NLWJC - Kagan

DPC - Box 032 - Folder 019

Immigration - H1B Visas [2]

Immig - H1B visas

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Hyde:

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

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

We are pleased that H.R. 3736 as reported from the Immigration and Claims Subcommittee is consistent with one of our primary objectives, insofar as it links a temporary increase in the H-1B cap to the enactment of meaningful reforms to the H-1B visa program. H.R. 3736 would help ensure that U.S. workers do not lose their jobs to temporary foreign workers and that qualified U.S. workers have the opportunity to fill a job before a temporary foreign worker is hired. Moreover, H.R. 3736 modestly expands enforcement authority to help prevent employer abuses of the H-1B program. These reforms will effectively target H-1B visas to industries experiencing skill shortages. The Administration strongly opposes amendments that would weaken these reforms.

Unfortunately, H.R. 3736 does not contain any provision to encourage additional training of U.S. workers. Training is a vital component of our strategy to address the long-term demand for highly skilled U.S. workers and to enhance the international competitiveness of important U.S. industries. An effective training strategy would also work to reduce the demand for H-1B visas. The Administration strongly supports amending H.R. 3736 to provide for additional training opportunities for U.S. workers and believes that this training should be funded, in part, through a modest H-1B application fee paid by employers. The Administration is also concerned that the increase in the annual number of H-1B visas reflected in this bill is too large, although we agree that the increase should last for only three years.

The Administration believes that H.R. 3736 would substantially improve the current H-1B program and, with the addition of a meaningful training provision and a modest reduction in

the level of increase in the annual H-1B visa cap, would garner the Administration's support. We look forward to working with the Congress on these and other specific provisions in the bill.

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

Sincerely,

Immig - H1B visas

Julie A. Fernandes
05/05/98 09:23:28 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc:
Subject: H1B and Regional Skills Alliances

Bruce/Elena:
Just to clarify a bit our discussion from yesterday:

We persuaded Kennedy to include Regional Skills Alliance is his bill that was defeated in Committee. Abraham's bill includes a $50 million scholarship program (funded through an appropriation). Our objective in the House was for Smith's bill to include meaningful reform to the H1B program (b/c that is where Abraham is most weak). Peter concluded that making changes to Abraham's training program would be the least difficult thing for us to work out in conference. We did, however, want to make sure that the House bill included a fee -- the Senate billd does not. The money generated from this fee is how we would want to fund any training program. Moran's Regional Skills Alliance proposal (which, like ours, was modeled on the PPI idea) is very similar to what we included in our outline and in Kennedy's bill. The principal differences are: (1) Moran's RSAs would be administered by Commerce rather than Labor; and (2) they would be required to be led by industry (rather than just permitting industry to be part of the RSA). Lofgren's current proposal would devote 80% of the money generated by the fee to part D of Title IV of JTPA. The provision is explicitly designed to, among other things, "help alleviate skill shortages and enhance the competitiveness of the labor force" and to fund programs (including "partnership programs") that "address industry-wide skill shortages." Thus, we concluded that RSAs could be funded through this (unless we wanted to have the program administered by Commerce). Peter thinks of the Lofgren language as a placeholder that would allow us to build more explicitly at conference.
I have asked Peter to follow up with others in Congress to ascertain the more general (outside the House Judiciary committee) feeling about RSAs. None of Moran's co-sponsors are on the Judiciary Committee.

julie

H.L.C.

Immig - HIB visas

105TH CONGRESS
2D SESSION

H. R. 3736

IN THE HOUSE OF REPRESENTATIVES

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Immigration and Nationality Act to make changes relating to H–1B nonimmigrants.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

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

SEC. 2. TEMPORARY INCREASE IN SKILLED FOREIGN WORKERS.

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

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

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

"(i) 95,000 in fiscal year 1998;

"(ii) 105,000 in fiscal year 1999; and

"(iii) 115,000 in fiscal year 2000; or"; and

(2) by adding at the end the following:

"(5) In each of fiscal years 1999 and 2000, the total number of aliens described in section 212(a)(5)(C) who may be issued visas or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) may not exceed 7,500.".

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

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

"(E)(i) The employer has not laid off or otherwise displaced and will not lay off or otherwise displace, within the period beginning 6 months before and ending 90 days following the date of filing of the application or during the 90 days immediately preceding and following the date of filing of any visa

petition supported by the application, any United States worker (as defined in paragraph (3)) (including a worker whose services are obtained by contract, employee leasing, temporary help agreement, or other similar means) who has substantially equivalent qualifications and experience in the specialty occupation, and in the area of employment, for which H–1B nonimmigrants are sought or in which they are employed.

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

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

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

"(iii) Clause (ii) shall not apply to an employer's placement of an H–1B nonimmigrant with another employer if the other employer has executed an attestation that it satisfies and will satisfy the

conditions described in clause (i) during the period described in such clause.".

(b) DEFINITIONS.—

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

"(3) For purposes of this subsection:

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

"(B) The term 'lay off or otherwise displace', with respect to an employee—

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

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

"(C) The term 'United States worker' means—

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

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

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

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

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

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

"(F)(i) The employer, prior to filing the application, has taken, in good faith, timely and significant steps to recruit and retain sufficient United States workers in the specialty occupation for which H–1B nonimmigrants are sought. Such steps shall have included recruitment in the United States,

using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H–1B nonimmigrants under subparagraph (A), and offering employment to any qualified United States worker who applies.

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

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

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

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

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

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

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

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

"(A) The term 'H–1B-dependent employer' means an employer that—

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

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

to at least 20 percent of the number of such full-time equivalent employees; or

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

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

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

"(D) The term 'non-H–1B-dependent employer' means an employer that is not an H–1B-dependent employer.".

SEC. 6. INCREASED ENFORCEMENT AND PENALTIES.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEC. 7. EFFECTIVE DATE.

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

Immig - H1B visas

Julie A. Fernandes
05/06/98 05:29:39 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: H1B -- meeting with high tech VPs

Elena,
The meeting with high-tech human resources VPs went well. Sally clearly communicated our desire to work with them to develop legislative language that meets our goals (targeting to skill shortages and protecting U.S. workers), while not being either too burdensome on employers or too difficult for DOL to administer. The companies have agreed to try to draft some language (particularly on the lay-off and job contractor provisions) that would both capture the bad actors and work effeciently for the good actors.

Many in the room seemed to agree with our goals, but appear to be looking for confidence on the details.

The last I knew, House Judiciary mark-up is scheduled for next Wed. The Abraham bill may still go to the floor next week.

Julie

Immig - H1B visas

Julie A. Fernandes
05/06/98 12:26:34 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: H1B -- hitting the cap

Elena,
FYI. According to Bob Bach, the State Dept. has issued approximately 64,000 H1B visas as of today. They have enough applications in the pipeline that by tomorrow, they will have reached the cap. INS is issuing a notice of reaching the cap and that b/c their statute requires that once they run out of visas they must deny additional applications, they would advise employers not to file new applications until further notice.

Julie

Immig - HIB visas

U.S. Department of Justice
IMMIGRATION AND NATURALIZATION SERVICE
Washington, DC 20536

NEWS RELEASE

Contact: Media Services
Office of Public Affairs
(202) 514-2648 Fax: (202) 514-1776
Internet: www.ins.usdoj.gov

May 8, 1998

INS Implements New H-1B Procedures As H-1B Visas Reach Cap for Fiscal Year 1998

WASHINGTON – The Immigration and Naturalization Service (INS) announced today that it will stop accepting H-1B visa petitions for Fiscal Year (FY) 1998 employment of H-1B workers beginning **Monday, May 11, 1998.** INS has determined that the 65,000 annual cap on the H-1B visa category, which was established by the Immigration Act of 1990 (IMMACT), will be reached for FY 1998 based on petitions already filed.

Petitions for Initial Employment

INS will implement the following procedures, which will be published in the Federal Register on Monday, May 11, 1998, for the remainder of FY 1998 (through September 30, 1998), unless legislation is enacted to raise the numerical limit prior to the end of FY 1998.

- All initial employment petitions for H-1B workers for FY 1998 that are received on or after May 11 will be returned along with the accompanying fees to petitioners. INS will advise petitioners that they may resubmit their petitions, at any time, and request employment beginning on or after October 1, 1998, when H-1B visas for FY 1999 become available.

- For initial employment petitions for H-1B workers for FY 1998 that are received before May 11 but are not decided before the cap is reached, INS will advise petitioners that the limit has been reached and that they may either withdraw their petitions and forfeit the fees, or delay employment until October 1, 1998, when H-1B visas for FY 1999 become available.

- H-1B petitions requesting initial employment for H-1B workers beginning on or after October 1, 1998 (FY 1999) will be processed as received by INS, and counted against the 65,000 cap for FY 1999.

Exceptions — Petitions for Current H-1B Workers

INS will continue to process petitions filed for current H-1B workers, since they are not affected by the visa cap. Such applications include petitions to either extend the stay or amend the terms of employment for current H-1B workers, as well as petitions for current H-1B workers to change employers, or to work concurrently in a second H-1B position.

(more)

Background

The H-1B is a temporary visa category for nonimmigrant workers that includes specialty occupations which require a bachelor's degree or higher and fashion models of distinguished merit and ability. Typical H-1B occupations include architects, engineers, computer programmers, accountants, doctors and college professors. Initially, the maximum period of admission is three years, which may be extended for an additional three years.

Questions and Answers

Q. Have H-1B visas reached the 65,000 annual cap in the past?

A. Yes. The 65,000 annual limit was reached in FY 1997 on September 1, 1997. A total of 5,099 beneficiaries approved during the rest of the fiscal year (September 2, 1997 to September 30, 1997) were held in abeyance until the beginning of the new fiscal year, October 1, 1998, and were applied to the FY 1998 limit.

Q. How many H-1B visas have been approved in past years?

FY 1997 = 65,000
FY 1996 = 55,141
FY 1995 = 54,178
FY 1994 = 60,279
FY 1993 = 61,591
FY 1992 = 48,645

Q. What is the Administration's view on increasing the annual cap?

A. The Administration believes that any short-term increases in H-1B visas must be coupled with substantial industry efforts to increase the skill level of U.S. workers as well as needed reforms of the H-1B visa program. These reforms include requiring employers to make bona fide efforts to recruit and retain U.S. workers before hiring temporary foreign workers, and prohibiting lay-offs of U.S. workers to replace them with temporary foreign workers.

Q. What will happen if the numerical limitation is raised by Congress?

A. Congress is currently debating whether to raise the numerical limit for FY 1998. If legislation is enacted to increase the annual cap, INS will modify the procedures specified in the May 11th Federal Register notice and outlined above by publishing a notice of the change in the Federal Register, and conducting a similar outreach effort to inform H-1B petitioners.

- INS -

Immig - H1B visas

STATEMENT OF ADMINISTRATION POLICY

TO: RAHM EMANUEL
LARRY STEIN
JOHN PODESTA
SYLVIA MATHEWS
GENE SPERLING
SALLY KATZEN
BRUCE REED
ELENA KAGAN
KAREN TRAMONTANO
JANET MURGUIA
CHUCK BRAIN
TRACY THORNTON
PETER JACOBY
BRODERICK JOHNSON
BILL MARSHALL
RON KLAIN
CECILIA ROUSE
PAUL WEINSTEIN
JASON GOLDBERG

CC: DIRECTOR RAINES
DEPUTY DIRECTOR LEW
CHARLES KIEFFER
BARBARA CHOW
LISA KOUNTOUPES
CHUCK KONIGSBERG

DATE: 5/8/98
FROM: Kate Donovan, OMB Legislative Affairs
RE: FOR YOUR CLEARANCE -- Draft SAP on S. 1723 - American Competitiveness Act

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Attached is a draft SAP on S. 1723 - American Competitiveness Act

Position: Secretary of Labor veto recommendation.

Timing: Scheduled for Senate floor action on Monday, May 11. We aim to send Monday morning. Please call Kate Donovan at 5-4790 by 10:00am, Monday, 5/11, with your comments or clearance. Thank you.

DRAFT -- NOT FOR RELEASE

May 8, 1998
(Senate)

S. 1723 - American Competitiveness Act
(Abraham (R) Michigan and 15 cosponsors)

S.1723, "The American Competitiveness Act," is intended to respond to a reported skills shortage in the information technology industry by increasing the annual cap on the number of temporary visas for foreign "specialty" workers under the H-1B program. For the reasons outlined below, the Administration strongly opposes Senate passage of S. 1723. If S. 1723 were presented to the President, the Secretary of Labor would recommend that the bill be vetoed.

Regrettably, S.1723 emphasizes providing opportunities for foreign workers rather than providing opportunities for and protecting U.S. workers. The bill's temporary increase in the annual number of H-1B visas is too large (up to 115,000) and lasts too long (5 years). In addition, the bill does not help ensure that U.S. workers do not lose their jobs to temporary foreign workers. Nor does the bill ensure that employers have made serious efforts to recruit U.S. workers for open positions so that qualified U.S. workers have the opportunity to fill a job before a temporary foreign worker is hired. Moreover, rather than strengthening program requirements and enforcement to prevent employer abuses of the H-1B program, S.1723 undermines some of the program's important enforcement provisions.

Since 1993 the Administration has sought reforms of the H-1B program, including: (1) requiring employers to make bona fide efforts to recruit and retain U.S. workers before hiring temporary foreign workers; and (2) prohibiting lay-offs of U.S. workers to replace them with foreign temporary workers. These reforms, if enacted, would help target H-1B usage to industries and employers that are experiencing skill shortages.

Also, the Administration believes that the first response for increasing the availability of skilled workers for industry must be increasing the skills of U.S. workers and helping the labor market work better to match employers with U.S. workers. The Administration has called upon the private sector to establish training programs and partnerships with educational institutions to give U.S. workers the skills needed for these jobs. It also has urged industry to reach out to dislocated workers as well as segments of the labor force underrepresented in high skilled jobs. The Administration is eager to work with industry to help create these programs and partnerships. S.1723 includes an authorization for a scholarship fund and a small fund to train dislocated workers, but it provides no funding for these programs. The Administration believes that increased training opportunities for U.S. workers should be funded in part through a modest H-1B application fee paid by employers.

Additional efforts to increase the skill level of U.S. workers and needed improvements in the

H-1B program are necessary prerequisites for the Administration to support any short-term increase in the number of H-1B visas available for temporary foreign workers. The Administration wants to work with the Congress to develop a bill that addresses the growing demand for highly skilled workers, while effectively protecting and promoting the interests of U.S. workers and enhancing the international competitiveness of important U.S. industries.

S. 1723 would increase direct spending and receipts; therefore it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act (OBRA) of 1990. The bill does not contain provisions to fully offset the increased direct spending. OMB's preliminary scoring estimates that this bill would increase direct spending by $1 million annually during FYs 1999-2003.

* * * * * * *

(Do Not Distribute Outside Executive Office of the President)

This Statement of Administration Policy was developed by the Legislative Reference Division (Schroeder), in consultation with the Departments of Commerce (Escobar), Education (Sommerville), HHS (Taylor), Justice (Jones), Labor (Taylor), USTR (Collins), NSF (Eisentadt), OSTP (Levinson), WH/COS (Tramontano), WHLA (Jacoby), NEC (Rouse), DPC (Fernandes), NSD (Henry/Fox), HRD (Tyer, Matlack/Chow), TCJS (Mertens), IAD (Farley), OIRA (Chenok), and BASD (Balis).

Defense, State, and the Treasury did not respond to our request for views on this SAP.

OMB/LA Clearance:

The Senate Judiciary Committee reported S. 1723 with an amendment in the nature of a substitute, without a written report, on April 2, 1998.

H.R. 3736, a similar House bill dealing with the same subject, is scheduled for markup by the House Judiciary Committee on May 14th.

Administration Position to Date

On April 2, 1998, Justice, Commerce, and Labor sent a joint letter to the Senate Judiciary Committee "strongly opposing" S. 1723.

In addition, the Department of Labor testified before the Senate Judiciary Committee on February 25, 1998, supporting reforms to the H1-B temporary visa program for skilled workers.

Discussion

The H1-B nonimmigrant worker visa program currently permits up to 65,000 skilled workers per year to enter the United States and work for up to three years. S. 1723 is intended to reform the H1-B visa program and alleviate a skills shortage in the high technology industry in the United States by adjusting the cap on H1-B visas.

Temporary Employment-Based Nonimmigrants. S. 1723 would create a new visa category, H1-C, for nonimmigrant nonphysician healthcare workers. Beginning in FY 1999, no more than 10,000 visas could be issued under the new H1-C visa program. The nonphysician healthcare workers who qualify for admission under the H1-C category would no longer be eligible for admission under the H1-B program for nonimmigrant skilled workers.

S. 1723 would temporarily increase the annual cap on H1-B visas as follows in: (1) FY 1998 - 95,000; (2) FY 1999 - the number of H1-B visas issued in FY 1998 minus 10,000 plus any unused H2-B visas (temporary unskilled workers) for the preceding fiscal year; (3) FY 2000 - FY 2002 - the number of H1-B visas issued in 1998 plus any unused H2-B and H1-C visas for the

preceding fiscal year .

Penalties. S. 1723 would increase penalties for employers who willfully violate H1-B or H1-C visa program requirements. The bill would authorize the Secretary of Labor to perform, on a case-by-case basis, random inspections of employers who have previously been found to have willfully violated requirements of the H1-B or H-1C visa programs. Random inspections would be permitted for the five year period following the employer's violation of the visa program.

Employers may be subject to certain administrative and civil monetary penalties if they are found to have willfully violated H1-B or H1-C program requirements by laying-off domestic workers in an effort to replace them with foreign workers. In addition, employers who have violated the no lay-off provision would be barred from participating in the H1-B and H1-C visa programs for at least two years. The term "laid off" specifically excludes situations where the loss of employment is due to inadequate performance, violation of workplace rules, voluntary departure or retirement, or the expiration of a grant, contract, or other agreement.

Training and Placement. S. 1723 would authorize appropriations of $50 million for FY 1999 to be used as a Federal match to States for student incentive grants. The funds would be used to assist States in providing grants to low-income students in higher education programs of mathematics, computer science, or engineering.

In addition, the bill would authorize appropriations of $10 million for each of FYs 1999-2003 for the Secretary of Labor to provide training in information technology to unemployed individuals seeking employment.

The bill would require the Secretary of Labor to establish or improve an Internet-based employment data bank. The purpose of the data bank would be to facilitate job searchers in the technology field and help match potential employers with employees. S. 1723 would authorize appropriations of $8 million for each of FYs 1999-2003 for the data bank.

Permanent Employment-Based Immigrants. If the cap on the total number of employment-based immigrant (permanent) visas has not been met in a calendar quarter, S. 1723 would remove the current per country cap on these visas for that quarter. In addition, certain nonimmigrant (temporary) aliens would be eligible to apply for an extension of their nonimmigrant status if they: (1) have petitions pending for employment-based immigrant status adjustment; and (2) are subject to per country limitations.

Other provisions of S. 1723 would:

- Transfer from Labor to Justice certain responsibilities related to the review of employer applications to participate in the H1-B and H1-C visa programs.

- Set out specific guidance related to the computation of "prevailing wage" for certain higher education and Federal researchers and professional athletes and for the posting of job notices.

- Require the Attorney General to provide reports to Congress: (1) quarterly on the number of aliens who were provided nonimmigrant status under the H1-B visa program during the previous quarter; and (2) annually on the occupations and compensation of aliens granted nonimmigrant status under the H1-B visa program during the previous fiscal year.

- Require the National Science Foundation to submit a report to Congress, no later than October 1, 2000, assessing the labor market needs for workers with high technology skills. S. 1723 authorizes NSF to use available appropriations to pay for this study.

- Permit nonimmigrant workers admitted under the H1-B visa program to accept academic honorarium payments for services on behalf of an institution of higher education or other nonprofit entity.

Pay-As-You-Go Scoring

Per TCJS (Mertens) and BASD (Balis), S. 1723 is subject to the pay-as-you-go (PAYGO) requirement of OBRA because it increases direct spending. CBO's final report estimates that S. 1723 would increase direct spending by $1 million annually during FYS 1999-2003. CBO concurs.

LEGISLATIVE REFERENCE DIVISION
May 8, 1998

Immig-H1B visas

Julie A. Fernandes
05/06/98 12:26:34 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: H1B -- hitting the cap

Elena,
FYI. According to Bob Bach, the State Dept. has issued approximately 64,000 H1B visas as of today. They have enough applications in the pipeline that by tomorrow, they will have reached the cap. INS is issuing a notice of reaching the cap and that b/c their statute requires that once they run out of visas they must deny additional applications, they would advise employers not to file new applications until further notice.

Julie

Immig - H1B visas

Julie A. Fernandes
05/06/98 05:29:39 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: H1B -- meeting with high tech VPs

Elena,
The meeting with high-tech human resources VPs went well. Sally clearly communicated our desire to work with them to develop legislative language that meets our goals (targeting to skill shortages and protecting U.S. workers), while not being either too burdensome on employers or too difficult for DOL to administer. The companies have agreed to try to draft some language (particularly on the lay-off and job contractor provisions) that would both capture the bad actors and work effeciently for the good actors.

Many in the room seemed to agree with our goals, but appear to be looking for confidence on the details.

The last I knew, House Judiciary mark-up is scheduled for next Wed. The Abraham bill may still go to the floor next week.

Julie

Immig - HIB visas

OK

DRAFT -- NOT FOR RELEASE

May 6, 1998 (Senate)

S. 1723 - American Competitiveness Act
(Abraham (R) Michigan and 15 cosponsors)

S.1723, "The American Competitiveness Act," is intended to respond to a reported skills shortage in the information technology industry by increasing the annual cap on the number of temporary visas for foreign "specialty" workers under the H-1B program. For the reasons outlined below, the Administration strongly opposes Senate passage of S. 1723. If S. 1723 were passed by the Congress and presented to the President, the Secretary of Labor would recommend that he veto the bill.

Regrettably, S.1723 emphasizes providing opportunities for foreign workers rather than providing opportunities for and protecting U.S. workers. The bill's temporary increase in the annual number of H-1B visas is too large (up to 115,000) and lasts too long (5 years). In addition, the bill does not help ensure that U.S. workers do not lose their jobs to temporary foreign workers and that qualified U.S. workers have the opportunity to fill a job before a temporary foreign worker is hired. Moreover, rather than strengthening program requirements and enforcement to prevent employer abuses of the H-1B program, S.1723 undermines some of the program's important enforcement provisions.

Since 1993 the Administration has sought reforms of the H-1B program, including requiring employers to make bona fide efforts to recruit and retain U.S. workers before hiring temporary foreign workers and prohibiting lay-offs of U.S. workers to replace them with foreign temporary workers. These reforms, if enacted, would help target H-1B usage to industries and employers that are experiencing skill shortages.

Also, the Administration believes that the first step in increasing the availability of skilled workers for industry must be increasing the skills of U.S. workers and helping the labor market work better to match employers with U.S. workers. Although S.1723 includes an authorization for a scholarship fund and a small fund to train dislocated workers, the Administration believes that increased training opportunities for U.S. workers should be funded through an H-1B application fee paid by employers.

Substantial additional efforts by industry to increase the skill level of U.S. workers and needed improvements in the H-1B program are necessary prerequisites for the Administration to support any short-term increase in the number of H-1B visas available for temporary foreign workers. The Administration wants to work with the Congress to develop a bill that addresses the growing demand for highly skilled workers, while effectively protecting and promoting the interests of U.S. workers and enhancing the international competitiveness of important U.S. industries.

* * * * * * *

Immig - H1B visas

Julie A. Fernandes
05/05/98 06:59:12 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: H1B -- hitting the cap

Elena:
FYI. Sally has asked INS to put off issuing a notice of reaching the cap until they are very close (within a couple thousand) to reaching it. As of April 15th, the State Dept. had issued 57,093 H-1B visas this year (including approximately 5,000 rolled over from last year). As of this morning, INS estimated that they were above 60,000, though Doris told Sally this afternoon that she was told they had reached 65,000. Bob Bach is going to get back to me on the exact number as soon as he can (hopefully as of the am).
INS wants to release the notice as a way of providing better "customer service." Sally is reluctant to issue a notice (and a statement that no more applications will be accepted OR that new applications will be denied) until we are sure that the new legislation will not meet the need in time.

Julie

* To help get you through the mtg. Immig - H1B visas

Annotated Agenda for DPC/NEC Meeting on H-1B Visas
April 9, 1998

The purpose of this meeting it to identify the key components of legislative proposals and decide our priorities.

I. **H-1B reforms previously endorsed by the Administration**

a. "Recruit and retain"
What, precisely, would we be requiring an employer to do?

b. No lay-off provision
How do we respond to the argument from industry that hiring/firing is too decentralized to allow for fair use of a no lay-off provision?

delay efforts

c. Reduced maximum stay from six to three years
Given that we are proposing a temporary increase in the cap, do we want to continue to advocate for limiting the maximum stay to three years?

complaint/investigation
industry standards

d. Other issues related to these reforms

(i) Occupational classification
How would we recommend defining who is laid-off or who must be recruited? Based on "occupation" or skill attainment?

(ii) Job contractors
Do we want to include a provision that ensures that both end-employers and contractors make the requisite attestations?

(iii) Prevailing wage
Abraham uses the current definition of "wage" but allows employers to use outdated wage data. Kennedy defines "wage" to include benefits and other compensation, which Labor says they do not have reliable data on. What do we recommend?

II. **Enhanced enforcement**
The DOL has proposed that they be given greater authority to ensure that employers comply with the standards of hiring H-1B workers.
Which are the most important?

A. 1 Independent authority to investigate
B. 2 subpoena authority
C. ~~3 ability to conduct audits~~
D. 3 increase penalties (from $5000 to $10,000)

III. **Application fee**
Should there be an application fee? How much?

IV. **Training**
a. Regional skills alliances
b. NSF's Advanced Technological Education program.
c. Scholarships or Loans?

V. **Other concerns**
a. Concerns of the Academic community
Many in the academic community are concerned about the "recruit and retain" and "no lay-off" provisions because of the temporary nature of many research grants.

b. Increased enforcment authority by the Office of Special Counsel
OSC wants the legislation to provide for a cause of action to a U.S. worker who is replaced by an H-1B worker OR who is denied employment in favor of an H-1B worker.

VI. **Overall priorities**
How do we rank reforms vs. training vs. enforcement?

Immig - H1B visas

Julie A. Fernandes
04/28/98 09:00:51 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Gene B. Sperling/OPD/EOP, Sally Katzen/OPD/EOP

cc: Cecilia E. Rouse/OPD/EOP, Laura Emmett/WHO/EOP, Melissa Green/OPD/EOP, Cathy R. Mays/OPD/EOP

Subject: H1B Legislation

Bruce/Elena/Gene/Sally:

We just received the House bill and spoke with Peter.
Smith's bill includes strong reform language, but does not include a training piece. Though Smith is not adverse to training, he is getting beat up a lot by Rogan and Drier on the reforms, and doesn't want to further alienate them by including a training piece that looks like the creation of another federal training bureaucracy. Smith told Watt and Lofgren that if they can get some Republican support for training, he would include it. With training included, Watt will get on the bill. Lofgren is still a maybe. Lofgren proposed putting money from the fee into an existing program at Education (MESA) that provides math and science programs for middle school kids whose parents did not go to college. She expressed a preference for using any money generated to fund an existing program.

Peter told Smith that though his reforms seem to reflect a lot of what we would like, the bill would be unacceptable to us without training. Smith asked Peter very directly for our support.

Peter believes that we may be in a very good position. Our proposal could be seen as a compromise between Abraham and Smith. Lofgren was arguing our reform language tonight.

Peter recommends that we prepare a letter for the mark-up on Thursday. The letter would strongly support Smith's legislation insofar as it comports with one of our key principles -- strong reforms to the H1B program coupled with a temporary increase in the cap. We would, however, also want to indicate that the bill needs to include a training piece and perhaps that his increase is high. Peter further recommends that this letter come from Bruce and Gene (= White House). Please advise.

Julie & Ceci

Immig-H1B visas

THE WHITE HOUSE
WASHINGTON

April 30, 1998

The Honorable Lamar Smith
Chairman
Subcommittee on Immigration
Judiciary Committee
U. S. House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

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

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

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

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

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

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

Sincerely,

BRUCE REED
Assistant to the President
for Domestic Policy

GENE B. SPERLING
Assistant to the President
for Economic Policy

cc: Representative Melvin L. Watt, Ranking Member

Immig - H1B visas

H1B legislative language -- two issues

1. Commerce and Labor disagree on the necessary attestations for the "recruit and retain" section. Labor wants the list of options to include employer-financed training programs. Commerce thinks that the suggestion, even as an option, may appear too coercive (particularly in light of their efforts to get employers to finance such programs voluntarily). Labor does not like the option to consider whether current employees could, with some training, perform the tasks required by the available position. They think that this is very difficult to enforce, and gets them too much in the business of second-guessing employer decisions that evaluate their current employees potential to acquire the needed skills within a reasonable period of time.

   We are working on a compromise, and seem close. Labor may be willing to accept an attestation that offers two things that the employer must do: (1) advertising; and (2) meaningful monetary incentives, which includes the possibility of training subsidies. We are pitching this to Commerce this morning.

2. Labor wants the first enforcement trigger to include when the Secretary has reasonable cause to believe that there has been a "pattern or practice of unsuccessful recruitment [of U.S. workers] by the employer." Commerce initially rejected this addition, in the interest of keeping all of the triggers simple and easily determined by the employer. Labor is willing to ultimately give this up, but we are going to try once more with Commerce.

Immig - HIB visas

MEMORANDUM TO ELENA KAGAN AND SALLY KATZEN

FROM: Julie Fernandes and Cecilia Rouse

DATE: April 8, 1998

RE: Background on H-1B Visa Reform

Though the Administration has endorsed a set of principles that should guide any legislation that proposes to increase the cap on the number of H-1B visas, we need to evaluate key components of possible legislative proposals and decide our priorities. This memo outlines aspects of the existing legislative proposals on which we need to focus.

Background

The H-1B visa program was designed to allow for the temporary admission of foreign "specialty workers" for employment in the United States. In its current form, it allows the admission of up to 65,000 non-immigrant workers each year. Each visa lasts for three years, and is renewable for another three. The program was designed to meet the short-term employment needs of employers seeking highly-skilled workers. Currently, H-1B visas are issued on a first come, first served basis.

Under current law, before obtaining a temporary foreign worker under the H-1B program, employers must attest that: (1) they will pay the prevailing wage; (2) notification has been provided to their employees and the representing union; (3) there is no strike or lock-out; and (4) the employment of H-1B non-immigrants will not adversely affect the working conditions of workers similarly employed. The Labor Department only has the authority to review these attestations for completeness and obvious inaccuracies.

Since 1993, the Administration has sought reforms to the H-1B visa program, including requiring employers to attest that they have and are taking timely and significant steps to recruit and retain U.S. workers in the jobs in which they seek to employ H-1B non-immigrants; prohibiting employers from laying-off a U.S. worker to replace them with a temporary foreign worker; and reducing the authorized length of stay from six to three years to better reflect the temporary nature of the presumed employment need. INS and Labor agree that these reforms would target H-1B usage to employers experiencing genuine skill shortages, thus relieving the pressure on the cap.

Industry is strongly opposed to these reforms. In general, they assert (1) that DOL's occupational classifications do not reflect the breadth of occupations within the industry, thus causing a recruitment or no lay-off provision to be unworkable; (2) that they do not want the government to second-guess their hiring and firing decisions; and (3) that these reforms would be

equivalent to the labor certification requirement that exists in the permanent visa program, and thus would be slow and ineffective. Organized labor, however, supports these reforms, arguing they are needed to protect U.S. workers.

Issues to Consider

1. **What does "recruit and retain" mean?**

According to the Department of Labor, the Administration has never defined what precisely would satisfy the "recruit and retain" requirement. Industry opposes this provision, in part, because it is not clear exactly what would be required.

The Kennedy-Feinstein legislation includes a provision that would require employers to attest to having taken timely, significant, and effective steps to recruit and retain U.S. workers prior to obtaining an H-1B foreign worker, with compliance measured by comparison to "industry-wide standards." However, it is unclear how this would work. For example, how would these "industry-wide standards" for recruitment and retention be identified? Also, should we endorse a process that simply identifies standards that reflect what industry is currently doing (therefore codifying the status quo) or should we ask industry to do more to recruit U.S. workers before being able to hire a temporary foreign worker? If we want them to do more, how do we define what we want them to do?

The "recruit and retain" provision of the now-defunct foreign nurses program (H-1A) set out several steps that an employer could take to recruit and retain U.S. workers, and then defined satisfaction of the statutory requirement as compliance with some subset of those. This method, though effective in the context of a single industry (where it is easier to define the universe of possibly acceptable recruitment methods), could prove unworkable for the H-1B program, given the diversity of industries that use it.

2. **Occupational classification**

Industry objects to a proposal that would permit the Department of Labor to use "recruit and retain" or "no lay-off" provisions to limit industry's employment choices based on occupational classifications established by the DOL. At the same time, industry has argued for broader occupational categories for the prevailing wage calculation since more general categories usually result in lower wage estimates.

Labor has agreed that it would not make sense to require employers to use existing occupational classifications to establish compliance with a "recruit and retain" or "no lay-off" provision. An alternative is to consider defining who needs to be recruited or who cannot be laid-off based on skill-level (e.g., the ability to program in java) or on the amount of additional training an incumbent or other U.S. worker would need to perform the job (e.g., someone who could program in java with six weeks training), rather than on occupational classification (e.g.,

computer programmer).

3. **Practicability of a no lay-off provision**

Industry also argues that a no lay-off provision would be difficult to administer, given the decentralized nature of employment decisions in large companies. They ask, for example, whether a firm that lays-off a worker in Chicago, but wants to hire one in Houston, would be considered to have "laid-off" the Chicago worker, and thus unable to hire an H-1B worker in Houston.

The Abraham bill includes a no lay-off provision that would not achieve our goals. His proposal would prohibit an employer from employing a temporary foreign worker "at the specific place of employment and in the specific employment opportunity from which a U.S. worker with substantially equivalent qualifications and experience in the specific employment opportunity has been laid-off." This language makes every employee unique, and thus is likely unenforceable.

4. **The role of job contractors**

In 1995, the Administration endorsed a proposal that job contractors seeking to use the H-1B program would be precluded from placing H-1B workers at sites of customers that had not also attested to complying with the H-1B criteria. Given that the top ten users of the H-1B program are job contractors, we may want to consider this as part of our overall reform package.

5. **Reduced maximum stay from six to three years**

Under current law, the H-1B visa lasts for six years (it is a three year visa that is almost always renewed for an additional three years). The proposed reform would eliminate the possibility of renewal, thus creating a maximum stay of three years. In both 1993 and 1995, the Administration strongly supported this limitation as better comporting with the "temporary" nature of the presumed employment need.

However, the Administration proposed this reform in the context of <u>not</u> increasing the cap on the annual number of H-1B visas. It would be somewhat incongruous to both increase the annual cap and effectively limit by half the number of H-1B visa holders in the country at any one time. Thus, if we were to endorse raising the annual cap (even temporarily), this increase should not be coupled with a proposed reform to limit the annual number of visas.

6. **Enhanced enforcement**

In addition to the above reforms to the H-1B program, the Labor Department has proposed that they be given greater authority and resources to ensure that employers comply with the standards for hiring temporary foreign workers under the H-1B program (either current or

proposed).

Under current law, it is not clear that the Department of Labor has independent authority (i.e., where there has been no complaint) to initiate an investigation of an employer suspected of not substantively complying with the labor market attestations. The Kennedy-Feinstein proposal would give the Secretary independent authority to investigate (upon a finding of probable cause), subpoena authority, an ability to conduct random audits, and would increase the penalties for employers found in violation (from $5,000 to $10,000). These changes seem appropriate to ensure compliance with the objectives of the H-1B program. However, though each element of this enhanced enforcement is important, the subpoena authority and the ability to investigate without a complaint are the most critical.

The Abraham bill increases the penalty for willful violations of the H-1B program, but eliminates penalties for less than willful violations. In addition, the bill allows DOL to conduct random inspections of willful violators (for 5 years), but does not authorize additional money to do so. Also, under Abraham's bill, an employer could only be investigated for having violated the "no lay-off" provision if the employer were already being investigated for another violation. These reforms would weaken, rather than strengthen, the Secretary's enforcement authority.

7. **Prevailing wage**

Under current law, an employer must pay each H-1B non-immigrant the "higher of prevailing or actual wage paid to similarly-employed U.S. workers." The Kennedy-Feinstein bill would modify this requirement to include benefits and all other compensation when calculating the wage standard. However, according to the Department of Labor, they would not be able to calculate a reliable prevailing wage that includes non-wage compensation.

While the Abraham bill uses the current definition of wages, it would allow employers to use any published survey "which shall be considered correct and valid if the survey was conducted in accordance with generally accepted industry standards and the employer has maintained a copy of the survey information" to determine the prevailing wage. The requirement would permit the use of outdated wage data and would give DOL little control over the quality of the surveys used to determine the prevailing wage.

In the past, DOL has advocated for a prevailing wage calculation based on the applicable prevailing wage plus the same benefits and additional compensation provided to similarly employed workers of the employer.

8. **An application fee**

Currently, employers only pay a small processing fee when filing for an H-1B visa. The Kennedy-Feinstein bill proposes a fee of $250 per H-1B visa application. An application fee is a straightforward way to require employers who use the H-1B program to directly contribute to

more training for U.S. workers and to generate additional funds for enforcement. However, an application fee will likely be perceived as a tax, and thus could be unpopular.

If we decide to push for the establishment of an application fee, we may want to increase it to $500. First, the higher fee will generate more money for training. Second, as a tactical matter, if we begin negotiations at $500 we may end up at $250 (rather than beginning at $250 and ending up at $0). We should be careful, however, not to endorse a fee that would create such a disincentive to participation that it would effectively prevent the United States from meeting its treaty obligations (under the GATS) to permit 65,000 persons to enter annually under the H-1B program.

9. **Training**

In order to meet the short-term and long-term needs of industry, training should be geared towards incumbent workers as well as those who have yet to enter the workforce. In addition, there is widespread support among the agencies for programs that encourage employers to work together with educators or training providers.

The Kennedy-Feinstein bill contains a proposal for the creation of "Regional Skills Alliances." Money generated through application fees would be used to set up these Alliances that would bring together employers, organized labor, U.S. workers and educational institutions to focus on building the skills of U.S. workers. Another proposal is to allocate additional funds to the National Science Foundation's (NSF) Advanced Technological Education (ATE) program. ATE is an educational institution-based program that is designed to foster partnerships between two- and four-year colleges, secondary schools, government, and industry to improve educational programs through curriculum and teacher/faculty development. These programs, in combination, could address the training of both new and incumbent workers.

There remains the question of whether the Administration should push for a provison that provides training money directly to individuals either through scholarships or loans. The Kennedy-Feinstein bill includes the creation of a new short-term student loan program. The Abraham bill adds funds to an existing scholarship program. According to OMB, the Department of Education, and others, there currently exists a variety of both loan and grant programs that are available to most workers. In addition, the Lifelong Learning Tax Credit is available to enable incumbent workers to obtain additional training. Thus, it may not make sense to spend any money generated by an H-1B application fee to augment an already adequate pool of money for loans or scholarships.

10. **Academic community concerns**

Some members of the academic community have expressed concern that a "recruit and retain" or "no lay-off" provision would unfairly limit their ability to hire H-1B non-immigrants as part of (temporary) research grant programs.

Immig - HIB visas

Kay Casstevens @ OVP

04/01/98 06:16:33 PM

Record Type: Record

To: Sally Katzen/OPD/EOP, Elena Kagan/OPD/EOP

cc: Ricardo M. Gonzales/OVP, Peter G. Jacoby/WHO/EOP, Donald H. Gips/OVP
Subject: H1b visas

The VP received a letter from several high-tech type Members of Congress (bipartisan) asking if they could sit down with him and appropriate White House staff to craft a consensus measure on H1b visas. Don Gips suggested that I contact you two and get your recommendations. Don thinks it would be a good idea to get the input of this group.

Given that they are headed out to recess, perhaps we could set up a meeting with the relevant staff rather than the Members themselves. I think I would prefer that. I will fax you the letter -- please let me know what you think. Thanks, Kay.

PS The two lead signatories on the letter are Jim Moran and David Dreier. Also signing are: Jennifer Dunn, Darlene Hooley, Christopher Shays, Earl Blumenauer, Ralph Hall, James Rogan and Tom Campbell. Interesting crowd.

Immig - H1B visas

Julie A. Fernandes
04/28/98 08:58:33 AM

Record Type: Record

To: Elena Kagan/OPD/EOP, Sally Katzen/OPD/EOP, Cecilia E. Rouse/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: H1B -- hitting the cap

Elena, Sally and Ceci:
According to the INS, they have approved 57,093 petitions for H1B visas as of April 15th. They anticipate hitting the cap by the middle of May. Their plan is to publish a notice that suspends the receipt of new petitions as of the notice's publication date, because they believe that they have enough petition applications in the pipeline to meet the 65,000. INS wants to brief the Hill on their proposed procedure on Wednesday (prior to the Thursday mark-up). They are preparing press material on this procedure and will forward it to us for review.

Julie

Ch
360-664-0228

Immig - HtB visas

PETER G. JACOBY [redacted]
04/27/98 08:10:59 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Laura Emmett/WHO/EOP, Shannon Mason/OPD/EOP
Subject: H-1B Legislation

I dropped off our draft legislative language earlier this evening to George Fishman (Smith) and Tina Hone (Watt) and faxed the language to Zoe Lofgren's staff. George just called back informing me that they would have a final bill tommorrow (it was drafted over the weekend) which he would share with us tomorrow evening after Lamar Smith meets with his fellow Republicans on the Subcommittee. While declining to give details, he said that although we would not like the bill's increase in the caps, we would like all of the other provisions. He did indicate that we would not like the bill's failure to contain other provisions (my read of this comment is that they left the training piece out). Watt's staff and Lofgren's staff indicate that they did not have any input in the bill over the weekend. Finally, I have to confess that I gave George a draft of our language on Friday (anticipating that he would draft over the weekend) and he indicated that some of our language has been included. We shall see.

After they introduce the measure tomorrow they plan to markup in Subcommittee on Thursday, in full Committee next week and on the House floor the week after that. Stay tuned.

Message Sent To:

Sally Katzen/OPD/EOP
Elena Kagan/OPD/EOP
Cecilia E. Rouse/OPD/EOP
Julie A. Fernandes/OPD/EOP
Barbara Chow/OMB/EOP

Immigration - H1B visas

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20502

April 16, 1998

MEMORANDUM FOR SALLY KATZEN AND ELENA KAGAN

FROM: KERRI-ANN JONES Kerri-Ann Jones Acting Director

SUBJECT: Impact of H-1B Reform Proposals on the Research Community

This note deals with H-1B reform proposals of greatest importance to the research community, which include the following:

1. Recruit and retain requirements
2. Definition of "lay off"
3. Prevailing wage determination
4. Duration of stay
5. Training fees

In addition, a possible H-1D category, specifically for scientists, mathematicians and engineers is presented.

1. **Recruit and retain.** Young and intermediate age scientists are often selected for temporary employment to introduce new techniques or instrumentation, developed abroad, to U.S. laboratories. These scientists are selected for their specific training and/or skills, which are matched to specific research needs.

S.1878 specifies that measures must be taken to recruit U.S. workers prior to seeking H-1B workers. An exception is made for "aliens of extraordinary ability, or aliens who are outstanding professors and researchers." This exception is not useful for the circumstances described above or for international scientific collaborations, in which it is often the staff of the outstanding professor who participate.

S. 1723 is silent on this issue.

Conclusions and Recommendations. OSTP believes that requiring government-funded research institutions to perform labor market testing will seriously compromise one of the most important mechanisms for bringing new, specialized scientific and technical information to our country.

2. **Definition of "lay off."** Participation in many scientific projects is for limited duration, based on the support provided for training or technology introduction.

The termination of such participation is expected and is part of the normal research cycle.

S. 1878's definition of "laid off" might be interpreted to apply to these situations. An insert stating that this is NOT the case would be a necessary clarification.

S. 1723's definition of "lay off" takes into account expiration of a grant, contract or other agreement, which would cover the concerns about customary term employment in the research setting. It also contains language more clearly defining similar employment, further lessening the possibility of a misinterpretation of lay off.

Conclusions and Recommendations. OSTP strongly prefers the S. 1723 definition of lay off.

3. Prevailing Wage Determination. S. 1878 is silent on prevailing wage rates.

S. 1723 would amend current law to provide a means by which the prevailing wage level for employees of an institution of higher education, or a related or affiliated nonprofit entity, or a nonprofit or Federal research institute or agency, would take into account employees at such institutions, entities and agencies in the area of employment.

Conclusions and Recommendations. National Science and Technology Council member agencies have worked with OMB and DOL for many years to resolve this issue. S. 1723 would return to the pre-Hathaway method for prevailing wage determination in the publicly-funded research community, which we would view as a satisfactory outcome.

4. Duration of Stay. S. 1878 cuts the duration of the H-1B visa from 6 to 3 years

S. 1723 is silent on this issue.

Conclusions and Recommendations. Three years is not sufficient time in which to complete certain research projects. Some flexibility would be required to accommodate longer stays.

5. Training Fees. S. 1878 establishes a fee to be paid by the employer to be used, in part, to endow a loan program and provide grants for training U.S. workers.

S. 1723 recognizes the need to encourage and equip more American young people to enter technical fields such as mathematics, engineering and computer science by authorizing a grant program for low-income students and training for unemployed Americans.

Conclusions and Recommendations. OSTP supports the principle that the competitiveness of the U.S. workforce can be improved by increased education and

training. We believe, however, that it would be inappropriate and wasteful to divert monies from the core missions of institutions whose primary focus is education and knowledge creation, in order to establish a new program with attendant administrative costs. We would encourage the use of funds gained from the fee for enhancements and more efficient use of existing educational and curriculum development programs and increased funding for programs in two-year community colleges.

It may be that it will become more appropriate to establish a visa category for scientific and technical workers, rather than seeking to fit the needs of diverse occupations with the H1-B visa. The paragraphs below provide for that.

ESTABLISHMENT OF H-1D NONIMMIGRANT CATEGORY FOR SCIENTISTS, MATHEMATICIANS AND ENGINEERS

(1) Section 101(a)(15)(H)(I)(8U.S.C.1101(a)(15)(H)(I) is amended – (A) by inserting after subsection (i)(c), the following:

(i)(d) scientist, mathematician or engineer who has attained at least a master's degree or equivalent in a scientific discipline, and who is coming temporarily to the United States to teach, train, or conduct research, or

(i)(e) scientist, mathematician or engineer who has attained at least a master's degree or its equivalent in a scientific discipline, and who is coming temporarily to the United States to participate in a cooperative joint scientific activity carried out under an Agreement between the Federal Government and the alien's Government.

This creates a new H-1D non-immigrant visa category that will include foreign scientists, mathematicians and engineers coming to the United States to teach, train or conduct research in an institution of higher education (as defined in section 1201(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity, or a nonprofit or Federal research institute or agency; or to participate in bona fide international collaborative science projects.

H-1D visas are removed and subtracted from the H-1B category.

Immigration -
H1B visas

Question & Answer on Immigration: H-1B visas
May 1, 1998

Q: What is your position regarding the call by industry to increase the number of temporary visas available for highly skilled foreign workers?

A: I believe that the first step in increasing the availability of skilled workers for industry must be increasing the skills of U.S. workers and helping the labor market work better to match employers with U.S. workers. Therefore, substantial additional efforts by industry to increase the skill level of U.S. workers and needed improvements in the H-1B visa program to protect U.S. workers by targeting the program's use to employers experiencing genuine skills shortages are necessary prerequisites for me to support any short-term increase in the number of H-1B visas available for temporary foreign workers.

Q: Yesterday the House Judiciary Subcommittee on Immigration approved legislation that increases the number of H-1B visas for temporary foreign workers. What is your position regarding this legislation?

A: I am pleased that Representatives Smith's bill is consistent with one of my primary objectives, insofar as it links a temporary increase in the H-1B cap to the enactment of meaningful reforms to the H-1B visa program. The bill would help ensure that U.S. workers would not lose their jobs to a temporary foreign worker and that qualified U.S. workers would have the opportunity to fill a job before a temporary foreign worker is hired. Moreover, the bill modestly expands enforcement authority to help prevent employer abuses of the H-1B program. These reforms will effectively target H-1B visas to industries experiencing skill shortages.

Unfortunately, the bill does not contain any provision for additional training opportunities for U.S. workers. Training is a vital component of my strategy to address the long-term demand for highly skilled U.S. workers and to enhance the international competitiveness of important U.S. industries. I am also concerned that the increase in the annual number of H-1B visas reflected in this bill is too large, although I agree that the increase should be temporary.

I would be pleased to support this bill if it included meaningful training provisions and a modest reduction in the level of increase in the annual H-1B visa cap.

Q: What is your position regarding Senator Abraham's bill?

A: Senator Abraham's bill includes a large increase in the annual number of visas and provides no meaningful reform of the H-1B program. I would be happy to work with members of the Senate to develop a bill that is more consistent with the Administration's principles.

Background

H-1B visas are temporary work visas that allow "highly skilled" immigrants (with a BA or equivalent) to work in this country for up to six years. Under current law, the number of H-1B visas is capped at 65,000 per year. Last year, this cap was reached for the first time. The information technology (IT) industry strongly supports raising the annual cap to address what they maintain is a shortage of U.S. workers with IT skills. Others, including the Department of Labor, challenge the industry's conclusions about a shortage and are concerned that the current H-1B program does not target its use to employers who are experiencing skills shortages.

Though the Administration has never before squarely addressed the issue of the cap, we have consistently emphasized training and re-training U.S. workers to enable them to move into jobs within the high-tech industry. Also, since 1993 we have sought reforms to the H-1B program that would target their use to industries with genuine short-term skill shortages.

On April 2, 1998, the Administration (Secretaries Daley and Herman and Attorney General Reno) sent a letter to Congress that opposed Senator Abraham's bill (that provided for a large, temporary increase in the cap and the expansion of an existing scholarship program for low-income students, but did not provide meaningful reform of the H-1B program) and endorsed the approach advocated by Senator Kennedy (that would effect a temporary increase in the cap, but also included reform to the H-1B program and increased training for U.S. workers). On April 30, 1998, the Administration sent a letter to Congress supporting Representative Lamar Smith's bill, if it is modified to include meaningful training provisions and a more modest increase in the cap.

Immig - H1B visas

Julie A. Fernandes
05/01/98 10:04:49 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP, Cathy R. Mays/OPD/EOP
Subject: H1B update

Bruce/Elena:
At yesterday's subcommittee mark-up, Smith's bill was voted out with no amendments (on a voice vote). Afterwards, both the Intel lobbyist and someone from Senator Abraham's staff approached Peter saying that it appeared as if they had to deal with us. A very good sign. The Intel lobbyist was the most stridently opposed to our reform ideas when we met with high-tech lobbyists when this whole thing first started (a couple of months ago).

The full committee mark-up is scheduled for next Wed. or Thursday. Also, the Intel execs are in town next Wednesday and their lobbyist has asked for a meeting. Peter is going to try to set something up (to include Sally and Elena). Peter may want to cast this as "informational" rather than a place to deal, pricipally b/c he thinks that we may be able to get all that we want out of the full committee mark-up. Also, Peter is setting up a Democratic staff briefing for Monday (also to include Sally and Elena).

Finally, Abraham's bill is likely to go to the floor the week of May 11th (high-tech week in the Senate). We are going to begin working on a SAP.

Julie

Immig - H1B visas

Julie A. Fernandes
04/21/98 07:33:59 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: H1B meeting with Members

Elena,
Peter is setting up a meeting between himself, you, Sally and Representatives Lamar Smith, Mel Watt and Zoe Lofgren to discuss what the Administration wants to be included in H1B visa legislation. They are not interested in getting specific language from us; rather, they want our positions on (1) size and duration of the increase in the cap; (2) training; (3) H1B reforms; and (4) the application fee. This meeting will likely take place on Thursday. Once the date/time is firm, Peter will call Laura to coordinate with your schedule.

As you know, our objective is to get strong reform language in the House bill. With the exception of the Department of Commerce, all of the agencies have agreed on both recruit & retain and no lay-off language. In general, Commerce is uncomfortable with too much discretion being given to the Secretary of Labor to "second-guess" the recruitment and the lay-off decisions of employers. We are working with Labor and Commerce on a compromise.

Attached is a version of where we are with the language as of today. As you will see, we include a proposal for a new visa category that applies only to very highly skilled science, engineering and math grads. All agreed that this is an alternative that we could present. I will update you on the rest as we go. Thanks.

Julie


LEG5.WP

Immigration -
H1B visas

Julie A. Fernandes
04/22/98 11:39:58 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: 2:30pm Meeting with Commerce and Labor

Elena,
The following are the two issues to be resolved at this afternoon's meeting with Labor and Commerce.

1. Recruit and retain

Commerce would prefer a scheme that lists acceptable recruitment/retention practices, and requires the employer to attest to having complied with a subset of these. Thus, as long as the employer recruits (regardless of whether the employer eventually hires a qualified U.S. worker found through this recruitment), they are o.k. Labor prefers a "performance" based attestation -- one that requires that the employer's recruitment fails to turn up U.S. workers that are qualified to do the job.

2. No lay-off

Labor wants this provision to protect against an employer firing a U.S. worker in order to hire an H1B worker, but wants the burden to be on the employer to demonstrate that the U.S. worker and the H1B worker did not have substantially equivalent education and experience. Commerce's suggested language only requires that if an employer lays-off a U.S. worker, they must recruit within their company to fill the position -- something that would already be required by the recruit and retain provision. It seems that Commerce's biggest concern is not wanting the Labor Department to have too much discretion to decide whether a laid-off employee is "substantially equivalent" to an H1B employee.

We have suggested to Labor, and will suggest to Commerce, that we could leave the lay-off language as is, and limit enforcement/investigation to cases where (1) there is a complaint filed ; (2) a certain number or percentage of employees have been laid off; or (3) where the employers workforce is more than x% H1B. This would allow investigation of the bigger cases, while mostly limiting the Department's enforcement of the more routine employment decisions.

Julie

Immig- H1B visas

H1B paper as of 2:30

Julie A. Fernandes
04/23/98 02:07:24 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: H1B paper

Elena,
HEre is the most recent draft. Commerce and Labor are still in disagreement over two parts. (1) whether, as part of the attestation on "recruit and retain" there should be an explicit requirement that the employer retrain their incumbent workers (Labor -- yes; Commerce -- no); and (2) that Labor wants to be able to impose sanctions if the employer makes a "material misrepresentation" as to any of the attestations (including the two new ones). If they can, that swallows the exceptions that we have carved out (Labor has this authority to sanction for misrepresentations on other attestations, and would continue to). We are still working with Labor and Commerce to get this worked out asap.

Julie


LEG8.WP

Immig - H1B visas

Julie A. Fernandes
04/08/98 12:30:41 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: H1B -- legislative action

Elena,
I spoke with Peter and Earl Grohl from Labor this morning. As I mentioned yesterday, Lamar Smith (Chair of the House Judiciary Subcommittee on Immigration) has asked the DOL to appear at a hearing on H1B visas on April 21st. According to Peter, Smith and Mel Watt (ranking member) are working on a bi-partisan bill that they will introduce soon after the hearing. According to Smith's staffer (George Fishman), they want to include the "recruit and retain" and "no lay-off" provisions, modeled after what is in the Kennedy bill. Fishman has asked Peter for a signal of what in Kennedy's bill is important to the Administration.

Smith's bill may also include a provision that would require any person entering under the family unification program to have a high school diploma. This is a whole other can of worms that we likely do not want to grapple with at the same time.

Peter has not had a conversation with Smith's staffer re: training. He plans to get with Gerry to have that conversation. However, Peter thinks that Kennedy may not include H1B reforms in his bill (compromising with Abraham), and thus our priority should be to ensure that there are H1B reforms included in the House bill, and then work out a compromise with the Sen. version later. Peter plans to speak again with Kennedy and Abraham to push for the reforms.

Julie

Immig - H1B visas

Bio

BIOTECHNOLOGY
INDUSTRY
ORGANIZATION

April 17, 1998

Elena Kagan
Deputy Assistant to the President for Domestic Policy
2nd Floor, West Wing
Office of Policy Development
Executive Office of the President
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Elena:

BIO has recently joined the H1B visa coalition. Our purpose in joining is to support enactment of relief from the current quota which threatens to limit the number of biotechnology scientists who can work for our industry. We have seen the impact of the current quota on information technology workers dominate the debate. We are concerned that a solution might be crafted that does not provide across-the-board H1B visa relief to include biotechnology company employees. The coalition recruited BIO to join so we feel sure that it would not support a proposal which is unbalanced, but we remain alert to others who might not understand or appreciate our concerns.

We surveyed our Human Resources Committee and found that H1B visas are used to retain U.S. trained foreign Ph.D. graduate students who have collaborated with the firm on biomedical research while they are residing here on a student visa or to hire expertise in a narrow area of science where few experts exist anywhere in the world. A graduate student might, for example, be focusing his or her Ph.D. thesis on research where the firm is interested in developing a product. It then clearly makes sense for the firm to be able to retain the student as a full-time employee to amplify the research and develop it into a product for the benefit of patients. If it becomes unlikely that the firm will be able to retain the student under an H1B visa, it would be less likely that the firm would collaborate with the student on the thesis or that the thesis work will quickly lead to development of cures and therapies for deadly and disabling diseases. This means that the low H1B visa ceiling might have an adverse impact on biomedical research and the interests of patients, not just on economic growth.

Our concern lies with highly trained scientists, not persons with just a BA degree and not even on lab technicians. Our issues are unrelated to any questions which might

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arise about employees who barely meet (or do not even meet) the minimum standard for this category of visas. It is common in our biotechnology firms for half of the employees to have a Ph.D.

While we do not have comprehensive data on the numerical extent of the H1B problem with biotechnology firms, a survey of one hundred of our companies found that 63% expected that the cap would cause a problem, and while overall the number of these employees is not large, the timely hiring each of these employees is very important to the continued research of this industry's companies. For example, one of our companies in Seattle has a research project on dendritic cells, according to our company, only three experts exist in the world. Two of those experts do not want to live in Seattle, leaving a single French scientist able and willing to work for our company. If no H1B visas are available when he decides to work for here in the United States, the company will have to hire the worker through the Green card process and delay the research for about a year and a half. We are attempting to address a problem before it becomes a crisis.

Biotechnology research requires the physical presence of the employees and cannot be conducted electronically from satellite firms. Our industry's research thrives with a critical number of scientist working physically together, when expensive equipment, reagents and technical support coexist. In this sense our industry is more dependent on relief from the quota than other sectors where telecommuting might provide some relief.

Our industry is quite vulnerable. The industry has never had a profitable year and has lost about $4 billion in each of the last three years. Regulatory requirements which increase the cost of doing business or delay the development of products which can produce revenue can jeopardize a firm's prospects. First it faces the challenge of raising huge amounts of capital, conducting cutting-edge biomedical research, securing strong intellectual property protection, navigating the FDA approval process, and then selling its product in a very competitive health care market. It is imperative that they are able to hire the scientists with the expertise to justify this extraordinary risk.

The biotechnology industry has enjoyed three excellent years of capital formation and the number of employees is expanding rapidly. The most comprehensive survey finds that employment has grown by 5%, 9% and 19% the last three years, rising from 103,000 to 140,000. This growth is likely to accelerate. We are now seeing an explosion in biomedical research, a consensus for a doubling of NIH spending, and potential breakthroughs from the genomics revolution, the advent of gene therapy and cell therapy, and new challenges posed by drug-resistant and emerging viruses.

The United States is dominant in international markets, but nearly every other country has targeted biotechnology research as a growth area. As we enter what many call the "Biotech Century," our country has a powerful incentive to ensure that impediments do not exist to continuing this dominance.

Please feel free to call us with any questions. 202-857-0244. Thanks very much for your assistance.

Sincerely,

Dave Schmickel
Patent and Legal Counsel

Charles E. Ludlam
Vice President for
Government Relations