

Testimony Given By

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**"The Border Security, Economic Opportunity, and Immigration  
Modernization Act, S.744."**

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I want to thank Chairman Leahy, Ranking Member Grassley, 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 the Rochester Institute of Technology in Rochester, New York. I have been studying high-skill immigration policy for more than a decade, so I appreciate the opportunity to share my thoughts about how the proposed Border Security, Economic Opportunity, and Immigration Modernization Act might impact the U.S. economy and American workers. I want to acknowledge Senator Durbin's leadership in ensuring that some reforms of the H-1B and L-1 guest worker visas were included in this bill.

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. The opportunity to testify is a professional honor but it is also very meaningful to me personally.

High-skill immigration has the potential to spur innovation and economic growth, and to create better job opportunities for American workers. However, I have concluded that our high-skill immigration policy, as currently designed and administered, does more harm than good. To meet the needs of the U.S. economy and U.S. workers, our guestworker and permanent residence programs need immediate and substantial overhaul. I will focus most of my testimony on the H-1B guest worker program, but the L-1 and OPT guest worker programs suffer from even more significant problems.

**The majority of the H-1B program is now being used to hire cheap indentured workers.**

The bulk of demand for H-1B visas is driven by the desire for lower cost workers, not by a race for specialized talent or a shortage of American talent. All of the top 10 H-1B employers in FY12 used the program principally to outsource American jobs to overseas locations.

**Outsourcing firms received more than half of the H-1B visas issued in FY12. Outsourcing is only the most visible and obvious symptom of the underlying problems with the H-1B program. Program misuse is widespread.**

The H-1B program currently has three fundamental flaws:

- 1) employers can legally hire H-1B workers at substantially lower wages than American workers,
- 2) American workers do not have a first and legitimate shot at these jobs and can even be replaced by H-1B workers, and,
- 3) accountability in, and oversight of, the program is nearly non-existent.

**The Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, includes safeguards that move in a positive direction, but it falls short by not fixing the fundamental problems in the H-1B or other guest worker programs. Employers will continue to bring in cheaper foreign workers, with ordinary skills, to directly substitute for, rather than complement, workers already in America.** Under this bill the H-1B program would continue displacing American workers and deny them both current and future opportunities. It also discourages American students from pursuing these professions. These problems will expand since the bill proposes to roughly double the number of H-1Bs, which potentially could grow to a tripling.

**The good news is that adding some modifications to the legislation could solve these problems. The provisions contained in S.600, the H-1B and L-1 Visa Reform Act of 2013, introduced by Senators Grassley and Brown, should be included in S.744.**

Let me turn to some facts about the H-1B program that are not often understood.

### **The Mythology & Facts About The H-1B Program**

The public discussion about the H-1B program is often misleading and mistaken, and does not represent the way the program operates in practice. Let me discuss a few key features of how the H-1B program actually works.

- 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. An H-1B worker is essentially indentured to a particular employer.
- 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 1 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 4,035 H-1Bs yet applied for a mere 8 greencards for its H-1B workers in FY12. That is a 0.2% rate, or 1 greencard application for every 50 H-1B workers.

<b>Table 1</b>				
<b>The Top 10 H-1B Employers (All Outsourcers) Do Not Sponsor Their H-1B Workers For Greencards</b>				
<b>FY12 H-1B RANK</b>	<b>Employer</b>	<b>FY 12 H-1B</b>		<b>Immigration Yield = Greencard/ H-1Bs</b>
		<b>Initial Petitions</b>	<b>FY12 Greencard Applications for H-1Bs</b>	
1	Cognizant	9,280	669	7%
2	Tata	7,485	10	0%
3	Infosys	5,600	21	0%
4	Wipro	4,304	30	1%
5	Accenture	4,035	8	0%
6	HCL	2,131	105	5%
7	Tech Mahindra SATYAM	1,963	20	1%
8	IBM India	1,846	96	5%
9	Larsen & Toubro	1,829	15	1%
10	Deloitte	1,668	260	16%
<b>TOTAL</b>		<b>40,141</b>	<b>1,234</b>	<b>3%</b>

- H-1B workers can be paid wages that are lower than the market wage for an American worker. While employers are required to pay a "prevailing" wage, which may sound like a market wage it is not. Congress, not the market, sets the "prevailing wage", and it is set far below than a market wage. It is the fiduciary duty of employers to lower their costs if it increases their profits for the owners, so it is no surprise that employers take advantage of the opportunity to hire workers at below-market wages.
- Employers do not have to look for American workers before hiring an H-1B worker. Simply put, no shortage is necessary before hiring an H-1B worker.
- Employers can displace an American worker with an H-1B worker. This has been happening with more frequency. Simply put, even if there is a surplus of American workers who are doing the job, they can be displaced by an H-1B. There have been a number of documented cases of American workers training their foreign replacements. I personally know American engineers, working at a major firm in Rochester, who are currently being "shadowed" by guest workers who will soon take over their jobs. The American engineers will be let go. Like many American engineers about to lose their jobs to guest workers, they are frustrated but scared. They are unwilling to tell their story publicly for fear of retribution and for fear of losing their severance packages.

- To qualify for an H-1B, the foreign worker need no special or rare skills. The worker must hold a Bachelor's degree. Approximately 30% of American workers already hold a bachelors degree and their unemployment rates continue to be very high. H-1Bs can be hired into virtually any occupation that generally requires a bachelors degree. The typical H-1B worker has no more than ordinary skills, skills that are abundantly available amongst American workers. Or skills that could be easily acquired by American students.
- The H-1B program is already huge. USCIS doesn't know how many H-1Bs are here but analysts estimate that there are approximately 650,000 here right now. On top of that we know that approximately 120,000 new H-1Bs arrive every year.<sup>1</sup> As the National Academies found in 2000, these numbers are large enough to distort the labor market. It is having significant adverse impacts on the American workforce, job opportunities, and wages. In new research to be published shortly, Professor Hal Salzman estimates that approximately one-third to one-half of new IT jobs were taken by guest workers on H-1B, L-1 and OPT.<sup>2</sup> This is not because there aren't enough Americans studying STEM fields. Salzman finds, "In computer and information science and in engineering, U.S. colleges graduate 50 percent more students than are hired into those fields each year; of the computer science graduates not entering the IT workforce, 32 percent say it is because IT jobs are unavailable, and 53 percent say they found better job opportunities outside of IT occupations." Most of the jobs being filled by H-1Bs are ones that Americans can and should be filling.
- There is no shortage of American STEM workers and students. As Salzman finds, "the United States has more than a sufficient supply of workers available to work in STEM occupations." The key indicator of a shortage would be rapidly rising wages, but wages in STEM and in computer occupations have been essentially flat for more than a decade.
- The H-1B program harms employers that hire American workers. Domestic sourcing companies, such as Ameritas Technologies and Systems in Motion, are being penalized by U.S. Government H-1B policies because they are hiring American workers. Their competitor firms hire H-1B workers because they can be paid less than Americans.
- Stepped up enforcement will not solve the problem. Most of the problems with the H-1B program are loopholes that can only be fixed through legislation.

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<sup>1</sup> The 120,000 is larger than the 85,000 cap because many employers are exempt from the cap.

<sup>2</sup> This paper, written by Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, will be published by the Economic Policy Institute.

- Program integrity relies almost entirely upon whistleblowers. There is virtually no oversight of the program. The only program accountability and integrity comes from relying on whistleblowers. This is the worst possible design of program integrity.

### **S.744 Moves in the Right Direction But Falls Far Short on Safeguards**

S.744 attempts to address some of the flaws in the H-1B program but falls short. S.600 would fix the flaws and close the loopholes.

#### *S.744 Raises Wage Floor from 17th to 33rd Percentile But Wage Floors Remain Below American Wages*

It is an open secret in the information technology industry that H-1B workers can be paid below-market wages. Brian Keane, CEO of Ameritas Technologies and a veteran of the technology industry, summed it up this way at a recent Senate briefing of Judiciary Committee staff:

Outsourcing firms who place H-1B personnel onsite at a client, will typically charge an average of \$60-75 per hour of IT work. Compare that to a US-based IT staffing firm which will need to charge \$80-100 per hour, or a US IT consultancy which likely will charge \$90-150 per hour. Simply put, firms using H-1B labor are paying lower wages so they can charge lower prices than equivalent US competitors that use US citizens as their workforce.

Neeraj Gupta, who joins me on this panel, pegs the cost savings at approximately 20%.

Last week, the Wall Street Journal reported that, "Indian IT professionals working in the U.S. are typically paid about 25% less than their American counterparts."<sup>3</sup>

S.744 raises the wage floor for the H-1B program from the 17th percentile to the 33rd percentile for the particular occupation in a specific geographic area. This is a step in the right direction but the 33rd percentile is still far below market wages for American workers.

To illustrate why this is still too low, let me provide you some concrete examples of what the wage floor would be if S.744 were adopted:

- Under the bill's wages, a firm could **hire an electronics engineer for a mere \$39,000 per year** in College Station, TX. **This is more than a 37% discount (a whopping \$23,000 annually) over the starting salary for an entry level Bachelor's degree**

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<sup>3</sup> [http://blogs.wsj.com/indiarealtime/2013/04/18/u-s-visa-bill-very-tough-for-indian-it/?mod=wsj\\_streaming\\_latest-headlines](http://blogs.wsj.com/indiarealtime/2013/04/18/u-s-visa-bill-very-tough-for-indian-it/?mod=wsj_streaming_latest-headlines)

**engineer.<sup>45</sup> And it is an astonishing 59% lower than the national average wage of \$95,250 for electronics engineers at all skill levels.**

- Firms could **hire a computer programmer for \$11.90 per hour** in the Pee Dee region of South Carolina. This is **68% lower than the national average wage of \$78,260.**
- Firms could **hire a computer systems analyst for \$43,413 per year** in Roanoke VA, which is **48% lower than the national average salary for computer systems analysts of \$83,800.** Computer systems analysts is by far the most common H-1B occupation accounting for more than a quarter of all the H-1B applications certified by the Department of Labor.<sup>6</sup>
- Firms could hire a **computer professional for \$10.64 per hour in Salisbury, MD, or 73% lower than the national average wage of \$81,140.**
- Firms could hire an **accountant for \$35,027 in Lewis, MO, or 51% lower than the national average wage of \$71,040.**

All of these occupations are amongst the top 10 H-1B occupations according to the FY12 Department of Labor H-1B data. The three computer occupations above were by far the largest of all H-1B occupations accounting for more than half of all of the H-1B applications approved by the Department of Labor. The examples I have given are located in low-cost areas but they illustrate the rule: the H-1B wage floors are far below market wages. In some high-cost areas, the discounts might be less, but they are still substantial.

It is worth keeping in mind that the **H-1B advocates have claimed that the H-1B workers they seek possess superior skills. If this is the case, then those workers should be paid at least the average wage.**

Some have argued that American workers are protected by the following employer requirement, "Employers must attest to the Department of Labor that they will pay wages to the H-1B nonimmigrant workers that are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question." While this sounds like a requirement with teeth, in reality it is nothing more than a paper tiger. Any human resource professional can easily tweak requirements to make two similar positions appear dissimilar. The

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<sup>4</sup> The data for the wage floor is sourced from the prevailing wage tables at the Department of Labor's Foreign Labor Certification Program webpage. The wage is calculated as the current Level 2 wage or 80% of the mean wage, whichever is higher.

<sup>5</sup> The National Association of Colleges & Employers (NACE) conducts an annual salary survey of recent graduates by discipline.

<sup>6</sup> This is based on the Office of Foreign Labor Certification fact sheet for FY12: [http://www.foreignlaborcert.doleta.gov/pdf/h\\_1b\\_temp\\_visa\\_2012.pdf](http://www.foreignlaborcert.doleta.gov/pdf/h_1b_temp_visa_2012.pdf)

data prove this out. There is no case that I'm aware of where the Department of Labor has tried to enforce this requirement. And even if it attempted to, it would be doubtful that it ever could.

Lastly, I think there are important technical flaws in the ways in which the Department of Labor calculates Prevailing Wages. Virtually no electronics engineer with a BS degree is being paid \$39,000, yet the Department of Labor claims that one-third of them in College Station, TX, are being paid less than that. I believe that Congress should ask the Department of Labor to do a thorough review of how it is measuring Prevailing Wages and make appropriate changes to better reflect the Congress' intent.

*S.744 Requires Posting of Jobs But No Actual Active Recruitment Requirements - American Workers Deserve a First & Legitimate Shot At These Jobs*

There were a couple positive, albeit weak, steps in S.744 when it comes to recruiting American workers.

S.744 requires that H-1B jobs be posted to a national jobs board for 30 days. There is nothing stopping the jobs posting from becoming more than a pro forma exercise, where firms post the jobs but still hire an H-1B instead of a qualified American applicant. The bill should include a tally of the number of applicants for each position posted.

Most H-1B employers will never have to look for American workers prior to hiring an Americans. The bill does not require "good faith" recruiting of American workers. It should.

The good faith recruitment requirements are common sense and are not burdensome. Here are some excerpts from the compliance guidance from the Department of Labor of what is required.<sup>7</sup>

**What does the term "recruitment" mean?**

The term "recruitment" means the process by which an employer seeks to contact or to attract the attention of any person who may apply for any job that the employer is considering filling with an H-1B worker. Recruitment must take place before the LCA or petition is filed. Recruitment includes soliciting, receiving, considering, and reviewing applications.

**What solicitation methods may an employer use in seeking to contact or to attract the attention of potential U.S. applicants for employment and to solicit applications from persons for employment?**

"Solicitation methods" that an employer may use are:

Either external or internal to the employer's workforce; or

Either active (where an employer takes positive, proactive steps to identify potential applicants and to get information about its job openings into the hands of such persons), or passive (where potential applicants find their way to an employer's job announcements).

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<sup>7</sup> <http://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62O.htm>

**An employer must recruit in “good faith.” What does this mean?**

An employer which recruits in good faith must offer fair and nondiscriminatory opportunities for employment to U.S. workers. U.S. workers must be given fair consideration for jobs. H-1B workers must not be favored over U.S. workers.

It is good step that S.744 has eliminated a major loophole in the good faith recruitment requirements for so-called H-1B Dependent firms. Current law provides H-1B Dependent firms exemptions the additional good faith and non-displacement regulations if they claimed to pay the H-1B worker more than \$60,000 or if the worker held a Masters degree. This loophole was widely used by most H-1B Dependent firms. While this loophole has been closed, the bill puts a new one in its place. Firms will be exempted from the requirements should they begin the paperwork for greencards for some of their workers. We could see a rush to begin paperwork with no intention of following through. As former Congressman Bruce Morrison observed recently, “It could just be a matter of paper pushing, ... All you have to do is file a piece of paper, which doesn’t even have to be approved or approvable.”

*S.744 Attempts to Curb Outsourcing But Simply Shifts it to Other Firms Instead*

The H-1B visa has been aptly dubbed the "outsourcing visa" by a number of observers. All of the top 10 H-1B employers in FY12 use the program principally to outsource American jobs overseas. Table 2 below shows this very clearly. Every single firm used the program to facilitate the shipping of American jobs overseas. These ten firms alone received an astonishing 40,141 H-1B visas in FY12, or nearly half of that year's allotment.

<b>All of the Top 10 H-1B Employers in FY12 Used It Principally for Offshoring</b>			
<b>FY12 H-1B RANK</b>	<b>Employer</b>	<b>FY 12 H-1B Initial Petitions</b>	<b>Significant Offshoring</b>
1	Cognizant	9,280	X
2	Tata	7,485	X
3	Infosys	5,600	X
4	Wipro	4,304	X
5	Accenture	4,035	X
6	HCL	2,131	X
7	Tech Mahindra SATYAM	1,963	X
8	IBM India	1,846	X
9	Larsen & Toubro	1,829	X
10	Deloitte	1,668	X
<b>TOTAL</b>		<b>40,141</b>	

Three key provisions in S.744 attempt to curb the use of the H-1B program for outsourcing American jobs overseas. The first is the so-called 50/50 rule, which prohibits firms that have more than 50% of its U.S. workforce on H-1B or L-1 visas from getting additional visas. This is a good rule but it isn't sufficient. Many of the firms that use the H-1B program to ship American jobs overseas, like IBM India and Accenture, will not meet these thresholds due their legacy business models. Therefore, we will simply see the outsourcing shift from a company like Cognizant, which will face restrictions, to an Accenture, which will not. The net result for American workers and the American economy will still be same negative outcome - more jobs being shipped offshore due to loopholes in the H-1B program.

The second is that H-1B dependent firms will have to meet a higher wage floor than other H-1B employers. That wage floor will be set at the average wage for the occupation in the geographic area. This is, again, a good development but the likely outcome will be a shift of work from H-1B dependent outsourcers to outsourcers that are not H-1B dependent. American workers will continue to be undercut and undermined.

Another good provision of S.744 is that it bans the outplacement of H-1B workers. But it only bans it for H-1B Dependent firms. It allows non-dependent firms to do outplacement by paying a \$500 fee. Again, we would expect that work will shift from dependent to non-dependent firms and that American workers will continue to be undercut.

#### *S.744 Only Includes Regular Audits of H-1B Dependent Firms*

In addition to abuse, which is legal due to loopholes, the H-1B program has been rife with fraud for many years. This hasn't been stamped out because program integrity is almost entirely reliant on hoping that whistleblowers will come forward. There is absolutely no rational reason for an H-1B worker to come forward with a complaint. Their visa is held by their employer, so if they complain they could be fired and have to leave the country. But more importantly, H-1B whistleblower cases typically take 5 years to adjudicate and result in awards that are miniscule. One case of alleged widespread fraud by Infosys is illustrative. The whistleblower, Jay Palmer, has been subjected to threats and harassment for years.

S.744 includes audits only of H-1B Dependent firms. These are a small number of H-1B employers that account for an outsized share of the number of H-1Bs granted. However, the bill does not require any random auditing of other H-1B employers. This is a significant drawback in the bill. A random audit of all H-1B employers should be adopted. Without it, the vast majority of H-1B have no reason to carefully comply with the regulations.

### *S.744 Includes Important Non-Displacement Requirements For All Firms*

The H-1B program has been used to displace American workers at many firms. This sometimes happens in subtle ways. Age discrimination is an open secret in the technology industry and the H-1B workers, most of whom are young, have been used as a way fuel this age discrimination.

I would urge Congress to keep the non-displacement requirements outlined in section 4221 for all firms. These provisions will ensure that employers are using the H-1B for truly specialized talent rather than because the H-1B worker is younger, and therefore cheaper.

The non-displacement requirements for L-1 visas, contained in Section 4301, are also important to include in any final legislation. The L-1 visa has been extensively to displace American workers.

### **Major Problems With L-1 & OPT Visas Not Addressed**

The L-1 and OPT visa programs are in many ways more harmful to American workers than the H-1B program.

Neither the L-1 nor the OPT have *any wage floor*, a cap, recruitment requirements, or non-displacement. Further, neither program has virtually any scrutiny. 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 coming in every year.

The L-1 program has been extensively used to support the outsourcing of American jobs overseas as can be seen by Table 3. S.744 wouldn't stem this at all.

The L-1 visa program has no wage floor and the wage arbitrage opportunities are even greater. 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 \$10,000 per year. Even including the housing allowances and living expenses often given to these workers, the wages would be far below market. S.744 does not set a wage floor.

I would note that the industry lobbying coalition, Compete America, heartily endorsed the *IDEA Act of 2011* introduced in the House in the 112th Congress.<sup>8</sup> That bill included a wage floor for L-1 workers, something that doesn't exist now.

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<sup>8</sup> See: <http://www.competeamerica.org/media/ideaact2011>

**Table 3**

**Top 10 L-1 Employers for Fiscal Year 2008  
8 of 10 Have Significant Offshoring**

<b>L-1 Use Rank</b>	<b>Company</b>	<b>L-1s Obtained FY08</b>	<b>Significant Offshoring</b>
1	Tata Consultancy Services	1,998	X
2	Cognizant Technology	1,893	X
3	Wipro	662	X
4	Satyam (now Mahindra Satyam)	604	X
5	Infosys	377	X
6	IBM India	364	X
7	Hewlett Packard	319	X
8	GSTechnical Services	288	X
9	Schlumberger	287	
10	Intel Corp	226	

**Source:** DHS USCIS

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.

While the H-1B program has loopholes that allow employers to bring in cheaper workers, the OPT has even wider loopholes and little oversight and transparency. For example, unlike the H-1B there is no wage floor for the OPT. 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 recently 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 US for extended periods of time, rather than simply obtain practical training, they should have their employers use the H-1B program.

**Major Increase in H-1B Cap is Unwarranted & Detrimental**

There is no reason for an increase in the H-1B cap, and any increase would do significant harm to American workers and students.

All objective studies that have examined the STEM labor markets have concluded that there is no systemic shortage of American workers and students. These have been conducted by academics, like Salzman and Lowell, as well as respected think tanks like RAND.

There are always spot shortages for specialized talent. To address these shortages immigration policy should allow employers access foreign guest workers for these positions. A large H-1B program will send a clear signal to American students to avoid professions where employers will simply use the H-1B to import cheaper workers. It will also send a signal to the employers that they do not have to invest in workforce development.

S.744 is extremely generous with the number of skilled greencards that have been allocated. There is no reason why the number of guest workers need to be increased. The proposed EB greencards coupled with the current guestworker program already has the potential to overwhelm the American STEM labor market.

### **Trade Policy Creeping in on Immigration Policy in S.744**

There are a few provisions in S.744 that require more clarification. It is unclear what Section 4402 would do to the law. Does it exempt these nationals from free trade agreement countries from the H-1B cap? From the rules? We need more clarity on the goal of this section.

#### *H-1Bs for Ireland Without the Bachelors Requirement*

Section 4403 of S.744 appears to create a new work visa program for people from under the existing E-3 program. The E-3 was created as an H-1B program specifically for Australians as a workaround of the U.S.-Australian Free Trade Agreement. It has a cap of 10,000 visas and allows Australians to avoid the H-1B cap. Under the E-3 program, S.744 creates a new set of temporary work permits for Irish who have no more than a high school education.

The temporary non-immigrant work program is already too complex. It makes little sense to add to the alphabet soup of visa programs. There should be a bright line between trade and immigration policy.

### **Recommendations**

By closing the H-1B and L-1 visa loopholes described above, Congress would create and retain hundreds of thousands of high-wage American jobs and ensure that our labor market works fairly for American and foreign workers alike. The “H-1B and L-1 Visa Reform Act of 2013”, S.600, would solve the most important problems with these programs and should be included in S.744.

I summarize what needs to be done to restore the integrity of the programs below.

### *Pay Guest Workers True Market Wages*

H-1B and L-1 workers should be paid true *market* wages. The Congressionally imposed four-level wage structure for the H-1B program should be abandoned. No guest worker should be paid less than the median wage in the occupation for all skill levels. Ensuring that employers pay market wages will remove the temptation of wage arbitrage. Further, employers should pay an annual fee equal to 10% of the average annual wage in the occupation. Those fees could be used to increase the skills of the American workforce and will ensure that employers are hiring guest workers who are filling real gaps in the labor market.

S.744 increases the wage floor but H-1Bs can still be paid below-market wages. And the bill does nothing to fix the L-1 wages.

### *Institute an Effective Labor Market Test*

All employers should, at a minimum, perform good faith recruitment of American workers prior to hiring an H-1B or L-1 worker. They should also be required to not displace American workers.

L-1B visas surpassed the number of L-1As over the past decade, in concert with the rise of the offshore outsourcing industry. Yet no one, including the consular officers who review the applications, can identify what constitutes *specialized knowledge*. Congress should either eliminate the category or clearly define specialized knowledge.

S.744 only applies good faith recruiting to a small subset of employers and provides no clarity on what constitutes L-1B specialized knowledge.

### *Eliminate access to additional H-1B and L-1 visas for any H-1B Dependent firms.*

The programs are intended to help employers in the United States operate more effectively, providing them skilled workers they cannot find in the U.S. It should not be a way for businesses to compete here in the U.S. with an imported workforce. With the exception of very small businesses, no employer should be permitted to employ a workforce consisting of more than 15% H-1Bs or L-1s. There is no reason, other than wage arbitrage, for any firm to have more than 15% of its workforce on guest worker visas.

S.744 sets the threshold at 50%. This is a good step in the right direction but the threshold should be set lower.

### *Shine Light on H-1B & L-1 Program Practice*

There is widespread and substantial misunderstanding, in the media and even amongst some policy makers, about how the programs work in practice. Many of these misunderstandings could be cleared up through greater transparency. Congress and USCIS should publish data on program use by employer, including job title, job location, actual wages paid, and whether the

worker is being sponsored for permanent residence. The data should include all H-1B & L-1 workers, not just newly issued and renewed petitions. Further, the practice and impact of L-1 blanket petitions should be examined.

H-1B & L-1 use by *H-1B Dependent* firms should be investigated and the findings publicly released. The GAO or IG should be asked to complete a study of the weaknesses of the H-1B Dependent regulations on good faith recruiting and non-displacement. So called H-1B Dependent firms must meet additional requirements prior to hiring an H-1B worker, yet it is clear that these firms are able to circumvent Congress' intent regarding those additional requirements. As noted above, these firms are able to hire literally thousands of H-1Bs annually without hiring any Americans for those positions.

#### *Institute Sensible Oversight*

Through their use of guest worker visas employers are asking government to intervene in the normal functioning of the American labor market. With this privilege should come accountability. Employers using guest workers should be subject to random audits to ensure they are fulfilling the obligations contained in their attestations. And government agencies in charge of these programs—the Departments of Homeland Security, Labor, and State—should be granted the authority, and allocated resources, to ensure the programs are operating properly. Given the efforts in Congress to cut deeply into discretionary spending, some mechanism to fund these audits should be created. At a minimum, one in ten H-1B & L-1 employers should be audited and, if they are not eliminated, every H-1B Dependent firm should be audited every year.

S.744 includes audits only of the H-1B Dependent firms. The vast majority of firms will never be kept accountable by an audit. So, the program will continue to ensure its integrity solely by whistleblowers.

#### *Establish a Clear Single Objective for the H-1B Program*

The H-1B program is a so-called "dual-intent" visa; i.e., though the visas are temporary, employers can choose to sponsor these workers for permanent residence. While this design feature appears to provide flexibility, it comes at substantial cost. Is the H-1B program supposed to be truly temporary, be used sparingly, and only for short periods of time? Or is it the way to entice very recent foreign graduates of American universities to stay permanently? Or is it the primary bridge to immigration for high-skilled workers who are trained abroad? Each of these objectives creates inherent conflicts in program design; e.g., in setting wage floors. Congress should consider how to limit the scope of the H-1B program to improve its performance.

#### *Other High-Skill Visa Programs Need Scrutiny & Fixing*

I have highlighted in detail the problems with the H-1B and L-1 visa programs. But I would like to briefly point to some other critical issues for high skill immigration policy. Other temporary

visa programs, such as the B-1, OPT, and J-1, are also badly in need of an overhaul, and are being used to circumvent the annual numerical limit on H-1Bs and the regulatory controls on the L-1.

With respect to the B-1 “business visitor” visa we have even less information about how it might be being exploited, but recent news reports and an ongoing lawsuit reveal that they are being used to get around the H-1B rules and cap. Pending litigation alleges that B-1 visas are being used for shuttling in workers rather than business visitors. And job websites advertise explicitly for jobs for foreigners with eligible B-1 & B-2 visas<sup>9</sup>, in direct contradiction of the purpose of these visas.

In 2008, the duration of the OPT work visa was extended for STEM majors to 29 months without oversight or any approval from Congress. The list of eligible majors was recently expanded by the Obama Administration. The largest beneficiaries of this extension are obscure colleges that are providing workers to the offshore outsourcing industry.<sup>10</sup> There is no wage floor for OPT and one analyst estimates they are paid a mere 40% of what Americans earn. The rationale for the OPT extension has disappeared – according an analysis of BLS data by IEEE-USA more than 300,000 American engineers and computer professionals are unemployed - so the OPT STEM extension should be rolled back to its original duration.

S.744 does nothing to address these major loopholes.

#### *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 guest worker 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 jurisdiction.

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<sup>9</sup> See [www.naukri.com](http://www.naukri.com) as described in Malia Politzer & Surabhi Agarwal, “B-1 visa holders in demand on job portals,” *LiveMint.com*, June 23, 2011. <http://www.livemint.com/2011/06/23014418/B1-visa-holders-in-demand-on.html>

<sup>10</sup> For the list of universities benefitting from the OPT STEM extension see, [http://www.computerworld.com/s/article/9196738/H\\_1B\\_at\\_20\\_How\\_the\\_tech\\_worker\\_visa\\_is\\_remaking\\_IT\\_in\\_America](http://www.computerworld.com/s/article/9196738/H_1B_at_20_How_the_tech_worker_visa_is_remaking_IT_in_America)

### *Simple Administrative Fix Would Prioritize Foreign Graduates of American Universities*

Some have argued that foreign students with advanced degrees from American universities should have a priority with the H-1B program but DHS could easily do more to fulfill this goal. The quota for new H-1B workers is 85,000 per year with 20,000 of those set aside for advanced degree graduates of U.S. universities. The 20,000 additional visas were created specifically to provide prioritization for advanced degree graduates of U.S. universities. But the way in which DHS counts advanced degree holders towards the cap severely hampers its effectiveness. DHS fills the 20,000 cap with applications from advanced degree graduates before counting them against the 65,000. If DHS instead counted them against base cap of 65,000 first it would free up more than enough spaces for advanced degree holders.

S.744 expands the base cap substantially from 65,000 to 110,000. But it only increases the advanced degree cap from 20,000 to 25,000. This is one of the most baffling features of the legislation. Industry has repeatedly put the straw man forward that the cap is too low so foreign graduates of American universities are being forced out of the country. If there is any increase in the cap, and I don't think it is warranted, it should be allocated towards advanced degree graduates of U.S. universities.

### *Immigration Policy Should Be Made By Congress But It Needs Specialized Expertise From An Independent Commission*

A number of think tanks and academics, including the Migration Policy Institute and the Economic Policy Institute, have recommended that Congress create a standing commission on immigration. This commission would track the implementation of policy, the changing needs of the U.S. economy and labor market, and make recommendations to Congress on legislative changes. Given the nature of immigration policymaking Congress should seriously consider creating such a commission.

S.744 proposes creating a Bureau to address these but it is focused on low-skilled guestworker programs. The Bureau's jurisdiction should be expanded to high-skilled guestworker programs.

## **CONCLUSION**

In conclusion, let me say that I believe the United States benefits enormously from high skilled permanent 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& 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.

Those the H-1B & L-1 programs have repeatedly made claims that the program is 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 reforms. The policies I have proposed pose no limitations on employers' ability to hire foreign workers who truly complement America's talent pool.