Testimony of John Miano Before the Subcommittee on Immigration, Border Security, and Claims House Judiciary Committee

March 23, 2006

Disclosure

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Summary

- The annual quota is the only real protection for American workers in the H-1B program.
- Where the skill level can be determined from the disclosure data, employers classify the majority of H-1B computer programming workers as "entry level."
- Employer prevailing wage claims on Labor Condition Applications (LCAs) for programming occupations averaged $18,000 less than the actual median wage for the same job and location.
- Wages for H-1B programming workers listed on LCAs averaged $13,000 below the median wage for occupation and location.
- The vast majority of workers for which LCAs are applied for computer programming are for the "offshoring" and "bodyshopping" industries rather than U.S. technology companies.
- Reasonable limits on the number of H-1B workers a single employer may hire would make sufficient visas available for U.S. technology companies.
- Some employers are making questionable wage claims on LCAs. Allowing employers to use nearly any source to determine the prevailing wage makes it impossible to determine the extent to which such questionable claims are used on LCAs.
- Congress has established the labor certification process as a "rubber stamp" operation that has no value.
- Congress has defined the eligibility for H-1B visas in such vague terms that much of the program's use is outside of its intended purpose.
- The data collection and reporting are not adequate to monitor the H-1B program.
- After eleven years, Congress has yet to close the loophole allowing the direct replacement of U.S. workers by H-1B workers.
- The H-1B program contains bizarre restrictions intended to prevent enforcement.
- The H-1B program is the engine that drives the "offshoring" of U.S. technology jobs to other countries.

Predictions

Should the H-1B program be increased once again, we have the experience of the previous H-1B increases to guide us as to what the effects will be.

- There will be increased unemployment for U.S. technology workers.
- Fewer U.S. students will study technology fields and more foreign students will.
- The number of U.S. jobs lost to "offshore outsourcing" will surge.
- More U.S. workers in science and engineering will leave to take jobs in other fields.
- All net growth in programming jobs will be consumed by H-1B workers.
- Competition from businesses employing low wage H-1B workers will force U.S. businesses to join in the practice to stay in business just as we see in industries with large numbers of illegal aliens.
- The queue for green cards will grow.

The Purpose of the H-1B Program

In this statement I would like to compare the purpose of the H-1B program to its actual operation. In order to do so, one needs a definition of the program's purpose. Since there is no official definition, I am going to refer to this statement of purpose for the H-1B program coming from someone expressing support for the H-1B program.

> The purpose of the H-1B program is to give companies such as Intel access to advanced university level talent in the hard sciences and engineering field. The need for the H-1B program is rooted in the lack of educated U.S. workers, particularly in engineering and other hard sciences, Patrick Duffy, Human Resources Attorney, Intel Corporation, Testimony to the Senate Judiciary Committee, Sep. 16, 2003.

My Experience

I worked professionally as a computer programmer from 1984 until 2002. Most of that time I spent working as a software consultant, including eight years with Digital Equipment Corporation. This allowed me to work with many companies in various industries.

I first became aware of the H-1B program and its abuses in 1994 when two local companies, AIG in Livingston N.J. and SeaLand in Elizabeth N.J., replaced their U.S. programming staffs with lower paid workers imported on H-1B visas. Since both of these mass firings involved hundred of workers, I have several friends and neighbors who became victims of these early cases of H-1B abuse.

At the time, these mass firings were a great shock to people in the industry. How could it possibly be legal for employers to fire U.S. workers and replace them with foreign workers? As we learned, such replacements are perfectly legal and over the years they became commonplace.

At the time of my last visit to this committee, I was working with Dun & Bradstreet. Six months later, that company's CIO sent the following e-mail to her staff:

> From: Hessamfar, Elahe
>
> Sent: Monday, March 20, 2000 1:16 PM
>
> To: D&B GTO U.S.
>
> Subject: Offshore development
>
> Dear all,
>
> As the business world around us becomes more and more competitive, large companies such as ours must find new ways to become more nimble and flexible to be able to respond more quickly to the competitive environment. We must sharpen our focus on our core competencies and move to outsource work that can be done more efficiently by others. GTO's strategic value lies in the expertise we offer our business partners in how to effectively use technology to solve business problems.
>
> In the second half of 1999, we began to look seriously at the possibility of off-shoring both software development and application maintenance as a means to reduce the cost structure of GTO. By moving to this type of model, we can become a more flexible organization by adding or reducing resources based on business needs. As we move to a more variable resourcing strategy that includes work being done at off-shore development centers, the skills desired and roles required within GTO will change. Changing our operational model in this way will create new opportunities for individuals within GTO who have the skills to be business analysts, designers, architects, project leaders, quality assurance analysts and other roles with greater business impact.
>
> We've chosen two organizations to assist us in this endeavor - WIPRO Infotech and Cognizant Technology Solutions (CTS).[1] These vendors have established Off-shore Development Centers (ODCs) in India where they build and support software for many large corporations such as ours. Over the course of the next year, these two organizations will become extensions to the GTO organization. We've asked them to assist us in determining the priority in which systems will be moved off-shore. In order to facilitate this prioritization, representatives of both companies are meeting with application development and support teams to understand our applications. I ask that you consider them as members of our team and give them your full cooperation during this analysis. In the future, project teams will be composed of a mix of D&B resources, on-shore resources from these firms, as well as off-shore resources in India. Within our model, all parties will work under the guidance and direction of the Program Manager as I outlined to you in a recent communication.
>
> Marcia Hopkins has been named the Program Manager for this strategic initiative. She is tasked with creating the overall plan for implementing the off-shore model in GTO. By end of the first quarter, she will set the priority for off-shoring existing application support, maintenance and new software development. In addition, she will define the infrastructure elements (the "factory") required to successfully manage resources in India as part of our development teams and develop the plan for implementing those elements. Finally, the off-shore program plan will address the "people" elements of this transition including:

[1] These companies are among the largest users of H-1B visas. See Table 1 below.

identifying the roles needed to support the new model, inventorying the skills and roles that exist today versus those required in the future and defining the process for transitioning work from employees to off-shore consultants in cases where that makes business sense.

The process of moving work to the ODCs will begin in April and continue throughout the next eighteen months. I know that you must be wondering "what happens if my job gets transferred to the ODC?"

I assure you that these decisions will not be made lightly. Decisions to move work off-shore will be made after careful analysis of the business situation and will only be done in cases that make business sense. If your current role is to be impacted, you will be provided with notice to begin retraining or to interview for other internal positions. Should no suitable alternative exist for you at the time your application/project moves off-shore, severance benefits will be provided to you under the Career Transition Plan.

Your continued commitment and dedication are necessary to ensure a smooth transition to this new model. I thank you in advance for your support & cooperation and we will continue to update you with more specifics of the program as they evolve. In the interim, if you have any questions, please feel free to contact your manager, Marcia Hopkins or Jean Chesterfield.

Elahe

Here we see U.S. Dun & Bradstreet employees being called on to treat their replacements as "members of the team".

Over the next year I had the opportunity to see first hand U.S. workers training their H-1B replacements before they were fired.[2] I even had the opportunity to meet one programmer who had been replaced by H-1B workers at AIG. Afterwards, he went to work at Dun & Bradstreet only to be fired and replaced by H-1B workers there as well.

My observation was that the skill level of the H-1B replacements was generally very poor. A small number of the replacements looked like they would eventually become good programmers. However, even the select few potentially good programmers in the group were beginners who were receiving on-the-job-training. No one seemed to care about skill levels as long as the replacements worked cheaply.

In the computer industry, most H-1B workers are employed by companies that contract these workers out to other companies. The H-1B workers come into the United States with no actual job. Instead, when they come to the United States they directly compete with U.S. workers for jobs. While I was at Dun & Bradstreet, someone, probably as a joke, signed me up for several H-1B "hotlist" subscriptions. Hotlists are lists with resumés of H-1B workers already in the United States who do not have work. Companies exchange hotlists so those with available H-1B workers can subcontract them to other companies that will rent out the workers.

As a result of these subscriptions, I received hundreds of resumés a week for H-1B workers who were in the United States but needed actual jobs. In nearly all cases, they stated the worker was available for work the same week "Anywhere in the U.S." From

[2] Most of the replacements were on H-1B visas. A few of them were on chained B visas. "Offshoring" projects are notorious for having sudden replacements in U.S.-based staff resulting from attempts to chain B visas being rejected.

the nature of these postings I believe that very few employers of record were filing LCAs and verifying they were paying these workers the prevailing wage for their new work location.

The resumés I received from these lists were quite interesting because nearly all had similar attributes. All of these resumes listed a college degree but they never listed the institution that granted the degree. Another quirk was that nearly all of these resumes listed three years of experience with three separate employers before getting a H-1B visa. Certain employers would show up with unusual frequency. From the resumés sent to me, it appeared that the Mumbai Housing Authority hires more programmers than Microsoft. The irony here is that if a U.S. worker submitted a resumé like these (e.g. without listing the university granting a degree), it would go straight to the garbage yet nearly all of these workers had been contracted out to U.S. employers at some point.

In Summary

- I have personally seen Americans being fired and replaced by lower-paid workers on H-1B visas.[3]
- I have personally seen the H-1B program used to import large numbers of workers with limited skills who required extensive on-the-job training.
- I have personally seen resumés for H-1B workers with U.S. experience that would immediately be rejected had they been from Americans.
- I have personally seen resumés for H-1B workers that immediately suggested the education and experience listed were fraudulent.

Some in industry claim that H-1B workers are needed because they cannot find a sufficient number of U.S. workers to fill open jobs. Others in industry claim that H-1B workers are needed because they cannot find Americans who have the advanced skills industry needs. However:

1. If the H-1B program is needed because of a lack of shortage of Americans, why are U.S. workers being replaced by H-1B workers?
2. If the H-1B program is needed because Americans do not have the advanced skills industry needs, whey are Americans training their H-1B replacements?

My Research

From Dun & Bradstreet I moved on to Seton Hall Law School. As part of my independent research at Seton Hall, I began examining data from Labor Condition Applications for H-1B workers. Having been trained in the sciences, I have become appalled at the level of rigor employed in "studies" intended to influence public policy. I decided I would analyze the LCAs and document my results while applying the standards of research that I had been trained to use in physics, mathematics and chemistry.

My study was published by the Center for Immigration Studies and is available at their web site, www.cis.org. It contains a detailed description of how the results were obtained. What I am most proud of in this research, and what I think sets it apart from most, is that I believe it is reproducible. The study explains where the data came from and

[3] As well at L-1 and B visas.

how it was analyzed. I expect that any member of this committee can take the data I worked with, follow my procedures and get similar results

My research in this area continues so I am including some new results based upon the FY 2005 data. This is why you will find some mixture of fiscal years. Here I am only using the FY 2005 data for analyses that I did not make on the FY 2004 data. Also, keep in mind that with the exception of overall LCA approvals and the discussion of the use of H-1B outside of science and engineering, all of the results I present are limited to LCAs for computer programming workers. See the appendix for the details on occupations covered.

The H-1B disclosure data has a number of limitations. The most significant of these is that it does not tell what happens beyond the labor certification process. For example, if one examines the LCA for a Hostess at Mama Tucci's Restaurant (an actual approved LCA in the 2004 data), there is no way to tell if this LCA became an H-1B visa. This analysis is complicated further by the fact that a single LCA can be used for visa applications for multiple H-1B workers. One cannot tell what wage went on the H-1B visa application and there is no way to tell what the employer actually paid the H-1B worker.

The previously mentioned limitations do not affect measuring prevailing wage claims on LCAs. However, the information in the LCA data is not sufficient to verify the correctness of the employer-supplied data.

Despite its limitations, LCA disclosure data is the best data available. This is the data that the government makes available to the public to monitor the state of the H-1B program.

Data collection and reporting for the H-1B program is atrocious. I am not the first to point out the need for better reporting in the H-1B program.[4]

- USCIS/INS have granted more visas than allowed.
- USCIS has not produced the congressionally mandated reports on the H-1B program since FY 2003.
- No data is available on visas actually issued.
- No one knows how many people are in the United States on H-1B visas.
- No one knows how many workers on H-1B visas remain illegally in the United States after their visas expire.[5]
- There has never been a reporting on the number of visas actually issued by employer for an entire year.

[4] See for example United States General Accounting Office, H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers, GAO/HEHS-00-157, Sept. 2000, p. 5.

[5] United States General Accounting Office, H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers, GAO/HEHS-00-157, Sept. 2000, p. 18.

The definition of eligible workers is too vague to have the H-1B program operate rationally.

Under Mr. Duffy's statement of purpose for H-1B, the program is supposed to be for "hard sciences and engineering". The reality is the H-1B program is open to a much broader range of occupations. More precisely, those eligible are "specialty occupations" or "fashion models."[6] (Fashion models make up only a very small number LCAs so I will not consider them further.) The definition of specialty occupation is extremely broad, essentially any occupation requiring a bachelor's degree or higher or work experience equivalent to a bachelor's degree.[7]

Much H-1B usage cannot be explained by a lack of Americans educated in those fields. The H-1B disclosure data contains approved LCAs for virtually any occupation imaginable. Accountants are the most represented profession outside of science and engineering. Newspaper reporters, restaurant hostesses, nannies are represented in approved LCAs. I was surprised to find in the disclosure data that the local gym I go to has three approved LCAs for "Dance Instructors".

One thing I found surprising in examining H-1B data is that fields outside science and engineering benefited most from the past temporary increases in the H-1B program. Prior to FY 2001, H-1B visas for workers in fields outside of science and engineering accounted for about 30% of the new visas issued.[8] After the increase in the H-1B quota, in FY 2001 the percentage of visas issued for occupations outside of science and engineering surged to 52% and remained in the majority through FY 2003.[9] Since the expiration of the temporary quota increases, it appears this figure has returned to its historical level of about 30%.[10] Should the H-1B quota be increased again, we should expect that most of the increased usage will be for workers outside of science and engineering.

Let us assume for argument's sake that that the U.S. educational system is not producing sufficient graduates in science and engineering. If the purpose of the H-1B program be to fill this void, a rational H-1B program would have a clearer, more limited definition of eligibility. As currently defined by Congress, the H-1B program is simply a mechanism for foreign workers in any field that can be packaged as a specialty occupation to come to the United States.

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[6] 8 U.S.C. § 1101 (a)(15)(H) (West 2004)

[7] 8 U.S.C. § 1182 (i)(2) (LEXIS 2006)

[8] U.S. Immigration and Naturalization Service, Characteristics of Specialty Occupation Workers (H-1B) May 1998 – July 1999, Feb. 2000, U.S. Immigration and Naturalization Service, Characteristics of Specialty Occupation Workers (H-1B) October 1999 – February 2000, June 2000

[9] U.S. Immigration and Naturalization Service, Report on Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2001, July 2002, United State Department of Homeland Security, Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2002, Sept. 2003, United State Department of Homeland Security, Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2003, Sept. 2004

[10] This is my estimate based upon the percentage of LCAs approved. USCIS has been deficient in producing the congressionally mandated annual reports on the H-1B program. The last one issued was for FY 2003.

The problem of poorly defined eligibility for the H-1B program was identified long ago but Congress has allowed it to fester.

> In our opinion, not all types of jobs being filled by H-1B aliens necessarily represent jobs that would enhance U.S. employers' abilities to compete in a global economy. While there is no requirement that there be a labor shortage in the occupation for which employers file LCAs, the H-1B program is being used to staff such positions as: accountants, piano instructors and accompanists, primary school teachers, physicians, and assistant professors and professors. While the aliens who filled these positions may have baccalaureate degrees, or equivalent, we question whether the jobs meet the full definition of specialty occupation.[11]

Close inspection of the LCA suggests a large percentage of applications are for occupations outside the intended purpose of the H-1B program. If Congress were to define eligibility requirements to match its intended purpose of the H-1B program, there would be a significant number of additional visas available to U.S. technology companies.

Few H-1B visas for programmers are going to U.S. technology leaders.

I return again to Mr. Duffy's statement of purpose for the H-1B program. In that he says H-1B's purpose to provide workers to "companies such as Intel". Presumably, by that he means the purpose of the H-1B program is to provide workers to U.S. technology companies.

Once again, this purpose of the H-1B program does not correspond with what is actually going on. Table 1 contains a list of the companies requesting the largest number of H-1B workers in programming occupations. Together they represent over 40% of the workers requested.

1. Wipro Limited
2. Infosys Technologies
3. Syntel
4. HPS America
5. Oracle Corporation
6. IBM Global Service India
7. Tata Consultancy Services
8. Satyam Computer Services
9. Patni Computer Systems
10. Mphasis Corporation
11. Intelligroup

[11] U.S. Department of Labor Office of Inspector General Office of Audit, The Department of Labor's Foreign Labor Certification Programs: The System Is Broken and Needs To Be Fixed, May 22, 1996

12. eBusiness Application Solutions
13. iGate Mastech
14. HCL Technologies America
15. Tata Infotech
16. Enterprise Business Solutions
17. Cognizant Technology Solutions
18. Rapidigm
19. IntelliQuest Systems
20. Jags Software

Table 1 Top Users of H-1B Visas for Programming Workers FY 2004

What is striking is how few U.S. technology powerhouses are among them. In fact, the majority of these companies are not U.S. companies at all. Except for Oracle, all of these companies are in the "H-1B bodyshopping" and "offshoring industries". From the 2005 LCA data I conservatively estimate that more than two-thirds of the workers in computer programming occupations are going to employers in the offshoring and bodyshopping industries.

The U.S. Department of Labor Office of Inspector General Office of Audit stated, "in our opinion, the H-1B program was not intended for an employer to establish a business of H-1B aliens to contract out to U.S. employers." [12] Now this is the predominate use of the H-1B program in the computer industry.

Because of the concentration of visas with a few employers, if Congress were to impose a reasonable limit on the number of H-1B visas a single employer could have, there would be plenty of visas available. Half of one percent of Hewlett-Packard employees are on H-1B visas.[13] Restricting employers to 5% of the U.S. work force would not negatively impact U.S. technology leaders but would make many more visas available to them.

Without such a change, we should be honest and say that the purpose of the H-1B program is to provide a pool of workers for bodyshops to supply to other companies and to expedite the "offshoring" of U.S. technology jobs.

Employer prevailing wages claims on LCAs do not reflect the actual prevailing wage.

One of the areas I investigated was employer prevailing wage claims made on LCAs. The prevailing wage for H-1B workers is supposed to be that of the occupation and geographic location at which the H-1B worker is to be employed.[14] In comparing the prevailing wage claims on LCAs to the OES data, I found that employer prevailing wage claims were not representative of the actual prevailing wage for a given occupation and

[12] U.S. Department of Labor Office of Inspector General Office of Audit, The Department of Labor's Foreign Labor Certification Programs: The System Is Broken and Needs To Be Fixed, May 22, 1996, p. 25.

[13] Mandaro, Laura, "Tech Firms Say H-1B Visa Caps Create Shortage Of Skilled Staff", *Investor's Business Daily*, Mar. 8, 2006.

[14] 20 C.F.R. §655.715

location. Employer prevailing wage claims averaged $18,000 a year less than the median salary given in the OES data for the occupation and state. The distribution suggests employer prevailing wage claims are generally based upon approximately the 25th percentile rather than the median or mean. I refer you to the appendix of my statement for the details on prevailing wage claims.

I am currently investigating why claimed prevailing wages are so low. Under rules Congress has established for making prevailing wage claims, it is probably impossible to make a comprehensive scientific measurement of how prevailing wages have been derived. The problems with making such an analysis include:

- The use of wage sources not publicly available (e.g commercial or employer surveys).
- Job titles in LCAs not matching the job titles used by the wage source.
- The LCAs do not list what measurement from the wage source is being used.
- Wage sources that do not maintain public archives and only give the current data, not what has been reported earlier on LCAs.

To illustrate this problem, in FY 2005, over 10,000 computer programming LCAs used "Watson-Wyatt" as the prevailing wage source. There is no way to determine from the LCAs which Watson-Wyatt product was used as the source or which of their measurements was used for the prevailing wage. All of my requests to Watson-Wyatt for information about specific claims have been ignored.

My hypothesis, based upon examining the LCA data, is that the most significant reason prevailing wage claims are so low is because most employers are using measurements of wages for new graduates and entry level workers, rather than the prevailing wage for the occupation and location. For example, many employers are using the National Association of Colleges and Employers wage survey for the prevailing wage, a source that is exclusively a measurement of wages paid to new graduates.

I have also found a significant amount of misreporting of prevailing wages in the LCA data.

- In examining prevailing wage claims that used salary.com I found many were using the 25th percentile rather than the median as the prevailing wage. However, since very few job titles on LCAs can be matched to job titles used by salary.com and this wage source does not make archives of older data available, it is impossible to measure the true extent of this practice.
- In FY 2005, 65 LCAs used the ComputerWorld salary survey as the prevailing wage source. I provided ComputerWorld with the data for these LCAs and they responded that they could not match any of the prevailing wage claims to their data. ComputerWorld also observed that the wages reported in their survey were "consistently higher" than wage claims made on LCAs.
- I find many LCA using the OES data that I cannot identify the source record for the claim. I also find many LCAs where the employer appears to be using the wage for a lower paying occupation as the prevailing wage (e.g. using the prevailing wage for a programmer when the job title is "Software Engineer").

Because of the poor state of data collection, there may be no scientific way to measure the extent of actual misreporting of wages in LCAs.

The Labor Certification process is ineffective.

If, as shown in the previous section, employer prevailing wage claims really are so low, why is the Department of Labor approving them? For that, blame Congress.

Congress has mandated that Labor Certification process be a "rubber stamp" operation.

> The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 101(a)(15)(H)(i)(b) [8 USCS § 1101(a)(15)(H)(i)(b)] within 7 days of the date of the filing of the application.[15]

Effectively all LCAs are approved. Out of 307,779 LCAs processed in FY 2005, only 848 (0%) were rejected. By limiting the LCA approval process to checking the form is filled out correctly, Congress has ensured employers can abuse it with impunity.

The DoL appears to interpret the term "obvious" very broadly, presumably, because of Congress's restrictions. LCAs that I think most people would find are obviously improper routinely get approved. It only takes a brief inspection of the LCA data to see how little verification of the applications takes place.

- Occupation given as "Specialty Occupation" and contact's job title listed as "retired."
- LCAs with wages taking 5% off the prevailing wage are still being approved even though the practice is now prohibited.[16]
- LCA with wages more than 5% less than the prevailing wage are being approved even though this has always been prohibited.

Since Congress has limited the DoL to checking the form is filled out correctly and nearly all LCAs are being approved, one has to wonder what the point of having the labor certification process is at all. It has no value in protecting U.S. workers and creates more paperwork for employers. The only possible reason I can come up with for having the current LCA system is to allow employers to claim in the press that, "H-1B workers are not underpaid because the law requires they be paid the prevailing wage."

The Department of Labor's Office of Inspector General concurs with my assessment of the process.

> The OIG believes that if DOL is to have a meaningful role in the labor certification process, it should have corresponding statutory authority, not currently available, to ensure the integrity of the process, by verifying the accuracy of the information provided on LCAs. In our opinion, as the H-1B program is currently operated, DOL adds nothing substantial to the process. It would be more

[15] 8 U.S.C. 1182 (n)(ii) (LEXIS 2006).
[16] 8 U.S.C. § 1182 (p)(3) (LEXIS 2006)

> efficient if the employers filed their applications directly to BCIS, for visa approval.[17]

Reported H-1B wages are significantly lower than what U.S. workers earn.

I have also analyzed wages listed on LCAs for computer programming workers. I found:

- That the wages listed for H-1B workers averaged about $13,000 less than the median U.S. wage for the occupation and state.
- The wages for the majority of H-1B workers were in the bottom 25th percentile of U.S. wages for occupation and state.
- Wages for only 16% of H-1B workers were above the median U.S. wage for occupation and state.

The details of this analysis are given in the appendix.

The low wages being paid to H-1B workers negatively affects both U.S. workers and companies.

> Bob McCord, president of NSYST Technologies Inc., a Dallas computer services and Web-hosting company, said … he has seen his business suffer from competition from companies that bring in foreign high-tech workers through the H1-B visa program and then pay them less than U.S. workers…"I would rather them enforce existing laws that say corporations can't use H1-B visas to draw down the wages of American workers – and that's what they are doing. Then at the same time, they train those workers to go and set up in another country."[18]

A different view of the H-1B program.

I scanned the list of employers with LCAs in the FY 2005 data and selected those that stood out to me as recognized names in the computer industry. I then compared their wages to U.S. wages using the 2004 OES data. The results are shown in Table 2. Since the selection of employers here is unscientific and for illustrative purposes, if any member of the committee would like the same analysis done with other employers added or some of these removed, I will provide the information upon request.

Employer	U.S./H-1B Wage Difference
Apple	(Above) $19,507
eBay	$14,493
IBM	$12,681
Sybase	$12,342

[17] Office of Inspector General United States Department of Labor, "Overview and Assessment of Vulnerabilities in the Department of Labor's Alien Labor Certification Programs", Sept. 30, 2003.

[18] Solís, Dianne and Reddy, Supeep, "Keeping eyes on immigration debate, Business owners, workers, families in Texas brace for impact", *Dallas Morning News*, Mar. 24, 2006.

Employer	U.S./H-1B Wage Difference
Google	$11,138
Lucent Technologies	$9,991
Symantec Corporation	$9,937
BEA Systems	$8,970
Automatic Data Processing	$8,603
Texas Instruments	$8,481
Borland	$7,337
Verizon	$6,749
Dell	$6,219
Unisys Corporation	$5,594
Cingular Wireless	$4,676
Computer Associates	$4,228
Hewlett-Packard	$3,961
Adobe Systems	$3,704
Cisco Systems	$3,643
Microsoft	$3,054
Intel	$1,128
Sun Microsystems	$19
Intuit	(Below) ($316)
Qualcomm	($565)
NVIDIA Corporation	($3,585)
Yahoo!	($7,949)
Oracle	($10,270)
EMC Corporation	($15,004)
Motorola	($19,584)

Table 2 LCA wages compared to OES wages for "big name" employers – FY 2005.

As you can see in this list, there are high paying H-1B employers, mediocre wage employers and low wage employers with everything in between. However, as a group, the wages in this group are significantly higher than overall H-1B wages and much closure to the actual prevailing wage. I have plotted the distribution of overall H-1B wages and these "big name" wages in Figure 2 to illustrate this point. The y-axis value gives the percentage of workers in the U.S. wage percentile ranges shown on the x-axis.

This example illustrates the LCA shows there are some employers that use the H-1B program for its intended purpose as defined by Mr. Duffy. We have some technology companies, like Apple, that the data indicates are paying their H-1B workers the premium wages one would expect for "highly skilled workers." Even with some low paying H-1B employers thrown in, the "big name" group's H-1B wages are close to U.S. wages. In other words, there is an anecdotal case for the benefits of the H-1B program. It is entirely possible to put together a group of technology leaders that would show a pattern of H-1B workers making high wages. The problem is that the overall use of the H-1B program (including that of many "big name" technology companies) does not fit this pattern.

Most critics of the H-1B program would like to see changes that allow U.S. technology companies to have access to the world's best talent while, at the same time, cuts out the abuse that dominates the program and causes negative effects on U.S. workers.

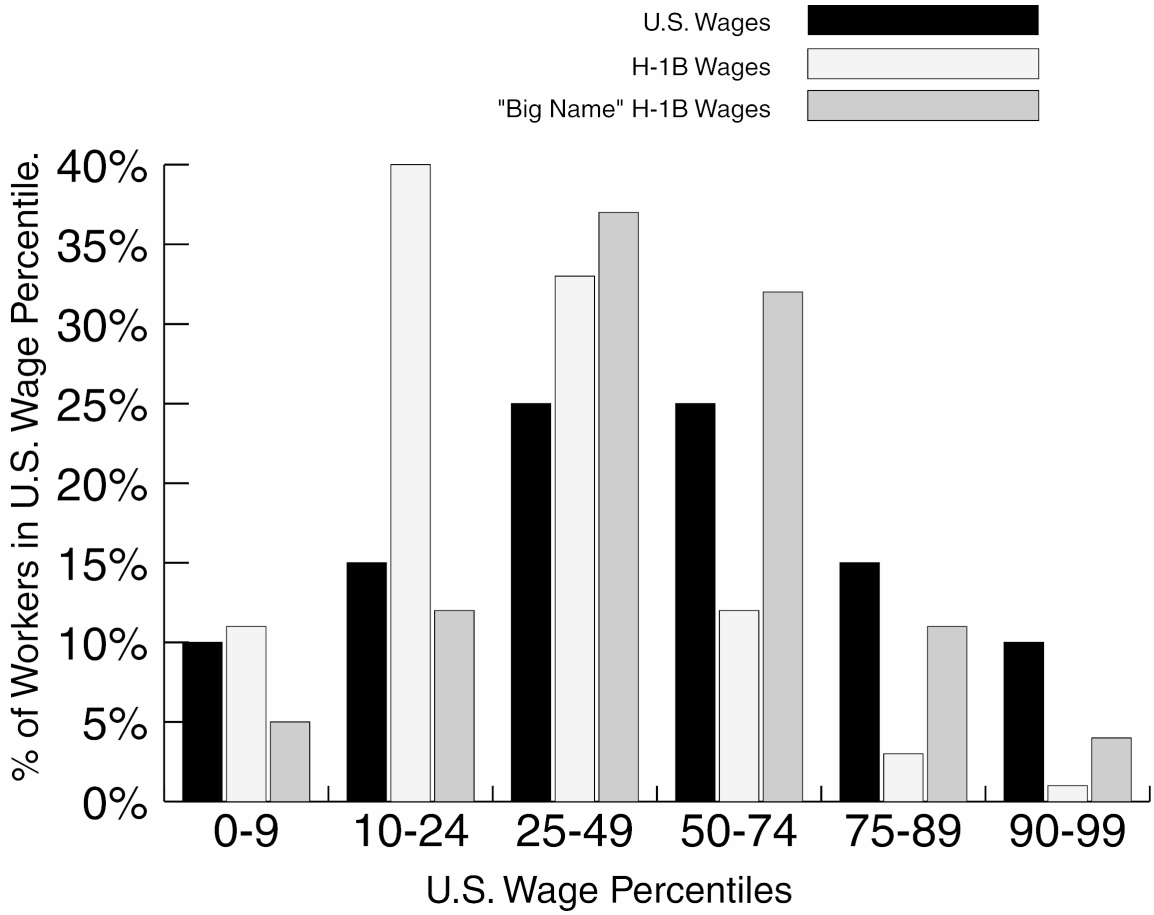

Figure 1 U.S. wages compared to H-1B wages and "Big Name" H-1B wages, FY 2005.

Employers classify most H-1B workers as having low skills.

In my study of the FY 2004 data, I stated that the overwhelming concentration of wages for H-1B workers at the bottom end of the pay scale suggested that the H-1B program was primarily for cheap workers rather than highly skilled workers. The FY 2005 disclosure data confirms that conclusion.

In 2004, Congress modified the prevailing wage requirement. It required the Department of Labor to provide four skill levels when the Department of Labor provides prevailing wages.

> Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.[19]

[19] 8 U.S.C. § 1182 (n)(1)(p)(4) (LEXIS 2006)

With the wage level data now available, we have the ability to see how *employers* rate the skills of their H-1B workers. The Department of Labor defines the four skill levels as:

- Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation.
- Level 2 (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation.
- Level 3 (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained either through education or experience special skills or knowledge.
- Level 4 (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification and application of standard procedures and techniques.[20]

In general, OES wages for Level 1 and Level 2 are below the median and those for Level 3 and Level 4 are above the median.

Using the prevailing wage claims, state, and occupation, I have been able to match 45,000 LCAs for programming occupations from FY 2005 using OES 2005 as the wage source to the source record used to make the prevailing wage claim. The resulting skill distribution is shown in Figure 2. The employer-claimed skills for H-1B workers are overwhelmingly concentrated at the bottom.

Let me quote the complete definition for a Level 1 worker.

> Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Since H-1B applies to jobs requiring at least a bachelor's degree and an experience requirement dictates at least a level 3 skill level, I question whether any worker who fits this description should be granted an H-1B visa, let alone the majority.

[20] http://workforcesecurity.doleta.gov/foreign/wages.asp, these are first sentences of the descriptions.

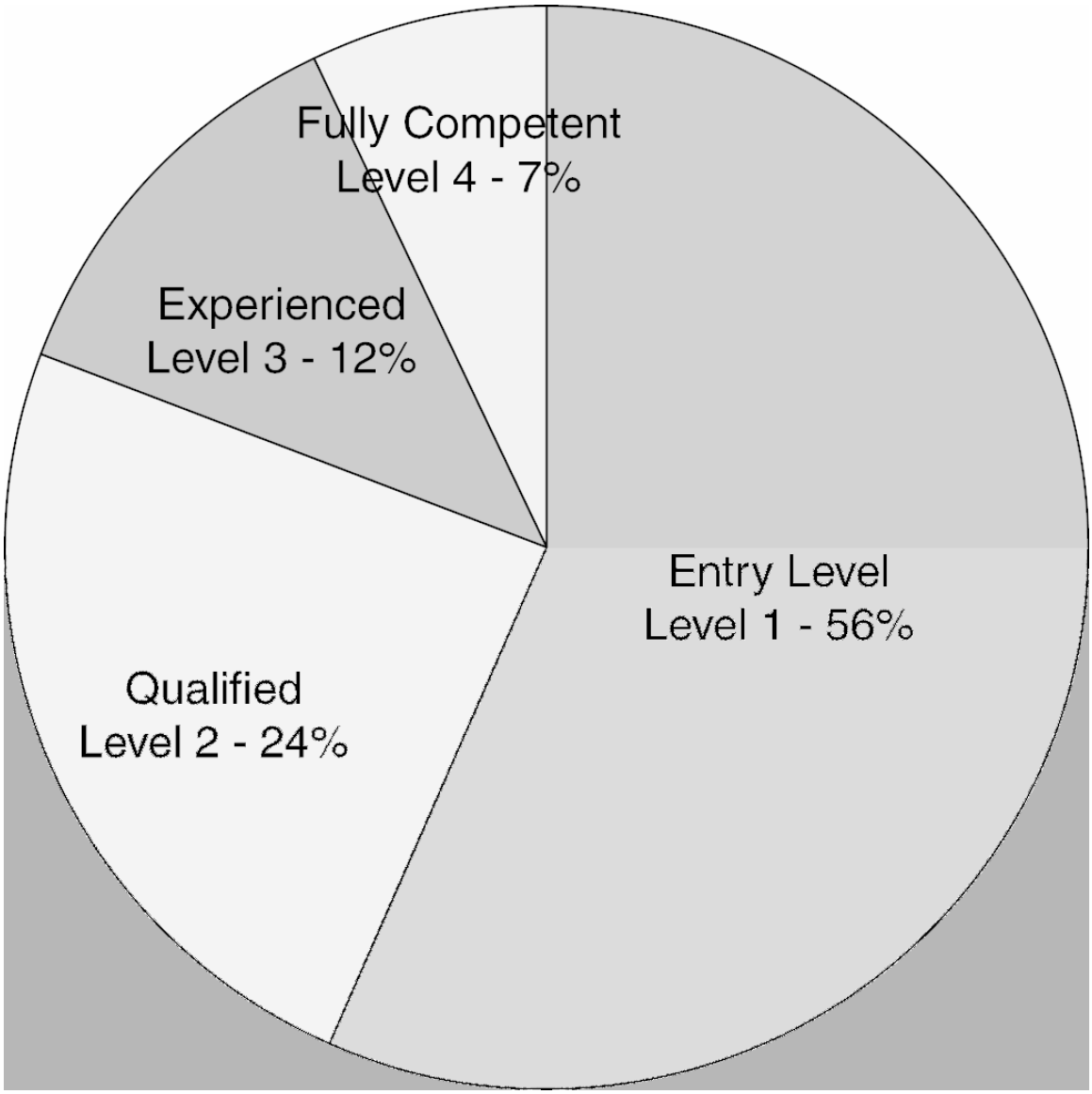

Figure 2 Distribution of H-1B Computer Workers by Skill Level – FY 2005.

Let us return once again to Mr. Duffy from Intel's statement of purpose for the H-1B program. That is, to provide people with "advanced university level talent". Yet employers themselves are classifying the majority of H-1B computer workers as those, "who have only a basic understanding of the occupation". The disclosure data show that either employers are understating the skill level of H-1B workers to get an artificially low prevailing wage or the primary use of the H-1B program is to import low skilled workers.

Issues related to LCAs are only part of the problem with the H-1B program.

My research published by the Center for Immigration Studies dealt exclusively with H-1B issues related to LCAs. These are by no means the only problems with the H-1B program so I would like to briefly raise some of the others.

H-1B allows the direct replacement of Americans with lower-paid guestworkers.

I have mentioned this issue in discussing my personal experience with the H-1B program. Here I will briefly mention some of the details. Technically it is illegal to fire Americans and replace them with H-1B workers. However, the law has a well-known and frequently-used loophole which allows just that. The way it works is an employer uses a third party (known as a "bodyshop" in the computer industry) to supply H-1B replacements.

This was the mechanism used in all the cases I mentioned previously to displace U.S. workers. Even though both parties know exactly what is going on:

- The employer can say it never hired any H-1B workers.
- The bodyshop can say it never fired any Americans.

So the law has not been broken.

Congress has been aware of this problem since 1995 and has refused to close it.

"Bodyshopping" of H-1B workers undermines any protections in the system.

The H-1B program has created the business of "H-1B bodyshopping" where workers on H-1B visas are contracted out to other employers. In the computer industry, bodyshopping appears to be the principal use of the H-1B program. This causes a number of problems:

- Displacement of U.S. workers as described previously.
- Direct competition between H-1B workers and U.S. workers for jobs. One web site targeted towards H-1B workers claimed about 20% of H-1B workers in the bodyshopping industry are seeking work rather than being actively employed.[21]
- The practice of "benching" where employers do not pay H-1B workers or pay them at a reduced rate when they have no actual work. While the practice is illegal, it is clearly a common practice. Descriptions of "benching" and how H-1B workers should cope with it has been documented in the U.S.[22] and foreign press[23] and is openly discussed on web sites and forums targeted towards H-1B workers.[24]
- Prevailing wages get certified for one location while the worker is actually in another.
- The practice makes it impossible to verify where H-1B workers actually are located.
- The LCA data suggest there are bodyshops that are generic importers of workers (e.g. importing programmers and physical therapists[25]).
- It eliminates all protection for U.S. workers who are employed on a contract basis.[26]

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[21] http://www.assureconsulting.com/articles/limbo.shtml

[22] See for example, Lubman, Sarah, "H-1B Boom: Middlemen thriving in lucrative industry while foreign workers complain of abuse", San Jose Mercury-News, Sept. 17, 2003.

[23] See for example Kumar, V. Rishi, "Portability clause: Consulting firms cautious on H-1B visas", *The Hindu Business Line (India)*, June 1, 2004.

[24] See for example, http://www.h1base.com/page.asp?id=203, http://www.assureconsulting.com/faqs/h1b_bench.shtml

[25] Seeton, Melissa Griffy, "Foreign workers take jobs in Stark", Canton Repository, Mar. 26, 2006.

H-1B is the engine driving the movement of technology jobs overseas.

Developing software is not like making sneakers. If a U.S. sneaker company wants to manufacture overseas, it will come up with the detailed specification for making the sneaker then ship those designs overseas. Workers overseas will use those specifications to create the sneakers. In contrast, for software all the work is in the pre-manufacturing stage. Manufacturing software costs pennies.

In order to provide "offshore" software development services, companies need a strong presence in the United States to provide support and customer contact. For that, "offshoring" companies rely heavily on the H-1B program. It is no coincidence that the largest users of the H-1B program are the companies that specialize in moving software development work to foreign countries. In the "offshoring" model, each H-1B visa represents about three software jobs being lost.[27] While the eventually-approved 2000 H-1B increase was pending, the Indian press predicted (correctly) that is would generate a huge increase in "offshoring".[28]

Congressionally imposed limit on enforcement ensures abuse goes unpunished.

> (G) (i) The Secretary of Labor may initiate an investigation of any employer that employs nonimmigrants described in section 101(a)(15)(H)(i)(b) [8 USCS § 1101(a)(15)(H)(i)(b)] if the Secretary of Labor has reasonable cause to believe that the employer is not in compliance with this subsection. *In the case of an investigation under this clause, the Secretary of Labor (or the acting Secretary in the case of the absence of disability of the Secretary of Labor) shall personally certify that reasonable cause exists and shall approve commencement of the investigation*.[29]

Requiring the personal approval of the Secretary of Labor before an investigation of abuse can begin ensures there will be few, if any, investigations. Enforcement in the H-1B program relies entirely on the H-1B workers themselves filing a complaint.

The fees collected by the H-1B Program are not effective in training U.S. workers.

This is the Department of Labor's assessment. [30]

Program	Assessment	Explanation
H-1B Technical Skills Training Grants	Ineffective	Does not raise skills of U.S. workers in specialty and high-tech jobs so that

[26] e.g. "permatemps" at Microsoft.

[27] Vaas, Lisa, "Face time boosts a project's chance of success", *eWeek*, Aug. 7, 2000.

[28] "US H1-B hike to 600,000 can be big software export boost", *The Hindu Business Line (India)*, Oct. 8, 2000

[29] 8 U.S.C. 1182 (n)(1)(G) (i) (LEXIS 2006) – emphasis mine.

[30] U.S. Department of Labor, Proposed Budget, FY 2003, p. 216.

		employers' demand for temporary alien workers with H-1B visas will decline.

The H-1B Quota

As meager as it is, the H-1B quota is the only protection for Americans that exists in the H-1B program. The quota serves the important purpose of a limit on the damage the program can cause U.S. workers.

Even the protection of the quota is subject to government tinkering or mistakes. For example, in FY 1999 and FY 2004 many more H-1B visas were issued than permitted.

A quota is a limit. The existence of a quota means that Congress intended that this program have some size limit. The fact that employers are reaching the quota does not automatically mean it should be increased. In fact, why should not the quota be reached? If employers can pay H-1B workers based upon prevailing wage claims averaging $18,000 below the actual prevailing wage, it is only natural that there would be huge industry demand for such a supply of cheap labor.

Let me express my frustration. Congress has been aware of the abuses in the H-1B program since 1995 when hearings were held after the AIG and SeaLand abuses. Yet, even after case after case of bulk replacements of U.S. workers and scathing government reports, the only thing Congress has done is to respond to industry demands for bigger visa quotas.

What is it going to take for Congress to make its very first real fix to the H-1B program?

Over my years of following this program, what I have found particularly disturbing is that nearly every piece of H-1B legislation enacted has contained something billed as a worker protection. However, these protections always contain some provision to ensure the "protection" protects nobody. The abuse in the H-1B program is not there by accident. It is there because of deliberate design incorporated into legislation.

Many of us will remember the 1998 H-1B legislation[31] that contained pages upon pages of now expired "H-1B dependent employer" provision designed to protect no one as well as the pages of regulations implementing these "do nothing" provisions.

Even now, the political discussion is not about what fixes should be made to the H-1B program but rather, once again, how much bigger the program should be made.

I point out that the H-1B expansion bill this committee approved in 1998 contained a provision to close the loophole that allows the type of mass firings I described earlier.[32] At the time industry folks said they would rather have no bill than one containing this provision and it disappeared before the legislation was voted on and approved. Industry lobbyists called this version of the bill that gave them everything they wanted and all of the few worker protections stripped out as the "compromise version".

[31] PL 105-277, October 21, 1998, 112 Stat 2681
[32] H.R. 3736, 105th Congress as reported.

The irony is that if Congress simply cleaned up the H-1B program, there would be plenty of visas available for U.S. technology companies under the current quota.

Recommendations

These are my recommendations for change.

The H-1B program needs to be fixed — not made bigger!

The H-1B Quota

1. The current H-1B quota should not be increased
2. The separate system for Australians should be eliminated.
3. The academic exemption should be eliminated and either be placed under the general quota or separate quota.

Public Policy

4. Create a clear definition of eligibility for H-1B visas that reflects the intention of Congress for the program.

Enforcement

5. Eliminate the restrictions on verification of LCAs
6. Eliminate the restriction requiring the personal prior approval of the Secretary of Labor before investigating abuse.
7. Grant Americans negatively affected by H-1B abuse a private cause of action.

H-1B Usage

8. Ban the practice of employers supplying H-1B workers to other businesses on a contract bases ("bodyshopping").
9. Limit employers to a maximum of 5% of their employees on H-1B visas

Labor Certification Process

10. Remove the limitations that restricts the LCA approval process to checking the form is filled out correctly.
11. Restrict prevailing wage claims to U.S. government sources.
12. Set the minimum wage level to a percentile reflecting the "best and brightest" or "highly skilled" (e.g. 70^{th} percentile) rather than one reflecting "mediocre" or "average" (i.e. the prevailing wage).

Reporting

13. Make available the data from USCIS on actual H-1B visas issued.
14. Require annual reports to monitor actual wages paid to H-1B workers and to determine when employment has ended.

Appendix 1. My response to critics of this research

Since the publication of these results there have been surprisingly few criticisms of the research published. However, I would like to respond to some of the issues made either publicly or to me in private.

The results are invalid because they only consider the prevailing wage and not the skill.

The H-1B program requires the employer pay the higher of the prevailing wage or the wage paid to employees with similar experience and qualifications. My study did not take into account requirement to pay based upon skills and qualifications because there was a not practicable way to measure it. [33]

Keep in mind that my intention was to come up with a conservative estimate of the H-1B/U.S. wage difference, not to generate a figure that was as large as possible. Since employers are required to pay the higher of the two values, were it possible to measure what they should be paying based upon skills it would have made the H-1B/U.S. wage larger than what I reported.

I see no harm in using procedures that underreport the H-1B/U.S. wage difference.

Employers actually pay more than what is on LCAs.

As described earlier, because the available data ends at the LCA state, we do not know what happens further on down the line in the H-1B process. One published claim was that an inspection of some H-1B filings from an undisclosed source found the actual H-1B wage was 22% greater than the prevailing wage.[34]

Assume for argument's sake employers are paying on average 22% greater than what they claim as the prevailing wage. Keeping in mind that my measurements of prevailing wage claims were direct measurements, my research found the actual prevailing wage was 36% greater than what employers say it is on LCAs. So even if one concedes H-1B workers are paid 22% more, employers would need to give their H-1B workers another 14% boost in wages to be at the prevailing wage. Even with this assumption, H-1B workers still would be paid less than Americans.

I point out that all of the documented evidence I am aware of suggests employers are paying less than the wage on the LCA. Examples include:

- A government investigation found 19% of H-1B workers were paid less than the wage on LCA.[35]
- Priority I software submitted $58,500 as the prevailing wage for web developers but actually paid between $50 and $100 a week.[36]

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[33] 8 U.S.C. 1182 (n)(1)(A) (LEXIS 006)

[34] Anderson, Stewart, Letter to the Editor, *Washington Times*, Mar. 15, 2006

[35] U.S. Department of Labor Office of Inspector General Office of Audit, "The Department of Labor's Foreign Labor Certification Programs: The System Is Broken and Needs To Be Fixed", May 22, 1996, p 21.

[36] McHale, Todd, "Software and mortgage companies violate immmigration laws" (sic), *Burlington Times*, Mar. 23, 2006.

- Cybersoftec was not paying H-1B workers at all. Instead, employees paid the company for visas in order to get into the country.[37]
- The problem of "benching" described previously.

The data on the H-1B program that is available is the LCA data. If people want to claim H-1B workers are paid more than reported on LCAs, they need Congress to collect and make additional data on the H-1B program available to support that claim. The LCA data does not support claims H-1B workers are paid anything close to the actual prevailing wage.

The Atlanta Federal Reserve Study

The authority more frequently cited in attempts to rebut my research has been one published by the Federal Reserve Bank of Atlanta.[38] This report has been "spun" to say that its result was the H-1B program has no negative effect on U.S. workers. In at least one case the selective cutting and pasting from the report amounted to "academic fraud".

For completeness, I have cited this report in my previous academic papers on the H-1B program. However, because of its carefully qualified conclusions, I have only mentioned it to acknowledge it exists and have never used it as a source to support an argument. I am going to refrain from putting any "spin" on this report, including highlighting selected points. Instead, for the record I quote the study's conclusions in their entirety and let the readers judge for themselves what it says about the impact of the H-1B program on U.S. workers.

> Using data on labor condition applications—the first step in getting an H-1B visa—in fiscal year 2001, this study examines the relationship between LCAs and earnings, earnings growth, and the unemployment rate in the IT sector at the state level. The results provide little support for claims that the program has a negative impact on wages. However, some results do suggest a positive relationship between the number of LCA applications and the unemployment rate a year later. The failure to find an adverse wage effect does not necessarily indicate that H-1B workers do not depress wages but perhaps that any effect is difficult to find, as concluded by previous studies.
>
> A final caveat to these findings is that employers are increasingly using L-1 visas, which are intracompany transfers of workers from overseas branches or subsidiaries, to bring in foreign workers (Hafner and Preysman 2003). Unlike H-1B visas, L-1 visas are not capped and do not require employers to pay the prevailing wage. The increasing use of L-1 visas instead of H-1B visas may

[37] Martin, John P., "Feds seize millions from man held in illegal immigrant scheme", Newark Star-Ledger, Jan. 14, 2006, p. 1.

[38] See for example Mandaro, Laura, "Tech Firms Say H-1B Visa Caps Create Shortage Of Skilled Staff", *Investor's Business Daily*, Mar. 8, 2006.

reduce the measured impact of H-1Bs on native workers but not the total impact of foreign workers. If data on L-1 visa holders become available, this possibility merits analysis.[39]

Appendix 2. The Bottom of the Pay Scale Wages for H-1B Computer Programmers

December 2005

By John Miano

Published By The Center for Immigration Studies (www.cis.org)

Executive Summary

The temporary visa program known as H-1B enables U.S. employers to hire professional-level foreign workers for a period of up to six years. According to the law (8 U.S.C. § 1182(n)), employers must pay H-1B workers either the same rate as other employees with similar skills and qualifications or the "prevailing wage" for that occupation and location, whichever is higher. This is to prevent the hiring of foreign workers from depressing U.S. wages and to protect foreign workers from exploitation.

This report examines the wage data in Labor Department records for Fiscal Year 2004. It compares wages in approved Labor Condition Applications (LCAs) for H-1B workers in computer programming occupations to wage levels of U.S. workers in the same occupation and location. The analysis demonstrates that, despite the H-1B prevailing-wage requirement, actual pay rates reported by employers of H-1B workers were significantly lower than those of American workers. These findings show that the implementation of the prevailing-wage requirement in the H-1B program does not ensure that H-1B workers are paid comparably to U.S. workers. Moreover, the data suggest that, rather than helping employers meet labor shortages or bring in workers with needed skills, as is often claimed by program users, the H-1B program is instead more often used by employers to import cheaper labor.

Key Findings

- In spite of the requirement that H-1B workers be paid the prevailing wage, H-1B workers earn significantly less than their American counterparts. On average, applications for H-1B workers in computer occupations were for wages $13,000 less than Americans in the same occupation and state.
- Wages for H-1B workers in computer programming occupations are overwhelmingly concentrated at the bottom of the U.S. pay scale. Wages on LCAs for 85 percent of H-1B workers were for less than the median U.S. wage in the same occupations and state.
- Applications for 47 percent of H-1B computer programming workers were for wages below even the prevailing wage claimed by their employers.

[39] Zavodny, Madeline, "The H-1B Program and Its Effects on Information Technology Workers", *Federal Reserve Bank of Atlanta Economic Review*, Q3 2003, p. 10.

- Very few H-1B workers earned high wages by U.S. standards. Applications for only 4 percent of H-1B workers were among the top 25 percent of wages for U.S. workers in the same state and occupation.
- Many employers use their own salary surveys and wage surveys for entry-level workers, rather than more relevant and objective data sources, to make prevailing-wage claims when hiring H-1B workers.
- Employers of large numbers of H-1B workers tend to pay those workers less than those who hire a few. Employers making applications for more than 100 H-1B workers had wages averaging $9,000 less than employers of one to 10 H-1B workers.
- The problem of low wages for H-1B workers could be addressed with a few relatively simple changes to the law.

Purpose

The purpose of this report is to examine the effectiveness of the prevailing wage requirements in the H-1B program and to determine whether there is a difference between wages paid to H-1B workers in computer programming fields and wages for U.S. workers in the same fields. This report uses the Bureau of Labor Statistics Occupational Employment Statistics as the measurement of U.S. wages and the H-1B Labor Condition Application disclosure data as the measurement of H-1B wages.

The H-1B Visa Program

This H-1B visa program was created in 1990 as a guestworker program for specialty occupations. A specialty occupation is one that requires a college degree or equivalent professional experience. There is no specific skill requirement for an H-1B visa.

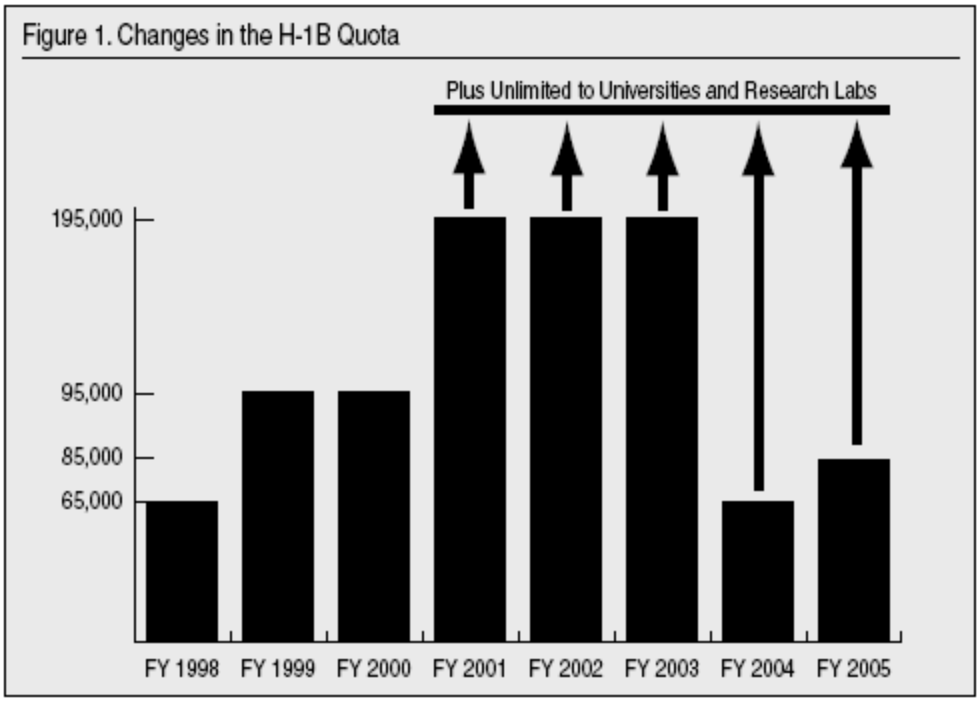
The H-1B program is technically classified as a non-immigrant program. H-1B visas are valid for up to three years and can be renewed once for an additional three years. H-1B visas are also tied to employment so that an H-1B visa becomes invalid if the worker loses his job. While employed, it is relatively easy for a worker on an H-1B visa to transfer the visa to another employer. Transfers do not extend the time limit on the original visa.

While the H-1B is a temporary, non-immigrant visa, the law allows H-1B holders to apply for permanent residency and, since H-1B workers can bring their families with them, any children born during their stay become U.S. citizens. While relatively few H-1B workers obtain permanent residency, anecdotal evidence suggests a significant percentage, perhaps the majority, of workers who come to the United States on H-1B visas come intending to stay permanently.

The challenge for H-1B workers who want to remain in the United States is to get a permanent residency application processed within the six-year maximum term of an H-1B visa. Congress has modified the H-1B program to allow workers in the final stages of a permanent residency application to remain in the United States beyond the six-year time limit. However, an H-1B worker who changes employers is unlikely to be successful in getting permanent residency.

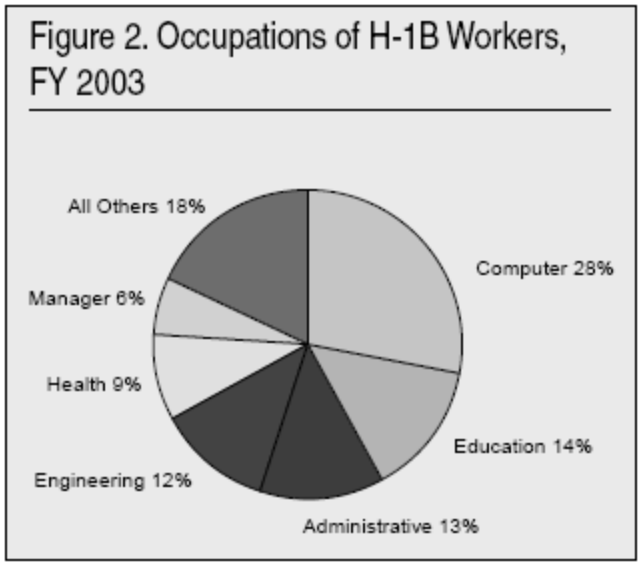
The H-1B program was originally limited to 65,000 visas a year. As the popularity of the H-1B program grew in the late 1990s, employers started to exhaust this quota. In 1998, 2000, and 2004 Congress enacted both temporary increases and permanent increases in the program. Figure 1 shows the quota changes over time. The current limits, effective in FY 2005, divide H-1B visa into four categories with different limits:

- No limit to the number of visas issued to universities and research institutions.
- 20,000 visas reserved for those with graduate degrees from U.S. institutions.
- 6,800 visas reserved for Singapore and Chile under free trade agreements.
- 58,200 visas for all others.

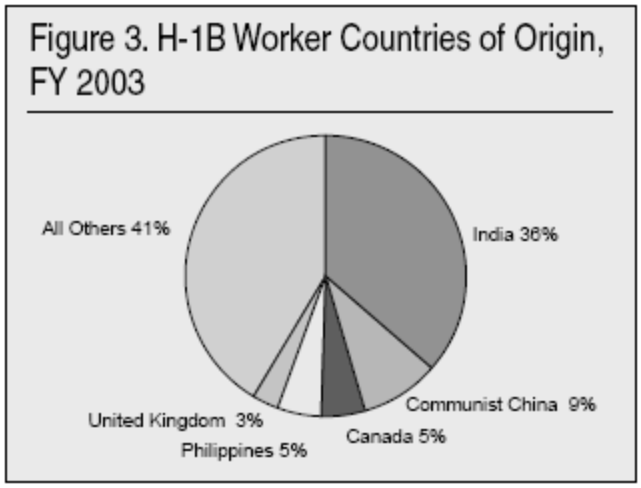


This complicated visa allocation scheme reflects the political struggles that have surrounded the H-1B program since 1994. The general H-1B quota for FY 2005 was exhausted on the first day of the fiscal year and six weeks beforehand in FY 2006. However, only about a third of the quota for U.S-educated workers was used in FY 2005 and it is unlikely to be used up in FY 2006."

H-1B visas are often referred to as "high tech" visas since historically most have been issued to workers in computer programming, engineering, or science disciplines. In recent years, while the H-1B quota was temporarily increased, the percentage of workers in these occupations declined. Figure 2 shows the distribution of H-1B visas issued by occupation.



Workers from India and China dominate the H-1B program. Before the temporary increases in the H-1B visa quota, nearly half of all H-1B visas went to people born in India. During the periods of increased H-1B quotas, the percentage of H-1B visas issued to people born in these countries decreased. Figure 3 shows the distribution of H-1B visas issued by country.



The law requires employers to pay H-1B workers the prevailing wage. In theory, the H-1B program is supposed to prevent employers from bypassing U.S. workers in favor of lower-paid foreign workers.

Labor Condition Application

As part of making an application for an H-1B visa, the employer must submit a Labor Condition Application (LCA). The Labor Department is responsible for ensuring that the hiring of foreign workers will not adversely affect the wages and working conditions of U.S. workers -- or displace U.S. workers -- and the LCA is the principle tool for ascertaining this. In this, the employer certifies:

- It will be paying the H-1B worker the higher of the wages paid to other employees with similar experience and qualifications or the prevailing wage for the occupation in the location of employment.
- There is no current strike or lockout.
- The employer will provide notice to other employees of the application filing.

The federal regulations governing LCAs allow employers to select a prevailing wage from a number of different types of sources:

- Complying with the Davis-Bacon Act or Service Contract Act (SCA) on Federal Contracts.
- Union collective-bargaining agreement.
- A State Employment Security Agency (SESA) prevailing-wage determination.
- Another wage source that "reflects the weighted average wage paid to workers similarly employed in the area of intended employment" and "is reasonable and consistent with recognized standards and principles in producing a prevailing wage."

On computer programmer LCAs, SESA is the wage source for about 10 percent of LCAs and about 90 percent use some other wage source. Davis-Bacon, SCA, and union contracts are rarely encountered as wage sources.

Under the plain text of the law, the prevailing wage is supposed to be the prevailing wage for the occupation and is not supposed to take experience into account. As described in more detail later, until 2004 the Department of Labor's online wage library gave one prevailing wage for experienced workers and one for entry-level workers. The 2004 changes to the H-1B program direct the Department of Labor to make four prevailing wage levels available to employers that take into account "experience, education, and the level of supervision." This is the only authorization for a prevailing wage source to take into account anything other than occupation and location.

Unfortunately, the LCA system has been nothing more than a paper-shuffling process. The Department of Labor does not actually verify the data within an LCA or make approval judgments based upon its contents. Until FY 2006 the law expressly prohibited the Department Labor from evaluating the contents of an LCA other than to ensure the form had been filled out correctly.

The Controversy

Proponents of H-1B often argue that the program is vital to U.S. competitiveness because it allows the world's "best and brightest" to come to America and helps sustain U.S. leadership in the technology sector. Program critics cite a number of problems and apparent abuses of the H-1B program, including:

- The practice of "bodyshopping," or "contracting out" workers on H-1B visas.
- Employers using the H-1B program to replace Americans.
- H-1B's role in "offshoring" work to other countries.
- Use of the H-1B program for back-door immigration.
- The lack of employer monitoring.
- Statutory provisions intended to prevent enforcement of the law.
- Allegations that the H-1B program is used to depress wages.

Appendix G[40] lists the employers who are the largest users of the H-1B program. Most of these companies are known as “bodyshops.” This term refers to the practice of sponsoring large numbers of H-1B workers who then perform IT or back-office tasks for U.S. companies on a contract basis. The H-1B worker will get his paycheck from the bodyshop but will work in the contracting company's facility and will have every outward sign of being an employee of the contracting company. Often the contract worker is performing tasks that were once done by a regular U.S. employee.

The increasingly common practice of bodyshopping seems to have emerged as a direct result of the availability of H-1B workers as a low-cost alternative to U.S. workers. Bodyshops may sponsor large numbers of H-1B workers who have no actual assignment when they arrive in the country. The bodyshops circulate lists of available H-1B workers to employers, placing them in direct competition with U.S. workers seeking similar jobs.

Frequently, the employer/employee relationship between the bodyshop and H-1B worker is suspect. Some companies advertise on the Internet for H-1B workers and after sponsoring them keep a percentage of the worker's earnings. In a number of cases, companies obtained H-1B visas for individuals who then disappeared upon arrival ("Ga. Co. Pleads Guilty in INS Case," Associated Press, Nov. 24, 1999). In an extreme case, a man used the H-1B program to import teenage sex slave girls from India (David Ferris & Demian Bulwa, "Berkeley Landlord Faces Sex Charge," Contra County Times, Jan. 20, 2000). In addition to creating direct competition to Americans for jobs, the H-1B program plays a critical role in the offshoring phenomenon. The largest suppliers of offshore programming services are also among the largest users of H-1B visas (See Appendix G). The offshoring companies use the H-1B program to train their employees in U.S. business practices and to provide local support for operations moved overseas.

Methodology

This report takes a conservative approach in comparing H-1B wages to U.S. wages. Initial analyses of the data clearly showed that H-1B wages were significantly less than U.S. wages. As the analysis was refined, each time a choice was identified on how to treat data, the author examined the alternatives then chose the one that minimized the H-1B/U.S. wage difference.

The data for U.S. wages came from the Bureau of Labor Statistics Occupational Employment Statistics (OES) at www.bls.gov/OES. The OES program estimates wages and employment in over 800 occupations. There are estimates for the entire nation, by state, and for metropolitan areas.

This report uses the 2003 statewide estimates for comparison with H-1B wages, the year prior to the H-1B wage data. The reason for using wage data older than the H-1B data is that this is the prevailing wage information that would have been available to the employers when making the LCA. This choice is consistent with the approach of minimizing any U.S./H-1B wage differential.

The OES data define a category of occupations called "Computer and mathematical occupations," into which programming jobs fall. This report compares U.S.

[40] Available online at http://www.cis.org/articles/2005/back1305appendices.pdf

wages to H-1B wages in the OES occupations from this category and its subdivisions listed in Table 1.

Table 1. OES Job Categories Employed in This Report

Standard Occupation Code	Occupation Description
15-0000	Computer and mathematical occupations
15-1011	Computer and information scientists, research
15-1021	Computer programmers
15-1031	Computer software engineers, applications
15-1032	Computer software engineers, systems software
15-1041	Computer support specialists
15-1051	Computer systems analysts
15-1061	Database administrators
15-1071	Network and computer systems administrators
15-1081	Network systems and data communications analysts

The data for H-1B wages came from the H-1B disclosure web site at www.flcdatacenter.com . This contains electronic versions of LCAs filed by employers where each LCA is a single row in a table. The starting point was the data for computer-related occupations. The next step was to delete all the rows for LCAs that had been rejected by the Department of Labor. All wages specified in periods of less than a year were converted to annual wages.

The most difficult process was to match the jobs in LCAs to OES codes. The only encoding of occupations in an electronic LCA row is a job code from U.S. Citizenship and Immigration Services (a bureau within the Department of Homeland Security). LCAs include a job title but these are employer job titles, not OES job titles. In addition, OES data and the USCIS differ as to what jobs are computer occupations. The result of this inconsistent usage of job titles is that there is no simple way to match up LCAs to wage data.

This report used pattern matching to associate LCAs with employer job titles. For the most part this method does not cause significant problems except where employers use unusual job titles or in a few cases where common employer titles tend to create ambiguities.

The most significant of these ambiguities is the common employer job title "Programmer/Analyst." Is this a "Programmer" or a "Systems Analyst" in the OES occupation classification system? After examining a sample of "Programmer/Analyst" LCAs that used OES as the prevailing wage source, all of those that could be traced back to the OES prevailing wage were found to be using "System Analyst" as the OES occupation. This would have justified classifying "Programmer/Analyst" as "Systems Analysts." However, this association increased the national H-1B/U.S. wage difference by about $4,000 greater than classifying these LCAs as "Programmers." So, in keeping with the conservative goals of this report, "Programmer/Analysts" are treated as "Programmers."

A similar example is variations on the job title "Software Engineer." The OES data has two such classifications, "systems software" and "applications." In some cases, it was clear which of these categories a particular job title fell into. In the end, this report classified "Software Engineer" on LCAs as OES "Computer software engineers, applications" because this creates the smaller H-1B/U.S. wage difference.

The most lengthy preparation step was cleaning up the data. The number of obvious errors in the LCA disclosure data is staggering. For example, employer names and job titles are frequently misspelled. Many wages are multiplied by a factor of 10, 100, or 1,000. This report assumed programmer salaries over $300,000 contained such an error.

Once the data are cleaned up, analysis becomes a straightforward, though often time consuming, process of querying the data.

In this report the term "H-1B workers" always means "H-1B workers in Computer Programming Professions." Likewise, "H-1B wages" always means "Employer claims of wages to be paid to H-1B workers according to Approved Labor Condition Applications." Only approved LCAs were used in this report.

Limitations

The most significant limitation in this report is that it is based on Labor Condition Applications rather than actual H-1B visas issued. The number of LCAs filed is much greater than the number of H-1B visas issued. When taking into account multiple workers on many LCAs, the disparity is even greater.

There are three major reasons for this disparity. An LCA may be approved and one or more H-1B applications based on that LCA may be rejected by USCIS; an employer may not submit an H-1B application for an LCA; or the employer may not submit H-1B applications for as many workers specified on an LCA.

While the Department of Labor makes detailed LCA information available, USCIS does not provide the analogous data for H-1B visas. Therefore, this report assumes that the salary distribution in LCAs is closely related to the distribution in approved H-1B visas. In short, it is based on what employers are asking for in H-1B visas rather than what they are necessarily getting.

The lack of standardization or encoding of occupations within the LCA data creates the other significant limitation in this report. The precision of the results here is limited by the need to match employer job titles to OES occupations. But since that the disparity between H-1B wages and U.S. wages is so great, this limitation does not affect the conclusion that significant wage difference exists. However, it does make a difference in the precision by which that size of difference can be measured. Since this report is consistent in taking the path that minimizes the H-1B/U.S. wage difference, the wage differences reported here represents the lower bound for that wage difference.

Results

This report finds the wages paid to H-1B workers in computer programming occupations for FY 2004 were significantly lower than wages paid to U.S. workers in the

same occupation and state. Table 2 shows the H-1B salary ranges and the average differences between the OES Mean and OES Median.

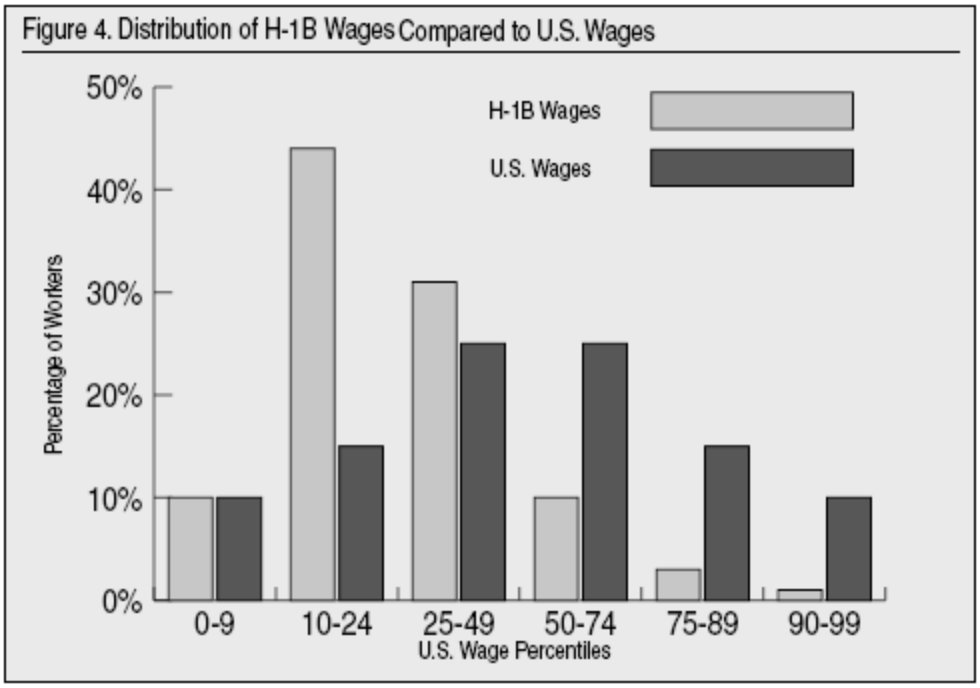
Table 2. H-1B Salary Ranges and Differences from OES Wages

Min	Max	Mean	OES Mean	Difference	OES Median	Difference
$16,796	$260,000	$52,312	$67,700	($15,388)	$65,003	($12,691)

In addition to the average salaries for H-1B workers being much lower than those of corresponding U.S. workers, the distribution of H-1B wages are overwhelmingly concentrated at the bottom end of the wage scale.

Figure 4 graphically illustrates the relationship between H-1B wages to U.S. wages. The horizontal axis shows U.S. percentile ranges and the vertical axis shows the percentage of workers with salaries falling within those ranges. H-1B salaries are concentrated in the bottom end of the scale with the largest concentration in the 10-24 percentile range. That means the largest concentration of H-1B workers make less than highest 75 percent of U.S. wage earners.

Figure 4. Distribution of H-1B Wages Compared to U.S. Wages



The appendices to this report[41] contain additional breakdowns of H-1B wage data comparing them to U.S. wages:

Appendix A: H-1B Wages Compared to U.S. Wages by Occupation
Appendix B: H-1B Wages Compared to U.S. Wages by State
Appendix C: H-1B Wages Compared to U.S. Wages by State and Occupation
Appendix D: H-1B Wages Compared to U.S. Wages by Employer

The LCA disclosure data clearly show that prevailing wage provisions in the H-1B program do not result in H-1B workers actually being paid the prevailing wage. In

[41] Available online at http://www.cis.org/articles/2005/back1305appendices.pdf

spite of these provisions, the overwhelming majority of H-1B computer workers are actually paid wages substantially lower than Americans in equivalent positions. This finding suggests that in most cases the motivations behind employers' use of the H-1B program is for low-wage workers rather than highly skilled workers.

Prevailing-Wage Claims

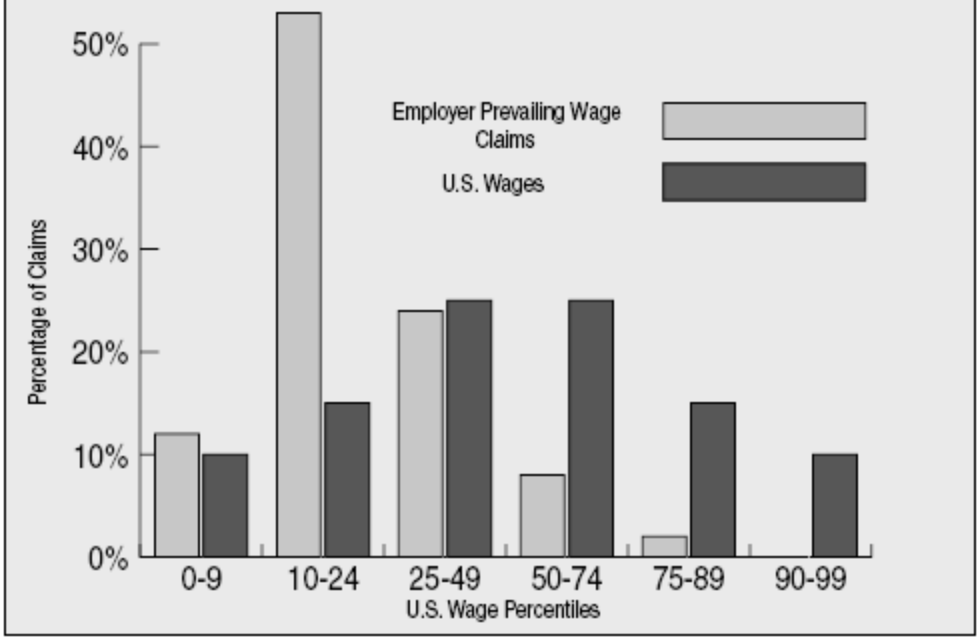
Employer prevailing wage claims tended to be even lower and more concentrated at the low end of the wage scale than H-1B wages. Table 3 shows the range of prevailing-wage claims and their average difference from U.S. wages.

Table 3. H-1B Prevailing Wage Claims and Differences from OES Wages

Min	Max	Mean	OES Mean	Difference	OES Median	Difference
$10,900	$198,826	$49,618	$67,689	($18,070)	$64,994	($15,376)

The distribution of H-1B prevailing-wage claims compared to U.S. wages is shown graphically in Figure 5. This figure was created in the same manner as Figure 4 except that it compares U.S. wages to employer-claimed prevailing wages. The low prevailing-wage claims on LCAs show that most employers are understating the prevailing wage on LCAs. Clearly, employer prevailing-wage claims are in no way representative of actual wages paid to U.S. workers.

Figure 5. Distribution of H-1B Prevailing Wage Claims Compared to U.S. Wages



It should also be noted that the wages reported for 47 percent of H-1B workers were for less than the prevailing wage claimed by the employer on the LCA (See Appendix H[42]). Prior to FY 2006, the law allowed employers to pay H-1B workers 95 percent of the claimed prevailing wage. A substantial number of employers took

[42] Available online at http://www.cis.org/articles/2005/back1305appendices.pdf

advantage of this explicitly permitted method to pay H-1B workers less than Americans, some even taking the discount to a fraction of a percent more than the law allowed.

It is also important to note that the low wages paid to H-1B workers and the low prevailing wages submitted by employers do not in themselves imply the employers are violating the law. Instead, the data illustrate how ineffective the law is at ensuring H-1B workers are paid the prevailing wage.

However, some prevailing-wage claims are so out-of-line with industry norms that they suggest violations or fraud are occurring. One key flaw in the system is that employers are allowed to use almost any source to determine the prevailing wage.

Some Specific Wage Sources

In FY 2004, employers used over 75 different sources to make approved prevailing wage claims for H-1B computer workers. Most LCAs use government wage sources with Watson Wyatt being by far the most frequently used non-government wage source. A common theme among prevailing wage sources is the use of entry-level wage surveys to determine the prevailing wage for H-1B applications. The following sections contain observations about a few of the most commonly used wage sources and wage sources employers used to produce extremely low prevailing wages.

National Association of Colleges and Employers. The wage source employers used to report the lowest prevailing wage claims is the National Association of Colleges and Employers (NACE) wage survey with wages about $27,000 less a year than the OES median. The NACE wage survey measures the wages of recent college graduates so it is a source of entry-level wages only. Of employers that used NACE as a prevailing wage source, 75 percent used no other wage source on LCAs. For these employers, either all of their H-1B hires came directly out of school or their prevailing wage claims were entirely bogus. In any case, this report asserts that a private survey of wages paid to new graduates is not a legitimate prevailing wage source under the plain meaning of the law.

Employer Wage Surveys. The H-1B program allows employers to use their own wage surveys as a prevailing wage source. The second lowest prevailing wage source was employer salary surveys. When H-1B employers used their own surveys, the prevailing wage claims were about $22,000 a year less than the OES median. The size of this difference suggests that employer wage surveys are of questionable use in measuring the prevailing wage for LCAs. Through this mechanism, employers paying low wages are simply re-affirming their own low standards, rather than providing a real comparison to industry or wider labor market standards.

MIT Wage Survey. The third lowest wage source, and one of the most puzzling encountered in the LCA data, is the 2002 "MIT Wage Survey," used by only two employers but for over 300 H-1B workers. What was unusual about these LCAs is that every one claimed the exact same prevailing wage of $45,000.

The only "MIT Wage Survey" this report could locate is MIT's survey of wages for recent graduates. The 2002 edition contains only one value of $45,000: the lowest salary offered to an MIT graduate with a bachelor’s degree in electrical engineering & computer science. Should this be the case, this report questions the legitimacy of the lowest salary offer made to MIT graduates as a prevailing wage.

Table 4. 2002 Wage Summary: MIT Course 6-2 Electrical Engineering & Computer Science

	Base Yearly Salary			
Degree	Low	Average	High	Reports
Bachelors	$45,000	$57,343	$68,000	16
Masters	$67,500	$67,500	$67,500	1
M. Eng.	$65,000	$81,058	$110,000	17
Doctoral	$80,000	$99,875	$112,000	8

Occupational Employment Statistics. OES is by far the most frequently-cited prevailing wage source, used for about half of all H-1B workers. Yet LCAs using OES as the wage source claimed a prevailing wage of about $17,000 less than the median OES wage for the same state and occupation.

For those unfamiliar with the LCA system, this difference might appear incongruous. How could employers and this report be looking at the same data and coming to such different results?

The answer is in how the on-line wage library for LCA applications presents the OES data. The wage data available directly from OES provide the mean and median wages as well as the wages at various percentiles. Though based on the OES data, the on-line wage library for LCAs at www.flcdatacenter.com provides two prevailing wages based upon the OES data: the Level 1 (or entry level) prevailing wage and the Level 2 (or experienced) prevailing wage. Apparently most employers who use the on-line wage library select the entry-level wage as the prevailing wage.

It would be interesting to compare prevailing wage claims using the entry-level wage to the experienced level wage. Unfortunately, the Level 1/Level 2 wage data for 2004 are not publicly available. They will be available for the new wage levels for FY 2006, so a future report may be able to determine how the new wage levels are being used.

As mentioned previously, the recent changes to the H-1B program require the Department of Labor to make four prevailing-wage levels available to employers. This could result in employers making ever lower prevailing-wage claims.

A real-world example illustrates how this system allows employers to make lower prevailing-wage claims. The employer claims the prevailing wage for a Systems Analyst in Charlotte, N.C., according to OES in FY 2002 was $42,246. This wage is the Level 1, or entry level, wage. The Level 2 wage was $69,618. The mean OES wage was $60,150. By selecting the entry-level wage as the prevailing wage, the employer realizes about $18,000 in wage savings. As described previously, employers were allowed to pay 95 percent of the claimed prevailing wage, as this employer has done. So here, the employer is paying the H-1B workers the absolute lowest wage it can get away with. This example demonstrates how the current prevailing wage requirements of the H-1B program serve as a low-wage target for employers rather than as protection for U.S. workers.

Number of H-1B Workers Requested

There is an interesting trend in the wage data with regard to the number of H-1B workers an employer seeks. Employers of large numbers of H-1B visas pay significantly less than employers with a small number of H-1B visas. Employers making applications for one to 10 H-1B workers paid an average of $9,000 a year more than employers making applications for more than 100 H-1B workers (See Appendix F[43]).

Observations

The preparation of this report involved many weeks of examining LCAs data. While outside the scope of this report, a number of patterns emerged that raise suspicions of abuse. Some of those patterns involving computer occupations are listed here in the hope that some other researchers might investigate them.

- Applications made for computer programmers by businesses that do not normally employ programmers (e.g. stores and restaurants).
- Employers with absurdly low salaries for programmers, especially those with all of their H-1B workers being paid below the 10th percentile.
- Small companies whose number of H-1B visas requests appear to be more than they could possibly employ. This might suggest H-1B workers are not actually performing work for their employer or where employers have workers idle and not being paid (illegal "benching").
- Employers requesting large numbers of H-1B workers in locations not likely to have significant numbers of programming jobs, suggesting the employer is using one location for wage certification and other locations for the actual job site.
- The grossly disproportionate number of applications for H-1B workers in New Jersey (Appendix E) suggests that many of these H-1B workers are not actually working in New Jersey.
- The LCAs for many companies show a disregard for the formalities of business associations. For example, one can find limited partnerships doing business as "corporations" and entities that have submitted LCAs under different forms of organization.

Recommendations[44]

If there is any correlation between wages and skills, it is clear the H-1B program is rarely being used to import "highly skilled" workers. While the wage data do suggest a few employers use the H-1B program to import a small number of highly skilled workers, these are clearly exceptional cases.

Overwhelmingly, the H-1B program is used to import workers at the very bottom of the wage scale. The wide gap between wages for U.S. workers and H-1B workers helps explain why industry demand for H-1B workers is so high and why the annual visa quotas are being exhausted.

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[43] Available online at http://www.cis.org/articles/2005/back1305appendices.pdf

[44] These recommendations are limited to remedying problems reflected in the LCA data. There are additional problems in the H-1B program that are outside the bounds of this study.

Many in industry have called for an increase in the number of H-1B visas, citing the early exhaustion of the cap as reflective of widespread need for skilled workers. However, the fact that very few H-1B workers are earning salaries as high as U.S. workers in the same profession would seem to refute that claim, and should make lawmakers wary of increasing the H-1B quota. The exhaustion of the H-1B quota may reflect employers' interest in lowering labor costs or widespread fraud rather than an insufficient number of visas.

Specifics

This report makes the following specific recommendations to correct the prevailing wage provisions of the H-1B program:

- Retain the current 65,000 cap on regular H-1B visas. With the majority of applications for H1-B computer programmers at salaries below the prevailing wage, the cap is the only real safeguard in the H-1B system.
- Limit the number of H-1B visas that an employer can obtain each year based on the number of U.S. employees the company has.
- Employers should be required to use a standard wage source produced by the federal government when making prevailing wage claims for LCAs. Allowing employers to pick from nearly any wage source is not a valid measure of the prevailing wage.
- Employers should be required to pay H-1B workers at a level higher than the mean wage, such as the 75th percentile, rather than at the prevailing wage, to prevent widespread use of H-1B workers from depressing U.S. salary levels. Lessening the H-1B salary differential may reduce pressure on the visa quota, as employers will use the program only for true industry needs and for the most highly-skilled workers, rather than the cheapest workers.
- In order to better monitor the H-1B program, employers should be required to enter a Standard Occupation Code (SOC) for each employee on the application. Most employers are looking this information up already in order to get OES prevailing wages. It would require little effort for employers to put this information on the LCA.
- In order to better monitor the H-1B program, USCIS should make wage and employer information available on H-1B visas actually issued. Researchers now must rely on Labor Department data from the LCA, which may or may not result in an actual visa issuance.

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