

H-1Bs Drive Down High Tech Wages



*Congressman Dana Rohrabacher (46-CA)**

A conference sponsored by the law firm of Cohen & Grigsby caused a great deal of controversy earlier this year. The conference was advising business owners and employers how to make the H1-B visa laws work for them, and against American job seekers. Ironically, the same gee-whiz high tech wizardry that allows you to post videos online caught big business in the act of using H-1B visas to drive down wages for high tech employees that developed these systems.

In the video taken at the seminar, which was posted on numerous web sites, Lawrence Lebowitz, Vice President of Marketing at Cohen & Grigsby, says:

“Our goal is clearly not to find a qualified U.S. worker . . . our objective is to get this person a green card.”¹

Mr. Lebowitz goes on to advise firms how to avoid finding a potential American applicant by advertising in out of the way or irrelevant places, yet still comply with the law.

“Clearly we are not going to find a place where the applicants are most numerous,” says Lebowitz, “we’re going to find a place where—again we’re complying with the law—[we’re] hoping and likely not to find qualified worker applicants.”²

And if somehow a qualified American sneaks through and applies for the deliberately misplaced and under-advertised position? Not to worry, Mr. Lebowitz reassures his audience:

“If someone looks like they are very qualified, if necessary schedule an interview; go through the whole process to find a legal basis to disqualify them.”³

Clearly, no tweaks in the law, no rework of the regulations, will help defend Americans against this cynical and brutal attempt to chase them away from the best paying jobs. It is high time to admit the only thing H1-B visas do is drive down wages. Instead of investing in training and educating our own work



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For High Tech, Getting Workers Is Now a Crisis

William T. Archey and Josh James***

Very few Members of Congress seem to understand one of the less talked about but equally portentous consequences of the recent death of the immigration bill: it has put the high-tech industry into a crisis by continuing to deny it the ability to attract the best and brightest talent from around the world.

The issue of high skilled, legal immigration, which allows companies to bring highly educated workers to the United States on temporary H-1B visas or permanent employment-based green cards, received little media attention. But in terms of American economic and technological prowess, it will have a huge impact. Nobody on Capitol Hill seems to understand this.

The failure of Congress to act on high skilled immigration means that companies will not have access to the qualified workers they need and some will be forced to move offshore—not because the labor is cheaper, not because the market is bigger, but because that is where the talent is.

Since the Sputnik crisis—the 50th anniversary of which was October 4th of this year—America has been the beneficiary of being able to attract the best minds in the world to come work in the United States. 9/11 slowed that flow dramatically. It also slowed the creation of jobs and wealth that foreign-born scientists and engineers spawned over the last 50 years.

The inability to obtain these visas is compounded by a simple fact. Fewer American kids are choosing engineering as a major. U.S. universities awarded 79,700 bachelors degrees in engineering in 2005, down 22 percent from a high of 97,100 in 1986, according to the Department of Education.¹ For graduate engineering degrees, Americans receive only half of all masters and one-third of all doctorates awarded.² The rest go to foreign nationals, and without visas waiting for them upon graduation, they have to leave the country.

Let’s look at the other data:

- The U.S. high-tech industry lost over a million net jobs between 2000 and 2004.³ But between 2004 and 2006 the industry added 250,000 net new jobs.⁴ This job growth would have been substantially higher if qualified individuals, American or foreign-born, were available.⁵

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force, businesses use H-1B visas to both avoid investing in their work force and drive down the real market price for labor.

The current system creates the looming threat of flooding the market with H-1B visas if Americans will not accept the wages businesses offer rather than what the market rate for their skills actually dictates. Then businesses force American IT employees to either accept lower wages or lose out to a foreign worker who will. Of course, such tactics are meant to be illegal, but as the Cohen & Grigsby video demonstrates, attorneys and businesses have traditionally found ways to be technically compliant while still using imported workers.

This entire scenario assumes the overseas H-1B visa holder actually has the skills sought by the employer. However, pervasive fraud seems to be a cornerstone of the H-1B visa process. In July 2002, (Immigration and Naturalization Service (INS) reported in 3,247 cases examined, investigators were unable to verify the authenticity of nearly 45% of the petitioner's claims of education and work experience.⁴ Additionally, the INS found 21% of the examined applicant pool to be outright fraudulent.⁵ Certainly, if we are going to displace qualified American workers they ought to at least have the cold comfort of knowing they were replaced with a qualified overseas applicant.

A dependence on temporary visas to fill critical skills positions highlights a structural problem and weakness in our labor force that must be addressed. Offering scholarships and loan forgiveness to students with specialized skills willing to work in government and military for a number of years, like the bill I introduced and passed in the Congress, is a step in the right direction.

At the minimum, we should demand employers mount a real effort to find and hire Americans, using H-1Bs as a last and reluctant resort. If that is done, there will be no need to increase the number of H-1B visas issued. Its time to send a message that the current "wink and nod" method of obtaining H-1B visas will no longer be tolerated. **BLB**

ENDNOTES: *Congressman Dana Rohrabacher*

* Mr. Rohrabacher represents California's 46th District in the United States Congress.

¹ Paul McNamara, *How to avoid hiring an American*, NETWORK WORLD, Jun. 25, 2007, <http://www.networkworld.com/columnists/2007/062507buzz.html>.

² *Id.*

³ *Id.*

⁴ See Report on Characteristics of Specialty Occupation Workers (H-1B): Fiscal 2001, Immigration and Naturalization Service (July 2002)

⁵ See William Yates, Acting Deputy Executive Association Commissioner of the INS, Statement before the House Judiciary Committee, Subcommittee on Immigration and Claims (May 5, 1999); *House Immigration Subcommittee Holds Hearing on H-1B Visa Fraud*, TECH LAW JOURNAL, May 6, 1999, available at <http://www.techlawjournal.com/employ/19990506.htm>.

- The official U.S. unemployment rate for all engineers in 2006 was 1.8 percent; for electrical engineers it was 1.9 percent.⁶
- The fourth most difficult job category for employers to fill is engineers, according to Manpower's Annual Talent Shortage Survey.⁷
- In 2006, the average high-tech wage was 86 percent higher than the rest of the private sector. In some states, including California, the differential was over 100 percent.⁸
- Since 1995, one of every four U.S. high-tech companies was established by at least one foreign-born co-founder.⁹

One argument against increasing the cap on H-1B visas is that tech companies hire foreign workers on the cheap and depress wages. But as the 86 percent wage differential attests, high tech pays people very well. Have some companies abused the system? Yes. These companies, many of them foreign-owned, do try to use the H-1B program to hire cheaper labor. Though these companies are the exception rather than the rule, they clearly have abused the system and should be punished. The tech industry fully supports enforcement provisions that go after abusers of the system.

The overwhelming majority of companies pay H-1B workers the prevailing wage. As one senior executive of a large high-tech company stated: "Do you think I could get away with paying below the prevailing wage? These guys are sharp. They know exactly what they're worth."¹⁰

Even the IEEE, an association of engineers that argues against allowing in more foreign nationals, may be seeing the light. A commentary on the IEEE Spectrum website, in response to the recent tech industry job growth, remarked: "It's high time for all the hand wringing to end and for those involved in preparing a new generation of engineers and scientists to fill the job openings that are being offered now by this welcome rejuvenation in the U.S. electronics industry."¹¹

Despite this brave new world of globalization, American tech companies remain just that: American. They do not relish the idea of moving operations out of the United States. They would much rather hire an American worker or bring a foreign-born worker here to become part of the culture of an American company, creating high paying jobs, wealth, and intellectual property in the United States instead of in a foreign country.

If our lawmakers are serious about keeping a vibrant tech industry on American shores, with everything that engenders, then Congress cannot let this legislative year pass without taking action on legal, high-skilled immigration. **BLB**

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¹ President George W. Bush, State of the Union Address, Jan. 23, 2007 (transcript available at <http://www.whitehouse.gov/news/releases/2007/01/20070123-2.html>)

² Raymond Colitt, *Brazil to Seek Lower U.S. Tariffs, Accord on Ethanol*, REUTERS, Feb 28, 2007, available at <http://www.reuters.com/article/latestCrisis/idUSN28262025>.

³ See Brent D. Yacobucci, Congressional Research Service (CSR), Code No. RS21930, *Ethanol Imports and the Caribbean Basin Initiative*, (Mar. 10, 2006), available at <http://www.ncseonline.org/NLE/CRS/abstract.cfm?NLEid=177>.

⁴ See Office of the United States Trade Representative, *Ethanol Provisions in the CAFTA-DR* (Policy Brief, Feb. 2005), available at <http://www.fas.usda.gov/itp/CAFTA/Ethanol.pdf>.

⁵ General Agreement on Tariffs and Trade 1994 art. III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round vol. 1, 33 I.L.M. 1154 (1994) [hereinafter GATT]

⁶ GATT, *supra* note 5, art. I.

⁷ GATT art. III. See also WT/DS 8, 10, 11/AB/R Japan—Taxes on Alcoholic Beverages (Japan—Alcoholic Beverages II⁷) adopted by the WTO Dispute Settlement Body on November 1, 1996, pg. 26.

⁸ GATT art XXIV.

⁹ GATT, *supra* note 5, art. XXIV.

¹⁰ Pascal Lamy, Director-General, Opening Remarks at the WTO Conference on Multilateralizing Regionalism, (Sept. 10, 2007), available at http://www.wto.org/english/news_e/sppl_e/sppl67_e.htm.

¹¹ Energy Tax Act of 1978, Pub. L. No. 95–618, 92 Stat. 3174 (codified as amended in scattered sections of 19, 23, 26, and 42 U.S.C.)

¹² *Id.*

¹³ The U.S. Government has, since 1978, continuously maintained federal ethanol tax incentives. Congress extended these tax incentives in the Crude Oil Windfall Profit Tax Act of 1980, the Omnibus Budget Reconciliation Act of 1990, the Transportation Efficiency Act of the 21st Century (1998), and most recently in the Energy Policy Act of 2005.

¹⁴ Agreement on Subsidies and Countervailing Measures art. 1.1(a)(1), (b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 14, 33 I.L.M. 1125 (1994) [hereinafter SCM Agreement] *reprinted* in World Trade Org., *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 2* (1999) [hereinafter Legal Texts] available at www.wto.org/English/docs_e/legal_e/24-scm.pdf.

¹⁵ GATT, *supra* note 5, art. XXIII(1)(b).

¹⁶ Climate change bills incorporating a cap-and-trade regime have been introduced in both the House and Senate during the 110th Congress. For a summary of the major bills, see Jonathan L. Ramseur & Brent D. Yacobucci, Congressional Research Service (CRS), Code No. RL34067, *Climate Change Legislation in the*

110th Congress, (Jul. 17, 2007), available at <http://www.ncseonline.org/NLE/CRSreports/07Jul/RL34067.pdf>.

¹⁷ See Bruce Stokes, *Trade Winds Hit Climate Bills*, NATIONAL JOURNAL (Jul. 7, 2007).

¹⁸ See Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007) available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.1766> [hereinafter LCEA].

¹⁹ *Id.* § 502(e)–(f).

²⁰ *Id.* § 102(a)(1).

²¹ *Id.* § 502(e)(2)(1)–(f)(1)(A).

²² *Id.* § 3(6)(a)(i), (22).

²³ *Id.* § 204(c)(1)(H).

²⁴ *Id.* § 206..

²⁵ *Id.* § 303(a).

²⁶ *Id.* § 302.

²⁷ *Id.* § 501(e).

²⁸ *Id.* § 502(f)(4)(C)(ii).

²⁹ *Id.* § 502(f)(4)(A)(iii)(I).

³⁰ GATT, *supra* note 5, art. XX.

³¹ *Id.* art. XX(g).

³² *Id.* art. XX..

³³ LCEA, *supra* note 18, § 502(f)(3)(A)(ii).

³⁴ GATT, *supra* note 5, art. XX.

³⁵ GATT, *supra* note 5, art. XX.

³⁶ LCEA, *supra* note 18, § 502.

³⁷ See *id.* §§ 102, 602.

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¹ U.S. DEPARTMENT OF EDUCATION, INSTITUTE OF EDUCATION SCIENCES, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS: 2006 (Jul. 2007).

² *Id.*

³ AMERICAN ELECTRONICS ASSOCIATION, CYBERSTATES 2007: A STATE-BY-STATE OVERVIEW OF THE HIGH-TECHNOLOGY INDUSTRY (Apr. 2007) [hereinafter AeA 2007 Overview] (based on data from the U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT AND WAGES, ANNUAL AVERAGES (2007)).

⁴ *Id.*

⁵ AMERICAN ELECTRONICS ASSOCIATION, WE ARE STILL LOSING THE COMPETITIVE ADVANTAGE: NOW IS THE TIME TO ACT (Mar. 2007).

⁶ U.S. BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY (2007).

⁷ MANPOWER, INC., ANNUAL TALENT SHORTAGE SURVEY (Mar. 2007).

⁸ AeA 2007 Overview, *supra* note 3.

⁹ See Wadhwa, Vivek et al., *America's New Immigrant Entrepreneurs*, Master of Engineering Management Program, Duke University and the School of Information at the University of California, Berkeley, Jan. 4, 2007.

¹⁰ Anonymous.

¹¹ *U.S. High-Tech Jobs Accelerating Again*, IEEE SPECTRUM ONLINE, Apr. 24, 2007.