Testimony of

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Statement of
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Cornell Law School
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on
"Examining the Importance of the H-1B Visa
to the American Economy"

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Mr. Chairman and distinguished members of the committee, I am Stephen Yale-Loehr. I teach immigration and refugee law at Cornell Law School in Ithaca, New York, and am co-author of Immigration Law and Procedure, a 20-volume immigration law treatise that is considered the standard reference work in this field of law. I also am of counsel at True, Walsh & Miller in Ithaca, New York, where I practice business immigration law. I am honored to testify today both as an academic and on behalf of the American Immigration Lawyers Association (AILA). AILA is the immigration bar association of more than 8,000 attorneys and law professors who practice and teach immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is an affiliated organization of the American Bar Association. I chair AILA's Business Immigration Committee.

AILA's mission includes the advancement of the law pertaining to immigration and naturalization, the promotion of reforms and the facilitation of justice in the field. AILA's members focus on a wide variety of immigration issues and are well acquainted with the H-1B program, having significant experience representing and educating both the employers who need essential international personnel and the employees who meet that need. The members of our association represent large and small businesses, academic institutions, research facilities, and government entities that employ foreign nationals.

My testimony today focuses on the following:

? An overview of the H-1B nonimmigrant visa category: its history, legislative background, and usage;

? The importance of the H-1B visa category to the U.S. economy;

? The H-1B program's impact on U.S. workers;

? The important differences between the H-1B program and another nonimmigrant visa-the L-1 intra-company transferee visa;

? H-1Bs, the global economy, and free trade agreements; and

? Proposals to improve the H-1B category.

OVERVIEW OF THE H-1B PROGRAM

Through the H-1B program, U.S. employers are able to hire, on a temporary basis, highly educated foreign professionals for "specialty occupations"- jobs that require at least a bachelor's degree or the equivalent in the field of specialty. Examples include doctors, engineers, professors, accountants, researchers, medical personnel, and computer professionals. Besides using these foreign professionals to obtain essential skills or rare and unique knowledge, U.S. employers use the program to acquire special expertise in overseas markets, trends or distribution (therefore allowing U.S. businesses to compete in global markets), and to alleviate temporary shortages of U.S. professionals in specific occupations.

During the economic boom of the 1990s, highly educated foreign nationals filled vacancies in many sectors of our economy. While much attention focused on H-1Bs filling positions in the information technology (IT) field, H-1Bs also proved essential in many non-technology-oriented industries such as: education (elementary, secondary and higher); engineering; architectural and related services; scientific research and development; semiconductor and other component manufacturing; medical and surgical hospitals and other related medical services; pharmaceutical and medicine manufacturing; and management, scientific and technical consulting services.

Today, many industries continue to need highly educated professionals and turn to the H-1B program to fill these specialized positions that would otherwise remain vacant. In the science-oriented sectors there still are not enough U.S. students graduating with advanced degrees to fill these specialized positions. Other fields, such as education, have shortages in specific areas of the country where positions continue to go unfilled. In addition, as U.S. companies try to revitalize their businesses, they need access to professionals with unique knowledge, skills and expertise in the domestic and overseas markets. These professionals give U.S. companies the ability to develop new products, platforms and programs, enter new markets, and expand their client base. The result is increased productivity and job creation for American workers.

Legislative Background and Numerical Limits

Statutory authority for the H nonimmigrant visa categories is found in the Immigration and Nationality Act of 1952 (INA). Under the 1952 legislation, the H-1 category was comprised of foreign nationals of "distinguished merit and ability" who were filling temporary positions in the United States while maintaining a foreign residence abroad.

Congress has made a series of revisions to the H-1 category over the last 50 years. With the Immigration Nursing Relief Act of 1989, Congress split the old H-1 category into a separate H-1A category for registered nurses and an H-1B category for all other persons of distinguished merit and ability. The Immigration Act of 1990 (1990 Act) established the H-1B program as we know it today by limiting its use to noncitizens who are members of the professions, designated as "specialty occupations." The 1990 Act also added the current labor attestation scheme and did away with the foreign residence requirement.

In addition, as a result of the 1990 Act, the H-1B nonimmigrant classification was for the first time subjected to numerical limits. H-1Bs were initially limited to 65,000 per year. This "cap" was reached (and at times, exceeded) between 1997 and 2000, prompting Congress, through the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), to temporarily increase the annual allotment of H-1B visas (to 115,000 for fiscal years (FYs) 1999 and 2000, and to 107,500 for FY 2001). When those increases proved inadequate to meet demand, Congress passed another temporary increase in October 2000 through the American Competitiveness in the 21st Century Act (AC21). The AC21 raised the H-1B cap to 195,000 for FYs 2001-2003, with that number set to revert back to 65,000 two weeks from now, on October 1, 2003. Certain H-1B employees are exempt (and will continue to be exempt after October 1) from these numerical limitations, including those employed by institutions of higher education, a related or affiliated nonprofit, a nonprofit research organization, or a governmental research organization.

The AC21 also brought needed flexibility to the period of admission for H-1B nonimmigrants. Ordinarily, an H-1B worker is permitted to be in the United States for a maximum of six years. Initial admissions may be for up to three years, with extensions of up to another three years. A noncitizen who has reached the normal six-year H-1B cap is eligible for a new six-year period in H-1B status only after living outside the United States for at least one year.

The AC21 created two important exceptions to the six-year limit on H-1B stay. First, H-1B nonimmigrants who are beneficiaries of pending or approved immigrant visa petitions but who are running out of time because of quota backlogs may receive extensions until their adjustment of status applications are adjudicated. Second, an H-1B nonimmigrant with a pending I-140 immigrant visa petition or adjustment of status application may extend beyond the six years if more than 365 days have elapsed since his or her labor certification application or immigrant visa petition was filed. Extensions are granted in one-year increments.

Additional legislative changes to the program are discussed below.

Protection of U.S. Workers

Safeguards in the Program: Congress has been careful to build in safeguards to the H-1B program to ensure that H-1B foreign professionals do not undercut wages paid to comparable U.S. workers. Employers must offer the foreign professional a wage that is the higher of either the typical wage in the region for that type of work ("prevailing wage"), or what the employer actually pays existing employees with similar experience and duties ("actual wage"). The employer also must demonstrate that the position requires a professional in a specialty occupation and that the intended employee has the required qualifications. In addition, a U.S. employer using this program must guarantee that: (1) the foreign professional will be paid at or above the rate paid for a similar position at the employer's own offices or at those of its local competitors; (2) the foreign professional will not adversely affect the working conditions of U.S. colleagues; (3) U.S. colleagues will be given notice of the professional's presence among them; and (4) there is no strike or lockout at the worksite. These guarantees or "attestations" are made on a form known as the Labor Condition Application (LCA), which is a prerequisite to H-1B approval. Employers also must document compliance with these requirements in a public access file. Sanctions may be imposed upon an employer for failing to meet the LCA conditions or for making misrepresentations on the form, including back pay, civil fines, and temporary disqualification from filing certain immigrant or nonimmigrant visa petitions.

Under the ACWIA, employers who use a higher percentage of H-1B visas ("H-1B-dependent employers") and employers who have been found to commit a willful failure or misrepresentation in LCA compliance in the previous five years ("willful violators") must meet additional requirements, including documenting recruitment in the United States, and are forbidden from laying off American workers to hire an H-1B professional. The ACWIA also increased penalties for companies that violate the law to include fines of up to $35,000, a three-year bar from participating in visa programs, and repayment of salaries and benefits to any under-paid foreign professional. In addition, the ACWIA created a new penalty for retaliation against whistle blowers, and temporarily increased the authority of the Labor Department to investigate an employer's practices in connection with the LCA requirements upon receipt of specific credible information.

Fees Associated with Hiring an H-1B and Training Programs Funded by Fees: While the temporary increases in the H-1B cap, discussed in the preceding section, provided a short-term means to alleviate a shortage of U.S. workers, Congress also passed a more enduring remedy to the apparent mismatch between the skills and qualifications of U.S. workers and the skill requirements of U.S. employers. The ACWIA created a "user fee" of $500 over and above the regular filing fees as a condition for the approval of an H-1B visa petition filed on or after December 1, 1998. This fee was increased to $1,000, effective December 17, 2000. The fees, which are collected for the initial H-1B petition, the first extension of stay (with the same employer) and for a change of employer, fund both a scholarship and training account for U.S. workers and enforcement of the H-1B program. Employers exempt from this fee include institutions of higher education and related or affiliated nonprofit entities, nonprofit research organizations, and government research organizations. Other schools (elementary and secondary) were also added as exempt

employers in 2000. Additionally, no $1,000 fee is required where an amendment but no extension is requested, for example upon certain corporate restructurings. This $1,000 user fee is scheduled to end October 1, 2003.
During the past five years, fees paid by U.S. employers to hire foreign-born professionals on H-1B visas have totaled more than $692 million. These fees have helped provide training to more than 55,600 U.S. workers and have funded scholarships for more than 12,500 U.S. students in science and engineering.

Impact on Comparable U.S. Workers: It is hard to determine the impact of H-1B workers on comparable U.S. workers. The only comprehensive effort to date, conducted in 2000 by the National Research Council of the National Academy of Sciences, concluded that the magnitude of any effect the H-1B program has on wages is difficult to estimate with confidence. The report noted that the effect, if any, may not be to depress wages and employment opportunities for U.S. workers but rather to keep wages from rising as rapidly as they would if the program did not exist. Another study in 2001 similarly concluded that if the H-1B program has any effect on comparable U.S. workers, the effect must be subtle because it does not appear immediately in the data.

An article issued just last week by a research economist for the Federal Reserve in Atlanta tried to quantify the impact of H-1B professionals on IT workers, which is one subset of H-1B workers. After going through a complicated regression analysis, the author concluded that her results suggest that the number of H-1B workers does not depress wages or wage growth. The study also found that H-1Bs do not appear to have an adverse impact on contemporaneous unemployment rates, although they may have an effect on unemployment rates a year later.

The study also found that median income of H-1B recipients was $55,000 in fiscal 2001, and about 98 percent of these workers at least had a bachelor's degree. In contrast, about 26 percent of U.S. residents age 25 and older had at least a bachelor's degree in 2000, and median earnings among these workers was $46,969, according to Census Bureau figures cited by the Federal Reserve study. This tends to show that H-1B workers are being paid more than the average comparable U.S. worker, at least at a national level.

Another recent review of the H-1B program by the Immigration Policy Center (IPC) cites data from the National Science Foundation that foreign-born professionals actually earn more than their native counterparts when controlled for age and the year a science or engineering degree is earned.

According to the IPC report, some of this difference may result from foreign-born workers being more likely to enter the job market in private sector companies than in public or private universities, which pay less. Controlling for type of employer and occupation shows a negligible difference between foreign-born and native at the bachelor's, master's and Ph.D. levels. Although many individuals in the National Science Foundation data set may no longer be on H-1B visas, others are, and the ones who are not would in many cases have worked in that status for some period of time.

H-1Bs are not Cheap Labor: It is also important to take into account the money and hassle associated with hiring a foreign-born professional on an H-1B. To hire a foreign national on an H-1B visa a U.S. employer must incur the following costs: $1,500 to $2,500 in legal fees; $1,000 training/scholarship fee; $1,000 "premium processing" fee (not required but often used to overcome long processing times); and $125 or more in additional incidental costs. These combined costs total between $2,600 and $4,600. That does not include additional in-house human-resources costs associated with the extra work involved in the employment of foreign nationals or the time lag in hiring a foreign national vs. a native-born individual.

These costs and the National Science Foundation data noted above do not show the type of systematic underpayments to the foreign-born that would justify the charge of "cheap labor." Moreover, the fact that it is illegal to pay an H-1B visa holder less than a comparable native professional, combined with the difficulty of employers maintaining separate pay scales for H-1Bs and other employees working alongside them, as well as the ability of H-1B visa holders to change jobs and seek the market wage for their services,

leads to the conclusion that critics are exaggerating any widespread use of employees on H-1B visas as "cheap labor."

DOL H-1B Enforcement: Statistics from the Department of Labor (DOL) show an increase in H-1B enforcement over time. In FY 1997, the DOL began 33 investigations based on alleged violations of the H-1B program. By contrast, in FY 2001, when the recession hit in full force, the DOL began 200 H-1B investigations. If current trends continue, it appears that the DOL will start about 150 H-1B investigations in FY 2003. Overall, between FY 1992 and March 31, 2003 the DOL started 886 H-1B investigations and concluded 482 of them.

Overall, in the ten and one-half year period between FY 1992 and March 31, 2003, the DOL found that almost $12 million in back wages was due to over 2,300 H-1B nonimmigrants who had not been paid the correct amount.

A review of DOL H-1B enforcement actions concluded in the first half of FY 2003 provides more details about H-1B violators. During those six months the DOL found that 478 H-1B workers had not been paid the correct wage. Of those 478, 351 (71 percent) came from just three H-1B violators: Alphasoft Services Corporation in Walnut Creek, California (186 H-1B nonimmigrants due $141,981 in back wages); People.com Consultants Inc. in Maynard, Massachusetts (96 H-1B nonimmigrants due $609,037 in back wages); and JBAS Systems Inc. in Santa Clara, California (69 H-1B nonimmigrants due $249,758 in back wages). The other investigations typically involved only a few H-1B nonimmigrants each. Several investigations concluded that no back wages were due, but that the employer had failed to comply with the LCA public access requirements. If this enforcement trend is true for other fiscal years, this appears to indicate that a few companies account for most H-1B violations.

What does all this mean? As usual in the H-1B area, people can look at these statistics two ways. Some may argue that the number of investigations and fines indicate that the DOL is doing an adequate job enforcing the H-1B program. Others may complain that the total number of H-1B workers due back wages and the millions in fines levied under the program show that the H-1B program is flawed, or that DOL enforcement is inadequate, and that either way the H-1B program should be scrapped. Those numbers, however, should be measured against the size of the overall H-1B program. As stated above, in the ten and one-half year period between FY 1992 and March 31, 2003, the DOL found that slightly over 2,300 H-1B nonimmigrants were paid inadequate wages. During that same time the Immigration and Naturalization Service (INS) approved over one million H-1B petitions for new employment. Thus, the number of H-1B nonimmigrants found to have been paid inadequate wages is only about two-tenths of one percent.

My own view is that the DOL is enforcing the H-1B program adequately, and that most employers seem to be complying with the attestation regime. Supporting this view is the fact that the Labor Department has found "willful" H-1B violations requiring debarment from the program in less than five percent of its investigations. This disparity between the number of enforcement actions (886) and the ultimate finding of debarment (43) would seem to indicate that many employers simply experience some difficulty in complying with the complex H-1B-related regulations.

Statistics on H-1B Usage

An examination of the data reveals that H-1B visa usage is market driven. Like other nonimmigrant visa categories, H-1B usage has waxed and waned over the last decade in response to economic conditions. A chart from the U.S. Citizenship and Immigration Services (USCIS), attached as Appendix A, sets forth H-1B admissions and approvals for FYs 1992-2002, further broken down between cap and non-cap approvals.

Past Usage: Between FY 1992 and FY 1996, the former INS approved 62,000 or fewer H-1B petitions per year. From FY 1997 to FY 2001, the booming high technology sector and an expanding economy created demand for both native and foreign-born professionals. In many cases, U.S. employers hired the foreign-born professionals after they completed undergraduate or graduate studies in the United States. Increased

hiring of foreign-born professionals was not the result of a concerted effort to find and recruit foreign workers. Rather, in the course of normal recruiting, the employers hired both native and foreign-born individuals. As the IPC report notes, 10 percent of those holding U.S. baccalaureate degrees in science and engineering in 1999 were born abroad. "This figure was 20 percent for master's degree recipients and 25 percent or greater for doctorate-holders (much higher in some engineering and computer science fields)." Therefore, it is natural that employers would hire foreign-born individuals for a portion of available positions. Approximately 42 percent of those hired on H-1B visas in FY 2002 possessed a master's degree or higher, according to USCIS data.

Recent Usage: USCIS statistics show that during the economic peak in FY 2001, the former INS approved 164,000 H-1B petitions subject to the cap. However, in FY 2002, that number dropped by half, to 79,000- equaling a mere 0.058 percent of the total U.S. labor force.

Data also show that the number of H-1B petitions approved for workers in computer-related occupations fell precipitously by 61 percent from 191,400 in FY 2001 to 75,100 in FY 2002. While H-1B usage in nearly every occupation group declined between 2001 and 2002, notable exceptions included education, medicine and health, and life sciences. These occupation groups increased by 19, 14, and 7 percent. These statistics reinforce the fact that H-1B usage is market driven, having followed, in this example, the overall downward trend in the high tech sector. The data also reveal the importance of the H-1B category for non-information technology-related occupations, in particular for the vital and perennially underserved medical, education, and science sectors.

Data also indicate that in FY 2002, approximately 65 percent of the beneficiaries of initial H-1B employment were in the United States in another nonimmigrant status. In 2001, this number was 40 percent. The number of H-1B workers outside the United States approved for initial employment dropped from 115,800 to 36,500 in fiscal year 2002, or 68 percent below fiscal year 2001. The majority of H-1B beneficiaries who are already present in the United States are likely graduates of U.S. universities. These are the people we train to help industry. It is bad policy to train them and then tell them that they cannot obtain a job here because the H-1B cap is too low. Otherwise we are just training our foreign competition.

A USCIS press release on H-1B usage for FY 2003 indicates that 56,986 H-1B petitions subject to the cap were approved through June 30, 2003, the first three quarters of FY 2003. At that rate (6,333 per month) approximately 76,000 H-1B petitions subject to the cap would be approved this fiscal year.

THE L-1 AND H-1B VISA PROGRAMS--TWO DISTINCTLY DIFFERENT CREATURES

Some immigration critics have tended to lump together two very different nonimmigrant visa categories-the H-1B and the L-1 intracompany transferee categories-to the detriment of both. The L-1 and H-1B visa programs are distinct programs meant to achieve different ends. While the H-1B visa allows U.S. employers to hire professional level workers, the L-1 visa allows companies to transfer specific high-level talent that is already present in the company from one location to another in an expedient manner. These visa programs are designed for different purposes, and the requirements of each program reflect these differences. Unfortunately, when the distinct nature of these programs are blurred, as has happened with recent legislation, confusion results and the benefits of the programs are jeopardized. Such a blurring of the programs implies a lack of understanding of the different purposes of the two categories.

As noted above, U.S. employers use the H-1B visa program to hire foreign professionals who provide needed specialized or unique skills, relieve temporary worker shortages, and supply global market expertise. To be eligible for an H-1B visa, a foreign national must possess at least a U.S. bachelor's degree (or its equivalent) in a specific a specialty occupation.

As discussed above, H-1B employers have to satisfy certain requirements to protect the labor market. Employers must pay an H-1B worker the higher of the prevailing wage for the position or the actual wage paid to similarly situated professionals. They must also file an attestation form with the Labor Department

agreeing to certain conditions. As part of the attestation process, they must fulfill other obligations such as publicly posting a notice of the offered position at the place of employment and providing notice of the hire to any union representatives. H-1B employers who employ a certain number or percentage of H-1B employees must satisfy additional obligations. These employers are considered to be H-1B dependent and must demonstrate that their hires of H-1B employees have not resulted in the displacement of U.S. workers.

The L-1 visa is designed for the more narrow purpose of helping international companies transfer their key personnel-managers, executives, and employees with specialized knowledge-to assist affiliated U.S.-based operations. To be eligible for an L-1 visa, a foreign national normally must have been employed by the foreign company continuously as a manager, executive, or a person of specialized knowledge for at least one year during the three years preceding application to come to the United States. No degree or other external benchmarks must be met for L-1 eligibility because an applicant's general educational qualifications are not relevant to this visa category. Instead, this category contemplates factors pertinent to enhancing an international business's flexibility and productivity such as the length and type of specific experience gained with the affiliated business entity.

L-1 visa holders are current employees who are transferred temporarily within the company to add value or provide expertise based on their international experience with the company. As such, they do not constitute new hires. Moreover, the L-1 visa holder already is eligible to maintain home-country benefits, which in many cases, because of the particular foreign state's social welfare laws, are more valuable than U.S. benefits, and often difficult to measure and compare to U.S. benefit plans.

The different purposes of these visa programs are also reflected by each program's built-in flexibilities. The H-1B visa allows the foreign professional to efficiently move his employment relationship to a different unaffiliated employer. In addition, when the H-1B employee is the pursuing a green card through a sponsoring employer, this category permits extensions of stay beyond the maximum six-year statutory limit.

Such flexibilities are not offered the in the L-1 program since the individual is not actually entering the U.S. labor market, but is only in the United States to perform a job for his or her employer. However, the lack of a cap on the L-1 visa category does provide flexibility to U.S.-based employers by permitting them to transfer these key employees as necessary. Conversely, the H-1B program is not granted such flexibility and remains capped, even though usage statistics indicate that the cap is unnecessary because visa issuance follows market trends.

H-1B VISAS IN A GLOBALIZED ECONOMY

Globalization, or the cross-border movement of goods, services, and people, is one of the most important characteristics of this century. Some have raised concerns that globalization (and the related activity of overseas outsourcing, or offshoring) hurts the U.S. economy. In my view, the H-1B visa category, if properly administered and monitored, can be an antidote to concerns about overseas outsourcing. Use of H-1B visas encourages work in the United States and thus can help keep and grow jobs in the United States.

It is easy to paint the phenomenon of globalization with too broad a brush, characterizing it as either all good or all bad, depending on your point of view. I will address only one subset of globalization: jobs affecting IT workers. Bruce Mehlman, Assistant Secretary of Commerce for Technology Policy, noted in testimony before the House of Representatives in June that it is difficult to separate U.S. IT job losses due to the post-bubble business cycle from slower growth in overall IT employment resulting from global competition. Little data exists to demonstrate one-to-one relationships. It is clear that as the growth in U.S. IT jobs has slowed for multiple reasons, the volume and value of off-shored work has increased rapidly.

Forrester Research, a high-technology consulting group, estimates that the number of service sector jobs newly located overseas, many of them tied to the IT industry, will climb to 3.3 million in 2015 from about 400,000 this year. This shift of 3 million jobs represents about 2 percent of all U.S. jobs.

As Assistant Secretary of Commerce Mehlman noted, globalization contains both potential and pitfalls for the United States:

While policymakers try to promote national interests, it is getting much harder to define them as the global economy develops. For example, is it better for America to buy a BMW made in South Carolina or a Ford made in Canada? How about IT services procured through IBM but performed in India, versus services purchased from Infosys but staffed using H-1B workers living and spending their salaries in America? Is it better to help manufacturers remain competitive by enabling them to cut IT costs through off-shoring or help IT service workers remain employed by shielding them from global competition? New Jersey recently wrestled with a similar question when its Department of Human Services (Division of Family Development) off-shored a basic call center used to support a welfare program. In the wake of controversy, the state returned the nine jobs to New Jersey, albeit at 20 percent higher cost (thereby reducing the amount of funds available for the welfare recipients for whom the call center is needed). How will we answer the question when seeking to maximize resources for medical care for the elderly, education for our children or homeland defense?

As Mr. Mehlman also noted, overseas outsourcing of IT work can also benefit the United States and create more jobs for U.S. workers:

[T]he majority of work sent offshore is lower-wage, represents a small fraction of the overall market for software and IT services, and will never displace a large majority of work done here in the U.S. Indeed, the Bureau of Labor Statistics projected in December 2001 that the number of professional IT jobs in the U.S. will grow by 72.7% between 2000 and 2010. And since global competition is a two-way street, U.S. IT companies gain opportunities to win global business, particularly as developing nations improve their own domestic markets for hardware, software and services. For example, IBM won a $2.5 billion (over 10 years) contract to manage Deutsche Bank's IT operations in December 2003. In fact, in 2001 U.S. cross-border exports of IT services totaled $10.9 billion, while imports totaled $3 billion, yielding a trade surplus of $7.9 billion.

These are some of the hard questions Congress must ponder as it decides the proper role of immigration, including H-1B visas, in a globalized economy.

H-1B VISAS AND FREE TRADE AGREEMENTS

In considering any changes to the H-1B visa category, it is important to be aware that the General Agreement on Trade in Services (GATS) as well as some international free trade agreements (FTAs) contain immigration provisions relating to the H-1B visa.

In 1994, the United States became a signatory to the General Agreement on Trades and Services (GATS). This multilateral agreement included references to Section 101(a)(15)(H)(i)(B) of the INA in language on temporary professional workers. By the terms of the GATS, the United States is committed to admitting 65,000 H-1B visa holders each year under the definition of H-1B specified in GATS.

Similarly, on September 3, 2003, the President signed into law two free trade agreements: one with Chile (P.L. No. 108-77) and one with Singapore (P.L. No. 108-78). Among other provisions, these two FTAs create a special H-1B1 designation for Chile and Singapore professionals. This category comes under the H-1B umbrella, and is limited to 1,400 Chilean professionals and 5,400 Singaporean professionals. These 6,800 numbers will count against the overall H-1B cap, and will be reserved for each country under the H-1B cap for that fiscal year. If the H-1B1 cap is not reached in a given fiscal year, the remaining numbers can be issued to pending H-1B applicants from that same year for 45 days after the end of the fiscal year. At the end of the 45 days, or if the entire pending backlog is used up, the remaining number disappear.

Members of Congress have voiced complaints about immigration provisions being included in FTAs, arguing that Congress should decide immigration policy after due deliberation and debate, and not have it

imposed unilaterally by executive agreements. Legislation introduced by some members of this Committee would address this concern by prohibiting the inclusion of amendments to the immigration laws in international trade agreements. Nevertheless, several existing international agreements already contain H-1B provisions, and Congress must make sure that any changes to the H-1B category do not violate those bilateral or multilateral agreements.

PROPOSALS TO IMPROVE THE H-1B CATEGORY

As Congress ponders the next steps for the H-1B program, I urge you to consider several issues. On one hand, while the current economy is growing stronger, unemployment is rising, with six percent unemployment in some areas. On the other hand, Congress understands that its decisions on the H-1B program will have serious ramifications for American workers, American businesses, and the long-term economic interests of this country.

Even when H-1B professionals are not required in large numbers, they are still essential to fill specific positions in companies in all sectors across the country. Foreign professionals are needed in our current economy as job creators and product generators. As our economy improves and demand increases, U.S. employers will need increased access to these professionals.

To ensure the continued viability of the H-1B program, Congress must decide how to approach the issue and adopt a consistent approach over time. Some fixes, such as exemptions from the H-1B cap, would provide long-term relief to targeted areas and industries that Congress deems worthy of special attention. Other actions, such as raising the H-1B annual cap, would allow economic growth across all sectors of the economy.

Exemptions from the Cap

Potential areas for exemptions from the H-1B cap include: (1) jobs deemed to be in the public interest (if the federal government, state, or local governments or a 501(c)(3) non-profit requires an H-1B professional); (2) jobs requiring an H-1B professional that a state economic development agency deems important due to a positive economic impact; and (3) jobs that facilitate the retention of foreign students educated in the United States

Employees of Government Entities: If a government agency (any federal, state or local government entity, including school districts), working on behalf of the citizens under its jurisdiction, requires a foreign worker, it is not beneficial to the interests of the governmental entity to restrict its ability to hire that person. Government agencies will almost always be governed by policies or statute or some hiring restrictions that makes hiring a U.S. citizen preferable. Therefore, if the agency has chosen a foreign national hire, there will be an overriding benefit to the government and thus to the citizens that it serves. In addition, if a government agency feels it is necessary to hire a foreign national, it should not be competing with the private sector for H-1B numbers. Nor should the government deplete the pool of H-1Bs, depriving U.S. businesses of economic opportunity.

Employees of Non-profit Organizations: Entities that have been exempted from income tax pursuant to Internal Revenue Code § 501(c)(3) are by definition involved in activities that are in the public interest and that benefit local and national communities. These entities, which usually have limited resources, should not have to compete with for-profit companies for H-1B numbers. If a foreign worker meets their needs, it is in the interest of the country not to place any barriers to their activities.

State Economic Development Agencies: Economic development agencies are tools of the state government used to increase the economic health of the state by attracting jobs and investment. If a state determines that it is economically beneficial to the state to remove numerical restrictions from the hire of a particular foreign national or the foreign national employees of a particular investment entity, the state should have

that ability. The state is best able to determine whether foreign national hires workers will help to increase jobs for U.S. workers. It does not make sense to limit a state's ability to make that decision.

Graduates of U.S. Universities: Foreign students constitute a substantial economic benefit for many universities struggling with reduced state and federal aid and scholarship funds. Moreover, the available statistics for the fields in which foreign students study, such as the hard sciences and mathematics, suggest that they are an asset to this country. According to the U.S. Department of Education, in 2000, 42 percent of high-tech masters degrees were awarded by American universities to foreign students, and 45 percent of high-tech doctoral degrees were awarded to foreign nationals. Given the dramatic number of foreign nationals graduating with advanced degrees from our universities, combined with Bureau of Labor Statistic figures indicating a 47 percent growth in science and engineering jobs and an 82 percent increase in computer-related jobs between 2000 and 2010, we would be foolish to put the issue of H-1B head count ahead of the opportunity to allow these individuals to work temporarily in the United States, using their ability and academic prowess to our benefit.

Universities should continue to stress that foreign students return to their home countries after graduation. These returning students spread American ideas and values, which benefits the United States generally. However, those who wish to and are able to temporarily work in the United States should be able to do so, so that their training and abilities can benefit our country. Their return home after a period of H-1B work allows further transmission of our U.S. economic system and values, and if they stay permanently, there is a continuing benefit to the United States.

Exempting graduates of U.S. schools from the numerical restrictions on new H-1B petitions benefits U.S. universities economically, because potential students who desire a career in the United States will have that option more readily available. Moreover, it benefits the United States economically and intellectually when their ability to remain and contribute to our economic development is not hindered by the non-availability of H-1B numbers. The AFL-CIO Executive Council recently stated that U.S.-trained foreign graduate students should be given "preferential rights" for obtaining H-1B visas.

Increasing the H-1B Cap

An annual cap of 65,000 on H-1B usage is clearly too small. Even in the recent recession, actual H-1B usage subject to the cap averaged about 75,000 to 80,000. Moreover, it appears that fewer than 65,000 H-1B numbers are really available in FY 2004. I have heard estimates from the USCIS that about 22,000 H-1B cases that are subject to the annual cap have been filed in this fiscal year but will be adjudicated in FY 2004. Moreover, as indicated above, the Chile and Singapore FTAs set aside another 6,800 H-1B numbers per year for usage by foreign professionals in those two countries. Adding those two figures together, that leaves only about 36,200 numbers available for new H-1B petitions filed in FY 2004.

Even if there really were 65,000 "fresh" H-1B numbers next fiscal year, which there are not, that figure clearly is too low because it does not reflect how and why U.S. employers use foreign professionals. As noted earlier, many industries continue to need highly educated professionals and turn to the H-1B program to fill these specialized positions that would otherwise remain vacant. In the science-oriented sectors there are still too few U.S. students graduating with advanced degrees to fill these highly specialized positions. In other fields, such as education, shortages exist in specific areas of the country and positions continue to go unfilled. In addition, as U.S. companies try to revitalize their businesses, they need access to professionals with unique knowledge, skills, and expertise in overseas markets. These professionals give U.S. companies the ability to develop new products, platforms and programs, enter new markets, and expand their client base. The result is increased productivity and job creation for American workers.

A modest H-1B cap increase to 115,000 for FY 2004 would alleviate labor pressures associated with economic recovery while simultaneously permitting employers to hire H-1B workers to fill vacant specialty positions requiring specific sets of skills. While the timing of this cap increase is a legitimate topic of discussion, if Congress does nothing to alleviate this pressure, companies will not have access to needed

workers as the economy recovers. As the Congressional Research Service recently noted, "[i]f the [H-1B] ceiling drops by two-thirds to 65,000, . . . employers of workers in professional specialty occupations in which demand has continued to be strong (e.g., health care) could face heightened competition for visas." Congress must prevent this from happening.

CONCLUSION

The H-1B program is a small but vital part of America's economy. Highly educated foreign professionals allow U.S. employers to develop new products, conduct groundbreaking research, implement new projects, expand operations, create additional new jobs, and compete in the global marketplace. Even when H-1B professionals are not required in large numbers, they are still essential to fill specific positions in companies across the country. Foreign professionals are needed in our current economy as job creators and product generators.

As our economy improves and demand increases, U.S. employers will need increased access to these professionals. Our economy will suffer if the H-1B program cannot give U.S. employers such access. In the short term, limitations on access would prevent employers from fully using the special skills of these highly educated foreign professionals. As our economy recovers, such rigidity would limit our labor market supply, thereby hampering our economic vitality. The result will be American jobs lost and American projects losing out to foreign competition.

In sum, Congress needs to support an H-1B program that reflects our nation's need for highly educated foreign professionals and allows U.S. employers access to their talents now and in the future, while at the same time protecting American workers. The existing H-1B program accommodates both sets of interests. Changes set to take place October 1, 2003, however, will upset that delicate balance.

Thank you. I will be happy to answer your questions.

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