Testimony Given By

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On

# "Oh, Canada! How Outdated U.S. Immigration Policies Push Top Talent to Other Countries"

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I thank Chair Lofgren and Ranking Member McClintock for inviting me to testify. I have been studying high-skilled immigration policy for more than two decades and I am honored to share my research. The opportunity is personally meaningful since I am the son of skilled immigrants from India who were beneficiaries of the (Hart-Celler) Immigration & Nationality Act of 1965.

High-skilled immigration contributes significantly to the United States. High-skilled immigrants fill labor market gaps, advance research and development, spur innovation, become entrepreneurs, and add to the vibrancy of communities and the nation. But our policies do not come close to realizing the potential benefits of high-skilled immigration. A series of bad policy choices has created an unfair system that exploits foreign workers, harming them as well as U.S. workers.

The fundamental defect in our high-skilled immigration system is that it has become dominated by a rising number, and increasingly complex set, of temporary guestworker programs instead of permanent immigration. Guestworker programs are problematic at their core. The programs place guestworkers in a precarious position. And for the programs to work as intended, government must carefully create a complex set of rules, and then be vigilant in its follow-through on oversight and enforcement of such rules. The actual U.S. track record in managing guestworker programs has been nothing short of dismal.

Below I describe a framework of principles to assess guestworker programs, illustrate those principles with three high-skilled programs, and finish by describing the larger ramifications of the programs.

## I. Policy Principles to Assess the Effectiveness of Guestworker Programs

Three (3) fundamental policy principles should be used to assess the effectiveness of guestworker programs.

1. **Policy should ensure guestworkers complement, rather than compete with, U.S. workers.** Foreign workers should fill genuine gaps in the labor market. The government should only authorize the import of guestworkers for jobs that are difficult to fill from the U.S. labor supply. Economists use the term *complementary* to describe workers who fill such gaps, and the term *substitute* to describe workers who compete with U.S. workers. In administrative and legal terms this is typically described as: the hiring of the guestworker does not adversely affect the wages and working conditions of similarly employed U.S. workers.[1]
2. **Guestworker programs, by their very nature, are vulnerable to abuse. Therefore, strong protections are necessary to prevent worker exploitation.** Guestworkers, by definition, do not have the same rights as US workers. They are not on equal footing in the labor market and in many cases their residency status is dependent on employment. This places them in a precarious situation; therefore, sufficient protections are needed to prevent them from being exploited.

[1] See for example the DOL's description of the H-1B program. "The law establishes certain standards in order to protect similarly employed U.S. workers from being adversely affected by the employment of the nonimmigrant workers, as well as to protect the H-1B nonimmigrant workers." https://www.dol.gov/agencies/whd/immigration/h1b

3. **Guestworker programs must be usable.** The rules should not be so onerous to render the program unusable. Usability typically conflicts with efforts to meet the other two principles.

Sound policy requires an assessment of, and a balancing between, the three principles.

These policy principles are sometimes addressed in public discussions, including at Congressional hearings, but those discussions are too superficial. As a result, guestworker program details are not well understood nor debated by policymakers, academics, and the media. Yet the details determine the program behavior. What may appear to be minor differences in policy details, whether in statute or in rulemaking, have profound impacts on the overall performance and outcomes of guestworker programs.

I now turn to specific problems with the three largest high-skilled guestworker programs and propose reforms to fix them.

## II. H-1B Guestworker Flaws & Solutions

The H-1B visa is a skilled guestworker program. In its current regulatory state, virtually any occupation that typically requires a four-year college degree is H-1B eligible, from accounting to engineering to journalism. Most employers face a national annual cap on new H-1B workers of 85,000. However, specific categories of employers, such as universities, are exempt from the cap. Approximately 120,000 *new* H-1B workers are hired each year. The visa is good for three years and is conditionally renewable. The USCIS recently estimated there were about 600,000 H-1B workers in the U.S., making it the largest guestworker program.[2]

Current H-1B implementation promotes usability at the expense of filling skills gaps and protecting workers. As a result of these choices, the majority of H-1B workers are *competing* with, rather than *complementing*, the US workforce. Their hiring and employment are adversely affecting the wages and working conditions of U.S. workers. Further, the lack of adequate protections mean H-1B workers are frequently subject to exploitation.[3]

The following two program outcomes illustrate the dismal performance of the H-1B system.

### The H-1B Visa Program Remains the "Outsourcing Visa"

In a 2007 interview with the New York Times, a top Indian government official stated that the H-1B "has become the outsourcing visa," because it serves as the linchpin in helping to ship jobs from the U.S. to India. The official clearly stated: more H-1B visas equals more outsourcing to India.[4] There was a reaction of shock from policymakers at this revelation since it is antithetical to the purpose of the program. Yet, more than a decade since, neither Congress nor any of the four presidential administrations has made a single policy change to fix this obviously destructive outcome.

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[2] https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf

[3] Between 2014 and 2018, the Center for Investigative Reporting, now known as Reveal News, completed a series of reports called *Techsploitation* that highlighted the abuse of temporary guestworker programs: https://revealnews.org/topic/visa-fraud/

[4] https://www.nytimes.com/2007/04/15/business/yourmoney/15view.html

For more than fifteen years, offshore outsourcing firms have been amongst the largest H-1B employers. The rise of H-1B visa use fueled the rise of white-collar offshoring, destroying middle-class jobs and shipping innovation overseas. In 2020, the most recent data available, more than half of the top 30 H-1B employers continue to be offshore outsourcing firms.[5] These companies exploit the H-1B program's weaknesses to facilitate the transfer of U.S. jobs offshore as a lower cost alternative to hiring U.S. workers, and sometimes even directly replace incumbent U.S. workers with H-1B workers who are paid wages that are far below market wage rates.

No one can provide a reason for why such a terrible outcome is acceptable, especially since it can easily be fixed.

**Most H-1B Applications Are Certified at Wage Levels Below the Median Wage**

DOL lets H-1B employers undercut local wages. In 2019, sixty percent of H-1B positions certified by the U.S. Department of Labor were assigned wage levels well below the local median wage for the occupation.[6] While H-1B program rules allow this, DOL has the authority to change it—but hasn't.

The two lowest permissible H-1B prevailing wage levels are significantly lower than the local median salaries surveyed for occupations. The two lowest H-1B wage levels set by DOL correspond to the 17th and 34th wage percentiles locally for an occupation. This translates into salaries that are significantly lower than local median salaries—typically 20 to 40 percent lower than the median. H-1B employers can reap significant savings by selecting one of the two lowest wage levels instead of the Level 3 wage (the median, or 50th-percentile, wage) or the Level 4 wage (above the median, at the 67th percentile).

Major U.S. firms—not just outsourcing companies—pay low wages to their H-1B employees. Major U.S.-based technology firms that hire H-1B workers directly, rather than contract them out to third-party employers, had significant shares of their certified H-1B positions assigned as Level 1 or Level 2, the two lowest wage levels in fiscal 2019, both of which are below the local median wage:

- Amazon and Microsoft each had three-fourths or more of their H-1B positions assigned as Level 1 or Level 2.
- Walmart and Uber had roughly half of their H-1B positions assigned as Level 1 or Level 2.
- IBM had three-fifths of its H-1B positions assigned as Level 1 or Level 2.
- Qualcomm and Salesforce had two-fifths of their H-1B positions assigned as Level 1 or Level 2.
- Google had over one-half assigned as Level 2.
- Apple had one-third of its H-1B positions assigned as Level 2.

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[5] For more details see: https://www.epi.org/blog/the-h-1b-visa-program-remains-the-outsourcing-visa-more-than-half-of-the-top-30-h-1b-employers-were-outsourcing-firms/

[6] For more details see: https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/

These firms are not hiring H-1B workers at these levels due to any U.S. labor shortage. There is a large existing U.S. labor pool for Level 1 and 2 types of positions that could be expanded even further through private investments in training. **U.S. citizens and lawful permanent residents have been graduating in record numbers with bachelor's degrees in computer science and engineering over the past five years;[7] these recent graduates can and should be filling most positions that H-1B employers have assigned as Levels 1 and 2, and they should be prioritized for those positions**. But since most H-1B employers are not required to advertise H-1B positions to U.S. workers before hiring H-1B workers,[8] many U.S. workers are never afforded an opportunity to apply for these positions. Further, employers could develop the workers they need to fill these positions through training, since the positions are routine and require only modest skill levels. Instead, employers have all but disinvested in workforce training, in part because of the disincentives created by ready access to lower-paid H-1B workers.[9]

The ready access to lower-paid H-1B and OPT workers also undermines efforts to diversify the workforce. Technology firms have a poor track record on racial, ethnic, and gender workforce diversity, one that has been well-documented as well as persistent since the inception of the H-1B program. Technology firms have no incentive to expand their recruitment talent pool when there is an abundant supply of lower-cost indentured workers.

These outcomes are a direct result of **three fundamental flaws** in the program.

1. **H-1B requires no labor market test.** Employers can hire an H-1B worker without ever recruiting a single US worker. Let me repeat this fact since it is widely mistaken by elected officials, the media, and academics. Employers hire H-1B workers even when there are abundant US workers who can do the job, and it is not unusual for H-1B workers to even replace US workers. Such displacement scandals have been widely reported in the press, in the New York Times, Los Angeles Times, CBS' 60 Minutes, and elsewhere.
2. **H-1B workers can legally be paid lower wages than their U.S. counterparts and H-1B workers have much less bargaining power.** DOL has set the required wage rules so low that, year after year, most H-1B workers are certified at well below the average wage paid to US workers. Employers reap 20 to 40 percent discounts over US workers' wages. **The DOL recently estimated that its current rule will, over the next ten years, take $156 billion in wages from H-1B workers and transfer it to corporations**. The agency's regulatory announcement plainly states, "The Department expects that [keeping the rule] will result in savings to employers (and a reduction in wages to employees)

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[7] See National Science Board, Science & Engineering Indicators 2018, "Appendix Table 2-21. Earned Bachelor's Degrees, by Sex and Field: 2000–15," and "Appendix Table 2-22. Earned Bachelor's Degrees, by Citizenship, Field, Race, and Ethnicity: 2000–15."

[8] U.S. Department of Labor, Wage and Hour Division, "Fact Sheet #62O: Must an H-1B Employer Recruit U.S. Workers Before Seeking H-1B Workers?" (July 2009).

[9] For example, see the following work by Peter Cappelli: "Why Companies Aren't Getting the Employees They Need," *Wall Street Journal*, Oct 11, 2011; and "Skill Gaps, Skill Shortages, and Skill Mismatches: Evidence and Arguments for the United States," *ILR Review* 68, no. 2 (March 2015): 251–290.

represented by the reduction of transfer payments (wages) from employers to employees."[10] This is only one source of savings for employers.

The H-1B program does allow workers to change employers, which provides workers some bargaining power via a threat to quit. However, in practice their job mobility is circumscribed by two key factors: 1) their universe of potential employers is very small, and 2) switching jobs carries significant immigration related risks. The indenturing feature of the program, where the employer controls the visa and therefore the legal status of the worker, multiplies savings for an employer. It creates a major power imbalance between guestworker and employer, one that employers understand well and exploit. Many cases of worker exploitation and abuse have been reported in the press, but the vast majority are never reported. Guestworkers carry an extraordinary burden with them into the workplace every day.

Several economists have recently described how rising monopsony power in the labor market is an important factor in explaining U.S. wage stagnation. One of those economists, the late Alan Krueger, a professor at Princeton University who served as chairman of the Council of Economic Advisors in the Barack Obama White House, described how the executives of Silicon Valley technology firms were especially eager to use their monopsony power to keep their engineers' wages low by limiting their opportunities to leave.[11] Some of those executives—including Google's Eric Schmidt, a vocal advocate of H-1B expansion—went so far as to collude with one another by agreeing not to poach each other's engineers.[12] Employers, especially in the technology industry, see limiting worker mobility as an important human resource strategy to keep wages low.[13] The government helps make this happen in the H-1B system.

3. **Worker protections in the H-1B are extremely weak.** DOL and DHS agency oversight and government management of the program has been negligent. The few protections in the program have been gutted by astonishingly bad regulatory decisions by DOL and DHS. Making things worse, compliance relies entirely on whistleblowers, who are unlikely to come forward for fear of retaliation. The compliance system is designed and implemented to fail rather than be effective.

Remedying these flaws is straightforward, has bipartisan support, and most actions can be accomplished administratively.

1. **DOL should immediately implement its final wage rule, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States*.**[14] The most recent proposed version should be strengthened by raising the minimum wage to at least the median wage. Variations of this

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[10] U.S. Department of Labor, Employment & Training Administration, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States*, See Exhibit 3 for the wage transfer estimates. https://www.regulations.gov/document/ETA_FRDOC_0001-0257

[11] Alan B. Krueger, "The Rigged Labor Market," Milken Institute Review, April 28, 2017.

[12] Mark Ames, "The Techtopus: How Silicon Valley's Most Celebrated CEOs Conspired to Drive Down 100,000 Tech Engineers' Wages," Pando, January 23, 2014.

[13] See Ron Hira and Bharath Gopalaswamy, *Reforming US' High-Skilled Guestworker Program*, Atlantic Council, South Asia Center, Atlantic Council, January 2019.

[14] https://www.regulations.gov/document/ETA_FRDOC_0001-0257

approach of raising the wage levels have been proposed in bipartisan legislation including ones by Senators Durbin and Grassley, Representatives Pascrell and Khanna, as well as Chair Lofgren. Legislation, though, is not necessary since DOL has the authority to implement the change.

2. **DOL should require secondary employers of H-1B workers to attest that they will not adversely affect wages and working conditions**. One way to address the abuses of the outsourcing/staffing firms, which operate as secondary employers, would be to issue policy guidance and update the appropriate DOL ETA application forms so that secondary employers to which H-1B workers are outsourced will be required to file Labor Condition Applications with DOL. Such guidance, which was recently considered but then abandoned,[15] would close the loophole that allows firms like Disney and Southern California Edison to replace its U.S. employees with H-1B workers by employing them through an outsourcing firm.[16] Using Disney as an example, implementing this rule would require client firms like Disney —that benefit and profit from hiring outsourcers—to acknowledge their employment relationship with H-1B workers who are employed by outsourcers like Infosys and Tata, by requiring Disney to file its own LCA. By doing so, Disney would attest that hiring the H-1B worker through the outsourcer is not adversely affecting the wages and working conditions of the Disney workforce.
3. **DOL has failed to enforce the "actual wage" component of the H-1B prevailing wage rule and should begin enforcing it immediately**. Under the prevailing wage statute, although an employer has several options at their disposal to determine a prevailing wage for an LCA, they must offer the higher of either the prevailing wage or the "actual wage," which the corresponding regulation at 20 C.F.R. §655.731 defines as "the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question." This rule has never been investigated nor enforced. DOL should do both.
4. **The Secretary of Labor should exercise their authority to improve back-end enforcement.** The Secretary has authority to audit and investigate H-1B employers but has not exercised it [8 U.S.C. § 1182(n)(2)(G)]. The Secretary should begin audits of major H-1B employers to assure compliance with program rules including, but not limited to: appropriate prevailing wage level classification, adverse working conditions, wages, geographic placement, employment bonds, non-compete agreements, non-poach agreements, mandatory arbitration, and, treatment of workers.
   The Wage & Hour Division (WHD) has been an especially weak enforcer of the H-1B program. It has relied almost exclusively on a complaint driven process. Its successful investigations have yielded backpay for some H-1B workers but no relief for US workers. WHD's penalties are small and it has not exercised its authority to debar firms from the

[15] Employment and Training Administration, U.S. Department of Labor, "U.S. Department of Labor revises interpretation, issues new guidance clarifying filing, compliance requirements in H-1B visa program," Press Release Number 21-97-NAT, January 15, 2021.
[16] Julia Preston, "Pink Slips at Disney. But First, Training Foreign Replacements," *New York Times*, June 3, 2015.

program. In sum, the punishments have been few and far between and when they do occur, they are slaps on the wrist. Further, WHD has done nothing to protect US workers.

5. **DOL should work with USCIS to curb skill level misclassification**. Firms appear to systematically misclassify prevailing wage skill levels by selecting levels far below the actual skills (education and experience) of the worker and/or duties of the position. In FY19, 60% of all approved H-1B LCAs were for skill levels 1 and 2. DOL has chosen to define Level 1 as appropriate for entry level for bachelors graduates and Level 2 is for someone with 2-4 years of experience. These do not match with the skills of actual H-1B workers as published in the USCIS Characteristics of Specialty Occupations reports. In fiscal 2018, 70% of approved H-1B petitions were for workers 30 years of age and older—a significant indicator that those workers already possess at least six to eight years of experience. Further, H-1B workers' educational attainment, which is an important determinant of skills, indicate they should be filling higher skilled positions. In fact, 63% of all H-1B workers held an advanced degree (master's, professional, or doctorate degree), meaning one could reasonably conclude that a majority of H-1B workers have the educational attainment and/or years of experience to fill positions at wage levels 3 and 4. These data suggest H-1B employers are underpaying workers relative to their true skill levels. For example, the San Jose Mercury News published analysis showing that Uber Technologies assigned Level 2 wages to positions it described as "senior software engineer" even though DOL guidance recommends a minimum of Level 3.[17]
   DOL should also upgrade its skill level definitions to reflect the intent of the H-1B program of bringing in truly specialized workers. There is no reason to define the skill levels, and corresponding wages, down to the minimally eligible worker. The H-1B program was never intended as an entitlement for every worker.
6. **USCIS should immediately implement its rule, *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions***.[18] This would replace the *random* selection of H-1B visas with one that prioritizes highest wages. The current random selection rewards the mass users of the program including those like the offshore outsourcing firms that exploit the program while it penalizes those firms trying to hire truly specialized talent.[19] There is bipartisan support for implementing this rule from Senators Durbin and Grassley who called on DHS Secretary Mayorkas to implement it immediately.[20] I understand Chair Lofgren has in a prior Congress introduced legislation that would embrace a similar system. There is no justification of maintaining a system that prefers a $60,000 per year H-1B worker over one earning $250,000 per year. It is irrational and bad for the U.S. economy.
7. **USCIS should revisit its vacated rule, *Strengthening the H-1B Nonimmigrant Visa Classification Program*,[21] to determine which elements can be implemented**.

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[17] Ethan Baron, "H-1B: Uber Snatches Up More Foreign-Worker Visas as It Lays Off Hundreds of Employees," *Mercury News*, October 17, 2019.
[18] https://www.regulations.gov/document/USCIS-2020-0019-1119
[19] Julia Preston, "Large Companies Game H-1B Visa Program, Costing the U.S. Jobs," *New York Times*, November 10, 2015. https://www.nytimes.com/2015/11/11/us/large-companies-game-h-1b-visa-program-leaving-smaller-ones-in-the-cold.html
[20] News Release, "Durbin, Grassley to DHS: Implement H1-B Visa Program Reforms," March 21, 2021.
[21] https://www.regulations.gov/document/USCIS-2020-0018-0001

Especially important is the definitions of specialty occupation and employer-employee relationships.

8. **Congress should revise the H-1B program to require a labor market test that consists of requiring employers to actively recruit U.S. workers and hire qualified U.S. applicants prior to hiring an H-1B worker**. Canada has such a requirement for its temporary foreign worker program.[22]
9. **Congress should require random audits off all H-1B employers to promote compliance and accountability.**

These policy changes will surely impact the usability of the program, but collectively they do not create any undue burden for employers. They would substantially increase the skill level and quality of the pool of H-1B workers, pay those workers fair wages, truly complement the U.S. workforce, and spur U.S. economic growth and productivity.

## III. L-1 Guestworker Flaws & Solutions

The L-1 visa was created for U.S. and foreign-based multinational companies to transfer critical employees to the U.S. The program has two categories, L-1A for managers and executives, and L-1B for workers possessing firm-specific *specialized knowledge*. L-1 workers are supposed to be so deeply embedded with a particular firm, that they are irreplaceable by anyone in the U.S. labor supply. There are no reported government figures on the number of L-1 visa holders in the U.S. but there are likely around 300,000. There is no cap on L-1 visas.

Two incidents reveal the L-1 program's vulnerability to abuse.

In 2003, Michael Emmons and Patricia Fluno, who were employed by Siemens in Lake Mary Florida, were forced to train their L-1 visa replacements employed by India-based offshore outsourcing firm Tata Consultancy Services. Clearly, the L-1 workers brought no skills not readily available in the U.S. The work was already being done by U.S. workers Patricia Fluno and Michael Emmons who both testified before Congress about the indignant experience of training their replacement.[23] Yet in the nearly two decades since their testimonies, the L-1 visa program has not been reformed.

With no wage floor, the L-1 visa program offers wage arbitrage opportunities even greater than with the H-1B. Workers can be paid home country wages. The wage differentials between America and India, the source country for the largest share of L-1s, are staggering. In the case of an information technology worker from India, this could mean a salary of just $8,000 per year. Even including the housing allowances and living expenses often given to these workers, the wages would be far below market.

For an actual example of just how low L-1 visa wages can be, one needs to look no further than the case of Electronics for Imaging. The San Jose Mercury News reported that a firm,

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[22] https://www.canada.ca/en/employment-social-development/services/foreign-workers/median-wage/high/requirements.html

[23] House International Relations Committee hearing: http://commdocs.house.gov/committees/intlrel/hfa91679.000/hfa91679_0f.htm and Senate Judiciary Committee hearing: https://www.govinfo.gov/content/pkg/CHRG-108shrg91789/html/CHRG-108shrg91789.htm

Electronics for Imaging, paid its guestworkers from India $1.21/hour to install computers and mistreated them.[24] Those workers were imported on an L-1 visa, for work that should have been paid at an hourly rate of $19 to $45 per hour. Shockingly enough, the firm was not in any violation of the L-1 program because there is no wage requirement. Instead, they were found to have violated California minimum wage laws. Electronics for Imaging is not some obscure company, it is a Silicon Valley based publicly traded firm with more than a half-billion dollars in revenue.

Why do we have these bad outcomes?

The L-1 visa program suffers from the following flaws:

1. There is no labor market test.
2. There is no minimum required wage.
3. There are no education or skills requirements for L-1 workers.
4. The standards to qualify for L-1B "specialized knowledge" are so vague that it is nearly impossible to find a worker ineligible.
5. The standards to qualify for L-1A "managers and executives" are too loose

Remedying L-1 program flaws is straightforward.

1. Congress should require a wage floor sufficiently high so that L-1 workers are being imported for their skills rather than lower wages. Bipartisan bicameral legislation like the H-1B & L-1 Visa Reform Act introduced in the 116th Congress would create wage requirement for L-1 visa workers. The IDEA Act of 2011 introduced in the House by Chair Lofgren included a wage floor for some L-1B workers.
2. DHS should create a strong and bright-line definition specialized knowledge.
3. DHS should tighten its definition of management and executives to ensure that L-1A are serving such roles.
4. DHS should eliminate the option of a blanket petition, and instead review every petition individually.
5. DHS should randomly audit L-1 employers to ensure compliance with the rules, and to identify weaknesses in the program.

## IV. OPT Flaws & Solutions

The OPT has become the fastest growing guestworker program. Since 2015, OPT initial work authorization approvals have outpaced those for H-1B visas.[25] The OPT has effectively no protections, no visibility, and no oversight. Simply put the OPT program is like an H-1B program with no rules.

With no labor market test or wage rules, OPT workers are directly competing with recent college graduates. The USCIS has outsourced its responsibility to oversee the program to the very

[24] http://www.mercurynews.com/business/ci_26778017/tech-company-paid-employees-from-india-little-1
[25] https://www.bloomberg.com/graphics/2021-opinion-optional-practical-training-problems-stem-graduates-deserve-better-jobs-opportunities/?srnd=opinion

groups that benefit from it – universities and employers – which have clear conflicts of interest. This akin to a publicly traded firm being responsible for performing its own audits. The results have been disastrous. For example, the disciplines eligible for the STEM extension have exploded making a mockery any commonsense definition of STEM. OPT STEM eligible degrees include: Classics, Art History, Drama Therapy, Journalism, and most MBA programs.[26]

Many universities have created low quality degree programs designed to exploit the loopholes, and lack of oversight, in the OPT STEM guestworker program. The title of an investigative report by Mother Jones magazine describes it well, "Inside the Growing Guest Worker Program Trapping Indian Students in Virtual Servitude: And how American universities are acting as willing partners."[27]

For decades, the Optional Practical Training (OPT) program has permitted foreign graduates of U.S. universities, who visit the United States to study through the F-1 nonimmigrant visa program, to be employed in the United States for up to 12 months immediately after graduation. In 2008, the George W. Bush administration extended the OPT program period to 29 months for F-1 graduates of a science, technology, engineering, or math (STEM) program—known as the STEM OPT extension—through an Interim Final Rule (IFR) promulgated by the Department of Homeland Security (DHS). On August 12, 2015, the U.S. District Court for the District of Columbia struck down the 2008 IFR, ruling that the regulation was illegally created in violation of the Administrative Procedure Act. Judge Ellen Segal Huvelle vacated the IFR effective February 12, 2016.

On October 19, 2015, President Obama proposed new DHS regulations that would reinstate the STEM OPT extension and increase its duration from 29 months to 36 months per STEM degree for foreign STEM graduates, and allow the extension eligibility to apply to up to two STEM degrees. Effectively, this would allow foreign graduates with STEM degrees to be employed for up to six years while on an F-1 visa. The DHS regulatory notice solicited comments from the public. In my comment, co-authored with Daniel Costa, we argue that the president's STEM OPT extension proposal is problematic for several reasons: [28]

1. The STEM OPT extension program has no authorization in the law and was created entirely via executive fiat by the George W. Bush administration in 2008, which extended the original OPT program period from 12 to 29 months. Except for a three-year pilot program in 1990 (which expired shortly thereafter), Congress has never explicitly authorized the employment of foreign students on F-1 visas for 12, 29, 36, or 72 months.
2. The STEM OPT extension program masquerades as a mentoring and training program for foreign graduates with STEM degrees from U.S. universities; in practice it is a large temporary work-visa program for foreign workers with virtually no rules.

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[26] https://www.bloomberg.com/graphics/2021-opinion-optional-practical-training-problems-stem-graduates-deserve-better-jobs-opportunities/?srnd=opinion

[27] https://www.motherjones.com/politics/2017/09/inside-the-growing-guest-worker-program-trapping-indian-students-in-virtual-servitude/

[28] http://www.epi.org/blog/the-department-of-homeland-securitys-proposed-stem-opt-extension-fails-to-protect-foreign-students-and-american-workers/

3. There are no enforceable wage standards or protections for the foreign students in the OPT program or for the U.S. workers with whom the OPT workers compete. Employers are permitted to deeply undercut locally prevailing wages for jobs in STEM fields. Employers are not required to first recruit U.S. workers or even publicly advertise jobs to them before hiring OPT workers, meaning that employers do not have to establish the existence of a labor shortage before hiring workers through OPT.
4. The STEM OPT program makes de facto guestworkers significantly cheaper than U.S. workers by waiving the employer's obligation to pay federal payroll taxes. This creates a financial incentive for employers to hire OPT employees instead of U.S. workers in STEM jobs, which is an obvious disadvantage for U.S. workers, most of whom are likely to be recent STEM graduates seeking entry-level jobs.
5. The program will further reduce employment opportunities for U.S. graduates in STEM fields. And because the OPT is a de facto guestworker visa that can last as long as six years and has no annual numerical limit, its existence will encourage more foreign students to study in the United States in hopes of remaining here to work, leaving fewer educational opportunities for U.S. students.
6. There is no justification for extending the OPT work permit from one year to three or six years that is not based on the educational needs of foreign students or on the needs of the U.S. labor market. A 12-month work/training period is more than adequate for any STEM degree program.

DHS should eliminate the OPT STEM extension.

## V. Consequences of America's Dysfunctional High-Skilled Immigration Policy

### Guestworker Programs Create Organized Constituencies

Bad guestworker policies are generating extraordinary revenues and profits for: businesses that hire and supply underpaid indentured workers; labor brokers and universities selling access to the U.S. labor market; and immigration attorneys processing large volumes of applications. They have established business models based upon the exploitation of guestworker programs. The DOL estimates that maintaining its current wage rule, which is absurdly low, will transfer $156 billion in wages from H-1B workers to corporations' profits over the next ten years. These pressure groups seek to maintain their windfalls by shaping the impression of guestworker programs through political communications campaigns and underwriting favorable think tank and academic reports.

The groups place pressure on all three branches of government to maintain, and even expand, their entitlements flowing from guestworker exploitation. One recent example is illustrative. In its regulatory notices about revising the H-1B wage rules, DOL received thousands of comments supporting the status quo system. This is unsurprising because DOL *rules have created* a large clientele—employers, universities, labor brokers, and immigration attorneys—that directly profit from the current system that revolves around cheap, indentured labor. These groups have handsomely profited from the agency's blunders and will fight to maintain it, which includes bringing frivolous litigation against DOL to keep H-1B and U.S. workers underpaid, despite DOL's clear authority to require fair wages and labor standards and duty to uphold worker

protections. Such comments should be seen in this light, and not prevail over the agency's mission to ensure the programs meet their intended purpose of filling labor shortages and protecting both U.S. workers and migrant workers.

**Sunlight Does NOT Disinfect Guestworker Programs**

Former Supreme Court Justice Louis Brandeis famously stated that "sunlight is said to be the best of disinfectants" to describe how public disclosure and transparency in government programs can prevent them from being abused.[29] While public disclosure in high-skilled guestworker programs has helped us better understand how they operate in practice, such disclosures have not prevented abuse of the programs. In almost all cases, the abuse is perfectly legal, so sunlight does not lead to official consequences.

There appear to be few consequences even in the public sphere. Executives at Southern California Edison, Siemens, Disney, AT&T, and University of California may have been somewhat embarrassed to be exposed by the press (not government disclosure) for forcing their U.S. workers to train guestworkers, but they all moved forward with such actions even after being exposed. Their behavior did not change because the profits from guestworkers are so large and easy to get. While more public disclosure data, especially on the L-1 and OPT programs, could be helpful, it alone, will not change the business calculations of exploiting guestworker programs.

**The Integrity of Employment Based Labor Certification System Requires Investigation**

A recent Department of Justice lawsuit against Facebook for discriminating against U.S. workers raises significant concerns about the integrity of the employment-based labor certification system.[30] If the allegations are true, Facebook subverted the labor certification process by purposefully excluding qualified U.S. applicants from its recruitment. Reactions to the lawsuit by Facebook and from prominent immigration attorneys indicate that such discriminatory actions may be widespread and common. But this is not new. For years, U.S. workers have known that they are pawns in rigged hiring practices that include fake job ads and other techniques to exclude them from positions. In 2007, a video went viral in which a prominent law firm taught its clients how they can disqualify every qualified U.S. applicant for jobs posted through labor certification.[31] At the time, major press, including USA Today, covered the shocking revelations contained in the video, yet no government action was taken to investigate or fix the labor certification process. It is yet another example of DOL's negligence in standing up for the integrity of employment and immigration laws.

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[29] https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency/

[30] Justice Department Files Lawsuit Against Facebook for Discriminating Against U.S. Workers
Lawsuit Alleges Facebook Favors H-1B Visa Workers and Other Temporary Visa Holders over U.S. Workers,
https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-facebook-discriminating-against-us-workers

[31] https://www.youtube.com/watch?v=TCbFEgFajGU

**Looking Abroad for Lessons is Useful But Has Limitations – Lessons from Canada**

Learning from other countries is useful but must be done with care. Policies for guestworker programs and employment-based permanent immigration intersect with employment and educational policies as well as government management and competence.

Identical guestworker programs will behave differently across countries. Canada has different employment policies – laws (formal) and norms (informal). For instance, the Canadian workforce is much more unionized than the U.S., with a union density almost three times larger, 31% versus 11%.[32] Worker voice across sectors and in government are surely much stronger in the Canada than the U.S., affecting how employers use a guestworker program, and how government manages it.

Two useful takeaways from Canada's system are:

1. Canada uses a merit point system approach to its permanent immigration program[33]

2. **For its temporary guestworker program, Canada has a strong labor market test (employers must show they cannot find Canadian workers) and must pay their workers at least the median wage.** "Recruitment is the process of finding and selecting qualified employees. As part of the Temporary Foreign Worker Program requirements, you must conduct recruitment efforts to hire Canadians and permanent residents before offering a job to a temporary foreign worker."[34]

If Canada is indeed effective attracting high-skilled talent, as the title of this hearing implies, then it is doing it with an effective labor market test and paying high wages. The U.S. should do the same.

I close my testimony by observing that the current high-skilled system undermines confidence in the immigration system and government more generally. I know of no technology worker, U.S. or foreign, who thinks the program is run fairly. Fixing it would help restore confidence in the system and government more generally.

[32] Statistics Canada, *Union status by industry*, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410013201 ; U.S. Bureau of Labor Statistics, *Union Members Summary*, January 22, 2021, https://www.bls.gov/news.release/union2.nr0.htm
[33] https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers.html
[34] https://www.canada.ca/en/employment-social-development/services/foreign-workers/median-wage/high/requirements.html