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Testimony Given By

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"H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers"

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I want to thank Chairman Smith, Chairman Gallegly, and the members of the subcommittee for inviting me to testify today. My name is Ronil Hira. I am a professor of public policy at the Rochester Institute of Technology in Rochester, New York. I have been studying the H-1B program and high-skill immigration since 2000. I appreciate the opportunity to share my thoughts about how the H-1B program is currently impacting the U.S. economy and American workers.[1]

I have concluded that the H-1B program, as currently designed and administered, does more harm than good. **To meet the needs of the U.S. economy and U.S. workers, the H-1B visa program needs immediate and substantial overhaul.**

The principal goal of the H-1B visa program is to bring in foreign workers who complement the U.S. workforce. Instead, **loopholes in the program have made it too easy to bring in cheaper foreign workers, with ordinary skills, who directly substitute for, rather than complement, workers already in America.** They are clearly displacing and denying opportunities to U.S. workers. A sizable share of highly skilled American workers and students—engineers, information technologists, and scientists—have concluded that the H-1B program undercuts their wages and job opportunities. Those conclusions are largely correct and the program has lost legitimacy amongst much of America's high-tech workforce.

Furthermore, **program loopholes provide an unfair competitive advantage to companies specializing in offshore outsourcing, speeding up the process of shipping high-wage, high-tech jobs overseas. It has disadvantaged companies that primarily hire American workers** and forced those firms to accelerate their own offshoring, threatening America's future capacity to innovate and ability to create sufficient high-wage, high-technology jobs.

For at least the past five years, nearly all of the employers receiving the most H-1B visas are using them to offshore tens of thousands of high-wage, high-skilled American jobs. Table 1 below shows that, for fiscal years 2007 to 2009, seven of the top 10 H-1B employers are doing significant offshoring. Offshoring through the H-1B program is so common that it has been dubbed the "outsourcing visa" by India's former commerce minister.

The offshore outsourcing industry is adding hundreds of thousands of jobs every year. The top three India-based offshore outsourcing firms, Tata Consultancy Services, Infosys, and Wipro, added a stunning 57,000 net new employees last year alone. If the H-1B program loopholes were closed, many of those jobs would have gone to Americans.

[1] This testimony is based on two papers I published with the Economic Policy Institute (EPI): "The H-1B and L-1 Visa Programs: Out of Control," published on October 14, 2010; and, "Bridge to Immigration or Cheap Temporary Labor? The H-1B & L-1 Visa Programs Are a Source of Both," published on February 17, 2010. Both papers can be found on the EPI website: www.epi.org.

In a recent interview with *ComputerWorld* magazine, former Representative Bruce Morrison, a past chairman of this subcommittee and co-author of the Immigration Act of 1990 that created the H-1B program, summed up his view about how the H-1B program has been distorted by outsourcing:

> "If I knew in 1990 what I know today about the use of it [H-1Bs] for outsourcing, I wouldn't have drafted it so that staffing companies of that sort could have used it," Morrison said. Jobs are going abroad because of globalization, he said, "but the government shouldn't have its thumb on the scale, making it easier."

Table 1

Top 10 H-1B Employers for Fiscal Years 2007-09
7 of 10 Have Significant Offshoring

H-1B Use Rank	Company	H-1Bs Obtained FY07-09	Significant Offshoring
1	Infosys	9,625	X
2	Wipro	7,216	X
3	Satyam	3,557	X
4	Microsoft	3,318	
5	Tata	2,368	X
6	Deloitte	1,896	
7	Cognizant	1,669	X
8	IBM	1,550	X
9	Intel	1,454	
10	Accenture	1,396	X

Source: Department of Homeland Security U.S. Citizenship and Immigration Services: Initial H-1B I-129 Petitions FY07-09

Below I summarize the problems with the H-1B program and how we can solve them.

Four design flaws with the H-1B program

H-1B visa use has become antithetical to policymakers' goals due to four fundamental flaws:

Flaw 1 — No labor market test

Contrary to popular perception in the media, and even among some policymakers, the H-1B visa program does not require any labor market test. In other words, employers are not required to show that qualified American workers are unavailable before hiring foreign workers through the H-1B visa program. Employers can and do bypass American workers when recruiting for open positions and even replace outright existing American workers with H-1B guest workers.

Flaw 2—Wage requirements are too low

Wage requirements are too low for H-1B visas and as a result the program is extensively used for wage arbitrage. Employers have told the Government Accountability Office (GAO) that they hire H-1Bs because they can legally pay below-market wages. The primary wage requirement is the setting of a wage floor, the lowest level an employer can pay an H-1B. The current wage floor is approximately the 17th percentile. A recent GAO study found that the majority (54%) of H-1B labor condition applications were for that lowest level, a level reserved for "entry level" positions, hardly a wage level that the "best and brightest" would earn. Just to provide one example of how low that wage can be, the Department of Labor has certified wages as low as $12.25 per hour for H-1B computer professionals, an occupation where the typical median wage is more than $70,000.

Flaw 3—Work permits are held by the employer

Visas are held by the employer rather than the worker. An H-1B worker's legal status in the country is thus dependent on the employer, giving inordinate power to the employer over the worker. As a result, H-1B workers can be easily exploited and subject to poor working conditions, but they have little recourse because the working relationship is akin to indentured servitude. A number of cases have been highlighted in the press recently.

Flaw 4—The visa period is far too long

H-1B visas are issued for three years and are renewable for another three years, which magnifies the damage done by low wages and the inability of workers to change jobs freely. The visas can be extended indefinitely beyond six years when employers apply for permanent residence for their H-1B workers, keeping the visa valid beyond a decade in some cases. Extending the H-1B visa length in lieu of fixing the underlying problems associated with permanent residence creates more problems than it solves.

Flawed administration

In addition to the inherent flaws in the design of the program, there is little oversight or enforcement of the program.

H-1B program oversight and enforcement is deficient. The Department of Labor review of H-1B applications has been called a “rubber stamp” by its own Inspector General. And a 2008 Department of Homeland Security IG report found that one-in-five H-1Bs were granted under false pretenses—either through outright fraud or serious technical violations. Critical data on actual program use is either not released or in some cases not even collected. And program integrity largely relies on hope that H-1Bs would blow the whistle if they were being exploited. Whistle-blowing is highly unlikely given that H-1Bs' legal status depends on their continued employment.

Solving the problems with the H-1B program

By closing the H-1B visa loopholes described above, Congress would create and retain tens of thousands of high-wage American jobs and ensure that our labor market works fairly for American and foreign workers alike.

Institute an effective labor market test

An effective labor market test, such as labor certification for each application, needs to be created. U.S. workers should not be displaced by guest workers, and employers should demonstrate they have looked for and could not find qualified U.S. workers.

As a fix, some have proposed extending H-1B dependent firm rules to all firms. But these rules are clearly not effective since H-1B dependent firms are able to avoid hiring Americans while garnering thousands of H-1Bs annually. Table 1 above shows four of the top five H-1B recipients are H-1B Dependent.

Pay guest workers true market wages

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

Limit the visa to a maximum of three years, with no renewal

This will ensure that employers either sponsor their H-1B workers for permanent residence or find a suitable American worker to fill the position.

Eliminate access to additional H-1B visas for any H-1B dependent firms

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

Shine light on H-1B program practice

There is widespread and substantial misunderstanding, in the media and even among some policymakers, about how the program works in practice. Many of these misunderstandings could be cleared up through greater transparency. Congress and the USCIS should publish data on program use by employer, including job title, job location, actual wages paid, and whether the worker is being sponsored for permanent residence. The data should include all H-1B workers, not just newly issued and renewed petitions.

Further, H-1B use by *H-1B dependent* firms should be investigated and the findings publicly released. So called H-1B dependent firms must meet additional requirements prior to hiring an H-1B worker, yet it is clear that these firms are able to circumvent Congress' intent regarding those additional requirements. As noted above, these firms are able to hire literally thousands of H-1Bs annually without hiring any Americans for those positions.

Institute sensible oversight

Through their use of guest worker visas employers are asking government to intervene in the normal functioning of the American labor market. With this privilege should come accountability. Employers using guest workers should be subject to random audits to ensure they are fulfilling the obligations contained in their attestations. And government agencies in charge of these programs— the departments of Homeland Security, Labor, and State—should be granted the authority, and allocated resources, to ensure the programs are operating properly. Given the efforts in Congress to cut deeply into discretionary spending, some mechanism to fund these audits should be created. At a minimum, one in 10 H-1B employers should be audited and, if they are not eliminated, every H-1B dependent firm should be audited every year.

Establish a clear single objective for the H-1B program

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

The H-1B is often equated with permanent residence in the media's discussion of high-skill immigration policy. As I have shown, with an analysis of the PERM database, many of the largest users of the H-1B program sponsor few, if any, of their H-1Bs for permanent residency. In the case of offshore outsourcing firm Tata Consultancy Services, it received 2,368 H-1Bs between 2007 and 2009, yet didn't sponsor a single H-1B for permanent residence. This example illustrates how the program's reality doesn't match the claims made by employer coalitions such as Compete America.

Other high-skill visa programs need scrutiny and fixing

I understand that this hearing is specifically about the H-1B program but I would like to briefly highlight some other critical issues for high skill immigration policy that are directly related to the H-1B. Other temporary visa programs, such as the L-1 and B-1 and OPT, are also badly in need of an overhaul, and are being used to circumvent the annual numerical limit on H-1Bs. The L-1 visa program has even less control and oversight than the H-1B, has no annual “cap” and is very vulnerable to abuse. For example, the opportunities to exploit wage arbitrage using the L-1 is even greater than for the H-1B since the L-1 workers can be paid home country wages. The wage differentials between America and India, the source country for the largest share of L-1s, are staggering. With respect to the B-1 “business visitor” visa we have even less information about how it might be being exploited, but recent news reports and an ongoing lawsuit reveal that it is likely also being used to get around the H-1B rules and cap.

In 2008, the duration of the OPT work visa was extended for STEM to 29 months without oversight or any approval from Congress. It appears that the largest beneficiaries of this extension are obscure colleges that are providing workers to the offshore outsourcing industry. There is no wage floor for OPT and one analyst estimated they are paid a mere 40% of what Americans earn. The rationale for the OPT extension has disappeared so it should be rolled back to its original duration.

And certain categories of high-skill employment-based permanent resident visa programs with very long backlogs should be cleared. A clear pathway to permanent residence, which can be completed in a reasonable amount of time, should be created.

Immigration policy should be made by Congress, not the U.S. trade representative

Given the widespread use of both H-1B and L-1 visas by offshore outsourcing firms, Congress should take affirmative steps to make it clear that both guest worker programs and permanent residence are immigration, and not trade, policy issues. In 2003, the U.S. Trade Representative (USTR) negotiated free trade agreements (FTAs) with Chile and Singapore, which included additional H-1B visas for those two countries, and constrained Congress from changing laws that govern the L-1 visa program. In response, many members of Congress felt it was important to re-assert that Congress, not the USTR, has jurisdiction over immigration laws. But no law was ever passed. Without legislation, the muddying of trade and immigration policy will keep recurring. Most recently, it appears that some L-1 visa provisions were included as a side agreement in the Korea-U.S. Free Trade Agreement. Many countries, including India, have pressed for more liberalized visa regimes through trade agreements including proposing a new GATS work visa. Congress, not the U.S. Trade Representative, should have the authority to change these laws, and Congress should pass a law reaffirming jurisdiction.

Immigration policy should be made by Congress but it needs specialized expertise from an independent commission

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

In conclusion, let me say that I believe the United States benefits enormously from high-skilled permanent immigration, especially in the technology sectors. We can and should encourage the best and brightest to come to the United States and settle here permanently. But our future critically depends on our homegrown talent, and while we should welcome foreign workers, we must do it without undermining American workers and students. By closing the H-1B visa loopholes we would ensure that the technology sector remains an attractive labor market for Americans and continues to act as a magnet for the world’s best and brightest.

The lobbyists supporting the H-1B program have repeatedly made claims that the program is needed because there is a shortage of American workers with the requisite skills, and the foreign

workers being imported are the best and brightest. If that is indeed the case, then those employers should not object to these sensible reforms. The policies I have proposed pose no limitations on employers' ability to hire foreign workers who truly complement America's talent pool.