AFL-CIO Testimony on L-1 Visas

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

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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.

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 renew-ability 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.