

Fordham International Law Journal

Volume 35, Issue 4

2017

Article 3

Barriers to H-1B Visa Sponsorship in the IT Consulting Industry: The Economic Incentive to Alter H-1B Policy

Karen Jensen*

*Fordham University School of Law

Copyright ©2017 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

BARRIERS TO H-1B VISA SPONSORSHIP IN THE IT
CONSULTING INDUSTRY: THE ECONOMIC
INCENTIVE TO ALTER H-1B POLICY

*Karen Jensen**

INTRODUCTION	1028
I. DIFFICULTIES IN USING THE H-1B VISA IN THE IT CONSULTING INDUSTRY	1032
A. The H-1B Visa Program	1032
B. The IT and IT Consulting Industries	1034
C. The Problem: Body Shopping	1037
D. The US Government's Response	1041
1. LCA Program	1041
2. Neufeld Memo	1044
3. Costs of H-1B Barriers and the Potential Effects on the US Economy	1051
II. ALTERNATIVE APPROACHES TO CONSIDER	1055
A. Addressing Third-Party Placements	1056
1. Third-Party Placements: Commentators' Views	1056
2. Third-Party Placements: Australia's Example	1058
3. Third-Party Placements: Industry Leaders Sue for Withdrawal of the Neufeld Memo	1063
B. Addressing LCAs	1066
1. LCAs: Canada's Example	1066
2. LCAs: The US Government Perspective	1067
III. SUGGESTIONS TO CURTAIL ABUSES WITHOUT INHIBITING THE IT CONSULTING INDUSTRY	1068
A. Third-Party Placements Should Be Permitted	1068
B. Rescind or Revise the Neufeld Memo	1069

* J.D. Candidate, 2012, Fordham University School of Law; B.A. International Relations, 2004, American University. The Author would like to thank Professor Jennifer Gordon for her input and advice; Maxi Adamski and Kara Baquizal, Writing & Research Editors, and the editorial board of Volume XXXV of the *Fordham International Law Journal* for their review; and her husband, family, and friends for their support.

C. Increase Enforcement Efforts	1071
D. Modify the LCA Process	1073
CONCLUSION	1074

INTRODUCTION

Our primary and secondary school systems are increasingly failing to produce the skilled workers needed to utilize fully our ever more sophisticated and complex stock of intellectual and physical capital. . . . Skill shortages in America exist because we are shielding our skilled labor force from world competition. . . . If we are to continue to engage the world and enhance our standards of living, we will have to either markedly improve our elementary and secondary school systems or lower our barriers to skilled immigrants. In fact, progress on both fronts would confer important economic benefits.¹

Former Chairman of the US Federal Reserve Alan Greenspan's comments to the US Senate Subcommittee on Immigration, Refugees and Border Security were premised on the suppositions that more non-US workers will want to come to the United States for employment as the financial crisis abates and that immigration reform should be undertaken in anticipation of that influx.² Bill Gates, the founder of Microsoft Corp., testified in 2007 before the US Senate Committee on Health, Education, Labor, and Pensions that the United States should be concerned with the fact that it is turning away highly educated and highly skilled workers when global competition is increasingly threatening the United States' leadership in the field of technology.³ The subject that both of these American industry leaders

1. *Comprehensive Immigration Reform in 2009; Can We Do It and How?: Hearing Before the Subcomm. on Immigration, Refugees and Border Sec. of the S. Comm. on the Judiciary*, 111th Cong. 10–11 (2009) (statement of Alan Greenspan, former Chairman, Federal Reserve System of the United States) [hereinafter *Comprehensive Immigration Reform Hearing*] (reporting Alan Greenspan's comments regarding the importance of immigration policy in this changing economy).

2. *See id.* at 10 (noting in regard to the recent economic downturn that "as the crisis fades, there is little doubt that the attraction of the United States to foreign workers . . . will revive. I hope by then a badly needed set of reforms to our Nation's immigration laws will have been put in place").

3. *See Strengthening American Competitiveness in the 21st Century: Hearing Before the S. Comm. on Health, Educ., Labor, and Pensions*, 110th Cong. 17 (2007) (statement of Bill Gates, Chairman, Microsoft Corporation) [hereinafter *Strengthening American Competitiveness Hearing*] (stating that turning away skilled workers should concern the

criticize is the widely debated annual cap on the number of H-1B visas that can be issued.⁴ H-1B visas are temporary visas for highly skilled foreign workers that permit employment in a specialty occupation in the United States.⁵ The topic of the H-1B cap has been extensively explored, but employers encounter other types of problems when filing for H-1B visas for their employees.⁶

This Note explores one such problem that arose in January 2010, when the United States Citizenship and Immigration Services (“USCIS”) issued a memorandum that makes it difficult, if not impossible, for employers to hire H-1B workers for positions that require the employee to work at a third-party or client worksite.⁷ The memorandum in question is a guidance memo from Donald Neufeld, the Associate Director of USCIS Service Center Operations, to all adjudicators at the USCIS Service Centers (“Neufeld Memo”) establishing a more restrictive policy toward third-party worksite placements for H-1B visa holders.⁸ The Neufeld Memo affected

United States “both in human terms and in terms of our own economic self-interest. America will find it infinitely more difficult to maintain its technological leadership if it shuts out the very people who are most able to help us compete”).

4. See *id.* (arguing that the current cap of 65,000 workers annually is arbitrary and does not reflect the US demand for workers); *Comprehensive Immigration Reform Hearing, supra* note 1, at 10 (stating that the number of H-1B visas issued each year is “far too small to meet the need”).

5. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006); see *infra* Part I.A (describing in more detail the H-1B visa requirements).

6. See, e.g., *H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 82 (2011) (statement of Andrew Sherrill, Director, Education, Workforce, and Income Security, Government Accountability Office) [hereinafter *H-1B Visas Hearing*] (“The H-1B cap and the program itself have been a subject of continued controversy.”); Ajay Malshe, *From Obsolete to Essential: How Reforming Our Immigration Laws Can Stimulate and Strengthen the United States Economy*, 3 ALB. GOV’T L. REV. 358, 381–90 (2010) (advocating that the H-1B cap should be substantially increased); Norman Matloff, *Needed Reform for the H-1B and L-1 Work Visas (and Relation to Offshoring)* 1 (July 24, 2004) (unpublished manuscript), available at <http://www.cs.ucdavis.edu/~matloff/Summary.pdf> (stating that the H-1B cap is “inexcusably high”).

7. See generally Memorandum from Donald Neufeld, Assoc. Dir., Serv. Ctr. Operations, U.S. Citizenship & Immigration Servs., to Serv. Ctr. Dirs., U.S. Citizenship & Immigration Servs. (Jan. 8, 2010), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf> [hereinafter *Neufeld Memo*] (describing how service center adjudicators should evaluate H-1B visa applications in regard to the employer-employee relationship).

8. See *id.* at 1 (“This memorandum is intended to provide guidance, in the context of H-1B petitions, on the requirement that a petitioner establish that an employer-employee relationship exists . . .”).

several industries, but was directed primarily at information technology (“IT”) consulting firms, which will be the focus of this Note.⁹ The result has been a more rigorous visa application process and more frequent visa denials for IT consulting firms.¹⁰ The IT consulting industry’s business model requires it to regularly assign its consultants to work at a client’s office, but the Neufeld Memo limits employers’ ability to move their H-1B employees to third-party worksites.¹¹ The IT consulting industry, an important and rapidly growing segment of the US economy, has already suffered financial losses due to forfeited filing fees after denials, attorneys’ fees spent on complying with requests for additional evidence (“RFEs”), and the loss of key employees whose visas, although previously approved, were later denied extensions.¹² IT consulting firms seeking to hire H-

9. See Memorandum from the Am. Immigration Lawyers Ass’n to Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and Roxana Bacon, Chief Counsel, U.S. Citizenship & Immigration Servs. 4–6 (Mar. 19, 2010), available at <http://usavisanow.com/wp-content/uploads/2010/03/neufeld-aila-response-3-19-10.pdf> [hereinafter AILA Memo] (noting that the medical industry may be affected by the Neufeld Memo’s policies because many states’ laws prohibit doctors from working directly for the hospital, technically rendering them employees of another company working off-site, and that the government itself may be affected because many government workers are off-site contractors); see also Larry L. Drumm et al., *H-1Bs and Third-Party Worksites: I’ve a Feeling We’re Not in Kansas Anymore*, 2010 IMMIGR. PRAC. POINTERS 154, 155 (2010), available at <http://www.aila.org/content/fileviewer.aspx?docid=37838&linkid=242445> (describing the Neufeld Memo as part of a United States Citizenship and Immigration Service (“USCIS”) effort to curb fraud after it was discovered in some information technology (“IT”) firms); see also *Information Technology Definition*, in 9 MCGRAW-HILL ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY 168 (10th ed. 2007) (describing IT as an industry that creates and installs computer-based systems to assist in the acquisition, representation, use, storage, and transmission of information).

10. See *infra* notes 100–12 (describing the various procedural difficulties that an H-1B applicant faces as a result of the Neufeld Memo).

11. See Austin T. Fragomen, Jr., *Meeting the Standard: Specialized Knowledge Workers and the L-1B Visa Category*, 85 INTERPRETER RELEASES 757, 761–62 (2008) (describing the business model of a typical IT consulting company, including the months or years that must be spent at a client worksite in order to implement projects); AILA Memo, *supra* note 9, at 7 (detailing IT consulting companies’ business practices); see also Neufeld Memo, *supra* note 7, at 2 (describing the limitations on movement of H-1B employees to third-party worksites).

12. See *Occupational Outlook Handbook, 2012–13 Edition: Projections Overview*, BUREAU LAB. STAT.—U.S. DEP’T LAB. (Mar. 29, 2012), <http://www.bls.gov/oco/oco2003.htm> (projecting that, by 2020, computer systems design and related services will grow by forty-seven percent and that the consulting industry as a whole will expand at fifty-eight percent); see also Drumm et al., *supra* note 9, at 155 (reporting accounts of visa denials issued based on the Neufeld Memo, H-1B visa holders detained at the border on suspicion of working at third-party sites, and requests for extensive documentation when applying for an extension); Akshat Tewary, *The Neufeld Memorandum on H-1B Petitions, and Its Implications for the Computer Consulting Industry*, IMMIGR. DAILY, <http://www.ilw.com/articles/2010,1109-tewary.shtml> (last visited Apr. 20, 2012) (“Since the Memo’s issuance, many IT companies have been faced

IB visa holders to work at client sites also encounter difficulties when filing with the US Department of Labor for a Labor Condition Application (“LCA”). The LCA is a form that must be filed with and certified by the US Department of Labor attesting that the H-1B workers’ salary and benefits are equivalent to those earned by US workers, thereby not adversely affecting US wages.¹³ Further, a new LCA must be filed for each location where an employee works for more than thirty days.¹⁴ This creates additional burdens on employers, including high paperwork volumes and delays in a company’s ability to relocate their employees as needed.¹⁵ In sum, the Neufeld Memo’s constraints on third-party worksites, and the difficulties in securing LCAs for employees who change worksites, have obstructed the business operations of the IT consulting industry.¹⁶

Part I of this Note discusses the relevant background of the H-1B visa program, the IT consulting industry, and the practice of “job shopping.” Part II introduces solutions proposed by experts in the field, and explores the Australian and Canadian temporary foreign worker programs. Finally, Part III argues that in order to encourage additional growth in this already-innovative industry as the United States emerges from the recent financial crisis, the United States should reduce barriers to H-1B visa issuance to the IT consulting industry by withdrawing or revising the Neufeld Memo, expanding enforcement of existing regulations, and streamlining the LCA

with an increased number of petition denials, which are devastating to prospective H-1B nonimmigrants and extremely costly to their petitioning sponsors, both in terms of lost business opportunities as well as expended filing fees.”)

13. 8 C.F.R. § 214.2(h)(4)(i)(B)(1) (2012) (requiring that the employer file a Labor Condition Application (“LCA”) with the US Department of Labor before filing the H-1B petition); see FRAGOMEN GLOBAL, GLOBAL BUSINESS IMMIGRATION HANDBOOK § 20:14 (2011) (describing the LCA application process).

14. 20 C.F.R. § 655.735 (2012) (permitting placement of H-1B employees at third-party worksites without filing a new LCA, but only for “short-term placements,” and defining short-term placements as not exceeding thirty days, or sixty days if certain requirements are met); see AUSTIN T. FRAGOMEN ET AL., H-1B HANDBOOK § 2:105 (2011) (describing the requirements of short-term placements).

15. See *infra* Part I.D.1 (detailing the LCA program and the difficulties employers encounter when placing employees at third-party worksites).

16. See Complaint at 13, *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240 (D.D.C. 2010) (No. 10-CV-0941(GK)) [hereinafter *Broadgate* Complaint] (detailing how plaintiffs’ business has been impacted by the implementation of the Neufeld Memo); Patrick Thibodeau, *IT Staffing Firms File Suit over New H-1B Rules*, COMPUTERWORLD (June 9, 2010, 1:55 PM), http://www.computerworld.com/s/article/9177886/IT_staffing_firms_file_suit_over_new_H_1B_rules (describing the IT industry’s response to the Neufeld Memo as “a fight for survival”).

process. The measures taken by the government to limit third-party placements were an attempt to combat certain abusive practices in the H-1B system, but that effort resulted in a change of policy that hampers the progress of US businesses.

I. *DIFFICULTIES IN USING THE H-1B VISA IN THE IT CONSULTING INDUSTRY*

In order to understand the difficulties caused by barriers to third-party placements, it is necessary to explore the background of the H-1B visa and the IT consulting industry. Part I.A details the H-1B visa program. Part I.B describes the IT industry and its subset the IT consulting industry, and the source of the difficulties regarding third-party placements. It then details why the IT consulting industry is important to the US economy, and why the IT consulting industry relies on H-1B visas. Part I.C introduces an illegal practice that arose in the context of H-1B usage in the IT industry called “body shopping,” and the government’s attempts to address the practice. Finally, Part I.D discusses the government’s response to the difficulties that have arisen in the context of third-party placements of H-1B visa holders, and the consequences of that response.

A. *The H-1B Visa Program*

The Immigration Act of 1990 established the United States’ H-1B visa program to attract the world’s most highly educated and talented individuals to work temporarily in the United States.¹⁷ The H-1B visa is issued to nonimmigrant, highly skilled workers who are sponsored by US employers otherwise unable to find qualified US

17. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.); see Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and Brightest: A Critique of the Current U.S. Immigration System*, 38 *FORDHAM URB. L.J.* 183, 185 (2010) (explaining that the Immigration Act of 1990 sought to ensure that the best and brightest foreign workers were admitted to the United States). The H-1 category was created by the Immigration and Nationality Act of 1952, but it only superficially resembled the modern H-1B program. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C., 18 U.S.C.); see also Christopher Fulmer, Note, *A Critical Look at the H-1B Visa Program and Its Effects on U.S. and Foreign Workers: A Controversial Program Unhinged from Its Original Intent*, 13 *LEWIS & CLARK L. REV.* 823, 829 (2009) (noting that the H-1 category was created with the Immigration Act of 1952, but only with the 1990 amendments did it gain its distinctive characteristics, such as the annual cap on the number of visas issued and the Labor Condition Application (“LCA”) process).

citizens to fill specialty positions.¹⁸ Only 65,000 new H-1B visas can be issued each year.¹⁹ Visas are generally issued for three years at a time and are renewable for another three years, for a total of six years.²⁰ Before H-1B status can be approved, employers must submit an LCA attesting, among other things, that the wage paid to the H-1B worker is equivalent to the greater of either the actual wage paid to US workers similarly employed by the employer or to the prevailing wage for that position in the same geographic location as calculated by the US Department of Labor.²¹ These regulations attempt to balance the interests of allowing US businesses to hire the skilled employees necessary to remain competitive in the global market, and preventing the displacement of US workers in favor of visa holders.²²

18. See FRAGOMEN ET AL., *supra* note 14, § 1.18 (describing the basic requirements of the H-1B that holders be nonimmigrants coming to the United States to perform specialty occupations that require specialized knowledge, and that they have a US employer sponsor); see also FRAGOMEN GLOBAL, *supra* note 13, § 20.1 (explaining that nonimmigrant visas are for individuals coming to the United States for temporary visits and immigrant visas are for individuals who are qualified to enter the United States as permanent residents). A specialty occupation is one that normally requires a bachelor's degree, or higher, or its equivalent to perform. 8 C.F.R. § 214.2(h)(4)(iii) (2012).

19. 8 U.S.C. § 1184(g)(1)(A) (2006) (limiting the number of H-1B visas to 65,000 in each fiscal year after 2003). There is a separate cap of 20,000 H-1B visas for non-US citizens who have received a master's degree or higher from a US institution. *Id.* § 1184(g)(5)(C). For an explanation of the additional subsets and workings of the cap, see FRAGOMEN GLOBAL, *supra* note 13, § 20.14.

20. 8 C.F.R. §§ 214.2(h)(9)(iii)(A)(1), (h)(13)(iii)(A) (authorizing an H-1B petition to be approved for up to three years and an extension of stay for up to three additional years). There are some situations in which an H-1B holder may be authorized to stay beyond six years. For example, if an individual has begun the process of applying for permanent residence through his or her employment, the H-1B visa becomes extendable until a decision on the application has been made. See FRAGOMEN GLOBAL, *supra* note 13, § 20.14.

21. 8 C.F.R. 214.2(h)(1)(ii)(B)(1) (requiring that a certified LCA be obtained before filing an H-1B petition); see U.S. DEP'T OF LABOR, FORM ETA 9035, LABOR CONDITION APPLICATION FOR H-1B NONIMMIGRANTS (1994), available at <http://www.doleta.gov/regions/reg05/Documents/eta-9035.pdf> [hereinafter LABOR CONDITION APPLICATION FOR H-1B NONIMMIGRANTS] (listing the statements to which the employer must attest).

22. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-26, H-1B VISA PROGRAM: REFORMS ARE NEEDED TO MINIMIZE THE RISKS AND COSTS OF CURRENT PROGRAM 59 (2011) ("In creating the H-1B visa program, Congress sought to strike a difficult balance between satisfying the needs of a wide variety of businesses for high-skilled foreign labor while protecting access to jobs and appropriate compensation for U.S. workers."); RUTH ELLEN WASEM, CONG. RESEARCH SERV., 98-531 EPW, IMMIGRATION: NONIMMIGRANT H-1B SPECIALTY WORKER ISSUES AND LEGISLATION 1 (1998) (advising Congress as it considered business immigration legislation and noting the need "to balance the needs of U.S. employers with protection and opportunities for U.S. workers").

B. *The IT and IT Consulting Industries*

The IT industry creates and installs computer-based systems to assist in the acquisition, representation, use, storage, and transmission of information.²³ As businesses seek to establish, upgrade, and maintain their computer systems, demand for IT workers increases.²⁴ Some sectors within the IT industry are expected to experience job growth of forty-seven percent by 2020.²⁵ Where demand for employees outstrips the number of qualified US IT workers available, businesses turn to non-US workers and the H-1B visa.²⁶

The IT industry makes ample use of H-1B visas.²⁷ Approximately fifty-eight percent of all H-1B visas are issued to workers in computer-related occupations and approximately ten percent of all US IT workers hold H-1B visas.²⁸ Some commentators criticize this use of H-1B visas, claiming that US workers are displaced by H-1B workers; other commentators call attention to

23. See *Information Technology Definition*, *supra* note 9, at 168.

24. See *Occupational Outlook Handbook, 2012–13 Edition: Computer Programmers Job Outlook*, BUREAU LAB. STAT.—U.S. DEP'T LAB. (Mar. 29, 2012), <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-6> (“Most computer programmers work in computer system design and related services, an industry which is expected to grow as a result of an increasing demand for new computer software.”); *Occupational Outlook Handbook, 2012–13 Edition: Software Developers Job Outlook*, BUREAU LAB. STAT.—U.S. DEP'T LAB. (Mar. 29, 2012), <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-6> (“The main reason for the rapid growth [in employment of software developers] is a large increase in the demand for computer software.”).

25. See *Occupational Outlook Handbook, 2012–13 Edition: Projections Overview*, *supra* note 12 (projecting that employment in computer systems design and related services is expected to grow by forty-seven percent).

26. See *Strengthening American Competitiveness Hearing*, *supra* note 3, at 9 (“Now we face a critical shortage of scientific talent, and there’s only one way to solve that crisis today. Open our doors to highly talented scientists and engineers . . .”); see also *Talking Points: Immigration 101; H-2B and H-1B Workers*, AM. IMMIGR. LAWYERS ASS’N (Mar. 19, 2010), <http://www.aila.org/content/default.aspx?bc=6755%7C25667%7C34433%7C31586> (stating that H-1B workers are hired to “alleviate temporary shortages of U.S. professionals in specific occupations”).

27. See COUNCIL ON FOREIGN REL., INDEP. TASK FORCE REP. NO. 63, U.S. IMMIGRATION POLICY 51 (2009) (“American high technology companies are the main users of the H-1B program . . .”); see also Patrick Thibodeau, *H-1B at 20: How the ‘Tech Worker Visa’ Is Remaking IT in America*, COMPUTERWORLD (Nov. 17, 2010, 6:00 AM), http://www.computerworld.com/s/article/9196738/H_1B_at_20_How_the_tech_worker_visa_is_remaking_IT_in_America (“[T]he H-1B visa has become an entrenched part of global IT business . . .”).

28. See Madeline Zavodny, *The H-1B Program and Its Effects on Information Technology Workers*, 88 *ECON. REV.*, no. 3, 2003 at 1, 4, available at <http://www.frbatlanta.org/filelegacydocs/ACF6CBD.pdf> (analyzing H-1B statistics).

research that shows that H-1B employment in the technology industry is correlated with higher levels of innovation and productivity in the field, and that increased productivity produces a long-term net benefit in employment levels and salary for US workers.²⁹ One report found that for each H-1B worker hired, US technology companies increased their overall employment by five US workers.³⁰ Thus, the report suggested that H-1B workers are hired alongside US workers, not instead of them.³¹

Few companies have the resources to maintain an in-house IT department with sufficient personnel and skill to meet all of their IT needs.³² The IT consulting industry is a subset of the IT industry that focuses on providing IT support to client companies who have insufficient in-house IT capacity.³³ IT consulting firms typically hire and train highly skilled technology professionals, and their “product” is their employees’ talent and expertise.³⁴ The types of projects for which IT consultants are hired include: creation of an online purchase

29. For information on the nondisplacement of US workers, see FRAGOMEN GLOBAL, *supra* note 13, § 20.14 (noting that if the employer is found to be “H-1B dependant,” which essentially means that a certain proportion of its employees are H-1B holders, it must make additional attestations, such as that no US workers had been or would be displaced in the ninety days before and after filing the H-1B petition). For commentator interpretation of H-1B use, see GIOVANNI PERI, LABOR MARKETS INITIATIVE, MIGRATION POLICY INST., *THE IMPACT OF IMMIGRANTS IN RECESSION AND ECONOMIC EXPANSION* 7 (2010) (finding that although immigration may slightly impact native US employment in the short term, US workers benefit from highly skilled immigration in the long run (seven to ten years) through increased productivity and higher average income); William R. Kerr & William F. Lincoln, *The Supply Side of Innovation: H-1B Visa Reforms and U.S. Ethnic Invention*, 28 J. LAB. ECON. 473, 474 (2010) (analyzing ethnicity and patent data, modified by location, H-1B dependency data, as compared to H-1B cap fluctuations from 1998 onward, and finding that the pace and character of innovation in the technology industry was significantly influenced by H-1B admissions); Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. J.L. REFORM 815, 886–88 (2003) (examining the statistics regarding H-1B holders in the IT industry, and arguing that US workers were displaced by H-1B workers).

30. See NAT’L FOUND. FOR AM. POLICY, *H-1B VISAS AND JOB CREATION* 5 (2008) (noting that these statistics are based on the number of H-1B positions requested, not approved, so the actual proportion of US workers to H-1B workers is likely even higher).

31. See *id.* at 1 (finding that H-1B workers are “complementing other U.S. hires, rather than displacing them”).

32. See MANAGEMENT CONSULTING: A GUIDE TO THE PROFESSION 285 (Milan Kubr ed., 4th ed. 2002) (“[F]ew if any companies find it economical to maintain a permanent workforce with the vast range of skills needed to install, develop and integrate [the necessary IT systems].”).

33. See *id.* (explaining that IT consulting firms “bridge the gap” between the IT capabilities of a company and the suppliers of the IT products it needs to operate its business).

34. See AILA Memo, *supra* note 9, at 6–7 (describing IT consulting firms).

order system, digitization of business functions such as human resources or accounting, and integrating multiple business functions into one system, including customer relations, supply chain, and resource management.³⁵ Employees at IT consulting firms are assigned to client projects, either on-site or at client worksites, and are reassigned to new projects by the IT consulting firm when a project ends.³⁶ Employees may be sent to the client's workplace for anywhere between a few months to several years in order to install or develop a product, to train the client's employees in the use of the product, and to specialize the product to the client's needs.³⁷ The practice of placing employees at third-party worksites is widely accepted in US businesses and occurs in nearly all areas of commerce, from industrial to medical.³⁸ In 2010, temporary and contract employment as a whole generated approximately US\$87.4 billion in sales.³⁹

H-1B use is prevalent in the IT consulting industry even compared to the rest of the IT industry.⁴⁰ Extensive use of the H-1B visa in IT consulting firms is often necessary because of their mobile business model.⁴¹ US citizens frequently are uninterested in itinerant IT consulting positions because they require frequent relocation.⁴²

35. See *MANAGEMENT CONSULTING: A GUIDE TO THE PROFESSION*, *supra* note 32, at 297 (describing how consultants apply technology to help clients); see also AILA Memo, *supra* note 9, at 6–7 (listing the types of resources IT consultants typically provide, for example, providing a client with a team of consultants or an individual project manager).

36. See AILA Memo, *supra* note 9, at 7 (detailing the typical work-flow of an IT consulting company).

37. See Fragomen, Jr., *supra* note 11, at 761–62 (describing the “IT deliverables” that an IT consulting company provides to its clients).

38. See *Fact Sheet: Temporary and Contract Employees Work in All Occupations*, AM. STAFFING ASS'N (Oct. 23, 2008), <http://www.americanstaffing.net/statistics/pdf/occupations.pdf> (presenting statistics regarding the number of employees in each employment sector who are temporary or contract workers); see also AILA Memo, *supra* note 9, at 7 (“IT staffing and consulting companies constitute a wholly legitimate industry in the U.S. that is relied upon for needed resources by many U.S. businesses . . .”).

39. See *Fact Sheet: Staffing FAQs*, AM. STAFFING ASS'N (July 25, 2011), http://www.americanstaffing.net/statistics/pdf/Staffing_FAQs.pdf (providing the statistic that the temporary and contract staffing industry generated approximately US\$87.4 billion in sales).

40. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 22, at 19, 24 n.42 (stating that “staffing firms,” or consulting firms, are among the top H-1B hiring employers).

41. See *supra* note 37 and accompanying text (describing the mobile business model of the IT consulting industry).

42. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 22, at 24–25 (describing interviews with IT firms that said that they rely on the H-1B visa program because US workers were less willing to accept itinerant positions); see also NAT'L FOUND. FOR AM. POLICY, ANALYSIS: GAO REPORT FINDS H-1B PROFESSIONALS ARE PAID COMPARABLE TO SIMILAR

Non-US workers are more willing to take these itinerant positions because, unlike US workers, some H-1B workers do not have family in the United States and therefore can relocate easily.⁴³

C. *The Problem: Body Shopping*

A significant problem associated with H-1B visas and the IT consulting industry is the emergence of firms that abuse the visa system by employing a business model commonly known as “body shopping” or “job shopping.” Body shopping is a global phenomenon in which IT workers from developing nations, frequently India, are recruited in their home country with the promise of work and high salaries in a destination country, such as Australia, Canada, or the United States.⁴⁴ Body shops are often present in both the source country—the less-developed country with a pool of workers—and the destination country.⁴⁵ Body shops in destination countries are often run by noncitizens and hire almost exclusively foreign national employees.⁴⁶ The body shops have relationships with each other within the country and across borders, and they send IT workers from one consultancy to another as needed.⁴⁷ Some consider body shops to be “onshore offshoring” because of their foreign ownership and employees.⁴⁸ While some commentators do not object to the practice

U.S. PROFESSIONALS, IMPORTANT TO LARGE AND STARTUP COMPANIES 8 (2011) (finding that a requirement to travel or relocate may limit the availability of certain jobs for US workers).

43. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 22, at 24–25 (noting that H-1B holders are more willing to relocate around the country); see also NAT'L FOUND. FOR AM. POLICY, *supra* note 42, at 8 (stating that family may be the reason why US workers may not be willing to travel or relocate).

44. See XIANG BIAO, GLOBAL “BODY SHOPPING”: AN INDIAN LABOR SYSTEM IN THE INFORMATION TECHNOLOGY INDUSTRY 4 (Paul Rabinow ed., 2007) (describing the practice of body shopping). A “destination country” is the country where the employee is sent to work because the demand for IT work is high. See *id.* at 4–5 (detailing how and where body shop employees are recruited).

45. See *id.* at 4–5 (describing the body shops' multinational presence).

46. See Thibodeau, *supra* note 27 (“The rise of these small IT consulting and services firms that almost exclusively employ foreign workers has led to increased scrutiny of H-1B applications for companies of all size [sic].”).

47. See BIAO, *supra* note 44, at 7 (“Multiple mobility between [sic] various countries over a short span of time, rare for other migrants, was common for Indian IT workers.”).

48. See Ed Frauenheim, *Waging Battle on Foreign Labor: Salary Concerns Renew H-1B Visa Opposition*, CNET NEWS (Oct. 6, 2005, 4:00 AM), http://news.cnet.com/Waging-battle-on-foreign-labor/2009-1022_3-5888772.html (quoting Programmers Guild president Kim Berry describing body shopping as “essentially onshore offshoring”); see also Alaina M.

because the work is staying in the United States, even if it is performed by foreign-national workers, others consider body shopping to be the gateway to offshoring.⁴⁹ Once the body shop knows its client's needs and procedures, it will slowly move more of the work to its overseas affiliates.⁵⁰

Additional objections to body shopping arise because of the exploitation and abuse of employees.⁵¹ Body shops often recruit young, unemployed Indian men and women with the promise of employment and high salaries in the United States.⁵² New hires are presented with an adhesion contract that may, among other costly and restrictive provisions, require them to pay an exorbitant "finder's fee," or name a relative who will bear financial responsibility if the employee breaches the contract.⁵³ Once they arrive in the United States, body shop workers may find that there is no substantive assignment immediately available for them, and that they will be "benched" with little or no pay until an assignment is available.⁵⁴ Some body shops place employees in non-IT-related positions such as

Beach, Note, *H-1B Visa Legislation: Legal Deficiencies and the Need for Reform*, 6 S.C. J. INT'L L. & BUS. 273, 285–86 (2010) (describing body shops and their ramifications).

49. See Thibodeau, *supra* note 27 (describing opponents of body shopping as believing that the "H-1B visa and offshoring have become inextricably linked, with offshore companies placing H-1B workers in client sites in the U.S. with the intention of ultimately transferring the work overseas").

50. See RON HIRA, AGENDA FOR SHARED PROSPERITY, ECON. POLICY INST., BRIEFING PAPER NO. 187, OUTSOURCING AMERICA'S TECHNOLOGY AND KNOWLEDGE JOBS 5–6 (2007), <http://www.gpn.org/bp187/bp187.pdf> (describing the process of moving work from the United States to an associated foreign workforce); see also Fulmer, *supra* note 17, at 852–54 (connecting the use of H-1B visas to the practice of outsourcing).

51. See Steve Hamm & Moira Herbst, *America's High-Tech Sweatshops*, BLOOMBERG BUSINESSWEEK (Oct. 4, 2009, 1:12 PM), http://www.msnbc.msn.com/id/33145705/ns/business-bloomberg_businessweek (telling the stories of several H-1B workers whose employers charged them illegal fees, did not pay them or underpaid them, and threatened to terminate their sponsorship if they complained).

52. See *id.* (recounting the recruiting strategies of body shops).

53. See Rachel Konrad, *'Body Shop' Must Pay Fees in H-1B Lawsuit*, CNET NEWS (Apr. 25, 2001, 2:10 PM), http://news.cnet.com/Body-shop-must-pay-fees-in-H-1B-lawsuit/2100-1017_3-256477.html (describing the illegal practices that were the subject of a lawsuit, and noting that they are pervasive in the technology industry); see also Fulmer, *supra* note 17, at 854–56 (noting how H-1B workers could be vulnerable to abuse because of their relatively weak position in their transaction with the body shop). An adhesion contract is a "standard-form contract prepared by one party, to be signed by another party in a weaker position . . . who adheres to the contract with little choice about the terms." BLACK'S LAW DICTIONARY 293 (abridged 9th ed. 2010).

54. See BIAO, *supra* note 44, at 5 (describing the practice of "benching," in which body shops bring workers into the destination country without any client projects arranged for them, and do not give them work or pay until a job arises).

welding, accounting, or human resources.⁵⁵ If an employee complains or attempts to find another US employer, the body shop may invoke a noncompetition agreement, if one was included in the contract, or threaten to withdraw H-1B sponsorship and have him or her deported.⁵⁶ Essentially, some commentators argue, body shop employees are “de facto indentured servants.”⁵⁷

Most of the tactics described above violate or frustrate the purpose of H-1B regulations.⁵⁸ In addition to depriving the employee of wages, the practice of benching cuts the body shop’s operating costs, allowing it to offer services at lower prices and rendering other IT consulting companies unable to compete.⁵⁹

Further, benching is contrary to the US regulatory requirement that H-1B workers be paid the prevailing wage for the position and location in which the employee works for the duration of the sponsorship.⁶⁰ Contracting IT H-1B employees to clients in an occupation other than that listed on the H-1B visa petition is subject to criminal penalty for making a material misstatement in a matter

55. See Leah Phelps Carpenter, Comment, *The Status of the H-1B Visa in These Conflicting Times*, 10 TULSA J. COMP. & INT’L L. 553, 582–84 (2003) (detailing an incident in which fifty-three H-1B employees were assigned to work at a pickle factory).

56. See ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET 133 (2003) (acknowledging that although noncompetition agreements are banned in California, employees still feel pressure to comply with the employers sponsoring their visas); Fulmer, *supra* note 17, at 829, 854–55 (noting how “portability,” or the ability to transfer an H-1B from one employer to another, may be thwarted by noncompetition agreements, and showing that the power to deport is a power that employers can wield over workers). A noncompetition covenant is “[a] promise . . . not to engage in the same type of business for a stated time in the same market as the buyer partner or employer.” BLACK’S LAW DICTIONARY, *supra* note 53, at 334.

57. See Matloff, *supra* note 29, at 817 (arguing that H-1B workers cannot leave abusive employers because of their precarious immigration status).

58. See Beach, *supra* note 48, at 285 (describing how body shops’ tactics breach regulations regarding recruiting methods and how their results thwart the intent behind the H-1B regulations); see also David Leopold, *Why Is H-1B a Dirty Word?*, AILA LEADERSHIP BLOG (Feb. 1, 2010, 9:19 PM), <http://ailaleadershipblog.org/2010/02/01/why-is-h-1b-a-dirty-word/> (“Benching H-1B workers without pay, paying below the prevailing wage, sending H-1B workers on long-term assignments to a site not covered by an LCA—these are the practices we most often hear about, and every single one of these is a violation of an existing regulation that could be enforced by the Department of Labor.”).

59. See HIRA, *supra* note 50, at 3 (noting that US workers are forced to compete with H-1B holders who are working for a lower wage in substandard conditions); see also Beach, *supra* note 48, at 295 (urging enforcement agencies to supervise the H-1B program or US workers will not be able to compete with H-1B holders).

60. 20 C.F.R. § 655.731(c)(7) (2012) (requiring the employer to pay the full-time wage to the employee if the employee is not performing work due to a decision of the employer).

within government jurisdiction.⁶¹ As H-1B visas may not be used for unskilled labor, employing H-1B workers in such positions is especially troublesome considering the limited number of H-1B visas available each year.⁶² Using H-1B visas for unskilled labor prevents numerous workers whose skills would benefit the US economy from gaining entry.⁶³

Another common abusive practice in body shopping is setting an employee's salary based on the prevailing wage of a low-income region, claiming that the employee will work there, but actually sending the employee to work in a high-wage region for the same lower salary.⁶⁴ Such employees may have financial difficulties because the wage they earn is not proportionate to the cost of living, and the market wage for US IT workers in the area may become depressed due to available inexpensive labor.⁶⁵ Due to the exploitation of foreign workers and the violation of US immigration laws, body shopping is a significant difficulty in H-1B practice.

61. 18 U.S.C. § 1001 (2006) (providing for criminal fines and imprisonment for those who falsify or conceal information, or make a fraudulent statement in any matter in the jurisdiction of the executive, legislative, or judicial branches of the government).

62. 8 U.S.C. § 1184(g)(1)(A) (limiting the number of new H-1B visas annually to 65,000); see FRAGOMEN ET AL., *supra* note 14, § 1.18 (specifying that H-1B visas are issued to nonimmigrant, highly skilled workers slated to fill specialty positions); see also Todd H. Goodsell, Note, *On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 BYU J. PUB. L. 153, 169 (2007) (remarking that body shops obtaining a large proportion of the yearly allotment of H-1B visas prevents other workers with needed skills from entering the country).

63. See Goodsell, *supra* note 62, at 169 (describing the negative consequences of body shops' practices).

64. 20 C.F.R. § 655.731(a)(2) (requiring that the prevailing wage for the area of employment be determined when applying for an LCA); see Hamm & Herbst, *supra* note 51 (describing a New Jersey company that listed its H-1B employees' work locations as Coon Rapids, Iowa, where it had opened an office and where the prevailing wage for the position was US\$20.05 per hour, but actually employing them in New Jersey, where the prevailing wage was US\$30.43 per hour).

65. See Beach, *supra* note 48, at 295 (noting that abusive practices among employers, if unchecked, would continue to drive down wages for US workers); Hamm & Herbst, *supra* note 51 (telling the story of an H-1B worker hired at US\$60,000 a year as a computer programmer and analyst in Troy, Michigan, but instead worked as a chipmaker in San Diego where the increased cost of living and other financial setbacks caused by his sponsoring company resulted in his living "paycheck to paycheck" to provide for his wife and infant daughter).

D. *The US Government's Response*

In response to the threat of H-1B workers displacing US workers, and in response to the abuses described in Part I.C above, the US government instated measures to prevent such abuses and exploitations. The US government designed the LCA program to certify that the salary and benefits of non-US workers are equivalent to those of US workers in the same geographical region. To combat body shopping, the US government issued the Neufeld Memo, which limited the ability of employers to place employees at third-party worksites.⁶⁶ The following subsections discuss how the LCA program and the Neufeld Memo create barriers for employers wishing to place employees at third-party worksites.⁶⁷

1. LCA Program

In order to prevent the H-1B program from depressing wages for US workers, a prospective H-1B employer must file an LCA with the US Department of Labor (“DOL”) attesting to four main facts: (1) that the H-1B worker will be paid the higher of either the actual wage paid to similarly employed US workers in that location or the governmentally determined prevailing wage for that occupation in that location, (2) that H-1B employment will not adversely affect the working conditions of similarly employed workers in the area, (3) that there is currently no strike or lockout occurring at the place of employment where the applicant is seeking to work, and (4) that notice of the H-1B employment has been provided to the bargaining representative or posted in the workplace.⁶⁸ Because the prevailing wage is determined based on the location of the worksite, IT consulting firms must file a new LCA for each worksite where the employee will spend more than thirty days.⁶⁹ LCAs submitted through

66. See *supra* note 22 and accompanying text (describing the government’s motivation to avoid displacement of US workers); *supra* Part I.C (discussing the practice of body shopping).

67. See *infra* Parts I.D.1–2 (outlining the issues created by the LCA program and the Neufeld Memo).

68. LABOR CONDITION APPLICATION FOR H-1B NONIMMIGRANTS, *supra* note 21 (listing the statements to which an employer must attest). The bargaining representative referred to in the fourth attestation is a union or collective bargaining representative. See *Fact Sheet #62M: What Are an Employer’s H-1B Notification Requirements?*, WAGE & HOUR DIV.–U.S. DEP’T LAB. (Aug. 2009), www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62M.pdf.

69. See *supra* note 14 and accompanying text (describing the requirements for short-term placements of thirty days or less).

the DOL's website before 2009 were approved almost instantaneously because the LCA is based solely on attestations.⁷⁰ In 2009, fears of abuse led the DOL to institute iCert, a new online system for processing LCAs that involves closer scrutiny of the applications.⁷¹ LCA decisions now take up to seven business days.⁷²

These regulations cause problems for IT consulting companies because each new LCA costs them additional time and money.⁷³ Although the LCA is only a four-page online form that requires no filing fee, LCA filing regulations are complex and most companies require an attorney's assistance to maintain compliance.⁷⁴ Companies are required to post two public notices of each H-1B employment at the prospective worksite, and must document that the notice was posted for ten days.⁷⁵ That documentation, and other paperwork, is required to be held on-site for at least one year beyond the LCA expiration or withdrawal date.⁷⁶ Additionally, the documentation must be duplicated and kept in two separate files: one accessible to the

70. See Howard W. Gordon, *Emerging Issues in LCA Practice*, 2010 IMMIGR. PRAC. POINTERS 192, 192–93 (2010) (describing the LCA process as it was before the 2009 reforms).

71. See *id.* at 193 (detailing the new LCA system and the reasons for introducing it).

72. See *id.* (noting that, under the new system, nearly instantaneous approval comes to an end, LCAs are subject to scrutiny, and the US Department of Labor (“DOL”) is required to make a decision within seven working days); see also FRAGOMEN ET AL., *supra* note 14, § 2:97 (“The DOL is often using the full seven business days (the maximum time to adjudicate LCAs under the rules) to process cases submitted through the iCert Portal . . .”).

73. See Comments of the American Immigration Lawyers Association to the Interim Final Rule Issued by the U.S. Department of Labor Regarding the H-1B Program 5–6, 11 (Dec. 20, 2000), available at <http://www.aila.org/content/fileviewer.aspx?docid=3143&linkid=32298> [hereinafter AILA Comments] (describing the costs to the employer in terms of salary and attorney's fees, considering the time and expertise required to comply with regulations); see also Craig S. Morford, Comment, *H to B or Not to Be: What Gives Foreigners the Right to Come Here and Create American Jobs?*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 299, 322 (2011) (explaining that for the entire H-1B process, “[l]awyers’ fees, filing fees and other expenses can easily reach [US]\$5000 per applicant”).

74. See Ilana J. Drummond, *Hiring International Workers in Today's Economy: New Challenges and Strategies*, in EMPLOYING INTERNATIONAL WORKERS: LEADING LAWYERS ON UNDERSTANDING RECENT IMMIGRATION TRENDS, NAVIGATING THE VISA PROCESS, AND MEETING COMPLIANCE REQUIREMENTS 67, 97 (2010) (“Immigration law is as complex as tax law. Corporate counsel who are not proficient in immigration law should take the time to meet with reputable immigration counsel who specialize in corporate matters.”).

75. 20 C.F.R. § 655.734(a)(1)(ii)(A) (2012) (requiring that notice be posted at primary and third-party worksites in two conspicuous locations for ten days); see FRAGOMEN GLOBAL, *supra* note 13, § 20.14 (noting the requirement to post notice at the place of employment).

76. 20 C.F.R. § 655.760(c) (requiring that employers retain LCA documentation); see Drummond, *supra* note 74, at 80 (describing the public access file where documentation of the LCA is to be held for the duration of the LCA plus at least one year).

public on demand, and the other for potential audit by the DOL.⁷⁷ Any missing documentation or other minor noncompliance can result in a fine of up to US\$1000 per infraction, or if the breach is serious, the employer may be fined up to US\$35,000 per infraction and be banned from filing visa petitions for up to three years.⁷⁸ Because of the potential consequences of regulatory noncompliance, companies turn to attorneys to submit and document LCAs, and consequently must pay additional attorneys' fees for each new submission.⁷⁹

Another difficulty that IT consulting firms encounter in the LCA process is the requirement that notice be posted in two conspicuous locations at the employee's work site.⁸⁰ This means that an IT consulting company must ask its client to post LCAs at their worksite for each new H-1B holder who works at that location, document the posting dates, and return this information to the IT consulting company.⁸¹ This process can be a source of friction between the IT consulting company and its client.⁸² Client companies are being asked

77. 20 C.F.R. § 655.760(c) (noting that, in addition to the information in the public access file, the employer must retain payroll records in case of an enforcement proceeding); see FRAGOMEN GLOBAL, *supra* note 13, § 20.14 ("This documentation should include payroll information for all employees in the specific employment in question, information regarding the basis that the employer used to establish the actual wage rate, current information of adjustments to the H-1B worker's wage level, information regarding the employer's determination of the prevailing wage... and a copy of the notice... posted by the employer.").

78. 20 C.F.R. § 655.810 (describing the remedies that may be ordered if violations of LCA regulations are found).

79. See *supra* note 73 and accompanying text (describing the impact of attorneys' fees on the H-1B process).

80. 20 C.F.R. § 655.734(a)(1)(ii)(A)(1) (requiring that notice be posted at the employee's place(s) of employment at two conspicuous locations); see Drummond, *supra* note 74, at 81 (noting that the posting requirement adds a complexity that can make the LCA process daunting).

81. See AILA Comments, *supra* note 73, at 42 ("This requirement will compel employers of H-1B workers to post the notice of filing at client businesses over which they have no authority or control."); see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 22, at 55 (stating that the client may not know that a worker has an H-1B let alone know about the posting requirements).

82. See Drumm et al., *supra* note 9, at 165–67 (listing the documentation that may be required for the H-1B process, and urging attorneys to be sensitive to employers' and their clients' reactions to such requests); AILA Comments, *supra* note 73, at 43 (noting the "negative impact on private business relationships" caused by a combination of potential noncompliance and the incompatibility of the LCA process with many business contracts); see also *New I-129 Taunts Consulting Firms*, OLENDER PHAM, <http://www.olenderpham.com/immigration/business-immigration/news/New%20I-129> (last visited Apr. 20, 2012) (recognizing that, in order to determine if the employee's wage is equivalent to the actual wage at the worksite, the IT consulting firm would have to ask its client for documentation of the

to volunteer their employees' time to complete these tasks, and if the client company does not correctly follow procedure or neglects to return the information to the IT consulting company in a timely manner, the IT consulting company could face regulatory penalties.⁸³

In addition to the financial and business relations costs of multiple LCA submissions, the iCert program's processing period slows the flow of business for the IT consulting firms.⁸⁴ Workers who are needed on a new client project must wait up to seven business days while a new LCA is processed before they can move from one client site to another.⁸⁵ In a fast-paced industry such as IT, seven days' delay can be problematic.⁸⁶

2. Neufeld Memo

In 2008, the USCIS conducted a study of a sample of H-1B visa applications and found that approximately twenty-one percent contained a violation of regulations.⁸⁷ This prompted increased

client company's employees' salaries, and predicting that the client companies would not likely comply with this request).

83. See AILA Comments, *supra* note 73, at 43 (“[T]he employer is subject to potential violations of the requirement simply because of a lack of control over the client’s worksite. For example, an employer would have no way of knowing if, indeed, the posting . . . was properly placed at all.”); *H1B Compliance: LCA Posting Notices, Why and Where?*, MURTHY L. FIRM (May 15, 2009), http://www.murthy.com/news/n_h1lcan.html (noting that it is sometimes difficult to impress upon clients hosting H-1B workers the importance of complying with LCA requirements, and detailing the penalties for failure to comply).

84. See Gordon, *supra* note 70, at 193 (“Delays using the DOL iCert system make timing issues particularly important.”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 22, at 25 (noting that timing is important to IT consulting firms because they often render services to clients on short notice).

85. See Gordon, *supra* note 70, at 193, 196 (noting the delay between filing of an LCA and a decision, and that when an employee works at multiple locations, there must be an LCA to cover each worksite); see also FRAGOMEN ET AL., *supra* note 14, § 2:105 (“If the H-1B worker is placed at additional locations outside of one of the areas of intended employment listed on the original LCA, the general rule is that the employer must file a new LCA covering those new locations.”).

86. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 22, at 25 (reporting the statement of an IT consulting executive that clients often need services on short notice); see also AILA Memo, *supra* note 9, at 6–7 (noting that IT consultants provide consulting services when and how a client needs them, and that they help to “quickly ramp-up new projects with skilled resources”).

87. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *H-1B BENEFIT FRAUD & COMPLIANCE ASSESSMENT* (2008) (finding an overall violation rate of 20.7%, which is composed of a fraud rate of 13.4% and a technical violation rate of 7.3%); see also Thibodeau, *supra* note 27 (“[T]he USCIS used a random sample of 246 cases drawn from a pool of nearly

scrutiny of H-1B applications marked by a surge in the number of Request for Additional Evidence notices (“RFEs”) issued to H-1B petitioners.⁸⁸

In January 2010, the USCIS Associate Director of Service Center Operations, Donald Neufeld, issued a memorandum targeting the practice of placing employees at third-party worksites.⁸⁹ The Neufeld Memo was issued after US Senator Charles Grassley wrote a letter to the Assistant Secretary of Immigration and Customs Enforcement of the US Department of Homeland Security, John Morton, pressuring him to address H-1B visa fraud, providing as an example a body shop that was prosecuted in Senator Grassley’s home state of Iowa.⁹⁰ Based on the Neufeld Memo, the USCIS has denied some H-1B visa petitions from employers who place employees at third-party worksites because of concerns about whether there is a valid employer-employee relationship between the petitioning IT consulting company and the non-US worker.⁹¹ Immigration regulations define a “United States employer” as an employer that, among other characteristics, has an employer-employee relationship “as indicated by the fact that it may hire, pay, fire, supervise, or

100,000 and found 51 with problems ranging from fraud to ‘technical violations,’ which can be something as small as a mistake in the application.”).

88. See *H-1B Visas Hearing*, *supra* note 6, at 8 (statement of Donald Neufeld, Associate Director of Service Center Operations, U.S. Citizenship and Immigration Services) (reporting the findings of the fraud study and stating that, in response, the USCIS issued a memorandum that provided instructions for the issuance of Requests for Additional Evidence notices (“RFEs”)); see also Tewary, *supra* note 12 (providing as examples of information requested in RFEs: employment agreements, human resource records, and tax filings); Thibodeau, *supra* note 27 (“The findings . . . were enough to prompt the USCIS to increase its scrutiny of H-1B visa applications through ‘request[s] for evidence.’”).

89. See Neufeld Memo, *supra* note 7, at 1 (“This memorandum is intended to provide guidance, in the context of H-1B petitions, on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.”).

90. See *Grassley Pushes Immigration Authorities to Hold Employers Accountable for H-1B Visa Fraud*, UNITED STATES SENATOR CHUCK GRASSLEY (Nov. 6, 2009), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=24002 (providing a copy of Senator Grassley’s letter to Immigration and Customs Enforcement, which drew attention to cases of H-1B fraud); see also Drumm et al., *supra* note 9, at 155 (noting Senator Grassley’s criticism of the USCIS when discussing the Neufeld Memo’s origin).

91. See Drumm et al., *supra* note 9, at 155 (“AILA liaison reports that the USCIS . . . Service Centers are issuing denials based upon the Neufeld memo.”); Tewary, *supra* note 12 (noting that “H-1B petitions are being denied for lack of end-client documentation”).

otherwise control the work of any such employee.”⁹² The Neufeld Memo further defines “control” within the employer-employee relationship using the “right to control” test, which governs interpretation of the term “employer-employee relationship” in other areas of the law.⁹³ The interpretation states, in short, that in order to establish a valid employer-employee relationship, the employer must have a right to control the major functions of the employment, such as where, when, and how the assigned tasks are performed.⁹⁴ As a result of this altered definition, many employers who had previously filed successfully for employees have either been asked to provide extensive additional documentation, or have had their petitions denied altogether.⁹⁵

The Neufeld Memo supplies an example of an impermissible “Third-Party Placement/‘Job Shop’” employer-employee relationship in which the H-1B petitioner company provides IT staff to client companies on an as-needed basis.⁹⁶ In the hypothetical scenario, the H-1B worker is a computer analyst, but is assigned to a position maintaining the client company’s payroll.⁹⁷ The H-1B worker reports to the client company for work assignments, the petitioning company does not control the H-1B worker’s daily schedule, and the client company conducts the worker’s progress reviews.⁹⁸ This scenario is impermissible under the Neufeld Memo because of the petitioner’s lack of right to control and failure to actually exercise control.⁹⁹

92. 8 C.F.R. § 214.2(h)(4)(ii) (2012) (defining employer-employee relationship in the context of a specialty occupation in the H-1B category). For the definition of specialty occupation, see *supra* note 18.

93. Neufeld Memo, *supra* note 7, at 3 (describing the right of control test as it applies to the employer-employee relationship).

94. See *id.* (asserting that an employer must have the “right of control over when, where, and how the beneficiary performs the job” (footnote omitted)); see also Tewary, *supra* note 12 (stating that the Neufeld Memo requires IT consulting firms to demonstrate that they maintain control over their workers in third-party placements).

95. See AILA Memo, *supra* note 9, at 7–8 (“After many routine extensions, an employer of such a worker may find that it does not satisfy the dictates of the Neufeld Memo, particularly the misconstrued ‘right to control’ element. A key worker on a client project may be summarily sent home”); see also Leopold, *supra* note 58 (fearing the advent of a “slew of kitchen-sink RFE’s [sic]”).

96. See Neufeld Memo, *supra* note 7, at 6–7 (noting that in the example, the petitioner has no right of control over the employee, nor any actual exercise of control).

97. See *id.* at 6 (describing a hypothetical H-1B third-party placements scenario).

98. See *id.* at 7 (detailing the work assignments and performance review of the hypothetical employee).

99. See *id.* (noting the control problems in the described scenario).

While the Neufeld Memo describes certain types of permissible third-party placements, the practical result of the altered interpretation of “employer-employee relationship” is that any company using third-party placements may encounter difficulties in processing H-1B petitions.¹⁰⁰ The H-1B visa application form, the I-129, has been revised to inquire whether the employee will work off-site.¹⁰¹ If the employment situation is such that the existence of an employer-employee relationship may be in question, the employer must submit extensive evidence proving the relationship.¹⁰² This evidence could include the employment agreement between the consulting firm and the employee, the employee’s itinerary of work assignments, an employment letter describing the nature of the relationship, contracts or work orders between the IT consulting firm and its client confirming the firm’s right to control its employees, a description of the performance review process, and a copy of the IT consulting firm’s organizational chart.¹⁰³ One practitioner noted that H-1B petition packets “can be as thick as five inches.”¹⁰⁴ Prior to the Neufeld Memo, an employer placing an H-1B employee off-site and wishing to extend H-1B status needed only to submit (along with the petition form and LCA) form I-94 as proof of the employee’s current status, a letter describing the employment, and copies of the

100. See Drummond, *supra* note 74, at 73 (noting that it has become more difficult to sponsor workers assigned to “off-site” locations); see also AILA memo, *supra* note 9, at 4–6 (listing other types of employers that also use off-site placement whose practices are threatened, such as physicians, government contractors, and entrepreneurs).

101. See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., OMB No. 1615-0009, I-129, PETITION FOR A NONIMMIGRANT WORKER 4 (2011), available at <http://www.uscis.gov/files/form/i-129.pdf> (inquiring whether the employee will work off-site); see also *New I-129 Taunts Consulting Firms*, *supra* note 82 (stating that the USCIS released a new form I-129 on November 23, 2010).

102. See Austin T. Fragomen & Careen Shannon, *New USCIS Guidance Imposes Enhanced H-1B Evidence Requirements and Eligibility Standards*, IMMIGR. BUS. NEWS & COMMENT, Feb. 1, 2012, at 2 (listing various kinds of evidence that may be submitted to prove the employer-employee relationship); see also FRAGOMEN ET AL., *supra* note 14, § 1:41 (describing the types of employment that trigger the evidentiary requirement).

103. See Fragomen & Shannon, *supra* note 102, at 2 (noting the evidence required to prove employer-employee relationship, and separately describing the work itinerary required for those working at multiple worksites); see also FRAGOMEN ET AL., *supra* note 14, § 1:18(4) (listing the evidence required to establish an employer-employee relationship).

104. Thibodeau, *supra* note 27 (quoting White & Case attorney Marko C. Maglich, a labor, employment, and immigration law practitioner); see AILA Memo, *supra* note 9, at 2 (recognizing that employers will now have to spend a significant amount of time and money to gather the necessary evidence to file an H-1B petition).

employee's last two pay stubs and W-2 forms.¹⁰⁵ After the Neufeld Memo, these employers also must submit evidence of the continuing employer-employee relationship, including time sheets and work schedules, examples of the employee's work product, copies of performance reviews, and other employment records such as documentation of promotions, raises, and transfers.¹⁰⁶ If a company does not submit this information, the petition may be denied, or processing may be delayed in order to issue an RFE.¹⁰⁷

The itinerary requirement may be the most problematic for IT consulting firms.¹⁰⁸ The employer must submit an itinerary to cover the validity period requested on the H-1B petition, and it must include the dates of each service or engagement that the employee will perform for a client, the names and addresses of the clients, and the actual locations where the services are to be performed.¹⁰⁹ Some IT

105. See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., OMB NO. 1615-0009, INSTRUCTIONS FOR FORM I-129, PETITION FOR A NONIMMIGRANT WORKER 17 (defunct) (on file with author) (describing the filing requirements to renew an H-1B visa before the November 2010 update). Other evidence, such as documentation of continued licensing, may be required for other types of employment, but are inapplicable in the present scenario. See *id.* at 17–18. For a definition of W-2, see BLACK'S LAW DICTIONARY, *supra* note 53, at 1355 (“A statement of earnings and taxes withheld . . . during a given tax year.”).

106. See Neufeld Memo, *supra* note 7, at 9 (describing the types of evidence that a petitioner could submit to establish an employer-employee relationship); see also Fragomen & Shannon, *supra* note 102, at 2 (listing evidence required to file an H-1B extension including evidence as to whether the employer-employee relationship existed during the previous period of stay, and whether that relationship will continue in the extended period); FRAGOMEN ET AL., *supra* note 14, § 4:10 (“In light of the new guidance, employers have seen an increase in the kinds of documentation they will need to provide in initial petitions and extensions.”).

107. See FRAGOMEN ET AL., *supra* note 14, § 1:42 (noting that the heightened evidentiary requirements will essentially allow the USCIS to readjudicate cases resulting in possible termination of status, and noting that RFEs citing the memo have been reported); see also Drumm et al., *supra* note 9, at 155 (stating that those who do not adjust to the new evidentiary requirements will be “punished” with RFEs and denials).

108. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 22, at 25 (reporting that this requirement causes difficulties for IT firms because they “often cannot have a contract in place because they provide labor on short notice to their client firms”); *The Irritating Itinerary: Documenting Employee Work for a Full 3 Year Period*, BUS. IMMIGR. MONTHLY—HAMMOND L. GROUP, <http://www.hammondlawfirm.com/monthly/featured-article-february-2010.pdf> (last visited Apr. 20, 2012) [hereinafter *The Irritating Itinerary*] (noting that previously an employer could provide only a partial itinerary of employment and still qualify for a full three-year H-1B visa, but that recently the USCIS has begun to limit the validity of the H-1B issue to the time shown on the itinerary).

109. See Neufeld Memo, *supra* note 7, at 8 (providing guidance for enforcing the itinerary requirement); see also *The Irritating Itinerary*, *supra* note 108 (describing the itinerary requirements).

consulting firms are hired by their clients under renewable short-term contracts.¹¹⁰ The USCIS may decide to grant the employee H-1B status only for the duration of the documentable client contract, rather than the maximum three years.¹¹¹ Additionally, if the IT consulting firm assembles a long-term itinerary based on anticipated projects and work flow, but the actual course of employment differs substantially from this projection, the firm could potentially encounter problems if it is audited or when attempting to renew the visa.¹¹²

Immigration attorneys and IT consulting companies have challenged the Neufeld Memo and its ramifications.¹¹³ The American Immigration Lawyers Association (“AILA”) drafted a response memorandum (“AILA Memo”) questioning the validity of the changed policy.¹¹⁴ AILA’s primary argument is that the H-1B regulation already lists factors for the evaluation of the employer-employee relationship, and that the Neufeld Memo imposes new factors in excess of the regulatory requirements for determining

110. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 22, at 25 (describing the issue of business contracts not meeting the requirements of the USCIS); see also *The Irritating Itinerary*, *supra* note 108 (noting that some employers operate on a continuously renewing ninety-day contract, and therefore receive an approval notice for only ninety days rather than three years).

111. See FRAGOMEN ET AL., *supra* note 14, § 1:40 (“The Neufeld memo adopts a strict interpretation of the H-1B itinerary requirement . . . authorizing employment only in locations listed in the detailed itinerary and only for the period of time listed in the itinerary.”); see also *The Irritating Itinerary*, *supra* note 108 (recognizing the possibility that an H-1B visa will be approved for less than the full three years).

112. See FRAGOMEN ET AL., *supra* note 14, § 1:40 (stating that according to the Neufeld Memo, the employer must have a complete and detailed itinerary, and that consulting firms that cannot meet the requirement will have H-1B visas of shorter duration and have to file more extensions and amended petitions for later work assignments); cf. Austin T. Fragomen & Careen Shannon, *Addressing Off-Site, LCA Compliance and Itinerary Questions on the New Form I-129*, IMMIGR. BUS. NEWS & COMMENT, Feb. 1, 2011, at 20 (noting that the itinerary can be based on reasonable estimations of work locations and durations; however, if the estimations prove to be “largely inaccurate, without reasonable cause or explanation,” the employer could encounter problems in an inspection or when attempting to renew the H-1B).

113. See generally *Broadgate* Complaint, *supra* note 16 (filing a lawsuit challenging the Neufeld Memo on many of the same grounds as the AILA Memo); AILA Memo, *supra* note 9 (challenging the authorization to issue the Neufeld Memo as well as the legality of its contents).

114. See generally AILA Memo, *supra* note 9 (contradicting the Neufeld Memo’s provisions on both legal and policy grounds). The American Immigration Lawyers Association is a national association of legal professionals who practice and teach immigration law. See *About AILA*, AM. IMMIGR. LAWYERS ASS’N, <http://www.aila.org/content/default.aspx?docid=1021> (last visited Apr. 20, 2012).

whether an employer-employee relationship exists.¹¹⁵ Furthermore, AILA argues that the change is unlawful because it is a significant change in prior practice without conforming to the proper procedures.¹¹⁶ It is within the USCIS's power to make policy or regulatory changes, but the Administrative Procedure Act ("APA") requires that notice of the proposed change be published in the US Federal Register and that the public be permitted to submit their comments on the new policy; such a notice and comment process was not employed here.¹¹⁷

In *Broadgate Inc. v. U.S. Citizenship & Immigration Services*, a group of IT consulting firms that experienced difficulties in obtaining H-1B visas after the release of the Neufeld Memo filed a lawsuit against the USCIS, challenging the memorandum's legality on many of the same grounds as the AILA Memo.¹¹⁸ The complaint detailed how each plaintiff company complied with each factor listed in the H-1B regulations for employer-employee relationship: that they may hire, pay, fire, and exercise supervision and control over their employees.¹¹⁹ Additionally, the plaintiffs acknowledged that they shared supervision and control of their employees with their clients, but that they maintained the right to exercise these controls.¹²⁰ The

115. See AILA Memo, *supra* note 9, at 2 (citing the H-1B regulation's definitions of United States employer and employer-employee relationship, and challenging the Neufeld Memo's assertion that the H-1B regulation lacks clear definitions of these terms).

116. See *id.* at 10 (denying the USCIS's power to make a "significant change in prior regulation, policy and practice" without abiding by the rulemaking process).

117. 5 U.S.C. § 553 (2006) (requiring that any proposed rule be published in the Federal Register, and that any interested parties may submit written comments on the proposed rule); see AILA Memo, *supra* note 9, at 10 ("The Neufeld Memo constitutes a significant change in prior regulation, policy and practice, without the appropriate notice and comment required by the rulemaking process under the Administrative Procedure Act.").

118. See *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 242 (D.D.C. 2010) ("Plaintiffs argue . . . that the Neufeld Memorandum establishes a different standard from [8 C.F.R. § 214.2] control test, and therefore constitutes a new, binding rule. Because the Memorandum was not issued in accordance with the [Administrative Procedure Act's] procedures for agency rulemaking . . ."). To compare the plaintiffs' arguments in *Broadgate* to AILA's primary argument, see *supra* note 115 and accompanying text (elaborating on AILA's arguments against the Neufeld Memo).

119. See *Broadgate* Complaint, *supra* note 16, *passim* (evaluating each party's business practices in turn for conformity with the H-1B statute).

120. See *id.* at 11 ("[Plaintiffs] hire, pay, fire, supervise, provide benefits and provide direction to employees and have the right to control and in fact share control of the employee with the client."); cf. Neufeld Memo, *supra* note 7, at 3 n.6 (noting that "[a]n employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary").

plaintiffs alleged that the Neufeld Memo violated the APA's notice-and-comment procedures.¹²¹ In order for a court to have jurisdiction over an agency action under the APA, the action must be final and binding.¹²² The court held that the action in question was a memorandum intended to provide guidance to adjudicating officers, and was not final and binding.¹²³ The complaint was therefore dismissed, and the Neufeld Memo stands.¹²⁴

3. Costs of H-1B Barriers and the Potential Effects on the US Economy

The LCA and H-1B processes were already costly to IT consulting firms in terms of both time and money, but as additional barriers are created, the cost of H-1B visas may begin to eclipse the benefits.¹²⁵ IT consulting firms must now gather the additional evidence needed, pay additional attorneys' fees for a more extensive H-1B application and potential RFEs, and forfeit H-1B application fees if the petition is denied.¹²⁶ In addition, when key employees' petitions are delayed or denied, important projects at IT consulting firms are interrupted and that disruption, in turn, causes delays and additional costs to client corporations.¹²⁷ A US Government

121. See *Broadgate* Complaint, *supra* note 16, at 13–14 (noting that the USCIS did not follow the procedures of the Administrative Procedure Act (“APA”) when introducing the Neufeld Memo).

122. Administrative Procedure Act, 5 U.S.C. § 704 (2006) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”); see *Broadgate*, 730 F. Supp. 2d at 243 (“[T]he challenged agency action must be ‘final.’”).

123. See *Broadgate*, 730 F. Supp. 2d at 247 (“[T]he Memorandum does not constitute final agency action subject to judicial review and the notice and comment requirements under the APA.”).

124. See *id.* (dismissing the lawsuit with prejudice); see also FRAGOMEN ET AL., *supra* note 14, § 1:42 (“Unless the decision is reversed on appeal or USCIS rescinds the memo of its own accord, the Neufeld memorandum remains in effect.”).

125. See *supra* notes 73–85 and accompanying text (describing the costs, both monetary and temporal, of the LCA application process).

126. See AILA Memo, *supra* note 9, at 2–3 (discussing the additional paperwork burden for H-1B applicants as well as the financial and temporal commitment required to gather the required, assemble, and submit the required evidence); *Refund of Fees*, ADJUDICATOR'S FIELD MANUAL—U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1740.html> (last visited Apr. 20, 2012) (“In general, USCIS does not refund a fee or application regardless of the decision on the application.”).

127. See AILA Memo, *supra* note 9, at 8 (noting that the USCIS may hinder the client companies if a key H-1B employee on a client project is sent home); see also *H1B Memo on Employer-Employee Relationships and 3rd-Party Placements*, MURTHY L. FIRM (Jan. 22,

Accountability Office (“GAO”) report surveyed H-1B employers and found that IT service firms, which include IT consulting firms, were more likely than any other industry to respond that they either had or would move their operations offshore because of difficulty in securing qualified employees.¹²⁸ Some executives of US IT consulting companies with offices abroad reported sending a higher proportion of work to overseas offices because of labor shortages in the United States.¹²⁹

The IT industry, and specifically the IT consulting industry, is one of the fastest-growing areas in the US economy.¹³⁰ After the 2000 dot-com bubble burst, growth in the IT industry slowed.¹³¹ As the industry recovered, growth in the IT industry shifted away from technology production to services such as IT consulting.¹³² Since that

2010), http://www.murthy.com/news/n_e-erel.html (stating that if the IT consulting industry is disrupted, end-clients would have to adjust their business model regarding how short- and medium-term IT needs are met).

128. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 22, at 24–25 (reporting the tendency of IT staffing firms to move business offshore in the context of the H-1B cap, but further finding that the Neufeld Memo affected the companies’ decisions regarding the proportion of work shipped overseas).

129. See *id.* at 25 (reporting that while many IT executives expanded the portion of their work conducted overseas, executives that did not have an office abroad were opening or considering opening one).

130. See *Occupational Outlook Handbook, 2012–13 Edition: Projections Overview*, *supra* note 12 (“Employment in the information sector is projected to increase by 5 percent, adding 140,300 jobs by 2020. . . . Employment in computer systems design and related services is expected to increase by 47 percent. . . . Employment in management, scientific, and technical consulting services is anticipated to expand, at 58 percent.”); see also *supra* notes 24–25 (describing the increased demand for IT workers and the concurrent rapid growth of the industry).

131. See Dale W. Jorgenson et al., *Information Technology and US Productivity Growth: Evidence from a Prototype Industry Production Account*, in *INDUSTRIAL PRODUCTIVITY IN EUROPE: GROWTH AND CRISIS* 35, 45 (Matilde Mas & Robert Stehrer eds., 2012) (tracing the course of the IT services industry before and after the dot-com crash of 2000). The dot-com bubble grew throughout 1990s marked by a steep rise in the value of technology stocks until, starting on March 10, 2000, the stocks suddenly and drastically devalued. See Jorn Madslie, *Dotcom Bubble Burst: 10 Years On*, BBC NEWS (Mar. 9, 2010, 11:27 PM), <http://news.bbc.co.uk/2/hi/business/8558257.stm> (describing the formation and rupture of the dot-com bubble); see also Rachel Konrad & Sam Ames, *Market Turmoil Shakes World of Dot-Com Investors*, CNET NEWS (July 4, 2000, 11:00 AM), http://news.cnet.com/Market-turmoil-shakes-world-of-dot-com-investors/2100-1017_3-242698.html (detailing the aftermath of the dot-com bubble burst).

132. See Jorgenson et al., *supra* note 131, at 45 (describing how the share of IT capital input in the IT producing industries, such as manufacture of computer hardware and semiconductors, dramatically decreased since 2000, and shows no sign of recovery, but that the IT services industry continuously increased its share of IT capital input throughout the 1990s and has continued to do so after the dot-com crash); see also *Outlook Handbook, 2012–*

time, the IT services industry has continued to grow substantially.¹³³ The professional, scientific, and technical consulting services industry is projected to be the fastest-growing industry between 2010 and 2020.¹³⁴ As the United States recovers from the 2008 recession, the US Bureau of Labor Statistics projects that employment growth in professional, scientific, and technical consulting services will expand at a rate of twenty-nine percent, with demand for advice regarding implementation of new technology among the primary drivers of this growth.¹³⁵

Not only does the IT industry itself play a significant role in the US economy, but many other US industries depend on the IT industry to facilitate their operations.¹³⁶ In 1965, IT comprised less than five percent of US corporations' capital expenditures; by 2000, that figure had grown to more than fifty percent.¹³⁷ The IT industry has been recognized as vital to the growth of all industries because of the applicability of its work product to many sectors of the economy.¹³⁸

Although the United States has long been a world leader in technology-related goods and services, Europe and Asia have become increasingly competitive in the world market.¹³⁹ In the area of

13 Edition: *Projections Overview*, *supra* note 12 (noting that the US economy in general has shifted away from goods-producing industries and toward service-providing industries, and expecting that trend to continue).

133. See Jorgenson et al., *supra* note 131, at 45 (“The IT-service industries . . . have resumed the growth that was interrupted by the dot-com crash of 2000.”).

134. See *Outlook Handbook, 2012–13 Edition: Projections Overview*, *supra* note 12 (projecting that the management, scientific, and technical consulting services industry will grow by fifty-eight percent over the next eight years).

135. See *id.* (predicting the employment growth of the industry sector, and listing implementation of technology among several factors primarily driving the growth).

136. See Jorgenson et al., *supra* note 131, at 36 (“[T]he long-run growth of the economy depends critically on the performance of a relatively small number of sectors, such as agriculture and computers, where innovation takes place.”); see also NAT’L SCI. BD., SCIENCE AND ENGINEERING INDICATORS 2010, ch. 6, at 13 (2010), available at <http://www.nsf.gov/statistics/seind10/pdf/seind10.pdf> (“[IT] is regarded as crucial for the growth of today’s knowledge-based economies in much the same way that earlier general-purpose technologies (the steam engine, metal forging, and automatic machinery) were crucial for growth during the Industrial Revolution.”).

137. See NICHOLAS G. CARR, DOES IT MATTER? INFORMATION TECHNOLOGY AND THE CORROSION OF COMPETITIVE ADVANTAGE 4 (2004) (citing a study from the Bureau of Economic Analysis in the US Department of Commerce).

138. See NAT’L SCI. BD., *supra* note 136, ch. 6, at 13 (“[IT] has been identified by many economists and policymakers as vital for national economic growth and the competitiveness of all industries.”).

139. See NAT’L SCI. BD., *supra* note 136, Overview at 3 (discussing that the United States has long been a leader in sciences and technology but is losing ground to Asia and

information and communication technology services and manufacturing, Europe has already matched the United States at twenty-seven percent of the global market share, while China has increased its market share from four percent to twelve percent between 1995 and 2007.¹⁴⁰ Many countries, including France, Germany, Ireland, Sweden, and the United Kingdom, have introduced simplified admission schemes to attract highly skilled workers, particularly in the IT industry.¹⁴¹

In 2007, France enacted an immigration law that requires the government to maintain a list of professions that should have streamlined admission processes in order to attract skilled workers; technology-related occupations are among the fourteen listed categories.¹⁴² On the continental level, the Council of the European Union passed a directive in 2009 instituting a Blue Card, which will be valid for between one and four years, to allow highly skilled workers to travel and work in any of the participating countries.¹⁴³

Europe, specifically in the area of high technology); *see also* TASK FORCE ON THE FUTURE OF AM. INNOVATION, THE KNOWLEDGE ECONOMY: IS THE UNITED STATES LOSING ITS COMPETITIVE EDGE? 1 (2005) (“[I]n today’s rapidly evolving competitive world, the United States can no longer take its supremacy for granted. Nations from Europe to Eastern Asia are on a fast track to pass the United States in scientific excellence and technological innovation.”).

140. *See* NAT’L SCI. BD., *supra* note 136, ch. 6, at 4 (providing an overview of the report’s findings regarding the global economic shifts in knowledge- and technology-intensive industries).

141. *See* Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 186 (2006) (noting the efforts of various European countries, such as France, Germany, Ireland, Sweden, and the United Kingdom, to attract skilled workers due to the “rapid rise of the knowledge economy”); *see also* ORG. FOR ECON. CO-OPERATION & DEV., POLICY BRIEF: INTERNATIONAL MOBILITY OF THE HIGHLY SKILLED 6 (2002) (describing how various countries have lowered migration barriers for skilled workers, particularly in high-technology fields, including France, Germany, and the United Kingdom).

142. Loi 2006-911 du 24 juillet 2006 relative à l’immigration et à l’intégration [Law 2006-911 on Immigration and Integration], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 25, 2006, p. 11047; *see* Kara Murphy, *France’s New Law: Control Immigration Flows, Court the Highly Skilled*, MIGRATION POL’Y INST. (Nov. 2006), http://www.migrationpolicy.org/pubs/Backgrounder2_France.php (describing the French law); *see also* *Maîtriser les Flux Migratoires: Liste des “14 Métiers en Tension,”* L’IMMIGRATION, L’INTÉGRATION, L’AISLE ET LE DÉVELOPPEMENT SOLIDAIRE, http://www.immigration.gouv.fr/spip.php?page=dossiers_det_imm&num_rubrique=286&numarticle=1409 (last visited Apr. 20, 2012) (listing the fourteen professions eligible for streamlined application, including “[i]ngénieur production et exploitation des systèmes d’information” [engineer for production and operation of information systems]).

143. *See generally* Council Directive 2009/50/EC on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment,

The goal of the program is to provide a harmonized admission program to attract highly skilled workers, while still respecting the individual countries' rights to determine their own immigration laws.¹⁴⁴ In this highly competitive environment, the United States' decision to complicate the entry of skilled workers for the IT consulting industry is questionable.¹⁴⁵

In sum, as the IT consulting industry has developed over the years, it has grown in significance to the US economy, developed a business model that requires employees to work at client worksites, and grown to rely on H-1B visas. It also saw the emergence of the subpractice of body shopping that abuses the H-1B program. In response to this abuse, the United States instituted policies that have made it difficult, if not impossible, for employers to place H-1B workers at third-party worksites, affecting not only body shops but the IT consulting industry at large.

II. ALTERNATIVE APPROACHES TO CONSIDER

The issue confronting US policymakers today is how to create an H-1B policy that restricts abusive practices, such as body shopping, while still allowing the IT consulting industry to grow and contribute to the US economy's recovery. Part II examines solutions suggested

2009 O.J. L 155/17 [hereinafter Highly Qualified Employment Directive] (laying out the requirements of the Blue Card system and directing that participating countries—all EU countries except Denmark, Ireland, and the United Kingdom—enact the necessary domestic legislation by June 19, 2011); *cf.* Leo Cendrowicz, *A Green Light for Europe's Blue Card*, TIME, Oct. 24, 2007, <http://www.time.com/time/world/article/0,8599,1674962,00.html> (noting the European Commission's concern regarding shortages of skilled workers in several areas, including information technology).

144. *See* Highly Qualified Employment Directive, *supra* note 143, ¶ 11, at 18 (“This Directive aims only at defining the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment within the EU Blue Card system . . . This Directive fully respects the competences of Member States, particularly on employment, labour and social matters.”); *cf.* Cendrowicz, *supra* note 143 (quoting European Union (“EU”) Commission President José Manuel Barroso saying, “[a]t the moment, most highly skilled workers go to Canada, the United States and Australia . . . Why? Because we have 27 different and conflicting procedures in the E.U.”).

145. *See* INT'L INST. FOR LABOUR STUDIES, INT'L LABOUR ORG., *COMPETING FOR GLOBAL TALENT 12* (Christiane Kuptsch & Pang Eng Fong eds., 2006) (“Countries which fail to attract foreign talents and skills risk not only falling behind in the global competition for new intelligent products and services, but also maintaining the standards of living their populations have been used to.”); *Let Them Come*, ECONOMIST, Aug. 27, 2011, at 14 (recognizing that countries tend to limit business immigration during an economic downturn, but questioning that tendency in light of evidence that immigrant workers encourage productivity and innovation, and competition may draw those workers to other countries).

by IT industry leaders, legal commentators, government officials, and the examples set by Australia and Canada. Parts II.A.1 through II.A.3 discuss commentators' opinions of third-party placements, the example Australia sets in addressing third-party placements, and the comments of industry leaders, respectively. Parts II.B.1 and II.B.2 discuss the example Canada sets in addressing LCAs, and the US government's suggestions for improving the LCA program.

A. *Addressing Third-Party Placements*

The following are policy and practice suggestions to address the difficulty of placing H-1B employees at third-party worksites.

1. Third-Party Placements: Commentators' Views

Some commentators have argued that the US Congress should change the H-1B section of the Immigration Act of 1990 ("H-1B statute") to completely disallow third-party placements.¹⁴⁶ Proponents of this suggestion argue that permitting third-party placements of H-1B workers is a loophole that needs to be closed.¹⁴⁷ They suggest using as a model the US Congress' amendment of the L-1 visa statute's language to disallow third-party placements.¹⁴⁸ L-1 visas allow the employment of highly skilled workers in specialty occupations, but they differ from H-1Bs in that the employee must already have been an employee of the sponsoring company abroad, and that the employment in the United States must result from an

146. See Beach, *supra* note 48, at 293 (supporting the proposition to amend the H-1B statute to disallow contracting employees to other companies); see also Goodsell, *supra* note 62, at 171 (advocating that language be added to the H-1B statute forbidding the placement of workers with unaffiliated employers).

147. See Beach, *supra* note 48, at 286 (stating that body shops operate through a statutory loophole); see also Goodsell, *supra* note 62, at 171 (referring to elimination of third-party placements in the L-1 visa as closing a loophole and advocating that the same solution should apply to the H-1B program).

148. See L-1 Visa (Intracompany Transferee) Reform Act of 2004, Pub. L. 108-447, § 412(a), 118 Stat. 3351, 3352 (2004) (codified as amended in scattered sections of 8 U.S.C.) (amending the L-1 statute to no longer allow L-1 holders to be "stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent" if the worker would be controlled primarily by the unaffiliated employer or if the placement with the unaffiliated employer has nothing to do with the specialized knowledge of the worker); see also Beach, *supra* note 48, at 293-94 (describing the L-1 statutory amendment and advocating for the same result for the H-1B program); Goodsell, *supra* note 62, at 171 (describing the changes to the L-1 statute and noting that "[a] similar solution could be applied to the H-1B program").

intracompany transfer.¹⁴⁹ With the L-1 Visa (Intracompany Transferee) Reform Act of 2004, Congress amended the language of the L-1 visa statute to preclude use of the visa for any transferee who would be stationed at a third-party worksite.¹⁵⁰ Commentators suggest that similar wording could be added to the H-1B statute in order to curb the practice of body shopping.¹⁵¹ Opponents of this suggestion argue that L-1 and H-1B visas serve different purposes, so while this revision may be appropriate for L-1 visas, it is inappropriate for H-1B visas.¹⁵² In US Senator Saxby Chambliss's statement accompanying the introduction of the L-1 Visa (Intracompany Transferee) Reform Act of 2004, the Senator noted that placing employees at third-party worksites is more appropriate for an H-1B visa than an L-1 visa.¹⁵³ The L-1 Visa Reform Act also amended the H-1B statute adding an additional fee for new applicants, unrelated to third-party placements.¹⁵⁴ By amending both statutes and banning third-party

149. 8 U.S.C. § 1101(a)(15)(L) (2006) (requiring an L-1 holder to have worked continuously for one year for a company abroad and who seeks to continue to work for the same company in the United States in a managerial, executive, or specialized capacity); see FRAGOMEN GLOBAL, *supra* note 13, § 20:17 (noting that the employee must have been employed outside the United States for at least a year, must have been a manager, executive, or held a position involving specialized knowledge, and will work in the United States in the same capacity).

150. L-1 Visa (Intracompany Transferee) Reform Act of 2004 § 412(a) (disallowing the use of the L-1 visa for workers stationed at the worksite of another company).

151. See Beach, *supra* note 48, at 290, 292–94 (praising the Neufeld Memo as a “step in the right direction” but cautioning that its application is limited because it states that it is only a guidance memo, and further suggesting that language similar to the L-1 amendment be adopted in the H-1B statute); see also Goodsell, *supra* note 62, at 171 (suggesting that language be added to the H-1B statute to forbid labor for hire arrangements).

152. See AILA Memo, *supra* note 9, at 8–9 (citing US Senator Saxby Chambliss' commentary that placing an L-1 visa holder at a third-party worksite is inappropriate because the purpose of transferring an L-1 holder from abroad is that he or she has specialized knowledge of his or her own company, not a third company; such third-party placement is more appropriate in the H-1B category); see also Andrew M. Wilson, *Recent Changes in Employment-Based US Immigration Law: Current Challenges Facing US Employers Who Sponsor Foreign National Employees*, in EMPLOYING INTERNATIONAL WORKERS: LEADING LAWYERS ON NAVIGATING COMPLIANCE REQUIREMENTS, UNDERSTANDING CHANGING VISA RESTRICTIONS, AND LEVERAGING THE LATEST TECHNOLOGY 127, 138 (2011) (analyzing the AILA Memo's argument and reaching the same conclusion).

153. See 149 CONG. REC. S11,686 (daily ed. Sept. 17, 2003) (statement of Sen. Saxby Chambliss) (describing third-party placements of L-1 workers and saying that “if the L-1 employee does not bring anything more than generic knowledge of the third party company's operations, the foreign worker is acting more like an H-1B professional than a true intracompany transferee”).

154. See L-1 Visa (Intracompany Transferee) Reform Act of 2004 § 426 (imposing a fraud prevention and detection fee on initial applications for H-1B and L-1 visas).

placements for L-1s, but not for H-1Bs, Congress demonstrated that it recognizes a difference between L-1 and H-1B visas such that third-party placements are appropriate for H-1Bs but not L-1s.¹⁵⁵ Opponents of amending the H-1B statute argue that third-party placements in the H-1B program was legislatively intended, as other sections of the law make reference to H-1B third-party placements in other contexts.¹⁵⁶ LCA regulations require that H-1B-dependent employers and willful violators make more attestations than other petitioners, including an attestation that no US employees will be displaced from a third-party worksite where the H-1B worker will be placed.¹⁵⁷ These commentators suggest that because other regulations mention third-party placements of H-1B workers, it must have been legislatively intended, so third-party placements of H-1B workers should not be eliminated.¹⁵⁸

2. Third-Party Placements: Australia's Example

Australia's high skill employment visa program seeks to protect domestic worker interests and prevent exploitation of visa holders, including body shopping.¹⁵⁹ Under Australia's Employer Nomination

155. See AILA Memo, *supra* note 9, at 8–9 (explaining that Congress was aware of third-party placements in both the L-1 and H-1B visas, and chose to prohibit it only with respect to L-1s); see also Wilson, *supra* note 152, at 138 (“Congress reviewed the H-1B category at the same time [as the L-1 category], but it clearly decided not to [prohibit third-party placements] within the H-1B context.”).

156. See AILA Memo, *supra* note 9, at 8 (“Regulations of the Department of Labor explicitly contemplate third-party placement arrangements”); see also *Gearing up for FY2011 H-1B Filings: USCIS Stops Allowing Filings with Uncertified LCAs and AILA Protests Neufeld Memo*, INSIGHTFUL IMMIGR. BLOG–COMMENT. ON IMMIGR. POL’Y, CASES & TRENDS: CYRUS D. MEHTA & ASSOCIATES, PLLC (Mar. 19, 2010), <http://cyrusmehta.blogspot.com/2010/03/gearing-up-for-fy2011-h-1b-filings.html> (asserting that the DOL and Congress expressed intent to permit third-party placements for H-1B holders in laws and regulations).

157. 20 C.F.R. § 655.738 (2012) (“An employer that is subject to [the] additional attestation obligations [as an H-1B-dependent employer or willful violator] . . . is prohibited from displacement of any U.S. worker(s)—whether directly (in its own workforce) or secondarily (at a worksite of a second employer)”). A willful violator is an employer who is found to have committed a willful failure to comply with regulations or made a willful misrepresentation of a material fact. *Id.* § 655.736(f)(1)(ii).

158. See *supra* notes 156–57 and accompanying text (describing the positions of those who oppose a prohibition on third-party placements).

159. See DEP’T OF IMMIGRATION AND CITIZENSHIP, AUSTL. GOV’T, BOOKLET NO. 9, TEMPORARY BUSINESS (LONG STAY) (SUBCLASS 457) VISA 13 (2012), available at <http://www.immi.gov.au/allforms/booklets/books9.pdf> [hereinafter 457 VISA BOOKLET] (describing the goals of the skilled worker program); JOINT STANDING COMM. ON MIGRATION, PARLIAMENT OF THE COMMONWEALTH OF AUSTL., TEMPORARY VISAS,

method for the 457 temporary worker visa, employers apply to the immigration service for general permission to sponsor skilled workers; once approved, the employer nominates a skilled worker for a position, and finally, the employees apply to the immigration service for entry into Australia in order to fill their intended positions.¹⁶⁰ The eligible positions are limited to a list of occupations with labor shortages, and must meet a minimum pay level designated by the immigration service.¹⁶¹ This system, however, encounters the same problems regarding body shopping as the United States.¹⁶²

Australia also has confronted body shopping in its visa system, and the way it addressed the issue provides an example that other countries may follow. Body shopping in Australia is accompanied by the same exploitation of foreign workers and regulatory violations as in the United States.¹⁶³ Rather than targeting the body shops by prohibiting third-party placements altogether, the Australian government instituted a separate procedure for issuing temporary worker visas specifically for industries that place employees at third-party sites.¹⁶⁴ Realizing that “labour hire” industries, meaning staffing

PERMANENT BENEFITS: ENSURING THE EFFECTIVENESS, FAIRNESS AND INTEGRITY OF THE TEMPORARY BUSINESS VISA PROGRAM 97–98 (2007), available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=mig/457visas/report.htm (click “Consolidated version download”) (framing body shopping as “overseas labour hire” and detailing its abuses of the visa program).

160. See 457 VISA BOOKLET, *supra* note 159, at 8 (describing the “standard business sponsor” method of 457 visa-sponsorship); see also Paschal O. Nwokocho, *American Employment-Based Immigration Program in a Competitive Global Marketplace: Need for Reform*, 35 WM. MITCHELL L. REV. 38, 58 (2008) (describing the process for entry of skilled immigrants).

161. *Migration Regulations 1994* (Cth) (Austl.) (providing a list of occupations eligible for the 457 visa); see FRAGOMEN GLOBAL, *supra* note 13, § 1.10 (describing the basis for nominating positions under the 457 visa program).

162. See JOINT STANDING COMM. ON MIGRATION, *supra* note 159, at 97 (calling the industry of body shopping “overseas labour hire” and describing problems similar to body shopping, such as employees arriving in Australia to find that there is no job available, or being forced to sign an unfavorable contract).

163. See JOINT STANDING COMM. ON MIGRATION, *supra* note 159, at 97 (describing the abusive practices found in the use of the 457 visa). The Australian 457 visa is the rough equivalent to the US H-1B visa. See JOINT STANDING COMM. ON MIGRATION, *supra* note 159, at 49–52 (comparing the 457 visa and the H-1B visa). Compare FRAGOMEN GLOBAL, *supra* note 13, § 20.14 (describing the US H-1B visa), with FRAGOMEN GLOBAL, *supra* note 13, § 1.9 (describing the Australian 457 visa). For a description of body shopping in the United States, see *supra* Part I.C.

164. See *Visas, Immigration and Refugees: Employer Sponsored Workers*, DEP’T IMMIGR. & CITIZENSHIP–AUSTL. GOV’T, <http://www.immi.gov.au/skilled/on-hire->

or consulting, emerged in areas where such a stream of qualified employees was necessary, Australia instituted a system that provides flexibility for the business realities of the industry, but also ensures that its regulations are enforced.¹⁶⁵

In October 2007, the Australian Department of Immigration and Citizenship introduced a new process for staffing services, or “on-hire” firms.¹⁶⁶ Companies or industry representatives wishing to contract out employees to unrelated businesses may negotiate a labor agreement with the local branch of the immigration service, specifying the number of employees to be hired, the required skill set, and the salaries of the positions.¹⁶⁷ Further, the company or industry representative must demonstrate that it has tried to hire from the domestic market.¹⁶⁸ Labor agreements also require that the business or industry representative take specific steps to improve and increase training efforts for Australian workers.¹⁶⁹ This system permits third-party placements as established facets of the Australian economy, but verifies that there is a true skills shortage, domestic workers are not being displaced, and efforts are made to increase the skills of the pool of available Australian workers.¹⁷⁰ The labor agreement system allows companies, individually or in groups represented by an

industry.htm (last visited Apr. 20, 2012) (describing an arrangement for Australian employers that will place employees at third-party worksites).

165. See JOINT STANDING COMM. ON MIGRATION, *supra* note 159, at 95 (“In many industries, labour hire through the 457 visa program is an important source of employees.”); see also *Visas, Immigration and Refugees: Employer Sponsored Workers*, *supra* note 164 (stating that the system is “specifically tailored for the on-hire industry”).

166. See 457 VISA BOOKLET, *supra* note 159, at 12 (laying out the details of the labor agreement system for the on-hire industry); see also *Visas, Immigration and Refugees: Employer Sponsored Workers*, *supra* note 164 (describing the system for admitting 457 workers for the on-hire industry).

167. See 457 VISA BOOKLET, *supra* note 159, at 12 (describing the requirements of a labor agreement); see also FRAGOMEN GLOBAL, *supra* note 13, § 1.11 (listing the requirements to apply for a labor agreement).

168. See 457 VISA BOOKLET, *supra* note 159, at 12 (describing the purposes of the labor agreement system and listing some of its requirements); see also FRAGOMEN GLOBAL, *supra* note 13, § 1.11 (providing a short summary of the labor agreement system).

169. See 457 VISA BOOKLET, *supra* note 159, at 12 (“[E]mployers or industry associations are required to make commitments to the employment, education, training and career opportunities of Australians as part of the agreement.”); see also JOINT STANDING COMM. ON MIGRATION, *supra* note 159, at 99 (listing requirements to enter into a labor agreement, including a commitment to train Australian workers).

170. See 457 VISA BOOKLET, *supra* note 159, at 12 (listing the commitments required by employers and industry representatives entering into a labor agreement); see also FRAGOMEN GLOBAL, *supra* note 13, § 1.11 (describing the typical contents of a labor agreement).

association, to tailor the agreement to their specific company's or industry's needs and ensures the long-term efficient entry of the employees they need.¹⁷¹ In return for this flexibility and streamlined entry process, companies agree to voluntarily disclose information and cooperate with investigations regarding compliance.¹⁷²

Despite its benefits, the labor agreement system has been criticized. Before instituting the system, the Australian government did not consult with the on-hire industry, resulting in a five-month delay of 457 visa applications as the first labor agreements were still being negotiated.¹⁷³ Once multiple labor agreements were in place, reactions were varied: some considered the negotiation process too burdensome and time-consuming, while others felt that the time spent in negotiation was justified by the ultimate benefits.¹⁷⁴ The labor agreements, on average, take six to twelve weeks to negotiate.¹⁷⁵

Upon analyzing these difficulties, the Australian government attributed the problems to a lack of transparency regarding what measures make a proposed agreement acceptable to the government

171. See 457 VISA BOOKLET, *supra* note 159, at 12 (“A labour agreement is a formal agreement negotiated between the department and an employer. Labour agreements enable Australian employers to recruit a specified number of workers from overseas in approved occupations in response to identified skill shortages in the Australian labour market.”); *Visas, Immigration and Refugees: Employer Sponsored Workers*, *supra* note 164 (describing the labor agreement system as “tailored” to the on-hire industry).

172. See 457 VISA BOOKLET, *supra* note 159, at 16 (noting that employers have an obligation to provide information to the immigration service if certain events occur); see also *Visas, Immigration and Refugees: Employer Sponsored Workers; Labour Agreements*, DEP'T IMMIGR. & CITIZENSHIP–AUSTL. GOV'T, <http://www.immi.gov.au/skilled/skilled-workers/la/how-this-program-works.htm> (last visited Apr. 20, 2012) (listing among the responsibilities of an employer party to a labor agreement: “provide information to the Australian Government as part of the monitoring activities of the Labour Agreement”).

173. See Mahesh Sharma, *Rules Choking 457 Visa Flow*, AUSTRALIAN (Mar. 4, 2008, 12:00 AM), <http://www.theaustralian.com.au/australian-it/rules-choking-457-visa-flow/story-e6fgamf-111115701644> (reporting that the on-hire industry was unhappy with the lack of consultation on this issue, and that protests against the system continued for five months before the first labor agreement was approved).

174. See JOINT STANDING COMM. ON MIGRATION, *supra* note 159, at 100–03 (describing industry reactions to labor agreements); see also Sharma, *supra* note 173 (describing reasons why the on-hire industry was initially unhappy with the labor agreement system).

175. See JOINT STANDING COMM. ON MIGRATION, *supra* note 159, at 101 (citing one case in which “[i]t was suggested that this would take between 6 and 8 weeks but in fact 28 weeks later the industry remains without a Labour Agreement despite many meetings and versions of draft documents” (alteration in original)); see also *Labour Agreement Information*, DEP'T IMMIGR. & CITIZENSHIP–AUSTL. GOV'T, <http://skilledmigration.govspace.gov.au/files/2011/08/Labour-Agreement-Information.pdf> (last visited Apr. 20, 2012) (noting that labor agreements may take a long time to negotiate).

negotiator, and that the various local immigration services negotiating the agreements are inconsistent in their demands and concessions.¹⁷⁶ Despite these concerns, the consistency and certainty that labor agreements provide to employers entice them to continue the practice.¹⁷⁷

Australia has battled the abusive practice of body shopping by tailoring its enforcement measures to target the existing regulatory violations that body shops commit.¹⁷⁸ For example, Australia passed a law to allow the Australian Tax Office to disclose workers' income to the Australian Department of Immigration and Citizenship to ensure that the reported wage rate is, in fact, paid to the employee.¹⁷⁹ Information also may be shared with the Fair Work Ombudsman, an Australian government office that investigates workplace complaints and enforces workplace laws, enabling workers to recover any back-wages due.¹⁸⁰

176. See JOINT STANDING COMM. ON MIGRATION, *supra* note 159, at 101–03 (providing an example of one labor agreement submitted to the government negotiator by an industry representative that was, according to the industry representative, rejected “almost in its entirety” because of lack of regulatory guidance, and further highlighting the inconsistencies in the administration of labor agreements).

177. See *id.* at 105–06 (indicating that the organizations were overall pleased with the program and said that they would continue to use it).

178. See Maria Jockel, *Immigration Law and Enforcement in Australia*, in IMMIGRATION LAW CLIENT STRATEGIES IN THE ASIA-PACIFIC: LEADING LAWYERS ON NAVIGATING RECENT CHANGES, ANALYZING KEY LAWS, AND LOOKING AHEAD TO EMERGING TRENDS 89, 108 (2009) (noting that Australia has made arrangements for the seamless processing of 457 visa workers, but has complemented this policy with “robust monitoring, enforcement, and sanction measures that aim to ensure the integrity of the program”); see also JOINT STANDING COMM. ON MIGRATION, *supra* note 159, at 103 (reporting that many labor agreement participants experienced closer monitoring from the immigration service).

179. *Migration Legislation Amendment (Worker Protection) Act of 2008* (Cth) sch. 2 (Austl.); see Jockel, *supra* note 178, at 144. The Australian policy, like that of the United States, is to ensure that domestic wages and conditions are not depressed. See Jockel, *supra* note 178, at 144; see also *Departmental Information: Act Amendments to Strengthen the Integrity of the Temporary Skilled Visa Program*, DEP'T IMMIGR. & CITIZENSHIP—AUSTL. GOV'T, <http://www.immi.gov.au/legislation/amendments/2009/090914/lc14092009-01.htm> (last visited Apr. 20, 2012) (describing the Australian Worker Protection Act).

180. See Jockel, *supra* note 178, at 101 (ensuring that 457 visa workers are paid the appropriate wage and that Australian workers' wages are not depressed); *New Worker Protection Laws Will Allow Tax Checks*, CHRIS BOWEN, MP, MINISTER IMMIGR. & CITIZENSHIP (Sept. 14, 2009, 2:54 PM), <http://www.minister.immi.gov.au/media/media-releases/2009/ce09084.htm> (noting that the tax office may disclose information to the immigration service to ensure correct that wages are paid); see also *About Us*, FAIR WORK OMBUDSMAN—AUSTL. GOV'T, <http://www.fairwork.gov.au/about-us/pages/default.aspx> (last updated Feb. 12, 2012) (describing the purpose of the Australian Fair Work Ombudsman).

The Australian government expects information disclosure to act as a deterrent, as a noncompliant company could be penalized by both the Department of Immigration and Citizenship and by the Fair Work Ombudsman for its actions.¹⁸¹ If a body shop underpays its employees, that will be reflected on the employees' tax statements; those statements will be shared with the Department of Immigration and Citizenship, which may analyze them to determine the employers' regulatory compliance and issue fines and penalties for breaches, and possibly instigate criminal prosecution.¹⁸² Income information also will be shared with the Fair Work Ombudsman, who may bring an action against the employer to recover unpaid wages for the employee.¹⁸³ Additionally, if the penalized body shop had entered into a labor agreement as discussed above, that agreement could be suspended or revoked, preventing the body shop from using the 457 visa.¹⁸⁴

3. Third-Party Placements: Industry Leaders Sue for Withdrawal of the Neufeld Memo

IT consulting industry leaders advance a different perspective on the issue of H-1B third-party placements; they suggest that the Neufeld Memo be withdrawn. In their suit against the USCIS, the plaintiffs in *Broadgate* advocated for the withdrawal of the Neufeld

181. See Jockel, *supra* note 178, at 101 (expecting that knowledge that this information will be shared will act as a deterrent to keep employers from mistreating employees); see also *New Worker Protection Laws Will Allow Tax Checks*, *supra* note 180 ("The sharing of information . . . will act as an effective deterrent to rogue employers and ensure that instances of unfair or unsafe treatment of temporary skilled workers come to light quickly and are dealt with appropriately.").

182. See Jockel, *supra* note 178, at 137 (noting that the penalty for failure to comply with immigration regulations is criminal prosecution); see also *New Worker Protection Laws Will Allow Tax Checks*, *supra* note 180 ("Employers found in breach of the obligations in the Migration Regulations may be liable for fines of up to [AUD]\$33,000.").

183. See Jockel, *supra* note 178, at 101 (providing an example in which AUD\$8000 was recovered on behalf of two 457 visa workers who had been underpaid); see also *New Worker Protection Laws Will Allow Tax Checks*, *supra* note 180 (providing the same example of back-pay enforcement).

184. See 457 VISA BOOKLET, *supra* note 159, at 18 (noting that failure to comply with sponsorship requirements can result in suspension or termination of a labor agreement); see also *First Ever Termination of a Labour Agreement*, CHRIS BOWEN, MP, MINISTER FOR IMMIGR. & CITIZENSHIP (Feb. 15, 2012, 4:50 PM), <http://www.minister.immi.gov.au/media/cb/2012/cb182584.htm> (reporting the termination of the labor agreement of a company that underpaid its employees and reported false and misleading information to the Department of Immigration and Citizenship).

Memo.¹⁸⁵ Despite the case's dismissal, commentators still support certain arguments raised by the plaintiffs.¹⁸⁶ The Neufeld Memo stated that application of the control test was necessary because the employer-employee relationship was insufficiently defined in the H-1B statute.¹⁸⁷ The plaintiffs, however, argued that the H-1B regulation sufficiently defines the employer-employee relationship because it enumerates specific factors to determine if an employer-employee relationship exists.¹⁸⁸ Specifically, the H-1B regulation states:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which: (1) Engages a person to work within the United States; (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and (3) Has an Internal Revenue Service Tax identification number.¹⁸⁹

In *Broadgate*, the plaintiffs argued that, despite sharing authority over employees with their clients, they maintained the authority to hire, pay, fire, and supervise their employees.¹⁹⁰ Nonetheless, the USCIS denied their H-1B petitions because of a lack of employer-employee relationship.¹⁹¹ Because this shared control met the statutory definition of employer-employee relationship, but was deemed insufficient by the USCIS, plaintiffs argued that the USCIS has effectively changed the statutory definition from "control" to

185. See *Broadgate* Complaint, *supra* note 16, at 3 (arguing that the Neufeld Memo is "an invalid rule that must be vacated").

186. See, e.g., Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 45, 86 (2011) ("[The court's dismissal of *Broadgate*] is unlikely to stifle stakeholder complaints about the Neufeld Memo . . ."); Patrick Thibodeau, *IT Staffing Firms Lose H-1B Lawsuit*, COMPUTERWORLD (Sept. 13, 2010, 5:40 PM), http://www.computerworld.com/s/article/9185178/IT_staffing_firms_lose_H_1B_lawsuit ("[E]ven if the memo is considered only as guidance . . . staffing companies still have to ensure that the message out of the courtroom is heard in the field.").

187. See Neufeld Memo, *supra* note 7, at 2 (describing the regulatory and common law definitions of employer-employee relationship and the problems raised by the lack of clear guidance on this issue).

188. See *Broadgate* Complaint, *supra* note 16, at 2-3 (addressing the regulatory definition of employer-employee relationship).

189. 8 C.F.R. § 214.2(h)(4)(ii) (2012).

190. See *Broadgate* Complaint, *supra* note 16, at 11 (alleging that the plaintiffs fit the definition of "employer" as established by the H-1B regulation).

191. See *id.* at 5-8 (stating that plaintiffs' H-1B petitions were denied); *id.* at 11 (arguing that the employer-plaintiffs share control over their employees with their clients).

“solely” control or “exclusively” control.¹⁹² Although a definition of employer-employee relationship exists in the H-1B statute, the Neufeld Memo instead adopts the common law control-test definition.¹⁹³

In their complaint, the plaintiffs criticized the USCIS’s application of *Nationwide Mutual Ins. Co. v. Darden* to support its imposition of the control test to define the employer-employee relationship.¹⁹⁴ In the context of an action under the Employee Retirement Income Security Act (“ERISA”), *Darden* held that because the ERISA statute did not adequately define the term “employee,” the Court should refer to the common law definition.¹⁹⁵ The statutory definition of “employee” under ERISA is “any individual employed by an employer.”¹⁹⁶ The Court found this definition to be circular and ineffective at defining the term, and therefore applied the common law definition instead.¹⁹⁷ The Neufeld Memo quoted *Darden* in applying the control test to H-1B third-party placements, including factors such as the location of the work, the duration of the relationship, and the employer’s discretion over the employee’s work hours.¹⁹⁸ The plaintiffs alleged that because the H-1B regulation adequately defines the term employer-employee

192. *See id.* at 3 (“Since the memorandum changes an existing regulation by reading out the phrase ‘hire, fire, pay, or supervise,’ and effectively inserts the words ‘solely’ or ‘exclusively’, it limits agency discretion on its face and as applied, amends an existing legislative rule, and affects those outside the government . . .”).

193. *See id.* at 15–16 (mentioning that the Neufeld Memo adopted a common law definition of employer-employee relationship); *see also* Neufeld Memo, *supra* note 7, at 3 (establishing the master-servant relationship under agency common law as the applicable test).

194. *See Broadgate* Complaint, *supra* note 16, at 16 (describing the USCIS’s use of the *Darden* case and distinguishing its holding from the present situation). *See generally* *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

195. *See Darden*, 503 U.S. at 323 (finding the definition of “employee” to be “completely circular” and deciding that the common law definition should be used); *see also* Employee Retirement Income Security Act, 29 U.S.C. 18 § 1001 (2006) (stating that the purpose of the act is to enact minimum standards for employee benefit plans to ensure their financial stability and that they are administered fairly).

196. 29 U.S.C. § 1002(6) (defining the term “employee” for the purposes of the Employee Retirement Income Security Act (“ERISA”)).

197. *See Darden*, 503 U.S. at 323 (finding that ERISA’s definition of employer-employee relationship is “completely circular and explains nothing”).

198. *See* Neufeld Memo, *supra* note 7, at 3–4 (describing the common law control test to be applied to H-1B petitions); *see also Darden*, 503 U.S. at 323–24 (detailing the factors that the Court would consider in determining whether there is an employer-employee relationship under the common law control test); RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (2006) (providing an additional description of the common law control test).

relationship as an employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee," application of the common law control test is inappropriate.¹⁹⁹ Under *Darden*, they argued, the common law definition only applies in the absence of a workable statutory definition.²⁰⁰

B. Addressing LCAs

The following are examples of solutions provided by Canada, and policy suggestions from the United States government, to address the difficulties encountered in the LCA process due to H-1B third-party placements.

1. LCAs: Canada's Example

To address the barriers to H-1B sponsorship that IT consulting firms encounter in the LCA process, Canada provides an example of an alternative regulatory regime. Canada has experimented with several variations of the Labor Market Opinion ("LMO") process, a similar process to the United States' LCA system.²⁰¹ Like in the United States, the employer submits an LMO to the government agency Service Canada in order to show that the proposed work would not negatively affect the labor market in Canada.²⁰² One LMO can be submitted by an employer with multiple work locations listed, and Service Canada will obtain concurring LMOs from each province listed on behalf of the applicant "to avoid any unnecessary delays or confusion."²⁰³ Adopting a concurring opinion system would benefit

199. See *Broadgate* Complaint, *supra* note 16, at 15–16 (describing the plaintiffs' objection to the application of the common law test based on *Darden*).

200. See *id.* at 16 (distinguishing the holding of *Darden* from the facts in *Broadgate*).

201. See *H1B Visa: Fifth Quickest, Easiest and Cheapest Visas*, ANDY J. SEMOTIUK—US & CANADIAN IMMIGR. L., <http://www.myworkvisa.com/H1BVisa.aspx> (last visited Apr. 20, 2012) (describing the Labor Market Opinion ("LMO") as a similar process as the LCA). Compare FRAGOMEN GLOBAL, *supra* note 13, § 4.8 (detailing the LMO application procedure in Canada), with FRAGOMEN GLOBAL, *supra* note 13, § 20.14 (explaining the LCA application process in the United States).

202. See FRAGOMEN GLOBAL, *supra* note 13, § 4.8 (describing the Canadian LMO process).

203. See *id.* (explaining that when the employee will work in more than one location, concurring opinions are needed from all provinces where the employee will work, but that Service Canada obtains these concurrences for the employer); *Labour Market Opinion Directives: Part 1-Summary and Procedures*, HUM. RESOURCES & SKILLS DEV. CAN., http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lmodir/lmodir-6.shtml#6 (last updated May 27, 2011) ("When an offer of employment involves more than one region or

the IT consulting industry as it would obviate the necessity to file multiple LCA applications for employees at third-party worksites, avoiding the expenditure of unnecessary time and money.²⁰⁴

2. LCAs: The US Government Perspective

The LCA process requires that the application be posted at the worksite in order to provide notice to any US citizen employees who may be displaced.²⁰⁵ The GAO examined the LCA process and recommended that instead of posting LCAs at the worksite, the DOL should build and maintain a centralized website where all LCAs could be posted in order to provide easy, public access to H-1B employment information.²⁰⁶ The GAO sent its recommendations to the DOL but did not receive a response.²⁰⁷ The US Department of Justice responded that it concurs with this recommendation because if implemented, US workers could more easily determine if H-1B visa activity negatively affected their employment.²⁰⁸

Commentators, law practitioners, governments, and businesses have all made suggestions as to whether the third-party workplace should be abolished or reconfirmed, and how the labor market can best be assessed with a minimum of inconvenience to corporations.²⁰⁹ Commentators have suggested that the H-1B statute should be amended to disallow third-party placements like the L-1 visa, but opponents argue that third-party placements is legislatively intended for the H-1B visa. Australia's 457 visa provides an example of a system that has made specific arrangements to accommodate third-

province, the employer must submit the Labour Market Opinion application to the regional Service Canada Office nearest to where the job will first be located. Temporary Foreign Worker Program (TFWP) officers responsible for assessing applications seek concurrence from officers in other Centres serving regions or provinces where foreign workers will also be employed.”).

204. *See supra* note 69 and accompanying text (describing the necessity to file multiple LCAs for an employee's various work sites).

205. *See supra* note 80 and accompanying text (describing the posting requirement for the LCA).

206. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 22, at 63 (recommending that the DOL should create a website with a central, public posting location for all LCA notifications).

207. *See id.* (reporting that its recommendations were sent to the DOL but that it did not receive a response).

208. *See id.* app. VII, at 107 (relaying the Department of Justice's approval of the US Government Accountability Office's ("GAO") suggestion).

209. *See supra* Parts II.A–II.B (presenting arguments on both sides of the debate regarding third party placement, and providing examples from other jurisdictions).

party placements. The Australian Labor Agreement allows firms wishing to utilize third-party placements to negotiate a specialized agreement with the immigration service in order to keep the flow of work and employees open, while allowing the government to appropriately regulate the industry. The US IT consulting industry advocated for the withdrawal of the Neufeld Memo by filing the *Broadgate* lawsuit, arguing that the control test should not be applied to the H-1B statute because it adequately defined employer-employee relationship. Canada's LMO system provides an example of how obstruction of third-party placements in the United States' LCA process might be alleviated by providing for concurring opinions from multiple locations in a single LCA application. Finally, the GAO recommends improving the LCA process by creating a government-run online LCA posting website, rather than requiring LCAs to be physically posted at each worksite.

III. *SUGGESTIONS TO CURTAIL ABUSES WITHOUT INHIBITING THE IT CONSULTING INDUSTRY*

This Note finds that in order to address the abuses of body shops while leaving undisturbed the business practice of third-party placements, the USCIS should withdraw or revise the Neufeld Memo, increase enforcement efforts by using labor agreements and creating information-sharing regimes among government agencies, and modify the LCA process so that changing employee work locations and posting LCAs are less problematic. Part III.A explains why third-party placements should be permitted. Part III.B argues that the Neufeld Memo should be rescinded or revised. Part III.C suggests that the USCIS should increase enforcement efforts, following the Australian example of enforcement. Part III.D advocates for the amendment of the LCA program to streamline third-party placements, following the Canadian example.

A. Third-Party Placements Should Be Permitted

The H-1B statute should not be amended to prohibit the practice of third-party placements.²¹⁰ This Note detailed the adverse economic effects of the existing partial obstructions to third-party placements;

210. See *supra* Part II.A.1 (presenting arguments for and against prohibiting third-party practice).

completely disallowing third-party placements could have even more deleterious effects on the US economy.²¹¹ Aside from the economic issues, the suggestion that the H-1B statute should be amended to disallow third-party placements still fails to pass muster. Because L-1 visas are intended to facilitate the transfer of management and specialized skills internally among the branches of a company, placing L-1 holders at third-party worksites would not logically advance that purpose.²¹² Third-party placements are consistent with the H-1B program, as it is intended to facilitate the continued growth of business and industry in the United States and workers at client worksites still contribute to US industry.²¹³ The complete prohibition of third-party placements would severely hamper an industry in which growth and innovation are expected to be an integral part of the United States' recovery from the 2008 recession.²¹⁴ As previously discussed, third-party placements may not be appropriate for the L-1 program, but they were acknowledged in various regulations and in the legislative history of immigration statutes, so altering the H-1B statutory language to disallow third-party placements would not be consistent with apparent legislative intent.²¹⁵

B. Rescind or Revise the Neufeld Memo

The USCIS was misguided in its decision to target third-party placements instead of the actual abusive practices perpetrated by body shops.²¹⁶ The practice of placing employees at third-party worksites is widely accepted in US business.²¹⁷ The IT consulting industry is not engaging in any kind of rare or disreputable practice; third-party placements are a standard component of the business model on both

211. *See supra* Part II.D.3 (describing the economic effects of limitations to the IT consulting industry).

212. *See supra* notes 151–52 and accompanying text (describing the purpose of the L-1 visa).

213. *See supra* note 18 and accompanying text (describing the H-1B visa program and its goals).

214. *See supra* notes 130–38 and accompanying text (describing the important roles that IT and the IT consulting industry play in the US economy).

215. *See supra* notes 157–58 and accompanying text (explaining why the US Congress intended third-party placements in the context of the H-1B visa).

216. *See supra* note 89 and accompanying text (noting that the Neufeld Memo targeted the practice of third-party placements).

217. *See supra* notes 38–39 and accompanying text (describing how the consulting and staffing industries are common in and important to the US economy).

the supply and demand sides.²¹⁸ Thus, limiting access of the IT consulting industry to the talent pool of qualified H-1B employees severely limits the ability of the US economy as a whole to access the skilled employees it needs to innovate and grow.²¹⁹

Even apart from its economic repercussions, the USCIS should revise or withdraw the Neufeld Memo because of its legal inconsistencies.²²⁰ In regard to the “right to control,” the Neufeld Memo requires that H-1B adjudicators take into consideration whether the petitioner has the right to control the beneficiary on a day-to-day basis and whether the petitioner has the ability to control the manner and means in which the work product of the employee is accomplished.²²¹ These factors are adapted from the common law agency definition of the master-servant relationship.²²² The USCIS relied on the *Darden* case to support applying this definition in the H-1B context.²²³ The situation at hand can be distinguished from the situation in *Darden* because the ERISA definition is a tautology, whereas Congress defined employer-employee relationship much more substantially in the H-1B statute by including a set of factors to consider.²²⁴ The Supreme Court previously noted in *Darden* that when Congress uses terms with an established meaning in a definition, it intends to incorporate the meanings of those terms.²²⁵ The terms in the H-1B regulatory list, “hire, pay, fire, supervise, or otherwise control the work of,” have an established meaning, therefore it must be inferred that Congress intended that these terms

218. See *supra* notes 38–39 and accompanying text (showing that consulting and staffing are common and that client companies pay large sums to use such services).

219. See *supra* notes 136–38 and accompanying text (noting that IT is vital to the development of all industries).

220. See *supra* notes 186–200 and accompanying text (describing the legal inconsistencies alleged in the *Broadgate* case that commentators opposed to the Neufeld Memo still support).

221. See *supra* notes 96–99, 198–200 and accompanying text (describing the Neufeld Memo’s interpretation of the control test).

222. See *supra* note 193 (describing the common law origin of the Neufeld Memo’s definition of employer-employee relationship).

223. See *supra* note 194 and accompanying text (noting the USCIS’s reliance on the *Darden* case).

224. See *supra* note 189 and accompanying text (providing the definition of the employer-employee relationship from the H-1B statute).

225. See *supra* notes 195–200 (describing the *Darden* case and the *Broadgate* plaintiff’s interpretation of the *Darden* holding).

govern the definition of employer-employee relationship.²²⁶ *Darden* does not permit a descriptive statutory definition to be discarded in favor of the common law. By ignoring or adding to the list of factors provided in the statute to determine an employer-employee relationship, the USCIS exceeds the bounds of statutory construction in its guidance for adjudicators in determining whether an employer-employee relationship exists. While the *Broadgate* case cannot be retried, these arguments may still persuade members of the legal community and Congress to intervene if the USCIS does not voluntarily withdraw the Neufeld Memo.

Since the Neufeld Memo is unlikely to be judicially invalidated, the withdrawal would have to be voluntary.²²⁷ The legal and business community must follow the lead of the AILA Memo and the *Broadgate* case and continue to pressure the USCIS to withdraw the Neufeld Memo. In the alternative, Congress should consider amending the statutory language to make clear the intent that an employer-employee relationship is not jeopardized by third-party placements.²²⁸

C. Increase Enforcement Efforts

If the Neufeld Memo were withdrawn, returning to the status quo would not benefit any of the parties involved. Body shopping was not adequately controlled before the Neufeld Memo, and steps must be taken to curb the practice.²²⁹ It is detrimental to the IT consulting industry, to US workers, and to the economy at large.²³⁰ With the Neufeld Memo, the USCIS targeted a *characteristic* of the companies that violate the law—third-party placements—rather than targeting the violations themselves. As a result, law-abiding companies with

226. See *supra* note 189 and accompanying text (providing the specific terms of the H-1B definition of employer-employee relationship).

227. See *supra* note 124 (stating that unless the USCIS voluntarily withdraws the Neufeld Memo, the rule will stand).

228. For evidence that Congress has historically supported the use of third-party placements, see *supra* notes 147–58 and accompanying text (describing how Congress had an opportunity to amend the H-1B and L-1 visas, and that third-party placements is mentioned in other contexts).

229. See *supra* Part I.C (describing body shopping and the problems it causes).

230. See *supra* notes 51–65 and accompanying text (explaining the problems that arise as a result of the regulations violated by body shops).

the same characteristic were impaired as well.²³¹ The USCIS and the DOL should focus on enforcement efforts in the form of fines and penalties for breaches of law, as well as criminal charges for willful crimes, in order to deter violations from occurring at all.²³²

The common infractions that body shops commit are: paying employees lower than the prevailing wage, “benching” employees between assignments, contracting employees to work in low-skill or unrelated positions, and listing the work location on the LCA in an area with a low prevailing wage, but sending employees to work in an area with a high prevailing wage.²³³ To combat paying below the prevailing wage and benching, the United States should follow Australia’s example and institute an information-sharing regime.²³⁴ The US Internal Revenue Service (“IRS”) would provide income information for H-1B workers to the DOL in order to certify that the prevailing wage was actually paid. If the income reported by the employee to the IRS is lower than it should be for full-time work at the prevailing or actual wage, then the employer would be subject to fines. A system of negotiating labor agreements consistent with the Australian example may help to stem the practices of placing H-1B workers at low-skill or unrelated positions and LCA work location misstatements.²³⁵ If labor agreements were in place, they would likely include a requirement that the employer disclose information to the USCIS and cooperate with investigations.²³⁶ While the USCIS can already issue requests for additional evidence and perform site visits, the Australian model makes the process more business-friendly.²³⁷ If the USCIS receives information that calls an employer’s practices into doubt, the USCIS could request that the business disclose information under the labor agreement rather than revoking the H-1B status or immediately conducting a disruptive site visit. If, after

231. *See supra* notes 93–95 and accompanying text (noting that some companies’ H-1B petitions have been denied because of the Neufeld Memo’s redefinition of the control test).

232. *See supra* notes 178–84 and accompanying text (showing how Australia has increased its enforcement efforts instead of banning third-party placements altogether).

233. *See supra* Part I.C (describing the common infractions committed by body shops).

234. *See supra* notes 178–84 and accompanying text (detailing Australia’s information-sharing legislation).

235. *See supra* notes 164–72 and accompanying text (describing the Australian labor agreement system).

236. *See supra* note 172 and accompanying text (describing the Australian labor agreement requirements of disclosure and cooperation).

237. *See supra* notes 171–72 and accompanying text (noting that employers found the labor agreement system to be more flexible than the traditional process).

various exchanges of information, the USCIS's doubts are not quelled, it could then conduct a site visit, with which the company is bound to fully cooperate under the labor agreement. If violations are found, then not only will the company be fined but it may lose its labor agreement as well.²³⁸ The outcomes of the current system and the Australian system are the same—the USCIS is able to verify compliance and penalize noncompliance—but the difference is that the process under a labor agreement is more flexible and business-friendly.

D. *Modify the LCA Process*

The DOL should follow Canada's example and streamline the LCA process for mobile employees.²³⁹ Canada's "concurring opinion" system is necessary because the provinces share control of immigration regulation with the federal government, which is not the case in the United States.²⁴⁰ Regardless, the DOL could similarly streamline IT consulting companies' experience with the LCA system by allowing employers to amend LCAs to add new work locations. It is unnecessarily burdensome to require employers to submit a new LCA for each employee for each location where they may work.²⁴¹ If an employer takes on a new client in a new location and wishes to send an H-1B employee to that new worksite immediately, an employee with an approved H-1B and LCA should be able to amend the LCA to add the new location. Currently, IT consultants must wait seven business days for a new LCA to be approved before transferring to his or her next assignment. Considering the pace at which the IT consulting industry moves, seven days can make a vast difference in outcomes for both the IT consulting company and its client.²⁴² If a software system crashes, a client company cannot wait seven business days for a consultant to arrive.

238. *See supra* notes 181–84 and accompanying text (describing the penalties under the Australian labor agreement system).

239. *See supra* notes 201–04 and accompanying text (describing Canada's LMO system).

240. *See supra* note 203 and accompanying text (noting that Canada will acquire a concurring opinion from other provinces on behalf of the employer).

241. *See supra* note 69 and accompanying text (noting that a new LCA must be filed for locations where employees work for more than thirty days).

242. *See supra* note 86 and accompanying text (noting that seven days' delay in processing LCAs can be problematic given clients' needs).

Another way that IT consulting companies' client relationships could be better served is by implementing the GAO's suggestion that the DOL create a central website where employers could post LCAs.²⁴³ IT consulting companies' clients would no longer need to administer the postings on behalf of the IT consulting company, possibly exposing them to regulatory fines if the task is not properly completed. If the posting system were managed online, IT consulting companies could administer the postings themselves without inconveniencing their clients and without needing to rely on another company to guarantee their regulatory compliance.²⁴⁴ This solution also would satisfy the DOL's goal of public notification of H-1B employment more efficiently than the current system. US workers would be able to see LCA postings for all worksites, not just those posted within their own company, and those wishing to examine other employers' public LCA files would no longer need to visit each business and request to see their physical files. This is a much more convenient solution for the public and a much less intrusive solution for companies.

CONCLUSION

Because the IT consulting industry contributes to the US economy's health and provides services to a wide range of industries throughout the United States, and because the IT consulting industry relies on H-1B visas to remain competitive, barriers to H-1B visa sponsorship in the industry should be minimized. Although the H-1B visa has been abused by body shops using third-party placements, solutions should be narrowly tailored to excise the harmful practices while leaving the beneficial practices undisturbed. The IT consulting industry's business model, which includes third-party placements, is an integral part of commerce in the United States, and should not be subjected to unnecessary barriers to growth.

243. *See supra* notes 205–07 and accompanying text (discussing the GAO's suggestion regarding centralizing LCA postings).

244. *See supra* notes 80–86 and accompanying text (describing the issue of LCAs being posted by client companies and the repercussions if clients do not comply).