Hearing on S.744, The Border Security, Economic Opportunity, and Immigration Modernization Act
April 22, 2013
Senator Leahy
Questions for the Record for Brad Smith

Q. The Uniting American Families Act (UAFA) would allow American citizens who are in long term committed relationships, or are married, to sponsor their foreign partners or spouse for green cards under the family immigration system, just as heterosexual married couples are currently allowed to do under the law. I have championed this proposal since 2003, when I first introduced the legislation. This year, I welcomed Senator Susan Collins (R-Maine) as an original cosponsor of this bipartisan legislation.

a. Does Microsoft have a position on the Uniting American Families Act?

Yes, Microsoft supports the Uniting American Families Act and sent a formal letter of support on June 27, 2011. A copy of the letter is attached.

b. Why do you believe that UAFA is important to American companies?

As an innovation leader, our most critical asset is the brainpower of the people in our workforce. Our talented employees are the key to our competitive strength, our ability to generate new ideas and products, and our ongoing capacity to create new jobs in the American economy.

Currently, same-sex permanent partners of U.S. citizens and lawful permanent residents cannot access similar benefits extended to married couples which impose a tremendous hardship on a number of our employees as well as the individuals we seek to recruit. These highly talented individuals are forced to choose between abandoning successful careers and established lives in the U.S. or living indefinitely in separate countries. Neither is a choice that makes sense and UAFA would change this outdated barrier.

Senator Jeff Sessions
Questions for the Record
Brad Smith, General Counsel and Executive Vice President, Microsoft

1. If S. 744 were to become law, do you believe that the Department of Homeland Security would deport those who enter the country illegally or overstay their visas after the bill's enactment?

In testimony last week before the Judiciary Committee, Janet Napolitano, the Secretary of the Department of Homeland Security noted that this legislation will strengthen both national security and border security by helping to better identify individuals who are physically present in the U.S. Our understanding of the bill is that it does not change the current policy or practice of the Department of Homeland Security with respect to removal proceedings.

2. If S. 744 were to become law, how many total new immigrants, including those currently here illegally who would be granted some form of legal status and those who would be admitted to the country under all categories of chain migration, would be added to the United States over a ten-year period following the date of enactment and over a fifteen-year period following the date of enactment?

Respectfully, Microsoft is not in a position to provide a qualified answer to these specific questions. We believe U.S. government officials are in the best position to provide an estimate on the future flow of immigrants under S. 744.

Questions for the Record
Comprehensive Immigration Reform
Senator Mike Lee
April 22, 2013

Brad Smith
In your testimony, you expressed several concerns with the burdens the H-1B reforms would place on your business.

- *Could you elaborate on those concerns?*

Thank you for the opportunity to provide additional detail on some of the concerns we have with the current language of S.744, the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013.

Two sections of the bill that would benefit from further clarification and refinement are the recruitment requirements and nondisplacement provisions relating to H-1B workers. As I explained at the hearing, Microsoft is and intends to be a strong supporter of this bill. It makes many important improvements to bring the supply of employment-based green cards and H-1B visas into line with the skills demands of today's innovation economy. With respect to H-1B visas, though, if the recruitment and nondisplacement requirements are not refined, they would stand as unnecessary obstacles to use of the visas by employers who create jobs in this country.

Recruitment

For the first time, the bill includes a recruitment requirement even for employers with a small overall population of H-1B workers. For each H-1B petition—including petitions seeking to extend the H-1B status of existing employees—every employer would need to attest that it has advertised the job on a new website created by the Secretary of Labor, and has offered the job to any U.S. worker who applies and is equally or better qualified for the job than the H-1B worker. Employers that are H-1B dependent would have to make an additional attestation that they have taken good faith steps to recruit in the U.S. using procedures that meet industry-wide standards and are offering compensation that is at least as great as that required to be offered to the H-1B nonimmigrant.

As a threshold matter, it is important to understand that we are not dealing with a choice between hiring U.S. workers and hiring foreign workers. The talent shortage is so acute that we need both to address today's workforce needs. And, to be clear, Microsoft endorses the idea of requiring that H-1B employers make good faith efforts to recruit U.S. workers in the occupations for which H-1Bs are sought, using industry-wide standards and offering the same level of compensation. At Microsoft, we do this already, not just because it is the right thing to do, but also because it is a necessity to meet our business needs. Microsoft engages in massive recruitment efforts for talent—including U.S. workers—on a daily basis. We spend millions of dollars each year in our recruitment efforts, with a staff of over 300 recruiters whose key assignment is to find qualified candidates for our job openings. We hire people from hundreds of U.S. universities, and we conduct significant targeted recruitment efforts at 100 of those

schools with whom we have cultivated deep connections and relationships over the years to ensure the opportunities available at Microsoft are widely known. We also dedicate significant resources to the recruitment of experienced candidates within the industry, and we leverage a multitude of connection points, including professional networks and associations, a robust employee referral program, dozens of job search websites, social media and our own careers website. We even have a blog at www.microsoftjobsblog.com that is devoted to generating as much visibility as possible for our opportunities. We don't just wait for potential candidates to find us. We do everything we can to find them.

When we make our hiring decisions, we evaluate our candidates thoughtfully to ensure that the candidate with the best qualifications receives an employment offer. We are confident in how we hire and the opportunities that we provide to American workers. Our main concern is with having those hiring decisions second-guessed by Department of Labor auditors years after those decisions are made. This introduces a deep level of uncertainty, particularly with regard to how regulators would make appropriate assessments of employers' hiring decisions. The imposition of new requirements on non-dependent employers—whose workforces are already comprised primarily of U.S. workers—to keep voluminous records on each applicant and every hiring decision would also add a significant level of administrative overhead and expense without improving protections for U.S. workers or helping drive innovation and business growth. This level of regulation would certainly create substantial new resource demands for the government as well, and in the context of compliant, non-dependent employers, would not be the best use of limited enforcement resources. Ultimately, employers are in the best position to assess applicants and their qualifications in relation to their workforce needs, and it is in our clear business interest to hire the most qualified candidates. We believe that this provision must recognize that reality.

Nondisplacement

The bill also includes a requirement that even companies with very small percentages of H-1B workers not have displaced a U.S. worker within the 90 days prior to an H-1B petition, and that they will not do so within 90 days following a petition. Again, we fully endorse the principle that H-1B visas should not be used to displace U.S. workers, but we should be certain to focus the restriction on the practice we all want to prohibit—replacing an American worker with an H-1B worker. But as drafted, this provision could disrupt a number of situations that Congress would consider to be both legitimate and important business options—such as changes in the number of U.S. workers due to acquisition or divestiture activity—none of which would involve actual displacement of U.S. workers. Particularly for companies like Microsoft with a well-documented record of job creation and hiring U.S. workers, these provisions should be carefully crafted to preserve the critical flexibility that employers need to make workforce decisions that enable important strategic business decisions.

The bill recognizes these types of situations and includes an exemption for situations where the number of U.S. workers in the professional ranks has not decreased in the prior year. This is a sensible exemption, but it may not be broad enough to accommodate for common situations such as divestitures, acquisitions, and other noncontroversial occurrences in the corporate ecosystem. The framework of the exemption—based on job zones—also creates challenges in calculating

the qualifying metrics for the exemption. There are simple refinements to address this concern. One option would be to require an attestation of nondisplacement that more precisely provides that the employer is not filing an H-1B petition for the intent or purpose of displacing a specific U.S. worker. We recognize that compromises are necessary for a bill of this magnitude, but we are optimistic that this provision can be refined while still ensuring strong protections against the displacement of U.S. workers.

- *How can we ensure that H-1B visas are not exploited by outsourcing companies, without overly burdening businesses that use them for legitimate reasons?*

We often hear general concerns about wages in relation to the overall H-1B program. Microsoft creates thousands of high skilled, high paying jobs in the U.S. every year. As required by the existing provisions of the H-1B program, we pay our H-1B employees the same as their peers who are U.S. citizens. As a result, at our headquarters in Redmond, WA, software development engineers who have recently graduated college have starting salaries in excess of 36% above the Department of Labor's Level 1 wage for the occupation, not to mention the additional opportunities for bonuses and stock awards. This bill would restructure the prevailing wage system and substantially increase the minimum wage floor for all H-1B employees. Microsoft is supportive of this approach because it protects U.S. workers and it helps disprove the common misperception that H-1B workers are used as a cheap source of labor.

We think it makes sense to differentiate and tailor the restrictions and enforcement applied to companies based on whether they are dependent or non-dependent employers—and the bill takes strong steps in this direction. For example, firms with a U.S. workforce more than 50% comprised of H-1B and L-1 employees will be barred from obtaining new H-1Bs after a three year phase in period. H-1B dependent employers will also be required to pay the highest wage level for its H-1B employees. And H-1B dependent employers will be subject to strong requirements to recruit U.S. workers as well as restrictions on nondisplacement. We do agree with the approach taken by the drafters of the bill to exclude H-1 and L-1 employees being sponsored for permanent residence from the dependency calculations in the bill.

While these additional burdens make sense for employers who are H-1B dependent, nondependent employers should have a different level of attestation requirements applied to them. These are companies who, like Microsoft, are clearly recruiting and hiring U.S. workers, as evidenced by the low percentage of their workforces that are comprised of H-1B employees. These are also the companies that do not use the H-1B visa to displace U.S. workers. Simple revisions to the existing language on both of these attestation requirements would alleviate these concerns. Specifically, it makes sense to require nondependent employers to attest that they have attempted in good faith to recruit U.S. workers in the occupations for which H-1B employees are sought, but they shouldn't be subjected to regulators second-guessing individualized hiring decisions years after those decisions are made. Similarly, employers should be required to attest that H-1B petitions are not being filed to displace specific U.S. workers. But the definition of displacement under the current language must be narrowed to properly exclude circumstances where no specific displacement has actually taken place.