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THE L–1 VISA AND AMERICAN INTERESTS IN THE 21ST CENTURY GLOBAL ECONOMY

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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TUESDAY, JULY 29, 2003

UNITED STATES SENATE,
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:34 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Saxby Chambliss, Chairman of the Subcommittee, presiding.

Present: Senators Chambliss, Grassley, Cornyn, Kennedy, and Feinstein.

OPENING STATEMENT OF HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA

Chairman CHAMBLISS. The Subcommittee will come to order. We are here today for a Subcommittee hearing on the Immigration and Border Security Subcommittee for the purpose of reviewing the L–1 visa program.

I appreciate our panel of witnesses testifying today on "The L–1 Visa and American Interests in the 21st Century Global Economy."

Congress created the L–1 visa to allow international companies to move executives, managers and other key personnel within the company and into the United States temporarily. A current concern is whether some companies are making an end-run around the visa process by bringing in professional workers on an L–1 visa who are not solely intra-company transferees. With media reports that some American workers have been displaced, cause for closing the so-called L–1 loophole are increasing.

Today we will hear from a full range of perspectives and will evaluate what actions can be taken without potentially adverse consequences.

One particular issue is with companies who bring in workers not just to transfer within the company, but also for outsourcing them to other companies. For example, an alleged problem arises when an offshore company obtains L–1 visas to transfer foreign workers who had general professional skills that are shared broadly by U.S. workers. Once these L–1 workers arrive in the United States, they are outsourced to a third-party company, often to work with computer software that is widely available. When an outsourced L–1 worker sits at a desk next to his U.S. counterpart doing the same work, a concern is whether the foreign worker really has the kind

of specialized knowledge of his company's product that was anticipated by the statute or whether this is a clever legal use of the L–1 visa that evades the intent of Congress.

Some critics of the L–1 visa have advocated legislation, and that may be appropriate, yet we must be careful not to impose overly-burdensome requirements on United States businesses. Unnecessary restrictions often backfire by limiting flexibility, deterring investment, and hurting the very businesses that we agree already use the L–1 as Congress intended. We need the best people in the world to come to the United States, to bring their skills and innovative ideas, and to support our business enterprises, and the L–1 visa is an important tool to achieve these purposes.

We look forward to our witnesses' presentations today, and before we get to our panels, I want to call on my distinguished Ranking Member from Massachusetts, Senator Kennedy, for any comments he wishes to make.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman. Thank you for having the hearing today.

In today's world, the title of the hearing suggests, commerce, like communication, is global. Every other country in the world is within America's reach, and we are within their reach too. In this new world, Americans earn their livelihood in peaceful competition and peaceful cooperation with the entire world. For the good of the Nation and its economy, we must not adopt an immigration policy whose goal is to isolate our Nation.

Curtailing legal immigration in a way that impedes the flow of highly-skilled foreign professionals or top-level foreign executives and managers may well undermine our economic and competitive leadership in the world.

At the same time, we must make sure that companies do not misuse the temporary visa programs to lay off U.S. workers and replace them with cheaper foreign workers.

There have been a number of media stories about companies firing talented U.S. employees and replacing them with foreign workers brought in under L visas, willing to work longer hours for less pay. In the most flagrant instance, the replaced workers have even been asked to train their foreign replacements. Our immigration laws must contain protections to guards against such abusive layoffs.

The L visa program was created to enable multinational corporations to transfer their top level executives, managers or employees with specialized knowledge of the corporation to assist its affiliates in the United States. The program was not intended to be used to admit rank-and-file employees who have no special knowledge of the corporation but who would compete with U.S. workers.

In contrast, the H–1B visa was designed to admit workers who possessed a needed specialized skill, even though they did not have any specialized knowledge of the corporation. To address the problem of U.S. worker displacement, Congress required companies seeking H–1B visas to demonstrate they were not able to find qualified U.S. workers for their positions.

Recent press reports indicate that some international companies may be misusing L–1 visas to circumvent the worker protections in the H–1Bs and displace American workers. Others claim that the press reports exaggerate the problem and that there is no widespread abuse of the L–1 visa.

The witnesses at our hearing today represent a wide array of views on the issue. Clearly there is anecdotal evidence of abuses of the L visa program. The issue is the extent of the abuses and whether safeguards are needed, either by administrative changes or statutory reforms. Our immigration laws, regulation and procedures must be fair and reasonable, must address the needs of employers and protect the rights of workers. While this task may not be easy, it will be made easier if both opponents and proponents of the L–1 visa program provide this Committee with the assistance in assessing the extent of the problem and suggesting corrective action.

I look forward to the witnesses. I thank the Chair for having the hearing.

Chairman CHAMBLISS. Thank you, Senator Kennedy.

Before we move to our panel, we have one of our distinguished colleagues here, Senator Chris Dodd, who has a presentation he wishes to make on this particular issue.

Senator Dodd, welcome. We look forward to hearing from you.

STATEMENT OF HON. CHRISTOPHER J. DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator DODD. Thank you very much, Mr. Chairman. I will keep this very, very brief, and I want to extend my appreciation to you for allowing me to come by and share some few brief thoughts about the issue.

Let me first of all commend the Committee for looking into this very specific issue. Like many of my colleagues, while I do not sit on this Committee, I felt I knew the immigration laws fairly well, and certainly the H–1B visa program and others. The L–1 program was something I was not terribly familiar with until the issues that you have identified and Senator Kennedy has identified came to my attention in my own state.

Let me state the obvious at the outset, something I am sure that every single member of this Committee and our colleagues would agree with, and that is that we strongly believe that citizens from other nations have made and will continue to make a very sound and enormous contribution to the overall well-being of our Nation. We are after all a Nation that was founded by immigrants, and we have been sustained, and grown as a result of the contribution of millions of people who have come to our shores from around the globe over the last two centuries, and we have remained vibrant and creative because our doors have remained open to supplement the talents of a very gifted and skilled American workforce. I emphasize the word "supplement," Mr. Chairman. Not that I did not say "substitute." That is really what we are talking about here today. I am sure that none of us believe that American workers should be treated as second-class citizens when it comes to the security of their jobs here at home, and that security should not be jeopardized by U.S. Government programs and policies related to

the temporary employment of certain nonimmigrant visa holders. At the very least laws enacted by Congress should ensure that workers living in my home State of Connecticut or elsewhere around the country confront a level playing field when competing for jobs. No member of Congress would knowingly support Government programs that cause American workers to lose their jobs, nor do I mean to suggest that this is a stated purpose of the L–1 visa program that is the subject of this hearing. The stated purposes of the program, I have now grown to learn, allow, as you pointed out and Senator Kennedy has, for intracompany transfers of certain executives, managers and individuals with specialized skills from foreign offices of companies to their U.S. operations on a temporary basis.

During the economic boom of the 1990's, when jobs were easy to find, evidence now suggests that abuses of L–1 and H–1B visas often went unchecked, but the state of the job market has changed, of course. Massive layoffs have occurred at companies both large and small and it now takes months for laid-off workers to find new jobs. The unemployment rate is now over 6 percent.

There is clearly a growing body of anecdotal evidence to suggest that both L–1 and H–1B visa programs have been and are being misused by some employers because of weaknesses in existing law and implementing regulations, and because of ineffective or absent Government enforcement. Between 1997 and 2002 some 3.4 million H–1B and L–1 visas were approved by U.S. Immigration authorities. 70,000 of those visa holders have been employed in my State of Connecticut. The L–1 visa program has grown significantly during that time period, from 203,000 visas issued in 1997 to nearly 314,000 in 2002. This growth in visa approvals has occurred while domestic unemployment has risen in the latter portion of that time period.

One of the witnesses that the Committee will hear from this afternoon will give additional credibility to the belief that at least some of these employers have not hesitated to take advantage of weaknesses in the L–1 visa program to replace American workers with lower cost L–1 visa holders. I have come to the conclusion, Mr. Chairman, that it is time for Congress to take a serious look at the L–1 and H–1B visa programs and to propose remedies for the offensive weaknesses in those programs, weaknesses that are hurting our own citizens, and hope these hearings will be the first step in that process.

I sought to take some steps of my own in that direction a weak or so ago with the introduction of S. 1452, the USA Jobs Protection Act of 2003. I was pleased to be joined in that effort by our colleague, my colleague from Connecticut, Republican House member Nancy Johnson, who I know, Mr. Chairman, you served with in the House. She and I have brought together the various House proposals, and have combined it in a single proposal which she has offered there and I have offered in the Senate, and I would ask unanimous consent that a copy of that bill be included in your record if it is all right.

Chairman CHAMBLISS. Without objection.

Senator DODD. Once enacted into law, we think that this would ensure the L–1 visa program is utilized, continue to be utilized for

the purposes which it was originally intended, and that was not to displace American workers with lower-cost foreign visa holders. This legislation would also tighten the law with respect to H–1B visa programs, but I will not go into that today. That is not the subject of your hearing.

Very simply, let me just say what the bill would do, and you have already commented on some of the suggestions. First, it would end the practice of allowing L–1 visa holders to be subcontracted by one employer to another. This is becoming a growing feature of this program. That was never the intent of the legislation initially. It would also take away a big incentive for replacing American workers with L–1 visa holders by requiring that these new workers are paid the prevailing wage of the job that they would be replacing. It requires that before a U.S. employer seeks to bring a specialized worker from a foreign affiliate of his or her company, that a documented, good faith effort should be made to fill the position with American workers. The L–1 visa program was established to allow companies to temporarily bring to the United States managers and executives with an institutional memory of the firm's practices and policies to pass on that knowledge. I agree that such institutional expertise is invaluable to the success of a company's operations in the United States. But the individuals that are granted visas under this provision should have a well-established work history with a company to qualify for such a visa. That is why we have included a provision in our bill that would require individuals seeking L–1 visas must have been employed by the company seeking their transfer to the United States for two of the last 3 years, rather than 6 months of 1 year required under existing law.

I mentioned earlier that there is a growing body of anecdotal evidence that suggested that both the L–1 and H–1B visa programs are creating problems with certain categories of American workers. Why do we not have more hard data on this important issue? I would say to the Committee that this is because there has been very little Government oversight or enforcement of these programs, particularly the L–1 program. I have attended to address this deficiency. Our bill contains provisions that would require the Labor Department to oversee this program. It will finally provide the Labor Department with the authority it currently lacks to investigate potential violators of the law and to impose sanctions. The bill would also make a number of reforms in the H–1B visa program. I will not go into that right now. I will submit some of that for the record if I may.

I know the Committee has a number of witnesses you are going to hear from today which I think can offer some additional light on this subject matter.

Mr. Chairman, based upon many Connecticut families that I have heard from on the subject, together with the testimony you are going to hear today, I believe the L–1 and H–1B visa programs have contributed to the growth in unemployment in Connecticut and elsewhere. It is within this Committee's legislative responsibility to analyze these problems created by the current law and practices, and propose remedies. As you do so, I would urge members to give consideration to the bill that Congresswoman Johnson and I have submitted, and I will be willing to work with you as

we try and fashion some remedies here to try and straighten this situation out. What is self-evident of course is that the status quo is not acceptable. American workers have the right to expect the Congress to do what is necessary to protect their jobs from this kind of activity so that the will be able to continue to provide for their families.

I certainly look forward to working with you and other members of the Committee to provide that kind of leadership on this issue, and I thank you immensely for allowing me to share some of these thoughts with you and the Committee.

Chairman CHAMBLISS. Senator Dodd, thank you very much for being here. We appreciate your insight and your hard work to this point on the issue, and we look forward to the referral of your bill and continuing to dialogue and work with you as we solve this in the way that is most beneficial to the American worker and the American business community.

Senator DODD. Thank you very much, Mr. Chairman. I appreciate it.

Senator KENNEDY. May I just thank you for your presence here. In the H–1B we have a requirement for $1,000 fee. Actually I thought it ought to be higher. That fund is used for training Americans so that they can develop those skills over the period of time. One of the things that we see in short supply is the resources, even for the Department of Labor, to look into these abuses, whether it is H–1B or the L visas. Do you think it would make sense if they were doing a similar kind of thing, bringing in these foreign workers for the L–1, that they might also participate in a similar kind of a program in terms of the skills? You might just take a look at it and let us know what you might think.

Senator DODD. In fact, the bill I have introduced has that provision.

Senator KENNEDY. It has that provision?

Senator DODD. We think that is sound judgment.

Senator KENNEDY. Is it $1,000?

Senator DODD. I think we used $1,000. We can say it pays for itself. We do not have a dollar amount in the bill.

Senator KENNEDY. Okay.

Senator DODD. I think it is a very good suggestion as well, and I know that you are going to look into the H–1Bs and I supported it back a few years ago. I mean my State is a good example. It is a high-tech State, a lot of information technology, and there was a real demand back a few years ago. We raised the caps on the H–1B visa program, and I think we did so wisely at the time. That is only a 3-year deal. You are going to have to reconsider that now, and I would hope when you are looking at it, we take a look at this new environment we are operating in now before allowing that number to go back up to the years we have had previously, just as a suggestion.

Chairman CHAMBLISS. You are correct. It has to be reauthorized by the end of September, and Senator Kennedy and I intend to make sure we thoroughly review it between now and then.

Senator DODD. Good. Thank you very much.

Chairman CHAMBLISS. Again, thanks very much.

We will now call panel members up. Patricia Fluno, who is a former Siemens Technologies employee from Lake Mary, Florida; Beth R. Verman, President, Systems Staffing Group, a member of the National Association of Computer Consultant Businesses from Bala Cynwyd, Pennsylvania. I hope I said that right. Michael W. Gildea, Executive Director, Department for Professional Employees from the AFL–CIO here in Washington, D.C.; Daryl Buffenstein, General Counsel, Global Personnel Alliance from Atlanta, Georgia; Mr. Austin T. Fragomen, Jr., Chairman, American Council of International Personnel, Washington, D.C.; and Mr. Stephen Yale-Loehr, Adjunct Professor, Cornell Law School, Ithaca, New York.

As we introduce you individually here, we will recognize you for opening statements. We are going to start over here with you, Mr. Yale-Loehr. Excuse me. We are starting over here with Ms. Fluno. And if you will, due to the size of our panel, we will be happy to take any statements you want to put in the record, but if you will limit your opening comments to 5 minutes or less, we will greatly appreciate it so we can get to questions from the members to you.

So, Ms. Fluno, welcome. Thank you for coming up from Lake Mary, Florida, and we look forward to hearing your story, which we have all read about, and we appreciate you being here today. Thank you.

STATEMENT OF PATRICIA FLUNO, FORMER SIEMENS TECHNOLOGIES EMPLOYEE, LAKE MARY, FLORIDA

Ms. FLUNO. Thank you very much. My name is Pat Fluno. I am a computer programmer from Orlando, Florida. My coworkers and I lost our jobs to visa holders from India. I would like to begin by reading excerpts from a letter I wrote to Representative John Mica in August of 2002, asking for help.

We are employees in the data processing department of Siemens ICN, at both the Lake Mary and Boca Raton sites. We are all U.S. citizens and full-time salaried computer programmers and analysts ranging in age from 33 to 56.

Approximately 15 employees have letters dated August 19, 2002, indicating a layoff date in conjunction with the restructuring of IT. At that time, employee meetings were held informing us that the department would be outsourced. During the months of May and June management had meetings with outsourcing companies on site. We were interviewed by several of those companies and all expressed surprise that we had already been given definitive layoff dates. During the last week of June, the outsourcing company was announced as Tata Consulting Services of India. People from TCS were on site July 1st. They immediately begin interviewing us on how to do our jobs. Layoffs of Americans began on July 15 and were scheduled to continue through August 30.

We are being laid off and TCS personnel are taking our jobs. Siemens management has told us to transition our work to TCS and show them how to continue the development and support work already begun by Americans. My letter to Representative Mica ends by asking for help to prevent this injustice.

We lost our jobs and we had to train our replacements so there would be little interruption to Siemens. This was the most humiliating experience of my life.

Our visa-holder replacements are sitting at our old desks, answering our old phones, and working on the same systems and programs we did—but for one third the cost. This is what a manager at Siemens told me. 15 people were laid off. At an average high-tech salary of $75,000 each, that is over $1.1 million of gross wages lost to Federal and State income taxes, from just 15 people. The visa holders do not pay income taxes. Representatives of TCS will tell you that their programmers make $36,000 per year, which is just under the average starting salary range for American programmers. But what is the breakdown of that money? $24,000 of that is nontaxable living expenses for working out of town. That leaves just $12,000 of real salary paid to them in equivalent Indian rupees. $12,000, close to the U.S. minimum wage. An American having an income of $36,000 would have to pay taxes, but not these visa holders. There are no salary rules for L–1 visas.

How can they come to the U.S. so easily? The L–1 states that they must be a specialized knowledge worker familiar with the products and services of the company. There are many legitimate uses for the L–1 to transfer employees from one company subsidiary to another. But transferring a worker from Tata India to Tata U.S. for work at Siemens is not what was intended by the L–1 visa. They are not working on Tata's computer systems, but on those of Siemens. In our particular case, Tata knew Americans were being laid off, so they did not use the H–1B visas. Instead they fraudulently used the L–1. There are no regulations regarding the misuse of L–1s and only limited penalties for H–1B abuse. Where is the INS? Where is the DOL? There are hundred of thousands of L–1 and H–1B workers in the United States taking jobs that Americans can do and that Americans want to do. Every H–1B and L–1 visa given to outsourcing companies like Tata is a job an American should have.

What is happening here? In a time when our National security is paramount, we are making ourselves dependent on third world nations for our computer technology. We are giving these countries the ability to access, modify and break the very computer systems that run the U.S. economic infrastructure.

Yet, we have an even greater parasite on our economy, and it comes from American companies. U.S. corporations are taking entire departments and relocating them to an Indian subsidiary. Hundreds of data processing, payables, and call center jobs are lost at one time. Ask Microsoft. Ask IBM. Ask Cigna. Ask almost any large U.S. corporation and you will find they have sent jobs offshore. The term "offshore" is just a euphemism for American jobs that are lost and will never return. What is the economic impact of this? In the short term these companies say they are cutting costs, but in the long term they are undermining their consumer base. Where will our children find jobs? In marketing perhaps? Marketing to whom?

We need incentives to keep jobs in the U.S. We need monitoring of visa holders. We need fines for abuse and punitive damages for affected American workers. Current H–1B penalties only apply to certain types of companies. Misuse is misuse. It must apply to all situations equally. We need to enforce the laws we already have. Why can a company like Tata, operating in the United States,

mock our equal opportunity and ethnic diversity laws? Where is the EEOC?

I have one question to ask all the CIOs and all the CEOs who have laid off U.S. citizens in favor of cheap labor. How does it feel to know you have personally contributed to the decline of the American economy? How does it feel?

Thank you.

[The prepared statement of Ms. Fluno appears as a submission for the record.]

Chairman CHAMBLISS. Thank you very much.

Ms. Verman, welcome.

STATEMENT OF BETH R. VERMAN, PRESIDENT, SYSTEMS STAFFING GROUP, INC., ON BEHALF OF THE NATIONAL ASSOCIATION OF COMPUTER CONSULTANT BUSINESSES, BALA CYNWYD, PENNSYLVANIA

Ms. VERMAN. Thank you, Chairman Chambliss, members of the Subcommittee.

My name is Beth Verman. I am President of Systems Staffing Groups, Inc. My company is located just outside of Philadelphia, and I am appearing today on behalf of the National Association of Computer Consultant Businesses, the NACCB. The NACCB has approximately 300 member firms with operations in over 40 States and is the only national trade association exclusively representing information technology, IT services companies. On behalf of NACCB we thank you for allowing us to address this important issue.

My company, like other IT services firms, serves the need for flexibility in the IT workforce. It does not make economic sense for most clients to stay fully staffed for all potential IT development projects. That would be like permanently employing every construction trade for an office building project that may be needed some time in the future. Most large companies maintain a split between in-house employees and outside consulting resources. Consulting resources can be shifted to respond to a client's needs for different skill sets and different levels of demand. IT consultants are utilized to both augment existing in-house personnel as well as provide teams to help develop and integrate technology projects. This staffing flexibility helps make full-time employees more secure and gives their employer the flexibility needed in our rapidly changing environment.

After over 12 years in the IT staffing business, I founded Systems Staffing Group, a certified woman-owned business, in September 2000. My company specializes in placing IT professionals such as java programmers and software engineers with Fortune 500 insurance and financial services companies. Most of my clients are located in Pennsylvania, Delaware, New York, New Jersey and Connecticut. I am a small business, averaging 20 consultants on billing, and I anticipate doing over $2.5 million in gross revenue this year. I was honored to have recently received one of Philadelphia's top "40 under 40" minority executive awards.

While I am proud of my firm's progress to date, particularly in light of becoming a new mother this year, I have been frustrated that its growth has been hampered because of unfair competition

with large foreign-based consulting companies that are not playing by the same set of rules my domestic company plays by. Let me give you a specific example. In prior years we typically place 12 or more consultants a year at a major insurance company. Since January 1st of this year, we have only placed 2 consultants at the same client site. This is not a result of lack of demand. Rather, many of the consultants we have placed at this large insurance company, along with many direct employees of the company, have been replaced by individuals brought into the United States by large foreign consulting companies on L–1B intracompany transfer visas reserved for persons with specialized knowledge. I have personally seen similar arrangements at other client sites, and the NACCB has reports from other members experiencing the same kind of displacement.

The L–1B visa was established to allow multinational companies to bring persons with specialized knowledge of the petitioning company's products, procedures and processes to the U.S. to work for a related U.S. company. The specialized knowledge is supposed to be an advanced level of skill that does not involve skills readily available in the U.S. labor market. The foreign IT workers that have been placed at some of my client sites are not utilizing any specialized knowledge. They are in effect staffing assignments at a third party client site. Although these firms often package their services as fixed price or time and material projects, the L–1B IT workers they employ are performing the same jobs, sitting at the same desks as consultants I had placed on a staff augmentation basis with the same client. Based on my observations, the IT workers brought in on L–1B visas possess no unique skills; their skill sets are readily available in this country. By simply posting an available position to a major Internet job board, my recruiters could quickly generate hundreds of qualified candidates who possess the required skills being filled by workers who have entered the country on L–1B visas. Why then are so many of these foreign companies using the L–1B specialized knowledge visa? The answer is it gives them an unfair competitive advantage in selling IT services against U.S. based companies.

By squeezing IT workers into the L–1B visa category, it appears that these companies are circumventing many of the requirements of the H–1B visa program. Under the L–1B program, unlike the H–1B program, there is no obligation to pay a prevailing wage, no obligation to pay $1,000 fee to support education and training of U.S. workers, no obligation to attest an effort has been made to recruit a U.S. worker or attest that there has not and will not be a layoff of a U.S. worker for H–1B dependent companies. Finally, by its nature, the L–1B visa is only available to companies with an offshore presence, leaving firms such as my company with only a U.S. presence at a competitive disadvantage.

By utilizing the L–1B program, large foreign consulting companies are able to undercut my client billing rates by 30 to 40 percent. The only way to undercut billing rates to that extent is to pay IT workers significantly less than an equivalent U.S. worker. Further, NACCB has serious concerns whether L–1B visa holders and their petitioning employers are meeting all of their U.S. tax obligations.

While I believe there are flaws in the current L–1B visa program, NACCB and I remain strong supporters of business immigration. During the talent shortage that this country experienced in the late 1990's and into 2000, which was particularly acute in technology-related positions, NACCB supported an increase in the H–1B visa cap. While most of the consultants I place with clients are U.S. citizens or legal residents, I do place H–1B consultants brought in by other firms. NACCB and I believe that responsible business immigration contributes to U.S. competitiveness and is an essential business tool in a global economy.

As this Subcommittee considers the current L–1B program, I would hope you would consider some modest changes that will allow the legitimate use of the L–1 visa to continue, but eliminate the current abuses of the visa. NACCB has provided you in our legislative changes, those changes that we would like to see.

Some have called for more drastic measures such as prevailing wage requirements and annual caps. NACCB and I believe that these measures are neither necessary nor advisable. Given the differences in pay scales between the United States and many other nations, prevailing wage requirements would exclude the entry of many executives, managers and individuals with substantial knowledge of proprietary processes that contribute to U.S. competitiveness. Likewise, annual caps, which are notoriously difficult to set with any degree of accuracy, would potentially restrict the legitimate use of the L–1 visa without addressing the problem. By limiting the use of the visa for the purposes for which it was originally intended through modest statutory changes, the abuses can be eliminated without overly restricting the movement of individuals for legitimate business purposes.

Mr. Chairman, in conclusion, I am ready, willing and able to compete aggressively in the marketplace. I not only welcome competition, I relish it. I have always succeeded in highly-competitive environments. Such an environment requires me to continually improve and deliver greater value to my clients. However, I am being asked to compete against foreign consulting companies that are provided an unfair competitive advantage by stretching my own country's immigration laws. To use a football metaphor, the L–1B visa program as it is currently being used allows foreign IT services companies the ability to start with the ball on my 10 yard line, whereas I must start with the ball on my own 20. All we ask is that U.S. laws are clarified, upheld and enforced so we have a level playing field. I urge this Subcommittee to begin the process of leveling this playing field. Thank you for the opportunity to express my views and the views of many U.S.-based IT services companies.

[The prepared statement of Ms. Verman appears as a submission for the record.]

Chairman CHAMBLISS. Thank you very much.

Mr. Gildea, pleased to have you today.

STATEMENT OF MICHAEL W. GILDEA, EXECUTIVE DIRECTOR, DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL–CIO, WASHINGTON, D.C.

Mr. GILDEA. Thank you, Mr. Chairman.

My name is Mike Gildea, and I am the Executive Director of the Department for Professional Employees for the AFL–CIO, a consortium of 25 national units representing nearly 4 million professional and technical employees in both the public and private sectors.

Mr. Chairman, we appreciate the opportunity to present our views here today. Mr. Chairman, we also appreciate your comments and those of Senator Feinstein and other members of the Subcommittee during full Committee deliberations on the Chile-Singapore Free Trade Agreements. Hopefully, the USTR will refrain from dabbling in immigration law in future agreements in light of the bipartisan bicameral backlash that has resulted.

That confrontation did serve to raise a much larger issue related to guest worker visa policies, and that is that there is no coherent national policy regarding professional guest workers.

Whether it is L–1, H–1B, TN visas or other such programs, each operates under different standards, limitations and rules of accountability where they may exist. Given the adverse impact that these programs are having on U.S. professionals, perhaps now is the time to develop a more holistic coordinated Federal policy in this regard.

What is particularly baffling about these programs is there is no nexus between the unusually high current of unemployment among professional and technical workers, and the fact that the guest worker population now numbers over 1 million according to some estimates. As a result, well-qualified American professionals are forced to compete against foreign workers here in the us for domestic jobs. In our opinion, there is something seriously wrong with this picture.

I strongly urge the Subcommittee to address these and other public policy anomalies as you consider badly-needed reforms in both the L–1 and H–1B programs. Key policy questions need to be addressed. What is the total number of guest workers that should be allowed into the U.S. under all such programs? To what extent should there be uniformity across all programs with regard to protections, eligibility, qualifications, enforcement protocols, et cetera? Should employers be limited in the total number of temporary foreign workers they can have on a payroll from all guest worker programs?

As to L–1, it is intended to facilitate intracompany transfer for purposes of training strategic personnel with global corporations that have U.S. facilities.

We have no problem with this concept. But now it has morphed into something that has victimized highly-skilled, well-educated American professionals like Patricia Fluno.

The L–1 program has few limitations, and such, it is ripe for fraud and abuse. There are no statutory prohibitions against using L–1s to replace an American worker. Such replacements should be banned, and stiff penalties including civil fines and debarment for violation should be imposed along with strengthening DOL enforcement tools. In addition, the relevant sections of the "dependent employer requirement" under H–1B should also be applied.

There is no annual limit on the number of L–1 visas that can be issued. According to State Department statistics from 1995 to 2001 the number of L–1 visas doubled from 29,000 to over 59,000. Given

these numbers, we suspect that some employers are job-churning the L–1s, that is, bringing them in for 3, 4, or 5 years, and then replacing them with second and third general L–1s. We would recommend that a cap be imposed that reflects the utilization average over the last decade, about 35,000.

Another problem is the renewability of the visa, an issue that was a major point of controversy regarding the misnamed "temporary entry" provisions of the trade agreements. L–1 has a two-tier renewal scheme for the 1-year visa. For those with specialized knowledge it is 5 renewals. We do not believe that 5 years is a temporary program. 2 to 3 years is sufficient, especially if these L–1s posses a high degree of specialized knowledge.

Subcontracting by outsourcing firms is another abuse. I doubt that Congress envisioned the likes of Tata Consultancy Services, Wipro and Infosys Technologies, all Indian-owned firms, when it created the program 33 years ago. As some of the more senior members of this Subcommittee know, some of these firms and others like them have a troubled history under H–1B. Today they are among the biggest users of the L–1 program. Their outsourcing under it appears to contradict the original intent of the program. On this point, the statutory language seems clear, so it would be a reasonable clarification of law to specifically prohibit subcontracting.

During deliberations on the trade agreements, Congress forced the USTR to agree to the same fee that is applicable under H–1B, $1,000 per visa, and that should be applied to the L–1 program with the bulk of the proceeds going to oversight and enforcement by the appropriate Federal agencies. The imposition of the $1,000 fee would serve as a modest disincentive to discourage overuse of the program and accomplish a better degree of fee uniformity across all professional guest worker programs.

In the Siemens case, according to the San Francisco Chronicle, Tata Consultancy acknowledged that it paid wages below the average local wages for basic programmers, which was far below the wages paid to U.S. employees who were fired. Requiring the payment of a prevailing wage to L–1 workers would discourage those who would try to use the program as a back door to cheap labor.

Mr. Chairman, we have detailed for the Subcommittee other problem areas and reform proposals in our written submission. I would therefore like to close by raising one final concern that your Judiciary Committee colleague, Senator Lindsey Graham, reference at each of the recent full Committee sessions on the trade agreements, the outsourcing of professional and technical jobs overseas. This matter was the subject of a recent hearing in the House Small Business Committee.

Recently there has been a spate of news article about this troubling phenomenon. The reason I raise it in the context of your hearing is that there is a connecting thread and that is Tata, Wipro and Infosys, the firms I mentioned earlier. They are not just brokerage houses for L–1B and H–1B visas, they are among the primary players involved in the transfer of tens of thousands of U.S. jobs and tens of millions in payroll.

A recent study by Forrester Research estimates that if current trends continue over the next 15 years, the U.S. will lose 3.3 mil-

lion high-end service jobs and $136 billion in wages. Today major U.S. firms from many sectors are falling all over themselves to get into the outsourcing exodus.

As they used to say in one of this Nation's greatest technology initiatives, the space program, "Houston, we've got a problem," and I would suggest it is a big one. One this time it is not textile, steel, machine tool and other manufacturing jobs. Many of them are long gone. Now it is the high-tech, high-paying jobs that are headed out of town. The question for this Subcommittee is to what extent are guest worker programs under your jurisdiction contributing to the outsourcing tidal wave? I would suggest that it is significant.

In conclusion, professional technical workers in this Nation have made enormous personal sacrifices to gain the education and training necessary to compete for the knowledge jobs in the so-called new American economy. They deserve better than to be victimized by immigration programs like L–1 and H–1B. Congress can make a long-overdue start in cleaning up guest worker visa programs by implementing badly-needed reforms.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gildea appears as a submission for the record.]

Chairman CHAMBLISS. Thank you very much, Mr. Gildea.

Mr. Buffenstein, welcome, and we look forward to your testimony.

STATEMENT OF DARYL R. BUFFENSTEIN, GENERAL COUNSEL, GLOBAL PERSONNEL ALLIANCE, ATLANTA, GEORGIA

Mr. BUFFENSTEIN. Thank you, Mr. Chairman.

The Global Personnel Alliance, Mr. Chairman, is a group of companies, a loose consortium of companies that are very interested in immigration and global mobility issues because of the effect on generating employment in the United States and on maintaining the competitiveness of U.S. industry abroad.

Mr. Chairman, we would like to commend your comments and the comments of Senator Kennedy to the extent that they reflect a sincere intention to look carefully at this problem before rushing to legislation.

We are not here to dispute or question any facts that have been asserted by any witnesses today. Indeed, everyone should have profound sympathy with anyone who has lost their job for whatever reason. There may well be circumstances where people on L–1 visas have been improperly classified. But if I may borrow a term that Al Simpson used on this Committee when he chaired it many years ago. Professor—Senator Simpson, sorry.

Senator KENNEDY. Better be careful now which one you use.

[Laughter.]

Mr. BUFFENSTEIN. He is now a professor, that is correct. But as Senator Simpson would have said, "We are a couple of tacos short of a combination plate."

[Laughter.]

Mr. BUFFENSTEIN. The issue we have heard about today, Mr. Chairman, is a small slice of a very big picture, and that picture is the story of international investment creating jobs in this country in small towns across the country, the very kind of jobs Mr.

Gildea talked about having disappeared, manufacturing jobs, bread and butter, meat and potatoes jobs throughout the country, the story of how American companies keep competitive on international markets by bringing in a select cadre of specialists, managers, executives, technologists, who bring the technologies here so that we can export, who bring the technologies for research and development facilities that stay here so that we can keep jobs here rather than sending them offshore. In all the cited instances that we have heard about today, all the articles that have been written on this subject recently, and there have been a good number of them, reflect a very specific and particular phenomenon, and that is a phenomenon where an L–1 visa holder is working off site at another company that is not the company that brought the L–1 visa holder in, using knowledge that more often than not, as Ms. Fluno mentioned, appears to be generic knowledge and not specialized knowledge.

So we ask you not to throw the baby out with the bath water. If there is legislation it needs to be focused exactly on that problem. In looking at that problem it should be remembered that many of the instances in which an employee works off site, as we will show in a while, are very legitimate instances.

Mr. Chairman, there is not one Governor in this country I think that has not taken a trip abroad. Many States have offices simply to encourage foreign investment, to encourage international investment. Georgia has 250,000 jobs attributable to foreign companies. Massachusetts has almost exactly the same amount. Texas has something like 475,000 jobs, New York close to 500,000 jobs, and California a whopping 750,000 jobs attributable to international companies. That investment would not be here without the people that bring it, the specialists who bring in the know-how, and the technologies.

There is a small German-owned company in South Carolina that set up a manufacturing facility to manufacture transmission belts that has manufacturing operations in Ohio as well, that has 470 workers and just one L–1 visa holder. But that person is necessary to bring in technology from a manufacturing facility in Sweden that is now used to manufacture in the United States.

There is a Belgian company that is based on Georgia that just bought a manufacturing company in Utah that already has 100 employees. By bringing in specialized digital signage technologies from Europe, that company believes it can increase that manufacturing facility to 300 people within two to 3 years.

These are not unique examples, Mr. Chairman. They are examples that are bound. There are as many examples as they are foreign companies operating in each State, and in Georgia, there are 1,500 with 600 manufacturing facilities counted in that number. But the role of the L visa in creating American exports and developing American competitiveness abroad is even more compelling. A major airline with 60,000 employees, 58,000 of them in the United States, used the L visa to bring in a pricing analyst who had competitive knowledge of foreign markets, confidential knowledge of that airline's position on foreign markets. That airline, out of 58,000 employees, has only 12 L–1s, .0002 of its workforce. A major manufacturer in Ohio has a select cadre of some 30 L–1s in a work-

force of 60,000, that bring in key knowledge of its foreign markets so it can customize equipment for sale abroad.

In many instances, or at least some instances, Mr. Chairman, there are circumstances where people are placed, as I have said, at other employers. A California developer of optical lenses needed to bring in a key global developer of that lens coating and have that person work as a joint venture partner. That development will create hundreds of jobs and would not have been possible without that person. The State Department, in its operating guidelines, has developed a scenario whereby those situations should be differentiated. Maybe sometimes it has not been honored, but many other limitations on the L visa that have been suggested go way beyond that initial scenario we have talked about. What we need here is a surgical instrument to look at the problem and devise legislation, not a sledge hammer that will knock off every company from its competitive advantage.

Mr. Chairman, thank you for the opportunity to talk to you today.

[The prepared statement of Mr. Buffenstein appears as a submission for the record.]

Chairman CHAMBLISS. Thank you very much, Mr. Buffenstein.

Mr. Fragomen, welcome. We look forward to hearing from you.

STATEMENT OF AUSTIN T. FRAGOMEN, JR., CHAIRMAN, AMERICAN COUNCIL ON INTERNATIONAL PERSONNEL, INC., WASHINGTON, D.C.

Mr. FRAGOMEN. Good afternoon, Chairman Chambliss, Senator Kennedy, distinguished members of the Committee.

The American Council on International Personnel is a nonprofit corporation founded in 1972 with over 300 members, all of whom are large global corporations, who collectively thousands of L petitions. For over 30 years the L-visa category for intracompany transfers has been essential to international investment and economic expansion. It is a tool that allows U.S. companies to participate in the global economy, and it has become a model for other countries seeking to capture a share of the global marketplace by facilitating the international transfer of knowledge, skills and talent. ACIP shares a concern of the Committee and of the previous witnesses regarding possible fraud and abuse in the program, and I think we all agree that appropriate sanctions should be imposed upon those who misuse the immigration system. However, the L visa is critical to the continued participation of U.S. companies in the 21st century global economy, and we urge Congress to move forward deliberately and with caution, which we can take from this hearing seems to be the predisposition of the Committee.

To understand the L visa, it is important to understand the scope of international personnel transfers which fall in the general category of global mobility. I mention in my paper that a recent survey of 181 companies revealed that they have a combined expat population of over 35,000 employees. Unlike years past when primarily upper level executives were transferred abroad for a few years to gain international perspective and broader knowledge of markets and business practices abroad, today's transferees include

professionals from all levels and operating units within the company.

Where the problem has been created is, as pointed out by several witnesses and recent media articles, Congressional hearings, focusing on L visa usage in the context of outsourcing information technology and other professional services. A company may choose to outsource for a variety of reasons including where it wishes to limit in-house services to core competencies, to obtain enhanced services from expert service providers, or simply to reduce cost and maintain profitability. Outsourcing is not a new business model, but we acknowledge that it often comes with painful adjustments for U.S. workers.

What has changed is that increasingly outsourced work is going to offshore firms or offshore subsidiaries of U.S. firms. Immigration laws, in particularly the L–1B, certainly facilitate these business arrangements, but are a by-product rather than an impetus for the offshoring model. Congress should consider what efforts must be made to ensure that the U.S. is an attractive locale for investment, that wages and working conditions of U.S. workers are not unfairly undercut, and that U.S. workers are prepared to meet the challenges and opportunities of the new economy.

Proponents argue that while offshoring may cause some temporary dislocation in the U.S. workforce, it will also keep industries competitive, provide investment in developing countries and eventually create new markets for U.S. goods and services that will spur future economic growth. Whether one agrees with this assessment or not, the trend toward outsourcing and offshoring will not be halted by changes to the immigration laws.

We have few recommendations. First, allegations that U.S. workers have been laid off and replaced by cheaper foreign workers extend to a very limited group of L–1B specialized knowledge employees who work off site. Therefore, any correction should be targeted at this perceived problem and not at the L visa category as a whole. The most effective approach to meet this objective would be to clearly delineate what does and does not constitute specialized knowledge. For example, knowledge of generic programming languages should not constitute specialized knowledge. ACIP firmly believes that with the appropriate guidance from Congress, BCIS and DOS are well-equipped to make determinations regarding eligibility for an appropriate usage of L–1 visas. It is not necessary to rewrite the entire L law, add significant new regulatory burdens for all L visa employers or create a new regulatory scheme.

Second, the detection of fraudulent credentials, questionable business entities and inappropriate use of the program can be enhanced through precertification programs where companies frequently filing L visa applications under the L-blanket petition of established criteria and protocols, limited resources demand that we increase information sharing and cooperation between the Government and employers.

Finally, ACIP believes that the issues spurring many of the concerns expressed today derive from changes in the global economy and not deficiencies in the L category or regulations. Congress has a duty to consider the impact of new business models such as offshoring and opportunities for U.S. workers. However, the L visa

is but a small piece of the puzzle. ACIP and member companies have and will continue to work on and support a variety of education and workforce initiatives to ensure we have access to the talent needed to compete in the 21st century global economy. We should not let short-term economic difficulties blind us to long-term economic opportunities. ACIP recommends that Congress commission a study with the input of business experts that examines emerging economic trends and examines the array of policies necessary to ensure future economic growth and opportunities for U.S. workers.

The L visa program, particularly the blanket program, is extremely important in facilitating global commerce for U.S. companies and has been for over 30 years. It is a model of success in an often broken immigration system. Our challenge is to create a secure and efficient immigration system that protects U.S. workers while anticipating employers' needs for access to talent from around the world. ACIP stands ready to work with you in building such a system.

So I thank you for your time and consideration, and request that our full statement be included in the record. Thank you.

[The prepared statement of Mr. Fragomen appears as a submission for the record.]

Chairman CHAMBLISS. Certainly we will be happy to include your full statement, and thank you, Mr. Fragomen.

Professor Yale-Loehr, we are pleased to have you and look forward to your testimony.

STATEMENT OF STEPHEN YALE-LOEHR, ADJUNCT PROFESSOR OF LAW, CORNELL LAW SCHOOL, ITHACA, NEW YORK

Mr. YALE-LOEHR. Thank you very much. Mr. Chairman, distinguished members of the subcommittee, I teach immigration law at Cornell Law School. I am also a co-author of a 20-volume immigration law treatise that is the standard reference work in the field. So I am testifying today from an academic background to try to give you some overview and perspective about the L–1 visa category. Much of what is in my written testimony has already been mentioned before so I am not going to tell you about the differences between the L–1A or the L–1B. Instead let me first focus on how the L–1 visa category is being used.

As my grasp in statistics and my testimony indicate, L–1 visa usage has waxed and waned over the last 10 years or so. It has always been much less used than another common visa category, the H–1B. At its peak in fiscal year 2001 the State Department issued 59,000 L–1 visas. Even that, though it sounds like a lot, was only 37 percent of the H–1B visa usage for that year, and that 59,000 L–1 visas constituted less than 1 percent of all nonimmigrant visas issued that year. Moreover, as you have heard from the other witnesses, the controversy within the L–1 context focuses on one subset of L–1s, and that is L–1B's. The State Department does not separately categorize how many L–1B visas it breaks out, and that is one thing that I would recommend, is to try to find out how the L–1B visa usage has increased over the years, because I think that it is common consensus that there is no real problem with the L–1A visa category for executives and managers.

Similarly, on numbers, I want to point out, some people have said, for example, that there ar 300,000 L–1s that come into the country every year. That number derives from statistics by the Bureau of Citizenship and Immigration Services as to the number of entrants, admissions each year by L–1 visa users, and L–2 spouses and children. Therefore, that number is exaggerated because on average the BCIS estimates L–1 visa holders come in about 5 times a year. So that is not a true picture of the usage. It is rather how many times they are coming in back and forth. Therefore, it gives you an idea of how often L–1 visas are used for multiple travel over the years rather than being here just one time continuously in the United States.

One other thing I want to focus on is the difference between the L–1 category and the H–1B visa category because I think it is important they are for two different reasons, and we need to keep those differences distinct.

The H–1B visas are granted to professionals who have at least a college degree or equivalent. They are needed to provide unique skills, relieve temporary worker shortages or supply global market expertise. By contrast, the L–1 visa is designed for a narrower purpose, as we have heard, to help international companies bring in managers, executives or people with specialized knowledge on a temporary basis to assist their U.S. operations. There is no degree required for L–1 eligibility because general educational requirements are not relevant for this category. Instead what we need are people who have inside knowledge about the company's operations and who bring that kind of background to bear when they come to the United States. A degree may be irrelevant, and as Mr. Buffenstein's written testimony indicates, in some instances there are people who do not have college degrees, but because of their unique knowledge of the company's operations, the L–1 visa category is the only way they can come into the United States. So we should not impose a professional degree requirement on the L–1 visa category.

Similarly, there are differences between the H–1B and the L–1 such as there is no portability of employment to unaffiliated entities in the L–1 category, and there are no extensions of L–1 stay beyond the statutory cap of 5 or 7 years. Thus, in these respects the L–1 category is in fact more restrictive than the H–1B visa category.

I also want to talk a little bit about globalization because that is sort of the sub-theme of this hearing. It is certainly an important characteristic of this century and affects all countries. Rather than paint too broad a brush, I want to point out that globalization contains both potential pitfalls and advantages for the United States.

Assistant Secretary of Commerce for Technology Policy Mehlman, testified before the House of Representatives last month overseas outsourcing of IT, which is one subset of globalization, can actually benefit the United States and create jobs for U.S. workers. He stated in his testimony that so far the majority of work sent offshore is low-wage, represents a small fraction of the overall market for software and IT services and does not displace a large majority of the work done here in the United States. He continued that the Bureau of Labor Statistics projected in December of 2001

that the number of professional IT jobs in the United States will grow by 72 percent between then and 2010. The Bureau of Labor Statistics have also indicated that there is going to be a shortage of service sector jobs of about 9 million by 2010. So even though there is some overseas offshoring going on, on the whole the prospects for employment in the IT and service areas is still bright.

Obviously, Congress needs to consider globalization and offshore outsourcing, but in my view the L–1 visa category, if properly administered and monitored, can be an anecdote to concerns about overseas outsourcing. Use of L–1 visas encourages both foreign investment in the United States and can help keep and grow jobs in the United States.

In conclusion, like others have stated here, I think that we need to take a surgical approach to considering changes to the L–1 visa category. The narrow area of concern and possible abuses in the L–1B area where people claim to have specialized knowledge but do not really when they come into the United States and they are placed at third-party sites. We need to look at that narrow issue and see what we need to do about it, and it is possible that we can do that administratively rather than through legislation.

Thank you very much.

[The prepared statement of Mr. Yale-Loehr appears as a submission for the record.]

Chairman CHAMBLISS. Thank you very much.

To all of our witnesses, we certainly have the spectrum covered here, which is great. That is exactly what we wanted to try to do.

Ms. Fluno, let me start with you. Your displacement took place in the year 2002. What has been the result or the follow on with you and your coworkers at Siemens with respect to finding other employment in this high-tech community?

Ms. FLUNO. About one third of the people managed to get positions within Siemens, but another third are—they have been employed, but most are under employed, meaning that they are making less than they used to, and in fact, one gentleman cannot get a job in programming. He is mowing lawns. About one third are still unemployed.

But I have learned a new term here this afternoon. I am going to tell them that they are having a short-term economic difficulty, and to tell that to the mortgage company.

Chairman CHAMBLISS. Do you know whether or not your replacement had ever previously been employed by Siemens?

Ms. FLUNO. I do not believe so.

Chairman CHAMBLISS. Mr. Fragomen, your firm represents Tata Services which has been mentioned here any number of times. Could you explain what kind of specialized knowledge Tata's products or services that Tata L–1 workers have?

Mr. FRAGOMEN. I can make a few general remarks. I am not really testifying on behalf of Tata, but I would be happy to address the Chairman's question.

Essentially the standard that is used by the American Consulate in India for the various consular posts in issuing L–1 visas, which is pretty much followed by other consular posts around the world, is that the job applicant has to have two things. First of all, L–1 blanket petitions require the applicant to have a professional de-

gree, so they have to have a degree in computer science or a degree that is very, very specifically related to what they are doing. Secondly, they have to have experience working with the software of the company with whom they are going to be placed, or alternatively, working with proprietary software that Tata has developed that would be utilized within specific industries. So it is very, very narrow in terms of defining specialized knowledge.

The consul would not grant a visa to someone who just had generic programming skills, for instance. It has to be a situation where the person is both a professional and has prior experience with the specific proprietary software. That would be the answer to the question.

Now, I cannot relate that specifically to the Siemens situation because I do not have knowledge, but I would be happy to make an inquiry and see whether I could provide some information to the Committee.

Chairman CHAMBLISS. If you could provide some specifics on that, we would appreciate that.

Mr. FRAGOMEN. I would be pleased to do that.

Chairman CHAMBLISS. Ms. Verman, as a businesswoman running a competitive consulting company, do you believe that too much Government interference and over regulation is a concern with legislation that would tighten up the L–1 visa, and could you give us any example of how you might think that would interfere?

Ms. VERMAN. I believe your question is how do I feel that the Government interference on the L–1 visa will affect my business?

Chairman CHAMBLISS. Will affect the issuance and the practical day-to-day operation of L–1 visa issuance.

Ms. VERMAN. I think it would affect it tremendously. I think that it is not an even playing field at this point in time, that I am asked to compete against, at a disadvantage against foreign consulting companies where they have competitive advantage of transferring L–1B visa foreign workers here, and they put them here at a lower cost. I cannot compete with U.S. workers here for the same price.

Chairman CHAMBLISS. Are most of your workers that you obtain visas for domestic workers? Are they U.S. citizens?

Ms. VERMAN. Most are U.S. citizens, legal residents, or I do also employ H–1B visa consultants as well.

Chairman CHAMBLISS. Mr. Buffenstein, would you explain how Global Personnel Alliance members use L–1 visas, and particularly what ways L–1 benefits American interests as those companies use it?

Mr. BUFFENSTEIN. Mr. Chairman, a classic example is a U.S. company, such as the airline I mentioned, that needs to remain competitive on international markets and needs to bring in a key process or some confidential knowledge about the operations abroad to the United States in order to fuel exports or to make that company more competitive. The manufacturer that I mentioned in the Midwest is a good example. They make truck drive parts and axles. They need to customize them for Latin American or Asian markets. In order to do that they need to bring in a couple of key people with specialized user requirement knowledge for those markets in order to facilitate those exports.

In another circumstance, the same company brought in a key individual who had knowledge of a European manufacturing process of a design modification that had been done in Europe that they wanted to bring back to the United States to introduce it into this manufacturing facility because they thought it something that would help their exports. Again, we are talking about 30 people, 35 people in a workforce of 60,000. One of the examples in that same company, Mr. Chairman, I think is instructive. It is a Canadian individual who is the global leader for Brand Management and Marketing, and he is on an L–1, but he divides his time between Canada and the United States. That is something that I think is greatly ignored, that many L–1s are not in the United States on a full-time basis, but rather divide their time between the United States and abroad. There is a paper company, small paper company with 2,000 employees based in the Southeast that has a number of key experts, just 4 of them on L–1 visas, but these people are probably here once a month, or every 3 months they come here in order to attend to some very complex and expensive machinery that that company needs in order to sustain its 2,000 employees.

For example, one of our companies has a managing director who is British, who comes to the United States and works here just one week out of every quarter. So for a total of 4 weeks a year that person is working here. Because the person is employed in the United States and actually performing a job when he is here, he cannot use a B or other kind of visa. He needs to get an L–1. So he gets an L–1, but that is literally for 4 weeks a year.

What this all points out, Mr. Chairman, is that there really needs to be some study of some of the circumstances. Where are these L–1s working? Are they in California? Are they mainly in Georgia? What do they do? What occupations are they in? This kind of information is sorely lacking, and I would hope that as any part of the action that your Committee takes, that you would solicit some of this kind of information before too drastic a remedy is taken.

Chairman CHAMBLISS. Thank you.

Senator Kennedy?

Senator KENNEDY. Thank you very much.

Of course, the Immigration Service is supposed to know that when they grant the visa. I mean we do not need to go back in and all have another study. They are supposed to meet the requirements. The idea basically is if you have a specialized worker, the basic concept was because they are going to provide some specialized knowledge which means it is going to mean more workers and more jobs for people, but what we are talking about are the abuses I think here we have seen.

I remember very clearly the 1965 debate on the immigration issue, eliminated the national origin quota system. We had the western hemisphere compromise. We eliminated the Asia-Pacific triangle. In 1970 the needs came because we had the beginning of the internationalization, and this was a very specialized kind of a program. I was trying to look back in the debates. They are virtually nonexistent because we were just trying to fill a very specialized concept, and that is the highly-skilled people for companies that are coming in here who had been a part of the company fam-

ily, may not have the degrees, but had that special knowledge that was very important for that company to be expanding and expanding employment here.

The concern that we have is whether they are growing with all of these abuses, and how extensive are they. That is what we are trying to get at today.

But I an enormously sympathetic to Beth Verman, what she has said, and that is, if we let abuses go on, here is a company that is trying to compete, and if they can jiggle the system, whether it is the L–1 or whether the H–1B, and they can jiggle the system and get people in there and pay them a hell of a lot less, how is an American company, who is trying to play by the rules, trying to employ Americans, trying to deal and compete, they are at a significant disadvantage. I mean I may be putting more in your mouth than you said, but I hear the argument and have heard it for a long time, and I think that that is being unfair to American companies. So this is a complicated issue and question.

I would like to get back to the issue about the definition of "specialized knowledge." We have not got a lot of time. But a number of you talked about specialized knowledge. Is there a general understanding? Maybe Beth and Michael, you will be able to talk about it. Is there a sense that specialized knowledge is being abused? And we ought to understand what that specialized knowledge is and come back? I mean I would be interested. Ms. Verman, could you comment on it again?

Ms. VERMAN. I feel that the term "specialized knowledge" is very broad, and it needs to be more defined. That seems to be where one of the abuses are.

Senator KENNEDY. Mr. Gildea?

Mr. GILDEA. If you look at the Siemens case, you wonder what kind of specialized knowledge they had when the workers, who were later to be displaced, were asked to train these folks, so what was the specialized knowledge base there for those workers? We are concerned about that under this program.

Senator KENNEDY. How much of this, Mr. Gildea, is the enforcement? I think we have had hearing after hearing, year after year after year, Department of Labor, under Democrats and Republicans. There are not a lot of resources. The restrictions in terms of the enforcement. We tried attestation, was sort of a newer concept, thinking that the business community would play by the rules, and I think the great majority have. There are abuses on it, and I do not know how we are going to be able to deal with it, but how much of this is the fact that we are not getting enforcement? We ought to try and hold accountable, or try to provide additional resources or do whatever we can with the Labor Department in terms of enforcement. How much of it is an enforcement problem, and how much of it do you think is the definition, how much of it is legislative? Is there any way to quantify it?

Mr. GILDEA. I think it is a little of each. In the case of enforcement you had OIG reports from the Department of Labor, GAO reports as well, looking at both L–1s and H–1Bs, and they do not have sufficient authority to enforce in some cases. The issue of blanket petitions, you wonder if the volume is such in the consular

offices that they do not have time to look at these petitions in the way they need the kind of oversight.

I do think that your suggestion regarding the fee makes sense. It is what we have recommended. And that the bulk of that should go into enforcement functions for DOL, for BCIS and for the consul offices to do the job that needs to be done in terms of screening and monitoring and data collection, gathering the information that they can report to you so that the Congress, House and Senate can do its oversight responsibilities and know exactly what is going on in these programs, and hopefully before these kinds of abuses set in, take action to prevent the abuses.

Senator KENNEDY. I had a favorite of 3,000. Then we got to 2,000, and then we are down to 1,000. These are just a small number, but they are highly specialized. The company needs them. We talked about training and enforcement, and it does not seem to be unreasonable.

Let me ask you on sort of an issue, Mr. Gildea, and then any of the others on the panel, as I see that time is going on. I listened to what Professor Yale-Loehr talked about in terms of the foreign investment and basically low wages. You know, enormously interesting, it caught my eye last night, in Newsweek, a long article in Newsweek. They talked about the shift, not just about low-wage jobs, but about the handling customer service, telemarketing, paperwork, biggest corporations, firms like GE, American Express, prefers to use them now. Now Fortune 500, Microsoft, is sending not just low wage, but are talking about the managerial and above workers, or at least those kinds of jobs overseas. In this case it mentioned particularly in India, and used the comparison in terms of what managers were getting, some managers were getting, an enormous disparity. How should we be dealing with this? That is a little bit off this, although some have referred that this is not unrelated. I have been listening and trying to understand better how it is related. I would be interested in what ideas you have on this, where are we going with it? Maybe you would take a crack at it, and I will ask Mr. Gildea and if anybody else has a comment. Then my time is up.

Mr. YALE-LOEHR. Yes, Senator Kennedy. I think globalization is a large issue that needs to be addressed by Congress comprehensively. As other witnesses have said, immigration restrictions are not going to stop globalization. That is a phenomenon that is too big that one little immigration legislation is going to be able to stop. I think we need to look at that comprehensively. I think within globalization the L–1 visa category is actually one way to try to keep jobs in the United States. By bringing in key people, managers, executives, people with true specialized knowledge that will enhance and create jobs in the United States, that can offset some of the negative aspects of globalization.

Mr. GILDEA. Senator, we do not see it that way. What we see some of these outsourcing firms doing is bringing in the lower wage workers, particularly from India, bring them in to get the skills and jobs of people like Patricia Fluno, and over time taking the knowledge and the skills back to India and working with the same companies that are responsible for setting up huge high-tech centers in India, and shipping hundreds of jobs going in the reverse

direction. That is what our concern is with respect to these higher level jobs.

Senator KENNEDY. What do we do about that?

Mr. GILDEA. In terms of the visa fix we are—

Senator KENNEDY. I am thinking of going the other way. I am interested in what you think about what is happening here, but I mean, how in the world are you going to stop companies from going and shipping these managerial jobs and higher-paying jobs over to India or these other countries? They are going to be appealing to what is a 30,000 or $40,000 job here, goes for 3,000 or 4,000 jobs over in these other countries. They are going not just do it for low income, but they are looking at these other skilled jobs. Should we be worried about it, and what are we going to do about it?

Mr. GILDEA. I think you should be worried about it. It is what indeed has happened in the manufacturing sector, where those jobs have gone to the lower wage rates. Even now you see, as a result of NAFTA and the maquilladora developers in Mexico, even those jobs, as Mexican workers' wages rise, those jobs are headed out of Mexico. If globalization, which for many U.S. workers means the unemployment line, is about that, we have got a tough problem in front of us, and it is not just the manufacturing jobs any more.

Chairman CHAMBLISS. Mr. Buffenstein, do you have a comment?

Mr. BUFFENSTEIN. Mr. Chairman, I think in response to Senator Kennedy's question, it is not really possible to legislate a macroeconomic phenomenon. The problem with the globalization phenomenon, especially in the information technology industry, is that that is an industry which is highly mobile. It so opens that India has got a population fluent in English and proficient in this regard. We cannot legislate against companies moving businesses to India.

But we can do, in information technology and elsewhere, is help U.S. business and industry be as competitive as conceivably possible and make sure that we have the ability to bring jobs here in industries where it is close to markets and where companies want the manufacturing to be.

If you take the members of this Subcommittee, Mr. Chairman, alone, just the States represented by the members of this Subcommittee, 3 million jobs in those States are attributable directly to income-producing, employment-generating international investment, and lots of their manufacturing facilities in Massachusetts and Georgia that specifically are close to market, optical equipment, transmission equipment, all kinds of bread-and-butter manufacturing jobs that we need to encourage and bring to this country.

In the information technology area, for example, one of our members has a developer in Ireland that they have brought to the United States that is helping educational proprietary software be developed here, whereas otherwise those jobs would have gone abroad. We need to encourage and facilitate that.

Senator KENNEDY. Thank you very much, Mr. Chairman.

Chairman CHAMBLISS. Thank you.

Senator Feinstein?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I think it is correct that we take a good look at the L visa.

I am sorry to be late. I was on the floor speaking on the trade agreement. You know, it is interesting, the more I am really looking into the trade agreement, having immigration staff look into it, it really is a stealth permanent immigration program. These visas are renewable forever. What I did not know is L visas do not pay taxes. So you are going to have people here that do not pay taxes, and replaces. Ms. Fluno said she makes $98,000 a year—

Ms. FLUNO. Did. Did, that is past tense.

Senator FEINSTEIN. Did. Trained the worker that is going to make a third what she makes. And this is good for us?

Four years ago, and I represent California, I had a whole bunch of CEOs come to me, how they needed more H–1B visas, et cetera, et cetera. I bought the argument and I went along with it. So now we are faced with a trade agreement, Singapore, Chile, that has this L–1 visa program attached to it. Then I began taking a big look at some of the numbers involved in these so-called temporary worker programs. What you find is, at this time in the country, we have 5.2 million people taking jobs in this country under temporary visa categories, and 40,400 are Chileans, and 29,400 are Singaporeans, for a total of 70,000 workers in these other visa categories.

So I have to wonder why are we increasing this L–1 visa? I understand the L–1A, which I thought was the purpose of the program, that if you want to send a manager temporarily to give some advice to their counterparts in this country and then return, that is fine. But I do not really think that is what is happening. I think what is happening is, through this treaty, which I gather was to be a precedent for other treaties, to have a program where there is no labor certification, there is no labor investigation, and therefore, Ms. Fluno cannot even complain and have that complaint investigated as to whether she is being replaced for monetary reason. And I hazard a guess that is exactly what this program is going to be used to do.

What I have also found, that fraud is increasing in all of these programs, and I just documented that on the floor of the Senate with numbers and dollars in fines.

Now, I appreciate global competition. I come from a State that is a high-cost State, and the American dream has always been for a worker to be able to own a home and buy a car and educate their kids, and it is very hard to do it on $32,000 paying taxes. Now we are going to have $32,000 and no taxes. I really think to have workers that are able to come into this country—and that is the second part of the L program, the L–1B—and be here for 7 years and pay no taxes and replace American workers, that is not something I want to be a part of. I come from the State that has the biggest, I guess, technology industry, and I would hope that computer firms and chip firms and others in my State would not do that.

As a matter of fact, when we expanded the L–1 visa program, it was really TechNet in California—and Senator Kennedy will remember this—that came up with the $1,000 fee that they would

match and create a program to better educate domestic workers. Suddenly, 5 years later, we have lost all that.

So I would like anybody to tell me that, give me a better reason why there should be an L–1B program where you do not pay taxes, where you can replace an American worker, where there is no prevailing rate? Why should we have that in this country? Somebody defend it.

Mr. BUFFENSTEIN. Senator, I would like to take a shot if I may. I am not aware of any manufacturer in this country—and over 25 years I have worked with many of them that bring in L–1 workers—who have L–1 workers that are not paying taxes in this country. The IRS regulations specifically require that if someone is resident here, meaning that they are more than a certain 181 days a year, or over a period of time, 3 months, 120 days, 4 months, that they are residents, and they have to pay taxes just like you and me.

There may be some financial arrangements involving the specific instances of abuse that have been cited, where people are not complying or where they have arranged certain mechanisms, but that certainly is not the mainstream of manufacturing. So the problem is, when you have a manufacturer—

Senator FEINSTEIN. Would you just clarify that? Are you speaking to the L–1B or the L–1A?

Mr. BUFFENSTEIN. The L–1B and the L–1A.

Senator FEINSTEIN. To both.

Mr. BUFFENSTEIN. Both.

Senator FEINSTEIN. You are saying neither pays any taxes.

Mr. BUFFENSTEIN. No, ma'am. I am saying that in both circumstances the overwhelming number of manufacturers, certainly every one that I have worked with, those individuals, if they are resident in the United States have to pay taxes as residents, just as you and I do.

Senator FEINSTEIN. What is the definition of "residency?" What do we mean by that?

Mr. BUFFENSTEIN. Well, it gets into a complex regulatory issue, but the definition of residency is quite simple. Anyone who in any 1 year is here more than 181 days, or someone who over a period of time is here more than—it is a complex formula, whereby you add a sixth of the previous year and third of the year before. Basically, if you are here for more than 120 days a year, you are a resident. There are some treaties that exempt you in certain circumstances, if you are being taxed by the other country.

But the point I am making here—because I do not know, and I am not disputing, what the circumstance was that Ms. Fluno encountered in Florida. What I am saying is that the vast majority of companies are neurotically desperate to be compliant with the law, both from a tax standpoint and from an immigration standpoint. They employ batteries of internal compliance people and outside lawyers who try to do this. And the manufacturers, like the one that I mentioned in the Midwest or like the optical lens manufacturer in Northern California, are companies that need an L–1B in order to bring in a needed technology to integrate that technology into the United States so that manufacturing can occur here.

Mr. FRAGOMEN. I would like to—

Senator FEINSTEIN. Please, go ahead, and then I will come back.

Mr. FRAGOMEN. I just wanted to add to Mr. Buffenstein's remark, that even if a person is not a resident for tax purposes, as a nonresident they pay tax at a statutory 30 percent rate without deductions. So virtually everybody pays taxes.

On the issue of the—on the other issue—

Senator FEINSTEIN. Not if it is the product of a trade agreement.

Mr. FRAGOMEN. To my knowledge—and we would be happy to submit some information for the Committee to the record, but to my knowledge, even if it is pursuant to a trade agreement, that taxes are still paid. It is just a question of whether they are paid as resident or as a nonresident.

Senator FEINSTEIN. I am told something else, so I would really appreciate any information you could provide, specific information of specifics involving what kind of taxes people pay, and we are going to ask CRS to clarify this for us so that we know exactly.

Mr. Buffenstein, let me ask you this. I think many U.S. companies see the L–1 program as a way to import foreign workers without the restrictions and costs of the H–1B program. Restrictions that apply to H–1B but not L–1 include an annual limit on the number of visas issued and a requirement that the visa applicants have a bachelor degree or higher. H–1B visa applicants, as you know, have to pay the $1,000 fee we have just talked about, toward training American workers. L–1 applicants do not. Visa law also requires workers with H–1Bs to be paid the prevailing wage in the region where they work, while L–1 visa carries no salary requirements. Would you be supportive of a prevailing rate requirement?

Mr. BUFFENSTEIN. Senator, firstly, the airline that I mentioned earlier that employs 60,000 workers and brought in a pricing analyst to the United States, that individual who helped them be competitive on international fare markets and brought very specialized and in many respects confidential knowledge about their fares on European markets did not have a degree and would not have qualified if some of the proposals that are flying around now were enacted.

In addition if there was a quota and the quota had been reached for that particular year, we would have had to tell that airline, well, sorry, you cannot have this person now. You have to wait a year, by which time the foreign carriers would have got the financial advantage. So some of those issues I think are best addressed qualitatively rather than quantitatively. In terms of—

Senator FEINSTEIN. That was not my question, sir.

Mr. BUFFENSTEIN. I am sorry, ma'am. You mentioned in terms of prevailing wage requirements specifically.

Senator FEINSTEIN. The question was, would you support a prevailing rate attached to the L–1 visa?

Mr. BUFFENSTEIN. As long as the mechanism was one in which international companies could continue to pay home country benefits, continue to keep people on international compensation systems, and there were a way of devising that that the Department of Labor certainly has not shown with respect to the current H–1B program. Because when you have someone who is brought, for example, for 6 months to the United States or for 9 months, and

then taken to Canada for a few months, you cannot keep on moving that person onto a different payroll. There are apples and oranges questions with respect to benefits. It is enormously expensive to transfer personnel to the United States. Many of these multinational companies that bring these key experts here pay enormous amounts of money and equalize compensation and tax burden for their individuals.

The pricing analyst that I mentioned with respect to the major airline, is one who was relocated abroad earlier, because once the person's sojourn was complete in the United States, it is an expensive thing to keep the person here, so they were sent back immediately. So it all depends. The devil is very much in the detail on that issue, Senator.

Senator FEINSTEIN. But if the individual were here, I do not know what portion of L–1 visas that are here utilize the entire 7-year period, but I suspect it is a large number. Does anyone know?

Mr. FRAGOMEN. We did a study among our member companies, and the average stay in the United States on L–1 visas is approximately 2 years, and there are very few persons who stay more than 3 years, so very much, unlike the H–1, where there are a large percentage of persons who convert to permanent residents, it is very large in the L visa category. It may interest you that among the companies that do the offshore development work, for instance, that many of them have no permanent residents program at all. Everyone is rotated out within a year or two of when they come to the United States.

Senator FEINSTEIN. Then let me ask you this. Why, in the two trade agreements we have before us, are they providing for unlimited years, you can renew the visa forever? Why would that be necessary if people do not stay that length of time?

Mr. FRAGOMEN. Basically in the trade agreements you have two categories. You have your L visas, and then you have your free trade entries, the TNs, as in the North American Free Trade Agreement. The TNs are much more an abbreviated H–1 essentially, and those people frequently stay for a long time. But there is not any particular reason that there would have to be a cap on L–1 time. I mean most L–1s just do not remain in the United States. Statistically, the number that convert to permanent residence is very small.

Senator FEINSTEIN. Do you have data on how many countries that would allow the same thing in reverse?

Mr. FRAGOMEN. Actually, I do. One of the practice areas in which we are engaged is global immigration, and I can give you a rundown of 10 or 20 countries. You will see that every one of them has the equivalent of an L visa category to facilitate international mobility.

Senator FEINSTEIN. That are not limited in number?

Mr. FRAGOMEN. No, they are not limited in number. The basic concept behind L visas is to try to limit usage by defining the category sufficiently narrowly so there are not negative competitive impacts on the local labor market. That is the basic concept, unlike the H–1, which is driven much more by labor market tests or at least creating a level playing field in terms of a labor market. But I would be happy to provide this information.

Senator FEINSTEIN. I would appreciate that, because again, in the trade agreement we have before us, they dropped the word "highly" before "specialized" and actually provided for a number of occupational categories that do not require a bachelor's degree as well, which is rather interesting. So it is clearly meant to be a broader L–1 program, I guess not like what you are saying if what you are saying is right, that individuals can come in and effectively remain for the rest of their lives. It is mandatory that they are able to bring their families. And if there is any different point of view on the pattern of entry, we have to submit it to an international tribunal for decision, a very unusual agreement in that regard.

Thank you, Mr. Chairman.

Chairman CHAMBLISS. Senator Cornyn.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman. One benefit to being a junior member of this Subcommittee is most of the obvious questions are already asked by the time it gets to me.

Chairman CHAMBLISS. But you are a lot smarter about L–1.

[Laughter.]

Senator CORNYN. Thank you. I would just like to make an observation perhaps, and that is this whole subject of this hearing and also the hearings that you have held previously in this Subcommittee, I think have demonstrated how broken in so many respects our immigration system is, and certainly I hope what comes out of this hearing and the other hearings that you have convened is that we address not only the policy but obviously the enforcement issues, because no matter what Congress does in terms of writing a new law, if it is not enforced, that policy not only fails to be implemented, but it also breeds, I believe, disrespect for the law generally. Right now I am sorry to say I do not see our immigration laws being adequately enforced pretty much across the board.

I think what we need to make sure we do is to make sure that any changes in this area obviously are fair to domestic workers, that it is predictable for employers and those workers, and that it is enforced diligently, as I think we all agree it should be.

The amazing thing about this is that it seems to cut across so many different policy areas. One reason of course we bring in foreign workers, particularly those with specialized knowledge, because our education system some say is not producing those workers, so it implicates that. Obviously, it implicates our domestic economy and the global economy, as we have heard. It implicates homeland security concerns as we have heard previously, where some 300,000 people are currently in this country under final orders of deportation and we simply do not know where they are.

In the hearing last Friday before Senator Graham's Subcommittee on the Judiciary Committee on Crime, the Border Patrol told us that they apprehend about 1 million people who come into this country illegally each year, but they cannot tell us how many they do not apprehend, but the best estimate is between 8 and 10 million undocumented immigrants are currently in the United States now. While we hope, and certainly I would expect that most

are here because they want what immigrants have always wanted, which is an opportunity for a better life for themselves and their families, in a post 9/11 world the demands of border security and homeland security I think require us to be far more diligent in that area.

As we have heard Senator Feinstein, in the two free trade agreements that we have before us, I think could even be tonight, with Chile and Singapore, we have concerns that now the Executive Branch wants to get involved in immigration policy, which under the Constitution is reserved to the Congress.

So I commend you for this hearing. I found it very edifying, like others here. It is also disconcerting in a lot of ways, and I hope and I expect that this Subcommittee and the Judiciary Committee, and hopefully the Senate as a whole will address these concerns, not just in a piecemeal fashion but in a comprehensive way so that our immigration system can be credible and fair, predictable and enforced.

Thank you.

Chairman CHAMBLISS. Thank you, Senator Cornyn.

Let me direct this to Mr. Buffenstein, Mr. Fragomen and Mr. Yale-Loehr. You know Ms. Fluno's story. You know the facts. She has related them again today. In my mind the use of L–1 visa is not consistent with the allowance of an individual to come in and replace an existing worker. You have all talked about the need for bringing in technical workers to engage from the standpoint of being able to assist with productivity or assist in the high-tech end of the manufacturing segment, but they should not be allowed to come in to replace a worker. Am I wrong about that, or do you disagree with that? Would you all take a shot at that?

Mr. BUFFENSTEIN. Mr. Chairman, I think you are precisely correct because the definition of specialized knowledge would be violated if the knowledge was readily available here and was generic, where someone could just come and replace someone in a job which if the company could have found some people in the United States who were qualified for it. And that is the point I made earlier, and I would like to reiterate it, is that every instance of cited abuse, most particularly, Ms. Fluno's, but every instance of cited abuse, whether in the articles, what the people have talked about on this panel, all relate to the specific circumstance where there has been a contracting out or a leasing out of employment to a second employer, where there is no affiliation between the first and the second employer than a contractual agreement, and where the knowledge is generic knowledge, not to suggest that Ms. Fluno's knowledge was not substantial, but it is not knowledge that is possessed within that company or specifically by that company abroad, and that is what distinguishes the L–1.

So if there is going to be a legislative solution, and not an administrative one, it should be targeted very specifically at that situation, bearing in mind that there are situations where it is very valid for a company, for example, an airline, to send someone to a code share airline in order to conduct a project, and not to throw that baby out with the bath water, but that is where it should be targeted. So I agree with you 100 percent.

Mr. FRAGOMEN. I would agree with Mr. Buffenstein as well. I would just like to perhaps try to draw the distinction between maybe slightly different uses of L–1B visas. In a typical job shop situation, where a company is essentially just providing employees in the U.S., importing them and then essentially contracting them out, where they are working on another employer's premises and they become absorbed in the workforce or displace U.S. workers, and they have generic computing skills, software, hardware, et cetera, I think we all agree that that is not an appropriate L–1 usage because they do not possess specialized knowledge.

But in an offshoring situation, we talked a little bit about how the development centers are created abroad, and these development centers actually do the software development, programming, et cetera. The companies send persons to the U.S. as part of a team, and part of this team is to feed information back to the development centers abroad, and the personnel of the companies come over and have very specialized knowledge of the particular software involved, meaning the proprietary software of the company for whom they are rendering this service, come and feed information back, and it is a cooperative kind of an effort.

Now, in that kind of a situation, that is very different than the situation of a job shop. Now, personnel in those circumstances might only be in the United States for 6 months, for a year. Then they go back abroad. Then they are frequently reassigned to projects in other countries. So it is not a matter of just working the U.S.

Now, this offshoring model can result, and frequently does result, unfortunately, in that it constitutes a form of outsourcing, it results in U.S. workers losing their jobs because the entire function is contracted out to this company who performs part of the work abroad and then has employees in the U.S. as well. That is why it is a complicated issue because it is really a subset of the outsourcing phenomena, which is actually what causes the loss of jobs. So it is not a one-to-one displacement situation.

Mr. YALE-LOEHR. I could add two things to that. I agree with the previous two statements, but adding two things to that. Number one is in 1996 the State Department sent out guidance to its consular posts about this use of the L–1B visa usage, where they are placing them at third-party sites. That policy guidance, under which circumstances it is acceptable and when it is not acceptable is quoted in my testimony. Therefore, to the extent that you want to look at that particular aspect of L–1B usage, you might look at that State Department guidance and see if either administratively or legislatively that would be a good starting point to try to curb the abuse in that particular area.

Second and more broadly, I think that you might consider seeing ways that you could encourage foreign countries to adopt legislation that meets international standards for protecting workers, and that way the economic advantages of outsourcing work in countries that do not honor employment norms will be lessened and the corresponding disadvantage of doing business in the United States will be overcome.

Chairman CHAMBLISS. Ms. Feinstein's question to you relative to prevailing wage, if I understand what you just said, and my under-

standing of L–1, prevailing wage really is irrelevant because we are not replacing somebody, if this thing works the way it is supposed to work, we are not replacing somebody, so prevailing wage really should not be of any import to us. Am I correct in that?

Mr. BUFFENSTEIN. Precisely, Senator.

Chairman CHAMBLISS. Obviously, it looks as though what is going on is that we have got, from a conceptual standpoint, a program that was needed, probably is still needed to whatever extent companies need to bring in highly-skilled people for specific assignments, but we are seeing an abuse of that program, and the practical day-to-day operation of it has affected Ms. Fluno and Ms. Verman particularly directly.

I think what we are going to do, we have a number of bills out there now. You all have seen these bills. When you get back and you put your feet on the table and have an opportunity to think about it, if you want to give us any comments on what you think with respect to those bills. My guess is we are going to try to hone in on tightening this law up to try to prevent the abuse that somebody like Ms. Fluno is having to go through right now.

This type of thing really does generate a lot of emotion out of politicians especially, because Ms. Fluno's story is very, very real, and there are a lot more of Ms. Flunos out there. You probably know a lot more examples about it than we do.

We are going to make every effort to try to tighten this thing up, so we would appreciate any comments any of you have with respect to what we might specifically look at it as we move forward. We do not want to destroy the whole program. It obviously is a good program conceptually and is something that we need to continue, but we certainly do need to tighten it up.

I want to thank all of you for being here today. I know some of you have made a very special effort to be here, and we appreciate your written as well as your verbal testimony.

I ask unanimous consent that we keep the record open until 5:00 o'clock this Friday for any additional information. If any of you wish to submit any additional information or any member of the Subcommittee wishes to, we will accept it.

That being the case, we will stand adjourned. Thanks again.

[Whereupon, at 4:22 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Statement of Daryl R. Buffenstein
On Behalf of the
Global Personnel Alliance
Hearing before the Senate Committee on the Judiciary
Subcommittee on Immigration and Border Security
on
"The L1 Visa and American Interests in the 21st Century Global Economy"
July 29, 2003

Introduction

Mr. Chairman and Members of the Subcommittee, good afternoon. My name is Daryl Buffenstein. I am appearing on behalf of the Global Personnel Alliance (GPA). GPA is a loose consortium of internationally active companies interested in global personnel mobility. These are companies for which national immigration policy is important because of the effect of such policy on their ability to compete internationally and to create employment in the United States. GPA includes companies in a wide range of industries. GPA's member companies range in size from Fortune 500 companies to smaller and even closely held businesses, and include business organizations such as chambers of commerce. GPA was initiated as a way for these companies and business organizations to share information concerning international personnel issues and policies.

We appreciate the opportunity to participate in this hearing concerning "The L-1 Visa and American Interests in the 21st Century Global Economy." It is clear to us, Mr. Chairman, that you and your colleagues are approaching this important issue with the proper care. GPA believes that this issue cannot properly be addressed without a clear understanding of the benefits to the United States economy, and the benefits to United States workers, that the L-1 visa has provided.

There have recently appeared widely publicized charges in the media that the L-1 visa has been misused in ways that result in the displacement of United States workers. Our purpose is not to question or dispute any facts asserted by other witnesses here today, and we have profound sympathy for anyone who loses a job, for whatever reason. There may well be circumstances where people have been incorrectly classified in the L category.

But we believe that there is another, much bigger story to tell. The story of the L-1 is the story of job creation. It is the story of bringing jobs to the United States,

and of keeping here, in this country, jobs that would otherwise move elsewhere. The legitimate use of the L-1 visa is critical to the ability of companies to transfer needed managerial and specialized expertise to their United States operations. The story of the L-1 visa is the story of strengthened competitiveness for United States companies in domestic and international markets, the story of exports generated by new technologies, know-how and expertise imported from abroad, of how we have nurtured research and development on our own shores. It is the story of the States' successful efforts to attract employment-generating investment by international companies. Especially at a time when these factors are so critical to our fragile economy, it is essential that this Subcommittee exercise steady leadership, conduct a sober review of any problem and a careful analysis of tailored solutions, and ensure at all costs that we do not throw the baby out with the bathwater.

The role of the L-1 Visa in Economic Development: State Efforts to Attract Foreign Investment

Consider first the employment-generating role of foreign investment. The L-1 visa provisions were originally enacted in 1970 to permit U.S.-based companies to cross-fertilize knowledge and expertise by transferring key managers and specialists among their various affiliates. In the past thirty years however, there has been a significant transformation in the global economy, and the role of the United States in that economy has become more complex and multi-dimensional. Thirty years ago there was relatively little foreign investment in the United States. Now, for good reason, the States compete vigorously, with each other and with other countries around the globe, for employment-generating foreign investment. That reason is jobs. It is the rare governor who has not taken at least several, and usually numerous, missions abroad to seek foreign capital, know-how and expertise in the form of employment-creating investments. Indeed, many states (California, New York and Georgia, to list but three examples) have offices and staff strategically placed in key cities abroad with the sole function of promoting those states as an ideal environment for locating marketing, distribution, and eventually manufacturing facilities.

Successful investments necessarily involve people. Without the select cadre of key executives, managers, and specialists who are involved in these transfers, there would be, quite simply, no investments and therefore no jobs. And many, if not most, of these people are here on L-1 visas. They are very few in number relative to the jobs they create. But they are truly essential to economic development out of all proportion to their number. Georgia and Massachusetts each have well over 223,000 jobs created by exactly that kind of international investment. There are over 259,000 jobs in Ohio, over 437,000 jobs in Texas, over 470,000 jobs in New York, and almost three-quarters of a million jobs in California, created or sustained by international investment. The distinguished members of this subcommittee alone represent states in which substantially over 3 million jobs have been created by foreign investment.

Foreign investment has created overall approximately six and a half million jobs in the United States: jobs in manufacturing; jobs in research and development; jobs in transportation; jobs in every sector and every industry; and, of course, jobs in information technology. It is probable that these figures vastly under-report the job-generating impact of foreign investment since they are gleaned from Bureau of Economic Analysis reports filed by the investing companies, many of which appear to be unaware of the required filings. But given these numbers it is significant that in no year to date have there been as many as 60,000 L-1 visas issued. And this is 60,000 in a labor market of over 200 million.

As described above, these L-1 visa holders are usually only a small fraction of the workforce in a particular business, but contribute to job creation out of proportion to their number. A South Carolina-based company established by a German investor, for example, has 470 employees in the United States (including manufacturing facilities in Ohio) and only one L-1 visa holder. The company is a manufacturer of power transmission equipment, including conveyor systems for baggage handling and other uses. The L-1 visa holder has contributed significantly to sales and employment by bringing specialized knowledge of the design, manufacture and marketing of this specialized product in Sweden. Companies like this are picture postcards for the efforts of states like South Carolina and Ohio to attract foreign investment, and of the pivotal role played by the L-1 visa in that effort. This is the second such United States assignment for this individual.

Another European company, headquartered in Georgia, has 750 employees in the United States, and is a diversified manufacturing conglomerate, producing products as diverse as LED screens for stadium walls, medical monitors, food sorting equipment, and specialized avionics and air traffic control systems. The company recently acquired a manufacturing facility in Utah that has approximately 100 employees. By introducing new digital signage technologies from its overseas operations through the medium of a few L-1 visa holders, the company is hopeful that this facility can as much as triple its employment numbers to a workforce of up to 300 in the next two to three years. Yet another European-owned company for example, has over 700 employees in the United States, and less than a dozen on L-1 visas. These include specialists in a unique "sputtering" process, which metalizes film for armor-coated windows and is used for safety in government buildings, including the Capitol itself.

The story of the L-1 visa as a mechanism promoting employment-generating international investments in the United States is a compelling one. There are as many examples as there are international companies. In Georgia alone, for example, there are well over 1,500 such companies, and close to 600 of these are manufacturing facilities. Any changes in federal immigration law and policy should be carefully crafted so as to assist and not impede the States' efforts in this regard.

The Role of the L-1 Visa in Maintaining U.S. Competitiveness Internationally

The role of the L-1 visa in facilitating the competitiveness of United States companies in international markets is even more compelling. Many more jobs are at stake. The L-1 visa is critical to the promotion of United States exports. It is essential to enable corporate research and development to remain and flourish in the United States. It directly affects the ability to keep manufacturing in the United States. In an increasingly global economy the choices are often stark. If we do not permit the technology and know-how to move to where it is needed for manufacturing or research and development, those activities often will have to move to the technology and know-how. In short, L-1 usage by American companies is overwhelmingly a mechanism of job creation. It is critical to the international competitiveness of American businesses, from large multinationals to small United States companies with operations abroad. And again, L-1 visa holders, typically only a tiny fraction of the workforce of the business, contribute to job creation in this country out of all proportion to their number. Plans to restrict this visa category would place in peril the major benefits that caused the Congress – out of the country's own economic self-interest – to create the L visa in the first place.

The pivotal role of the L-1 visa in fueling exports is easily explained. To produce and sell products for foreign markets, American companies must have knowledge of foreign operating conditions, consumer preferences, competing products, the regulatory environment and other expertise relating to those markets. Without access to a select number of persons from those markets with such knowledge, American business and industry is at a severe disadvantage vis-à-vis its foreign competitors. Business opportunities are found and lost with stunning rapidity, and the flexibility to respond promptly to problems and opportunities is of paramount importance. The business community is already encumbered by logistical difficulties in securing the expeditious transfer of personnel needed to facilitate employment or exports. The regular petition process at BCIS Service Centers is slow and difficult. The application procedure at Consulates abroad has become more complex and time-consuming as a result of recent events. Requests for further information are frequent and not always logical. The leadership of BCIS Homeland Security is well motivated and dedicated to efficiency, but is hampered badly by a lack of resources. The appeals process is cumbersome and even slower. Further unnecessary restrictions will literally handcuff American business on international markets.

Examples abound across every industry. The ability to compete internationally is, for example, fundamental to the survival of the automotive component parts industry. A major manufacturer in the Midwest provides a living to over 60,000 employees. A select cadre of only three dozen L-1 visa holders plays a

role that is very important to those jobs. Some of them are here to infuse into the United States manufacturing and marketing operations key knowledge of foreign operating conditions, including development and design expertise consistent with user requirements in South America and Asia. Such a role cannot, by definition, be performed by anyone who has not worked extensively with the company in the foreign market, and that role is necessary to facilitate many millions of dollars of competitive exports. Others bring to the United States operations processes and technologies developed in European plants. One is a key manager who coordinates global product and brand management activities and uses an L-1 visa to divide his time between Canada and the United States. Without these L-1 visa holders it would be difficult, indeed impossible, for these companies to sustain its employment levels in the United States.

Indeed, many L-1 visa holders divide their time between United States and foreign operations, but are critical to the economic health of American companies. A relatively small paper products manufacturer, for example, has barely over 2,000 employees and half a dozen L-1B workers. These specialists are experts in the design and operation of complex and expensive machinery designed and customized abroad valued in the hundreds of millions of dollars. They divide their time between the United States and abroad. Without them the manufacturing process would grind to a halt.

The use of L-1 visas to bring persons key to product research and development to the United States directly permits such operations to remain here. The world's leading animal health company moved its headquarters from the UK to the United States. In one particular facility in a small Southeast town, where there are approximately 600 American workers employed in research and manufacturing, an L-1B holder plays a very key role in the manufacture of vaccines. His knowledge of manufacturing techniques and research parameters developed abroad is used to design and implement efficient and accurate manufacturing procedures in the United States. This allows the company to manufacture these vaccines in the United States, rather than manufacturing them in Europe, thus creating jobs here. Without the type of knowledge transfer that is at the heart of this L-1B visa holder's job, many of these manufacturing jobs would have had to remain or move abroad. He is one of only three L-1B visa holders in this particular manufacturing facility. Similarly, a manufacturer of food products has a key research and development facility in the Midwest, which is in turn critical to the company's manufacturing facilities. All of the research was previously performed in Europe. A very small group of L-1B visa holders were transferred to start the research and development facility here, and this facility has now created substantial employment. Likewise, a California manufacturer of lenses brought one of its employees to this country on an L-1 to start test laboratories in Kentucky. Those laboratories now employ more than fifty people in that state. These jobs would not exist for Kentucky workers if the company had been

forced to build its laboratory abroad in order to use the necessary leadership and development expertise of the L-1 executive.

These examples are representative of the daily business experience across this nation, in literally every industry, including information technology. One software company, a California-based company with approximately 500 employees, brought a specialized employee from its European operations to transfer new product technology to the company so that software developers in the United States could then develop products using that technology. Without this transfer, the development would be taking place in Europe and the jobs would go there instead.

A major United States airline offers a vivid example of how the L-1 visa fits into the business operations of a large United States employer, and is vital for such companies to improve their international competitiveness. This carrier employs approximately 60,000 people, and well over 58,000 of those are employed in the United States. However, the airline's continued success in a global economy, and ultimately its economic recovery, is dependent upon its continued ability to use effectively the expertise of its employees around the world. This includes the flexibility to bring a select few key employees to the United States when the specialized knowledge or leadership experience of those employees is needed. The L-1 visa is critical to this objective.

Today this airline has 12 employees in L-1 status, which amounts to a mere 0.0002% of its United States workforce. Those 12 employees, however, bring valuable expertise to its operations, which in turn enables it to maintain its competitive position in the market place, to maintain existing jobs for United States workers, and to create additional employment opportunities in the United States. For example, the airline brought a pricing analyst from the United Kingdom to its United States headquarters in L-1 status. The pricing analyst possessed highly specialized, proprietary knowledge of the airline's European markets, an expertise not previously available to this airline's pricing team in the United States. The pricing analyst worked with the airline's United States pricing group to formulate more competitive fares for its European markets, which improved its ability to compete more effectively with other carriers for traffic to this region. During his assignment, the analyst remained on the U.K. payroll, but received tax and cost of living adjustments to equalize his pay, as well as a substantial housing allowance. Following the conclusion of the analyst's United States assignment (which was less than five years in duration), the analyst was returned abroad. The L-1 visa allowed the airline to bring this employee to the United States in a capacity that enabled the employee to effectively work and collaborate with United States colleagues. With the unprecedented financial challenges facing the airline industry, this airline's continued ability to draw upon the expertise of its non-United States workers, such as this pricing analyst, is more important than ever before.

Placing L-1 Employees at the Site of a Second Employer

All of the media reports that focus on the displacement of American workers involve a very particular arrangement in which the L-1 visa holder appears to be providing simple contract employment to a third party. If that is in fact the arrangement, it would seem to be a misuse of the L-1 visa. The L-1 was not meant to permit companies to bring in workers of generic expertise who are then transferred to the worksite of another, unaffiliated company that effectively becomes the employer, save for actually paying the worker's salary. The core purpose of the L-1 is instead to permit multinational companies to bring to United States operations their managers, executives, and employees with specialized knowledge of the company's products, systems, and other traits. This problem, if indeed it is shown widely to exist, could be addressed through a carefully tailored statutory definition of the necessary employment relationship.

Yet there are innumerable situations in which it is entirely legitimate, indeed essential, for a multinational corporation to place a manager or executive, or a focused group of specialists in company processes, at the site of another company. It could seriously harm international competitiveness and job creation, and would not increase protection for the American worker, to forbid these sorts of arrangements. For example, a manufacturer of lenses, based in California, is engaged in a partnership with another United States company to develop and manufacture coating for lenses. This manufacturer's global leader for this particular product development is in this country on an L-1 visa. He sits in an office at the joint venture partner company, and works very closely with the partner company's employees. As a result, he has been able to direct these critical development efforts, working closely with the partner's key employees. Without this L-1 visa, and without the ability to work directly at the site of the partner company, that development project would not have gone forward in this country. Instead, the work would have gone forward in another country, since this particular person has expertise that is indispensable to lead the project. The project is expected to create hundreds of new manufacturing and high-paying testing and research jobs in this country

There are many other circumstances in which having an L-1 visa holder work at the site of another employer is an integral and legitimate part of that person's job for the petitioning employer, and where eliminating the ability to do so will harm job opportunities for United States workers. For example, half a dozen airlines have established a Sky Team joint venture that is vital to the participating United States carrier's ability to realize synergies and fill excess capacity. This concept is vital to the international competitiveness of the participating United States airline, and therefore to its ultimate survival. Under some of the proposals now circulating in Congress, however, the airline would be prohibited from transferring an international specialist with knowledge of its cargo economics and capacities to the United States

on an L-1 visa if that specialist would be deployed at the joint venture, even if all of the airline's other employees at the joint venture were United States employees.

Another example of L-1 employees working off-site goes to the heart of a phenomenon of integral importance to the States' efforts to attract employment-generating foreign investment. Some of the largest manufacturing facilities in the United States are preceded by the initial establishment of a small representative or marketing office, to which a solitary L-1 is transferred. Soon thereafter a distribution relationship with an independent distributor is arranged. The L-1 specialist is deployed at the site of the distributor to assist in the marketing of the product and to monitor and observe its debut in the United States marketplace. The next step might be to conduct assembly in the United States, perhaps in conjunction with the distributor, and the final step would be a full fledged manufacturing facility employing, to the delight of the host state, numerous United States workers. The natural development of this scenario could be precluded by provisions prohibiting the petitioning company from stationing that initial L-1 employee at its distributor.

It can also be critical to preserve the ability of a manufacturer to deploy customer service engineers at the site of its customers. For example, a major manufacturer of automotive parts based in the Midwest petitions for an L-1 visa for a technical expert who has highly specialized knowledge of the design modifications and engineering relating to the functioning and operating of heavy duty truck parts in difficult operating conditions abroad. It is necessary to infuse this knowledge into the United States company's operations in order to improve its production processes and its foreign sales. In accordance with standard practice, the parts manufacturer wishes to deploy the L-1 engineer temporarily as a customer service engineer at the site of its United States customer, a truck manufacturing plant. The customer service engineer would be bringing in key knowledge of these parts to the customer's plant so that the manufacturing line is kept moving. The role is critical to production and jobs at both the parts manufacturer and the truck manufacturer.

Existing administrative policies quite properly recognize that these sorts of situations represent legitimate uses of the L-1B, though the visa holder is actually placed at the site of, and is involved in operations at, the site of another employer. Yet, certain bills recently introduced, in a well-intentioned effort to target the distinct situation involving "job shops," would forbid off-site work so broadly as to eliminate these fully legitimate arrangements. H.R. 2152, for example, would restrict the placement of an L-1 visa holder with another employer where there are "indicia of an employment relationship" between the L-1 holder and the other employer. This prohibition, which has been defined administratively in regulations governing the separate H-1B program, could be triggered simply by such factors as working at the site of the other company, during the same hours as its employees, or on matters that are "part of the regular business" of the other company. Those are factors that may be present in a perfectly valid off-site placement, but one where it is clear that the L-1

visa holder is employed by his own company, and not by the other. We agree that a red flag can fairly go up when a company seeking an L-1 plans to place the visa holder off-site. But it cannot be its own restriction, as existing administrative practice emphasizes. Any changes to the statute should be carefully drawn instead to test whether an off-site arrangement is one where the L-1 applicant would be effectively employed by the company to whose workplace he would be sent, and not by the company seeking the L-1 visa. While H.R. 2152 is properly tailored in that it does not seek to reach beyond the "job shop" issue, its approach to that problem is overly broad and very likely to impede legitimate uses of the L-1 that involve placement of the L-1 visa holder at the site of a partner company.

Other Proposed Limitations

Other proposed limitations on the L-1 visa would reach far beyond the off-site employment situation, and would instead severely restrict the availability of the L-1 for needs that unquestionably lie exclusively within the petitioning company itself. Indeed, these proposals would badly damage the value of the L-1 visa to the United States economy and to United States employees.

One such proposal would eliminate the availability of "blanket" L petitions for qualified companies. The blanket petition has provided an important savings of government adjudications resources, and much more efficient processing for qualified companies. The proposal to abolish it is apparently based on the mistaken belief that approval of a blanket L petition automatically authorizes the petitioning company to bring in a flood of L workers. But the blanket L petition does no such thing. It merely permits the government to decide in a single adjudication certain common issues about the petitioning organization. For qualified businesses that meet certain requirements regarding size or previous L-1 activity, the blanket petition is simply a determination that the various entities included in the petition have a parent, subsidiary or affiliate relationship to one another. Approval of a blanket petition does not itself result in the granting of a single L-1 visa. Instead, each person seeking an L-1 visa must still go before a government officer and qualify individually for L-1 classification. The blanket petition simply frees the government to focus on those eligibility requirements, rather than having to decide again, over and over with each such petition, the same question about the petitioning organization's corporate relationships. Eliminating the blanket petition would worsen the already massive caseload of the Bureau of Citizenship and Immigration Services, at a time when it is struggling to find new efficiencies, and would subject businesses to unnecessary additional delays, with no gains whatsoever for worker protection. On the other hand, there could usefully be some examination of the extent to which reducing, at the beginning of 2002, the required period of employment abroad to only six months in the case of blanket petitions, might have resulted in the alleged instances in which an off-site job shop arrangement has resulted in abuse.

Another proposed change to the L category would impose a requirement that an L-1 visa holder possess a degree. Again, this proposal has nothing whatsoever to do with the "job shop" allegations, and would impede rather than fulfill the proper functioning of the L-1 visa. The proposed degree requirement apparently is based on the notion that, since the H-1B category requires a bachelor's degree or its equivalent, the L-1 should not have a lesser standard. This is a false logic. The L-1 category does not have a lesser standard; it has a different one. The H-1 category is for workers in specialty occupations, and it is thus the nature of the job type, broadly, that is important. The degree requirement is the very trait that defines a certain occupation as a "specialty occupation", and therefore an appropriate H-1 occupation. With the L-1 visa, by contrast, it is the nature of the worker's role and capabilities within the particular company that is determinative; that is, whether the employee is one of the company's managers or executives, or an employee holding specialized knowledge of that particular company's products and systems. These persons may have degrees, but often do not. They usually have achieved such company specialization, or position of leadership, independent of their formal educational background. They should not be denied an L-1 for reasons having to do with an entirely separate visa category.

Some have proposed an annual cap on L-1 visas. Even putting aside the problems of administration, such a cap would mean that, for some period of each fiscal year after the cap was reached, L-1 visas would simply be unavailable. This would unnecessarily disrupt business processes, decrease flexibility to respond to time-sensitive business opportunities, and reduce competitiveness, and is not tied in any way to the "job shop" problem that has prompted attention to the L-1 visa. This sort of flat numerical limit would be particularly inappropriate and unnecessary since L-1 visa holders make up such a small proportion of the non-immigrants working in this country, they typically make up only a tiny percentage of the workforce of their companies, and the L-1 visa results in more American jobs, not fewer. It would quite literally be a cap on productivity.

Still other proposals, even more far-reaching, are being introduced with alarming rapidity. Identical bills introduced late last week in both the House and the Senate, the contents of which became known only yesterday, would go in yet a different direction. Beyond including the "indicia of employment" test, these bills would impose on companies filing petitions for L-1 workers the same requirements as are currently imposed on H-1B dependent employers. These include, most significantly, requiring companies petitioning for L-1B specialized knowledge employees to attest that they have recruited, using industry-wide standards, in the United States in advance of seeking to transfer an L-1. While there is some basis for doing this in the context of a business that is dependent on the hiring of large numbers of H-1B workers to fill shortages that exist generically within particular specialty occupations, it makes no sense in the L-1 category. It would requires these

companies to attest to an impossibility. By definition, the L-1 specialized knowledge category should involve persons who have already acquired specialized internal knowledge having to do with the particular company and that knowledge does not exist outside that company. At best, this requirement would impose on companies the need to undertake a futile outside search for an employee with internal company knowledge. Such an employee will not exist outside the company, and such search will bring only delay.

If even some of the provisions of bills recently introduced were enacted into law, the critical competitive advantage described in the above examples could not have been realized. The airline pricing analyst, for example, would have been denied an L-1 visa, for lacking a degree. Even if he had a degree, the new competitive pricing project would have been delayed for a very long time, with disastrous consequences, if for example a cap were in place and the need for the project first arose after the cap was reached for that fiscal year. Moreover, it would have been impossible to recruit for such expertise in advance of transferring this analyst, because the need to be filled was for a person possessing not only specialized knowledge of the European pricing market, but one with in-house, confidential, and proprietary knowledge of that particular company's market position, pricing strategies, and other practices. And, with the exception of the one overly broad "indicia of employment" test discussed above, none of these proposals is even addressed to the "job shop" allegations underlying the current concerns about the L-1 visa program. In what may be undue legislative haste to address a problem the dimensions of which are not clearly known, still more proposals are being introduced regularly, including the new proposal introduced in the Senate and House at the end of last week.

Conclusion and Recommendations

We have done our best to gather and present to you important information about the role of the L-1 visa in the daily life of the business world, and the contribution that this visa makes to the United States economy and to creating jobs for United States workers. Unnecessarily restricting L-1 visas will surely cost jobs and harm exports. It is important to remember, though, much of what you are hearing today is, to a large extent, anecdotal. No clear empirical picture of the problem exists. Perhaps the wisest step the Congress could take at this stage would be to mandate a methodical evaluation of L-1 usage. Then any problems could be more clearly understood and better measured, and any legislative corrections could address such problems precisely, and not in ways that are overbroad, far removed from the problem, and harmful rather than helpful to the American economy.

A brief word on the issue of L-1 numbers reinforces the need to acquire good data. There has been a lot of confusion on this subject, with some articles referencing

very high numbers that in fact reflect the number of L-1 admissions, not new L-1 petitions. Intracompany transferees tend to travel with great frequency, and every time they return to the United States after a brief business trip abroad, that counts as another admission. Counting admissions, therefore, greatly distorts the picture of the L-1 presence in this country. In addition, many L-1 beneficiaries are not based permanently in the United States but, rather, divide their time between their existing jobs abroad and their functions in the United States. These situations may involve projects that require periodic involvement from the specialist abroad who brings key knowledge to the United States, or an executive who is the managing director of a foreign company with a manufacturing subsidiary in the United States and who also functions as the President of the United States subsidiary, but who works at that subsidiary for only a week every quarter. Some articles have cited figures that apparently include L-1 visa holders and their spouses and families. Even the visa issuances counted by the State Department may be inflated, since they may include reissuances or revalidations of visas previously given.

In short, Congress is in a position of disadvantage on this subject because of a lack of clear information, and the absence of such information is increasing the risk of legislation that is harmful to the United States economy without protecting American workers. We would suggest that, rather than legislating without a clear picture, Congress should first ask that that picture be drawn properly. It would serve the legislative process well to know, for example, how many first-time L-1 petitions are granted each year, in addition to how many admissions there are, or how many amended petitions or petitions for extensions there are. It would be useful to know how many L-1 visas are used by workers for United States-based companies, and how many by foreign companies expanding into the United States; where in the country L-1 visa holders are working, and in what occupation. It may be particularly useful to have information concerning the number of L-1B aliens admitted under the blanket petition process as a result of the new, reduced experience requirement enacted some eighteen months ago.

If this Subcommittee concludes that the L-1 category is in need of alteration, such legislation should obviously be narrowly tailored to the problem as it may appear to exist. If further information bears out the problem that has been reported in the press, we expect that this tailored solution could be achieved through a narrowly crafted statutory test that falls short of the overbroad "indicia of employment" test contemplated in H.R. 2152, but that would prohibit L-1 transfers where control over the transferred employee is yielded so much that the employee is effectively employed by the outside company and specialized knowledge of the petitioning company is not truly necessary to the assignment.

We appreciate this opportunity to contribute to the Subcommittee's work on this valuable visa category, and we look forward to working together with you and your able staff as your efforts continue.

My name is Pat Fluno. I'm a computer programmer from Orlando, Florida. My co-workers and I lost our jobs to visa holders from India. I'd like to begin by reading excerpts from a letter I wrote to Representative John Mica in August of 2002 asking for help.

We are employees in the data processing department (IT) of Siemens ICN, at both the Lake Mary and Boca Raton sites. We are all US citizens and full time salaried computer programmers and analysts ranging in age from 33 to 56.

Approximately 15 employees have letters dated April 19, 2002, indicating a layoff date 'in conjunction with the restructuring of I.T.' At that time, employee meetings were held informing us that the department would be outsourced. During the months of May and June, management had meetings with outsourcing companies on site. We were interviewed by several of those companies and all expressed surprise that we had already been given definitive layoff dates. During the last week of June, the outsourcing company was announced as Tata Consulting Services of India. People from TCS were on site July 1, 2002. They immediately began interviewing us on how to do our jobs. Layoffs of Americans began on July 15 and were scheduled to continue through August 30.

We are being laid off and TCS personnel are taking our jobs. Siemens management has told us to "transition" our work to TCS and show them how to continue the development and support work already begun by Americans. My letter to Representative Mica ends by asking for help to prevent this injustice.

We lost our jobs AND we had to train our replacements so there would be little interruption to Siemens. This was the most humiliating experience of my life.

Our visa-holders replacements are sitting at our old desks, answering our old phones, and working on the same systems and programs we did... but for one-third the cost. This is what a manager at Siemens told me. Fifteen people were laid off. At an average high-tech salary of $75,000 each, that's over $1.1 million of gross wages lost to Federal and State income taxes...from just 15 people. The visa holders do not pay income taxes. Representatives of TCS will tell you that their programmers make $36,000 per year, which is just under the average salary range for American programmers. But what's the breakdown of that money? $24,000 of that is non-taxable living expenses for working 'out of town'. That leaves just $12,000 of real salary paid to them in equivalent Indian rupees. $12,000 – close to the US minimum wage. An American having an income of $36,000 would have to pay taxes, but not these visa holders. There are no salary rules for L1 visas.

How can they come to the US so easily? The L1 states that they must be a "specialized knowledge worker familiar with the products and services of the company". There are many legitimate uses of the L1 to transfer employees from one company subsidiary to another. But, transferring a worker from Tata India to Tata US for work at Siemens is NOT what was intended by the L1 visa . They are not working on Tata's computer systems, but on those of Siemens. In our particular case, Tata knew Americans were being laid off, so they didn't use H1-B

visas. Instead they fraudulently used the L1. There are no regulations regarding the misuse of L1's, and only limited penalties for H1-B abuse. Where is the INS ? Where is the DOL ? There are hundreds of thousands of L1 and H1-B workers in the United States taking jobs that Americans can do and that Americans want to do. Every H1-B and L1 visa given to outsourcing companies like Tata is a job an American should have.

What is happening here? In a time when our national security is paramount, we are making ourselves dependent on third world nations for our computer technology. We are giving these countries the ability to access, modify and break the very computer systems that run the US economic infrastructure.

Yet, we have an even greater parasite on our economy and it comes from American companies. US corporations are taking entire departments and relocating them to an Indian subsidiary. Hundreds of data processing, payables, and call center jobs are lost at one time. Ask Microsoft. Ask IBM. Ask Cigna. Ask almost any large US corporation and you'll find they have sent jobs off-shore. The term "off-shore" is just a euphemism for American jobs that are lost and will never return. What is the economic impact of this? In the short term, these companies say they are cutting costs, but in the long term they are undermining their consumer base. Where will our children find jobs? In marketing perhaps? Marketing to whom?

We need incentives to keep jobs in the US. We need monitoring of visa holders. We need fines for abuse and punitive damages for affected American workers. Current H1B penalties only apply to certain types of companies.

Misuse is misuse – it MUST apply to all situations equally. We need to enforce the laws we already have. Why can a company like Tata, operating in the United States, mock our equal opportunity and ethnic diversity laws. Where is the EEOC?

I have one question to ask of all the CIO's and CEO's who have laid off US citizens in favor of cheap labor: How does it feel to know you have personally contributed to the decline of the American economy?

HOW DOES IT FEEL ?

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Testimony of

Mr. Austin T. Fragomen, Jr., Chairman
American Council on International Personnel, Inc.

Before The

U.S. Senate Subcommittee on Immigration, Border Security, and Citizenship

"L-1 Visa and American Interests in the 21st Century Global Economy"

July 29, 2003

Good afternoon Chairman Chambliss, Senator Kennedy, and distinguished Members of the Committee. On behalf of the American Council on International Personnel (ACIP), it is a privilege to have the opportunity to testify before this committee today. For over 30 years, the L visa category for Intracompany Transferees has been essential to international investment and economic expansion in the United States. The L visa is a tool that allows U.S. multinational companies to fully participate in the Twenty-first century global economy, and it has become a model for other countries seeking to capture a greater share of the global marketplace by facilitating the international transfer of knowledge, skills and talent. ACIP shares the Committee's concern about possible fraud and abuse in the L visa program. Appropriate sanctions should be imposed upon those who misuse our immigration system. However, because the L visa is critical to the continued participation of U.S. companies in the Twenty-first century global economy, we urge that Congress move forward deliberately and with caution, should it consider making amendments to the L visa category.

Today, ACIP will put forward three recommendations. First, that the allegations of abuse in this program – that is to say that U.S. workers have been laid-off and replaced with cheaper foreign workers – extend to a limited group of L-1B specialized knowledge workers and companies. Therefore any corrections should be targeted at this problem and not at the L visa category as a whole. The most effective approach to meet this objective would be to clearly delineate what does and does not constitute "specialized knowledge." Second, the detection of fraudulent credentials, questionable business entities, and inappropriate uses of the program can be enhanced through the expansion of precertification programs such as the blanket L visa. Limited resources demand that we increase information sharing and cooperation between the government and U.S. employers, and the L blanket has been a model program in this regard for many years. And, finally, ACIP believes that the issues spurring many of the concerns expressed today derive from changes in the global economy and not deficiencies in the L visa category or regulations. Congress has a duty to consider the impact of new business models such as offshoring on opportunities for U.S. workers. It is imperative, however, to consider the whole picture. The need to reduce costs to maintain profitability, tax laws, education policy and workforce preparedness, intellectual

property rights and many other factors are driving companies to locate work abroad. The L visa is but a small piece of this puzzle. A study to determine how to retain America's edge in this changing economy would be appropriate. Each of these recommendations is addressed in more detail later in this statement.

ACIP is a not-for-profit association of over 300 corporate and institutional members with an interest in the movement of personnel across international borders. Each of our members employs at least 500 employees worldwide; and, in total, our members employ millions of U.S. citizens and foreign nationals in all industries throughout the world. ACIP sponsors seminars and produces publications aimed at educating in-house legal and human resource professionals on compliance with immigration laws, and works with Congress and the Executive Branch to facilitate the movement of international personnel. ACIP members have extensive experience with the L visa program and have been instrumental in developing the laws and regulations facilitating the transfer of intracompany transfers so vital in a global economy.

I have practiced various aspects of immigration law for the past 35 years, and was privileged to serve as Staff Counsel for the Immigration Subcommittee in the U.S. House of Representatives when the L visa category was enacted in 1970. Currently, I chair ACIP's Board of Directors, and serve as Managing Partner of Fragomen, Del Rey, Bernsen & Loewy, PC, the world's largest firm practicing exclusively in the field of global immigration and nationality law.

Global Mobility and L-1 Visa Usage by International Companies

To understand the L visa, it is important to understand the scope of international personnel transfers, commonly referred to as "global mobility." A recent survey of just 181 small, mid-size, and large companies with offices in 130 countries revealed that they have a combined expatriate population of more than 35,150 employees.[i] Unlike years past when primarily upper-level executives were transferred abroad for a few years to gain an international perspective and broader knowledge of markets and business, today's transfers include professionals from all levels and operating units within the company.

The goals for international assignments range from filling a skills gap to launching new endeavors, technology transfer and building management expertise.[ii] Many companies have made international experience a prerequisite to promotion within the organization and devote extensive resources to developing an international staff capable of functioning around the world. International assignments may last from less than six months to over three years.[iii] Depending upon the nature and duration of the assignment, the employee may be placed on either the home country or host country payroll. Expatriate compensation packages include benefits such as housing and education allowances, travel and expense reimbursement, tax equalization, language and cultural training, and spousal career assistance.[iv] The L visa and its equivalents in other countries play a critical role in facilitating global mobility.

Congress created the L visa category in 1970 in recognition of the need for international companies to have an avenue for temporarily transferring employees from abroad to the United States. The L-1 statutory provisions have been modified several times since then, to reflect evolving business practices, including more explicit definitions of qualifying capacities. The L visa plays a vital role in a company's ability to remain competitive in the global market, by allowing it to transfer employees with specific experience and skills from a company abroad to the same company, parent, affiliate or subsidiary within the United States. These employees must have been continuously employed by the company for one of the past three years, or for six months if the visa application is filed under an approved blanket petition. By their nature, L visa holders have experience with and knowledge of the company's operations, products and processes, and most are transferred only after many years of employment. This experience and expertise distinguishes them from other types of nonimmigrant workers who may be new hires from a competitor or recent college graduates. Even within the L category, however, important distinctions are drawn between the two types of L visas, the L-1A for executives and managers and the L-1B for employees with specialized knowledge.

L-1A *executives* direct the management of an organization or a major component or function of an organization. Similarly, L-1A *managers* have the primary duty of directing an organization, or area of

an organization, and supervision or control of the work of others, or management of an essential function at a senior level in the organization's hierarchy. L-1A executives and managers tend to be transferred for longer-term assignments as their skills involve oversight, implementation and standardization of projects, processes and investments, integration of business units, and the opening of markets. Generally, their families are relocated with them at significant expense to the company. L-1A managers and executives are sometimes sponsored for legal permanent residency if it is in the company's and employee's best interest to have the employee remain in the United States. For example, a number of CEOs and other executives playing leading roles in U.S. companies initially transferred to the United States on L-1 visas.

L-1B employees have "*specialized knowledge* of the company, its product and its application in international markets, or have an advanced level of knowledge of processes and procedures of the company."[v] L-1Bs are engineers, technicians, programmers, auditors and others with very specific skills. As companies have integrated their global operations, the mobility of these employees has increased. Tremendous gains in productivity can be realized by transferring international teams who already have the knowledge and experience to implement a project either in-house or for a client in a timely and cost-efficient manner. L-1B assignment duration tends to be shorter, often less than six months, and their families may or may not accompany them. A typical L-1B assignee may be an engineer who has overseen the installation of a manufacturing process or software system abroad that will be replicated in the United States. Most L-1B workers are not sponsored for legal permanent residence as the goal for their assignment is to utilize their skills on a specific project and then send them on to their next assignment.

Congress has recognized the importance of the timely transfer of international assignees. The L was the first visa to mandate that the former Immigration and Naturalization Service (INS) process petitions in less than 30 days. While this deadline has not always been met, the Service rightly prioritizes these cases. In addition, Congress approved the "Blanket L" program. Under the blanket L option, a company is pre-certified to utilize the L visa program, either by meeting certain size and income

requirements, or through a demonstrated track record of case approvals. In addition to managers and executives, only specialized knowledge workers regarded as professionals who hold a bachelor's degree may enter the United States through the use of a blanket petition. The blanket petition conserves the government's resources while maintaining compliance and security. The Bureau of Citizenship and Immigration Services (BCIS) undertakes an up-front review of the corporation and its qualifying entities, and this certification is reviewed after three years. The blanket L program eliminates the requirement that an individual application be submitted to BCIS. Instead, the transferring employee presents himself or herself to the U.S. Consulate abroad. A Department of State (DOS) Consular Official determines whether the employee meets the criteria for issuance of an L visa and performs a security check. If there are concerns about the employee's eligibility, Consular Officials frequently require the company to submit an individual application to BCIS. Consulates are tending to develop more specific guidelines to determine when managers, executives and specialized knowledge workers may utilize the classification without an approved BCIS petition. A broad range of ACIP member companies report more stringent reviews over the past year, particularly where the employee may be spending some of his or her time working off-site. We believe that such rigorous review by BCIS adjudicators and consular officers is appropriate when driven by clear, concrete guidance from Congress and/or the agency headquarters.

The majority of the employers who utilize the L visa program are large, global companies because of the legal requirements for the visa category. In Fiscal Year 2002, the Department of State issued 57,721 L-1 visas, according to the U.S. Department of State Visa Office, with a similar number issued to immediate family members (spouses and children) who accompany the principal visa holder. The Visa Office also has indicated that as of July 17, 44,565 L-1 visas have been issued for Fiscal Year 2003. It has been estimated that approximately half are L-1A and half are L-1B. Given that the current fiscal year ends on September 30, it appears that there will be no increase in demand for L-1 visas. Reports that over 300,000 L-1 workers enter the United States each year are highly misleading, as they reflect multiple entries by the same highly mobile L visa holders.

The L visa provides companies the flexibility necessary in a global market place to best utilize the skills available to integrate global research, development, sales and marketing initiatives as well as international mergers and acquisitions. As anticipated when the program was initiated in 1970, the cross-fertilization of ideas and the movement of personnel contribute significantly to international business operations. By definition, L-1 personnel entering the United States already have a proven track record with the business organization. Managers and executives typically are overseeing projects, essential functions or entire business units. They bring expertise to the United States and transmit corporate knowledge and culture to overseas operations. Specialized knowledge workers are coming to the United States because of their experience in working with a given process, tool or product that is integral to the particular company's way of doing business. Thus, the L-1 visa category permits global business organizations to build and invest in a global pool of talent, a major source of their strength. The level of international trade and investment inherent in today's economy would not be possible without this type of visa classification. Virtually every industrial country has a visa equivalent to the L-1 that allows for the exchange of personnel without a test for labor market impact.

The Difference Between L-1 and H-1B Visas

It is important to note that the L-1 visa category is distinct in its origins and usage from the H-1B visa and in its relationship to U.S. workers. Their differing legislative constructs make certain attestations and procedures appropriate for H-1B visas inappropriate for L visas. The L-1A classification is clearly different from the H-1B visa, as it may only be utilized by managers and executives rather than all levels of professionals. The L-1B classification requires the employee to have specialized knowledge that has been obtained as a result of his or her unique pre-existing relationship with a company; in contrast, the H-1B professional typically possesses educational credentials and/or a skill set that was developed elsewhere and is present when the worker first seeks employment with the employer. In fact, most global companies use both types of visas depending upon the qualifications of the employee and the nature of

the assignment. In most instances, H-1B employees are able to obtain employment because of the nature of their professional degree, often obtained at a U.S. university, or their experience with a competitor in the United States or abroad. L-1B employees, on the contrary, are transferred to the United States on the basis of proven records, resources and special or advanced knowledge that a company values and wishes to utilize in the United States as part of its effort to grow and remain competitive. L-1B stays are frequently of a shorter duration than the typical H-1B visitor, and they often remain on foreign payrolls, separate and apart from their U.S. colleagues. This is in contrast to a majority of H-1B workers who are sponsored for permanent residence. While many L-1 workers meet the statutory requirements for an H-1B visa, their criteria are distinct and narrowly drawn and serve different purposes for the company.

As H-1B workers might be drawn from the domestic or international marketplace, Congress in 1990 sought to assure that the employment of these foreign nationals did not adversely affect the wages and working conditions of U.S. workers. The labor condition attestation and related wage requirements were meant to create a level playing field for U.S. and foreign workers. Under this framework, H-1B workers are typically only hired when they either have superior skills, knowledge, expertise and/or accomplishments that are of great value to an employer, or alternatively, when U.S. workers are unavailable. In the L-1 category on the other hand, only a limited pool of workers are available for L-1 classification: members of a business organization's existing workforce. The L-1 category was enacted in 1970 and amended in 1990 with the expectation that it would be carefully monitored and regulated by the INS, now the BCIS. This expectation has largely been met, with adjudicators closely scrutinizing petitions, often questioning and sometimes denying cases that would appear approvable.

ACIP member companies are gravely concerned by legislative proposals that would attempt to superimpose the H-1B program on top of the L visa by establishing numerical quotas well below current usage, requiring a prevailing wage without taking into consideration global compensation packages, eliminating the blanket L visa program that facilitates the timely and efficient transfer of personnel, and imposing strict time limits on L visas that may not meet companies' assignment needs. The impact of

these proposals on legitimate global business users of the L visa category would be dramatic and unacceptable. These changes would not address the concerns of displaced U.S. workers associated with offshoring, but would place the United States at a relative disadvantage to our trading partners who are increasingly using streamlined visa policies to attract trade and investment.

The New Offshoring Business Model and Its Impact on Visa Usage

A series of recent media articles, as well as congressional hearings, have focused on L visa usage in the context of the outsourcing of information technology and other white-collar services. A company may choose to outsource for a variety of reasons including where it wishes to reduce costs in order to maintain profitability, lacks the in-house expertise to complete the project, to limit in-house services to core competenencies in order to enhance quality, to obtain enhanced services from the outside firm, or simply because outsourcing is more efficient in terms of time and costs. Outsourcing is not a new business model and we acknowledge that it often comes with painful adjustments for U.S. workers. What has changed is that increasingly the outsourced work is going to offshore firms or offshore subsidiaries of U.S. firms as opposed to different companies also located in the United States.

Typically, there is not a one-for-one replacement of a U.S. employee by a foreign or outsourced worker. Rather, the companies that win the contracts utilize alternative business models. A company that wins a competitive bid to provide services will assign a team to the account. This team will be comprised of some combination of U.S. and foreign workers in the United States, as well as a team of employees operating at a center abroad. The U.S.-based workers typically collect information and coordinate activities with workers abroad. Examples of work contracted offshore include software development, back-office financial operations, and customer service call centers. The cost savings occur not in the United States, because L workers receive global compensation packages similar to U.S. workers, but overseas where the majority of the work is done.

Immigration laws, in particular the L-1B visa, certainly facilitate these business arrangements but they are a byproduct rather than an impetus of the offshoring model, as it has come to be called. Congress, and the nation, should appropriately consider what efforts must be made to ensure the United States is an attractive locale for investment, that the wages and working conditions of U.S. workers are not unfairly undercut, and that U.S. workers are prepared to meet the technological challenges and opportunities of this new economy. Proponents argue that while offshoring may cause some temporary dislocation in the U.S. workforce, particularly in today's sluggish economy, it will also keep industries competitive, provide investment in poorer nations, and eventually create new markets for U.S. goods and services that will spur future economic growth. Whether you agree with this assessment or not, the trend toward outsourcing and offshoring will not be halted by changes to our immigration laws.

We are concerned that proposals to prohibit placement of L employees at client or customer sites are overly broad and would restrict legitimate contractual arrangements and accepted business practices. There are many instances where the nature of a job requires the presence of an L visa holder at a customer site. For example, an auditor engaged in reviewing the client's worldwide operations may enter the United States on an L visa but work primarily at the client's site, as this is where the necessary information is located. Similarly, sales professionals spend most of their time visiting customers. BCIS and DOS regularly distinguish these legitimate uses from other, more questionable, outplacement arrangements and we applaud these efforts. This job could be made easier through revised definitions of specialized knowledge and enhanced use of precertification programs.

Recommendations

ACIP has attempted to explain the importance of L visas in the Twenty-first century global economy, to distinguish the L visa from the H-1B and to explain the larger economic forces surrounding offshoring and the displacement of U.S. workers. In our efforts to protect U.S. workers, we must not impose new burdens on global companies that make the United States an even less attractive locale for

business operations and investment. ACIP would like to offer the following recommendations for consideration by Congress:

1. **Clarification of L-1B Specialized Knowledge.** ACIP notes that the business world has changed dramatically in the past 30 years and that it is not always easy to identify which corporate arrangements or positions qualify for the L visa, particularly the L-1B. The agencies' efforts to identify illegitimate uses of the program could be aided by legislative or regulatory clarification of some of the terms and definitions already in our laws. Better explanation of what experience and expertise qualify as "specialized knowledge" would be particularly effective. The allegations of abuse in the media have involved L-1B specialized knowledge visas, not L-1A visas for managers and executives. ACIP acknowledges that there has been ongoing disagreement about how the concept of "specialized knowledge" should be defined. Recently, BCIS and DOS offices have been taking a rather restrictive stance, at least in terms of how longstanding definitions of specialized knowledge are applied. More specificity in terms of the regulatory definition could lead to clearer standards that ultimately make it easier for companies to rely on continued utilization of this classification.

   ACIP strongly supports a joint review by Congress, the relevant agencies, and industry organizations to craft a meaningful, clear and appropriate definition of specialized knowledge. Input from all interested parties will be vital to ensuring that today's complex business relationships are appropriately accommodated by our laws. ACIP firmly believes that with appropriate guidance BCIS and DOS are well equipped to make determinations regarding eligibility for and appropriate usage of L visas. It is not necessary to rewrite our L laws, add significant new regulatory burdens for all L visa employers or create a new regulatory scheme.

2. **Expansion of Precertification Programs to Identify Legitimate Users.** ACIP acknowledges that the L visa program is not without fraud and abuse, but we would posit that it involves a small percentage of cases. Nonetheless, the use of fraudulent credentials and bogus corporations are particularly troubling and cast a pall over all legitimate users. ACIP member companies have worked

closely with Consulates, particularly in India and China, to identify and stop fraud. ACIP has previously testified before Congress about ways to reduce fraud and abuse.[vi] We would like to reiterate our support for the expansion of precertification programs today.

The Blanket L program is one model for precertification. A detailed, initial review of qualifying business relationships by experienced BCIS officials produces more consistent and reliable results than the adjudication of tens of thousands of individual petitions. It allows for up-front clarification of complex issues, such as the company's relationship to the overseas entity, while still requiring Consular officials to review the bona fides of each particular employee. This streamlined process inherently conserves scarce government resources, while providing for even more thorough, consistent and fair adjudications. Many ACIP members have taken the blanket program a step further by establishing relationships with consular officials in countries where they have a significant presence. This allows the company to educate and give advance notice to consular officials about their global operations and intended plans for transferring personnel. We believe this type of government-private interaction and programs that identify legitimate users should be encouraged by formalizing mechanisms for companies to seek "pre-certification" at the consulates and establishing more direct lines of communication between the consulates and companies to resolve problem cases. These changes would benefit both the government and employers.

3. **Study on Competitiveness in the Twenty-first Century Global Economy.** Although today's hearing focuses on L visas, a wide variety of policies – trade, labor, investment, education and tax – must be considered in determining how to maintain U.S. competitiveness in the Twenty-first century. A strong economy will provide opportunities for those U.S. workers who have the education and training to meet the technological challenges of the new economy. ACIP member companies have supported legislation such as No Child Left Behind that benefits today's and tomorrow's workers. We will continue to work with our member companies on a variety of education and workforce issues to ensure we have access to the talent needed to compete in the Twenty-first century global economy.

Demographic trends show that access to talent will be a vital issue for years to come. Over the course of this next century, ACIP believes that immigration policy will increasingly become a tool that countries employ to attract trade, investment and talented workers to their shores. We should not let short-term economic difficulties blind us to long-term economic opportunities. ACIP recommends that Congress commission a study, with the input of business experts, that examines emerging economic trends and examines the array of policies necessary to ensure future economic growth and opportunities for U.S. workers.

Conclusion

The L visa program, particularly the blanket L program, has been extremely important in facilitating global commerce for U.S. companies for over thirty years. It has been a model of success in an often-broken immigration system. Our challenge is to create a secure and efficient immigration system that protects U.S. workers while anticipating employers' needs for access to talent from around the world. ACIP stands ready to work with you to build such a system.

Thank you for your time and consideration. I have submitted a full statement for the record, and look forward to answering any questions that you might have.

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[i] Global Relocation Trends 2002 Survey Report. Sponsored by GMAC Global Relocation Services, the National Foreign Trade Council, Inc. and SHRM Global Forum.
[ii] Ibid.
[iii] Ibid.
[iv] KPMG's Global Assignment Policies and Practices Survey 2003.
[v] INA 214(c)(2)(B).
[vi] Statement of Lynn Shotwell, ACIP, before the House Subcommittee on Immigration and Claims, May 5, 1999.

Department for Professional Employees, AFL-CIO

TESTIMONY OF

MICHAEL W. GILDEA, EXECUTIVE DIRECTOR

DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO

BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON IMMIGRATION

REGARDING THE L-1 VISA PROGRAM

JULY 29, 2003

Chairman Chambliss and members of the Subcommittee:

Thank you for the opportunity to present the views of our organization on the matter of the L-1 visa program. The Department for Professional Employees, AFL-CIO is a consortium of 25 national unions representing nearly 4 million professional and technical employees in both the public and private sectors.

Mr. Chairman let me begin by thanking you for convening this hearing. We also appreciate your comments and those of Senator Feinstein as well as other members of this subcommittee that were made last week during the full committee hearing and markup of the Chile-Singapore Free Trade Agreements. You and other Senators recognized that the USTR had overstepped its authority and trampled on yours when it embedded within those agreements new policies related to the "temporary" entry of professionals from those two nations. Hopefully the USTR will refrain from doing so in future agreements in light of the bi-partisan, bi-cameral backlash that has resulted.

Yet that confrontation served to raise a much larger issue relating to such guest worker visa policies. And that is that there is no coherent national policy regarding professional guest workers.

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Whether it is L-1, H-1B, TN visas or other such programs, each of them operate under different standards, limitations and rules of accountability where they exist. Given the adverse impact that these programs are having on U.S professionals--many of whom are either unemployed or underemployed--as well as the non-immigrant workers themselves, perhaps now is the time and this is the venue to develop a more holistic, coordinated federal policy in this regard.

For example, what is particularly baffling about these programs is that none of them connect to the realities of current U.S. labor market conditions. There is no nexus between the unusually high current rate of unemployment among professional and technical workers and the fact that the guest worker population now numbers over 1 million according to some estimates. As a result, these existing guest worker programs in effect force well qualified, American professionals to compete against foreign workers here in the U.S. for domestic jobs. In our opinion, there's something seriously wrong with that picture.

I strongly urge the Subcommittee to address these and other public policy anomalies as you consider badly needed reforms in both the L-1 and H-1B programs. Now is the time to be asking tough questions. Chief among them are what is the total number of guest workers that should be allowed into the U.S. under all such programs in periods of high and low unemployment? To what extent should there be uniformity across all programs with regard to worker protections, employer eligibility, visa duration and fees, guest worker qualifications and credentials, enforcement and penalty protocols, etc? Should U.S.-based employers be limited in the total number of temporary foreign workers they can have on the payroll from all guest worker programs? We sincerely hope the Subcommittee will address these overarching issues as your review and assessment of guest worker programs unfolds.

As to L-1, as we all know that it was originally intended to facilitate the "intra-company transfer" of strategic personnel within global corporations that have U. S. facilities. The L-1 non-immigrant worker is then supposed to undertake training in the U.S. side of the operation and then return for re-employment at an overseas location.

Our unions have no problem with this basic concept. But we vehemently object to how this program has morphed into something that now victimizes highly skilled, well educated American professionals. What follows is a brief summary of what we consider to be some of the more blatant abuses that have evolved under the L-1 program along with some suggestions for reform.

REPLACEMENT of U.S. WORKERS

Recent exposés in Business Week magazine, the New York Times, the San Francisco Chronicle and other publications have detailed the plight of workers like Patricia Fluno and other IT employees who have been fired as a direct result of abuse of the L-1 visa. We are also hearing about similar situations from our members at, Boeing, IBM, Microsoft and elsewhere. And often the indignity of losing one's job is compounded by the demand of the employer that U.S. workers train their replacements. It should be a fundamental principle of immigration law that no professional worker in this country should ever have to live in fear of losing their livelihoods because federal law allowed a foreign guest worker to come here and take it away from them. Ironclad protections to guarantee that outcome are long overdue.

The problem is that the L-1 program has few limitations and as such it is ripe for fraud and abuse. For example, there are no statutory prohibitions against laying-off an American worker and replacing him or her with an L-1. Nor is there any requirement that the employer pay the occupational prevailing wage as is the case under H-1B. It is exactly the absence of these and other protections and limitations that make the L-1 program far more attractive to employers than H-1B and is a major reason for the explosive growth in this visa category.

The simple solution is an outright ban on the dislocation of American workers by L-1 visa holders with stiff penalties including civil fines and debarment for violations. This should be coupled with beefed up Department of Labor (DoL) enforcement authority to monitor L-1 usage through random surveys and compliance audits, investigate and adjudicate complaints and impose penalties where warranted. In addition the "dependent employer" requirement under H-1B should also be applied. That standard mandates that an employer attest that no layoffs have or will occur at the jobsite where the L-1 is to be employed 90 days before or after the H-1b petition is filed.

VISA CAPS

Unlike any of the larger professional guest worker visa programs, there is no annual limit on the number of L-1 visas that can be issued. This is a glaring omission that must be addressed. According to statistics from the State Department's Bureau of Consular Affairs, from 1995 to 2001 the number of L-1 visas doubled from 29,000 to over 59,000. Given these numbers, we suspect that

some employers are "job churning" the L-1s, that is bringing them in for three, four or five years and then replacing them with second or third generation L-1s. We would recommend that a cap be imposed that reflects the utilization average over the last decade--about 35,000 per year. An endless pipeline of readily available cheap foreign workers lends itself to the kinds of abuses we see today and encourages companies to game the system and engage in job churning. Numerical limits are essential for two other important reasons: Unlike H-1B, there is no labor certification process, and; caps are needed to facilitate Congress' development of an overarching national policy regarding the overall number of foreign guest workers that are permitted in the U.S. In addition, consideration should be given to placing a limit on the total number of guest workers that any single employer can hire under all categories of guest worker programs.

DURATION

A problem common to all of the professional guest worker programs including L-1 is the renewability of the visa. This issue was a major point of controversy regarding the misnamed "temporary entry" provisions of the trade agreements whose one year visa can be renewed forever. Under L-1 it's a two tier scheme—the one year visa for managers and executives can be renewed for seven years; for those with specialized knowledge-- five years. I'll focus on the latter. Five years isn't temporary. Two to three years is more than enough time to get the training needed especially if these L-1s possess a high degree of specialized knowledge. I would strongly urge the Subcommittee to consider applying more reasonable time constraints to L-1 as well as to other guest worker programs. This too would also likely help to discourage the practice of job churning because the long duration of these visas precludes the promotion or advancement of an incumbent U.S. worker into these positions and as well disadvantages qualified but unemployed Americans who have no opportunity to fill these positions because they are never advertised.

BODY SHOPS

Another of the more blatant abuses of the program is perpetrated by outsourcing companies who bring in foreign workers and then subcontract them out to other businesses. I doubt that the Congress envisioned the likes of Tata Consultancy Services, Wipro Technologies, and Infosys

Technologies—all Indian owned firms--when it created this program 33 years ago. As some of the more senior members of this committee know, some of these firms and others like them have had a troubled history under the H-1B program. In fact, prior legislation relating to H-1B has specifically addressed abusive practices by them such as benching.

Yet these firms are now among the biggest users of the L-1 program supplying Indian IT talent to the likes of Bank of America, Hewlett-Packard, Dell and Apple Computer, General Electric, Cisco Systems, Visa International, Merrill Lynch, Boeing, Bank One, Eli Lilly, Chevron-Texaco, Sun Microsystems and of course Siemens. Their access to L-1s appears to contradict the original intent of the program as described earlier. In fact, spokespersons for the State Department and the Bureau of Customs and Immigration Services (BCIS) have publicly stated that this kind of L-1 outsourcing is fraudulent.

On this point, the statutory language seems clear. Title 8 of the uniform Code of Federal Regulations, Part 214, Section 214.2(l) entitled "Intracompany Transfers" states the following under subsection (ii) entitled "Definitions":

> *Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.*

That seems clear enough but to stop the outsourcing epidemic it seems reasonable to restrict access to these visas to the primary employer whose international operations require U.S. based training and to—if necessary--specifically outlaw subcontracting. Rep Dan Mica (R-FL) has gotten the ball rolling on this reform by introducing legislation recently in the House to address this problem. The standard proposed in the pending DeLauro-Shays L-1 reform bill—H.R. 2702--appears to be more comprehensive. We urge the Subcommittee to close this loophole and keep the body shops out of this program.

VISA FEE

This issue as well was a major point of controversy during the recent deliberations over the trade agreements. Congress forced the USTR to agree to the same fee that's applicable under H-1B--$1,000 per visa--and we applaud that initiative. That fee should also be applied to the L-1 program but with the majority of the proceeds going principally to the (BCIS) for administration and data collection, to the DoL for enforcement and oversight and for the Department of State's Counselor Offices to assure thorough review and examination of visa applications. The imposition of the $1,000 fee also serves as a modest disincentive to discourage over use of the program and would accomplish a higher degree of fee uniformity across all professional guest worker programs. In addition, there should also be an explicit prohibition against employers seeking to regain repayment of the fee of any other visa-related costs from the guest worker.

PREVAILING WAGES

In the poster child Siemens case, according to the San Francisco Chronicle, Tata Consultancy Services acknowledged that it paid some of the replacement programmers "only $36,000 a year—below the average local range of $37,794 to $69,638 for a basic programmer (determined by the DoL)". This was of course well below the compensation levels paid to those U.S. employees who were laid off as a result of their deal with Tata Consultancy Services.

Requiring the payment of a prevailing wage to the L-1 workers would discourage those who would try to use the program as a back door to cheap labor. Although the H-1B program does have a prevailing wage requirement, it is ineffective because employers can fabricate a wage by supplying their own wage data instead of relying upon government wage information. Instead we would recommend for your review the prevailing wage standard proposed under H.R. 2702 which is the greater of the following: the locally determined prevailing wage level for the occupational classification in the area of employment; the median average wage for all workers in the occupational classification in the area of employment; the median wage for skill level two in the occupational classification found in the most recent Occupation Employment Statistics survey. We would also advocate that the L-1 worker be assured of receiving the same benefits that are extended to other similarly situated workers at the host company.

QUALIFICATIONS AND CREDENTIALS

One of the few requirements under L-1 is that the prospective L-1 worker must have been employed by the host company for at least one year out of the previous three years. This is insufficient. If the worker truly has a long term employment attachment to the parent firm sufficient for that company to invest the considerable resources to have that worker trained in the U.S. then a two year prior employment requirement would not appear to be onerous. In addition, if the worker is legitimately a high-end, skilled professional with specialized knowledge then they ought to have minimal academic credentials to go along with the prior employment experience. We would recommend adoption of the same criterion contained in the H-1B program which requires the prospective guest worker to possess at least a bachelor's degree or its equivalent.

It is exceedingly important that more strenuous prerequisites be applied to this area of the law because this is where much of the visa fraud in these kinds of programs occurs. In fact a three-year-old GAO review reported that the then INS had found a high incidence of fraudulent use of L-1 visas calling it "the new wave of alien smuggling".

L-1 WORKER PROTECTIONS

Exploitation of guest workers sadly is part and parcel of the sad history of these programs beginning with the infamous Bracero tragedy. Any L-1 reform effort must incorporate protections for the non-immigrant guest worker otherwise abuse will continue to run rampant through this program. Already detailed are proposals related to prevailing wages, benefit equity and protection from coercion related to repayment of visa-related fees. Well-tailored, whistle blower safeguards are also needed so that either a U.S. or temporary foreign worker can report L-1 related, employer misconduct to the appropriate federal agency without fear of reprisal. In addition, proven incidents of wage chiseling should be addressed through harsh penalties such as a double back-pay remedy.

OTHER ENFORCEMENT AND OVERSIGHT REMEDIES

In addition to earlier referenced suggestions, we would also recommend that:

- Civil penalties also be applied for misrepresentation or fraud related to the information submitted on the visa application;
- To allow for careful review of L-1 applications, the practice of submitting blanket petitions for multiple L-1 workers should be eliminated;
- Strict timelines be imposed for the response, processing and administrative adjudication of complaints by DoL;
- Congress mandate appropriate data collection protocols and timelines for reports by the relevant federal agencies to assist Congress with its oversight of this program.

Mr. Chairman, there is one last issue that hopefully the Subcommittee will also take time to consider. Your Judiciary Committee colleague—Senator Lindsey Graham--raised this issue at each of the recent full committee sessions on the trade agreements. That subject was the outsourcing of U.S. professional and technical jobs overseas. This matter was recently the subject of a hearing in the House Small Business Committee.

In addition to the media exposés about L-1, there has been a spate of articles recently about this phenomenon. The reason I raise it in the context of your hearing is that there is a connecting thread. And that is Tata Consultancy Services, Wipro Technologies, and Infosys Technologies—the Indian- owned firms I mentioned earlier.

These firms are not just brokerage houses for L-1 and H-1B visas. They are among the primary culprits involved in the heist of hundreds of thousands of U.S. jobs and tens of millions in payroll. It goes something like this: First they contract with a complicit American firm to perform a tech related service like software maintenance. They will do this work here in the U.S. at bargain basement rates using guest workers. Then they bring in the Indian guest workers by the thousands; they've been doing that for many years. As you may already know, India is by far the largest user H-1B and L-1 visas. Once the team of temporary workers has got the knowledge and technical skills--sometimes after being trained by U.S. workers--as much of the work that is technically feasible is then carted back to India. There, the same Indian firms that stoke the visa pipeline are facilitating the creation high tech centers that employ hundreds of Indian nationals to do the work formally done by American professionals.

A recent study by Forrester Research estimates that if current trends continue over the next 15 years the U.S. will lose 3.3 million high end service jobs and $136 billion in wages. In one key segment of the tech industry, Jon Piot CEO of Impact Innovations Group in Dallas says that "software development in the U. S. will be extinct by mid-2006, with gradual job losses much like the U.S. textile industry experienced during the last quarter of the 20th century." Today major U.S. firms from many sectors are falling all over themselves to get into the outsourcing bonanza.

As they used to say in one of this nation's' greatest technology initiatives, the space program—"Houston we've got a problem". And I would suggest it's a big one. Only this time it's not those textile, steel, machine tool and other manufacturing jobs; many of them are long gone. Now it's the high tech, high end, high paying jobs that are headed out of town. The question for this Subcommittee is to what extent are the guest worker programs under your jurisdiction contributing to the outsourcing tidal wave. I would suggest that it is significant.

In conclusion, professional and technical workers in this nation have made enormous personal sacrifices to gain the education and training necessary to compete for the knowledge jobs in the so-called new American economy. They deserve better than to be victimized by immigration programs like L-1 and H-1B. Congress can make a long, overdue starts in cleaning up guest worker visa programs by implementing badly-needed reforms. At a time when so many American professionals are out of work, from our perspective a public policy failure in this arena is not an option.

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

July 29, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Senator Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Subcommittee on Immigration and Border Security
Hearing on

"THE L1 VISA AND AMERICAN INTERESTS IN THE 21ST CENTURY GLOBAL ECONOMY"

As our nation competes in a global economy, the movement of personnel across international borders has become more and more important. American companies need to have access to their operations overseas, and American workers need to have the opportunity to compete in foreign market without undue restrictions.

For citizens of the United States to receive the benefits and courtesy abroad, the United States government must, to a degree that is reasonable and appropriate, and within the parameters of sound immigration policy, reciprocate the treatment. Under our current law, the intra-company transferee visa, known as the "L" visa and the professional worker visa, known as the "H1-b" visa are two of the vehicles to facilitate the incoming of essential personnel.

The L visa, if used correctly, is intended for executives and managers, or persons with specialized knowledge, who must enter the United States for the limited purpose of working in the United States offices of the same company where the visa holder had previously worked for a required period of time. Likewise, the H1-b visa holders, many of whom are actually young people who were educated in the United States and in whom our country has already made an investment, are here to fill positions that legitimate American businesses cannot fill with American workers at this time. They must receive the prevailing wages and cannot be brought here as leverage in any labor dispute. Neither the L nor the H1-b visa is intended for the misuse by unscrupulous American employers who displace American workers.

I am sensitive to the fact that some American workers have been hurt by abuses of the L and H1-b visas. I want to reassure members of the Subcommittee on Immigration that I do not tolerate fraud and abuse of our immigration and labor laws, and will support any appropriate action to curb fraud in the area of temporary entry of foreign workers. We need to recognize that the international movement of personnel and the legitimate use of these visas are not what hurt American workers. The problem is the misuse of these visas by those who are not complying with the statutory and regulatory requirements, and who do not pay prevailing wages. The

misuse of these visas not only hurts Americans workers, but leads to exploitation of foreign workers as well.

I have faith in the American workers. I have no doubt that with the appropriate training, our workers can compete with the best in the world. I also believe that competition is good for America. We have no reason to fear foreign competition in the global economy, so long as we are playing by the same rules and on a level playing field. As many of you know, I introduced "The American Competitiveness in the Twenty-First Century Act" that authorizes the transfer of funds collected from H1-b visa application fees to be invested in training American workers in the fields where we have traditionally relied on foreign workers. I ask my colleagues to join me in efforts to educate and prepare American workers to fill the needs of our job market, especially in the fields of math, science, and high technology. It is my hope that, in due time, we will no longer rely on foreign workers to help fill our needs in any sector of the job market.

Finally, I wish to thank Chairman Chambliss for holding this hearing and discussing the issues that are of tremendous importance to the protection of American workers and to our ability to compete in the global economy.

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Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

July 29, 2003

PRINTABLE VERSION

Statement of Senator Patrick Leahy
Subcommittee on Immigration and Border Security
Hearing on "The L1 Visa and American Interests
in the 21st Century Global Economy"
July 29, 2003

The L-1 visa has become quite controversial in recent months, and today's hearing provides an opportunity for this Committee to examine that controversy. This visa was created to make it possible for international companies with a presence in the United States to bring their employees here, an important purpose if used properly. Recently, however, there have been numerous allegations that the visas have not been used as Congress intended.

Business Week reported in March that L-1s are being used widely by software outsourcing companies, who bring IT workers from abroad and place them at U.S. companies. According to a State Department spokesman quoted in the story, it is not permissible to use L-1's for outsourcing, but thousands have nevertheless been used for that purpose.

It is noteworthy that even as the American economy has weakened dramatically – and unemployment has risen rapidly – over the last three years, the number of L-1 visas has increased substantially. During the first five months of FY2003, for example, L-1's increased by 10 percent while H-1B's fell by 17 percent.

I think we all want to ensure that American companies are not prevented from bringing their international employees here to work, as such a move could further weaken our economy. At the same time, I am deeply concerned by reports that L-1 visas are being used to displace American workers with contract employees making a fraction of their salaries, or to evade the stricter requirements of H-1B visas. This is a complicated issue, and I believe it is important for us to study it thoroughly before we make changes to the law. We have heard disturbing anecdotal reports about abuse of the L-1 visas, but we should determine the program's problems more systematically. I hope that today will serve as the beginning of that process.

I also hope that as we review this program and the H-1B program, we will also review the temporary entry provisions that are contained in the Free Trade Agreements with Chile and Singapore that are currently pending before the

Senate. I believe that we should revisit those changes as we examine our other temporary entry programs during this Congress. I think that one thing that unites us on this Committee is the idea that Congress has the constitutional authority to make immigration policy, and we should do all that we can to exercise that authority thoughtfully.

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PRINTER FRIENDLY VERSION

Testimony of

Beth R. Verman

President, Systems Staffing Group, Inc.
on behalf of
National Association of Computer Consultant Businesses (NACCB)

To

The Senate Committee on the Judiciary
Subcommittee on Immigration and Border Security

On

The L1 Visa and American Interests in a
21st Century Global Economy

Tuesday, July 29, 2003
2:30 p.m.
226 Dirksen Senate Office Building

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Chairman Chambliss, Senator Kennedy, Members of the Subcommittee:

My name is Beth Verman. I am President of Systems Staffing Group, Inc. My company is located just outside Philadelphia. I am appearing today on behalf of the National Association of Computer of Consultant Businesses (NACCB). NACCB has approximately 300 member firms with operations in over 40 states and is the only national trade association exclusively representing Information Technology (IT) Services Companies. On behalf of NACCB, we thank you for allowing us to address this important issue.

My company, like other IT services firms, serves the need for flexibility in the IT workforce. It does not make economic sense for most clients to stay fully staffed for all potential IT development projects. That would be like permanently employing every construction trade for an office building project that may be needed some time in the future. Most large companies maintain a split between in-house employees and outside consulting resources. Consulting resources can be shifted to respond to a client's needs for different skill sets and different levels of demand. IT consultants are utilized to both augment existing in-house IT personnel as well as provide teams to help develop and integrate technology projects. This staffing flexibility helps make full-time employees more secure and gives their employer the flexibility needed in our rapidly changing environment.

After over 12 years in the IT staffing business, I founded Systems Staffing Group, a certified woman-owned business, in September 2000. My company specializes in placing IT professionals such as java programmers and software engineers with Fortune 500 insurance and financial services companies. Most of my clients are located in Pennsylvania, Delaware, New York, New Jersey and Connecticut. I am a small business, averaging 20 consultants on

billing and I anticipate doing over $2.5 million in gross revenue this year. I was honored to have recently received one of Philadelphia's top "40 under 40" minority executive awards.

While I am proud of my firm's progress to date (particularly in light of becoming a new mother this year), I have been frustrated that its growth has been hampered because of unfair competition with large foreign-based consulting companies that are not playing by the same set of rules my domestic company plays by. Let me give you a specific example. In prior years, we have typically placed 12 or more consultants a year at a major insurance company. Since January 1st of this year, we have only placed 2 consultants at the same client site. This is not a result of lack of demand. Rather, many of the consultants we have placed at this large insurance company, along with many direct employees of the company, have been replaced by individuals brought into the United States by large foreign consulting companies on L-1B intracompany transfer visas reserved for persons with specialized knowledge. I have personally seen similar arrangements at other client sites and the NACCB has reports from other members experiencing the same kind of displacement.

The L-1B visa was established to allow multinational companies to bring persons with specialized knowledge of the petitioning company's products, procedures and processes to the U.S. to work for a related U.S. company. The specialized knowledge is supposed to be an advanced level of skill that does not involve skills readily available in the U.S. labor market. The foreign IT workers that have been placed at some of my client sites are not utilizing any specialized knowledge. They are in effect staffing assignments at a third party client site. Although these firms often package their services as fixed price or time and material projects, the L-1B IT workers they employ are performing the same jobs, sitting at the same desks as consultants I had placed on a staff augmentation basis with the same client

Based on my observations, the IT workers brought in on L-1B visas possess no unique skills; their skill sets are readily available in this country. By simply posting an available position to a major Internet job board, my recruiters could quickly generate hundreds of qualified candidates who possess the required skills being filled by workers who have entered the country on L-1B visas. Why then are many of these foreign companies using the L-1B specialized knowledge visa? The answer is it gives them an unfair competitive advantage in selling IT services against U.S. based companies.

By squeezing IT workers into the L-1B visa category, it appears that these companies are circumventing many of the requirements of the H-1B visa program. Under the L-1B program, unlike the H-1B program, there is no obligation to pay a prevailing wage, no obligation to pay $1,000 fee to support education and training of U.S. workers, no obligation to attest an effort has been made to recruit a U.S. worker or attest that there has not and will not be a layoff of a U.S. worker for H-1B dependent companies. Finally, by its nature, the L-1B visa is only available to companies with an offshore presence, leaving firms such as my company with only a U.S. presence at a competitive disadvantage.

By utilizing the L-1B program, large foreign consulting companies are able to undercut my client billing rates by 30% to 40%. The only way to undercut billing rates to that extent is to pay IT workers significantly less than an equivalent U.S. worker. Further, NACCB has serious concerns whether L-1B visa holders and their petitioning employers are meeting all of their U.S. tax obligations

While I believe there are flaws in the current L-1B visa program, NACCB and I remain strong supporters of business immigration. During the talent shortage that this country experienced in the late 1990s and into 2000 which was particularly acute in

technology related positions, NACCB supported an increase in the H-1B visa cap. While most of the consultants I place with clients are U.S. citizens or legal residents, I do place H-1B consultants brought in by other firms. NACCB and I believe that responsible business immigration contributes to U.S. competitiveness and is an essential business tool in a global economy. As this subcommittee considers the current L-1B program, I would hope you would consider some modest changes that will allow the legitimate use of the L-1 visa to continue, but eliminate the current abuses of the visa. NACCB asks you to consider the following modifications to the program: (1) The crux of the problem lies with the vague and overly broad definition of "specialized knowledge." The petitioning organization should be required to demonstrate that the applicant seeking admission on an L-1 visa has been employed for at least one year and possesses "substantial" knowledge of the organization's proprietary processes, procedures, products or methodologies. The one-year requirement should apply to blanket petitions as well. (2) Persons brought in on L-1B visas should be required to remain under the sole and exclusive control of the petitioning organization; bringing in IT workers on L-1B visas for staff supplementation purposes at client sites should not be permitted. (3) There is a significant need for better tracking and transparency of the L-1 visa program. With better and more timely information on the number of L-1Bs, countries of origin, wages paid to persons entering on L-1B visas, this subcommittee and other Members of Congress will be in a better position to conduct effective oversight and make informed policy decisions. (4) Because of the urgent nature of this issue, these statutory changes should be made effective upon enactment. By proposing modest statutory changes, the need to issue extensive new regulations which have historically taken the responsible agencies years, can be avoided.

Some have called for more drastic measures such as prevailing wage requirements and annual caps. NACCB and I believe that these measures are neither necessary nor advisable. Given the differences in pay scales between the United States and many other nations, prevailing wage requirements would exclude the entry of many executives, managers and individuals with substantial knowledge of proprietary processes that contribute to U.S. competitiveness. Likewise, annual caps, which are notoriously difficult to set with any degree of accuracy, would potentially restrict the legitimate use of the L-1 visa without addressing the problem. By limiting the use of the visa for the purposes for which it was originally intended through modest statutory changes, the abuses can be eliminated without overly restricting the movement of individuals for legitimate business purposes.

Mr. Chairman, in conclusion, I am ready, willing, and able to compete aggressively in the marketplace. I not only welcome competition, I relish it. I have always succeeded in highly competitive environments. Such an environment requires me to continually improve and deliver greater value to my clients. However, I am being asked to compete against foreign consulting companies that are provided an unfair competitive advantage by stretching my own country's immigration laws. To use a football metaphor, the L-1B visa program as it is currently being used allows foreign IT services companies the ability to start with the ball on my 10 yard line; whereas I must start with the ball on my own 20. All we ask is that U.S. laws are clarified, upheld and enforced so we have a level playing field. I urge this subcommittee to begin the process of leveling this playing field. Thank you for the opportunity to express my views and the views of many U.S. based IT services companies.

National Association of Computer Consultant Businesses NACCB

Attachment

NACCB's Proposed Legislative Solution

1. The following language should be added to Section 101(a)(44) of the Immigration and Nationality Act (8 USC Section 1101(a)(44)):

The term "specialized knowledge" refers to an assignment within an organization requiring an advanced level of skill and expertise which surpasses that ordinarily encountered in a particular field and which:

(a) has been gained through extensive prior experience with the employer which shall not be less than one year; and

(b) has provided the individual fulfilling that assignment with substantial knowledge of the organization's proprietary processes, procedures, products or methodologies and their application in international markets or that does not involve skills readily available in the United States labor market.

Strike INA § 214 (c)(2)(B) (8 USC § 1184(c)(2)(B)).

2. The L-1 applicant must remain under the sole and exclusive control of the petitioning organization, which at a minimum must:

(a) supervise the individual;

(b) control the individual's work product;

(c) control the time, place and content of the individual's work and all other essential elements of the services being performed; and

(d) own, operate or control the primary work location.

3. The petitioner requesting the specialized knowledge worker must be a U.S. entity and file and sign the petition as is required of H-1B petitions (8 C.F.R. § 214.2(h)(2)) and state the applicant's proposed wages in U.S. dollars.

4. Require persons currently in the United States with more than six months remaining on an L-1B blanket status to have the application re-adjudicated.

5. A beneficiary of a blanket L visa, within three years preceding the time of his or her application for admission into the U.S., must have been employed abroad by the petitioning employer continuously for at least one year (as was originally required). The current six month requirement is not a sufficient amount of time for an employee to gain extensive or even significant experience with the petitioning organization. This would conform the experience requirement for the L-1B blanket petitions with those for non-blanket L-1B petitions. Edit Section 214(c) (2)(A) of the INA to strike the last sentence with respect to specialized knowledge applicants.

6. These legislative changes should be effective upon enactment.

Statement of

Stephen Yale-Loehr

Adjunct Professor of Law, Cornell Law School

on

"The L-1 Visa and American Interests in the 21st Century Global Economy"

Before the Senate Committee on the Judiciary Subcommittee on Immigration and Border Security

Tuesday, July 29, 2003

Washington, D.C.

Mr. Chairman and distinguished Members of the Subcommittee, I am Stephen Yale-Loehr. I teach immigration and refugee law at Cornell Law School in Ithaca, New York, and am co-author of *Immigration Law and Procedure*, a 20-volume immigration law treatise that is considered the standard reference work in this field of law. I also am of counsel at True, Walsh & Miller in Ithaca, New York. I am honored to be here today to discuss the L-1 nonimmigrant visa program.

For almost 35 years the L-1 visa has been a vital tool both for U.S. companies with an international presence and for international firms expanding into the United States. Although not a heavily used visa in terms of numbers, the L-1 visa has done much to help U.S. companies be competitive. It also facilitates foreign investment in the United States. In fact it is the principal immigration vehicle U.S. companies use to bring in qualified personnel temporarily from their operations abroad to serve as managers or executives or to apply certain specialized knowledge. It also is the principal nonimmigrant visa category that foreign companies use to build U.S. factories, open offices, and hire significant numbers of U.S. workers to staff their U.S. operations. Unless U.S. and foreign companies are able to bring key personnel to their American operations, U.S. companies will be put at a competitive disadvantage and foreign companies will be unlikely to establish or expand their presence in our country.

The L visa program recently has come under scrutiny, both in Congress and in the media, primarily because of a weakened economy and the continuing trend toward outsourcing information technology (IT) work overseas. As a result of this scrutiny, which has focused in the wrong direction, several measures have been introduced that would limit severely the effectiveness of the L visa as a tool for facilitating both foreign investment and job creation here in the United States. These proposals to restrict use of the L-1 visa would unnecessarily limit its legitimate use, thereby diminishing the economic competitiveness of U.S. companies, impeding foreign investment in the United States, and resulting in the loss of American jobs.

Overview of the L Visa Program

Congress created the L-1 nonimmigrant visa category in 1970 primarily but not exclusively to assist multinational companies that experienced difficulties (as a result of changes to the immigration laws enacted in 1965) in bringing to the United States critical personnel temporarily from abroad.[1] To be eligible for an L-1 visa, a foreign national normally must have been employed by the foreign company continuously for at least one year[2] during the preceding three years in a managerial or executive position or in a

[1] *See* H.R. Rep. 91-851 (Feb. 24, 1970), *reprinted in* 1970 U.S.C.C.A.N. 2750; S. Rep. No. 91-366 (Aug. 8, 1969); *Nonimmigrant Visas: Hearings on H.R. 445, H.R. 9112, H.R. 7022, H.R. 9554 Before Subcomm. No. 1 of the H.R. Comm. on the Judiciary*, 91st Cong., 1st Sess. 112 (1970); 116 Cong. Rec. H5729-35 (daily ed. Mar. 3, 1970), 116 Cong. Rec. S8728-33 (daily ed. Mar. 23, 1970). The L visa category is codified at INA § 101(a)(15)(L), 8 U.S.C. §1101(a)(15)(L). *See generally* 2 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 24.01 [hereinafter, Gordon, Mailman & Yale-Loehr].

[2] In 2002 Congress reduced the one year period of continuous employment abroad requirement to six months if the U.S. business entity has obtained approval of an L-1 "blanket" petition. Pub. L. No. 107-125,

position where she gained specialized knowledge.[3] The individual must be coming to the United States to provide services to the same employer or a branch office, subsidiary or affiliate.[4] For this reason L-1 visa holders are known as intracompany transferees. Either the employing entity abroad or the prospective U.S. employer may be the petitioner, assuming each is otherwise qualified.

Executives and managers enter the United States on an L-1A visa. Employees with specialized knowledge enter the United States on an L-1B visa. To qualify for specialized knowledge, the employee must possess special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge in the organization's processes and procedures.[5] Spouses and children of principal L-1 visa holders enter on L-2 visas.

An employee brought in on an L-1A visa in a managerial or executive capacity may work in the United States for up to seven years.[6] L-1B beneficiaries may work in the United States for up to five years.[7]

Since the L-1 program's creation, Congress has consistently responded to the needs of the business community by facilitating the process by which multinational companies import key personnel via the L-1 visa. Originally, the L-1 beneficiary had to have worked for the company abroad during the year immediately before filing the L-1 petition. A later amendment broadened the qualifying period to one year during the prior three, thus permitting a former employee to rejoin the multinational company in the United States. Congress has also reduced the one-year prior experience requirement to six months if the U.S. business entity has obtained approval of an L-1 "blanket" petition. (A "blanket" L petition allows employers to have a petition on file that certifies that the organization meets the requirements of the blanket L visa program.[8] The purpose of the blanket L visa process is to eliminate one step of the normal L visa processing because there is no prior Bureau of Citizenship and Immigration Services filing required for the individual entering under the blanket L visa for that company. However, individual applicants for L-1 visas under the blanket program must still be interviewed by consular officials to make

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§ 2, 115 Stat. 2403 (2002). The blanket L visa program is available to companies that have: (1) obtained approval of petitions for at least ten L-1 managers, executives, or specialized knowledge professionals during the previous 12 months; (2) U.S. subsidiaries or affiliates with combined annual sales of at least $ 25 million; or (3) a U.S. work force of at least 1,000 employees. 8 C.F.R. § 214.2(l)(4)(i)(D). *See generally* Alan Tafapolsky, A. James Vazquez-Azpiri, Charles Foster & Stephen Yale-Loehr, *Cover Me: The Blanket L Program*, *in* 2 American Immigration Lawyers Association, Immigration and Nationality Law Handbook 2001-02, at 13 (Randy P. Auerbach et al. eds., 2001).

[3] 8 C.F.R. § 214.2(l)(1)(i).

[4] *Id.*

[5] 8 C.F.R. § 214.2(l)(1)(ii)(D).

[6] INA § 214(c)(2)(D), 8 U.S.C. § 1184(c)(2)(D).

[7] *Id.*

[8] Those requirements are listed *supra* note 2.

sure they meet the legal requirements to qualify as managers, executives, or specialized knowledge professionals.)

Congress further facilitated the use of the L-1 visa by easing the definition of "specialized knowledge,"[9] pushing the INS to process L-1 petitions within 30 days, and qualifying managerial and executive transferees for permanent residence in a priority category. Congress also later broadened the definition of "affiliate" to include firms that market their accounting or management consulting services under the umbrella of an internationally known name and organization even if they are not linked by equity and operating control.[10] And in 2002, Congress permitted the spouses of L-1 employees to work in the United States.[11] It is evident from the continual congressional attention to the L visa program that Congress, for thirty-plus years, has recognized and valued the L-1 program as a vehicle for job creation and business investment in the United States.

Statistics on L Visa Usage

L-1 visa usage has waxed and waned over the last decade in response to economic conditions, as has usage of other nonimmigrant visa categories. The following table and chart indicate State Department issuances of L-1, L-2, H-1B, and all nonimmigrant visas for fiscal years (FY) 1991-2003:

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[9] When first enacted in 1970, the statute did not define "specialized knowledge." Immigration and Naturalization Service (INS) regulations in the 1980s interpreted the term narrowly, requiring the employee to have proprietary knowledge of the company's product or services. The INS also claimed that only a few employees in the company could have such knowledge. In 1990 Congress defined specialized knowledge simply as "special knowledge of the company product and its application in international markets or . . . an advanced level of knowledge of processes and procedures of the company." Immigration Act of 1990, Pub. L. No. 101–649, § 206(b)(2), 104 Stat. 4978 (enacting INA § 214(c)(2)(B), 8 U.S.C. § 1184(c)(2)(B)). As the leading immigration treatise puts it, the 1990 statutory definition "seems closer to interpretations contemporaneous with the original [1970] statute." 2 Gordon, Mailman & Yale-Loehr, *supra* note 1, at § 24.03[5].

[10] *See id.*

[11] See Pub. L. No. 127-125, 115 Stat. 2403 (2002) (adding INA § 214(c)(2)(E), 8 U.S.C. § 1184(c)(2)(E)).

FY	L-1	L-2	H-1B	Total (NIV) Issued Per FY
1991	16,109	21,139	51,882	5,977,961
1992	17,345	21,358	44,290	5,368,437
1993	20,369	23,832	35,818	5,359,620
1994	22,666	26,450	42,843	5,610,953
1995	29,088	33,508	51,832	6,181,822
1996	32,098	37,617	58,327	6,237,870
1997	36,589	43,476	80,547	5,942,061
1998	38,307	44,176	91,360	5,814,153
1999	41,739	46,289	116,513	6,192,478
2000	54,963	57,069	133,290	7,141,636
2001	59,384	61,154	161,643	7,588,778
2002	57,721	54,903	118,352	5,769,637
2003	54,817	50,065	100,969	2,690,576

2003 data extrapolated from data taken October 1, 2002 through July 24, 2003

Source: State Department Visa Office

The statistics show that L-1 visa usage has always been less than another commonly used nonimmigrant visa category, the H-1B. At its peak in FY 2001, the State Department issued 59,384 L-1 visas.[12] That is only 37 percent of the number of H-1B visas issued that year, and less than 1 percent of all nonimmigrant visas issued that year. Since FY 2001, the number of L-1 visas issued each year has declined because of the current economic conditions in the United States. The graph indicates that although L-1 visa usage climbed from FY 1991-2001, H-1B visa usage climbed much higher and faster.

India was the largest beneficiary of the L visa program in FY 2002, with Indian nationals receiving approximately one-fourth (27,456 or 24.4 percent) of the 112,624 L-1 and L-2 visas issued in FY 2002.[13] Japan and Great Britain (including Northern Ireland) were in second and third place, respectively, with 14,214 (12.6 percent) L-1 and L-2 visas issued to Japanese nationals and 12,763 (11.3 percent) going to nationals of Great Britain.[14] Apart from these three countries, no other country received more than five percent of the L visas issued in FY 2002.[15] Canadian nationals entering the United States as intracompany transferees do not need to obtain an L visa.

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[12] The State Department does not separate L-1A and L-1B visa issuances. Also, the State Department does not keep statistics on visa refusals by visa category type.

[13] Ruth Ellen Wasem, *Immigration Policy for Intracompany Transfers (L Visas): Issues for Legislation*, Cong. Res. Service 3 (June 12, 2003).

[14] *Id.*

[15] *Id.*

The L-1 and H-1B Visa Programs—Two Distinctly Different Creatures

The L-1 and H-1B visa programs serve very different functions for U.S. businesses. The requirements for the two visa categories reflect these differences. H-1B visas are granted to professionals in specialty occupations to provide needed specialized or unique skills, relieve temporary worker shortages, and supply global market expertise. To be eligible for an H-1B visa, a foreign national must possess at least a U.S. bachelor's degree (or its equivalent) in a specific field.[16]

By contrast, the L-1 visa is designed for the more narrow purpose of helping international companies transfer managers, executives, and employees with specialized knowledge to assist affiliated U.S.-based operations. As previously noted, to be eligible for an L-1 visa, a foreign national normally must have been employed by the foreign company continuously as a manager, executive, or a person of specialized knowledge for at least one year[17] during the three years preceding application to come to the United States. No degree or other external benchmarks must be met for L-1 eligibility because an applicant's general educational qualifications are not relevant to this visa category. Instead, this category contemplates factors pertinent to enhancing an international business's flexibility and productivity such as the length and type of specific experience gained with the affiliated business entity.

Employers must pay an H-1B worker the higher of the prevailing wage for the position or the actual wage paid to similarly situated employees. They must also file an attestation form with the Labor Department agreeing to certain conditions. As part of the attestation process they must fulfill other ministerial obligations such as publicly posting a notice of the offered position at the place of employment and providing notice of the hire to any union representatives. L-1 employers are not required to make similar attestations because L-1 employees technically do not constitute new hires that could displace U.S. workers. Rather, the L-1 employee is being transferred temporarily within the company to add value or provide expertise based on their international experience with the company. Moreover, the L-1 visa holder already is eligible to maintain home-country benefits,[18] which in many cases, because of the particular foreign state's social welfare laws, are more valuable than U.S. benefits, and often difficult to measure and compare to U.S. benefit schemes under prevalent "cafeteria" plans.

H-1B employers must satisfy additional obligations if they employ a certain number or percentage of H-1B employees. These employers are considered to be H-1B dependent and must demonstrate that their hires of H-1B employees have not resulted in the displacement of U.S. workers. The L-1 program does not limit the number of L-1 employees that can be hired. As the statistics above indicate, L-1 visa usage is much lower than H-1B visa usage.

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[16] *See generally* 2 Gordon, Mailman & Yale-Loehr, *supra* note 1, at § 20.08.

[17] The one year period of continuous employment abroad has been reduced to six months if the U.S. business entity has obtained approval of an L-1 blanket petition. *See supra* note 2.

[18] *See, e.g.*, Matter of Pozzoli, 14 I. & N. Dec. 569 (Reg. Comm'r 1974).

Unlike the H-1B visa, there are no provisions under the L-1 category allowing for portability of employment to unaffiliated entities and no extensions of L-1 stay beyond the maximum five- or seven-year statutory limit. Thus, the L-1 category is in some ways more restrictive than the H-1B visa category.

The number of H-1B visas available in any fiscal year is statutorily capped. Congress has not placed any limit on the number of L-1 visas that can be issued in a given year in large part because the number of new L-1 visa applicants in a given year is statistically insignificant (typically less than 1 percent of all nonimmigrant visas issued per year). Such a cap would be unwise because it would unnecessarily limit the flexibility of U.S. or foreign employers who need to bring in L-1 visa holders to fulfill specific tasks that often are time-sensitive.

L-1 Visas in a Globalized Economy

Globalization, or the cross-border movement of goods, services, and people, is one of the most important characteristics of this century. It is easy to paint the phenomenon with too broad a brush, characterizing it as either all good or all bad, depending on your point of view. I will address only one subset of globalization: jobs affecting IT workers.

As Bruce Mehlman, Assistant Secretary of Commerce for Technology Policy, noted in testimony before the House of Representatives last month, it is difficult to separate U.S. IT job losses due to the post-bubble business cycle from slower growth in overall IT employment resulting from global competition or "off-shoring" work. Little data exists to demonstrate one-to-one relationships.[19] It is clear that as the growth in U.S. IT jobs has slowed for multiple reasons, the volume and value of off-shored work has increased rapidly.[20]

Forrester Research, a high-technology consulting group, estimates that the number of service sector jobs newly located overseas, many of them tied to the IT industry, will climb to 3.3 million in 2015 from about 400,000 this year. This shift of 3 million jobs represents about 2 percent of all U.S. jobs.[21]

As Assistant Secretary of Commerce Mehlman noted, globalization contains both potential and pitfalls for the United States:

> While policymakers try to promote national interests, it is getting much harder to define them as the global economy develops. For example, is it better for America to buy a BMW made in South Carolina or a Ford made in Canada? How about IT

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[19] Testimony of Bruce P. Mehlman, Assistant Secretary for Technology Policy, U.S. Dep't of Commerce, *The Globalization of White-Collar Jobs: Can America Lose These Jobs and Still Prosper?*, House Committee on Small Business (June 18, 2003), *available at* http://www.house.gov/smbiz/hearings/108th/2003/030618/mehlman.html (last visited July 25, 2003) [hereinafter Mehlman testimony].

[20] *Id.*

[21] Steven Greenhouse, *I.B.M. Explores Shift of White-Collar Jobs Overseas*, New York Times, July 22, 2003.

> services procured through IBM but performed in India, versus services purchased from Infosys but staffed using H-1B workers living and spending their salaries in America? Is it better to help manufacturers remain competitive by enabling them to cut IT costs through off-shoring or help IT service workers remain employed by shielding them from global competition? New Jersey recently wrestled with a similar question when its Department of Human Services (Division of Family Development) off-shored a basic call center used to support a welfare program. In the wake of controversy, the state returned the nine jobs to New Jersey, albeit at 20 percent higher cost (thereby reducing the amount of funds available for the welfare recipients for whom the call center is needed). How will we answer the question when seeking to maximize resources for medical care for the elderly, education for our children or homeland defense?[22]

As Mr. Mehlman also noted, overseas outsourcing of IT work can also benefit the United States and create more jobs for U.S. workers:

> [T]he majority of work sent offshore is lower-wage, represents a small fraction of the overall market for software and IT services, and will never displace a large majority of work done here in the U.S. Indeed, the Bureau of Labor Statistics projected in December 2001 that the number of professional IT jobs in the U.S. will grow by 72.7% between 2000 and 2010. And since global competition is a two-way street, U.S. IT companies gain opportunities to win global business, particularly as developing nations improve their own domestic markets for hardware, software and services. For example, IBM won a $2.5 billion (over 10 years) contract to manage Deutsche Bank's IT operations in December 2003. In fact, in 2001 U.S. cross-border exports of IT services totaled $10.9 billion, while imports totaled $3 billion, yielding a trade surplus of $7.9 billion.[23]

These are some of the hard questions Congress must ponder as it decides the proper role of immigration in a globalized economy. In my view, the L-1 visa category, if properly administered and monitored, can be an antidote to concerns about overseas outsourcing. Use of L-1 visas encourages foreign investment in the United States and thus can help keep and grow jobs in the United States.

L-1 Visas and Displacement of U.S. Workers

As noted previously, the L-1 visa program recently has come under scrutiny, primarily because of a weakened economy and the continuing shift toward outsourcing and offshoring IT work.[24] Critics of the program allege that the L-1 visa is being used to import low-cost foreign contract workers to replace U.S. workers.

Current immigration law prohibits using an L-1 visa to send a foreign national to the United States simply as contract labor to work alongside the workforce of a third party,

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[22] Mehlman testimony, *supra* note 19.

[23] *Id.*

[24] *See generally* Stanley Mailman & Stephen Yale-Loehr, *The L-1 Visa Program Under Attack*, New York Law Journal, June 19, 2003, at 3.

under the control of the third party, performing the same kind of work done by the third entity's employees and displacing U.S. employees.

According to current law and guidance issued by the State Department seven years ago, an L-1 visa holder can visit a third party site only when the petitioning organization controls the time, place, and content of the work assignment, and, in the case of an L-1B visa, if the visa holder possesses specialized knowledge. For example, if an international company has developed proprietary computer software that will improve a U.S. company's production capabilities, it is permissible for an L-1B visa holder to install the software at the third party client site and train the client's workforce in its specialized uses. The ability of an L-1 intracompany transferee to visit customer sites promotes business profits, lowers costs to consumers through the development of innovative products and services, and, as experience has shown, leads to the creation of jobs for U.S. workers.

Reportedly, some L visas recently were granted under which the L-1B visa holder was assigned to a third party site, was not using specialized knowledge, and was not under the control of the petitioning employer. These visas appear to have been erroneously granted, since using an L-1B visa for that purpose is clearly forbidden under both current law and State Department guidance. Anecdotal reports indicate that the State Department has already taken steps to deny L-1B visas under such facts.

The recent flurry of activity and scrutiny surrounding the L program appears to be a direct result of this limited incident, and, as noted above, of the continued sluggish domestic economy and the new reality of an increasingly global economy and attendant workforce. The media has given the issue significant play, with several articles, including a March 10, 2003 piece in *Business Week*,[25] alleging "widespread abuse" of the L visa program, particularly in the outsourcing of personnel by foreign IT companies and the alleged resulting displacement of U.S. workers. The State Department, however, has been dealing with the outsourcing issue for several years, as evidenced by this excerpt from a 1996 cable to its consular post in Madras, India:

> Offsite work at a contracting firm's premises is a common practice and is not in and of itself sufficient to warrant [L-1] visa refusal. In order to make a finding of ineligibility in a case involving offsite work, the applicant must be determined not to possess specialized knowledge in procedures, services, research, equipment or techniques particular to the sending organization, or it must be determined [that] the supervision of the applicant, his/her work product, control of the time, place and content of his/her work and other essential elements of his/her employment is under the direction of a third party so the petitioning company appears to be engaging in a simple contract labor arrangement.[26]

As noted above, there are two key points to consider in determining whether an L-1 visa holder's proposed offsite work is appropriate. The first of these is whether the L-1B

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[25] Brian Grow with Manjeet Kripalani, *A Visa Loophole as Big as a Mainframe*, Business Week, Mar. 10, 2003, at 82.

[26] State Dept. Cable no. 96-State-75033, *summarized in* 73 Interpreter Releases 963 (July 22, 1996).

employee truly has specialized knowledge (i.e., knowledge special to the petitioning company) or is merely entering the United States to perform generic work. The second consideration is whether the L-1B worker actually remains the petitioner's employee or is managed by the offsite customer and effectively becomes that company's employee.

One typical example of an appropriate use of the L-1 program might be a company that develops and sells specialized computer applications that simplify, say, certain banking operations. The firm contracts to install the application in customers' computer systems and to train the customers' personnel in its use. To do this, the firm could legitimately use an L-1B petition to bring a programmer temporarily from its foreign affiliate. That programmer knows the application and may even have helped to develop its latest version. Although necessarily on the bank's premises and liaising with its personnel, the L-1B employee uses the specialized technology that the petitioner developed and gets his instructions from that company. How much the employee is paid in this situation shouldn't matter, as he isn't directly competing with U.S. workers.

While some of the situations highlighted by *Business Week* and other publications would appear to be abuses of the L-1 classification, such situations appear to be limited occurrences. Although it is appropriate for Congress to consider how to remedy any inappropriate use of the L-1 visa, however limited the abuse may be, members should rely on data that accurately portray the extent, if any, of such abuse. If a remedy truly is needed, one can be fashioned, perhaps administratively, that focuses on the perceived problem—the leasing of L-1 employees to perform simple contract labor. Congress must guard against enacting broad restrictions that could limit the current usefulness of the L-1 visa as a vehicle for facilitating and sustaining American competitiveness in an increasingly global economy.

The joint phenomena of offshoring and domestic or foreign outsourcing are economic realities of the increasingly global economy. Far from encouraging these trends, the L-1 visa program provides multinational firms the flexibility to assign managers and specialized personnel to facilities in the United States on an as-needed basis, thus facilitating business investment in the United States and job creation that benefits U.S. workers. Should Congress decide to impose additional restrictions on this important visa category, multinational firms may conclude that it is too burdensome and unprofitable to do business in this country—a decision that would directly result in the loss of employment for many U.S. workers.

L-1 Visas and Foreign Trade Agreements

In considering any changes to the L visa category, Congress should be aware that some international free trade agreements (FTAs) contain immigration provisions. Members of Congress have rightly complained about immigration provisions being included in FTAs, arguing that Congress should decide immigration policy after due deliberation and debate, not have it imposed unilaterally by executive agreements. Nevertheless, several existing FTAs already contain immigration provisions, and Congress must make sure that any changes to immigration law do not violate those bilateral or multilateral agreements.

For example, the North American Free Trade Agreement (NAFTA), which the United States signed with Canada and Mexico almost ten years ago, has an immigration provision concerning intracompany transferees.[27] NAFTA requires the three signatory countries to grant temporary entry to businesspersons employed by a foreign enterprise who seek to render services to that enterprise or its affiliate or subsidiary, in a capacity that is managerial, executive or that involves special knowledge.[28] Temporary entrants must have worked continuously for one year out of the past three in a foreign country for the same enterprise that they are seeking to serve here in the United States.[29]

Similarly, just last week the House of Representatives approved by wide margins two new free trade agreements: one with Chile (H.R. 2738) and one with Singapore (H.R. 2739). Like NAFTA, the Chile and Singapore FTAs require each member to grant temporary entry for intracompany transfers.[30] Transferees must have worked continuously for one out of three years at a foreign enterprise before application.[31] Additionally, the temporary entrant must be transferring to that enterprise's business in the United States or one of its affiliates or subsidiaries.[32] Temporary entrants must also be transferring to serve in a capacity that is managerial, executive or that involves specialized knowledge.[33] These two FTAs are now before the Senate for final approval.

Significantly, all three of these free trade agreements prohibit the parties from imposing or maintaining numerical restrictions relating to temporary entry of intracompany transferees.[34] Thus, any legislation by Congress imposing a numerical limit on L visas might be considered a violation of these three free trade agreements.

Conclusion

It is tragic when any American loses his or her job. Uncertain economic times and a changing economy generate legitimate concerns and demand our attention and effective responses. The L-1 visa category should be viewed as an essential part of this country's arsenal to create and keep jobs in the United States.

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[27] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., ch. 16, annex 1603, § C(1), *available at* http://www.nafta-sec-alena.org/english/index.htm (last visited July 24, 2003).

[28] *Id.*

[29] *Id.*

[30] U.S.-Chile Free Trade Agreement, June 6, 2003, Chile-U.S., ch. 14, annex 14.3, § C(1), *available at* http://www.ustr.gov/new/fta/Chile/final/14.temporary%20entry.PDF (last visited July 24, 2003); U.S.-Singapore Free Trade Agreement, May 6, 2003, Sing.-U.S., ch. 11, annex 11A, § III(1) , *available at* http://www.ustr.gov/new/fta/Singapore/final/text%20final.PDF (last visited July 24, 2003).

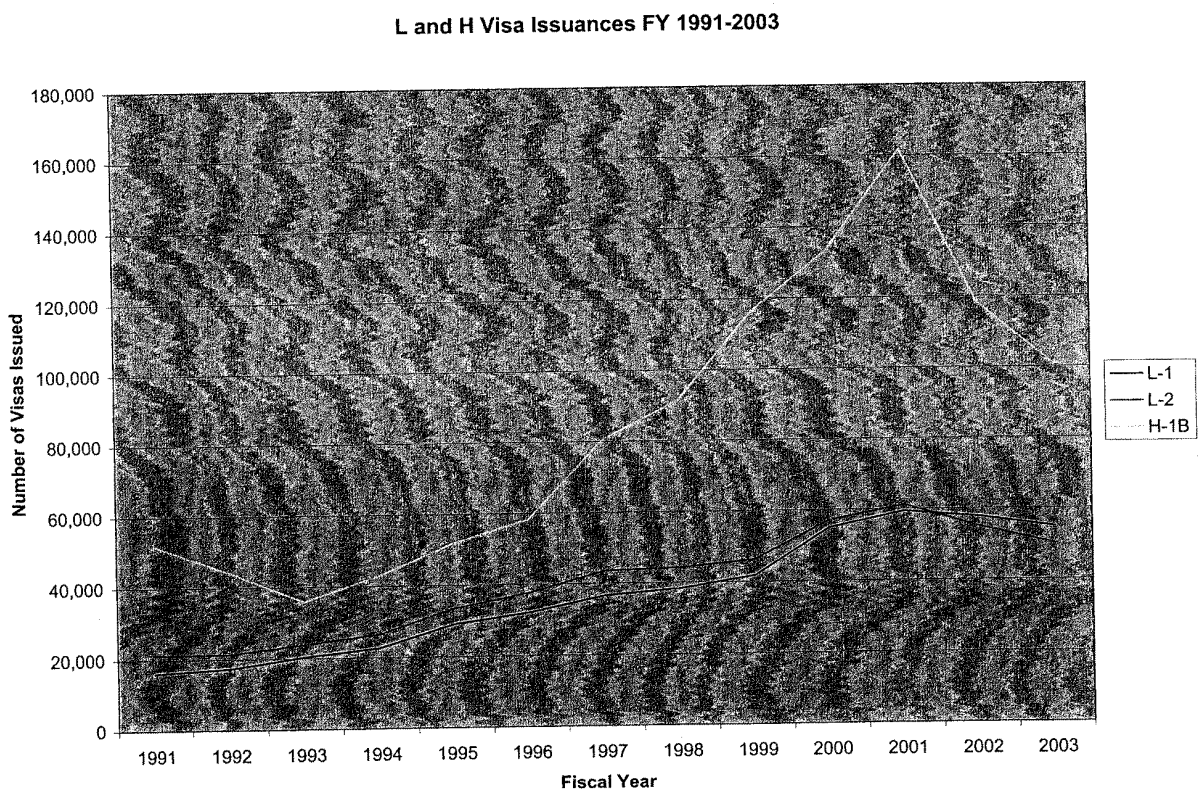
[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] U.S.-Chile Free Trade Agreement, June 6, 2003, Chile-U.S., ch. 14, annex 14.3, § C(2)(b) , *available at* http://www.ustr.gov/new/fta/Chile/final/14.temporary%20entry.PDF (last visited July 24, 2003); U.S.-Singapore Free Trade Agreement, May 6, 2003, Sing.-U.S., ch. 11, annex 11A, § III(2)(b) , *available at* http://www.ustr.gov/new/fta/Singapore/final/text%20final.PDF (last visited July 24, 2003); North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex-U.S., ch. 16, annex 1603, § C(2)(b) , *available at* http://www.nafta-sec-alena.org/english/index.htm (last visited July 24, 2003).

In fact, for over 35 years the L-1 visa has been a vital tool for both U.S. companies with an international presence and international firms expanding into the United States. The L-1 visa has allowed U.S. and foreign companies to build U.S. factories, open offices, create new jobs in the United States and hire significant numbers of U.S. workers to fill these jobs. Properly administered, the L-1 visa category can offset concerns about globalization by keeping and adding jobs here. Congress should carefully consider the benefits of the L-1 visa category before enacting restrictions that could hurt its use and the United States in the long run.


L and H Visa Issuances FY 1991-2003
Number of Visas Issued
180,000
160,000
140,000
120,000
100,000
80,000
60,000
40,000
20,000
0
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
Fiscal Year
L-1
L-2
H-1B