

Fixing Our Badly Broken H-1B Visa and Employer-Sponsored Green Card Programs

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1 Prologue: “TubeGate”

It was an “emperor has no clothes” moment.

A prominent immigration law firm, Cohen and Grigsby, had held a conference for its clients on how to sponsor foreign workers for visas, both temporary (H-1B) and permanent (green cards). The firm had uploaded videos of the conference to the YouTube Web site, apparently as a means of advertising.¹ Critics of the H-1B visa program found the video to be chock full of damning admissions by the firm that the law’s so-called “protections” for American workers are easily—and legally—circumvented.

One of the critical organizations, the Programmers Guild, placed an excerpt from Part 9 of the video set on the Web.² In the excerpt, Larry Lebowitz, a partner in the firm, explains to a group of his clients how to use loopholes in the green card law to avoid hiring American citizens and permanent residents. Lebowitz points out, without a trace of remorse:

And our goal is clearly, not to find a qualified and interested U.S. worker. And you know in a sense that sounds funny, but it’s what we’re trying to do here. We are complying with the law fully, but ah, our objective is to get this person a green card, and get through the labor certification process. So certainly we are not going to try to find a place [at which to advertise the job] where the applicants are the most numerous. We’re going to try to find a place where we can comply with the law, and hoping, and likely, not to find qualified and interested [American] worker applicants.

In other words, though the law says that an employer must attempt to find an American to fill a given job before resorting to sponsoring a foreign worker for a green card, the law is so full of loopholes that it is easy to circumvent—*fully legally*.

In Part 12 of the video series, another lawyer with the firm, Jen Pack, explains how to pay a foreign worker (either one holding an H-1B visa or an applicant for a green card) \$10,000 to \$15,000 below market wage—*again in full compliance with the law*.

The videos came as a shock to many members of Congress and their staffers, because they had been repeatedly assured by tech industry lobbyists that the law protects American workers and forbids the use of foreign nationals as cheap labor. But it should not have been news to them. Two of Congress’ own studies, in 2000 and 2003, had included findings of widespread abuse, and back in 1996 the Department of Labor released a report whose very title made the point quite bluntly—THE DEPARTMENT OF LABOR’S FOREIGN LABOR CERTIFICATION PROGRAMS: THE SYSTEM IS BROKEN AND NEEDS TO BE FIXED.³ More than a decade later, it is time for Congress to stop giving the industry lobbyists undeserved credibility, and to finally fix these broken programs.

¹See BUSINESSWEEK, July 9, 2007, http://www.businessweek.com/magazine/content/07_28/c4042003.htm; INFORMATIONWEEK, June 18, 2007, <http://www.informationweek.com/story/showArticle.jhtml?articleID=199905192>; and the PITTSBURGH POST-GAZETTE, June 22, 2007, <http://www.post-gazette.com/pg/07173/796195-28.stm>. The videos were removed from YouTube by the firm after the negative press emerged, but the videos are still available on the Programmers Guild Web site at http://www.programmersguild.org/video/youtube_master.html and at <http://lyrelyrepantzandfier.com>.

²<http://www.youtube.com/watch?v=TCbFEgFajGU>

³DOL Final Report No.06-96-002-03-321, Joseph Frisch.

2 Bulleted Summary

The following will be shown in this document:

- The industry claim to need H-1Bs to remedy a labor shortage is false (Section 4.1). Their claim that the H-1Bs are “the best and the brightest,” needed to keep American firms innovative, is also false in the vast majority of cases (Section 4.2). Instead, the employers’ goal is use H-1Bs as a source of cheap labor (Section 4.3).
- Government officials and industry representatives have explicitly stated that the goal of H-1B is the importation of cheap labor (Section 4.3.3).
- The abuse of H-1Bs for cheap labor is widespread, actually standard. It extends throughout the industry, *including the large, household-name American firms*. It is not limited to the Indian-owned firms by any means (Section 6). The loopholes are used by the most prominent immigration law firms.
- It is crucial to keep in mind that use of H-1Bs for cheap labor is fully legal, due to loopholes in the law’s *prevailing wage* requirement (Section 5); it is NOT fraud. One must distinguish between the terms *abuse*—using the program for inappropriate, though legal, purposes—and *fraud*, i.e. unlawful actions.
- Accordingly, solving the problem requires *eliminating the loopholes*, NOT increasing enforcement (Section 5).
- Though some foreign workers are facing long waits for green cards, “the best and the brightest” applicants are in a separate category with much higher priority, and have a wait of only a few months. The industry lobbyists are incorrect in claiming that we risk losing workers of outstanding talent who may return home rather than endure a long wait for a green card.
- The industry lobbyists have lost credibility. Reform will require that Congress start to give serious consideration to the overwhelming evidence that the H-1B program is fundamentally broken and needs a thorough overhaul (Section 7.1).

Various solutions will be presented in Section 7.

3 Overview of Foreign Worker Programs Used by the Tech Industry

H-1B is a temporary visa, with the official term for the temporary nature being *nonimmigrant*. By contrast, a green card confers permanent residency status. It gives the bearer the right to live and work in the U.S. forever, and also makes him eligible to become a naturalized citizen later on. A green card is considered a visa too, not surprisingly called an *immigrant visa*.

As temporary and permanent visas, respectively, H-1B and employer-sponsored green cards are theoretically separate. Indeed, many employers hire H-1Bs and do not sponsor them for green cards. However, over the years the typical pattern has been for employers to sponsor their foreign workers for green cards, but also sponsor them simultaneously for an H-1B visa, the latter giving them the ability to work during the several years wait while the green card application is pending. The law allows H-1Bs to have *dual intent*, which is just a technical term meaning that even though they are currently on a temporary visa, the employer is at the same time applying for permanent status for them.

Most employer-sponsored green cards involve the process of *labor certification*, which is supposed to verify that no qualified American is available for the job. The labor certification procedure is known as PERM.

For details of the processes, see

<http://heather.cs.ucdavis.edu/Archive/H1BGreenCardTutorial.txt>.

Another temporary visa often used by the tech industry is L-1. This enables a firm to bring a worker who is employed in a foreign branch of the firm to the U.S. for temporary work.

Here is a comparison of the visas:

Types of Work Visas			
visa	duration	U.S. recruit. required?	prev. wage required?
H-1B	temporary	no (other than H-1B-dep.)	yes
green card	permanent	yes	yes
L-1	temporary	no	no

4 What Is the Real Reason Why Tech Employers Hire H-1Bs?

The industry lobbyists claim that the industry needs H-1Bs to remedy a labor shortage and to retain its innovative lead over foreign competitors. Both of these claims are false. Instead, the employers want the H-1Bs as a source of cheap labor.

4.1 The H-1Bs Are NOT Hired to Remedy a Tech Labor Shortage

The constant cry of the industry lobbyists that the tech industry cannot find qualified workers is clearly false:

- No government or private study (other than those sponsored by the industry) has ever found a tech labor shortage, including during the dot-com boom.⁴
- In a time of labor shortage, wages skyrocket. Yet starting salaries for new graduates in computer science and electrical engineering, adjusted for inflation, have been stagnant or falling since 2001, as shown by a 2005 study conducted by BUSINESSWEEK chief economist Michael Mandel and reconfirmed by 2007 data.⁵

⁴ See extensive details in N. Matloff, "On the Need for Reform of the H-1B Nonimmigrant Work Visa in Computer-Related Occupations," UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM, Fall 2003, Vol. 36, Issue 4, 815-914. A copy of the article is on the Web, at <http://heather.cs.ucdavis.edu/MichJLawReform.pdf>, though with pagination starting at page 1 rather than 815.

⁵ See "Good Time to Learn Accounting," *BusinessWeek.com*, Sept. 15, 2005, http://businessweek.com/the_thread/economicsunbound/archives/2005/09/good_time_to_le.html. The starting salary for new computer science grads was \$52,473 in 2001 (<http://www.naceweb.org/press/display.asp?year=2007&prid=111>) and \$53,051 in 2007 (<http://www.naceweb.org/press/display.asp?year=2007&prid=264>). Inflation for this time period was about 16% but yet the starting salary for computer science grads only increased by 1%.

Change in Starting Wage	
major	salary change
Computer Engineering	-12.0%
Electrical Engineering	-10.2%
Psychology	-9.3%
Sociology	-4.1%
Computer Science	-12.7%
Marketing	-6.5%
Business Administration	-5.7%
Accounting	-2.3%

In other words, the salaries reflect that there is a labor surplus, not a shortage.

- Since the industry lobbyists claim the industry needs H-1Bs because not enough Americans pursue advanced degrees, I conducted a followup study to the BUSINESSWEEK investigation, analyzing the Master's degree level.⁶ The result was that starting salaries for new Master's degree graduates have been flat or falling too, disproving the industry's claim of a shortage at the advanced degree level.⁷
- The study by CEO-turned-academic Vivek Wadhwa is interesting, in that instead of using indirect methods, he actually asked employers whether they were having trouble hiring engineers.⁸ The study found that job offers to applicants were being accepted at high rates and that employers did not see much need to offer hiring bonuses, both of which findings disprove the industry's labor shortage claim. Wadhwa has made this point numerous times in the press.⁹
- The engineering areas that use the most H-1Bs are the computer-related fields, i.e. Computer Engineering, Computer Science and Electrical Engineering. As was seen above, salaries for those fields have been falling or flat, disproving a shortage. Additional insight into this can be seen in some interesting data regarding on-campus recruiting by employers, posted by the office of Engineering and Computer Science Career Services at the California State University, Sacramento, for the academic year 2006-2007:

Firms Recruiting by Field			
major	# Bach. grads.	# Master's grads.	# firms recruiting
Civil Eng.	52	17	35
Comp. Eng.	39	1	9
Comp. Sci.	74	54	9
Elec. Eng.	75	77	13
Mech. Eng.	52	16	20

The computer-related fields have the most graduates but the fewest firms recruiting them—a dramatic mismatch. Even allowing for the fact that different firms might be hiring different numbers of people,

⁶*Best? Brightest? A Green Card Giveaway for Foreign Grads Would Be Unwarranted*, CIS Backgrounder, May 2006, <http://www.cis.org/articles/2006/back506.pdf>. Insufficient data exists at the doctoral level.

⁷It is true that a substantial fraction of advanced degree recipients in the tech area are foreign students. However, that does not imply that we do not have enough Americans with advanced degrees; on the contrary, many holders of such degrees have been laid off in recent years. Note by the way that the reason there are so many foreign students in graduate programs is that the government actually planned the H-1B program to have this effect, in order to hold down PhD salaries. See Section 4.3.3 below.

⁸*Industry Trends in Engineering Offshoring*, Wadhwa *et al*, Duke University, Pratt School of Engineering Research Summary, 2006, memp.pratt.duke.edu/downloads/Duke_Industry_Trends_in_Engineering_Offshoring_10_24_06.pdf.

⁹See for example *Engineer Shortage? Duke Study Says No*, NPR broadcast, April 30, 2007, <http://www.npr.org/templates/story/story.php?storyId=9910492>.

you can see that there is no shortage of new graduates in the computer fields.

The industry lobbyists like to cite low unemployment figures for programmers, but this is highly misleading, because people leave the field when they can't find work, and thus do not appear in the unemployment data. Bureau of Labor Statistics researcher Carolyn Veneri explained,¹⁰

A major drawback in using...unemployment rates in analyses of shortages is that the unemployment rate is calculated based on a person's last job, rather than the longest job held or occupation in which he or she trained and is actually looking for work. This means an individual with experience as a computer programmer who is seeking a programming job, but who last worked as a cashier, is classified as an unemployed cashier, not an unemployed programmer...

Of course, the same is true if the person is *currently* working as a cashier too.

4.2 H-1B Is Mainly NOT About Innovation or Getting “the Best and the Brightest”

4.2.1 Most H-1Bs Are Ordinary People, Doing Ordinary Work

The industry lobbyists claim that the H-1Bs are “the best and the brightest,” and are needed to keep American firms innovative. Yet the fact is that the vast majority of H-1Bs are ordinary people doing ordinary work:

- The CIS study by John Miano¹¹ is highly illuminating. Miano analyzed the H-1B data in terms of the four levels of experience that the Department of Labor uses in determining prevailing wage for foreign workers:

Percent of Visas by Experience Level		
level	qualifications	percent of visas
I	entry	56%
II	qualified	31%
III	experienced	8%
IV	fully competent	5%

Fully 56 percent of the workers are rated by their employers as Level I, which is defined by the Department of Labor as “beginning level employees who have only a basic understanding of the occupation [and who] perform routine tasks that require limited, if any, exercise of judgment.” The phrasing for Level II is similar, defined as consisting of workers who “perform moderately complex tasks that require limited judgment.” This clearly shows that the H-1Bs are not brought in for innovation. Only 5 percent are rated at Level IV, which consists of workers who “plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques...”

I later did a similar analysis on the PERM data.¹² Among other things, I showed that *the same pattern holds for the same big-name firms claiming to Congress that they need the H-1Bs for innovation:*

¹⁰Carol Veneri, *Can Occupational Labor Shortages Be Identified Using Available Data?*, MONTHLY LABOR REVIEW, March 1999, p15.

¹¹*Low Salaries for Low Skills Wages and Skill Levels for H-1B Computer Workers, 2005*, April 2007, <http://www.cis.org/articles/2007/back407.html>.

¹²*Still Not the Best and the Brightest*, CIS BACKGROUNDER, May 2008.

%	Level I%	Level II%	Level III%	Level IV
Cisco	4%	57%	28%	10%
Google	11%	69%	18%	2%
Intel	3%	68%	27%	2%
Microsoft	26%	65%	6%	3%
Motorola	19%	72%	8%	1%
Oracle	44%	34%	19%	3%
Texas Instruments	8%	46%	25%	21%

With the exception of Texas Instruments, the major firms are for the most part hiring at Levels I and II, again in which workers do jobs “that require limited judgment.”

That study also showed that these putative “world class engineers” are being paid what their employers consider just average for their experience and education levels in the given occupation. Here are the median ratios of the foreign workers’ actual salaries to what the employers say average workers in the field make:¹³

occupation	median ratio	count
programmers	1.00	1181
software engineers	1.01	12470
electrical/electronics engineers	1.00	2867
all (non-s.w.) engineers	1.00	6598
all occupations	1.01	52350

If these were indeed “world class engineers,” they would be paid far above average, which as can be seen here is not the case.

- The tech industry employers give the impression that many of the H-1Bs they hire have PhDs. Yet only 1.6 percent of the computer-related H-1Bs in 1999/2000 had a PhD.¹⁴

Moreover, the foreign doctoral students are disproportionately enrolled in the academically weaker universities, as seen here: ¹⁵

Percent of Foreign Students by Experience Level	
department quality	% foreign
highest quarter	37.2%
second quarter	44.5%
third quarter	47.5%
lowest quarter	50.6%

- A recent study has been much cited by industry lobbyists, because it finds that immigrant tech workers have been involved in founding a number of companies and in many projects that were awarded patents.¹⁶ However, as confirmed by the lead author, Vivek Wadhwa, the report’s data show that the

¹³As detailed in Section 5.1, there are, real problems with these statements by employers. The ratio data in the table here take the point of view, “Let’s take the employers at their word regarding prevailing wages, in order to test their claim that they are hiring “world class engineers.”

¹⁴Data courtesy of Michael Hoefler of the USCIS, 2000. Note that the overall figure for H-1Bs in general was 7.6 percent, primarily consisting of H-1Bs working on university research projects in the life sciences.

¹⁵See David S. North, *SOOTHING THE ESTABLISHMENT: THE IMPACT OF FOREIGN-BORN SCIENTISTS AND ENGINEERS ON AMERICA*, University Press of America, 1995, p.48.

¹⁶See Wadhwa, Saxenian, Rissing and Gereffi, *America’s New Entrepreneurs*, Duke University School of Engineering, 2007. An update study by Wadhwa and coauthors, *Intellectual Property, the Immigration Backlog, and a Reverse Brain-Drain: America’s New Immigrant Entrepreneurs, Part III*, relies on highly flawed data; see [urlhttp://heather.cs.ucdavis.edu/Archive/WadhwaIII.txt](http://heather.cs.ucdavis.edu/Archive/WadhwaIII.txt).

immigrants have the same rates of entrepreneurship and patenting as the natives do. In other words, the influx from abroad is not bringing “better” engineers to the nation.

The industry lobbyists highlight some of the famous immigrant entrepreneurs in the industry, such as Jerry Yang and Sergey Brin, co-founders of Yahoo and Google. Yet neither of them immigrated to the United States as an H-1B visa holder; both came to the United States as minors with their parents, and thus are irrelevant to the H-1B issue. The lobbyists also like to cite Andy Grove, an early Intel employee (and NOT a cofounder), yet he came to the United States as a refugee, not under employer sponsorship.

More importantly, none of these firms has been pivotal to the industry technologically. There are lots of good Web search programs. In fact, Yahoo bought the one it uses, rather than developing its own. Rest assured, we would all still be surfing the Web without Yahoo and Google. And we would have computer chips to enable our surfing too: Although IBM launched Intel to world dominance by choosing the Intel chip for the first IBM PC in 1982, it had lots of other choices. IBM’s engineers preferred the chips by Motorola and NEC, and Bill Gates once called the Intel chip “brain damaged.”

4.2.2 H-1B Is Causing an Internal Brain Drain

A small percentage of the H-1Bs truly are outstanding talents from abroad, and I have always supported facilitating their immigration. But at the same time, as can be seen from the example below, the H-1B program is causing us to lose our top talents, an *internal brain drain*.

A former student of mine, has a Master’s degree, holds patents and had his work written up in the WALL STREET JOURNAL. He is articulate and is well-liked by his peers. But once he reached his late 30s, he found it more and more difficult to find an engineering job, and he recently left the field. Here is someone with a strong track record of innovation, but there is no place for him in the industry. Clearly, innovation is not the industry’s priority; their priority is saving money, which means shunning the older workers (more on this in Section 4.3.2).

Moreover, many of our most innovative young people are avoiding the field in the first place, as it is simply not financially attractive. Just consider, for instance, the fact that Microsoft pays its new PhDs in computer science around \$90,000—but pays its new lawyers \$140,000, with the gap widening even more in subsequent years. This can be attributed directly to H-1B, as the National Science Foundation promoted the program as a means of holding down PhD salaries in science and engineering (see note 27 below).

4.3 The Primary Use of H-1B Workers IS for Cheap Labor

The lobbyists have used their shortage and innovation claims to mask their real goal, which is to use the H-1Bs as cheap labor.

In order to understand the problem—and even more importantly, in order to solve it—it is crucial to keep in mind that employers use H-1Bs to save on labor costs in two different ways. Thus I will devote two separate subsections to them, following.

4.3.1 Type I Salary Savings

Employers incur Type I salary savings by paying H-1Bs less than the norm for comparable American workers, i.e. Americans of similar educational background, experience, skill sets and so on.

Type I savings have been well documented:

- A UCLA study on general engineering professions found a 33 percent wage gap between the foreign workers and Americans.¹⁷
- Papademetriou and Yale-Loehr¹⁸ analyzed labor certification applications for employer-sponsored green cards during 1988-1990. The authors tabulated job and INS jurisdiction combinations for which the mean actual wage paid to the foreign national was lower than the 45th percentile for the given job market. For computer-related occupations, they found the discrepancies in hourly wages shown as follows:

Foreign Worker Wages Vs. Market Wage			
job	state	mean foreign-national wage	mean market wage
Comp. Sys. Analysts and Scientists	NJ	\$15.24	\$21.64
Comp. Sys. Analysts and Scientists	NY	\$16.28	\$20.57
Comp. Programmers	NJ	\$15.65	\$19.74

The gaps here are sizable, ranging from 10.4 percent to 29.6 percent, though for some states and occupations the gaps were smaller.

- My own analysis, for computer-related professionals in Silicon Valley, found a 15-20 percent wage gap.¹⁹
- As part of a congressionally-commissioned study, the National Research Council subcontracted Hal Salzman, then of the University of Massachusetts, to study the question of cheap labor and other issues. The NRC states that, "...based on interviews with some H-1B employers, Salzman reported that H-1B workers in jobs requiring lower levels of IT skill received lower wages, less senior job titles, smaller signing bonuses, and smaller pay and compensation increases than would be typical for the work they actually did."²⁰
- The Government Accountability Office (GAO), Congress' investigative arm, also conducted an employer survey, in which they too found employers admitting to abusing the H-1B program, saying that "they hired H-1B workers in part because these workers would often accept lower salaries than similarly qualified U.S. workers; however, these employers said they never paid H-1B workers less than the required wage."²¹

¹⁷See Paul Ong and Evelyn Blumenthal, *Scientists and Engineers*, in Darrell Hamamoto and Rodolfo Torres (ed.), *NEW AMERICAN DESTINIES: A READER IN CONTEMPORARY ASIAN AND LATINO IMMIGRATION*, p.163. Stuart Anderson, an active proponent of the H-1B program, later contended that the UCLA study did not show wage exploitation of the immigrant engineers. I have shown elsewhere why his analysis is flawed (see note 4 above), but in any case, the UCLA authors' comments as to the meaning of the 33 percent wage gap were quite clear. They cited earlier findings that the foreign engineers may be "willing to accept lower salaries in order to obtain full-time employment in the U.S., a prerequisite for permanent residency," and the senior author, Ong, stated flatly that "Companies took advantage of immigrants" (Robert Bellinger, *Study Warns of Backlash, Resentment*, *ELECTRONIC ENGINEERING TIMES*, July 18, 1994). Ong's statement should settle the issue.

¹⁸Demetrios Papademetriou and Stephen Yale-Loehr, *BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS*, Carnegie Endowment for International Peace, 1996, p.67.

¹⁹See note 4 above.

²⁰National Research Council, *BUILDING A WORKFORCE FOR THE INFORMATION ECONOMY*, National Academies Press, 2001.

²¹H-1B FOREIGN WORKERS: BETTER TRACKING NEEDED TO HELP DETERMINE H-1B PROGRAM'S EFFECTS ON U.S. WORKFORCE, GAO-03-883, September 2003, www.gao.gov/new.items/d03883.pdf. The report also featured a statistical analysis, with mixed results, but this analysis was badly flawed; see <http://heather.cs.ucdavis.edu/Archive/GAO03.txt>.

Note especially the last two items. It is one thing to use data analysis to show that the problem exists, but even more powerful to see employers actually admitting to the abuse. Needless to say, many more were underpaying the H-1Bs but were savvy enough not to admit it.

4.3.2 Type II Salary Savings

Type II savings stem from the fact that older workers are perceived as being more expensive than younger ones. In many cases, when employers exhaust the supply of young American workers, they turn to hiring younger H-1Bs in lieu of older Americans. In this manner, the H-1B program is providing employers with cheap labor.

So, the key to understanding why older programmers and engineers have so much trouble finding work²² is indeed that they are perceived as being much more expensive than younger workers. To make this concrete, recall that the Department of Labor sets four levels of experience for computing prevailing wage. Here are the numbers for 2007, for software engineers in the region containing Durham, North Carolina:²³

Prev. Wage Experience Levels	
level	prev. wage
I	\$62,213 year
II	\$75,088 year
III	\$87,984 year
IV	\$100,859 year

Recall that the definition of Level IV is “fully competent,” i.e. the seasoned professional. So you can see that hiring a young H-1B instead of a mid-career American is saving close to 40 percent.

So, the employers focus on hiring the young, and the H-1B program provides then with a large labor pool of young workers. As seen in Section 4.2 above, the vast majority of H-1Bs have low levels of experience. The Indian IT giant Tata Consultancy Services, a major supplier of H-1B workers in the U.S., actually highlighted the youth of its programmers on its Web page.²⁴

Tata Programmer Experience Levels	
experience	percent
under 2 years	52%
2-5 years	41%
5-10 years	5%
10-15 years	1%
15+ years	1%

So, Type II salary savings comprise a major reason for the huge attractiveness of the H-1B program to employers.

One of the most strident advocates of an expanded H-1B program has been Intel. The firm has a major hiring focus on new or recent graduates, which author Tim Jackson reported was instituted in response to

²²See the NRC study, note 20 above, for data on time to find a job, etc.

²³See <http://www.flcdatcenter.com/OesQuickResults.aspx?area=20500&code=15-1031.00&year=8&source=1> I've chosen North Carolina here because my two case studies below, in Sections 5.1.2 and 5.1.3, are in that state. But the differences in levels would be similar in any other locale.

²⁴TCS recruiting page, originally at <http://www.usa-tcs.com/careers/whyjoin.html>. It was subsequently removed by Tata, but can be found in the cache at <http://web.archive.org/web/20041010223626/www.tcs-america.com/careers/whyjoin.html>.

a suggestion “by management consultants who feared the company was aging too fast, [recommending] easing older employees out of the company and replacing them with younger ones.”²⁵ Intel has stated repeatedly that most of the H-1Bs it hires are new graduates.²⁶

4.3.3 Government Officials and Industry Representatives Have Stated the Goal of H-1B Is Cheap Labor

In rare moments of candor, government officials and industry representatives have actually admitted that the goal of H-1B is the import of cheap labor. For instance:

- The National Science Foundation (NSF), a federal agency that was instrumental in getting Congress to establish the H-1B program in 1990, touted the program as a means of holding down PhD salaries. In a 1989 policy paper by Peter House, Director of the Policy and Research Analysis Division of the NSF²⁷ warned of a trend of rising PhD salaries in science and engineering, and proposed remedying this “problem” via having large enrollments of foreign students in U.S. PhD programs. Note carefully that this NSF official was fully aware of the fact that the resulting low PhD salaries would then drive American students away from pursuing doctoral degrees, stating

A growing influx of foreign PhDs into U.S. labor markets will hold down the level of PhD salaries to the extent that foreign students are attracted to U.S. doctoral programs as a way of immigrating to the U.S. ...[If] doctoral studies are failing to appeal to a large (or growing) percentage of the best citizen baccalaureates, then a key issue is pay...A number of [the Americans] will select alternative career paths...For these baccalaureates, the effective premium for acquiring a PhD may actually be negative.

True to the NSF’s goal, new law school graduates now make about 50% more in starting pay than new PhDs in computer science, and true to the NSF’s forecast, today Americans comprise only 50% of PhD students in computer science. Actually, we are overproducing PhDs,²⁸ but we do need some, and yet H-1B is causing our best young minds to literally seek greener pastures.

- Former Federal Reserve chairman Alan Greenspan made similar remarks in 2007, stating that an increase in immigration of tech workers is needed in order to “suppress the skilled-wage level.”²⁹

²⁵Tim Jackson, *INSIDE INTEL*, Dutton, 1997.

²⁶ See for example Testimony of Patrick J. Duffy, Human Resources Attorney for Intel Corporation, Senate Judiciary Committee, September 16, 2000, at http://judiciary.senate.gov/testimony.cfm?id=913&wit_id=2610, last visited June 8, 2006.

²⁷ See Eric Weinstein, *HOW AND WHY GOVERNMENT, UNIVERSITIES, AND INDUSTRY CREATE DOMESTIC LABOR SHORTAGES OF SCIENTISTS AND HIGH-TECH WORKERS*, NBER, MIT, 1998, <http://nber.nber.org/~peat/PapersFolder/Papers/SG/NSF.html>, and also Daniel S. Greenberg, *A Shortage of Scientists and Engineers*, WASHINGTON POST, August 18, 1991, p.C7.

²⁸The 1995 report, *THE PRODUCTION AND UTILIZATION OF SCIENCE AND ENGINEERING DOCTORATES IN THE UNITED STATES*, William F. Massy and Charles A. Goldman, Stanford Institute for Higher Education Research, Stanford University, still holds true today.

²⁹*Bloomberg News*, March 14, 2007, http://www.boston.com/business/globe/articles/2007/03/14/greenspan_let_more_skilled_immigrants_in/.

Ironically, a 2003 Fed study, *The H-1B Program and Its Effects on Information Technology Workers*, Madeline Zavodny, FEDERAL RESERVE BANK OF ATLANTA ECONOMIC REVIEW, Third Quarter 2003, <http://www.frbatlanta.org/filelegacydocs/ACF6CBD.pdf>, claimed that the H-1B program is not having an adverse impact on American IT salaries. Unfortunately, the American workers analyzed in the study were primarily technicians, a job category not held by H-1Bs (who are limited to jobs normally requiring a Bachelor’s degree). This of course made the study useless. See <http://heather.cs.ucdavis.edu/Archive/Fed03.txt> for a detailed critical analysis of the study.

- The Information Technology Association of America (ITAA) has been at the forefront of advocating expansions of the H-1B program. Their 1997 report³⁰ convinced Congress to enact the first increase in the H-1B cap in 1998. Though they repeatedly denied that employers hire H-1Bs as cheap labor, claiming that H-1Bs were needed because American workers were simply not available, the ITAA report itself showed clearly that Americans were indeed available but that employers just did not want to pay the price. Here is how they put it:

At a certain level, in a global market, U.S. companies risk their profitability if they must pay individuals premiums beyond that which customers are willing to pay for the product or service those employees produce.

The ITAA also said that Americans could be trained for these jobs, but that giving them these skills would make them worth more than the employers wanted to pay, and thus the employers “need” H-1Bs:

Training employees in IT would seem to be a win-win for both worker and employer. And often that is the case. However, extensive training creates other issues. “You take a \$45,000 asset, spend some time and money training him, and suddenly he’s turned into an \$80,000 asset,” says Mary Kay Cosmetics CIO Trey Bradley. That can lead to another problem. New graduates trained in cutting edge technologies become highly marketable individuals and, therefore, are attractive to other employers.

Note that this also disproves the industry lobbyists’ claim that the 40-year-old Americans are not hireable because they lack up-to-date skills; the real issue is salary, not skills. In this regard, note too the well-publicized cases in which Americans were laid off and replaced by foreign workers, and forced to train their foreign replacements; this shows that it was the foreign workers that lacked the skills, not the Americans.³¹

4.4 De Facto Indentured Servitude of the H-1Bs

Though technically the foreign workers have the right to switch employers, and thus alleviate their exploitation, in practical terms, they cannot afford to do so if they are being sponsored for a green card. For most of them, the wait for a green card is so long that starting the process all over again with another employer would be unthinkable.

Murali Devarakonda, a member of the Board of Directors of the Immigrant Support Network, an H-1B organization active in 2000, said, “This is legal human rights violation in America...You [as an H-1B] are an indentured servant, a modern-day slave...”³²

Even the pro-industry National Research Council report recognized the problem:³³ “Foreign nationals dislike [labor certification, one of the stages in obtaining a green card] because the process is so lengthy (often 3 years or longer in some areas of the country) and prevents them (on pain of having to begin the process all over again) from changing employers...”

³⁰Stuart Anderson, *HELP WANTED: THE IT WORKFORCE GAP AT THE DAWN OF A NEW CENTURY*, 1997, ITAA

³¹See my article cited in note 4 for extensive analysis of the skills issue.

³²STRAIGHT TALK (weekly television program produced by Santa Clara County Democratic Club), June 10, 2000.

³³NRC, note 20 above, p.171.

4.5 Role of H-1B in Offshoring

The industry lobbyists often state that if they cannot bring H-1Bs to work in the U.S., they will be forced to send the work offshore. This is highly misleading, in two senses:

- Much of the work is just not feasible to do remotely,³⁴ in spite of the fact that offshore labor is even cheaper than H-1Bs.
- Contrary to the industry claim that H-1B and L-1 visas enable them to avoid offshoring work, the visas actually play a key role in *facilitating* offshoring, so crucial that the Indian commerce minister, Kamal Nath, called H-1B “the outsourcing visa.”³⁵ Ronil Hira, an Indian-American professor of public policy at the Rochester Institute of Technology, showed that the typical setup for an offshoring project is to have one worker onshore (as an H-1B or L-1) for every two workers offshore.³⁶ The onshore workers handle liaison, provide training, etc.³⁷

5 The Abuse Is Enabled by Loopholes, Not Fraud

As mentioned earlier, the use of H-1Bs as cheap labor is NOT an issue of fraud. It is fully legal, due to huge loopholes in the law. **Meaningful reform of the H-1B and green card programs is not possible without a full understanding of this point.**

Because the problem is loopholes rather than violation of the law, the solution to the problems is NOT to beef up enforcement. Indeed, the Government Accountability Office’s 2006 audit found that compliance rates were good. This was not surprising to anyone involved with either side of the H-1B controversy, because again, the employers are complying with the law, utilizing loopholes that allow them to use H-1Bs as cheap labor.

5.1 Loopholes Around the Prevailing Wage Law

The law states that employers of foreign workers—both H-1Bs and green card applicants—must pay the workers the “prevailing wage.” However, the legal definition of this term is so riddled with loopholes as to make the law useless.

This was recognized in the GAO report cited earlier,³⁸ which stated,

[The employers said] they hired H-1B workers in part because these workers would often accept lower salaries than similarly qualified U.S. workers; however, these employers said they never paid H-1B workers less than the required wage.

That last clause is key: The employers paid H-1Bs below-market rates yet still paid the legally required wage. This is because the legally required wage IS below market levels, due to loopholes.

³⁴*Offshoring: What Can Go Wrong?*, Norman Matloff, IEEE IT PROFESSIONAL, July/August 2005.

³⁵*Outsourcers Corner Market for U.S. Skilled Worker Visas*, Anand Giridharadas, INTERNATIONAL HERALD TRIBUNE, April 12, 2007.

³⁶*U.S. Immigration Regulations and India’s Information Technology Industry*, TECHNOLOGICAL FORECASTING & SOCIAL CHANGE, 2004.

³⁷One industry lobbyist has dismissed this argument, saying if the employers really wanted cheap trainees, they would use the H-3 training visa. But that visa is very narrow in scope, and is thus unsuitable in most cases.

³⁸Note 21.

5.1.1 An All-Purpose Loophole

Although the press coverage of the YouTube videos (Section 1) focused on the immigration law firm’s advice to employers on how to avoid hiring Americans, another section of that video set is equally important. In part 12, lawyer Pack explains various ways that an employer can use to pay a foreign worker (either one holding an H-1B visa or an applicant for a green card) below-market wages—in full compliance with the law. For example, in this excerpt Pack shows how the employer can shave \$10,000 to \$15,000 off the market price:

...let’s say [the government prevailing wage] is \$10,000 or \$15,000 higher than the employee is going to be making, then we may want to consider reworking our requirements, maybe scaling back from a Master’s degree to a Bachelor’s, or going from five years of prior experience to two...

Why is this legal? Actually, Pack’s statement illustrates what one might call “the mother of all loopholes” in the H-1B/green card prevailing wage law: Under the law, prevailing wage is determined by the JOB, not by the WORKER. Here are just a few examples of the vast utility of this loophole:

- Suppose the job requires only a Bachelor’s degree but the foreign worker has a Master’s. The employer (legitimately) considers a Master’s to be a “plus” but not an absolute requirement. Then the official prevailing wage is legally defined to be at the Bachelor’s level. Result: The employer can hire a foreign worker who has a Master’s degree but pay her only a Bachelor’s-level salary—IN FULL COMPLIANCE WITH THE LAW.
- Suppose the foreign worker has experience in a certain technical skill, let’s say Linux programming. The employer (legitimately) considers such experience to be a “plus” but not an absolute requirement. Then the official prevailing wage is legally defined to be for a worker without such experience. Result: The employer can hire a foreign worker who has a skill that would command a premium salary on the open market but pay him a salary which does not recognize this skill—again, IN FULL COMPLIANCE WITH THE LAW.
- Suppose the job requires only two years of experience, but the employer (legitimately) considers five years of experience to be a “plus.” Then the official prevailing wage is legally defined to be at the level of two years of experience. Result: The employer can hire a foreign worker who has five years of experience but pay her a wage appropriate for only two years—once again, IN FULL COMPLIANCE WITH THE LAW.

This third example above explains why more than half of the H-1Bs are paid wages at the government’s lowest level of experience. as we saw in Section 4.2 above.

This is one of the big loopholes. As immigration lawyer Sean Olender once put it, “This disparity often results in very experienced candidates being underpaid.”³⁹

There are many other loopholes. Pack mentions, for instance, that employers can shop around for different private salary surveys instead of using the government data. Obviously, they take the wage cited by the “lowest bidder.”

³⁹Olender law office Web page, <http://www.usvisa-law.com/prevaili.htm>. This comment was made at a time when the two-level prevailing wage scheme was in effect. Olender added that the prior scheme could result in overpayment at the lower experience level. Note that that means that some other loopholes were used at that time for the lower experience levels.

Pack also notes that in the case of a foreign worker who is being sponsored for a green card, the employer can claim, again fully legally, that the worker is making a salary which is higher than the one he is actually being paid, as long as it is likely he'll get raises to this level by the time the green card is issued, three or four years later. (Thus those who analyze the Department of Labor PERM data should keep in mind that many of the salaries stated by employers there for their foreign workers are inflated.)

5.1.2 Case Study I

These points were illustrated well in an investigation of actions by the Bank of America by John Miano of the Programmers Guild.⁴⁰

In 2001 Bank of America (BofA) in Charlotte, NC “outsourced” its Human Resources (HR) functions to a company called Exult. As part of the arrangement, the Bank of America employees supporting these functions were made Exult employees.

At the end of 2001, Exult announced it was “outsourcing” its computer programming work to two “H-1B bodyshops,” HCL and Hexaware. Unlike in the previous “outsourcing,” the existing employees were fired and replaced by foreign H-1B workers. The American BofA/Exult employees were forced to train their replacements in order to collect a severance package.

The affected employees had very specialized skills in that they worked with PeopleSoft and Oracle...reported salaries [were] \$70,000-\$90,000 for the BofA/Exult employees who lost their jobs...

Attached below is an Labor Condition Application filed by HCL for some of the H-1B replacements at BofA/Exult. The salary for the H-1B workers is \$39,184, about half of what the people they replaced made...

The first step used here in the wage depression process is to call the H-1B workers generic “systems analysts.” So instead of using the higher-than-average wage for the specialized skills of Oracle and PeopleSoft, the employer uses the wage for systems analysts as a whole.

...employers can get a prevailing wage for Level I and Level II⁴¹...which in this example are \$41,246 and \$69,618 respectively. So now the employer claims the H-1B workers are “beginning level employees” and uses the lower wage as the prevailing wage. The law only requires H-1B workers to be paid within 95% of the prevailing wage. The employer takes 95% of \$41,246 and comes up with a wage of \$39,184. Thus, the company is paying the H-1B workers about half of what the workers they replaced made.

In other words, the employer here saved about 50 percent by hiring H-1Bs. This appears to be a combination of Type I savings—accrued by not having to pay a market for technical skills with PeopleSoft and Oracle⁴²—and Type II savings—accrued by hiring young H-1Bs instead of mid-career Americans.

5.1.3 Case Study II

This case study is different, in that the employer is hiring workers of outstanding talent. As I showed earlier, *the vast majority of H-1Bs are NOT “the best and the brightest”*; they are ordinary people doing ordinary

⁴⁰John Miano, HOW TO UNDERPAY H-1B WORKERS, Programmers Guild Web site, <http://www.colosseumbuilders.com/Guild/h1b/howtounderpay.htm>.

⁴¹A two-level experience scheme was in use at that time.

⁴²Typically possession of special skills brings a salary premium of around 20 percent. See p.847 in the reference in note 4 above.

work. However, in that minority of instances in which the foreign worker is of outstanding talent, I fully support facilitating her immigration. But I do NOT support paying them salaries well below what their abilities would command on the open market, and sadly this is commonplace. Here I will illustrate this with an example kindly provided to me by Vivek Wadhwa, a former tech CEO who is now a major critic of the H-1B program.⁴³

The example consists of two H-1Bs hired by Wadhwa when he was CEO of Relativity Technologies. He states that both workers were of first-rate abilities, yet his firm was able to pay them far below their market value.⁴⁴

The firm hired an H-1B Software Engineer for \$44,144, and a Computer Programmer for \$31,933. Note that even new Bachelor's graduates in computer science got around \$50,000 at the time, so these two salaries were very low by any standard, and even lower when one accounts for the high qualifications of the two workers.

The first H-1B, who was hired in 2001, had a Master's degree and had been working part-time for Wadhwa in Russia for the previous three years. Moreover, at the time Wadhwa hired this worker, he had been working for a Russian government joint venture company in Russia, developing telephone and networking systems, sophisticated work. And yet as an H-1B he was being paid less than a new Bachelor's graduate with no experience, fully legally.

How did the firm manage to pay such low salaries and yet be fully compliant with the law? Once again, remember, the legal prevailing wage is determined by the JOB, not by the WORKER. So in determining the prevailing wage, Wadhwa's firm did NOT have to factor in the worker's Master's degree, and did NOT have to account for his sophisticated work experience.

This saved the firm plenty of money. The regulations require that if the profession considers a Bachelor's degree entry level, as is the case with the jobs taken by computer-related H-1Bs, then a job that requires a Master's must be rated at least Level II. At that time the government prevailing wages were \$46,467 for Level I and \$73,278 for Level II. In other words, the firm saved almost \$27,000 dollars by declaring the job to be Level I, even though the worker was Level II.

In addition, at that time, employers were allowed to pay 5 percent less than prevailing wage. That resulted in a figure of \$44,144, which is what they ended up paying the H-1B. On the open market, this worker, with his Master's degree, his sophisticated job experience and top talent, would have easily earned \$80,000.

5.2 Loopholes Used to Avoid Hiring Americans

5.2.1 The Green Card Program

The law does require that Americans be given priority before an employer can sponsor a foreign worker for a green card.⁴⁵ Yet as seen in the infamous YouTube video (Section 1), it is fully legal for such an employer to studiously avoid any attempt at hiring an American. What is the resolution of this seeming contradiction?

The loophole lies in the fact that the law is directed at the Secretary of Labor, not the employer. When an employer applies for a green card for a foreign worker, the Secretary is, by law, supposed to ascertain

⁴³Though he opposes the H-1B program, he supports the concept of "fast-track green cards." However, I believe the green cards are just as harmful as the H-1Bs. See Section 7.3.2 below.

⁴⁴It should be noted that, as CEO, Wadhwa played little if any role in this. His firm's Human Resources Department and immigration lawyers were the ones to set salaries, prevailing wage and so on.

⁴⁵This is not required for H-1Bs. See Section 5.2.2.

that no qualified American is available for the job. This is supposedly done via regulations written by the Department of Labor. But those regulations merely specify steps that must be taken by the employer, such as advertising the job in a newspaper. As stated in the video, though, the employer can choose a newspaper in which prospective applicants may not see the ad. When Lebowitz, the law firm's partner, stated

So certainly we are not going to try to find a place [at which to advertise the job] where the applicants are the most numerous. We're going to try to find a place where we can comply with the law, and hoping, and likely, not to find qualified and interested worker applicants.

lawyer Pack then explained,

Fortunately, DOL gives 10 options [for venues for the ad], from which you can select three.

A number of other measures can be taken as well.

Yet they will receive some American applications, and in video 10 the firm explains what to do with them—i.e. how to reject them. First, the employer can describe the applicant as not interested in the position! One of the firm's lawyers, Jennifer Barton, says:

If they [the American applicants] don't like the salary, don't like the work location, [we deem them] not interested...Those are ways we can disqualify them, get them out of the market...

Note the “don't like the salary” part. In the free market, employers would have to negotiate with applicants. But having access to foreign workers changes that; the employers simply offers a very low salary and then dismisses the American applicants as “not interested.” So here again is one of many, many ways in which employers can hire foreign workers more cheaply than Americans—and remember, it's all fully legal.

Barton continues:

If it gets to the point where somebody's looking like they're very qualified, we ask [the employer] to have the manager of that specific position step in and go over the qualifications with them—if necessary schedule an interview, go through the whole process to find a legal basis to disqualify them for this position—in most cases there doesn't seem to be a problem.

In other words, **it is easy to legally reject all American applicants.**

5.2.2 The H-1B Program

As noted earlier, in the main the H-1B visa does not have a requirement that Americans be given hiring priority.

However, there is an exceptional category for *H-1B-dependent* employers, defined to be those for whom at least 15 percent of the workforce has an H-1B, in which special requirements apply. This is a tiny category, comprising only 0.1% of all H-1B employers,⁴⁶ but because the Durbin/Grassley bill has proposed

⁴⁶Immigration attorney Jose' Latour's electronic newsletter, <http://www.usvisanews.com/memo1192.html>, January 6, 2001.

extending these special requirements to all H-1B employers, it is worthwhile to examine the exact language of the statute.

An H-1B-dependent employer may not hire an H-1B until he

...has taken, in good faith, timely and significant steps to recruit and retain sufficient United States workers in the specialty occupation for which H-1B nonimmigrants are sought. Such steps shall have included recruitment in the United States, using procedures that meet industry-wide standards...and offering employment to any qualified United States worker who applies.

Clearly, this is a stronger standard than in the case of employer-sponsored green cards. In the YouTube videos, the lawyers are clearly recommending that employers NOT recruit “in good faith,” as it is not required for green cards. The H-1B-dependent employers do have such a requirement.

H-1B-dependent employers also have other restrictions, such as not being allowed to hire H-1Bs within 90 days of a layoff. Of course, the statute is still not free of other loopholes discussed above, but it is clear that this aspect of the Durbin/Grassley bill is a step in the right direction.

6 The Abuse Is Widespread, NOT Limited to the Indian-Owned Firms

Unfortunately, over the years some politicians have been using the Indian-owned firms as scapegoats for the abuse of the H-1B program. I remember hearing this talk from members of Congress as far back as 1998, when I testified before the House Immigration Subcommittee. But this is not only unfair to the Indians, it is completely false. **Use of these gaping loopholes in H-1B and green card law is widespread, engaged in by virtually all firms. It has become standard operating procedure.**

For example, the Department of Labor PERM data on green card sponsorships shows some of the name-brand companies that are clients of Cohen and Grigsby, the law firm whose YouTube video explained how to use various loopholes:

- Marconi Communications
- Westinghouse
- PPG Industries
- University of Pittsburgh
- Del Monte Foods
- Bayer Corp.
- Highmark Blue Cross Blue Shield
- PNC Financial Services Group.

One way to see that virtually all the employers make use of these loopholes is to note whether firms make use of one of the minor loopholes, which is that up through 2004 employers were allowed to pay only 95 percent of prevailing wage. As can be seen from the PERM data, say for 2000-2004, nearly every major firm made some use of that loophole before the law changed in December 2004.

In fact, one can get further insight by examining the following PERM records for software engineers hired by Cohen and Grigsby clients:

wage paid	prevailing wage	firm
64240	67621	Bayer Corporate and Business Services LLC
64240	67621	CM Technologies Corp.
64240	67621	CompunetiX
64240	67621	Kemma Software
64240	67621	Marconi Communications
64240	67621	Union Switch & Signal

Notice that in spite of the wide variety in industry sector, and the presumed even wider variety in skills and abilities in the workers involved, they are all being paid the same salary, \$64,240. What is the reason for this remarkable “coincidence”? The answer, as can be seen above, is that in each case the law firm had the employer take advantage of the “95% rule.” Use of this rule can be seen in the data for most other big firms, such as Intel.

To be sure, there are also instances in which the employers pay more than the prevailing wage. And of course the 5 percent savings is very minor, much smaller compared to what is obtainable via the major loopholes. But the point here is to show that companies in general take advantage of loopholes, not just the Indian ones. And you can be sure that they take advantage of the major loopholes, not just the minor ones.

And the fact that these figures are identical also shows that in many cases the foreign workers have no negotiating power at all.

To further make the point that use of the loopholes is standard operating procedure, note too that Cohen and Grigsby is a top law firm, not some fly-by-night operation. Indeed, any good immigration law firm will strive to make full use of the loopholes, just as any good tax accountant will utilize all the loopholes in the tax code, minor and major.

In this light, it is worth taking a look at a column by one of the most prominent immigration lawyers, Joel Stewart, which read like a print version of the “We’re trying to avoid hiring an American” YouTube video produced by the Cohen and Grigsby firm. Stewart boasts,

Employers who favor aliens have an arsenal of legal means to reject all U.S. workers who apply.”⁴⁷

Indeed the title of his article, “Legal Rejection of U.S. Workers,” speaks volumes. But what is most important to note is that Stewart literally “wrote the book” on labor certification for green card applicants. He is the editor of THE PERM BOOK, the standard reference on PERM processing in labor certifications, and the editor of, as well as an author in, THE PERM QUARTERLY:⁴⁸ Given Stewart’s prominence in the profession, it is clear that the usage of the loopholes is standard.

7 Solutions

As seen in the YouTube videos, and as detailed in Section 7.1 below, the industry lobbyists have no credibility. They have repeatedly claimed that current law protects American workers, all the while aggressively

⁴⁷Joel Stewart, *Legal Rejection of U.S. Workers*, IMMIGRATION DAILY, April 24, 2000, www.ilw.com/articles/2000,0424-Stewart.shtm.

⁴⁸See http://fowler-white.com/profile.asp?wld_id=2966823.

using legal loopholes that completely undermine that spirit of “protection.” Reform is urgently needed.

7.1 Congress Must Move Past Listening Only to the Industry Lobbyists

This excerpt from a 2006 article on Microsoft’s lobbying of Congress on the H-1B issue is very telling:⁴⁹

When asked about reports and data presented to convince Democrats on the Judiciary Committee that the U.S. didn’t have the workforce it needed to fill these jobs, Tracy Schmalzer, spokesperson for the Democrats on the Judiciary Committee, responded: “Did you know Bill Gates has been pretty high-profile on this?”

In other words, what the industry lobbyists say is taken at face value, no questions asked. Yet the industry has a huge monetary incentive to push for more H-1Bs, which obviously can and does color their remarks. Thus their claims must be viewed with skepticism, indeed very severe skepticism in light of their record.

Similarly, Congress has been ignorant of information that shows severe flaws in foreign worker programs. A prime example of this is that even though two congressionally-commissioned studies have shown that abuse of the H-1B program is commonplace (see Section 4.3.3), there is probably not a single member of either house of Congress who is aware of Congress’ own studies in this regard.

In another example of Congress’ ignorance of its own research, about a month before the vote on the 2000 legislation that expanded the H-1B program, the congressional investigative office, GAO, released a report which was highly critical of the H-1B program.⁵⁰ Yet the entire 19,000-word discussion of the bill on the Senate floor consisted of praise for H-1B; the GAO report was not mentioned even once.⁵¹ The legislation passed by a vote of 96-1, as if the GAO report didn’t exist.

While the industry could provide important insight into the foreign worker debate, the reality is that their track record on credibility has been abysmal. Here are a few examples of industry claims that they themselves have shown to be false and hypocritical:

- Microsoft has been claiming it is short-handed in software developers,⁵² yet it ordered 1,000 of its contract software developers to take a week off without pay.⁵³
- Sun Microsystems, which has been in the vanguard of the push for more H-1Bs, testified to the Senate that “Sun gives employment priority to U.S. workers.”⁵⁴ Yet it testified at a Department of Labor administrative law hearing,⁵⁵ and told the *SAN FRANCISCO CHRONICLE*,⁵⁶ that it does NOT give employment priority to Americans.

⁴⁹ *What’s Good for Bill Gates...*, Rebecca Clarren, SALON MAGAZINE, May 26, 2006

⁵⁰ GAO, H-1B FOREIGN WORKERS: BETTER CONTROLS NEEDED TO HELP EMPLOYERS AND PROTECT WORKERS, General Accounting Office, GAO/HEHS-00-157, September 2000.

⁵¹ CONGRESSIONAL RECORD, Senate, October 3, 2000, at S9643.

⁵² *Microsoft, Intel Push U.S. to Welcome More Skilled Immigrants*, Nicholas Johnston, BLOOMBERG NEWS, May 15, 2006, <http://quote.bloomberg.com/apps/news?pid=10000103&sid=aZM1MDJr4Bio&refer=new>.

⁵³ *Microsoft Contractors to Take 7 Days Off*, Allison Linn, the ASSOCIATED PRESS, May 22, 2006, http://www.businessweek.com/ap/financialnews/D8HP41U80.htm?campaign_id=apn_tech_down.

⁵⁴ TESTIMONY OF KENNETH M. ALVARES, VICE PRESIDENT, HUMAN RESOURCES, SUN MICROSYSTEMS, INC., BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, HEARING ON THE HIGH TECH WORKER SHORTAGE AND IMMIGRATION POLICY, FEBRUARY 25, 1998, <http://judiciary.senate.gov/oldsite/alvarez.htm>.

⁵⁵ *Santiglia v. Sun Microsystems*, U.S. Dept. of Labor, Office of Administrative Law Judges, Case No 2003-LCA-2.

⁵⁶ *Sun Accused of Worker Discrimination*, Benjamin Pimentel, *San Francisco Chronicle*, June 25, 2002.

- Intel’s Patrick Duffy, Human Resources Attorney, claimed to the Senate that⁵⁷

Intel’s philosophy in regard to hiring foreign employees is clear. Whenever there is a U.S. position to be filled, Intel’s philosophy is to seek U.S. workers first. Our U.S. Visa Sponsorship Guideline is an example of this philosophy. Our guideline requires that, prior to extending an offer to an individual requiring temporary worker sponsorship, a business group must demonstrate that there is a shortage of U.S. workers with the skills required for the particular job and that the business has made good faith efforts to source qualified U.S. workers.

Yet this claim was belied by a statement by a hiring manager at Intel, who stated publicly that Intel’s efforts to find American workers were sorely lacking.⁵⁸

It’s a matter of what are the mechanisms, how does a hiring manager in Silicon Valley get a hold of re’sume’s? What happens is, you get a lot of H-1B re’sume’s. I had to go out myself, instead of relying on the Personnel Dept., to go and advertise at several colleges where I thought I would be able to find some good employees. And lo and behold, I found a very good one at Cal Poly, Pomona.

- One of the Cohen and Grigsby attorneys who appeared in the YouTube videos, Matt Phillips, told the PITTSBURGH POST-GAZETTE that employers do their best to try to find Americans to fill a spot before resorting to hiring foreign workers⁵⁹—while in the videos, the firm is telling employers how to AVOID finding Americans.
- Larry Lebowitz, the Cohen and Grigsby partner who emceed the YouTube videos, wrote an op-ed in 2000 in which he assures readers that the law on foreign workers protects American workers. In it Lebowitz claimed that

U.S. companies that bring in foreign professionals usually do so as a last resort...To hire H-1Bs, a company must: Guarantee the H-1B will be paid the prevailing wage or better...These rules actually help U.S. workers, too, by keeping wages high, ensuring that U.S. workers are not displaced...

Yet his videos show his firm helps employers avoid hiring Americans and pay the foreign workers below-market wages.

- In his testimony to the Senate, Stephen Yale-Loehr, another prominent immigration lawyer,⁶⁰ he stridently contended that H-1Bs are not paid less than Americans. He went on at length on this issue, with it comprising close to half of his entire testimony. Yet as we saw in Section 4.3.1, Yale-Loehr found in his own research that salary abuse of the foreign workers was rampant.⁶¹

⁵⁷See note 26 above.

⁵⁸See the article in note 4 above, p.896.

⁵⁹*Crush of Applicants for Visas Has Firms Fearing Staff Losses*, Anya Sostek, PITTSBURGH POST-GAZETTE, April 5, 2007.

⁶⁰STATEMENT OF STEPHEN YALE-LOEHR OF CORNELL LAW SCHOOL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION ON “EXAMINING THE IMPORTANCE OF THE H-1B VISA TO THE AMERICAN ECONOMY,” BEFORE THE SENATE COMMITTEE ON THE JUDICIARY, September 16, 2003, <http://www.twmlaw.com/new/htestimony.htm>.

⁶¹His testimony also cites some National Science Foundation data. For an analysis of the flaws of that study, see my article cited in note 4 above, pp.874ff.

Prominent politicians have open admitted that industry's monetary clout plays a key role in Congress' support of the H-1B program. Sen. Robert Bennett (R-Utah) remarked, "Once it's clear (the visa bill) is going to get through, everybody signs up so nobody can be in the position of being accused of being against high tech. There were, in fact, a whole lot of folks against it, but because they are tapping the high-tech community for campaign contributions, they don't want to admit that in public."⁶² A major supporter of pending legislation which would increase the H-1B quota, Rep. Tom Davis (R-Va.), said, "This is not a popular bill with the public. It's popular with the CEOs...This is a very important issue for the high-tech executives who give the money."⁶³ Rep. Davis was chair of the Republican Congressional Campaign Committee.

No wonder the 2000 bill passed by 96-1 in the Senate, and by a voice vote in the House!

7.2 Needed Reforms

Here are some reasonable reforms that should be made in the H-1B and employer-sponsored green card programs:

- Eliminate the current four-level prevailing wage scheme used for H-1B and green cards. Instead, simply define the prevailing wage to be the overall median for the given occupation, regardless of skill level.
- Define the prevailing wage according to the qualifications of the WORKER, not according to the requirements of the JOB.
- Extend to all H-1B employers the requirements currently applied to H-1B-dependent employers. This would mean that employers must give hiring priority to American workers, and that they could not hire an H-1B within 90 days before or after a layoff.
- Clean up the green card labor certification process, requiring that jobs be advertised on a Web site maintained by the Department of Labor (not by a commercial firm).

These proposals will be analyzed in the subsections below. **BEFORE READING THE PROPOSALS, PLEASE REVIEW THE MATERIAL ON TYPE I AND II SALARY SAVINGS IN SECTIONS 4.3.1 AND 4.3.2.** This is crucial in order to understand how the proposals work.

7.2.1 Replace the Current Four-Level Prevailing Wage Scheme with a Single-Level Policy

The current four-level structure for determining prevailing wage is actually quite new, having been implemented in 2005. Even the two-level scheme used earlier was only instituted in 1995. It is clear from the Miano data presented in Section 4.2 that these multilevel structures have turned the H-1B program into a vast mechanism for the import of cheap labor.

Instead, prevailing wage should be defined as a single level, the overall median, regardless of experience level. That median should be based on the OES data of the Bureau of Labor Statistics.

⁶²Carolyn Lochhead, *Bill to Boost Tech Visas Sails Through Congress: Clinton Expected to Sign Popular Measure*, SAN FRANCISCO CHRONICLE, October 4, 2000.

⁶³*Committee To Address Bill Eliminating H-1B Cap* NATIONAL JOURNAL TECHNOLOGY DAILY, May 5, 2000 and Lars-Erik Nelson, *Pols Are Going Overboard On Visa Program*, NEW YORK DAILY NEWS, May 3, 2000.

The industry lobbyists may oppose such a measure, on the grounds that they hire a lot of newly-graduated foreign students. But remember, the industry claims that these students are “the best and the brightest,” that they are key to the firms’ innovation and so on. Thus they should be willing to pay a premium.

This proposal would not be a radical departure from established practice. As noted, the two-level scheme was not used for H-1B until 1995, and generally the concept of prevailing wage typically has meant the overall median (or mean) salary, for instance in Davis-Bacon and Service Contract Act settings.⁶⁴

The bill introduced by Senators Durbin and Grassley in 2007, S.1035, has a provision along these lines.

Projected Impact: The Miano data show that if such a policy were in place, considerably more than half of the H-1Bs today would be ineligible. Based on the information presented in Sections 4.3 and 5, it should be clear that those workers in fact *should* be ineligible. In other words, this policy would eliminate a large portion of the abuse of the H-1B program.

7.2.2 Define Prevailing Wage According to the Worker, Not the Job

Recall from Section 5.1.1 that current law, by defining prevailing wage according to the job, not the worker, allows employers to pay foreign workers below-market wages. In the YouTube videos, the immigration lawyer talks of savings of \$10,000 to \$15,000 in this manner.

The definition of prevailing wage should be changed to reflect the education, skill set and experience level of the worker. This is, after all, how the open labor market works, and thus it is the way H-1B should work too.

Projected Impact: As can be seen by the prominent citing of the loophole in the YouTube videos, this policy change would prevent numerous cases of use of H-1Bs as cheap labor. The case study in Section 5.1.3 also illustrates this.

7.2.3 Extend the Current H-1B-Dependent Requirements to All Employers

The H-1B-dependent category was established as part of the 1998 legislation. The philosophy behind it was that abuse of the H-1B program was mainly limited to the Indian “body shops.” Yet as we saw in Section 6, that perception was inaccurate; the abuse is widespread, over all types of companies. Thus it makes sense to extend the requirements in this category to all H-1B employers.

As mentioned before, this would mean that employers must give hiring priority to American workers, and that they could not hire an H-1B during the period 90 days prior to and 90 days after a layoff. The latter condition includes secondary employment, in which the primary employer “rents out” the H-1B to work for a secondary employer.⁶⁵

The Durbin-Grassley bill also contains such a provision. However, its usefulness would be limited unless it were to also grant the *private right of action* to affected American workers. This would grant an American worker who, for instance, was qualified for a job and yet was illegally rejected in favor of a foreign worker, standing to bring a lawsuit against the employer. Reform of H-1B and the green card process should include this right.

⁶⁴See for example the Kentucky prevailing wage law, discussed in <http://www.bipps.org/ARTICLE.ASP?ID=730>.

⁶⁵Many critics of the H-1B program advocate banning secondary employment, but I disagree. Such a ban would be very difficult to formulate effectively, and in any case would easily be circumvented by direct hiring. In other words, instead of IBM “renting” from Tata Consultancy Services, IBM would simply hire more H-1Bs directly, or hire L-1s from its foreign subsidiaries.

Projected Impact: There have been a number of cases of layoffs in which Americans have been replaced by H-1Bs, as exemplified by the case study in Section 5.1.2. The policy here would prevent such incidents. As mentioned before, the “good faith” recruitment requirement would still be subject to abuse, but would be considerably better than the current green card recruitment requirements. Since most green card sponsorees serve first as H-1Bs, this would be an improvement, especially if coupled with reform of the prevailing wage definitions, in the previous proposal.

7.2.4 Reform the Labor Certification Process

Congress should place a high priority on cleaning up the disgraceful—but widespread and fully legal—abuse of the green card labor certification process seen in the YouTube videos.

Employers should be required to advertise on a Web site maintained by the Department of Labor (not by a commercial firm) specifically for jobs that employers wish to fill with foreign workers. After the job is filled, the Web site entry should indicate whether a foreign worker was hired.

It should be illegal for the employer to “pile on” skill requirements in the job ad that are not critical to a job applicant’s ability to perform excellent work after a week or two of acclimation to the employer’s needs.

Projected Impact: This would put some teeth into the law’s spirit that employers must recruit Americans before resorting to hiring foreign workers. It would make it much more difficult for law firms to hide job openings and find pretexts on which to reject qualified American applicants. Among other things, this would reduce the number of employers who are hiring young H-1Bs because they are cheaper than older Americans.

7.3 Other Green Card Issues

7.3.1 The Green Card Backlog—a Contrived “Crisis” That Does NOT Need Reform

Unlike previous tech industry lobbying campaigns on worker visas, which involved only H-1B, lately the industry has been calling not only for expansion of H-1B but also of the employer-sponsored green card programs. Their claim is that we are at risk of losing “the best and brightest” foreign workers, as these workers tire of waiting six years or more for their green cards. This is egregiously misleading.

The green card categories used by the tech industry are called EB-1, EB-2 and EB-3. The key point is that these three tiers are prioritized by level of talent, as codified in the law:

- EB-1 is for “foreign nationals of extraordinary ability” and for “outstanding professors.”
- EB-2 is for those who are either of “exceptional ability” or possess an “advanced degree.”
- EB-3 is for those with Bachelor’s degrees.

Due to this prioritization, those in EB-1 have virtually no wait, merely a few months. Thus the industry lobbyists’ claims that we are losing the “geniuses” are completely unfounded.

The EB-2 category should be considered here too, due to the “exceptional ability” clause, but in reality this category consists mainly of Master’s degree holders. Since anyone with a Master’s qualifies, including those from “XYZ State College,” most workers in this category are ordinary people doing ordinary work, not “the

best and the brightest.” Nevertheless, even in their case wait time has typically been two or three years; currently those from China have a wait of two and a half years, and Indians are waiting three years.

Thus the dire wait of seven years or more claimed by pro-industry analysts⁶⁶ is false. It is true that many of those in the EB-3 category have such long waits, but they are by definition not “the best and the brightest,” and as discussed earlier in Section 4.1, these workers (as well as most in EB-2) are not needed in the first place.

7.3.2 Fast Track Green Cards Would NOT Solve the H-1B Problem

As discussed in Section 4.4, the foreign workers are in essence indentured servants, a status which enables their exploitation in wages and other aspects. This status in turn typically arises from the fact that green card sponsorship in practice renders the foreign worker immobile. Accordingly, some critics of the H-1B program have proposed the creation of a fast-track green card program.

However, this would be the wrong solution. While it would address the issue of Type I salary savings (Section 4.3.1), it would do nothing to solve the problem of Type II salary savings (Section 4.3.2), since the proposals for fast-track green cards have targeted new graduates.

Any effective reform of the H-1B program must deal with the issue of Type II salary savings. This is readily seen, for instance, in Case Study I in Section 5.1.2. From the data in Sections 4.3.1 and 4.3.2, one can see that the 50 percent salary savings employers accrued in Case Study I break down to approximately 20 percent Type I and 30 percent Type II. In other words, with fast-track green cards addressing part of the Type I issue,⁶⁷ the employers in Case Study I would still have saved 30 percent. Clearly, they would still hire the foreign workers and lay off the Americans.

It should be noted that advocacy of fast-track green cards has mainly arisen out of political considerations. For instance, IEEE-USA has conceded that its support of the notion stems at least in part from the heavy pressure exerted by the IEEE parent organization (dominated by pro-H-1B industry executives and academics) to tone down IEEE-USA’s criticism of the H-1B program. Support of fast-track green cards allows one to take a pro-immigration stance while still criticizing H-1B. But as explained above, in practical terms it would not solve the problems.

⁶⁶See note 8 above and for instance *Many Green Card Seekers Wait Seven Years or More: Researchers Say Backlog Could Spur “Reverse Brain Drain”*, SAN JOSE MERCURY NEWS, August 22, 2007.

⁶⁷It is only part, because the proposals for fast-track green cards, such as the SKIL bill, have defined “fast” as three years, thus still allowing three years of *de facto* indentured servitude.