

## Comments

### **EXPLOITING DREAMS: H-1B VISA FRAUD, ITS EFFECTS, AND POTENTIAL SOLUTIONS**

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#### I. INTRODUCTION

In response to a 2008 report by U.S. Citizenship and Immigration Services, which brought to the fore rampant fraud in the H-1B visa program, Senator Chuck Grassley (R-Iowa) remarked: “The results of this report validate exactly what I’ve been fearful of—some employers are bringing H-1B visa holders into our country with complete disregard for the law. . . . The fraud and abuse outlined in this report shows that it’s time to put some needed reform in place.”<sup>1</sup> The Senator’s commentary reflected the proliferating view that the H-1B visa program is a system fraught with abuse and fraud and is ripe for reform. This prevalence of fraud in the H-1B visa program can, in large part, be attributed to a lack of governmental oversight.

Unfortunately, insufficient oversight authority has been a dilemma confronting many government agencies in recent years. A case in point: despite numerous red flags and tip-offs, the Securities and Exchange Commission (“SEC”) ignored warnings while Bernard Madoff engaged in “the most complex and sinister fraud in American history[.]”<sup>2</sup> In his

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1. Press Release, Senator Chuck Grassley, Grassley Questions Agency About Fraud in H-1B Program (Oct. 9, 2008), *available at* [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=17678](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=17678).

2. See Robert Chew, *A Madoff Whistle-Blower Tells His Story*, TIME.COM (Feb. 4, 2009), <http://www.time.com/time/business/article/0,8599,1877181,00.html> (discussing the testimony of Harry Markopolos, who allegedly tipped off the SEC about suspected securities fraud by Madoff, before the House Financial Services Committee).

testimony before the House Financial Services Committee in February 2009, Harry Markopolos opined that the SEC's failure to investigate Madoff's crooked returns was "equivalent to a major league baseball player batting .966 and no one suspecting that this player was cheating[.]"<sup>3</sup> An investigation conducted by the SEC's inspector general confirmed that the regulators assigned to oversee Wall Street clearly dropped the ball in repeatedly failing to uncover Madoff's historic scam.<sup>4</sup>

Unfortunately, the SEC has not been the only regulatory agency recently accused of "dropping the ball." The National Transportation Safety Board's ("NTSB") probe of the February 12, 2009 Colgan Air accident near Buffalo, New York, which killed fifty people, uncovered a myriad of weaknesses in pilot training and hiring practices.<sup>5</sup> The NTSB criticized the regional airline industry for employing inadequately trained pilots with too little experience, who suffer from fatigue and are paid low wages.<sup>6</sup> Regarding the FAA's oversight of regional airlines, the NTSB concluded: "[T]he current FAA surveillance standards for oversight at air carriers undergoing rapid growth and increased complexity of operations do not guarantee that any challenges encountered by the carriers as a result of these changes will be appropriately mitigated."<sup>7</sup>

In addition to the SEC and NTSB, the National Highway Traffic Safety Administration ("NHTSA") has also been reprehended for its lack of oversight. In early 2010, NHTSA sustained intense criticism for its slow response to complaints about defects in Toyota vehicles, which in documented cases compromised consumer safety. The massive recalls that occurred prompted Congress to reconsider whether the agency has lived up to its mission of protecting motorists.<sup>8</sup> Whether in regard to automobiles, airplanes, or investors, there appears to be a general consensus that increased governmental regulation is indeed necessary.

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3. *Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the H. Subcomm. on Capital Markets, Insurance, and Gov't Sponsored Enterprises of the H. Comm. on Financial Servs.*, 111th Cong. 10 (2009) (testimony of Henry Markopolos, CFA, CFE), available at <http://financialservices.house.gov/markopolos020409.pdf>.

4. SEC, OFFICE OF INSPECTOR GENERAL, CASE NO. OIG-509, INVESTIGATION OF FAILURE TO UNCOVER BERNARD MADOFF'S PONZI SCHEME (2009), available at <http://www.sec.gov/news/studies/2009/oig-509-exec-summary.pdf>.

5. Lisa Stark and Huma Khan, *Pilot Error to Blame in Deadly Flight Accident Last February*, ABC NEWS (Feb. 2, 2010), <http://abcnews.go.com/WN/Travel/ntsb-pilot-error-blame-colgan-air-flight-3407/story?id=9726879>.

6. *Id.*

7. NTSB, AIRCRAFT ACCIDENT REPORT 139 (2010), available at <http://ntsb.gov/Publictn/2010/AAR1001.pdf>.

8. *Toyota Woes Put Spotlight on Fed Oversight*, WASH. TIMES, Mar. 11, 2010, available at <http://www.washingtontimes.com/news/2010/mar/11/toyota-woes-put-spotlight-fed-oversight/>.

While current reform proposals regarding the H-1B program, specifically the H-1B and L-1 Visa Reform Act of 2009, make considerable headway, this Comment argues that the proposals do not go far enough with respect to oversight authority. Part II of the Comment sets forth pertinent aspects of and reforms to the Immigration and Nationality Act, of which the H-1B visa program is part. Part III provides an overview of the H-1B visa program as it exists in its current form. Part IV describes contemporary safeguards in the H-1B visa system, and Part V goes on to discuss the shortcomings and rampant abuse in the system despite these safeguards. Part VI discusses past and current reform proposals, with particular emphasis on the H-1B and L-1 Visa Reform Act of 2009. This section also presents the ongoing debate over the H-1B visa cap, as well as economic and legislative hurdles confronted by employers seeking to hire H-1B workers. Taking into account various aspects of the reform proposals, Part VII advocates particular measures that this author believes are essential components of comprehensive reform.

## II. BACKGROUND

The original version of the Immigration and Nationality Act (“INA”) was passed in 1952 to govern immigration to, and citizenship in, the United States.<sup>9</sup> The INA stands alone as a body of law, and is also contained in various sections of Title 8 of the United States Code.<sup>10</sup> Important reforms to the INA were enacted in 1965, at which point the national origins quota system, which had governed admission into the United States previously, was replaced by a system focused on family reunification and the desire to obtain a skilled workforce.<sup>11</sup> Additionally, the 1965 Amendments increased the annual ceiling on immigrants.<sup>12</sup> Immediate relatives of American citizens were not included in this ceiling.<sup>13</sup> Highest preference was given to the relatives of American citizens and permanent resident aliens, followed by applicants with special job skills.<sup>14</sup> Over the next two decades, there were additional amendments to the INA that altered

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9. U.S. Citizenship and Immigration Servs., Immigration and Nationality Act, <http://www.uscis.gov/portal/site/uscis> (follow “Laws” hyperlink; then follow “Immigration Nationality Act” hyperlink) (last visited Oct. 16, 2010).

10. *Id.*

11. CTR. FOR IMMIGRATION STUDIES, *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act* (Sept. 1995), <http://www.cis.org/articles/1995/back395.html> (last visited Oct. 10, 2010).

12. *Id.*

13. *Id.*

14. *Id.*

immigration quotas.<sup>15</sup> Concurrent with these legislative changes was an evolution in U.S. policy toward a focus on rooting out refugees and illegal aliens.<sup>16</sup>

The most significant change regarding employment-related immigration came with the 1990 Immigration Act (“IMMACT”). The goal of this legislation was “to help American businesses hire highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found.”<sup>17</sup> It was as a result of this Act that the H-1B visa category was born.

### III. THE H-1B VISA PROGRAM: AN OVERVIEW

#### A. Legislation

The H-1B visa program allows American employers to temporarily employ non-immigrant aliens to perform specialized occupations in the United States.<sup>18</sup> According to the Immigration and Nationality Act, a “specialty occupation” is an occupation that requires: (1) theoretical and practical application of a body of highly specialized knowledge; and (2) attainment of a bachelor’s or higher degree in the specific specialty.<sup>19</sup> Congress first implemented an annual cap on the number of H-1B visas in the 1990 Immigration Act, which set the limit at 65,000.<sup>20</sup> Due to high demand for H-1B workers that corresponded with the dot-com bubble, Congress provided for an increase in the cap between 1999 and 2003.<sup>21</sup> In the fiscal year 2004, the cap returned to 65,000, and has remained at that level ever since.<sup>22</sup>

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15. *Id.*

16. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (establishing a separate admissions policy for refugees, and setting a separate target for refugees at 50,000); see also Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (attempting to control and deter illegal immigration); THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, ED211612, FINAL REPORT (1981) (reviewing the provisions and effects of the INA, with particular focus on illegal immigrants and refugees).

17. Employment-Based Immigrants, 56 Fed. Reg. 60,897 (Nov. 29, 1991).

18. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006).

19. 8 U.S.C. § 1184(i) (2006).

20. Immigration Act of 1990, Pub. L. No. 101-649, § 205(a), 104 Stat. 4978, 5019-22.

21. See OFFICE OF TECHNOLOGY POLICY, U.S. DEP’T OF COMMERCE, ED412360, AMERICA’S NEW DEFICIT: THE SHORTAGE OF INFORMATION TECHNOLOGY WORKERS (1997), available

at [http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?\\_nfpb=true&\\_ERICExtSearch\\_SearchValue\\_0=ED412360&ERICExtSearch\\_SearchType\\_0=no&accno=ED412360](http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED412360&ERICExtSearch_SearchType_0=no&accno=ED412360) (discussing the potential shortage of information technology workers in the U.S. due to the possibility that the nation’s education system would not be able to train enough of these workers to meet the growing demand).

22. 8 U.S.C. § 1184(g) (2006). The 65,000 cap does not include an additional 20,000

### B. Logistics

In order to hire an H-1B non-immigrant alien, an employer must file a Labor Condition Application (“LCA”) with the U.S. Department of Labor (“DOL”).<sup>23</sup> The LCA must include the number of employees to be hired, their occupational classification, the actual wage rate, the prevailing wage rate, the source of the wage data, the duration of employment, and the date of need.<sup>24</sup> Employers are required to pay H-1B visa workers either the same wage as paid to other employees with similar skills and qualifications, or the “prevailing wage” for that occupation and location, whichever is higher.<sup>25</sup> The employer must also file an H-1B visa petition with U.S. Citizenship and Immigration Services (“USCIS”).<sup>26</sup> The DOL must certify both the LCA and petition, which are then sent to the Department of Homeland Security for approval.<sup>27</sup>

The initial stay for an H-1B visa worker in the United States is three years, but can be extended to a maximum of six years.<sup>28</sup> Unlike other non-immigrant visa categories, the H-1B category permits dual intent: workers coming to the U.S. need not avow their intent to leave the country once their visa has expired. Accordingly, H-1B visa holders can pursue permanent residence.<sup>29</sup>

## IV. SAFEGUARDS IN THE SYSTEM

Most of the safeguards in the present H-1B visa program have been implemented in response to critics’ arguments that the system displaces American workers from U.S. jobs. The annual H-1B visa cap of 65,000, which has been in place since 2004, represents somewhat of a compromise between critics and advocates of the program, though definitive lines in the

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H-1B visas granted to individuals with U.S. graduate degrees, who are statutorily exempted from the cap under the H-1B Visa Reform Act of 2004. H.R. 4818, 108th Cong. § 425 (2004).

23. 8 U.S.C. § 1182(n) (2006).

24. *Id.*

25. 8 U.S.C. §§ 1182(n)(1)(A)(i)(I)-(II) (2006).

26. 8 U.S.C. § 1184(c) (2006).

27. 8 U.S.C. § 1101(a)(15)(H) (2006). On March 1, 2003, the Department of Homeland Security took over all functions and authorities of the Immigration and Naturalization Service (which previously had been responsible for approving LCAs and petitions) under the Homeland Security Act of 2002 and the Homeland Security Reorganization Plan of November 25, 2002. Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (2002).

28. 8 U.S.C. §§ 1184(g),(k) (2006).

29. 8 U.S.C. § 1184(h) (2006).

debate over the cap are difficult to discern.<sup>30</sup>

Another safeguard to protect American workers is the “H-1B dependent” designation of certain employers who have workforces consisting of 15% or more H-1B workers. The “H-1B dependent” category developed out of the American Competitiveness and Workforce Improvement Act of 1998 (“ACWIA 98”), which implemented reforms to the INA.<sup>31</sup> As defined by ACWIA 98, an “H-1B dependent employer” is an employer that: (1) has twenty-five or fewer full-time employees who are employed in the United States and employs more than seven H-1B non-immigrants; (2) has between twenty-six and fifty full-time employees who are employed in the United States and employs more than twelve H-1B non-immigrants; or (3) has at least fifty-one full-time employees who are employed in the U.S. and H-1B non-immigrants make up at least 15% of that workforce.<sup>32</sup>

H-1B dependent employers are subject to more stringent regulations. ACWIA 98, in a section titled “Protection Against Displacement of United States Workers in Case of H-1B-Dependent Employers,” limits an H-1B dependent employer’s ability to transfer an H-1B worker to another employer, requires that employers certify in the LCA that they have not and will not displace American workers, and obliges employers to take steps to recruit American workers who are equally or better qualified for the position for which an H-1B worker is sought.<sup>33</sup> ACWIA 98 also increased penalties for violations of the INA and mandated that the National Science Foundation study the impact of the H-1B visa program and keep Congress abreast of its findings.<sup>34</sup> Since the enactment of ACWIA 98, a number of fees have been added to the H-1B visa application process as an additional method of deterring abuse of the system and protecting American workers.<sup>35</sup>

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30. Courtney L. Cromwell, *Friend or Foe of the U.S. Labor Market: Why Congress Should Raise or Eliminate the H-1B Visa Cap*, 3 BROOK. J. CORP. FIN. & COM. L. 455 (2009). See *infra* Part VI for discussion on the debate regarding the visa cap.

31. Pub. L. No. 105-277, Div. C, Title IV, § 412, 112 Stat. 2681-642, 642-5 (1998).

32. *Id.* at § 412(b).

33. *Id.* at §§ 412(a)(1)(E)-(G).

34. *Id.* at §§ 413, 417, 418.

35. See Pub. L. No. 106-311, 114 Stat. 1247 (2000) (increasing the petitioner fee from \$500 to \$1000); H-1B Visa Reform Act of 2004, Pub. L. No. 108-447, §§ 422, 426, 118 Stat. 2809, 3353, 3357 (2004) (raising the petitioner fee to \$1500 and implementing a \$500 fraud prevention and detection fee for H-1B applications). See also *infra* Part VI.D for additional discussion regarding filing fees.

## V. A SYSTEM RIFE WITH FRAUD AND ABUSE

In September 2008, USCIS released a report on its findings regarding the prevalence of fraud in H-1B petitions. The study examined 246 petitions filed between October 1, 2005 and March 31, 2006.<sup>36</sup> The results revealed that 51 petitions out of the 246 that were analyzed were fraudulent, or contained at least one technical violation.<sup>37</sup> When these numbers were extrapolated to evaluate the total number of applications filed during this period, it was estimated that the number of violations could actually range from 15,500 to 25,600.<sup>38</sup>

One of the most blatant misrepresentations cited in the USCIS study involved a case in which the employee was performing duties significantly different from those described in the LCA and petition. In that case, the position described in the petition and LCA was that of a business development analyst, but the employer later admitted to USCIS that the employee would be working in a laundromat doing laundry and maintaining washing machines.<sup>39</sup> Other misrepresentations included businesses that did not exist, educational degrees that were fraudulent, and signatures that had been forged.<sup>40</sup>

### A. Administrative Loopholes

It is the opinion of this author that the problems in the H-1B system are perpetuated by a lack of oversight.<sup>41</sup> The Labor Condition Application is the primary way the DOL regulates the H-1B program. According to one critic, “the LCA system has been nothing more than a paper-shuffling process” since the DOL ordinarily accepts the employer’s statement of the truthfulness of the application without independently verifying its contents.<sup>42</sup> The Government Accountability Office (“GAO”) conducted interviews of H-1B employers, and reported: “Some employers said that

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36. The total number of petitions filed during this period was 96,827. U.S. CITIZENSHIP AND IMMIGRATION SERVS., H-1B BENEFIT FRAUD & COMPLIANCE ASSESSMENT 5 (Sept. 2008), [http://www.uscis.gov/files/nativedocuments/H-1B\\_BFCA\\_20sep08.pdf](http://www.uscis.gov/files/nativedocuments/H-1B_BFCA_20sep08.pdf).

37. 33 cases (13.4%) were fraudulent, and 18 cases (7.3%) contained technical violations. Hence, the overall violation rate in the 246 cases analyzed was 20.7%. *Id.* at 7.

38. *Id.* at n.9.

39. *Id.* at 7.

40. *Id.*

41. See *infra* Part VII for a proposal to increase the oversight authority of the federal government.

42. John Miano, *The Bottom of the Pay Scale: Wages for H-1B Computer Programmers*, CTR. FOR IMMIGRATION STUDIES, 1, 4 (Dec. 2005), <http://www.cis.org/articles/2005/back1305.pdf>.

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.”<sup>43</sup> Many of the problems associated with implementing the prevailing wage occur because of the limited oversight role of the DOL. The DOL’s Office of Inspector General has described the LCA certification process as merely a “rubber stamp” of the employer’s application.<sup>44</sup> The LCA review process is completely automated, and the employer is not required to submit any supporting documentation. The GAO has concluded that “as the [H-1B] program currently operates, the goals of preventing abuse of the program and providing efficient services to employers and workers are not being achieved. Limited by the law, Labor’s review of the LCA is perfunctory and adds little assurance that labor conditions employers attest to actually exist.”<sup>45</sup>

The DOL is only authorized to review an employer’s attestation of the truthfulness of the LCA for “completeness and obvious inaccuracies.”<sup>46</sup> The Department does not have the authority to open an investigation of an employer suspected of abusing the system unless it receives a formal complaint. Even if a complaint is filed, the Secretary of Labor must personally authorize an investigation.<sup>47</sup> Many proposals to curb abuse of the H-1B system focus on these shortcomings, and advocate expanding the oversight role of the DOL.<sup>48</sup>

### B. Body Shops

In an October 2009 cover article for *Business Week* magazine entitled *America’s High-Tech Sweatshops*, Moira Herbst and Steve Hamm shed light on some of the most egregious abuses of the H-1B program.<sup>49</sup>

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43. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-883, H-1B FOREIGN WORKERS: BETTER TRACKING NEEDED TO HELP DETERMINE H-1B PROGRAM’S EFFECTS ON U.S. WORKFORCE i, 4 (Sept. 2003), available at <http://www.gao.gov/new.items/d03883.pdf>.

44. *Statement of Charles C. Masten, Inspector General, U.S. Dep’t of Labor: Before the H. Subcomm. on Labor, Health and Human Servs., Educ. and Related Agencies of the H. Comm. On Appropriations*, 105th Cong. 11 (1997), available at <http://www.oig.dol.gov/public/testimony/19970410.pdf>.

45. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-00-157, H-1B FOREIGN WORKERS: BETTER CONTROLS NEEDED TO HELP EMPLOYERS AND PROTECT WORKERS 34 (2000), available at <http://www.gao.gov/archive/2000/he00157.pdf>.

46. 8 U.S.C. § 1182(t)(2)(C) (2006).

47. See 8 U.S.C. § 1182(n)(2)(A) (2006) (requiring the Secretary of Labor to establish a process for receiving and investigating complaints).

48. See *infra* Part VI and Part VII for a discussion of past and current proposals.

49. Steve Hamm and Moira Herbst, *America’s High-Tech Sweatshops*, BUSINESS WEEK, Oct. 12, 2009, at 34.

Specifically, the authors point to “body shops,” small labor suppliers that have thrived in recent years due to cost-cutting pressures in the U.S. economy. Because of these pressures, large companies look to outsourcers to supply them with workers for their technological operations. Rather than employing a fixed staff that is either idle or overloaded at any point in time, companies pay outsourcers to supply the desired amount of labor. Outsourcing permits companies to convert the fixed costs of salaried employees into the variable costs of a contingent, as-needed workforce comprised of outsourced workers. Hence, the business can closely match costs and revenues, and can better insulate its bottom line from fluctuations caused by the ability to cover fixed costs.<sup>50</sup>

In order to keep costs low, the outsourcers maintain a lean workforce at each of their client’s sites, and then turn to body shops if additional labor is required. The outsourcing firms and body shops rely heavily on foreign employees who come to the United States on temporary visas, such as the H-1B.<sup>51</sup> The employee works for the body shop, which in turn supplies the outsourcers, which then supply the company, the ultimate user of the labor. The number of layers in this type of system creates a breeding ground for fraud and abuse.

### C. *Present and Prior Litigation*

H-1B visa fraud has been an issue in the spotlight recently as lawsuits have been brought against employers, and more specifically, against body shops. In February 2009, Vision Systems Group, an information technology services firm, was indicted on ten federal counts for allegedly using fraudulent documents to bring H-1B workers into the United States.<sup>52</sup> The indictment was later expanded to eighteen counts,<sup>53</sup> including a charge for violating the INA requirement that employers pay H-1B visa workers the prevailing wage for a particular occupation in a particular location. Vision Systems, based in New Jersey, set up a branch office in Iowa. The company claimed that many of its H-1B employees were working in Iowa, where the wage rate is significantly lower than in New Jersey, where the company’s headquarters are located.<sup>54</sup>

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50. *Cost-Volume-Profit and Business Scalability*, PRINCIPLESOFACCOUNTING.COM, <http://www.principlesofaccounting.com/chapter%2018.htm> (last visited Oct. 16, 2010).

51. Hamm and Herbst, *supra* note 49, at 37.

52. Media Release, U.S. Dep’t of Justice, U.S. Attorney, Southern District of Iowa, 11 Arrested, Indicted in Multi-state Operation Targeting Visa and Mail Fraud (Feb. 12, 2009), available at <http://www.uscis.gov/files/article/11arrestedmultivisa-fraud02feb09.pdf>.

53. Patrick Thibodeau, *U.S. Expands H-1B Fraud Case Against N.J. Firm*, COMPUTERWORLD, Sept. 7, 2009, <http://www.computerworld.com/s/article/342686>.

54. *Id.* Accord Moira Herbst, *Visa Fraud Sparks Arrests Nationwide*, BUSINESS WEEK

In one of the only legal cases involving an employer's failure to comply with the H-1B visa program requirements, the DOL decided in favor of the Administrator of the Wage and Hour Division, acting on behalf of an H-1B visa worker.<sup>55</sup> Itek Consulting was found guilty of violating the INA requirement that H-1B visa workers be paid beginning on the date on which employment commences, for both productive and non-productive time.<sup>56</sup> Although an employer need not pay wages to an H-1B worker in non-productive status due to conditions unrelated to employment or which render the employee unable to work, payment of the prevailing wage is required during employment-related non-productive time.<sup>57</sup> The Administrative Law Judge determined that Itek had engaged in illegal "benching" of an H-1B non-immigrant when it placed the employee on non-productive status without pay.<sup>58</sup>

## VI. PAST AND CURRENT REFORMS

In recent years, Congress considered a number of H-1B reform bills that were never enacted into law. These include: the Defend the American Dream Act of 2005; the USA Jobs Protection Act of 2005;<sup>59</sup> the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007;<sup>60</sup> the H-1B and L-1 Visa Fraud and Abuse Prevention Act of 2007; and the H-1B and L-1 Visa Reform Act of 2009.

### A. *Prior Legislation*

The Defend the American Dream Act of 2005 set more definite guidelines for wage determination than had previously existed.<sup>61</sup> The Act implemented further safeguards to protect American workers, and provided stringent notice requirements for employers seeking H-1B visas.<sup>62</sup> Additionally, the bill tripled H-1B application fees, increased the Secretary

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ONLINE, Feb. 13, 2009, [http://www.businessweek.com/bwdaily/dnflash/content/feb2009/db20090212\\_920784.htm](http://www.businessweek.com/bwdaily/dnflash/content/feb2009/db20090212_920784.htm) (discussing the federal investigation into suspected visa fraud engaged in by Vision Systems Group).

55. *Adm'r, Wage & Hour Div. v. Itek Consulting, Inc.*, 2008-LCA-00046 (Dep't of Labor May 6, 2009).

56. *Id.*

57. 8 U.S.C. § 1182(n)(2)(c)(vii) (2006); 20 C.F.R. § 655.731(c)(ii).

58. *Itek Consulting*, 2008-LCA-00046, at 12.

59. USA Jobs Protection Act of 2005, H.R. 3322, 109th Cong. (2005).

60. Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1639, 110th Cong. (2007).

61. H.R. 4378, 109th Cong. § 2 (2005).

62. *Id.* at §§ 3-4.

of Labor's oversight function, and provided a private right of action for employees harmed by violations of the INA.<sup>63</sup> Similar ideas were set forth in the USA Jobs Protection Act of 2005. The goals of this bill included preventing the displacement of American workers, and increasing the monitoring and enforcement authority of the Secretary of Labor over the H-1B and L-1 visa programs.<sup>64</sup> Congress did not pass either bill.

Another effort to weed out systemic fraud in the H-1B visa program was considered by the 110th Congress in the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007.<sup>65</sup> In addition to increasing the H-1B visa cap,<sup>66</sup> the bill set forth a number of restrictions on the H-1B program. These restrictions included eliminating "dual intent" for H-1B non-immigrants to prevent H-1B workers from seeking permanent resident status in the U.S.,<sup>67</sup> subjecting employers to more demanding rules,<sup>68</sup> and increasing H-1B application fees.<sup>69</sup> Congress did not pass this bill.

#### *B. The H-1B and L-1 Visa Reform Act*

Senators Dick Durbin (D-Illinois) and Chuck Grassley (R-Iowa) proposed the H-1B and L-1 Visa Fraud and Abuse Prevention Act of 2007 during the 110th Congress.<sup>70</sup> Although the bill never made it out of committee, it was re-proposed by the Senators during the 111th Congress as the H-1B and L-1 Visa Reform Act of 2009.<sup>71</sup>

The Durbin-Grassley bill attempts to reform the H-1B program so as to prevent abuse and fraud, and to protect American workers.<sup>72</sup> In introducing the bill, Senator Durbin remarked:

The H-1B visa program should complement the U.S. workforce, not replace it. . . . Congress created the H-1B visa program so an employer could hire a foreign guest-worker when a qualified

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63. *Id.* at §§ 8-10.

64. H.R. 3322, 109th Cong. (2005).

65. S. 1639, 110th Cong. (2007).

66. *Id.* at Title IV, § 419(a)(1).

67. *Id.* at § 218B.

68. *Id.*

69. *Id.*

70. S. 1035, 110th Cong. (2007).

71. S. 887, 111th Cong. (2009). In this paper, I also use the term "Durbin-Grassley bill" to refer to this legislation. With the closing of the 111th Congress, the bill had not been brought up for a vote. It remains to be seen whether it will be reintroduced in the 112th Congress.

72. The bill also proposes reform of the L-1 program. L-1 visas allow foreign specialized workers to relocate to a corporation's U.S. office after working abroad for the company for at least one year prior to the grant of L-1 status.

American worker could not be found. However, the H-1B visa program is plagued with fraud and abuse and is now a vehicle for outsourcing that deprives qualified American workers of their jobs. Our bill will put a stop to the outsourcing of American jobs and discrimination against American workers.<sup>73</sup>

Included within the H-1B and L-1 Visa Reform Act of 2009 are a multitude of provisions that strive to protect American workers. Examples of such provisions include: (1) a requirement that *all* employers (not only those that are H-1B dependent) that want to hire an H-1B worker first make a good-faith attempt to recruit a qualified American worker,<sup>74</sup> (2) a prohibition on the practice of “H-1B only ads”;<sup>75</sup> and (3) a bar on companies with more than fifty U.S. employees from getting any additional work visas if more than 50% of their U.S. workforce consists of H-1B or L-1 visa holders—the so-called “50/50 provision.”<sup>76</sup> The 50/50 provision is one of the most controversial aspects of the bill, and has aroused outcry from non-U.S. outsourcing companies that hire skilled workers from abroad.<sup>77</sup> Critics of the provision argue that the legislation would essentially prevent large outsourcing companies from hiring more foreign workers to work in the U.S. As Natarajan Chandrasekaran, chief executive officer of Tata Consultancy, an Indian information technology outsourcing company, puts it: “It certainly does surprise us that the U.S., being so capitalist, is now going in the opposite direction[.]”<sup>78</sup> If the bill passes in its current form, outsourcers may turn to off-shoring their work as an alternative to hiring more American employees.<sup>79</sup>

According to a study conducted by researchers at Duke and Harvard Universities that was released March 2, 2009, changes in the rules governing the hiring process for H-1B workers may have a negative impact

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73. Press Release, Senator Dick Durbin, Durbin, Grassley Introduce Legislation to Reform H-1B Visa Program (Apr. 23, 2009), *available at* <http://durbin.senate.gov/showRelease.cfm?releaseId=311910>.

74. S. 887, at § 101.

75. *Id.* at § 102.

76. *Id.*

77. Foreign outsourcing firms, such as Wipro and Infosys Technologies, are among the most active participants in the H-1B visa program. With 1,964 H-1B visas in 2009, Wipro garnered more of these visas from USCIS than any other company, domestic or foreign. *Wipro Tops List of H-1B Visa Professionals in 2009*, THE ECONOMIC TIMES (Jan. 7, 2010), <http://economictimes.indiatimes.com/news/news-by-industry/services/travel/visa-power/Wipro-tops-list-of-H-1B-visa-professionals-in-2009/articleshow/5415615.cms>.

78. Moira Herbst, *Work Visa Bill Threatens Indian Outsourcers*, BUSINESS WEEK ONLINE (June 3, 2009), [http://www.businessweek.com/bwdaily/dnflash/content/jun2009/db2009062\\_581634.htm](http://www.businessweek.com/bwdaily/dnflash/content/jun2009/db2009062_581634.htm).

79. *Id.*

on innovation in the United States.<sup>80</sup> Vivek Wadhwa, the lead researcher on the study, has been highly critical of restrictions on the H-1B program, particularly those contained in the Durbin-Grassley bill. According to Wadhwa, “[t]o put up walls that block the best and brightest from coming to America is bad policy in both the short and the long term[,]” which is exactly what he perceives the legislation will do.<sup>81</sup>

In addition to the provisions intended to protect the American workforce, the H-1B and L-1 Visa Reform Act contains a number of provisions that increase the DOL’s monitoring authority. For example, the bill would expand the Department’s ability to review H-1B visa applications. In its current form, the INA permits the Secretary of Labor to review applications only for “completeness and obvious inaccuracies.”<sup>82</sup> The Durbin-Grassley bill would extend review of an application to include both fraud and misrepresentations of material fact.<sup>83</sup> If, upon reviewing the application, the Secretary “identifies clear indicators of fraud or misrepresentation of material fact, the Secretary may conduct an investigation[.]”<sup>84</sup>

The H-1B and L-1 Visa Reform Act would allow the DOL to conduct random audits of any company that employs H-1B non-immigrants.<sup>85</sup> Additionally, the DOL would be required to conduct annual compliance audits of companies that employ large numbers of H-1B workers—those with more than one-hundred U.S.-based employees, of which more than 15% of such employees are H-1B visa holders.<sup>86</sup> In order to facilitate the DOL’s ability to perform these functions, the bill authorizes an additional two-hundred DOL employees to be responsible for administering, overseeing, investigating, and enforcing guest worker programs such as the H-1B.<sup>87</sup> Hence, with this reform act in place, the federal government’s role in weeding out fraud and abuse in the H-1B program would be significantly expanded.

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80. Vivek Wadhwa et al., *America’s Loss is the World’s Gain* 7 (Mar. 2009), [http://www.kauffman.org/uploadedFiles/americas\\_loss.pdf](http://www.kauffman.org/uploadedFiles/americas_loss.pdf).

81. Vivek Wadhwa, *We Need Smarter, Not Fewer, H-1B Visas*, BUSINESS WEEK ONLINE, May 11, 2009, [http://www.businessweek.com/technology/content/may2009/tc20090511\\_939248.htm](http://www.businessweek.com/technology/content/may2009/tc20090511_939248.htm).

82. 8 U.S.C. § 1182(n)(1)(G) (2006).

83. S. 887, 111th Cong. § 103.

84. *Id.* This is an expansion of the DOL’s investigatory power, which is currently limited to situations in which a complaint has been filed. 8 U.S.C. § 1182(n)(2)(A) (2006).

85. S. 887, at § 111.

86. *Id.*

87. *Id.* at § 124.

### C. *The Debate Over the Cap*

Although the Durbin-Grassley bill in its current form does not focus on the annual H-1B visa cap, many other proposals aimed at reforming the system focus precisely on this issue. On one side of the debate are those who believe that “the U.S. labor market is suffering at the hands of the H-1B visa cap, putting U.S. jobs at risk to off-shoring and putting the United States in danger of losing its most valuable resource in the twenty-first century, intellectual capital.”<sup>88</sup> In other words, the cap should be raised to permit “the best and brightest” to come to the United States, which will in turn promote and preserve America’s status as an innovator on the world stage.<sup>89</sup>

On the other side of the debate are those who advocate lowering the cap. The arguments on this side are traditionally based on the belief that H-1B workers displace American workers. Additionally, it has been contended that the real reason behind the IT industry’s support of an increase in the cap is its desire for a constant source of cheap labor. Raising the cap would thus serve to feed the industry’s perverse incentives.<sup>90</sup> A paper by Harvard Professor George J. Borjas for the National Bureau of Economic Research revealed that an “immigrant-induced 10 percent increase in the size of a skill group lowers the wage of native workers in that group by 3 to 4 percent.”<sup>91</sup> As Kim Berry, president of the Programmers Guild, puts it:

Raising the cap would be a boon for Indian bodyshops. . . . These firms produce nothing of value while they undercut U.S. wages. . . . They are corrupting the supply and demand of the tech labor market and dissuading future generations from entering the field.<sup>92</sup>

Many on this side of the debate also take issue with their opponents’

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88. See Cromwell, *supra* note 30, at 465 (advocating an increase in the H-1B visa cap).

89. *Id.*

90. See Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. J.L. REFORM 815, 817 (2003) (suggesting that finding a source of cheap labor is an employer’s primary motive in hiring an H-1B worker).

91. George J. Borjas, *The Labor Market Impact of High-skill Immigration* 2 n.2 (Nat’l Bureau of Econ. Research, Working Paper No. 11217, 2005), available at <http://www.hks.harvard.edu/fs/gborjas/Papers/w11217.pdf>.

92. Moira Herbst, *Another Wave of H-1Bs on the Way*, BUSINESS WEEK ONLINE, Apr. 31, 2008, [http://www.businessweek.com/bwdaily/dnflash/content/mar2008/db20080330\\_182808.htm](http://www.businessweek.com/bwdaily/dnflash/content/mar2008/db20080330_182808.htm). The Programmers Guild is an organization devoted to advancing the interests of technical and professional workers in the information technology fields.

view that H-1B workers are the world's best and brightest. Ron Hira, an associate professor of public policy at Rochester Institute of Technology and an expert on outsourcing, has tried to dispel what he perceives to be an inaccurate conception of H-1B worker talent: "While some are truly exceptional, they make up a small share of the visa holders. The minimum degree required to hold an H-1B visa is a bachelor's degree or equivalent experience, hardly a rare commodity."<sup>93</sup>

*D. Additional Obstacles for H-1B Employers*

In addition to political pressure, a persistently weak U.S. economy has presented challenges for the H-1B program. While employers scooped up the 65,000 visas available in just one day, as of September 25, 2009, nearly six months after the government began accepting applications for fiscal year 2010, only 46,700 applications had been filed.<sup>94</sup> It was not until December 21, 2009 that USCIS announced that it had received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year 2010.<sup>95</sup> Another deterrent for some companies seeking to hire H-1B employees is a recent increase in filing fees. In August 2010, President Obama signed into law Public Law 111-230, which increases H-1B filing fees by \$2000 for employers with a workforce of fifty or more employees in the United States, at least 50% of whom are H-1B or L-1 non-immigrants.<sup>96</sup>

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93. Ron Hira, *It's Time to Overhaul H-1B Visas*, BUSINESS WEEK, Apr. 13, 2009, at 63, available at [http://www.businessweek.com/magazine/content/09\\_15/b4126063331942.htm](http://www.businessweek.com/magazine/content/09_15/b4126063331942.htm) [hereinafter Hira I].

94. Miriam Jordan, *Slump Sinks Visa Program*, THE WALL STREET JOURNAL, Oct. 29, 2009, at A1, available at <http://online.wsj.com/article/SB125677268735914549.html>. Applications for the following fiscal year can be filed as early as April. Hence, employers began applying for H-1B visas in April of 2009 for the 2010 fiscal year.

95. Press Release, U.S. Citizenship and Immigration Servs., USCIS Reaches FY 2010 H-1B Cap (Dec. 21, 2009), available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=153a1638367b5210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. As of November 5, 2010, the cap for fiscal year 2011 still had not been reached. *H-1B Fiscal Year (FY) 2011 Cap Season*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Nov. 2010), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=4b7cdd1d5fd37210VgnVCM100000082ca60aRCRD&vgnnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD>.

96. Press Release, U.S. Citizenship and Immigration Servs., USCIS Implements H-1B and L-1 Fee Increase According to Public Law 111-230 (Aug. 14, 2010), available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=27eac9514bb8a210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. The law also implements an additional \$2250 fee for L-1 petitions.

An additional hurdle for companies seeking to hire H-1B visa workers is the Employ American Workers Act (“EAWA”), a provision included in the American Recovery and Reinvestment Act (the “stimulus bill”), which was signed into law by President Obama in February 2009.<sup>97</sup> EAWA prohibits a company receiving funding through the Troubled Asset Relief Program (“TARP”) to hire an H-1B worker without first certifying that no qualified American worker has been, or will be, displaced and that the company made affirmative efforts to first find a qualified American worker for the job.<sup>98</sup> EAWA has caused many financial institutions, most notably Bank of America, to retract some job offers to foreign hires.<sup>99</sup> Remarking on EAWA and what he views as a growing anti-immigrant sentiment, Vivek Wadhwa said: “The best and the brightest who would normally come here are saying, ‘Why do we need to go to a country where we are not welcome, where our quality of life would be less, and we would be at the bottom of the social ladder?’”<sup>100</sup> Lloyd Blankfein, the CEO of Goldman Sachs, was similarly skeptical about the new requirements:

[R]ecent legislation constrains the ability of financial institutions to hire employees through the H-1B visa program. This program helps bring the most highly trained and technical people into our labor market. The U.S. has always been a magnet for many of the most talented, hungry and qualified people in the world. Especially at this time in our economy, do we really want to tell individuals who will help companies to grow and innovate—ultimately creating more jobs—that they should go work elsewhere?<sup>101</sup>

## VII. FIRST STEPS TOWARD A BETTER SYSTEM

As we have seen in the past, reform proposals that attempt to accomplish too much too quickly are unlikely to be successful. While there is general agreement that the H-1B system is an area ripe for reform, there is debate over the process by which reform can best be achieved. In this author’s opinion, it is essential to initiate the reform process with proposals that are narrow in scope. By beginning with smaller issues that are more likely to garner political consensus, the likelihood of achieving larger and more comprehensive reform will be increased.

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97. Pub. L. No. 111-5, Div. A, Title XVI, § 1611, 123 Stat. 115, 305.

98. *Id.*

99. Jordan, *supra* note 94, at A1.

100. *Id.* at A2.

101. Greg Morcroft, *Full text of Goldman Sachs CEO speech*, MARKETWATCH, Apr. 7, 2009, available at <http://photos.wsj.net/story/text-goldman-sachs-ceo-lloyd>.

The H-1B and L-1 Visa Reform Act of 2009 is an example of a resolution that strives to achieve too much in a single piece of legislation. Reforms implemented by the bill cover a wide spectrum of issues, ranging from application requirements to governmental authority. Because the legislation is broad in scope, it is likely to face political opposition in Congress, and may suffer the same fate as many other attempts to reform the H-1B visa program.

Additionally, the H-1B visa cap should be an issue dealt with only after the initial foundation for reform has been laid. The issue of the cap generates abundant political, social, and economic debate, as previously discussed in Part VI. Therefore, prior to implementing changes to the cap, Congress should focus on issues more likely to generate consensus. One such issue involves increasing the DOL's authority to regulate the H-1B program.

Augmenting the federal government's oversight and investigative authority is a key component of H-1B visa reform. According to Ron Hira, "[t]he H-1B program can be cleaned up by closing loopholes and increasing oversight."<sup>102</sup> Many of the Durbin-Grassley proposals are on-target in this regard. For example, the Durbin-Grassley bill would expand the DOL's ability to review H-1B visa applications, extending review of an application to include both fraud and misrepresentations of material fact.<sup>103</sup> Upon a finding of fraud or misrepresentation, the DOL would be permitted to initiate an investigation.<sup>104</sup> Additionally, the bill would allow the DOL to conduct random audits of any company that employs H-1B non-immigrants, and require the Department to conduct annual audits of companies employing significant numbers of H-1B workers.<sup>105</sup> To facilitate the performance of these functions, the DOL can hire an additional two-hundred employees.<sup>106</sup>

In order to implement a more effective oversight mechanism, the DOL will need increased discretionary budget authority. I propose a supplemental tax, to be paid for by those companies whose H-1B visa workers make up more than a certain percent of the total workforce (percent to be determined on the basis of research and expert testimony). This tax will effectively serve to finance the increased spending requirements. Giving the DOL greater latitude to regulate the H-1B program is an essential component of successful reform. Instead of relying on various governmental authorities to come in and conduct investigations

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102. Hira I, *supra* note 93, at 64.

103. S. 887, 111th Cong. § 103.

104. *Id.*

105. *Id.* at § 111.

106. *Id.* at § 124.

after alleged fraudulent activity has already occurred,<sup>107</sup> we can preempt fraud *ex ante* by empowering the DOL with greater oversight capability. Additionally, increased funding will permit more on-site visits to ensure that both employers and employees comply with legal requirements. On-site visits will assist in combating a major flaw in the H-1B system, which entails a relatively stringent initial verification process offset by a lack of oversight once the H-1B employee has entered the country. Since fraud often becomes apparent only after the application process has been completed,<sup>108</sup> random site visits to ensure that H-1B participants are complying with the rules are an important component of comprehensive reform.

Current government policies deter H-1B workers from reporting wrongful practices engaged in by their employers. When an employee comes to the U.S. on an H-1B visa, the visa is held by the employer, not the worker. If the employee complains, the company can terminate its visa sponsorship and the worker must then leave the country. Although a terminated employee can remain in the U.S. if he is granted permanent citizenship, this process may take up to ten years and is ordinarily not a viable alternative. As Michael F. Brown, an attorney in Wisconsin who handles immigration cases, says, “[M]any of these people don’t know their rights. . . . They’re essentially captives.”<sup>109</sup>

This situation will likely continue unless the extraordinary power wielded by employers of H-1B workers in the current system is curtailed. If employers are holding the visas for the workers, and have complete discretion over whether and when to apply for permanent resident status for those workers, they are essentially able to keep their employees “captive.” The current system frequently puts guest workers who want to become permanent residents “in a state of indentured limbo.”<sup>110</sup> A possible resolution is a power-shift from employer to employee: the employee could hold the visa herself and independently apply for permanent residency.

Employers have lobbied hard against allowing H-1B workers to

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107. See Herbst, *supra* note 54 (discussing a federal probe into H-1B visa fraud, which resulted in the indictment of information technology services firm Vision Systems Group).

108. See H-1B BENEFIT FRAUD & COMPLIANCE ASSESSMENT (Sept. 2008), *supra* note 36 (citing examples of fraud in the H-1B system, including petitions from businesses that do not exist, employers paying less than the required prevailing wage, and visa holders working a different job than was stated in the petition).

109. Hamm and Herbst, *supra* note 49, at 38.

110. Ron Hira, *Bridge to Immigration or Cheap Temporary Labor? The H-1B & L-1 Visa Programs Are a Source of Both*, 257 ECON. POLICY INST., BRIEFING PAPER 13 (Feb. 17, 2009), available at [http://epi.3cdn.net/60b75ba377ebc081b5\\_hem6b5qjc.pdf](http://epi.3cdn.net/60b75ba377ebc081b5_hem6b5qjc.pdf) [hereinafter Hira II].

sponsor themselves for permanent resident status, and thus far they have been successful. During the 2007 debate over comprehensive immigration reform, businesses fought hard against a proposal to allocate self-sponsored high-skill immigrant visas based on a merit point system, arguing that employers are best equipped to select the talent that is needed in the country.<sup>111</sup> In spite of these protestations, however, limiting employers' control over the H-1B process is precisely what is needed if the system is to be effectively reformed. While a merit-based point system may not be an ideal solution, reform that makes the path to permanent residency easier for employees is essential. Regarding this issue, Ron Hira contends: "When employers need skilled foreign workers, they should rely primarily on permanent immigration to supply them. Guest worker visa programs should be relied on only when truly necessary and should be significantly overhauled to ensure that foreign workers cannot be exploited and American workers are not undercut."<sup>112</sup>

In order to curb employer abuse and assist the DOL in regulating the H-1B program, a whistleblower mechanism should be implemented. A law simulating the Whistleblower Protection Act would encourage employees to inform the DOL of their employers' abuse of the H-1B system, without fear of repercussion.<sup>113</sup> This policy would be an effective tool in combating violations by smaller companies, such as body shops. Because of their size, body shops frequently escape the purview of regulators and law enforcement; they are, so-to-speak, "under the radar." While preventing visa abuses by these companies is labor intensive, the combination of increased DOL oversight authority and whistleblower protection for employees will make the task feasible.

#### VIII. CONCLUSION

As articulated in this Comment, the H-1B program is riddled with violations, the effects of which are both far-reaching and devastating. If comprehensive reform is not achieved immediately, America's position as a world innovator in the economic, social, and technological realms will surely erode. Reform can begin by taking small steps that have the

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111. See Molly Hennessy-Fiske and Jim Puzanghera, *Immigration Plan Doesn't Add up, Critics Say: Businesses Fault the Senate Bill's Point System, Saying It Can't Keep Pace with the Changing Economy*, LOS ANGELES TIMES, May 24, 2007, available at <http://articles.latimes.com/2007/may/24/nation/na-points24> (discussing a Senate proposal to implement a point-based system that would be used to allocate green cards).

112. Hira II, *supra* note 110, at 13.

113. See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C.) (providing statutory protection for federal employees who report illegal or improper government activities).

potential to make a big impact, as discussed in Part VII. Regulation through oversight and a whistleblower system are just some of the changes that should be implemented if H-1B visa fraud is to be scaled back significantly, and eventually eliminated. Salvation of the H-1B visa program is possible with appropriate reform. A sound program, checked and balanced, would set the stage for legitimate and fair labor practices that will benefit American workers and their foreign counterparts alike.