

THE WHITE HOUSE

WASHINGTON

March 30, 1998

MEMORANDUM FOR DPC/NEC PRINCIPALS

FROM: ELENA KAGAN AND SALLY KATZEN

SUBJECT: BACKGROUND ON H-1B VISA ISSUES

A number of industries -- and especially the information technology (IT) industry -- claim that they are suffering from "skills shortages." Though the IT industry is the most vocal and visible industry to claim a shortage, shortages have also been argued for truckers, welders in shipyards, and other such occupations. A study by Virginia Tech (for the Information Technology Association of America) claims that there are 350,000 job vacancies in the information technology industry nationwide; the *Washington Post* reported there are 19,000 such jobs unfilled in Virginia. Several informed observers have questioned the severity of the short-term "crisis," but there is little doubt that the demand for workers with IT skills is increasing. Indeed, some of our federal agencies are reporting difficulties hiring IT workers (for Y2K and other IT projects).

One way in which companies can alleviate such short-term skills shortages is through the H-1B visa program. The H-1B visa category allows foreign "specialty workers" (those with a BA or equivalent) to work temporarily in the U.S. The visas are issued for a 3-year period, and almost always renewed for an additional three years. More than forty percent of those who enter the U.S. through the H-1B visa program end up in a permanent visa program. There is no way to determine how many overstay their visas, and thus remain to work illegally. The H-1B visa cap of 65,000 per year was reached for the first time last year. INS estimates that the cap will be reached by May or June of this year.

The top ten users of H-1B visas are job contractors who employ foreign workers and who provide personnel to the high-tech industry. Nevertheless, INS estimates that only about one-half of the applications submitted are for computer-related jobs; other occupations include physical and occupational therapists, academic researchers, and other occupations where there is not necessarily evidence of a skills shortage. Currently, there is only a nominal processing fee for each application and there is no requirement that the employer recruit U.S. workers or agree not to lay-off a U.S. worker prior to hiring a foreign worker for the same position.

In thinking about how to address the question of raising the H-1B cap to meet the demands of the IT industry for more skilled workers, the Administration has developed three guiding principles:

- We must train American workers to meet the demands of our rapidly changing economy;
- We must reform the H-1B visa program to protect American workers, by targeting it to industries with genuine skill shortages; and
- We will consider temporarily raising the annual H-1B cap as part of a comprehensive package that includes reform of the H-1B program and a long-term solution to employer needs for skilled workers.

Action Forcing Events

On March 6, Senator Abraham introduced a bill (S. 1723, "The American Competitiveness Act," co-sponsored by Hatch, McCain, DeWine, and Specter) that would permanently increase the annual H-1B cap. His bill also contains a scholarship program. This bill is scheduled for mark-up on Thursday, April 2.

On Friday, March 27, Senator Kennedy (along with Senator Feinstein) introduced a bill that would temporarily increase the H-1B cap to 90,000 (phased back to 65,000 after three years). In addition, the Kennedy proposal includes (1) a loan program designed to address the need to increase high-tech skills of American workers and (2) reforms to the H-1B program that would target it to industries with genuine skill shortages. At the time of Kennedy's announcement, we provided the White House Press Office with the attached Questions & Answers.

Current Legislation

The three major components of the Abraham and Kennedy bills relate to the size and duration of the increase in the H-1B cap; reforms in the H-1B visa program; and education and training.

Facts on the Abraham Bill (S. 1723)

Increase in the Cap

- Permanently increases the annual cap on H-1B visas to about 100,000 in FY 1998 and about 125,000 in FY1999 (taking into account the 10,000 visas under the new H-1C category).
- Creates a new temporary visa category (H-1C) with a cap of 10,000 specifically for health care professionals.

Reforms to H-1B Program

- No reforms to the H-1B program.

Enforcement

- Increases the penalty for willful violations of the H-1B program, but eliminates penalties for less than willful violations.
- Allows DOL to conduct random inspections of willful violators (for 5 years), but does not appropriate additional money to do so.
- Weakens the current “prevailing wage determination,” which requires that H-1B visa holders be paid the higher of the prevailing or actual wage to similarly employed workers. The bill stipulates that factors such as years of experience, academic degree, institution attended, grade point average, publications, and personal traits deemed essential to job performance be considered.

Education/Training

- Authorizes \$50M be added to the State Student Incentive Grant (SSIG) program to create scholarships for low-income students majoring in mathematics, computer science, and engineering.
- Authorizes \$8M for the Secretary of Labor to create an Internet talent bank.

Facts on the Kennedy Bill

Increase in the Cap

- Increases the cap *temporarily* (to 90,000 for three years beginning in FY 1998, and back to 65,000 in FY 2001 and thereafter).
- Off sets the increase in the H-1B program (over 65,000) with decreases in the H-2B visa program (for temporary unskilled, non-agricultural workers). The H-2A program has never reached its cap.
- Caps the number of health care workers in the H-1B visa program at 5,000.

Reforms to H-1B Program

- Requires that prior to obtaining an H-1B visa, employers must attest to having attempted to recruit U.S. workers.
- Requires that prior to obtaining an H-1B visa, employers must attest to not having laid off a U.S. worker within 6 months of having filed for the visa, and to commit to not doing so for another 90 days.
- Reduces the maximum length of stay on an H-1B visa from 6 to 3 years.

Enforcement

- Includes benefits and other non-wage compensation in the determination of the prevailing

wage.

- Provides additional enforcement power to the Secretary of Labor.

Education/Training

- Establishes a loan program (\$10,000/person) to enable individuals to obtain training necessary for high-tech industries.
- Provides seed grants to assist in creating “Regional Skills Alliances” between employers, labor organizations, state and local government, training institutions, etc. These Alliances are designed to help industry organize the labor market to meet their needs by increasing the skills required for employment in specific industries or occupations and/or assessing and developing strategies for addressing critical skill needs at broad geographic levels.
- Levies a user fee of not more than \$250 per application to administer the H-1B visa program. This fee would also be used to fund the loan program and the Regional Skills Alliances, and would help fund enforcement activities associated with the program.

The differences between these two proposals are significant. First, while the Kennedy proposal provides a temporary increase of the H-1B cap to 90,000 in the first year (to be phased out after three years), Abraham proposes a permanent increase to 125,000 (after two years). Second, while the Kennedy proposal includes all of the reforms to the H-1B program previously endorsed by the Administration (no lay-off provision; recruitment requirement; and reduction in maximum length of stay from six to three years), the Abraham bill does not contain any reforms of the H-1B visa program. In fact, the Abraham bill weakens the existing program by eliminating penalties for less than willful violations and by essentially repealing the prevailing wage determination requirement.

Legislative Setting

Kennedy’s legislation is intended to offer a credible substitute to the Abraham bill. Kennedy will try to attract all Democrats on the Committee, along with Senators Kyl and Grassley. However, Feinstein, Kyl, and Grassley are reportedly discussing a possible compromise position between Abraham and Kennedy. Apparently, Kyl, Grassley, and Feinstein are opposed to a permanent increase in the H-1B visa cap (as reflected in Abraham’s bill), but are also opposed to the H-1B reforms contained in Kennedy’s proposal.

There are two schools of thought on the position of the IT industry -- (1) that the companies really want an increase in the cap, and thus would be willing to cut a deal with Kennedy if the Abraham bill stalls; or (2) that the companies want the increase, but not at the cost of H-1B reforms and so will not deal with Kennedy, even if that risks a veto.

The AFL-CIO has indicated that it will not oppose a small, temporary increase in the cap as long as it is accompanied by increased training and education and reform of the H-1B

program. At the same time, the AFL-CIO has made clear that it will not accept a legislative alternative that does not include H-1B reforms.

Issues for Consideration

In addressing the H-1B visa issue, the Administration must consider three issues: increasing the number of H-1B visas, training, and reforms to the H-1B visa program.

Increasing the Number of H-1B Visas

The IT industry is pressing hard to increase the number of H-1B visas. In contrast, organized labor will accept an increase in the number of visas only if it is accompanied by reforms to the H-1B visa program and education and training of American workers; even then, labor is insisting that the increase be both small and temporary. We also need to consider whether the additional visas can or should be targeted to the IT industry. Targeting of this kind might be difficult because many IT positions are actually in non-IT industries, such as banking and finance.

Training

Almost everyone agrees that an increase in the number of H-1B visas should be accompanied by a substantial education and training effort. Both the Abraham and Kennedy bills include attempts to encourage more Americans to obtain such training (particularly for jobs in the IT industry). Currently, the Kennedy bill includes a \$250 application fee for H-1B visas that would fund a loan program and the creation of Regional Skills Alliances. Questions to consider include: Is it appropriate to impose a fee to be used for training? Is the training component in the Kennedy bill substantial enough to “compensate” (either alone or in conjunction with the H-1B reforms) for the increase in the cap? Most importantly, will the \$250 application fee generate additional funds for training or will there be an off-set in existing training funds?

In addition, we might consider whether we should pursue a non-legislative training strategy. The IT industry already does a considerable amount of education and training (for example, several companies have partnered with community colleges, or adopted an elementary or secondary school to upgrade their science and technology equipment). Can, or should, we make our willingness to sign any bill contingent on IT companies investing more in developing long-term solutions to the growing demand for IT workers? Such efforts might include expanding the current efforts of the IT industry, expanding the involvement of the IT industry in “school-to-work” efforts, and/or encouraging underrepresented groups to pursue careers in information technology. And, how can we leverage the training that organized labor is doing to get results in this area?

Finally, we need to consider whether it is appropriate to impose more training obligations on firms not in the IT industry. If not, should the IT industry get an advantage in receiving H-1B visas? If we should impose more training on non-IT firms, how do we accomplish it?

Reforms to the H-1B Visa Program

The crux of the negotiations with the IT industry over the Kennedy bill will be the H-1B reforms. The Administration's position has been that these reforms are critical to our three-part strategy. These reforms would protect U.S. workers while reducing the pressure on the H-1B cap by ensuring that the visas be used only when there is a genuine labor shortage. Many view the reforms as essential if the cap on the number of visas is raised.

The IT industry is very opposed to these reforms. It argues that a no lay-off provision could disrupt normal, non-abusive hiring and firing decisions. And the industry objects to a recruit-and-retain requirement because it will then be subject to the Labor Department's views on what is, or is not, proper recruitment.

The three reforms currently contained in Kennedy's bill were sought by the Administration in 1993. Should we continue our insistence on these reforms? Are there others that we have not considered?

Question & Answer on Immigration: H1B visas
March 26, 1998

Q: This morning Senators Kennedy and Feinstein held a press conference outlining a proposal to increase the cap on temporary visas for foreign workers (H-1B visas). Does the Administration support their proposal?

A: We are still reviewing the Kennedy/Feinstein proposal. We have heard a lot recently about the shortage of trained workers in the information technology (IT) industry. We believe that the first response to increasing the availability of IT workers must be increasing the skills of American workers and helping the labor market work better so there is a supply of skilled workers where there is a demand for skilled employees. While it may be necessary in the short-term to increase the number of visas for temporary foreign workers (under the H-1B program), this must be done only in conjunction with additional efforts by the IT industry to increase the skill level of American workers and with needed improvements in the H-1B program. Key components of that strategy are our HOPE scholarships, the Lifetime Learning Tuition Credit, and the expansion of Pell Grants. It is also critical that Congress pass the G.I. Bill for America's Workers this spring.

Any temporary increase in the H-1B visa program should be limited to the minimum amount necessary. Also, expanding the number of visas, even temporarily, must be accompanied by needed improvements to the H-1B program. Since 1993, this Administration has sought reforms of the H-1B visa program, including requiring employers to "recruit and retain" U.S. workers before hiring temporary foreign workers, prohibiting lay-offs of U.S. workers to replace them with foreign temporary workers, and reducing the maximum stay for H-1B workers from 6 to 3 years. These reforms, if enacted, would help target H-1B usage to industries and employers that are exhibiting genuine labor shortages.

Q: Does the Administration support Senator Abraham's bill, "The American Competitiveness Act," that also increases the number of H-1B visas?

A: Regrettably the Abraham bill emphasizes providing opportunities for foreign workers rather than providing for and protecting U.S. workers. For example, the bill's increase in the number of H-1B visas is permanent. Second, the bill does not require that employers "recruit and retain" U.S. workers before hiring temporary foreign workers and it does not prohibit employers from laying-off U.S. workers in order to replace them with foreign temporary workers.

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Agenda for NEC/DPC H-1B Principals Meeting

Tuesday, March 31, 1998

Roosevelt Room, 5:30pm

1. General Comments or Questions Regarding the H-1B Background Memo
2. Update on the Legislative Situation
3. Issues for Consideration
4. Administration's Position

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- EB re Shulata mtg.
- M. Moore?