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Friday, April 17, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: James J. Jukes (for) Assistant Director for Legislative Reference
OMB CONTACT: Ingrid M. Schroeder
PHONE: (202)395-3883 FAX: (202)395-3109

SUBJECT: LABOR Testimony on H1B Nonimmigrant Visa Program and the
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DEADLINE: 4:30pm Friday, April 17, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The attached testimony is for a House Judiciary subcommittee hearing on April 21st.

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STATEMENT OF JOHN R. FRASER
DEPUTY WAGE AND HOUR ADMINISTRATOR
EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS
OF THE HOUSE JUDICIARY COMMITTEE

*Automated Records Management System
Hex-Dump Conversion*

April 21, 1998

Mr. Chairman and Members of the Subcommittee:

We appreciate this opportunity to share the views of the Administration on whether this country's important high-technology industry should be afforded increased access to foreign workers to meet its growing demand for high skilled workers. In doing so, I also want to again call your attention to the pressing need for reform of the H-1B nonimmigrant visa program through which increased numbers of foreign workers are being sought by the high-technology industry.

The Administration believes that our information technology (IT) industry is an essential element of our continuing, strong economic growth and wider prosperity. Our interest in the industry's strength is evidenced by our participation in a recent convocation in Berkeley that assessed IT work force needs. Further, as you know from Administration proposals advanced beginning in 1993, we believe that the H-1B program needs fundamental reform. I would like to commend the Subcommittee for its interest in these issues.

We believe the issue of whether to afford the IT industry increased access to foreign temporary workers should be evaluated within the framework of the following three questions:

- (1) Is there a shortage of skilled U.S. workers to fill jobs in the IT industry and meet future workforce needs?
- (1) What would be the consequences of raising the cap on the number of foreign workers admitted under the H-1B program?

(3) Can the current H-1B program provide the IT industry appropriate access to foreign workers while still protecting the job opportunities, wages and working conditions of U.S. workers?

I will address each of these in turn.

**Tight Labor Markets Exist But
U.S. Skills Shortages Are Unclear**

Proponents of allowing increased IT industry access to foreign workers argue that this is necessary for the industry to be able to overcome an acute shortage of skilled U.S. workers.

While there is no dispute that there is strong growth in demand for workers in the IT industry, it is not at all clear that there is a shortage of skilled U.S. workers to meet this demand or that the domestic labor market won't be able -- as it has over the last decade -- to satisfy projected job growth in the next decade.

U.S. employment has been growing rapidly, labor markets are increasingly tight, and they are likely to remain so. This is true for the national labor market as a whole -- given our sustained economic expansion and low national unemployment rate -- and IT labor markets appear to be particularly affected.

Employment of computer systems analysts, engineers, and scientists has been growing by 10 percent a year -- well above the growth of comparable occupations -- and is expected to continue growing at a comparable rate through 2006. The Bureau of Labor Statistics projects that the U.S. will require more than 1.3 million new workers in IT core occupations between 1996 and 2006 to fill job openings projected to occur due to growth and the need to replace workers who leave the labor force or transfer to other occupations.

The underlying dynamics of the IT labor market and asserted labor shortages are very controversial. Industry advocates say that more than three hundred thousand jobs cannot be filled and that these vacancies are raising business costs and hurting U.S. competitiveness. On the other hand, critics say the IT industry:

- drastically overstates any problem by producing inflated job vacancy data and equating it to skills shortages;

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- continues to lay off tens of thousands of workers --e.g., Intel, Netscape, Cypress Semiconductor and Silicon Graphics recently announced large lay-offs; and
- fails to tap reservoirs of available talent by insisting on unnecessarily specific job requirements and not providing more training to develop workers' skills.

The Subcommittee should also take into consideration other factors that bear on the question of the scope and duration of any labor shortage in the IT industry:

- The current "millennium problem" is certainly occupying thousands of IT workers for the short-term;
- new technologies are being introduced that are making possible more efficient ways to produce software, store and retrieve data, speed up computations and in other ways improve the productivity of the IT work force;
- the number of computer science degrees conferred (bachelors, masters and doctorates) has been rising since 1992; and
- Most -- nearly three quarters -- of IT workers actually got their education and training in other disciplines.

A point of contention is the equation of job vacancies and actual skills shortages. An industry association sponsored survey indicates that there may be as many as 350,000 job vacancies in the IT industry. However, aside from the concerns about the usefulness of this survey that you will hear from the GAO, this does not necessarily signal that there is an acute shortage of skilled workers. Most industries and firms have job openings at any point in time reflecting worker turnover and employment growth.

Wages growing substantially faster than average can be a reliable indicator of skill shortages, but the wage growth record for the IT industry is mixed. BLS wage trends for broad computer-related categories show average wage growth between 1988 and 1997 for all categories, with above-average growth in wages only in 1996 and 1997 in the lower-skill computer-related categories, particularly programmers. At the same time, a variety of industry wage surveys show larger wage increases in 1996 and 1997 in more specialized, high-skill occupations.

Considering all of these indicators, we believe that there

is simply no conclusive evidence of a shortage of skilled U.S. workers to meet the labor demands of the IT industry. The need for further analysis of this question is underscored by the recent conclusions of the Commerce Department and General Accounting Office (GAO) that much more needs to be known about the demand and supply of IT workers. These conclusions were reached by the Commerce Department in its September 1997 report, and the GAO subsequent evaluation of that report. Both Commerce and GAO findings were inconclusive on the issue of an IT U.S. worker shortage and found that more information and data are needed to understand and properly characterize the IT labor market.

Consequences of Raising the H-1B Visa CAP

In light of the highly ambiguous information about the state of the IT labor market, we strongly urge that any decision to raise the H-1B visa cap must carefully consider the probable adverse impact of such a move on the normal process by which the labor markets adjust to a growing demand for workers. The proper first response to tight labor markets should be, in the Administration's view, to let the market react rather than introducing artificial factors, such as increasing access to foreign temporary workers, that will delay, if not prevent, the normal labor market adjustments.

It is very important to remember that tight labor markets are good for U.S. workers. A tight labor market causes employers to raise wages, improve working conditions, and provide increased training to enable currently employed workers to keep pace with technology and induce more workers to enter the labor market. The increased demand for trained workers induces educational and job training institutions to teach new skills. With more opportunities for training, workers acquire skills needed to obtain better, higher-paying and more secure jobs, thereby creating open jobs and career ladders for those just entering or reentering the labor market -- young people, welfare recipients, displaced workers, and other disadvantaged groups. Indeed, the IT labor market has begun to respond to these signals of increased demand. A survey of U.S. Ph.D. departments of computer science and computer engineering showed bachelor-level enrollments were up 46% in 1996, and another 39% in 1997 -- nearly doubling over the two year period. Moreover, the high technology jobs at the center of this debate are precisely the types of skilled employment Americans have been led to expect will become available to them as a result of globalization.

Therefore, tight labor markets create incentives for employers and workers to react in ways needed to achieve many

of the Nation's top priorities: moving welfare recipients, out-of-school youth, and dislocated workers into jobs; providing greater opportunities for lifelong learning; and raising wages and reducing income inequality.

However, labor markets can sometimes be slow to respond to skills shortages. In these circumstances, it is often argued that foreign temporary workers are needed in the short-term to provide necessary skills while the labor market adjusts and provides U.S. workers with the requisite training. Without needed foreign temporary workers, some argue that the IT industry may adjust to skills shortages in ways that do not serve the short-term or long-term priorities of the country, either by reducing job creation or by moving jobs overseas. Further, the IT sector is so critical to our competitive edge in an array of industries and services that disproportionate harm could come to the U.S. economy if, in fact, skill shortages do become problematic.

Even in such circumstances the expanded use of foreign temporary workers may well interfere with labor market adjustments and may make achieving our other priorities more difficult. The presence of more foreign workers may reduce the incentive for U.S. workers to acquire new skills, and fewer employers and institutions may be induced to increase training and education. Such impacts could only be exacerbated by increasing the current H-1B visa cap, without needed reforms.

We must also be cognizant that raising the H-1B cap will almost certainly increase both legal and illegal immigration. We know that nearly half of the workers who obtain permanent residency in the U.S. as employment-based immigrants convert from H-visa nonimmigrant status. And according to Immigration and Naturalization Service statistics, nearly one-half of all illegal aliens resident in the U.S. are visa over-stayers. With the attachments they will form in the U.S. during their nonimmigrant stay of 6 years (or more), one can expect many of the additional H-1B entrants will eventually join the ranks of visa over-stayers.

Mr. Chairman, we have heard a lot from advocates of raising the H-1B visa cap that this would be good for the IT industry, enhancing its growth, productivity and international competitiveness and, in turn, U.S. economic growth and prosperity. We must pay close attention to these concerns. But the public has heard little so far about the adverse impact of raising the cap, such as the effect on workers who have lost or are seeking jobs in the IT industry. The Department, however, has heard from many concerned individuals and groups on this issue. If I may, I would like to request that copies of scores of letters we have received from opponents of raising the cap be included in the record of today's hearing.

The Administration believes it is essential to meet the workforce needs of the IT industry first through the education and training of U.S. workers. Our first response should be to provide the needed skills to U.S. workers to qualify them for IT jobs to secure the growth and strengthen the global leadership of this important industry.

The Administration already has taken significant steps to increase our capacity to enhance workforce skills. The President continues to pursue comprehensive reform of the Nation's employment and training system by working with Congress to enact the principles embodied in his GI Bill proposal. Moreover, in the historic balanced budget agreement of last summer, the President insisted on and achieved the largest increase in 30 years in the Federal investment to expand the skills of American workers, including:

- the largest Pell Grant increase in two decades;
- Hope Scholarships to make the first two years of postsecondary education universally available;
- the Lifelong Learning Tax Credit for the last 2 years of college and continuing adult education and training to upgrade worker skills;
- a major increase in employment and training resources, including increases for dislocated workers and disadvantaged adults and youth; and
- a \$3 billion program to help long-term welfare recipients secure lasting, unsubsidized employment.

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Further, the Administration announced several new initiatives at the recent Berkeley Convocation to help address the growing demand for IT workers:

- A Labor Department Technology Demonstration project to test innovative ways of establishing partnerships between local workforce development systems, employers, training providers and others to train dislocated workers in needed high tech skills;
- The expansion and integration of America's Job Bank and America's Talent Bank to allow employers and workers to list and access job openings and worker resumes in one integrated system;
- The convening of four town hall meetings by the Commerce Department to discuss IT workforce needs, identify innovative practices, and showcase successful models; and
- A joint Education and Labor grant program to expand employer involvement in high technology school-to-work programs.

Last week President Clinton and Secretary Herman announced that grants totaling \$1.6 million are being provided to projects in four States to continue for another year highly successful programs to train dislocated workers for high paying jobs in information technology.

We believe that there is more that can be done to move U.S. workers into high technology jobs, and we welcome the discussions that may be sparked by this hearing. We are committed to pursuing a continued dialogue with the major stakeholders in the IT workforce issue -- government, industry, workers, and education and training institutions -- to better define the workforce needs of the IT industry and develop appropriate solutions to meet these needs domestically through commitments from each of the stakeholders. Such a dialogue is critical because increased immigration, if needed at all, can be only a small part of the solution to the workforce needs of the IT industry.

In sum, Mr. Chairman, our assessment of the likely effects of raising the H-1B cap reconfirms our strong conviction that our primary public policy response to skills mismatches due to changing technologies and economic restructuring, including in the IT industry, must be to prepare the U.S. workforce to meet new demands. Importing needed skills should, at most,

be a short-term response to meet urgent needs while we actively adjust to quickly changing circumstances. Increased immigration should be the last -- not the first -- public policy response to skills shortages.

Given this broader context, let me now turn to the third of the issues I listed -- the pressing need for reform of the H-1B nonimmigrant program.

H-1B Nonimmigrant Program Must be Reformed

The current H-1B program is broken and desperately in need of reform. As presently designed, it is simply not serving its intended purpose. The role of immigration programs, like the H-1B program, in meeting temporary skills shortages is to allow employers to have access to temporary foreign workers with the requisite skills while the domestic labor market makes appropriate adjustments -- not to interfere with or to frustrate such adjustments. The H-1B program does not focus available visas on temporary skills shortages. Nor does the program adequately protect the job opportunities and wages and working conditions of U.S. workers.

The fundamental structural flaws in the current H-1B program are well documented in a May 1996 audit report by the Department's Inspector General (IG). The IG's major findings illustrate the problems with the H-1B program and I would ask the Subcommittee to accept the IG's full audit report in the record of today's hearing.

The IG found that, despite the legislative intent:

" . . . the [H-1B] program does not always meet urgent, short-term demand for highly-skilled, unique individuals who are not available in the domestic work force. Instead, it serves as a probationary try-out employment program for illegal aliens, foreign students, and foreign visitors to determine if they will be sponsored for permanent status."

The IG also found that "75 percent of the [H-1B employees] . . . worked for employers who did not adequately document that the wage specified on the LCA [employer's application] was the proper wage, and 19 percent of the aliens were paid below the wage specified on the LCA." The IG also found that "some [H-1B] employers use alien labor to reduce payroll costs either by paying less than prevailing wage to their own alien employees or treating these aliens as independent contractors, thereby avoiding related payroll and administrative costs." It found, in addition, that "other

[H-1B] employers are 'job shops' whose business is to provide H-1B alien contract labor to other employers." The IG concluded that the H-1B program does little to protect the jobs or wage levels of U.S. workers and it recommended eliminating the current program and establishing a new program to fulfill Congress' intent.

Mr. Chairman, any consideration of even temporary increases in the H-1B visa cap as part of the answer for the tight labor market faced by the IT industry must include much-needed reforms of the program. In this regard, certain conditions would have to be met for the Administration to support any such step. More specifically, besides requiring substantial additional efforts by the IT industry to increase the pool of skilled U.S. workers, needed improvements in the H-1B visa program are a prerequisite for Administration support for any modest, short-term increase in the number of H-1B visas.

The H-1B program allows the admission of up to 65,000 workers each year (to stay for as long as six years), to meet short-term, high-skills employment needs in the domestic labor market. In principle, this can be an appropriate purpose, consistent with our overall goal of giving priority to improving the skills of U.S. workers.

In practice, however, employers do not have to demonstrate any type of employment need or any effort at domestic recruitment prior to getting a foreign temporary worker. In addition, employers are entirely free to lay-off U.S. workers to replace them with foreign temporary workers. Employers obtain H-1B foreign workers by filing a labor condition application with the Department affirming that they have complied with four requirements:

- that a wage (not less than the local prevailing rate) will be paid to the foreign workers;
- that no strike or lockout exists involving the occupation;
- that notification has been provided to U.S. workers or their union; and
- that the employment of H-1B nonimmigrants will not adversely affect the working conditions of U.S. workers similarly employed.

By law, the Labor Department can do no more than review these attestations for completeness and obvious inaccuracies -- to determine whether an employer checked all of the boxes, made no flagrant errors, and signed the attestation -- and must do so within 7 days of receipt.

As the IG found, the H-1B program often operates as a "probationary" employment program where employers bring workers to the U.S. (or convert them from student status) and, if they perform well, later sponsor them for permanent admission. In these circumstances, U.S. workers are never afforded the opportunity to compete for the job.

Many employers, to be sure, use the H-1B nonimmigrant program for its intended purpose: to provide U.S. businesses with timely access to the "best and the brightest" in the international labor market to meet urgent but generally temporary business needs. I want to emphasize that the Administration recognizes the need for this legitimate use of the program. But reform of the H-1B program is needed because it simply does not provide the appropriate balance between timely access to the international labor market and adequate protection of U.S. workers' job opportunities, wages and working conditions.

Greater protections for U.S. workers are needed because many employers use the H-1B program to employ not the "best and the brightest", but rather entry- and journey-level foreign workers. Minimum education and work experience qualifications for H-1B jobs are a 4-year college degree and no work experience, or the equivalent in terms of combined education and work experience. While some H-1B jobs are very high-paying jobs, nearly 80 percent of H-1B jobs pay less than \$50,000 a year -- a good salary, but certainly at the low-end of the pay scale for IT occupations even at the entry-level.

The existing H-1B program is broken in several respects. First, current law does not require any test for the availability of qualified U.S. workers in the domestic labor market. Therefore, many of the visas under the current cap of 65,000 can be -- and are -- used by employers to hire foreign workers for purposes other than meeting a skills shortage.

Second, current law allows a U.S. employer to lay off U.S. workers and replace them with H-1B workers. Third, current law allows employers to retain H-1B workers for up to 6 years to fill a presumably "temporary" need. We simply do not believe this is right.

The Administration asked the Congress in 1993 to amend

the H-1B nonimmigrant program to address these fundamental structural problems. Unfortunately for many U.S. businesses and workers, these amendments have not been enacted. The amendments requested in 1993 were carefully designed to ensure continued business access to needed high-skills workers in the international labor market while decreasing the H-1B program's susceptibility to misuse to the detriment of U.S. workers and the businesses which employ them. Briefly stated, the amendments would require employers which seek access to temporary foreign "professional" workers to attest that:

- they have taken timely and significant steps to recruit and retain U.S. workers in these occupations; and
- they have not laid off or otherwise displaced U.S. workers in the occupations for which they seek nonimmigrant workers in the periods immediately preceding and following their seeking such workers.

In addition, the Administration urged enactment of another amendment to reduce the allowable period of stay under the H-1B program from six to three years to better reflect the "temporary" nature of the presumed employment need.

Enactment of these amendments will help employers actually facing skills shortages, including those in the IT industry, obtain needed workers through the H-1B program. Under existing law, employers facing skills shortages are disadvantaged because they must compete for available visas (up to the cap of 65,000) on a first-come, first-served basis with other employers that do not face such shortages. Enactment of the proposed amendments would reduce pressure on the visa cap by screening out employers that are not faced with skills shortages but have no interest in recruiting U.S. workers.

If U.S. employers are to be delegated greater rights to decide when to import foreign workers to fill jobs in the U.S., then the people have the right to decide under what conditions such authority should be conveyed. It simply makes sense that these conditions include trying first to fill the employment need from within the U.S. labor market, and assuring that U.S. workers are not removed in order for their jobs to be filled by foreign temporary workers. Neither of these simple, common sense requirements exists in current law.

These Reforms Will NOT Cause Delays

Some employers contend that adding these requirements will substantially slow down the admission process for foreign

temporary workers and add many bureaucratic requirements to approval of their application for H-1B nonimmigrant workers. This contention is simply untrue.

The Administration's proposed reforms would add two more boxes to be checked on the employer's one-page application. The Labor Department would still be subject to the existing requirements of law that the application be processed within seven days and only rejected where incomplete or where there are "obvious inaccuracies." There would be no new pre-adjudication process that could cause delays in processing and approval. The employer would simply attest that it had tested the U.S. labor market in attempting to fill the job(s) and that, during certain times, it had not or would not lay off U.S. workers in the same job.

Employers in the IT sector repeatedly assert that they search exhaustively in the U.S. labor market to fill open jobs and that the tight IT labor market does not allow lay off or displacement of U.S. workers. Accordingly, attesting to these two common sense reforms would impose no additional burden on employers in the IT industry.

These Reforms Will NOT Cause Excessive Government Oversight of Employers' Hiring and Termination Decisions

Some employers contend that these reforms would -- after the application is approved and the nonimmigrants admitted -- subject the employer's hiring and termination decisions to "second guessing" by the government. Such decisions are already subject to review in the context of enforcement of employment discrimination laws, including the anti-discrimination provisions of the immigration law.

Employers' authority to import foreign workers is conditional. There are few impediments to the exercise of this authority by employers before the approval of the nonimmigrant admission.

Employers' hiring and termination decision-making must be subject to scrutiny after-the-fact. This scrutiny helps ensure that the employers are not discriminating against U.S. workers in favor of hiring foreign temporary workers.

This is a straight-forward law enforcement issue. Employers that are delegated authority to decide to import foreign workers need to be accountable for abiding by the conditions attached; specifically, to give U.S. workers a legitimate first chance at the jobs for which foreign temporary workers are being sought.

If the Administration's reforms are not implemented and the two new attestation elements are not added to the H-1B program, then the Labor Department will not be able to assure that the intended purposes of the program are actually served, regardless of any new enforcement authority granted by Congress.

The H-1B program exists to assure that U.S. employers can access the international labor market when they cannot find U.S. workers. Under current law, as the Inspector General has pointed out, the government is effectively powerless to assure that employers use the H-1B program for its intended purpose, and that purpose only.

Conclusion

Mr. Chairman, let me conclude by restating that the growing workforce needs of the IT industry can only be met -- and the strength and growth of the industry secured in the long run -- if we take the steps needed to fully develop and utilize the skills of U.S. workers. Increased immigration acts at cross-purposes with this goal, and therefore can at best only be a very small part of the solution and must be viewed as a minor complement to the development of the U.S. workforce. Further, let me repeat that reform of the H-1B program is integral and essential to eliminating abuses under the program and providing appropriate protections for U.S. workers. Enactment of these reforms would effectively allocate a greater share of H-1B visas to employers facing actual skills shortages.

I appreciate the interest shown by the Subcommittee and staff in our views, and your thoughtful consideration of them. The Department looks forward to continuing to work closely and cooperatively with you and your staff on these issues.

Mr. Chairman, that concludes my prepared statement. I would be happy to respond to any questions.

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TEXT:
Here's latest status of state/tribal plans

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Welfare-to-Work Formula Grant Status

5 States announced 1/29/98: IL, LA,MI,NE,NV \$122 M

2 States announced 2/19: MA,SC \$33 M

3 States announced 3/2: KA,HI,MN \$26 M

2 States announced 3/30: MO,TN \$40 M

1State announced 4/10?: KY \$18 M

TOTAL TO DATE: 13 states \$240 M

States with pending plans:

AL (\$14 M), AR (\$8.5), DE (\$2.8) -- week of 4/20	\$25
GA	\$28.4M
CA	\$190.4M
RI	\$4.4 M
MT	\$3.2 M
CO	\$9.9 M
NC	\$25.3 M
WI	\$12.9

TOTAL PENDING: 10 states \$300 M

States indicating they don't plan to apply:

ID, UT, OH, SD, WY, MS (DOL discussing further) \$71 M

TRIBAL PLANS

26 approved 3/19 \$5.8 M

33 approved 4/1 \$4.4 M

TOTAL TO DATE: 59 \$10.2M

As of 4/20/98

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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LRM ID: IMS301
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Monday, April 20, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: James J. Jukes (for) Assistant Director for Legislative Reference
OMB CONTACT: Ingrid M. Schroeder
PHONE: (202)395-3883 FAX: (202)395-3109

SUBJECT: REVISED LABOR Testimony on H1B Nonimmigrant Visa Program
and the High Technology Industry

DEADLINE: 3:30pm Monday, April 20, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The attached revised testimony was originally circulated under

LRM #IMS299 on Friday, April 17th. The testimony is for a hearing TOMORROW - April 21st. If we do not hear from you by the above deadline we will assume that you have no objections to the attached testimony.
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LRM ID: IMS301 SUBJECT: REVISED LABOR Testimony on H1B Nonimmigrant Visa
Program and the High Technology Industry

RESPONSE TO

LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

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Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: _____ (Date)
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The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment
- _____ See proposed edits on pages _____
- _____ Other: _____
- _____ FAX RETURN of _____ pages, attached to this response sheet

STATEMENT OF JOHN R. FRASER
DEPUTY WAGE AND HOUR ADMINISTRATOR
EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS
OF THE HOUSE JUDICIARY COMMITTEE

April 21, 1998

Mr. Chairman and Members of the Subcommittee:

We appreciate this opportunity to share the views of the Administration on whether this country's important high-technology industry should be afforded increased access to temporary foreign workers to meet its growing demand for highly skilled workers. In doing so, I want to again call your attention to the need to strengthen our education and training system to provide U.S. workers with the opportunity to acquire the skills needed to compete in our rapidly changing economy and the need pressing for reform of the H-1B nonimmigrant visa program.

Our information technology (IT) industry is essential to our continuing strong economic growth and wider prosperity. Our interest in the industry's strength is evidenced by our participation in a recent convocation in Berkeley that assessed IT work force needs. Further, as you know from Administration proposals advanced since 1993, we believe that the H-1B program needs fundamental reform. I would like to commend the Subcommittee for its interest in these issues.

We believe the issue of whether to increase the IT industry's access to temporary foreign workers should be evaluated within the framework of the following three questions:

- (1) Is there a shortage of skilled U.S. workers to fill jobs in the IT industry and meet future workforce needs?
- (2) What would be the consequences of raising the annual H-1B cap?
- (3) Does the current H-1B program need to be reformed in order to provide industry appropriate access to temporary foreign workers while protecting the job opportunities, wages and working conditions of U.S. workers?

I will address each of these in turn.

Tight Labor Markets and IT Skills Shortages

Proponents of increasing the annual cap on H-1B visas argue that this increase is necessary for the IT industry to be able to overcome an acute shortage of skilled U.S. workers. While there is no dispute that there is strong growth in demand for workers in the IT industry, it is much less clear that there is a shortage of skilled U.S. workers to meet this demand or that the domestic labor market won't be able to do so as it has over the last decade to satisfy projected job growth.

U.S. employment has been growing rapidly, labor markets are increasingly tight, and they are likely to remain so. Though this is true for the nation as a whole, IT labor markets appear to be particularly affected. Employment opportunities for computer systems analysts, engineers, and scientists have been growing by 10 percent a year or more well above the growth of comparable occupations and are expected to continue growing at a comparable rate through 2006. The Bureau of Labor Statistics (BLS) predicts that the U.S. will require more than 1.3 million new workers in IT core occupations between 1996 and 2006 to fill job openings projected to occur due to growth and the need to replace workers who leave the labor force or transfer to other occupations.

The IT skills shortage issue is very controversial. Some industry advocates assert that there exist more than three hundred thousand unfilled jobs within the IT industry, and that these vacancies are raising business costs and hurting U.S. competitiveness. On the other hand, critics argue that the IT industry: (1) overstates the problem by producing inflated job vacancy data and equating it to skills shortages; (2) continues to lay off tens of thousands of workers (e.g., Intel, Netscape, Cypress Semiconductor and Silicon Graphics recently announced large lay-offs); and (3) fails to tap reservoirs of available talent by insisting on unnecessarily specific job requirements and not providing more training to develop incumbent workers' skills.

Equating job vacancies and actual skills shortages is particularly controversial. While an industry association-sponsored survey indicates that there may be as many as 350,000 job vacancies in the IT industry, as you will hear, the General Accounting Office (GAO) has concluded that this

does not necessarily signal an acute shortage of skilled workers. In fact, most industries and firms (particularly those with rapid employment growth and high worker turnover) will have large numbers of job openings that do not indicate skills shortages.

While higher than average wage growth can be a reliable indicator of skill shortages, the wage growth record for the IT industry is mixed. Though BLS wage trends for broad computer-related categories show only average wage growth between 1988 and 1997 for all categories, it only shows above-average wage growth in 1996 and 1997 and only in the lower-skill computer-related categories, such as programmers. At the same time, a variety of industry wage surveys show larger wage increases in 1996 and 1997 in specialized, high-skill occupations.

The Commerce Department's September 1997 report and the subsequent GAO evaluation of that report both were inconclusive on the issue of a shortage of U.S. workers with IT skills and both concluded that more information and data are needed to understand and properly characterize the IT labor market.

The Subcommittee should also take into consideration other factors that bear on the question of the scope and duration of any labor shortage in the IT industry:

The current "Year 2000" problem is now occupying thousands of IT workers for the short-term;

New technologies are being introduced that are creating more efficient ways to produce software, store and retrieve data, speed up computations, and generally improve the productivity of the IT work force;

The number of computer science enrollments has risen significantly in the last two years and nearly three-quarters of all IT workers got their education in other disciplines.

Consequences of Raising the H-1B Visa CAP

We strongly urge that any decision to raise the H-1B visa cap carefully consider the possible adverse impact of such a move on the normal process by which labor markets adjust to a growing demand for workers. The labor market should be permitted to adjust to this increased demand without the introduction of artificial factors (such as increasing access to temporary foreign workers) that could delay, if not prevent, these normal market adjustments. Indeed, the IT labor market has already begun to respond to the signals of increased demand. A survey of U.S. Ph.D. departments of computer science and computer engineering showed bachelor-level enrollments were up 46% in 1996, and another 39% in 1997 -- nearly doubling over the two year period (q: does this include foreign students?).

It is also important to remember that tight labor markets are good for U.S. workers. A tight labor market causes employers to raise wages, improve working conditions, and provide increased training to enable currently employed workers to keep pace with technology. An increased demand for trained workers induces educational and job training institutions to teach new skills. With more opportunities for training, workers acquire skills needed to obtain better, higher-paying and more secure jobs, thereby creating open jobs and career ladders for those just entering or reentering the labor market (e.g., young people, welfare recipients, displaced workers, and other disadvantaged groups). Therefore, tight labor markets create incentives for employers and workers to react in ways needed to achieve many of the Nation's top priorities: moving welfare recipients, out-of-school youth, and dislocated workers into jobs; providing greater opportunities for lifelong learning; and raising wages and reducing income inequality.

However, while tight labor markets are good for U.S. workers, labor markets can sometimes be slow to respond to skills shortages. In these circumstances, it is often argued that temporary foreign workers are needed in the short-term to provide necessary skills while the labor

market adjusts to provide U.S. workers with the requisite training. Without needed foreign temporary workers, industries experiencing genuine skill shortages may adjust in ways that do not serve the short-term or long-term priorities of the country, either by reducing job creation or by moving jobs overseas. Further, because the IT sector is so critical to our global competitive edge, the U.S. economy could suffer disproportionate harm if skill shortages do become acute.

Because the expanded use of foreign temporary workers may interfere with labor market adjustments and may make achieving our other priorities more difficult, we must make sure that any increase in the annual number of foreign temporary workers is done with care to ensure that the use of these foreign temporary workers is responding to a genuine skill shortage and does not interfere with healthy adjustments in the labor market.

We must also be cognizant that raising the H-1B cap will almost certainly increase both legal and illegal immigration. We know that nearly half of the workers who obtain permanent residency in the US as employment-based immigrants convert from H-visa nonimmigrant status. And according to the INS statistics, nearly one-half of all illegal aliens resident in the United States are visa over-stayers. With the attachments and equity they will form in the U.S. during their nonimmigrant stay of 6 years (or more), one can expect many of the additional H-1B entrants will eventually join the ranks of visa over-stayers.

The Department of Labor has heard from many concerned individuals and groups on the issue of the adverse impact on U.S. workers of raising the annual cap on H-1B visas. I would like to request that copies of the many letters we have received from these people be included in the record of today's hearing.

The Administration believes that our first response to meeting the workforce needs of the IT industry should be to provide the needed skills to U.S. workers to qualify them for IT jobs. The Administration already has taken significant steps to increase our capacity to enhance workforce skills. The President continues to pursue comprehensive reform of the Nation's employment and training system by working with Congress to enact the principles embodied in his GI Bill proposal. Moreover, in the historic balanced budget agreement of last summer, the President insisted on and achieved the largest increase in 30 years in the Federal investment to expand the skills of American workers, including: the largest Pell Grant increase in two decades; Hope Scholarships to make the first two years of post-secondary education universally available; the Lifelong Learning Tax Credit for the last 2 years of college and continuing adult education and training to upgrade worker skills; a major increase in employment and training resources, including increases for dislocated workers and disadvantaged adults and youth; and a \$3 billion program to help long-term welfare recipients secure lasting, unsubsidized employment.

Further, the Administration announced several new initiatives at the recent Berkeley Convocation to help address the growing demand for IT workers:

A Labor Department Technology Demonstration project to test innovative ways of establishing partnerships between local workforce development systems, employers, training providers and others to train dislocated workers in needed high tech skills;

The expansion and integration of America's Job Bank and America's Talent Bank to allow employers and workers to list and access job openings and worker resumes in one integrated system;

The convening of four town hall meetings by the Commerce Department to discuss IT workforce needs, identify innovative practices, and showcase successful models; and

In addition, last week President Clinton and Secretary Herman announced that grants, totaling \$1.6 million, are being provided to projects in four states to continue highly successful programs to train dislocated workers for high paying jobs in information technology.

Finally, with the Technology Literacy Challenge and related educational programs, the Administration has put strong emphasis on effective use of educational technology to strengthen our nation's schools and school-to-work transition. Linking elementary/secondary schools, institutions of higher education, and business can produce the knowledge, know-how, and skills our nation's businesses and young people need in IT. This creates opportunities for business and America's students alike. [need more information on this to be able to answer questions.]

We believe that there is more that can be done to move U.S. workers into high technology jobs, and we welcome the discussions that may be sparked by this hearing. We are committed to continuing to pursue a dialogue with the major stakeholders on this critical workforce issue -- government, industry, workers, and education and training institutions -- to better define the workforce needs of the IT industry and develop appropriate solutions to meet these needs domestically through commitments from each of the stakeholders.

In sum, Mr. Chairman, our assessment of the likely effects of raising the H-1B cap reconfirms our strong conviction that our primary public policy response to skills mismatches due to changing technologies and economic restructuring must be to prepare the U.S. workforce to meet new demands. Yet we recognize that short-term demands for skills may require that we develop a balanced, short-term, response to meet urgent needs while we actively adjust to rapidly changing circumstances. However, increased numbers of temporary foreign workers should be the last -- not the first -- public policy response to skills shortages.

Given this broader context, let me now turn to the third of the issues I listed -- the pressing need for reform of the H-1B nonimmigrant program.

H-1B Nonimmigrant Program Must be Reformed

The H-1B visa program allows the admission of up to 65,000 workers each year (to stay for as long as six years), to meet short-term, high-skills employment needs in the domestic labor market. Temporary visa programs, like H-1B, are intended to allow employers who are faced with a domestic skills shortage to have access to temporary foreign workers with the requisite skills while the domestic labor market makes appropriate adjustments.

However, there exist serious structural flaws in the current H-1B program. These flaws are documented in a May 1996 report by the Department's Inspector General (IG). I would ask the Subcommittee to accept the IG's full report in the record of today's hearing.

The IG found that, despite the legislative intent:

... the [H-1B] program does not always meet urgent, short-term demand for highly-skilled, unique individuals who are not available in the domestic work force. Instead, it serves as a probationary try-out employment program for illegal aliens, foreign students, and foreign visitors to determine if they will be sponsored for permanent status. 8

The IG also found that some [H-1B] employers use alien labor to reduce payroll costs either by paying less than the prevailing wage to their own alien employees or treating these aliens as independent contractors, thereby avoiding related payroll and administrative costs. 8 It found, in addition, that other [H-1B] employers are -- job shops, whose business is to provide H-1B alien contract labor to other employers. 8 The IG concluded that the H-1B program does little to protect the jobs or wage of U.S. workers and it recommended eliminating

the current program and establishing a new program to fulfill Congress's intent.

Employers obtain H-1B workers by simply filing a labor condition application (LCA) with the Department affirming that they have complied with four requirements: that the higher of the local prevailing rate or the wage paid to the employer's similarly-employed workers will be paid to the foreign workers; that no strike or lockout exists involving the occupation; that notification has been provided to U.S. workers or their union; and that the employment of H-1B nonimmigrants will not adversely affect the working conditions of U.S. workers similarly employed.

By law, the Labor Department can do no more than review these attestations for completeness and obvious inaccuracies to determine whether an employer checked all of the boxes, made no flagrant errors, and signed the attestation and must do so within 7 days of receipt.

Because current law does not require any test for the availability of qualified U.S. workers in the domestic labor market, many of the visas under the current cap of 65,000 can be used by employers to hire foreign workers for purposes other than meeting a skills shortage. In addition, current law allows a U.S. employer to lay off U.S. workers and replace them with H-1B workers, and allows employers to retain H-1B workers for up to 6 years to fill a presumably temporary need. We simply do not believe this is right.

In 1993 the Administration asked the Congress to amend the H-1B nonimmigrant program to address these structural problems. Unfortunately for many U.S. businesses and workers, these amendments have not been enacted. The amendments requested in 1993 were carefully designed to ensure continued business access to needed high-skill workers in the international labor market while decreasing the H-1B program's susceptibility to misuse to the detriment of U.S. workers and the businesses that employ them. Briefly stated, the amendments would require employers which seek access to temporary foreign professional workers to also attest that:

they have taken timely and significant steps to recruit and retain U.S. workers in these occupations; and

they have not laid off or otherwise displaced U.S. workers in the occupations for which they seek nonimmigrant workers in the periods immediately preceding and following their seeking such workers.

In addition, the Administration urged enactment of another amendment to reduce the allowable period of stay under the H-1B program from six to three years to better reflect the temporary nature of the presumed employment need.

Enactment of these reforms will help employers actually facing skills shortages, including those in the IT industry, obtain needed workers through the H-1B program. Under existing law, employers facing skills shortages must compete for available visas (up to the cap of 65,000) on a first-come, first-served basis with other employers that do not face such shortages. Thus, enactment of the proposed amendments would reduce pressure on the visa cap by screening out employers that are not faced with skills shortages and have no interest in recruiting U.S. workers.

Some employers contend that adding these requirements will substantially slow down the admission process for foreign temporary workers and add many bureaucratic requirements to approval of their application. This contention is simply untrue. The Administration's proposed reforms would add two more boxes to be checked on the employer's one-page application. The Labor Department would still be subject to the existing requirements that the application be processed within seven days and only rejected where incomplete or where there are obvious inaccuracies. There would be no new procedures that could cause delays

in processing and approval. The employer would simply attest that it had tested the U.S. labor market in attempting to fill the job(s) and that, during certain times, it had not or would not lay off U.S. workers in the same occupation.

Many industry representatives assert that they search exhaustively in the U.S. labor market to fill open jobs and that the tight IT labor market does not allow lay off or displacement of U.S. workers. Accordingly, attesting to these two common sense reforms should impose no additional burden.

Some employers contend that any attempt to monitor the truthfulness of these attestations □* after the application is approved and the nonimmigrants admitted □* would subject the employer□,s hiring and termination decisions to □&second guessing□8 by the government. Such decisions are already subject to review in the context of enforcement of employment discrimination laws, including the anti-discrimination provisions of the immigration laws. Moreover, under existing law, employers□; authority to import foreign workers is conditional and there are few impediments to the exercise of this authority by employers before the approval of the nonimmigrant admission. Subjecting employers□, hiring and termination decision-making to scrutiny after-the-fact is the least burdensome way to ensure that the employers are not discriminating against U.S. workers in favor of temporary foreign workers.

If the Administration□,s reforms are not implemented and the two new attestation elements are not added to the H-1B program, the Labor Department will not be able to assure that the intended purposes of the program are actually served. The H-1B program exists to assure that U.S. employers can meet short-term labor needs by limited access the international labor market. Under current law, as the Inspector General has pointed out, the government is effectively powerless to assure that employers use the H-1B program for its intended purpose, and that purpose only.

Conclusion

Mr. Chairman, let me conclude by restating that the growing workforce needs of the IT industry can only be met □* and the strength and growth of the industry secured in the long run □* if we take the steps needed to fully develop and utilize the skills of U.S. workers. Increased reliance on temporary foreign workers should, at most, only be a small part of the solution and must be viewed as a minor complement to the development of the U.S. workforce. Further, let me repeat that reform of the H-1B program is essential to eliminating abuses under the program and providing appropriate protections for U.S. workers. Enactment of these reforms would effectively allocate a greater share of H-1B visas to employers facing actual skills shortages.

I appreciate the interest shown by the Subcommittee and staff in our views, and your thoughtful consideration of them. The Department looks forward to continuing to work closely and cooperatively with you and your staff on these issues.

Mr. Chairman, that concludes my prepared statement. I would be happy to respond to any questions.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Donna L. Geisbert (CN=Donna L. Geisbert/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:22-APR-1998 08:22:21.00

SUBJECT: Weekly Tobacco Strategy Meeting

TO: DAILARD_C (DAILARD_C @ A1 @ CD @ VAXGTWY [UNKNOWN]) (OPD)
READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Christopher C. Jennings (CN=Christopher C. Jennings/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Peter R. Orszag (CN=Peter R. Orszag/OU=OPD/O=EOP @ EOP [OPD])
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TO: Barry J. Toiv (CN=Barry J. Toiv/OU=WHO/O=EOP @ EOP [WHO])
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TO: Barbara D. Woolley (CN=Barbara D. Woolley/OU=WHO/O=EOP @ EOP [WHO])
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TO: Donald H. Gips (CN=Donald H. Gips/O=OVP @ OVP [UNKNOWN])
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TO: Jeanne Lambrew (CN=Jeanne Lambrew/OU=OPD/O=EOP @ EOP [OPD])
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TO: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP @ EOP [OPD])
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TO: MARR_C (MARR_C @ A1 @ CD @ VAXGTWY [UNKNOWN]) (OPD)
READ:UNKNOWN

TO: Charles F. Stone (CN=Charles F. Stone/OU=CEA/O=EOP @ EOP [CEA])
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TO: Joshua Gotbaum (CN=Joshua Gotbaum/OU=OMB/O=EOP @ EOP [OMB])
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TO: Sherman G. Boone (CN=Sherman G. Boone/OU=OPD/O=EOP @ EOP [OPD])
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TO: Emily Bromberg (CN=Emily Bromberg/OU=WHO/O=EOP @ EOP [WHO])
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TO: Toby Donenfeld (CN=Toby Donenfeld/O=OVP @ OVP [UNKNOWN])
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TO: Jerold R. Mande (CN=Jerold R. Mande/OU=OSTP/O=EOP @ EOP [OSTP])
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TO: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [OPD])
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CC: MURRAY_MM (MURRAY_MM @ A1 @ CD @ VAXGTWY [UNKNOWN]) (WHO)
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CC: Dan J. Taylor (CN=Dan J. Taylor/O=OVP @ OVP [UNKNOWN])
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CC: haverkamp_jennifer (haverkamp_jennifer @ ustr.gov @ INET @ VAXGTWY [UNKNOWN])
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CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])
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CC: Jill M. Pizzuto (CN=Jill M. Pizzuto/OU=OMB/O=EOP @ EOP [OMB])
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TEXT:

We will be having the Weekly Tobacco Strategy Meeting tomorrow, April 23,
at 2:45 in Room 211, OEOB.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Ruby Shamir (CN=Ruby Shamir/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:22-APR-1998 18:08:34.00

SUBJECT: Women's Mtg

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TO: Marsha Scott (CN=Marsha Scott/OU=WHO/O=EOP @ EOP [WHO])
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TO: Lucia F. Gilliland (CN=Lucia F. Gilliland/O=OVP @ OVP [UNKNOWN])
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TO: Sandra Thurman (CN=Sandra Thurman/OU=OPD/O=EOP @ EOP [OPD])
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TO: Judith A. Winston (CN=Judith A. Winston/OU=PIR/O=EOP @ EOP [PIR])
READ:UNKNOWN

TO: Robin Leeds (CN=Robin Leeds/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Roberta W. Greene (CN=Roberta W. Greene/OU=WHO/O=EOP @ EOP [WHO])
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TO: Janet Murguia (CN=Janet Murguia/OU=WHO/O=EOP @ EOP [WHO])
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TO: Karen E. Skelton (CN=Karen E. Skelton/OU=WHO/O=EOP @ EOP [WHO])
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TO: Sylvia M. Mathews (CN=Sylvia M. Mathews/OU=WHO/O=EOP @ EOP [WHO])
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TO: Minyon Moore (CN=Minyon Moore/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Susan M. Liss (CN=Susan M. Liss/O=OVP @ OVP [UNKNOWN])
READ:UNKNOWN

TO: Ellen M. Lovell (CN=Ellen M. Lovell/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Miriam H. Vogel (CN=Miriam H. Vogel/OU=WHO/O=EOP @ EOP [WHO])
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CC: Francine P. Obermiller (CN=Francine P. Obermiller/OU=CEA/O=EOP @ EOP [CEA])
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CC: Noa A. Meyer (CN=Noa A. Meyer/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Jennifer L. Klein (CN=Jennifer L. Klein/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

CC: June G. Turner (CN=June G. Turner/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Marjorie Tarmey (CN=Marjorie Tarmey/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Mindy E. Myers (CN=Mindy E. Myers/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Tania I. Lopez (CN=Tania I. Lopez/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Marjorie A. Black (CN=Marjorie A. Black/OU=PIR/O=EOP @ EOP [PIR])
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CC: Mona G. Mohib (CN=Mona G. Mohib/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Nicole R. Rabner (CN=Nicole R. Rabner/OU=WHO/O=EOP @ EOP [WHO])
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CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])
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CC: Katharine Button (CN=Katharine Button/OU=WHO/O=EOP @ EOP [WHO])
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TEXT:

There will be a Women's Mtg on Thursday at 9:00am in room 100. Thanks.

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Presidential Records Act - [44 U.S.C. 2204(a)]

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Melissa N. Benton (CN=Melissa N. Benton/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME: 24-APR-1998 15:13:11.00

SUBJECT: LABOR Testimony on HR2871 A bill to amend the Occupational Safety and Heal

TO: lrm (lrm @ ostp.eop.gov @ inet [UNKNOWN])

READ: UNKNOWN

TO: US@2=TELEMAIL@3=GOV+GSA2@7=GSALEGISLATION@6=GSA2@mrx@lngtwy (1=US@2=TELEMAIL@3=

READ: UNKNOWN

TO: clrm (clrm @ doc.gov @ inet [UNKNOWN])

READ: UNKNOWN

TO: cla (cla @ sba.gov @ inet [UNKNOWN])

READ: UNKNOWN

TO: oshrc (oshrc @ oshrc.gov @ inet [UNKNOWN])

READ: UNKNOWN

TO: Robert G. Damus (CN=Robert G. Damus/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

TO: Karen Tramontano (CN=Karen Tramontano/OU=WHO/O=EOP@EOP [WHO])

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TO: Sarah S. Lee (CN=Sarah S. Lee/OU=OMB/O=EOP@EOP [OMB])

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TO: John Kamensky (CN=John Kamensky/OU=OMB/O=EOP@EOP [OMB])

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TO: David J. Haun (CN=David J. Haun/OU=OMB/O=EOP@EOP [OMB])

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TO: Richard J. Turman (CN=Richard J. Turman/OU=OMB/O=EOP@EOP [OMB])

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TO: Kevin P. Cichetti (CN=Kevin P. Cichetti/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

TO: Daniel J. Chenok (CN=Daniel J. Chenok/OU=OMB/O=EOP@EOP [OMB])

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TO: Derek A. Chapin (CN=Derek A. Chapin/OU=OMB/O=EOP@EOP [OMB])

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TO: Larry R. Matlack (CN=Larry R. Matlack/OU=OMB/O=EOP@EOP [OMB])

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TO: CARNEVALE_J@A1@CD@LNGTWY (CARNEVALE_J@A1@CD@LNGTWY [UNKNOWN]) (DON)

READ: UNKNOWN

TO: ola (ola @ opm.gov @ inet [UNKNOWN])

READ: UNKNOWN

TO: jwedekind (jwedekind @ nlr.gov @ inet [UNKNOWN])

READ:UNKNOWN

TO: US@2=TELEMAIL@5=JMD@7=Deborah@6=Clifton@mrx@lngtwy (1=US@2=TELEMAIL@5=JMD@7=Deb
READ:UNKNOWN

TO: lrm (lrm @ os.dhhs.gov @ inet [UNKNOWN])
READ:UNKNOWN

TO: Sanders D. Korenman (CN=Sanders D. Korenman/OU=CEA/O=EOP@EOP [CEA])
READ:UNKNOWN

TO: William P. Marshall (CN=William P. Marshall/OU=WHO/O=EOP@EOP [WHO])
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TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])
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TO: Kate P. Donovan (CN=Kate P. Donovan/OU=OMB/O=EOP@EOP [OMB])
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TO: John E. Thompson (CN=John E. Thompson/OU=OMB/O=EOP@EOP [OMB])
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TO: Emil E. Parker (CN=Emil E. Parker/OU=OPD/O=EOP@EOP [OPD])
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TO: Barry T. Clendenin (CN=Barry T. Clendenin/OU=OMB/O=EOP@EOP [OMB])
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TO: Barry White (CN=Barry White/OU=OMB/O=EOP@EOP [OMB])
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CC: James C. Murr (CN=James C. Murr/OU=OMB/O=EOP@EOP [OMB])
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----- Forwarded by Melissa N. Benton/OMB/EOP on 04/24/98

03:06 PM -----

Total Pages: _____

LRM ID: MNB151
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Friday, April 24, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Melissa N. Benton

PHONE: (202)395-7887 FAX: (202)395-6148

SUBJECT: LABOR Testimony on HR2871 A bill to amend the Occupational Safety and Health Act of 1970 to provide for the establishment of advisory panels for the Secretary of Labor.

DEADLINE: 2 p.m. Monday, April 27, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: To follow is draft Labor testimony to be delivered the morning of Wednesday, April 29th before the Workforce Protections Subcommittee of House Education and the Workforce. The testimony addresses H.R. 2871, as well as five other OSHA reform bills pending before the Committee (H.R. 2869, H.R. 2661, H.R. 2873, H.R. 2879, and H.R. 3519).

The deadline is firm.

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EOP:

Barry White
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Janet R. Forsgren
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LRM ID: MNB151 SUBJECT: LABOR Testimony on HR2871 A bill to amend the Occupational Safety and Health Act of 1970 to provide for the establishment of advisory panels for the Secretary of Labor.

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
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Please include the LRM number shown above, and the subject shown below.

TO: Melissa N. Benton Phone: 395-7887 Fax: 395-6148
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ (Date)
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 _____ (Agency)
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The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

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_____ FAX RETURN of _____ pages, attached to this response sheet

STATEMENT OF ASSISTANT SECRETARY CHARLES JEFFRESS
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
BEFORE THE
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

UNITED STATES HOUSE OF REPRESENTATIVES

APRIL 29, 1998

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify about several proposals to amend the Occupational Safety and Health Act of 1970. I appreciate the opportunity to express the views of the Occupational Safety and Health Administration on H.R. 2869, 2661, 2871, 2873, 2879 and 3519. Mr. Chairman, although we have known each other for many years and I previously testified before you as head of North Carolina OSHA, this is my first appearance before your subcommittee since my confirmation as OSHA's Assistant Secretary. I have appreciated your overtures to me and your willingness to discuss OSHA's concerns about various OSHA reform proposals. I was glad to return those overtures and to join you in supporting the passage of two earlier bills, H.R. 2864 and 2877.

OSHA's core mission is to ensure a safe and healthy workplace for every working man and woman in the Nation. We are making progress; the Bureau of Labor Statistics announced last December that the rate of worker injuries and illnesses was at 7.4 per 100 workers, the lowest point in the history of the BLS occupational injury and illness survey. But more must be done to protect our Nation's workers. The Nation still suffers approximately 7,000 fatalities per year from safety hazards and 50-60,000 fatalities from occupational disease. At the same time, we seek methods that avoid placing unnecessary burdens on employers. Through reinvention, OSHA is developing new strategies that leverage the agency's limited resources and, in many cases, re-shape how OSHA interacts with employers and workers to promote safe and healthy work environments.

The New OSHA

OSHA is changing the way it does business. It has been three years since President Clinton announced the "New OSHA" initiative. Since then, we have developed a broad range of partnership programs that promote cooperative efforts between employers, workers and government. We are making enforcement programs smarter and fairer by spending more time at the most hazardous workplaces and less time at safer ones. We are treating responsible employers differently than neglectful ones. OSHA is simplifying standards by rewriting them in plain language, using performance-based approaches wherever possible. We're focusing less on individual, technical violations, and more on systematic approaches that allow workers and employers to find and fix hazards on an ongoing basis. And finally, we're measuring results, where possible, not by numbers of citations or penalties, but by real improvements in the lives of working people, such as reduced injury and illness rates.

I would like to express my appreciation to you, Mr. Chairman, and to the rest of the Committee for your cooperative spirit during my short tenure with OSHA. I was pleased that we could reach compromises on H.R. 2864 and 2877, OSHA reform bills that you recently passed in the House. However, while I appreciate your interest in working together on OSHA-related legislation, I regret that we are unlikely to find common

ground on the proposals on the subcommittee's agenda today. In OSHA's view, the bills to be discussed today are either unnecessary or would undermine OSHA's ability to protect workers.

H.R. 2869 -- Excluding Employer Audits from Discovery

H.R. 2869 would create an evidentiary privilege for employer self-audit documents. This extremely broad privilege would vastly complicate OSHA enforcement. It would force the agency to arrive at conclusions about workplace hazards and accidents without critical information from safety professionals and consultants with firsthand knowledge. In many cases, particularly in fatality and catastrophe investigations, self-audit records and reports are the most reliable, and often the only means of establishing the facts. Under such circumstances, OSHA needs the ability to gather all the information it can to explain why these accidents happened and to help prevent them from happening again.

The fact that the bill contains an exception for "safety and health assessments prescribed under section 6(b)(7)" of the OSH Act does little to ameliorate the bill's harmful effects on enforcement of OSHA requirements. That section of the Act specifically addresses only a limited class of requirements dealing with medical surveillance and exposure monitoring, so the bill would leave the vast majority of workplace health and safety assessments required by OSHA rules off-limits to scrutiny by OSHA, the Review Commission and the courts. Furthermore, many of OSHA's audit requirements are expressed in general, performance-oriented terms, making it difficult if not impossible to discern the line between mandatory and voluntary audit activity, especially in workplaces administered by conscientious employers. Finally, OSHA is required to demonstrate employer knowledge of a cited hazard, and is required, in proposing penalties, to ascertain the extent of an employer's good faith, inquiries which cannot fairly be resolved without access to the very records which document knowledge and good faith.

Contrary to the belief of many businesses, disclosure of self-audit documents generally benefits good faith employers. OSHA provides penalty reductions where employers who receive citations have acted in good faith to try and correct deficiencies identified in an audit. For example, in a hypothetical small muffler shop the owner keeps his mufflers in a storage loft, but the loft does not have a railing. While conducting a self-audit, the employer discovers that the loft poses a serious fall hazard to his employees. As a result, he moves the mufflers as far away from the ledge as possible and puts cones along the ledge. When an OSHA compliance officer comes to inspect this muffler shop, he immediately spots the fall hazard. Under ordinary circumstances, failure to install a guardrail would result in a \$5,000 fine. In this case, however, the employer would receive a credit worth \$3,875. This is because, through the self-audit documents, the employer can show that he acted in good faith and that he did do something to try to reduce the likelihood of injury to his employees. If this small business has no history of serious violations, the \$5,000 penalty would ultimately be reduced to \$75.

The proposed evidentiary privilege would protect only bad actors -- employers who have identified hazards, have failed to make good faith efforts to correct them, and wish to hide the evidence.

H.R. 2661 and H.R. 2781 -- Additional Scientific and Economic Peer Review

H.R. 2661 and 2871 would both require the Secretary to create an advisory panel to review scientific and economic data every time OSHA proposes a new standard. H.R. 2871 provides an exception where the standard has been promulgated through negotiated rulemaking. This additional committee is unnecessary, duplicative and would create serious delays in our rulemaking process -- a process that many already criticize

as taking too long.

Today, major rules typically take as many as eight years to publish. In the meantime, workers are exposed to hazards every day. During that time, OSHA has a variety of obligations: engage in notice and comment rulemaking; conduct economic and risk analyses; assess impact on small businesses and, depending upon that impact, convene a small business panel under the Small Business Regulatory Enforcement Fairness Act; survey industries; and do extensive review of research on selected topics. When OSHA issues a proposal, the agency also engages in a rigorous public hearing process. On standards where peer review of a part of the supporting material is necessary, a peer review has been done. For example, the risk assessment for tuberculosis was peer reviewed. Once the proposed standard is published in the Federal Register, any interested party can comment upon the standard itself as well as the underlying scientific and economic data.

OSHA's public hearings allow for the fullest, most thorough discourse on every subject relevant to a rule. They provide the greatest possible public access to the process -- scientists, economists, safety and health professionals, representatives of potentially affected industries and any other interested parties may and do participate. At public hearings, interested parties can submit testimony and evidence, cross examine OSHA experts and engage in debate with other participants. For example, OSHA just completed nine days of hearings last week on the agency's proposed standard on occupational exposure to Tuberculosis. Scientists and economists always present new data and test each other's theories through questioning and comment, a process from which OSHA has gained valuable information. The entire discussion is conducted in full public view, and enables participants to challenge one another's positions. Public hearings are often held around the country to make it easier for interested parties to attend. I invite members of this committee to come attend one of our hearings and observe this critical process in action.

A new committee, like the ones proposed in H.R. 2661 and 2871, would provide selected persons an additional closed-door opportunity to influence rulemaking after the public process is complete. This would give the committee members an unfair advantage. In addition, the closed nature of the committee proceedings would prevent the public from a full and fair discussion on their rationale and decisions. The bill's failure to require disclosure from this committee makes its already unnecessary contribution suspect as well.

The President, consistent with Executive Order 12838 and the National Performance Review, has asked Congress to show restraint in the creation of new statutory committees. In the interest of promulgating rules that will best protect workers, this is an appropriate time to exercise that restraint.

H.R. 2873 -- Risk Assessment and Cost-Benefit Analyses for Every Industry

H.R. 2873 would require OSHA to conduct an individual risk assessment and cost-benefit analysis for each industry affected by a proposed standard. OSHA cannot base its health standards on cost-benefit analyses and is required by law to reduce significant risk to the extent feasible. However, OSHA agrees that comprehensive and accurate risk assessments and economic analyses are valuable informational tools, and devotes considerable effort to making these documents clear and methodologically sound. For each rule, the Agency already conducts detailed risk assessments, develops extensive significance-of-risk analyses, demonstrates technological and economic feasibility, evaluates benefits, and assesses impacts (including small business impacts). Cost estimates and feasibility analyses are commonly conducted at the industry level, because data on the technological and financial status of each industry

that reflect real conditions in that industry are usually publicly available. However, it is rarely the case that industry-specific data on risk are available; even where such data are available, they generally cannot be used to produce statistically meaningful results. Because industry-specific risk data are not available, it is not possible to develop industry-specific benefits analyses.

H.R. 2879 -- Limiting Liability at Multi-Employer Worksites

H.R. 2879 would limit the liability of certain employers, particularly general contractors in the construction industry, at multi-employer worksites. This bill would prohibit OSHA from citing an employer for a violation if the employer has no employees exposed to the hazard and has neither created the hazard nor assumed responsibility for ensuring that the other employers at the worksite comply. This would create an incentive for general contractors to give up their authority to ensure that subcontractors comply with safety standards. If we encourage the employers in the best position to enhance workplace safety to reduce their authority, workers will pay the price.

First, let me clear up some misunderstandings about liability under the OSH Act. The OSH Act holds all employers responsible for hazards under their control regardless of which employees are exposed. Some employers have misconstrued our policy as limiting the liability of the subcontractor by holding the general contractor liable instead. This is not the case. We do hold the subcontractor liable. Where a general contractor has failed to exercise due diligence in meeting its responsibility, we then hold the general contractor liable as well. That way, we can ensure that both the subcontractor and the general contractor have the incentive to coordinate their efforts in keeping the workers on the site safe.

OSHA's multi-employer worksite policy reflects court decisions that involved very serious accidents; workers were getting killed because general contractors and subcontractors failed to coordinate their responsibilities for ensuring worker safety and health. The tragedy that occurred at L, Ambiance Plaza in Connecticut is a prime example of the origins of our rule. In that case, 28 workers were killed when a high rise under construction collapsed through the error of one subcontractor. Workers from several subcontractors were killed.

Where one subcontractor creates a hazard for the employees of another subcontractor, only the general contractor may be in the best position to get the problem corrected. Just as general contractors have the ultimate supervisory power of all other aspects of the work, the best way to protect all of the workers at a particular site is for the general contractor to have overall responsibility for coordinating efforts for worker safety and health as well.

Under the case law, the liability of general contractors is not absolute, but depends on the circumstances of the case. Further limiting the liability of the general contractor would be a step backward. None of us wants to revisit the tragedies of the past. In our experience, this has proven the most effective method in reducing injuries and fatalities at multi-employer worksites. The bottom line is that we need all of the contractors to work together to make multi-employer worksites safe. In order to ensure the safety and health of the employees of both the general contractor and the subcontractors we cannot limit the responsibility of either.

H.R. 3519 -- Standard and Electronic MSDS's

H.R. 3519 proposes to amend the OSH Act to require electronic access to Material Safety Data Sheets (MSDS's). The bill would also require OSHA to modify its Hazard Communication Standard (29 CFR 1910.1200) to require a standard format for MSDS's. These proposals are well intentioned, and

OSHA is working along parallel lines. However, we believe that legislation is unnecessary and unwise at this time.

OSHA supports allowing employers to provide their workers with electronic access to MSDS's. In fact, OSHA has allowed such electronic access for some time. However, there has been confusion in some quarters about OSHA's policy regarding electronic access. Consequently, OSHA issued a new compliance directive clarifying the agency's policy at approximately the same time this bill was introduced. Since the bill and the modified compliance directive presumably were being drafted simultaneously, it is entirely possible that the bill's authors were unaware of the impending clarification. OSHA assumes that the clarification should address the authors' concerns. In the event the subcommittee feels that additional action by OSHA is necessary to get the word out, we are prepared to work with you to increase awareness.

The standardization of MSDS's is appealing. In fact, OSHA is participating in international discussions on how MSDS's might be standardized. However, standardization is premature. It is also more difficult than it sounds.

MSDS's have a variety of users, with varying backgrounds and needs. While workers have access to them and have a right to know the information they contain, MSDS's are also used by physicians, nurses, industrial hygienists, safety engineers, toxicologists, firefighters, emergency responders, and others. Because MSDS's serve such a broad function, the American National Standards Institute (ANSI) developed a consensus standard that recognizes the diversity of the MSDS audience by requiring certain information that is of most use to workers to be placed in the beginning of the document, and stated in simple language. ANSI developed this "order of information" after extensive discussions with experts revealed that there is no real consensus on how an MSDS should be presented.

There is an ongoing and extensive international effort to harmonize hazard communication requirements for hazard classification, labeling, and material safety data sheets. OSHA has participated in this effort for many years. The ANSI "order of information" may be part of a globally harmonized system by the year 2000. Therefore, OSHA believes the wisest course is to wait until that system is complete before modifying our hazard communication standard. It is far better to standardize consistent with an internationally accepted approach, both from a worker protection standpoint and trade perspective. If Congress were to mandate a change at this point, U.S. manufacturers would be required to change their MSDS's in the short term, and then again in a few years. This would be costly for business and would have little benefit for workers.

Protecting Workers Better

Mr. Chairman, there are a variety of ways to strengthen the protection provided to workers under the OSH Act. We would, for example, support legislation that strengthens the whistleblower protections of the OSH Act. It is fundamental that workers must feel free to inform their employer or the government when dangerous working conditions threaten their life or safety. There is a good deal of evidence, however, that many employees do not feel free to complain about unsafe conditions and that too many employers feel they can retaliate against whistleblowers with impunity. The provisions in place today in section 11(c) of the Act are too weak and too cumbersome to discourage employer retaliation or to provide an effective remedy for the victims of retaliation. A recent report of the Inspector General of the Department of Labor found that whistleblowers frequently face retaliation for exposing unsafe or unhealthy working conditions. A nurse at Skyline Terrace Nursing Home, for example, complained about the home's lack of gloves, which are required to protect employees from bloodborne pathogens. Four days after

an inspection, she was fired in retaliation for the complaint. Another company, Hahner, Foreman & Harness, Inc., fired an employee for refusing to go up in a gondola three or four stories above the ground. The gondola had been malfunctioning and the employee believed it to be unsafe. When the employee refused to risk his safety, his superintendent instructed him that if he did not go back up into the malfunctioning gondola, somebody else would. He was fired for his refusal. If you wish to strengthen the safety and health protection available to workers, I suggest this as a place to begin.

In North Carolina in 1993, the state legislature took several steps that greatly strengthened whistleblower protections after the Hamlet fire revealed the flaws in our State Plan. The changes included a longer statute of limitations, a private right of action and a provision for treble damages. I believe these changes have played an important part in the progress North Carolina has made in reducing injury, illness and fatality rates over the last five years.

In addition, the OSH Act does not effectively protect federal, state and local employees (maintenance workers, construction workers, firefighters, etc.). Consequently, with the exception of the few states that actively provide public sector coverage, OSHA has little ability to require positive change on the part of public employers. As a consequence, this limited authority hinders OSHA's success in reducing illness, injuries and fatalities on the job.

There are numerous examples of on-the-job tragedies that occurred primarily because safety and health protections do not apply to public employees. These tragedies could have been prevented by compliance with OSHA rules. In addition, studies have shown that the overall cost of providing OSH Act coverage for these employees is small, especially compared with the amount of money which would be saved by reducing the cost of worker injuries.

A third option for deterring action that places workers at risk is increasing the criminal penalty for an employer whose willful conduct causes the death of an employee. We would urge that these violations not be classified as misdemeanors, but felonies. We believe that the possibility of incarceration for periods in excess of one year would serve as a more effective deterrent to employers who would risk the safety and health of their employees. The current classification for willful workplace safety and health violations that lead to an employee's death are woefully inadequate to address the harm caused. Classifying such crimes as felonies would more justly reflect the severity of the offense.

Conclusion

In conclusion, the bills before us today would take us in the wrong direction. Prohibiting OSHA from gathering necessary information, adding redundant and burdensome layers to our rulemaking process and limiting employer liability is not the way to protect the working men and women of this country. Again, let me reiterate my appreciation for this opportunity to testify before you today. I look forward to continuing our dialogue in our effort to improve OSHA's contribution to the safety and health of American workers.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sean P. Maloney (CN=Sean P. Maloney/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:27-APR-1998 12:09:43.00

SUBJECT: The President's Trip to NY

TO: Phillip Caplan (CN=Phillip Caplan/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Jonathan Orszag (CN=Jonathan Orszag/OU=OPD/O=EOP @ EOP [OPD])
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TO: Jonathan H. Adashek (CN=Jonathan H. Adashek/OU=WHO/O=EOP @ EOP [WHO])
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TO: Daniel Wexler (CN=Daniel Wexler/OU=WHO/O=EOP @ EOP [WHO])
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TO: Dorian V. Weaver (CN=Dorian V. Weaver/OU=WHO/O=EOP @ EOP [WHO])
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TO: Brenda M. Anders (CN=Brenda M. Anders/OU=WHO/O=EOP @ EOP [WHO])

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TO: Amy W. Tobe (CN=Amy W. Tobe/OU=WHO/O=EOP @ EOP [WHO])
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TO: Jon P. Jennings (CN=Jon P. Jennings/OU=WHO/O=EOP @ EOP [WHO])
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TO: Cecily C. Williams (CN=Cecily C. Williams/OU=WHO/O=EOP @ EOP [WHO])
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TO: Paul J. Weinstein Jr. (CN=Paul J. Weinstein Jr./OU=OPD/O=EOP @ EOP [OPD])
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TO: Christopher Wayne (CN=Christopher Wayne/OU=WHO/O=EOP @ EOP [WHO])
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TO: Michael Waldman (CN=Michael Waldman/OU=WHO/O=EOP @ EOP [WHO])
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TO: Michael V. Terrell (CN=Michael V. Terrell/OU=CEQ/O=EOP @ EOP [CEQ])
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TO: Christa Robinson (CN=Christa Robinson/OU=OPD/O=EOP @ EOP [OPD])
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TO: John Podesta (CN=John Podesta/OU=WHO/O=EOP @ EOP [WHO])
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TO: Jennifer M. Palmieri (CN=Jennifer M. Palmieri/OU=WHO/O=EOP @ EOP [WHO])
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TO: Elizabeth R. Newman (CN=Elizabeth R. Newman/OU=WHO/O=EOP @ EOP [WHO])
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TO: Anne E. McGuire (CN=Anne E. McGuire/OU=WHO/O=EOP @ EOP [WHO])

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TO: Bruce R. Lindsey (CN=Bruce R. Lindsey/OU=WHO/O=EOP @ EOP [WHO])
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TO: Christopher J. Lavery (CN=Christopher J. Lavery/OU=WHO/O=EOP @ EOP [WHO])
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TO: Jason S. Goldberg (CN=Jason S. Goldberg/OU=WHO/O=EOP @ EOP [WHO])
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TO: Shelley N. Fidler (CN=Shelley N. Fidler/OU=CEQ/O=EOP @ EOP [CEQ])
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TO: Anne M. Edwards (CN=Anne M. Edwards/OU=WHO/O=EOP @ EOP [WHO])
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TO: Suzanne Dale (CN=Suzanne Dale/OU=WHO/O=EOP @ EOP [WHO])
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TO: Michael Cohen (CN=Michael Cohen/OU=OPD/O=EOP @ EOP [OPD])
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TO: Daniel K. Chang (CN=Daniel K. Chang/OU=CEA/O=EOP @ EOP [CEA])
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TO: Laura K. Capps (CN=Laura K. Capps/OU=WHO/O=EOP @ EOP [WHO])
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TO: Debra D. Bird (CN=Debra D. Bird/OU=WHO/O=EOP @ EOP [WHO])
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TO: Barbara A. Barclay (CN=Barbara A. Barclay/OU=WHO/O=EOP @ EOP [WHO])
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TO: Kris M Balderston (CN=Kris M Balderston/OU=WHO/O=EOP @ EOP [WHO])
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TO: Lori L. Anderson (CN=Lori L. Anderson/OU=WHO/O=EOP @ EOP [WHO])
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TEXT:

Tomorrow, Tuesday, April 28, 1998, the President will travel to New York City to attend a DSCC dinner. Deadlines for the President's trip book are as follows:

Background Memos:

DUE TODAY AT 6:00 P.M.

- Political Memo
- CEQ Hot Issues
- Cabinet Affairs Hot Issues
- Economic One-Pager
- Accomplishments

Event Memos:

DUE TODAY AT 6:00 P.M.

- DSCC Dinner

Please call or e-mail me if you have any questions. Thanks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Melissa N. Benton (CN=Melissa N. Benton/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:27-APR-1998 13:54:42.00

SUBJECT: LRM MNB 151--Labor testimony on OSHA Reform legislation

TO: Sanders D. Korenman (CN=Sanders D. Korenman/OU=CEA/O=EOP@EOP [CEA])
READ:UNKNOWN

TO: William P. Marshall (CN=William P. Marshall/OU=WHO/O=EOP@EOP [WHO])
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TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP@EOP [OPD])
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TO: John Kamensky (CN=John Kamensky/OU=OMB/O=EOP@EOP [OMB])
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CC: Janet R. Forsgren (CN=Janet R. Forsgren/OU=OMB/O=EOP@EOP [OMB])
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TEXT:

This is a reminder that your comments on the subject LRM are due at 2 p.m. TODAY.

Please provide any comments to me by that time. If I do not hear from you, I will assume no comment and will proceed with clearing the testimony.

Please call (5-7887) or e-mail if you have any questions. Thanks!

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Melissa N. Benton (CN=Melissa N. Benton/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:27-APR-1998 14:56:46.00

SUBJECT: LRM MNB 150--Labor (BLS) testimony on Revision of the Consumer Price Index

TO: Kate P. Donovan (CN=Kate P. Donovan/OU=OMB/O=EOP@EOP [OMB])

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TO: Emil E. Parker (CN=Emil E. Parker/OU=OPD/O=EOP@EOP [OPD])

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CC: Janet R. Forsgren (CN=Janet R. Forsgren/OU=OMB/O=EOP@EOP [OMB])

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TEXT:

This is a reminder that your comments on the subject LRM are due at 3 p.m. today.

Please provide any comments by that time. If I do not hear from you, I will assume you have no comments on the testimony.

Please call (5-7887) or e-mail if you have any questions. Thanks!

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Ingrid M. Schroeder (CN=Ingrid M. Schroeder/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:27-APR-1998 18:22:47.00

SUBJECT: LRM #IMS 309 - H1B Temporary Immigrant Visa Program Reforms

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CC: Darlene O. Gaymon (CN=Darlene O. Gaymon/OU=OMB/O=EOP@EOP [OMB])
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CC: James J. Jukes (CN=James J. Jukes/OU=OMB/O=EOP@EOP [OMB])
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TEXT:
You will not receive a paper copy of this LRM.
Total Pages: _____

LRM ID: IMS309
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Monday, April 27, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: James J. Jukes (for) Assistant Director for Legislative Reference
OMB CONTACT: Ingrid M. Schroeder
PHONE: (202)395-3883 FAX: (202)395-3109

SUBJECT: H1B Temporary Immigrant Visa Program Reforms

DEADLINE: COB Tuesday, April 28, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the

program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: This document is intended to be characterized as an Administration offer during discussions with Members of Congress this week.
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Rebecca M. Blank
Maria J. Hanratty

James C. Murr
LRM ID: IMS309 SUBJECT: H1B Temporary Immigrant Visa Program Reforms

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Ingrid M. Schroeder Phone: 395-3883 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment
- _____ See proposed edits on pages _____
- _____ Other: _____
- _____ FAX RETURN of _____ pages, attached to this response sheet

April 27, 1998

Draft Proposals Regarding Reform to the H-1B Visa Program

The Administration has committed to pursuing both reforms to the H-1B visa program and increased training opportunities for U.S. workers as part of any legislation that would temporarily raise the annual cap on H-1B visas. The following are some draft proposals for reform of the H-1B visa program.

I. Recruitment and Non-displacement of United States Workers Prior to Seeking Nonimmigrant Workers

(a) IN GENERAL -- Section 212(n)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1)) is amended by inserting at the end the following new subparagraph:

(E)(I) The employer, prior to filing the application, has taken good faith, timely and significant steps to recruit and retain sufficient U.S. workers in the specialty occupation in which the non-immigrant whose services are being sought will be employed. Good faith steps to recruit and retain shall be defined as:

(a) the employer taking the following two actions in a manner reasonably designed to recruit and retain U.S. workers:

- (i) widespread advertising of the relevant job openings to both current and prospective employees (e.g., through America's Job Bank, participation in job fairs, the Internet, employer newsletters and electronic communications, general circulation publications, professional journals and magazines); and
- (ii) offering meaningful monetary incentives to applicants (such as paying above the prevailing wage, paying bonuses, or providing stock options) above those already included in the base compensation package; or offering training subsidies, or a training program, that provides the means for its current employees to enhance their skills to qualify for jobs in the specialty occupation in which the nonimmigrant will be (or is) employed; and

(b) The employer did not receive applications from any U.S worker with at least substantially equivalent qualifications and experience to the temporary foreign worker offered employment; or (ii) offered employment to a U.S. worker with at least substantially equivalent qualifications and experience to the temporary foreign worker offered

employment, but the offer of employment to the U.S. worker was refused; and

(c) Offering compensation at least at the amount required by subparagraph (A).

(E)(II) The recruitment requirements of this subparagraph shall not apply to aliens with extraordinary ability, aliens who are outstanding professors and researchers, and certain multinational executives and managers described in section 203(b)(1). The recruitment requirements of this subparagraph shall also not apply to a scientist, mathematician, or engineer who has attained at least a master's degree or its equivalent in a scientific or engineering discipline, and who is coming temporarily to the United States to participate in a cooperative joint scientific activity carried out under an Agreement between the Federal Government and the alien's Government.

(F)(I) The employer --

(a) has not and will not -- within the 90-day period immediately preceding and the 90-day period immediately following the filing of the application, and within the 90-day period immediately preceding and the

90-day period immediately following the filing of any visa petition supported by the application -- lay off or otherwise displace any United States worker, including a worker obtained by contract, employee leasing, temporary help agreements, or otherwise displace any United States worker, including a worker obtained by contract, employee leasing, temporary help agreement, or other similar basis, who has substantially equivalent qualifications and experience in the specialty occupation in which the nonimmigrant will be (or is) employed; and

(F) (II) For purposes of this subparagraph, the term "laid off," with respect to an employee, means the employee's loss of employment, other than a discharge for cause or a voluntary departure or voluntary retirement. The term "laid off" does not apply to any case in which employment is relocated to a different geographic area and the affected employee is offered a chance to move to the new location with the same wages and benefits, but elects not to move to the new location.

(G) The employer offered compensation as required by subparagraph (A).

(b) For purposes of this subsection, the term "United States worker" means --

- (I) a citizen or national of the United States
- (II) an alien lawfully admitted to the United States for permanent residence; or
- (III) an alien authorized to be employed by this Act or by the Attorney General.

II. Wage Comparability

Section 212(n)(1)(A)(I) of such Act is amended by inserting "(including the value of benefits and additional compensation)" after "wages."
 Section 212(n)(1)(A)(I)(I) is amended by inserting "(including the value of benefits and additional compensation)" after "actual wage level."

III. Job Contractors

In the case of an employer that is a job contractor (within the meaning of regulations promulgated by the Secretary of Labor to carry out this subsection), the contractor will not place any H-1B employee with another employer unless such other employer has executed an attestation that the employer is complying and will continue to comply with the requirements of this paragraph in the same manner as they apply to the job contractor.

IV. Enforcement

(a) Independent Authority to Investigate

Section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)) is amended --

(I) in paragraph (2)(A), by striking the first sentence and inserting the following:

"The Secretary may conduct investigations pursuant to a complaint or, absent a complaint, where the Secretary has reasonable cause to believe that:

(a) there is a pattern or practice of: complaints by U.S. workers

against the employer; unsuccessful recruitment by the employer; or violations by the employer;

(b) the employer's U.S. workforce is comprised of more than 10%

nonimmigrant workers or the employer is making application that would result in more than 10% nonimmigrant workers in its U.S. workforce;

(c) an employer has laid off or otherwise displaced more than 10% of its U.S. workforce or 100 U.S. workers (whichever is fewer) in any one year period (or has announced the intent to make such a lay-off).

The Secretary shall establish a process for the receipt, investigation, and disposition of complaints or other cases of noncompliance with this section.

(II) in paragraph (2)(C), by inserting "&", or that the employer failed to cooperate in the conduct of the Secretary's investigation or has intimidated, discharged, or otherwise discriminated against any person because that person has asserted a right or has cooperated in an investigation under this paragraph after a material fact in an application.

(III) in paragraph (2), by adding at the end the following new subparagraph:

(E) The Secretary may issue subpoenas requiring the attendance and testimony of witnesses or the production of any records, books, papers, or documents in connection with any investigation or hearing, conducted under this paragraph. In conducting a hearing, the Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this paragraph, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall apply.

V. Sanctions

Section 212(n)(2)(C) is amended to read:

If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B); a substantial failure to meet a condition of paragraphs (1)(C) or (1)(D); a willful failure to meet a condition of paragraph (1)(A); a violation(s) of paragraphs (1)(E) or (1)(F) that is willful, or reflects a pattern or practice of violations, or is a violation that affects a significant number of individuals; or a misrepresentation of a material fact in the application (but any misrepresentation of a material fact relating to paragraphs (1)(E) or (1)(F) must be willful, or reflects a pattern or practice of

violations, or is a violation that affects a significant number of individuals) *

(i) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$5,000 per violation) as the Secretary determines to be appropriate,

VI. Application Fee

Section 212(n) of the Immigration and Nationality Act (8 USC 1182(n)) is

amended by adding the following new paragraph:

□(3) (A) The Secretary of Labor shall establish, by regulation, a fee to be paid by an employer for each position for which an application is filed for certification of a nonimmigrant temporary worker under section 101(a)(15)(H)(i)(b) and (c).

(B) The fee shall be set at a level that --

(i) will ensure recovery of the full costs of providing adjudication and application services; and,

(ii) finances activities authorized under Section XXXXX (the Regional and Industry Special Skills Training Fund).

(C) During the period ending September 30, 2001, such a fee shall not exceed \$250 for each position.

(D) (i) It shall be unlawful for an employer to require, as a condition of employment by such employer, that the fee prescribed under this paragraph or any part of the fee be paid directly or indirectly by the alien whose services are being sought.

(ii) Any person or entity that is determined, after notice and opportunity for an administrative hearing, to have violated clause (I) shall be subject to a civil penalty of \$5,000 for each violation, to an administrative order requiring the payment of any fee described in this paragraph, and the disqualification for one year from petitioning for temporary nonimmigrant workers under this subsection.

(iii) Any amount determined to have been paid, directly or indirectly, toward the filing fee described in paragraph (3)(A) by the alien whose services were sought, shall be repaid by the employer to such alien.

(E) Notwithstanding any other provision of law, all fees, as described in this paragraph as are designated by the Secretary of Labor in regulations shall be deposited as offsetting receipts into a separate account entitled □Temporary Worker Fee Account□8 in the Treasury of the United States. All deposits into the □Temporary Worker Fee Account□8 shall remain available until expended by the Secretary to reimburse any appropriation for expenses related to activities described in subparagraph (B).□8

VII. Training

At the appropriate place, insert the following new section:

SEC. ____ REGIONAL AND INDUSTRY SPECIAL SKILLS TRAINING GRANTS.

(a) IN GENERAL.-- Amounts available for carrying out this section from the Temporary Worker Fee Account under paragraph (3)(A) of section 212(n) of the Immigration and Nationality Act (8 U.S.C. 1182(n)) shall be used in accordance with the provisions of this section. From such amounts, the Secretary of Labor, in consultation with the Secretary of Commerce and the Secretary of Education, shall make competitive grants to eligible entities described in subsection (b), in order to enhance the capabilities of industries with significant skill needs to utilize the labor market in meeting their needs more effectively through--

(1) improving the job skills of American workers as necessary for employment in specific industries and occupations with significant skill needs;

(2) assessing and developing strategies to address significant skills needs at the local, State, regional, and national levels; and
(3) developing regional skills alliances to facilitate coordination of activities at the local, State, and regional levels in developing strategies to meet such needs.

(b) ELIGIBLE ENTITIES.

(1) IN GENERAL.-- For the purposes of this section, an eligible entity is a consortium that consists of, but is not limited to, two or more of the following:

- (A) employers;
- (B) labor organizations;
- (C) State or local governments;
- (D) private industry councils;
- (E) postsecondary educational institutions;
- (F) nonprofit organizations representing businesses or industries;

or

(G) nonprofit training organizations.

(2) ADDITIONAL REQUIREMENT.-- To the maximum extent practicable, each business, organization, or governmental unit that joins in forming an eligible entity under paragraph (1) shall be located in the same geographic region of the United States.

(c) GRANT LIMITATIONS.-- A grant may not be provided to any eligible entity under this section for more than two annual grant periods. Out of any grant made to an eligible entity, the portion to be used for creating, planning, and developing the alliance may not exceed \$750,000 for any such annual grant period.

(d) APPLICATION.-- The Secretary may provide a grant to an eligible entity under subsection (a) only pursuant to an application that is consistent with the provisions of this section and contains such information as the Secretary may deem reasonable.

(e) USE OF AMOUNTS.-- In making grants under subsection (a), the eligible entity may, to the extent that such activities build upon and supplement on-going activities and will not duplicate or supplant current activities, provide for:

(1) an identification of local, State, regional, and national skills needs;

(2) an assessment of the extent to which workers in the United States are being educated and trained in needed skills;

(3) the development of strategies to enhance the focus of training and education investments on industries with significant skill needs and rapidly expanding occupations;

(4) the provision of training or retraining for upgrading the skills of workers, including retraining incumbent workers for continued employment with an employer;

(5) the provision of improved occupational information and projections;

(6) an assessment of training and job skill needs for specific industries; and

(7) assistance in developing curriculum and training methods, and identification of and assistance in developing training providers.

(f) ADDITIONAL CRITERIA FOR GRANTS.-- In making grants under subsection (a), the Secretary shall provide that--

(1) a peer review process shall be utilized to recommend awards of grants;

(2) applications shall ensure that private industry councils and labor organizations in the areas to be served have collaborated in the development of such applications;

(3) preference be given to applications that demonstrate significant collaboration with major stakeholders in the State and local

workforce development systems;

(4) with respect to any application, any amount of Federal funds to be used for training or retraining activities for incumbent workers as described in subsection (e)(4) shall be matched by an equal amount from non-Federal sources to be used for such purpose; and

(5) preference be given to applications for grants, based on the extent to which non-Federal sources will provide amounts which match a portion of the Federal funds to be made available for the grant.

(g) NATIONAL ALLIANCE FOR HIGH-TECHNOLOGY SKILLS.--

(1) ESTABLISHMENT.-- In order to complement the program of grants under this section, including the activities of regional skills alliances, a National Alliance for High Technology Skills shall be established within six months after the enactment of this Act, consisting of individuals who are representative of private industry, organized labor, work-force development systems, education, and government at the local, State, and national levels.

(2) RECOMMENDATIONS AND REPORT.-- The National Alliance shall develop and recommend strategies for the training of American workers to meet future demands for high-technology skills. The National Alliance shall prepare and submit an interim report to the President and to the Congress, including its findings and recommendations, not later than February 1, 2001, and a final report not later than September 30, 2003.

(3) MEMBERSHIP.-- The Secretary of Labor, in consultation with the Secretary of Commerce and the Secretary of Education, shall establish procedures relating to the appointment of members, the conduct of meetings and public hearings, and the provision of staff assistance and support resources for the National Alliance.

(4) LIMITATION.-- Out of the amounts available for use under this section, not more than \$1,000,000 annually shall be available for carrying out the responsibilities of the Alliance under this subsection.

(h) DEFINITION.-- For purposes of this section:

(1) The term "Secretary" means the Secretary of Labor.

(2) The term "private industry council" means the entity described under section 102 of the Job Training Partnership Act, or similar entity under any successor Federal statute.

VIII. New Visa Category Proposal

A new program (H-1C) that creates temporary visas for use only by non-immigrants with very high skill levels. In particular:

The program would be authorized for four years beginning in FY1998.

There would be a maximum of 25,000 visas for FY1998, FY1999, and FY2000, and a maximum of 15,000 visas for FY2001.

Only employers whose number of H-1B and "H-1C" employees in the prior year constitutes no greater than one-half of their U.S. based workforce are eligible to apply.

Only individuals with a minimum of a master's degree (or equivalent degree) in math, science, or engineering; or a bachelor's degree in math, science, or engineering and five years of experience in the specialty occupation; or who will earn at least \$75,000 per year (exclusive of benefits) are eligible for an "H-1C" visa.

Requires a \$500 fee for each position for which an application is filed for training, enforcement, and administration of the program.

The H-1C8 visas would be issued for a 3-year period, and renewable for an additional 3 years.

All of the requirements of the H-1C8 visa program would be the same as would exist under the reformed H-1B program.