

**DRIVING JOBS AND INNOVATION OFFSHORE:  
THE IMPACT OF HIGH-SKILL IMMIGRATION  
RESTRICTIONS ON AMERICA**

**EXECUTIVE SUMMARY**

U.S. technology companies, research labs and companies serving clients in a range of fields are being driven by Congress to pursue offshore alternatives due to current and proposed restrictions on high-skill immigration. The burgeoning demand for skilled labor throughout the U.S. economy and an increasing need to compete globally has created a demand for scientists, engineers and professionals in the United States that cannot be filled by Americans alone.

The availability of H-1B temporary visas, which generally are good for 6 years, is crucial, otherwise skilled foreign nationals, particularly graduates of U.S. universities, could not work or remain in the United States, since waits for green cards last many years.<sup>1</sup> The supply of H-1B visas has been exhausted before the start of each of the past four fiscal years, often leaving employers with no choice but to hire skilled foreign nationals outside the U.S. or see these scientists, engineers and professionals lost to competitors overseas. Despite this, some Members of Congress, often relying on anecdotes rather than the realities of the global economy, have launched concerted efforts to make it even more difficult to use H-1B visas by proposing a variety of restrictive amendments to current law. This comes at a time when the European Union is opening its doors wider to attract skilled immigrants.

Research and interviews show efforts at restriction often are based on myths, including the belief by some that H-1B visa holders are hired only as “cheap labor.” In fact, if companies simply wanted to save money they would hire foreign nationals only in other countries, where wage rates can be a fraction of U.S. salaries. Companies are employing skilled foreign nationals because they help create innovations, fuel growth and fill skill gaps, not because they’ll work more cheaply. The issue is not simply one of numbers, nor is it confined to the information technology industry. “We’re losing people all the time,” said a director of a top research facility. “Perhaps nothing impedes more the chain of brilliance in medical research in America than the H-1B cap.”

Among the findings in this analysis:

- Under current law, H-1B professionals must be paid the *higher* of the prevailing wage or the actual wage paid to similarly employed Americans. In addition, companies generally pay approximately \$6,000 in legal and government-imposed fees when hiring an H-1B visa holder (and up to \$10,000 more to sponsor an individual for permanent residence). Even among the relatively small number of employers where suspicion of abuse has been present the average underpayments owed to H-1B workers have turned out to be relatively small. In examining all DOL final agency actions between 1992 and 2004, one finds the average amount of back wages owed to an H-1B employee was only \$5,919 – that is about the amount of money U.S. employers typically pay in H-1B legal and government-imposed fees.

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

- Despite the impression created by critics we do not see a large number of investigations, complaints filed or serious violations uncovered. Moreover, among the comparatively small number of violations found in recent years, the Department of Labor concluded employers either committed paperwork violations or misread employer obligations in a non-willful manner in almost 90 percent of the investigations. (Only approximately 7 to 15 willful violations have been found each year since 1992.)
- H-1B visa holders are not “indentured servants,” as critics allege. They change companies frequently and Congress made it easier for those in H-1B status to change jobs. “Someone on an H-1B can usually get a new job in a few weeks,” notes an immigration attorney.
- It is inaccurate (and offensive) to argue that people not born in the United States have no value in the marketplace unless they work more cheaply than Americans. Official data show 57 percent of new H-1B professionals have earned a master’s degree or higher. When recruiting on college campuses, companies find that foreign nationals account for 50 to 80 percent of advanced degree candidates in science and engineering disciplines at leading American universities.
- For 12 months at a time during each of the past four fiscal years no new H-1Bs could even enter the U.S. labor market because the annual quota had been reached before the year started, so those facing unfortunate economic difficulties cannot blame H-1B visa holders (since it’s unlikely employers would hold jobs open for a year if a qualified U.S. professional was available). New H-1B professionals accounted for only 0.07 percent of the U.S. labor force in 2006.
- A May 2006 *Money* magazine survey ranked software engineer first among jobs based on salary, strong growth prospects and potential for creativity. The unemployment rate for those in math and computer occupations is at 2.8 percent, compared to 4.7 percent nationally. This is virtually full employment, with those seeking work primarily between jobs, located in the wrong geographic region, or possessing the wrong skill set. This low unemployment rate is indicative, along with the demand for H-1B visas, of the demand for technology professionals in non-IT businesses that need to utilize information technology (IT), as well as in more traditional technology firms. Between 2003 and 2006, salaries in math and computer occupations increased by 9.5%, slightly more than the 8.2% for all occupations. Salaries for computer and information scientists increased 14.1% over the same 3 years.
- Congressional critics seeking to add new restrictions and fees on H-1B visa holders are attempting to cripple the use of the visas and prevent companies from hiring skilled foreign nationals in the United

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

States. Many of the measures are so extreme that it is implausible to believe Congressional critics are simply trying to “reform” the use of H-1B or L-1 (intracompany transferee) visas.

- Some proposals would even require companies to gain advance permission from the Department of Labor before a company’s employees could provide service at a client’s location. Such a poor understanding of the global economy and the alternatives faced by companies to conducting work in the U.S. undermines the already tenuous arguments offered by critics against educated foreign nationals.
- Due to sketchy statutory definitions like “essentially equivalent” job, many proposed H-1B restrictions would cause a General Counsel to conclude his or her company may be unlikely to be in compliance if they hire H-1B professionals, which appears to be the goal of Congressional critics. In the days of flexible job functions and multiple locations, the safer alternative for companies is to expand outside the United States rather than risk such legal liability.
- In an apparent effort to discredit the use of visas to hire foreign nationals in general, in 2007 critics started arguing that most H-1B visas are used by companies headquartered in India and that this deprives U.S. companies of the visas. However, the 10 “outsourcing” companies cited most by critics used less than 14 percent of new H-1B petitions approved in 2006 for initial employment, according to U.S. Citizenship and Immigration Services.<sup>2</sup> Employers snapped up all H-1B visas the first day applications were submitted in FY 2008, meaning the 15,000 petitions used by these 10 companies has no major impact on the overall availability of H-1Bs. If critics were truly concerned about American companies gaining greater access to H-1B visas they would support a higher annual limit or expanded exemptions from the H-1B cap.
- Further restricting the conditions under which companies obtain H-1B and L-1 visas for skilled foreign nationals, even in exchange for higher annual limits on H-1Bs, is likely to result in less innovation and job creation in the United States as companies hire more individuals abroad. A more sensible policy is to increase quotas for H-1B visas and green cards without new conditions and to enforce existing law.

The reality of the global economy is that employers and their capital will follow the talent – wherever that talent is permitted to work and flourish. During the past decade, low H-1B and green card quotas have caused the country’s employers to lose opportunities to grow and innovate. While Members of Congress often talk about “protecting” American jobs, those who persist in pursuing restrictions on hiring skilled foreign nationals are inhibiting job creation and innovation in the United States.

## **CHARGES BY H-1B CRITICS LACK SUPPORTING EVIDENCE**

“We must acknowledge that nothing has immunized us against the unhappy effect that economic disappointment works on the soul, or against the temptation to find scapegoats to hold responsible for deeper problems,” writes Patricia Nelson Limerick, faculty director of the Center of the American West, University of Colorado.<sup>3</sup> While Limerick used these words to describe efforts to drive out Chinese Americans from U.S. cities in the 19<sup>th</sup> century, the description also applies to a small but vocal segment of American information technology workers who seek to drive out or prevent the entry of primarily Indian and Chinese professionals on H-1B temporary visas.

If one follows web postings and the words of their allies, including some Members of Congress, the argument appears to be that every American in science and engineering would be employed at the company and salary of their choice if not for the relatively small number of H-1B visa holders (0.07 percent of the U.S. labor force) who annually enter the United States or stay to work after graduating from a U.S. university.

The following pages examine the primary arguments offered by critics and discuss the likely harmful impact of proposed legislative restrictions on H-1B and L-1 (intracompany transferee) visas.

## **H-1B PROFESSIONALS ARE NOT “CHEAP LABOR”**

Repeat something loud and long enough and eventually people may believe it, particularly since it’s easier to level a charge than refute one. Still, despite years of rhetoric critics have presented no compelling evidence employers hiring individuals on H-1B visas are systematically paying less than the market wage.

First, under current law, H-1B professionals must be paid the *higher* of the prevailing wage or the actual wage paid to similarly employed Americans. Moreover, on top of that requirement, companies generally pay approximately \$6,000 in legal and government-imposed fees when hiring an H-1B visa holder (and up to \$10,000 more to sponsor an individual for permanent residence). While it is true the Department of Labor’s enforcement of H-1Bs is primarily complaint-driven (though Congress has provided a mechanism for self-initiated DOL investigations), it is telling that among the cases investigated relatively few violations have been found to be labeled “willful” and/or result in debarment. DOL found employers either committed paperwork violations or misread employer obligations in a non-willful manner in almost 90 percent of the investigations in FY 2004. In fact, in FY 2004, DOL found willful violations in only 11 percent (15 of 136) of its investigations that became final.<sup>4</sup>

Second, in the small proportion of cases where back wages are actually owed the amounts are no more, on average, than what companies would pay anyway in various legal and government fees. In examining all DOL

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

final agency actions between 1992 and 2004, one finds the average amount of back wages owed to an H-1B employee was only \$5,919 – that is about the amount of money U.S. employers typically pay in H-1B legal and government-imposed fees.<sup>5</sup> These figures cast doubt on allegations of widespread underpayment of H-1B professionals, given that even among employers where suspicion of abuse was present the average underpayments have turned out to be relatively small.

Third, a study by Madeline Zavodny, a research economist at the Federal Reserve Bank of Atlanta, found, “H-1B workers [also] do not appear to depress contemporaneous earnings growth.” As to unemployment, the study concluded that the entry of H-1B computer programmers “do not appear to have an adverse impact on contemporaneous unemployment rates.” The study also noted that some results “do suggest a positive relationship between the number of LCA [Labor Condition] applications and the unemployment rate a year later.” Zavodny concluded: “None of the results suggest that an influx of H-1Bs as proxied by Labor Condition Applications filed relative to total IT employment, lower contemporaneous average earnings. Indeed, many of the results indicate a positive, statistically significant relationship.” This would mean H-1B employment is actually associated with better job conditions for natives, according to the study, which could be because H-1B professionals are complementary to native professionals.<sup>6</sup>

Fourth, some research by critics utilizes data that fail to focus on what employers actually pay individuals on H-1B visas, relying on prevailing wage information alone, when, in fact, the actual amount companies pay is generally much higher. (Publicly available prevailing wage data represent a minimum companies are required to pay.) Actual starting salaries for H-1B professionals averaged 22 percent above the prevailing wage standards, according to a statistically valid sample of H-1B cases randomly selected for NFAP by a respected law firm. Given the intense competition for labor it defies logic that companies operating in close proximity to one another would pay their H-1B visa holders vastly dissimilar amounts, as alleged in critics’ research, or would maintain separate pay scales for U.S. and foreign-born professionals within their companies.<sup>7</sup>

## **H-1B VISA HOLDERS POSSESS LABOR MOBILITY**

It is not true that H-1B visa holders are “indentured servants,” as critics allege. In fact, they change companies frequently and Congress made it easier for those in H-1B status to change jobs by allowing movement to another employer before all paperwork is completed. “Someone on an H-1B can usually get a new job in a few weeks,” said Warren Leiden, partner, Berry, Appleman and Leiden.<sup>8</sup> In other words, even if a company hired someone for less than the market wage initially it is unlikely such a situation would persist.

Data from the Department of Homeland Security show that in FY 2005 more H-1B applications were approved for “continuing” employment than for initial employment. While continuing employment also includes H-1B

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

professionals receiving an “extension” to stay at the same employer for an additional three years, anecdotal evidence indicates most “continuing” employment involves an H-1B visa holder changing to a new employer. To the extent H-1B visa holders are reluctant to change jobs after beginning an application for a green card, the solution is to provide more employment-based immigrant visas and eliminate the current backlog. But the power to do that rests squarely in the hands of Members of Congress, including Congressional critics of H-1B visas.

**THE PATRONIZING “CHEAP LABOR” ARGUMENT**

The reason the “cheap labor” argument persists as the mantra of critics is that without such an argument those favoring restrictions would have to concede that H-1B visa holders are being hired alongside Americans because the H-1Bs are highly qualified and sought after professionals. It’s clear that critics of H-1B visas are either against immigration in general or seek to limit competition in their chosen field. However, it crosses the line to argue that people not born in the United States have no value in the marketplace except if they work more cheaply than Americans (an unproven allegation). “It is insulting to foreign nationals to imply they are not smart enough to seek a competitive wage for themselves,” said one human resources executive at a large technology company. “The individuals we hire often receive multiple job offers.”<sup>9</sup>

**MOST H-1BS HAVE GRADUATE DEGREES**

Contrary to assertions that H-1B visa holders are not highly skilled, official data show 57 percent of recent new H-1B professionals earned a master’s degree or higher, according to the Department of Homeland Security.<sup>10</sup> When companies recruit they find a high proportion of foreign nationals in important disciplines. In 2005, U.S. universities awarded 55 percent of Masters degrees and 67 percent of PhDs in electrical engineering to foreign nationals, according to the American Association of Engineering Societies.<sup>11</sup>

**COMPANY-WIDE CONSPIRACIES UNLIKELY**

To believe that U.S. companies go out of their way to pay H-1B visa holders less than the market wage would compel one to believe in company-wide conspiracies at many of America’s most successful companies, a number of whom are rated as among the best places to work in America.

Moreover, many of the critics cite companies with enormous annual profits that would have little to gain and much to lose from underpaying foreign nationals. If one looks at the list of large U.S. companies among the leading employers of H-1B visa holders nearly all of the corporations earned profits in excess of \$3 billion in 2006. Among these companies are Microsoft (\$12.6 billion in net income in 2006), IBM (\$9.4 billion), Cisco (\$7 billion), Intel (\$5 billion), Oracle (\$4.7 billion), and Google (\$3 billion). The idea that saving a few thousand dollars on computer or engineering salaries is somehow crucial to these companies strains credulity, particularly when one notes

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

companies already must pay typically up to \$6,000 in various legal and government fees to hire H-1B professionals and there is no evidence these companies pay other than the market wage or higher to their employees.

To the contrary, what is important to these and other companies is the ability to hire the best person for a position, regardless of place of birth. Under Section 413 of the American Competitiveness and Workforce Improvement Act (passed in 1998), a company found committing a “willful” violation of the law regulating the proper wages for H-1B visa holders and displacing a U.S. worker is barred for *three years* from hiring any foreign nationals in the United States and faces up to a \$35,000 fine per violation.<sup>12</sup> Why would companies risk such a devastating prohibition? It is implausible they would engage in such high risk, low reward activity.

And how would the underpayment come about? Would the CEO of a large company or the V.P. of human resources walk down to the company's immigration specialist and order him or her to attempt to save \$5,000 or more on H-1B visa holders by purposely underpaying them and then convince the company's law firm to also engage in this subterfuge? If not, then would a company's immigration specialist (a mid-level employee) take on the risk of embroiling the company in controversy and being barred from hiring any foreign nationals on H-1B visas for years? In any case, once in the country, what would prevent any H-1B visa holder who believes he or she is underpaid from going to work for a company that would pay the correct market wage? The answer is nothing. As discussed below, H-1B visa holders have the right to change jobs in search of better opportunities.

To systematically underpay H-1B visa holders would require, in effect, keeping a separate set of books, one with the pay scales for Americans and the other for foreign nationals in similar jobs within the same company. Is it even realistic to assume this takes place in any competitive company, never mind almost all companies hiring H-1B visa holders, as critics presumably believe?

The leading Indian companies hiring H-1B visas also have profits exceeding \$500 million a year and it's difficult to argue they have achieved that success by underpaying individuals. Critics cannot simultaneously argue that H-1B visa holders are crucial to the business strategy of these Indian companies and at the same time argue the companies would risk that strategy – and face a prohibition on hiring H-1Bs in the United States – by flouting the law on required wages. Either the ability to employ H-1B visa holders and other foreign nationals in the United States is important to these companies or it's not important enough for them to be concerned about losing that ability. It cannot be both.

## **NO SIGNS OF SYSTEMIC ABUSE PRESENT IN GOVERNMENT DATA**

Critics hope to make any increase in H-1B visas contingent on imposing new restrictions on companies hiring foreign-born professionals, scientists and engineers. While many of the critics' attacks have centered on so-called "outsourcing" companies, the intent is to impose new restrictions on all companies that seek access to skilled foreign-born talent. As discussed later in this analysis, many of the restrictions put forward by Senators Richard Durbin (D-IL), Charles Grassley (R-IA), Bernard Sanders (I-VT) and Claire McCaskill (D-MO) would impact all U.S. companies hiring foreign-born talent.

Senator Grassley has said there is a "high amount of fraud and abuse" involving H-1B visas. However, an examination of objective data belies this statement. When questioned by the *Wall Street Journal* a Grassley spokeswoman cited only anecdotal evidence, saying, "People have called our office."<sup>13</sup> By objective measurements there is not evidence of significant abuse but modest problems that are addressed through agency enforcement.

The data show it would be mistake to tar all companies with the faults of literally a few. Of the \$4.8 million owed in back wages in 2004, more than half (53 percent) came from findings against just 7 companies, none of whom are household names. Abuse does occur but the evidence indicates it is limited and of a character that can be handled within existing laws and regulations.

In fact, the amount of back wages owed to H-1B workers, small as it is, actually fell between FY 2005 and FY 2006. Moreover, the aggregate total of back wages owed is almost infinitesimal placed in the context of a \$13 trillion economy. In FY 2005, only \$5.2 million in back wages were owed to H-1B professionals based on DOL investigations and the total dropped to \$4.6 million in FY 2006.<sup>14</sup> Consistent with other years, 86 percent of the cases investigated (104 of 121) in FY 2005 resulted in no civil monetary penalties being assessed. In FY 2006, no civil monetary penalties were assessed in 89 percent of the cases completed (14 of 133).<sup>15</sup>

The data show the vast majority of cases investigated by the Department of Labor have involved only paperwork violations, not willful abuse, and that back wage payments were generally fairly small. The proportion of H-1B professionals owed back wages is also small. Back wages were owed to less than 1 percent (0.28 percent) of the individuals who received H-1B status between FY 1999 and FY 2002 – a total of 1,323 individuals out of approximately 473,000 individuals.

The pattern described above can be seen in a recent DOL enforcement action. India-based Patni Computer Systems agreed with the Department of Labor that the company paid 607 workers on H-1B visas less than the prevailing wage in 2004 and 2005. The Department of Labor did not oppose Patni's contention that this was due



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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

to an accounting error, since the government did not assess any additional penalties and concluded Patni's actions were not willful. Patni agreed to pay approximately \$2.4 million to the 607 workers, which comes to slightly less than \$4,000 each. It is worth noting that \$4,000 per worker is likely less than what the company paid in various legal and government fees to sponsor the workers (\$5,000 to \$6,000 in legal and government fees).

## **LAYING OFF AMERICANS?**

An allegation sometimes made is that companies lay off Americans to hire H-1B visa holders in their place. Presumably the only reason any company would even consider doing this if they could get away with paying the H-1Bs much less than the legally required wage – which would be against the law. Under the Immigration and Nationality Act it is unlawful for any company to layoff an American and replace him or her with an H-1B visa holder found to be willfully paid less than the required wage.<sup>16</sup>

In a recent letter to the *Wall Street Journal*, Senator Charles Grassley wrote, "I challenge the Journal to wave their labor force figures in the face of one of the hi-tech workers who have had to train their own replacement who is an H-1B visa holder."<sup>17</sup> The National Foundation for American Policy sent a letter to Senator Grassley's office requesting a list of the names of "hi-tech workers who have had to train their own replacement who is an H-1B visa holder." To date we have not received such a list from Senator Grassley's office.

## **H-1B VISA HOLDERS HIRED IN ADDITION TO AMERICANS**

A key premise of critics is that companies hire H-1B professionals to the exclusion of Americans. But this makes little sense. Almost all companies that utilize H-1B visa holders have U.S. workers representing 85 percent to 99 percent of their workforce. Any businesses with more than 15 percent of their workforce on H-1B visas is considered "H-1B dependent" under the law and must adhere to a stricter set of labor rules.

Senator Grassley recently stated, "Unfortunately, the H-1B program is so popular, it is now replacing the U.S. labor force rather than supplementing it."<sup>18</sup> There does not appear to be any basis for this statement. There are approximately 152 million people in the U.S. labor force who are not on H-1B visas. The number of new H-1B visa holders in the United States accounted for 0.07 percent of the U.S. labor force in 2006.

## **NO NEW H-1BS FOR 12 MONTHS AT A TIME, SO HARD TO BLAME THEM FOR NOT FINDING DESIRED JOB**

Blaming H-1B visa holders for the plight of those who do not possess their desired jobs in the technology fields is unwarranted. In many cases, the companies where individuals are seeking employment were either started or

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

advanced significantly by skilled immigrants. (See, for example, Stuart Anderson, *American Made*, National Venture Capital Association, November 2006.) Moreover, for 12 months at a time during each of the past four fiscal years no new H-1Bs could even enter the U.S. labor market because the annual quota had been reached before the start of the year. This means employers would often need to wait more than a year just to hire an H-1B professional, something few would choose to do if they instead found a qualified U.S. professional available. It's another reason why those facing unfortunate economic difficulties cannot legitimately blame H-1B visa holders for their plight. As noted previously, new H-1B professionals account for less than one-tenth of one percent of the U.S. labor force each year.

## **U.S. IT WORKERS DOING WELL ECONOMICALLY**

U.S. professionals in information technology (IT) are doing well economically and are among the best-compensated workers in the world. "Software engineers have the best jobs in America, according to a *Money* magazine survey," reported *Computerworld*. The May 2006 *Money* magazine survey ranked software engineer first based on salary, strong growth prospects and the potential for creativity.<sup>19</sup> "There is a huge mismatch between perception and reality," according to Rice University Professor Moshe Vardi, who chaired a commission on software jobs for the Association for Computing Machinery. "There are more IT jobs now than there were six years ago at the height of the IT boom . . . The salary for application programmer has continued to increase every year since 2001."<sup>20</sup>

## **EARNINGS**

In May 2006, Computer and Mathematical occupations had an average annual salary of \$69,240, based upon the Bureau of Labor Statistics' (BLS) Occupation and Employment Statistics Survey. Based on the difference between May 2003 and May 2006, salaries increased by 9.5%, slightly more than the 8.2% for all occupations. Programmers earned an average of \$69,500 after a 7.7% increase that matched the national average.<sup>21</sup> One should note that increasingly these types of jobs are subject to global competition, not just domestic factors. Moreover, the BLS salary figures do not include increases in the value of benefits, which have become an important part of compensation in recent years.

At the higher end of the occupational grouping, computer and information scientists earned \$96,440 after a 14.1% increase over the same 3 years, and computer software engineers \$84,155 after a 9.5% increase.<sup>22</sup> Two related engineering fields (not included in computer and mathematical occupations by BLS) are electrical engineers (\$78,900 with a 9.4% increase) and computer hardware engineers (\$91,250 with a 15.0% increase).<sup>23</sup>

## UNEMPLOYMENT

The official BLS unemployment rate for those in "computer and mathematical occupations" was 2.8% in October 2007 compared to 4.7% overall. Within this broad occupational category (programmers are only 14% of total employment in this category) only 94,000 persons were unemployed.<sup>24</sup>

BLS does not report estimates for more detailed occupation groups, due to a concern for the standard error of the estimates, but it is possible to use the same data source, the Current Population Survey, to estimate unemployment for smaller groups, albeit with lower reliability. If the smaller (and generally lower-skilled) occupation of programmer were reported, it would have a still low unemployment rate of about 2.8% in calendar year 2006, with an estimate of slightly less than 17,000 individuals unemployed nationwide.<sup>25</sup> Some of the 17,000 are just between jobs – the "frictional" unemployment that is difficult to reduce. With the unemployment rate so low, this is likely to be a very large portion of total unemployment. Of those remaining, some are in the wrong geographic area or have the wrong set of skills for the jobs the H-1B holders are filling. Some are seeking employment in another occupation, but counted as unemployed programmers since it was their last job.

The jobs of H-1B programmers would not necessarily be filled within the United States if they were not hired. Some of them bring skills that complement and not substitute for other programmers – creating new jobs. While it is possible some U.S. professionals would do better if they faced less competition, whether from H-1B professionals or Americans graduating from college, this would represent narrow economic self-interest as opposed to the welfare of the nation as a whole. Still, given the jobs and innovations created by foreign-born scientists and engineers in technology fields, H-1B visa holders likely benefit even those narrow self-interests by adding value to the U.S. economy. In addition to fostering innovations and, if they become permanent residents, perhaps later starting businesses, while in the United States H-1B professionals are paying taxes and buying goods and services that create other jobs in the U.S. economy.

## CASE AGAINST H-1B VISAS AND “OUTSOURCING” OVERSTATED

In general, it is ironic to be concerned about “outsourcing” in the context of H-1Bs, since denying all companies access to talented foreign-born professionals here in America due to a lack of H-1B visas or by imposing new restrictions likely does more to encourage U.S. employers to build up human resources overseas than any other U.S. policy. Simply put, companies will follow the talent to remain competitive.

As with the enforcement data, we see similar overstating of the case by critics on the charge that “most” H-1B visas are used by companies that engage in “outsourcing.” In fact, the 10 companies cited most by critics used less than 14 percent of new H-1B petitions approved in 2006 for initial employment (meaning for new hires who

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

were not in H-1B status for a prior employer), according to U.S. Citizenship and Immigration Services.<sup>26</sup> The 10 companies cited in these reports are Infosys Technologies, Wipro Technologies, Cognizant Technology Solutions, Patni Computer Systems, Mphasis, HCL America, Deloitte & Touche, Tata Consultancy Services, Accenture and Satyam Computer Services. Senators Grassley and Durbin wrote a letter to the companies on this list with headquarters in India.<sup>27</sup> The vast majority of H-1B visas go to U.S. high tech companies, financial institutions and U.S. universities.<sup>28</sup>

As Table 1 shows the new H-1B professionals hired in 2006 by these global companies totaled fewer than 15,000, representing less than 4 percent of the approximately 440,000 people employed by these 10 companies worldwide. It would be difficult to claim such a small number and proportion of employees are leading to the loss of a large number of American jobs, particularly within the context of a U.S. economy producing employment for over 145 million people. In fact, it is not clear it is leading to the loss of any American jobs.<sup>29</sup>

**Table 1**  
**New H-1Bs of Top “Outsourcing” Firms as a Proportion of Their Global Workforce**

<b>EMPLOYER</b>	<b>New H-1B Petitions Approved in 2006</b>	<b>Total Global Employment of Company (2006)</b>	<b>2006 New H-1Bs as Percentage of Company Global Workforce</b>
<b>WIPRO LTD.</b>	3,143	53,700	5.9 %
<b>INFOSYS TECHNOLOGIES LTD.</b>	3,125	52,700	5.9%
<b>TATA CONSULTANCY SERVICES LTD.</b>	2,754	62,832	4.4%
<b>SATYAM COMPUTER SERVICES LTD.</b>	1,753	28,624	6.1%
<b>PATNI COMPUTER SYSTEMS INC.</b>	969	11,802	8.2%
<b>COGNIZANT TECH SOLUTIONS U.S.</b>	863	24,300	3.6%
<b>HCL AMERICA INC.</b>	652	24,000	2.7%
<b>DELOITTE &amp; TOUCHE LLP</b>	545	30,000	1.8%
<b>ACCENTURE LLP</b>	519	140,000	0.37%
<b>MPHASIS CORP.</b>	445	12,000	3.7%
<b>TOTAL</b>	<b>14,768</b>	<b>439,958</b>	<b>3.4%</b>

Source: USCIS; National Foundation for American Policy; Company Annual Reports and Public Company Data: List of “Outsourcing” Firms based on list in report by the Economic Policy Institute (March 28, 2007 and *New York Times* (April 15, 2007) based on company filings with Department of Labor (which are different than USCIS data that include only petitions approved for individual employees). These are approved petitions for initial employment.

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

If these companies were not allowed to hire any H-1B visa holders in the United States, they would still service U.S. customers in India or elsewhere. They operate in America because they are servicing U.S. customers that wish to contract with them and prefer certain work to be done in North America. Like other foreign companies in the United States they pay taxes and make purchases in the local or national economy that create jobs beyond those produced directly by the company.

While in this country, H-1B professionals on temporary assignments are paying U.S. taxes on their earnings and purchasing American goods and services, which creates jobs. Moreover, when they return to India or elsewhere they would have gained a natural proclivity for American products, which can be seen in many parts of India today. Human resources specialists point out many H-1B professionals pay taxes into the U.S. Social Security system with no hope of receiving benefits.<sup>30</sup>

Senator Durbin and others have made much of the fact that a number of H-1B professionals come to the United States to work for Indian companies and then return to India to work. The impression created is one of Indians being trained here like soldiers so they can return to India and “kill” American jobs. This type of zero-sum thinking is far from the reality of the dynamic workings of a global economy and places the mutual benefits gained by consumers and producers in a threatening posture for political effect. Yet even in the context of a zero-sum analysis the statements by critics don’t match the facts. The small number of H-1Bs sponsored by Indian companies each year is less than 1 percent of the 1.6 million workers today in India’s IT software and services sector.<sup>31</sup> While the U.S. work experience is certainly useful, it would still represent a tiny increase in India’s IT capabilities even if all returned to India (some obtain permanent resident visas in the U.S. or could later go to Canada or the United Kingdom). Besides, if the individuals are working on contracts in India for U.S. companies they are likely making the American companies more efficient and competitive.

There is also considerable debate concerning the premise that the United States is “losing” jobs to outsourcing. Since 2004, at the height of concerns about outsourcing, the U.S. unemployment rate has dropped from 5.6 percent (February 2004) to 4.7 percent (October 2007) and the number of net new jobs in the United States has increased by more than 7 million, according to Department of Labor data.<sup>32</sup> “While global software and IT service outsourcing displaces some IT workers, total employment in the United States increases as the benefits ripple through the economy,” according to the economic consulting firm Global Insight in a report released by the Information Technology Association of America. “The incremental economic activity that follows offshore IT outsourcing creates over 257,000 net new jobs in 2005 and is expected to create over 337,000 net new jobs by 2010.”<sup>33</sup>

## **JOBS AND INNOVATION**

Recent research has illustrated the role foreign-born scientists and engineers play in the U.S. economy and the overall growth of technology-related jobs.

- Since 2003, the number of net new jobs in America has increased by over 8 million, according to the Department of Labor. The Bureau of Labor Statistics projects growth of 100,000 jobs a year in computer and math science occupations between 2004 and 2014, the highest of all white collar professional categories.<sup>34</sup> It is easy to forget that the Internet economy we enjoy today – and that employs millions of people – did not even exist two decades ago.
- Studies by the National Venture Capital Association and Duke University show that one in four high technology companies started since 1990 had an immigrant founder, creating hundreds of thousands of jobs and numerous innovations.<sup>35</sup>
- From 1950 to 2000, employment in science and engineering occupations grew from fewer than 200,000 to about 4.8 million workers, according to the National Science Foundation (NSF).<sup>36</sup>
- Approximately 12.9 million workers say they need at least a bachelor's degree level of knowledge in science and engineering fields in their jobs.<sup>37</sup>

## **FAILURE OF CONGRESS TO ACT ON THE H-1B CAP: THE IMPACT ON INTERNATIONAL STUDENTS**

The failure of Congress to increase the annual H-1B cap, which is set at only 65,000 a year (with an extra 20,000 for graduate-degree holders), means many outstanding international students cannot stay and work in the United States after graduating from American colleges. The H-1B visa quota is generally the only way for students and post-doctoral researchers to remain in America and has been exhausted before even the start of the past four fiscal years. College administrators and company recruiters say international students are increasingly taking offers for jobs in Hong Kong, London and Bangalore, rather than Boston, New York or Silicon Valley.<sup>38</sup>

Individuals fortunate enough to garner an H-1B visa must endure many years of waiting before gaining permanent residence (a green card). Outstanding would-be immigrants must now wait 5, 6 or potentially even 10 years because the annual employment-based green card quota of 140,000 is simply too low. During that time those in the queue often choose not to change jobs or accept promotions because doing so could trigger a new

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

application and an even longer wait. The uncertainty takes a significant human toll and sends a signal to current and future skilled immigrants that America may not be the place to build a career, start a business or raise a family.

When U.S. companies recruit on campuses they find foreign nationals represent between 50 to 80 percent of new electrical engineers and computer scientists in most graduate level programs at U.S. colleges.<sup>39</sup> If international students are not able to work in the United States after completing their studies because the H-1B cap is exhausted before the students even graduate, then many talented individuals will decide not to pursue a degree in America. And this would be a major loss. According to a study by Keith Maskus, an economist at the University of Colorado, for every 100 international students who receive science or engineering Ph.D.'s from American universities, the nation gains 62 future patent applications.<sup>40</sup> We also have examples of many individuals who came here as international students, received H-1B visas and later started exciting companies or helped develop key innovations in the United States.<sup>41</sup>

Below is the percentage of foreign nationals enrolled among full-time students in graduate programs at a selection of U.S. universities (2006, National Science Foundation):

- Indiana University: computer science (63% foreign); electrical engineering (71%).
- University of Texas at Austin: computer science (67%); electrical engineering (76%).
- Iowa State: computer science (73%); electrical engineering (72%).
- Rice University: computer science (67%); electrical engineering (56%).
- University of Virginia: computer science (55%); electrical engineering (64%).
- University of Southern California: computer science (80%); electrical engineering (78%).
- Stanford University: computer science (41%); electrical engineering (63%).
- University of Arizona: computer science (57%); electrical engineering (86%).
- University of Massachusetts: computer science (50%); electrical engineering (68%).

The policy question is simple: Do we want to educate these individuals and send them out of the country to compete against U.S. firms, or to assimilate this talent and allow them to create jobs and innovations here in America? Since long regulatory delays and inadequate employment-based immigration quotas make it virtually impossible to hire an individual directly on a green card (permanent residence), the availability of H-1B visas is essential, otherwise skilled foreign nationals, particularly graduates of U.S. universities, could not work or remain in the United States.

## **IMPACT OF THE H-1B CAP ON RESEARCH**

Many of the world's top young biomedical researchers come as post-doctorates to the Scripps Research Institute, headquartered in La Jolla, California. It is one of America's largest private, non-profit research organizations. The premise of Scripps, according to Thomas M. Barnett, Director of the International Office, is to serve as a "revolving door" for post-docs.<sup>42</sup> The easiest way to secure the services of a foreign national post-doc is through the J-1 exchange visa, although a waiver must be obtained for the individual to stay permanently.

Under the law, as a non-profit research institute, Scripps can hire an individual after their post-doc work is complete on an H-1B visa without regard to the numerical limit. (Scripps does not hire many post-docs on a permanent basis.) However, the key problem is a lack of mobility when these outstanding young researchers seek to stay and continue their work in the United States. This is where the H-1B cap is perhaps most damaging to America, according to Barnett.

"Biomedical research is global but our current immigration visa system is neither global nor mobile," said Barnett. When these top researchers finish their post-doctoral work they may not be able to stay and work in the United States for U.S. pharmaceutical companies or other firms due to the H-1B cap being reached. In addition, even if Scripps hires an individual on an H-1B, under the rules an H-1B number must be available if the researcher is seeking to work for a U.S. company (since H-1B visas for private companies are counted against the H-1B annual limit). "We're losing people all the time," said Barnett. "Perhaps nothing impedes more the chain of brilliance in medical research in America than the H-1B cap."

Congress failing to raise H-1B and green card quotas has harmed the ability of private U.S. research labs to retain top talent and compete globally. An outstanding international student may not have a visa available upon graduation or, at best, might be able to work for one year on a J-1 exchange visa with no guarantee an H-1B visa will become available in the future. "When we leave positions unfilled or we keep people for a year and lose them to a foreign competitor because of no available H-1B visas it hurts our ability to conduct high level research," said the chief scientist at one of America's top corporate research facilities. "Because of immigration restrictions there are a fair number of people the company can't hire, including in product development."

The issue is not one of filling positions with "bodies." He points out there's often a big gap between the top people in a field and the next tier. "When we can't get the top people because of immigration restrictions it can push us back a year, or we might not even pursue a particular area of research." He wishes there was a body of laws in place that would allow an outstanding researcher to be sponsored on a temporary visa in weeks and later converted to a green card (permanent residence) in a timely manner. "No question that would give us a significant



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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

advantage over our foreign competitors and allow more work to be done in the United States. But it's not just an issue of competition. Recruiting these types of individuals is necessary to have a world-class research facility."<sup>43</sup>

## **THE CHILDREN OF H-1B VISA HOLDERS**

At the 2004 Intel Science Talent Search, the nation's premiere science competition for top high school students, the National Foundation for American Policy conducted interviews to determine the immigration background of the 40 finalists. The results: two-thirds of the Intel Science Talent Search finalists were the children of immigrants. And even though new H-1B visa holders each year represent only 0.03 percent of the U.S. population, it turns out more of the children had parents who entered the country on H-1B visas than had parents born in the United States. In other words, if critics had their way, many of the coming generation's top scientists and engineers would not be here in the United States today – because we never would have allowed in their parents.<sup>44</sup>

## **NEGATIVE IMPACT OF NEW H-1B VISA RESTRICTIONS ON COMPANIES AND THE ECONOMY**

Below we discuss the impact of various proposed restrictions on U.S. companies, job creation and innovation. The common characteristic shared by all the proposed restrictions is they are “solutions in search of a problem.” As noted earlier, there is no evidence of overwhelming abuse of H-1B visas, nor is there evidence that U.S. professionals need to be protected from competition in the labor market or that the country as a whole would benefit from such protection.

## **IMPOSING NEW “NONDISPLACEMENT” REQUIREMENTS ON ALL COMPANIES**

Under current law, all employers already are required to pay the higher of the prevailing or actual wages paid to similarly employed Americans and face debarment *for no less than three years* from the use of H-1B visas and up to a \$35,000 fine per violation if they dismiss an employee simply to hire an H-1B professional below the legally permissible wage.<sup>45</sup>

Back in 1998, after much debate and consideration, Congress decided to enact measures that would impose certain attestations on past willful violators and companies with more than 15 percent of H-1Bs on their workforce, so-called “H-1B dependent” companies. Congress specifically imposed the attestations on only willful violators and H-1B “dependent” companies (though 15 percent may be too low a threshold for dependency) because it believed such measures would be exceedingly difficult for fast-moving tech companies to comply with, given the broad scope the Department of Labor would apply to inherently ambiguous terms like “essentially equivalent” jobs.

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

In essence, the nondisplacement attestation requires companies to attest they will not lay off a U.S. worker within a certain time period of hiring an H-1B professional for a job. Current law states that an H-1B dependent company or past willful violator must attest that “the employer did not displace and will not displace a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application.” The statute defines displacement as follows: “The employer is considered to ‘displace’ a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought.”<sup>46</sup> (“Nonimmigrants are temporary visa holders, such as those on H-1B visas, and do not have the right to stay in the country permanently without becoming lawful permanent residents.”)

While there is little evidence that U.S. companies are firing Americans to hire H-1B professionals in their places, the problem for employers arises from the legal ambiguities surrounding the statute and regulations.

An analysis of the current statute by the law firm of Paul Hastings helps explain the problem: “Employers must prove that job departures are voluntary and are not “constructive discharges”; they must demonstrate when discharges are performance related; they must demonstrate the nature of a contract whose ending results in personnel changes; they must demonstrate when offers of different jobs within the same company are bona fide; they have to demonstrate (according to a highly subjective DOL regulatory standard) whether two jobs are “essentially equivalent,” requiring analysis of the job requirements, the typical characteristics of employees performing those jobs, etc.; they must assess and document what are relevant “areas of employment” for the displacement analysis; they must assess and document issues of “direct” versus “secondary” displacement; and far more.”<sup>47</sup>

In addition to taking the controversial step of applying the nondisplacement attestation to all companies, the bill debated in the U.S. Senate (S. 1348) in 2007 would have changed the attestation to make it even more unworkable for all employers. It would have expanded the nondisplacement attestation to 180 days (essentially before/after filing an H-1B petition/application) from the current 90 days, which, as noted, now applies only to willful violators and H-1B dependent employers. This means that a company would become liable under sketchy definitions such as “essentially the equivalent of the job” for any individuals they dismissed over the course of a year. (This change in the law likely would have conflicted with U.S. obligations under the General Agreement on Trade in Services.)

There is no evidence of a need to expand the scope or application of the nondisplacement attestation. In the days of flexible job functions and multiple locations such a provision would cause a General Counsel to conclude his or

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

her company may be unlikely to be in compliance if they hire any H-1B professionals. The safer alternative would be to expand outside the United States rather than risk such legal liability.

## **EXPANDING THE RECRUITMENT ATTESTATION TO ALL COMPANIES**

Another measure included in the 2007 Senate immigration bill would have expanded the “recruitment” attestation to all employers, rather than applying it only to willful violators and “H-1B-dependent” companies as under current law. This is not a small matter. In 1998, the H-1B visa bill was held up for approximately 6 months over the recruitment (and nondisplacement) attestation. A compromise was reached to impose the two attestations on a smaller segment of employers (primarily those with more than 15 percent of their workforce on H-1B visas) not on all companies that hire skilled foreign-born professionals, scientists and researchers.

Under current law, those companies to which the recruitment attestation applies must attest when petitioning for an H-1B visa holder that the employer “has taken good faith steps to recruit, in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H-1B nonimmigrants under subparagraph (A), United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought; and (II) has offered the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.”<sup>48</sup>

“The main problem with imposing a new recruitment attestation on all employers is not that companies are not recruiting U.S. workers – they obviously are – it’s the enormous time and effort of satisfying the Labor Department’s inevitable bureaucratic requirements and *being exposed to the legal risk of failing to do so after the fact in a later audit*,” said Warren Leiden, partner, Berry, Appleman and Leiden.<sup>49</sup>

By definition, with the exception of “H-1B dependent” companies, employers applying for H-1B visas already have 85 to 99 percent of their domestic payrolls filled with U.S. workers, so it’s clear they are regularly recruiting Americans. Expanding the “recruitment” attestation is unnecessary. If a company wishes to sponsor an individual for permanent residence it is at that stage the more elaborate recruitment requirements imposed by the Department of Labor must be satisfied. To burden U.S. companies in this way appears designed to prevent them from using H-1B visas in the first place.

## **THE STRICT REQUIREMENTS ALREADY PLACED ON “OUTSOURCING”**

### **COMPANIES**

There is a significant disconnect between the rhetoric of advocates for restrictive H-1B provisions and the actual legislative language proposed. Senators Richard Durbin and Charles Grassley have excoriated Indian companies for allegedly using H-1B visas for “outsourcing.” But these firms, as H-1B dependent companies, already must comply with the law’s recruitment and nondisplacement attestations, so expanding these attestations would affect only *other* employers of H-1B visa holders.

The nondisplacement attestation also specifically applies to the type of consulting and ongoing project work engaged in by many Indian companies at client sites. Under the law, an H-1B dependent company (a business with 15 percent or more of their workforce on H-1B visas) attests it “will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) . . . unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other employer.”<sup>50</sup>

“We adhere to the recruitment attestation,” said one human resources executive with an H-1B dependent company, “and even though we hire Americans it’s still not easy to recruit them.” She says the company’s clients in the United States demand workers that have a minimum of two to three years of experience. That is why the firm usually ends up hiring H-1B visa holders who have gained experience in India or elsewhere. The company advertises on well-known employment websites, places local ads and participates in job fairs but there are “not enough U.S. workers who both have the set of skills to serve our clients and are willing to locate to where the jobs are located,” said the executive. The company hires Americans for IT positions and has recruited heavily and hired U.S. managers. But she conceded that it’s possible many Americans would prefer to work at a U.S. company over an Indian firm.<sup>51</sup>

Wipro Technologies is another Indian company that has been criticized for hiring more H-1B visa holders than U.S. workers in the United States. However, Wipro recently announced plans to expand operations in the United States by opening up a software development center in Atlanta where it hopes to employ up to 500 to 1,000 people in the future. It plans to train Americans with associate degrees and those seeking career changes, such as former military personnel. The center is related to Wipro’s acquisition of U.S.-based InfoCrossing, which operates data centers at five locations in America.

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

“As for the Atlanta development center – and three others on the drawing board for southern U.S. cities – Wipro needs those because its biggest U.S. customers want some people available locally,” reports *InformationWeek*. This belies the main argument used against Indian companies, that they simply hire people on H-1B visas so they can then send the individual back to work for them in India. In fact, the evidence indicates the reason Indian companies operate in the United States is for the oldest reason in business – because their customers desire it.<sup>52</sup>

## **MANDATORY INVESTIGATIONS OF COMPANIES AND EXPANDED INVESTIGATIVE AUTHORITY**

How many Members of Congress would favor a law that requires a fixed percentage of U.S. Senators and Representatives to be investigated by the Department of Justice every year? How many Congressional staff would like a law that requires a fixed percentage of anyone who works on the staff of a Member of Congress to be investigated by the federal government on an annual basis? In both cases, there would be no prior evidence the individuals or offices violated the law but the government would investigate nonetheless and those targeted would have to defend themselves and absorb the attendant financial and other costs.

It is unlikely anyone in an elected or staff capacity in Congress would think mandatory investigations of those working in the legislative branch of government is appropriate, and for good reason, since it upends the notion of justice to be compelled by the government to prove yourself not guilty even when there is no allegation of wrongdoing. However, that is precisely the approach that Members of Congress came close to imposing in the now-defunct Senate immigration bill (S. 1348).

In the real world, government investigations can be costly and time-consuming even for those in full compliance with the law, particularly given how complicated and ambiguous parts of the law are (and may become). That is a key reason why today, for the most part, H-1B investigations by the Department of Labor are “complaint-driven,” meaning a complaint is filed by someone with knowledge a transgression may have taken place. However, current law also allows the Secretary of Labor to approve an investigation when receiving credible evidence a violation may have occurred.

S. 1348 would have removed virtually all constraints in this area by allowing the Secretary of Labor to investigate all H-1B employers without any evidence or information related to wrongdoing if it labels such investigations “audits.” In fact, the bill appeared to eliminate current safe harbors for even “good faith” technical or procedural failures under the law.<sup>53</sup>

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

Going further, the bill actually *mandated* that the Department of Labor investigate at least 1 percent of companies that hire H-1B visa holders and all H-1B dependent companies, without regard to evidence of any wrongdoing.<sup>54</sup> Not all H-1B dependent companies are “Indian”; a number of U.S. start-up and mid-sized companies in the technology field also fall above the 15 percent H-1B threshold and would be subject to mandatory investigations.<sup>55</sup>

An amendment that was pending to the Senate bill from Senators Durbin and McCaskill also would have required a mandatory investigation of all companies that hired more than 30 percent of its H-1Bs at a prevailing wage classified as Level 1. This likely would have triggered mandatory investigations of many companies without evidence they had done anything wrong other than hire H-1B professionals after graduating from a U.S. university. Level 1 generally refers to the amount of experience an individual possesses, so most international students with a graduate degree would be classified as Level 1, notes Greg Siskind, an attorney at Siskind Susser Bland. “The proposed amendment presupposes that an H-1B visa is not appropriate for entry level positions without any sufficient rationale to support this notion,” said Siskind. To use a sports analogy, a rookie shortstop and second basemen may not possess prior Major League experience but that doesn’t mean a baseball team should be investigated because two out of four infielders are highly skilled but lack experience.

A provision in the Senate bill also would have given the Secretary of Homeland Security the authority to initiate an investigation of any employer that employs L-1 visa holders without any showing or suspicion of wrongdoing. As noted earlier, this type of amendment to current law ignores the costs of defending oneself against a federal agency.

## **MAKING LIFE HARDER FOR U.S. STUDENTS**

It is ironic that at the same time some legislators are claiming companies should do more to help U.S. students enter math and science fields, these same lawmakers want to make it more likely U.S. universities won’t have faculty available to teach such students. Prior to FY 1999, U.S. universities fell under the same H-1B cap as other employers. This created enormous difficulties on campuses when the annual supply of H-1B visas was exhausted in many cases before hiring could take place before the next semester of classes. This led to classes being canceled and uncertainty surrounding course offerings for students, which colleges pointed out to many Congressional offices. (More than one-third of American university engineering faculty with Ph.D.s is foreign-born.<sup>56</sup>) In response to hearing the problems created by the H-1B cap, in 1998 Congress instituted an exemption from the annual H-1B ceiling for universities and non-profit and U.S. government research institute.

Since historically any new numerical ceiling instituted by Congress has never proved sufficient over time, repealing the exemption from the H-1B cap for these employers, as proposed by some legislators this summer,

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

would likely lead to the same situation as existed before – classes canceled or not offered and important research delayed or not taking place in the United States.

**TAXING TALENT OUT OF THE UNITED STATES**

Economists know that if you want less of something, then you should increase the tax on it. That is precisely what critics seek to do to foreign talent – tax it so high that companies will have no choice but to go without this talent, at least in America. As part of S. 1348, the Senate accepted an amendment by Senator Bernard Sanders to, in effect, increase from (the current) \$1,500 to \$5,000 the scholarship/training fee that U.S. companies pay for each H-1B professional they hire (and visa renewals). Senator Sanders originally sought to raise the tax to \$10,000, revealing the amendment's intent was to price H-1B visa holders out of the labor market.

Today, in addition to company philanthropy, U.S. businesses pay \$91 billion a year in local taxes to support public education. Moreover, to date companies have received little credit for the nearly \$2 billion in these H-1B training and scholarship fees that they have paid just since 1999, funding 40,000 scholarships.<sup>57</sup>

A National Foundation for American Policy analysis, based on receipt data received from the Department of Homeland Security, showed the higher Sanders fee would have cost companies \$4.8 billion over 5 years.<sup>58</sup> This tax increase on the hiring of H-1B professionals would have represented an enormous extraction of wealth from the most innovative companies in America and was designed to make hiring H-1B professionals prohibitively expensive.

The Sanders amendment would have been part of a bill that increased the H-1B visa limit, albeit with numerous new labor restrictions. More recently, Senator Grassley sponsored an amendment virtually identical to Sanders' as part of a Senate appropriations bill. To date that amendment has not become law. However, it is instructive that the \$3,500 per H-1B fee in the Grassley amendment, as high as it was, would not have been in exchange for a higher annual quota, as in the past. A National Foundation for American Policy analysis estimates the higher fee would have cost companies \$3.1 billion over 5 years. (It is a lower amount than the Sanders amendment because the additional \$3,500 would have been applied against a smaller visa total.)<sup>59</sup>

The fee started at \$500 in FY 1999, in exchange for a higher H-1B limit, and quickly rose to \$1,000 in exchange for another H-1 quota increase. It now rests at \$1,500, although the H-1B cap is again back at 65,000 a year (albeit with a 20,000 exemption for those receiving an advanced degree from a U.S. university). In addition, companies must pay a \$500 "anti-fraud" fee.

## **IMPOSING ADDITIONAL RESTRICTIONS ON H-1B AND L-1 VISAS**

At a time when other countries are liberalizing their rules on skilled workers and U.S. companies are engaged in a global battle for talent against foreign competitors one would think the debate in Congress would be over how much the H-1B visa cap should be increased and how to make it easier for skilled foreign-born professionals, researchers and scientists to stay permanently in the United States. Instead, Congress has been sidetracked by a handful of legislators who seek to impose a vastly more restrictive regime on all companies that hire in the global marketplace.

Before analyzing the proposed new restrictions, some background on L visas is instructive. L visas have been around since 1970 to allow U.S. companies to transfer executives, managers and personnel with specialized knowledge from their overseas operations into the United States to work. To qualify, L-1 beneficiaries must have worked abroad for the employer for at least one continuous year (within a three-year period) prior to a petition being filed.<sup>60</sup> This would prevent, for example, someone being hired overseas and immediately being sent to work in the United States. Also, based on USCIS regulations, an executive or manager is limited to seven years, while an individual with specialized knowledge can stay for five years.

The U.S. Citizenship and Immigration Services divides intracompany transferees into two categories: L-1A and L-1B. “An L-1A is an alien coming temporarily to perform services in a managerial or executive capacity. An L-1B is an alien coming temporarily to perform services that entail specialized knowledge. Specialized knowledge is a special knowledge of the employer’s product or its application in international markets or an advanced level of knowledge of the employer’s processes and procedures.”<sup>61</sup>

An area of controversy regarding L-1 visas is whether they are used in place of H-1B visas, which in some ways are more restrictive and have often become unavailable to companies due to reduced annual numerical caps. The evidence indicates L-1 visas generally are not utilized instead of H-1Bs. One reason is that an H-1B is normally used for a new hire, while an L-1 must have worked for a company for at least one year continuously. “Another possible indication that L-1s are not widely used as alternatives to the H-1B is that in fiscal year 2004 the congressional numerical limit on H-1B status was significantly reduced, but no increase in L receipts or approvals was observed,” according to a (DHS) Office of Inspector General (OIG) report.<sup>62</sup>

In 2003 and 2004, critics of L-1 visas gained mileage from a few cases of alleged displacement of U.S. workers that were the source of sympathetic media coverage and even Congressional hearings.<sup>63</sup> However, there is little evidence this reflects a wider trend, even if the facts as presented in these instances were correct – and the U.S. companies involved disputed the media’s coverage of these cases. Given the fervor and organizational skills of critics, it is clear nearly every new incident involving L-1 visas would be publicly trumpeted as another example



*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

that must be acted upon. The OIG report concluded, “While many of the claims that appear in the media about L-1 workers displacing American workers and testimony may have merit, they do not seem to represent a significant national trend.”<sup>64</sup> In November 2004, Congress passed the “L-1 Visa and H-1B Visa Reform Act” to address the abuses alleged in media reports.

**MANDATING DOL BUREAUCRATS TO ACT AS “EMPLOYMENT CZARS”**

In addition to those measures discussed earlier, a series of proposals to restrict both H-1B visas and L-1 visas would have been offered as floor amendments to the 2007 Senate immigration bill. These are important to note since a number of these amendments could resurface as potential inclusion in any legislation to increase the H-1B visa quota. Nearly all of these proposed amendments would have been offered by Senators Richard Durbin and Claire McCaskill. Analysis of these provisions follows below.

- In an extraordinary attempt to insert the federal government into basic company-client relationships, a Durbin-McCaskill amendment (pending to be offered to the 2007 Senate immigration bill) would have forbid any company from sending an H-1B or L-1 visa holder to another company’s worksite unless a Department of Labor bureaucrat granted a waiver that allowed this to take place. This would have established a type of central planning apparatus to micromanage consulting and client arrangements throughout the country. Such an attempt to ossify the labor market would result in less flexible labor markets and more work being done outside the United States, where prior approval from a U.S. government bureaucracy would not be necessary.
- In a similar spirit, another amendment would have required that nobody could be hired on an H-1B visa unless the company first advertised the position on a Department of Labor website using specifically mandated criteria. This shows a significant lack of understanding in how many companies recruit. Many companies engage in ongoing recruitment utilizing a variety of methods and bogging down employers with government-mandated recruitment methods is another way to discourage the hiring of foreign nationals, not to encourage the hiring of Americans. U.S. companies already possess sufficient incentive to hire American workers without creating endless hoops to hiring outstanding international students and other talented foreign nationals.
- Similarly, another Durbin-McCaskill amendment would have compelled companies to rely on Department of Labor wage surveys, rather than the type of private sector salary surveys commonly used by U.S. companies.

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

- A Durbin-McCaskill amendment would have incorporated nearly all the rules on H-1B visas, which involves new hires, and applied them to anyone entering the country on L-1 visas, which are only used by individuals who have already worked for the company a year or more abroad. Such a policy involves almost a high school student viewpoint of how companies operate, presupposing that innovative and successful companies are involved in a global conspiracy with the sole intention of ensuring Americans are not employed at high skill jobs in the United States. And, it should be noted, this comes at a time when there is virtual full employment in technology fields in America and tech jobs are rated at the top of employment surveys.
- A proposed amendment from Senator Bernard Sanders would have prohibited any employer from filing for a visa if there had been a “mass layoff” in the company in the prior 12 months, the type of strict policy limiting labor market flexibility one sees in European countries with higher unemployment rates because employers fear adding employees that are hard to dismiss. Under the Sanders amendment if a “mass layoff” occurred at the company during anytime in the future a skilled foreign national would be forced to leave the country (revocation of their visa) or face deportation.

## **BARRING COMPANIES FROM USING THEIR OWN EMPLOYEES IN THE U.S. AND OTHER BROAD PROHIBITIONS**

Taken in their totality, the restrictions proposed by some lawmakers appear to give new meaning to the word “overkill.” Some Members of Congress attempt to do the equivalent of stopping foul balls from going into the parking lot at a Little League baseball field by 1) building a backstop, 2) constructing a dome over the field, and then 3) banning the playing of baseball games altogether at the Little League field.

On top of all the various new restrictions that would have been imposed on companies of all types that hire H-1B visa holders or transfer in their own employees on L-1 visas, another Durbin-McCaskill amendment would have prohibited any company from having a U.S. workforce made up of 50 percent or more H-1B and L-1 visa holders, essentially a prohibition for some companies on filing for more H-1B visas or transferring in employees from overseas. A proposed amendment by Senator Maria Cantwell would have prohibited companies with more than 1,000 employees from filing more than 1,000 new H-1B applications in a fiscal year.

As discussed earlier, America need not fear Indian or other companies that operate in the United States by serving clients in technology, pharmaceuticals and financial services. By increasing the efficiency of U.S. firms through performing specialized services these companies enhance the productivity of labor in America, which raises standards of living and enables U.S. firms to compete better globally. As USCIS data show, the 10

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

“outsourcing” firms cited by critics used less than 14 percent of H-1B visas for initial employment in 2006. (See earlier discussion.) If Congress is concerned there are still not enough visas available for other companies then the simple policy response is not to impose new restrictive measures against an entire category of firms but rather to provide sufficient increases in the annual H-1B quota.

“USCIS scrutiny of L-1 cases is exceptionally stringent and its interpretation of what qualifies as specialized knowledge is likely more strict than lawmakers realize,” said Vic Goel, an attorney and managing partner at Goel & Anderson. “These provisions attempting to limit the number of H-1B and L-1 visa holders a company may employ appear to be a thinly veiled attempt to stifle competition from foreign-based firms.”

Goel points out there is a basic misunderstanding of the type of work these firms do today, as opposed to several years ago. “The claim that the Indian companies only offer cheap labor fails to acknowledge that these companies now offer their clients a value proposition that is founded as much on innovation and process improvement as on cost savings. Almost all of these companies invest heavily in research and development and have developed specialized products and tools that have allowed them to build their brands by addressing client needs through innovation. The reality is that by increasing restrictions on these visas Congress is only further handcuffing U.S. companies.”

There is a question whether such a broad prohibition on H-1B visas would violate U.S. obligations under the General Agreement on Trade in Services.

## **PUSHING THE WORK OFFSHORE**

“Many Americans do not realize how Europeans fear the flexibility that U.S. financial institutions have gained by employing consulting firms to assist in key functions,” said one U.S. company executive. “If these types of restrictions on H-1B and L-1 visas became law, then much of the work now done in the United States would vanish overnight and be done in Canada, Mexico, Costa Rica, Eastern Europe, and elsewhere.”<sup>65</sup>

Lost in the recent debate is the knowledge that many of the so-called “outsourcing” companies have developed expertise far beyond the basic back office operations seen in the early years of business process outsourcing (BPO). Today, these companies engage in clinical testing for pharmaceutical products, handle large volumes of financial data and transactions, and program sophisticated code for leading high technology companies. These tend to be deep-seated relationships with clients, so the types of rules proposed in Congress would harm not only the companies but their U.S. clients, which would ask that the work be done outside the United States.

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

“Our clients will not drop us because the H-1B and L-1 restrictions make it hard to bring people into the United States,” said an American-born executive for one of the companies frequently targeted by critics. “We’ll make other geographic arrangements, either nearby, such as in Canada or Mexico, or farther away. We would rather do the work in the United States but if some Members of Congress insist on driving the work offshore we’ll adjust. But it’s bad for the country.”<sup>66</sup>

Technological advances have made doing work outside of the United States even easier in recent years. With the Internet it can be as simple to connect to someone in India as the person in the next cubicle, according to technology executives. Communicating in a virtual environment, as seen in social websites like MySpace, has gravitated to the commercial world, they note. With TelePresence, for example, one can hold a meeting with people from around the world with high definition screens. “People can see if someone missed a spot shaving,” said the executive. “I don’t need to go to India to meet with clients.”<sup>67</sup>

Moving work outside the United States in response to visa limitations would hardly be limited to so-called “outsourcing” companies. Microsoft attracted attention earlier in 2007 when it announced that current U.S. immigration restrictions were one factor involved in setting up a new facility in Canada.<sup>68</sup> “We currently do 85% of our development work in the U.S., and we’d like to continue doing that,” said Jack Krumholtz, Microsoft’s director of government affairs. “But if we can’t hire the developers we need . . . we’re going to have to look to other options to get the work done.”<sup>69</sup> Other companies are making similar decisions but choose not to state the reasons so explicitly. “One-third of companies said the lack of H-1B visas had influenced their company’s decision to place more personnel in facilities abroad,” according to a 2006 survey of privately-held businesses.<sup>70</sup>

In a recent interview with the *San Jose Mercury News*, Seagate Technology CEO Bill Watkins said, “Every person who gets a Ph.D. in the U.S. should get a green card. I’ve got to hire those people. If I can’t hire them here, we’ll start moving the infrastructure of R&D offshore. I have R&D in Singapore now. I can MIT graduates there – and I get subsidies for it.”<sup>71</sup>

## **WHILE THE U.S. MAKES IT HARDER, EUROPE IS MAKING IT EASIER**

Today, when knowledge and skills are so spread out across the world, it makes no more sense, in effect, to require U.S. companies to hire only people born in the United States than to impose rules that no one born outside of a specific Congressional district could work for the U.S. Representative serving in that district (or to impose a special recruitment regime to ensure that only people born in New Hampshire could work for a U.S. Senator from New Hampshire.) This is particularly the case because most recipients of graduate degrees in key technical fields at U.S. universities are foreign nationals.

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

Other countries are taking a different approach. While Congress seeks to make it more difficult for skilled foreign nationals to work in America, the European Union (EU) is making it easier. “The European Union faces a shortage of 20 million skilled workers over the next 20 years. So it’s streamlining its immigration process. Under the proposal, foreign workers would fill out a single application for any of E.U.’s 27 member nations,” reported National Public Radio’s Marketplace.<sup>72</sup> Under the EU “blue card” It will be far easier to work in European Union than ever before. Australia has also loosened its rules to attract skilled immigrants and international students.

## CONCLUSION

The availability of H-1B visas is crucial, otherwise skilled foreign nationals, particularly graduates of U.S. universities, could not work or remain in the United States. The supply of visas has been exhausted before the start of each of the past four fiscal years, often leaving employers with no choice but to hire skilled foreign nationals outside the United States or see these scientists, engineers and professionals lost to competitors overseas. Despite this, some Members of Congress have launched concerted efforts to make it even more difficult to use H-1B visas by proposing a variety of restrictive amendments to current law.

A number of the provisions proposed by lawmakers view skilled foreign nationals as something that must be kept from our shores, rather than as human beings with skills and ambitions that benefit our nation. Although cloaked in the guise of “protecting” American workers, these proposals do not offer protection but rather appeal to our lowest instincts.

It is unclear how sincere is the criticism of so-called “outsourcing” firms using H-1B visas. It appears the criticism of Indian firms is being used as a tactical device to undermine support for H-1Bs more generally. The approximately 15,000 new H-1B petitions used by large Indian businesses each year makes little difference to the overall availability of H-1Bs, given that employers snapped up all H-1B visas on the first day applications were submitted in FY 2008. If critics were truly concerned about ensuring large U.S. technology companies have greater access to H-1B visas, then these critics would simply support a much higher annual H-1B ceiling and larger exemptions from the H-1B cap, rather than the higher fees and plethora of new labor restrictions to be placed on all companies that hire skilled foreign nationals.

Companies will hire the best people for the jobs and place them outside the United States if U.S. law prohibits the individuals from being hired inside America. Smaller companies without an offshore option will continue to go without key personnel needed to grow. Congress cannot compel U.S. companies to offer positions to unqualified applicants.

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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

For 12 months at a time during each of the past four fiscal years no new H-1Bs could even enter the U.S. labor market because the annual quota had been reached before the year started, so those facing unfortunate economic difficulties cannot blame H-1B visa holders (since it's unlikely employers would hold jobs open for more than a year if a qualified U.S. professional was available). New H-1B professionals accounted for only 0.07 percent of the U.S. labor force in 2006. Further restricting the conditions under which companies may obtain H-1B and L-1 visas for skilled foreign nationals, even if done in exchange for a higher annual limit on H-1Bs, is likely to result in less innovation and job creation in the United States as companies are encouraged to hire more individuals outside the country. A more sensible policy is to increase quotas for H-1B visas and green cards without new conditions and to enforce existing law.

## APPENDIX

**Table 2**  
**Top 20 Employers of New H-1Bs in FY 2006**

EMPLOYER	New H-1B Petitions Approved in 2006
WIPRO LTD.	3,143
INFOSYS TECHNOLOGIES LTD.	3,125
TATA CONSULTANCY SERVICES LTD.	2,754
SATYAM COMPUTER SERVICES LTD.	1,753
MICROSOFT CORP.	1,297
PATNI COMPUTER SYSTEMS INC.	969
COGNIZANT TECH SOLUTIONS U.S.	863
I-FLEX SOLUTIONS INC.	695
HCL AMERICA INC.	652
LARSEN & TOUBRO INFOTECH LTD.	624
TECH MAHINDRA AMERICAS INC.	614
INTEL CORP.	613
DELOITTE & TOUCHE LLP	545
ACCENTURE LLP	519
POLARIS SOFTWARE LAB INDIA LTD.	497
MPHASIS CORP.	445
SYNTEL CONSULTING INC.	415
ERNST & YOUNG LLP	396
LANCESOFT INC.	394
Other	88,070 (80.3 percent)
<b>TOTAL</b>	<b>109,614 (0.07 % of U.S. labor force)*</b>

Source: USCIS; Explanatory note from USCIS: Employers were identified and counted on the basis of tax ID. The number of approved petitions for new workers is not identical with the number of workers on the job because workers are occasionally sponsored by more than one employer, the job offer may subsequently be withdrawn, the job offer may be declined, or the worker if residing outside the country, may be denied a visa. The total of 109,614 exceeds 65,000 regular plus 20,000 masters caps because it includes petitions for new workers exempted from the caps. Fiscal year of petition approval often is earlier than fiscal year of worker start date. For example, about 50,000 H-1B petitions were approved in FY 2006 for a start date in FY 2007. The reason is that many petitions were filed in April (beginning of cap season) and May by sponsors for workers beginning their employment in October---two different fiscal years. The same phenomenon occurred this year, offsetting last year's effect to an unknown extent, but rendering straight comparisons between petition approvals and employment starts in a fiscal year subject to error and misinterpretation. \*The CIA Fact Book estimates the size of the U.S. labor force in 2006 at 151.4 million. The list in the table is for individuals who were hired on an approved H-1B petition for "initial employment" in 2006. Petitions approved for "continuing employment" would include both H-1B renewals by that same employer and individuals who had been working on H-1B status for another employer.

**END NOTES**

<sup>1</sup> Due to low quotas on green cards, it typically can take 5 years or more for an employment-based immigrant visa to become available for a skilled immigrant.

<sup>2</sup> According to USCIS there were 109,614 new H-1B visa holders who gained initial employment in 2006 (this includes H-1Bs exempt from the annual numerical limit) and the 10 “outsourcing” companies cited by critics used 14,768 H-1Bs for initial employment, or 13.5 percent. The 20,000 figure sometimes cited by critics appears to be derived from other lists that include H-1B visa holders whose petitions are renewed, which were counted in a prior year.

<sup>3</sup> Patricia Nelson Limerick, “Witness to Persecution,” *The New York Times Book Review*, July 29, 2007.

<sup>4</sup> DOL data; CIA World Factbook, 2006. Back wages owed to 641 H-1B visa holders in 2004 is not a large number in the context of the U.S. labor force.

<sup>5</sup> NFAP calculation from Department of Labor data. Over the course of more than a dozen years, the cumulative total of back wages owed was approximately \$19 million. Placed in the context of a \$12 trillion U.S. economy this figure is not large. NFAP requested but did not receive individual case data for FY 2005 and FY 2006.

<sup>6</sup> Madeline Zavodny, “The H-1B Program and Its Effects on Information Technology Workers,” Federal Reserve Bank of Atlanta, *Economic Review*, Third Quarter 2003.

<sup>7</sup> For a more detailed discussion see *H-1B Professionals and Wages: Setting the Record Straight*, NFAP Policy Brief, March 2006.

<sup>8</sup> Interview with Warren Leiden.

<sup>9</sup> Interview with NFAP.

<sup>10</sup> 2006 data. Department of Homeland Security; National Science Foundation.

<sup>11</sup> American Association of Engineering Societies.

<sup>12</sup> Section 413 of the American Competitiveness and Workforce Improvement Act.

<sup>13</sup> “The Grassley Visa Tax, Editorial,” *The Wall Street Journal*, November 2, 2007.

<sup>14</sup> To put \$4.6 million in perspective, it is about what Roger Clemens earned in a month pitching for the New York Yankees in 2007.

<sup>15</sup> Examination of Department of Labor data.

<sup>16</sup> Section 413 of the American Competitiveness and Workforce Improvement Act.

<sup>17</sup> “Investing in America, Making Things Worse,” Letter, Senator Charles Grassley, *The Wall Street Journal*, November 8, 2007.



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*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

<sup>18</sup> Floor statement of Senator Charles Grassley, November 5, 2007.

<sup>19</sup> Ellen Wulforst, "Survey: Software engineers top list of best jobs," *Computerworld*, April 13, 2006.

<sup>20</sup> Brian D. Lee, "Computer science still a good career, leader of job migration task force says," *Stanford Report*, November 6, 2006.

<sup>21</sup> Bureau of Labor Statistics. <http://www.bls.gov/oes>.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid. This shows a recovery from the dot com "bust."

<sup>24</sup> Bureau of Labor Statistics and additional analysis.

<sup>25</sup> Analysis using the Current Population Survey monthly outgoing rotation group files, assembled by the National Bureau of Economic Research.

<sup>26</sup> USCIS.

<sup>27</sup> "Grassley, Durbin Ask for Details on Companies' Use of H-1B Visas," Press Release, Office of Senator Charles Grassley, May 14, 2007.

<sup>28</sup> The data NFAP obtained are for approved petitions for new hires (initial employment) by companies in 2006. Data published by *InformationWeek* listing the top 200 H-1B employers include both initial employment and continuing employment, which would include both renewals by that same employer and individuals who had been working on H-1B status for another employer. The list published in *InformationWeek* shows many U.S. universities, financial institutions and high tech companies in the broader list.

<http://www.informationweek.com/news/showArticle.jhtml?articleID=199601616&pgno=2&queryText>

<sup>29</sup> Senator Grassley recently said that these companies used 20,000 of 85,000 H-1B visas in 2006, which does not appear to be the best measurement. The 20,000 figure includes renewals of individuals already working here in H-1B status who were counted against the cap in a previous year. Moreover, according to USCIS there were 109,614 new H-1B visa holders who gained initial employment in 2006. Floor statement of Senator Charles Grassley, November 5, 2007.

<sup>30</sup> There is no totalization agreement between the U.S. and India.

<sup>31</sup> [http://www.nasscom.in/upload/5216/Indian\\_IT\\_Industry\\_Factsheet\\_Feb2007.pdf](http://www.nasscom.in/upload/5216/Indian_IT_Industry_Factsheet_Feb2007.pdf).

<sup>32</sup> Bureau of Labor Statistics.

<sup>33</sup> Global Insight, *The Comprehensive Impact of Offshore Software and IT Services Outsourcing on the U.S. Economy*, ITAA, 2005. A 2006 report by the Duke Center for International Business Education and Research and Booz Allen Hamilton found that the number of jobs lost onshore per offshore project has dropped by 70 percent since 2005....90 percent of all R&D offshore implementations created no job losses on shore." The report concluded, "In the near term, contrary to various claims, fears about loss of high-skill jobs in engineering and science are unfounded." The research found that "In effect, offshoring is no longer about moving low-paid jobs

elsewhere; but about sourcing highly skilled talent everywhere. What used to be an exercise in tactical labor cost savings is now a strategic imperative of competing for talent globally.” Arie Y. Lewin and Vinay Couto, *Next Generation Offshoring, The Globalization of Innovation*, Duke University Fuqua School of Business and Booz Allen Hamilton, 2006. *Washington Post* columnist Robert Samuelson has written, “In a recent paper, Jacob Funk Kirkegaard of the Peterson Institute for International Economics reviewed many studies. His conclusion: “The heated public and political debate . . . has been vastly overblown.” For the United States, Kirkegaard examined a survey on “mass layoffs” from the Bureau of Labor Statistics to see how many stemmed from offshoring. The answer: 4 percent. That included both manufacturing and service jobs. In 2004 and 2005, the BLS counted almost 1 million workers fired in layoffs of 50 or more....Only about 12 percent of layoffs stemmed from “movement of work” -- a category that would include offshoring. But two-thirds of those moves were domestic.” Robert Samuelson, “What Offshoring Wave?” *The Washington Post*, May 16, 2007.

<sup>34</sup> Bureau of Labor Statistics.

<sup>35</sup> [http://www.nvca.org/pdf/AmericanMade\\_study.pdf](http://www.nvca.org/pdf/AmericanMade_study.pdf);

[http://memp.pratt.duke.edu/downloads/americas\\_new\\_immigrant\\_entrepreneurs.pdf](http://memp.pratt.duke.edu/downloads/americas_new_immigrant_entrepreneurs.pdf)

<sup>36</sup> Science and Engineering Indicators (2006), Chapter 3, National Science Foundation, 2006.

<sup>37</sup> Ibid.

<sup>38</sup> NFAP interviews.

<sup>39</sup> National Science Foundation.

<sup>40</sup> Stuart Anderson, “The Nation’s Future is Stuck Overseas,” *The New York Times*, November 16, 2007.

<sup>41</sup> No comparable list of companies started and innovations created by those who complain about H-1B visa holders has been produced.

<sup>42</sup> Interview with NFAP.

<sup>43</sup> Interview with NFAP.

<sup>44</sup> Stuart Anderson, *The Multiplier Effect*, National Foundation for American Policy, July 2004.

<sup>45</sup> Section 413 of the American Competitiveness and Workforce Improvement Act.

<sup>46</sup> Section 412 of the American Competitiveness and Workforce Improvement Act, passed in 1998.

<sup>47</sup> Paul Hastings.

<sup>48</sup> Section 412 of the American Competitiveness and Workforce Improvement Act.

<sup>49</sup> Interview with Warren Leiden. Emphasis added.

<sup>50</sup> Section 412 of the American Competitiveness and Workforce Improvement Act.

<sup>51</sup> Interview with NFAP.

<sup>52</sup> Marianne Kolbasuk McGee, “From H-1Bs to Growth: Why Wipro’s Buying into the U.S. IT Market,” *InformationWeek*, August 11, 2007.

*Driving Jobs and Innovation Offshore: The Impact of High-Skill Immigration Restrictions on America*

<sup>53</sup> American Council on International Personnel.

<sup>54</sup> In Section 421, under “Audits,” the bill states: “The Secretary may conduct surveys of the degree to which employers comply with the requirements under this subsection and may conduct annual compliance audits of employers that employ H-1B nonimmigrants. The Secretary shall conduct annual compliance audits of not less than 1 percent of the employers that employ H-1B nonimmigrants during the applicable calendar year.”

<sup>55</sup> The bill would also have doubled current penalties for H-1B violations and permit DOL employees to be the basis of information leading to an investigation.

<sup>56</sup> Richard B. Freeman, “Does Globalization of the Scientific/Engineering Workforce Threaten U.S. Economic Leadership?”, p. 8.

<sup>57</sup> See <http://www.nfap.com/pdf/0507brief-business-immigration.pdf>.

<sup>58</sup> The \$3,500 additional tax is on the hiring of an H-1B visa holder and renewals of H-1B status. When taking into account the rise in H-1B visas in the bill, including the “escalator” provisions, the projected additional tax paid by companies would be: Year 1: \$849 million; Year 2: \$919 million; Year 3: \$999 million; Year 4: 1.02 billion; Year 5: 1.02 billion, for a total of \$4.8 billion over 5 years. This does not factor in an increased level of renewals, which would mean a higher total over 5 years. Whether this high a fee violates GATS may be worthy of further research.

<sup>59</sup> “The Grassley Visa Tax,” Review and Outlook, *The Wall Street Journal*, November 2, 2007.

<sup>60</sup> *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, Office of Inspector General, Department of Homeland Security, January 2006, p. 3.

<sup>61</sup> *Ibid.*, p. 3. “To receive an L-1 visa, a petition (Form I-129) must be filed with USCIS on behalf of the worker by a sponsoring firm. An L-1 petition, when approved, is used by the beneficiary to apply for an L-1 visa if abroad, or to change status if already in the United States. . . . USCIS adjudicators examine many factors before approving an L-1 petition. Both the position that is going to be filled and the worker who will be hired must meet many criteria. Petitions that are complete and clearly meet the standards can be promptly approved. Other petitions require correspondence – a Request For Evidence (RFE) – between the service center and the petitioner to resolve unclear or incomplete submissions.” Eligible employers can file “blanket” petitions that do not require the additional step of USCIS processing.

<sup>62</sup> *Ibid.*, p. 11-12.

<sup>63</sup> Hearing before the Senate Committee on the Judiciary Subcommittee on Immigration and Border Security, July 29, 2003.

<sup>64</sup> OIG report, p. 11.

<sup>65</sup> Interview with NFAP.

<sup>66</sup> *Ibid.*

<sup>67</sup> Interview with NFAP.

<sup>68</sup> Todd Bishop, "Microsoft plans to open software center in B.C.," *Seattle Post-Intelligencer*, July 5, 2007.

<sup>69</sup> "American Brain Drain," Editorial, *The Wall Street Journal*, November 30, 2007.

<sup>70</sup> Stuart Anderson, *American-Made*, National Venture Capital Association, November 2006, p. 24. The survey was of privately-held companies that received venture capital. The report noted, "This may understate the phenomenon, since smaller businesses with no overseas operations do not possess the option of placing personnel abroad."

<sup>71</sup> Vindu Goel, "Making room for storage," *San Jose Mercury News*, November 25, 2007.

<sup>72</sup> Dan Grech, "Blue Card: Don't Leave Home Without It?" NPR Marketplace, October 23, 2007.

## ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at [www.nfap.com](http://www.nfap.com).