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Subcommittee on Immigration Policy and Enforcement

**"H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and
U.S. Workers"**

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Thank you, Chairman Gallegly, Ranking Member Lofgren, and distinguished members of the subcommittee. I am grateful for the opportunity to join you at this hearing. My name is Bo Cooper. I chair the Washington, D.C. office of Berry Appleman & Leiden, a national immigration law firm. I served in government as the General Counsel of the former Immigration and Naturalization Service from 1999 to 2003. I have also taught immigration at law schools in Michigan and here in Washington, and I work closely with Compete America, a coalition of corporations, universities, research institutions, and trade associations that advocates for reform of America's immigration policies surrounding high-skilled foreign professionals.

I have therefore had the opportunity to be involved in the H-1B and related issues we are discussing today from a full range of perspectives: as a practitioner in the midst of the flow of the program; as a government official charged with both enforcement and services responsibilities; as an academic; and as a policy advocate.

You have a difficult but urgent job. In the economic straits our country is facing, all policy debates must keep focused on jobs, and our country's high-skilled immigration policies must be a central part of that thinking.

A surprising level of rancor has surrounded the high-skilled immigration debate in recent years, especially with respect to the H-1B program. This level of rancor traces mainly to a fundamental misconception: that the job supply in the United States is a zero-sum game, and that a job occupied by a foreign professional is a job lost to a U.S. worker. This is a misconception that has got to be shed if we are to push forward a high-skilled immigration policy that equips the United States to remain the world's innovation leader, and to regain its maximum economic strength, and to restore job growth and prosperity for the U.S. worker. Throughout our history, our country has operated on the principle that the more brain power we can attract from around the world, the more creativity, invention, and growth we can achieve here at home.

Fortunately, as the anxiety from the worst stages of the recession begins to subside, there appears to be a reemerging consensus that we need to stick to this principle. The President began the year by emphasizing in the State of the Union address that the key to winning the future is "to out-innovate, out-educate, and out-build the rest of the world. We have to make America the best place on Earth to do business." The President emphasized the importance to our economy of students who "come here from abroad to study in our colleges and universities. But as soon as they obtain advanced degrees, we send them back home to compete against us. It makes no sense."

In a speech on strategies for economic growth just last week at Stanford University, Majority Leader Cantor sounded the same theme: "As a country we have always invited the best and brightest from around the world – many of whom are educated in our universities – to contribute to our economic growth. Yet our visa system has failed to keep pace with the demands of our economy. If bringing in high-skilled workers from abroad helps us keep thousands of jobs here in America, our antiquated laws should not be a barrier."

That leads directly to our topic today: the role of the H-1B program in attracting the world's best talent to this country, enabling our employers to use the talents alongside U.S. professionals to maximum effect, and enabling these professionals to drive economic growth in America.

To be sure, the H-1B program is only a part of a larger high-skilled immigration ecosystem. Student visa policies, intracompany transfer policies, and business visitor policies must also be smart and robust. And, of course, the system cannot work without smarter policies toward permanent residence. Without the ability to bring high-skilled foreign professionals permanently into the U.S. workforce, our employers face recruiting disadvantages and lose smart people who will join other economies to compete against us.

But the bottom line is that the H-1B program is an indispensable part of the high-skilled immigration ecosystem. Without a robust, fully functioning H-1B program, that ecosystem – and its role in our ability to out-innovate the rest of the world, to keep jobs here, and to grow new jobs in this country – will collapse. The H-1B is often the only way to get highly skilled foreign professionals on the job quickly, when the economy needs them. The H-1B is often the only way to bring in a person with pinpointed skills to perform a crucial temporary assignment. And it is overwhelmingly the only way to bring bright foreign talent across the bridge to permanent residence, and a permanent role as contributors to the U.S. economy.

The policy approach to the H-1B program should be governed fundamentally by the physician's oath: First do no harm. Those of us who practice immigration law see in our offices every day the ways in which the people in the H-1B program blossom in the American economy, both in temporary assignments and as they move permanently into the U.S. economy. Following are just a few examples of the power of the H-1B program to fuel the U.S. economy.

- Sonu Aggarwal is the CEO of Unify², a company in Redmond, Washington that helps global businesses transform the way they communicate by leveraging unified communications services and products: email, instant messaging, telephony, video access, and more. Mr. Aggarwal came to the United States as a student at Dartmouth and MIT, and then entered the workforce with an H-1B visa. He is an author of the original patent on enterprise instant messaging technology, the seed that grew into his current company. This unified communications application today enables health care providers to monitor patients in real time through the patients' cell phone. Its potential applications reach to, for example, enabling military patients in the Middle East to receive real-time diagnosis and treatment from a team of physicians around the world, with video and instant data access. Now a U.S. citizen, Mr. Aggarwal runs a company with 34 employees globally and 24 in the United States. Of these 24, 22 are U.S. workers. H-1Bs are used in obviously sparing numbers, when needed for candidates with extremely hard-to-find skill sets that are necessary to give this U.S. job-generating company a global competitive advantage. Moreover, the U.S. job growth stands only to continue. Unify² has doubled in size in the last half-year, and today has a monthly growth rate of 10 percent. The H-1B visa program was an indispensable part of this process for Mr. Aggarwal, and continues to be an essential, though numerically modest, part of the company's U.S. job growth.

- Dr. Bohdan Pohamac, a physician on an H-1B at Brigham & Women's Hospital in Boston, led the 30-person team that last week performed the nation's first full face transplant, changing life for a Texas construction worker who was badly disfigured in a power line accident.
- Oncologist Hiroto Inaba, an H-1B at St. Jude Children's Research Hospital in Memphis, is the lead author of a study that identified childhood cancer survivors who are at increased risk for lung problems. The study is the most comprehensive look yet at the long-term lung function of childhood leukemia survivors whose treatment included bone marrow transplantation. The results may help physicians identify leukemia patients at increased risk for post-transplant lung problems and adjust treatment to avoid those problems.

Clearly, these are the kinds of technological, intellectual, and economic contributions that our high-skilled immigration system, and the H-1B program as an essential part of it, must facilitate. And this handful of examples sits alongside the continuing pattern at companies like Microsoft, Google, Oracle, Intel, Caterpillar, and scores of others, all using H-1Bs in modest numbers. These companies have each directly created tens of thousands of jobs for U.S. workers, and indirectly created exponentially more in the downstream economy. This is the main story of what the H-1B program does for the U.S. economy.

In addition to the contributions of H-1B workers to the U.S. economy, the H-1B program itself is designed simultaneously to help develop the domestic workforce. H-1B employers have poured massive sums of money into programs to train U.S. workers and educate U.S. students. Moreover, H-1B employers fund their own program's enforcement. Each time an employer files a petition for a new H-1B worker, and then again when the employer first seeks to extend that H-1B worker's stay, that employer pays a \$1500 training and education fee. Each time an employer files a petition for a new H-1B worker, that employer also pays a \$500 anti-fraud fee. A recent report from the National Foundation for American Policy shows that, since FY 2000, employers have paid to the federal government over \$3 billion in training/scholarship fees and anti-fraud fees, according to data obtained from U.S. Citizenship and Immigration Services. These fees have funded 58,000 college scholarships for U.S. students through the National Science Foundation and training for over 100,000 U.S. workers through the Department of Labor. This is in addition to corporate taxes and charitable donations to support education, as well as significant internal corporate resources for employee training and professional development.

Debate over the H-1B program often focuses, as it should, on whether the program serves, as its critics contend, simply as a source of cheap foreign labor that can be substituted for U.S. workers. Key facts too often are lost in that debate. First, it quite simply costs a lot to employ an H-1B worker. Government filing fees alone are \$2320 for the initial petition, and \$1820 for the first three-year extension. If the employer is sponsoring the employee for a green card and additional extensions are necessary, filing fees for each additional extension are \$320. For an H-1B from India or China, the source of so many engineering graduates, two additional H-1B extensions could easily be necessary, so that the H-1B government filing fees through the process would total \$4780. This is putting aside the legal fees, which would typically run in the neighborhood of \$7000 through that process. It is also putting aside the legal and filing fees for the green card, which could easily range between \$10,000 and \$15,000, especially if the professional worker has a family. These substantial expenses help to augment one of the conclusions drawn in the NFAP study mentioned above: "The more than \$3 billion employers

have paid in mandatory government fees to hire skilled foreign nationals since 2000 is a testament to one thing – if companies really are trying to save money by hiring H-1B visa holders, then they are not doing a very good job of it.”

Perhaps the starkest evidence against the argument that the H-1B program is simply a source of cheap foreign labor lies in the picture of how the program has actually been used in different economic circumstances. This is not a new point, but no honest debate over the H-1B program can take place without this point remaining front and center. In 2008, when the economy was very strong and hiring was robust across the board, demand for H-1B workers was robust as well. On April 1 of that year, on the first day filing was permitted, six months before the beginning of the fiscal year when the visas could be used, tens of thousands more H-1B petitions were submitted than there were slots available. The following year, in 2009, America was in the throes of the recession. Employers could not hire, and in fact often had to trim their workforces, and they were seeking to tighten their belts in every way. In these circumstances, if the H-1B program were truly a source of cheaper labor, then there should have been a rush for H-1Bs. Yet the opposite happened. Demand plummeted that year, and H-1B visas remained available for nearly nine months. The same thing happened in 2010, as the effects of the recession continued. That year, H-1Bs remained available for even longer.

This is a recurring pattern. For Fiscal Year 2001, when the tech industry was at full throttle and demand for talent across the board, including foreign talent, was very high, Congress – as it should have – gave employers a horn of plenty for H-1B visas, tripling the cap temporarily to 195,000. Then the tech bubble burst, though, and the very same thing happened as during the recent recession: demand plummeted, and not even half the supply was used.

This pattern offers a simple, crystal-clear lesson. The H-1B program does not work as a source of cheaper foreign labor. It is an expensive, time-consuming program that employers turn to when they need to do so for expertise. Clearly there must be rules to protect the interests of U.S. workers, and there is a complex web of those rules in place. But in the end, the market has proven to be the most effective regulator of the program.

It is certainly the case that there is fraud and abuse within the H-1B program, as there is within any benefits program. I am confident that responsible employers across the board would welcome improved enforcement to better find and punish employers who violate the program’s rules. Yet the H-1B debate on enforcement has evolved into the introduction of bills over the past few years with extravagant proposals to restructure the H-1B program in broad ways that would affect the full range of H-1B program users.

Meanwhile, the government has already put tremendous financial and analytical resources into H-1B fraud and misuse. The H-1B Fraud report that U.S. Citizenship and Immigration Services has addressed as part of this hearing identified the key ways in which some employers violate the rules, in ways that line up with much of what has been reported in the media. Violations tend to follow a known pattern. There are employers who bring in H-1B workers and do not pay the promised wage. Some employers calculate the required wage as if the worker would be working in an inexpensive market, and then send

the worker to a more expensive market where the prevailing wages would be higher. Some employers have H-1B workers perform roles that differ from what was in the petition, and that would not qualify for an H-1B. Some employers do not pay H-1B employees during periods where there is no work, in violation of what are called the “benching” rules. Some H-1B petitions were found to have been filed by “employers” that did not in fact exist. These are serious violations, but they are violations that can be – and that sometimes are, though not effectively enough – identified and punished now, with the rules that are already in place.

This is particularly true in view of the massive enforcement resources paid into the Treasury for this purpose by employers. Conspicuous by their absence today is the Department of Labor, which plays a major role in H-1B enforcement. Before Congress embarks on a major revision of the H-1B program in ways that could impede the ability of meticulous, responsible, job-creating employers to use the program, it should use its oversight authority to examine whether the government’s enforcement resources are being used to maximum effectiveness. As part of that, it should ensure that enforcement resources are targeted as carefully as possible to what the government already knows about where program violations tend to be focused. For example, while the USCIS program to perform on-site inspections of H-1B employers certainly makes sense, and the employers I am familiar with are typically quite content to receive these inspections, we have often seen large employers with careful and sophisticated compliance programs and strong compliance records receive repeated audits. There is likely room to target these investigative efforts more strategically.

What is most critical is that, as Congress evaluates the H-1B program, it does so with clear eyes and without overreacting to exaggerated arguments against the program. Any alterations must be carefully targeted to carefully identified problems. In particular, Congress should not judge the program based on isolated examples of abuse. Certainly there are H-1B employers who break the rules and misuse the program, and those are the examples we hear in the media. But Congress needs to look at the program as a whole, recognizing that most employers comply fully, pay well in excess of the prevailing wage, and use H-1Bs as only a tiny percentage of their overall workforce.

As an example of the kinds of exaggerated descriptions that can be unhelpful to the debate, opponents of the H-1B program commonly describe the program in inflamed language like “indentured labor.” A calmer look at the program as it actually works shows that the H-1B worker has remarkable freedom to change jobs. An H-1B worker can change employers as soon as a new employer is prepared to hire him or her. Under special “portability” rules that Congress enacted precisely to ensure freedom of movement, it is not even necessary to wait through USCIS processing periods. As soon as the new employer files a new H-1B petition, the employee can start the new job.

It is a simple matter of (1) the new employer providing notice to its workers, and to any bargaining unit, that it is going to file a petition for an H-1B worker, and then (2) making enforceable promises to the Labor Department that the employer will pay the prevailing wage and observe the other requirements for the protection of U.S. workers. Then the employer pays the new filing fee, the U.S. worker training and education fee, and anti-fraud fee, and the whole process can be accomplished in less than two weeks. This is hardly an “indentured labor” program, and the frequent use of labels like that should not

guide Congress toward program changes that are destructive rather than helpful to U.S. economic interests.

To be sure, this does not address the entire mobility problem. Even though H-1B employees can change employers freely, if they are in the green card backlog, then changing employers typically means stepping even farther back in the already extreme green card backlog. Nor does making the H-1B program the best it can be provide the full solution to finding a high-skilled immigration policy that will enable us to out-innovate the rest of the world. Employers of highly skilled professionals typically wish to bring their employees permanently into the U.S. economy, and observers across the board tend to view that as a net positive for the United States. Efforts to shorten that bridge to permanent residence, or to eliminate it for those in especially critical fields, are essential parts of the high-skilled immigration reform puzzle. But if we are to attract the bright minds from around the world that will help U.S. employers keep jobs in the United States, grow more jobs for U.S. workers, and remain the world's innovation leader, a robust and effective H-1B program is essential.