1999).

nonimmigrants must be Mexican or Canadian; L nonimmigrants must be employed by entities with the proper qualifying corporate relationships as set forth in the L visa regulations; E-1 and E-2 nonimmigrants must bear the same nationality as the employing company in the U.S., and the company must be a proper E visa entity registered with the consulate or embassy of the company's nationality;[257] F-1 students are limited to a maximum of one year of practical training, sometimes limited to employment through internship programs under cooperative agreements already in existence with the school; and J-1 exchangees are limited to employment permitted by their USIA-approved exchange programs. While a prudent U.S. employer should try to exploit these non-H-1B visa categories whenever possible,[258] none of them permit a company to hand-pick an individual who they feel is best-qualified for a specialty occupation from the global labor pool free from the restrictions inherent in each alternative category.

V. PROPOSED REMEDIES AND IMPROVEMENTS

Despite claims to the contrary, there is a shortage of qualified U.S. workers to fill professional specialty occupations in the United States, and the H-1B visa program is viewed by domestic employers as the best viable short-term solution to the problem. The long-term solution to the problem is to educate Americans within our educational system to be prepared to fill these positions. No U.S. employer would logically wish to undergo the time, trouble, and expense of obtaining H-1B visas and, ultimately, green cards, for foreign nationals recruited to fill these positions. Furthermore, while claims, and indeed, documented cases of abuse of the H-1B visa program exist, the enforcement remedies also exist—they are simply not being implemented by the INS and DOL. As with any rule, the H-1B visa regulations have no value or authority as long as they are not enforced. The H-1B visa machine may be broken. However, the remedy is not to abandon the program. The solution is to refine the program so it may be applied to real-world professional staffing situations the way it was intended. With some legislative exceptions, the fixes must occur at the agency level.

In the short-term, in order to permit domestic enterprises to compete in the world marketplace, and to avoid U.S. companies being put in a position where they are forced to move high-technology jobs overseas, it is clearly

257. *See* 9 FAM § 41.51, Note 3.2 (1998).

258. The reasons for this are the positive benefits built into each alternative visa category. Also, with the exception to the TN visa category as applied to Mexican citizens, none of these alternatives to the H-1B visa program are subject to prevailing wage regulations or any of the other attestations required of an LCA.

within the interest of the country to relax and to refine the H-1B program at the agency level. Both the INS and the DOL are currently far from being efficient in fundamental service oriented operations. All of the INS service centers must timely and accurately process H-1B visa petitions, and improve their lines of communication with the outside world. The DOL must continue to improve its ability to process LCAs, and labor certifications within reasonable time frames. Once these agencies (particularly the DOL) have raised adjudications and communications to a level of competence satisfactory to the United States employers who depend on them (*not* the INS's or DOL's own perceptions of what is competent), they should concentrate on detecting fraud and LCA violations in the workplace and levying sanctions as appropriate. Each agency should take great care not to become overzealous in its enforcement of its respective regulations, thus losing sight of the forest for the trees. After all, the purpose of the enforcement sanctions is to prevent, discourage and punish violations of the regulations—not to make it more difficult, or even impossible, for U.S. companies to use H-1B nonimmigrants when they require them. Both of these agencies have great difficulty in separating their adjudicatory roles from their proper enforcement activities—an underlying inclination to find fault in the application or petition in question in order to deny it.

Also within the scope of the short-term, Congress should consider floating the H-1B visa cap to correspond to realistic demand by U.S. employers for workers they cannot locate domestically. They could suspend it temporarily or eliminate it for an indefinite period in order to permit scholarship programs to supply the workforce with domestic professionals. Clearly, the current 115,000 limit on H-1B visas is not adequate to meet demand, and the limit is only going to diminish over the next three years. The H-1B scholarship program, while a good idea and on the right track, cannot come close to closing the gap between supply and demand of professional specialty occupation workers in the United States. Congress must look to the status of real world education and employment conditions to establish any limits on the H-1B program. Asking qualified experts how many visas should be available, and for how long, and then reducing the number in compromise in order to pacify dissenting constituents, is counter-productive and fails to solve the short-term problem.

Further, if Congress amended the Act to permit a reasonably tenable waiver of the labor certification requirement for certain H-1B occupations, the DOL could spend less time processing labor certifications, and more time on enforcement. This would create more permanently employed foreign nationals in professional occupations, thus reducing the demand for fresh H-1B labor. Also, the DOL could simply perform its congressionally mandated function of establishing a certified shortage occupation pilot

program. Of course, in order for such a program to be successful, the DOL must actually certify shortage occupations—not hide behind a facade that high-demand H-1B occupations are not in short supply in the U.S., like the DOL's alleged maintenance of Schedule A. A good gauge of what should be a certified shortage occupation is the H-1B visa program itself. The DOL could simply tabulate the occupations from LCAs it already has on file to identify high-demand occupations, thus avoiding gross changes in procedure.

Of course, the long-term solution here is encourage United States citizens and permanent residents, at a young age, to study mathematics and the sciences, and to pursue university-level degrees in those disciplines.[259] Contrary to Congress' posture implied by the H-1B scholarship program, the ACWIA is not going to create a pool of hundreds of thousands of additional U.S. workers qualified to serve in specialty occupations by 2002. The scholarship program makes sense, and U.S. industry is following suit by spending money and resources on education. However, it does not amount to a sweeping change of heart by America's youth as to which majors to pursue in college, or even whether to attend post-secondary institutions at all.

Congress, and the subordinated agencies in charge of administering the U.S. immigration laws, must always keep the following in mind: we are now living and working in a global economy. If protectionist or restrictionist attitudes continue to pervade the immigration laws, rendering them impracticable or impossible to utilize, two obvious short-term solutions will arise: 1) move the jobs abroad to the source of the required professional labor; or 2) outsource and utilize manufacturers and service organizations abroad for the high-technology products and services required by corporate consumers of such goods and services worldwide. Either scenario keeps the U.S. company profitable, which is its primary concern. However, either scenario also pumps jobs, or money, or both out of the U.S. economy. Therefore, Congress should impress upon these agencies an acknowledgment that protection of U.S. workers is not the end-all, be-all reason for their existence. There is a greater good they must serve.

Finally, H-1B visa petitions are almost always prepared by attorneys, specially trained paralegal personnel, or individuals on staff at the U.S. employers themselves who are thoroughly educated and versed in legislative and regulatory requirements of employment-based immigration. Ironically, the INS adjudicating officers, whose responsibility it is to make legal determinations on these and other immigration filings, are not attorneys. Nor are they supervised by attorneys. Many are career

259. *See* Boyd-Merritt, *supra* note 204.

government employees, many are trained in enforcement techniques (e.g. arrests, detention, use of firearms, etc.), and many are former military personnel. If this article has established anything, it proves that the H-1B visa requirements and effects are exceedingly complex and difficult to understand, even for seasoned lawyers and members of Congress and their staffs. The INS Nebraska Service Center, at the time the author toured it, employed several hundred individuals, but only one attorney. Also, this attorney had no direct oversight of the hundreds of legal determinations being made by INS adjudicators every day.

Perhaps the INS and the DOL could endeavor to employ adjudicators with experience and education in disciplines related to law, business and labor relations to increase efficiency and to decrease, or eliminate, the often-complained-of processing delays, errors, lost files and unprofessional attitude frequently exhibited by these agencies. Failing that, the INS and DOL should at least design an incentive system under which adjudicators who do their jobs correctly and efficiently receive some type of bonus for a job well done. After all, employers and practitioners are not the adversaries of the INS and DOL. We are all trying to cope with unclear rules, inadequate government funding and improper Congressional fixes to a severe problem.

VI. CONCLUSION

The H-1B program can work properly if the suggestions discussed above are fully and properly implemented to maximize agency efficiency, with additional flexibility in the number of H-1B visas available per fiscal year, in concert with feasible pro-education programs in place for a long-term solution. The current attitude of going to great efforts to determine feasible solutions, only to undermine them in order to keep anti-immigration constituents happy, is a no-win proposition, and serves only to perpetuate the problem. The focus of U.S. immigration law, and of those agencies empowered to enforce it, must shift to a more global scope. If this cannot be achieved, as a matter of basic economic survival, the United States could find its high-technology manufacturers moving operations to places where they can employ the professional labor they greatly require. Congress must train itself to think globally if we are to remain competitive in the world economy.

VII. AFTERWORD

This Article was researched and written in the Summer of 1999. By the time it was edited for publishing some events transpired in employment-based immigration practice which should be noted.

First, the DOL has refined further its efforts to bring LCA adjudications to within the seven-day limit imposed by its own regulations.[260] This most pleasant result is likely in response to the promise of additional funding from the $500 enhanced H-1B visa fee if adjudications are made timely, discussed *supra.*

Nonetheless, there are still occasions of properly filed LCAs seeming to vanish as the system is still experiencing growing pains. On September 23, 1999, the DOL cheerfully reported to AILA that the "Automated LCA Faxback System has been operating without problems for the last six weeks . . . ."[261] However, the DOL admitted to continued glitches in this system on October 20 and again on November 3, 1999.[262] On the whole, the author can report that LCA adjudications are now almost consistently within the regulatory seven-day limit for the first time in recent years. Practitioners are thrilled by the results. With the DOL utilizing the automated LCA Faxback system, not only are LCAs being adjudicated within reasonable (and even legal) time frames, DOL personnel are now free to adjudicate Labor Certifications—the next administrative hurdle the DOL must conquer.

The thorny issue of the H-1B visa cap, unfortunately, continues to be a problem. Since this article was written, Fiscal Year 1999 ended and Fiscal Year 2000 began. AILA recently reported that the INS "contends that it has issued visas in excess of the FY 99 cap, and thus will compensate by, in effect, reducing the FY 2000 cap."[263] The actual number of H-1B petition approvals issued by the INS in excess of the Fiscal Year 1999 cap of 115,000 is reported to be as high as 20,000.[264] Accordingly, if the agency goes through with its plan, the statutory 115,000 H-1B visa cap for Fiscal Year 2000 will be unilaterally reduced by the INS to about 95,000. This potential reduction has elicted a fervent reaction from employers and practitioners.

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260. *See* 20 C.F.R. § 655.730(b) (1998).

261. LCA Faxback System Update (visited Nov. 24, 1999) <http://www.aila.org>.

262. *See* LDA FaxBack System Up and Running!, and DOL Region IX Update on LCAs (visited Nov. 24, 1999) <http://www.aila.org>.

263. INS H-1B Count Elicits Sharp Congressional Response, ADVOCACY UPDATE, Vol. 3, No. 16, Oct. 8, 1999, available at <http://www.aila.org> (visited Nov. 24, 1999).

264. *See* INS H-1B Count Elicits Sharp Congressional Response (visited Nov. 24, 1999) <http://www.aila.org>.

In response to this most recent blunder in the INS's administration of the H-1B program, Senator Spencer Abraham, as Chairman of the Senate Immigration Subcommittee, penned a rather stinging letter to Doris Meissner, the Commissioner of the INS, dated October 5, 1999. In his letter, the Senator criticizes the INS's planned remedy to this problem by expressing to Commissioner Meissner that, "[s]uch action not only would lack statutory authority but would be based on what time and again has proven to be inaccurate counting methods utilized by the INS."[265] The Senator told the INS that,

> given past INS counting procedures on H1-B visas[,] it is far more likely that the INS miscounted in a manner that deprived employers of available visas in FY 1999, rather than issued too many visas. In short, I don't believe it when I hear the agency tell Congress that now it is counting correctly. In FY 1996, in response to inquiries from industry, and in FY 1997, in response to my own inquiry, the INS went back and checked its H1B [sic] counting procedures and concluded in both instances that it had double counted thousands of visas and therefore had not reached the H1B [sic] visa cap at times when the agency had concluded that it had.[266]

The Senator's letter continues:

> Considering that the INS slowed processing as early as April and stopped accepting new petitions for H1Bs [sic] in June of this year, it is hard to understand how it could have awarded too many visas, when it had many months to calibrate visa issuance. In a letter dated May 13, 1999, I questioned INS counting methodologies. I have yet to receive a reply to that letter . . . . Second, I do not believe the INS possesses the statutory authority to shift visas from one year to the next. If it does have that authority, then it would be just as logical for it to take visas not used in an earlier fiscal year, such as in FY 1994 or FY 1995, and use those numbers against the FY 1999 totals as it would be to take visas out of FY 2000 totals.[267]

The context and tone of Senator Abraham's letter to the INS Commissioner sums up the prevailing attitude of Congress and constituent employers over the fundamental operations of the INS and the agency's inadequacies. To date, Commissioner Meissner has yet to express to AILA

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265. Abraham Letter to Meissner re H-1B Count, (visited Nov. 24, 1999) <http://www.aila.org.>.

266. *See id.*

267. *Id.*

any response to the Senator's concerns. We remain curious to see how this latest round of head butting between the INS and Congress resolves itself.