Testimony of
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The Scope of Skilled Foreign Labor

The current system, created by the Immigration Act of 1952, originally had only one visa category for admitting foreign labor: H. The number of programs for guestworkers in skilled occupations has exploded since then. These are some examples:

Skilled Guestworker Programs Created By Statute:

- E-3
- H-1B
- H-1B1
- J
- L-1B
- O
- TN

Skilled Guestworker Programs Created By Administrative Action:

- OPT (Optional Practical Training)
- H-4
- BILOH (B in lieu of H-1B)

New Executive Action

Starting in 2012, the executive branch has claimed that it has *unlimited authority* to grant work authorizations to aliens. This began in the context of illegal aliens under the Deferred Action for Childhood Arrivals (DACA) program and followed up with the Deferred Action for Parents of Americans (DAPA) program. However recently, the administration has claimed authority for H-1B spouse employment, student employment, and employment by green card applicants.

The unlikely source of this newfound authority is this provision defining those aliens employers may not hire without being subject to criminal and civil penalties:

> 8 U.S.C. § 1324a(h)(3) **Definition of unauthorized alien**
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> As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

DHS now claims that the "or by the Attorney General" clause confers on the executive "co-equal" authority with Congress to define classes of aliens who may work in the United States.[1]

This claim of unlimited executive authority to grant employment to aliens is the subject of at least four lawsuits: *Texas v. United States* (Supreme Court), *Arizona Dream Act Coalition v. Brewer* (9th Circuit), *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security* (D.C. Circuit), and *Save Jobs USA v. U.S. Department of Homeland Security* (District of Columbia District). If the executive branch prevails in these cases, Congress will have ceded its constitutional authority to control alien employment. So far, only the 5th Circuit has addressed this question. The 5th Circuit, replying on the plain language of the provision, held that § 1324a does not convey such broad authority to DHS.[2] The Supreme Court is now reviewing that decision.

If the courts hold that Congress, indeed, has made such a "broad delegation" to the executive, Congress will effectively be removed from the control of alien employment in the United States and any protections Congress enacts for American workers can be voided through regulation.

The H-1B Program

H-1B visas have become synonymous with skilled[3] guestworkers, in spite of the proliferation of similar programs. Because the other guestworker programs have minimal, if any, protections for Americans, I focus on H-1B. The problems I describe here are applicable to other guestworker programs as well.

I. The H-1B program is needlessly complicated.

The entire H category prior to the immigration act of 1990 was under 100 words. Now, H-1B alone is now nearly 7,000 words and takes about 20 pages to print out (formatted as here). At best, the H-1B program is worthy of 2 printed pages. There is no reason a guest worker visa petition should require the assistance of a lawyer. Nonetheless, H-1B is so convoluted it, quite literally, takes a lawyer to figure out what the visa fee is in any given circumstance.

The major source of complexity is the H-1B program has separate rules for different categories of employers and workers, including:

- Exempt H-1B Nonimmigrants
- H-1B Dependent Employers
- Institutions of higher education, nonprofit research organizations, and Governmental research organizations
- Willful violators

The result is needless complexity that creates opportunity for abuse.

The same rules should apply to all employers and all workers. There is no bright line

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[1] The same "or by the Attorney General/Secretary of Homeland Security" language describing work authorizations occurs in other places in Title 8, including 8 U.S.C. §§ 1182(n)(4)(E) and (t)(4)(D).

[2] *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (*cert.* granted, Jan. 19, 2016).

[3] By *skilled*, one means that there are some educational or technical requirements for admission.

between "good H-1B employers" and "bad H-1B employers." Many like to make the Indian companies scapegoats for H-1B abuse. Indeed, American companies, such as IBM and Disney, engage in the same type of abuse attributed to Indian companies. Congress has set up special, more lenient rules for academic institutions, but they have been among the worst abusers of the H-1B program. Wright State University was using its H-1B quota exemption to funnel contract labor to industry.[4] Both the City University of New York[5] and University of Massachusetts[6] have cooked up H-1B employment scams taking advantage of their exemption. In addition, DHS has proposed regulations recently that expand the university quota exemption beyond anything Congress intended.[7] Creating exceptions in the rules simply opens the door for abuse. Worse yet, limiting protections for American workers to specific types of employers and specific types of alien workers produced the result that there are no real protections for American workers at all.

II. H-1B allows employers to replace Americans.

8 U.S.C. § 1182(n)(1)(E)–(F) contains the provisions addressing the displacement of Americans by H-1B workers. Under those provisions, an employer may replace an American with an H-1B worker *at will* unless:

1. The H-1B worker does not have a graduate degree; and
2. The H-1B worker is paid less than $60,000; and
3. The employer is a willful violator or has more than 15% of its employees who are on H-1B visas, paid less than $60,000, and do not have graduate degrees.

Beginning with AIG and Sea-Land in 1994 and leading up Disney, Southern California Edison, Cargill, Northeast Utilities, Fossil, Hertz, and Toys R Us, employers have been replacing Americans with H-1B workers routinely. This practices is completely legal, as the Department of Justice found in its just concluded investigation at Southern California Edison.

The fact that so many employers replace the American technology workers they already have with H-1B guestworkers makes a mockery of claims that there is a shortage of such workers. Replacing Americans with foreign workers SHOULD NOT BE TOLERATED.

III. H-1B allows employers to pay aliens ridiculously low wages.

The Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 421, 118 Stat. 2809, 3353 (2004), directed the Department of Labor to provide at least four skill based H-1B prevailing wages, "commensurate with experience, education, and the level of supervision" or to take an existing wage survey and segment it. Because the DoL's wage survey

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[4] Josh Sweigart, Suspended WSU employees tied to IT contract, Dayton Daily News, Sept. 11, 2015

[5] Liz Robbins, *CUNY Schools to Lure Foreign Entrepreneurs With New Visa Program*, New York Times, Feb. 17, 2016

[6] Ellen Huet, *How Tech Startup Founders Are Hacking Immigration*, Bloomberg, Feb. 10 2016.

[7] Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 80 Fed. Reg. 81,900–45 (proposed Dec. 31, 2015).

"captures no information about actual skills or responsibilities of the workers" it had to use the latter option where the wage levels correspond to the 17th, 34th, 50th, and 67th percentiles.[8]

The following table shows the distribution of H-1B worker skill level as classified by employers (measured at two points in time). This shows that employers consistently classify nearly all H-1B workers at the lowest two skill levels where the H-1B prevailing wage" is below the normal prevailing wage (the median):

Skill Level	% of H-1B Workers GAO 2011[9]	% of H-1B Workers Miano 2007[10]	H-1B "Prevailing Wage"[11]
1 (Lowest)	52%	56%	17th Percentile
2	30%	32%	34th Percentile
3	12%	8%	Median
4 (Highest)	6%	5%	67th Percentile

This data demonstrates that employers view the H-1B program as a mechanism for importing low-skilled, low-wage workers. Notice that, if the H-1B program be limited to aliens whose skill level commands merely the median wage (average skill level), the H-1B quotas would not come close to being reached. And, if H-1B be limited to high skilled individuals, the quotas would not be a factor at all.

The following tables show the H-1B "prevailing wages" for various cities and the substantial average annual savings (relative to the median) the H-1B prevailing wage system generates for employers hiring an H-1B worker compared to hiring an American:

	New York	Salt Lake City	San Francisco	Minneapolis	Hartford
Level 1	$58,053.00	$47,861.00	$66,518.00	$54,038.00	$59,010.00
Level 2	$74,714.00	$63,627.00	$85,634.00	$67,330.00	$70,533.00
Level 3	$91,395.00	$79,373.00	$104,770.00	$80,642.00	$82,035.00
Level 4	$108,056.00	$95,139.00	$123,885.00	$93,933.00	$93,558.00
Average H-1B[12] Savings	$21,342.48	$20,164.08	$24,484.94	$17,030.22	$14,732.22

[8] 79 Fed. Reg. 14,451

[9] GAO, *H-1B Visa Program*, Jan. 2011, p. 97

[10] John Miano, *Low Salaries for Low Skills: Wages and Skill Levels for H-1B Computer Workers, 2005*, Center for Immigration Studies, Apr. 2007 (computer workers only)

[11] 79 Fed. Reg. 14,451

[12] The wage source is the Foreign Labor Certification web site, www.flcdatacenter. The average savings are differences between the wage levels (weighted according to the GAO's skill level distribution) and the median wage.

Wage	Chicago	Burlington	Houston	Charlotte	Atlanta
Level 1	$46,842.00	$44,387.00	$48,422.00	$56,014.00	$56,909.00
Level 2	$60,570.00	$56,014.00	$63,482.00	$69,826.00	$77,563.00
Level 3	$74,298.00	$67,642.00	$78,562.00	$83,637.00	$98,238.00
Level 4	$88,026.00	$79,269.00	$93,621.00	$97,448.00	$118,893.00
Average H-1B Savings	$17,571.84	$14,883.38	$19,293.26	$17,678.60	$26,454.28

	New Orleans	Birmingham	Des Moines
Level 1	$48,214.00	$48,589.00	$47,965.00
Level 2	$59,530.00	$65,062.00	$59,966.00
Level 3	$70,824.00	$81,536.00	$71,947.00
Level 4	$82,139.00	$98,010.00	$83,949.00
Average H-1B Savings	$14,466.50	$21,086.20	$15,344.82

The tiered H-1B "prevailing wage" system allows employers to pay foreign workers significantly less than what they would have to pay Americans on the open labor market.

In addition, 8 U.S.C. § 1182(p)(1) allows academic employers to pay even lower wages by requiring that the H-1B "prevailing wage" for such employers "shall only take into account employees at such institutions and organizations in the area of employment." This system, mandated by Congress allows employers to legally pay H-1B workers ridiculously low wages.

If it seems puzzling why employers have such a high demand for *low skilled* H-1B workers, remember that most H-1B workers are employed in the contract labor market where they bill by the hour. In that market, low skilled workers (who take more billable hours to accomplish a task) are more profitable than high skilled workers.

IV. The H-1B program does not require recruitment of Americans or a showing Americans are not available.

The full extent of the recruitment requirement in the H-1B program is that certain employers hiring aliens earning less than $60,000 and not holding graduate degrees must check a box on the Labor Condition Application saying they recruited Americans in good faith.

V. H-1B includes restrictions on enforcement that allow the system to be abused with impunity.

The H-1B enforcement provisions are simply antediluvian. Those provisions go on at length spelling out when (and when not) the law can be enforced. Pages of statutory text could be replaced with one sentence:

> The Secretary of Labor is authorized to enforce the provisions of this section.

The most notorious provision in the entire H-1B program governs the approval process for H-1B Labor Condition Applications at 8 U.S.C. § 1182(n)(1)(G)(ii):

> The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies.

This reduces the entire Labor Condition Application process to a meaningless paper shuffling exercise. The Department of Labor Inspector General's semiannual reports have called for removing this restriction for the past 20 years. The latest report states or this restriction:

> Among our concerns is that DOL is statutorily required to certify H-1B applications unless it determines them to be "incomplete or obviously inaccurate." Given this fact, it is not surprising that OIG investigations have shown the H-1B program to be susceptible to significant fraud and abuse[13]

A number of bills have "addressed" this provision by rewording it to no effect.[14] The Inspector General recommends:

> If DOL is to have a meaningful role in the H-1B specialty-occupations foreign labor certification process, it must have the statutory authority to ensure the integrity of that process, including the ability to verify the accuracy of information provided on labor condition applications. Currently, the Department is statutorily required to certify such applications, unless it determines them to be "incomplete or obviously inaccurate." Our concern with the Department's limited ability to ensure the integrity of the certification process is heightened by the results of OIG analyses and investigations showing that the program is susceptible to significant fraud and abuse, particularly by employers and attorneys.[15]

VI. The H-1B program should be strictly non-immigrant.

The original H visa program was strictly non-immigrant. The H-1B program was created in 1990, explicitly allowing dual intent. Allowing over 80,000 aliens (plus their dependents) a year from India on H-1B visas to apply for fewer than 10,000 green cards has had an entirely predictable effect: green card backlogs for Indian nationals.

In 2004, Congress addressed the backlog for Indian nationals by allowing aliens on H-1B visas with pending green cards to remain in the United States indefinitely.[16] That change had another equally predictable consequence: even bigger green card backlogs for Indian nationals.

Congress should not address permanent residency issues from the unique H-1B/India/China problem. For nearly all other countries, the employment-based green card system is working as it should. According to the March 2016 Visa Bulletin, there is no employment based green card backlog for any countries other than India (10 years), China (1 year), and the Philippines (5 years). Trying to fix a system based upon outliers is an invitation for disaster, as the growing Indian green card backlogs

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[13] Dep't of Labor, Office of Inspector General, Semiannual Report to Congress: April 1 – September 30, 2015, p. 4.

[14] *E.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act of 2013

[15] Dep't of Labor OIG at 53

[16] Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004)

from previous "fixes" demonstrates.

Proposed legislation, such as the I-Squared Act, take the radical step of abolishing per country quotas for employment-based green cards entirely to address this problem that is unique to India. Such an action would replace our diversity-based immigration policy with an India/China immigration policy.

The solution to this problem is simple: treat the disease, not the symptoms, by making H-1B strictly non-immigrant.

VII. There needs to be better data reporting to monitor the H-1B program.

The only publicly available data on H-1B visas is the Labor Condition Application data filed with the Department of Labor. While this data can show some trends in the H-1B program it is extremely limited because (1) there is a many-to-many relationship between LCAs and workers (*i.e.*, one LCA can apply to many workers, a single worker can have multiple LCAs, and LCAs may not apply to any workers; and (2) because there is no cost and they are easy to do, many employers file defensive LCAs. DHS provides an annual summary of H-1B information but no actual visa data.

From the available data, we can get:

- A direct measurement of employer prevailing wage claims.
- An indirect estimate of H-1B wages.
- An indirect estimate of H-1B geographic distribution.

And that is about it. The LCA data does not even provide a basis for determining who the top H-1B employers are and how many visas they get each year. Many questions about the H-1B program could be put to rest if DHS were to collect and make available the data from H-1B petitions.

VIII. The only protection for American workers under the H-1B program is the annual quotas.

As described above the prevailing wage and non-displacement requirements in the H-1B program do nothing to protect Americans. The H-1B quotas are the only thing that stands between H-1B and total chaos. They serve the important purpose of limiting the extent of the damage H-1B causes.

The H-1B quotas are under constant assault from legislation and, more immediately, executive action.

What should be done?

- Congress must control the proliferation of guestworker programs. This includes rejecting trade deals that mandate guestworker programs and addressing the new claims of executive authority for creating guestworker programs through regulation.
- Guestworker enforcement provisions must be simplified and consolidated. All provisions should apply equally to all employer and all guestworkers. The same enforcement provisions should apply to all guestworker programs. If it takes a lawyer to make a guestworker visa petition, the system is too complicated.
- There should be a complete, unequivocal ban on replacing Americans with foreign workers.

- There is no shortage of Americans (or any other nationality) with average or below average skill. Either the prevailing wage system must require skilled workers to be paid a wage that is significantly higher than the median (*e.g.*, 67th percentile); or such workers must be paid the median wage and employer must demonstrate no Americans are available for the position.
- Guestworker visas should be strictly nonimmigrant.
- DHS should be required to collect and make available all data on guestworker petition so that these programs can be monitored.
- Employers should not be allowed to penalize H-1B workers for quitting.

BIOGRAPHY

John Miano is an attorney who specializes in representing Americans who have been injured by the immigration system. He and Michelle Malkin are the co-authors of the book Sold Out that documents the rampant abuse in H-1B and other visa programs.

Prior to law school, Mr. Miano was a computer programmer where he saw, first hand, the widespread abuse of H-1B taking place in the industry, including Americans being replaced by foreign workers. In 1998, he founded the Programmers Guild, a professional organization for computer programmers. After law school, he became a fellow at the Center for Immigration studies where he does research on guest worker programs. Mr. Miano has written three books on computers and programming.

About Washtech

WashTech/CWA was formed in 1998 by Microsoft contract employees in Redmond, Washington and quickly affiliated with the 700,000-member strong Communications Workers of America (CWA).

By working with the CWA and taking the lead on issues that affect our fellow high-tech workers, our voices are being heard-in the press, in the boardrooms, and in Congress. High-tech workers from Silicon Valley to Boston are joining together to work to keep the jobs for which many of us were educated and trained.

Our Mission

WashTech/CWA is an innovative and influential union whose members advocate for all technology workers in Washington State and beyond.

We are a visionary community of activists and a leading voice for our members in the global economy.

We help build economic security and fair working conditions through collective action, bargaining and legislative advocacy.