

2010

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Alaina M. Beach

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Recommended Citation

Beach, Alaina M. (2010) "H-1B Visa Legislation: Legal Deficiencies and the Need for Reform," *South Carolina Journal of International Law and Business*: Vol. 6 : Iss. 2 , Article 4.

Available at: <https://scholarcommons.sc.edu/scjilb/vol6/iss2/4>

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H-1B VISA LEGISLATION: LEGAL DEFICIENCIES AND THE NEED FOR REFORM

Alaina M. Beach

I. INTRODUCTION

Despite the highest U.S. unemployment rate in over a decade,¹ current federal law provides that 65,000 nonimmigrant workers, or workers temporarily in the country to serve in a specialized occupation, may be issued H-1B work visas in order to fill positions in the U.S. each year.² This massive number does not include the additional H-1B visas permitted to be issued for workers employed at “an institution of higher education,” a “nonprofit research organization or governmental research organization,” or for workers who have “earned a master’s or higher degree from a United States institution of higher education.”³ To hire H-1B workers, employers must undergo a specific certification process, and after certification, they must adhere to employer guidelines.⁴ This paper first explores that process and its deficiencies, with an emphasis on the practice of “bodyshopping” and its effect on the H-1B program. It then examines the ways in which the Economic Recovery and Reinvestment Act and the Neufeld Memo have altered certification rules. Finally, this paper posits that better regulatory methods are needed to prevent employers from abusing the H-1B visa program.

¹ Louis Uchitelle, *Jobless Rate Hits 7.2%, a 16-Year High*, N.Y. TIMES, Jan. 9, 2009, available at <http://www.nytimes.com/2009/01/10/business/economy/10jobs.html>.

² 8 U.S.C.A. § 1184(g)(1)(A) (West 2009); see also John Miano, Center for Immigration Studies, *The Bottom of the Pay Scale: Wages for H-1B Computer Programmers*, BACKGROUNDERS AND REPORTS, Dec. 2005, at 2, available at <http://www.cis.org/articles/2005/back1305.pdf> [hereinafter Miano, *Bottom of the Pay Scale*].

³ 8 U.S.C.A. § 1184(g)(5) (West 2009).

⁴ Miano, *Bottom of the Pay Scale*], *supra* note 2, cited in 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, 160 (2007).

II. THE H-1B PROGRAM

The H-1B program was designed to provide a means of recruiting foreign specialty workers on a temporary basis, without detracting from the employment of American citizens: "Congress's intent . . . consisted of a balancing of dual concerns: establishing a[n] efficient immigration system which is responsive to labor needs while simultaneously according [] protection to both domestic and alien workers."⁵ This program, which the Immigration Act of 1990 created,⁶ established a visa classification that applies to nonimmigrant aliens "coming temporarily to the United States to perform services . . . in a specialty occupation."⁷ A specialty occupation requires "theoretical and practical application of a body of highly specialized knowledge,"⁸ such as technical expertise, nurse training, and teaching techniques.⁹ The occupation must also require a bachelor's degree or higher "in the specific specialty."¹⁰

To hire an H-1B worker, an employer must gain certification. The employment certification process begins when the potential employer files the Labor Condition Application (LCA)¹¹ with the Department of Labor at most six months before it intends to employ the worker.¹² The Department of Labor's Employment and Training Administration (ETA) rejects "incomplete or obviously inaccurate

⁵ H. Rosemary Jeronimides, *The H-1B Visa Category: A Tug of War*, 7 GEO. IMMIGR. L. J. 367, 374 (1993) (describing the "underlying congressional intent" behind The Immigration and Nationality Act of 1990). In establishing the original temporary work visa, "Congress attempted to balance competing concerns . . . to facilitate the entry of foreign workers with special abilities and skills who might prove beneficial to the American economy . . . [without] interfer[ing] with the labor supply, wages, or working conditions of the United States domestic work force." *Id.* at 368.

⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, H-1B VISA PROGRAM: LABOR COULD IMPROVE ITS OVERSIGHT AND INCREASE INFORMATION SHARING WITH HOMELAND SECURITY, GAO-06-720 (2006) [hereinafter GAO REPORT].

⁷ 8 U.S.C.A. § 1101(a)(15)(H) (West 2009); see Miano, *Bottom of the Pay Scale*, *supra* note 2, at 2.

⁸ 8 U.S.C.A. § 1184(i)(1) (West 2009).

⁹ Miano, *Bottom of the Pay Scale*, *supra* note 2, at 10.

¹⁰ 8 U.S.C.A. § 1184(i)(1); see also GAO REPORT, *supra* note 6, at 5.

¹¹ *E.g.*, 20 C.F.R. § 655.700 (2008); GAO REPORT, *supra* note 6, at 6; see also Jeronimides, *supra* note 5, at 375.

¹² 20 C.F.R. § 655.730(b) (2008).

LCAs.”¹³ By submitting and signing the LCA, “the employer . . . attests the statements in the LCA are true and promises to comply with the labor condition statements (attestations) specifically identified in [the forms].”¹⁴ Filing the LCA commits the employer to paying H-1 visa-holders “the greater of the actual wage rate . . . or the prevailing wage.”¹⁵ The actual wage is the amount the employer pays all other workers “with similar experience and qualifications for the specific employment in question.”¹⁶ The prevailing wage is “the average wage paid to similarly employed workers in the requested occupation in the area of intended employment.”¹⁷ By filing the LCA, the employer also vows to ensure “that the employment of H-1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment,”¹⁸ “that there is not at that time a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment,”¹⁹ and that “the employer has provided notice . . . to the . . . employees in the occupational classification in which the H-1B nonimmigrants will be employed.”²⁰ The employer must include specific details as to “the number of workers sought, the occupational classification . . . , and [the] wage rate and conditions.”²¹

Employers that qualify as “H-1B-dependent employer[s]” and employers found to have willfully violated H-1B program requirements commit themselves to additional attestations.²² An H-1B-dependent employer is “an employer that meets [certain] standards, which are based on the [ratio] between the employer’s total work force employed in the U.S. . . . and the employer’s H-1B nonimmigrant employees.”²³ H-1B-dependent employers have more than fifteen percent of their

¹³ *E.g.*, 20 C.F.R. § 655.730(b); GAO REPORT, *supra* note 6, at 6.

¹⁴ 20 C.F.R. § 655.730(c)(2) (2008); *see also* GAO REPORT, *supra* note 6, at 6.

¹⁵ 20 C.F.R. § 655.731(a) (2009); *see also* GAO REPORT, *supra* note 6, at 6.

¹⁶ 20 C.F.R. § 655.731(a)(1) (2009).

¹⁷ U.S. Dep’t of Labor Employment & Training Admin, Foreign Labor Certification Prevailing Wages, (Dec. 23, 2009), <http://www.foreignlaborcert.doleta.gov/wages.cfm>; *see also* 20 C.F.R. § 655.731(a)(2) (2009).

¹⁸ *E.g.*, 20 C.F.R. § 655.732 (2008); GAO REPORT, *supra* note 6, at 6.

¹⁹ 20 C.F.R. § 655.733 (2008); *see also* GAO REPORT, *supra* note 6, at 6.

²⁰ 20 C.F.R. § 655.734 (2008); *see also* GAO REPORT, *supra* note 6, at 7.

²¹ 8 U.S.C.A. § 1182(n)(1)(D) (West 2008); *see also* GAO REPORT, *supra* note 6, at 13.

²² *E.g.*, 20 C.F.R. § 655.730(c)(2); GAO REPORT, *supra* note 6, at 7.

²³ 20 C.F.R. § 655.736(a)(1) (2006).

workforce on visas.²⁴ These employers and willful violators²⁵ must attest that, in seeking and hiring H-1B workers, these employers have “not displace[d] U.S. workers from jobs . . . and that such employers [have] recruit[ed] U.S. workers before hiring H-1B nonimmigrants.”²⁶ An employer is held to a good faith standard in attempting to recruit U.S. workers prior to hiring H-1B workers.²⁷

After the LCA has been approved, the employer must file the LCA and an H-1B petition with United States Citizenship and Immigration Services (USCIS) for each worker the employer intends to hire.²⁸ “[T]he nonimmigrant then may apply for an H-1B visa abroad at a consular office of the Department of State.”²⁹

III. REGULATION OF EMPLOYERS: THE KEY PLAYERS AND PENALTIES

Authorities monitor active and applicant employers in the H-1B program in several ways. The ETA may reject LCAs that are incomplete or contain obvious mistakes.³⁰ The ETA may also reject H-1B-dependent employers and past willful violators who do not meet the supplemental required attestations on the LCA.³¹ During petition review (adjudication), Homeland Security makes sure the certified LCA is included with the petition, “the employer is eligible to employ an H-1B worker, [] the position is a specialty occupation, and [] the prospective H-1B worker is qualified”³² The Department of

²⁴ E.g., GAO REPORT, *supra* note 6, at 7; Patrick Thibodeau & Jaikumar Vijayan, *Stimulus Package Sets H - 1B Limits; Leaves Out E-Verify Mandate*, COMPUTERWORLD, Feb. 23, 2009, available at <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=334451>.

²⁵ 20 C.F.R. § 655.730(c)(2).

²⁶ 20 C.F.R. § 655.736 (2006); see also 20 C.F.R. § 655.738(e) (West 2010); GAO REPORT, *supra* note 6, at 7.

²⁷ E.g., 20 C.F.R. § 655.739 (West 2010); Dep’t of Labor, Office of Compliance Assistance Policy, Sept. 2009, <http://www.dol.gov/compliance/guide/h1b.htm> [hereinafter Dep’t of Labor, Office of Compliance Assistance Policy]; GAO REPORT, *supra* note 6, at 7.

²⁸ E.g., 20 C.F.R. § 655.700(b)(2) (2008), GAO REPORT, *supra* note 6, at 7-10.

²⁹ 20 C.F.R. § 655.700(b)(3) (2008) (“If the nonimmigrant is already in the United States in a status other than H-1B, he/she may apply to the DHS for a change of visa status.”).

³⁰ 20 C.F.R. § 655.730(b).

³¹ 20 C.F.R. § 655.730(c)(2).

³² GAO REPORT, *supra* note 6, at 8.

Homeland Security may reject petitions that fail to meet any of these requirements.³³ After these initial application and petition processes, the Wage and Hour Division of the Department of Labor may investigate employers in practice if there is “reasonable cause to believe [the] employer did not comply or misrepresented information on its application.”³⁴ This reasonable belief usually stems from complaints by “H-1B workers or certain others with knowledge of [the] employer’s practices.”³⁵ Additionally, the Labor Department may conduct random investigations of past willful violators.³⁶ A final method of enforcement stems from complaints by American citizens to the Justice Department’s Office of Special Counsel for Immigration Related Unfair Employment Practices.³⁷ This department investigates “charges of citizenship discrimination brought by U.S. workers who allege that an employer preferred to hire an H-1B worker” over an American citizen.³⁸

Aside from denial of H-1B employer status, penalties vary for violations of H-1B program rules.³⁹ The Administrator of the ETA, who performs “all of the Secretary’s investigative and enforcement functions” as they pertain to the Labor Condition Application,⁴⁰ may assign penalties including fines “of up to \$10,000 and/or imprisonment of up to five years for knowing and willful submission of false statements”⁴¹ Additionally, failure to pay required wages or provide adequate working conditions may result in ordered “payment of back wages (including benefits),” regardless of whether the violation was willful.⁴² Other penalties include fines capped at “\$1000 for each affected person” (subject to the Administrator’s discretion),⁴³ “disqualification from approval of petitions,” and “other administrative remedies as the Administrator determines to be appropriate.”⁴⁴ Additionally, the Office of Special Counsel for Immigration Related Unfair Employment Practices may “investigate charges of immigration-

³³ *Id.*

³⁴ *Id.*

³⁵ *E.g.*, GAO REPORT, *supra* note 6, at 18; Jeronimides, *supra* note 5, at 376.

³⁶ GAO REPORT, *supra* note 6, at 18.

³⁷ *Id.* at 8.

³⁸ *Id.*

³⁹ *See id.* at 17.

⁴⁰ 20 C.F.R. § 655.800 (2006).

⁴¹ 20 C.F.R. § 655.805(a).

⁴² 20 C.F.R. § 655.805(b); *see also* GAO REPORT, *supra* note 6, at 8.

⁴³ 20 C.F.R. § 655.410(a) (2009).

⁴⁴ 20 C.F.R. § 655.810 (2006).

related unfair employment practices” and file a complaint in connection therewith.⁴⁵ The penalties for violations found through these types of complaints are left to the discretion of “specially designated administrative law judges within the Office of the Chief Administrative Hearing Officer [of the] U.S. Department of Justice.”⁴⁶

IV. ENFORCEMENT METHODS: INEFFECTIVE CHECK ON ABUSES

Despite its systematic and organized appearance, the H-1B program is ineffective at preventing and properly penalizing abuses.⁴⁷ Employers may manipulate the hiring procedure to obtain cheap, dependable labor at the expense of American job seekers. The first opportunity for abuse arises when the employer fills out the LCA.

A. LCA APPROVAL PROCESS

The LCA data is evaluated on its face; as long as the information does not raise suspicions and meets the general requirements, it passes muster.⁴⁸ Therefore, the employer has the ability to dodge suspicion by meeting the minimum criteria, at which point the chance of being questioned is very low.⁴⁹ The “incomplete or obvious inaccuracies” threshold⁵⁰ is a very low standard:

Labor has defined obvious inaccuracies as when an employer . . . states a wage rate that is below the Fair Labor Standards Act minimum wage; [] identifies a wage rate that is below the prevailing wage on the application; and [] identifies a wage range where the bottom of the range is lower than the prevailing wage on the application.⁵¹

Although regulations provide guidance to potential employer-applicants when filling out the LCA, these regulations do not mandate close investigation by the Labor Department.⁵² The prevailing wage “is

⁴⁵ 28 C.F.R. § 0.53(b)(1) (1997); *see also* GAO REPORT, *supra* note 6, at 25.

⁴⁶ 28 C.F.R. § 0.53(b)(1).

⁴⁷ *See* Miano, *Bottom of the Pay Scale*, *supra* note 2, at 1.

⁴⁸ GAO REPORT, *supra* note 6, at 10.

⁴⁹ *See id.* at 23.

⁵⁰ 20 C.F.R. § 655.730(b); *see also* GAO REPORT, *supra* note 6, at 26.

⁵¹ GAO REPORT, *supra* note 6, at 14.

⁵² 20 C.F.R. § 655.731 (2009).

usually obtained by contacting the State Workforce Agency (SWA) having jurisdiction over the geographic area of intended employment or from other legitimate sources of information.”⁵³ Although the recently-implemented “iCert program” provides guidance to applicants by way of a “Prevailing Wage Quick Start Guide”⁵⁴ and a more comprehensive “Prevailing Wage User Guide,”⁵⁵ the validity of the resulting prevailing wage depends on more than just appropriate estimation by the source of information consulted for wage approximations; the validity also depends on the accuracy of the employer’s employment description.⁵⁶ If the employer provides an occupational classification that meets the requirements of a specialty occupation simply for purposes of obtaining an H-1B visa but intends to assign more responsibilities to the worker than those admitted on the LCA, then the assigned wage minimum noted by the Labor Department may be inappropriate for that worker.⁵⁷ Further, although the employer must maintain documentation supporting “the validity of the wage statement,” the employer need

⁵³ U.S. Dep’t of Labor Employment & Training Admin., Foreign Labor Certification Prevailing Wages, Dec. 23, 2009, <http://www.foreignlaborcert.doleta.gov/wages.cfm>; see also 20 C.F.R. § 655.731(a)(2); see also Jeronimides, *supra* note 5, at 383-88 (explaining the evolution of H-1B regulations, where initially The Technical Immigration and Naturalization Amendment of 1991 set out to allow flexibility in wage determinations and to “eliminate the rigidity,” and subsequent corresponding regulations provided “prevailing wage sources in order of priority,” diminishing the originally desired flexibility).

⁵⁴ EMPLOYMENT AND TRAINING ADMIN. PERFORMANCE AND TECH. OFFICE, U.S. DEP’T OF LABOR, iCERT PREVAILING WAGE QUICK START GUIDE FOR EXTERNAL USERS, http://icert.doleta.gov/library/user_guides/iCERT_Prevailing_Wage_Quick_Start_Guide.pdf (last visited Feb. 26, 2010) [hereinafter iCERT PREVAILING WAGE QUICK START GUIDE FOR EXTERNAL USERS].

⁵⁵ EMPLOYMENT AND TRAINING ADMIN. PERFORMANCE AND TECH. OFFICE, U.S. DEP’T OF LABOR, iCERT LCA MODULE ONLINE SYSTEM EXTERNAL USER GUIDE, VERSION 1.0, AILA INFO.NET DOC. NO. 09041064 (2009), <http://www.aila.org/content/fileviewer.aspx?docid=28587&linkid=199300>.

⁵⁶ See 20 C.F.R. § 655.731.

⁵⁷ See John Miano, Former President, Programmers Guild, Testimony Before the Subcomm. on Immigration, Border Security, and Claims of the H. Judiciary Comm. 109th Cong. 6-7, 10 (2006), available at <http://www.aila.us/content/default.aspx?docid=18964> [hereinafter Miano, Testimony], cited in 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, 165 (2007); see also 20 C.F.R. § 655.731; Goodsell, *supra* note 4, at 162-63.

only present such documentation to the Department of Labor upon request.⁵⁸

In practice, H-1B wages consistently fall below the wages of U.S. workers.⁵⁹ John Miano, who founded the Programmers Guild, “a union for computer programmers,”⁶⁰ has alleged that “the overwhelming majority of H-1B workers are actually paid wages substantially lower than Americans in equivalent positions.”⁶¹ Consequently, “the LCA system has been nothing more than a paper-shuffling process.”⁶²

However, in April of 2009, the DOL unveiled the new iCert program, which was intended to help the DOL in “tightening its review of applications for H-1B visas.”⁶³ The program has shifted the previously online system toward a system involving manual processing of applications. Previously, an LCA was “approved within seconds of submission. With the implementation of iCert, for the first time DOL staffers . . . manually process LCAs to ensure thorough scrutiny of the application, resulting in approval times of at least 5 to 7 business days.”⁶⁴ Further, now “the employer must specify the number of workers to be classified as new employment.”⁶⁵ The additional fields, added time, and manual review involved in filing and processing LCAs through iCert is at least a step in the right direction with regard to preventing the certification of so many LCAs that contain errors.⁶⁶

⁵⁸ 20 C.F.R. § 655.731(b)(1).

⁵⁹ Goodsell, *supra* note 57, at 165.

⁶⁰ *Id.* at 161.

⁶¹ Miano, Testimony, *supra* note 57, at 34.

⁶² Miano, *Bottom of the Pay Scale*, *supra* note 2, at 4.

⁶³ Posting of Kellie N. Lego to The H-1B Visa Lawyer’s Blog, 2009 — The Year of Immigration Compliance, http://www.h1bvisalawyerblog.com/2009/03/2009_the_year_of_immigration_c.html (Mar. 18, 2009); *see also* Regulatory Information: NAFSA’s iCERT Resource Page, http://www.nafsa.org/regulatory_information.sec/the_icert_portal_system/ (last visited Feb. 26, 2010) [hereinafter NAFSA’S iCERT Resource Page].

⁶⁴ Lego, *supra* note 63.

⁶⁵ New DOL System iCERT for H1B LCAs, http://www.h1bvisalawyerblog.com/2009/03/2009_the_year_of_immigration_c.html (Mar. 30, 2009); *see* iCERT PREVAILING WAGE QUICK START GUIDE FOR EXTERNAL USERS, *supra* note 54.

⁶⁶ *See* NAFSA’s iCERT Resource Page, *supra* note 63.

B. COMPLAINT-BASED ENFORCEMENT

Post-certification procedures fail to sufficiently police workplace activity and protect H-1B workers.⁶⁷ Because the application review process fails to adequately monitor potential abuses, enforcement of the H-1B program's rules and guidelines stems largely from complaints by H-1B workers themselves or by others.⁶⁸ Nevertheless, while an H-1B worker or third party may file a complaint,⁶⁹ in practice it is rare for either party to execute this step.⁷⁰ H-1B workers who realize that they are not being treated properly are often hesitant to complain out of fear of being penalized by employers or ultimately losing their visas entirely.⁷¹ To employers, this behavior may seem like "remarkable loyalty,"⁷² but this perception masks the true reason for such committed employment relationships: "Since an H-1B is typically in no position to seek other employment, the employer need not worry that the worker will suddenly leave . . . in the middle of a pressing project."⁷³ In practice, therefore, these H-1B workers are relegated to a role of "de facto indentured servitude."⁷⁴ Additionally, because holding an H-1B work visa does not prevent an alien from later obtaining a green card, an H-1B worker's reluctance to complain may result from hope for or dependence on the employer's sponsorship of the worker's permanent residency down the road.⁷⁵

⁶⁷ See Miano, Testimony, *supra* note 57, at 10-11, cited in Goodsell, *supra* note 57, at 165.

⁶⁸ See 20 C.F.R. § 655.710 (2006); see also GAO REPORT, *supra* note 6, at 16.

⁶⁹ GAO REPORT, *supra* note 6, at 16.

⁷⁰ See Norman 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, 910 (2003); see also Ron Hira, *EPI Briefing Paper #187: Outsourcing America's Technology and Knowledge Jobs*, ECONOMIC POLICY INSTITUTE, at 4, Mar. 28, 2007, available at <http://www.sharedprosperity.org/bp187/bp187.pdf> [hereinafter Hira, *Outsourcing America's Technology*].

⁷¹ Hira, *Outsourcing America's Technology*, *supra* note 70, at 4.

⁷² Matloff, *supra* note 70, at 817.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE RANKING MINORITY MEMBER, SUBCOMM. ON CRIMINAL JUSTICE, DRUG, POLICY, AND HUMAN RESOURCES, COMM. ON GOV'T REFORM, H. OF REP., BETTER CONTROLS NEEDED TO HELP EMPLOYERS AND PROTECT WORKERS, GAO/HEHS-00-157, 22 (2000) available at <http://www.gao.gov/archive/2000/he00157.pdf>; see also Jeronimides, *supra* note 5, at 378-79 (describing the relationship between temporary workers and temporary workers seeking permanent residence).

Although several protections exist for H-1B workers who complain about employers' actions, these protections are vague and ineffective at encouraging H-1B workers to file complaints when applicable.⁷⁶ Statutory whistleblower protections mandate that employers may not "intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee" based on the employee's disclosure of information to authorities.⁷⁷ Another statutory protection provides the opportunity for an H-1B worker who has complained to seek other employment during the remaining H-1B period without penalty of losing H-1B status.⁷⁸ Further, if the H-1B worker somehow loses visa status while "fac[ing] retaliatory action from his or her employer[,] . . . USCIS adjudicators may consider [this result] an 'extraordinary circumstance' as defined by 8 CFR 214.1(c)(4)" and may reinstitute the H-1B visa.⁷⁹ Unfortunately, the decision of whether to apply these protections is in the discretion of USCIS.⁸⁰

When a third party complains that an employer's behavior violates H-1B or certification guidelines, subsequent investigation occurs only if the complaint provides "reasonable cause to believe that the employer has committed a violation," and that either "the violation is willful," meaning it reflects a pattern of that type of behavior, or "the employer has committed substantial violations, affecting multiple employees."⁸¹ It is only after the complaint has met these criteria and the Secretary has approved the prospective investigation that "an investigation should be commenced by the Administrator."⁸² An American citizen-employee may also complain upon cause to believe that the employer has discriminated against the employee by "preferr[ing] to hire an H-1B worker."⁸³ In such a case, the Justice

⁷⁶ Hira, *Outsourcing America's Technology*, *supra* note 70, at 4.

⁷⁷ 8 U.S.C.A. § 1182(n)(2)(C)(iv) (West 2008).

⁷⁸ 8 U.S.C.A. § 1182(n)(2)(C)(v) (West 2008).

⁷⁹ Donald Neufeld, *Memorandum* (U.S. Citizenship & Immigration Serv. May 30, 2008) (citing 8 C.F.R. § 214.1(c)(4) (2009)), *available at* <http://www.h1blegalrights.com/wp-content/uploads/2008/12/termination-retaliation-extraordinary-circumstance.pdf>.

⁸⁰ Will I Be Deported If I Complain Against My H-1B Employer?, <http://www.h1blegalrights.com/?p=33> (Nov. 26, 2008, 04:56 EST).

⁸¹ 20 C.F.R. § 655.807(d) (2006).

⁸² 20 C.F.R. § 655.807(g) (2006).

⁸³ GAO REPORT, *supra* note 6, at 8; *see also* 20 C.F.R. § 501.3(b) (2008).

Department has discretion to investigate.⁸⁴ The charges may be dismissed for lack of reasonable cause.⁸⁵

C. RANDOM INVESTIGATIONS OF WILLFUL VIOLATORS

An additional, minimal check on H-1B employers comes with the Department of Labor's authority to randomly investigate employers who have been deemed willful violators within the past five years.⁸⁶ However, employers subject to this authority represent a small percentage of H-1B employers in general.⁸⁷ The process does not target employers who are not yet identified as violators, and this group constitutes the bulk of the employer class.⁸⁸

D. EFFECT

Because few means of H-1B rule enforcement exist, it is crucial for H-1B workers and third parties to utilize the complaint system.⁸⁹ When H-1B workers fear that filing complaints may detrimentally impact their citizenship status or work conditions, their decisions not to file indirectly affect American workers,⁹⁰ these Americans may not appeal to employers whose H-1B workers accept small wages out of fear.

Ron Hira, a well-known expert on outsourcing issues,⁹¹ explained the rarity of investigations of certified employers and the work conditions these employers provide for their H-1B workers:

H-1B employers are never scrutinized except in the rare case that an investigation is triggered by an H-1B worker whistleblower. When investigated, violations

⁸⁴ GAO REPORT, *supra* note 6, at 25.

⁸⁵ *Id.*

⁸⁶ Fact Sheet # 62S: What Is a Willful Violator Employer? (Dep't of Labor July 2008), <http://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62S.pdf> [hereinafter Dep't of Labor, Fact Sheet].

⁸⁷ GAO REPORT, *supra* note 6, at 19. Although the number of cases is small, "cases with willful violations . . . have increased from 8 percent in fiscal year 2000 to 14 percent in fiscal year 2005. *Id.* at 24.

⁸⁸ *Id.*

⁸⁹ See Hira, *Outsourcing America's Technology*, *supra* note 70.

⁹⁰ *Id.*

⁹¹ Bio for Ron Hira, P.H.D., P.E., http://www.uscc.gov/bios/2005bios/05_01_13bios/hira_on.htm (last visited Mar. 16, 2009).

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.⁹²

Hira further notes, "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."⁹³ Rather than pursue a complaint whose favorable end the worker may never see, the H-1B worker often finds silent endurance the more attractive option.⁹⁴ Thus, the complaint system, in its current state, fails to offer reliable regulation.

Because the Department of Labor only randomly investigates employers previously adjudged as willful violators,⁹⁵ undetected violator-employers are generally secure and need only fear complaints, which are rarely, if ever, filed.⁹⁶ Although USCIS has recently attempted to increase oversight of the H-1B program,⁹⁷ much improvement is still needed.⁹⁸ The bottom line is that the abuses are not disappearing: "[S]erious violations of the H-1B program by employers are so common that one in five visas are affected by either fraud or 'technical violations.' This means that potentially thousands of employers may be violating the rules, some willfully."⁹⁹

⁹² Hira, *Outsourcing America's Technology*, *supra* note 70.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Dep't of Labor, Fact Sheet, *supra* note 86.

⁹⁶ Hira, *Outsourcing America's Technology*, *supra* note 70.

⁹⁷ Lego, *supra* note 63.

⁹⁸ See Hira, *Outsourcing America's Technology*, *supra* note 70.

⁹⁹ Patrick Thibodeau, *Widespread Problems, Fraud Found in H-1B Program*, COMPUTERWORLD, Oct. 9, 2008, <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9116758>.

V. H-1B "BODYSHOPS"

When employers in need of specialized workers struggle to find affordable talent, third party companies known as "bodyshops" or "outsourcing firms" often solve this problem to the detriment of American workers.¹⁰⁰ Bodyshops submit paperwork for certification before real work assignments exist and "bring H-1B visa workers into the country and then contract [them] out to other companies on a work-for-hire basis."¹⁰¹ The hired H-1B workers then focus on projects for the end employer, which "allows the [end] employer to say it never hired any H-1B workers."¹⁰² Bodyshops profit by charging the end company more than they pay the H-1B workers.¹⁰³ The phenomenon of bodyshopping further deters employers from whole-heartedly attempting to fill positions with American workers; not only can these employers utilize cheaper immigrant labor, but they can also do so without jumping through the hoops associated with certification.¹⁰⁴ Of the multiple ways parties abuse the H-1B system, the practice of bodyshopping is likely the most serious offense.

If the intent behind the H-1B program is to provide American employers with regulated access to highly-specialized international workers on a temporary basis,¹⁰⁵ bodyshopping thwarts this function completely.¹⁰⁶ In addition to deceiving officials who oversee the H-1B visa program, because only limited visas are available, bodyshopping precludes "other workers who would potentially provide needed skills to the U.S. economy [from] obtain[ing] visas."¹⁰⁷ Further, bodyshops are typically "H-1B-dependent" employers because a high percentage of workers have H-1B visas.¹⁰⁸ It is unlikely, however, that they recruit in a manner that is consistent with the certification attestation regarding seeking American employees as a first resort.¹⁰⁹ Bodyshops often merely "sponsor workers without actual assignments and then

¹⁰⁰ Miano, Testimony, *supra* note 57, at 18.

¹⁰¹ Goodsell, *supra* note 57, at 156.

¹⁰² *Id.* at 168 (citing Miano, Testimony, *supra* note 57).

¹⁰³ See Miano, Testimony, *supra* note 57, at 18-19.

¹⁰⁴ *Id.*

¹⁰⁵ Jeronimides, *supra* note 5.

¹⁰⁶ Hira, *Outsourcing America's Technology*, *supra* note 70, at 3.

¹⁰⁷ Goodsell, *supra* note 57, at 169.

¹⁰⁸ 20 C.F.R. § 655.736; *see also* 20 C.F.R. § 655.738(e); GAO REPORT, *supra* note 6, at 7.

¹⁰⁹ 20 C.F.R. § 655.736.

'circulate lists of available H-1B workers to employers.'"¹¹⁰ As John Miano described before the Subcommittee on Immigration, Border Security, and Claims, "Hotlists are lists with resumes of H-1B workers already in the United States who do not have work. Companies exchange hotlists so those with available H-1B workers can subcontract them to other companies that will rent out the workers."¹¹¹ Even if the end employer has attempted to recruit Americans before resorting to the bodyshop's assistance, the bodyshop, which is the H-1B employer according to certification documents, has not met the statutorily-mandated attestation of recruiting U.S. workers.¹¹² By manipulating a statutory loophole¹¹³ to their benefit, bodyshops outsource jobs to foreigners who, by virtue of the H-1B program, are stationed in America—"essentially onshore offshoring."¹¹⁴ Miano, using 2005 LCA data, estimated "that more than two thirds of the workers in computer programming occupations are going to employers in the offshoring and bodyshopping industries."¹¹⁵ The labor is cheap and easy to obtain. Naturally, employers choose the cheapest hiring technique, sometimes without fully understanding the manner in which this hiring technique violates H-1B visa policy. Without effective monitoring and penalization, the practice of bodyshopping will continue to thrive and defeat the intent of the H-1B visa program.

VI. CHANGES IN THE H-1B PROGRAM

There have been several recent changes to the H-1B Visa program. On January 6, 2009, Congress introduced Section 1611 of the Economic Recovery and Reinvestment Act, subtitled "Employ American Workers Act," with the stated objective of helping Americans counteract the rise in unemployment rates.¹¹⁶ This legislation imposes specific requirements on certain types of employers wishing to hire non-citizen workers, including H-1B workers. For

¹¹⁰ Goodsell, *supra* note 57, at 168.

¹¹¹ Miano, Testimony, *supra* note 57, at 5.

¹¹² See 20 C.F.R. § 655.736; see also 20 C.F.R. § 655.738(e); GAO REPORT, *supra* note 6, at 12.

¹¹³ Thibodeau & Vijayan, *supra* note 24.

¹¹⁴ Ed Frauenheim, *Waging Battle of Foreign Labor*, CNET NEWS.COM, Oct. 6, 2005, available at http://news.cnet.com/Waging-battle-on-foreign-labor/2009-1022_3-5888772.html.

¹¹⁵ Miano, Testimony, *supra* note 57, at 9.

¹¹⁶ Economic Recovery and Reinvestment Plan, § 1611(b)(1), Jan. 6, 2009, 191, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf.

example, the legislation imposes “additional requirements for employers who receive funds through the Troubled Asset Relief Program [TARP] or under Section 13 of the Federal Reserve Act (covered funding) before they may hire a foreign national to work in the H-1B specialty occupation category.”¹¹⁷ Qualifying financial institutions¹¹⁸ must now follow the new/extended process, which requires that they adhere to the same heightened attestation standards previously required of only H-1B-dependent employers.¹¹⁹ Although the changes make it more difficult and expensive for affected companies to hire H-1B workers directly and will likely provide some assistance to Americans looking for employment directly within those companies,¹²⁰ the legislation does not address the biggest abuse to the H-1B system: bodysourcing. For example, as Ron Hira notes, “many TARP recipients have ‘huge shadow workforces’ at outsourcing vendors Restricting H-1B hiring . . . ‘doesn’t close the loopholes where most of the abuse occurs.’”¹²¹ The H-1B section of the Employ American Workers Act has many other weaknesses, including embracing the H-1B-dependent employer attestation standard, which is difficult to enforce. A qualifying employer must attest that it has made a “good faith” effort to recruit an American worker.¹²² Proving a lack

¹¹⁷ USCIS Announces New Requirements for Hiring H-1B Foreign Workers (U.S. Citizenship & Immigration Serv. 2009) <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=34dd9b5d82420210VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

¹¹⁸ The Emergency Economic Stabilization Act of 2008 defines “financial institution” as:

any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State, territory, or possession of the United States, the District of Columbia, Commonwealth of Puerto Rico, Commonwealth of Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands, and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government.

12 U.S.C.A. § 5202(5).

¹¹⁹ Economic Recovery and Reinvestment Plan, *supra* note 116.

¹²⁰ *Id.*

¹²¹ Thibodeau & Vijayan, *supra* note 24.

¹²² Marianne Kolbasuk McGee, *Stimulus Package Makes it Harder to Hire H-1B Workers*, INFORMATION WEEK, February 18, 2009, available at http://www.informationweek.com/news/global-cio/h1b/showArticle.jhtml?articleID=214500968&cid=nl_IWK_daily_H.

of good faith, however, is problematic. Bloggers in the IT industry have commented on this very problem, explaining how employers dodge their “good faith” obligations. One Human Resources representative expressed his concerns anonymously:

[E]mployers routinely get around that requirement by running fraudulent job ads and conducting bad faith interviews of qualified American workers and then simply rejecting all American applicants . . . I have over ten years [of] experience in corporate Human Resources departments and technical recruiting operations, and I have actually seen these tactics used. Many HR reps are aware of these tactics but do not speak out in public for fear of losing their careers also.¹²³

It is difficult to prove that an employer did not recruit U.S. workers in good faith because the inquiry is fact-intensive and somewhat subjective. Thus, the standard provides another way for an employer who desires to hire H-1B workers to manipulate the system.¹²⁴

The Employ American Workers Act’s provisions affecting the financial services sector will not likely reduce participation in the H-1B visa program as a whole:¹²⁵

It's estimated that in the financial services and banking sector, less than 1% of workers have H-1B visas . . . So while the new provisions will make it more burdensome for financial services and banks that have received federal bailouts to hire H-1B visa workers, the new rules themselves aren't likely to make [a] sizable dent in the overall demand for H-1B visas . . . The United States currently grants petitions for up to 85,000 new H-1B visas annually.¹²⁶

¹²³ Posting of HR Representative to IT BUSINESS EDGE, *H-1B Visa Proposal: 'Unintended Consequences' All Around*, <http://www.itbusinessedge.com/cm/blogs/all/h-1b-visa-proposal-unintended-consequences-all-around/?cs=10104> (Apr. 9, 2007, 06:54).

¹²⁴ Ron Hira explained the absence of a “labor market test” that would prove a regular H-1B employer had first recruited American workers before hiring the H-1B worker. Hira, *Outsourcing America's Technology*, *supra* note 70, at 2-3.

¹²⁵ Thibodeau & Vijayan, *supra* note 24.

¹²⁶ McGee, *supra* note 122.

In fact, even within the financial services sector, bodyshopping remains an avenue incentivizing employers to deal with immigrant employees only indirectly:

Most of the H-1B use, and abuse, happens through relationships banks have with outsourcing firms . . . [the amendment does not] restrict[] them from working with those firms . . . a bank could still legally force a laid-off American employee to train a replacement worker who is on an H-1B visa.¹²⁷

Ironically, the H-1B program might generally push specialty employment offshore rather than boosting it in this country: “Rather than preventing the outsourcing of jobs, the H-1B program . . . accelerat[es] 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.”¹²⁸ These firms thrive by facilitating H-1B workers’ acquisition of high-level skills onsite and subsequent return to their native countries, where the workers may then assist clients cheaply and effectively.¹²⁹

On the other hand, H1-B visa requirements may compel employers to outsource while avoiding the red tape of the visas altogether:

Why go through the expense — including not just the visa fees but also the legal fees needed to process the visas, the time it takes to get new employees trained and up and running, plus the uncertainty, delays, and lack of permanency of investments you may have made in hiring foreign workers — when you can just contract a company outside our borders and still get most of the benefits of having the best and the brightest working for you?¹³⁰

¹²⁷ Eric Krangel, *Anti-Immigrant Worker Bill Won’t Stop H-1B Abuse*, THE BUSINESS INSIDER, Feb. 9, 2009, <http://www.businessinsider.com/2009/2/bill-blocking-h-1b-hires-for-tarp-takers-wont-stop-h-1b-abuse>.

¹²⁸ Hira, *Outsourcing America’s Technology*, *supra* note 70, at 2.

¹²⁹ *Id.* at 5-6.

¹³⁰ Ephraim Schwartz, *Green-card Regulations Encourage Off-shoring*, INFOWORLD, Mar. 29, 2005, http://www.infoworld.com/article/05/03/29/14OPreality_1.html.

Hira expressed his opinion on the outsourcing problems associated with the H-1B program in an article discussing the effect of this new Economic Recovery Plan on American engineers: “The Obama Administration has been in office just a few weeks now, but we already know how it will address the offshoring of engineering jobs. It will promote it.”¹³¹ By continuing to support a system in which loopholes exist and agencies fail to regulate all offenses, the government perpetuates these violations and thus makes outsourcing a more attractive option to employers seeking cheap labor.¹³²

Fortunately, more recent developments mark a step in the right direction of reducing the impact of bodyshops. On January 8, 2010, Donald Neufeld published a memorandum offering “guidance to adjudication officers to clarify what constitutes a valid employer-employee relationship to qualify for the H-1B ‘specialty occupation’ classification.”¹³³ This memorandum acknowledges the ambiguity that may lead to H-1B visa confusion: “The lack of guidance clearly defining what constitutes a valid employer-employee relationship as required by 8 C.F.R. 214.2(h)(4)(ii) has raised problems, in particular, with . . . beneficiaries placed at third-party worksites.”¹³⁴ The memo states, “Petitioner [i.e., the bodyshop-employer] control over the [visa] beneficiary must be established when the beneficiary is placed into another employer’s business, and expected to become a part of that business’s regular operations.”¹³⁵ The 2010 Neufeld memorandum

¹³¹ Ron Hira, *Opinion: The Obama Administration Promotes Outsourcing*, EE TIMES, Feb. 4, 2009, at 1, <http://www.eetimes.com/showArticle.jhtml;jsessionid=YI2IUHT1TPPH4QSNLQSKHSCJUNN2JVN?articleID=213001145>.

¹³² *Id.*

¹³³ *Questions and Answers: USCIS Issues Guidance Memorandum on Establishing the “Employee-Employer Relationship” in H-1B Petitions* (U.S. Citizenship and Immigr. Serv.), Jan. 13, 2010, (citing Memorandum from Donald Neufeld USCIS Assoc. Director to USCIS Service Center Directors (Jan. 8, 2010)), <http://www.uscis.gov> (follow “NEWS” hyperlink; then January 2010 “Questions and Answers: USCIS Issues Guidance Memorandum on Establishing the ‘Employee-Employer Relationship’ in H-1B Petitions” hyperlink) [hereinafter U.S. Citizenship and Immigr. Serv.].

¹³⁴ Memorandum from Donald Neufeld USCIS Associate Director to USCIS Service Center Directors, Jan. 8, 2010, <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf> [hereinafter Neufeld, 2010 Memorandum]

¹³⁵ *Id.*

specifically designates bodyshops as examples of employment that “would not present a valid employer-employee relationship”.¹³⁶

Third Party Placement / “Job Shop”

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company’s payroll. Once placed at the client company, the beneficiary reports to a manager who works for the third-party company. [He] does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriet[ary] information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary’s end-product, the payroll, is not in any way related to the petitioner’s line of business, which is computer consulting. The beneficiary’s progress reviews are completed by the client company, not the petitioner.

[Petitioner Has no Right to Control; No Exercise of Control]¹³⁷

To determine whether a valid “employer-employee relationship” exists, USCIS evaluates “whether the petitioner has the ‘right to control’ the beneficiary’s employment.”¹³⁸ The memo further provides that USCIS may request evidence upon belief “that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary’s employment term with the employer.”¹³⁹

¹³⁶ *Id.* at 5.

¹³⁷ *Id.* at 6-7.

¹³⁸ U.S. Citizenship and Immigr. Serv., *supra* note 133.

¹³⁹ Neufeld, 2010 Memorandum, *supra* note 134, at 10.

Employers may submit documentation as evidence that the proper relationship has been maintained; additionally, examples of relevant documentation are outlined in the memo.¹⁴⁰ Upon receipt of such evidence, “[a]djudicators will review and weigh all the evidence submitted to determine whether a qualifying employer-employee relationship has been established.”¹⁴¹

The 2010 Neufeld memorandum certainly makes employers aware that USCIS does not intend to ignore abuses any longer. However, the memo limits its applicability to “solely for the training and guidance of USCIS personnel” by stating that it “may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.”¹⁴² Despite this language, the memo “revises the Adjudicator’s Field Manual, which is binding on adjudicators pursuant to AFM Section 3.4.”¹⁴³ Accordingly, the memo has been challenged as a potential violation of the Administrative Procedures Act through failure to abide by proper “notice and comment requirements.”¹⁴⁴ However, according to USCIS, the memo does not alter the law with regard to H-1B petitions: “The H-1B regulations currently require that a United States employer establish that it has an employer-employee relations[hip] with respect to the beneficiary, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of such employee.”¹⁴⁵ Despite the claims of failed adherence to proper notice and comment requirements, deportations based on the Neufeld memo have already begun.¹⁴⁶ Challenges to the memo’s validity are likely to continue.

¹⁴⁰ U.S. Citizenship and Immigr. Serv., *supra* note 133. These examples include but are not limited to “a complete itinerary of services or engagements,” copies of signed Employment Agreements and contracts, and copies of position descriptions. Neufeld, 2010 Memorandum, *supra* note 134, at 8.

¹⁴¹ U.S. Citizenship and Immigr. Serv., *supra* note 133.

¹⁴² Neufeld, 2010 Memorandum, *supra* note 134, at 10-11.

¹⁴³ AILA-USCIS HQ Liaison Committee, American Immigration Lawyers Association (AILA), Letter to Roxana Bacon, Chief Counsel of the U.S. Citizenship & Immigr. Serv. (January 26, 2010) 1-2, <http://www.docstoc.com/docs/23690947/AILA-Letter-on-Neufeld-Memo-of-Jan-2010>.

¹⁴⁴ *Id.*

¹⁴⁵ U.S. Citizenship and Immigr. Serv., *supra* note 133.

¹⁴⁶ See Jacob Cherian, *Deportation of H-1B Visa Workers at Newark, JFK—New Face of Outsourcing*, GROUND REPORT, Jan. 31, 2010,

VII. CONSIDERED CHANGES TO THE H-1B PROGRAM

A. TAKE PROPER STEPS TO CHANGE SUBSTANTIVE LAW

Changing H-1B statutory language may help further the goals of USCIS and eliminate abuse. At present, the L-1 visa program¹⁴⁷ contains legislation forbidding bodyshops:

(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
(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.¹⁴⁸

Thus, 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.¹⁴⁹ With the addition of this language, Congress eliminated the L-1 bodyshopping loophole.¹⁵⁰ If the H-1B program could be amended to similarly prohibit bodyshops, this legislation would help eliminate any uncertainty as to the permissibility of

<http://www.groundreport.com/Business/Deportation-of-H-IB-Visa-Workers-at-Newark-JFK-New/2916904>.

¹⁴⁷ The L-1 visa “requires the visa applicant to be a current employee of the sponsoring company.” This “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.’” Goodsell, *supra* note 57, at 170 (citing 8 U.S.C.A. § 1101(a)(15)(L) (2006)).

¹⁴⁸ Goodsell, *supra* note 57, at 170-71 (citing 8 U.S.C.A. § 1184(c)(2)(F) (West 2004)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

bodyshopping.¹⁵¹ However, the L-1 program accounts for a much smaller portion of work visas than does the H-1B program.¹⁵² Based on the magnitude of the H-1B program, enforcing the legislation would require extensive monitoring of employers and their worksites.¹⁵³ So far, this monitoring is not a common practice.¹⁵⁴

Ideally, the Neufeld memo and future, properly-implemented H-1B statutory changes would result in a realistically-priced labor standard. These adjustments could cause employers to stop exploiting the sometimes desperate H-1B visa holders, whose motivations for accepting low pay and long hours may go unnoticed or be completely unknown to the end employer.¹⁵⁵ Despite the ways in which such changes may disrupt American businesses that rely on third party labor, ultimately, such a restriction on H-1B employment should wean American businesses of this source of cheap labor and encourage them to reinvest in U.S. workers and in specialty education.¹⁵⁶

B. INCREASED OVERSIGHT

Although the LCA review and certification process likely has improved by way of iCert so that the process will no longer amount to “simply a ‘rubber stamp’ of the employer’s application,”¹⁵⁷ iCert will not eliminate abuse by employers. The largest and most severe abuses may occur onsite, where H-1B workers may be undercompensated by extreme hours or low wages.¹⁵⁸ Therefore, it is necessary for enforcement agencies to initiate more in-person checks of H-1B work locations and to monitor H-1B workers’ paychecks and the hours they actually work. A recent crackdown on H-1B program abuse suggests that officials focus predominantly on initial filings rather than post-certification practices in looking for signs of violations.¹⁵⁹ The charges

¹⁵¹ *Id.*

¹⁵² *Id.* at 170.

¹⁵³ See Goodsell, *supra* note 57, at 170.

¹⁵⁴ Miano, Testimony, *supra* note 57, at 11.

¹⁵⁵ Matloff, *supra* note 70.

¹⁵⁶ See Goodsell, *supra* note 57.

¹⁵⁷ Hira, *Outsourcing America's Technology*, *supra* note 70.

¹⁵⁸ See Matloff, *supra* note 70.

¹⁵⁹ Patrick Thibodeau, *Fed Indictments Tell How H-1B Visas Were Used to Undercut Wages*, COMPUTERWORLD, Feb. 13, 2009, available at <http://www.computerworld.com/action/article.do?command=viewArticleBasic&taxonomyName=Outsourcing&articleId=9127943&taxonomyId=72&pageNumber=1>

and investigations hinged on documentation abuse, as employers were charged with conspiracy, mail fraud, wire fraud, and making a false statement in an immigration matter.¹⁶⁰ Officials initiated these investigations when they saw “inconsistencies during the application process.”¹⁶¹ If the application process had not caught these violations, employers may have been able to continue underpaying workers and manipulating the program.¹⁶² Effectively monitoring post-certification employer practices might require keeping open lines of communication between H-1B workers and enforcement agencies and systematically reviewing the behavior of employers.¹⁶³

If enforcement agencies do not make strides to change the H-1B program in order to assure that “the H-1B is not used as a ‘cheap labor’ program,”¹⁶⁴ the program will continue to drive down compensation for American workers who cannot compete with the low wage requirements of H-1B workers.¹⁶⁵ Studies have already reflected this dangerous trend:

According to the U.S. Citizenship & Immigration Service’s (USCIS) most recent annual report 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.¹⁶⁶

Cheap H-1B labor is very attractive to employers hoping to profitably complete a project. Stricter enforcement mechanisms are necessary to prevent the growth of these wage disparities.

C. STRICTER PENALTIES

In order to lessen the disparity between salaries U.S. workers demand and those paid to H-1B workers, enforcement agencies should also impose stricter penalties on violators and raise the administrative costs of hiring H-1B workers. Not only might this cause employers to

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Hira, *Outsourcing America’s Technology*, *supra* note 70.

¹⁶⁴ Hira, *Outsourcing America’s Technology*, *supra* note 70, at 3.

¹⁶⁵ See Hira, *Outsourcing America’s Technology*, *supra* note 70.

¹⁶⁶ *Id.* at 4.

reconsider breaking the rules, but this money could be used to subsidize corresponding specialty education of U.S. workers.¹⁶⁷ Such a practice may eventually undercut arguments that the H-1B workers are the only specialty workers capable of completing the desired tasks.¹⁶⁸ Currently, the money received from administrative fines and penalties is “channeled to the National Science Foundation and the Department of Labor, primarily for job training programs for U.S. workers, college scholarships for low income students in engineering, math, computer science, and certain other science enrichment courses.”¹⁶⁹ Due to the cap on fines, this funding is limited in its “capacity to transfer wealth created by immigration from employers who benefit from immigrant workers to U.S. citizens who may be displaced.”¹⁷⁰ Increasing penalties to augment specialty training for U.S. workers would make more American workers more appealing to employers.¹⁷¹

Alternatively, H-1B employers could be required to subsidize training for an American worker for each H-1B hired.¹⁷² Such a rule could provide that an employer who hires an H-1B worker to complete a specific project must also set aside a statutorily imposed amount for the education of current or future U.S. workers so that these workers in training would eventually match H-1B workers in skill level. In turn, this education could decrease the chances of H-1B workers permanently displacing U.S. workers in the event that the H-1Bs become green card-holders.¹⁷³ The U.S. workers in training would gain a competitive advantage and job security while the H-1B worker is able to complete necessary, immediate tasks. Thus, the government could assist Americans in coming up to speed with the technologies and specialty skills fueling the demand for H-1B workers rather than employers becoming complacent with such skills as within the H-1B niche.¹⁷⁴

As an extension of the increase in penalties, legislation should also swap the “good faith” requirement for recruiting U.S. workers for

¹⁶⁷ See Miano, Testimony, *supra* note 57.

¹⁶⁸ Goodsell, *supra* note 57, at 155.

¹⁶⁹ Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2080 (2007).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Miano, Testimony, *supra* note 57.

¹⁷³ U.S. GEN. ACCOUNTING OFFICE, *supra* note 75.

¹⁷⁴ See Miano, Testimony, *supra* note 57.

a more workable standard.¹⁷⁵ A list of mandatory steps an employer must undertake for recruiting American workers before considering the H-1B program would help accomplish this goal.¹⁷⁶ Legislation should also impose the additional attestations and recruiting requirement on all H-1B employers, not just H-1B-dependents or willful violators.¹⁷⁷ The Department of Labor currently relies on “education as its primary method of promoting compliance with the H-1B program,” through “assistance programs and [by posting] guidance on its website.”¹⁷⁸ However, updating federal legislation to include specific mandatory recruitment techniques would create a stronger and more consistent structure for compliance with recruitment requirements; these updates could eliminate the problems generated by employers who either fail to comprehend the extent to which they must recruit U.S. workers or fail to truly act in good faith. Such legislation could help prevent employer practices of creating fake job postings or failing to actively recruit U.S. workers.¹⁷⁹

VIII. CONCLUSION

Current H-1B legislation, although improving, is insufficient to protect H-1B workers from employers who manipulate the H-1B system in order to acquire cheap labor. This deficiency causes American workers to lower their wage standards, when feasible, in order to remain competitive in the job market. Future legislation should address these inadequacies and promote greater enforcement of H-1B rules.

¹⁷⁵ Dep’t of Labor, Office of Compliance Assistance Policy, *supra* note 27.

¹⁷⁶ *Id.*

¹⁷⁷ See Dep’t of Labor, Office of Compliance Assistance Policy, *supra* note 27.

¹⁷⁸ GAO REPORT, *supra* note 6, at 4.

¹⁷⁹ IT BUSINESS EDGE, *supra* note 123.

