

3-1-2007

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Recommended Citation

Todd H. Goodsell, *On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 BYU J. Pub. L. 153 (2007).

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On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers

I. INTRODUCTION

During the summer of 2006, the nation was abuzz with talk of immigration reform. From Congress to Calexico,¹ talk of amnesty² and anti-terrorism,³ green cards and orange cards,⁴ minute men⁵ and “mini-Ellis Islands”⁶ filled both backyard summer barbecues and news reports. Emotions and rhetoric ran high. It seemed as though everyone had an opinion, but no one could agree on a solution.

Although much of the discussion focused on illegal immigration, or more specifically, illegal immigration at the United States-Mexico border, beneath the surface another debate continued to develop. The legal entry of high-skilled foreign workers into the United States, though neglected by media reports, also divided the nation.⁷

1. See Linda Hales, *At the Borders, Creative Crossings*, WASH. POST, July 29, 2006, at C01 (discussing the architecture at the port of the famed town); see also *U.S. Customs and Border Protection Offers Tips for Summer Border Travel*, US FED NEWS, July 27, 2006 (offering tips for legal border crossings at the border town).

2. See Tamar Jacoby, *Amnesty is Not a Four-Letter Word*, L.A. TIMES, July 29, 2006, at B17.

3. See Tim Jones, *Canadians Also Paying Price of 9/11 Security*, CHI. TRIB., May 24, 2006, at C1.

4. On May 22, 2006, Senator Diane Feinstein (D-CA) proposed an amendment to the Senate Comprehensive Immigration Reform Bill which provided for the development of an “orange card.” 152 Cong. Rec. S. 4849, 4851–60 (2006). The orange card, an obvious reference to the green card, was to be a biometric identification card given to undocumented immigrants who paid taxes and passed background checks. *Id.* at 4852. The orange card would be a step towards the eventual goal of obtaining a green card. *Id.* The amendment to the bill ultimately failed the next day by a largely partisan vote of 37-61. 152 Cong. Rec. S. 4924, 4936 (2006).

5. See Michael Stetz, *Border Marchers, Minutemen Swap Verbal Jabs*, SAN DIEGO UNION-TRIB., June 4, 2006, at B2.

6. Speaking from the Conservative think tank, the Heritage Foundation, Representative Mike Pence (R-Ind.) proposed what he viewed as a middle ground between amnesty and deportation with an innovative market twist. The plan intended to encourage self-deportation by establishing privately run worker placement agencies outside of the country. He labeled these agencies “Ellis Island Centers.” The Representative claimed that through these centers, people could be back in the country working in a week or less. He envisioned employers helping undocumented workers prepare for registration at these centers. At these “mini-Ellis Islands,” people were to be fingerprinted, screened and then issued “W-visas.” See Mike Pence, R-Ind., U.S. House of Rep., *Border Security and Immigration: Building a Principled Consensus for Reform*, Address, (May 23, 2006) in HERITAGE LECTURES, June 2, 2006, at 4.

7. See S. Mitra Kalita, *Most See Visa Program as Severely Flawed*, WASH. POST, Mar. 31,

Every year the United States grants thousands of H-1B visas, which admit foreign workers into the country to perform specialty occupations vital to the national economy.⁸ Determining whether to expand the H-1B program to admit more workers is a topic of heated debate. Those in favor of the program say it keeps the United States competitive in a global economy, that it admits “the world’s best and brightest,”⁹ and that it is necessary to make up for labor shortages in the nation’s technical and scientific workforce.¹⁰ Those opposed to the program question the extent of the labor shortage¹¹ and contend that the system also costs Americans thousands of jobs as companies use the program as a source of cheap labor.¹² Advocates from both sides have staked out seemingly irreconcilable positions on the matter. Major business leaders, such as a Bill Gates and Scott McNealy, the head of Sun Microsystems,¹³ have courted Congress and called for an expansion of the program, warning the nation of the need to bring great minds to America. Labor unions¹⁴ and minority-rights groups¹⁵ have expressed concerns about the effects of the system on American jobs. Even gay rights advocates have called for reform of the system.¹⁶

2006, at D01 (“Somewhere in the debate over immigration and the future of illegal workers, another, less-publicized fight is being waged over those who toil in air-conditioned offices, earn up to six-figure salaries and spend their days programming and punching code.”); Deborah Rothberg, *H-1B Increase Quietly Passes First Hurdle*, EWEEK.COM, May 31, 2006, <http://www.eweek.com/article2/0,1759,1969617,00.asp>.

8. See e.g., Carolyn Lochhead, *Immigration Bill Would Add Visas for Tech Workers*, S.F. CHRON., A1 (March 10, 2006) (discussing the number of workers admitted to the U.S. under the H-1B program); see also *infra* Part II.

9. Lilia Rissman, Letter to the Editor, *Legal Immigrants*, CHI. TRIB., June 5, 2006, at 18 (“[N]ew immigration laws should also ensure that the U.S. will continue to attract the world’s best and brightest.”); see also Senator John Cornyn, Editorial, *Bring Best and Brightest*, San Antonio Express-News, July 18, 2006, at 6B (emphasizing the importance of attracting “the best and brightest individuals to work here in the U.S. and to ensure that these talented workers and their jobs stay here in the U.S.”).

10. John Carroll, *Why We Need H-1B Professionals*, ZDNet, Feb. 3, 2003, http://news.zdnet.com/2100-9595_22-983066.html; see also Rissman, *supra* note 9.

11. See *infra* note 33.

12. See Paul Donnelly, *H-1B is Just Another Government Subsidy*, COMPUTERWORLD, July 22, 2002, www.computerworld.com/careertopics.careers.recruiting/story/0,10801,72848,00.html; Sharon Gaudin, *Are H-1B Visas a Cog in the Offshoring Machine?* IT MGMT., Apr. 14, 2006, <http://itmanagement.earthweb.com/career/article.php/3599141>.

13. Alan Murray, *High-Tech Titans Unite on Lifting Visa Caps*, WALL ST. J., June 14, 2006, at A2.

14. See, e.g., AFL-CIO Executive Council, *Reform the H-1B and L-1 Guest Worker Visa Programs*, Aug. 6, 2003, available at <http://aflcio.org/aboutus/thisistheafclcio/ecouncil/ec08062003e.cfm>.

15. Carrie Kirby, *On the Sidelines: H-1B Leaves Minority Workers on Sidelines, Groups Say*, S.F. CHRON., Oct. 19, 2000, at B1.

16. See Susan Laurel Hodges, *Left Out by the Legal Route In*, WASH. POST, June 12, 2006, at A21 (calling for increase in H-1B visa cap so that it will be easier for the author’s partner to enter the country, as they cannot legally marry).

Questions as to whether there is truly a high-tech labor shortage or whether businesses are merely looking to avoid training and compensation costs are difficult to answer.¹⁷ As has been rightly pointed out, “this has largely been a controversy with much noise and relatively little light.”¹⁸ What is certain is that the current system is flawed.¹⁹ Numbers aside, abuse of the H-1B system is evident from applications approved for a broad range of non-technical occupations including: accountants, newspaper reporters, dance instructors, restaurant hostesses, and nannies.²⁰

Much of the contention centers around the number of visas issued each year: an economic debate about whether an influx of immigrants will hurt or benefit the U.S.²¹ This Article attempts to avoid adopting a position on either side of the numbers question, and instead focuses on improving the current system so that it functions as intended, balancing what has been described as the “fundamental tension” underlying the U.S. immigration debate, namely “an immigration policy that facilitates the employment of non-citizen workers by U.S. employers and seeks to protect U.S. labor from competition by non-citizen workers.”²² Fraud and corruption in this program is troubling as any future guest-worker

17. Indeed, such questions may even be unanswerable. See Roger Waldinger and Christopher L. Erickson, *Temporarily Foreign? The Labor Market for Migrant Professionals in High-Tech at the Peak of the Boom*, 24 COMP. LAB. L. & POL’Y J. 463, 465 (2003).

18. *Id.* at 464.

19. Kalita, *supra* note 7, at D01 (“[U]nderlying the [H-1B debate] is a belief, even among the workers themselves, that the current H-1B program is severely flawed.”); see also Note, *Looking to the North While Playing Doctor: Solving the H-1B Visa Problem by Following Canada’s Lead*, 10 Minn. J. Global Trade 433, 446 (2001) [hereinafter *Looking to the North*] (“The United States Congress is painfully aware that it is impossible to please everyone all of the time; however, it is difficult to find even one soul who lauds the H-1B legislation. . . .”) (citing Lisa Vaas, *What H-1B Bill Will Come Out Ahead?*, EWEEK, Sept. 18, 2000, at 28).

20. *Testimony of John Miano Before the Subcomm. on Immigr., Border Security, and Claims, H. Judiciary Comm.*, 109th Cong. 7 (2006) (statement of John Miano, Former President, Programmers Guild); available at <http://judiciary.house.gov/media/pdfs/miano033006.pdf> [hereinafter Miano 2006]. The government makes Labor Condition Applications available to the public. *Id.*

21. See George Newman, Editorial, *A Plea for Sanity in the Immigration Debate*, ST. LOUIS POST-DISPATCH, Aug. 21, 2006, at B9. In this editorial, an immigration attorney mentions two studies by prominent scholars reaching opposite conclusions: “George Borjas of the John F. Kennedy School of Government at Harvard University argues persuasively that the large influx of workers will seriously damage the U.S. economy. David Card at the University of California at Berkeley argues just as persuasively that it will be enormously beneficial.” *Id.* For a discussion of the complexity surrounding the economic debate see Roger Lowenstein, *The Immigration Equation*, NY TIMES MAGAZINE, July 9, 2006, at 36.

22. Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L.J. 967, 968 (2002). Alternatively, this can also be seen as “the tension between the desire of U.S. employers for foreign labor and the wish of the U.S. government to protect the interests of U.S. workers.” Carl Falstrom, *Swimming in the International Labor Pool: What Employers Need to Know About Recent Changes to the H1-B Program*, 27 S.F. ATT’Y 31, 33 (2001).

program will likely reflect the current legislative scheme.²³

Part II of this Article provides an overview of the H-1B program, the system designed by Congress to bring foreign workers into the United States temporarily. Part III presents views from both sides of the debate in order to provide a context for the proposed solution and illuminate the flaws and controversy within the current system. Although H-1B visa holders work in a broad range of careers,²⁴ this Article focuses on computer programmers, as this newly-unionized group has recently made lobbying efforts²⁵ and the computer industry receives about one-third of the H-1B visas issued each year.²⁶ This section highlights one of the unforeseen flaws of the present H-1B visa system, “bodyshopping,” the name given to the practice whereby companies bring H-1B visa workers into the country and then contract the workers out to other companies on a work-for-hire basis, in an attempt to avoid statutory wage requirements.²⁷ Part IV advocates a statutory amendment to eliminate bodyshopping, a change already enacted in a similar visa program and welcomed by labor advocates. Some might say that changing the system in this fashion would limit foreign workers’ mobility and subject them to increased abuse at the hands of employers, thereby discouraging “the world’s best and brightest” from working in America. Part V responds to such potential critics by demonstrating the protections that already exist for foreign workers within the current system. Part VI offers a brief conclusion.

23. As one congressional Representative stated, any guest-worker program developed in the future will be based on flawed systems such as the H-1B program. Statement of Congressman Issa, Before the H. Subcomm. On Immigr., “Is the Department of Labor doing enough to protect U.S. workers?” (June 22, 2006) (based on notes in author’s possession).

24. *See supra* note 20.

25. These efforts can be seen in the testimony of John Miano, *infra* Part III.

26. Sarah Ryley, *Thousands of Skilled Professionals from Overseas Work for Less Money in Positions Americans Want, Critics Say*, DETROIT NEWS, September 30, 2006, at 1B (“31 percent of H-1B visa holders work in computer-related fields.”). According to Norm Matloff, “the vast majority of H-1Bs in high-tech positions are computer programmers. . . .” Norm Matloff, *On the Need for Reform of the H-1B Non-immigrant Work Visa in Computer-related Occupations*, 36 U. MICH. J.L. REFORM 815, 831 (2003), available at <http://heather.cs.ucdavis.edu/Mich.pdf>. Matloff relates that the label “programmer” is rarely used in Silicon Valley, and that in the software and hardware industries, programmers are often referred to as “software engineers.” *Id.* at 831–32.

27. The practice has also been referred to as “job shopping” or “benching,” but the latter is actually a description of one aspect of the process. *See infra* notes 113–14 and accompanying text.

II. OVERVIEW

This section briefly introduces the H-1B visa by providing an overview of the program and the application process. An explanation of the basic statutory scheme is necessary for understanding the problems with the current system and the solution proposed by this Article.

A. H-1B Overview²⁸

The H-1B program was established by the Immigration Act of 1990 to allow nonimmigrant aliens²⁹ to work in specialty occupations³⁰ in the United States for up to six years.³¹ Although an H-1B visa does not directly result in legal permanent residence, visa holders may apply for permanent residency through employer sponsorships.³² H-1B applicants do not need to show that they intend to remain in the country beyond those six years.³³

Currently, the yearly cap on H-1B visas is 65,000.³⁴ In response to industry claims of a technology labor shortage,³⁵ Congress raised the limit to 115,000 during 1999-2000 and to 195,000 during 2001-2003, but

28. For a somewhat dated, but more extensive review of the H-1B program, see Brian John Halliday, *In Order to Hire the Best Person for the Job, We Have to do What? A Look at the H-1B Visa Program: The Short-term Solution for Continued American Competitiveness in the Global High-Technology Marketplace*, 11 U. FLA. J. L. & PUB. POL'Y 33, 35-48 (1999).

29. For a definition of *nonimmigrant* see 8 U.S.C. § 1101(a)(15) (2000).

30. A specialty occupation is one that "requires theoretical and practical application of a body of highly specialized knowledge and . . . attainment of a bachelor's or higher degree or its equivalent." 8 U.S.C. § 1184(i)(1)(A) (2000). U.S. Citizenship and Immigration Services (USCIS) offers the following as examples of specialty occupations: "architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts." USCIS, H-1B Frequently Asked Questions, <http://www.uscis.gov/graphics/howdoi/h1b.htm> (last visited June 19, 2006) [*hereinafter* FAQ].

31. After that time, an alien must remain outside of the country for one year before he/she can be approved again. FAQ, *supra* note 30.

32. Although the U.S. Government allots 140,000 employment-based green cards annually, many of these go unused due to the backlog that plagues the immigration system. See David C. Yang, *Globalization and the Transnational Asian "Knowledge Class"*, 12 ASIAN L.J. 137, 147 (2005).

33. See Susan Montalvo-Gesser, *Unilateral Versus Multilateral Approach to Labor Migration: Search for an Adequate Way of Negotiating Foreign Workers' & Domestic Employers' Interests and National Economic Vitality*, 43 BRANDEIS L.J. 261, 265 (2004) ("The H-1B visa allows a six-year residence in the United States without requiring a foreign professional to demonstrate against the presumption that they intend to permanently immigrate to the United States.") (citing Demetrios G. Papademetriou, *The Shifting Expectations of Free Trade and Migration in NAFTA's Promise and Reality: Lessons from Mexico for the Hemisphere* 39, 42 (2003)).

34. 8 U.S.C. § 1184(g)(1)(A)(i) (2000).

35. Matloff, *supra* note 20, at 816. Matloff presents several studies that question the validity of claims to a shortage. *Id.* at 833-45.

the limit returned to 65,000 in 2004.³⁶ Additionally, 20,000 visas go to those with graduate degrees from U.S. institutions and there are no limits on the number of visas issued to universities and research institutions.³⁷

The recently passed Senate Comprehensive Immigration Reform Bill,³⁸ currently awaiting conference committee negotiations with the House,³⁹ proposes to raise the current H-1B cap.⁴⁰ Much of the attention this past summer focused on undocumented immigration,⁴¹ and it is uncertain whether the proposed increases to the H-1B cap will survive negotiations.⁴²

The demand for H-1B visas is great. The quota for the visas was exhausted on the first day of fiscal year 2005, and in 2006, the quota was exhausted six weeks prior to the start of the fiscal year.⁴³ This year, U.S. Citizenship and Immigration Services (USCIS) announced that the quota for fiscal year 2007 was met on May 26, 2006.⁴⁴

36. See 8 U.S.C. § 1184(g)(1)(A) (2000). Pending legislation could allow for 115,000 with an automatic twenty percent increase each year the cap is met. See *infra* note 41.

37. 8 U.S.C. § 1184(g)(5)(c); see also Testimony to the U.S. H. Judiciary Comm., Subcomm. on Immigr. and Claims, 106th Cong. (1999) (statement of John M. Miano, President, Programmers Guild), available at http://www.colosseumbuilders.com/articles/miano_testimony.html [hereinafter Miano 1999]. Within the 65,000 visas, 6,800 visas are reserved for Singapore and Chile under free trade agreements. *Id.*

38. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

39. Last year, the House prepared two bills proposing to close some of the loopholes discussed below. However, neither the Defend the American Dream Act of 2005, H.R. 4378, 109th Cong. (2005), nor the USA Jobs Protection Act of 2005, H.R. 3322, 109th Cong. (2005), has made it beyond the House Judiciary Committee. The bills sought to “increase the monitoring and enforcement authority of the Secretary of Labor,” eliminate bodyshopping (for a description of bodyshopping, see *infra* Part III.B.3), and create a private right of action for individuals adversely affected by the hiring of an H-1B worker. It remains to be seen whether any aspects of these two pieces of legislation will resurface during the upcoming committee negotiations.

40. The bill proposes to increase the annual cap from 65,000 to 115,000. Each year the cap is met, the subsequent year’s cap will increase to 120 percent of the previous year’s total. See *id.* This means if 115,000 visas are issued during the first year after the law is passed, 138,000 will be allowed during the next. If that cap is met, the following year would allow 165,600 and so forth.

41. “The immigration debate swirling through Congress this summer is mostly about low-skilled immigrants. Largely ignored are the highly skilled legal immigrants. . . .” June Kronholz, *Under a Cloud: For Dr. Sengupta, Long-term Visa is a Long Way Off*, WALL ST. J., June 27, 2006, at A1. Groups affected by this legislation, however, have weighed in on the matter. Microsoft’s Bill Gates released a statement applauding the Senate for its proposed reforms. Microsoft, Statement From Bill Gates on Senate Passage of Comprehensive Immigration Reform (May 25, 2006), <http://www.microsoft.com/presspass/press/2006/may06/05-25StatementBillPR.mspx>. Labor groups have already spoken out against it. See, e.g., Michael Cooney, Editorial, *H-1B Limits Raised, Controversy Ignited*, NETWORK WORLD, June 5, 2006, <http://www.networkworld.com/columnists/2006/060506editorial.html>.

42. The House Subcommittee on Immigration did hold a hearing on the efficacy of the Labor Department in enforcing the aims of the H-1B program, but its effect on pending legislation cannot be determined at this time.

43. *Id.*

44. Press Release, U.S. Citizenship and Immigration Services, USCIS Reaches H-1B Cap (June 1, 2006), available at http://www.uscis.gov/files/pressrelease/FY07H1Bcap_060106PR.pdf.

*B. The Application Process*⁴⁵

Applying for an H-1B visa requires sponsorship by a U.S. employer. The employer must file a Labor Condition Application (LCA) affirming:

- It will pay the H-1B worker at least the wages paid to other employees with similar experience and qualifications or the local prevailing wage, whichever is greater;⁴⁶
- There is no current strike or lockout in the occupational qualifications requested;
- The employer will provide notice of the application filing to other employees or a bargaining representative.⁴⁷

Note that an employer does not need to certify that it has attempted to offer the position to workers already in the United States or that hiring an H-1B worker will not displace any U.S. workers. In contrast, if an employer is H-1B dependent,⁴⁸ the employer must also attest:

- It will not “displace any similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the date of petition filing;”
- It will not “place any H-1B worker with any other employer or at another employer’s worksite unless first making a good faith inquiry of the employer at the secondary worksite and obtaining assurances that the other employer will not displace a U.S. worker within 90 days before or after placement of the H-1B worker;”
- It will “[t]ake good faith steps to recruit a U.S. worker for the

45. For a practitioner’s overview of the process see generally, John F. Koryto & Michael E. Stroter, *Business/Employment Law: Get into the Game: Hiring the Best from Around the Globe Isn’t Just for Playing Field*, 84 MICH. B. J. 26 (2005).

46. Regulations allow employers to select a prevailing wage from a number of different sources as long as it is “calculated consistent with recognized industry standards.” U.S. Department of Labor, Fact Sheet #59: Changes Made By the H-1B Visa Reform Act of 2004, <http://www.dol.gov/esa/regs/compliance/whd/whdfs59.htm> (Last visited June 19, 2006) [*hereinafter* Fact Sheet]. Department of Labor wage surveys are available for prevailing wage purposes and include four levels based on experience, education, and level of supervision. *Id.*

47. U.S. Department of Labor, Employment and Training Administration, Form ETA 9035, available at <http://workforcsecurity.doleta.gov/foreign/pdf/eta9035v50.pdf> (last visited June 29, 2006).

48. An employer is “H-1B dependent” if it meets one of three standards: it has more than fifty employees, and fifteen percent or more of its employees are H-1B visa holders; it has twenty-six to fifty employees, and the company employs more than twelve H-1B visa holders; or it has twenty-five or fewer employees, and the company employs more than seven H-1B workers. 20 C.F.R. § 655.736(a)(1) (2006).

position for which the H-1B worker is sought and offer the job to any U.S. worker who applies for the job and is equally or better qualified.”⁴⁹

The employer must then file the certified LCA along with a Form I-129 petition (Petition for a Nonimmigrant Worker) and a fee to USCIS, after which the alien may apply for the H-1B visa.⁵⁰ Thus the worker is dependent on a U.S. employer to enter and remain in the country. The entire application process generally lasts several months.⁵¹

Although Congress designed the system with a goal of protecting the interests of U.S. workers, the LCA process remained flawed. Prior to fiscal year 2006, the law only allowed the Department of Labor to ensure the Labor Condition Application form had been filled out correctly.⁵² Now, the Department of Labor may investigate the contents of an LCA:

[W]hen the Secretary of Labor personally certifies that there is reasonable cause to believe that the employer is not in compliance . . . or when a credible source provides information that includes allegations that within the past [twelve] months an employer has willfully failed to meet an LCA condition, has engaged in a pattern or practice of violations or has committed a substantial failure to meet an LCA condition that affects multiple employees.⁵³

49. See Fact Sheet, *supra* note 48.

50. See 20 C.F.R. § 655.700 (2006); FAQ, *supra* note 30.

51. For estimates of the length of time required for H-1B applications, see Adam Green, Frequently Asked Questions, Law Offices of Adam Green, <http://www.employment-family-sponsored-immigration.com/faq.html> (last visited Sept. 14, 2006) (two to three months); University of Michigan International Center, Employment Information, <http://www.umich.edu/~icenter/intlstudents/employ/H1-BFAQ.html> (last visited Sept. 18, 2006) (three to six months); University of Tennessee, How LONG Does It Take to Process an H-1B Application? <http://web.utk.edu/~globe/iss/forms/h1processingtimes.pdf> (last visited Oct. 5, 2006) (Two to nine months, depending on immigration status of the applicant); Hunton & Williams, The New Fiscal Year Begins October 1, 2004: How Long Will H-1B Visas Last?, BUS. IMMIG. ALERT (Aug. 2004), available at http://www.hunton.com/files/tbl_s47Details/FileUpload265/738/Business_Immigration_Alert_H-1B_CAP.pdf (Applications can be filed, at the earliest, six months before a job's start date).

52. See John Miano, *The Bottom of the Pay Scale: Wages for H-1B Computer Programmers* (Center for Immigr. Stud., D.C.), Dec. 2005, available at <http://www.cis.org/articles/2005/back1305.pdf> [hereinafter CIS]; Fact Sheet, *supra* note 48.

53. See Fact Sheet, *supra* note 48. Additionally, under the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), the Office of Special Counsel (OSC) in the Civil Rights Division of the U.S. Department of Justice is responsible for handling “failure to select” charges, where aggrieved parties may file complaints against employers for “seek[ing] to hire an H-1B visa holder over an equally or better qualified U.S. worker.” Statement of Juan Carlos Benitez Before the Subcomm. on Immigr., H. Judiciary Comm. 107th Cong. 7 (2002) (statement of Juan Carlos Benitez, Special Counsel for Immigr. Related Unfair Employment Practices, C.R. Div., U.S. Dep’t of Just.); available at <http://judiciary.house.gov/legacy/benitez032102.htm>.

Even though attempts to correct the system indicate progress towards its dual goals of protecting native workers and attracting foreign talent, as the next section demonstrates, the current scheme still contains noticeable and exploited flaws.

III. FLAWS IN THE SYSTEM: BODYSHOPPING UNCOVERED

This section explains the controversy surrounding the current system by presenting views from both sides of the debate. It is hoped that by discussing the views of three individuals who have published on the topic of H-1B reform, the reader will gain an enriched overview of the controversy. Specifically, this section will analyze the perspectives of John Miano, founder and current legal counsel of the Programmers Guild—a union for computer programmers; Stuart Anderson, director of the National Foundation for American Policy; and finally, Norm Matloff, a computer science professor and frequent writer on the H-1B program. The biases of each of these individuals will become quite obvious in this section. The pro-labor arguments of Miano provide a context for Anderson's pro-immigration positions, and Matloff's pro-labor responses, in turn, further develop the context for both. After briefly introducing these individuals, this section explores the contentions surrounding several of the flaws of the current system—focusing on one problem in particular, bodyshopping—by summarizing the writings and testimony before Congress of the three individuals concerning the H-1B program. Seeing the dialogue concerning this topic presented in one place will hopefully help the reader recognize the difficulty in identifying and remedying the problems in the current system.

A. Individual Introductions

John Miano worked as a computer programmer for eighteen years and has published several articles and books on programming.⁵⁴ In 1998, Miano founded the Programmers Guild to represent the interests of American computer programmers.⁵⁵ Miano has since stepped down as chairman of the Guild, and he now runs his own consulting agency.⁵⁶ In

⁵⁴. Miano 1999 *supra* note 38; Miano 2006, *supra* note 20.

⁵⁵. Miano 1999 *supra* note 38.

⁵⁶. Colosseum Builders, Inc., Company Profile, <http://www.colosseumbuilders.com> (last visited Oct. 6, 2006). Miano also has his own blog at <http://johnontech.blogspot.com/>. The site was started in January 2006 and currently only has seven brief postings that comment on various topics including H-1B visas.

2002, he enrolled in law school where he researched data on Labor Condition Applications for H-1B workers.⁵⁷ He recently published his findings through the Center for Immigration Studies (CIS).⁵⁸

Stuart Anderson is the Executive Director of the National Foundation for American Policy (NFAP).⁵⁹ Anderson is recognized as the author of legislation which expanded the H-1B program in 1998 and 2000.⁶⁰ A former Cato immigration specialist, Anderson also worked at the Immigration and Naturalization Service (INS) as Executive Associate Commissioner for Policy and Planning and as Counselor to the Commissioner from August 2001 to January 2003.⁶¹ He too has testified before Congress on immigration matters and recently produced a report establishing a general defense of the H-1B program and refuting specific claims of Miano's CIS study, "H-1B Professionals and Wages: Setting the Record Straight."⁶²

57. Miano 2006, *supra* note 20, at 5.

58. CIS, *supra* note 54. Many argue that the motivations of those who oppose immigration expansion contain powerful racial undertones, *see generally e.g.*, Yang, *supra* note 33, and it should be mentioned that Miano has also published several articles and comments on the controversial immigration website VDARE.com. The site has been labeled by the Associated Press as an "immigration-focused Web magazine." Laura Wides-Munoz, *Spanish 'Star-Spangled Banner' Draws Ire*, Apr. 27, 2006, <http://www.breitbart.com/news/2006/04/27/D8H8LGDO0.html>. However, Media Matters, a media watchdog group whose self-declared mission is "correcting conservative misinformation in the U.S. media," *Media Matters for America, Our Mission, Who We Are*, http://mediamatters.org/about_us/ (last visited June 19, 2006), relates that VDARE.com "publishes the work of 'white nationalists'" and points out that "the Southern Poverty Law Center added VDARE.com to its list of hate websites." J.B., *Associated Press Identified VDARE.com as an 'Immigration-focused Web Magazine' - Not Noting That It Publishes 'White Nationalists'*, MEDIA MATTERS FOR AMERICA, (May 2, 2006), <http://mediamatters.org/items/200605020003>. Articles on VDARE.com include: Bryanna Bevens, *How about 'National Hispanic Crime Prevention Awareness Month'?*, VDARE.COM, Sept. 29, 2004, http://www.vdare.com/bevens/hispanic_month.htm and Paul Craig Roberts, *White Americans: Second Class Citizens*, VDARE.COM, Feb. 19, 2002, http://www.vdare.com/bevens/hispanic_month.htm. In addition, the site includes a guide on how to report illegal aliens. Juan Mann, *2006 Reporting Aliens Update*, VDARE.com, Feb. 20, 2006, <http://www.vdare.com/faq.htm>. Miano's writings include: John Miano, *Remember 9/11 by Doing Something About Software Terrorist Threat*, VDARE.COM, Sept. 10, 2002, http://www.vdare.com/misc/miano_terrorist.htm, and *Ten Principles of Immigration*, VDARE.COM, Oct. 10, 2001, http://www.vdare.com/fulford/contest_miano.htm.

59. National Foundation for American Policy, *Biographies*, <http://nfap.com/about/biographies/> (last visited June 19, 2006). Anderson has been described as "an ideological libertarian," who "despise[s] . . . computerized documentation and visa-tracking." Nicholas Confessore, *Borderline Insanity*, WASH. MONTHLY, May 2002, available at <http://washingtonmonthly.com/features/2001/0205.confessore.html>, cited by Norm Matloff, *Stuart Anderson Criticizes Miano Study*, H-1B/L-1/OFFSHORING E-NEWSLETTER, Mar. 14, 2006, <http://heather.cs.ucdavis.edu/Archive/NFAP.txt> [*hereinafter* E-NEWSLETTER].

60. Matloff, *supra* note 26, at 865.

61. National Foundation for American Policy, *supra* note 63.

62. *H-1B Professionals and Wages: Setting the Record Straight*, NFAP POLICY BRIEF (Nat'l Found. for Am. Pol'y, Arlington, Va.), Mar. 2006, available at <http://nfap.com/researchactivities/articles/NFAPPolicyBriefH1BProfessionalsAndWages0306.pdf> [*hereinafter* NFAP BRIEF]. According to Miano, Anderson was contracted to respond to the CIS report. Colosseum Builders, Inc., *Frequently Asked Questions*, <http://www.colosseumbuilders.com/cisfaq.htm> (last visited June

Norm Matloff is a computer science professor at UC Davis. He has written frequently on high-skilled worker immigration,⁶³ including a law review article published in the Michigan Journal for Law Reform.⁶⁴ In May 2006, he produced an article for CIS on student visas.⁶⁵ He has also testified before Congress on the H-1B visa program.⁶⁶

B. Discussion of the Problems in the Current H-1B System

1. Problems with Labor Condition Applications.

An initial hurdle in discussing H-1B reform is that LCA information is somewhat limited. According to John Miano, the Government makes detailed LCA information available, but does not provide any specific data for the corresponding H-1B visa.⁶⁷ He alleges that under the current system there is no way to tell what happens after the labor certification process.⁶⁸ Miano writes that one LCA “can be used for visa applications for multiple H-1B workers. . . . and there is no way to tell what the employer actually paid the H-1B worker.”⁶⁹ Based on his research, of the 307,779 LCAs processed during fiscal year 2005 only 848 were rejected.⁷⁰ While examining LCAs, Miano observed evidence suggesting flaws in the system, including:

20, 2006). Miano does not indicate who he suspects contracted Anderson. *Id.*

63. *E.g.*, Norm Matloff, *Best? Brightest? A Green Card Giveaway for Foreign Grads Would Be Unwarranted*, (Center for Immigr. Stud., D.C.), May 2006, available at <http://www.cis.org/articles/2006/back506.html>. Like Miano, Matloff has also written on VDARE.com. *E.g.*, Norm Matloff, *Oakland's Bilingualism: No American Need Apply*, VDARE.COM, Apr. 27, 2001, http://www.vdare.com/misc/matloff/oaklands_bilingualism.htm.

64. Matloff, *supra* note 26.

65. Norm Matloff, *Best? Brightest? A Green Card Giveaway for Foreign Grads Would Be Unwarranted*, (Center for Immigr. Stud., D.C.), May 2006, available at <http://www.cis.org/articles/2006/back506.html>.

66. Debunking the Myth of a Desperate Software Labor Shortage: Hearing Before the Subcomm. on Immigr., H. Judiciary Comm., 105th Cong. (1998) (testimony of Norm Matloff), updated version available at <http://heather.cs.ucdavis.edu/itaa.real.pdf>.

67. CIS, *supra* note 54, at 6.

68. *See id.*

69. Miano 2006, *supra* note 20, at 6. Miano also discusses further problems that render the LCA process ineffective. He alleges the Federal government granted more visas than statutorily allowed. *Id.* He claims “USCIS has not produced the congressionally mandated reports on the H-1B program since [fiscal year] 2003.” *Id.* As a result, Miano asserts, “[n]o one knows how many people are in the U.S. on H-1B visas,” nor does anyone know “how many workers on H-1B visas remain illegally in the United States after their visas expire.” *Id.*

70. Miano 2006, *supra* note 20, at 11. Miano suggests this is because the Department of Labor only checks for incomplete or obviously inaccurate forms. *Id.*

- Applications made for computer programmers by businesses that do not normally employ programmers (e.g., stores and restaurants).
- Employers with absurdly low salaries for programmers, especially those with all of their H-1B workers being paid below the 10th percentile [of the industry].
- Small companies whose number of H-1B visa requests appear to be more than they could possibly employ. . . .
- Employers requesting large numbers of H-1B workers in locations not likely to have significant numbers of programming jobs, suggesting the employers are using one location for wage certification and other locations for the actual job site. . . .
- The LCAs for many companies show a disregard for the formalities of business associations. . . . [e.g.,] limited partnerships doing business as “corporations” and entities that have submitted LCAs under different forms of organization].⁷¹

Despite the difficulties associated with gathering accurate data, Miano’s limited findings do indicate that various forms of abuse do indeed occur within the current system. Although exact numbers prove difficult to verify,⁷² Miano builds a strong foundation for the need for reform.

2. *Wage Questions*

Further problems with LCAs arise when one tries to gather useful data on wages. Claims that H-1B workers are paid less are difficult to substantiate as wage data used to complete LCAs come from varying sources. Miano compared employer prevailing wages claims on LCAs to Occupational Employment Statistics (OES) data and concluded that the employer figures do not reflect actual prevailing wages.⁷³ He acknowledges there are a number of problems in making these comparisons because employers do not disclose how they arrive at prevailing wage claims and many of their purported sources do not match the data.⁷⁴ To illustrate this he refers to fiscal year 2004, where he found employers had used over seventy-five different sources to report prevailing wages.⁷⁵ He found the lack of standardization for encoding of

71. CIS, *supra* note 54, at 10.

72. *See infra* Part III.B.2.

73. Miano 2006, *supra* note 20, at 9.

74. *See id.* at 6.

75. These included: Watson Wyatt, National Association of Colleges and Employers, Employer Wage Surveys, MIT Wage Survey, and Occupational Employment Statistics. CIS, *supra* note 54, at 8–9.

occupations in LCA data leads to imprecision in any attempted analysis.⁷⁶

Despite these difficulties, based on his studies, Miano concluded that reported H-1B wages are significantly lower than U.S. workers' wages. Specifically, he offers the following findings:

- [W]ages listed for H-1B workers averaged about \$13,000 less than the median U.S. wage for U.S. workers in the same occupation and state.
- The wages for the majority of H-1B workers were in the bottom 25th percentile of U.S. wages for occupation and state.
- Wages for only 16% of H-1B workers were above the median U.S. wage for occupation and state.⁷⁷

Thus, Miano concludes, "prevailing wage provisions in the H-1B program do not result in H-1B workers actually being paid the prevailing wage."⁷⁸ In fact, his findings concluded that "prevailing wage claims [tend] to be even lower and more concentrated at the low end of the wage scale than H-1B wages"⁷⁹ and that despite provisions in the law to prevent this from occurring, "the overwhelming majority of H-1B computer workers are actually paid wages substantially lower than Americans in equivalent positions."⁸⁰

Employers claim that H-1B visas bring in highly-skilled workers, but Miano argues the majority of the applications are for entry-level positions.⁸¹ He writes that many businesses use the H-1B program to import "workers at the very bottom of the wage scale," not highly-skilled workers.⁸² He claims that "[t]he exhaustion of the H-1B quota may reflect employers' interest in lowering labor costs or widespread fraud rather than an insufficient number of visas."⁸³

Despite Miano's claims, Stuart Anderson states that no evidence exists that companies maintain two sets of pay scales (i.e., one for foreign-born and one for natives).⁸⁴ Anderson contends that "[t]hose who would bar the door to foreign nationals being hired on H-1B visas . . . need to explain why it would be better if those individuals were hired in

76. *Id.* at 6.

77. Miano 2006, *supra* note 20, at 12.

78. CIS, *supra* note 54, at 7.

79. *Id.*

80. *Id.*

81. *See* Miano 2006, *supra* note 20, at 1.

82. CIS, *supra* note 54, at 10.

83. *Id.* at 11.

84. *Id.*

other nations by either U.S. or foreign companies.”⁸⁵ Anderson argues that the OES data used by Miano is problematic when compared to wages on LCAs because:

- the survey included forms of compensation such as bonuses which are prohibited on Labor Condition Applications;
- the data reflected all workers at a firm, not just new hires; and
- the OES estimates are not age-adjusted, which makes them higher than prevailing wages.⁸⁶

As further evidence of the unreliability of the Matloff study, Anderson states that simply averaging the minimum with the maximum salary on an LCA results in an average salary of \$66,885—36% more than the average minimum salary on LCAs and 3% more than the OES salary cited by Miano.⁸⁷ To substantiate his contentions, Anderson’s think tank, the NFAP, asked a law firm to gather data on H-1B cases⁸⁸ and found that the average actual wage paid to H-1B visa holders was more than twenty-two percent higher than the prevailing wage.⁸⁹ Thus, Anderson’s findings appear to contradict those of Miano.

However, in response to Anderson, Norm Matloff argues that Anderson’s underpayment data is calculated relative to the prevailing wage, which Matloff claims is actually below the market wage.⁹⁰ Thus the figures cited by Anderson may not be as conclusive as the NFAP report seems to suggest. This article does not intend to imply that either of these figures is more valid than the other. However, this controversy demonstrates that the problems associated with exploring H-1B abuse become increasingly difficult as opposing contentions are supported by seemingly authoritative statistics.

Anderson also cites research findings to counter allegations that employers want H-1B workers so that they can pay them less. He refers to a study, which found foreign-born and native professionals earn “virtually identical salaries in math and science fields.”⁹¹ Anderson also

85. *Id.* For an opposing viewpoint see Matloff, *supra* note 26, at 882–84 (discussing the problems that arise when trying to outsource computer-related positions overseas).

86. *Id.* at 9–10.

87. Anderson states that on an LCA, employers often list the minimum and the maximum salary they intend to pay and that this represents a conservative estimate because on forms where the maximum was blank he assumed the maximum was equal to the minimum. *Id.* at 10.

88. *Id.* at 9. Anderson does not disclose what firm did this or any of the details regarding its methodology, but only refers to “a respected law firm” randomly selecting one hundred cases. *Id.*

89. *Id.* He says this was not meant to show that actual wages are always twenty-two percent higher than the prevailing wage data, but to show that utilizing prevailing wage data is unreliable.

90. E-NEWSLETTER, *supra* note 63.

91. CIS, *supra* note 54, at 5

cites to National Science Foundation (NSF) data, which “indicate[s] that foreign-born professionals actually earn more than their native counterparts when controlled for age and the year . . . [their] degree is earned.”⁹²

However, as Norm Matloff points out, these studies analyzed the salaries of *foreign-born* workers and did not address specific claims of *H-1B* underpayment.⁹³ Matloff agrees with Anderson’s interpretation of the data in these studies—that foreign-born and native professionals earn roughly equivalent salaries, but Matloff argues that “H-1Bs comprise only a small percentage of the foreign-born category.” According to Matloff, “foreign-born” also includes anyone who immigrated to the United States as a child. Of course, this does not necessarily mean that H-1B visa holders are not paid equivalent salaries, but simply Anderson’s arguments do not directly respond to Miano’s claims of underpayment for H-1B workers.

Anderson also argues that the relatively few instances of enforcement and fines resulting from H-1B underpayment indicate that abuse is not widespread.⁹⁴ He found that “[b]etween 1992 and 2004 . . . the average amount of back wages owed to an H-1B employee was \$5,919” and only eleven percent of all violations were found to be willful.⁹⁵ If indeed enforcement can serve as a reliable indicator of the amount of abuse, then it would seem that the problems of abuse are quite limited.

Based on these conflicting contentions, it is difficult to determine whether there is indeed underpayment of H-1B workers. Certainly a standard wage source used in all LCAs would help.⁹⁶ Because further information appears necessary to determine exactly what sort of wage discrepancies exist, this Article instead turns to a more readily identifiable problem in the next section.

3. *Bodyshops: a Fundamental Problem.*

Bodyshopping occurs when companies bring H-1B visa workers into the U.S. and then contract the workers out to other companies on a work-for-hire basis. By contracting the visa holders, rather than hiring them, the company can pay the H-1B visa holders lower wages than it would

92. *Id.*

93. E-NEWSLETTER, *supra* note 63.

94. NFAP BRIEF, *supra* note 66 at 6.

95. *Id.* at 6.

96. Miano makes this very suggestion. *See* Miano 2006, *supra* note 20, at 19–20.

pay employees without violating statutory equal-pay requirement.⁹⁷ A bodyshop allows the employer to say it never hired any H-1B workers, and the bodyshop can in turn say it never fired any Americans.⁹⁸ As Miano describes it, bodyshops are “a low cost alternative to U.S. workers.”⁹⁹ According to Miano, bodyshops sponsor workers without actual assignments and then “circulate[s] lists of available H-1B workers to employers.”¹⁰⁰

Upon learning about bodyshops, the question naturally arises as to what these companies are. Miano claims, “[f]ew H-1B visas for programmers are going to U.S. technology leaders.”¹⁰¹ According to his testimony, all of the top twenty users of H-1B visas, with one exception, are what Miano labels as “H-1B bodyshopp[ers]” or “offshoring industries.”¹⁰² He contends that under the current system the true purpose of the H-1B visa program appears to be nothing more than a way to “provide a pool of workers for bodyshops to supply to other companies and to expedite the ‘offshoring’ of U.S. technology jobs.”¹⁰³

Another way Miano argues bodyshopping undermines protections in the system is the illegal practice of “benching,” where employers pay a reduced wage or nothing while the worker has no work, which he claims is a common practice.¹⁰⁴ According to Miano, up to twenty percent of H-1B workers in bodyshops are seeking employment.¹⁰⁵

Anderson does not mention the problem of bodyshopping in his report, but he does argue that the cost of processing fees also makes it unlikely that employers will look to H-1B workers for cheap labor.¹⁰⁶ Anderson relates employers must not only pay H-1B professionals the same wages as similar individuals, but the company must also pay \$5,910 in fees as well as other in-house human resources costs and potentially \$10,000 associated with sponsoring a party for a green card.¹⁰⁷ Although Anderson responds to arguments about H-1B policies

97. See CIS, *supra* note 54, at 4.

98. See *id.* Bodyshops would presumably be considered H-1B dependent. See *supra* notes 50–51 and accompanying text.

99. See CIS, *supra* note 54, at 4. Miano asserts that the H-1B program “allows [for] the direct replacement of Americans with lower-paid guestworkers.” Miano 2006, *supra* note 20, at 17.

100. See CIS, *supra* note 54, at 4.

101. *Id.* at 8.

102. *Id.* at 9. The one exception he notes is Oracle. *Id.*

103. *Id.*

104. *Id.* at 17.

105. *Id.* Augmenting this problem is the situation where prevailing wages are certified for one location, but the worker is located elsewhere, making it impossible to verify where H-1B workers are located. *Id.*

106. *Id.* at 6–7.

107. *Id.* at 7.

generally, bodyshopping circumvents his contentions because the companies who hire the visa holders on a contractual basis are not the ones who deal with the fees and associated difficulties of sponsoring the visa holders, nor do they submit LCAs attesting that the visa holders will be paid at the contracting company's wage scale.¹⁰⁸

In summary, bodyshops frustrates both the aims of the U.S. immigration system, namely protecting U.S. labor and promoting the employment of foreign workers in the U.S.¹⁰⁹ Labor interests are damaged when bodyshops place H-1B workers "in direct competition with U.S. workers seeking similar jobs."¹¹⁰ Additionally, because bodyshops claim a large number of the visas each year, other workers who would potentially provide needed skills to the U.S. economy are unable to obtain visas. Thus, while often times a burden on one of the policy aims benefits the other,¹¹¹ bodyshopping results in a detriment to both aims of the immigration system.

IV. PROPOSED SOLUTION: STATUTORY LANGUAGE TO ELIMINATE BODYSHOPPING

The H-1B visa is just one component of the United States' immigration policy. Recently, Congress voted to reform a similar scheme, the L-1 visa program.¹¹² The L-1 visa shares much in common with the H-1B visa, both good and bad. Because of the many parallels between the two visa programs, the statutory solution to L-1 bodyshopping also provides an ideal model for reforming the current H-1B system.

The L-category visa has existed since the 1970s, when the Immigration and Nationality Act was amended, but it was overhauled by the Immigration Act of 1990,¹¹³ the same act that created the H-1B

108. Matloff also responds to this argument, stating that \$6,000 in legal fees are quickly recovered by a company who underpays a visa holder \$15,000 annually. See E-NEWSLETTER, *supra* note 63.

109. See *supra* note 22 and accompanying text.

110. See CIS, *supra* note 54, at 4.

111. Anderson writes, "It is a dim view of humanity—and a misreading of the nation's economy—to assume that opportunity for some must mean misery for others." NFAP Brief, *supra* note 66 at 12. The above statement does not intend to claim immigration is a zero-sum game, but to state that the two aims of the immigration policy often contradict one another.

112. The L-1 Visa Reform Act of 2004 became law in December 2004 as part of the Omnibus Appropriations Act for fiscal year 2005. See Press Release, U.S. Citizenship and Immigration Services, USCIS To Implement L-1 Visa Reform Act of 2004 (December 8, 2004).

113. Office of Inspector General, Department of Homeland Security, Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program, OIG-06-22, Jan. 2006, at 6, available at http://www.dhs.gov/xoig/assets/katovrsgh/OIG_06-22_Jan06.pdf [*hereinafter* L-1 Visa Review].

visa.¹¹⁴ The visa differs from the H-1B, in that the L-1 requires the visa applicant to be a current employee of the sponsoring company.¹¹⁵ The L-1 visa allows a foreign worker employed by an overseas company to enter the country for one year, “in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.”¹¹⁶ An H-1B applicant, in contrast, is hired by the sponsoring company to work in the U.S. once the visa has been approved.¹¹⁷ Like the H-1B visa, the L-1 visa is mostly used for computer and IT positions and virtually all applications are approved.¹¹⁸ Further, both programs have been criticized for allowing bodyshopping to negatively influence American employment.¹¹⁹

L-1 visa holders represent just a small percentage of temporary workers in the United States technology industry.¹²⁰ For example, during fiscal year 2002, the ratio of H-1B visa holders to L-1B workers was twenty to one.¹²¹ Even though L-1 visas represent a fraction of all foreign tech workers, Congress amended the L-1 visa scheme to prevent bodyshopping. Faced with the rise of foreign companies in the United States and concerns of transplanted foreign competitors forcing American workers out of their jobs, Congress added the following language to the text of the Immigration and Nationality Act:

(F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if—
(i) the alien will be controlled and supervised principally by such unaffiliated employer; or

114. See *supra* Part II.A.

115. L-1 Visa Review, *supra* note 122, at 3.

116. 8 U.S.C.A. § 1101(a)(15)(L) (2006). See also Ephraim Schwartz, *Homeland Security Probes L-1 Visa Abuses: Office of the Inspector General Finds Significant Flaws in Overseas Hiring Program*, INFOWORLD.COM, Mar. 21, 2006, http://www.infoworld.com/article/06/03/21/76507_13OPreality_1.html.

117. See *supra* Part II.B.

118. Schwartz, *supra* note 125. The L-1 is sometimes called the “The Computer Visa” as ninety percent of the visas go to people in computer and information technology positions. *Id.*

119. *Id.* (discussing problems with L-1 visa bodyshopping). For a discussion of H-1B bodyshopping see *supra* Part III.B.3.

120. L-1 Visa Review, *supra* note 122, at 12–13.

121. At the peak year of L-1 visas, the ratio of H-1B visa holders to L-1 visa holders was still ten to one. *Id.* at 13.

(ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

8 U.S.C. § 1184(c)(2)(F).

Thus, under the current reform, workers entering the United States on an L-1 visa must remain employed by the sponsoring company and cannot be contracted out to other companies. With the addition of this language, Congress eliminated the L-1 bodyshopping loophole.

A similar solution could be applied to the H-1B program. Language could be added to the statute which would forbid the placement of H-1B workers in labor for hire arrangements with unaffiliated employers. Thus employers could not abuse the system by contracting out work to H-1B bodyshops at lower wages. Such an amendment would not necessarily preclude H-1B workers from changing employers. If another company would be willing to sponsor the H-1B worker, then the prospective employer could petition for a transfer. The new employer would be required to meet the same standards for employment.

Banning the practice of bodyshopping will result in several important changes. First, this will free up a large percentage of the visas, as bodyshops already receive most of the visas.¹²² As always, companies will be free to hire H-1B workers if they are willing to pay them the same as U.S. workers. By eliminating bodyshops, employers will no longer be able to cut costs by contracting foreign visa holders to perform jobs that American workers would otherwise do. This will also increase the opportunity for “the world’s best and brightest” to come to the U.S., who may have otherwise avoided the quickly-exhausted and uncertain application process.

This statutory solution proposed by this Article does not address the question of whether Congress should raise the H-1B cap, nor does the Article need to answer this dilemma. Once Congress bans bodyshopping, and if it becomes apparent that there is not a labor shortage, employers will not have a cheap-labor incentive to motivate them to go through the hassle and additional expense of hiring foreign workers. As a result, employers may even have an incentive to provide additional training to U.S. workers. On the other hand, if the labor shortage is as severe as industry executives insist, then H-1B workers will continue to fill a

122. See *supra* text accompanying notes 110–12.

necessary role at the levels currently allowed by statute.¹²³ Congress can then address the question of increasing the annual visa cap, without the pressure from those motivated by the possibility of exploiting cheaper labor through bodyshopping.

Visa holders, by the very nature of their situation as workers dependent upon employers for the right to remain in the country—either permanently or temporarily—remain less likely to protest against unfair working conditions than their counterparts with permanent resident status.¹²⁴ It seems likely that employers would attempt to cut corners by demanding more of visa holders than permanent residents. The next section addresses the concern that eliminating bodyshops further limits mobility and potentially subjects visa holders to increased abuse.

V. PROTECTING FOREIGN WORKERS

Sponsoring employers recognize that H-1B workers are dependant on employment to stay in the country.¹²⁵ As a result, H-1B workers are less likely to assert their rights or reject unreasonable assignments.¹²⁶ Because foreign workers are more vulnerable, they are much more likely to be subjected to abuse by employers. Much has been written concerning the potential abuses facing H-1B visa holders,¹²⁷ and immigrant workers in general.¹²⁸

One could claim that the above mentioned reform¹²⁹ would further limit the mobility of foreign workers. Such limitations could discourage potential H-1B applicants from working in America, which would make labor unions happy, but also presents the threat of keeping the “world’s best and brightest” from considering the U.S. Many have suggested that

123. Miano adopts a similar view. *See* Miano 2006, *supra* note 20 at 19 He argues the fact that some employers are reaching the quota does not mean that the government should raise the quatae quota should be raised. He claims if Congress would fix the H-1B program to eliminate loopholes, “there would be plenty of visas available for U.S. technology companies.” *Id.* at 20.

124. *See* E-NEWSLETTER, *supra* note 63 (“The H-1B has the legal right to change employers, but dare not do so, since that would mean starting the green card process all over again from scratch.”).

125. Matloff refers to this problem as “de facto indentured servitude.” Matloff, *supra* note 26, at 864–69.

126. *See e.g., id.* at 880–81 (presenting anecdotal evidence of H-1B workers working longer hours without extra pay). A 2003 Government Accountability Office (GAO) study found that some employers hire H-1B workers because they accept lower salaries than similarly qualified U.S. workers. *See* E-NEWSLETTER, *supra* note 63.

127. For further examples of abuse of the program see Leah Phelps Carpenter, *The Status of the H-1B Visa in These Conflicting Times*, 10 TULSA J. COMP. & INT’L L. 553,576–85 (2003).

128. *See, e.g.,* Maire-Claire Belleau, *Mail-order Brides in a Global World*, 67 ALB. L. REV. 595 (2003).

129. *Supra* Part IV.

refusing to liberalize the H-1B program would send potential workers to other countries, such as Canada,¹³⁰ which have opened their borders to high-skilled foreign workers. Increased limitations on the H-1B program could cost the United States even more of the world's great minds.

However, one needs to recognize that Congress has already enacted statutory provisions which provide foreign workers with protection against aggressive employers. The current law helps level the playing field by protecting the rights of these foreign workers. The case of *Tambay v. Peer*,¹³¹ provides an example of these protections in action.

Dr. Nishin Tambay was an Indian citizen who began working as a licensed physician for Meeta D. Peer, M.D., P.C.¹³² To satisfy requirements for his visa,¹³³ Dr. Tambay was required to work forty hours per week in approved Medically Under-served Areas (MUAs).¹³⁴ At the time of hiring, Peer told Dr. Tambay that there would be sufficient work for him to meet the weekly hour requirement at the approved locations.¹³⁵ Peer hired Dr. Tambay on a five-year contract for a salary in excess of \$100,000 with a ten percent raise for each completed year.¹³⁶ The employment contract provided that Peer would have sole discretion over Tambay's schedule, that Tambay would work forty hours per week, and that Tambay could be fired for cause with twenty-four hours written notice.¹³⁷

Peer obtained government approval for Dr. Tambay to work at its facilities as part of Dr. Tambay's forty hour requirement, but failed to complete the approval process for other locations.¹³⁸ Dr. Tambay's daily schedule involved being on call for Peer and performing rounds at several hospitals and medical facilities,¹³⁹ but not all of the locations to which Peer assigned Dr. Tambay were approved MUAs.¹⁴⁰ In October 2001, after speaking with an immigration attorney about becoming a U.S. citizen, Dr. Tambay became concerned as to whether his work

130. For a discussion contrasting the United States' immigration policy with that of Canada see *Looking to the North*, *supra* note 19. For a broad comparison of U.S. and Canadian immigration policies see generally, Peter H. Schuck, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT'L L. 1 (2001).

131. No. 03-4499, 2005 U.S. Dist. LEXIS 9300 (E.D. Pa. May 17, 2005).

132. *Id.* at *1-2.

133. Dr. Tambay began with a J-1 visa, but successfully petitioned INS for an H-1B visa in order to avoid returning to India for his residency. *Id.* at *4, *8.

134. *Id.* at *6.

135. *Id.* at *7.

136. *Id.* at *21.

137. *Id.* at *6-7.

138. *Id.* at *8-9.

139. *Id.* at *9.

140. *Id.*

schedule satisfied the visa requirements.¹⁴¹ On at least two occasions, Dr. Tambay consulted the government administrator responsible for his program, who told him that Peer must contact her to address his concerns.¹⁴²

In November 2001, Dr. Tambay became involved in an argument with Peer concerning his billing requirements, during which Peer told Tambay not to come back to work.¹⁴³ The day after the altercation, Peer told Tambay, “It’s too late, it’s over. You’re fired. Get out of the office.”¹⁴⁴ Through an attorney Tambay asserted that he was still willing to work, that he was fired without cause or written notice, and he demanded to be reinstated.¹⁴⁵ Peer refused, and Tambay filed a complaint in district court.¹⁴⁶ Meanwhile, the government administrator had repeatedly tried to contact Peer, but her messages were never returned.¹⁴⁷

Over the ensuing months, negotiations between Peer, Tambay, and the government administrator led to the determination that Tambay should continue to work for Peer even though Tambay could not comply with the hourly requirement until approval for other locations was reached.¹⁴⁸ After reaching this decision, Tambay was told by staff at Peer PC that he could not work there.¹⁴⁹ Eventually, Dr. Tambay was able to find employment in Cleveland, where he was able to satisfy the weekly hour requirement.¹⁵⁰

Although these facts alone would provide ample evidence of mistreatment of an H-1B employee, as the district court action progressed, more abuses came to the surface. Over the course of his employment, it was discovered that Peer also withheld \$134,035.79 of Dr. Tambay’s salary.¹⁵¹ Dr. Tambay’s story would likely cause a potential H-1B candidate to hesitate before undertaking employment in the United States. However, the district court did not allow these abuses to take place. As a result of the Peers’ violations of the employment contract, the District Court awarded Dr. Tambay over \$200,000 in

141. *Id.* at *11.

142. *Id.*

143. *Id.* at *13.

144. *Id.* at *14. In its pleadings, Peer claimed that Dr. Tambay said “I quit” during the course of the argument that led to his leaving, but notably the district court found this lacked credibility as “Dr. Tambay needed to continue his employment to maintain his immigration status and stay in the United States.” *Id.* at *13 n.5.

145. *Id.* at *14.

146. *Id.*

147. *Id.* at *17.

148. *Id.*

149. *Id.* at *18.

150. *Id.* at *19–20.

151. *Id.* at *22

damages plus attorneys fees.¹⁵²

Other actions against abusive employers have also proven successful. An example of this can be seen in the newly decided case of *Chellen v. John Pickle Co.*¹⁵³ As a result of a disturbing, and hopefully rare, situation the district court awarded over \$1.2 million in damages to a group of fifty-two Indian high-skilled workers who paid substantial fees to enter the U.S. in the hope of earning lawful wages working for a parts manufacturer in the oil industry¹⁵⁴ only upon arrival to be locked in a compound and forced to live in a warehouse. Among the workers were skilled welders, who were only paid \$1.00 to \$3.17 an hour, while non-Indian employees earned \$14.00 per hour for comparable work at the same factory.¹⁵⁵ Even though the workers prevailed, with stories like this, the United States obviously has a long way to go to establish itself as a nation interested in protecting vulnerable immigrant groups.

This year, further steps toward fighting H-1B abuse have been taken in court. Recently an action was commenced in California, where an Indian H-1B worker sued Tata International, one of the largest bodyshopping corporations in the United States, for lost wages as a result of failing to pay the contracted gross salary, implementing an illegal vacation policy, and forcing him and other H-1B visa holders to sign over their state and federal employment tax refund checks to the company.¹⁵⁶ The outcome of this action is still pending.

These cases demonstrate that the current statutory system has the potential to protect visa holders from abuse. Thus, once bodyshopping is eliminated, the major problems with the H-1B system become issues of enforcement¹⁵⁷ and information,¹⁵⁸ not necessarily further statutory

152. *See id.* at *28–29. The Judge declined to award Dr. Tambay twenty-five percent in liquidated damages as he found there was “a good faith contest or dispute” as to the amount owed Dr. Tambay. *Id.* at *26.

153. 446 F. Supp. 2d 1247 (2006). *See also* Leah Phelps Carpenter, *The Status of the H-1B Visa in These Conflicting Times*, 10 TULSA J. COMP & INT’L L. 553, 582 (2003) (discussing the factual background of the then recently filed case). A description of the 71 page decision can be found at U.S. Equal Employment Opportunity Commission, Judge Orders John Pickle Co. To Pay \$1.24 Million to 52 Foreign Workers in “Human Trafficking” Case, <http://www.eeoc.gov/press/5-26-06.html>.

154. American Society for Industrial Security, Discrimination, John Pickle Company, Inc, Equal Employment Opportunity Commission,

155. Pickle threatened to deport two of the men after they sneaked out of the compound, slipping past the armed guard and under a barbed wire fence, on Thanksgiving.

156. *Vedachalam v. Tata Am. Int’l Corp.*, No. 06-0963, 1, 1–2 (N.D. Cal. filed Feb. 2006).

157. Matloff rejects the idea that enforcement is the main problem with the current system. E-NEWSLETTER, *supra* note 63 (“As I’ve said many times, the problem of underpayment of H-1Bs is NOT an enforcement issue. The problem is in the law itself, not in the enforcement of it.”).

158. If H-1B workers are informed of their rights upon obtaining a visa, they will be much more likely to assert them. Outreach programs, such as those already provided by the Office of Special Counsel for Unfair Immigration-Related Employment Practices in the Civil Rights Division

reform.

Further, according to Stuart Anderson, H-1B visa holders already enjoy a great deal of mobility, despite claims to the contrary.¹⁵⁹ In support of this idea, he reports that “[a] number of S&P 500 companies related that the majority of their H-1B hires first worked for other employers.”¹⁶⁰ Additionally, Anderson states that during 2003 more H-1B applications were approved for “continuing” employment than for initial employment, and “anecdotal evidence indicates that most ‘continuing’ employment involves an H-1B visa holder changing to a new employer.”¹⁶¹ He argues that if H-1B holders lack mobility out of a fear that “they will lose their place in the queue for labor certification and permanent residence,” then the solution is not to change the H-1B program but rather to make changes to the labor certification and residence application processes.¹⁶²

Successes such as that of Dr. Tambay show that employers can be stopped from abusing worker’s rights in the United States. Removing bodyshopping from the system will promote a setting that is fairer to all workers: both visa holders and U.S. citizens alike. Once the system reflects the needs of U.S. companies and gives proper respect to the rights of workers, Congress can then more accurately determine whether to increase the cap on H-1B visas.

VI. CONCLUSION

The need for H-1B visa reform is critical to immigration reform. The H-1B program brings talent to the U.S. that would otherwise work in other countries. Although the current system has measures to prevent employers from exploiting potentially cheaper labor resources, flaws exist that make the program less desirable than what it could otherwise be. Determining how many visas to issue will always remain a hotly-contested matter. What can be agreed upon, however, is that bodyshopping harms both U.S. and foreign workers. By eliminating bodyshopping, the H-1B program can protect American jobs. At the same time the nation must assure foreign workers’ rights, thus continuing to make the United States a desirable location for the “world’s best and

of the U.S. Department of Justice, would help in this regard. *See e.g.*, An Overview of the Office of Special Counsel for Immigration-Related Unfair Employment Practices, <http://www.usdoj.gov/crt/osc/htm/WebOverview2005.htm> (last visited December 1, 2006).

159. NFAP BRIEF, *supra* note 66 at 8.

160. Anderson does not cite a source for this information. *Id.*

161. Anderson does not indicate a source for this anecdotal evidence. *Id.*

162. Anderson claims “Major U.S. employers have supported such reforms,” but they have not survived congressional negotiations. *Id.*

brightest.” Statutory reform to eliminate H-1B bodyshopping will thus enable the U.S. to meet both aims of its immigration program, “the employment of non-citizen workers by U.S. employers and [the protection of] U.S. labor from competition by non-citizen workers.”¹⁶³

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163. Trucios-Haynes, *supra* note 22 at 968; *see also* other references in note 22 and accompanying text.

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