A CRITICAL LOOK AT THE H-1B VISA PROGRAM AND ITS EFFECTS ON U.S. AND FOREIGN WORKERS—A CONTROVERSIAL PROGRAM UNHINGED FROM ITS ORIGINAL INTENT

by
Christopher Fulmer[*]

The H-1B visa program was designed to encourage the immigration of exceptionally talented people, and today the demand for H-1B visas is staggering. However, critics of the H-1B visa program argue that the loopholes in the current law allow employers to misuse the program by hiring foreign works at less than market wages for jobs that could easily be filled by American workers. This Article lays out a statutory framework of the H-1B program and its weaknesses, as well as an explanation of the strong political and human forces involved in this highly polarized debate. Last, this Article suggests amendments to the current H-1B program to curb abuse while still allowing American companies to recruit the "best and brightest" minds from around the world.

[*] Christopher Fulmer, J.D., Lewis & Clark Law School, 2009.

I. INTRODUCTION

In the summer of 2007, the respectable Pittsburgh-based law firm Cohen & Grigsby ignited fresh debate over foreign workers when a video of its annual Immigration Law Update Seminar, posted on the internet, revealed how easy it is to shortchange U.S. and foreign workers in full compliance of the law.[1] Attorneys at the firm, whose clientele include Westinghouse, Del Monte Foods, and Bayer Corporation, detailed how so called loopholes in the current law allow employers to avoid hiring Americans and to pay foreign workers less than market wages.[2] One director stated "Our goal is clearly not to find a qualified and interested U.S. worker."[3] The loopholes referred to impose non-displacement and good faith recruitment requirements on a very small number of H-1B employers deemed "H-1B dependent," and hold employers to a manipulable standard that allows them to pay H-1B employees less than their U.S. counterparts.

Indeed, demand for H-1B visas is staggering. According to a preliminary count, U.S. Citizenship and Immigration Services (USCIS) received over 163,000 H-1B petitions the fiscal year (FY) 2008, up from 133,000 in the FY 2007, for the 85,000 slots available to qualified applicants and foreigners holding advanced degrees from U.S. universities.[4] Bill Gates foresaw in 2007 what would happen in 2008—that for the first time, new graduates would miss the de facto application deadline for H-1B visas. The FY 2007 cap was reached 4 years before the year began and Bill Gates predicted that the 2008 cap would be reached before 2008 degree candidates graduated.[5] As early as 1995, then

[1] Throughout this article, "foreign workers" and "H-1Bs" will refer to temporary nonimmigrant skilled workers in H-1B status, unless otherwise noted.

[2] Norman Matloff, *Fixing Our Badly Broken H-1B Visa and Employer-Sponsored Green Card Programs*, 19, May 9, 2008, http://heather.cs.ucdavis.edu/PrevWage.pdf.

[3] Moira Herbst, *Americans Need Not Apply*, BUSINESSWEEK, July 9, 2007, *available at* http://www.businessweek.com/magazine/content/07_28/c4042003.htm (quoting video of seminar available on YouTube).

[4] Anne Broache, *H-1B Update: Number of Requests Grew This Year*, CNET NEWS, Apr. 11, 2008, http://www.news.com/8301-10784_3-9917080-7.html.

[5] *Examining Strengthening American Competitiveness for the 21st Century: Hearing of the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 10 (2007) (statement of Bill Gates, Chairman, Microsoft Corporation) [hereinafter *Strengthening American Competitiveness*].

Secretary of Labor, Robert Reich, stated the dilemma that continues to this day:

> [W]hat was conceived as a means to meet temporary business needs for unique, highly skilled professionals from abroad is, in fact, being used by some employers to bring in relatively large numbers of foreign workers who may well be displacing U.S. workers and eroding employers' commitment to the domestic workforce.[6]

Careful and lasting reform of the H-1B visa program is badly overdue.

This Article lays out a statutory framework of the issues, as well as an explanation of the strong political and human forces involved in this highly polarized debate on H-1B. Part II sets out to establish a global perspective on the H-1B scheme and its purpose, how its parameters have evolved, and the actors involved—namely, U.S. and foreign workers, employers, and government agencies. Parts II.A and II.B survey the regulatory and historical landscape, delving into the process employers must follow to procure these skilled, nonimmigrant workers, and reasons behind the visa's expansion and contraction. Parts II.C and II.D discuss enforcement, remedies, and the inextricable role government agencies have in monitoring the program. Part III critiques the overall H-1B scheme while addressing three main issues of concern: the disputed need for H-1B, prevailing wages, and job shops. Finally, Part IV examines proposals for improving the plight of U.S. and nonimmigrant workers while preserving the original intent of the program.

II. UNDERSTANDING THE CURRENT LEGAL FRAMEWORK

Congressional intent behind the H-1B program has remained basically unchanged since it took modern form in 1990. For almost twenty years, the program's aim has been to "encourage the immigration of exceptionally talented people, such as scientists, engineers, and educators."[7] The program has helped entice the world's "best and brightest" to relocate to America in order to innovate and create wealth and jobs.[8] Without people like Krishna Bharat and Orkut Buyukkokten, who brought their talents from India and Turkey and rose to prominence while in H-1B status, the technology that drives Google today might not exist.[9]

---

[6] H.R. REP. NO. 104-469, at 146 (1996).

[7] Statement by President George Bush Upon Signing the Immigration Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1946, 1947 (Nov. 29, 1990).

[8] Anand Giridharadas, *Outsourcers Upend Visa Program: Would-be Innovators and Migrants to the U.S. are Shut Out*, INT'L HERALD TRIB., Apr. 13, 2007, at 13.

[9] *See Comprehensive Immigration Reform: Business Community Perspectives: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 9 (2007) (statement of Laszlo Bock, Vice President, People Operations, Google, Inc.).

Approximately eight percent of Google's U.S. employees are H-1B authorized, and it is likely that even more H-1B workers would be sought to fill the eight hundred open positions Google is reported to have in the Bay Area alone.[10] However, the much lamented eighty-five thousand annual cap on H-1Bs prevents many employers from hiring as many foreign workers as they would otherwise. Bill Gates, who often testifies before Congress about the H-1B program as the annual H-1B rush begins, urges there is a shortage of skilled American workers so acute that the U.S. will continue to lose its competitive edge unless our "misguided" immigration policies are reformed to allow more skilled foreigners into the United States.[11] "If I could just change one law in the U.S., it would be this," said Gates earlier this year, referring to the H-1B numerical cap.[12]

Indeed, legislators who supported expansion of the 1998 visa program, American Competitiveness and Workforce Improvement Act of 1998,[13] rejected the idea that each H-1B employee displaces an equivalent U.S. worker, i.e., that "there is a fixed number of jobs and competition for which is a zero-sum game."[14] They contended that flexible labor markets allow "additional people entering the labor force, whether native-born students out of school, immigrants, or nonimmigrants, [to] expand job opportunities and create other jobs."[15] Particularly with H-1B visas, there was no data showing a correlation between the percentage of foreign workers in a particular occupation and unemployment rates in the same occupation.[16]

Finally, legislators who favored expansion of the H-1B program in 2000, the American Competitiveness in the Twenty-First Century Act,[17] made clear that "highly skilled foreign workers are certain to be in a position to make unique contributions to the U.S. economy."[18] A worker who fits this description may be a "uniquely talented individual with unique knowledge and skills," or someone who has "specialized

[10] *Id.*

[11] *See Strengthening American Competitiveness, supra* note 5, at 9.

[12] Patrick Thibodeau, *Gates to Appear Again Before Congress on Eve of H-1B Visa Rush*, COMPUTERWORLD, Mar. 3, 2008, http://www.computerworld.com/s/article/9066460/Gates_to_appear_again_before_Congress_on_eve_of_H_1B_visa_rush.

[13] *See* American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-641 (1998) (current version at 8 U.S.C. § 1101 (2006)).

[14] S. REP. NO. 105-186, at 13 (1998).

[15] *Id.*

[16] *Id.*

[17] *See* American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (codified as amended in scattered sections of 8 U.S.C.).

[18] S. REP. NO. 106-260 at 2 (2000).

knowledge about a subject far more prominently studied abroad than in the United States."[19]

Heated calls in favor of raising the cap and expanding the H-1B program are countered by American workers who have been displaced by foreign workers. In 2002, Guy Santiglia filed a complaint against his employer, Sun Microsystems ("Sun"), charging that it engaged in citizenship discrimination by favoring H-1B workers over American workers.[20] Santiglia alleged that Sun had laid off 3,900 American workers in 2001, only to petition for thousands of H-1B workers that same year.[21] Ultimately, Sun was found only to be in violation of failing to post public notice of its intent to hire H-1B workers.[22]

For the most part, employers may engage in preferential hiring of H-1B workers. The Department of Labor (DOL) has stated explicitly that "non H-1B dependent" employers, or those whose H-1B workers comprise less than 15 percent of its total workforce, may hire a foreign worker even when a qualified American worker wants the job, and may displace an American worker from his job in favor of a foreign worker.[23] Contrary to popular belief, it is *only* "H-1B dependent" employers who must comply with non-displacement and good faith recruitment requirements.[24] Regulations make it easy to avoid classification as an "H-1B dependent" employer, as they allow the employer to count all of its employees (e.g., janitors, secretaries, etc.) when calculating the ratio—not only workers in the particular specialty occupation.[25] An employer

[19] *Id.* Examples of workers deemed able to make unique contributions include an expert on Chinese wheat employed in an American food producer's research division, someone with native knowledge of a foreign language or culture hired to localize services or products for sale abroad, or someone who furthers a U.S. company's globalization strategy by gaining experience in the U.S. before deploying to the company's overseas affiliate. *Id.*

[20] *See* Santiglia v. Sun Microsystems, Inc., ALJ Case No. 2003-LCA-2 (Dep't of Labor July 29, 2005) (Admin. Review Bd.), *available at* http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/LCA/03_076.LCAP.PDF.

[21] Benjamin Pimentel, *Sun Accused of Worker Discrimination,* S.F. CHRON., June 25, 2002, at B1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/06/25/BU244728.DTL.

[22] *See Santiglia*, ALJ Case No. 2003-LCA-2.

[23] U.S. DEP'T OF LABOR, STRATEGIC PLAN: FISCAL YEARS 2006–2011, at 35 (2006), *available at* http://www.dol.gov/_sec/stratplan/strat_plan_2006-2011.pdf. Regulatory provisions that require H-1B dependent employers to offer jobs to equally or better qualified U.S. workers, and prohibit them from displacing U.S. workers, are found at 20 C.F.R. §§ 655.738, 655.739(j) (2008), respectively. No such provisions apply to nondependent employers.

[24] *See* 8 U.S.C. § 1182(n)(3) (2006) for a complete definition of "H-1B dependent."

[25] *See* 20 C.F.R. § 655.736 (2008) ("[Calculation is] based on the ratio between the employer's total workforce employed in the U.S. . . . and the employer's H-1B nonimmigrant employees . . . ."); *see also* Ramachandran v. Blue Star Infotech, Wage & Hour Case No. 2002-LCA-8 (Dep't of Labor June 4, 2002), *available at*

may also elude such classification by hiring nonimmigrant workers who qualify for "exempt" status because they have a master's degree or annual income of at least sixty thousand dollars.[26] Based on the foregoing, it is no wonder why so few employers qualify as "H-1B dependent" and must account for the non-displacement of U.S. workers.

Nevertheless, so widespread is the belief that American workers are displacement-proof that many politicians and the media often do not see the problem. They mistakenly report that displacement protections apply to all H-1B employers, or that a labor market test, similar to that required for employment-based immigration, exists.[27] Articles by large media outlets like *The Wall Street Journal* have perpetuated this misunderstanding.[28]

Additionally, H-1B workers may be vulnerable to varying levels of exploitation by U.S. employers. The problem most H-1B critics cite is a statutory gap that enables employers to pay foreign workers below prevailing wages.[29] The Center for Immigration Studies (CIS), a group critical of expanding the visa, claims that H-1B workers in Information Technology (IT) related occupations are paid approximately thirteen thousand dollars less than American workers, and that the H-1B program is little more than a source of cheap labor.[30] Another sharp criticism is directed at so called "job shops"—i.e., recruitment firms that obtain H-1B visas for foreign workers who are then outsourced to U.S. clients, namely

http://www.oalj.dol.gov/PUBLIC/INA/DECISIONS/ALJ_DECISIONS/LCA/2002_00008.LCA_files/css/2002_00008.LCA.PDF.

[26] *See* 20 C.F.R. § 655.737(b) (2008).

[27] Ron Hira, *Outsourcing America's Technology and Knowledge Jobs*, ECON. POL'Y INST. BRIEFING PAPER NO. 187, at 3 (2007) (senators Norm Coleman and Barack Obama's responses to constituents concerned with the H-1B visa scheme illustrate a widespread misunderstanding).

[28] *See id.* at 2. In a front page story chronicling the frustrating visa situation of an Indian-born scientist, a reporter for *The Wall Street Journal* wrote: "Dr. Sengupta arrived in the U.S. on a visa that is reserved for temporary visitors on education exchanges. Colorado State next sponsored him for an H-1B, which requires an employer to attest that it can't find a U.S. worker and is paying the immigrant the prevailing U.S. wage." June Kronholz, *Under a Cloud: For Dr. Sengupta, Long-Term Visa Is a Long Way Off*, WALL ST. J., June 27, 2006, at A1.

[29] 20 C.F.R. § 655.731(a)(2) (2008) provides that an employer may choose from an array of sources to determine prevailing wage. These sources may yield widely different wage figures, allowing the employer to select the lowest one. Further, because prevailing wage is determined by the job, not the worker, employers may rework the education and experience requirements of a job to a bare minimum and obtain a lower wage figure. *See infra* Part III.B.

[30] John Miano, *The Bottom of the Pay Scale: Wages for H-1B Computer Programmers* BACKGROUNDER (Ctr. for Immigration Studies, Washington, D.C.) Dec. 2005, at 6, *available at* http://www.cis.org/articles/2005/back1305.pdf. Although the CIS study has a few limitations, its methodology appears to be reliable. *See infra* note 232 for a discussion of the methodology. The terms "body shop" and "job shop" are used interchangeably in this article, although they have the same meaning.

IT firms.[31] In 2007, India-based outsourcing firms topped the list of companies granted the most visas, occupying five out of the top ten slots.[32] H-1B proponents claim that "body shops" keep American jobs from going overseas by servicing the needs of U.S. clients in the United States.[33] However, critics claim that body shop workers' time in H-1B status allows them to learn their clients' requirements so that they are later able to transfer their clients' business to their home country.[34] This practice appears to be so common that the Indian Minister of Commerce has dubbed the H-1B visa the "outsourcing visa."[35]

Finally, the H-1B program has raised troubling issues that stem from the relatively powerless position that many foreign workers occupy while in the United States.[36] There are documented cases of unscrupulous employers who force foreign workers into adhesion contracts, *de facto* indentured servitude, and in some extreme cases, resort to psychological mistreatment. The current legal framework permits employers to wield power over foreign workers in other ways, such as forced loyalty and the power to deport.

In order to effect meaningful change to the H-1B visa, the interests and protection of both American and foreign workers must be kept in mind. The legal protections that actually exist should be identified and clarified before one can formulate solutions. This raises another point of disagreement—whether current statutory protections provide an adequate basis for increased enforcement, or whether those protections are so insufficient that enforcing them would allow the most serious abuses to continue unchecked.

A. Regulatory Components of the H-1B Scheme

Currently, through the H-1B program, an employer may hire, on a temporary basis, foreign workers to perform services in a specialty occupation.[37] A specialty occupation is one with two requirements: "theoretical and practical application of a body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent)."[38] While the Immigration Act of

[31] Todd H. Goodsell, Note, *On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 BYU J. PUB. L. 153, 168 (2007).

[32] Marianne Kolbasuk McGee, *Who Gets H-1B Visas? Check Out This List*, INFORMATIONWEEK, May 17, 2007, http://www.informationweek.com/story/showArticle.jhtml?articleID=199601616.

[33] Tracy Halliday, Note, *The World of Offshoring: H-1B Visas Can be Utilized to Curb the Business Trend of Offshoring*, 25 HAMLINE J. PUB. L. & POL'Y 407, 426 (2004).

[34] *See* Hira, *supra* note 27, at 5.

[35] *See* Giridharadas, *supra* note 8.

[36] Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations,* 36 U. MICH. J.L. REFORM 815, 865 (2003).

[37] 8 U.S.C. § 1101(a)(15)(H) (2006).

[38] 8 U.S.C. § 1184(i)(1) (2006).

1990[39] established the H-1B program as it is known today, it has existed since the Immigration and Nationality Act of 1952[40] created the H-1 category and allowed foreign workers of "distinguished merit and ability" to reside and work in the United States temporarily while keeping a foreign residence.[41] The 1990 Immigration Act got rid of the foreign residency requirement, reserved H-1Bs for members of professions by creating "specialty occupations," capped H-1B visas for the first time at sixty-five thousand annually, and added a labor attestation scheme.[42]

To hire an H-1B worker, the employer must first file a Labor Condition Application (LCA), usually Form ETA 9035E, with DOL's Employment and Training Administration (ETA). An LCA contains four "attestations," or requirements, that employers must agree to regarding their responsibilities to the H-1B worker.[43] By submitting and signing the LCA, employers can incur penalties if one or more of the "attestations" is violated.[44]

First, an H-1B worker must be paid the required wage rate, meaning the greater of the actual wage rate (i.e., "the wage rate paid by the employer to all other individuals with similar experience and qualifications") or the prevailing wage, determined by market wage data for workers similarly employed in the area of intended employment.[45] H-1B workers must also be paid for nonproductive time if they are not working due to a decision by the employer (e.g., lack of assigned work).[46]

Second, the employment of H-1B workers must not negatively affect the working conditions of workers similarly employed in the area of intended employment.[47] "Working conditions" include items such as "hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules."[48]

Third, the employer cannot be involved in a strike, lockout, or work stoppage in the course of a labor dispute in the H-1B worker's area of

---

[39] Pub. L. No. 101-649, 104 Stat. 4978 (1990) (current version at 8 U.S.C. § 1101 (2006)).

[40] Pub. L. No. 82-414, 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1101 (2006)).

[41] *Examining the Importance of the H-1B Visa to the American Economy: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 122 (2003) [hereinafter *Examining the Importance of H-1B Visa*] (statement of Stephen Yale-Loehr, Chair, Business Immigration Committee, American Immigration Lawyers Association, and Adjunct Professor, Cornell University Law School).

[42] *Id.* at 121–22.

[43] 20 C.F.R. § 655.705 (2008).

[44] 20 C.F.R. § 655.730(c)(2) (2008).

[45] 20 C.F.R. § 655.731 (2008).

[46] *Id.* § 655.731(c)(3)(iii)(C)(7).

[47] 20 C.F.R. § 655.732 (2008).

[48] AUSTIN T. FRAGOMEN ET AL., H-1B HANDBOOK § 2:53 (Thomson Reuters/West 2008).

intended employment.[49] Nor can an H-1B worker be contracted out to a client company experiencing a strike or lockout in the same occupational classification as the H-1B worker.[50]

Last, the employer must provide notice of filing the LCA to the employee's bargaining representative, or must "[post] notice of filing in conspicuous locations in the employer's establishment(s) in the area of intended employment."[51] Notices must be posted on or within thirty days before the LCA is filed, and indicate that H-1B workers are sought; the number of workers the employer is seeking; the occupational classification; wages offered; period of employment; location or locations at which H-1B workers will be employed; and that the LCA is available for public inspection.[52] Notices may be in hard copy or electronic form.[53] Distribution can be by whatever means the employer normally uses to communicate with its employees.[54]

While these four attestations apply to all H-1B employers, employers deemed "H-1B dependent" or "willful violator" must attest to two additional provisions. The first one prohibits an employer subject to this provision from displacing any U.S. worker, whether directly from its own workforce, or secondarily at a client's worksite.[55] The second one requires such employer to recruit U.S. workers in good faith and to offer a job to a U.S. worker who applies and is equally or better qualified.[56] Generally, an "H-1B dependent" employer has 15 percent or more of its workers in H-1B status, although different thresholds apply to smaller employers.[57] "Willful violators" are employers that have failed to maintain their H-1B obligations during the five-year period preceding the LCA filing.[58] These two categories of H-1B employers are the only ones to which provisions for non-displacement and priority recruitment of American workers apply.

An employer submits a signed LCA to ETA, which determines within seven working days whether to certify it. The certification rate for LCAs is extremely high—approximately 99.5 percent, according to a Government Accountability Office (GAO) analysis of 960,563 applications reviewed between January 2002 and September 2005.[59] DOL

[49] 20 C.F.R. § 655.733(a) (2008).
[50] *Id.* § 655.733(a)(1).
[51] 20 C.F.R. § 655.734 (2008).
[52] 20 C.F.R. § 655.734(a)(1)(i) (2008).
[53] *Id.* § 655.734(a)(1)(ii)(A) (2008).
[54] *Id.* § 655.734(a)(1)(ii)(B).
[55] 20 C.F.R. § 655.738 (2008).
[56] 20 C.F.R. § 655.739 (2008).
[57] *See* 20 C.F.R. § 655.736(a) (2008).
[58] *See id.* § 655.736(f).
[59] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-720, H-1B VISA PROGRAM: LABOR COULD IMPROVE ITS OVERSIGHT AND INCREASE INFORMATION SHARING WITH HOMELAND SECURITY 12 (2006) [hereinafter INFORMATION SHARING], *available at* http://www.gao.gov/new.items/d06720.pdf.

applies an "incomplete or obviously inaccurate" standard to information provided on the LCA, which includes the employer's address and identification number, type of positions sought to be filled, prevailing wage and location of the positions, how many workers are sought, the amount workers will be paid, and how long the workers will be needed.[60]

Once an LCA is certified by ETA, all employers, whether or not they are "H-1B dependent" or "willful violator," are liable for the following:[61] (1) misrepresentation of a material fact;[62] (2) failure to pay the required wage; (3) failure to provide similar working conditions; (4) filing an LCA during a strike or lockout; (5) failure to give proper notice of filing an LCA; (6) failure to supply specific information on an LCA; (7) displacing a U.S. worker and committing a willful violation of 20 C.F.R. § 655.805(a)(2)–(9); (8) requiring a foreign worker to pay the H-1B filing fee; (9) requiring a foreign worker to pay for withdrawing before an agreed upon date; (10) discrimination against an employee for protected conduct; (11) failure to make the LCA available to the public; (12) failure to keep required documentation; and (13) failure to comply with other provisions of 20 C.F.R. § 655 Subparts H & I.[63]

Only "H-1B dependent" and "willful violator" employers are liable for the following: (1) displacement of a U.S. worker, primary or secondary; (2) failure to inquire whether an outsourced H-1B worker might displace a U.S. worker at the client's location; and (3) failure to recruit in good faith.[64] Complaints based on a "failure to select" are directed to the Department of Justice's (DOJ) Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).[65]

An H-1B employer then submits the certified LCA to the Department of Homeland Security (DHS) along with DHS Form I-129, the employer's H-1B petition. DHS approval hinges on three determinations: "whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation . . . and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification."[66] If approved, the prospective H-1B worker may apply for

[60] 20 C.F.R. § 655.740(a)(2) (2008).

[61] The same provisions take effect when a foreign worker commences work with another H-1B employer pursuant to the portability provisions of section 214(n) of the Immigration and Naturalization Act, 8 U.S.C. § 1184(n), even before ETA approves the new LCA. *See* 20 C.F.R. § 655.805(d) (2008).

[62] Federal criminal statutes penalize a misrepresentation that is knowing and willful. *See* 18 U.S.C. §§ 1001, 1546 (2006); 20 C.F.R. § 655.805(a)(1) (2008).

[63] 20 C.F.R. § 655.805(a).

[64] *Id.*

[65] *INS and Office of Special Counsel for Immigration Related Unfair Employment Practices: Hearing Before the H. Subcomm. on Immigration and Claims of the H. Comm. On the Judiciary*, 107th Cong. 6 (2002), *available at* http://judiciary.house.gov/Legacy/78340.PDF.

[66] 20 C.F.R. § 655.705(b) (2008).

and obtain his visa through a U.S. Consulate abroad, or if already present in the United States, may be eligible for adjustment of status.[67]

B. Historical Context and Development of the H-1B Scheme

During the 1990s, IT industry leaders grew concerned over a shortage of skilled workers, citing studies that found a dwindling number of U.S. college graduates in computer science, widespread job vacancies, and other signs that demand was outstripping supply at an alarming rate.[68] These studies were criticized because of either unsound methodology, IT industry funding, or both.[69] Nevertheless, Congress accepted the industry's demand for higher caps "because the success of our economy is so indebted to advances in computer technology."[70] It was "willing to give industry the benefit of the doubt, to accept claims that there [was] a shortage and that it [could] only be alleviated through an increase of foreign workers through the H-1B program."[71] The ACWIA provided temporary relief by raising the cap from 65,000 to 115,000 for fiscal years (FYs) 1999 to 2000, and to 107,500 for FY 2001.[72] ACWIA was designed to be only a short-term fix, as Congress expected there to be "a bumper crop of American college graduates skilled in computer science beginning in the summer of 2001."[73]

Again convinced that the IT industry faced a skilled labor shortage, Congress passed the American Competitiveness in the Twenty-First Century Act of 2000 (Twenty-First Centry Act).[74] The Twenty-First Centry Act raised the H-1B cap to 195,000 for FYs 2001 to 2003, and exempted from the cap workers employed by institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, and governmental research organizations.[75] Although the cap reverted

---

[67] *Id.*

[68] *See* INFO. TECH. ASS'N OF AM., HELP WANTED: THE IT WORKFORCE GAP AT THE DAWN OF A NEW CENTURY, 13 (1997) [hereinafter HELP WANTED: 1997]; INFO. TECH. ASS'N OF AM., HELP WANTED 1998: A CALL FOR COLLABORATIVE ACTION FOR THE NEW MILLENNIUM 4 (1998) [hereinafter HELP WANTED: 1998]; OFFICE OF TECH. POLICY, U.S. DEP'T OF COMMERCE, AMERICA'S NEW DEFICIT: THE SHORTAGE OF INFORMATION TECHNOLOGY WORKERS 5 (1997).

[69] *See* U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-98-106R, INFORMATION TECHNOLOGY: ASSESSMENT OF THE DEPARTMENT OF COMMERCE'S REPORT ON WORKFORCE DEMAND AND SUPPLY 2 (1998) [hereinafter WORKFORCE DEMAND AND SUPPLY], *available at* http://gao.gov/archive/1998/he98106.pdf.

[70] H.R. REP. No. 105-657, at 19–20 (1998).

[71] *Id.* at 19.

[72] American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, § 411(a)(A), 112 Stat. 2681-641, 2681-642 (1998) (current version at 8 U.S.C. § 1184 (2006)).

[73] *See* H.R. REP. NO. 105-657, at 20.

[74] American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000) (codified as amended in scattered sections of 8 U.S.C.).

[75] *Id.* at §§ 102(b), 103.

back to sixty-five thousand in 2004, the cap exemptions were expanded by the H-1B Visa Reform Act of 2004 to include twenty thousand foreign nationals each year who have earned a master's degree or higher from a U.S. institution.[76]

H-1B holders are admitted to the United States for three years, and may have one extension for a total stay of six years.[77] Additional one-year extensions are available to foreign workers who are awaiting an employer-sponsored green card.[78] Petitions for extension, changes in employment conditions, or requests for new H-1B employment do not count against the annual cap.[79]

Considered the "best and [the] brightest,"[80] these workers travel from all corners of the world to fill a broad range of specialty occupation positions in the private and public sectors, even within the U.S. federal government and K–12 school districts.[81] According to the most recent report available, 267,131 H-1B petitions were approved in FY 2005—44.4% were granted to workers born in India.[82] In fact, more than half of the Top 10 H-1B employers were firms based in India.[83] China placed second at a distant 9.2%.[84] Computer-related occupations drew the largest number of H-1B petitions, 43%, followed by occupations in architecture, engineering, and surveying at a distant 12.1%.[85] H-1B holders tended to be younger—approximately two-thirds were between the age of twenty-five to thirty-four.[86] Regarding level of education, most held a bachelor's (44.8%) or master's degree (36.8%).[87] Median annual compensation of all H-1B holders was fifty-five thousand dollars, five thousand lower than the median yearly income of foreign workers in computer-related occupations.[88] Median compensation for initial

[76] H-1B Visa Reform Act of 2004 § 425, Pub. L. No. 108-447, § 425, 118 Stat. 3353, 3356 (2004) (codified as amended in scattered sections of 8 U.S.C.).

[77] 8 U.S.C. § 1184(g)(4) (2006).

[78] *See* American Competitiveness in the Twenty-First Century Act § 106(b).

[79] *Id.* at § 106(a). *See also* U.S. CITIZENSHIP AND IMMIGRATION SERV., CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H-1B): FISCAL YEAR 2005, 4 (2006) [hereinafter CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS], *available at* http://www.uscis.gov/files/nativedocuments/H1B_FY05_Characteristics.pdf.

[80] *See Strengthening American Competitiveness*, *supra* note 5, at 9.

[81] *See* McGee, *supra* note 32. The following U.S. government agencies and school districts were listed among the Top 200 H-1B employers in 2006: New York City Public Schools (642 visas, ranked 22nd), National Institutes of Health (322 visas, ranked 55th), Dallas Independent School District (255 visas, ranked 83rd), Houston Independent School District (209 visas, ranked 116th), Prince Georges County Public Schools (203 visas, ranked 128th), Fannie Mae (141 visas, ranked 199th).

[82] CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS, *supra* note 79, at 7–8.

[83] *See* McGee, *supra* note 32.

[84] CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS, *supra* note 79, at 8.

[85] *Id.* at 13.

[86] *Id.* at 9.

[87] *Id.* at 10.

[88] *Id.* at 16.

employment in computer-related occupations was sixty thousand dollars.[89] Over half of the petitions approved were for continuing employment (150,204)—the remainder (116,927) were for initial employment.[90]

C. Enforcement Provisions

Employers must pay H-1B workers the required wage rate, meaning the greater of the "actual wage" rate, i.e., "the wage rate paid by the employer to all other individuals with similar experience and qualifications,"[91] or the "prevailing wage," determined by market wage data for workers similarly employed in the area of intended employment.[92] "The purpose of the prevailing wage is to ensure that H-1B workers are not being paid below market-wages."[93] Simply put, prevailing wage regulations were enacted to keep the H-1B program from becoming a "cheap labor" program.[94]

The DOL does not require an employer to use a particular methodology for determining prevailing wages.[95] An employer may consult with "a [State Workforce Agency], an independent authoritative source, or other legitimate sources of wage data."[96] A prevailing wage determination by the State Workforce Agency generally uses figures from a Bureau of Labor Statistics wage survey to calculate the "arithmetic mean of wages of workers similarly employed in the area of intended employment."[97] The other two sources of prevailing wages are acceptable so long as they are based on the weighted average wage or median wage of workers similarly employed, are based on the most recent and accurate information available, and are reasonable and consistent with recognized standards and principles in producing a prevailing wage.[98] While these regulations seem effective on paper, they leave the door open to abuse.

Prevailing wages can vary greatly depending on which of the three sources is used. Because DOL allows employers to choose which wage source to use, employers are free to choose nongovernment surveys. In FY 2004, DOL approved prevailing wage determinations made by over seventy-five different sources.[99] Cost-conscious employers may lawfully use

---

[89] *Id.*

[90] *Id.* at 6.

[91] 20 C.F.R. § 655.731(a)(1) (2008).

[92] *Id.* at § 655.731(a)(2).

[93] *See* Hira, *supra* note 27, at 3.

[94] *Id.*

[95] 20 C.F.R. § 655.731(a)(2).

[96] *Id.*

[97] *Id.* at § 655.731(a)(2)(ii)(A). "Similarly employed" is defined as "having substantially comparable jobs in the occupational classification in the area of intended employment." *Id.* at § 655.731(a)(2)(iii).

[98] *Id.* at §§ 655.731(a)(2)(ii), 655.731(b)(3)(iii).

[99] *See* Miano, *supra* note 30, at 8.

the wage of the lowest bidder on their LCAs.[100] This practice is mentioned in the Cohen & Grigsby YouTube clip.[101] Also, until provisions of the H-1B Reform Act of 2004 were enacted on March 8, 2005, employers were allowed to pay their workers only ninety-five percent of the prevailing wage.[102]

1. Role of Government Agencies in Enforcing H-1B Law

Four government agencies play a role in H-1B enforcement: the departments of Labor, Homeland Security, Justice, and State.[103] The DOL's Office of Foreign Labor Certification (OFLC) and the Wage and Hour Division (WHD), components of ETA and the Employment Standards Administration (ESA) respectively, specialize in LCA adjudication and H-1B enforcement.[104] Homeland Security, specifically the U.S. Citizenship and Immigration Services (USCIS), coordinates with DOL to ensure that petitions from debarred employers are denied during the debarment period.[105] DOJ's Office of Special Counsel, a component of the Civil Rights Division, enforces a provision that requires employers deemed to be "H-1B dependent" or a "willful violator" to hire a U.S. worker who is equally or better qualified than a foreign worker,[106] a charge known as "failure to select."[107] Finally, the State Department issues H-1B visas through U.S. Embassies and Consulates overseas.[108]

Several gaps exist in the current enforcement scheme, which make it difficult or impossible for government agencies to effectively protect foreign and U.S. workers.[109] Inadequate authority to enforce, lack of

[100] There is no language in 20 C.F.R. § 655.731, the provision applicable to prevailing wage, preventing an employer from shopping around for the lowest wage source, so long as the wage is calculated using the "best information available." 20 C.F.R. § 655.731(a)(2)(ii).

[101] YouTube: PERM Fake Job Ads defraud Americans to secure green cards (programmersguild 2007), http://www.youtube.com/watch?v=TCbFEgFajGU (video of Cohen & Grigsby Seventh Annual Immigration Law Update, held on May 15 2007). *See also* Herbst, *supra* note 3.

[102] INFORMATION SHARING, *supra* note 59, at 29.

[103] 20 C.F.R. § 655.705 (2008).

[104] U.S. Dep't of Labor, Department of Labor Agencies, http://www.dol.gov/dol/organization.htm.

[105] INFORMATION SHARING, *supra* note 59, at 24.

[106] 20 C.F.R. § 655.739 (2008).

[107] *See supra* note 65 and accompanying text.

[108] U.S. Dept. of State, Temporary Workers, http://travel.state.gov/visa/temp/types/types_1271.html.

[109] Some believe that enforcement gaps were purposefully created to prevent effective H-1B policing. "'It was set up that way because the most powerful corporate interests wanted it set up that way,'" says the president of a labor union group in Maine. "'It's not that the Labor Department doesn't have concerns. (The law) literally ties the hands of the Department of Labor.'" Ron Hira, an outspoken H-1B critic, agrees. "'If you read all the language, you'd think this is all working the way it's supposed to be.' . . . 'You can tell the American public, 'We've got all these protections in place.' At the same time, 'wink wink, nod nod' to the companies.'"

information sharing, and restrictions on the use of enforcement resources are problems that have been raised but have not yet been resolved.[110] The agencies most affected are the ETA, WHD, and USCIS.

2. Inadequate Authority to Enforce

The WHD is authorized to investigate underpayment of prevailing wages,[111] and civil money penalties may be assessed if the failure to pay was "willful."[112] The DOL Secretary may order payment of back wages whether or not underpayment was willful.[113] However, DOL is statutorily prevented from using employer-provided information[114] and DHS-discovered discrepancies[115] to initiate investigation against prevailing wage violators and others. These restrictions on DOL severely limit its enforcement ability, and leave it to H-1B workers and other "aggrieved parties" to complain to WHD after violations arise. Between FYs 2000 and 2005, WHD fielded 1,026 complaints, with the number of complaints increasing annually during that period.[116] Assessment of back wages and penalties increased as well, from $1.2 million paid to 226 H-1B workers in 2000, to $5.2 million to 604 workers in 2005.[117] DHS received fifty debarment requests from DOL between 2002 and 2005.[118]

However, DOL's ability to enforce H-1B provisions would be strengthened if it could use employer-provided LCA information as a basis for investigation. DOL's ETA is charged with certifying or denying an LCA within seven days of receipt from the employer.[119] Its oversight is limited to identifying omissions and obvious inaccuracies (e.g., ensuring that all necessary boxes and blanks are checked and filled in, that a debarred employer's application gets flagged, that the application wage rate is not below the application prevailing wage, etc.). It has been

"The problem is, it is written by the people who are using the program." *See* Matt Wickenheiser, *Invitation to Fraud,* PORTLAND PRESS HERALD, Sept. 26, 2006, at A1, *available at* http://pressherald.mainetoday.com/news/immigration/060926im22m.html.

[110] *Id.*

[111] INFORMATION SHARING, *supra* note 59, at 24.

[112] 20 C.F.R. § 655.805(a)(2), (b) (2008). Subsection (c) defines "willful failure" as "a knowing failure or a reckless disregard with respect to [payment of the required wage or maintaining working conditions]." *Id.* § 655.805(c). Underpayment of the required wage is just one of sixteen H-1B violations that WHD may investigate. *See id.* § 655.805(a)(1)–(16).

[113] *Id.* at § 655.805(b).

[114] Information contained in an LCA for purposes of securing H-1B employment is not considered credible for purposes of initiating an investigation. 8 U.S.C. § 1182(n)(2)(G)(iv), (v) (2006).

[115] DHS is not considered an "aggrieved party." Therefore, information received from, or a complaint filed by, DHS may not trigger an investigation. *See* INFORMATION SHARING, *supra* note 59, at 24.

[116] *Id.* at 17, 18 tbl.4.

[117] *Id.* at 17.

[118] *Id.* at 18.

[119] 20 C.F.R. § 655.730(b) (2008).

criticized as a rubber stamp process, and understandably so—from 2002 to 2005 the ETA certified 99.5 percent of the 960,563 LCAs it reviewed.[120] A 2006 GAO study found 3,229 LCAs were wrongly certified because application wages were lower than the prevailing wage for the occupation.[121] Those "obvious inaccuracies" slipped by.[122] The study also found that ETA certified 993 LCAs with invalid employer identification numbers.[123] Those were errors that may have been non-obvious, but could have been avoided with minimal effort. As DOL already has a database with valid employer identification numbers that it uses to confirm the existence of employers sponsoring permanent immigrants, it could simply check H-1B employer identification numbers as well.[124] DOL officials say they do not do more because the ETA is charged with an attestation process, not a verification process.[125] It is precluded by law from ensuring the authenticity of employer-submitted information.[126]

Since 2000, there have been calls to remove DOL from the LCA certification process. A GAO report published that year phrased it bluntly:

> Limited by the law, Labor's review of the LCA is perfunctory and adds little assurance that labor conditions employers attest to actually exist. Furthermore, the requirement that employers first file the LCA with Labor before filing the same information with INS represents an extra, time-consuming step that adds to H-1B processing time.[127]

The DOL's Office of Inspector General stated: "In our opinion, DOL adds nothing substantial to the H-1B program. It would be more efficient if the employers filed their applications directly to the Bureau of Citizenship and Immigration Services (BCIS) for visa approval."[128]

3. Lack of Information Sharing

Not only is DOL precluded from using LCA information to initiate investigations, there is also no process by which DOL can use information that DHS reviews as a basis of investigation. DHS's role in the H-1B

---

[120] *See* INFORMATION SHARING, *supra* note 59, at 12.

[121] *Id.* at 14.

[122] *Id.*

[123] *Id.* at 15.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 6; *See also* 20 C.F.R. § 655.740(a)(2) (2008).

[127] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-00-157, H-1B FOREIGN WORKERS: BETTER CONTROLS NEEDED TO HELP EMPLOYERS AND PROTECT WORKER, 34 (Sept. 2000) [hereinafter BETTER CONTROLS], *available at* http://www.doleta.gov/h-1b/pdf/gao_hehs-00-157.pdf.

[128] OFFICE OF INSPECTOR GEN., U.S. DEP'T OF LABOR, REP. NO. 06-03-007-03-321, OVERVIEW AND ASSESSMENT OF VULNERABILITIES IN THE DEPARTMENT OF LABOR'S ALIEN LABOR CERTIFICATION PROGRAMS 2 (2003), *available at* http://www.oig.dol.gov/public/reports/oa/2003/06-03-007-03-321.pdf (note that the BCIS is a sub-agency of DHS).

process is to adjudicate an employer's petition by doing the following: checking that the petition is accompanied by an approved LCA, ensuring the employer can employ an H-1B worker, confirming the position is a specialty occupation, and that the applicant worker is qualified for the position.[129] It also reviews petitions for H-1B extensions, which may be accompanied by the worker's W-2 form.[130] However, when DHS finds a discrepancy between the W-2 wage and the original LCA wage, and suspects underpayment, DOL will not initiate an investigation based on that information because it does not consider DHS an "aggrieved party."[131]

"Aggrieved party" related authority is one of the four types of H-1B enforcement "authority" WHD has.[132] An aggrieved party is a "person or entity whose operations or interests are adversely affected by the employer's alleged noncompliance with the [LCA]."[133] The WHD's definition of "aggrieved party" has traditionally included the State Department, but not DHS.[134] Nor do the remaining three grounds under which WHD has enforcement authority—for willful violators, credible sources, or by Secretary's certification—allow information from DHS to be received. The authority to enforce against a "willful violator" allows WHD to conduct random investigations of employers who have committed a willful failure to meet LCA conditions, or a willful misrepresentation of a material fact in the LCA within the last five years.[135] Although WHD has had this authority to investigate willful violators since 1998, it did not actually use it until 2006 because most willful violators went out of business.[136] WHD maintains an online list of willful violators.[137] Currently, there are fifty listed.[138]

"Credible source" authority permits the WHD to investigate if credible information from a known source provides reasonable cause to believe that an employer has committed a willful failure to meet certain LCA requirements, has engaged in a pattern of failure to meet such requirements, or has committed a substantial failure to meet such

---

[129] *See* BETTER CONTROLS, *supra* note 127, at 10.

[130] *See* INFORMATION SHARING, *supra* note 59, at 24.

[131] *Id.*

[132] *Is the Labor Department Doing Enough to Protect U.S. Workers?: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 29 (2006) (statement of Alfred Robinson, Acting Administrator, Wage and Hour Division, Department of Labor).

[133] *Id.* at 34; *See also* 20 C.F.R. § 655.715 (2008).

[134] *Is the Labor Department Doing Enough to Protect U.S. Workers?*, *supra* note 132, at 34. No rationale can be found to explain this seemingly arbitrary classification.

[135] 20 C.F.R. § 655.736(f) (2008).

[136] *See* INFORMATION SHARING, *supra* note 59, at 18–19.

[137] *See* WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, H-1B WILLFUL VIOLATOR LIST OF EMPLOYERS, http://www.dol.gov/esa/whd/immigration/H1BWillfulViolator.htm.

[138] *Id.* (This list is often updated. Author last visited and verified this number on Aug. 25, 2009).

requirements that affects multiple workers.[139] However, two limitations narrow the scope of enforcement: no information may come from a DOL employee, nor come from an employer, to DOL or DHS as part of the H-1B process.[140] The last enforcement authority comes from the Secretary of Labor's certification, and is limited to violations other than incompleteness or obvious inaccuracies.[141] As of 2006, the DOL Secretary had never exercised certification.[142]

Another problem created by a lack of information sharing is that USCIS cannot tell whether an employer is exploiting a weakness in the system by petitioning for more workers than originally requested in the LCA.[143] An employer can submit one LCA for multiple workers, and ETA will approve it provided it is complete and free of "obvious inaccuracies."[144] However, USCIS cannot match each petition with its accompanying LCA because its computer system has no way of "talking" to ETA's systems.[145] If USCIS staff do not contact the employer to verify the names of the H-1B workers on the approved LCA, it risks granting more H-1B visas than the approved LCA allowed the employer to hire.[146]

The 2006 GAO report asked Congress to consider two reforms that would have a great impact on WHD's enforcement abilities.[147] First, it should be permitted to use employer-provided information to initiate investigations. Second, DHS should be directed to provide DOL with any information it receives that suggests an employer is failing its H-1B obligations.[148] WHD has recommended that Congress grant it the same broad authority it has under the Fair Labor Standards Act to "investigate such facts, conditions, practices, or matters as . . . necessary or appropriate to determine whether" a violation has occurred.[149]

4. Restrictions on the Use of Enforcement Resources

WHD has stated it would need more flexible spending ability should Congress grant it broader enforcement authority.[150] Presently, a fraud prevention fee of five hundred dollars is collected by DHS when

---

[139] 8 U.S.C. § 1182(n)(2)(G)(ii) (2006).

[140] *Is the Labor Department Doing Enough to Protect U.S. Workers?*, *supra* note 132, at 34.

[141] *Id.*

[142] *Id.*

[143] *See* INFORMATION SHARING, *supra* note 59, at 23.

[144] *See* 20 C.F.R. §§ 655.730(c)(5), 655.740(a)(2) (2008).

[145] *See* INFORMATION SHARING, *supra* note 59, at 23.

[146] *Id.*

[147] *Id.* at 26.

[148] 20 C.F.R. § 655.736(f) (2008).

[149] 29 U.S.C. § 211(a) (2006) (originally enacted as Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 11(a), 52 Stat. 1060, 1066).

[150] U.S. GEN. ACCOUNTING OFFICE, GAO-03-883, H-1B FOREIGN WORKERS: BETTER TRACKING NEEDED TO HELP DETERMINE H-1B PROGRAM'S EFFECTS ON U.S. WORKFORCE 26 (2003), *available at* http://www.gao.gov/new.items/d03883.pdf.

employers file H-1B petitions, and the total amount collected is divided in equal thirds by the State Department, DHS, and DOL.[151] Of the approximately thirty million dollar share DOL receives annually, it is only able to spend around four million dollars[152] due to its current limited authority to investigate only LCA matters under section 212(n) of the Immigration and Naturalization Act (INA).[153] DOL entered FY 2007 with a sixty million dollar surplus, fifty million dollars of which was cancelled because it was not able to spend it.[154] Ideally, broader investigative authority would be coupled with a change in the statutory language of section 286(v)(2)(C) of the INA, which restricts use of the anti-fraud fee.[155]

D. Remedies

1. For Violation of LCA Obligations

The remedies available to U.S. and foreign workers when an employer fails to abide by its LCA obligations are spelled out in 20 C.F.R. § 655.810. Remedies are divided into three categories—civil money penalties, debarment, and "other" administrative remedies.[156] In each case, the WHD Administrator has some discretion to determine the type of remedy imposed. In all cases, the Administrator has the authority to order a remedy after an investigation of one or more of sixteen complaints enumerated in 20 C.F.R. § 655.805(a).[157] All have to do with enforcement of LCA attestations.

To illustrate, suppose an "H-1B dependent" employer willfully causes the displacement of a U.S. worker employed by its client where the foreign worker is placed. The WHD Administrator may impose a civil money penalty up to thirty-five thousand dollars, disqualification from LCA approval for at least three years, reinstatement of the displaced U.S. worker, back wages, and any "other appropriate legal or equitable remedies."[158] In the case of an employer who willfully fails to pay the required wage, a money penalty up to five thousand dollars, debarment for at least two years, back wages, and any "other appropriate legal or

---

[151] Immigration and Naturalization Act § 286(v), 8 U.S.C. § 1356(v) (2006); 8 U.S.C. § 1184(c)(12).

[152] *Is the Labor Department Doing Enough to Protect U.S. Workers?, supra* note 132, at 36.

[153] 8 U.S.C. § 1182(c)(12).

[154] APPROPRIATIONS FOR FISCAL YEAR 2008: HEARING BEFORE THE SUBCOMM. ON LABOR, HEALTH AND HUMAN SERVICES, EDUCATION, AND RELATED AGENCIES OF THE S. COMM. ON APPROPRIATIONS, 4 (2007) (statement of Elaine Cho, Secretary of Labor).

[155] 8 U.S.C. § 1356(v)(2)(C) (restricting the manner in which the State Department and DHS use their shares of fraud prevention fees).

[156] 20 C.F.R. § 655.810(e)(2) (2008).

[157] *See supra* notes 61–65 and accompanying text.

[158] 20 C.F.R. § 655.810(e)(2).

equitable remedies" may be ordered.[159] Simple, unwilling failure to pay the required wage may result in back wages, but no fine or debarment.[160] In any case, fines may not exceed one thousand, five thousand, or thirty-five thousand dollars per violation; debarment periods are from one, two, or three or more years per violation; and "other administrative remedies" range from reinstatement, back wages, and "other appropriate legal or equitable remedies."[161] All remedies are administered by WHD.[162]

In general, a complaint is lodged with WHD by an "aggrieved party"—"a person or entity whose operations or interests are adversely affected by the employer's alleged noncompliance with the [LCA]" and includes H-1B workers, bargaining representatives, adversely affected competitors, and government agencies.[163] However, "non-aggrieved" parties may also file complaints for the *willful* violation of provisions described in 20 C.F.R. § 655.805(a).[164]

An aggrieved party must exhaust all administrative remedies before it may be heard by a federal court.[165] After a complaint is filed and WHD makes a determination, either party may seek review by an Administrative Judge.[166] From there, appeal may be taken to DOL's Administrative Review Board.[167] Thereafter, judicial review may be sought in the federal courts.[168]

Finally, whistleblower protections are in place to protect U.S. and foreign workers against retaliation by H-1B employers. An employer is prohibited from discriminating, in any way, against an employee—past, present, or future—who complains to his employer, or who "cooperates or seeks to cooperate in an investigation."[169] Further, the DOL Secretary and Attorney General may devise a way for an H-1B whistleblower complaining of employer retaliation to remain in the United States and "to seek other appropriate employment" until his visa expires.[170]

2. For Violation of Other Laws

Other possible options for foreign workers to pursue, whether H-1B or not, are claims arising under the Fair Labor Standards Act, claims for

[159] 20 C.F.R. § 655.810.

[160] *Id.*

[161] 20 C.F.R. § 655.810(e)(2).

[162] 20 C.F.R. § 655.710(a) (2008).

[163] *See* 20 C.F.R. § 655.715 (2008). Note that Labor and Homeland Security are not "aggrieved parties" under the regulation.

[164] 20 C.F.R. § 655.807(a)(2) (listing the applicable provisions as *id.* § 655.805(a)(1)–(4), (7)–(9)).

[165] Shah v. Wilco Sys., Inc., 126 F. Supp. 2d 641, 647–48 (S.D.N.Y. 2000).

[166] 20 C.F.R. § 655.820.

[167] 20 C.F.R. §§ 655.845.

[168] 20 C.F.R. §§ 655.850.

[169] Immigration and Naturalization Act § 212(n)(2)(C)(iv), 8 U.S.C. § 1182(n)(2)(C)(iv) (2006).

[170] 8 U.S.C. § 1182(n)(2)(C)(iv).

disparate treatment, or state tort claims.[171] Fifty-two skilled Indian workers, whom an Equal Employment Opportunity Commission expert witness characterized as "trauma victims,"[172] successfully recovered under all three in a case called *Chellen v. John Pickle Co., Inc. (Chellen II)*.[173] Plaintiffs recovered compensatory and punitive damages for mental and emotional distress under 42 U.S.C. §§ 1981 and 2000e-2(a)(1) (Title VII of the Civil Rights Act of 1964), arising from discriminatory treatment.[174] Under the Fair Labor Standards Act, they were entitled to recover back wages for work performed, and "liquidated damages equal to the full amount of back pay."[175] Actions for deceit and false imprisonment under state tort laws were also decided in plaintiff's favor.[176]

III. CRITIQUE OF THE H-1B REGULATORY SCHEME

A. The Need For H-1B Visas Is Disputed

On one side of the H-1B debate are the IT industry and lobbyists who claim the artificially low cap on H-1B visas exacerbates an already critical shortage of skilled workers.[177] Proponents assert that foreign workers decelerate offshoring by meeting the demands of U.S. companies for skilled workers whom they cannot find in the United States.[178] They conclude that failure to raise the H-1B cap will leave employers with no choice but to relocate operations abroad.[179] Indeed, Microsoft's alleged inability to bring foreign talent into the United States informed its decision to open the Microsoft Canada Development Centre (MCDC) just outside of Vancouver, British Columbia, in 2007. In not so subtle language, MCDC's employment webpage claims the Centre will

[171] Chellen v. John Pickle Co., Inc., 446 F. Supp. 2d 1247, 1276, 1284, 1290 (N.D. Okla. 2006).

[172] *Id.* at 1268. "Trauma victims" was an apt term due to the mistreatment plaintiffs experienced on the job, including false imprisonment, substandard living conditions, and threats. See *infra* Part III.D. for a discussion of *Chellen* as it relates to job shops.

[173] *Chellen*, 446 F. Supp. 2d at 1247. The *Chellen* plaintiffs were job shop workers under inappropriately obtained B-1 status. For litigation purposes, they were treated as undocumented workers.

[174] *Id.* at 1269–70, 1281–82.

[175] *Id.* at 1278–80.

[176] *Id.* at 1273–74.

[177] *Strengthening American Competitiveness*, *supra* note 5, at 9.

[178] Halliday, *supra* note 33, at 426.

[179] Suzette Brooks Masters & Ted Ruthizer, *The H-1B Straitjacket: Why Congress Should Repeal the Cap on Foreign-Born Highly Skilled Workers* (Ctr. For Trade Policy Studies at the Cato Inst., Trade Briefing Paper no. 7) Mar. 3, 2000 at 1, *available at*, http://www.freetrade.org/pubs/briefs/tbp-007.pdf.

"allow the company to continue to recruit and retain highly-skilled people affected by the immigration issues in the U.S."[180]

Those who argue the H-1B program accelerates offshoring point to the fact that India-based outsourcing firms are issued a disproportionate share of this highly coveted visa.[181] In 2006, nine of these firms collectively received 19,512 of the 65,000 visas allocated.[182] Critics allege these foreign workers come to learn the skills of their U.S. counterparts and position their offshore employer to do their clients' operations abroad for a fraction of the cost.[183]

H-1B proponents also assert that foreign employees actually create new jobs for Americans.[184] Editorials in the Wall Street Journal[185] and The Economist[186] have endorsed findings by the National Foundation for American Policy that for every H-1B certification requested, U.S. technology companies in the S&P 500 create five new jobs.[187] Another study by the National Foundation for American Policy (NFAP) reports there are 140,000 skilled job openings in the S&P 500 which require a bachelor's degree or higher.[188] It found that technology companies in the S&P have a disproportionately high number of openings, with an average of 470 each.[189] These findings were endorsed by the Wall Street Journal as well.[190]

The Center for Immigration Studies (CIS) issued a report just three months later refuting NFAP's job creation claim.[191] It stressed that if the 5-to-1 claim was correct, at least 500,000 new jobs would have been

[180] Microsoft.com, Microsoft Canada Career Centre, http://www.microsoft.com/canada/employment/default.mspx (last visted August 5, 2009).

[181] *See* Hira, *supra* note 27, at 5.

[182] *See* McGee, *supra* note 32.

[183] *See* Hira, *supra* note 27, at 5–6.

[184] *H-1B Visas and Job Creation* NFAP POLICY BRIEF (Nat'l Found. for Am. Pol'y, Arlington, Va.) Mar. 2008, at 1, *available at* http://www.nfap.com/pdf/080311h1b.pdf [hereinafter *H-1B Visas and Job Creation*]. Stuart Anderson, now Executive Director of NFAP, is a well-known H-1B proponent.

[185] Editorial, *More Visas, More Jobs*, THE WALL ST. J., Mar. 19, 2008, at A16 [hereinafter *More Visas, More Jobs*].

[186] *Lexington: Help Not Wanted*, THE ECONOMIST, Apr. 12, 2008, at 38.

[187] *See H-1B Visas and Job Creation*, s*upra* note 184, at 1. The report suggests the new jobs are comparable to the ones filled by H-1B employees. "There are empirical reasons to believe these findings demonstrate new opportunities being created for U.S. workers by the availability of foreign high-skilled labor, *rather than a substitution.*" *Id.* (emphasis added).

[188] *Talent Search: Job Openings and the Need for Skilled Labor in the U.S. Economy* NFAP POLICY BRIEF (Nat'l Found. for Am. Pol'y, Arlington, Va.) March 2008, at 3, *available at* http://www.nfap.com/pdf/080311talentsrc.pdf.

[189] *Id.*

[190] *See More Visas, More Jobs*, supra note 185.

[191] John Miano, *H-1B Visa Numbers: No Relationship to Economic Need* BACKGROUNDER (Ctr. For Immigration Studies, Washington, D.C.) June 2008, at 3–4, *available at* http://www.cis.org/articles/2008/back708.pdf.

created in 2005 alone, based on the 116,927 new H-1B visas that were issued that fiscal year.[192] Such explosive growth in new jobs has not materialized.[193] Given that approximately forty percent of new H-1B visas granted annually go to computer workers, the NFAP data would suggest the creation of at least 200,000 new computer-related positions every year.[194] CIS, citing figures from the Bureau of Labor Statistics, argues that number is around sixty-three thousand.[195]

Moreover, critics of the program, many of whom are highly skilled but unemployed U.S. workers, argue that if a labor shortage really existed, IT salaries would be on the rise.[196] Disagreement also persists whether H-1B workers are truly the "best and brightest"[197] workers without whom our technological edge will erode, or whether they are simply "ordinary people doing ordinary work" for cheap.[198]

Norman Matloff, a well-known and long time critic of the program, claimed in 2003 there is not a single study confirming a worker shortage that was not funded by the IT industry.[199] The *Help Wanted* Reports were a prime example.[200] To support their worker shortage claim, they pointed to three main findings—a staggering number of IT job vacancies, low unemployment, and rising wages in the IT sector.[201] A number of methodological flaws were revealed, and none of the findings were replicated by non-industry studies. The results of the industry-funded studies were questionable.

The *Help Wanted* studies surveyed a random sample of small, medium, and large-size IT companies—271 companies responded to the 1997 survey,[202] 532 responded in 1998.[203] Each survey asked "How many vacancies does your company have for employees skilled in information technology?"[204] ITAA reported 191,000 vacancies based on its 1997 responses[205] and 346,000 vacancies based on its 1998 responses.[206] The 1998 figures reflect a staggering ten percent vacancy rate. However, a

---

[192] *Id.*

[193] *Id.*

[194] CHARACTERISTICS OF SPECIALTY OCCUPATIONS, *supra* note 79, at 13.

[195] *See* Miano, *supra* note 191, at 3.

[196] *See* Alice LaPlante, *To H-1B Or Not To H-1B?*, INFORMATIONWEEK, July 14, 2007, http://www.informationweek.com/shared/printableArticle.jhtml?articleID=201000479.

[197] *See* Miano, *supra* note 30, at 1, 4.

[198] Matloff, *supra* note 2, at 7.

[199] Matloff, *supra* note 36, at 834.

[200] *See* HELP WANTED: 1997 *and* HELP WANTED: 1998, *supra* note 68.

[201] *See generally,* HELP WANTED: 1997, *supra* note 68.

[202] HELP WANTED: 1997, *supra* note 68, at 55.

[203] HELP WANTED: 1998, *supra* note 68, at 4.

[204] HELP WANTED: 1997, *supra* note 68, at 15.

[205] HELP WANTED: 1997, *supra* note 68, at 14 tbl.2.

[206] HELP WANTED: 1998, *supra* note 68, at 4.

GAO report cited the fact that the surveys counted a position as "open" when the work was actually performed by outside consultants.[207] The fact that computer programmers commonly work as consultants undermines the accuracy of the finding.[208] Further, the survey's director noted that "even if 346,000 qualified applicants . . . appeared today, in all probability immediate positions would not be available—to translate this number to an absolute would be misleading."[209] As it turns out, companies post vacancy ads even when there is no position to be filled.[210]

More criticism followed. "[The ITAA] survey response rate of 14 percent is inadequate to form a basis for a nationwide estimate of unfilled [IT] jobs.[211] . . . [In] order to make sound generalizations, the effective response rate should usually be at least 75 percent."[212] Further undermining ITAA's claim was the fact that employers who responded did not specify whether the vacancies existed because the wages offered were not enough to attract qualified applicants.[213] Peter Cappelli, author of a University of Pennsylvania study in 2000 on the disputed IT labor shortage, summed up the irreconcilable views of IT employers claiming a shortage and others calling into question the existence of one for employers.[214] This key point is cited by critics like Matloff who claim there is a shortage of cheap labor.

The IT industry also says that low unemployment among IT workers is indicative of a worker shortage. However, there is more actual unemployment among IT workers than is apparent:

> A major drawback in using . . . unemployment rates in analyses of shortages is that the unemployment rate is calculated based on a person's last job, rather than the longest job held or occupation in which he or she trained and is actually looking for work. This means an individual with experience as a computer programmer who is seeking a programming job, but who last worked as a cashier, is classified as an unemployed cashier, not an unemployed programmer.[215]

---

[207] *See* WORKFORCE DEMAND AND SUPPLY, *supra* note 69, at 7.

[208] Matloff, *supra* note 36, at 834.

[209] HELP WANTED: 1998, *supra* note 68, at 12.

[210] Ads are sometimes used to give the impression that a company is up-and-coming or for other public relations ploys. They are also used to "generate resumes for unspecified future positions." Nora Isaacs, *Decoding the want ads*, INFOWORLD, Nov. 2, 1998, at 103.

[211] H.R. REP. NO. 105-657, at 16 (1998) (*citing* WORKFORCE DEMAND AND SUPPLY, *supra* note 69, at 5).

[212] *Id.* (*citing* WORKFORCE DEMAND AND SUPPLY, *supra* note 69, at 7).

[213] *Id.*

[214] PETER CAPPELLI, IS THERE A SHORTAGE OF INFORMATION TECHNOLOGY WORKERS?, (2000) (report to McKinsey and Co. for "War for Technical Talent" project) *available at* http://www.programmersguild.org/archives/lib/it1_cappelli_wharton.doc.

[215] Carolyn M. Veneri, *Can Occupational Labor Shortages be Identified Using Available Data?*, 122 MONTHLY LAB. REV. 15, Mar. 1999, at 15, 18.

"Or better yet," Matloff points out, "if the programmer is *currently* employed as a cashier, he/she is counted as an employed cashier rather than as an unemployed programmer."[216]

Finally, generally speaking, if a shortage truly existed, a rise in IT wages would reflect demand for skilled workers.[217] However, the rate at which IT wages were rising at the time mirrored the general increase in earnings of most professions. Yet, none of those professions claimed to have a shortage of workers.[218] More recently, studies have shown that wages for new computer science graduates were stagnant or falling between 2001 and 2005. According to a survey by the National Association of Colleges and Employers, the starting pay in 2001 was $52,473, and $53,051 in 2007[219]—this is a mere 1 percent increase during a period that saw 16 percent inflation.[220]

Despite the unreliable indicators of a worker shortage raised in the *Helped Wanted* studies, the American Competitiveness and Workforce Improvement Act of 1998 was passed.[221] Congress gave the IT industry "the benefit of the doubt" of a worker shortage and "accept[ed] claims . . . that it can only be alleviated through an increase of foreign workers through the H-1B program."[222] The American Competitiveness and Workforce Improvement Act of 1998 passed by a large margin despite the potential negative impacts of raising the H-1B cap and calls for longer term solutions like IT internships for high school and college students, modernizing the IT certification system, and company-sponsored training.[223] The final version contained enforcement provisions that appeared to protect American workers from layoff and unfair working conditions, but actually only applied to a very small percentage of employers. On the bright side, it provided for a five hundred dollars per petition fee to be used for educating and training

[216] Matloff, *supra* note 36, at 836 n.107.

[217] *High-Tech Worker Shortage and U.S. Immigration Policy: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 80 (1998) (statement of Robert I. Lerman, Economist, Urban Institute) [hereinafter *High-Tech Worker Shortage*].

[218] Matloff, *supra* note 36, at 855.

[219] Press Release, Nat'l Ass'n of Coll. & Employers, Class of 2001 Enjoyed Hefty Starting Salary Offers (Sept. 17, 2001), *available at* http://www.naceweb.org/press/display.asp?year=2007&prid=111; Press Release, Nat'l Ass'n of Coll. & Employers, Year-End Report Shows Salary Gains for Class of 2007 (Sept. 12, 2007), *available at* http://www.naceweb.org/press/display.asp?year=2007&prid=264.

[220] Matloff, *supra* note 2, at 5 n.5.

[221] American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-641 (1998).

[222] *See* H.R. REP. NO. 105-657, at 19 (1998).

[223] *High-Tech Worker Shortages*, *supra* note 217, at 85 ("Ironically, the policy of expanding immigrant visas for IT positions is potentially counter-productive because it can increase uncertainty and reduce the incentive to enter the field. Prospective US students may choose not to prepare for the IT field if they see that foreigners will gain easy access to visas simply by entering an IT occupation.").

Americans and eventually eliminating reliance on foreign skilled workers. The fee was expected to raise seventy-five million dollars a year.

The Twenty-First Century Act passed by an even larger margin, raising the H-1B cap to 195,000 in FY 2001; 195,000 in FY 2002; and 195,000 in FY 2003.[224] The cap was to revert to sixty-five thousand in FY 2004. The Twenty-First Centry Act Senate Report claimed "the error Congress made [in 1998] was in underestimating the workforce needs of the United States in the year 2000."[225] Remarkably, the Report did not acknowledge the weaknesses of the worker shortage claim like the American Competitiveness and Workforce Improvement Act of 1998 House Report had. Moreover, it touted the insufficient enforcement provisions enacted by the American Competitiveness and Workforce Improvement Act of 1998 which applied only to H-1B dependent employers. In response to H-1B critics, the Senate Report highlighted some of the main reasons the Twenty-First Century Act was enacted: the hiring of foreign skilled workers creates new jobs for Americans, failure to raise the cap would accelerate offshoring, and low unemployment rates controvert critics' claims that job prospects for Americans were harmed by H-1Bs in any way.[226]

Buried within the Senate Report is section XIII, which airs out some of the reservations held by members who voted in favor of the Twenty-First Century Act. Herein lies a considerable concern that should have undermined the claimed shortage and passage of the Twenty-First Century Act:

> Although many new jobs are created in the IT industry each year, we also know that thousands of IT workers were laid off in 1999. For example 5,180 workers lost their jobs at Electronic Data Systems, 2,150 at Compaq, and 3,000 at NEC-Packard Bell. . . . According to a February 8, 1999, article in "Computerworld" magazine, U.S. Census Bureau data show that the unemployment rate for IT workers over age 40 is more than five times that of other unemployed workers. . . .
>
> As we address the needs of the IT industry, we must strive to first place those laid off workers in new jobs and to enforce our labor and employment laws so that the current IT workforce gets the pay, benefits, and working conditions to which they are entitled.[227]

Within the IT industry in particular, replacement of American workers with H-1B labor might be less objectionable if all H-1B workers had unique or better skills. According to Norman Matloff, however, this appears not to be the case. Matloff, Professor of Computer Science at the

---

[224] *See* American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 102(a)(2), 114 Stat. 1251 (2000) (codified as amended in scattered sections of 8 U.S.C.).

[225] S. REP. NO. 106-260, at 2 (2000).

[226] *Id.* at 11–12.

[227] *Id.* at 33.

University of California, Davis, says what matters most is general programming talent, not knowledge of particular programming languages.[228] Bill Gates agrees—"We're not looking for any specific knowledge because things change so fast, and it's easy to learn stuff. You've got to have an excitement about software, a certain intelligence . . . . It's not like the specific knowledge that counts . . . ."[229] Matloff would claim that IT workers over age forty are laid off more often than their younger counterparts because there are more savings to be had by replacing older, higher paid American workers, not because they lack proficiency in newer programming languages.[230]

The fact that the IT industry is claiming a shortage at the same time when thousands of IT workers continue to be laid off and displaced by H-1B workers should raise a red flag and, at the very least, force Congress to question the propriety of permitting more foreign workers to enter the U.S. job market.[231]

B. Prevailing Wages Are Prone to Manipulation

The H-1B program has been criticized for bringing "cheap labor" to the United States. A 2005 study showed that H-1B computer programmers, on average, earned approximately thirteen thousand dollars less than their American counterparts in the same occupation and state.[232] This figure, if true, points to a wide disparity in wages between American and H-1B workers, one that undermines the intended policy behind the prevailing wage requirement. Why would an employer keep an American computer programmer on the job if an H-1B holder is

[228] Matloff, *supra* note 36, at 851. Matloff is in favor of importing "the best and the brightest" workers to the U.S., but says H-1B visas should be reserved for the small percentage of H-1B workers in IT that have "*extraordinary* talent." *Id.* at 861 (emphasis added).

[229] Hal Lancaster, *Managing Your Career*, WALL ST. J., Nov. 8, 1994, at B1, *quoted in* Matloff, *supra* note 36, at 852 n.157.

[230] *See* Matloff, *supra* note 36, at 887.

[231] One should bear in mind that the provision for non-displacement of American workers applies *only* to employers deemed "H-1B dependent" or "willful violator." These constitute only a small percentage of employers.

[232] *See* Miano, *supra* note 30. To arrive at this figure, the study collected publicly available data from DOL's OFLC. The OFLC discloses the wage rates and prevailing wages contained on all electronic LCAs submitted by employers at http://flcdatacenter.com. Data from rejected LCAs was deleted. It then compiled wage rates on LCAs containing job titles with Occupational Employment Statistics (OES) equivalents for computer-related occupations. Admittedly, there was some difficulty interpreting inconsistent job titles and matching them with OES codes. However, when a job title could be categorized under one of two codes, a conservative approach was taken by matching the job title with the code that produced the smallest wage differential. Finally, the mean H-1B wage rate ($52,312) was compared to the mean OES wage rate ($65,003), revealing a $12,691 difference. The other caveat to this figure is that due to availability of information, it is based on LCAs, not on the actual H-1B visas issued by DHS.

willing to do it for thirteen thousand dollars less?[233] A 2003 GAO report, referring to employers it had surveyed, stated "[they said] they hired H-1B workers in part because these workers would often accept lower salaries than similarly qualified U.S. workers; however, these employers said they never paid H-1B workers less than the required wage."[234] This statement is revealing because it suggests that the employers paid H-1B workers below-market wages but still paid the legally required wage.[235]

The manner in which these cost savings are obtained is noteworthy. By lowering the educational and experience requirements of a job to a bare minimum, employers can save ten to fifteen thousand dollars on the market price of an H-1B worker.[236] Matloff argues this is possible because "[u]nder the law, prevailing wage is determined by the JOB, not by the WORKER."[237] That is to say, the education and experience requirements of a job, regardless of the amount of education and prior experience of the worker, determines the lawful prevailing wage. Guidelines issued by ETA seem to confirm Matloff's observation.[238] They stated:

> [A prevailing wage determination is made by] selecting one of the four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements: tasks, knowledge, skills, and specific vocational preparation . . . generally required for acceptable performance in that occupation.[239]
>
> . . . .
>
> Employer requirements in a job offer that are at the upper range of the requirements and preparation generally required for

[233] One might inquire about the actual wage paid to other workers with similar experience and qualifications, since the required wage is the higher of the actual or prevailing wage. While there is not much discussion about this in the literature, it appears that calculation of actual wage is fairly manipulable. An employer can argue the H-1B worker's foreign experience is not comparable to the U.S. experience of her American counterparts, or that comparable employees include entry level employees. Further, in a situation where the employer's entire workforce is H-1B workers, or the employer hires a single worker for the position, there will be no similar U.S. workers on which an actual wage determination can be based. *See* FRAGOMEN ET AL., *supra* note 48, at § 6:29, at ¶ 4.

[234] *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 150, at 4.

[235] Matloff, *supra* note 2, at 14.

[236] *Id.* at 15. This manner of cost savings is also discussed in the Cohen & Grigsby YouTube clip. YouTube: PERM Fake Job Ads defraud Americans to secure green cards (programmersguild 2007), http://www.youtube.com/watch?v=TCbFEgFajGU (video of Cohen & Grigsby Seventh Annual Immigration Law Update, held on May 15 2007).

[237] Matloff, *supra* note 2, at 15.

[238] EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, PREVAILING WAGE DETERMINATION POLICY GUIDANCE 6 (2005), *available at* http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

[239] *Id.* at 6.

> performance in an occupation are indicators that a prevailing wage determination at a higher level should be considered.[240]

According to DOL guidelines, a prevailing wage calculation takes into account only the employer's job requirements and general occupational requirements as determined by the DOL's Occupational Information Network (O*NET), not an applicant's qualifications.[241] Such indifference to the credentials of the worker allows an employer, for example, to pay an H-1B worker with a master's degree a bachelor's degree salary, in compliance with the law.[242] In the case of an employer petitioning for an H-1B computer programmer, the employer would simply state that the position to be filled does not require a level of education higher than that generally required for computer programming positions, i.e., an O*NET Education & Training Category Code 5, or bachelor's degree. While DOL may assess penalties if it finds the employer's minimum requirements to be "unrealistic or inappropriate," such minimization on paper remains a loophole that results in the underpayment of H-1B workers.[243] Closing this so called loophole, perhaps by linking the prevailing wage with a worker's credentials, rather than an employer's manipulable job requirements, would help to alleviate the "cheap labor" criticisms of the H-1B visa.

Besides the claim that the H-1B program provides "cheap labor" is the criticism that most "H-1Bs are ordinary people, doing ordinary work."[244] Clearly, the "highly specialized knowledge" standard imposed by H-1B law does not seem to encompass "ordinary work." An analysis of the DOL's four-tier method[245] for assessing level of skill is illustrative in that employers rated fifty-six percent of their H-1B workers at Level I (entry level).[246] Employees rated at Level I are "beginning level employees who have only a basic understanding of the occupation [and who] perform routine tasks that require limited, if any, exercise of judgment."[247] Thirty-one percent were rated at Level II (qualified),[248] which applies to "qualified employees who have attained, either through education or

---

[240] *Id.* at 8.

[241] "O*NET" is the trademark name for DOL's Occupational Information Network. It is a reference for occupational information regarding the labor certification process. *See id.* at 3.

[242] This example is borrowed from Matloff, *supra* note 2, at 15.

[243] *See* FRAGOMEN ET AL., *supra* note 48, at § 6:30.

[244] Matloff, *supra* note 2, at 7.

[245] The four-tier method was enacted by Congress in 2004. Previously, only two tiers were available to rate workers' skills. 8 U.S.C. § 1182(p)(4) (2006); 20 C.F.R. § 656.40 (2008) (implementing the new four-tier method).

[246] John Miano, *Low Salaries for Low Skills: Wages and Skill Levels for H-1B Computer Workers* BACKGROUNDER (Ctr. for Immigration Studies, Washington, D.C.) Apr. 2007, at 7, *available at* http://www.cis.org/articles/2007/back407.pdf.

[247] *See* EMPLOYMENT & TRAINING ADMIN., *supra* note 238, at 7.

[248] Miano, *supra* note 246, at 5, 7.

experience, a good understanding of the occupation."[249] Two conclusions can be drawn from the rating of most H-1B workers at Levels I and II: either they really are "ordinary people, doing ordinary work," or employers are misrepresenting a worker's skill level in order to obtain a lower prevailing wage.

Only eight percent were classified at Level III (experienced), and five percent at Level IV (fully competent).[250] Level III applies to "experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, *special skills or knowledge*."[251] Given the similarity of the wording of Level III skill and the "highly specialized knowledge" standard imposed by H-1B law, it seems odd that only thirteen percent of H-1B workers are classified at Level III or higher. If a worker meets both prongs of the legal standard, i.e., she has the required specialized degree *and* is able *to apply* that body of highly specialized knowledge, the language in DOL's prevailing wage determination guideline suggests she should be classified above Level II.

C. Job Shops Open the Door to Outsourcing and Exploitation

Another weakness of the H-1B program is that it can be manipulated to allow foreign companies to strengthen their overseas position and hurt American workers in the process. According to a 2006 list, five of the top ten companies receiving the most H-1B visas were Indian job shops, or outsourcers.[252] Nearly one-third, or 19,512 of the 65,000 visas allotted for nonexempt H-1Bs, were granted to nine Indian outsourcers.[253] India's Commerce Minister Kamal Nath has dubbed H-1B "the outsourcing visa" because it allows outsourcers to "gain expertise and win contracts from Western companies to transfer critical operations to places like Bangalore."[254] "'To deliver the solutions from a remote environment . . . you need a certain number of people being with a customer, understanding his needs and collecting the requirements,'" says the chairman of Satyam Computer Services, number five on the list of top visa recipients.[255]

The primary benefit to an offshore outsourcer using the H-1B visa is knowledge transfer.[256] Foreign workers spend time with their U.S. clients,

---

[249] EMPLOYMENT & TRAINING ADMIN., *supra* note 238, at 7.

[250] Miano, *supra* note 246, at 5, 7.

[251] *See* EMPLOYMENT & TRAINING ADMIN., *supra* note 238, at 7 (emphasis added).

[252] *See* McGee, *supra* note 32. "Outsourcing" in this context involves moving work from the U.S. abroad where it can be performed at a lower cost. *See* Hira, *supra* note 27, at 5.

[253] McGee, *supra* note 32.

[254] *See* Giridharadas, *supra* note 8.

[255] *Id.*

[256] Hira, *supra* note 27, at 5–6. Much of the job shop discussion applies equally to L-1 visas.

observing and learning their operations, before taking their newly acquired knowledge back to their home country where the same work can be done more efficiently and at a fraction of the cost. Not uncommonly, American workers are forced to cooperate and train their H-1B replacements as a condition of receiving a severance package. "A bodyshop allows the employer to say it never hired any H-1B workers, and the bodyshop can in turn say it never fired any Americans."[257]

H-1B workers can displace American workers in two different ways: primary and secondary displacement. Primary or "direct" displacement happens when an H-1B employer "lays off" a U.S. worker, employed by the same employer, in a position essentially equivalent to the foreign worker's job.[258] Secondary displacement occurs when the placement of an H-1B worker at a client's workplace displaces a U.S. worker employed by the client.[259] Provisions against both types of non-displacement apply only to "H-1B dependent" and "willful violator" employers—therefore, they apply only to a small minority of H-1B employers. However, many offshore outsourcing companies would fall into the "H-1B dependent" category because over fifteen percent of their workforce is presumably in H-1B status.[260]

In theory, the provision against secondary displacement of U.S. workers is especially important because it protects those U.S. workers at the job shop's client company from displacement by H-1B workers doing essentially equivalent work there.[261] An H-1B employer must make reasonable efforts to find out if the secondary employer has displaced, or intends to displace, a similarly employed U.S. worker during the ninety-day period before and after placement.[262] If such efforts are not made, the H-1B employer, not the secondary employer, is liable in an enforcement action.[263] However, the protection applies only if the H-1B worker performs duties at the secondary employer's worksite, and if there are indicia of an employment relationship between the two.[264]

"H-1B dependent" employers, which job shops presumably are,[265] have an additional obligation to recruit U.S. workers in good faith.[266] "[G]ood faith steps" must be taken "so as to offer fair opportunities for employment to U.S. workers, without skewing the recruitment process

---

[257] *See* Goodsell, *supra* note 31, at 168.

[258] 20 C.F.R. § 655.738(c) (2008). "Lay off" includes a U.S. worker's voluntary retirement or "constructive discharge." *Id.* at § 655.738(b)(1). This situation would seem to include an employer subject to the non-displacement requirement who conditions a severance package on the training of the H-1B replacement.

[259] *Id.* at § 655.738(d).

[260] Hira, *supra* note 27, at 4–5.

[261] 20 C.F.R. § 655.738(d)(1).

[262] *Id.* at § 655.738(d)(5).

[263] *Id.* at § 655.738(d)(3).

[264] *Id.* at § 655.738(d)(2).

[265] Hira, *supra* note 27, at 5.

[266] 20 C.F.R. § 655.739 (2008).

against U.S. workers or in favor of H-1B nonimmigrants."[267] Failure to select a U.S. worker "who applies and is equally or better qualified for the job than the H-1B nonimmigrant" is enforced by the DOJ's OSC.[268]

Enforcement of the non-displacement and good faith recruitment provisions against job shops seems illusory. As they continue to garner a lion's share of a limited number of H-1B visas, it is apparent that no enforcement actions have targeted them for violation of the non-displacement provisions.[269] This is despite the fact that several outsourcing firms fit the "H-1B dependent" description, yet operate in such a way that causes secondary displacement.[270]

D. Job Shop and Other H-1B Employees Are Vulnerable to Abuse

The relatively powerless position that many foreign workers occupy leads some job shop employers to impose oppressive conditions, sometimes even before the worker leaves her country. These conditions range from exorbitant "finder's fees" and restrictive covenants not to compete, to *de facto* indentured servitude, and in some cases psychological mistreatment.

There are documented cases of job shops that require substantial deposit money to be paid upfront to protect against breach of the employment agreement between the job shop and foreign worker, typically for the foreign worker's early withdrawal from the job.[271] H-1B regulations clearly state "The employer is permitted to receive *bona fide* liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to an agreed date."[272] In the event of breach, which may be determined by the job shop rather than a third-party arbitrator, the entire sum may be forfeited. In the alternative, the job shop might require a close family relative to serve as surety, so that the relative is held jointly and severally liable to pay an agreed amount if the worker fails or neglects to comply with the terms and conditions of the agreement.[273] Sometimes it is a nonrefundable fee so large that

[267] *Id.* at § 655.739(h).

[268] *Id.* at § 655.739(j).

[269] If enforcement action had been taken, mandatory debarment of at least one year would be imposed. 20 C.F.R. § 655.810(b), (d) (2008). A debarred job shop would be noticeably absent from any list of top users of H-1B visas.

[270] Hira, *supra* note 27, at 5.

[271] *See, e.g.*, Vedachalam v. Tata Am. Int'l Corp., 477 F. Supp. 2d 1080, 1082–83 (N.D. Cal. 2007). The issue here was the validity of an arbitration clause contained in the agreement.

[272] 20 C.F.R. § 655.731(c)(10)(i)(B) (2008). As long as the liquidated damages amount is a "reasonable approximation" of anticipated or actual damage caused by breach, payment will not be viewed as a penalty, which *is* prohibited by § 655.731(c)(10)(i)(A). *See id.* § 655.731(c)(10)(i)(C).

[273] *Vedachalam,* 477 F. Supp. 2d at 1082.

money is loaned from family and friends.[274] One job shop required payment of a twenty-five thousand dollar "finder's fee."[275]

A powerful force behind at least some employers' preference for H-1B workers is their exploitability for compliant labor.[276] "*De facto* indentured servitude" is a generic term that describes a foreign worker's total reliance on his employer for continued legal immigration status, or green card sponsorship that so many desire.[277] To an H-1B worker, termination of employment means loss of H-1B status.[278] Employers are aware of the difficulty of leaving, and may benefit from it. The portability provisions of INA[279] addressed concerns about the power employers wield "as a result of [their] control over the employee's legal status."[280] H-1B portability allows workers to change employers as soon as a new, non-frivolous H-1B petition is filed by the prospective employer, without waiting for approval of the new petition.[281] This provides a flexible means for escaping exploitative employer conduct. However, there are limitations to the relief portability provides. For example, non-compete agreements and restrictive covenants, common in the computer industry, may limit a worker's ability to "port" to a new employer if they forbid him from working in a similar position with a different employer.[282]

Finally, psychological mistreatment of foreign workers can occur in the worst cases, as illustrated by *Chellen v. John Pickle Co. Inc. (Chellen II)*. In 2001, fifty-two men were lured by the promise of permanent welding jobs and good pay at the John Pickle Company (JPC) in Tulsa, Oklahoma. However, their excitement quickly wore off as they confronted restrictions on "movement, communications, privacy, worship, and access to health care."[283] Upon arrival, their passports, visas, return airlines tickets, and I-94 Forms were confiscated and were not returned when

[274] *See, e.g.,* Chellen v. John Pickle Co., Inc., 344 F. Supp. 2d 1278, 1280–81 (N.D. Okla. 2004).

[275] Rachel Konrad, '*Body Shop' Must Pay Fees in H-1B Lawsuit*, CNET NEWS, Apr. 25, 2001, *available at* http://news.cnet.com/2100-1017-256477.html.

[276] Matloff, *supra* note 36, at 868–69.

[277] *Id.* at 864–86.

[278] *INS Discusses Status of H-1B and L-1 Nonimmigrants Who are Terminated*, 76 INTERPRETER RELEASES 378 (1999); *INS Repudiates "Let Things Slide" Language, Confirms that H-1B Status Ends Upon Termination of Employment*, 78 INTERPRETER RELEASES 608, 609 (2001).

[279] Immigration and Naturalization Act § 214(n), 8 U.S.C. § 1184(n) (2006).

[280] S. REP. NO. 106-260, at 22–23 (2000).

[281] If the petition is ultimately denied, H-1B work authorization ceases at that time. 8 U.S.C. § 1184(n).

[282] Asonye & Associates, Attorneys at Law, Non-Compete Agreements/Restrictive Covenants for H-1B Visa Holders, and Other Alien Workers, http://www.chicagoimmigrationattorney.net/index.php?option=com_content&task=view&id=488&Itemid=599 .

[283] Chellen v. John Pickle Co., Inc., 446 F. Supp. 2d 1247, 1260 (N.D. Okla. 2006).

requested.[284] JPC did not allow them to leave the JPC premises without permission, threatening arrest and detention by the police, or harm "by Americans who were angry about the September 11, 2001 terrorist attacks. . . ."[285] After some of the *Chellen II* plaintiffs defied these orders, JPC hired an armed guard to stop "unauthorized departures," the main gate to the JPC was locked over the Thanksgiving holiday, and the dormitory doors were chained shut at night.[286] Further, plaintiffs' email and telephone exchanges were monitored and recorded.[287] JPC also limited plaintiffs' ability to practice their Hindu, Christian, and Muslim faiths off-site. The Hindu plaintiffs, for example, made do with a small shrine inside a makeshift cabinet and worshipped there.[288] Regarding health care, several requests were refused and dismissed as "minor matters or hypochondria."[289]

Further, the *Chellen (II)* plaintiffs suffered from substandard living conditions and a hostile work environment. They described their dormitory as a "refugee camp" or housing for people displaced "after a disaster."[290] Food was inadequate—JPC ordered an amount enough for only 25–30 workers, roughly half the number it actually fed. The plaintiffs experienced "abusive language, demeaning job assignments, and threats and intimidation based on their national origin."[291] Especially alarming was an incident where a JPC manager called their job shop employer in India, who said that JPC managers should "beat [them] and 'break their damn legs.'"[292] The plaintiffs feared retaliation by their job shop employer on themselves and their families, such as smearing of their names and preventing them from gaining employment, hence, rendering them unable to pay back debts they incurred for their "finder's fees."[293]

IV. PROPOSALS FOR IMPROVING THE H-1B PROGRAM

A few relatively small changes to H-1B law could have a significant, positive impact on U.S. and foreign workers. The following proposals would help restore the H-1B visa to its original intent of allowing only those with exceptional talent or unique knowledge and skills to relocate to the United States. However, resistance can be anticipated from

[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.* at 1261.
[288] *Id.* at 1262.
[289] *Id.* at 1263.
[290] *Id.*
[291] *Id.* at 1264.
[292] *Id.* at 1265.
[293] *Id.*

industry and employers who have become accustomed to the savings and forced loyalty that have benefitted them.

A. Make the Prevailing Wage Less Prone to Manipulation in Employer's Favor

Currently, prevailing wage is determined by the job, not by the worker. DOL's own guidelines say that only the employer's job requirements and general occupational requirements need be considered, not the applicant's qualifications. This ability to disregard an applicant's education and experience, without violating H-1B laws, is an open door to manipulation. It is no wonder that eighty-seven percent of H-1B workers are paid DOL's Level I and Level II wages.[294] Employers are able to "rework the requirements" of the job and state them at a bare minimum. The fact that H-1B workers are touted as the "best and brightest," and must have "specialized knowledge" should automatically catapult them into Level III and Level IV wage classifications. Requiring employers to take an applicant's qualifications into account when determining her salary would result in paying her what she is worth.

Admittedly, a system that uses a foreign worker's qualifications to determine prevailing wage, rather than the requirements of the job and general occupation, could raise its own unique challenges. Such a system may be prone to the manipulability associated with the actual wage requirement mentioned earlier.[295] The task of converting a foreign worker's credentials acquired abroad into comparable U.S. equivalents could prove to be a laborious task. Further, there would be nothing to prevent an unscrupulous employer from trying to downplay the worker's credentials, the same way it might try to rework the requirements of a job to a bare minimum under the current scheme. However, a framework could be created wherein disputes between the employer and foreign worker regarding the worker's credentials and corresponding wage would generally be resolved in the worker's favor, since employers seeking exceptional talent should be willing to pay the higher wage.

Such a framework would also have the potential to prevent H-1B workers from taking low-paying jobs they are overqualified for. If the H-1B program attracts workers to jobs that require exceptional talent, over-qualification should only rarely occur. When it does, the worker should be able to command a level of pay that corresponds with her credentials. Such a measure would help ensure that the foreign worker is desired for her exceptional skills or unique talents, not for her captive loyalty and ability to save the employer money.

Perhaps with these concerns in mind, the H-1B and L-1 Visa Reform Act of 2009[296] provides that the required wage is the highest of the

---

[294] *See* notes 40–45 and accompanying text.

[295] *See* FRAGOMEN ET AL., *supra* note 48, at § 6:30.

[296] S. 887, 111th Congress (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s111-887.

prevailing wage, actual wage, or OES Level II wage. If passed, this legislation would prohibit employers from paying foreign workers the Level I-Entry Level wage on the OES four-tier scale. This measure gives employers less incentive to use the visa as a cost saving device, as Level II wages are notably higher.

B. Subject All H-1B Employers to the Non-displacement and Good Faith Recruitment Provisions Currently Imposed on "H-1B Dependent" and "Willful Violator" Employers

The manipulability of prevailing wages provides employers a way to pay foreign workers less than their U.S. counterparts. Without prohibitions in place to prevent employers from replacing American workers with cheaper ones, or from hiring cheaper workers over Americans, a profit-driven enterprise is left with an easy choice. By imposing non-displacement and good faith recruitment provisions on all H-1B employers, cost savings will cease to be the main draw of the H-1B visa program. A cheap labor program was not the goal of the program when it was conceived.

C. Give WHD Greater Power to Initiate Investigations

The current enforcement scheme prevents what are possibly the most important sources of information—employers themselves and Homeland Security—from serving as bases for investigation of out-of-compliance employers. In most cases, a violation must occur and workers potentially suffer before intervention is possible. A preventative, rather than reactive, system of using LCA and DHS-discovered information would reduce the amount of harm inflicted on workers, and also likely reduce litigation-related costs. WHD should have broad authority to use whatever information it has available to investigate unscrupulous employers.

Indeed, a new framework under which WHD had greater power to investigate would increase DOL's investigative workload and would require close cooperation between DOL and DHS. WHD would need to have access to more resources in order to investigate and bring charges against the large number employers who would be suspected of violation based on LCA and DHS-discovered information. According to a recent DHS study, employers violate H-1B law by committing fraud or technical violations twenty-one percent of the time.[297] Ideally, a broader grant of authority to detect violations would be coupled with giving DOL freer use of the money collected by anti-fraud fees.[298] Finally, concerns about any unwillingness between DOL and DHS to cooperate are alleviated by

[297] *See* DEP'T OF HOMELAND SEC., H-1B BENEFIT FRAUD & COMPLIANCE ASSESSMENT (2008), *available at* http://www.uscis.gov/files/nativedocuments/H-1B_BFCA_20sep08.pdf.

[298] *See supra* note 150–54 and accompanying text.

statements by both in favor of intervention by Congress to make changes to allow information sharing.[299]

D. Prohibit the Outsourcing of H-1B Workers

Congress should enact anti-outsourcing provisions applicable to the H-1B visa as it did for the L-1 pursuant to the L-1 Visa (Intracompany Transferee) Reform Act of 2004.[300] These provisions provide that an L-1 holder loses status if her placement offsite is "essentially an arrangement to provide labor for hire" for an unaffiliated, i.e. nonpetitioning, employer.[301] Similar provisions for the H-1B visa would have at least two immediate effects. First, it would eliminate job shops by depriving them of their biggest, if not sole, source of revenue—their clients, who pay them for the services their workers render offsite. This would make thousands of H-1B visas available to employers who genuinely desire to bring the "best and brightest" to the United States, and foreign workers who want to make the United States their permanent home. Second, it would bring "knowledge transfer" to a halt. Foreign workers, now prohibited from placement offsite at a client's location, could no longer learn the client's requirements and position the job shop to do the work cheaper offshore. A third result is that the secondary displacement of American workers would cease. Foreign workers could no longer be contracted out to a job shop's clients, and therefore would no longer pose a threat of taking over the jobs performed by the clients' U.S. workers.

A prohibition on the outsourcing of H-1B workers could spell financial loss for U.S. companies who rely on job shops to provide them with vital services at a lower cost. Such companies could no longer hire the services of job shop workers even if they intended only to supplement, not replace, their existing U.S. workforce. However, a prohibition takes away companies' ability to cut costs and maximize profit at the expense of U.S. jobs.

V. CONCLUSION

Arguments on both sides of the H-1B debate have reached a feverish pitch in recent years. While the debate continues and H-1B visa demand grows, the annual cap remains at eighty-five thousand. Perhaps the reason why Congress has not enacted any of the many bills to raise the cap is that its flaws have finally been exposed. While Congress would be ill advised to raise the cap without improving protections for U.S. and

---

[299] *See* INFORMATION SHARING, *supra* note 59, at 23; *See also Is the Labor Department Doing Enough to Protect U.S. Workers?*, *supra* note 132, at 30–31.

[300] Pub. L. No. 108-447, § 401, 118 Stat. 3351 (2004) (codified as amended in scattered sections of 8 U.S.C.).

[301] Immigration and Naturalization Act § 214(c)(2)(F), 8 U.S.C. § 1184(c)(2)(F) (2006).

foreign workers, it would also be remiss to maintain the H-1B program as it currently is. It is likely that once the much needed worker protections are built in, the old cost-saving reasons for hiring H-1Bs will disappear, and demand for the visa will fall. Uniquely skilled foreign workers will be compensated on par with their American counterparts, and the original intent of the program will be realized.