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Looking to the North While Playing Doctor: Solving the H-1B Visa Problem by Following Canada's Lead

Sarah Jain

In the late twentieth century, the United States high technology industry began an explosive growth spurt that has carried through the turn of the century.¹ The rapidly evolving state of technology,² coupled with the shortage of skilled American workers,³ has driven United States employers to import high technology talent from abroad.⁴ Foreign technology workers most frequently receive authorization to work in the United States through the H-1B visa program.⁵ The United States government's limited offerings of working visas contribute to the H-1B's immense popularity.⁶ Instead of creating an efficient marketplace, the complex, protectionist H-1B program stifles the growth of high technology companies, and in turn, asphyxiates the U.S. economy.

This Note examines the H-1B visa program as it applies to the information technology (IT) sector of the United States

1. See Steve Lohr, *Computer Age Gains Respect of Economists*, N.Y. TIMES, Apr. 14, 1999, at A1; Pam Woodall, *A Survey of the New Economy: Labour Pains: Wanted: More Brains, Less Brawn*, ECONOMIST, Sept. 23, 2000, at 66; Peter Behr, *How Virginia Has Fed on a High-Tech Diet*, WASH. POST, Jan. 18, 1999, at F32.

2. See Pam Woodall, *A Survey of the New Economy: Untangling E-conomics*, ECONOMIST, Sept. 23, 2000, at 66.

3. See *infra* Part I.A for a discussion of the worker shortage.

4. See A. James Vázquez-Azpiri, *Through the Eye of a Needle: Canadian Information Technology Professionals and the TN Category of the NAFTA*, 77 INTERPRETER RELEASES 805, 807 (June 26, 2000).

5. See *id.*

6. The other working visa programs are quite restrictive. For example, TN visas, created by the North American Free Trade Agreement (NAFTA), are only for citizens of Canada and Mexico. See 8 C.F.R. § 214.6 (2000). L-1 visas are only viable for intracompany transferees. See 8 C.F.R. § 214.2(l)(12)(i) (2000). E-1 visas are strictly for treaty traders and the related E-2 visas only for treaty investors. See 8 C.F.R. § 214.2(e)(3) (2000). And, F-1 visas are for students and allow for limited employment authorization. See 8 C.F.R. § 214.2(f)(1)(i) (2000).

economy. Part I of this Note provides a survey of the high technology worker shortage, a background of the H-1B visa program, and an examination of the program's flaws. Part II outlines the Canadian program for foreign workers in the IT industry and proposes adopting certain Canadian policies to facilitate the entry of foreign workers in the IT sector.

I. AFFIXING THE TOURNIQUET: USING H-1B VISAS TO STEM THE FLOW OF FOREIGN TEMPORARY WORKERS INTO THE UNITED STATES

During the late 1990s, H-1B proponent employers in the IT industry complained of a labor shortage, while H-1B opponents proclaimed the antithesis. Congress, in the middle of this battle, needed to discern the reality of the labor shortage and consider the shortcomings of the H-1B visa program before legislating its most recent remedy, which ameliorates some of the most pressing problems of the H-1B visa crisis. Unfortunately, pervasive ills persist.

A. TAKING THE ECONOMIC PULSE: DIAGNOSING THE REALITY OF THE INFORMATION TECHNOLOGY LABOR SHORTAGE AND THE ACTUAL NEED

Compelling evidence exists supporting the criticism that the current United States visa process is partially responsible for the shortage of qualified high technology workers. By all accounts, the American economy reached a strong crescendo in the late 1990s leaving unemployment at a thirty-year low.⁷ Currently, it takes an average of 12.5 weeks for an unemployed worker to get a job, down from 13.8 weeks the previous year.⁸ More specifically, the IT industry has been booming.⁹ From

7. See *Benefits to the American Economy of a More Educated Workforce: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 7 (1999) (hereinafter *Benefits to the American Economy of a More Educated Workforce*) (recording U.S. unemployment at record low levels of 4.3%). See also Janet Purdy Levaux, *How to Tap into the Skilled Immigrant Labor Pool*, INVESTOR'S BUS. DAILY, Mar. 29, 2000, at 10.

8. See *Immigration and the Economy*, 19 AILA'S IMMIGRATION LAW TODAY 173, 175 (Apr. 2000).

9. See *Benefits to the American Economy of a More Educated Workforce*, *supra* note 7, at 43, 45, 61 & 66. See also James D. Van Erden, *People Aspects of Technological Change: Immigration Issues, Labor Mobility, the Brain Drain, and R & D—A U.S. Perspective*, 25 CAN.-U.S. L.J. 53, 58 (1999) (stating that technology is being developed so fast that the half-life of a software engineer is between 1 ½ - 2 ½

1993-98 the economy gained 1.1 million jobs in the high technology industry.¹⁰ A 1997 Bureau of Labor Statistics study shows phenomenal growth rates of 118% for computer scientists, 109% for computer engineers, and 103% for systems analysts.¹¹ Congress predicts that the United States will need approximately twenty million workers between 1999 and 2026 to maintain a growth rate of 2.5%.¹² However, technology-based companies have had trouble fulfilling their needs for qualified workers,¹³ while at the same time, the number of U.S. citizens who are also highly-skilled graduates has declined.¹⁴ The hottest new industries, including microelectronics, Internet technologies and electronic commerce "require a highly skilled, knowledge-based workforce."¹⁵ Furthermore, companies in the United States have spent over sixty billion dollars on formal training for their employees.¹⁶ These facts lead to the conclusion that the demand for highly skilled technology workers exceeds its supply under the current immigration laws.

This skills shortage, coupled with the many problems involved in H-1B visa processing,¹⁷ leads to dire consequences. Economic experts caution that the lack of qualified workers will hinder the economy by curtailing business expansion, curbing profits and stimulating inflation.¹⁸ Other consequences include companies moving production facilities and jobs out of the United States to countries where qualified workers are more abundant and easily employable.¹⁹ This results in talented

years; in addition, by the year 2000, half of the world's scientific engineering knowledge will have been generated in the previous seven years).

10. See *Benefits to the American Economy of a More Educated Workforce*, *supra* note 7, at 43.

11. See *id.* at 65.

12. See *id.* at 66.

13. See *Gates Laments Tech Worker Shortage*, ASSOCIATED PRESS, June 2, 1998.

14. See *Benefits to the American Economy of a More Educated Workforce*, *supra* note 7, at 46, (citing that from 1990-96, the number of high-technology degrees awarded to U.S. students fell five percent, from 219,000 to 208,000, while electrical engineering degrees declined more than twenty-two percent).

15. See *id.* at 45.

16. See *id.* at 66.

17. See *infra* Part I.C.

18. See *Studies Affirm Immigrants Essential to Economic Boom*, 19 AILA'S IMMIGRATION LAW TODAY 359 (July/Aug. 2000).

19. See Julekha Dash & Patrick Thibodeau, *Election Politics Stall H-1B Hike; If Cap Not Raised, Work May Move Offshore*, COMPUTERWORLD, Sept. 11, 2000, at 95 (stating that "more than one-third of 42 Fortune 500 companies surveyed by EPF [Employment Policy Foundation] said they would move jobs out of the U.S. if H-1B workers weren't available").

foreign technology workers being lured away from companies in the United States by companies in countries with less restrictive immigration processes.²⁰ These possibilities lend a sense of urgency to the pleas of H-1B employers and have garnered congressional attention.

Although the bulk of information affirms the U.S. labor shortage in the IT sector, a steady voice has been heard from the other side. Representatives from the AFL-CIO have cried foul, asserting that enough qualified American workers exist to fill the ranks.²¹ In fact, pro-labor forces scoff at the so-called desperate employers, arguing that many of the largest high-technology companies are inundated with resumes and reject the vast majority of applicants.²² These opponents of the H-1B program also maintain that employers' interests only lie in the younger, cheaper labor source that H-1B visas provide,²³ resulting in discrimination against available, but older, workers.²⁴ Additionally, it is argued that H-1B workers can be

20. See Levaux, *supra* note 7, at 10 (reporting that countries such as Canada, Israel and Ireland may try to attract high-tech talent with prospects of swift citizenship processes); see also *Benefits to the American Economy of a More Educated Workforce*, *supra* note 7, at 34 (stating that the Canadian and Australian immigration systems "work very well. They are very important in getting high skilled workers into those countries, in particular high skilled workers who would really rather come to the United States, but cannot because of our Immigration Laws. So, we are actually subsidizing Canada, Australia, and other countries").

21. See Doug White, Letter to the Editor, *High-Tech Labor Wars*, WASH. POST, Sept. 22, 2000, at A24 (asserting that the Department of Education statistics indicate that there are 300,000 U.S. graduates in math, computer science, and engineering each year, and that this is sufficient to fill the estimated 204,000 high-tech job opportunities each year).

22. See Norman Matloff, *High-Tech Cheap Labor*, WASH. POST, Sept. 12, 2000, at A35 (reporting that "Cisco receives 20,000 applications per month but hires only 5 percent of the applicants;" Microsoft hires only 2 percent, Qualcomm 5 percent, and Red Hat Linux a measly 1 percent).

23. See Norman Matloff, *High-Tech Cheap Labor*, WASH. POST, Sept. 12, 2000, at A35 (claiming that the law requiring employers to pay the prevailing wage is "riddled with loopholes"). But see Brian John Halliday, *In Order to Hire the Best Person for the Job, We Have to Do What?*, 11 U. FLA. J.L. & PUB. POLY 33, 42 (1999) (asserting that prevailing wage issues rarely arise since most employers pay above that rate, and the fact that employers are willing to suffer through the arduous H-1B process shows there is a lack of qualified U.S. citizens available; consequently, qualified foreign nationals are able to demand higher salaries and employers must pay them).

24. See *Immigration and America's Workforce for the 21st Century: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 105th Cong. 60-61 (1998) (statement of David A. Smith, Director of Policy, AFL-CIO). But see Dash & Thibodeau, *supra* note 19, at 95 (noting that many older programmers with basic skills are simply not qualified for jobs which require knowledge of newer, cutting-edge programming languages).

compared to indentured servants because the system makes changing jobs cumbersome and keeps mobility to a minimum.²⁵ Finally, some employers do not maintain interest in the H-1B talent, calling it an “addictive quick fix.”²⁶ Instead, they have focused their energy inward and are developing their current employees.²⁷

B. THE WAY WE WERE: DEFINING THE H-1B VISA AS IT EXISTED BEFORE THE FALL 2000 LEGISLATIVE FLURRY

The United States’ immigration legislation concerning temporary foreign workers has long been extremely protectionist in nature.²⁸ Congress has crafted it to protect the U.S. labor force and to allow foreign temporary workers to enter the U.S. only when their admittance serves the national economy, cultural interests, or welfare.²⁹ The H-1B nonimmigrant, working visa is a vivid example of this protectionist legislation. As set forth in the Immigration and Nationality Act (INA),³⁰ an alien cannot receive the H-1B visa

25. See Joel Stewart, Editorial, *High-Tech Labor Wars*, WASH. POST, Sept. 22, 2000, at A24. But see *INS to Conduct Audit of H-1B Program*; Senator Abraham Urges Broader Inquiry 77 INTERPRETER RELEASES 90, 91 (Jan. 14, 2000) (demonstrating that H-1B workers are not indentured servants as approximately one-third of H-1B visa holders change employers during their stays).

26. See Lisa Vaas, *H-1B Vetoed, Called Stopgap by Companies—Some Businesses Resist Turning H-1B—Dependent; Industry Trend or Event*, PC WEEK, May 1, 2000, at 61, 61; DAVID S. NORTH, NONIMMIGRANT WORKERS IN THE U.S.: CURRENT TRENDS AND FUTURE IMPLICATIONS 168 (1980).

27. See Vaas, *supra* note 26.

28. See *Gannet Corp. v. Stevens*, 282 F. Supp. 437, 445 (V.I. 1968) (holding Virgin Islands Employment Act, which gave resident workers preference in employment over nonresident workers and required importing employers to certify that residents’ wages or working conditions would not be adversely effected, did not conflict with the Immigration and Nationality Act).

29. See *id.* See also JAMES G. GIMPEL & JAMES R. EDWARDS, JR., THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM 61 (1999).

30. 8 U.S.C. § 1101 (1999) (hereinafter “INA”). The Immigration and Nationality Act was established by Congress in 1952. Since that time, it has evolved through several notable amendments: the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1101 (1999)); the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1101 (1999)); the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991) (codified at 8 U.S.C. § 1101 (1999)); the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. § 1101 (1999)); and the American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, Title IV of Div. C, 112 Stat. 2681 (codified at 8 U.S.C. § 1101 (1999)) [hereinafter ACWIA].

unless she "is coming temporarily to the United States to perform services . . . in a specialty occupation."³¹ A "specialty occupation" requires "theoretical and practical application of a body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum" requirement to perform the job.³² The regulations indicate that the specialty occupations include, but are not limited to, "architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts."³³ Thus, an important aspect of the H-1B program is that it applies to a wide variety of professions.

The H-1B visa allows temporary employment for a period of up to six years³⁴ and embodies the idea of a "dual intent." Dual intent includes the intent to work temporarily and a simultaneous intent to possibly stay permanently in the United States.³⁵ The notion of "dual intent" provides a major advantage as it allows the foreign worker to adjust to permanent residency through an employment-based application and thereby continue the employment. However, "dual intent" is not attached to all nonimmigrant visas. For example, H-2 visas for agricultural workers and H-3 visas for trainees embody only temporary intent.³⁶ To obtain one of these visas, the alien must prove to the consular officer that he or she has purely temporary intent, not the presumed immigrant intent, and, a residence abroad which he or she does not intend to abandon.³⁷

Another essential part of the H-1B procedure is its process. The H-1B process begins with the employer filing a Labor Condition Application (hereinafter "LCA") with the Department

31. INA § 1101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (1999). The statute explains that H-1B visas may be obtained for foreign workers in the general category of "specialty occupations," and the specific category of "fashion models." *See id.* This Note will not discuss the H-1B visas for fashion models, only "specialty occupations," particularly those in the IT sector.

32. INA § 214(i)(1), 8 U.S.C. § 1184(i)(1) (1999). Pursuant to § 214(i)(2), a person may meet the degree requirements by obtaining full state licensure to practice the occupation, by completing the degree for the occupation, or by obtaining experience equivalent to the degree and holding progressively responsible positions.

33. 8 C.F.R. § 214.2(h)(4)(ii) (2000).

34. *See* 8 U.S.C. § 1184(g)(4) (2000).

35. *See* INA § 214(h), 8 U.S.C. § 1184(h) (2000); INA § 214(b), 8 U.S.C. § 1184(b) (2000); *see, e.g.*, 1997-98 IMMIGR. & NATIONALITY HANDBOOK VOLUME I 145, 145-46 (R. Patrick Murphy et al. eds., 1997).

36. *See* 1997-98 IMMIGR. & NATIONALITY HANDBOOK VOLUME I, *supra* note 35, at 145-46.

37. *See id.*

of Labor (hereinafter "DOL"). The LCA certifies that the employer will offer the foreign worker the actual wage³⁸ or the prevailing wage,³⁹ whichever is greater, and that the employment of the foreign worker will not adversely affect the working conditions of the employer's U.S. employees.⁴⁰ The employer must certify that there is no strike or lockout taking place, and that the collective bargaining representative has been notified.⁴¹ The INA also requires that foreign workers receive the same benefits as the other workers and establishes a complaint policy for LCA violations and the requisite penalties.⁴² Finally, H-1B dependent employers must certify that they have taken good faith steps to recruit American workers for the job, and that they have offered the job to any United States worker who applies and is equally or better qualified than the foreign worker.⁴³

When the LCA is approved by the DOL, the employer then files the H-1B petition with the Immigration and Naturalization Service (INS)⁴⁴ with the required \$500 fee for each petition.⁴⁵ Since the actual and prevailing wages are based upon the particular job title or position and geographic area of employment, the wages may vary if the foreign worker changes

38. The actual wage is the wage "paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question." INA § 212(n)(1)(A)(i)(I), 8 U.S.C. § 1182 (n)(1)(A)(i)(I)(1999).

39. The prevailing wage equals the wage paid for the specific "occupational classification in the area of employment." INA § 212(n)(1)(A)(i)(II), 8 U.S.C. § 1182 (n)(1)(A)(i)(II) (1999).

40. See INA § 212(n)(1)(A), 8 U.S.C. § 1182 (n)(1)(A)(ii) (1999); 20 C.F.R. § 655.730 (1999).

41. See INA § 212(n)(1)(B) & (C), 8 U.S.C. § 1182 (n)(1)(B) & (C)(1) (1999).

42. See INA § 212(n), 8 U.S.C. § 1182 (n)(2)(A) (1999).

43. See INA § 212(n)(1)(G)(i)(I) & (II), 8 U.S.C. § 1182(n)(1)(G)(i)(I) & (II) (1999). The comparison of the employer's size and the number or percentage of H-1B employees determines whether an employer is H-1B dependent. See INA § 212(n)(3)(A), 8 U.S.C. § 1182(n)(3)(A) (1999). Experts predict that the rules governing H-1B dependent employers will mainly affect large employers that act as job contractors in the computer services area. See AUSTIN T. FRAGOMEN ET AL., IMMIGRATION LEGISLATION HANDBOOK: COVERING THE ILLEGAL IMMIGRANT, WELFARE AND ANTITERRORISM LAWS 12-16 (1999).

44. See 8 C.F.R. § 214.2(h)(2)(i) (2000). See also Halliday, *supra* note 23, at 45 (noting that it may take one to four months to process the LCA and H-1B petition).

45. See 8 U.S.C. § 1184(c) (2000). This fee was added by the ACWIA amendment of 1998 and is in addition to the normal filing fee for Form I-129, Petition for a Nonimmigrant Worker. The purpose of the \$500 fee is to fund job training; scholarships for low-income students enrolled in a mathematics, computer science or engineering programs; and National Science Foundation grants. In addition, six percent of the amount collected will fund administration and enforcement of the H-1B program. See 8 U.S.C. § 1356 (2000).

positions or work sites.⁴⁶ If a change like this or any other material change in employment occurs, the employer has the burden of filing another LCA with the DOL and a new or amended H-1B petition with the INS.⁴⁷ If the foreign worker wishes to change employers, the prospective employer must file a new LCA and H-1B petition and have it approved before the foreign worker may begin working for the new employer.⁴⁸ Thus, the employer ends up dealing with two federal agencies and a myriad of complex rules in this process.⁴⁹

C. CATALOGUING THE PERVASIVE ILLS OF THE H-1B VISA PROGRAM

Past Congressional responses to the adverse cries of industry on one side and unions on the other have left a pockmarked landscape in the H-1B law and led to numerous implementation and feasibility difficulties. Basically, the H-1B petition process is "a Byzantine rule that is hamstringing employers and keeping them from conducting business in the way companies normally do in this day and age."⁵⁰

Some free market economists suggest that American immigration policy should take on a more *laissez faire* flavor with the goal of reducing discretionary government intervention and encouraging outcomes caused by invisible market forces.⁵¹ In this flexible system, a country would admit workers based on human capital endowments. The likely losers in this system would be the unskilled and poorly educated, who, under

46. See 8 C.F.R. § 214.2(h)(2)(I) (1999).

47. See 8 C.F.R. § 214.2(h)(2)(I) (1999); see also Laurie Grossman & Susan J. Cohen, *The Effect of Changed Circumstances on H-1B Nonimmigrant Workers*, in 1997-98 IMMIGR. & NATIONALITY LAW HANDBOOK VOLUME II 186, 200-06 (1997) (detailing when a new LCA or H-1B petition must be filed in cases where foreign workers change location, work at more than one location, and work for multiple employers).

48. See 8 C.F.R. § 214.2(h)(2)(I) (1999).

49. See generally Jung S. Hahm, Note, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1692-1701 (2000) (discussing the problems faced by employers forced to deal with the DOL and INS and proposing the consolidation of the supervisory responsibilities for the H-1B program in the DOL).

50. Angelo A. Paparelli, *LCA's/H-1B Nonimmigrant Visas*, in 32nd ANNUAL IMMIGR. & NATURALIZATION INST. 81, 107 (1999) (quoting immigration attorney Eleanor Pelta).

51. See VERNON M. BRIGGS, JR., *Mass Immigration, Free Trade and the Forgotten American Worker*, in IN DEFENSE OF THE ALIEN 20, 30 (1994).

protectionism, could secure more highly paid positions.⁵² Although this paints a picture of seamless flows of intellectual capital, an unfettered immigration policy, especially for temporary workers, is an unlikely scenario.

Instead, American immigration policies, such as the H-1B visa program, undoubtedly spawned from realist theory, which suggests that countries allow the influx of foreigners to the extent it advances economic, national and political interests.⁵³ “[P]olitical and economic interests of the state, including military security, foreign relations, territorial integrity, and national integration, drive the regulation of international migration.”⁵⁴ With these realist interests in mind, Congress created an incredibly complex H-1B law,⁵⁵ spurning talent-hungry employers and opportunistic foreign workers alike. The H-1B law generates many problems, including ambiguous, time-consuming procedures; quota restrictions; troubles in allocating scholarship and training funds; and difficulties in adjusting status to permanent residency.

The first major problems with the H-1B visa procedure are its ambiguous nature and its complicated and restrictive process. Immigration attorneys, employers, and anxious foreign workers have aired their frustrations about dealing with the capacious and dubious terms in both the DOL and INS regulations. The terms in the regulations are often either undefined (e.g. “material change”) or defined differently in several places (e.g. “employer”); thus, employers and their attorneys find themselves scrutinizing DOL and INS policy guidelines and advisory opinions from agency officials in an attempt to understand the terms.⁵⁶ Further, deciding whom the “employer” is, and whether a new LCA or H-1B petition needs to be filed, becomes especially problematic in the age of increased mergers and acquisitions.⁵⁷

52. See *id.* at 21.

53. See DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 6 (2000).

54. *Id.*

55. See *supra* note 30 and accompanying text.

56. See Grossman & Cohen, *supra* note 47, at 191.

57. See Catherine Mayou, *Mergers and Acquisitions in Today's Technology Industry Driven Economy—Unanticipated Immigration Issues*, 42 ORANGE COUNTY LAWYER 6, 7-8 (July 2000) (stating that if after a merger or acquisition any “material” change occurs, such as a change in the federal tax identification number or in the conditions of employment, the new entity as the “employer” must file a new LCA and a new or amended H-1B petition for each foreign worker); see also Grossman & Cohen, *supra* note 47, at 194; INS *Advises on Corporate Changes*

A second problem relates to the time and expense involved in acquiring an H-1B visa. Requiring an employer to file an LCA with the DOL certifying that the employer will pay the higher of the actual or prevailing wage seems reasonable since it both protects United States workers from employers importing cheap foreign labor and foreign workers from being paid at low, exploitative levels.⁵⁸ However, it lashes the employer and the anxiously awaiting employee by adding more time and expense to the employment process. In addition, the law punishes employers who are deemed H-1B dependent by requiring that they take good faith steps to recruit American workers.⁵⁹ Spending precious time and energy on this step is arguably wasteful and futile because a severe labor shortage exists in the IT sector.⁶⁰

The specific annual limit on the number of H-1B visas issued constitutes another problem.⁶¹ Due in part to the fierce lobbying by the IT sector, the 1998 ACWIA amendment to the Act increased the annual number of visas from 65,000 in fiscal year 1998 to 115,000 in fiscal years 1999 and 2000.⁶² Unfortunately, the increase did little to satisfy the key constituencies, particularly the IT industry.⁶³ The year 2000 demonstrated clearly the sore inadequacy of the annual visa

and H-1B Workers, 77 INTERPRETER RELEASES 465, 478 (Apr. 10, 2000).

58. See INA § 212(n)(1)(A)(i)(I) & (II), 8 U.S.C. § 1182 (n)(1)(A)(i)(I) & (II) (1999); see also text accompanying notes 38-40.

59. See INA § 212(n)(1)(G)(i)(I) & (II), 8 U.S.C. § 1182(n)(1)(G)(i)(I) & (II) (1999); see also text accompanying note 43.

60. See *supra* notes 9-16 and accompanying text.

61. See INA § 214(g)(1)(A), 8 U.S.C. § 1184(g)(1)(A) (2000). Many criticize these quota numbers as arbitrary and unrelated to the true demand. See LYNN FRENDR SHOTWELL, *Temporary Worker Visa Policy: Meeting the Needs of the 21st Century*, in IN DEFENSE OF THE ALIEN 55, 56-57 (2000); CHARLES B. KEELY, *Global Human Resource Strategies: Firms, International Personnel, and Immigration Law*, in IN DEFENSE OF THE ALIEN 101, 111 (1999); DORIS M. MEISSNER ET AL., INTERNATIONAL MIGRATION CHALLENGES IN A NEW ERA 15 (1993).

62. See *id.*

63. See Jeanne Malitz, *A Need for Foreign-Born Professionals*, SAN DIEGO UNION TRIB., Sept. 24, 2000, at G-3 (reporting that IT employers in the San Diego region were voicing concern over their worker shortages and immediate need for more H-1B employees); *The Trouble with H-1B*, NAT'L J. TECH. DAILY (AM Ed. Sept. 11, 2000) (describing the lobbying efforts of the Information Technology Industry Council in urging passage of H-1B cap-raising legislation); Ann Pomeroy, *INS Loses Count of H-1B Visas Because of Computer Malfunction*, SOC'Y FOR HUM. RESOURCE MGMT., Dec. 1999, at 5 (detailing that the American Business for Legal Immigration (ABLI) coalition of companies and business organizations lobbied Congress and the President to raise the quota and alleviate the burden on U.S. employers).

allotment, for on March 21, 2000, the INS announced that the annual H-1B limit of 115,000 visa approvals had been reached for the entire fiscal year.⁶⁴ Since the fiscal year begins on October 1st of each year, this meant that the United States had exceeded its visa approval limit less than halfway through the year.⁶⁵ This is the earliest point in a fiscal year that the quota has been reached.⁶⁶ When the INS finally announced in July 2000 that it had finished processing the last petitions for fiscal year 2000, almost 30,000 petitions subject to the cap remained pending to be deducted from the fiscal year 2001 cap.⁶⁷ Eventually, high profile economists, such as Federal Reserve Chairman Alan Greenspan, called for a review of the immigration laws and a lifting of the H-1B visa cap.⁶⁸ In an effort to discern the real need, Congress commissioned two reports from the National Science Foundation, the first concerning older workers in the information technology field, and the second concerning the IT labor market needs.⁶⁹

Even the seemingly simple task of counting the number of H-1B visas issued has snowballed into an embarrassing fiasco for the INS.⁷⁰ Auditors from an accounting firm determined that the INS issued between 21,888 and 23,385 H-1B visas in excess of the fiscal year 1999 cap of 115,000.⁷¹ Both computer malfunctions⁷² and human error caused this miscalculation. The human error stemmed from mistakenly including H-1B visa holders who were temporarily outside of the U.S., H-1B visa holders who changed employers, and multiple petitions filed on behalf of a single beneficiary.⁷³ Besides the double counting of petitions which likely occurs, the audit also discovered that the

64. See *INS Announces H-1B Cap Reached for FY 2000, Publishes Procedures for Post-Cap Cases*, 77 INTERPRETER RELEASES 369, 369-71 (Mar. 24, 2000).

65. See *id.* at 369.

66. See *INS Cuts Off H-1B Filings Subject to Cap*, 19 AILA's IMMIGR. LAW TODAY 258 (May 2000).

67. See *INS Announces Completion of H-1B Processing for FY 2000*, 77 INTERPRETER RELEASES, 1081, 1087 (July 31, 2000).

68. See *Greenspan Says U.S. Immigration Laws Should Be Reviewed in Light of Labor Shortage*, AGENCE FRANCE PRESSE (Jan. 26, 2000).

69. See ACWIA, *supra* note 30, at §§ 417, 418.

70. See Ann Pomeroy, *INS Loses Count of H-1B Visas Because of Computer Malfunction*, SOC'Y FOR HUM. RESOURCE MGMT, Dec. 1999, at 5.

71. See *H-1B Audit Determines Over-Issuance Larger Than Initially Estimated; INS Instructs on Petition Language*, 77 INTERPRETER RELEASES 466 (Apr. 10, 2000).

72. See Pomeroy, *supra* note 70.

73. See *INS to Conduct Audit of H-1B Program; Senator Abraham Urges Broader Inquiry*, 77 INTERPRETER RELEASES 90, 91-92 (Jan. 14, 2000).

INS does not add revoked petitions (e.g. fraudulent) back into the visa pool; in effect, this extinguishes the availability of the visas before the quota is actually reached.⁷⁴ Former Senator, Spencer Abraham, while in office, summarized that if counting errors of the sort outlined above have been occurring and are allowed to persist uncorrected, the effect will be to negate a substantial portion of what Congress sought to do when it raised the H-1B cap two years ago.⁷⁵

Another criticism of the H-1B law concerns the \$500 fee per petition to fund scholarships and training, a provision that the ACWIA amendment of 1998 recently instituted.⁷⁶ The funds are being generated as planned;⁷⁷ however, critics contend that these funds are doing little to help the IT worker shortage because they are doled out slowly and allocated incorrectly.⁷⁸ Critics assert that the DOL has a history of focusing on groups of people with few or no skills who are not viable IT candidates in the immediate future.⁷⁹ In addition, since the DOL has been very slow in doling out the funds, training programs are still in their infancy, and employers are proclaiming that the programs have not lessened their reliance on H-1B visas.⁸⁰ In response to the DOL's ineffective handling of funds, industry trade groups and employers have proposed that the money be controlled by more efficient "regional alliances that wed business, education and labor unions."⁸¹

The final problem area in the H-1B law concerns the

74. See *KPMG Issues Report on 1999 H-1B Count*, 19 AILA'S IMMIGRATION LAW TODAY 328 (June 2000).

75. See *INS to Conduct Audit of H-1B Program; Senator Abraham Urges Broader Inquiry*, *supra* note 73, at 92.

76. See 8 U.S.C. § 1184 (2000).

77. See Bara Vaida, *Labor Targets H-1B Fees to Lower-skilled Workers*, NAT'L J. TECH. DAILY, Sept. 29, 2000, PM ed. (explaining that the Department of Labor has received approximately \$171.5 million from H-1B visa fees to fund high-tech focused scholarships and job training and has started distributing these funds for the first time this year).

78. See Lisa Vaas, *Failing Grades-H-1B Fees Fail to Lessen Reliance on Imported IT Skills; Industry Trend or Event*, EWEEK, Sept. 18, 2000, at 24 (stating that the U.S. General Accounting Office has accused the DOL of allocating the funds without precision because the Labor Department never determined exactly what IT skills are needed in the domestic work force).

79. See *id.* at 28. The DOL admits that they train employees mainly for low skill, entry-level positions. See *id.* See also Halliday, *supra* note 23 at 62-64 (asserting that the H-1B fee program is inadequate because the program still does not generate enough money to put the needed number of workers through school and that the training provided by the program is not equivalent to a high-level degree).

80. See Vaas, *supra* note 78.

81. See *id.*

difficulties H-1B visa holders face when they attempt to adjust status⁸² to permanent residency. Every year thousands of H-1B workers and their families who qualify for green card status have been forced to leave the United States because their six-year H-1B visas expire⁸³ before their permanent residency petitions are approved.⁸⁴ This unfortunate result is due to INS processing delays and the restrictive permanent residency law that allocates the same number of immigrant visas for each country without regard to differences in population.⁸⁵ In this way, small countries, such as Jamaica, are offered the same number of immigrant visas as large countries like India or China. India and China both have large numbers of foreign workers waiting to adjust their status, while some small countries may not even exhaust their allotment.⁸⁶ Critics argue that legislation raising the H-1B cap must be combined with measures to decrease the waiting time for permanent residency.⁸⁷ If the H-1B cap is raised, then the backlogs for permanent residence would drastically increase,⁸⁸ resulting in a

82. "Adjustment of status" refers to the change from a nonimmigrant visa status, such as the H-1B, to an immigrant visa status, more commonly referred to as permanent residency or obtaining a green card. See INA § 245, 8 U.S.C. § 1255 (1999).

83. See Mitchell L. Wexler, *Needed Immigration Strategies for Hi Tech Talent*, 42 ORANGE COUNTY LAWYER 14, 15 (2000) (suggesting that a possible, albeit not very viable, strategy for a worker close to his or her six-year limit is to have the H-1B worker leave the United States for one year, perhaps by assigning him or her to a facility abroad, and upon returning the H-1B worker would get a renewed six-year period).

84. See Scott Wright, *Making Immigration Policy Work for Business*, INT'L BRIEFING, Sept. 8, 2000 (proposing to allow those H-1B holders who have applied for permanent residency at least one year before their H-1B visa expires to stay in the United States until their immigrant petition is approved or denied). See also PHILIP MARTIN, *Shortages, Wages and Qualified Workers: Options for Dealing with Nonimmigrants*, in 22 IN DEFENSE OF THE ALIEN 113, 114 (Lydro F. Tomasi, ed., 1999) (noting the familiar aphorism that "there is nothing more permanent than temporary workers," yet the H-1B law makes no concessions for this reality).

85. See INA § 202(a), 8 U.S.C. § 1152(a) (1999).

86. See also Wright, *supra* note 84 (explaining that the two largest sources of skilled IT workers are from India and China).

87. See Carrie Kirby, *Can't Get Action from INS? Canada Has a Deal for You*, SAN FRANCISCO CHRON., Aug. 25, 2000, at A19 (explaining that it can take four years or more to receive permanent residency status in the United States, exhausting two-thirds of the six year maximum available on an H-1B visa).

88. See *New H-1B Proposal Would Raise Cap, Boost Portability, Address Lengthy LPR Adjudications*, 77 INTERPRETER RELEASES 200 (Feb. 14, 2000) (citing a press release for the Center for Immigration Studies which found that backlogs for permanent residence would become unbearable "as close to one million

pathetically small percentage of future H-1B holders obtaining green card status.⁸⁹

The United States Congress is painfully aware that it is impossible to please everyone all of the time; however, it is difficult to find even one soul who lauds the H-1B legislation:

One thing's for sure about the current laws governing H-1B visas: It's hard to find anyone who's happy with them. IT employers are unhappy because they want the annual 115,000 limit on H-1B visas increased, and they want to take control of the retraining fees collected from H-1B applications. Those active in H-1B legislative reform are unhappy because they believe importing offshore IT talent is unfair to U.S. workers and that retraining efforts funded by H-1B fees are little more than a hollow gesture. Even government auditors are unhappy with how the program is being run . . . because the Department of Labor hasn't collected data on what specific IT skills are needed, [and] it hasn't been able to allocate H-1B-generated retraining funds with precision.⁹⁰

The short-sighted H-1B law is not the result of well-defined and rationally planned considerations for the national interest.⁹¹ Rather, this legislation reflects the political sway of powerful, well-organized interest groups.⁹² Once again in October of 2000, the interest groups persuaded Congress through their political demands.⁹³ However, the resultant law is not necessarily fraught with arcane and short-lived provisions since the lobbying muscle now lies in the liberal-minded high technology sector.

H-1B workers arrive by 2003 into an employment-based immigration system with 140,000 [annually] available slots").

89. See Shailesh Gala, Letter to the Editor, *High-Tech Labor Wars*, WASH. POST, Sept. 22, 2000, at A24 (stating that if H-1B cap-raising legislation is enacted without green card reform provisions, "less than fifteen percent of future H-1Bs will obtain permanent residence").

90. Lisa Vaas, *What H-1B Bill Will Come Out Ahead?*, EWEEK, Sept. 18, 2000, at 28.

91. See DELAET, *supra* note 53, at 4.

92. The 1990s have engaged Congress in an especially volatile tug of war. See *id.* at 105 (explaining that during the 1990s anti-immigration groups, such as the Federation for American Immigration Reform (FAIR), grew and became more vocal); GIMPEL & EDWARDS, *supra* note 29, at 46-47 (stating that during the 1990s IT businesses began to lobby for immigration expansion; Microsoft, Intel, Motorola, Sun Microsystems and Texas Instruments joined to form the American Business for Legal Immigration (ABLI) Coalition).

93. See *infra* note 95 and accompanying text (legislation that is pre-immigration for science-oriented and tech workers).

D. ATTEMPTS TO HEAL THE WOUNDED: EXAMINING THE NEW RELIEF FOR THE H-1B VISA CRISIS

Congress responded to the many problems of the H-1B program by passing an act to increase the H-1B education and training fee from \$500 to \$1,000 per petition⁹⁴ and the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).⁹⁵ The AC21 begins boldly by increasing the H-1B cap from the 107,500 to 195,000 for Fiscal Years 2001 through 2003.⁹⁶ Also included in this section is a provision that clears out the pending case backlog from the previous year.⁹⁷ This is definitely a step in the right direction since it ensures that the full 195,000 visas will be available for Fiscal Year 2001. However, there is nothing to suggest that the 195,000 figure was the product of careful economic analysis of anticipated supply and demand.⁹⁸ Retaining the cap is a restrictive measure that hinders flexibility in the labor market and the booming economy.⁹⁹

94. See Act to Increase the Fees Charged to Employers Who Are Petitioners of H-1B Nonimmigrant Workers, Pub. L. No. 106-311 (Oct. 17, 2000).

95. See American Competitiveness in the Twenty-First Century Act, Pub. L. No. 106-313 (Oct. 17, 2000) [hereinafter AC21]. AC21 includes the following major provisions: (1) it raises the H-1B visa quota to 195,000 for FY2001-03; (2) it exempts from the cap employees of higher educational institutions or related nonprofit organizations while they are working for that employer; (3) it eases the per-country immigrant visa limits and allows over-subscribed countries to utilize the unused immigrant visas of other countries; (4) it allows extension of H-1B status for those visa holders who have an immigrant visa petition pending; (5) it allows visa holders to begin to work for a new employer when an application has been submitted without waiting for approval; however, if denied, the authorization is terminated; (6) it extends the H-1B dependent employer attestations and Department of Labor investigation provisions; (7) it recovers fraudulently used visas and returns them to the pool as unused; (8) it specifies the portions of education and training funds that certain organizations will receive; (9) it requires the National Science Foundation to conduct a study on the "digital divide," that is, to determine how technology access impacts those in society who have it, versus those who do not; and finally, (10) it outlines immigration services and infrastructure improvements. See *id.* See also *Statement by the President: Signing of the 'American Competitiveness in the Twenty-First Century Act'*, U.S. NEWSWIRE, Oct. 17, 2000.

96. See AC21, *supra* note 95, at § 102(a).

97. See *id.* at § 102(b).

98. Thus, this legislation could result in another inadequate H-1B visa quota. Since the IT sector is growing at such a phenomenal rate, this is not out of the realm of possibility. Some suggest suspending the cap temporarily or eliminating it entirely. See Halliday, *supra* note 23, at 72; Hahm, *supra* note 49, at 1677-78 (calling for a relaxation of the visa cap).

99. See Statement by the President, *supra* note 95 (stating that his "Administration has made clear that any increase in H-1B visas should be temporary and limited in number").

The next section makes impressive headway for employers in higher educational institutions and nonprofit and governmental research organizations by exempting their H-1B employees from the cap.¹⁰⁰ This presents good news for the high technology industry for two reasons. First, those visas normally used by higher education and research institutions will now be available for high technology workers and other specialty occupations. Second, the law exempts employees of higher educational institutions "or a related or affiliated nonprofit entity."¹⁰¹ This language may provide a loophole for technology companies to establish foundations in conjunction with universities and thereby exempt the employees who would work there. Third, Congress has clearly delineated that H-1B holders shall not be counted toward the cap again, unless they are eligible for another full six-year period.¹⁰² This counting rule will overrule current INS practice of including H-1B workers who are temporarily outside of the United States,¹⁰³ and hopefully result in more consistent counting across the INS offices. The prohibition against double counting essentially requires INS to develop a reliable system to guard against this practice.

This same section of the law dashed the hopes of foreign graduate students attending institutions in the United States who were anxiously awaiting a similar exemption from the cap.¹⁰⁴ Earlier bill proposals had incorporated an exemption provision for foreign graduate students of United States institutions.¹⁰⁵ However, the final act removed this student exemption, but inadvertently left the words in the title.¹⁰⁶ This is very unfortunate for these students and the American economy, because these students could help ease the highly skilled worker shortage. Further, there is no worry that these students would flood the job market, since many of them have already blended into the American workforce by holding full-time jobs through student employment authorizations.¹⁰⁷ The

100. See AC21, *supra* note 95, at § 103. This section ensures higher educational institutions will be able to employ, without delay, the best and brightest to teach U.S. students.

101. *Id.*

102. See *id.*

103. See *supra* note 73 and accompanying text.

104. See AC21, *supra* note 95, § 103.

105. See, e.g., H.R. 3983, 106th Cong. (2000) and H.R. 4200, 106th Cong. (2000).

106. See AC21, *supra* note 95, § 103. The taunting title announces "Special Rule for Universities, Research Facilities, and Graduate Degree Recipients; Counting Rules." *Id.*

107. See 8 C.F.R. § 214.2 (f)(1)(i) (2000).

error in this section of the law is evidence that this new H-1B amendment lacked rational planning and was once again the result of a rushed attempt to appease lobbyists before Congress adjourned for the year.¹⁰⁸

H-1B workers also triumphed through this law. First, the law increased the portability of H-1B visas so that a worker may begin new employment immediately upon the filing of a petition by a new employer and need not wait for the actual approval from INS.¹⁰⁹ This important provision facilitates job transferring for foreign workers and eradicates the anti-immigration stance of H-1B workers as indentured servants.¹¹⁰ Foreign workers will also celebrate the fact that their H-1B status can now be extended past the six-year limit if their permanent residency petitions are delayed in processing.¹¹¹ Further, more immigrant visas will be available to the nationals of oversubscribed countries, namely India and China, since the law allows unused, employment-based immigrant visas to be made available regardless of per-country ceilings.¹¹²

The new law also extends the DOL's authority to investigate H-1B employers without a complaint if the DOL receives specific, credible evidence of employer violations.¹¹³ This should allay H-1B opponents' fear of rogue employers turning a blind eye to the law or attempting to slip through a supposed loophole.¹¹⁴ In the same breath, this section wields an unfortunate blow by extending the attestation requirement for H-1B dependent employers.¹¹⁵ This burden increases the time

108. See *supra* notes 91-93 and accompanying text.

109. See AC21, *supra* note 95, § 105.

110. See *supra* note 25 and accompanying text. In addition, free market economists will glory in this provision as it facilitates resource maximization. See *id.*

111. See AC21, *supra* note 95, § 106. This will eliminate some of the hardships by allowing employers to retain workers long term and employees to make decisions regarding their future with more certainty.

112. See AC21, *supra* note 95, § 104. Basically, this should reduce the backlog for green cards for nationals of high demand countries like India and China.

113. See AC21, *supra* note 95, § 107. The DOL investigative authority is extended until September 30, 2003. See *id.* In December 2000, the DOL complemented the INA amendment by clarifying when an employer undergoing a corporate reorganization is in danger of an LCA violation. Basically, the successor entity need not file a new LCA if it agrees to assume its predecessor entity's obligations and liabilities under the existing LCA. See Temporary Employment in the United States of Nonimmigrants Under H-1B Visas, 65 Fed. Reg. 80109, 80112 (Dec. 20, 2000).

114. See Matloff, *supra* note 23.

115. See AC21, *supra* note 95, § 107. These attestations are required until October 1, 2003.

and expense involved in hiring qualified foreign workers for those employers deemed H-1B dependent.¹¹⁶

In addition, the law forces the INS to recycle visas by returning unused immigrant visas¹¹⁷ or H-1B visas revoked for fraud back to the pool.¹¹⁸ This provision will also contribute to a more accurate count of both H-1B and immigrant visas.

In the next section of the Act, Congress reallocated funds to the DOL for education and worker training.¹¹⁹ Since a twin H-1B bill signed into law the same day increases the education and training fee from \$500 to \$1,000,¹²⁰ and the number of H-1B visas allotted has almost doubled, the DOL will now control approximately quadruple the funds. To stave off dubious stares from DOL critics,¹²¹ Congress is requiring the DOL to produce a progress report within one year concerning the number of people who have completed the training and entered the high-skills workforce.¹²² Critics are sure to give an approving nod to the distribution of seventy five percent of the grants to workforce investment boards and the allocation of eighty percent of grants for skills training in high technology, information technology, and biotechnology.¹²³ These specifications are vital because Congress mandates a majority of funds be spent on the acute and important high technology labor shortage. Moreover, Congress funnels the funds to local business experts who are more aware of the local situation and more agile and effective actors. However, this section of the law also reinforces the

116. See *supra* notes 59 & 60 and accompanying text. In December 2000, the DOL published interim final H-1B regulations effectuating the attestations under the ACWIA and October 2000 INA amendments for H-1B dependent employers. See Temporary Employment in the United States of Nonimmigrants Under H-1B Visas, 65 Fed. Reg. 80109 (Dec. 20, 2000).

117. See AC21, *supra* note 95, § 106(d).

118. See AC21, *supra* note 95, § 108.

119. See AC21, *supra* note 95, § 110.

120. See Act to Increase the Fees, *supra* note 94. One of the likely goals of this legislation is to deter employers through cost from employing foreign temporary workers. However, the increase is unlikely to deter the wealthy firms in the high technology sector which view foreign talent as well worth the price.

121. See *supra* notes 76-80 and accompanying text.

122. See AC21, *supra* note 95, § 110. Besides requiring this general progress report, it was wise to force the bureaucratic giant to complete the report within a year; this should quell the concerns raised about the DOL's slow action. See *id.*

123. See AC21, *supra* note 95, § 111. In his statement, President Clinton acknowledges that the government funds are inadequate to meet the great need to educate and train workers. He then apportions some of the burden to "high-tech companies to redouble their efforts to find long-term solutions" to the worker shortage, such as focusing on elementary school children, minorities, and rural residents. See Statement by the President, *supra* note 95.

concern that the programs will focus on workers with few or no skills and those at the low end of the skills spectrum,¹²⁴ leaving the IT sector with a continued shortage of highly skilled workers. Whatever the effect on the high-tech worker shortage, many critics will agree that this section endeavors to move towards the important and necessary goal of training the U.S. workforce.

Another major part of the new H-1B law is the Immigration Services and Infrastructure Act of 2000.¹²⁵ This Title directs INS to take steps to reduce the backlog of visa petitions with the goal of eliminating the backlog within the year.¹²⁶ Although an admirable directive, Congress does not back this INS mission with any funds,¹²⁷ which realistically lessens the chances of success. Congress has also required informational reports from INS detailing the backlog situation, plans for reduction and a data systems assessment.¹²⁸

Overall, this more liberal H-1B legislation appears to be an improvement over the old law. However, capping the H-1B visas in the face of a growing economy can only be a temporary bandage, requiring periodic remedial action by Congress. Further, the Presidential Statement on the H-1B laws exudes protectionism. President Clinton stated that the "acts recognize the importance of allowing additional skilled workers into the United States to work in the short-run, while supporting longer-term efforts to prepare American workers for the jobs of the new economy."¹²⁹ While it is important to look inward for talent and

124. See AC21, *supra* note 95, § 111 (explaining that "[t]raining shall not necessarily be at the level of a baccalaureate degree, but preparation for workers at a broad range along the career ladder"); see also Vaas, *supra* note 78 (quoting Democratic Representative Zoe Lofgren of California as stating "[t]raining is good, but a six-month training program will not fill the need for a Ph.D. or a post-doc in particle physics").

125. See Immigration Services and Infrastructure Improvements Act of 2000, S. 2045, 106th Cong., Tit. II, § 201(2000).

126. See *id.* at § 204. Notably, this is the first time Congress has stated its opinion regarding how long immigration benefits should take to adjudicate. Congress opined that immigration petitions should be adjudicated within 180 days of filing, and certain nonimmigrant petitions (including H, L, O and P visa petitions) should be processed within 30 days of filing.

127. See *id.* Authorizing language is no guarantee that Congress will actually appropriate any funds.

128. See *id.* at § 205. This additional reporting requirement, although a good idea in theory, simply burdens an understaffed INS. If the agency is unable to process its backlog of immigration petitions, it is doubtful that it has the time and resources to diligently construct this report.

129. See Statement by the President, *supra* note 95.

to utilize these resources in the future, it also seems naïve and isolationist, in view of our increasingly global economy, to believe the U.S. could remain competitive without the constant lifeblood from abroad.

Lawmakers equipped with relevant statistics and information must stand back and objectively view the U.S. labor situation. Although H-1B opponents' disarmingly loud cry to protect the American workforce would lead one to think the United States is literally being invaded by foreign workers,¹³⁰ the reality of the situation is that "the H-1B visa program accounts for just one-tenth of [one percent] of the overall U.S. workforce."¹³¹ The legislature needs to balance the interests of protectionist union forces and the IT wave of the future in a realistic way, giving sufficient deference to IT employers' and the economy's needs. Since the United States is at risk of losing both valuable technology companies and talented H-1B visa holders to foreign countries,¹³² it is imperative that the United States continue its immigration reform.

II. "FEW THINGS ARE HARDER TO PUT UP WITH THAN THE ANNOYANCE OF A GOOD EXAMPLE"¹³³:

POSSIBILITIES OF BORROWING FROM CANADA'S IMMIGRATION POLICY

A. CONTEMPLATING ALTERNATIVE MEDICINE: EXAMINING CANADIAN IMMIGRATION PROVISIONS FOR TEMPORARY, TECHNOLOGY PROFESSIONALS

In contrast to U.S. attempts to reign in immigration, Canada encourages the immigration of skilled workers. Canada's rate of natural population growth has declined; thus, Canada needs immigrants if it wants to continue to progress in the future.¹³⁴ To maintain its competitive edge "in a knowledge-based and service-oriented world economy," Canada must

130. See *supra* notes 21-25 and accompanying text.

131. Joanie Wexler, *Should the H-1B Cap Be Raised?*, COMPUTERWORLD, Aug. 28, 2000, at 46.

132. See *supra* notes 19 & 20 and accompanying text.

133. MARK TWAIN, PUDD'NHEAD WILSON AND THOSE EXTRAORDINARY TWINS, 92 (Sidney E. Berger ed., W.W. Norton & Co. 1980).

134. See CITIZENSHIP AND IMMIGRATION CANADA, CANADA THE PLACE TO BE: ANNUAL IMMIGRATION PLAN FOR THE YEAR 2000, 6 (1999).

attract highly skilled workers and hone the skills of its domestic workforce.¹³⁵ In a very pro-immigration stance, the Canadian government has stated that its year 2000 Immigration Plan reflects its beliefs in the social and economic benefits of immigration.¹³⁶ The Immigration Plan projects that during 2000, Canada will admit as immigrants between 100,500-113,300 skilled workers, between 15,000-16,000 business people, and 1,400 provincial nominees.¹³⁷ Canada does not have immigration quotas, but instead presents an Immigration Plan to the House of Commons each year; the numbers contained therein are projections reflecting recent experience, not limits, so they may be exceeded.¹³⁸ As Canada has not attained its immigration goals in recent years,¹³⁹ it is making a concerted effort to attract immigrants.¹⁴⁰ Canada also encourages the presence of skilled temporary workers, especially those whose skills are in short supply in the Canadian labor market and "whose presence offers Canada a net benefit."¹⁴¹ All persons seeking entry to Canada who are not Canadian citizens or permanent residents ("landed immigrants") must obtain visitor's status; this status encompasses students, workers, tourists and others.¹⁴²

Pilot projects are one of the easiest methods to obtain employment authorization and exemption from the Canadian job validation process.¹⁴³ These projects parallel the Labor Certification process for permanent residency in the United

135. See *id.*

136. See *id.*

137. See *id.* at 7.

138. See also *Benefits to the American Economy of a More Educated Workforce*, *supra* note 7 at 98 (statement of Stephen F. Clarke, Senior Legal Specialist, Law Library of Congress).

139. See CITIZENSHIP AND IMMIGRATION CANADA, *supra* note 134, at 10 (noting that in 1999 Canada had projected between 100,200-111,200 skilled worker immigrants and approximately 17,700-19,700 business immigrants; however, during 1999 Canada actually welcomed only 89,300 skilled workers and 13,200 business immigrants); see also *Benefits to the American Economy of a More Educated Workforce*, *supra* note 7 at 98 (1999).

140. See *Benefits to the American Economy of a More Educated Workforce*, *supra* note 7, at 34, 37 (acknowledging that the Canadian immigration system works very well, but recognizing that the Canadian system faces different population and economic dynamics than the United States).

141. See CITIZENSHIP AND IMMIGRATION CANADA, *supra* note 134, at 15.

142. See CITIZENSHIP AND IMMIGRATION CANADA, *supra* note 134, at 15; Asher Frankel & Gary Endelman, *Go North Young Man, Go North: Working Temporarily in Canada from an American Perspective*, 77 INTERPRETER RELEASES 73, 75 (Jan. 14, 2000).

143. See Frankel & Endelman, *supra* note 142, at 80-87.

States.¹⁴⁴ The pilot projects require a national job validation letter, which effectively validates a whole class of foreign workers and facilitates the employment authorization process.¹⁴⁵ Presently two such pilot projects are in place: one is for the spouses of employment authorization holders; the other is for software development workers.¹⁴⁶

The Software Development Worker Pilot Project germinated when Canadian employers in the software industry voiced concern over a shortage of qualified, high-level software developers.¹⁴⁷ Several groups, including Citizenship and Immigration Canada, Human Resources Development Canada, Industry Canada, and the Software Human Resources Council, worked together to establish the pilot program and streamline work authorization for the needed workers.¹⁴⁸ Each job description sets out specific "skills, duties, experience, education, and language ability required for each of the seven positions."¹⁴⁹ If a person's qualifications or the job offer does not fall within the descriptions, that person must apply for employment authorization the normal way.¹⁵⁰ Canada began the Software Development Worker Pilot Project in May of 1997 and has extended it because of its success.¹⁵¹

Although the Canadian policies for temporary IT workers are not perfect, these laws have been more heartily embraced by

144. See Frankel & Endelman, *supra* note 142, at 81. Canada is not relying entirely on the pilot projects to ameliorate the worker shortages. The Canadian government also addresses labor shortages through education and training. See Software Human Resource Council, *Software Development Worker Pilot Project: Pilot Evaluation Introduction*, at <http://www.shrc.ca/search/index.html> (last visited Jan. 10, 2001).

145. See Frankel & Endelman, *supra* note 142, at 81.

146. See Frankel & Endelman, *supra* note 142, at 81.

147. See Frankel & Endelman, *supra* note 142, at 81.

148. See Frankel & Endelman, *supra* note 142, at 81. Human Resource Development Canada collaborated with industry, particularly the Software Human Resources Council to identify the needed skills and then to create job descriptions. See *id.*

149. Frankel & Endelman, *supra* note 142, at 82.

150. See Frankel & Endelman, *supra* note 142, at 82.

151. See Frankel & Endelman, *supra* note 142, at 81. An evaluation of the Software Development Worker Pilot Project reports that a majority of firms supported the project and the pilot workers were highly satisfied with it. This evaluation further enumerates the strengths of the project, including its speed and simplicity in facilitating entry into Canada, its highly cost-effective method of enabling employers to obtain highly educated workers, and its ability to increase Canada's attractiveness for high tech workers. See Software Human Resource Council, *Software Development Worker Pilot Project: Pilot Evaluation Introduction*, at <http://www.shrc.ca/search/index.html> (last visited Jan. 10, 2001).

needy employers than their poor Southern cousin, the H-1B program.

B. FOLLOWING THE DOCTOR'S ORDER: IMPLEMENTING CANADIAN STRATEGIES IN THE AILING H-1B LAW

Canadian pilot projects, which help alleviate worker shortages and facilitate the entry of talented foreign workers, stand superior to the H-1B program for several reasons. First, these projects do not impose an annual limit on the number of foreign workers who may enter the country. Second, the projects are implemented with relative ease. Third, the foreign worker's employment status is separable from his or her visitor's status. Finally, the pilot projects do not impose restraints hindering a foreign worker's transition to permanent residency status.

Unlike the H-1B program,¹⁵² Canada does not limit the number of foreign workers who may enter the country to be employed in a pilot project. These flexible projects mirror the Canadian stance on immigration flows.¹⁵³ Canada is not tied to arbitrary numbers like the United States; rather, the Canadian government is intent upon meeting the needs of employers, eliminating the specified worker shortages, and remaining competitive in the global marketplace. This does not mean the projects are allowed to run amuck by ruthlessly taking jobs from qualified Canadians. On the contrary, the projects are closely monitored, and if a shortage persists upon the project termination date, the project is extended to meet the foreseeable need.¹⁵⁴ This quotaless system is far superior to the current H-1B program; it would eradicate the congressional guesswork and pacify needy employers.

Next, in contrast to the complex H-1B visa application that leaves anxious United States employers at the mercy of both the DOL and INS, the Canadian pilot project mends employers and government in a seamless process. Canadian employers are involved in the projects from the start by alerting the government of an apparent worker shortage, and then when the shortage is verified, by helping create the specific job descriptions for the available positions.¹⁵⁵ This cooperation between government and industry undoubtedly culminates in a

152. See AC21 *supra* note 95 and accompanying text.

153. See *supra* note 138 and accompanying text.

154. See generally Frankel & Endelman, *supra* note 142, at 81.

155. See *supra* note 148 and accompanying text.

more efficient information flow and results in a more practical and complete project. In fact, software industry employers and foreign workers alike have expressed much support for and satisfaction with the pilot project because of its cost-effectiveness in obtaining workers and its quick and simple process.¹⁵⁶

If the United States used pilot projects, government and industry could handle various labor shortages in a more efficient and objective manner. Small, representative groups from different regions would meet to pinpoint the exact occupational need. Then, because articulating an estimated number of foreign workers is an inexact science, there would be no H-1B cap for this particular specialty occupation for a specified period of time. If the labor shortage was ongoing, the government and industry group would meet again to extend the cap-less period. This idea would satisfy both the government, which is intent upon retaining the cap,¹⁵⁷ and free market economists and industry, who insist upon a freer flow of resources.¹⁵⁸ Moreover, it would be flexible enough to respond to any labor shortage in the economy.¹⁵⁹

Canadian immigration policy offers a further bonus in its separation of the visitor and employment statuses. The idea that the visitor's status is separable from the employment authorization is an attractive concept.¹⁶⁰ In effect, the Canadian government gives foreigners layers of authorization for entry into Canada. The first basic layer is the visitor's status. This status allows general entry into Canada and encompasses students, workers, tourists and others.¹⁶¹ If a foreign visitor would like to work in Canada, the Canadian government gives another layer of authorization, the employment authorization.¹⁶² The beauty of this system is that if foreign workers become unemployed, they do not automatically lose their reason for being in Canada. The visitor's status continues as a safety net, allowing them to remain in Canada and seek new employment. Conversely, the H-1B visa rests solely on employment in the

156. See *supra* note 151 and accompanying text.

157. See Statement by the President, *supra* note 95.

158. See *supra* notes 9-16 and accompanying text.

159. In this sense, this plan is superior to the inflexible "T" visa proposal which is only for foreign nationals completing a post-secondary degree in mathematics, science, engineering or computer science. See, e.g., H.R. 2687, 106th Cong. (1999).

160. See generally Frankel & Endelman, *supra* note 142, at 75.

161. See Frankel & Endelman, *supra* note 142, at 75.

162. See Frankel & Endelman, *supra* note 142, at 80-87.

United States.¹⁶³ The H-1B visa does not simultaneously embody a visitor's status. Therefore, when H-1B workers lose their jobs, they lose their reason for being present in the United States and must leave as soon as possible.¹⁶⁴ This strong tie to employment is what anti-immigration forces pounce on when comparing H-1B workers to indentured servants since their mobility is severely limited.¹⁶⁵ Section 105 of AC21 has helped the situation by increasing the portability of H-1B visas.¹⁶⁶ However, that still does not allow an unemployed H-1B worker to remain in the United States and be a tourist. Thus, the Canadian policy would offer more flexibility in this regard.

Finally, the Canadian pilot project would be a vast improvement upon the H-1B program because it would not hinder a foreign worker's adjustment to permanent residency. Even with the new AC21 provisions,¹⁶⁷ it is still difficult and time-consuming for an H-1B holder to adjust to permanent residency in the United States. In sharp contrast, Canada has recognized the value of highly-skilled immigrants and has shaped its immigration policy accordingly.¹⁶⁸ The Canadian government understands that temporary workers often stay permanently, and that highly skilled workers actually create jobs, stimulating the economy. Although it is true that Canada and the United States have different immigration and economic needs,¹⁶⁹ the latter makes a fatal mistake in undervaluing highly skilled foreign workers.

III. CONCLUSION

The H-1B visa program is a vital part of U.S. immigration law that allows for the influx of temporary foreign workers in specialty occupations. Today this visa type has become especially critical for employers in the high technology sector because of the pronounced shortage in this area. However, the H-1B visa's quota and time restrictions, not to mention the

163. See *supra* note 31 and accompanying text.

164. In fact, if an H-1B employee "is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien." INA § 214(c)(5)(A), 8 U.S.C. § 1184(c)(5)(A) (1999).

165. See *supra* note 21.

166. See *supra* notes 25-95 and accompanying text.

167. See *supra* notes 111-112 and accompanying text.

168. See *supra* notes 140-141 and accompanying text.

169. See *supra* note 140.

labyrinthine regulations and complex application procedure, are incredibly burdensome to employers and foreign workers alike. Recent H-1B legislation has made headway towards liberalizing the temporary worker program, but the H-1B cap and visa duration regulations remain persistent problems. Implementing the superior Canadian ideas of pilot projects and a fallback visitor's status would inject efficiency and flexibility into the U.S. H-1B program. Thus in the end, a stable, streamlined H-1B program would brighten the outlook of Congress, which need not broach the same problem every couple years; employers, who could hire critical talent; and foreign workers, who could maintain their status and attain their dreams.