

Needed Reform for the H-1B and L-1 Work Visas (and Relation to Offshoring)

Norman Matloff*
Department of Computer Science
University of California, Davis
matloff@cs.ucdavis.edu

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1 Overview of the Visa Programs

H-1B is a temporary work visa program established in 1990.¹ **Note carefully that employers are NOT required to recruit Americans before resorting to hiring H-1Bs.**²

In 1998 and then again in 2000, computer-related employers demanded that Congress increase the yearly cap on H-1Bs, from its original level of 65,000 to 115,000 in 1998 and 195,000 (plus new cap-exempt categories) in 2000. The employers claimed to need these workers to remedy a software labor shortage, citing industry-sponsored studies. However, none of the numerous independent studies ever confirmed a shortage.³ Prominent members of Congress publicly admitted that they were forced to approve the H-1B expansions because of industry campaign contributions.⁴

The H-1B cap sunsetted to its original level of 65,000 on October 1, 2003. Note, by the way, that the quota exemptions established by Congress in 2000 did not sunset, so the real quota is still higher than 65,000.⁵ Given that more than 100,000 American programmers are unemployed, this figure of 65,000+ is still inexcusably high.

L-1 is another work visa type which is often mentioned these days in the news. It has virtually no restrictions at all, and thus would appear to be even worse than H-1B. It must be noted, though, that none of the nominal restrictions in H-1B have worked to protect American workers anyway. In particular, the H-1B requirement that employers pay their H-1Bs “prevailing wage” is useless, as the law is riddled with huge loopholes. Thus in actuality H-1B is just as destructive as L-1.

*Dr. Matloff is a professor of computer science and a former software developer in industry. His bio is available at <http://heather.cs.ucdavis.edu/matloff.html>.

¹H-1B replaced a similar program, H-1.

²There was a very minor exception established in the 1998 legislation. As explained later, this covered only 0.1% of H-1B employers, and in any case even this minuscule category sunsetted in October 2003.

³See Section IV.A of my law journal article, 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, 815-914. Available at <http://heather.cs.ucdavis.edu/MichJLawReform.pdf>

⁴See Section II.B.2 of law journal article, note 3 above.

⁵The INS has refused to release figures as to the number of visas actually granted in the exempt categories established in 2000.

2 Direct Adverse Impacts of the H-1B Program on U.S. Workers

- H-1B law does NOT require employers to give hiring preference to Americans over H-1Bs.⁶
- By official data, currently more than 100,000 U.S. computer programmers⁸ are unemployed. Many more are *underemployed*, working in nonprofessional jobs such as bus driver, real estate appraiser, and so on. The un- and under-employed easily total several hundred thousand workers. Meanwhile 463,000 H-1Bs were employed in the field, as of 2002.⁹
- Major companies are abusing the program:
 - In 2002, **Sun Microsystems** admitted in court that it is laying off Americans while retaining H-1Bs *in the same jobs*, and that it does not give Americans priority over H-1Bs in hiring.¹⁰ They stated it in the press too, telling the *San Francisco Chronicle* that “[Immigration status] is not a criterion for hiring or firing.”¹¹ This directly contradicts their 1998 testimony to the U.S. Senate, in which they stated “Sun gives employment priority to U.S. workers,” and repeatedly represented that they employ H-1Bs only as a last resort when no qualified Americans are available.¹²
 - A number of other major companies have replaced American workers by H-1Bs and L-1s. In addition, employers such as **Siemens**¹³ and the **Bank of America/Exult**¹⁴ have admitted that they force their American workers to train their foreign replacements, and the practice is widespread.¹⁵

The Bank of America serves as a sad but highly illuminating case study. As noted in Section 6, one usage of H-1Bs and L-1s is as liaisons to offshore work. The bank uses a combination of H-1Bs/L-1s in the U.S. (Concord, California and Charlotte, North Carolina) and workers in India. The H-1Bs are grossly underpaid, as shown in the detailed analysis by the Programmers Guild.¹⁶ Tragically, one American programmer committed suicide in the parking lot of the bank’s California facility after being replaced by a foreign worker.¹⁷ Note by the way that the

⁶The 1998 legislation did establish a very tiny category known as “H-1B-dependent” employers. Employers in that category were required to recruit Americans before H-1Bs, could not hire H-1Bs if they are laying off Americans, etc. However, only 50 out of 50,000 H-1B employers were in the H-1B-dependent category.⁷ One problem was that the 15% bar in the definition of *H-1B-dependent* was quite high, since it does not exclude a firm’s nontechnical workers, e.g. secretaries, marketers, sales staff, custodians, etc. The law (whose implementation the industry got delayed to 2001) sunsetted in October 2003.

⁸The term *programmers* includes software engineers, system analysts and so on. The vast majority of high-tech H-1Bs are programmers, as opposed, for example, to electrical engineers and the like. See Section III of my law journal paper, note 3 above.

⁹ See Section VI.A of my law journal article, note 3 above.

¹⁰SANTIGLIA V. SUN MICROSYSTEMS, U.S. Dept. of Labor, Office of Administrative Law Judges, Case No.: No. 2003-LCA-2, pages 9 and 206.

¹¹June 25, 2002.

¹²Ken Alvares, Vice President, Human Resources, Sun Microsystems, TESTIMONY BEFORE THE COMMITTEE ON THE JUDICIARY U.S. SENATE HEARING ON THE HIGH TECH WORKER SHORTAGE AND IMMIGRATION POLICY, February 25, 1998.

¹³ See Margaret Quan, *Critics Warn New Visa Bill Doesn’t Go Far Enough*, ELECTRONIC ENGINEERING TIMES, May 22, 2003 and WKMG-TV news broadcast, *Where Did the Jobs Go?*, <http://www.local16.com/news/1984334/detail.html>, February 17, 2003, updated February 19.

¹⁴See Jim Gardner, *Bank Job: You’re Fired, Now Go Train Your Replacement*, SAN FRANCISCO BUSINESS TIMES, November 22, 2002.

¹⁵See for example Jennifer Bjorhus, *U.S. Workers Taking H-1B Issues to Court*, SAN JOSE MERCURY NEWS, September 26, 2002.

¹⁶HOW TO UNDERPAY AN H-1B, <http://www.programmersguild.org/Guild/h1b/howtounderpay.htm>

¹⁷Ellen Lee, *Job Losses Sap Morale of Workers*, CONTRA COSTA TIMES, May 13, 2003.

Bank of America has, during this same time period, had very healthy profits, so it can hardly claim it turned to foreign labor to avoid red ink.

- Clearly the industry lobbyists are wrong in claiming that recent reductions in H-1B visas means that “the system is working.” It is NOT working. The number of new visas issued is down simply because the number of job openings is down, not because employers are acting more responsibly than before.
- The National Research Council report, commissioned by Congress, pointed out that H-1Bs have an adverse impact on overall wage levels.¹⁸
- Due to a combination of H-1B, L-1 and offshoring, **the American software developer will become extinct within the next few years.** The percentage of new programmer jobs going to H-1Bs and L-1s has shown a sharp upward trend in recent years. The Commerce Dept. says 28% of the programmer jobs during 1996-1998 went to H-1Bs;¹⁹ the Federal Reserve Bank gave a 50% figure for 1999;²⁰ and my very rough calculations, based on an attempt to piece together different types of data, suggest a figure as high as 90% for 2001. Jon Piot, COO of the Impact Innovations Group even estimates a precise date at which the “extinction” of the American programmer will occur—2006.²¹ Given the flurry of current activity in which many American programmers are being laid off and replaced by H-1Bs/L-1s, that date may need to be revised to an earlier one.
- I am using the term *American* to mean U.S. citizens (native or naturalized) and permanent residents. Green card holders/naturalized citizens are just as adversely affected as natives are; both native and foreign-born Americans are shunned by employers in favor of the exploitable H-1Bs.²²

3 Use of H-1Bs/L-1s As Cheap, Compliant Labor

- Types of labor cost savings accrued by hiring H-1Bs/L-1s:
 - **Type I:** Employer pays H-1Bs less than Americans of the same qualifications.
 - **Type II:** Employer runs out of younger Americans to hire, then hires younger H-1Bs/L-1s, thus avoids hiring older—i.e. perceived expensive—Americans.²³
 - **Type III:** Employer exploits the H-1B/L-1s’ *de facto* indentured-servant status, forcing them to work extremely long hours, an indirect salary savings.
 - **Type IV:** H-1B/L-1 worker population, by swelling overall U.S. labor pool, suppresses wages.

Much attention is paid to Type I savings, rightly so, but Type II savings is also a very important issue.

¹⁸National Research Council, BUILDING A WORKFORCE FOR THE INFORMATION ECONOMY, National Academies Press, 2001.

¹⁹ DIGITAL ECONOMY 2000, Department of Commerce, June 5, 2000.

²⁰Miriam Wasserman, *EllisIsland.com?*, REGIONAL REVIEW, Quarter 4 2000/Quarter 1 2001.

²¹*Computerworld*, May 19, 2003. Piot’s remarks are focused on offshoring. My view is somewhat different, as seen in Section 6, but the principle is the same, i.e. replacement by cheap foreign labor.

²²As pointed out by Pakistani immigrant Shankar Lakhavani of the Institute of Electrical and Electronic Engineers, “There are many immigrants like me who are American citizens, and they would like a crack at these jobs [which are going to H-1Bs].”

²³See the congressionally-commissioned NRC report (National Research Council, BUILDING A WORKFORCE FOR THE INFORMATION ECONOMY, National Academies Press, 2001), and Section VI.B of my law journal article, (note 3 above), for extensive analyses of the fact that older workers face major difficulties finding work in this field. Without access to the H-1B/L-1 labor pool, the employers would be forced to consider the older workers.

- Plenty of *hard data*²⁴ showing that Type I and II savings is rampant:
 - (Type I savings.) UCLA study; 33% pay gap.²⁵
 - (At least Type II savings, likely Type I as well.) Cornell University study; 10.4-29.6% pay gap.²⁶
 - (Type I savings.) UC Davis study; 15-20% pay gap.²⁷
 - (Type I savings.) Congressionally-commissioned NRC and GAO employer surveys.²⁸ Numerous employers explicitly stated that they pay H-1Bs less than comparable Americans.²⁹
 - (At least Type II savings, likely Type I as well.) INS data show that the median salary for computer-related H-1Bs is \$50,000,³⁰ while the corresponding median for Americans is \$66,230.³¹
 - It is clear even without data that the H-1Bs are paid less on average than comparable Americans, due to their *de facto* indentured servant status (see below). If one cannot move about freely in the labor market and negotiate the best salary, then one will likely not be paid as much as one would with such freedom.

- H-1Bs/L-1s are typically *de facto* indentured servants, thus exploitable:
 - Immigrants Support Network (www.isn.org) has said that the H-1Bs are “...indentured servant[s]...modern day slave[s].”³²
 - H-1Bs are in essence immobile if they are being sponsored for a green card.³³
 - See also the NRC report.³⁴

²⁴Contrary to the claims by industry lobbyists that evidence of abuse is merely “anecdotal.”

²⁵Paul 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*. Stuart Anderson, an advocate of the H-1B program, contends that the Ong study does not show a pay gap. See Section V.C.2 of my law journal article, note 3 above, for my analysis refuting his claims. It suffices to say that Prof. Ong himself stated, “Employers took advantage of the immigrants.”

²⁶Demetrios Papademetriou and Stephen Yale-Loehr, *BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS*, Carnegie Endowment for International Peace, 1996.

²⁷See Section V of my law journal article, note 3 above.

²⁸NRC report, note 23 above, p.175.

²⁹The gap was not quantified, but the NRC report stated, “...based on interviews with some H-1B employers...[H-1Bs] 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.” The NRC commission added several qualifiers to this statement; see my analysis refuting those qualifiers in Sections V.C.7 and V.C.8 of my law journal article, note 3 above.

Similar employer comments were heard in the study done by Congress’ General Accounting Office, released in September 2003. (*H-1B Foreign Workers: Better Tracking Needed to Help Determine H-1B Program’s Effects on the U.S. Workforce*, GAO-03-883, September 2003.) The study also attempted to quantify this effect by analyzing government data, and came up with mixed results. However, the data analysis in the study had severe methodological problems. See my critique of the study, at <http://heather.cs.ucdavis.edu/GAO03.txt>.

The study performed by the Federal Reserve Bank in 2003 (*The H-1B Program and Its Effects on Information Technology Workers*, Madeline Zavodny, ISSN 0732-1813) suffers from similar, though even worse, methodological problems than the GAO study. See <http://heather.cs.ucdavis.edu/Fed03.txt>.

³⁰INS, REPORT ON CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H-1B): FISCAL YEAR 2001, July 2002.

³¹Bureau of Labor Statistics, 2001 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES.

³²*Straight Talk* (weekly television program produced by Santa Clara County Democratic Club), June 10, 2000.

³³This remains the case, in spite of 2000 legislation which made some technical corrections to H-1B law.

³⁴Note 23 above.

4 Prevailing-Wage Laws Are Virtually Meaningless

- Laws/regulations which require H-1Bs to be paid “prevailing wage” are riddled with loopholes.³⁵
- E.g., “hot” software skills, say XML, do not need to be accounted for in calculating prevailing-wage level. Thus one can hire an H-1B XML programmer, who would command a premium wage on the open market, for the price of a generic programmer—all perfectly legal. Similarly, one could hire an H-1B programmer of outstanding talent, again a trait which would cost the employer a major premium on the open market, and yet only pay the H-1B the wages of a programmer of average talent.
- E.g. the prevailing wage is defined in terms of the *job*, not the *worker*. If for instance the employer states that a job requires only a Bachelor’s degree and two years of experience, he can fill the job with an H-1B who has a Master’s and ten years of experience, yet still set the prevailing wage at the Bachelor’s/two years level.
- See the excellent Programmers Guild case study (**Bank of America**).³⁶
- Related loopholes exemplified by immigration attorney Joel Stewart boast, concerning the green card process, “Employers who favor aliens have an arsenal of legal means to reject all U.S. workers who apply.”³⁷
- So, the low-wage problem in H-1B is NOT an enforcement issue. It is purely a matter of huge loopholes in the law. The employers are in full compliance with the law and regulations when they underpay the H-1Bs.
- Prevailing-wage laws do nothing at all to address Type II salary savings.

5 The L-1 Visa

- Nominally for intracompany transfers, but used heavily in recent years to bring programmers from India to the U.S.
- Unlike H-1B, L-1 has almost no restrictions: No labor condition test, no prevailing-wage requirement, no annual cap on the number of visas issued, etc.
- Immigration lawyers dislike L-1, because its lack of restrictions means the application procedure is extremely simple—so that they cannot make much money in processing it.
- Increase in L-1 numbers around 2001 likely due to the DOL-designated H-1B-dependent employers switching to L-1 to avoid the H-1B-dependent restrictions.

6 The Offshoring Issue

- Some politicians are trying to divert attention by saying the real problem is offshoring, i.e. sending software development abroad, rather than H-1B/L-1. This is very misleading.

³⁵It is thus useless to complain to the Dept. of Labor, as DOL itself has pointed out. Since the employers’ usage of loopholes is fully legal, there is no legal basis on which workers can complain. Thus the industry lobbyists are incorrect in claiming that lack of complaints must mean that abuse of H-1B is rare.

³⁶Note 16 above.

³⁷Joel Stewart, *Legal Rejection of U.S. Workers*, IMMIGRATION DAILY, April 24, 2000.

- A report commissioned by the Information Technology Association of America (ITAA), a major industry lobbying group, found that only 104,000 American IT jobs were lost during 2000-2003 due to offshoring.³⁸ By contrast, as of 2002, there were 463,000 H-1Bs (not including tens of thousands of L-1s) holding IT jobs in the U.S.³⁹ Clearly, at least up to now, H-1B/L-1 has been a much larger problem than offshoring.
- Crucial point: Most offshoring software projects include a key “onshore,” i.e. U.S., component, staffed by H-1Bs/L-1s. Typically H-1Bs/L-1 comprise 20% or more of the project.⁴⁰ **So, even the offshoring issue is an H-1B/L-1 issue; offshoring depends on the H-1B and L-1 programs for its success.**
- I do not believe the percentage of offshoring will ever become more than, say, 5% or so. It is simply too difficult to do software development by remote control, no matter how good one’s communications technology is. The missed deadlines, misunderstanding of specifications, etc. can be highly costly, far more than the savings involved.⁴¹
- The savings accruing from offshoring are not nearly as large as perceived, and in fact are commensurate with the savings obtained by importing the H-1Bs and L-1 to work in the U.S. Though programmer salaries in India are very low, even advocates of offshoring estimate the overall cost savings for offshoring to be in the range of 15 to 40 percent.⁴² This is about the same range of savings accrued for work done in the U.S. by hiring H-1Bs. Given the similarity in salary savings between offshoring and labor importation, and the fact that having the work done on-site is far more productive, it is much more cost-effective from a CEO’s point of view to hire H-1Bs than to offshore the work.
- The claims made by the Indian industry that the offshored work is of superior quality are unwarranted. Their claims are based on their ratings under the Capabilities Maturity Model (CMM). But CMM merely assesses project management techniques, not the quality of the project’s personnel. As one of the officials in the CMM project noted, “You can be a [highest CMM rated] organization that produces software that might be garbage.”⁴³

Good software development requires constant interaction among developers, as opposed to the best interaction offshoring can offer, which is discussions once every 24 hours via videoconferencing. Another major problem with offshoring is that the Indian business model is to staff projects with

³⁸See Behravesh, N. and Klein, L., *The Comprehensive Impact of Offshore IT Software and Services Outsourcing on the U.S. Economy and the IT Industry*, Global Insight (prepared for the Information Technology Association of America), March 2004. The ITAA of course has a pro-offshoring agenda, thus raising the question as to whether this figure is low. But commensurate figures were found in a Merrill-Lynch survey (Ganapati, P., Outsourcing Holds Huge Promise for India: Merrill Lynch, *India Abroad*, September 13, 2002, B2), and an analysis by the Gartner Group (Miller, M., The Benefits of Offshore Outsourcing, *PC Magazine*, April 28, 2004), the latter also being important in that it is more recent.

³⁹See note 9 above. This number should not be confused with the yearly cap on *new* H-1Bs, which in 2002 was 195,000 new visas per year. In other words, the 463,000 figure included both the new H-1Bs arriving that year and H-1Bs who had arrived earlier but were still working in the U.S. that year.

⁴⁰See the NRC report, note 23 above, Section 5.4. See also the academic paper by Prof. Ronil Hira of Rochester University, UTILIZING IMMIGRATION REGULATIONS AS A COMPETITIVE ADVANTAGE, <http://www.cspo.org/products/papers/Bangalore.PDF>, Columbia University Center for Science, Policy and Outcomes. Note again that we are discussing offshoring of software development, not sub-Bachelor’s level jobs like call centers.

⁴¹See for instance the NRC report, note 23 above, pages 180 and 184, for a general discussion of the problems, and Bertch, W., Offshore Outsourcing Failed Us, *Network Computing*, Oct. 16, 2003 for a detailed case study.

⁴²Sand Hill Group, Prospecting for Offshore Value, *Enterprise Critical*, May 2003; Overby, S., The Hidden Costs of Offshore Outsourcing, *CIO Magazine*, September 1, 2003; Parry, E., Gartner: Offshore Outsourcing Horse Has “Left the Barn,” *Search-CIO.com*, July 8, 2003; Hopkins, S. and Tribble, S., Outsourcing: the Rush Overseas, *Charlotte Observer*, Dec. 14, 2003.

⁴³Koch, C., Bursting the CMM Hype, *CIO Magazine*, Mar. 1, 2004.

young, inexperienced programmers, in order to minimize costs;⁴⁴ this has obvious adverse impacts on quality.

7 Skill Sets

- Industry lobbyists claim that they hire H-1Bs/L-1s because of their special skill sets, not for cheap labor, yet the facts show otherwise.
- As seen in Sections 3 and 4, the statistical evidence is quite clear that the H-1Bs are indeed paid less than comparable Americans. If H-1Bs had better skills, they would be paid more than comparable Americans, not less. The issue is cheap labor, not skill sets.
- As noted in Section 2, employers are forcing the laid-off Americans to train their foreign replacements. This shows how absurd the employers' claims are that the H-1Bs/L-1s have special skill sets that the Americans lack. Clearly, it is the American workers who have the skills, not the H-1B/L-1s, since the Americans are training the visa workers rather than vice versa.

8 “The Best and the Brightest”

- I have always strongly supported bringing in the “geniuses” from around the world. But only a tiny percentage of H-1Bs fit this description.
- 99% of computer-related H-1Bs make less than \$79,400 per year, certainly not genius-level pay in a field in which the median (i.e. 50th percentile) salary for all Software Application Engineers in 2001 was \$70,210.⁴⁵
- Of 54 recipients of the ACM System Software Award through 2001 (this is the award most closely associated with innovation in practice), only two have been foreign-born.⁴⁶
- Foreign computer science/engineering doctoral students in the U.S., who often later become H-1Bs, have generally been of ordinary quality, not “geniuses.”⁴⁷ The foreign students are disproportionately enrolled in the academically weaker universities,⁴⁸ and their representation in the ACM Dissertation

⁴⁴Oneal, M., India Feels backlash on Jobs, *Chicago Tribune*, February 8, 2004 (quote of Arvind Thakur).

⁴⁵Bureau of Labor Statistics, 2001 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES, and statistical analysis of INS data in my academic paper (see note 3 above).

⁴⁶See N. Matloff, academic paper, note 3 above. The ACM (the Association for Computing Machinery) is the main computer science professional body.

⁴⁷The former foreign doctoral students comprise only a small fraction of all H-1Bs anyway; see below.

⁴⁸ See David S. North, *SOOTHING THE ESTABLISHMENT: THE IMPACT OF FOREIGN-BORN SCIENTISTS AND ENGINEERS ON AMERICA*, University Press of America, 1995. North found that the lower-ranked U.S. engineering doctoral programs consisted 50.6% of foreign students, while the higher-ranked U.S. programs had only a 37.2% foreign enrollment.

The PR hype on the quality of the H-1Bs was epitomized by a 60 MINUTES television broadcast on January 12, 2003, amidst a PR campaign by Indians and Indian-Americans called “Brand IIT.” (See *Big Guns Come Together to Promote Brand IIT*, Harihar Narayanswamy, *TIMES OF INDIA*, December 26, 2002.) The goal was to publicize the Indian Institute of Technology university system. The 60 MINUTES piece called IIT the best engineering school in the world, and portrayed all the IIT graduates as geniuses. All of this was puff-piece journalism, not a serious look at what actually is a genuine success story.

India should indeed take pride in IIT, and there have indeed been many top IIT students who come to U.S. graduate schools (some later becoming top university faculty). But it is certainly not the case that most, or even many, IIT students are geniuses. And the institution itself is merely good, not world-class. Its faculty have not produced the seminal research papers, the patents, the standard-setting textbooks and so on which are needed for world-class status. It suffices to point out that it is the IIT graduates who come to the U.S. for advanced study, rather than American students going to IIT.

Awards has been proportionally lower than their enrollment numbers.⁴⁹

- True international recognition, not merely the possession of a doctorate or publications, should be the criterion for “best and brightest.” The current National Interest Waiver system works well, though the related O visa might need updating.
- Industry lobbyists often cite a study extolling the entrepreneurial activity of Asian immigrants in Silicon Valley.⁵⁰ However, the study does not claim that immigrants are more entrepreneurial than natives, and in fact the study data for Silicon Valley show that the rate of Asian immigrant entrepreneurship (29% in the late 1990s) is less than Asian immigrant representation in the tech workforce (37% in 2000). Similarly, immigrant-founded companies have generally not made pathbreaking advances in technology.⁵¹

9 Master’s and PhD Degrees

The industry statement that 40-50% of U.S. doctorates in computer science are awarded to foreign students is accurate but misleading.

- The Ph.D. issue is a red herring in the H-1B debate. Only 1% of computer-related H-1Bs have a doctorate.⁵²
- A doctorate is not needed in this field. Even the big firms such as **Intel** and **Sun Microsystems** hire very few of them.⁵³
- Pursuing a Ph.D. is not financially attractive for domestic students; a doctorate causes a net loss in lifetime career earnings in industry.⁵⁴

Similar remarks hold for Master’s degrees.

The claims made by some industry spokespeople that most of their H-1Bs Master’s or PhD degrees are not supported by the data. For example, see an analysis of Intel’s claims on this at <http://heather.cs.ucdavis.edu/Senate03.txt>.

The industry’s claims to need Master’s degree holders is incorrect too. See <http://heather.cs.ucdavis.edu/CNN03.txt>.

⁴⁹N. Matloff, academic paper, note 3 above.

⁵⁰AnnaLee Saxenian, SILICON VALLEY’S NEW IMMIGRANT ENTREPRENEURS, Public Policy Institute of California. PPIC is in funded by an industry-related source, William R. Hewlett, co-founder of Hewlett-Packard. Much of PPIC’s endowment consists of Hewlett-Packard stock. (*The Role and Impact of the Public Policy Institute of California: An Operating Foundation as Think Tank*, David W. Lyon, presented to the PPIC Board of Directors at its quarterly meeting, March 4, 2004.) For a critical analysis of the study, see Section VI.E of my law journal article, note 3 above.

⁵¹Nor have native-founded companies generally done so. Progress in the computer field is highly incremental, and virtually no one individual or individual firm has been indispensable.

Consider Intel, for instance. Much has been made of the fact that its former CEO, Andy Grove, is an immigrant. (It is also claimed that he was a founder of the firm, which is incorrect.) The facts are that (a) Grove’s role was as a manager, rather than as a technological contributor, and (b) the industry would arguably have been better off without Intel. IBM’s own engineers objected when IBM decided to use Intel chips for the first PC, preferring chips made by firms such as Motorola, NEC, etc., and Bill Gates once called the Intel chips “brain-damaged.”

⁵²Source: Private INS data. See <http://heather.cs.ucdavis.edu/itaa.html>.

⁵³See N. Matloff, academic paper, note 3 above, for a detailed analysis. Note by the way that many of the big names of the field, e.g. Microsoft founder Bill Gates, Oracle founder Larry Ellison, Apple/Pixar founder Steve Jobs, do not even have a Bachelor’s degree, let alone a PhD.

⁵⁴National Research Council, BUILDING A WORKFORCE FOR THE INFORMATION ECONOMY, congressionally-commissioned report, National Academies Press, 2001.

10 Proposals for Reform

Here I critique several bills currently in Congress, and then present my own reform proposal. To set the stage, I wish to first note the goals.

10.1 A Goal We Should NOT Set

The goals of reform legislation should be (a) to protect the access of American workers to jobs, and (b) to address the problem of abuse of foreign workers.

But a goal that I would argue we should NOT have is to forbid employers of H-1Bs/L-1s from having those foreign workers perform work on projects for third-party employers. Since this is counter to current thinking, even among reformists, it requires some explanation.

As mentioned earlier, the incident occurred which brought L-1 into national focus was the highly-publicized action by Siemens in Florida in which Siemens laid off Americans, replacing them by L-1s “rented” from Tata Consultancy Services.⁵⁵ The L-1s were paid approximately one-third of what the Americans had been making, and the Americans were also forced to train the L-1s.⁵⁶ In the resulting furor, the focus somehow was lost on the main issue—Americans being replaced by cheap foreign labor—with attention instead being centered on the fact that the L-1s hired by TCS were working for another employer, Siemens.

This shift in focus was unwarranted. TCS, like many software firms, is in the business of developing software for clients. If it were to have a legitimate need for programmers with specialized knowledge not available in the U.S.,⁵⁷ necessary for one of the projects TCS was engaged in with Siemens, then it would be perfectly reasonable for TCS to use L-1s for that purpose.

Again, the real issue is that TCS was simply using the L-1s as cheap labor. This will be very important when viewing the bills described below.

10.2 Current Bills in Congress

- The Mica bill (HR 2154) supposedly reforms L-1 but actually does nothing at all. Mica claims his bill is a response to the TCS/Siemens incident discussed above, supposedly outlawing the use of L-1s with third-party employers. As noted above, this really is not the major issue, but even if it were, the fact is that the bill would not prevent this kind of action at all.

The bill contains a huge loophole under which TCS could continue business with Siemens as long as it were to avoid the appearance of “indicia of a employment relationship” between the TCS workers and Siemens. Thus TCS need only make some cosmetic changes and then continue business as usual with Siemens. The Dept. of Labor has an itemized list of “indicia of a employment relationship,” and the TCS/Siemens situation would clearly not fit most of them. For example, one of them is that the “third-party employer,” meaning Siemens in this case, have the right to fire a Tata worker; all TCS would have to do under Mica’s law would say, “We, Tata, reserve the full rights as to hiring and firing; Siemens has no such power.”

Note also that Mica has specifically stated that he wants to continue to allow Siemens to import programmers from its own Indian subsidiary, so even without Tata, Siemens would still be able to import cheap foreign labor.

⁵⁵See note 13 above.

⁵⁶Feinstein Seeking Changes in Skilled-Worker Visas, *San Francisco Chronicle*, July 30, 2003.

⁵⁷The word *legitimate* is key, of course.

By the way, Mica is the recipient of Siemens' second-largest campaign contribution, the largest being Sen. John Warner.

- The DeLauro bill (HR 2702) would bring genuine reform to L-1. Its best features are: (a) it adds a prevailing-wage requirement to L-1, and in fact the proposed requirement is much better than the toothless one currently in H-1B law; (b) it contains an anti-layoff provision; and (c) it places a cap on L-1 visas.

This bill also does an effective job of preventing outsourcing to third-party employers, but as mentioned earlier, I do not consider this to be an important issue.

The major drawback of this bill is that it does not reform H-1B.

- The Dodd/Johnson bill's (S 1452, HR 2849) best features are its requirement that employers give Americans hiring priority over H-1Bs, and its anti-layoff provision, which it applies to both L-1 and H-1B. Its main drawbacks are that it has no prevailing-wage feature and no L-1 cap.

Its provision on third-party employers is similar to Mica's, which again is ineffective and not important anyway.

- The Tancredo bill (HR 2688) in essence does away with H-1B altogether.

10.3 My Proposal for Reform

Note: Meaningful, useful reform of the H-1B and other guest-worker programs will presumably occur as a synthesis of a number of diverse ideas. The reforms outlined here represent my own views, and are not intended to negate proposals made the Programmers Guild and other labor advocacy groups.

10.3.1 Goals/Requirements

Reform must address the following points:

- Reform must remove the employers' ability to attain both Type I and Type II salary savings.
- Guest workers must be allowed full mobility in the labor market, during the *entire* time they are being sponsored for green cards.
- All employers must be covered, especially including the large firms.
- Not only H-1B, but also L-1 and other similar visas should be covered.
- The guest worker and employer-sponsored green card processes must be simplified and expedited, and bureaucracy must be greatly reduced or eliminated.
- Reform of the H-1B program should NOT involve establishment of training programs. We already have a surplus of Americans with the needed skills; employers simply do not want to use them, preferring the cheap labor of H-1Bs and other foreign workers. U.S. firms are laying off Americans and replacing them with foreign workers, in many cases with the "training program" being that the Americans are forced to train their foreign replacements.

- In considering the viewpoints of interested parties, motivations must be understood. While the motivations of labor organizations, industry trade groups and so on are obvious, many people do not realize the “hidden agenda” of some of the other entities involved. It should be kept in mind that the National Science Foundation (NSF) and universities, both of them highly active players in the H-1B lobbying scene, have very severe biases in favor of an expansive H-1B program.⁵⁸

10.3.2 A Comprehensive Reform Proposal

This program would replace H-1B, L-1 and other guest-worker programs used to import technical workers. However, for brevity I will simply use the term *H-1B* here.

Here is an outline of my proposal:

- To be eligible to an H-1B, the employer would be required to have not have laid off Americans in similar jobs within the last 6 months, and not employ H-1Bs in more than 15% of its technical workforce.
- An employer who wishes to hire an H-1B would be required to advertise the job on a central Dept. of Labor (DOL) Web page for 30 days. If the employer did not hire an American during this period, the employer would have automatic permission to hire the H-1B.
- The wage paid to an H-1B would be required to be at least the national median for all workers in the field, including those with all levels of experience.⁵⁹
- After hiring the H-1B, the employer would update the entry in the database, stating the qualifications of the H-1B who was hired.⁶⁰
- The visa would be valid for 3 years. During this time, the worker could move from employer to employer at will, providing that each new employer goes through the 30-day ad procedure on the DOL database.
- If the worker were to stay employed in the tech field for all but 60 days during the 3-year period, the worker would be deemed as having proved his/her value to the economy, and would automatically be granted permanent-resident (i.e. green card) status.
- If on the other hand, the worker were to become unemployed for more than 60 days, he/she would be required to leave the country within 15 days.
- The law would explicitly state that employers must give hiring priority to Americans. An employer would not be allowed to reject an American job applicant in favor of an H-1B by saying the American is overqualified, or by overspecifying skills requirements.

⁵⁸The NSF has explicitly called for the importation of foreign scientists and engineers in order to suppress Ph.D. salaries. See Eric Weinstein, HOW AND WHY GOVERNMENT, UNIVERSITIES, AND INDUSTRY CREATE DOMESTIC LABOR SHORTAGES OF SCIENTISTS AND HIGH-TECH WORKERS, NBER, Harvard University, 1998.

The universities have enormous incentives to toe the industry party line concerning H-1B and industry claims of a software labor shortage. They count on industry for large donations of equipment, research funds and even the construction of entire buildings, and they are major users of the H-1B program themselves. See note 48, Section II.B.1 in my law journal article, note 3 above.

⁵⁹The median would be the government OES figure for the given job classification. Employers would not be able to choose the minimum among numerous private surveys.

⁶⁰The employer would inform DOL as to the salary paid, but need not put it in the database.

- A Commission on Technical Guest Workers, with regional branches, would be established within the DOL. Any American who felt he had been wrongly rejected for a position in favor of an H-1B would be able to file a simple, convenient Web-based challenge. If the Commission were to find in a challenger's favor, the employer would be required to offer a similar position to the petitioner. Neither party would be allowed to appeal a decision by the Commission.
- The normal yearly cap on guest workers would be set at 65,000. The Commission on Technical Guest Workers would have the power to increase that number by 20% in a given year if unusually rapid economic expansion warranted it; larger increases would be left to Congress.

10.3.3 Justification

Note what is missing from this proposal—bureaucracy and delay. The adjudication of the work visa and green card would be almost completely automated, and should work in “real time.” The system would eliminate the need of large firms to maintain special Immigration Departments, and small firms would find that their expenses for legal fees would be reduced to a small fraction of their current level.

The safeguards in my proposal against Type I and Type II wage abuse by employers take on different forms. I guard against Type I savings by eliminating the indentured servitude problem which currently is the major enabler of those savings. To guard against Type II savings, I have the provision that the guest worker be paid at least the median for the given profession, a requirement that the data show would be effective in eliminating much of this kind of abuse of the H-1B program. In addition, the system has recruitment and anti-layoff provisions, makes the entire process transparent to American workers in a timely manner, and establishes the Commission on Technical Guest Workers, which would give them a clear, easy avenue through which they could file complaints.

The various safeguards—working in concert, which is key—would not be foolproof but should provide reasonable worker protection while giving access to foreign labor to sincere employers.