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ABUSES IN THE L-VISA PROGRAM
Undermining the U.S. Labor Market

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Executive summary

In a globalized business environment, it should come as no surprise that corporations conducting business activities in multiple national jurisdictions may need to place their experienced, high-level managerial and executive personnel and workers with highly specialized talents, in offices located in countries other than the ones where they were originally employed. Congress created the L-1 visa program in 1970 in order to facilitate this exact type of international intra-company employee transfer—and since then, the program has been used by multi-national companies with offices in the United States to temporarily transfer foreign employees to work in their U.S offices, subsidiaries, and affiliates.

Under current law, before transferring an employee from abroad, multi-national companies are not required to prove or attest that there are no adequately qualified U.S. workers available to fill the positions that are eventually awarded to L-1 visa beneficiaries. Is this appropriate? Are L-1 employees coming to the United States to complement U.S. workers, or to replace and displace them? If so, do U.S. workers deserve some degree of protection? Some other visa categories require companies that petition for temporary work visas to attest that no U.S. worker will be displaced or have their wages or working conditions adversely affected by the new temporary worker. Should these or other additional safeguards be part of the L-visa program for the benefit of U.S. workers and the labor market?

These questions have not been adequately addressed in any forum. This paper explores some of the issues surrounding these questions, by surveying the publicly available data, news articles, laws and regulations, congressional testimony, governmental reports, and investigations regarding the L-visa program. The paper finds that there is a clear lack of data available to both the public and the United States government that could facilitate an assessment of the program's impact on the U.S. labor market. Also, various reports and congressional testimony

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have cited the program's susceptibility to abuse, often due to overly broad definitions of key statutory and regulatory terms. Finally, the lack of a labor market test, minimum wage requirements, or any numerical cap on L-1 and L-2 visas allows multi-national companies to circumvent the numerical restrictions and labor certification and attestation required by the H-1B class of temporary work visa, which in turn can lead to the displacement and replacement of workers already in the United States, while also placing downward pressure on wages for all workers. In conclusion, the paper assesses current legislative proposals for reforming the L-visa program and offers a series of policy recommendations for its improvement.

This briefing paper finds:

- The use of the L visa has increased dramatically since 1990. But it lacks any cap, numerical limitation, or significant educational requirements—while also being one of the least regulated visas categories. In 2008, nearly 84,000 L-1 visas were granted, along with over 71,000 L-2 visas (many of whom are also authorized to work in the U.S.).

- The L-1 visa can and has been used, legally, by employers to replace U.S. workers with lower paid temporary foreign workers, and to avoid basic requirements that are part of other work visa categories, such as paying the prevailing wage and requiring employers to attest that there are no U.S. workers available for the position.

- Neither the public nor the government know how many L-1 and L-2 visa beneficiaries are present in the United States or may have returned to their country of origin, nor does it possess or share data on how many of them are working, what occupations they hold, and what their wages are.

- The L-1 visa is being used by Indian offshoring companies to train their workers while they are in the United States, and those workers export that knowledge and training, along with the job itself, back to their home country where the work is performed at a lower cost to the company.

Introduction

In a globalized business environment, it should come as no surprise that corporations conducting business activities in multiple national jurisdictions may need to place their experienced, high-level managerial and executive personnel, and workers with highly specialized talents, in offices located in countries other than the ones where they were originally employed. Congress created the L-1 visa program in 1970 in order to facilitate this exact type of international intra-company employee transfer—and since then, the program has been used by multi-national companies with offices in the United States to temporarily transfer foreign employees to work in their U.S. offices, subsidiaries, and affiliates.

Global mobility for highly skilled corporate personnel is unquestionably a legitimate business need, and can benefit the U.S. economy by incorporating the best and brightest foreign workers and leaders into the labor market. These workers can provide skills, ideas, and innovation that may be lacking in America. But are the tens of thousands of L-1 visas granted every year being used for this purpose? Can this visa program be used in ways that are ultimately detrimental to the U.S. economy? Unfortunately, a lack of publicly available data about the L-1 visa program means that a clear understanding of this temporary work visa category has remained elusive. For example, what are the real effects, if any, of the L-1 visa program on the U.S. labor market, working conditions, and wages for all workers? No one knows for sure.

Under current law, before transferring an employee from abroad, multi-national companies are not required to prove or attest that there are no adequately qualified U.S. workers[1] available to fill the positions that are eventually awarded to L-1 visa beneficiaries. Is this appropriate? Are L-1 employees coming to the United States to complement U.S. workers, or to replace and displace them? If so, do U.S. workers deserve some degree of protection? Some other visa categories require companies that petition for temporary work visas to attest that no U.S. worker will be displaced or have their wages or working conditions adversely affected by the new temporary worker. Should these or other additional safeguards be part of the L-visa program for the benefit of U.S. workers and the labor market?

These questions have not been adequately addressed in any forum. This paper will explore some of the issues surrounding these questions, by surveying the publicly available data, news articles, laws and regulations, governmental reports, and investigations regarding the L-visa program. It will also assess current legislative proposals for reforming the program, and offer a series of policy recommendations for its improvement.

Background

Under United States immigration law, there are three categories of L visas: L-1A, L-1B, and L-2. Statutory authority for the L visa comes from the Immigration and Nationality Act (INA), section 101(a)(15)(L) and many of the implementing regulations can be found in two sections of the Code of Federal Regulations (CFR),[2] while additional interpretive guidance can be found in numerous INS and U.S. Citizenship and Immigration Services (USCIS) memoranda.[3]

The L-1 visa falls under the "nonimmigrant" class of work visas, which means they are temporary and do not confer any automatic rights for the holder to become a legal permanent resident (LPR) or naturalized citizen of the United States. It is also considered a "dual-intent" visa, meaning that applicants are not required to prove to immigration officials that they do not intend to remain in the United States after the expiration of the temporary visa in order to adjust to an "immigrant" status (i.e., the applicant is allowed to have both the intent to work in the United States temporarily, while simultaneously intending to become an immigrant or LPR).[4] Thus, an L-1 visa beneficiary may eventually become an LPR, but cannot apply for an adjustment of status on their own. Instead, the L-1 beneficiary's employer retains this right, and can exercise it at its own discretion by sponsoring an adjustment of status application for the employee, or else the employer can opt to allow the visa to expire, in which case the beneficiary must return to his or her home country—but recent reports provide evidence that employers are not applying for an adjustment of status for many of their temporary workers with L-1 visas (Hira 2010).

The L-1 visa's purpose is to facilitate the intra-company transfer of employees of multi-national corporations that are operating and employing workers in the United States and at least one other country. The granting of an L-1 visa authorizes foreign employees of such corporations who have been working for at least one continuous year during the three preceding years, and are acting in a "capacity that is managerial" or "executive" to be transferred from the company's foreign office to work temporarily for the same company in its U.S. office, branch, or subsidiary for up to seven years[5] (L-1A), and allows employees who possesses "specialized knowledge" of the company's product, service, or processes and procedures to do the same for up to five years[6] (L-1B). The essential terms are defined by the INA and the CFR,[7] but the Department of Homeland Security's (DHS) Office of Inspector General (OIG) has reported that the definitions are overly broad, and especially in the case of L-1B applications, adjudicators believe that the term "specialized knowledge" is defined so broadly that almost every petition could reasonably be approved (DHS OIG 2006, 1), and the USCIS Ombudsman Annual Report for 2010 recommended that the agency "establish clear adjudicatory L-1B guidelines," in part because it found that "there is confusion about what constitutes 'specialized knowledge'" (USCIS 2010, 48). The transferring employee does not have to be moving to the United States to work in the same exact capacity in which he or she was employed abroad, but the work itself must be done for the same employer (i.e., the petitioner-employer is prohibited from outsourcing the L-1 employee to an unaffiliated, non-petitioning employer).[8] Also, there are no requirements that the employee possess a university or professional degree of any type in order to be eligible, except in the case of L-1B "blanket" petitions (discussed below).

Dependents of the principal L-1 holder, which include the spouse and/or unmarried minor offspring, may be issued an L-2 visa. The L-2 allows the dependent to enter and reside in the United States subject to the same temporal limitations as the principal L-1 holder, and authorizes the dependent spouse to be lawfully employed in the United States,[9] if they comply with at least one of the two following procedures: they can either apply for and obtain an Employment Authorization Document (Yates 2002) through DHS, or present their I-94 form used to enter the country, along with evidence of their valid marriage[10] to the principal L-1 holder.[11] This allows the L-2 spouse to work for

any employer in any occupation. Under no circumstances are any other (i.e., non-spouse) L-2 dependents allowed to work (unless they switch to or acquire another class of visa that allows them to do so).

A prospective L-1 applicant-beneficiary normally cannot apply for the visa on his or her own accord. A sponsoring U.S. employer is required to file a petition with USCIS on behalf of the employee with the use of an I-129 form, and to pay a $320 (likely to be raised to $325)[12] base fee plus a $500 Fraud Prevention and Detection fee.[13] USCIS is legally required to accept or reject the petition within 30 days,[14] or the petitioning employer can pay an additional $1,000 for an expedited decision—which provides a money-back guarantee that USCIS will make a decision within 15 days[15] (reports suggest that USCIS often does not meet the non-expedited 30 day deadline (Kurzban 2008, 732), which means that potential beneficiaries may have to wait longer for a determination of their application).

Employers that use L visas on a regular basis are eligible to apply for L-1 "blanket" petitions[16] if they meet specific criteria.[17] This allows the employer's multiple potential L-1 beneficiaries to apply for L-1 visas on their own at their local consulates without needing to seek approval from USCIS via the I-129 petition. The blanket procedure moves the process along faster and means that individual petitions are reviewed by a consular officer, and thus receive less governmental scrutiny when being adjudicated (i.e., no USCIS review of individual petitions) in order to determine if the employee legitimately qualifies for an L-1 visa. There is, however, an educational requirement imposed by the blanket petition process that is not part of the regular application for an L-1B visa: if a company applies for a blanket L-1B, then the potential beneficiary is required to possess and show proof of a U.S. degree or its foreign equivalent.[18]

Only for-profit corporations that have "U.S. subsidiaries or affiliates with combined annual sales of at least $25 million, or have a United States work force of at least 1,000 employees"[19] are eligible to use the blanket procedure. Because of the applicable regulations, we know the general minimum size of the corporations that are using L-1 blanket petitions, but in their publicly available statistics, neither DHS nor USCIS lists the names of the specific corporations that benefit from it, nor the numbers of L-1 blanket visas granted each year (or of the L-2 dependents who accompany them).

Next, a potential U.S. employer may apply for an L-1 visa if the intended beneficiary is coming to the United States for the purpose of opening a new office in the country or if a U.S. branch of the company has recently been opened and has existed for less than one year. Federal regulations list the requirements for securing this type of L-1, including evidence that the physical premises for the office has been acquired, and of the foreign parent company's financial ability to commence doing business in the U.S. and to pay the L-1 employee's salary.[20] An L-1 visa under this provision is valid for one year, but can be extended later by submitting additional evidence demonstrating that the business is now open and operating.[21]

For all L-1 applications, the petitioning employer must attest that the prospective employee's length of time employed by the company, position within the company and/or specialized knowledge satisfy the requirements for an L-1 visa—but it is perhaps more important to note what the employer is not required to do. The petitioning employer is not required to attest that it will pay the L-1 worker the prevailing wage for the position, nor is it required to file a Labor Condition Application (LCA), which requires the employer to state under penalty of perjury that it will pay the prevailing wage, and that the working conditions of other U.S. workers similarly situated will not be harmed.[22] Both of these requirements in the LCA are components of the often discussed and debated H-1B visa.[23] They are two of the main U.S. worker and labor market protection provisions inherent in the H-1B, though as some authors have argued, their utility in practice is questionable at best, and non-existent at worst (Hira 2010). Nevertheless, they at least affirm the goal of protecting U.S. workers and wages. The L-visa process, on the other hand, does not offer any substantive or symbolic mechanism to protect U.S. workers through any safeguards resembling a labor market test, labor certification process or wage requirements.

L visa admissions: Numbers, origins, and occupations

How many L visa beneficiaries are out there?

The L visa has no numerical cap or limit under U.S. law or regulation.[24] Astoundingly, the Department of Homeland Security (DHS) does not have data on how many L-1 and H-1B holders are currently in the United States (Hira 2010, 5). DHS does have figures on the total yearly number of L visa admissions, but this number is misleading and unreliable (333,386 L-1 and 160,606 L-2 admissions for FY2009) (DHS 2010) because it is much higher than the number of new L visas granted for the same year. This is because many visa holders could cross the border multiple times throughout the year, while some may never cross at all. Thus, this number may be lower or higher than the total number of L visa beneficiaries currently residing in the United States—but no one can know for sure. However the U.S. Department of State (DOS) does publish statistics on the total number of L visas issued annually worldwide (DOS 2010); and for this set of data, the analysis is clear: the granting of L visas has skyrocketed since 1990.[25]

In 1990, there were 14,342 L-1 visas issued worldwide. By 2008, the number had jumped to 84,078, an increase of 486%. The number of L-1 visas increased steadily every year except for a slight dip in the years of 2002 and 2003, (which could likely have been a result of the economic recession that began in 2001),[26] but by 2004, the L-1 visa totals had already rebounded to surpass the 2001 level. L-1 visa totals in 2009 decreased for only the third time in 19 years, again likely a result of the current global recession.[27] If 2009 data are included in the

TABLE 1

L-1 and L-2 visas issued worldwide, 1990-2009

YEAR	L-1	L-2
1990	14,342	19,544
1991	16,109	21,139
1992	17,345	21,358
1993	20,369	23,832
1994	22,666	26,450
1995	29,088	33,508
1996	32,098	37,617
1997	36,589	43,476
1998	38,307	44,176
1999	41,739	46,289
2000	54,963	57,069
2001	59,384	61,154
2002	57,721	54,903
2003	57,245	53,571
2004	62,700	59,164
2005	65,458	57,523
2006	72,613	61,984
2007	84,532	70,340
2008	84,078	71,683
2009	64,696	59,579
TOTAL	**932,042**	**924,359**

SOURCE: U.S. Department of State.

calculation, the percent increase in L-1s since 1990 is still a whopping 351%.

The exact number of L-2 visas that are currently valid, and L-2 beneficiaries currently residing in the United States is difficult, if not impossible to calculate because data that distinguish how many L-2 visa holders are spouses or other L-2 dependants are not readily available, nor do the DHS or State Department statistics differentiate between L-2 beneficiaries who are tied to L-1A or L-1B visas. The latter distinction is key because it would allow us to distinguish the maximum number of L-2 visas that are now valid for either a five- or seven-year period. The lack of these data also makes it impossible to know how many L-2 visa holders are eligible to work and are currently employed. Based on the available data for 2003-09, as of the end of fiscal year 2009 there were as many as 321,109 to 433,844 valid L-2 visas.

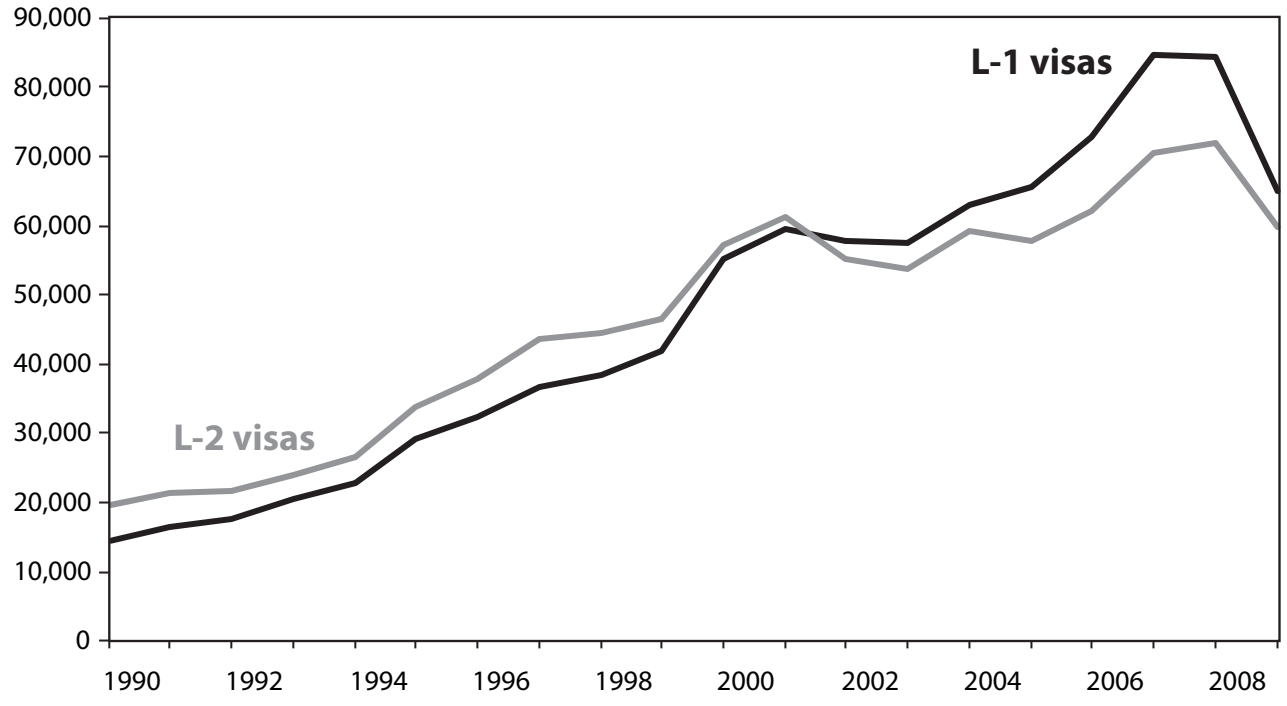
In terms of total L visas issued (L-1 and L-2), from 1990 to 2008 they increased by 359%, and if 2009 is included the total drops to 267% (DOS 2010). From 1990 to 2009, a total of 1,856,401 L visas have been issued (see **Table 1** and **Figure A**).

Whose nationals are receiving all of these thousands and thousands of L-1 visas?

One country has gradually come to dominate the list: India. This was not always the case, but companies operating in India have increased their L-1 visa usage correspondingly with their rapid growth as global players in the information technology (IT) services and support market. The statistics here are also dramatic: in 1997, India accounted for 4% of all L visas issued; by 2005, that number had jumped to 32.4%, and four years later, the most recent data available show that in 2009, 40.3% of all L visas went to employee-beneficiaries and their families being transferred from India to the United States. Other countries granted notable numbers of L visas include Japan, the United Kingdom, China, France, Germany, Mexico, Brazil and South Korea—but their totals still pale in comparison to India's. To illustrate, the next two

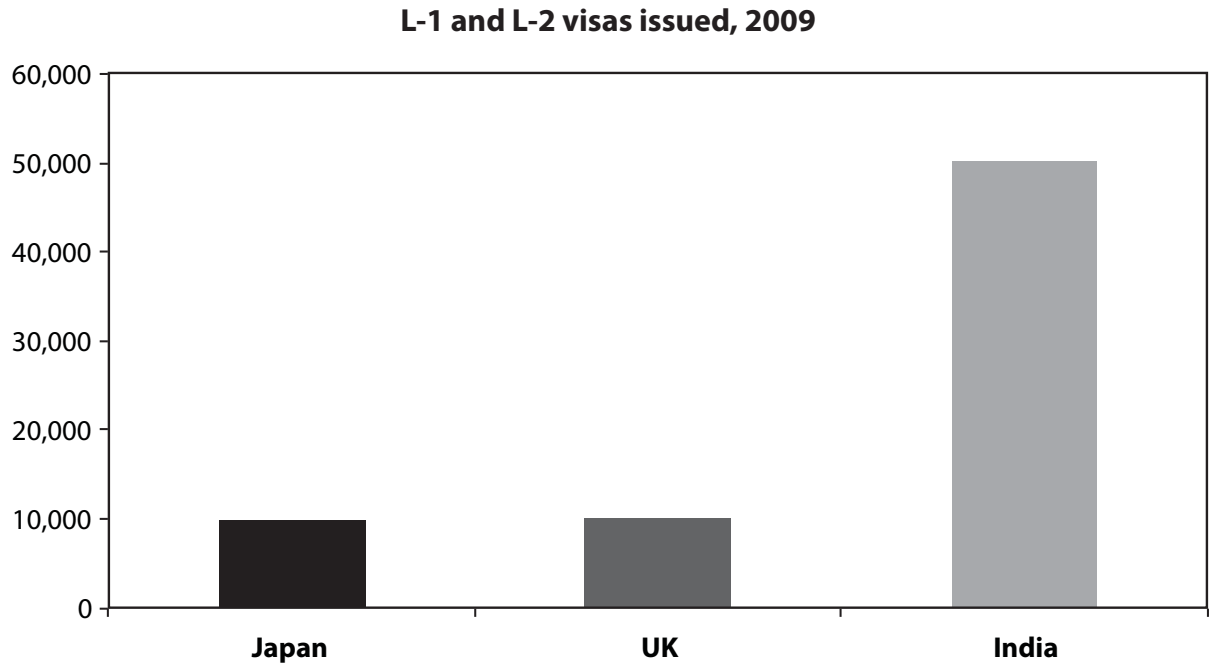
FIGURE A

L-1 and L-2 visas issued worldwide, 1990-2009



SOURCE: U.S. Department of State.

FIGURE B



SOURCE: U.S. Department of State.

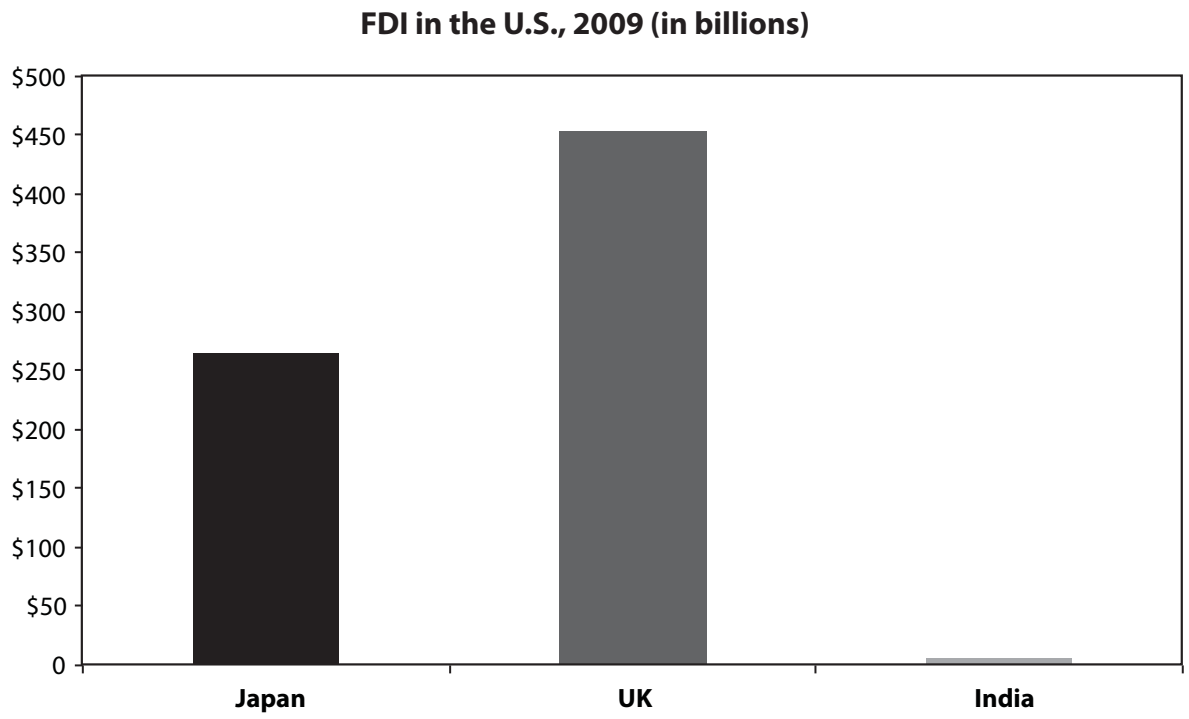
largest national users of L visas in 2009 were Japan and the U.K.: each was granted approximately 10,000 L visas in 2009, while over 50,000 were granted at Indian consulates (DOS 2010).

Although there were approximately 30,000 more L visas granted to Indians in 2009 than to Japanese and British applicants combined, making up over 40% of total L visas issued,[28] this does not mean that Indian firms are generating substantial job creation in the United States as a result of their extraordinary use of the L visa. In fact, investment in the U.S. by India is a tiny fraction of investment from Japan and the U.K. Although the American Council on International Personnel claims that the L-1 visa encourages trade and foreign direct investment (FDI) in the United States (ACIP 2010), and the U.S. Chamber of Commerce has argued that modifying the L-1 program would "hurt the United States' ability to attract foreign direct investment" (Chamber of Commerce 2003), in 2009, the United States received $453.9 billion in FDI from the U.K., $264.2 billion from Japan, and only $4.4 billion in FDI from India, the L-1's biggest user—comprising just 0.19% of the total FDI dollars in the United States (Ibarra-Caton 2010; BEA 2010). **Figures B** and **C** compare 2009 data for L visas and FDI.

Which occupations are eligible for the L-1 visa?

Unlike the H-1B, at present there are no restrictions on the types of businesses that can sponsor an L-1 visa, nor any specifications concerning the types of occupations that are eligible. When the L visa was established in 1970, Congress originally intended that it be used to transfer "top-level personnel" from multi-national corporations to the United States (Wasem 2006, 1), without regard for the exact type of occupation. Today, reports from DHS show that the L-1 visa is used mostly by high tech, computer, and IT services-related firms, and many of the top L-1 users specialize in the offshore outsourcing of IT jobs to India (DHS OIG 2006, 4; Hira 2010, 15). Furthermore, available data show that most of these jobs are no longer going to "top-level personnel," because after 2004, the number of L-1B visas granted surpassed the number of L-1As (DHS OIG 2006, 7). This suggests that fewer and fewer high-level executives and managers are being

FIGURE C



SOURCE: U.S. Bureau of Economic Analysis.

transferred to the United States, while an increasing proportion of "rank and file" (DHS OIG 2006, 7) employees of these corporations are being brought to the United States to occupy lower level positions (which might require a high degree of some particular skill, but are not in fact managerial or executive level positions).

How are U.S. workers and wages affected by the L visa?

The L-1 visa program offers no protection whatsoever for U.S. workers and the U.S. labor market. Multi-national corporations with offices, subsidiaries, affiliates, and operations in the United States are not required to prove that there are no available U.S. workers who can be hired for an open position, and they do not have to recruit or advertise any position to U.S. workers that may eventually go to an L-1 beneficiary, nor do they have to prove that transferring an L-1 employee to the United States would not adversely affect the working conditions of U.S. workers similarly situated. Thus, even if there are able and available U.S. workers who could fill positions staffed by L-1 beneficiaries, members of the U.S. workforce will never receive notice that these positions exist and subsequently can never apply for them. Nevertheless, it must be said that even the recruitment restrictions and requirements that are in place for other visa classes (e.g., with the H-1B visa), are little more than a bureaucratic box to check, and are insufficient to establish the existence of a labor shortage or to protect U.S. workers (Papademetriou 2009a, 12; Papademetriou and Yale-Loehr 1996; Papademetriou 2009b, 8).

The lack of wage restrictions or requirements associated with the L-1 visa is also problematic. Employers are not required to pay L-1 beneficiaries the prevailing wage or the market wage for their particular occupation. L-1 employees are in an unequal power relationship with their employers because L-1 beneficiaries are tied to their particular visa, and only the employer has the right to apply for permanent residence on their behalf. If the employee does not agree with the salary or working conditions being offered, or feels that he or she has been discriminated against, the employee can legally be fired, which automatically terminates the

employee's L-1 visa and requires that they immediately return to their home country, unless the fired employee can acquire another visa that allows him or her to remain in the United States while searching for another employer (e.g., a tourist visa). The L-1 beneficiary cannot quit and go in search of a better job with an L-1 visa, unless there is already another employer willing to sponsor a new application for a different category of work visa. Applying for another L-1 visa with a different employer is not an option because of the requirement that the employee be working abroad for a specific employer for one year during the last three years. This insulates the employer from wage competition and the normal supply and demand for workers. Thus, employers have nearly complete control over these temporary workers, and can offer lower salaries and benefits than they would to workers who are U.S. citizens or permanent residents.

Together, these factors cause harm to U.S. workers, wages, and the U.S. labor market in a number of ways. First, workers from abroad are transferred to U.S. offices, which displaces U.S. workers who may be qualified to fill those positions. They can even be brought in to replace U.S. workers currently employed with the petitioning company. An egregious example of the latter situation was widely reported in the news media in 2003, when several companies were using L-1 visas to transfer temporary workers to U.S. offices in order to replace their U.S. workers at one-sixth of their salary, but not before requiring the U.S. workers to train their foreign replacements on how to do their job (Cosgrove-Mather 2003; Grow 2003). Another news report described how Indian workers were being paid half the prevailing wage of U.S. workers in similar jobs (Gross 2004). This has the effect of lowering the average salary for workers in the particular occupation in question, forcing U.S. workers to accept lower and lower salaries in order to compete with L-1 visa beneficiaries for the same jobs. As a result, over the long term employers will have less of an incentive to increase wages or improve working conditions and benefits.

Cutting costs, whether by lowering wages for U.S. workers or by sending the jobs to cheaper workers overseas, is extremely important to the largest users of the L-1 visa: IT companies. *Computerworld Magazine* conducted a survey of 252 senior and corporate IT managers, reporting that "44% ranked reducing and controlling costs as their No. 1 reason for outsourcing to non-U.S. locations" (King 2003). And in fact, this is exactly what IT companies have been using the L-1 visa for, to cut costs by outsourcing. L-1 beneficiaries are transferred to the United States in order to refine their occupational skills in the American context or to learn the business processes of a U.S. corporation, and when they return to their home country, they not only transfer their newfound knowledge, but they effectively take the U.S. job with them as well, because now they have learned how to replicate the U.S. job on their home soil at a lower cost to the company.

There are reports that the IT companies' hunger for lower costs may have even led them into illegal activity. The *Wall Street Journal* reports that the Justice Department "is stepping up its investigation of the hiring practices of some of America's biggest companies," including Google, Intel, IBM and Apple. The investigation centers on allegations of antitrust violations involving mutual agreements not to recruit each others' employees, "costing skilled computer engineers and other workers opportunities to change jobs for higher pay or better benefits" (Catan 2010).

Fraud in the L-1 program has become a concern and could be having negative impacts on the U.S. labor market. One former U.S. Congressman stated that the American consulate in China had found a 90% fraud rate on L-visa applications (Hyde 2004, 2). Senator Christopher Dodd noted that "there has been very little government oversight or enforcement of…the L-1 program" (Dodd 2003). DHS reported that its L-visa adjudicators did not have enough information about foreign workers to verify their seniority levels or about foreign companies to verify their existence properly (DHS OIG 2006, 6 and 13). On May 27, 2010, Senator Chuck Grassley sent a public letter to DHS Secretary Janet Napolitano, inquiring about fraud in the L-visa program (Grassley 2010). Grassley sent the letter as a follow-up to questions he asked the Secretary during a Senate Judiciary Committee hearing a month earlier. During the hearing, Secretary Napolitano assured the Senator that she would quickly provide a written response—but as of yet the Secretary has not responded publicly. These statements and inquiries, combined with numerous other examples of governmental reports, cables,

and memoranda, verify that the relevant agencies and branches of the U.S. government have long known about problems and challenges associated with the L visa—but have failed to take substantial steps to remedy them or to create an effective system of oversight.

Other abuses of the L-1 visa can also adversely affect U.S. workers. First, there is evidence that software companies are using the L visa to circumvent H-1B visa quotas (DOS 2004) and restrictions, and to avoid the required LCA process (U.S. immigration attorneys go so far as to advertise this possibility, often listing on their Web sites the benefits of using an L-1 visa over an H-1B visa because of the lack of labor restrictions, numerical limits, and regulatory oversight).[29] Several family members can be "parked" in the United States—this occurs when L-1 beneficiaries bring their dependents to the United States on an L-2 visa, but the primary L-1 holder has no intention of remaining in the United States continuously for the entire duration of the L-1's validity, or only for brief intermittent periods (Aytes 2006, 3 and 10). This affects the labor market because (as noted above) L-2 spouses may work in the United States without being subject to any labor market restrictions, other than the requirement to obtain their Employment Authorization Document (EAD) or present an I-94 form with a marriage document—thus, they are authorized to compete for the same jobs as other U.S. workers, creating a more crowded job market, which benefits employers looking to pay lower salaries.

The U.S. government should take action to address the problems arising from a largely unregulated L-visa program, including offshore outsourcing, job losses, and wage reductions in affected industries. The most recent legislative attempt to do this was S. 887, "The H-1B and L-1 Visa Reform Act of 2009," introduced in the Senate on April 23, 2009 by Senator Dick Durbin and co-sponsored by Senator Chuck Grassley. The bill was referred to the Committee on the Judiciary, but no action has been taken on it. Its provisions have also been included in the "Comprehensive Immigration Reform ASAP Act of 2009" (H.R.4321), introduced in the House of Representatives by Representative Solomon Ortiz on December 15, 2009. Either the stand-alone Senate bill or the comprehensive version of immigration reform proposed by Representative Ortiz would contribute to repairing the broken L-visa system. Nevertheless, there is more that can be done. The following sections will explore this in some detail.

DHS policy recommendations for reforming the L visa

The DHS Office of the Inspector General report from 2006 proposed three major recommendations to USCIS:

1. Establish a procedure to obtain overseas verification of pending H and L petitions by Department of State officers in the related countries.

2. Explore with ICE whether ICE Visa Security Officers, experienced criminal investigators assigned abroad in compliance with Section 428(e) of the Homeland Security Act, could assist in checking the bona fides of L petitions submitted by petitioners in the countries in which the officers are assigned.

3. In cooperation with "L Visa Interagency Task Force," which consists of representatives from the Departments of Homeland Security, Justice, and State, seek legislative clarification relative to:

    a. applying the concepts of manager and executive to L-1A visas and verifying that the beneficiary will be so used;

    b. the term "specialized knowledge," as altered in the Immigration Act of 1990, and according to USCIS guidance issued in March 1994; and

    c. the criteria and proof required when a foreign company seeks to use an L petition to open a new office in the United States. That almost any foreign business proprietor can effectively petition himself and his family into the United States may not be in accord with congressional intent.

Based on the findings in the report, these recommendations seem to offer some common sense advice, and provide a viable first step absent substantial reform. Nevertheless, it is unclear to what extent USCIS has addressed the first recommendation, although they supported it as long as it was based on the current structure in

place. The second was supported by USCIS officials but rejected by its managers, as well as the State Department. USCIS responded to the third and final recommendation by stating, "that it will carefully review the matters raised by the Inspector General, but does not agree that any legislative recommendations regarding the L-1 visa program are necessary or appropriate." USCIS instead deferred the responsibility of offering any legislative recommendations to the L Visa Interagency Task Force (comprised of representatives from the Department of State, Department of Justice, and Department of Homeland Security), whose responsibility it was to report to the House and Senate Judiciary Committees on efforts to implement the recommendations from the OIG report, and to provide recommendations and suggestions on legislation to Congress (DHS OIG, 16-19). Section 416 of the L-1 Visa Reform Act of 2004 established this Task Force,[30] but under the law it had no real authority to mandate or implement any reforms, or to follow up on, or oversee how or whether the recommendations would be implemented in the future. Once the Task Force reports to Congress, its job is complete and the Task Force is dissolved. Nevertheless, the final report offers some value because it delineates the specific offices within the three agencies that play a role in monitoring the L-visa program, and specifically outlines their responsibilities (Task Force 2006)—but it does little to address the OIG's recommendations and does not propose any new legislation.

Current legislative proposals for reforming the L-visa program

Schumer-Reid-Menendez Conceptual Proposal for Immigration Reform

In April 2010, U.S. Senators Charles Schumer, Harry Reid and Robert Menendez released a 26-page "Conceptual Proposal for Immigration Reform" (Schumer 2010). The Proposal is not a specific piece of legislation; it is an essay about what comprehensive immigration reform would look like in future legislation, setting out a broad and basic framework. The proposal contains two paragraphs that specifically mention potential L-1 visa reforms. The listed reforms generally summarize some of those offered by the Durbin-Grassley H-1B and L-1 Visa Reform Act of 2009. Therefore, the next section of this paper will be devoted to analyzing a few of the relevant sections in the Durbin-Grassley bill, in order to highlight some of the positive reforms they could lead to, as well as offering some suggestions on how they could be improved.

How would the Durbin-Grassley H-1B and L-1 Visa Reform Act of 2009 change the L visa program?

Most of Section 102 applies to H-1B visas, but it does include one provision related to both H-1B and L nonimmigrants: the so-called "50-50" provision, which provides that any company with more than 50 employees in the United States cannot have more than 50% of its workforce made up of employees working on H-1B and/or L visas. This is an attempt to keep companies from having a workforce made up almost entirely of temporary, foreign workers. In June 2009, Bloomberg Businessweek reported that this provision "could threaten the business model" for the major IT outsourcing firms "such as Wipro Technologies, Infosys Technologies, and Tata Consultancy Services" (Herbst 2009). The same report also noted that top executives from these firms believed this could lead to a "trade dispute between India and the U.S."

The article also reported Azim Premji, the executive chairman of Wipro, warning that "the Indian government is likely to take action if the legislation passes in its current form" (Herbst 2009). The most drastic governmental "action" Mr. Premji is hinting at could conceivably come in the form of a formal complaint by the Indian government to the WTO for the United States' failure to carry out its obligations under 'Mode 4' of the General Agreement on Trade in Services (GATS), which regulates services provided by "one Member, through the presence of natural persons of a Member in the territory of any other Member."[32] Such a complaint could trigger the process laid out in the WTO's Dispute Settlement Understanding (DSU).[33] A recent report by the National Foundation for American Policy examines this possibility and concludes that there exists a significant likelihood that the United States would be found to be acting inconsistently with its international trade commitments based on changes to the H-1B and L-1 visa laws, including specifically the Durbin-Grassley 50-50 rule (Jochum 2010, 9),[34] thus putting the country at risk of retaliatory measures from other nations.

Without evaluating the merits of such claims, a brief comparative analysis of U.S. and Indian immigration policies toward foreign temporary workers would suggest that such an outcome is unlikely.

India's Mode 4 Schedule of Commitments under the GATS lists the category of "Intra-corporate transferees," essentially India's version of the L-1 visa, which applies to managers, executives, and specialists, granting such transferees the permission to remain in the country for five years.[35] The schedule of commitments does not contain any language that requires a labor market test, nor a preference for hiring available qualified Indian nationals with similar skills.

In 2009, due to an influx of Chinese workers that the Indian government believed were working and residing in India with the authorization of an inappropriate class of work visa, the Indian government required thousands of temporary foreign workers to leave the country and re-apply for their visas (*The Economic Times* 2010). In response to these Chinese workers, the Indian Ministry of Labour enacted new immigration policy guidelines in September and December of 2009.[36] This impacted approximately 70,000 temporary workers in India (Surabhi 2009). The Indian government's Press Information Bureau reported that "Employment" visas (E-visa) would now be granted only for a:

> …skilled and qualified professional appointed at senior level, skilled position such as technical expert, senior executive or in a managerial position etc. and will not be granted for jobs for which a large number of qualified Indians are available. (PIB 2009)

And in terms of the percentage of the total workforce that foreign workers can comprise in a particular company, the "[m]aximum ceiling of issuance of E-Visas to foreign nationals may be limited to 1% of total number of workers on the project with a minimum of 5 and maximum of 20."[37] The guidelines also establish that India is a "labour surplus country," and therefore when it comes to workers that are "unskilled and semi-skilled… no employment visa should be granted to this category of persons at any cost."[38]

In an interview, the Indian Minster of Labour indicated his strong intention to fully comply with and enforce the new guidelines when he stated that they "should be strictly implemented," and noted that employment visas "can only be given to highly skilled people working in supervisory or managerial capacities," and "no employment visa should be given to imported unskilled/semi-skilled workers. And also no employment visa should be given to any worker in a category for which expertise is available in our country" (Outlook India 2010).

These guidelines represent a shift by India in terms of its immigration policy toward an increased promotion and preference of Indian nationals for both low- and high-skilled occupations. As noted above, Indian offshoring companies are not using the L-1 visa exclusively to bring "highly skilled people working in supervisory or managerial capacities," and they wish to retain their existing right to have 50-100% of their U.S. workforce made up of temporary workers on H-1B and L-1 visas—yet the Indian government will not admit low- or semi-skilled temporary foreign workers; will only allow a company operating in India to petition for the most highly qualified foreign candidates; requires the hiring company to give preference to Indian nationals for the position; and restricts skilled foreign workers to no more than 1% of the total workforce in a company[39] or on a particular project. On the other hand, the United States allows some low- and semi-skilled workers to work in the United States on L-1B visas for five years and allows managers and executives on L-1A visas to stay for seven years; has no prohibition on granting an L-1 visa when there is a U.S. worker available "in a category for which expertise is available" in the United States; and has no rules on the maximum percentage of H-1B and L visa beneficiaries that a particular company may have as a total share of its workforce (i.e., a company may have 100% of its workers on H-1B or L visas, or any combination of the two).[40]

The *Financial Express* (an Indian newspaper) reported that "[a]nalysts expect multinationals with Indian subsidiaries to restructure their operations" as a result of these regulatory changes by the Indian Minstry of Labour. The same article speculated that India's new policies "did not violate WTO norms," but cited the concerns of Biswajit

Dhar, the Director General of the Research and Information System on Developing Countries—who warned that "India needs to tread carefully on such issues given that Mode 4 trade liberalization is high on India's agenda" (Surabhi 2009). Because the Indian government lacks reciprocity in its policies toward foreign temporary workers, Indian claims of anti-competitiveness or U.S. violations of WTO rules under GATS appear hypocritical and unreasonable. If India were to consider filing a complaint with the WTO on these grounds, it would have to take into consideration its own vulnerability to an almost identical complaint being filed by the United States.

Despite these unfounded fears of a trade war, and even claims of U.S. anti-capitalism from the CEO of Tata, the CEO of Infosys admitted that the Durbin-Grassley bill would force his company to increase worker recruitment in the United States, and that although "the business model would change…the bill wouldn't affect the company's financials in the long term." Wipro's CEO stated that "in anticipation of the visa law changes, Wipro has already started hiring more Americans at its centers in Atlanta and Troy, Michigan" (Herbst 2009). In addition, a report by UBS estimated that Cognizant Technology Solutions, another major outsourcing firm, "would need to hire 4,300 to 6,500 additional American employees" to comply with the law (Herbst 2009). And finally, *CIO* magazine recently reported that the India-based outsourcing firm Patni Computer Systems is paying close attention to legislative proposals such as the 50-50 rule, and preparing to hire more U.S. workers to reduce the ratio of foreign employees. The magazine also noted that the founder and CEO of outsourcing firm Horses for Sources concedes that there are now more available U.S. IT workers willing to accept lower salaries—along with his conclusion that "[w]hile several offshore providers would take a short-term hit…many would quickly staff up with U.S. talent" as a result of the 50-50 rule (Overby 2010). This is surely the strongest argument possible for the 50-50 provision in the Durbin-Grassley legislation: the IT outsourcers will be required to hire more U.S. workers, but ultimately it won't affect their profits—and they've already started hiring U.S. workers in the thousands, proving that there are able, willing and available domestic workers who can fill those IT jobs.

Upon the granting of an L-1 visa to a particular beneficiary, *Section 123* requires the issuing office (i.e., the State Department consulate if issued abroad) or DHS officer (if issued within the United States) to provide new L-1 employees with an informational brochure about their labor rights and wage protections, and the employer's obligations under federal law; the contact information for agencies that can assist in explaining them; and a copy of the application or petition submitted on their behalf. This is a useful provision that will at least provide some basic transparency to the worker about how to navigate and make use of any available legal or regulatory mechanisms that may be in place for their protection.

Section 124 grants the Department of Labor the authority and funding to hire 200 new employees to "administer, oversee, investigate, and enforce" the H-1B visa program. Unfortunately this additional staffing and funding for the DOL does not apply to L visas. This makes sense on one level, given that the bill gives DHS responsibility for overseeing, investigating, and enforcing employer compliance with the L visa—just as DOL will for the H-1B. But it would be far better to transfer responsibility for L-visa enforcement to DOL and provide adequate staffing for both visa programs. The kinds of investigations, and the kinds of labor protections at stake, should be almost identical, and it is DOL that has the enforcement history and expertise.

Section 201 replaces the previous section of the INA that does not allow L-1B workers to be leased or subcontracted to another employer that is not the original petitioner-employer. The new section would not allow an L-1B to be subcontracted for more than one year unless a waiver, newly created under this section, is granted by the DHS Secretary. A waiver would require that the employer not displace or intend to displace a U.S. worker with the use of the subcontracted L-1B in the 180 days prior to his or her start date; that the L-1B not be "controlled and supervised principally" by the new subcontractor-employer; and that the arrangement not be "labor for hire" that is unconnected to the specialized knowledge that was required by the original petitioner-employer. After a waiver is requested, DHS would have seven days to decide whether to grant or deny.

This section contains some inherent flaws. Under this section an L-1B worker can be subcontracted to any employer for any reason, so long as it is for less than one year (cumulatively). Section 201 would replace provisions inserted by the 2004 L-1 Visa Reform Act[41] that attempted to curb the practice of subcontracting L-1B employees, after reports surfaced that subcontracting and offshoring companies had begun using L-1 visas to displace IT workers in the United States (Verman 2003; Grow 2010). The L visa was created and designed to facilitate the transfer of workers within the *same* company—under INA 101(a)(15)(L), by definition the L visa allows the beneficiary to "render his services to the same employer or a subsidiary or affiliate." Without credible evidence of a genuine need for businesses to subcontract employees they have brought to the United States for the stated purpose of moving them to an American office within the same company—the subcontracting of L-1B employees should be banned entirely. Even if these provisions were to become enacted, it remains unclear whether and how they would be enforced. From the text it appears that responsibility for verifying employer compliance with the terms of the waiver falls to DHS, but this begs the question: shouldn't the Department of Labor be involved because employer violations, wage depression, and the possible displacement of U.S. workers are at issue? For instance, in Section 113, it is the DOL that is tasked with granting or denying waivers to employers that wish to subcontract their H-1B workers. Why split the work between agencies for such a similar visa category? This is an activity akin to labor certification, traditionally performed by the DOL—thus it seems that DOL should house the appropriate staff to conduct this type of work.

Section 202 codifies the rules and procedures for L-1 petitioners coming to the United States to open or be employed in a new office, and that wish to extend their stay beyond one year (the length of time for which such L-1 visa beneficiaries are authorized to remain in the United States). These rules and procedures already exist, in largely the same format, in the Code of Federal Regulations.[42] The only notable substantive change to the rules that would result is a restriction forbidding potential beneficiaries from applying if they have received 2 or more L-1 visas for the same purpose of opening or being employed in a new office during the previous two years.

Section 203 requires that the DHS "work cooperatively" with the DOS in verifying that companies or offices exist, or continue to exist, either abroad or in the United States. This cooperation could be quite useful in terms of reviewing applications in order to detect fraud in initial applications for L-1 visas. Unfortunately this provision is not specific enough in describing what working "cooperatively" means between two of the United States' largest governmental agencies. This concept would have to be developed further in order to determine what each agency's rights and responsibilities would consist of, and under what circumstances. Otherwise, cooperation could consist of almost anything (i.e., a phone call or an email from one official to another). A more institutionalized systematic process for cooperation should be mandated in the legislation.

The most important sections in the bill that strive to protect the wages and working conditions of U.S. and temporary foreign workers are sections 204 to 207. *Section 204* grants the DHS the authority to investigate the compliance of any employer of workers with L visas; to act on credible information about employer violations and withhold the source of information; and establishes a procedure to provide DHS with information about employer violations. *Section 207* prohibits retaliation against an employee for providing DHS with such information. *Section 204* further requires that the DHS conduct compliance audits of at least 1% of all employers, and audits of every employer using more than 100 L visas or with more than 15% of its workforce authorized with L visas. The findings of the audits must then be made public.

Section 205 sets wage rates and working conditions for L visa beneficiaries. Any L visa beneficiary working longer than one year must be paid no less than the highest of the prevailing wage or the median wage for the occupational classification in the area of employment or the median wage for skill level two in their occupational classification. An employer must also not create conditions for the worker that will adversely affect the conditions of other workers similarly employed. Section 205 requires employers to submit the W-2 wage and tax forms of their L category nonimmigrant workers to DHS; prohibits them

from charging an employee any fine for quitting their job before a mutually agreed upon end date; and requires the employer to offer the employee the same job benefits that are afforded to U.S. workers. *Section 206* sets two levels of fines and penalties for an employer's "failure" or "willful failure" to meet all of these requirements, and makes the employer liable for lost wages and benefits that the worker has accrued.

No provisions or mechanisms for protecting L visa beneficiary workers existed previously, so these parts of the Durbin-Grassley bill constitute a step in the right direction toward regulating and overseeing workers with L visas. However, the bill is lacking in a few key areas. First, there are no protections of any kind for foreign workers with L visas who work for less than one year. Neither the prevailing wage, median wage, nor classification rules will apply within this first year. Hypothetically, an employer could apply for an L-1 worker, bring the worker into the country, and pay him or her any salary and offer no employment benefits for an entire year. The worker could then be sent home after one year while the employer could apply for a new worker and repeat the process.

Next, it is unclear why DHS—that is, presumably either USCIS or Immigration and Customs Enforcement (ICE)—would be responsible for investigating and auditing employers using L visas, while the DOL, under this proposed law and some current law, is responsible for conducting investigations related to H-1B employers (whenever the Secretary of Labor has "reasonable cause" to believe an employer is failing to comply with existing rules),[43] while also acting as the appropriate agency to receive and investigate complaints regarding employer compliance.[44] Reports have shown evidence that the two visas are similar, and employers are using the L-1 visa to circumvent the caps and restrictions involved in the H-1B applicant process.[45] As a result, one agency should be in charge of monitoring employers' use of both the H-1B and entire L category of visas. DOL already has experience in conducting H-1B investigations, and would be granted extra funding and staff to continue doing so under this law, which makes them the logical agency to bear this responsibility. It is possible that DHS would have to increase staff or train current staff to become competent with an entirely new set of skills in order to conduct these investigations. This would make efforts between the two agencies redundant and lead to unnecessary waste of public resources.

The legislation also fails to prohibit employers from replacing a U.S. employee with an L-1 employee. In order for such a provision to achieve its intended result, whenever this occurs, a U.S. worker should have access to an administrative remedy, or as a matter of last resort, be given the right to file a lawsuit against any employer that has replaced him or her with an L visa beneficiary having a similar skill set and/or qualifications.

Section 211 requires the DHS Office of the Inspector General to submit a report to Congress detailing problems that may exist with the L-1 visa blanket petition process. The report would "assess the efficiency and reliability of the process for reviewing" blanket petitions, as well as "whether the process includes adequate safeguards against fraud and abuse." Such a report is clearly necessary to understand more about the entire blanket process. However, what the public already knows about it would justify a temporary suspension of L-1 blanket petitions—at least until the OIG reports to Congress. The language in this section could reasonably go beyond requiring a report—because it is evident that the process is largely unregulated once a corporation is allowed to use blanket petitions, and no agency is charged with oversight in order to determine if the beneficiaries of blanket petitions are displacing or replacing U.S. workers or putting downward pressure on wages for U.S. workers. Furthermore, any statistics or data that the government may have regarding blanket petitions are not publicly available or readily accessible on DOS or USCIS Web sites.

The Durbin-Grassley bill offers an acknowledgement that the L visa program is not functioning as intended, and provides some minimum protections formerly unavailable under any current laws or regulations in force. Building on these incremental improvements, the next section will propose some basic principles for achieving meaningful reform of the L visa program.

General policy recommendations and principles for reform

In order to improve the L visa program with the goal of ensuring that the rights of U.S. workers are protected,

Congress should consider at least the following recommendations, policies, and/or actions:

- **Compile and publish accurate data on all of the L visa categories, and do a better job of keeping track of L visa beneficiaries.** The Departments of Labor, State, and Homeland Security should always know how many L visa beneficiaries are in the country or have returned permanently to their home countries, how many are working and who their employers are, and which occupations they hold. These data should differentiate between the L-1A, L-1B, and L-2 categories. Without these data, Congress and U.S. agencies cannot make fully informed judgments about the labor market or immigration policy.

- **Enact legislation that clearly establishes the specific meaning of "manager" and "executive" for L-1A petitions, and develop a narrowly tailored definition and consistent, clear administrative policy guidance for "specialized knowledge" applications for L-1B visas.** As described above, both DHS and USCIS have documented the confusion and difficulties faced by adjudicators responsible for reviewing L-1 visa petitions.

- **Set an annual numerical cap on L-1 and L-2 visas.** The lack of any limits on the number of L-1 visas granted can encourage companies to use the L-1 as an alternative to other temporary worker visas with more stringent restrictions. Setting the appropriate level of L-1 visas to authorize could be determined yearly by the use of a commission of experts that would assess the needs of the labor market and make recommendations to Congress. The use of a Foreign Worker Adjustment Commission[46] could achieve this.

- **Forbid multi-national companies from transferring employees to U.S. offices on L-1 visas *unless* no qualified U.S. worker can be found to fill the position. In order to determine that no qualified U.S. worker is available, a reliable and effective labor market test should be developed and implemented, which includes independent shortage analyses of particular occupations and industries in the United States.** Extensive recruitment and training of domestic workers, including the use of State Workforce Agencies, can also serve as evidence of a firm's good faith efforts to find U.S. workers before petitioning for workers from abroad.

- **Require L-1 transferees to possess extensive post-secondary education, training, or experience.** At present, except for blanket petition applicants for the L-1B category, no educational requirements exist for the L-1. The lack of such a basic requirement could allow companies to transfer unskilled workers to the United States on an L-1 visa, especially in light of how broadly the term "specialized knowledge" has been interpreted. An uneducated, untrained, and unskilled worker should not be considered a corporate "manager" or "executive," or be deemed to have "specialized knowledge" not readily available or easily acquired in the U.S. labor market—they must at least possess a bachelor's-level professional or academic degree.

- **Require that employers pay L-1 and L-2 workers at least the market wage for U.S. workers similarly situated, and no less than the prevailing wage, to ensure that wages are not depressed for U.S. workers in similar occupations and with comparable skill levels.** There is recent evidence that the arrival of H-1B visa workers in the IT sector is associated with a drop in wages for some IT workers in the United States (Tambe 2009).[47] Because the L visa program is also used to bring new IT workers into the country in significant numbers, while requiring even less governmental oversight, it is reasonable to conclude that these workers may be depressing the wages of U.S. workers in the same industry.

- **Empower the Department of Labor with significant authority to audit firms and enforce any new rules created to protect against U.S. worker replacement, adverse working conditions, and downward pressure on wages caused by L-1 or L-2**

temporary workers. Because a detailed analysis and deep understanding of the labor market will be required, the Department of Labor should be designated as the appropriate agency to enforce any new labor market test, rules, or regulations related to L visas. The Department of Homeland Security was not designed to protect the interests of U.S. workers nor as a watchdog for the labor market, thus it should not be involved with auditing and enforcing provisions related to temporary workers in the context of the labor market.

- **Give U.S. workers the right to an administrative proceeding and remedy, and standing to sue an employer in federal court if they have been replaced by a specific employee with an L-1 visa, or if an employer pays an L-1 worker less than the prevailing wage.** Holding employers financially liable for negatively impacting the U.S. labor market will give employers an incentive to more extensively recruit workers in the United States.

- **Introduce employment requirements for L-2 dependent spouses, such as a labor market test to determine if employment of an L-2 worker would adversely affect U.S. workers, and give U.S. workers the right to an administrative proceeding and remedy, and standing to sue an employer in federal court if they have been replaced by a specific employee with an L-2 visa, or if an employer pays an L-2 worker less than the prevailing wage.** The number of L-2 visas granted each year is close to the number of L-1s granted, and in some years more L-2 visas were issued than L-1s. Some L-2 beneficiaries are non-spouse dependents and ineligible to work—but the public has no idea how many L-2 beneficiaries are eligible to work. This is precisely why more data are required. Combined with the lax employment requirements for L-2s (namely, applying to DHS for an Employment Authorization Document or simply showing a potential employer some proof of marriage to the principal L-1 spouse), it is almost impossible to know how many L-2 beneficiaries are working and where. There could plausibly be hundreds of thousands of L-2 visa beneficiaries working in the United States, This would constitute another significant temporary worker program with virtually no oversight or regulation by any agency of the U.S. government.

- **Require L-1 employees to work only at the worksite of their original petitioner-employer or at their parent, subsidiary, and affiliate site and do not permit any waivers under any circumstances,[48] in order to prevent the outsourcing and subcontracting of these workers to other firms.** The L-1 visa category was created by Congress to facilitate the *intra*-company transfer of workers employed by multi-national companies, not *inter*-company transfer. The outsourcing of L-1 employees should be prohibited to prevent the use of L-1 workers in "body shops," which offer companies low-wage labor for hire.

- **Determine the appropriate maximum allowable percentage of temporary foreign workers that companies may hire as a portion of their total U.S. workforce—but not to exceed a total of 20%—unless a bona fide labor shortage in a particular sector of the economy has been identified by the Department of Labor or a Foreign Worker Adjustment Commission.** This would build upon, but go further than the Durbin-Grassley 50-50 rule. This recommendation is warranted in light of evidence that the largest offshore outsourcing firms are the biggest users of high-skilled temporary worker visas (Elstrom 2007; Hira 2007); thus, even more restrictive rules should be in place to discourage excessive and abusive (but nevertheless legal) use of H-1B and L-1 visas. In the alternative, at the very least an elevated level of scrutiny should be applied to such firms to determine if their need to have a U.S. workforce with more than 20% of workers holding H-1B and L-1 visas is in fact justified, along with random post-entry audits for verification purposes. One prominent immigration attorney (who advocates removing the cap on H-1B

visas) even recommends that no "H-1B dependent" firm should be allowed to apply for any more visas—this would set the cap at 15% (Endelman 2005).

- **Reduce the amount of time an L-1 beneficiary is authorized to stay and work in the United States.** The law allows five- or seven-year stays—this should be changed to allow a duration of only two or three years, as part of an intra-company career development or managerial or executive training program. After that period, if a company determines it has a legitimate need for the L-1 beneficiary to remain employed in its U.S. offices because of the worker's unique or exceptional knowledge and skills, or because of a labor shortage, then the company should be required to apply for permanent residence on behalf of the employee.

- **Suspend the blanket petition procedure.** Until more data and reports become available about which companies are using this procedure and to what extent, and that demonstrate what the impacts are of these new workers on the U.S. labor market and the wages of U.S. workers, the procedure should be suspended, because as currently designed, it avoids the USCIS level of review while expediting the authorization of multiple L-1 applicants. If a simplified bureaucratic process like the blanket procedure is determined to be beneficial after a thorough assessment has been conducted based on collected data about the program, any streamlined visa application/petition process should require significant post-entry audits and penalties to ensure employer compliance and discourage abuse. And in any event, the users of blanket petitions should be publicly listed on the DHS Web site, along with the number of visas issued, the occupations involved, and the wages paid.

- **Review and reform the criteria and proof required in the L-1 petition process for applicants wishing to enter the U.S. for the purpose of opening a new office.** This should be done to ensure that the process is consistent with congressional intent. In 2006, the DHS was concerned that this process created a situation where "almost any foreign business proprietor can effectively petition himself and his family into the United States" (DHS OIG 2006, 16).

- **Impose an "anti-fraud" fee of at least $5,000 for every L visa granted.** The current fees are nominal, and the increased revenue would help pay for increased oversight, auditing, and enforcement activities related to the L visa.

Endnotes

1. This paper defines "U.S. worker" to include workers already residing in the United States, who are either U.S. citizens, foreign-born residents holding another class of visa allowing them to engage in lawful employment in the United States and those who have attained Legal Permanent Resident status.
2. For example, see 8 CFR §241.2(l) (regarding L-1 status) and 22 CFR §41.54 (guidance for consular decision makers in the State Department).
3. See generally, *Immigration Policy and Procedural Memoranda*, USCIS Web site, available at: http://www.uscis.gov/memoranda (last visited May 27, 2010).
4. Under some other nonimmigrant visas categories, an applicant is presumed to have an intent to immigrate to the United States, and must "establish to the satisfaction of the consular officers" that he or she intends to return to his or her home country after the temporary visa has expired. Immigration and Nationality Act (INA) §214(b)
5. INA §214(c)(2)(D)(i)
6. INA §214(c)(2)(D)(ii)
7. "Managerial capacity," INA §101(a)(44)(A) and 8 CFR §214.2(l)(1)(ii)(B); "executive capacity," INA §101(a)(44)(B), and 8 CFR §214.2(l)(1)(ii)(C); and "specialized knowledge," 8 CFR §214.2(l)(1)(ii)(D); see also, Ohata 2002.
8. This modification to the L-1 rules came into effect in 2005, as part of the L-1 Visa and H-1B Visa Reform Act, part of the Fiscal Year 2005 Omnibus Spending Bill, Pub. L. No. 108-447. See §412.
9. INA §214(c)(2)(E)
10. This evidence should be in the form of a marriage certificate or document, showing that the marriage occurred either prior to entry into the United States or prior to an extension or change of status. See, *RM 00203.500 Employment Authorization for Nonimmigrants*, Section (C)(1) Aliens Work Authorized Without Specific DHS Authorization, Social Security Online Web site, available at: https://secure.ssa.gov/apps10/poms.nsf/lnx/0100203500#c1 (last visited May 27, 2010).
11. See, *RM 00203.600 List of Documents Establishing Lawful Alien Status for an SSN Card*, Social Security Online Web site, stating that the L-2 spouse "may work only when either DHS grants employment authorization and issues an EAD or the person presents, in addition to an I-94 showing an E-1, E-2, or L-2 classification of admission code, evidence he/she is the spouse of the principal E-1, E-2 or L-1 alien." Available at: https://secure.ssa.gov/apps10/poms.nsf/links/0100203600 (last visited May 27, 2010).
12. On June 9, 2010, USCIS proposed new federal regulations to change application fees for many visa categories. At the time of publishing this paper, the rules had entered into a formal notice and comment period for 45 days, beginning on June 11, 2010 and ending on July 26, 2010. For the announcement of this rule, see *U.S. Citizenship and Immigration Services Seeks Public Comment on Proposal to Adjust Fees for Immigration Benefits*, news release, USCIS, June 9, 2010, available at: www.aila.org/content/default.aspx?docid=32206 (last visited July 15, 2010). To access the proposed regulations online, see the Federal Register, available at: http://edocket.access.gpo.gov/2010/2010-13991.htm and http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480b0015e (last visited July 15, 2010).
13. §426, *H-1B Visa Reform Act of 2004*, Pub. L. No. 108-447.
14. INA §214(c)(2)(C) and 8 CFR §214.2(l)(7)(i)
15. 8 CFR §103.2(f)
16. 8 CFR §214.2(l)(4)
17. The petitioner and the parent company, branches, subsidiaries, and affiliates must be: engaged in commercial trade or services; and have an office in the United States doing business for one year or more; and have three or more U.S. and foreign branches, subsidiaries or affiliates; and must have obtained at least 10 L visas in the previous 12 months, or have a combined annual sales of more than $25 million, or have a U.S. workforce of at least 1,000 employees. 8 CFR §214.2(l)(4)(i)(A) – (D)
18. A potential blanket L-1B beneficiary must be a "specialized knowledge professional," possessing a relevant U.S. degree or its equivalent. INA §101(a)(32) and 8 CFR §214.2(l)(1)(ii)(E)
19. 8 CFR §214.2(l)(4)(i)(A) – (D)
20. 8 CFR §214.2(l)(3)(v) and (vi)
21. 8 CFR. §214.2(l)(7)(i)(A)(3)
22. *Labor Condition Application for H-1B Nonimmigrants*, U.S. Department of Labor, Employment and Training Administration, available at: http://www.doleta.gov/regions/reg05/Documents/eta-9035.pdf (last visited May 27, 2010).
23. The H-1B visa is another "dual-intent" visa category for temporary workers. See generally, *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, USCIS Web site, available at: http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=73566811264a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD (last visited May 27, 2010).
24. Unlike the H-1B, capped annually at 65,000 (but with another 20,000 visas available for graduates of U.S. universities and no cap on non-profit research organizations).
25. In 1990, Congress passed The Immigration Act of 1990 (IMMACT90, Pub.L. 101-649, 104 Stat. 4978, November 29, 1990), which made changes to the L visa category, and led to the modern L visa as it exists today, but the L visa category originated in 1970.
26. Regarding the recession, see generally, *Economist* 2001 and Madslien 2010.
27. For an article discussing the effects of the recession on H-1B visa program, see Jordan 2009.
28. Also, although not discussed in detail in this paper, over 50% of H-1B visas issued went to Indian nationals in 2009 (DOS 2010).
29. For example, see, Advantages of the L-1 (section), Murthy Law Firm Web site, available at: http://www.murthy.com/news/ukL1H1B.html (last visited May 27, 2010); and "Ramesh Khurana Immigration Attorney L-1 Visas," Youtube.com video (in this video, Attorney Khurana states, "the benefit of L visa is that it is not subject to quota restrictions, which is applicable to H-1B, and secondly, it is not subject to labor laws. So people can easily be moved from overseas offices…to the United States," December 29, 2008, available at: http://www.youtube.com/watch?v=woylhyjbq-w (last visited May 27, 2010).

30. §416 Pub. L. No. 108-447

31. For media coverage about the proposed reforms, see Kolakowski (2010).

32. *GATS Training Module: Chapter 1; Basic Purpose and Concepts*, WTO Web site, available at: http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s3p1_e.htm (last visited May 27, 2010).

33. *Dispute Settlement Training Module: Chapter 4; Legal Basis for a Dispute; 4.4 Types of dispute in the GATS*, WTO Web site, available at: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s4p1_e.htm (last visited May 27, 2010).

34. This paper will not address the report's arguments in detail, but based on its analysis, it should at least be noted that the 50-50 rule will not reduce the *overall* number of H-1Bs granted, thus it would not constitute a numerical limitation to the 65,000 H-1Bs the United States is obligated to permit under its Schedule of Commitments; see Jochum (2010).

35. Schedules of commitments and lists of Article II exemptions, WTO Web site, available at: http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (last visited May 27, 2010).

36. *Guidelines to Issue of Visa for Foreign Personnel Coming to India for Execution of Projects/Contracts*, Ministry of Labour and Employment and Training, Government of India, September 8, 2009 and December 22, 2009, available at: http://dget.gov.in/Guidelines/welcome.html (last visited May 27, 2010).

37. *Guidelines to Issue of Visa for Foreign Personnel Coming to India for Execution of Projects/Contracts.*

38. Id.

39. The Indian Embassy in the United States outsources their visa processing to Travisa Outsourcing, a Washington, D.C.-based company. According to author's discussion with the company via telephone, for Employment visa purposes, there is no substantive definitional difference between an established "company" or a temporary "project" ("project" is the word used in the Ministry of Labour's Guidelines)—both are subject to the maximum 1% foreign workforce restriction. See, Travisa Web site, available at: https://indiavisa.travisaoutsourcing.com (last visited July 15, 2010).

40. For example, Logic Planet, Inc. employs 89 of its 95 IT workers with H-1B visas (94%), and DVR Softek Inc., has 45 of its employees working on H-1B visas, out of a total workforce of 50 (90%); see Thibodeau (2010).

41. INA §214(c)(2)(F)

42. See, 8 CFR §§214.2(l)(3)(v) and (vi); 8 CFR §§214.2(7)(i)(A)(3); and 8 CFR §214.2(l)(1)(ii)(F)

43. E.g., INA 212(n)(2)(G)

44. INA 212(n)(2)(A)

45. For example, the DHS OIG (2006) report mentions on page 10: "There is some concern that the L- 1B visa for workers with specialized knowledge, which has no such numerical limit, might serve as a way to avoid the H-1B cap for some employers."

46. As recommended by Ray Marshall. See Marshall (2009) and Eisenbrey and Marshall (2010). For another labor market commission proposal, see also Papademetriou et al. (2009b).

47. Although this working paper has become unavailable because it currently undergoing review, the Council on Foreign Relations (CFR) Web site posts an excerpt of the report's findings: "After controlling for offshoring levels, our estimates indicate that H-1B admissions at the current levels are associated with about 5% lower short-run wages for computer programmers and systems analysts…" CFR Web site, April 14, 2009, available at: http://www.cfr.org/publication/19500/ssrn.html (last visited July 15, 2010).

48. Current law governs this under INA § 214(c)(2)(F), and the Durbin-Grassley bill would create a new system allowing the DHS Secretary to grant waivers (discussed above).

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