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May 7, 2009

Charles H. Kuck, President
Jeanne A. Butterfield, Executive Director
American Immigration Lawyers Association
Suite 300, 1331 G Street, NW
Washington, DC 20005-3142

Dear Mr. Kuck and Ms. Butterfield:

It is surprising that the American Immigration Lawyers Association (AILA) considers the criticisms of the H-1B and L-1 visa programs in my report, *Immigration for Shared Prosperity: A Framework for Comprehensive Reform*, to be "venomous and inflammatory." (See AILA InfoNet Doc. No. 09041730, posted Apr. 17, 2009 at http://www.aila.org/content/default.aspx?docid=28657). This is so because those charges were thoroughly documented by research from academics, members of Congress, the GAO, the Department of Labor (DOL), the Department of Homeland Security (DHS), investigative reporters, and immigration experts. Although adequate data on these visa programs are not available, the evidence that we do have is fairly consistent: the L-1 and H-1B programs do not adequately protect foreign or domestic workers from wage suppression, discrimination and abuse, or the displacement of American workers by low-paid, indentured foreign workers.

The AILA quotes the legal protections for foreign and domestic workers, but it surely knows that loopholes in the laws, poor enforcement, and violations documented by DHS and others make reality very different. Indeed, some of these well-known problems were reported by Senators Dick Durbin (D-IL) and Chuck Grassley (R-IA), who recently introduced corrective bipartisan legislation. In their April 23, 2009 press release, for example, these senators report that "...the H-1B visa program is plagued with fraud and abuse and is now a vehicle for outsourcing that deprives qualified American workers of their jobs. Our bill would put a stop to the outsourcing of American jobs and discrimination against American workers."

Furthermore, according to this release, "Under current law, an outsourcing company can use American workers to train H-1B guest-workers, fire the American workers, and outsource the H-1B workers to a foreign country, where they will do the same job for a much lower wage. In fact, Indian Commerce Minister Kamel has referred to H-1B as 'the outsourcing visa.' "

Senators Durbin and Grassley likewise provide the following quotation from the Department of Labor: "H-1B workers may be hired even when a qualified U.S. worker wants the job, and the U.S. worker can be displaced from the job in favor of the foreign worker." They note, further, that some companies that discriminate against American workers are so brazen that their job advertisements say, 'H-1B visa holders only.' And some companies in the United States have workforces that consist almost entirely of H-1B guest-workers."

Senators Durbin and Grassley add that "Under current law, it is very difficult for the federal government to monitor the H-1B and L-1 visa programs." Even if the employer's application is clearly fraudulent, the DOL is prohibited from investigating employers who apply for or use these visas unless it receives a formal complaint and even then the Secretary of Labor must personally open an investigation. Little

wonder that DOL's Inspector General has concluded that the H-1B program is "highly susceptible to fraud" or that the DHS, at the behest of Congress, found fraud and/or serious problems in 21 percent of H-1B visas.

Senators Durbin and Grassley report, in addition, that "some employers use the L-1 [visa] program to evade restrictions on the H-1B program because the L-1 program does not have the annual cap and does not include even the minimal protections on the H-1B program. As a result, efforts to reform the H-1B program are unlikely to be successful if the L-1 program is not overhauled at the same time."

The Durbin-Grassley bill would require H-1B employers to first make a good-faith effort to recruit qualified Americans and prohibit them from displacing American workers, advertising for H-1B workers only, or hiring additional H-1B or L-1 workers if more than 50 percent of their employees already hold these visas. This bill would, in addition, "institute a number of reforms to the L-1 visa program, including establishing for the first time a process to investigate, audit, and penalize L-1 visa abuses."

The Durbin-Grassley bill is a good beginning, but it does not go far enough to correct the abuses in these visa programs, especially their use to suppress the wages of American workers. After all, it does little good to offer jobs to American workers if the wages those jobs pay are far below prevailing market rates. The AILA argues that "The H-1B program carefully protects wages by requiring that companies pay the higher of the wage paid by their competitors for comparable positions or the wage the company itself pays to other comparable workers." However, the L-1 visa program has no such requirement. Employers can legally replace U.S. workers and pay L-1 workers any wage they wish—which is often the much lower wages paid these workers in their home countries. *New York Times* journalist Steven Greenhouse reported in *American Prospect* (June 2009) that a quality assurance engineer for Watch Mark who earned $80,000 a year was forced, as a condition for receiving severance pay, to train her indentured replacement who, the American was told, earned $5,000 a year.

As for H-1B visas, the employer can pay the higher of the "actual wage" or the "prevailing wage" for the occupational qualification in the area of intended employment. It should be noted, however, that the employer is not required to use any specific methodology in determining the "prevailing" wage, which for H-1B purposes is not the same as the prevailing wage required in federal contract programs or the prevailing *market* wage as that term is ordinarily used by labor economists. Indeed, some employers have told GAO investigators that "…they hired H-1B workers in part because these workers would often accept lower salaries than similarly qualified U.S. workers; however, these employers said they never paid H-1B workers less than the required wages" (GAO 03-883, p. 4). Thus, employers can set the "prevailing wage" at far below market wages. For example, the wage for the H-1B lowest skill level is approximately the 17th percentile for the occupation in a specific location.

A couple of actual examples from the DOL Labor Condition Application Data Base for FY 2008 (http://www.flcdatacenter.com/Caseh1B.aspx) illustrate just how low H-1B wages can be. Alexandria, VA employer Ensyte LLC (Case # 1-08091-4201755) set a prevailing wage of $24,000 a year for a Systems Analyst (DOT Job Code 030) and the Ann Arbor, Mich. law office of Soo Park (Case #1-08095-4223633) set a prevailing wage of $25,000 a year for a Management Systems Analyst (DOT Job Code 039). Both of these cases were certified by the DOL at a time when the *starting* salary for an entry-level computer science graduate was about $57,000 (http://www.naceweb.org/salarysurvey/sscover0109.htm)

The evidence shows that these are not isolated cases. The demographic data released by the USCIS indicate that most H-1Bs are paid below the median wage for their occupations. Moreover, a detailed 2005 study by software industry expert John Miano (http://www.colosseumbuilders.com/) reports that the H-1B program is primarily used to import low-wage workers, not exceptional workers with "needed skills." Miano's detailed study found that

> In FY2005 H-1B employers' prevailing wage claims were $16,000 below the median wages for U.S. computer workers in the same location and occupation...[and] the actual wages reported for H-1B workers...averaged $12,000 below the median for U.S. workers in the same occupation and location.

The AILA claims that the H-1B and L-1 "protections are enforced by the Department of Labor and non-compliance already includes heavy penalties..." Unfortunately, however, the absence of compliance is well known and has been documented by the GAO, which finds examples of employers not paying H-1B workers even the wages required by their wage agreements. The GAO adds, "...the extent to which such violations occur is unknown and may be due in part to Labor's limited investigative authority." (http://www.gao.gov/new.items/d03883.pdf)

Enforcement of wage and other conditions depends heavily on complaints by H-1B workers, whose indentured status limits their ability to blow the whistle on violators. Neither the USCIS nor DOL conduct regular audits.

We should note, however, that eliminating fraud and other violations are necessary but not sufficient—many of the L-1 and H-1B abuses are perfectly legal.

Although we have grossly inadequate data about the H-1B and L-1 visa programs, the data we do have clearly support the conclusion that these programs are used to displace U.S. workers and suppress their wages. Moreover, little or nothing is done to ensure that these visas are used to import workers to fill real labor shortages—which, unlike the current system, would indeed strengthen the competitiveness of the American economy and promote broadly shared prosperity. Indeed, we have no reliable information about how many H-1B and L-1 workers there are (estimates vary between 600,000 and 800,000), where and under what conditions they are employed, or how their numbers relate to total employment in the occupations where they are employed. These programs also do not have adequate safeguards to protect domestic or the foreign indentured workers from abuses. The recommendations in *Immigration for Shared Prosperity: A Framework for Comprehensive Reform* are designed to address these defects. In addition to the provisions of the Durbin-Grassley bill, we need realistic, objective prevailing wage standards that will prevent these programs from being used to suppress the wages of American workers. Supporters often argue that the H-1B program is needed to attract the "best and the brightest" foreign workers, but the evidence shows that most of the foreign workers are hired for entry-level positions for which there do not appear to be shortages of qualified American workers. The H-1B and L-1 programs clearly need much better data and transparency to enable more effective evaluations of their impacts.

It also is hard to see why a regular job, which most of those held by H-1Bs appear to be, should be held by "temporary" visa holders indentured for 3, 6, or even 10 years. If there are validated shortages of workers for regular jobs that cannot be filled at market wages with qualified U.S. residents, it would be better to fill them with immigrants with full legal rights, including the right to earn citizenship.

I hope the AILA will join us in reforming these programs to protect American and foreign workers and promote shared prosperity in the United States and other countries.

Sincerely,

Ray Marshall
Audre and Bernard Rapoport Centennial Chair in
Economics and Public Affairs

Cc: Senator Dick Durbin
Senator Chuck Grassley
Hon. Hilda Solis
Hon. Janet Napolitano
Hon. George Miller
Hon. Nancy Pelosi
Hon. Harry Reid
Lawrence Mishel