Questions for the Record for John M. Miano
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Washington Alliance of Technology Workers
Subcommittee on Immigration
and the National Interest
"The Impact of High-Skilled Immigration on U.S. Workers"
Thursday, February 25, 2016

Questions from Senator Sessions

1. Could you please explain how S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act (113th Cong.) would have affected purportedly "high-skilled" immigration programs, and how those programs would have affected U.S. workers?

For our book *Sold Out*, Michelle Malkin and I went through the laborious task of applying all the edits in the H-1B provisions of S. 744 to the existing statutes. The striking feature of S. 744 is how much effort the drafters went through to ensure that H-1B abuse could continue.

S. 744 would have preserved for employers both the ability to pay H-1B workers extremely low wages and to replace Americans with those workers. That, combined with making even more H-1B workers available, would have made S. 744 a disaster for Americans workers.

Unnecessary complexity is a theme that runs throughout S. 744. One of the reasons H-1B is dysfunctional is that there are different rules that apply to certain types of aliens and employers. The effect of these different rule sets is that the restrictions in the program end up applying to no one. S. 744 adds two new rule sets, making it even easier to abuse the H-1B program.

H-1B Quota under S. 744

In Appendix E of Sold Out, Michelle Malkin and I print the text of the H-1B quota as it would have read under

S. 744. It takes an absurdly long two full pages to print out and takes a lawyer to figure out what it means. Under a needlessly complex scheme, the H-1B quota could grow from 165,000 to 230,000 a year.

The only real protection for Americans in the H-1B program is the quota. It serves the important role of limiting the amount of damage H-1B can cause. Under S. 744 the quota would have been raised so high that it would no longer be a limit.

S. 744 would have continued to allow employers to replace Americans with foreign workers.

The provisions in S. 744 related to the displacement of Americans by H-1B workers suffer from drafting errors and are completely nonsensical at times. There are changes to these provisions but, as before, there are so many escapes that employers would have been able to replace Americans at will with H-1B workers except in odd circumstances. The drafters of S. 744 went to much effort to ensure replacing Americans with foreign workers remains legal.

S. 744 would have continued to allow employers to pay H-1B workers low wages.

S. 744 would have replaced the current 4-tier "prevailing wage" system with a 3 tier system. The lowest tier could be no lower than 80% of the actual prevailing wage. This would have increased the H-1B wage by a few thousand dollars a year in the computer industry but it would still allow employers to pay significantly lower than market wages to H-1B aliens.

H-1B dependent employers would have been required to pay the actual prevailing wage but the new definition of that term under S. 744 included a means for employers to escape falling into that category.

One has to wonder why so much effort went into allowing employers to pay H-1B guest workers low wages.

2. Could you please explain how S. 153, the I-Squared

Act of 2015, would affect purportedly "high-skilled" immigration programs, and how those programs would affect U.S. workers?

The I-Squared Act is even worse for American workers than S. 744. It creates huge increases in foreign labor but makes no changes at all to protect American workers. Employers would still be able to pay H-1B workers extremely low wages and use those workers to replace Americans. I-Squared would make even more such foreign replacements available to employers. Features of I-Squared include:

- No protections for Americans whatsoever.
- No provisions to enhance enforcement.
- Huge increases in H-1B visas.

As with S. 744, I-Squared Act would put in place a needlessly complicated provision for determining the quota. The quota would range from 165,000 to 245,000.

- Aliens with graduate degrees from U.S. Schools would no longer count towards the H-1B cap.
- Treaty visas would no longer count towards the H-1B caps.
- H-1B spouses (H-4) authorized to be employed with no restrictions.
- Replaces our policy of diversity in immigration with an India/China Immigration policy.

  The I-Squared Act removes the per-country limits on employment-based green cards and increases those limits on other green card categories. This would be a dramatic shift in policy from one of diversity to an India/China immigration policy.

- Dual Intent for Student Visas

  The I-Squared Act allows aliens on student visas to have dual intent, transforming student visas into immigrant visas.

- Exempts dependents from green card caps.

Graduates in STEM fields would be exempt from green card caps. At the same time it does not define what *STEM* means leaving who is eligible for the exemption up to agency interpretation.

Question from Senator Grassley

Would you please expand on your understanding of the schemes to "hack" the H-1B program and how they work?

One such distinction in the H-1B program is whether the employer is a university or research institution. Such employers are exempt from the H-1B quota (8 U.S.C. § 1184(g)(5)) and their prevailing wage is only required to take into account wages paid at similar institutions (8 U.S.C. § 1182(p)(1)(B)). Furthermore, while Congress clearly intended the quota exemption to apply only to those employed *by* a university or research organization, the wording of the exclusion is "at an institution of higher education … or a related or affiliated nonprofit entity" (8 U.S.C. § 1184(g)(5)). The executive branch has expanded the exemption to apply to other types of employers to include those where the employee is working *at* a university or research organization but employed by someone else.

Having separate rules for academia and research has opened the door for several forms of abuse of the quota and prevailing wage rules of the H-1B program. Wright State University in Dayton Ohio has been embroiled in a scandal where the university hired H-1B workers which where then contracted out to private employers. Some universities, including CUNY and UMass, have engaged in H-1B scams whereby they hire foreign workers for part time jobs then allow them to work in entrepreneur programs. Commercial companies have started setting up research laboratories "at" universities where they can take advantage of the university quota exemptions.

Questions from Senator Cruz

1. Are there any recent, existing data regarding the number of U.S. citizen and/or legal permanent resident STEM degree-holders in the United States? If the answer is yes, please provide supporting information.

I respectfully defer this question to Drs. Salzman and Hira because they are the experts in this area.

2. If there are recent, existing data regarding the number of U.S. citizen and/or legal permanent resident STEM degree-holders in the United States, are there also data regarding the employment level of such STEM degree-holders? If the answer is yes, please provide supporting information.

I respectfully defer this question to Drs. Salzman and Hira because they are the experts in this area.

3. In the event recent, existing data show high levels of unemployment among U.S. citizen and/or legal permanent resident STEM degree-holders, please explain industry's primary rationale for the current expansive use of the H-1B visa program.

In 1989, the year before the H-1B program was created, the unemployment rate for computer professionals was 1.4% and for all professional workers was 1.7%.[1] By 1998, the computer unemployment rate had risen to 1.7% and the professional unemployment rate to 1.9%. Last year, the unemployment rate for both groups was 2.6%. Prior to the H-1B expansions in 1998, 2000, and 2004, the peak Computer unemployment rate was in 1991 at 3%.[2] In

[1] Linda Levine, *An Information Technology Labor Shortagage?*, Congressional Research Service, Sept. 15, 2000, p. 7.

[2] GAO, *Information Technology Employment*, No. HEHS-98-159R,

2003, 2009, and 2010, the computer unemployment rate exceeded 5%.

The H-1B program provides employers with a workforce that is:

- Cheap
- Compliant—an employer can make an H-1B worker immediately removable from the United States by terminating employment.
- Bound to the employer—H-1B workers with a green card petition pending, cannot change employers.
- Mobile—Where Americans have ties to specific regions, employers can move H-1B workers around the country at will.

4. Please provide any relevant information that can help explain why the H-1B visa program has such a disproportionately negative impact on IT workers.

This is actually a very interesting question. Several factors are at work to make IT the primary target of H-1B. First, IT workers tend to be at the high end of the salary range within corporate America. After Managerial and Legal occupations, IT is the third highest earning wage group at $84,000 a year. Furthermore, geographic differences often make the gap even greater. In Silicon Valley, IT workers earn 1.48 times more than the national average while business occupations in Silicon Valley only earn 1.32 times the national average. Employers who are looking to save on a per-body per-hour basis by using foreign labor will be immediately attracted to IT.

Second, there are no licensing barriers for foreign workers in IT.

Third, IT generally has a bad reputation in the corporate world. Most studies on the subject have found that the majority of IT projects are failures. The analogous situation to IT in civil engineering would be to imagine if

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May 12, 1998, p. 3.

one-half to two-thirds of all buildings built in America collapsed or had to be torn down immediately after being built. In such a dysfunctional industry, taking the step of throwing everyone out and bringing in foreign workers often does not seem too radical.

Fourth, IT outsourcing has become a fad (as corporate identity change was in the 1970's). A whole business of consulting and training has sprung up to promote the fad. Experience in outsourcing is now a requirement for nearly any senior IT management job. For example, Fossil replaced American IT workers using H-1B after it had hired new IT management from JC Penney where they had done the same.[3]

Fifth, because software development is so unpredictable time wise, the business of for hire software development is generally done on a billing per hour basis. When billing per hour, incompetent workers generate more revenue than highly skilled workers. The ideal situation for IT service companies it to get a contract for a must-complete project with an unlimited budget and bill as many people as possible to that project. Low skilled, low wage H-1B workers are ideal for generating profit on such projects. It is no surprise that most H-1B workers are employed by companies in this kind of business.

For example, the Affordable Care Act web site was probably worthy of a cost on the order of magnitude of tens of millions of dollars. Instead, it cost $2.1 billion.[4] That kind of must complete/money-is-unlimited project, whether government or corporate, is ideal for making money with H-1B workers.[5]

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[3] Mitchell Schnurman, *Fossil sells out its tech workers*, Dallas Morning News, May 16, 2015. Apparently Fossil did not do a Google search before hiring. CIO Magazine described the IT situation at JC Penney as "Mismanagement for the Ages." Kim S. Nash, *Tech and Exec Disasters Put J.C. Penney in a Bind*, Nov. 24, 2014.

[4] Alex Wayne, *Obamacare Website Costs Exceed $2 Billion, Study Finds*, Bloomberg Business, Sept. 24, 2014

[5] Patrick Thibodeaux, *H-1B workers in line for Obamacare work*, ComputerWorld, Sept. 25, 2013.

It should be pointed out that Washington, D.C. has, *by far*, the highest concentration of H-1B workers in the country, receiving about 4.3 times the number of H-1B workers that it would have if such workers were distributed by population.[6] This suggests that many H-1B workers are being used for Federal government projects.[7]

> 5. In your opinion, would U.S.-based STEM companies face a domestic labor shortage if the H-1B visa program, as it is currently constituted, were curtailed or eliminated?

According to the GAO, employers claim 52% of H-1B workers are at the lowest skill level. Such workers only command a wage at the 17th percentile. 30% are at the next lowest wage level where they command a salary at the 34th percentile. With nearly all H-1B workers at the bottom of the barrel in skill, there would be no problem finding Americans to fill that gap.

> 6. In your opinion, what impact would curtailment or elimination of the H-1B visa program have on the wages or earning power of U.S. citizen and/or legal permanent resident STEM degree-holders?

If the H-1B program were eliminated we would see a shift in how the wages are divided. We would see wages of technology workers rise while executive pay is likely to fall. After Northeast Utilities replaced American technology workers with H-1B workers, the company's CEO received a $1.5 million raise. After Disney replacing American technology workers with H-1B workers, its CEO received a $13.6 million raise. Eliminating the H-1B program is likely to put a brake on that kind of earnings shift

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[6] John Miano, *H-1B Concentrated in a Few High-Wage States*, Apr. 13, 2012. New Jersey is second at 2.9.

[7] Brian Mahoney, *Guest workers toil ... at the Labor Department?*, Politico, Mar. 11, 2016.

from workers to executives.

7. Please provide additional details about how the university exemption works.

There are two university exemptions in the H-1B program. Section 8 U.S.C. 1182(p)(1)(A) allows universities to pay a prevailing wage that only takes into account "employees at such institutions and organizations in the area of employment." This wage tends to be much lower than the overall prevailing wage. In Silicon Valley, the average wage for a programmer is $94,016. The academic average wage is $67,454. In Dallas, the average programmer wage is $82,389 while the academic average wage is $66,747.

The second is located at 8 U.S.C. § 1184(g)(5)(A) and exempts aliens employed "at an institution of higher education" from the H-1B quotas. This at language is problematic because DHS has been interpreting employed "at" as not meaning "employed by." If the alien works at a university facility he is exempt from the quota even if not employed by the university. DHS has recently proposed regulations to codify this expansive interpretation that was never intended by Congress.[8]

The effect is the quota exemption is that the number of H-1B visas approved is significantly larger than the 65,000 general quota and 20,000 quota for U.S. graduates. The number of new visas approved in recent years has been:

- FY 2011: 106,445 (21,445 quota exempt)
- FY 2012: 136,890 (51,890 quota exempt)
- FY 2013: 128,291 (43,291 quota exempt)
- FY 2014: 124,326 (39,326 quota exempt)

8. Are you aware of any fraudulent use of the univer-

[8] Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 80 Fed. Reg. 81,000 (proposed Dec. 31, 2016)

sity exemption? If the answer is yes, please provide supporting information, including any known instances of universities' fraudulent use of the H-1B visa program.

Yes. Wright State University in Dayton Ohio is currently under investigation for H-1B abuse of this kind.[9] The university had been acquiring H-1B visas then contracting those workers out to other companies, including one owned by a trustee of the university.[10] This scam allowed the aliens to be paid at the academic wage rate as well as exempt them from the H-1B quota.

In an even more brazen scheme, an employer invented its own university (Adam University) and used it to import foreign nurses on H-1B visas.[11]

Other universities are using the quota and prevailing wage exemptions the H-1B program in dubious ways[12]

There is also the issue of for profit businesses setting up operations *at* universities to take advantage of the academic quota exemption as it is currently being interpreted administratively.

9. What other visa programs or categories pose an equal or greater threat to the job security and/or earning power of domestic STEM workers?

- L-1B (Intra-company transfers) have no wage requirements and few restrictions on their use. In addition, the L category allows spouses to work without restriction.

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[9] Josh Sweigart, *Wright State 'poster child' for abuses of worker visa program*, Dayton Daily News, Oct. 4, 2015

[10] Josh Sweigart, *WSU sponsored visa for worker at trustee's firm*, Dayton Daily News, Sept. 12, 2015

[11] Press Release, *Highlands Ranch Man Found Guilty Of Human Trafficking And Other Offenses*, U.S. Attorney's Office, District of Colorado, July 1, 2013.

[12] Liz Robbins, *CUNY Schools to Lure Foreign Entrepreneurs With New Visa Program*, N.Y. Times, Feb. 17, 2016; David L. Harris, *Mass. 'Global Entrepreneur' program gets boost from bank deal*, Boston Business Journal, Sept. 17, 2015

- TN (NAFTA)
- E-3 (Australian Treaty)

All of these statutory programs allow aliens to work in technology fields with even fewer restrictions than H-1B.

10. Are any current federal guest worker programs authorized by regulation rather than statute?

- Optional Practical Training program (Student visas)
- BILOH (B in lieu of H-1B)
- H-4
- Green Card

These programs were created entirely through administrative actions and allow aliens to work in technology fields.

11. Does any provision of statutory law authorize any part of the federal government to establish a guest worker program via regulation?

The current administration has taken the dubious position that the definition of the term *unauthorized alien* (*i.e.*, those who cannot be hired without subjecting the employer to civil and criminal penalties) in 8 U.S.C. § 1324a(h)(3) gives the executive branch co-equal authority with Congress to authorize aliens to work. The administration has also asserted that the general authority under 8 U.S.C. § 1103(a) does the same. The scope of that claim authority is that the executive may authorize any alien to work in the United States unless Congress explicitly prohibits it.

The claim that § 1324a(h)(3) created or recognized such authority did not appear in any final regulation prior to 2015. That claim is now the subject of at least four cases pending in the Federal Courts.

12. In your opinion, would the I-Squared Act have a

negative impact on the employment level of domestic STEM workers, including domestic IT workers?

The I-Squared Act would be a complete disaster for American technology workers. The bill includes massive increases in foreign workers and makes no pretense of addressing abuse in the existing programs. The I-Squared Act also takes the radical step of replacing our diversity-based immigration policy with an India/China immigration policy.

14. Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee's attention?

I. Congress should put an end to trade deals incorporating provisions that restrict the legislature from making changes to immigration policy. Trade is the movement of goods; not the movement of people (*i.e.*, immigration). As a corollary to this, Congress should exercise the discipline to reject measures that would create guestworker programs for specific countries. In recent years there have been a number of such proposals. Having different rules for different countries would make the immigration system unwieldy.

II. Congress should be extremely concerned about the growing use of executive action to create guestworkers independent of Congress. Right now, the Executive is claiming in court that it holds authority to allow *any alien* to work in the United States unless Congress explicitly prohibits it. If Congress allows that to continue, the Executive can wipe out any statutory protection for American workers in the immigration system and Congress will become irrelevant in employment immigration policy.

III. Any reform of the immigration system needs to be lead by systems analysts who can organize flows through

the system and make the system efficient. Guestworker programs should be strictly non-immigrant. Giving H-1B and L visas duel intent has had the predictable effect of creating huge backlogs for countries supplying the bulk of H-1B workers (India and China). Allowing aliens to stay indefinitely on H-1B visas while waiting for green cards has had the equally predictable effect of making those backlogs even longer.

IV. Congress should reject outright proposals to turn universities into the gatekeepers of the immigration system. Mindless platitudes, such as "staple a green card to their diploma" do not survive even a first level of analysis. Why should a graduate of a 4th tier United States university get immigration priority over the graduate of a 1st tier foreign school? Such a system is unworkable because it would create fights over which fields are eligible for immigration priority and what schools are eligible.

V. Congress should reject proposals to create entrepreneur visas. Such proposals are like the mice deciding to tie a bell to the cat's neck: it sounds great but there is no way to implement it. Entrepreneurial ventures have a high probability of failure. If such visas were created, there would be no practicable way to separate the scammers from the legitimate failures. Such a system would be cruel if it expelled unsuccessful entrepreneurs or wrought with fraud if it did not expel failures.