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## OUTSOURCING AMERICA'S TECHNOLOGY AND KNOWLEDGE JOBS

### High-skill guest worker visas are currently hurting rather than helping keep jobs at home

BY RON HIRA

Throughout 2007 Congress will consider U.S. high-skill immigration policy reform once again. There is a widespread belief amongst various interest groups that the high-skill immigration system is broken. First, the loudest voices come from the high-technology industry, which argues that current policies are forcing them to turn away the best and brightest foreign workers, pointing out that many of them are educated in America's finest universities at taxpayers' expense. Universities, aligned with industry interests, are concerned that their foreign students are unable to find positions after graduation because of immigration constraints. But on the other hand, U.S. workers argue that they are being undercut by policies that allow U.S. workers to be displaced by foreign workers willing to be paid less. As for foreign workers, they complain of being put in potentially exploitable conditions and seemingly interminable waits for a Permanent Resident Card (typically called a green card). There is some truth in all of these viewpoints, albeit each group's perspective brings different and oftentimes conflicting policy prescriptions.

This briefing paper focuses on two key policy mechanisms for high-skill labor mobility and immigration, the H-1B and the L-1 guest worker visas.<sup>1</sup> In practice these programs not only fail to meet their policy goals, they actually work against them. And more importantly, the vast expansion of the H-1B program passed by the U.S. Senate last year will make the programs even more harmful. If these H-1B provisions were to be signed into law, the consequences are obvious: they would directly lead to more offshore outsourcing

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of jobs, displacement of American technology workers, decreased wages and job opportunities for those same workers, and the discouragement of young people from entering science and engineering fields.

Instead of expanding these *non-immigrant* work-permit programs, Congress should focus on repairing them so that they serve their intended purposes.

## H-1B expansion arguments fall short

Supporters of an expansion of the H-1B program argue that the work visas serve a critical role in the economy, particularly in the high-technology sector. Supporters typically make two claims. First, they claim that there is a systemic shortage of U.S. scientists and engineers, and the only way to fill the gap between domestic demand and supply of high-skill workers is by importing guest-workers through the H-1B program. They argue that, without a large increase in the H-1B program, they will be forced to outsource the jobs by hiring foreign scientists and engineers in their home countries. Second, they claim that the H-1B program serves as *the* gateway to immigration for the “best and brightest” foreigners, arguing that capturing the best and brightest is contingent on an expansion of the H-1B program.

But neither claim is supported by analysis of actual program operation. Rather than preventing the outsourcing of jobs, the H-1B program acts in just the opposite way, by accelerating the outsourcing of high-wage, high-skill jobs to low-cost countries. The largest users of the H-1B program are offshore outsourcing firms, whose business model depends on moving as much work overseas as possible. And these firms do not use the program as a bridge to immigration, for they sponsor very few of their workers for green cards. For example, in 2006, Wipro Technologies applied for 19,450 H-1B positions but only for 69 green cards, a 0.004 green card to H-1B application ratio. H-1B program links to immigration are increasingly tenuous, and more importantly, the H-1B proponents are providing policy makers a false choice: increase the H-1B program or risk losing the best and brightest foreign workers. There are many much better and more effective policy mechanisms to encourage the best and brightest to immigrate to the United States. The H-1B program does not have to be *the* gateway to immigration for the best and brightest.

What causes the gap between the promise and reality? The H-1B program does not live up to the promises of its supporters because of fundamental flaws in program design in three key areas (outlined below).

## Three fundamental design flaws

### 1. No labor market test

The most significant design flaw is the absence of a *labor market test*. The U.S. Department of Labor recently expressed the practical implications of this fact in a straightforward manner when it stated that “H-1B workers may be hired even when a qualified U.S. worker wants the job, and a U.S. worker can be displaced from the job in favor of the foreign worker.”<sup>2</sup> Simply put, an employer does not have to test the labor market before hiring a foreign worker on an H-1B.<sup>3</sup>

What is most remarkable about the H-1B policy discussion is how many journalists and politicians believe such a labor market test exists. For example, news stories over the past year in the *Los Angeles Times*, *San Diego Union Tribune*, *Wall Street Journal* (in a front page story at the height of last year’s immigration debate) have all mistakenly claimed the program has a labor market test. Prominent political leaders have also promulgated this fallacy. For example, a *San Francisco Chronicle* story highlighted the political battle over the H-1B program last year. Senators John McCain and Edward Kennedy, co-sponsors of the immigration bill that passed the U.S. Senate, reportedly countered criticism of the H-1B program by saying their bill included requirements that employers search for U.S. workers first.<sup>4</sup> But their bill included no such provisions. The misconceptions seem to be widespread within Congress. Below are excerpts from two recent letters sent by U.S. Senators, one a republican and one a democrat, in response to constituents who wrote, expressing concerns about the H-1B program’s effects on the U.S. workforce:<sup>5</sup>

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Sen. Norm Coleman:

While the continued viability of the H-1B visa program is vital, I fully support the important rules governing the issuance of H-1B visas to protect U.S. workers. An employer wishing to hire an H-1B nonimmigrant must demonstrate that there is an insufficient number of U.S. workers qualified for the position and must show that the business has not laid off a U.S. worker 90 days prior to or after hiring any H-1B worker. Employers must also show they have attempted to recruit U.S. workers and that the admission of foreign workers will not adversely affect the job opportunities, wages, and working conditions of U.S. workers.

Sen. Barak Obama:

The intent is that H1-B visas only be issued if qualified American workers are unable to take the jobs in question....I fully agree that H1-B hires should be a last recourse as a matter of labor policy.

The rules referenced in Coleman's letter simply don't exist for the vast majority of H-1B employers. And the intent that Obama's letter asserts is not met in practice.

The absence of a labor market test has been identified as a critical weakness by numerous government reviews of the program. For example, in assessing the H-1B program's effectiveness, the Bush administration's Office of Management and Budget found that it contributed to the program's serious vulnerability to fraud and abuse.<sup>6</sup>

Coupled with other program design flaws, the labor market test flaw creates incentives for employers to prefer foreign workers to American ones, and in some cases to actively displace American workers with H-1Bs.

## **2. Prevailing wage is not market wage**

The H-1B program's primary safeguard for U.S. as well as H-1B workers is the requirement that an H-1B worker be paid the *prevailing wage*. The prevailing wage guidelines are set by Congress and employer compliance is administered by the U.S. Department of Labor (DOL) through its foreign labor certification office. The purpose of the prevailing wage is to ensure that H-1B workers are not being paid below-market wages. The reservation wages for many foreign workers are lower than those for U.S. workers, so absent such a requirement, employers could have a significant financial incentive to hire a foreign worker over an American one. And U.S. workers employed in similar occupations could have their wages depressed and working conditions worsened as they compete with workers willing to take lower wages and work in sub-standard conditions. The essence of the regulation is to ensure that the H-1B is not used as a "cheap labor" program.

While the regulations governing the prevailing wage appear to be reasonable on paper, in practice they are ineffective. The implementation of the prevailing wage regulations is riddled with loopholes, enabling firms to pay below-market wages. How do we know this? Employers say so. The Government Accountability Office (GAO) conducted interviews of H-1B employers and reported that, "Some employers said that they hired H-1B workers in part because these workers would often accept lower salaries than similarly qualified U.S. workers; however, these employers said they never paid H-1B workers less than the required wage."<sup>7</sup>

Another case highlights the attractiveness of using the H-1B and L-1 programs for labor arbitrage. Tata Consultancy Services (TCS), the leading India-based offshore outsourcing firm, has the vast majority of its personnel in the U.S. on either H-1B or L-1 visas.<sup>8</sup> TCS Vice President Phiroz Vandrevalla described, in an interview with and India-based *Businessworld* magazine, how his company derives competitive advantages by paying its visa holders below-market wages:

"Our wage per employee is 20-25 percent lesser than U.S. wage for a similar employee," Vandrevalla said. "Typically, for a TCS employee with five years experience, the annual cost to the company is \$60,000-70,000, while a local American employee might cost \$80,000-100,000. This (labour arbitrage) is a fact of doing work onsite. It's a fact that Indian IT companies have an advantage here and there's nothing wrong in that....The issue is that of getting workers in the U.S. on wages far lower than local wage rate."<sup>9</sup>

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And one need only scan a few H-1B applications that have been “certified” by the U.S. DOL as meeting the prevailing wage to understand the massive gap between the legally constructed “prevailing” and a “market-based” wage. TCS was certified by the DOL to hire 10 computer programmers at \$8.22 an hour, and Infosys was certified to hire 100 programmers at \$9.15 per hour. It is impossible to believe that the market wage for the “best and brightest” computer programmers is \$8.22 per hour. It is important to note that the issue in these cases is not one of enforcement or abuse. These applications comply with the law, illustrating that the prevailing wage regulations can be easily met without paying market wages. But are these simply exceptional cases?

The aggregate data for computing professionals lend support to the argument that the practice of paying H-1Bs below-market wages is quite common. According to the U.S. Citizenship & Immigration Service’s (USCIS) most recent annual report<sup>10</sup> to Congress, the median wage in FY2005 for new H-1B computing professionals was \$50,000, far below the median for U.S. computing professionals. The median wage for new H-1Bs is even lower than the salary an *entry-level* bachelor’s degree graduate would command. So, half of the 52,352 H-1B computing professionals admitted in FY2005 earned less than entry-level wages. And even at the 75th percentile, new H-1B computing professionals earned just \$60,000, a far cry from the impression left by Microsoft’s Bill Gates that most H-1B workers are paid \$100,000 or more.<sup>11</sup>

Some of the problems with implementing the prevailing wage surface because of the limited oversight that Congress has granted to the U.S. DOL, something that has been noted in numerous government reports. For example, the DOL’s own Office of Inspector General has described the labor certification process, the primary means of safeguarding the labor market, as simply a “rubber stamp” of the employer’s application. The review process is completely automated, with no person reviewing applications, and the employer is not required to submit any supporting documentation. Based on the process, the GAO concluded that, “...as the [H-1B] program currently operates, the goals of preventing abuse of the program and providing efficient services to employers and workers are not being achieved. Limited by the law, Labor’s review of the [labor certification process] is perfunctory and adds little assurance that labor conditions employers attest to actually exist.”<sup>12</sup>

### **3. Deficient oversight**

Deficient oversight permeates nearly all aspects of the H-1B program, not just the front-end of the process described above. This leads to a program with pages of regulations that are essentially ineffective and toothless.

Oversight is particularly lacking once an H-1B is issued. H-1B employers are never scrutinized except in the rare case that an investigation is triggered by an H-1B worker whistleblower.<sup>13</sup> When investigated, violations of the H-1B program are found in more than 80% of the cases, a much higher percentage than other programs. The most common violations found were instances where employers did not pay H-1B workers what they were legally required. So, even when employers attest to pay a particular wage, they have little worry that anyone might audit them to ensure that actual wages match the wages on the applications.

It is also important to note that H-1B employees have particularly strong disincentives to blow the whistle on their employer. Because the employer holds the visa, an H-1B worker who gets terminated is out of status (they would have to leave the country) in the eyes of the USCIS. With cases against employers often taking five or more years to adjudicate, it is no wonder that few violations are ever brought to the attention of the DOL.

Another area with little oversight is controls on H-1B-dependent firms. H-1B-dependent employers are generally defined as firms with more than 15% of their U.S. workforce on H-1B visas. Congress was concerned about reports that some employers were almost exclusively hiring H-1B workers, so they attempted to rein in this practice by requiring H-1B dependent firms to attest to three additional things:

- *Recruitment & hiring*: the employer made a good faith effort to recruit and hire U.S. workers for the position;
- *Displacement*: the employer will not displace and did not displace any similarly employed U.S. workers within 90 days prior to or after the date of filing any H-1B visa petition; and,

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- *Secondary displacement:* before placing the H-1B employee with another employer, the current employer will inquire whether or not the other employer has displaced or intends to displace a similarly employed U.S. worker within 90 days before or after the new placement of the H-1B worker.

But these additional attestations are irrelevant if firms are never investigated or audited, and few, if any, are.

Based on their public statements, many of the leading offshore outsourcing firms fit into the H-1B-dependent category. With even a cursory inquiry it should be obvious to the DOL that some of these firms could be in violation of these regulations. For instance, in many cases these firms' business models are designed specifically to cause secondary displacement. Many offshore outsourcing firms are taking over existing jobs and processes. And it seems that many of them are not making a good faith effort to recruit U.S. workers. Searches of the "job opening" sections of their Web sites yield few, if any, openings in the United States. This is in spite of their rapid H-1B workforce growth.

## **L-1 visas have even fewer controls**

The L-1 visa program came under congressional scrutiny after a well-publicized case of U.S. information technology (IT) workers being asked to train their foreign replacements here on L-1s. The American employees were working at Siemens, Inc. in Lake Mary, Florida. Siemens decided to outsource the work to TCS, hoping to save money. The TCS employees reportedly earned one-third the salary of the U.S. workers they replaced.<sup>14</sup>

The story caught the attention of Congress, and after a series of hearings, some small adjustments were made to the L-1 program to fix some of the problems. But even after these reforms, a 2006 report from DHS' Office of Inspector General found four areas that left the L-1 program vulnerable to abuse.<sup>15</sup> The key problems identified were ones of oversight.

It is important to note that the L-1 program doesn't even have the façade of protection. It has no labor market test, no prevailing wage requirements, and no cap.

## **The results: the H-1B & L-1 visas become the outsourcing visas**

The poor design of the H-1B and L-1 program has led to outcomes directly contradicting the intent of the programs. H-1B and L-1 visas facilitate and accelerate the outsourcing of U.S. jobs, rather than keep them here. Offshore outsourcing firms, which exist to shift work from the United States to low-cost countries, are the leading users of both programs. **Table 1** shows the top 20 H-1B requestors in FY2006. The third column shows whether offshore outsourcing is a significant share of the firm's business line. For firms headquartered in India, the fourth column shows its ranking as a top IT exporter.

The top 11 (and 15 of the top 20) H-1B requestors are firms that specialize in offshore outsourcing, and there is not a single leading offshore outsourcing firm that isn't on the list. The fourth column demonstrates that most of the top India-based firms engaged in offshore outsourcing are major beneficiaries of the H-1B program.

Some people reading this may be surprised to see some firms, like Accenture and IBM, identified as offshore outsourcing firms. What they may not realize is that both of these companies, as well as their counterparts Deloitte & Touche and PricewaterhouseCoopers, have already aggressively moved into this business line. By August, Bermuda-based Accenture will have 35,000 workers in India, more than any other country including the United States. In three years, U.S.-based IBM will have 100,000 workers in India, up from 6,000 just four years ago.

Similarly, the Department of Homeland Security's Office of Inspector General found that nine of the top 10 L-1 petitioning employers specialized in IT offshore outsourcing from India. And the share of L-1B visas, a close cousin to H-1B visas, issued to Indian nationals has risen from 10% in 2002 to 48% in 2005, closely paralleling the rise of the Indian offshore outsourcing industry.

For offshore outsourcing, firms rely on the H-1B and L-1 programs for three principal reasons. First, it facilitates their knowledge transfer operations, where they rotate foreign workers in to learn U.S. workers' jobs—U.S. workers are "transferring knowledge," often under duress. Second, the H-1B and L-1 programs provide them an inexpensive, on-site

**Table 1**  
**Top H-1B requestors, FY2006**

<b>FY06 H-1B request rank<sup>16</sup></b>	<b>Company name</b>	<b>Offshore outsourcing is significant business line</b>	<b>Rank in Indian IT exports (only for firms with HQ in India)<sup>17</sup></b>
1	Infosys Technologies Limited	✓	2
2	Wipro Limited	✓	3
3	Cognizant Technology Solutions	✓	
4	Patni Computer Systems, Inc.	✓	6
5	Mphasis Corporation	✓	14
6	HCL America, Inc.	✓	5
7	Deloitte & Touche LLP	✓	
8	Tata Consultancy Services Limited	✓	1
9	Accenture LLP	✓	
10	Satyam Computer Services Ltd.	✓	4
11	PricewaterhouseCoopers LLP	✓	
12	Tri-Arch International		
13	Timkin Pvt. Ltd.		
14	Jsmn International, Inc		
15	Microsoft Corporation		
16	IGate Mastech, Inc.	✓	
17	New York City Public Schools		
18	IBM Corporation	✓	
19	Covansys Corporation	✓	
20	Tech Mahindra (Americas), Inc.	✓	8

**SOURCE:** Author's analysis.

presence that enables them to coordinate offshore functions. Many functions that are done remotely still require a significant amount of physical presence at the customer site. For example, according to its own financial reporting, Infosys' on-site workers directly accounted for 49.2% of its revenue in its most recent quarter.<sup>18</sup> We also know from Infosys' latest annual report that the majority of their technology professionals in the United States are either on H-1Bs or L-1s.<sup>19</sup> Third, the H-1B and L-1 programs allows the U.S. operations to serve as a training ground for foreign workers who then rotate back to their home country to do the work more effectively than they could have without such training in the United States. A recent *BusinessWeek* story described Wipro's use of the H-1B program this way: "Wipro has more than 4,000 employees in the U.S., and roughly 2,500 are on H-1B visas. About 1,000 new temporary workers come to the country each year, while 1,000 rotate back to India, with improved skills to serve clients."<sup>20</sup>

## What we should do

With respect to the H-1B program, Senator Edward Kennedy recently proclaimed, "We all agree Americans must be hired first." Unfortunately, the facts are clear that current law does not even come close to meeting this principle—H-1B

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workers can be preferred over U.S. workers and can even displace U.S. workers. Groups representing U.S. high-technology workers strongly believe the H-1B and L-1 visa programs are undercutting the labor market and have little integrity.<sup>21</sup> The H-1B and L-1 programs are both broken, but they can be fixed.

The first step is for Congress and the Bush administration to complete a top-to-bottom review of both programs in order to understand their real impacts on the U.S. workforce, and then to align program practice with its intent. The law must be rewritten to establish a market test and the following principles:

- that U.S. workers must not be displaced by guest-workers, and that employers must demonstrate they have looked for and could not find qualified U.S. workers;
- guest-workers must be paid market wages; and
- guest-worker employers should be subject to random audits to ensure they are fulfilling their attestations.

These might not be easy fixes, but they also are not particularly difficult. All solutions must be made with special attention to how they affect the program in practice. For example, for the H-1B program, the first bullet could be met by extending the H-1B dependent attestations to all H-1B employers. But for this reform to be effective it needs to be coupled with sufficient oversight. As described above, even though H-1B dependent firms attest to a labor market test, there are strong indications that many do not comply, yet are never held accountable. In order to close the loop and ensure compliance with the attestations, random audits need to be established. Paying for this additional government oversight could easily be covered by the current visa fees.

This briefing paper has focused almost entirely on the H-1B and L-1 visa programs, but it is important to recognize that the United States' permanent immigration system is connected to these guest-worker programs in multiple ways. Careful attention also needs to be applied toward other green card reforms.

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## Endnotes

1. There are other important reforms to the employment-based green card system that also need to be addressed but they are beyond the scope of this paper.
2. [http://www.dol.gov/\\_sec/stratplan/strat\\_plan\\_2006-2011.htm](http://www.dol.gov/_sec/stratplan/strat_plan_2006-2011.htm).
3. There is one category of firms, so called H-1B dependent employers, which are subject to additional regulations including a form of a labor market test. I will discuss problems with the implementation of these additional regulations later in the oversight section.
4. Carolyn Lochhead. Senate guest worker plan survives attack Boxer, Alabama Republican fail to kill provision, but number of visas is reduced. *San Francisco Chronicle*, Wednesday, May 17, 2006
5. These letters were circulated on an Internet listserv managed by Prof. Norm Matlof of U.C. Davis.
6. <http://www.whitehouse.gov/omb/expectmore/detail.10002378.2005.html>
7. GAO. *H-1B Foreign Workers: Better Tracking Needed to Help Determine H-1B Program's Effects on U.S. Workforce*. GAO-03-883, September 2003, p. 4 ([www.gao.gov/new.items/d03883.pdf](http://www.gao.gov/new.items/d03883.pdf)).
8. Patrick Thibodeau. H-1B backers want bigger increase in cap. *ComputerWorld*, November 29, 2004.
9. Shelley Singh. U.S. visas are not a TCS-specific issue. *Businessworld* (India) magazine, June 2003.
10. U.S. Citizenship & Immigration Service. *Characteristics of Specialty Occupations (H-1B): Fiscal Year 2005*. November 2006.
11. *Washington Post* columnist David Broder wrote last year that Mr. Gates told him that H-1B jobs at Microsoft start at \$100,000. Mr. Gates repeated the same figure during his testimony before the Senate a few weeks ago.
12. GAO. *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*. GAO/HEHS-00-157, p. 34. September 2000.
13. Although there are other ways that an investigation could be triggered, the restrictions on those events make them moot.

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14. Brian Grow. A mainframe-size visa loophole: more companies are using L-1 visas to bring in low-wage foreign info-tech workers—and replace Americans. *BusinessWeek*, March 6, 2003.
  15. U.S. Department of Homeland Security Office of Inspector General. *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*. OIG-06-22, January 2006.
  16. Author's analysis of U.S. Department of Labor's Foreign Labor Certification, FY06 H-1B LCA Data ([www.flcdatacenter.com](http://www.flcdatacenter.com), retrieved March 1, 2007)
  17. NASSCOM List of Top 20 Exporters retrieved March 1, 2007 from: <http://www.rediff.com/money/2006/jun/27tcs.htm>.
  18. Infosys Technologies, "Fact Sheet—Consolidated Financial data—3Q, 2006-07" (p.5). Accessed from <http://www.infosys.com/investor/Q3results2006-2007.asp> on March 22, 2007.
  19. Infosys Technologies, Form 20-F, Annual Report, (pp. 10-11) Accessed from (<http://www.infosys.com/investor/Reports.asp>) on March 22, 2007.
  20. Peter Elstrom. Work visas may work against the U.S.: Indian outsourcers file the most applications for temporary H-1B visas. Are they using them to train staff for jobs abroad?" [www.BusinessWeek.com](http://www.BusinessWeek.com). February 8, 2007.
  21. For example, the IEEE-USA, which represents the policy interests of 220,000 U.S. electrical and electronics engineers, has called for H-1B and L-1 visa reform.