Testimony by Stephen Yale-Loehr on L-1 Visas

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. 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 during the preceding three years in a managerial or executive position or in a position where she gained specialized knowledge. The individual must be coming to the United States to provide services to the same employer or a branch office, subsidiary or affiliate. 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. 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. L-1B beneficiaries may work in the United States for up to five years.

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. 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 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," 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. And in 2002, Congress permitted the spouses of L-1 employees to work in the United States. 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 the chart in Appendix A indicate State Department issuances of L-1, L-2, H-1B, and all nonimmigrant visas for fiscal years (FY) 1991-2003:

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 2	1,358	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. 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. 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. Apart from these three countries, no other country received more than five percent of the L visas issued in FY 2002. Canadian nationals entering the United States as intracompany transferees do not need to obtain an L visa.

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.

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 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, 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.

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. 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.

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.

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 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?

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.

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. 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, 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, 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.

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 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. 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. 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.

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. Transferees must

have worked continuously for one out of three years at a foreign enterprise before application. Additionally, the temporary entrant must be transferring to that enterprise's business in the United States or one of its affiliates or subsidiaries. Temporary entrants must also be transferring to serve in a capacity that is managerial, executive or that involves specialized knowledge. 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. 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.

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.

Appendix A