NLWJC - Kagan

DPC - Box 033 - Folder 001

Immigration - H1B Visas [3]

Immigration - H1B visas

**LRM ID:** IMS301 **SUBJECT:** REVISED LABOR Testimony on H1B Nonimmigrant Visa Program and the High Technology Industry

**RESPONSE TO**
**LEGISLATIVE REFERRAL**
**MEMORANDUM**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: Ingrid M. Schroeder Phone: 395-3883 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: ______________________ (Date)

______________________ (Name)

______________________ (Agency)

______________________ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _______

_____ Other: ______________________

_____ FAX RETURN of _____ pages, attached to this response sheet

STATEMENT OF JOHN R. FRASER
DEPUTY WAGE AND HOUR ADMINISTRATOR
EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS
OF THE HOUSE JUDICIARY COMMITTEE

April 21, 1998

Mr. Chairman and Members of the Subcommittee:

We appreciate this opportunity to share the views of the Administration on whether this country's important high-technology industry should be afforded increased access to temporary foreign workers to meet its growing demand for highly skilled workers. In doing so, I want to again call your attention to the need to strengthen our education and training system to provide U.S. workers with the opportunity to acquire the skills needed to compete in our rapidly changing economy and the need pressing for reform of the H-1B nonimmigrant visa program.

Our information technology (IT) industry is essential to our continuing strong economic growth and wider prosperity. Our interest in the industry's strength is evidenced by our participation in a recent convocation in Berkeley that assessed IT work force needs. Further, as you know from Administration proposals advanced since 1993, we believe that the H-1B program needs fundamental reform. I would like to commend the Subcommittee for its interest in these issues.

We believe the issue of whether to increase the IT industry's access to temporary foreign workers should be evaluated within the framework of the following three questions:

(1) Is there a shortage of skilled U.S. workers to fill jobs in the IT industry and meet future workforce needs?

(2) What would be the consequences of raising the annual H-1B cap?

(3) Does the current H-1B program need to be reformed in order to provide industry appropriate access to temporary foreign workers while protecting the job

opportunities, wages and working conditions of U.S. workers?

I will address each of these in turn.

**Tight Labor Markets and IT Skills Shortages**

Proponents of increasing the annual cap on H-1B visas argue that this increase is necessary for the IT industry to be able to overcome an acute shortage of skilled U.S. workers. While there is no dispute that there is strong growth in demand for workers in the IT industry, it is much less clear that there is a shortage of skilled U.S. workers to meet this demand or that the domestic labor market won't be able — as it has over the last decade — to satisfy projected job growth.

U.S. employment has been growing rapidly, labor markets are increasingly tight, and they are likely to remain so. Though this is true for the nation as a whole, IT labor markets appear to be particularly affected. Employment opportunities for computer systems analysts, engineers, and scientists have been growing by 10 percent a year — well above the growth of comparable occupations — and are expected to continue growing at a comparable rate through 2006. The Bureau of Labor Statistics (BLS) predicts that the U.S. will require more than 1.3 million new workers in IT core occupations between 1996 and 2006 to fill job openings projected to occur due to growth and the need to replace workers who leave the labor force or transfer to other occupations.

The IT skills shortage issue is very controversial. Some industry advocates assert that there exist more than three hundred thousand unfilled jobs within the IT industry, and that these vacancies are raising business costs and hurting U.S. competitiveness. On the other hand, critics argue that the IT industry: (1) overstates the problem by producing inflated job vacancy data and

equating it to skills shortages; (2) continues to lay off tens of thousands of workers (e.g., Intel, Netscape, Cypress Semiconductor and Silicon Graphics recently announced large lay-offs); and (3) fails to tap reservoirs of available talent by insisting on unnecessarily specific job requirements and not providing more training to develop incumbent workers' skills.

Equating job vacancies and actual skills shortages is particularly controversial. While an industry association-sponsored survey indicates that there may be as many as 350,000 job vacancies in the IT industry, as you will hear, the General Accounting Office (GAO) has concluded that this does not necessarily signal an acute shortage of skilled workers. In fact, most industries and firms (particularly those with rapid employment growth and high worker turnover) will have large numbers of job openings that do not indicate skills shortages.

While higher than average wage growth can be a reliable indicator of skill shortages, the wage growth record for the IT industry is mixed. Though BLS wage trends for broad computer-related categories show only average wage growth between 1988 and 1997 for all categories, it only shows above-average wage growth in 1996 and 1997 and only in the lower-skill computer-related categories, such as programmers. At the same time, a variety of industry wage surveys show larger wage increases in 1996 and 1997 in specialized, high-skill occupations.

The Commerce Department's September 1997 report and the subsequent GAO evaluation of that report both were inconclusive on the issue of a shortage of U.S. workers with IT skills and both concluded that more information and data are needed to understand and properly characterize the IT labor market.

The Subcommittee should also take into consideration other factors that bear on the

question of the scope and duration of any labor shortage in the IT industry:

- The current "Year 2000" problem is now occupying thousands of IT workers for the short-term;
- New technologies are being introduced that are creating more efficient ways to produce software, store and retrieve data, speed up computations, and generally improve the productivity of the IT work force;
- The number of computer science enrollments has risen significantly in the last two years and nearly three-quarters of all IT workers got their education in other disciplines.

**Consequences of Raising the H-1B Visa CAP**

We strongly urge that any decision to raise the H-1B visa cap carefully consider the possible adverse impact of such a move on the normal process by which labor markets adjust to a growing demand for workers. The labor market should be permitted to adjust to this increased demand without the introduction of artificial factors (such as increasing access to temporary foreign workers) that could delay, if not prevent, these normal market adjustments. Indeed, the IT labor market has already begun to respond to the signals of increased demand. A survey of U.S. Ph.D. departments of computer science and computer engineering showed bachelor-level enrollments were up 46% in 1996, and another 39% in 1997 -- nearly doubling over the two year period (q: **does this include foreign students?**).

It is also important to remember that tight labor markets are good for U.S. workers. A tight labor market causes employers to raise wages, improve working conditions, and provide increased training to enable currently employed workers to keep pace with technology. An increased demand for trained workers induces educational and job training institutions to teach

new skills. With more opportunities for training, workers acquire skills needed to obtain better, higher-paying and more secure jobs, thereby creating open jobs and career ladders for those just entering or reentering the labor market (e.g., young people, welfare recipients, displaced workers, and other disadvantaged groups). Therefore, tight labor markets create incentives for employers and workers to react in ways needed to achieve many of the Nation's top priorities: moving welfare recipients, out-of-school youth, and dislocated workers into jobs; providing greater opportunities for lifelong learning; and raising wages and reducing income inequality.

However, while tight labor markets are good for U.S. workers, labor markets can sometimes be slow to respond to skills shortages. In these circumstances, it is often argued that temporary foreign workers are needed in the short-term to provide necessary skills while the labor market adjusts to provide U.S. workers with the requisite training. Without needed foreign temporary workers, industries experiencing genuine skill shortages may adjust in ways that do not serve the short-term or long-term priorities of the country, either by reducing job creation or by moving jobs overseas. Further, because the IT sector is so critical to our global competitive edge, the U.S. economy could suffer disproportionate harm if skill shortages do become acute.

Because the expanded use of foreign temporary workers may interfere with labor market adjustments and may make achieving our other priorities more difficult, we must make sure that any increase in the annual number of foreign temporary workers is done with care to ensure that the use of these foreign temporary workers is responding to a genuine skill shortage and does not interfere with healthy adjustments in the labor market.

We must also be cognizant that raising the H-1B cap will almost certainly increase both legal and illegal immigration. We know that nearly half of the workers who obtain permanent

residency in the US as employment-based immigrants convert from H-visa nonimmigrant status. And according to the INS statistics, nearly one-half of all illegal aliens resident in the United States are visa over-stayers. With the attachments and equity they will form in the U.S. during their nonimmigrant stay of 6 years (or more), one can expect many of the additional H-1B entrants will eventually join the ranks of visa over-stayers.

The Department of Labor has heard from many concerned individuals and groups on the issue of the adverse impact on U.S. workers of raising the annual cap on H-1B visas. I would like to request that copies of the many letters we have received from these people be included in the record of today's hearing.

The Administration believes that our first response to meeting the workforce needs of the IT industry should be to provide the needed skills to U.S. workers to qualify them for IT jobs. The Administration already has taken significant steps to increase our capacity to enhance workforce skills. The President continues to pursue comprehensive reform of the Nation's employment and training system by working with Congress to enact the principles embodied in his GI Bill proposal. Moreover, in the historic balanced budget agreement of last summer, the President insisted on and achieved the largest increase in 30 years in the Federal investment to expand the skills of American workers, including:

the largest Pell Grant increase in two decades;

Hope Scholarships to make the first two years of post-secondary education universally available;

the Lifelong Learning Tax Credit for the last 2 years of college and continuing adult education and training to upgrade worker skills;

a major increase in employment and training resources, including increases for dislocated workers and disadvantaged adults and youth; and

a $3 billion program to help long-term welfare recipients secure lasting, unsubsidized employment.

Further, the Administration announced several new initiatives at the recent Berkeley Convocation to help address the growing demand for IT workers:

A Labor Department Technology Demonstration project to test innovative ways of establishing partnerships between local workforce development systems, employers, training providers and others to train dislocated workers in needed high tech skills;

The expansion and integration of America's Job Bank and America's Talent Bank to allow employers and workers to list and access job openings and worker resumes in one integrated system;

The convening of four town hall meetings by the Commerce Department to discuss IT workforce needs, identify innovative practices, and showcase successful models; and

In addition, last week President Clinton and Secretary Herman announced that grants, totaling $1.6 million, are being provided to projects in four states to continue highly successful programs to train dislocated workers for high paying jobs in information technology.

Finally, with the Technology Literacy Challenge and related educational programs, the Administration has put strong emphasis on effective use of educational technology to strengthen our nation's schools and school-to-work transition. Linking elementary/secondary schools, institutions of higher education, and business can produce the knowledge, know-how, and skills our nation's businesses and young people need in IT. This creates opportunities for business and

America's students alike. **[need more information on this to be able to answer questions.]**

We believe that there is more that can be done to move U.S. workers into high technology jobs, and we welcome the discussions that may be sparked by this hearing. We are committed to continuing to pursue a dialogue with the major stakeholders on this critical workforce issue — government, industry, workers, and education and training institutions — to better define the workforce needs of the IT industry and develop appropriate solutions to meet these needs domestically through commitments from each of the stakeholders.

In sum, Mr. Chairman, our assessment of the likely effects of raising the H-1B cap reconfirms our strong conviction that our primary public policy response to skills mismatches due to changing technologies and economic restructuring must be to prepare the U.S. workforce to meet new demands. Yet we recognize that short-term demands for skills may require that we develop a balanced, short-term, response to meet urgent needs while we actively adjust to rapidly changing circumstances. However, increased numbers of temporary foreign workers should be the last — not the first — public policy response to skills shortages.

Given this broader context, let me now turn to the third of the issues I listed — the pressing need for reform of the H-1B nonimmigrant program.

**H-1B Nonimmigrant Program Must be Reformed**

The H-1B visa program allows the admission of up to 65,000 workers each year (to stay for as long as six years), to meet short-term, high-skills employment needs in the domestic labor market. Temporary visa programs, like H-1B, are intended to allow employers who are faced with a domestic skills shortage to have access to temporary foreign workers with the requisite skills while the domestic labor market makes appropriate adjustments.

However, there exist serious structural flaws in the current H-1B program. These flaws are documented in a May 1996 report by the Department's Inspector General (IG). I would ask the Subcommittee to accept the IG's full report in the record of today's hearing.

The IG found that, despite the legislative intent:

> ". . . the [H-1B] program does not always meet urgent, short-term demand for highly-skilled, unique individuals who are not available in the domestic work force. Instead, it serves as a probationary try-out employment program for illegal aliens, foreign students, and foreign visitors to determine if they will be sponsored for permanent status."

The IG also found that "some [H-1B] employers use alien labor to reduce payroll costs either by paying less than the prevailing wage to their own alien employees or treating these aliens as independent contractors, thereby avoiding related payroll and administrative costs." It found, in addition, that "other [H-1B] employers are 'job shops' whose business is to provide H-1B alien contract labor to other employers." The IG concluded that the H-1B program does little to protect the jobs or wage of U.S. workers and it recommended eliminating the current program and establishing a new program to fulfill Congress' intent.

Employers obtain H-1B workers by simply filing a labor condition application (LCA) with the Department affirming that they have complied with four requirements:

that the higher of the local prevailing rate or the wage paid to the employer's similarly-employed workers will be paid to the foreign workers;

that no strike or lockout exists involving the occupation;

that notification has been provided to U.S. workers or their union; and

that the employment of H-1B nonimmigrants will not adversely affect the working conditions of U.S. workers similarly employed.

By law, the Labor Department can do no more than review these attestations for completeness and obvious inaccuracies — to determine whether an employer checked all of the boxes, made no flagrant errors, and signed the attestation — and must do so within 7 days of receipt.

Because current law does not require any test for the availability of qualified U.S. workers in the domestic labor market, many of the visas under the current cap of 65,000 can be used by employers to hire foreign workers for purposes other than meeting a skills shortage. In addition, current law allows a U.S. employer to lay off U.S. workers and replace them with H-1B workers, and allows employers to retain H-1B workers for up to 6 years to fill a presumably " temporary" need. We simply do not believe this is right.

In 1993 the Administration asked the Congress to amend the H-1B nonimmigrant program to address these structural problems. Unfortunately for many U.S. businesses and workers, these amendments have not been enacted. The amendments requested in 1993 were carefully designed to ensure continued business access to needed high-skill workers in the international labor market while decreasing the H-1B program's susceptibility to misuse to the detriment of U.S. workers and the businesses that employ them. Briefly stated, the amendments would require employers which seek access to temporary foreign "professional" workers to also attest that:

they have taken timely and significant steps to recruit and retain U.S. workers in these occupations; and

they have not laid off or otherwise displaced U.S. workers in the occupations for which they seek nonimmigrant workers in the periods immediately preceding and following

their seeking such workers.

In addition, the Administration urged enactment of another amendment to reduce the allowable period of stay under the H-1B program from six to three years to better reflect the " temporary" nature of the presumed employment need.

Enactment of these reforms will help employers actually facing skills shortages, including those in the IT industry, obtain needed workers through the H-1B program. Under existing law, employers facing skills shortages must compete for available visas (up to the cap of 65,000) on a first-come, first-served basis with other employers that do not face such shortages. Thus, enactment of the proposed amendments would reduce pressure on the visa cap by screening out employers that are not faced with skills shortages and have no interest in recruiting U.S. workers.

Some employers contend that adding these requirements will substantially slow down the admission process for foreign temporary workers and add many bureaucratic requirements to approval of their application. This contention is simply untrue. The Administration's proposed reforms would add two more boxes to be checked on the employer's one-page application. The Labor Department would still be subject to the existing requirements that the application be processed within seven days and only rejected where incomplete or where there are "obvious inaccuracies." There would be no new procedures that could cause delays in processing and approval. The employer would simply attest that it had tested the U.S. labor market in attempting to fill the job(s) and that, during certain times, it had not or would not lay off U.S. workers in the same occupation.

Many industry representatives assert that they search exhaustively in the U.S. labor

market to fill open jobs and that the tight IT labor market does not allow lay off or displacement of U.S. workers. Accordingly, attesting to these two common sense reforms should impose no additional burden.

Some employers contend that any attempt to monitor the truthfulness of these attestations — after the application is approved and the nonimmigrants admitted — would subject the employer's hiring and termination decisions to "second guessing" by the government. Such decisions are already subject to review in the context of enforcement of employment discrimination laws, including the anti-discrimination provisions of the immigration laws. Moreover, under existing law, employers' authority to import foreign workers is conditional and there are few impediments to the exercise of this authority by employers before the approval of the nonimmigrant admission. Subjecting employers' hiring and termination decision-making to scrutiny after-the-fact is the least burdensome way to ensure that the employers are not discriminating against U.S. workers in favor of temporary foreign workers.

If the Administration's reforms are not implemented and the two new attestation elements are not added to the H-1B program, the Labor Department will not be able to assure that the intended purposes of the program are actually served. The H-1B program exists to assure that U.S. employers can meet short-term labor needs by limited access the international labor market. Under current law, as the Inspector General has pointed out, the government is effectively powerless to assure that employers use the H-1B program for its intended purpose, and that purpose only.

**Conclusion**

Mr. Chairman, let me conclude by restating that the growing workforce needs of the IT

industry can only be met — and the strength and growth of the industry secured in the long run — if we take the steps needed to fully develop and utilize the skills of U.S. workers. Increased reliance on temporary foreign workers should, at most, only be a small part of the solution and must be viewed as a minor complement to the development of the U.S. workforce. Further, let me repeat that reform of the H-1B program is essential to eliminating abuses under the program and providing appropriate protections for U.S. workers. Enactment of these reforms would effectively allocate a greater share of H-1B visas to employers facing actual skills shortages.

I appreciate the interest shown by the Subcommittee and staff in our views, and your thoughtful consideration of them. The Department looks forward to continuing to work closely and cooperatively with you and your staff on these issues.

Mr. Chairman, that concludes my prepared statement. I would be happy to respond to any questions.

Message Sent To: ______________________________________________

Immigration - H1B visas

**Background on H-1B Visas and Legislation**
May 1, 1998

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.

Thus, while it may be necessary in the short-term to increase the number of visas for temporary foreign workers, this must be done only in conjunction with:

- Increased efforts by various stakeholders, including industry, to increase the skill level of U.S. workers.

- Improvements in the temporary visa program to require employers 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. It is important to emphasize that these reforms would target the visa program's use to employers (like many of those in the IT industry) experiencing genuine skills 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 (which includes targetted reforms to the H-1B program) if it is modified to include meaningful training provisions and a more modest increase in the cap.

A Note about Rep. Lofgren

Rep. Zoe Lofgren supports increasing the cap, but she has not endorsed our H-1B reforms. She is likely to raise two issues:

- Neither Sen. Abraham nor Rep. Smith include an application fee for each H-1B visa in

their bill. Rep. Lofren advocates charging such a fee to raise money for training and enforcement of the H-1B program. The Administration also strongly supports this fee.

- Rep. Lofren would also like the final bill to include a training provision. She has promoted a program called the Mathematics, Engineering, and Science Achievement (MESA) project. It is important for you to know that MESA is very similar to the Administration's High Hopes initiative (the major difference is that MESA focuses on math, science, and engineering while High Hopes can be broader). In fact, MESA was one of the prototypes used to develop High Hopes and many current MESA projects would be eligible to apply for a High Hopes grant if we succeed in getting it enacted. MESA is also similar to the middle school math and science strategy that the Department of Education and NSF are heading.

High Hopes will pass with the Higher Education Reauthorization Act in the House next week. It is not yet in the Senate version. We should emphasize working together to get High Hopes passed and to highlight the Department of Education/NSF middle school strategy.

105TH CONGRESS
2D SESSION

# H. R. ____

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Workforce Improve-
5 ment and Protection Act of 1998".
6 **SEC. 2. TEMPORARY INCREASE IN SKILLED FOREIGN**
7 **WORKERS.**
8 Section 214(g) of the Immigration and Nationality
9 Act (8 U.S.C. 1184(g)) is amended—

1 (1) by amending paragraph (1)(A) to read as
2 follows:
3 "(A) under section 101(a)(15)(H)(i)(b), subject
4 to paragraph (5), may not exceed—
5 "(i) 95,000 in fiscal year 1998;
6 "(ii) 105,000 in fiscal year 1999; and
7 "(iii) 115,000 in fiscal year 2000; or"; and
8 (2) by adding at the end the following:
9 "(5) In each of fiscal years 1999 and 2000, the total
10 number of aliens described in section 212(a)(5)(C) who
11 may be issued visas or otherwise provided nonimmigrant
12 status under section 101(a)(15)(H)(i)(b) may not exceed
13 7,500.".

14 **SEC. 3. PROTECTION AGAINST DISPLACEMENT OF UNITED**
15 **STATES WORKERS.**

16 (a) IN GENERAL.—Section 212(n)(1) of the Immi-
17 gration and Nationality Act (8 U.S.C. 1182(n)(1)) is
18 amended by inserting after subparagraph (D) the follow-
19 ing:
20 "(E)(i) The employer has not laid off or other-
21 wise displaced and will not lay off or otherwise dis-
22 place, within the period beginning 6 months before
23 and ending 90 days following the date of filing of
24 the application or during the 90 days immediately
25 preceding and following the date of filing of any visa

1 petition supported by the application, any United
2 States worker (as defined in paragraph (3)) (includ-
3 ing a worker whose services are obtained by con-
4 tract, employee leasing, temporary help agreement,
5 or other similar means) who has substantially equiv-
6 alent qualifications and experience in the specialty
7 occupation, and in the area of employment, for
8 which H–1B nonimmigrants are sought or in which
9 they are employed.

10 "(ii) Except as provided in clause (iii), in the
11 case of an employer that employs an H–1B non-
12 immigrant, the employer shall not place the non-
13 immigrant with another employer where—

14 "(I) the nonimmigrant performs his or her
15 duties in whole or in part at one or more work-
16 sites owned, operated, or controlled by such
17 other employer; and

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

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

1 conditions described in clause (i) during the period
2 described in such clause.".
3 (b) DEFINITIONS.—
4 (1) IN GENERAL.—Section 212(n) of the Immi-
5 gration and Nationality Act (8 U.S.C. 1182(n)) is
6 amended by adding at the end the following:
7 "(3) For purposes of this subsection:
8 "(A) The term 'H–1B nonimmigrant' means an
9 alien admitted or provided status as a nonimmigrant
10 described in section 101(a)(15)(H)(i)(b).
11 "(B) The term 'lay off or otherwise displace',
12 with respect to an employee—
13 "(i) means to cause the employee's loss of
14 employment, other than through a discharge for
15 cause, a voluntary departure, or a voluntary re-
16 tirement; and
17 "(ii) does not include any situation in
18 which employment is relocated to a different ge-
19 ographic area and the employee is offered a
20 chance to move to the new location, with wages
21 and benefits that are not less than those at the
22 old location, but elects not to move to the new
23 location.
24 "(C) The term 'United States worker' means—

1 "(i) a citizen or national of the United
2 States;
3 "(ii) an alien lawfully admitted for perma-
4 nent residence; or
5 "(iii) an alien authorized to be employed
6 by this Act or by the Attorney General.".
7 (2) CONFORMING AMENDMENTS.—Section
8 212(n)(1) of the Immigration and Nationality Act (8
9 U.S.C. 1182(n)(1)) is amended by striking "a non-
10 immigrant described in section 101(a)(15)(H)(i)(b)"
11 each place such term appears and inserting "an H–
12 1B nonimmigrant".

13 **SEC. 4. RECRUITMENT OF UNITED STATES WORKERS**
14 **PRIOR TO SEEKING NONIMMIGRANT WORK-**
15 **ERS.**

16 Section 212(n)(1) of the Immigration and Nationality
17 Act (8 U.S.C. 1182(n)(1)), as amended by section 3, is
18 further amended by inserting after subparagraph (E) the
19 following:
20 "(F)(i) The employer, prior to filing the appli-
21 cation, has taken, in good faith, timely and signifi-
22 cant steps to recruit and retain sufficient United
23 States workers in the specialty occupation for which
24 H–1B nonimmigrants are sought. Such steps shall
25 have included recruitment in the United States,

1 using procedures that meet industry-wide standards
2 and offering compensation that is at least as great
3 as that required to be offered to H–1B non-
4 immigrants under subparagraph (A), and offering
5 employment to any qualified United States worker
6 who applies.
7 "(ii) The conditions described in clause (i) shall
8 not apply to an employer with respect to the employ-
9 ment of an H–1B nonimmigrant who is described in
10 subparagraph (A), (B), or (C) of section
11 203(b)(1).".

12 **SEC. 6. LIMITATION ON AUTHORITY TO INITIATE COM-**
13 **PLAINTS AND CONDUCT INVESTIGATIONS**
14 **FOR NON-H–1B-DEPENDENT EMPLOYERS.**

15 (a) IN GENERAL.—Section 212(n)(2)(A) of the Im-
16 migration and Nationality Act (8 U.S.C. 1182(n)(2)(A))
17 is amended—
18 (1) in the second sentence, by striking the pe-
19 riod at the end and inserting the following: ", except
20 that the Secretary may only file such a complaint re-
21 specting an H–1B-dependent employer (as defined
22 in paragraph (3)), and only if there appears to be
23 a violation of an attestation or a misrepresentation
24 of a material fact in an application."; and

1 (B) by inserting after the second sentence
2 the following: "Except as provided in subpara-
3 graph (F) (relating to spot investigations dur-
4 ing probationary period), no investigation or
5 hearing shall be conducted with respect to an
6 employer except in response to a complaint filed
7 under the previous sentence.".
8 (b) DEFINITIONS.—Section 212(n)(3) of the Immi-
9 gration and Nationality Act (8 U.S.C. 1182(n)(2)), as
10 added by section 3, is amended—
11 (1) by redesignating subparagraphs (A), (B),
12 and (C) as subparagraphs (B), (C), and (E), respec-
13 tively;
14 (2) by inserting after "purposes of this sub-
15 section:" the following:
16 "(A) The term 'H–1B-dependent employer'
17 means an employer that—
18 "(i)(I) has fewer than 21 full-time equiva-
19 lent employees who are employed in the United
20 States; and (II) employs 4 or more H–1B non-
21 immigrants; or
22 "(ii)(I) has at least 21 but not more than
23 150 full-time equivalent employees who are em-
24 ployed in the United States; and (II) employs
25 H–1B nonimmigrants in a number that is equal

1 to at least 20 percent of the number of such
2 full-time equivalent employees; or
3 "(iii)(I) has at least 151 full-time equiva-
4 lent employees who are employed in the United
5 States; and (II) employs H–1B nonimmigrants
6 in a number that is equal to at least 15 percent
7 of the number of such full-time equivalent em-
8 ployees.
9 In applying this subparagraph, any group treated as
10 a single employer under subsection (b), (c), (m), or
11 (o) of section 414 of the Internal Revenue Code of
12 1986 shall be treated as a single employer. Aliens
13 employed under a petition for H–1B nonimmigrants
14 shall be treated as employees, and counted as non-
15 immigrants under section 101(a)(15)(H)(i)(b) under
16 this subparagraph."; and
17 (3) by inserting after subparagraph (C) (as so
18 redesignated) the following:
19 "(D) The term 'non-H–1B-dependent employer'
20 means an employer that is not an H–1B-dependent
21 employer.".
22 **SEC. 6. INCREASED ENFORCEMENT AND PENALTIES.**
23 (a) IN GENERAL.—Section 212(n)(2)(C) of the Im-
24 migration and Nationality Act (8 U.S.C. 1182(n)(2)(C))
25 is amended to read as follows:

1 "(C)(i) If the Secretary finds, after notice and oppor-
2 tunity for a hearing, a failure to meet a condition of para-
3 graph (1)(B) or (1)(E), a substantial failure to meet a
4 condition of paragraph (1)(C), (1)(D), or (1)(F), or a mis-
5 representation of material fact in an application—
6 "(I) the Secretary shall notify the Attorney
7 General of such finding and may, in addition, im-
8 pose such other administrative remedies (including
9 civil monetary penalties in an amount not to exceed
10 $1,000 per violation) as the Secretary determines to
11 be appropriate; and
12 "(II) the Attorney General shall not approve
13 petitions filed with respect to that employer under
14 section 204 or 214(c) during a period of at least 1
15 year for aliens to be employed by the employer.
16 "(ii) If the Secretary finds, after notice and oppor-
17 tunity for a hearing, a willful failure to meet a condition
18 of paragraph (1) or a willful misrepresentation of material
19 fact in an application—
20 "(I) the Secretary shall notify the Attorney
21 General of such finding and may, in addition, im-
22 pose such other administrative remedies (including
23 civil monetary penalties in an amount not to exceed
24 $5,000 per violation) as the Secretary determines to
25 be appropriate; and

1 "(II) the Attorney General shall not approve
2 petitions filed with respect to that employer under
3 section 204 or 214(c) during a period of at least 1
4 year for aliens to be employed by the employer.
5 "(iii) If the Secretary finds, after notice and oppor-
6 tunity for a hearing, a willful failure to meet a condition
7 of paragraph (1) or a willful misrepresentation of material
8 fact in an application, in the course of which failure or
9 misrepresentation the employer also has failed to meet a
10 condition of paragraph (1)(E)—
11 "(I) the Secretary shall notify the Attorney
12 General of such finding and may, in addition, im-
13 pose such other administrative remedies (including
14 civil monetary penalties in an amount not to exceed
15 $25,000 per violation) as the Secretary determines
16 to be appropriate; and
17 "(II) the Attorney General shall not approve
18 petitions filed with respect to that employer under
19 section 204 or 214(c) during a period of at least 2
20 years for aliens to be employed by the employer.".
21 (b) PLACEMENT OF H–1B NONIMMIGRANT WITH
22 OTHER EMPLOYER.—Section 212(n)(2) of the Immigra-
23 tion and Nationality Act (8 U.S.C. 1182(n)(2)) is amend-
24 ed by adding at the end the following:

1 "(E) Under regulations of the Secretary, the previous
2 provisions of this paragraph shall apply to a failure of an
3 other employer to comply with an attestation described in
4 paragraph (1)(E)(iii) in the same manner as they apply
5 to a failure to comply with a condition described in para-
6 graph (1)(E)(i).".
7 (c) SPOT INVESTIGATIONS DURING PROBATIONARY
8 PERIOD.—Section 212(n)(2) of the Immigration and Na-
9 tionality Act (8 U.S.C. 1182(n)(2)), as amended by sub-
10 section (b), is further amended by adding at the end the
11 following:
12 "(F) The Secretary may, on a case-by-case basis,
13 subject an employer to random investigations for a period
14 of up to 5 years, beginning on the date that the employer
15 is found by the Secretary to have committed a willful fail-
16 ure to meet a condition of paragraph (1) or to have made
17 a misrepresentation of material fact in an application. The
18 preceding sentence shall apply to an employer regardless
19 of whether the employer is an H–1B-dependent employer
20 or a non-H–1B-dependent employer. The authority of the
21 Secretary under this subparagraph shall not be construed
22 to be subject to, or limited by, the requirements of sub-
23 paragraph (A).".

1 **SEC. 7. EFFECTIVE DATE.**

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

Immig - H1B visas

Final

April 27, 1998

**Administration Position Regarding H-1B Legislation**

The Administration has committed to pursuing both reforms to the H-1B visa program and increased training opportunities for U.S. workers as part of any legislation that would temporarily raise the annual cap on H-1B visas. The following represents the Administration's position on major reforms and training initiatives.

**I. <u>Recruitment and Non-displacement of United States Workers Prior to Seeking Nonimmigrant Workers</u>**

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

(E)(I) The employer, prior to filing the application, has taken good faith, timely and significant steps to recruit and retain sufficient U.S. workers in the specialty occupation in which the non-immigrant whose services are being sought will be employed. Good faith steps to recruit and retain shall be defined as:

(a) the employer taking the following two actions in a manner reasonably designed to recruit and retain U.S. workers:

(i) widespread advertising of the relevant job openings to both current and prospective employees (e.g., through America's Job Bank, participation in job fairs, the Internet, employer newsletters and electronic communications, general circulation publications, professional journals and magazines); and

(ii) offering meaningful monetary incentives to applicants (such as paying above the prevailing wage, paying bonuses, or providing stock options) above those already included in the base compensation package; or offering training subsidies, or a training program, that provides the means for its current employees to enhance their skills to qualify for jobs in the specialty occupation in which the nonimmigrant will be (or is) employed; and

ads

monetary or training $/ programs

(b) The employer did not receive applications from any U.S worker with at least substantially equivalent qualifications and experience to the temporary foreign worker offered employment; or (ii) offered employment to a U.S. worker with at least substantially equivalent qualifications and experience to the temporary foreign worker offered employment, but the offer of employment to the U.S. worker was refused; and

(c) Offering compensation at least at the amount required by subparagraph (A).

(E)(II) The recruitment requirements of this subparagraph shall not apply to aliens with extraordinary ability, aliens who are outstanding professors and researchers, and certain multinational executives and managers described in section 203(b)(1). The recruitment requirements of this subparagraph shall also not apply to a scientist, mathematician, or engineer who has attained at least a master's degree or its equivalent in a scientific or engineering 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.

(F)(I) The employer --

(a) has not and will not -- within the 90-day period immediately preceding and the 90-day period immediately following the filing of the application, and within the 90-day period immediately preceding and the 90-day period immediately following the filing of any visa petition supported by the application -- lay off or otherwise displace any United States worker, including a worker obtained by contract, employee leasing, temporary help agreements, or otherwise displace any United States worker, including a worker obtained by contract, employee leasing, temporary help agreement, or other similar basis, who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant will be (or is) employed; and

(F)(II) For purposes of this subparagraph, the term "laid off," with respect to an employee, means the employee's loss of employment, other than a discharge for cause or a voluntary departure or voluntary retirement. The term "laid off" does not apply to any case in which employment is relocated to a different geographic area and the affected employee is offered a chance to move to the new location with the same wages and benefits, but elects not to move to the new location.

(G) The employer offered compensation as required by subparagraph (A).

(b) For purposes of this subsection, the term "United States worker" means --

(I) a citizen or national of the United States
(II) an alien lawfully admitted to the United States for permanent residence; or
(III) an alien authorized to be employed by this Act or by the Attorney General.

## II. Wage Comparability

Section 212(n)(1)(A)(I) of such Act is amended by inserting "(including the value of benefits and additional compensation)" after "wages." Section 212(n)(1)(A)(I)(I) is amended by inserting "(including the value of benefits and additional compensation)" after "actual wage level."

## III. Job Contractors

In the case of an employer that is a job contractor (within the meaning of regulations promulgated by the Secretary of Labor to carry out this subsection), the contractor will not place any H-1B employee with another employer unless such other employer has executed an attestation that the employer is complying and will continue to comply with the requirements of this paragraph in the same manner as they apply to the job contractor.

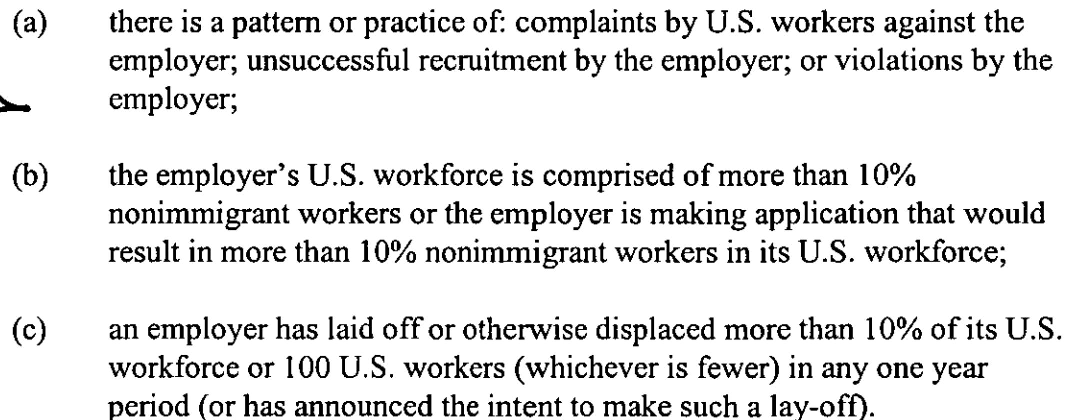
## IV. Enforcement

(a) Independent Authority to Investigate

Section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)) is amended --

(I) in paragraph (2)(A), by striking the first sentence and inserting the following:

"The Secretary may conduct investigations pursuant to a complaint or, absent a complaint, where the Secretary has reasonable cause to believe that:



(a) there is a pattern or practice of: complaints by U.S. workers against the employer; unsuccessful recruitment by the employer; or violations by the employer;

(b) the employer's U.S. workforce is comprised of more than 10% nonimmigrant workers or the employer is making application that would result in more than 10% nonimmigrant workers in its U.S. workforce;

(c) an employer has laid off or otherwise displaced more than 10% of its U.S. workforce or 100 U.S. workers (whichever is fewer) in any one year period (or has announced the intent to make such a lay-off).

The Secretary shall establish a process for the receipt, investigation, and disposition of complaints or other cases of noncompliance with this section."

(II) in paragraph (2)(C), by inserting ", or that the employer failed to cooperate in the conduct of the Secretary's investigation or has intimidated, discharged, or otherwise discriminated against any person because that person has asserted a right or has cooperated in an investigation under this paragraph" after "a material fact in an application."

(III) in paragraph (2), by adding at the end the following new subparagraph:

"(E) The Secretary may issue subpoenas requiring the attendance and testimony of witnesses or the production of any records, books, papers, or documents in connection with any investigation or hearing, conducted under this paragraph. In conducting a hearing, the Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this paragraph, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall apply."

## V. Sanctions

Section 212(n)(2)(C) is amended to read:

"If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B); a substantial failure to meet a condition of paragraphs (1)(C) or (1)(D); a willful failure to meet a condition of paragraph (1)(A); a violation(s) of paragraphs (1)(E) or (1)(F) that is willful, or reflects a pattern or practice of violations, or is a violation that affects a significant number of individuals; or a misrepresentation of a material fact in the application (but any misrepresentation of a material fact relating to paragraphs (1)(E) or (1)(F) must be willful, or reflects a pattern or practice of violations, or is a violation that affects a significant number of individuals) —

(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,"

## VI. Application Fee

Section 212(n) of the Immigration and Nationality Act (8 USC 1182(n)) is amended by adding the following new paragraph:

"(3)(A) The Secretary of Labor shall establish, by regulation, a fee to be paid by an employer for each position for which an application is filed for certification of a nonimmigrant temporary worker under section 101(a)(15)(H)(i)(b) and (c).

(B) The fee shall be set at a level that --

(i) will ensure recovery of the full costs of providing adjudication and application services; and,

(ii) finances activities authorized under Section XXXXX (the Regional and Industry Special Skills Training Fund).

(C) During the period ending September 30, 2001, such a fee shall not exceed $250 for each position.

(D) (i) It shall be unlawful for an employer to require, as a condition of employment by such employer, that the fee prescribed under this paragraph or any part of the fee be paid directly or indirectly by the alien whose services are being sought.

(ii) Any person or entity that is determined, after notice and opportunity for an administrative hearing, to have violated clause (I) shall be subject to a civil penalty of $5,000 for each violation, to an administrative order requiring the payment of any fee described in this paragraph, and the disqualification for one year from petitioning for temporary nonimmigrant workers under this subsection.

(iii) Any amount determined to have been paid, directly or indirectly, toward the filing fee described in paragraph (3)(A) by the alien whose services were sought, shall be repaid by the employer to such alien.

(E) Notwithstanding any other provision of law, all fees, as described in this paragraph as are designated by the Secretary of Labor in regulations shall be deposited as offsetting receipts into a separate account entitled "Temporary Worker Fee Account" in the Treasury of the United States. All deposits into the "Temporary Worker Fee Account" shall remain available until expended by the Secretary to reimburse any appropriation for expenses related to activities described in subparagraph (B)."

## VII. Training

The Administration strongly supports the creation of Regional Skills Alliances and expansion of the National Science Foundation (NSF)'s advanced technical education programs. The Administration does not support providing scholarships or loans to individuals, including the expansion of the State Student Incentive Grant (SSIG) program.

## VIII. New Visa Category Proposal

A new program (H-1C) that creates temporary visas for use only by non-immigrants with very high skill levels. In particular:

- The program would be authorized for four years beginning in FY1998.
- There would be a maximum of 25,000 visas for FY1998, FY1999, and FY2000, and a maximum of 15,000 visas for FY2001.

Only employers whose number of H-1B and "H-1C" employees in the prior year constitutes no greater than one-half of their U.S. based workforce are eligible to apply.

- Only individuals with a minimum of a master's degree (or equivalent degree) in math, science, or engineering; or a bachelor's degree in math, science, or engineering and five years of experience in the specialty occupation; or who will earn at least $75,000 per year (exclusive of benefits) are eligible for an "H-1C" visa.

- Requires a $500 fee for each position for which an application is filed for training, enforcement, and administration of the program.

- The "H-1C" visas would be issued for a 3-year period, and renewable for an additional 3 years.

- All of the requirements of the "H-1C" visa program would be the same as would exist under the reformed H-1B program.

Immig - H1B visas

## . EXAMPLES OF U.S. WORKERS REPLACED BY H-1B NONIMMIGRANTS

Source: The Atlanta Journal and The Atlanta Constitution, Nov. 1995

Data processing employees of **Delta Air Lines** laid off when replaced through contract with **TransQuest** "which provides computer information services for Delta Air Lines, has 1,200 employees plus 250 contract workers, many of whom are here on H-1B visas."

> "Accepting work wherever they can get it has become part of the job for many American computer programmers such as Downing. If he doesn't do it, thousands of foreign-born workers here on special work permits called H-1B visas will -- often for far less money.
>
> Increasingly, Americans such as Downing are having to compete with overseas workers willing to work for less as U.S. firms look abroad to fill high-skill jobs and satisfy mounting cost-cutting pressures. Corporate cuts are forcing many highly skilled American workers to change their lives dramatically.
>
> Meanwhile, many American firms are using retooled immigration laws at the expense of American workers."

Source: The Montgomery County Journal, Nov. 1995

**Fannie Mae** (the **Federal National Mortgage Association**) replaces U.S. software consultants with programmers from India working in the U.S. on H-1B visas who are employed by **Tata Consultancy Services, Inc.**

(The **National Association of Security Dealers** also reported as using **Tata** to hire H-1B programmers to replace at least 20 of its U.S. software consultants -- see below.)

> "Ramamathn R. Ramanan, Tata's manager for the mid-Atlantic region, said in an interview that the company provides highly skilled

computer programmers to an industry that has at times scrambled to find qualified workers. He said Tata hires the best and brightest that India has to offer and brings them here, where even low salaries appear good by Indian standards.

'What may be considered a paltry salary in the U.S. is considered very good in India,' Ramanan said.

Although yearly income in India averages less than $500, computer programmers there can earn as much as $5,000 a year. So a worker from India who was employed in the United States and paid $5 an hour would still earn more than $10,000 a year, doubling the earnings available in India. Ramanan would not say how much Tata's workers are paid."

Source: Washington Post, Dec. 1995

**National Association of Security Dealers** displaces U.S. software professionals through contract with **Tata Consultancy Services.**

"One of the latest controversies over the H-1B program erupted last month after it was reported that the National Association of Security Dealers had laid off 30 contract computer programmers and hired an Indian firm, Tata Consultancy Services, to do the work. The government-chartered association, based in Rockville, Md., owns, operates and regulates the Nasdaq Stock Market. Tata, which has a regional office in Silver Spring, is part of a huge Indian conglomerate that company officials say produces everything from tea to computer software.

An NASD spokesman, Marc Beauchamp, said Tata would employ about 40 people on the project, half of them working here on H-1B visas and half at Tata's home office in Bombay. He denied that any full-time NASD employees were fired and said that 'fewer than 20 outside contractors could possibly be affected' by the move."

Source: New York Times, Aug. 1995

**Sea-Land Services Inc.** lays off U.S. computer specialists to replace them through contract with **Software Ventures International**, based in the Philippines.

"When Sea-Land Services Inc. asked Jessie B. Lindsay, a longtime computer programmer for the company, to sign form letters to Congress last winter supporting legislation to protect American shipping jobs from foreign competition she loyally agreed.

But a week later, Sea-Land, a unit of CSX Corporation, announced that it was shutting down her division in Elizabeth, N.J., laying off most of the 325 employees and sub-contracting the work to programmers in India and the Philippines. Mrs. Lindsay was offered a job at least temporarily in Charlotte, N.C., to make sure the transition went smoothly, but quit because she had a baby and was reluctant to move.

'I felt betrayed,' Mrs. Lindsay said. Her family faced that situation twice last winter. Her husband, William F. Lindsay, also left his programming job at the American International Group when it, a large insurance company, brought programmers from India to his office and began training them to replace the American workers."

Source: The Detroit News, Feb. 1996; The Daily Record, Morris County, N.J., (two articles) Sep. and Nov. 1994

**American International Group (AIG) Inc.** lays off 250 computer professionals to replace them via contract with **Syntel Inc.** of Troy, Michigan.

The Daily Record:

"American International Group Inc. said yesterday it is laying off 250 workers, including 130 at its largest New Jersey office here [Livingston Township].

The insurer said contractors will take over some backroom tasks in

place of the laid-off workers, a practice called outsourcing. The contractors will enable AIG, as the insurer is called, to avoid paying full-time salaries in an operation with an unpredictable workload.

'It's feast or famine,' said Joe Norton, an AIG spokesman.

Livingston will bear the brunt of the cuts; those losing their jobs were given 60-days notice yesterday. Next hardest hit will be some 60 workers in a Bedford, Mass., office, Norton said. In Manhattan, AIG plans to lay off about 40 people.

The workers losing jobs are mostly computer programmers, Norton said."

"[AIG]... has earned a reputation for reacting fast to signs of runaway costs. Analysts and competitors said the computer operations in Livingston and the two other sites are probably efficient already. What probably prompted yesterday's move, they said, was AIG's discovery of new ways to run the computer operations more cheaply."

"... on Sept. 8 he was laid off along with 129 other workers at AIG's Livingston office. He was replaced by a foreign worker who came to this country on a nonimmigrant visa to work for a contractor under investigation by the U.S. Labor Department.

AIG laid off 250 workers altogether, mostly computer programmers."

"What made the layoffs bitter for Citarella and others was that AIG was replacing them with foreign workers through a process known as outsourcing.

AIG signed a contract with Syntel Inc., a Troy, Mich.-based company, to provide workers to perform a variety of computer programming functions.

Syntel pays the employees it provides to AIG, which saves by not having to pay full-time salaries or benefits.

Syntel supplied AIG with 100 foreign workers for its Livingston office, according to a Labor Condition Application obtained by the Daily Record from the U.S. Labor Department's Alien Certification Office in New York.

The workers come from abroad under an H-1B non-immigrant visa, which allows them to live and work in the United States for a maximum of six years."

"'It's total disillusionment with the American system,' said Citarella, who found himself training the person who would replace him."

The Detroit News:

"... She [Linda Kilcrease] and about 250 computer professionals not only lost their jobs, but were required to train their replacements in AIG's computing language and processes.

In Metro Detroit, some computer programmers say foreign contract workers and immigrants have driven down wages for computer programmers, engineers and scientists. One General Motors Corp. programmer, who asked not to be identified, said contract rates have fallen from about $40-$50 an hour to less than $30."

Source: The Dallas Morning News, Oct. 1995

Data processing employees of **IBM** in Austin, Tx, laid off and replaced through contract with the company's "Indian joint venture" with **Tata Information Systems, Ltd.**

"Software programmers and computer engineers around the United States find their jobs at risk because companies are bringing in programmers from India, Russia and elsewhere to do the work for less. Much less.

Larry Richards is a 36 year-old Austin programmer who found this out last year while working at IBM. Mr. Richards saw several colleagues get pink slips when Indian engineers came to work in their place."

STATEMENT OF JOHN R. FRASER
DEPUTY WAGE AND HOUR ADMINISTRATOR
EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS
OF THE HOUSE JUDICIARY COMMITTEE

April 21, 1998

Mr. Chairman and Members of the Subcommittee:

We appreciate this opportunity to share the views of the Administration on whether this country's important high-technology industry should be afforded increased access to temporary foreign workers to meet its growing demand for highly skilled workers. In doing so, I want to again call your attention to the need to train U.S. workers first in order to provide them with the opportunity to acquire the skills needed to compete in our rapidly changing economy, and to the pressing need for reform of the H-1B nonimmigrant visa program.

Our information technology (IT) industry is essential to our continuing strong economic growth and wider prosperity. Our interest in the industry's strength is evidenced by our participation in a recent convocation in Berkeley that assessed IT work force needs. Further, as you know from Administration proposals advanced since 1993, we believe that the H-1B program needs fundamental reform. I would like to commend the Subcommittee for its interest in these issues.

We believe the issue of whether to increase the IT industry's access to temporary foreign workers should be evaluated within the framework of the following three questions:

(1) Is there a shortage of skilled U.S. workers to fill jobs in the IT industry and meet

future workforce needs?

(2) What would be the consequences of raising the annual H-1B cap?

(3) Does the current H-1B program need to be reformed in order to provide industry appropriate access to temporary foreign workers while protecting the job opportunities, wages and working conditions of U.S. workers?

I will address each of these in turn.

## Tight Labor Markets and IT Skills Shortages

Proponents of increasing the annual cap on H-1B visas argue that this increase is necessary for the IT industry to be able to overcome an acute shortage of skilled U.S. workers. While there is no dispute that there is strong growth in demand for workers in the IT industry, it is much less clear what may be the magnitude of any shortage of skilled U.S. workers to meet this demand, or whether the domestic labor market will be able - as it has over the last decade - to satisfy projected job growth.

U.S. employment has been growing rapidly, labor markets are increasingly tight, and they are likely to remain so. Though this is true for the nation as a whole, IT labor markets appear to be particularly affected. Employment opportunities for computer systems analysts, engineers, and scientists have been growing by 10 percent a year — well above the growth of comparable occupations — and are expected to continue growing at a comparable rate through 2006. The Bureau of Labor Statistics (BLS) predicts that the U.S. will require more than 1.3 million new workers in IT core occupations between 1996 and 2006 to fill job openings projected to occur due to growth and the need to replace workers who leave the labor force or transfer to other occupations.

The IT skills shortage issue is somewhat controversial. Some industry advocates assert that there exist more than three hundred thousand unfilled jobs within the IT industry, and that these vacancies are raising business costs and hurting U.S. competitiveness. Industry points to a number of other factors to substantiate their assertion of an IT skills shortage – large numbers of want ads, hiring bonuses, aggressive recruiting, and high turnover of IT specialists within the industry.

On the other hand, critics argue that the IT industry: (1) overstates the problem by producing inflated job vacancy data and equating it to skills shortages; (2) continues to lay off tens of thousands of workers (e.g., Intel, Netscape, Cypress Semiconductor and Silicon Graphics recently announced large lay-offs); and (3) fails to tap reservoirs of available talent by insisting on unnecessarily specific job requirements and not providing more training to develop incumbent workers' skills.

One point of contention is the confusion between equating job vacancies and actual skills shortages. While an industry association-sponsored survey indicates that there may be as many as 350,000 job vacancies in the IT industry, as you will hear, the General Accounting Office (GAO) has concluded that this does not necessarily signal an acute shortage of skilled workers. In fact, most industries and firms (particularly those with rapid employment growth and high worker turnover) will have large numbers of job openings that may not indicate skills shortages.

While higher than average wage growth can be a reliable indicator of skill shortages, the wage growth record for the IT industry is mixed. Though BLS wage trends for broad computer-related categories show only average wage growth between 1988 and 1997 for all

categories, it only shows above-average wage growth in 1996 and 1997 and only in the lower-skill computer-related categories, such as programmers. At the same time, a variety of industry wage surveys show larger wage increases in 1996 and 1997 in specialized, high-skill occupations.

The Subcommittee should also take into consideration other factors that bear on the question of the scope and duration of any labor shortage in the IT industry:

- The current "Year 2000" problem is now occupying thousands of IT workers but only for the short-term;
- New technologies are being introduced that are creating more efficient ways to produce software, store and retrieve data, speed up computations, and generally improve the productivity of the IT work force;
- The number of computer science enrollments has risen significantly in the last two years (and nearly three-quarters of all IT workers got their education in other disciplines).

## Consequences of Raising the H-1B Visa Cap

We strongly urge that any decision to raise the H-1B visa cap carefully consider the possible adverse impact of such a move on the normal process by which labor markets adjust to a growing demand for workers. The labor market should be permitted to adjust to this increased demand without introducing unnecessary factors which could delay, if not prevent, these normal market adjustments. Indeed, the IT labor market has already begun to respond to the signals of increased demand. A survey of U.S. Ph.D. departments of computer science and computer engineering showed bachelor-level enrollments were up 46 percent in 1996, and

another 39 percent in 1997 -- nearly doubling over the two year period.

It is also important to remember that tight labor markets are good for U.S. workers. A tight labor market causes employers to raise wages, improve working conditions, and provide increased training to enable currently employed workers to keep pace with technology. An increased demand for trained workers induces educational and job training institutions to teach new skills. With more opportunities for training, workers acquire skills needed to obtain better, higher-paying and more secure jobs, thereby creating open jobs and career ladders for those just entering or reentering the labor market (e.g., young people, minorities, displaced workers, welfare recipients and other disadvantaged groups). Therefore, tight labor markets create incentives for employers and workers to react in ways needed to achieve many of the Nation's top priorities: raising wages; providing greater opportunities for lifelong learning; and moving welfare recipients, out-of-school youth, and dislocated workers into jobs.

However, while tight labor markets are good for U.S. workers, labor markets can sometimes be slow to respond to skills shortages. In these circumstances, it is often argued that temporary foreign workers are needed in the short-term to provide necessary skills while the labor market adjusts to provide U.S. workers with the requisite training. Without needed foreign temporary workers, industries experiencing skill shortages may adjust in ways that do not serve the short-term or long-term priorities of the country, either by reducing job creation or by moving jobs overseas. Further, because the IT sector is so critical to our global competitive edge, the U.S. economy could suffer disproportionate harm if skill shortages do become acute.

Because the expanded use of foreign temporary workers may interfere with labor market adjustments and may make achieving our other priorities more difficult, we must make sure that any increase in the annual number of foreign temporary workers is done with care to ensure that the use of these foreign temporary workers does not interfere with healthy adjustments in the labor market.

We must also be cognizant that raising the H-1B cap may subvert the protection of U.S. workers that is one of the key principles underlying this Administration's strong support of legal immigration. Raising the H-1B cap will almost certainly increase permanent employment-based legal immigration and, perhaps, illegal immigration. Nearly half of those who become permanent employment-based immigrants convert from H-visa nonimmigrant status. Rather than filling a temporary labor shortage, conversion fills permanent jobs that will then not be available to U.S. workers and students who we want to be able and prepared to fill high-tech jobs in our economy.

The Department of Labor has heard from many concerned individuals and groups on the issue of the adverse impact on U.S. workers of raising the annual cap on H-1B visas. I would like to request that copies of the many letters we have received from these people be included in the record of today's hearing.

The Administration believes that our first response to meeting the workforce needs of the IT industry should be to provide the needed skills to U.S. workers to qualify them for IT jobs. The Administration already has taken significant steps to increase our capacity to enhance workforce skills. The President continues to pursue comprehensive reform of the Nation's employment and training system by working with Congress to enact the principles

embodied in his GI Bill proposal. Moreover, in the historic balanced budget agreement of last summer, the President insisted on and achieved the largest increase in 30 years in the Federal investment to expand the skills of American workers, including:

- the largest Pell Grant increase in two decades;
- Hope Scholarships to make the first two years of post-secondary education universally available;
- the Lifelong Learning Tax Credit for the last 2 years of college and continuing adult education and training to upgrade worker skills;
- a major increase in employment and training resources, including increases for dislocated workers and disadvantaged adults and youth; and
- a $3 billion program to help long-term welfare recipients secure lasting, unsubsidized employment.

Further, the Administration announced several new initiatives at the recent Berkeley Convocation to help address the growing demand for IT workers:

- A Labor Department Technology Demonstration project to test innovative ways of establishing partnerships between local workforce development systems, employers, training providers and others to train dislocated workers in needed high tech skills;
- The expansion and integration of America's Job Bank and America's Talent Bank to allow employers and workers to list and access job openings and worker resumes in one integrated system; and
- The convening of four town hall meetings by the Commerce Department to discuss IT workforce needs, identify innovative practices, and showcase successful models.

In addition, last week President Clinton and Secretary Herman announced that grants totaling $1.6 million are being provided to projects in four states to continue highly successful programs to train dislocated workers for high paying jobs in information technology.

Finally, with the Technology Literacy Challenge and related educational programs, the Administration has put strong emphasis on effective use of educational technology to strengthen our nation's schools and school-to-work transition. Linking elementary/secondary schools, institutions of higher education, and business can produce the knowledge, know-how, and skills our nation's businesses and young people need in IT. This creates opportunities for business and America's students alike.

We believe that there is more that can be done to move U.S. workers into high technology jobs, and we welcome the discussions that may be sparked by this hearing. We are committed to continuing a dialogue with the major stakeholders on this critical workforce issue — government, industry, workers, and education and training institutions — to better define the workforce needs of the IT industry and develop appropriate solutions to meet these needs domestically through commitments from each of the stakeholders.

In sum, Mr. Chairman, our assessment of the likely effects of raising the H-1B cap reconfirms our strong conviction that our primary public policy response to skills mismatches due to changing technologies and economic restructuring must be to prepare the U.S. workforce to meet new demands. Yet we recognize that short-term demands for skills may require that we develop a balanced, short-term response to meet urgent needs while we actively adjust to rapidly changing circumstances. However, increased numbers of temporary foreign workers should be the last — not the first — public policy response to skills shortages.

Given this broader context, let me now turn to the third of the issues I listed — the pressing need for reform of the H-1B nonimmigrant program.

**H-1B Nonimmigrant Program Must be Reformed**

The H-1B visa program allows the admission of up to 65,000 workers each year (to stay for as long as six years), to meet short-term, high-skills employment needs in the domestic labor market. Temporary visa programs, like H-1B, are intended to allow employers who are faced with a domestic skills shortage to have access to temporary foreign workers with the requisite skills while the domestic labor market makes appropriate adjustments.

However, there exist serious structural flaws in the current H-1B program. These flaws are documented in a May 1996 report by the Department's Inspector General (IG). I would ask the Subcommittee to accept the IG's full report in the record of today's hearing.

The IG found that, despite the legislative intent:

> ". . . the [H-1B] program does not always meet urgent, short-term demand for highly-skilled, unique individuals who are not available in the domestic work force. Instead, it serves as a probationary try-out employment program for illegal aliens, foreign students, and foreign visitors to determine if they will be sponsored for permanent status."

The IG also found that "some [H-1B] employers use alien labor to reduce payroll costs either by paying less than the prevailing wage to their own alien employees or treating these aliens as independent contractors, thereby avoiding related payroll and administrative costs." It found, in addition, that "other [H-1B] employers are 'job shops' whose business is to provide H-1B alien contract labor to other employers." The IG concluded that the H-1B program does little to protect the jobs or wages of U.S. workers and it recommended eliminating the current program and establishing a new program to fulfill Congress' intent.

Employers obtain H-1B workers by simply filing a labor condition application (LCA) with the Department affirming that they have complied with four requirements:

- that the higher of the local prevailing rate or the wage paid to the employer's similarly-employed workers will be paid to the foreign workers;
- that no strike or lockout exists involving the occupation;
- that notification has been provided to U.S. workers or their union; and
- that the employment of H-1B nonimmigrants will not adversely affect the working conditions of U.S. workers similarly employed.

By law, the Labor Department can do no more than review these attestations for completeness and obvious inaccuracies — to determine whether an employer checked all of the boxes, made no flagrant errors, and signed the attestation — and must do so within 7 days of receipt.

Because current law does not require any test for the availability of qualified U.S. workers in the domestic labor market, many of the visas under the current cap of 65,000 can be used by employers to hire foreign workers for purposes other than meeting a skills shortage. In addition, current law does not require a U.S. employer to promise not to lay off U.S. workers and replace them with H-1B workers as a condition for gaining access to these foreign temporary workers, and it allows employers to retain H-1B workers for up to 6 years to fill a "temporary" need. We simply do not believe this is right.

In 1993 the Administration asked the Congress to amend the H-1B nonimmigrant program to address these structural problems. Unfortunately for many U.S. businesses and workers, these amendments have not been enacted. The amendments requested in 1993 were

carefully designed to ensure continued business access to needed high-skill workers in the international labor market while decreasing the H-1B program's susceptibility to misuse to the detriment of U.S. workers and the businesses that employ them. Briefly stated, the amendments would require employers which seek access to temporary foreign "professional" workers to also attest that:

- they have taken timely and significant steps to recruit and retain U.S. workers in these occupations; and
- they have not laid off or otherwise displaced U.S. workers in the occupations for which they seek nonimmigrant workers in the periods immediately preceding and following their seeking such workers.

Enactment of these reforms will help employers actually facing skills shortages, including those in the IT industry, obtain needed workers through the H-1B program. Under existing law, employers facing skills shortages must compete for available visas (up to the cap of 65,000) on a first-come, first-served basis with other employers that do not face such shortages. Thus, enactment of the proposed amendments would reduce pressure on the visa cap by screening out employers that are not faced with skills shortages and have no interest in recruiting U.S. workers.

If the Administration's reforms are not implemented, as the Inspector General has pointed out, the Labor Department will not be able to ensure that the intended purposes of the program are actually served. The H-1B program exists to ensure that U.S. employers can meet short-term labor needs by limited access to the international labor market. Under current law, the government cannot ensure that employers use the H-1B program for its intended

purpose, and that purpose only.

## Conclusion

Mr. Chairman, let me conclude by restating that the growing workforce needs of the IT industry can only be met — and the strength and growth of the industry secured in the long run — if we take the steps needed to fully develop and utilize the skills of U.S. workers. Increased reliance on temporary foreign workers should, at most, only be a small part of the solution and must be viewed as a minor complement to the development of the U.S. workforce. Further, let me repeat that reform of the H-1B program is essential to eliminating abuses under the program and providing appropriate protections for U.S. workers. Enactment of these reforms would effectively allocate a greater share of H-1B visas to employers facing actual skills shortages.

I appreciate the interest shown by the Subcommittee and staff in our views, and your thoughtful consideration of them. The Department looks forward to continuing to work closely and cooperatively with you and your staff on these issues.

Mr. Chairman, that concludes my prepared statement. I would be happy to respond to any questions.