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In A Hearing Before The
Judiciary Committee
U.S. Senate

On
"Immigration Reforms Needed to Protect Skilled American Workers"

March 17, 2015

Dirksen Senate Office Building

I want to thank Chairman Grassley, Ranking Member Leahy, and the members of the committee for inviting me to testify today. My name is Ronil Hira. I am a professor of public policy at Howard University in Washington DC. I am also a research associate with the Economic Policy Institute in Washington DC. I have been studying high-skill immigration policy for the past fifteen years, so I appreciate the opportunity to share my thoughts about what Congress and the Executive Branch can do to establish much-needed reforms to our immigration policy to ensure that skilled American workers are protected.

I want to acknowledge Senators Grassley, Durbin, and Sessions' leadership in pushing for reforms to protect both American workers and foreign guestworkers. I would also like to acknowledge their tireless efforts to shed light on how these programs are used, and misused, in practice. Most Americans, journalists, and many policymakers are unaware of how these programs are used to undercut American workers and in many cases replace them. This hearing is extremely important.

I also would like to note that I am the son of immigrants. My parents, both of whom were professionals, left India in the 1950s in search of a better life. After leaving India, they first lived in France for six years but decided to leave primarily because my late mother, who was a physician, could not practice medicine there. Subsequently, they received the opportunity to immigrate to America, immediately receiving greencards, and later became naturalized citizens. They had long and productive careers, my late father as an engineer and my late mother as an anesthesiologist. My wife's family has a similar immigrant story. My wife was born in India. Her father left India in 1970 to do graduate work in geology, first in the U.S. and later in Canada. He began working at Howard University as a professor of geology on an H-1 visa, a predecessor to the H-1B, before becoming a permanent resident and subsequently a citizen. High-skilled immigration has directly benefited my family enormously. The opportunity to testify is a professional honor but it is also very meaningful to me personally.

I. The Intent of Our Immigration Law is to Protect American Workers - Instead Our Guestworker Programs Inflict Serious Harm on Them

<u>Congress and multiple Administrations have inadvertently created a highly lucrative business model of bringing in cheaper H-1B workers to substitute for Americans.</u> There are mainframe-sized loopholes built into the H-1B program's design - the statutory law, regulations, administrative law, and policy guidance - and a complete disinterest on the part of multiple Administrations in enforcing the current rules, however weak they may be. Some of these loopholes are intentional, some are not, but they all add up to a system that *encourages* employers to exploit the H-1B program for cheap labor. Given the extraordinarily high profits involved in using guestworkers instead of Americans, it should surprise no one that many employers are taking advantage of this business model and lobbying to expand it.

In explaining the H-1B program rules the U.S. Department of Labor prominently and plainly states, "The Immigration & Nationality Act (INA) requires that the hiring of a foreign worker

will not adversely affect the wages and working conditions of U.S. workers comparably employed."[1]

The clear intent of the law [8 U.S. Code §1182], is that hiring foreign workers will not harm American workers. <u>Yet the H-1B program is most definitely harming American workers, harming them badly, and on a large scale.</u> *Most* of the H-1B program is now being used to import cheaper foreign guestworkers, replacing American workers, and undercutting their wages. So, contrary to intent of the INA, the use of the program is indeed "adversely affecting American workers' wages and working conditions." The scale of this damage is large and its effects long lasting, adversely impacting: the careers of hundreds of thousands of American workers; future generations of students; and, America's future capacity to innovate. This is not just adversely affecting a few workers. The H-1B program is very large with approximately 120,000 new workers admitted annually. Once admitted those workers can remain in the U.S. up to six years. While no one knows exactly how many H-1Bs are currently in the country, analysts estimate the stock of H-1B workers at 600,000.

There are hundreds of thousands of additional guestworkers admitted on L-1 and OPT visas, and they too are harming the job prospects of American workers. Because Congress never expected L-1 and OPT workers to be potential competition to American workers those programs have virtually no rules to protect American workers. That expectation was incorrect. As with the H-1B program, these guestworker visa programs are now being used too to replace and undercut American workers.

Congress needs to significantly overhaul these programs to protect American workers in order to meet the intent of the INA. And the Executive Branch needs to use its full authority to investigate and stamp out any violations that are occurring. Further, it needs to propose and promulgate new regulations and policy guidance to ensure compliance with its own statements about the INA.

Current protections in the H-1B program are seriously flawed. Skilled guestworker programs can serve important purposes: bringing in workers with unique or specialized skills; serving as a bridge to employment-based permanent immigration for specialized workers; and, offering practical training for foreign students. <u>But those positive uses have been overwhelmed by the use of these programs for cheaper labor.</u>

II. Southern California Edison Case Exposes Major Flaws in Protections for American Workers

The recent case of Southern California Edison (SCE) illustrates the most flagrant abuses of the H-1B program and exposes the flaws in the protections for American workers. As reported by *ComputerWorld* and the *Los Angeles Times,* SCE is replacing its American workers with H-1B workers hired by outsourcers Tata and Infosys. To add insult to injury, SCE forced its American workers to train their H-1B replacements as a condition of receiving their severance packages. There could not be a clearer case of the H-1B program being used to harm American workers'

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[1] http://www.foreignlaborcert.doleta.gov/pwscreens.cfm

wages and working conditions. And no clearer example demonstrating that the protections for American workers in the H-1B program are woefully inadequate. The SCE case is flagrant but isn't an isolated case. Disney in Florida reportedly did something similar to 500 American workers a few weeks ago. Many other cases have been documented such as Cargill in Minnesota, Harley Davidson in Wisconsin, and Northeast Utilities and Pfizer both in Connecticut. In addition to directly replacing American workers, H-1Bs are also widely being used instead of recruiting and hiring Americans. There are countless other examples, some reported and some not. Even when they are not replacing American workers, employers turn to H-1B workers without ever considering American workers. Recent news reports indicate that Deloitte Consulting is using exclusively foreign workers to upgrade the State of California's unemployment insurance computer systems. It is a sad irony that firms are importing guestworkers to service the unemployment system when hundreds of thousands of Americans who have the skills to do this work are unemployed and underemployed. And this isn't the first time H-1Bs have worked on an unemployment insurance system. The state of Indiana gave a similar contract to India-based Tata a decade ago and it too hired only guestworkers to do the work.

When I tell the story of SCE to a variety of people including Congressional staff they are astonished. They believe there are protections built into the H-1B program to prevent exactly what is happening at SCE. But they are wrong. There are widespread myths about the protections for American workers and how the program works in practice.

Myth: Employers must prove there are no qualified American workers before hiring an H-1B.
Reality: There are no requirements to demonstrate a shortage of Americans prior to hiring an H-1B. Employers do not need to recruit American workers for a job filled by an H-1B. In fact, a job can, and often is, earmarked for an H-1B worker. The SCE case demolishes the myth of H-1Bs only being hired when no American worker can be found - American workers were already doing the job and being replaced by H-1Bs. In the words of one SCE worker, "there wasn't a single job being taken over by foreign workers that wasn't already being done by an American." Obviously there is no shortage of Americans in this case. In fact, the American SCE workers were not considered for the position with SCE's contractors Tata and Infosys. And of course there was no shortage in the case of Cargill, Disney, Northeast Utilities, and Harley-Davidson.

Solution: Prior to hiring an H-1B, all employers should be required to actively recruit American workers and required to hire qualified American applicants. Explicitly ban all displacement of American workers by all employers. This would ensure that the H-1B program is being used as it is intended, to complement the American labor force. The technology industry has claimed that there is a dire systemic shortage of American workers and their jobs are going unfilled. If this is true then it should be effortless for them to meet these recruitment and hiring requirements.

Myth: H-1B workers cannot be cheaper than Americans because employers must pay the "prevailing wage."
Reality: Congress' intent of requiring that a legally defined "prevailing wage" be paid to H-1B workers was to ensure that H-1B workers were not pushing down the wages of American workers. To fulfill that, H-1B wages are supposed to be set at least at the market rate. But most

H-1Bs are paid below that market wage, and they are hired because they are cheaper than American workers. And this is perfectly legal. Why? Because the "prevailing wage" rules, in statute and regulations, are poorly designed and written. Employers can easily hire an H-1B worker at wages far below what an American worker is paid. Simply put, the H-1B program has become a cheap labor program. While it is well known in the industry that the cost savings of hiring an H-1B over an American are approximately 25%, SCE provides us with the most definitive case study to examine the cost savings. We can make a clear apples-to-apples comparison of wages because the H-1B workers are taking over the exact same jobs currently performed by American workers. See Table 1 below. SCE published a compensation study that showed its IT workers were paid an average of $110,466 per year. We know Tata and Infosys pays its new H-1B workers on average $65,565 & $70,882 respectively.[2] Therefore, the cost savings are approximately $40,000 per worker per year, which is a wage savings of about 43%. Multiply that by the 500 workers being replaced and there's a windfall of $20 million each and every year by replacing American workers with H-1Bs.

SCE was very explicit about its motivations. Los Angeles Times columnist Michael Hiltzik interviewed a number of SCE workers. One told him the following:[3]

> "They told us they could replace one of us with three, four, or five Indian personnel and still save money," one laid-off Edison worker told me, recounting a group meeting with supervisors last year. "They said, 'We can get four Indian guys for cheaper than the price of you.' You could hear a pin drop in the room."

Table 1
Tata & Infosys Pay Their H-1Bs 43-49% Less
Than The Southern California Edison IT Workers They Are Replacing

FY13 H-1B Rank	Firm	FY13 New H-1Bs Received	Firm's Average Wage for H-1Bs	Wage Savings vs. American Workers	Wage Savings in %
1	Infosys	6,269	$70,882	$39,584	**43%**
2	Tata Consultancy	6,163	$65,565	$44,901	**49%**
SCE Workers: Average Base Pay for IT Specialists/Engineers (2013)		$110,466			

Sources: H-1B: USCIS I-129 microdata; SCE workers: http://www3.sce.com/sscc/law/dis/dbattach5e.nsf/0/7BDB1F4E1B3463E688257C21008144AE/$FILE/SCE-06%20Vol.%2002%20Part%202.pdf

Why would an H-1B worker accept seemingly sub-standard wages? Because these wages are often much higher than the wages they can earn in their home country. For example, in India, the typical wage for an IT worker is $6,000 per year. Even if they are paid 40% less than the market

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[2] These data were obtained from the I-129 petition data submitted by each firm to USCIS. I received these data through a Freedom of Information Act request.

[3] http://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150222-column.html#page=1

wage in America, the $60,000 they earn in America is an order of magnitude more than they would back home. Given the demographics of India, there are more than 400 million people under the age of 18, there is a reserve army of labor from low cost countries willing and able to take over vast swaths of American jobs at far lower wages.

Infosys and Tata Consultancy have been top H-1B employers for a number of years. These two India-based IT firms specialize in outsourcing and offshoring, are major publicly traded companies with a combined market value of about $115 billion, and are the top two H-1B employers in the United States. In Fiscal Year (FY) 2013, Infosys ranked first with 6,269 H-1B petitions approved by the government, and Tata ranked second with 6,193. As with the SCE scandal, these leading offshore outsourcing firms use the H-1B program to replace American workers and to facilitate the offshoring of American jobs. Because of this, Americans lost more than 12,000 jobs to H-1B workers in just one year to those two companies alone.

Most of the top H-1B employers employ the exact same business model as Tata and Infosys. Hundreds of thousands of American workers have lost their jobs due to H-1B program misuse and hundreds of thousands more are losing wages.

Solution: Raise the minimum "prevailing wage" to at least the average (mean) wage. If the H-1B workers we would like to target have specialized skills, shouldn't they be paid at least the average wage? This will not completely eliminate the use of H-1B workers as cheaper labor but it would help clean up some of the most flagrant abuses. Further, the Department of Labor should periodically do special wage surveys of the most common H-1B occupations such as Computer Systems Analyst. And the Department of Labor & USCIS should begin reviewing the labor condition applications and I-129 petitions to ensure that the position listed is being classified correctly for both occupation and skill level.

Myth: Compliance with the program's rules that protect American workers is robust.
Reality: Compliance with the H-1B program depends almost exclusively on a whistle blower coming forward to flag violations. This is the worst and most ineffective method of ensuring compliance. Whistle blowers are almost always retaliated against if they come forward. Further, many workers, foreign and American, do not even know when violations are being made. Even in those cases where they are aware of a violation it is difficult for them to gather evidence that could prove it. It is also very unlikely that an H-1B worker will complain if he is being exploited, either by being underpaid or mistreated, a frequent occurrence. The employer holds the visa and if the worker complains the employer can easily terminate that worker. If terminated, the foreign worker is out-of-status and must leave the country immediately. That threat alone is enough to scare away many potential whistle blowers. But there are other tactics used to intimidate and bully H-1B workers into indentured servitude including employment bonds (literal indenture) and the threats of liquidated damages lawsuits. See the groundbreaking investigative stories, "Techsploitation," by the Center for Investigative Reporting (CIR) that chronicles many of these abuses.[4] The "ecosystem of fear" is pervasive according CIR. Here is how one H-1B worker described his dilemma:[5]

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[4] https://beta.cironline.org/investigations/techsploitation/
[5] http://www.revealnews.org/article/job-brokers-steal-wages-entrap-indian-tech-workers-in-us/

> "You can pretty much see a leash on my neck with my employer," said Saravanan Ranganathan, a Washington-area computer security expert here on an H-1B visa. "It's kind of like a hidden chain … and you'd better shut up, or you'll lose everything."

One of the more egregious abuses is the use of employment bonds - requiring H-1B workers to pay a king's ransom to be allowed to quit their job with an employer. CIR profiles a series of employment bonds used by Tata, the number two H-1B recipient in FY13:[6]

> Former Tata workers say the company tried to collect fees from them after they quit. Many immigrant tech workers say they are bound to their jobs this way, despite a federal law banning companies from penalizing H-1B visa holders for quitting. … Indian workers hired for U.S. jobs received an employee manual explaining that they would be sued for up to $30,000 if they left before the end of their contracts. The company also threatened to withhold retirement benefits.

The whistle blower, Jack "Jay" Palmer, who is here today, shows that even when violations are found, the government is unwilling to sanction the firms sufficiently to change their employment behavior. Jay Palmer, an employee at Infosys, was asked by the company to sign letters to the government in order to import guestworkers. He and the company knew the letters contained false information. Jay believed that signing those letters would deceive the government and refused. When he notified the company internally of these problems, instead of correcting them, Infosys retaliated against him. He was isolated, shut out of any work, and received threats, including ones on his life, from unknown persons. With no recourse provided by the company, Jay then went to the government to explain what was happening. After enduring a three-year ordeal, with no guarantee of success, there was some vindication. The government charged Infosys with a variety of transgressions of the visa programs such as the B-1 and H-1B. The government settled with the company for $34 million, the largest recorded immigration fine ever.[7] While that fine may be a record, it is miniscule to Infosys. It was a mere 0.4% of Infosys' $8.2 billion in annual revenues. From the perspective of Infosys executives, the fine was a small addition to their cost of doing business, and it did nothing to persuade the company from changing its behavior. It also sent a very clear signal to all of the other firms abusing the guestworker programs: even if you get caught for serious violation you will get nothing more than a slap on the wrist. The government should have debarred the company from the visa programs to send a signal to the market that protections for American workers really matter. One of the firms at the center of the SCE scandal is Infosys, the very company that the government gave a pass to. The government settled all right, and American workers are paying a huge price.

Jay persevered through an ordeal that should not be meted out on anyone. He is a true hero to American IT workers. He has also rendered himself unemployable, during the prime of his career. He can no longer work in an industry to which he dedicated 25 years of his life. Now, in his mid-forties is it really fair to ask him to completely shift to a new occupation because he did the right thing?

The American workers at SCE are in a similar situation. They would like someone to investigate whether there are violations of the H-1B program, but they have neither the resources nor knowledge about how to do so. Eight months ago SCE told their workers that it is outsourcing

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[6] http://www.revealnews.org/article-legacy/case-study-tata-consultancy-services/
[7] http://www.sec.gov/Archives/edgar/data/1067491/000106749113000061/exv99w02.htm

most IT functions and that they wanted them to train their guestworker replacement. If they said no, SCE would terminate them with cause and they would lose not only a severance package but also eligibility for unemployment insurance. Even the ones who did not sign a non-disparagement agreement know that if they speak out they will be blacklisted by the industry and render themselves unemployable.

The SCE workers are wondering: "Why should I lose my job when the work still needs to be done? Why is the government doing this to me and my family?" Adding to the injustice of losing their jobs, the SCE workers are being forced to do something that is so common in the industry it is a term of art: "knowledge transfer," an ugly euphemism that means being forced to train your own foreign replacement. The SCE workers are, "demoralized; in disbelief; beyond furious; down in the dumps; feeling anguish; depressed; feeling dehumanized; feeling humiliated; worrying about the future; worrying about paying the bills." The SCE workers rightly place the culpability squarely on SCE executives, the President, and Congress. One worker simply said, "Shame on Edison for doing this and shame on our politicians for enabling it."

The human toll on SCE workers is incalculable. And the signal it sends to all American IT workers and students cannot be underestimated. The government has policies to eliminate your job with guestworkers. <u>Not a single government official has met with the SCE workers to explain why they are losing their jobs to guestworkers.</u>

The Secretary of Labor has the statutory authority to investigate the case of Southern California Edison but has chosen not to. No one knows why the Secretary of Labor has turned a blind-eye to the SCE case and the many other cases that have been documented. He has not made any public statements about them. He should thoroughly investigate these cases, and if he finds violations, debar the companies from using guestworker visas. If he doesn't find violations, he should use all of his authority to propose and promulgate new regulations and policy guidance to fix these problems. Further, the Secretary of Labor should notify Congress of areas that require statutory changes, and work with Congress to get those passed.

The Obama Administration has very recently promulgated rules that create a new guestworker program for the spouses of H-1B workers. The rationale for those rules was to keep H-1B workers happy. If it has the authority and interest to keep guestworkers happy, why is it so reluctant to help American workers when they are so clearly being harmed by the H-1B program?

SOLUTION: Short term - Ask Secretary of Labor Thomas Perez and Wage & Hour Division Chief David Weil to investigate the SCE and other reported cases of American workers being replaced. Ask Secretary of Labor Perez to propose and promulgate any new regulations to protect American workers. Long-term - Institute a random audit of at least 1% of all employers each year. Grant a private right of action to H-1B workers to ensure they have a way to defend their rights through the judicial system.

III. Outsourcing by the Tens of Thousands - Practices at Southern California Edison are Common

Table 2 below shows that nine of the top ten H-1B employers in FY13 used the program principally to outsource American jobs to overseas locations. Outsourcing firms received more than half of the H-1B visas issued in FY13. The list is a who's who in the Indian outsourcing industry. In fact, Indian Government officials refer to the H-1B as the "Outsourcing Visa." Tata and Infosys, the two outsourcing companies hired by Southern California Edison to replace its American workers, were the *top 2* H-1B recipients in 2013. The rest of the outsourcing firms use the program the same way - for cheap labor and to facilitate the offshoring of American jobs.

	Table 2 H-1B is the "Outsourcing Visa" Nine of Top Ten H-1B Employers in FY13 Use The Program For Outsourcing & Cheap Labor		
FY13 H-1B Rank	Company Name	FY13 Approved New H-1Bs	Uses H-1B For Outsourcing
1	INFOSYS TECHNOLOGIES	6,269	Y
2	TATA CONSULTANCY SERVICES	6,163	Y
3	COGNIZANT TECH	5,192	Y
4	ACCENTURE LLP	3,321	Y
5	WIPRO LIMITED	2,638	Y
6	HCL AMERICA INC	1,732	Y
7	IBM INDIA PRIVATE LIMITED	1,363	Y
8	LARSEN & TOUBRO INFOTECH	1,163	Y
9	SATYAM COMPUTER SVCS LTD	1,072	Y
10	MICROSOFT CORPORATION	1,039	N
Total		29,952	9 of 10 Offshoring

Sources: USCIS I-129 & Author's Analysis

H-1B advocates often conflate the H-1B with a legal permanent residence (a greencard). The H-1B program is a temporary non-immigrant work permit. An H-1B is not legal permanent residence (a greencard). The employer holds the visa, not the worker, and if the H-1B worker is laid off he must leave the U.S. This provides enormous leverage over the H-1B worker.

The employer, not the worker, has the discretion of applying for a greencard for an H-1B worker. And most of the top H-1B employers don't sponsor their H-1B workers for greencards. By my estimates less than half of H-1Bs are being sponsored for greencards. As Table 3 below shows, most of the top H-1B employers are using the program for cheaper temporary labor - as a vehicle to outsource jobs overseas rather than as a bridge to permanent immigration. Just to use one example - Accenture received 3,321 H-1Bs yet applied for a mere 4 greencards for its H-1B workers in FY13. That is a 0.1% rate, or 1 greencard application for every 830 H-1B workers.

Tata received more than six-thousand H-1B workers and applied for exactly ZERO greencards for its H-1B workers in FY13.

Table 3				
Top H-1B Companies Don't Sponsor Workers for Greencards:				
Only 1 in 50 H-1Bs is Sponsored for a Greencard				
FY13 H-1B Rank	**Company Name**	**FY13 Approved New H-1Bs**	**Greencard Applications for H-1Bs**	**Immigration Yield = GC Apps / H-1Bs**
1	INFOSYS TECHNOLOGIES	6,269	7	0%
2	TATA CONSULTANCY SERVICES	6,163	0	0%
3	COGNIZANT TECH	5,192	152	3%
4	ACCENTURE LLP	3,321	4	0%
5	WIPRO LIMITED	2,638	1	0%
6	HCL AMERICA INC	1,732	128	7%
7	IBM INDIA PRIVATE LIMITED	1,363	0	0%
8	LARSEN & TOUBRO INFOTECH	1,163	29	2%
9	SATYAM COMPUTER SVCS LTD	1,072	22	2%
10	MICROSOFT CORPORATION	1,039	381	37%
Total		**29,952**	**724**	**2%**

Sources: H-1B Data: USCIS I-129;
2012 PERM DATA:
http://www.foreignlaborcert.doleta.gov/docs/py2012_q4/PERM_FY2012_Q4.xlsx
2013 PERM DATA: http://www.foreignlaborcert.doleta.gov/docs/perm/PERM_FY2013.xlsx

IV. The L-1 and OPT Guestworker Programs Have *No* Protections & Are Harming American Workers

The L-1 visa and F-1 visa Optional Practical Training (OPT) programs are in many ways more harmful to American workers than the H-1B program. They have no protections for American workers or foreign workers. There are no recruitment or non-displacement requirements for either program. American workers can and are replaced by these workers. The scandalous case in of Siemens, of Lake Mary Florida, forcing its American workers to train foreign L-1 visa replacements hired by Tata has been well documented.[8]

Neither the L-1 nor the OPT have *any wage floor,* a cap, recruitment requirements, or non-displacement. Further, both programs are subject to virtually no federal scrutiny or oversight. We have no idea how many L-1 visa holders are here at any one time, and unlike the H-1B, we don't even know how many are approved for each company because of blanket petitions (for which no

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[8] http://www.bloomberg.com/bw/stories/2003-03-05/a-mainframe-size-visa-loophole

publicly available government data exist). A review of L-1 visa issuance, I-129, and admissions data suggest the stock of L-1 workers is likely to be in the neighborhood of 300,000. In addition, employment authorization document data from DHS suggest there are likely to be about 200,000 L-2 spouses working in the labor market, who accompany the principal L-1 beneficiaries.

With no wage floor, the L-1 visa program offers wage arbitrage opportunities even greater than with the H-1B. Workers can be paid home country wages. The wage differentials between America and India, the source country for the largest share of L-1s, are staggering. In the case of an information technology worker from India, this could mean a salary of just $8,000 per year. Even including the housing allowances and living expenses often given to these workers, the wages would be far below market.

For an example of just how low L-1 visa wages can be, one needs to look no further than the case of Electronics for Imaging. The San Jose Mercury News reported that Electronics for Imaging was paying its guestworkers from India $1.21/hour to install computers and mistreating them.[9] Those workers were imported on an L-1 visa, for work that should have been paid at an hourly rate of $19 to $45 per hour. Shockingly enough, the firm was not in any violation of the L-1 program because there is no wage requirement. Instead they were found to have violated the minimum wage laws. Electronics for Imaging isn't some obscure company. It is Silicon Valley based publicly traded firm with more than half a billion dollars in revenue.

Would adopting a wage floor harm firms? The industry lobbying coalition, Compete America, heartily endorsed the *IDEA Act of 2011* introduced in the House in the 112th Congress.[10] That bill included a wage floor for L-1 workers, something that doesn't exist now.

Similarly to the H-1B, the L-1 program has been extensively used to support the outsourcing of American jobs overseas, as Table 4 shows.

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[9] http://www.mercurynews.com/business/ci_26778017/tech-company-paid-employees-from-india-little-1
[10] See: http://www.competeamerica.org/media/ideaact2011

Table 4

Top 10 L-1 Employers for Fiscal Years 2002-2011
9 of 10 Use L-1 Visas Principally for Outsourcing

L-1 Use Rank	Company	L-1s Obtained FY02-11	Uses L-1 for Outsourcing
1	Tata Consultancy Services	25,908	Y
2	Cognizant Technology	19,719	Y
3	IBM India	5,722	Y
4	Wipro	5,507	Y
5	Infosys	4,015	Y
6	Satyam (now Mahindra Satyam)	3,274	Y
7	HCL America	1,974	Y
8	Schlumberger	1,479	N
9	Price Waterhouse Coopers	1,375	Y
10	Hewlett Packard Intel Corp	1,254	Y

Source: DHS OIG: http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-107_Aug13.pdf

Turning to the OPT. There is virtually no oversight of the OPT program, and a recent GAO report titled *STUDENT AND EXCHANGE VISITOR PROGRAM: DHS Needs to Assess Risks and Strengthen Oversight of Foreign Students with Employment Authorization,* raised serious concerns about its operation. Universities and colleges are the ones who evaluate whether the position meets the OPT eligibility for their students. But the GAO warned that basic data collection in OPT is so bad that Immigration and Customs Enforcement (ICE) "cannot determine whether students with employment authorization are working in jobs related to their studies and not exceeding regulatory limits on unemployment." Thus, it is impossible to know if the program is working as intended. It should also be obvious to anyone that a serious conflict-of-interest exists when the entity that sells its educational services to a foreign student is also evaluating whether to approve a particular job as meeting the intent of the OPT. In fact, the data show the unsurprising result of this programmatic scheme: 96 percent of applications for OPT are approved—virtually a rubber stamp.

In 2008, Optional Practical Training (OPT) was extended from 12 to 29 months for STEM graduates to fill what was then called a shortage in the STEM field. But the government does not publish an occupational shortage list. If it did, it could allow OPT STEM extensions in identified shortage occupations. That's what a smart policy and program would look like. Instead, DHS publishes a lengthy list of STEM degrees that are eligible for the OPT STEM extension, many with a dubious link to actual STEM occupations such as HVAC technician. More importantly it does not link the availability of OPT to the real world conditions of the job market for graduates

with the listed STEM degrees. Biological sciences are included on the list event though no one can argue that there is a shortage of graduates in biology.

Even more concerning is that since it was conceived for training rather than work, OPT workers do not have to be paid at all. I know of a few cases of OPT workers with STEM degrees who are working without being paid a salary at all. B. Lindsay Lowell, a research professor at Georgetown University, estimates that OPT workers are paid a mere 40% of equivalent US workers. And many of the major beneficiaries of the OPT STEM extension are obscure universities with dubious credentials. For example, students from the unaccredited University of Northern Virginia, which was raided by USCIS investigators, received 189 OPT STEM extensions, 14th on the list of all universities. According to media reports USCIS has revoked University of Northern Virginia's ability to issue any new F-1 student visas for international students. For those foreign students who wish to work in the United States for extended periods of time, rather than simply obtain practical training, they should have their employers use the H-1B program.

In order to provide a scale of the OPT program, data from FY13 (the last year for which data are available) show that there were 123,000 foreign students working in the United States through the OPT program. This makes the OPT similar in size to the H-1B program, but with no rules. Approximately 20,000 have qualified for the 29-month STEM extension in each of the past two years. (See Table 5)

TABLE 5

Participants in the Optional Practical Training program (F-1 visa), Fiscal Years 2008-2015

	Total approvals*	STEM extension approvals
2008	28,497	1,143
2009	90,896	5,237
2010	96,916	9,984
2011	105,357	12,961
2012	115,303	15,827
2013	123,328	19,034
2014	unavailable	21,513
Totals	**560,297**	**85,699**

Note: *Approvals of employment authorization applications for Optional Practical Training.

Source: GAO, http://www.gao.gov/assets/670/661192.pdf; USCIS OPT data acquired through Freedom of Information Act request.

President Obama targeted the OPT and L-1 programs as part of his announcement in November of executive immigration actions. All indications are that instead of proposing protections for American and foreign workers, the President plans to increase the ease and attractiveness of using these programs for cheaper labor. The expectation is that the Administration would tie the hands of Consular Officers and USCIS adjudicators when interpreting what constitutes "specialized knowledge," making it far easier to bring in workers on L-1Bs who have ordinary knowledge and despite the problems in this category that the DHS Office of Inspector General identified in 2006 and 2013. It was also reported in the Washington Post that the Administration is considering expanding the types of degrees eligible for OPT STEM extensions and extending their duration to *four years!*

It should be noted that the OPT program's legality is questionable because the regulations that create it are arguably inconsistent with the F-1 visa statute. A pending federal lawsuit brought by tech workers against DHS is challenging the legality of the OPT STEM extension; the plaintiffs identified numerous individual cases where unemployed U.S. STEM workers were displaced by the program.

In the past, legitimate concerns have been raised about practical training programs for foreign nonimmigrant graduates. In the 1990 Immigration Act, Congress created a three-year pilot program similar to OPT, but which allowed foreign graduates to also be employed in fields unrelated to their degree (unlike the current OPT program). That pilot program required employers to pay a prevailing wage and recruit U.S. workers for 60 days. It also mandated a report to Congress on the program's impact on the U.S. labor market. The resulting 1994 joint report on the program by the Immigration and Naturalization Service and the Labor Department advised Congress not to extend the pilot program because it "is inconsistent with the statutory intent of the F-1 nonimmigrant visa," "run[s] counter ... to an affirmative policy of U.S. labor force development," and "may have adverse consequences for some U.S. workers." The 1990 pilot program was tiny compared to the current OPT program ("fewer than 5,000 students" in the first two years) and found to have negative impacts. But the government has yet do conduct a similar study on the labor market impact of the 120,000 OPT workers employed every year.

SOLUTIONS TO L-1 & OPT: Short term - The Executive Branch should use all of its authority to investigate abuses of the L-1 and OPT visa program. USCIS should propose and publish a rule on "specialized knowledge" through Administrative Procedure Act notice and comment, rather than through an interpretive guidance memo, as it plans to do. The Executive Branch should propose minimum wage regulations in the L-1 and OPT programs. DHS has broad legal authority to require that a minimum wage be paid as a condition of admission for L-1 workers (based on occupation and local area), and there is no statutory prohibition on creating a minimum or prevailing wage rule for OPT workers. Employers seeking to hire workers in an OPT status should also be required to advertise positions for 30 days in a centralized database and give hiring preference to any available U.S. workers. Because literally hundreds of thousands of U.S.-born and legal permanent residents graduate with STEM degrees from U.S. universities each year, such a requirement could realistically result in 100,000 jobs going to U.S. worker STEM grads instead of nonimmigrants on F-1 visas. Finally, require GAO, in

conjunction with DOL, to conduct a major study on the impact of the OPT program on the labor market.

V. Guestworker Visas Are Closing Off Pathways to the Middle Class, Exacerbating Racial, Gender, and Age Discrimination

Professional jobs have been an important rung on the ladder to the middle class. Computer Occupations in particular have been a traditional path from working class to the middle class. Exploitation of the H-1B and other guestworker programs is shutting that pathway down and as we see in the case of Southern California Edison, many are being forcibly sent down from the middle class.

This is especially troubling since the technology industry has a terrible track record on diversity. There are very low rates of hiring of African-Americans and Hispanics as well as women. And age discrimination is an open secret in the technology industry. The SCE workers are typically in their 40s and 50s and are men and women of all races. While the H-1Bs being imported for IT occupations are almost all Indian men in their 20s and 30s.

VI. Every Business Has an Incentive to Replace American Workers With Cheaper Guestworkers - The Business Model is Extraordinarily Profitable

So why is program practice clearly failing the intent of the law? There are mainframe-sized loopholes built into the program's design - the statutory law, regulations, administrative law, and policy guidance - and a the disinterest in enforcing the rules. Some of these loopholes are intentional, some are not, but they all add up to a system that *encourages* employers to exploit the H-1B program for cheap labor.

Combine those vast loopholes with the fact that replacing Americans with guestworkers is extraordinarily profitable and you have a recipe for massive and widespread abuse. Pioneers of using guestworkers instead of Americans, such as Infosys, are earning net profits of 20-25% in a sector, IT Services, where a net margin of 6-8% is considered doing well. Infosys now has a market cap of more than $40 billion largely thanks to America's policy not to protect American workers from unfair competition from H-1Bs. And the effects multiply as firms like Accenture, IBM, HP, and Deloitte are induced to adopt the H-1B business models of Infosys and Tata.

The executives making these decisions aren't villains, they are simply acting rationally by taking advantage of a business opportunity to reduce labor costs. Some would even argue that it is the fiduciary responsibility of these executives to exploit loopholes. The raison d'etre of contemporary firms has become to maximize shareholder value.

The tax system offers a good illustration. While many may not like the practice, no one is surprised when firms take advantage of loopholes in the tax code to store and cycle profits through offshore tax havens. Many of America's most venerable companies, including Apple,

Microsoft, GE, and Google use various schemes like the Dutch-Sandwich and Double-Irish to minimize the taxes they pay.[11]

Just as in taxes, it is rational and expected that firms seek to lower their labor costs. The recent wage-fixing scandal in Silicon Valley should be a reminder that even the most well-respected and richest companies and executives, including the late Steve Jobs from Apple and Google's Eric Schmidt, are laser focused on lowering labor costs. In the wage-fixing scandal they appeared to be willing to cross the line into collusion to keep the wages of their engineers down.[12]

Harming American Companies That Hire American Workers - The Reshoring of IT Services Is Being Crushed by H-1B & L-1 Policies

The H-1B program harms employers that hire American workers. Domestic sourcing companies, such as Ameritas Technologies, Nexient, and Rural Sourcing hire American workers, and invest in education and training those workers. Neeraj Gupta, founder of Nexient, testified before this Committee during the hearing on S.744. These firms have a real chance to create high paying middle class jobs but they are at a disadvantage because their competitors can freely hire H-1B and L-1 workers who can be paid less.

If we want to "insource" or "re-shore" then the best way to do so is to increase the protections for American workers.

VII. H-1B Legislative Policy Proposals Would Inflict Even More Harm on American Workers

A number of bills introduced in the 113th and 114th Congress' have proposed to significantly expand the H-1B program. Three, in particular, deserve some mention for this hearing.
The SKILLS Act introduced Congressman Issa in the 113th provides very large increases in the H-1B program but would not improve the protections for American workers.

The Immigration Innovation Act introduced in both the 113th and 114th Congress' at least triple the number of H-1Bs and provide no protection for American workers. IEEE-USA, which represents more than 200,000 American engineers, said the Immigration Innovation Act would, "destroy the U.S. high-tech workforce."

S.744, the Border Security, Economic Opportunity, and Immigration Modernization Act, passed the U.S. Senate in 2013. I would refer you to my detailed testimony on S.744 given on April 22, 2013. Back then, I thought the bill would do more harm than good but was a step in the right

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[11] http://www.bloomberg.com/news/articles/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes

[12] http://pando.com/2014/01/23/the-techtopus-how-silicon-valleys-most-celebrated-ceos-conspired-to-drive-down-100000-tech-engineers-wages/

direction. It never solved the fundamental issue that H-1B workers could be paid less than American workers. It set the "prevailing wage" at 20% less than the wage Americans are getting. Subsequent to that hearing, the bill was amended during markup, to strip key provisions that would protect American workers. One provision that was stripped is particularly important: the requirement that employers hire qualified Americans who apply. It rendered the recruitment protections meaningless. Firms could simply collect resumes and then ignore them, preferring to hire the H-1B who could be paid 20% less than the American worker.

S.744 had provisions targeting the heaviest users of the H-1B program in order to prevent the flagrant abuses of the H-1B program like those at SCE. But even if S.744 became law it wouldn't stop what is going on at SCE. The outsourcing companies might be different names - Accenture, IBM, or Deloitte - instead of Tata and Infosys, but the result would be the same. SCE workers would be training their cheaper H-1B replacements, albeit at Accenture instead of Infosys.

These bills all have overly generous greencard provisions in them for STEM workers and very low eligibility standards. These were not addressed in the hearings on S.744. While I believe that the US economy and American labor market can absorb somewhat higher levels of greencards for skilled workers without adversely impacting American workers, the numbers in these bills will be high enough to create significant negative impacts for American workers. Many of the skilled greencard provisions are uncapped and bypass the labor certification process, so there is no way to predict, nor control, the future dynamics of those seeking greencards.

S.744 proposed to eliminate labor certification for all STEM graduate students and eliminate the cap on their numbers. This will create perverse incentives in the market. Employers will be tempted to replace their older incumbent workers with cheaper fresh graduates, fueling age discrimination. And universities will be placed in a conflict of interest situation by becoming the sole gatekeeper for issuing greencards. Universities will essentially be able to sell greencards to foreign students. Given that Master's degrees are short in duration, and have little oversight from outside bodies, this provision will make it inexpensive for foreigners to purchase greencards. We will see a flood of foreign student applications, which will crowd out American students from the STEM fields. Those foreign students will in turn flood the labor market in the STEM fields, depressing wages, and further steering American students from studying these fields.

This key issue was not addressed in any of the hearings on this bill yet it might have the most lasting and largest impact on the American labor market. Congress, not Universities, should be making decisions on who can immigrate to the United States.

Skilled greecard provisions should be carefully crafted to include high standards, institute a labor certification, and the program should be capped.

The upshot is that all of these bills would inflict significantly more harm on American workers than the status quo. And the status quo is terrible for American workers - they are training their guestworker replacements.

The good news is that we have a blueprint from which to work. S.600, the H-1B and L-1 Visa Reform Act of 2013, introduced by Senators Grassley and Brown in the 113th Congress would

solve most of the significant problems with both the H-1B and L-1 visa programs. A reintroduced version should also include wage and recruitment rules for nonimmigrant workers in the OPT program and for the TN visa. It should also include a private right of action to ensure that foreign workers can exercise their rights.

VIII. Training is More Trojan Horse Than Panacea -There is No Systemic Shortage of American Technology Workers & Training Programs Such as Tech Hire are a Distraction at Best & Misinformation at Worst

The White House recently announced a $100 million initiative to train workers for IT jobs. As an educator I'm always pleased when the government recognizes the importance of training and education, but the simple fact is that this and other training initiatives are a distraction from what needs to be done to fix the IT labor market.

The Tech Hire initiative is based on a false premise: that there is a shortage of American IT workers and jobs are going unfilled. As my fellow panelist, Professor Hal Salzman, has shown, there is no shortage of IT workers. In making its case for Tech Hire, the White House is using proprietary, non-governmental, data on job openings from a private consulting firm to make the case that there is a shortage and to justify the program. No one knows the methodology that the consulting firm uses and how to interpret the numbers. The White House compounded the problem by claiming that these jobs are going "unfilled." As everyone knows, except maybe the White House's Chief Technology Officer, there is enormous churn in the IT labor market, so there are always large numbers of openings. Openings are not a good indicator of demand. Of course, if there were many jobs going unfilled we'd see very rapid increases in wages for IT jobs. That hasn't happened since the late 1990s.

The Tech Hire initiative also has no teeth to create jobs. Firms that are participating have no requirement to even consider the trainees for positions. The White House has not explained why any employer would hire one of these American trainees instead of a cheaper guestworker. So, the White House is making promises it knows it cannot keep.

What is particularly disturbing about the Tech Hire program is that it is funded by fees collected from H-1B applications in order to fill a "skills gap." The irony and absurdity of this program and its rationale is certainly not lost on the SCE workers training their H-1B replacements!

An American SCE IT worker is losing her job to an H-1B replacement, and is training that foreign worker. It's abundantly clear that the American IT workers have the superior skills. They are then told by the White House that the $1,000 paid in fees to the government for the H-1B will be used to "fill the skills gap" because there aren't enough trained IT workers.

The SCE worker loses his $110,000 job so that the government can collect $1,000 in fees to fund training for the phantom skills gap. What a terrible deal for America and its taxpayers.

The technology industry has long offered the Trojan Horse of paying training fees in exchange more H-1Bs. This is fool's gold for American workers. It is a lose-lose situation. American

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workers lose their jobs to H-1Bs, lose wages and bargaining power to H-1Bs, and the government spends pennies on training for jobs that are cheaper to fill with H-1Bs.

IX. Immigration Policy Should Be Made By Congress, Not the U.S. Trade Representative

Given the widespread use of both H-1B and L-1 visas by offshore outsourcing firms, Congress should take affirmative steps to make it clear that both guestworker programs and permanent residence are immigration—and not trade—policy issues. In 2003, the U.S. Trade Representative (USTR) negotiated free trade agreements (FTAs) with Chile and Singapore, which included additional H-1B visas for those two countries, and constrained Congress from changing laws that govern the L-1 visa program. In response, many members of Congress felt it was important to re-assert that Congress, not the USTR, has jurisdiction over immigration laws. But no law was ever passed. Without legislation, the muddying of trade and immigration policy will keep recurring. Most recently, it appears that some L-1 visa provisions were included as a side agreement in the Korea-U.S. Free Trade Agreement. Many countries, including India, have pressed for more liberalized visa regimes through trade agreements including proposing a new GATS work visa. Congress, not the U.S. Trade Representative, should have the authority to change these laws, and Congress should pass a law reaffirming its jurisdiction over immigration.

The Trans-Pacific Partnership deal which is being negotiated in secret, reportedly includes "labor mobility" provisions, usurping Congress' ability to set immigration law. Congress should instruct the US Trade Representative to eliminate any Mode 4 provisions from the agreement.

X. CONCLUSION

In conclusion, let me say that I believe the United States benefits enormously from high skilled immigration, especially in the technology sectors. We can, and should, encourage the best and brightest to come to the United States and settle here permanently. But our future critically depends on our homegrown talent, and while we should welcome foreign workers, we must do it without undermining American workers and students. Closing the H-1B and L-1 visa loopholes would ensure that the technology sector remains an attractive labor market for Americans and continues to act as a magnet for the world's best and brightest. These are not mutually exclusive options. We can find the right sets of solutions that provide the proper balance.

Proponents of expanding the H-1B & L-1 programs have repeatedly made claims that the programs are needed because there is a shortage of American workers with the requisite skills, and the foreign workers being imported are the best and brightest. If that is indeed the case, then those employers should not object to these sensible protections for both American and foreign workers. The policies I have proposed pose no limitations on employers' ability to hire foreign workers who truly complement America's talent pool.