

**Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
At a hearing entitled:
“Immigration Reforms Needed to Protect Skilled American Workers”
March 17, 2015**

A woman contacted me last week to share her story about being laid off from a company after twenty years and replaced by a foreign worker. She said her young son already knows two computer-programming languages, but she’s having second thoughts about steering him into her field of computers and information technology.

The focus of today’s hearing is on our country’s immigration policies and the need for reforms to better protect American workers. With that, I would like to talk about some of our visa programs to shed light on what is happening to American workers.

We’ll hear from witnesses about the H-1B visa program which allows employers to import so-called “specialty” workers from abroad. The program was intended to serve employers who could not find the skilled workers they needed in the United States. Most people believe that employers are supposed to recruit Americans before they petition for an H-1B worker. Yet, under the law, most employers are not required to prove to the Department of Labor that they tried to find an American to fill the job first. And, if there is an equally or even better qualified U.S. worker available, the company does not have to offer him or her the job. Over the years the program has become a government-assisted way for employers to bring in cheaper foreign labor, and now it appears these foreign workers take over – rather than complement – the U.S. workforce.

Even though the annual H-1B cap is 65,000, the actual number of foreign workers coming in through the program is much more because of numerous exemptions. For example, in Fiscal Year 2014, the agency in charge approved 315,857 H-1B petitions.

The program is highly susceptible to fraud and abuse. But, don’t take it just from me. In 2008, the Fraud Detection and National Security unit within U.S. Citizenship and Immigration Services (also known as USCIS) released a Benefit Fraud and Compliance Assessment regarding the program. The agency’s own report highlighted the serious and rampant fraud and abuse that is taking place. In fact, it showed a 20% violation rate in a random sample of H-1B petitions. The violations in this sample were stunning: people weren’t working where they were supposed to. Documents were forged. Foreign workers weren’t being paid what they were promised. Job duties were significantly different from the position description listed in their application to the Department of Labor. Site visits established that the reported business locations were non-existent, there was no evidence of daily business activity, the business locations were unable to support the number of employees claimed, or there was no evidence that the employers ever intended for the beneficiaries to fill the actual jobs offered.

According to the report, “In one instance, the position described on the petition and [Labor Condition Application] was that of a business development analyst. However, when USCIS

conducted its review, the petitioner stated the H-1B beneficiary would be working in a laundromat doing laundry and maintaining washing machines.”

In January 2011, the U.S. Government Accountability Office (GAO) published a report on the H-1B program in which it found that program oversight by Homeland Security and Labor is “fragmented and restricted.” It said this restricted oversight and statutory changes weaken protections for U.S. workers.

In October 2014, the Center for Investigative Reporting did an investigation of the program. It described how some H-1B employers exploit foreign workers, withhold wages, and force them into contracts that make them reluctant to ever speak up.

Then there are stories about how U.S. workers are treated. Time and again, we hear about how U.S. workers are being laid off and forced to hire their replacements, many of whom are not truly skilled. This is the case with Southern California Edison, a utility company that started laying off 500 American workers from its “IT” department last August. The company replaced them with foreign H-1B workers. The company opted to lay off Americans and instead contract that work out to two overseas-based IT consulting companies, which also happen to be some of the largest users of H-1B visas. In 2013, one of the two IT companies paid \$34 million in a [civil settlement](#) after allegations of systemic visa fraud and abuse, but was not prohibited from continuing to petition for H-1B workers.

Since I gave a speech on the floor of the Senate a couple weeks ago on this topic, a number of laid-off company employees have come forward to share their stories with me. I have heard about how the company forced them to sign non-disparagement agreements in order to receive their severance package. I have been told how the U.S. workers had to train their replacements – for weeks and months -- knowing all along that they were going to lose their jobs to cheaper workers who didn’t possess the skills they had. They said it was humiliating.

Worse yet, most of the 500 jobs that had been held by Americans at Southern California Edison will eventually just move overseas. According to [the Los Angeles Times](#), Edison admits that eventually about 70% of the work will shift overseas permanently.

Again, this is not new. As noted in a February 16 Los Angeles Times [editorial](#) entitled “End H-1B Visa Program’s Abuse,” Edison's action are “part of a years-long trend among companies of misusing H-1B visas to undercut wages and offshore high-paying American jobs.”

I invited Southern California Edison to join us today. I thought they would want to defend their actions and explain why U.S. workers have been left high and dry. Unfortunately, they declined my invitation.

Despite lax requirements in the law and very little oversight by the federal agencies in charge, some employers don’t like the red tape associated with the H-1B visa program. That is why they are finding alternative routes to import foreign workers.

Take, for example, the L visa program. The L-1 visa is for temporary intra-company transfers of personnel from a company's overseas office to its U.S. offices. A U.S. company may transfer personnel to the U.S. to work in a managerial, executive, or "specialized knowledge" capacity under the L visa program. In fiscal year 2013, USCIS approved 11,944 L-1 petitions.

Unlike the H-1B program, there is no cap on the number of L-1 visas that may be issued each year and there is no requirement that employers pay L-1 workers the locally prevailing wage or even the actual wage being paid to similarly qualified employees.

The problems with the L visa are not as apparent, especially since USCIS squashed an internal report that highlighted fraud and abuse. The agency seemingly didn't want another black eye as they had with the H-1B program.

Nonetheless, there are problems. In August 2013 the DHS Office of the Inspector General, at my request, examined the potential for fraud and abuse in the L-1 program. The OIG found problems with several aspects of the L-1 program, in particular the adjudication of L-1B "specialized knowledge" petitions and petitions for "new offices" being opened in the U.S. by L-1 transferees. Regarding specialized knowledge workers, the OIG said that it agreed with the USCIS Administrative Appeals Office that Congress intended for the L-1 program to benefit only a small number of beneficiaries: "A liberal definition of specialized knowledge would open the category to an unlimited number of foreign workers. ... Because it is not clear which employees should be granted L-1B visas, and because there are no numerical limits on the number that can be approved each year, the potential number of beneficiaries is limitless." And yet, a liberalized definition of specialized knowledge – implemented by executive memo and not by regulations requiring public comment – is exactly what we can expect from the Administration's promised executive actions. Regarding L-1 workers opening new offices in the U.S., the OIG found that "that there are program integrity risks with new office petitions" and that "[n]ew office petitions and extensions are inherently susceptible to abuse because much of the information in the initial petition is forward-looking and speculative."

Just last year, a Fremont, California tech company, Electronics for Imaging, Inc., was found by the Department of Labor to have violated the Fair Labor Standards Act for having grossly underpaid a group of Indian nationals who the company had transferred on L-1 visas from its office in India to install a new computer system at the headquarters facility in Fremont. Specifically, the company flew eight L-1B workers from Bangalore, India to California and paid them only \$1.21 per hour to work 120-hour weeks. The \$1.21 hourly rate was equivalent to what the employees made in Indian rupees at their workplace in India. Importantly, though the company was found by DOL to have violated the Fair Labor Standards Act for paying the workers below the State's minimum wage, it did not apparently violate any of the terms or conditions of the visa program because there is no prevailing wage requirement.

Some employers are also using the B-1 visa to get around the already weak wage requirements and protections of the H-1B visa. Under the law, persons may be admitted to the United States in "B" visa status "temporarily for business or temporarily for pleasure." Such visitors may not, however, be "coming for the purpose of ... performing skilled or unskilled labor."

State Department field guidance, however, allows an exception to the general prohibition on persons performing skilled or unskilled labor in B status in cases where the foreign worker is performing services in the U.S. that would otherwise qualify for H-1B status, is employed by an overseas entity, and receives no remuneration from a U.S. source. This State Department exemption has historically been called the “B-1 in lieu of H” provision.

In 2011, after learning of potential abuse of the B visa, I wrote to the Departments of Homeland Security and State asking whether either agency was considering eliminating the "B-1 in lieu of H" loophole. Despite assurance that State was “in the process of discussing with DHS removing or substantially modifying the B-1 in lieu of H guidelines,” there has still been no action.

Years have passed, the abuse continues, and both the Department of State and Department of Homeland Security continue to do absolutely nothing to address the B-1 in lieu of H issue or clarify by regulation what, exactly, B-1 visitors are authorized to do while they’re in the United States. Just last October, Infosys, the number one user of H-1B visas entered into a \$34 million settlement with the Department of Justice for allegations of systematic visa fraud and abuse of immigration processes. Among those allegations was that Infosys had attempted to bypass the prevailing wage requirement and other U.S. worker protections of the H-1B program by instead sending workers to the U.S. on B-1 visas to perform skilled labor on extended assignments at U.S. client worksites. The company allegedly coached employees applying for B-1 visas, providing them with specific instructions on how to deceive U.S. consular officials in their visa interviews.

Today, we will hear from the man who blew the whistle on this company for this visa fraud.

In addition to these nonimmigrant visa programs, we’ll hear about how foreign students on U.S. soil are being targeted by some employers. Employers have a pool of cheaper labor right here at home, and have resorted to using a special program known as Optional Practical Training (OPT) to bypass the H-1B visa program. OPT is a program that provides foreign students in F-1 visa status the opportunity to obtain work for a U.S. employer during and/or after completing an academic program in the United States. It was created by regulation, not by Congress.

There is no cap on the number of foreign students who may be employed in the U.S. in OPT, nor is there a requirement that the OPT workers be paid the locally prevailing wage or even the actual wage being paid to similarly qualified employees. There is also no requirement that the student have an offer of employment before being granted a work permit. In fiscal year 2013, USCIS granted employment authorization to 123,328 F-1 students under the OPT program.

In March 2014, the Government Accountability Office (GAO) issued a report finding that U.S. Immigration and Customs Enforcement (ICE) exercised inadequate oversight of the OPT program. Specifically, the GAO found that ICE’s Student and Exchange Visitor Program (SEVP) has not identified or assessed risks associated with OPT, such as potential fraud or noncompliance with ICE regulations. The report highlighted several other deficiencies in the program, including: 1) foreign students, sometimes aided by school officials, are currently abusing the OPT program to acquire unauthorized employment in the United States; 2) the federal government does not know where tens of thousands of foreign students in the OPT

program are located, who they are working for, or what they are doing while staying in the United States; 3) there is a lack of coordination within ICE, inconsistent collection of information by ICE, and inadequate monitoring mechanisms in place to ensure program compliance; and 4) there was insufficient oversight to ensure students were engaging in work that was in their field of study.

One year ago, last March, I sent a letter to Secretary Jeh Johnson requesting that the Department place a moratorium on the OPT program until the Secretary could certify that the foreign students were located and that the program no longer posed a threat to national security. That request has been ignored, and there's been no evidence that the program has been fixed.

Aside from the national security risks posed by the program, there is also the concern that OPT is allowing employers to use foreign students to bypass worker protections in other immigration programs. Foreign students don't have to be paid at all, and when they are paid they are substantially cheaper than U.S. workers because employers are generally not required to make the 7.65% wage contribution on their behalf for Social Security and Medicare taxes. They also become susceptible to exploitation because they are desperate to stay in the country.

Foreign students are being targeted. In 2013, IBM placed ads on their webpage with the following mandatory job requirement: "Should have a valid OPT work permit for legal work authorization in the United States." And, the job was located in Idaho. The anti-discrimination provision of the Immigration & Nationality Act does not permit employers to express or imply a preference for temporary visa holders over U.S. workers, for any employment opportunity in the United States. The Department of Justice opened an investigation. In late 2013, the Department of Justice announced it had reached a settlement agreement with IBM under the terms of which the company agreed to pay \$44,400 in civil penalties, revise its hiring and recruiting procedures and train its human resources personnel to ensure compliance with law, and to be subject to reporting requirements for a period of two years.

Allow me to show an example of a brazen help wanted ad. In this ad, the employer is looking for candidates with valid H-1B visas to work in the United States. The skill set needed? "Any technical skill is fine."

These job ads are often found, and according to Bright Future Jobs director, Donna Conroy, staffing agencies and recruiters are well aware they can avoid hiring Americans—and do so brazenly on Internet job portals, excluding Americans from high paying jobs in the tech sector.

Now that I have laid out a number of problems with our immigration policies, it raises the question as to why we in Congress would simply increase the supply for foreign workers without adding more protections for American workers. Claims by U.S. businesses that there just aren't enough U.S. workers willing and able to take these skilled jobs fall flat when we read stories about recent big layoffs in the tech industry. Bills have been introduced that seemingly ignore the plight of U.S. workers. Some bills would increase the annual number of H-1B visas from 65,000 to 115,000, or as high as 195,000 per year. This only makes the problem worse. It doesn't close the loopholes or prevent abuse. It doesn't make sure that American workers are put before foreign workers. It only increases the supply of cheaper foreign labor. Increasing the

supply of H-1B visas alone also won't help smaller U.S. companies who are already shut out of the program because the big corporations take thousands of visas each year. The number one user of H-1B visas is bringing in over 6,000 new workers each year. The top ten companies that use the H-1B program swallow up over 50% of the supply of available visas.

Instead of just increasing the supply of visas, real reforms are needed.

For years, I have worked with my colleague from Illinois, Senator Durbin. We have introduced legislation to get at the problems. Our bill would increase worker protections. Most importantly, it would require all employers seeking to hire an H-1B worker to first make a good faith effort to recruit an American worker.

Additionally, in the past, our bill would: (1) revise H-1B prevailing wage determination requirements; (2) require Internet posting and description of H-1B employment positions; (3) lengthen the period surrounding the hiring of an H-1B worker during which U.S. workers may not be laid off; (4) prohibit employer advertising that makes a position available only to, or gives priority to, H-1B nonimmigrants; and (6) limit the number of H-1B and L-1 employees that an employer of 50 or more workers in the United States may hire. The bill would also give DOL enhanced authority to investigate employer compliance, and it would set up a random audit scheme to keep employers honest.

The Durbin/Grassley bill would also reform the L-1 visa program. It would do so by establishing a prevailing wage requirement for L-1 workers and increasing DOL's authority to investigate applications for fraud.

Some may also say that Congress should pass the 2013 immigration bill, as if it would make the problems go away. That bill – S. 744 – may have been a good first step in acknowledging the problems with these visas, but it far from solved the crisis facing skilled American workers.

S. 744 attempts to address the concern that employers are able to bring in foreign workers without looking at American workers first. It says that an employer must take good faith steps to recruit U.S. workers, and the employers have to advertise the job on a Department of Labor website. However, the bill states that only some employers – so-called “dependent” employers with a high percentage of foreign workers – must offer the job first to any U.S. worker that is equally or better qualified. Why we wouldn't make such a requirement apply to all employers?

The bill also includes an unnecessarily generous provision allowing employers to forego counting “intending immigrants” in their workforce numbers when calculating whether the percentage of foreign workers in their workforce puts them over the “dependent” percentage threshold. Because the bill would impose stricter U.S. worker protection standards for dependent employers, employers with a large percentage of H-1B workers and who would otherwise be classified as H-1B dependent employers could get around the worker protections, wage requirements, and displacement rules simply by applying for Green Cards for their foreign workers. The Green Card application carveout doesn't actually require the worker to have followed through and gotten the Green Card. All the company has to do is file the application.

I'm told there has been an uptick in green card applications by dependent or near-dependent companies simply so such employers can use this loophole should it ever become law.

During this committee's consideration of S. 744, I offered several pro-U.S. worker amendments. Every amendment I offered was defeated. Ensuring that U.S. workers have the first opportunity at high paying, high skilled jobs in this country seems like a no-brainer to me.

I'm glad AFL-CIO President Trumka is here to shed light on how S. 744 missed the boat. Back in May 2013, Mr. Trumka wrote an opinion piece for *USA Today* saying that hi tech is not looking to bring in H-1B visa holders for a few years at a time because there is a shortage of tech workers, but instead want a massive expansion of H-1B visa holders "because they can pay them less." He concluded: "This is not about innovation and job creation. It is about dollars and cents."

The International Federation of Professional and Technical Engineers, a branch of the AFL-CIO which represents 90,000 engineers opposed the committee-passed bill saying, "Hundreds of thousands of foreign STEM workers will enter the United States each year for the sole purpose of working in jobs that Americans would normally do." They said, at the time, that "the bill fails miserably in fixing the worker abuses inherent in the program."

The Communications Workers of America, which represents 700,000 men and women in the telecommunications industry, said that the committee's immigration bill would "create preferential treatment for foreign born workers." They also said, "We can spend millions to educate a STEM workforce but without employers willing to hire these U.S. STEM workers, our work is for naught."

Today, the story must be told. The voices of American workers must be heard. The lives of U.S. workers and families are on the line. Will we do everything we can to protect future generations who desperately want to work in the high skilled sector? Or, will we simply ignore the plight of those who have lost their jobs and had to train their foreign replacements?

We cannot fail the American worker. Reforms are needed to put integrity back into our immigration system, and to ensure that American workers and students are given every chance to fill vacant jobs in this country.