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## United States-India Relations: Reconciling the H-1B Visa Hike and Framework for Cooperation on Trade and Investment

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# UNITED STATES-INDIA RELATIONS: RECONCILING THE H-1B VISA HIKE AND FRAMEWORK FOR COOPERATION ON TRADE AND INVESTMENT

Shari B. Hochberg\*

## I. INTRODUCTION

The United States and India are “the world’s two largest democracies.”<sup>1</sup> Since 2000,<sup>2</sup> the United States has worked with India to secure a “strategic partnership.”<sup>3</sup> Throughout the Clinton and Bush administrations, ties have strengthened between the nations. After signing a bilateral trade agreement<sup>4</sup> and subsequently hiking fees on H-1B visas,<sup>5</sup> the countries’ unity leaves the question of whether the current United States administration is strengthening ties with India in an effort to participate in a partnered global market competition or in an initiation of the practice of protectionism. These actions serve as mixed signals for the Indo-American relationship.

Part II of this Comment provides a history of the relationship between the United States and India. Part III discusses the Framework for Cooperation on Trade and Investment, signed by United States Trade Representative,

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<sup>1</sup> Barrack Obama, President, and Manmohan Singh, Prime Minister, Remarks at the Joint Press Conference in New Delhi, India (Nov. 8, 2010).

<sup>2</sup> K. ALAN KRONSTADT ET AL., CONG. RESEARCH SERV., RL 33529, INDIA-U.S. RELATIONS 1 (2010).

<sup>3</sup> UNITED STATES-INDIA TRADE POL’Y F., FRAMEWORK FOR COOPERATION ON TRADE AND INVESTMENT 1 (2010) [hereinafter FRAMEWORK].

<sup>4</sup> *Id.* at 1–3.

<sup>5</sup> Act of Aug. 13, 2010, Pub. L. No. 111-230, § 402, 124 Stat. 2485 (2010).

Ron Kirk, and Indian Minister of Commerce and Industry, Anand Sharma, on March 17, 2010. Part IV provides an understanding of the Immigration and Nationality Act, 8 U.S.C. § 1101, specifically focusing on section 1101(a)(15)(H)(i)(b), the H-1B visa. This Comment analyzes the function of the H-1B visa today, including allegations of illegal hiring practices and wage and hour violations committed by companies that utilize and defraud the H-1B visa program, the effects of which negatively influence India's domestic affairs.

Within this framework, Part V fleshes out the Southwest Border Supplemental Appropriations Act,<sup>6</sup> which President Obama signed into law on August 13, 2010. It discusses how the visa hike limits the number of professionals immigrating on temporary, nonimmigrant visas. Part VI touches on Ohio's ban on outsourcing, an Executive Order issued by former Governor Ted Strickland on August 6, 2010, which signifies state efforts to engage in protectionism. Part VII reflects on the response from companies and, perhaps more importantly, the Indian Government on the H-1B visa hike and Ohio ban. Finally, this Comment recommends a more substantive agreement on bilateral trade and investment, which protects United States domestic interests while competing in the global market and which broadens the United States' growth prospects in Asia while allowing India to handle its own domestic affairs.

## II. THE RELATIONSHIP BETWEEN INDIA AND THE UNITED STATES

India is one of the fastest growing investors in the United States, reaching about \$4.4 billion in 2009.<sup>7</sup> The United States has a reciprocal interest in investing in India's economic success to "prove to all those enamored of the Chinese model of authoritarian development that democracy is the firmest

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<sup>6</sup> *Id.* § 401.

<sup>7</sup> Press Release, The White House, U.S.-India Economic and Trade Relationship: Indian Investment in the U.S. (Nov. 6, 2010). The Tata Group is listed in this press release as having invested more than \$3 billion in the U.S. and as having employed 19,000 throughout the country. Tata Group's Tata Consultancy Services happens to be one of the top H-1B sponsors, planning to apply for 600-700 H-1B visas in 2011. *TCS to Hire 3,000 for Onsite Support*, THE FIN. EXPRESS (Apr. 21, 2010), <http://www.financial-express.com/news/tcs-to-hire-3-000-for-onsite-support/609022/>.

foundation for the achievement of humankind's most basic aspirations."<sup>8</sup>

#### A. Common Interests

The United States and India have a shared interest in the free flow of commerce and resources, ranging from cotton to pharmaceuticals.<sup>9</sup> Bilateral trade between the United States and India in 2008 for goods and services exceeded nearly \$50 billion.<sup>10</sup> Principal exports from the United States into India include "diagnostic or lab reagents, aircraft and parts, advanced machinery, cotton, fertilizers, ferrous waste/scrap metal, and computer hardware."<sup>11</sup> Principal imports from India into the United States "include textiles and ready-made garments, Internet-enabled services, agricultural and related products, gems and jewelry, leather products, and chemicals."<sup>12</sup>

Besides the common interest in merchandise trade, stabilization in Asia is critical to both countries. The United States has a profound security interest in reshaping the Asian power balance, both in terms of terrorism and nuclear warfare. India has been hit hard by terrorism, ranking sixth in terrorist killings in the most recent tally compiled by the United States National Counterterrorism Center.<sup>13</sup> India has a great stake in partnering with the United States to combat threats of

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<sup>8</sup> Daniel Twining, *Why Obama Needs to Play His Cards Right With India*, FOREIGN POL'Y, Nov. 24, 2009, [http://shadow.foreignpolicy.com/posts/2009/11/24/obama\\_should\\_propose\\_an\\_asian\\_g2\\_with\\_india](http://shadow.foreignpolicy.com/posts/2009/11/24/obama_should_propose_an_asian_g2_with_india).

<sup>9</sup> *Background Note: India*, U.S. DEPT OF ST. (July 14, 2010), <http://www.state.gov/r/pa/ei/bgn/3454.htm>. A difficulty with importing Indian pharmaceuticals is that the U.S. Food and Drug Administration has already experienced manufacturing "slip ups" from Indian pharmaceutical companies, such as Ranbaxy Laboratories and Sun Pharmaceutical Industries. Viveka Roychowdhury, *A Trojan Horse*, EXPRESS PHARMA, <http://www.expresspharmaonline.com/20101115/edit01.shtml> (last visited Feb. 29, 2012). Nevertheless, Indian efforts to develop generic pharmaceuticals will still likely benefit American-based pharmaceutical companies, such as Abbott Laboratories, that can purchase the formulations and distribute the product. *Id.* The United States will probably begin sending trade missions to India to promote continued sale of such goods in the medicinal and health care areas. *Id.*

<sup>10</sup> *Background Note: India*, *supra* note 9.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> NAT'L COUNTERTERRORISM CTR., 2009 REPORT ON TERRORISM 18 (2010).

terrorism, including those threats coming from within its own borders.<sup>14</sup>

Nevertheless, “there are some differences [between the countries], . . . including India's nuclear weapons programs and the pace of India's economic reforms.”<sup>15</sup> India did not sign the Nuclear Non-Proliferation Treaty. In 2008, however, the International Atomic Energy Agency approved the India-Safeguards Agreement, granting India rights and obligations it would have under the Nuclear Non-Proliferation Treaty, but without requiring India to sign. This is in part due to India's “no first use” policy, which makes it possible for the United States to continue to export nuclear materials and equipment to India despite the fact that India is not a signatory to the treaty. This does carve out a special niche for India, and it is important to United States' interests to create incentives and safeguards to the exception. To identify issues of interest and work collaboratively, the United States and India set up their Trade Policy Forum.

### *B. Trade Policy Forum*

The United States—India Strategic Dialogue (“the Strategic Dialogue”) announced in July 2009 reaffirms our strategic partnership and reflects our common belief that democracy, political and economic freedom, the rule of law, and security serve as the foundation of economic opportunity. The United States—India Trade Policy Forum (“the Trade Policy Forum”) is a key element of the Strategic Dialogue, serving to advance our two countries' efforts to expand our economic ties.<sup>16</sup>

The Trade Policy Forum was set up in 2005 and is comprised of five Focus Groups: Agriculture, Innovation and Creativity, Investment, Services, and Tariff and Non-Tariff

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<sup>14</sup> India has been facing Indian Islamic organizations, such as the SIMI (Students Islamic Movement of India), that have been responsible for many high profile terrorist attacks in the country. Their goal is an Islamic India, free from Westernization and adhering to a strict Muslim way of life. Yoginder Sikan, *Islamic Assertion in Contemporary India: The Case of the Students Islamic Movement of India*, 23 J. MUSLIM MINORITY AFF. 335, 341–43 (2003).

<sup>15</sup> *Background Note: India*, *supra* note 9.

<sup>16</sup> FRAMEWORK, *supra* note 3, at 1.

Barriers.<sup>17</sup> The Trade Policy Forum is co-chaired by the United States Trade Representative, Ron Kirk, and the Indian Minister of Commerce and Industry, Anand Sharma.<sup>18</sup> The Focus Groups meet periodically to work towards the goals of the Trade Policy Forum, identifying the issues impeding those areas and developing the means to enhance open bilateral trade and investment. The Focus Groups needed an adjunct to provide strategic direction, input, and support, and so the Private Sector Advisory Group (“PSAG”) was created in 2007.<sup>19</sup>

On September 21, 2010, the seventh Trade Policy Forum was convened.<sup>20</sup> The United States and India agreed to work together to support greater involvement of small and medium enterprises in each other’s markets and to pursue initiatives in the further development of India’s infrastructure, collaboration on clean energy and environmental services, information and communications technologies, and other key sectors.<sup>21</sup> The delegations discussed the continued working of the PSAG. PSAG also submitted a report to Ambassador Kirk and Minister Sharma outlining its proposals for advancing the U.S.-India trade and investment relationship at this meeting.<sup>22</sup>

### III. THE FRAMEWORK FOR COOPERATION ON TRADE AND INVESTMENT<sup>23</sup>

The Work Plan announced in the Framework begins by highlighting the work of the Trade Policy Forum’s focus groups:

1. Agriculture Focus Group: Adopting and applying transparent, [World Trade Organization (“WTO”)]-consistent policies governing trade in agricultural products, including science-based,

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<sup>17</sup> *India-US Bilateral Dialogues*, EMBASSY OF INDIA, <http://www.indianembassy.org/india---us-bilateral-dialogues.php> (last visited Feb. 29, 2011).

<sup>18</sup> Press Release, Office of the U.S. Trade Representative, United States and India Sign Framework for Cooperation on Trade and Investment: Kirk, Sharma Convene Meeting of Private Sector Advisory Group and Announce Bilateral Cooperation on Small-and Medium-Enterprise Development (Mar. 17, 2010).

<sup>19</sup> *Id.*

<sup>20</sup> Press Release, Office of the U.S. Trade Representative, United States and India Hold Seventh Trade Policy Forum (Sept. 21, 2010).

<sup>21</sup> Press Release, *supra* note 18.

<sup>22</sup> *Id.*

<sup>23</sup> FRAMEWORK, *supra* note 3, at 1.

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sanitary and phytosanitary policies, and other issues

2. Innovation and Creativity Focus Group: Improving intellectual property rights protection and enforcement, enhancing awareness of intellectual property rights, fostering innovation and creativity, and increasing collaboration between U.S. and Indian innovators

3. Investment Focus Group: Providing an open and predictable climate for bilateral investment and increasing opportunities for private investment across economic sectors, including in projects to support India's infrastructure goals

4. Services Focus Group: Promoting areas of cooperation that enable services trade, including bilateral cooperation, trade and investment in the information and communications technology, education, environmental and energy services and healthcare sectors

5. Tariff and Non-Tariff Barriers Focus Group: Promoting policies to expand market access, including adopting transparent, WTO-consistent policies governing tariffs, standards, customs valuation, licensing and other non-tariff regulations.<sup>24</sup>

The Framework goes on to explain initiatives to be undertaken to meet the objectives of developing and enforcing trade policies and fostering a trade-enhancing environment. Here, the Framework describes an initiative for greater involvement by small and medium-sized enterprises ("SME") in United States and Indian markets;<sup>25</sup> "[i]t also promotes inclusive growth . . . and the observance of labor rights."<sup>26</sup>

#### *A. Understanding the Framework*

The first part of the agreement focuses on agriculture and trade. About twenty percent of India's Gross Domestic Product ("GDP") is comprised of agriculture and related activities. Meanwhile, about seventy percent of the country lives in the countryside, and about fifty percent of the population have farm-related jobs.<sup>27</sup> The U.S. Department of Agriculture

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<sup>24</sup> *Id.* at 2–3.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.*

<sup>27</sup> Robert O. Blake, Jr., Assistant Sec'y of State for S. & Central Asian Affairs, Remarks at the Chicago Council on Global Affairs (Feb. 18, 2010).

created a fellowship opportunity that has brought forty-eight Indian agricultural specialists to the United States to study techniques that enable them to research and develop to help feed India's poor.<sup>28</sup>

For American companies to feel comfortable doing business in India and investing in Indian markets, solid intellectual property rights protection and enforcement are important goals of the Framework. In fact, "[e]nhancing awareness of intellectual property rights, fostering innovation and creativity, and increasing collaboration between U. S. and Indian innovators are the key objectives set forth in the agreement."<sup>29</sup> India's intellectual property protections are still weaker than those of the United States in important ways.<sup>30</sup> It is argued that a need for public awareness, as evidenced by the small number of patent applications filed per year, coupled with inefficient bureaucracy and weak penalties, have contributed to weak protections for intellectual property.<sup>31</sup>

Clarifying law, value, and procedure are important goals due to the unpredictability of the investment climate. While it is important to develop reliable principles, the past decade has evidenced the shift to consistent standards:

"Our total trade has more than doubled just in the last 5 years. The better news for American companies is that while U.S. imports from India doubled between 2003 and 2008, U.S. exports to India grew by a factor of three and a half over the same time period."<sup>32</sup>

In the areas of investment, services, and tariff and non-tariff barriers to trade, outsourcing is the principal notion. Business process outsourcing ("BPO"), the outsourcing of business functions such as call centers and finance and accounting operations, is frequently done in India, generally because the country has a well-educated workforce.<sup>33</sup> General

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<sup>28</sup> *Id.*

<sup>29</sup> FRAMEWORK, *supra* note 3, at 2.

<sup>30</sup> ASHISH S. PRASAD & VIOLETA I. BALAN, STRATEGIES FOR U.S. COMPANIES TO MITIGATE LEGAL RISKS FROM DOING BUSINESS IN INDIA (2007).

<sup>31</sup> *Id.*

<sup>32</sup> Blake, *supra* note 27.

<sup>33</sup> Bryan Bertram, Note, *Building Fortress India: Should a Federal Law Be Created to Address Privacy Concerns in the United States-Indian Business Process Outsourcing Relationship?*, 29 B.C. INT'L & COMP. L. REV. 245 (2006).

Electric ("GE"), for example, has approximately 12,000 employees in India who undertake accounting, claims processing, credit evaluation, and other similar functions for about eighty worldwide GE branches.<sup>34</sup> In the spring of 2007, Citigroup Inc. broadcasted it would bring some 8,000 positions to India in BPO functions.<sup>35</sup>

India is the second most attractive investment location among transnational corporations,<sup>36</sup> the second most attractive destination for manufacturing,<sup>37</sup> and the most preferred destination for services.<sup>38</sup> India "offers an unbeatable mix of low costs, deep technical and language skills, mature vendors, and supportive government policies,"<sup>39</sup> which are the main investment opportunities that American companies have been targeting.

The initiative announced in the Framework to integrate SMEs into the global supply chain could create new opportunities and more jobs in both the United States and India. This would be achieved through greater public awareness, enhanced public-private collaboration, and a sharper focus on the benefits of large company and SME collaboration.<sup>40</sup>

### *B. The Framework: Symbolic, not Substantive*

The Framework serves a symbolic purpose as reaffirming the strategic partnership between the United States and India. The Framework does not establish any new rights or obligations on either party, but serves as an agreement to continue dialogue on identifying and resolving divergences and specific barriers to bilateral trade and investment.

A rigid Indian alliance with or against the United States is

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<sup>34</sup> *Id.* at 249.

<sup>35</sup> A.T. KEARNEY, OFFSHORING FOR LONG-TERM ADVANTAGE: THE 2007 A.T. KEARNEY GLOBAL SERVICES LOCATION INDEX 5 (2007) [hereinafter 2007 GSLI].

<sup>36</sup> United Nations Conference on Trade & Dev., World Investment Report: Transnational Corporations and the Internationalization of R&D 34 (2005).

<sup>37</sup> GLOBAL BUS. POLICY COUNCIL, FDI CONFIDENCE INDEX (2004).

<sup>38</sup> 2007 GSLI, *supra* note 35.

<sup>39</sup> *Id.* at 5.

<sup>40</sup> Press Release, *supra* note 18.

highly unlikely, but a range of options exists in between. On key strategic and ideational issues, India could tilt toward the United States or engage in soft balancing<sup>41</sup> to frustrate United States policies. Strengthening multilateral ties is important to both countries, and each country's deep need to protect autonomy and solve domestic issues should lead to multinational treaties supporting global trade and investment, not necessarily a firm bilateral arrangement.

Only five months after the United States and India signed the Framework for Cooperation on Trade and Investment, President Obama signed a bill into law that increased fees employers must pay to apply for H1-B visas for their employees. This action serves as a mixed signal to India and the world; on one hand, the United States seeks to keep India in its corner by signing a symbolic bilateral agreement and, on the other hand, the United States is increasing fees on visas that affect Indian business and companies the most.

#### IV. THE H-1B VISA DIVERGING FROM CONGRESSIONAL INTENT

##### *A. Immigration and Nationality Statute, 8 U.S.C. §1101(a)(15)(H)(i)(b)*

Section 1101(a)(15)(H)(i)(b) of the Immigration and Nationality Statute states,

an alien . . . subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) of this title . . . who meets the requirements for the occupation specified in section 1184(i)(2) of this title . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title.<sup>42</sup>

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<sup>41</sup> Robert Pape, *Soft Balancing Against the United States*, 30 INT'L SEC. 7 (2005) (claiming how major powers are already engaging in the early stages of balancing behavior against the United States, by adopting "soft-balancing" measures that do not directly challenge U.S. military preponderance but use international institutions, economic statecraft, and diplomatic arrangements to delay, frustrate, and undermine U.S. policies).

<sup>42</sup> Immigration and Nationality Statute, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2010).

Congress realized the world was changing rapidly, as technological innovations, such as the Internet, were creating a high demand in the United States for high-tech workers to create new technologies and products.<sup>43</sup> Consequently, Congress created the H-1B visa program to allow for hiring foreign tech workers in special circumstances when American employers could not find qualified American citizens to fill jobs.<sup>44</sup>

In their properly functioning form, companies would be hiring the best and brightest foreign students to work in the United States for a relatively short amount of time. These temporary workers would assist in inventing new technologies and products for American-based employers, such as Microsoft or Apple. When their jobs in the United States were completed, they would open new avenues and lines of work for the American labor market.

Further, when the H-1B visa expired, if the company was unable to find a suitable replacement from the American workforce, it could apply for a green card<sup>45</sup> for that temporary worker. If the application was granted, that worker could move to the United States and continue working for the company. The worker would continue to innovate and create more products and technology, thereby creating more jobs, resources, services, and products for the American citizens.

The H-1B visa program is a “vehicle through which qualified aliens may seek admission to the United States on a temporary basis to work in their fields of expertise.”<sup>46</sup> It is intended to allow certain employers to staff workers from abroad in fields that have labor shortages.

Many argue the cap on H-1B visas should be raised or

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<sup>43</sup> 156 CONG. REC. S6996-01 (Aug. 12, 2010) (statement of Sen. Charles Schumer).

<sup>44</sup> Andrea Orr, *Enforcement Needed in H-1B Visa Laws*, ECON. POL'Y INST. (May 12, 2009), [http://www.epi.org/analysis\\_and\\_opinion/entry/enforce\\_ment\\_needed\\_in\\_h-1b\\_visa\\_laws/](http://www.epi.org/analysis_and_opinion/entry/enforce_ment_needed_in_h-1b_visa_laws/).

<sup>45</sup> *Need for Green Cards for Highly Skilled Workers Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter *Need for Green Cards*].

<sup>46</sup> U.S. DEP'T OF HOMELAND SEC., UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H-1B): FISCAL YEAR 2004 (2006).

eliminated, focusing on the argument that American employers in fields like information technology are not able to staff domestic workers. Further, it is not necessarily a question of a shortage of highly skilled workers because other factors play into the labor market. Indeed, “[t]he ultimate goal of our immigration policy should be to serve our nation’s best interest. Improving security is important, but at the same time, maintaining global competitiveness is vital to the national interest, and should be our objective.”<sup>47</sup>

### *B. The H-1B Visa Today*

The Government Accountability Office (“GAO”) recently found that H-1B employers categorize over half of their H-1B workers as entry level<sup>48</sup> and only six percent as fully competent.<sup>49</sup> This policy seems far from that of the best and brightest conceived of when the H-1B program was launched. GAO also reported that between 2004 and 2009, the United States government approved over one million H-1B visas to foreign nationals from thirteen “countries of concern.”<sup>50</sup> This is evidence of potential national security threats.

Fraud in the visa program is also a grave concern:

What was conceived as a means to meet temporary business needs for unique, highly skilled professionals from abroad is, in fact, being used by some employers to bring in relatively large numbers of foreign workers who may well be displacing U.S. workers and eroding employers' commitment to the domestic workforce.<sup>51</sup>

In 2008, United States Citizenship and Immigration Services’ (“USCIS”) Office of Fraud Detection and National

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<sup>47</sup> Mitchell L. Wexler, *A New Year and the Old Debate: Has Immigration Reform Reformed Anything?*, 13 NEXUS J. OP. 45, 57 (2007).

<sup>48</sup> 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 58 (2011).

<sup>49</sup> *Id.*

<sup>50</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-354, EXPORT CONTROLS: IMPROVEMENTS NEEDED TO PREVENT UNAUTHORIZED TECHNOLOGY RELEASES TO FOREIGN NATIONALS IN THE UNITED STATES 37 (2011).

<sup>51</sup> Christopher Fulmer, *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 (2009).

Security issued an assessment finding fraud in over thirteen percent of randomly selected cases.<sup>52</sup> This is evidenced by the use of staffing agencies to bring in H-1B workers, but then staffing them at other locations, usually performing work that would not satisfy the requirements of the program.<sup>53</sup> These agencies are known as body shops.

### C. Body Shops

Body shops are essentially contracting companies that sponsor workers on H-1B visas and subcontract the workers out to other companies. Body shops specialize in labor arbitrage, defined as “transferring work functions to a lower cost environment for increased savings.”<sup>54</sup> Not only can a body shop evade the minimum wage requirements<sup>55</sup> through a loophole in the legislation,<sup>56</sup> the body shop can also report that

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<sup>52</sup> *H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers Before the Subcomm. on Immigration Pol’y and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. (2011) (written testimony of Donald Neufeld, Associate Director, U.S. Citizenship and Immigration Services).

<sup>53</sup> See generally 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 (2003).

<sup>54</sup> 156 CONG. REC. S6996-01 (Aug. 12, 2010) (statement of Sen. Charles Schumer).

<sup>55</sup> 20 C.F.R. 655.731(a)(2) (2009) (providing “[t]he prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from an OFLC NPC (OES), an independent authoritative source, or other legitimate sources of wage data.”).

<sup>56</sup> “The loopholes referred to impose non-displacement and good faith recruitment requirements on a very small number of H-1B employers deemed ‘H-1B dependent,’ and hold employers to a manipulable standard that allows them to pay H-1B employees less than their U.S. counterparts.” Fulmer, *supra* note 51, at 824. The “manipulable standard” that Fulmer is discussing was brought to light when law firm Cohen & Grigsby, posted a video on their website (which was promptly removed) and on YouTube from their annual Immigration Law Update Seminar in May. Marketing Director Lawrence Lebowitz is quoted as saying, “Our goal is clearly not to find a qualified and interested U.S. worker.” Randall Burns, *Lawrence M. Lebowitz, Esq. “Our Objective at this Point is to Get You a Green Card”*, VDARE.COM (June 17, 2007, 12:36 PM), <http://www.vdare.com/posts/lawrence-m-lebowitz-esq-our-objectiv-e-is-to-get-this-person-a-green-card>.

it never discharged or displaced an American worker since the sub-contracting employer does not need to report it hired any H-1B workers.<sup>57</sup>

Essentially, the business model is to sponsor foreign workers into the United States who are willing to accept less pay than their American counterparts, but who qualify as specialty workers.<sup>58</sup> The next step is to place the foreign workers into other companies in exchange for a separate fee and subsequently transfer them from company to company in order to maximize profits from placement fees.<sup>59</sup> Thus, the companies are able to pay much less than the minimum wage to these foreign workers because they are camouflaged by layers of sub-contracting and invisible to enforcement agencies.

While it is true many body shops are impervious to liability because of this charade, some companies have found themselves faced with criminal and civil penalties on counts of conspiracy, mail fraud, and false claims with respect to immigration matters.<sup>60</sup>

#### 1. *United States v. Vision Systems Group, Inc.*<sup>61</sup>

On February 11, 2009, federal, state, and local law enforcement agencies in Iowa, California, Massachusetts, Texas, Pennsylvania, Kentucky, and New Jersey busted a nationwide H-1B scam ring.<sup>62</sup> Eleven people in seven states were arrested, and a ten-count indictment was issued against New Jersey IT services company Vision Systems Group.<sup>63</sup> The indictment charged Vision Systems Group with one count of conspiracy and eight counts of mail fraud, seeking \$7.4 million

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<sup>57</sup> Alaina M. Beach, *H-1B Visa Legislation: Legal Deficiencies and the Need for Reform*, 6 S.C. J. INT'L. L. & BUS. 273, 285 (2010). "The hired H-1B workers then focus on projects for the end employer, which 'allows the [end] employer to say it never hired any H-1B workers.' *Id.* (citations omitted).

<sup>58</sup> *Id.*

<sup>59</sup> *See id.* (explaining that "bodyshops profit by charging the end company more than they pay the H-1B workers.").

<sup>60</sup> *See infra* Parts IV.C.1, IV.C.2.

<sup>61</sup> Plea Agreement, U.S. v. Vision Systems Group, Inc., No. 4:09-CR-00004 (S.D. Iowa 2010).

<sup>62</sup> *11 Arrested, Indicted in Multi-State Visa Fraud Operation*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, (Feb. 12, 2009), available at <http://www.ice.gov/news/releases/0902/090212desmoines.htm>.

<sup>63</sup> *Id.*

in forfeitures.<sup>64</sup>

The defendant, Vision Systems Group, Inc. was registered as a New Jersey corporation since October 1996.<sup>65</sup> Vision Systems created Venturisoft, Inc., an affiliated entity, which was a shell corporation with no actual employees in the State of Iowa.<sup>66</sup> Vision Systems submitted a petition for foreign worker Suresh Kumar Pola.<sup>67</sup> The form and attachments were submitted to U.S. Citizenship & Immigration Services ("USCIS"), containing materially false statements concerning the name of the prospective employer, location of employment, and current number of Venturisoft employees.<sup>68</sup> It was reported that Pola would be employed by Venturisoft, when in fact he was employed by Vaptech Inc.<sup>69</sup> The documents stated that Pola would be working in specific towns in New Jersey and Iowa, but he was actually working at other locations throughout the United States.<sup>70</sup>

This is a classic example of a body shop defrauding the H-1B visa process. The indictment was brought in the United States District Court for the Southern District of Iowa, and a plea agreement was entered into and filed on October 14, 2010, with the defendant pleading guilty to mail fraud.<sup>71</sup>

The USCIS Deputy Director, Michael Aytes, said, "our adjudication officers can spot inconsistencies during the application process that ultimately lead to the successful outcome we're seeing today. Visa fraud undermines the integrity of the immigration system."<sup>72</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> Plea Agreement, *supra* note 61, at 5.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 6.

<sup>69</sup> Plea Agreement, *supra* note 61, at 6.

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 5.

<sup>72</sup> Roy Mark, *Feds Bust Nationwide H-1B Visa Scam*, E-WEEK.COM (Feb. 13, 2009), <http://www.eweek.com/c/a/IT-Management/Feds-Bust-Nationwide-H1B-Visa-Scam/>.

2. *Palmer v. Infosys Technologies, Ltd.*<sup>73</sup>

In addition to criminal complaints, lawsuits have also arisen in the H-1B arena. Infosys, a company with headquarters in India, is facing a lawsuit for H-1B visa fraud.<sup>74</sup> It is alleged that in March 2010, Palmer was invited to the company's Indian headquarters. During one of the planned meetings, Infosys management discussed the need and means to get around the H-1B limitations.<sup>75</sup> During the course of his employment, Palmer learned that Infosys was sending unskilled foreigners to work full-time positions, which is a violation of immigration law.<sup>76</sup> Infosys also allegedly overbilled its customers for the labor costs of the employees it outsourced to them.<sup>77</sup>

According to the complaint, Palmer was asked to write false "welcome letters" for the foreign Infosys employees seeking H-1B visas.<sup>78</sup> Palmer contacted Human Resources, which in turn confirmed that Infosys' foreign employees were not legally allowed to work in the United States on the H-1B visas. He was subsequently reprimanded for his refusal and transferred to another department where he was asked to rewrite employment contracts for employees on H-1B visas; again, he refused due to the illegality of the requested act.<sup>79</sup>

On November 9, 2011, Judge Thompson issued an opinion and order denying Infosys' motion to compel arbitration.<sup>80</sup> This claim of large-scale visa fraud will now be decided in court. If the allegations contained in the complaint prove to be true, this would be another example of an Indian-based company abusing

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<sup>73</sup> Complaint, *Palmer v. Infosys Tech., Ltd.*, No. 2:11-cv-00217 (Ala. Cir. Ct. 2011).

<sup>74</sup> See generally Bill Synder, *Inside Infosys's Alleged Illegal Visa Practices: Whistle-blower Claims Giant Indian Outsourcer is Illegally Importing Low-paid Tech Workers Using Temporary Visas*, PCWORLD (Mar. 31, 2011, 5:33 PM), [http://www.pcworld.com/article/223949/inside\\_infosyss\\_alleged\\_illegal visa\\_practices.html](http://www.pcworld.com/article/223949/inside_infosyss_alleged_illegal visa_practices.html).

<sup>75</sup> Complaint, *supra* note 73, at 4.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Id.*

<sup>80</sup> Opinion and Order, *Palmer v. Infosys Tech., Ltd.*, No. 2:11-cv-00217 (M.D. Ala. 2011).

the H-1B visa program and ignoring the United States' labor laws.

*D. The Ends Do Not Justify the Means*

The argument that H-1B workers generate more jobs for American workers is not without merit. Sun Microsystems, Inc., Intel, Ebay, Yahoo, and even Google very well would not exist today had the program not been available to the bright minds of Vinod Khosla, Andy Grove, Pierre Omidyar, Jerry Yang, and Sergey Brin.<sup>81</sup>

One problem is that the abuse of the H-1B program undermines the entire Immigration and Nationality Statute. Comprehensive reform is needed to encourage the world's best and brightest to come to the United States to create new technologies and businesses that will employ countless American workers. This reform needs to focus on discouraging businesses from using the United States immigration laws as a means to obtain temporary and less expensive foreign labor to replace capable American workers.<sup>82</sup>

Abuse of the system is lowering the wages for American technology workers who are already in the marketplace. The incentive to work for cheaper wages is driven by the high availability of H-1B visa holders trapped in the body shop business model. In New York City, for example, the prevailing wage for a computer systems engineer in systems software is \$68,370 for an entry-level worker and \$120,037 for a fully competent worker.<sup>83</sup> Some might argue that fully competent American workers are being displaced by entry-level H-1B visa holders.<sup>84</sup>

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<sup>81</sup> See generally *Top US Companies Founded by Immigrants: Intel, Solectron, Sanmina-SCI, Sun*, ZDNET RESEARCH (Nov. 15, 2006), <http://www.zdnet.com/blog/itfacts/top-us-companies-founded-by-immigrants-intel-solectron-sanmina-sci-sun/12064>.

<sup>82</sup> 156 CONG. REC. S6996-01 (Aug. 12, 2010) (statement of Sen. Charles Schumer).

<sup>83</sup> *H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers Before the Subcomm. on Immigration Pol'y and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. (2011).

<sup>84</sup> See Press Release, U.S. House of Representatives Comm. on the Judiciary, Statement of Judiciary Committee Chairman Lamar Smith Subcommittee on Immigration Policy and Enforcement Hearing on H-1B

The ends really do not justify the means. A market saturated with cheaper labor and foreign workers discourages American students from entering the technology industry in the first place. Science and math have not been promoted to full potential, so some students are lost from flaws in the country's education system. Other students who possess the desire and tenacity to study in such fields as technology and engineering simply do not have the money to afford advanced studies. Yet more students can see that paying hundreds of thousands of dollars for advanced degrees is not worth the cost when the jobs are already filled with foreign workers who are employed at pay rates far below what could support the repayment of a graduate student's debt.

*E. The Negative Effect of the H-1B Program on India*

As Infosys<sup>85</sup> and other Indian companies have prospered, they have also contributed to rising inequality in India. This has occurred partly by helping to bid up salaries for those who get top jobs. Infosys continues still to seek workers willing to earn less than it even pays in India.

The unequal distribution of wealth in India is no secret. One hundred million more Indians now live in poverty than in 2004.<sup>86</sup> India's nominal per capita GDP lags behind even poorer countries, and much of the country's wealth has accrued to the benefit of the urban middle class, widening the gap between the rich and the poor and leaving many in the countryside behind.<sup>87</sup> Furthermore, it seems thirty-seven percent of Indians are illiterate,<sup>88</sup> with more than thirty percent living in poverty.<sup>89</sup>

In 2009, the Indian Planning Commission issued a report indicating that the country has more than 400 million people

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Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers (Mar. 31, 2011).

<sup>85</sup> See *supra* Part IV.C.2.

<sup>86</sup> *100 Million More Indians Now Living in Poverty*, REUTERS (April 18, 2010), <http://in.reuters.com/article/2010/04/18/idINIndia-477918201004> 18.

<sup>87</sup> See John D. Giorciari, *India's Approach to Great-Power Status*, 35 FLETCHER F. WORLD AFF. 61 (2011).

<sup>88</sup> See *India Statistics*, UNICEF, [http://www.unicef.org/infobycountry/india\\_statistics.html](http://www.unicef.org/infobycountry/india_statistics.html) (last visited Feb. 29, 2012).

<sup>89</sup> *100 Million More Indians Now Living in Poverty*, *supra* note 86.

living on less than \$1.25 per day, the World Bank and United Nations' benchmark for absolute poverty.<sup>90</sup> Infosys, which prospered from outsourcing activities in the developed world, played a role in India's growth.<sup>91</sup> Its direct benefits, however, remain restricted to the most educated within India, even if it does reach further down the education hierarchy than it once did. S. Gopalakrishnan is one of the founders of Infosys and its current Chief Executive Officer.<sup>92</sup> Gopalakrishnan said that ten years ago, Infosys hired ninety percent of its new employees from the top tier of Indian universities, but now that number is down to ten percent.<sup>93</sup> He says this is due to the high competition among the graduates of those colleges.<sup>94</sup>

With documented violations of the visa program, ignored wage and hour laws, and harm to the infrastructure of both the United States and India, Congress must be aware something needs to be done. Before engaging in a comprehensive reform, an opportunity arose for the United States government to flex its muscles, whether intentional or not. The desire to create new United States Border Patrol positions, mainly to combat drug cartels and illegal immigration from Mexico, needed funding.<sup>95</sup> Instead of dipping into the nation's budget, Congress passed the Supplemental Appropriations Act.<sup>96</sup>

#### V. THE SOUTHWEST BORDER SECURITY ACT, SUPPLEMENTAL APPROPRIATIONS FOR FISCAL YEAR 2010

Section 402(b) of the Supplemental Appropriations Act provides:

From the date of the enactment of the Supplemental Appropriations through September 30, 2014, the fees required to

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<sup>90</sup> See Giorciari, *supra* note 87.

<sup>91</sup> Sanjay Jalona & Avinash Chandrakar, *Evolution of IT Services Delivery Model*, INFOSYS, Mar. 2008, at 2.

<sup>92</sup> See *Management Profiles*, INFOSYS, <http://www.infosys.com/about/management-profiles/Pages/s-gopalakrishnan.aspx> (last visited Mar. 2, 2011).

<sup>93</sup> Floyd, Norris, *Fearing Protectionism, In India*, N.Y. TIMES, Jan. 26, 2007, at C1.

<sup>94</sup> *Id.*

<sup>95</sup> Kent Paterson, *One Border, Two Narratives*, LA PRENSA SAN DIEGO (Aug. 13, 2010), <http://laprensa-sandiego.org/stories/one-border-two-narratives/>.

<sup>96</sup> *Id.*

be submitted with an application for admission as a nonimmigrant under 8 U.S.C. 1101(a)(15)(H)(i)(b) is increased by \$2,000 for applicants that employ 50 or more employees in the United States if more than 50 percent of the applicant's employees are such nonimmigrants or nonimmigrants described in section 101(a)(15)(L) of such Act.<sup>97</sup>

Securing the Southwest Border of the United States has been a top priority for the current Obama Administration. President Obama signed into law the Southwest Border Security Act, appropriating funds of \$600 million to include funding for drones; agency personnel from Alcohol, Tobacco, and Firearms; the Drug Enforcement Agency; and Federal Bureau of Investigation (“FBI”) border personnel.<sup>98</sup> This also includes a 1,000-person Border Patrol “strike force” to combat the “gangs and criminal organizations that operate on both [the United States and Mexican] sides of [the] border.”<sup>99</sup>

The greatest obstacle to this bill's passage was the inability to appropriate funds for the personnel, resources, and services it provides.<sup>100</sup> The American Recovery and Reinvestment Act of 2009<sup>101</sup> was the most attractive package to dip into for the funds.<sup>102</sup> The logical flaw, however, is that if Congress funded the Southwest Border Security Act with the stimulus, it would be making inroads into the programs that have been created to generate more jobs for American workers.

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<sup>97</sup> Act of Aug. 13, 2010, Pub. L. No. 111-230, § 402(b), 124 Stat. 2485 (2010).

<sup>98</sup> Kent Paterson, *One Border, Two Narratives*, LA PRENSA SAN DIEGO (Aug. 13, 2010), <http://laprensa-sandiego.org/stories/one-border-two-narratives/>.

<sup>99</sup> Press Release, The White House, Statement by the President on the Passage of the Southwest Border Security Bill (Aug. 12, 2010).

<sup>100</sup> See 156 CONG. REC. S6996-01 (Aug. 12, 2010) (statement of Sen. Charles E. Schumer).

<sup>101</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>102</sup> *Id.* In certain sectors, such as wind energy, the Recovery Act's stimulus is being used to create jobs overseas. As discussed in *infra* Part V, Ohio has become aware of the misuse of these public funds and is taking steps to reverse the damage caused by the issue. Four senators have petitioned “the Treasury Department to issue a moratorium on awarding grants until legislation can be written to rectify the problem.” Dustin Ensinger, *Outsourcing America's Stimulus Jobs*, ECON. IN CRISIS, Mar. 3, 2010, <http://www.economyincrisis.org/content/outsourcing-americas-stimulus-jobs>.

Another eye-catching option for this administration was, of course, not providing a payment plan.<sup>103</sup> Doing so, however, would mean increasing the nation's deficit by the proposed \$600 million.<sup>104</sup> That would have been a huge blow to taxpayers' pockets. Congress ultimately decided the funding for the Southwest Border Security Act would come by increasing fees on companies for H-1B visas for foreign workers when they are in a position to defraud the Department of Labor by employing these workers in body shop situations.<sup>105</sup> Certainly, it proves difficult to determine which employers are practicing legitimate H-1B sponsorship and which employers are defrauding the program.

## VI. PROTECTIONIST PRACTICES WITHIN THE UNITED STATES

In addition to indiscriminately applying fee hikes on a visa that is used predominately by Indian nationals and Indian companies alike, the state of Ohio realized its own public stimulus funds were being used to outsource work and implemented an Executive Order to cut off-shoring to destinations like India.<sup>106</sup>

### A. Ohio's Ban on Outsourcing

In 2008, foreign-controlled companies employed 231,600 workers in Ohio,<sup>107</sup> the seventh largest total among the fifty states.<sup>108</sup> Over one quarter of these workers were in the manufacturing sector.<sup>109</sup> Foreign investment created over five percent of the total private-industry employment in Ohio in

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<sup>103</sup> The Congressional Budget Office projects the United States' federal budget deficit to reach \$1.5 trillion in 2011. CONGRESSIONAL BUDGET OFFICE, BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2011 THROUGH 2021 (2011).

<sup>104</sup> *Id.*

<sup>105</sup> *See supra* Part IV.C.

<sup>106</sup> Donna Willis, *Gov. Issues Executive Order After NBC 4 Investigation of Outsourced Stimulus Jobs*, NBC4I.COM, <http://www2.nbc4i.com/news/2010/aug/06/17/gov-issues-executive-order-after-nbc-4-investigati-ar-181700/>.

<sup>107</sup> Ohio, *State Specific Benefits*, Link from OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/benefits-trade/state-specific-benefits> (last visited Mar. 10, 2012).

<sup>108</sup> *Id.* (calculated by clicking on each state to determine total foreign-controlled employment).

<sup>109</sup> *Id.*

2008.<sup>110</sup>

Former Governor of Ohio, Ted Strickland, issued Executive Order 2010-09S after an investigation found public funds were being used to outsource work. He stated that

Ohioans have been among the hardest hit by more than a decade of unfair trade agreements and the trickle-down economic policies that promoted offshoring jobs at the expense of Ohioans who work for a living. We must do everything within our power to prevent outsourcing jobs because it undermines our economic development objectives, slows our recovery and deprives Ohioans and other Americans of employment opportunities.<sup>111</sup>

In March of 2010, the Ohio Department of Development contracted with Parago, Inc., a Texas-based company, to administer a program to provide rebates for the purchase of new energy-efficient appliances.<sup>112</sup> Though the goal of the program was to create BPO-type jobs for Ohioans and other Americans, Parago reportedly used hundreds of workers in El Salvador to process applications and answer customers' calls.<sup>113</sup> An investigation revealed a practice of companies bidding for work and then outsourcing the work off-shore.<sup>114</sup> Though this Executive Order is simply reiterating United States law and policy, the response from Indian companies has been less than accepting.

#### VII. INDIA'S RESPONSE TO THE SUPPLEMENTAL APPROPRIATIONS ACT AND EXECUTIVE ORDER 2010-09S

The Government Accountability Office reported that between 2000 and 2009, the majority of approved H-1B workers were born in Asia, and 46.9% of the total holders had India listed as their country of birth.<sup>115</sup> It is quite understandable that India should feel targeted and

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<sup>110</sup> *Id.*

<sup>111</sup> Willis, *supra* note 106.

<sup>112</sup> Mark Niquette, *Strickland: No Ohio Outsourcing*, THE COLUMBUS DISPATCH (Aug. 7, 2010, 8:30 AM), [http://www.dispatchpolitics.com/live/content/local\\_news/stories/2010/08/07/copy/stricklandnoohiooutsourcing.html?sid=101](http://www.dispatchpolitics.com/live/content/local_news/stories/2010/08/07/copy/stricklandnoohiooutsourcing.html?sid=101).

<sup>113</sup> *Id.*

<sup>114</sup> Willis, *supra* note 106.

<sup>115</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 48, at 33.

discriminated against based on the measures taken by the United States in 2010.

Since the Framework is a symbolic document, not a treaty, India is not bound to maintain any level of trade and investment with the United States. India will put serious pressure on the United States market if the Administration does not communicate its goals clearly.<sup>116</sup> With that said, India is not a signatory to the WTO's multilateral public procurement treaty.<sup>117</sup> This means that arguing Ohio's ban is discriminatory or illegal will not likely be possible. Economic backlash, however, may work even better than legal arguments to the WTO in persuading the United States to change its practices.

Indian officials have certainly vocalized their issues with these practices,<sup>118</sup> but they have not specified what action the country would take if the United States does not fix the dichotomy it created when it passed the Supplemental Appropriations Act. They have said only, "[o]ur concerns on [the visa fee hike and the outsourcing ban by Ohio] have been registered and appreciated. We will wait for the next steps."<sup>119</sup>

A high-ranking administrative officer in India anonymously announced that during internal discussions, the government realized that at a time of such economic crisis internationally, asking the United States government to help protect jobs of Indian citizens would be counterproductive. Instead, the official suggests the government should help Indian engineers get work in countries in the EU or elsewhere, especially if these recent measures hurt their job prospects.<sup>120</sup> United States-India Business Council ("USIBC") President Ron

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<sup>116</sup> *U.S.-India Business Council Urges Congress and the Administration to Resist Immigration Legislation Targeting India*, BUSINESS WIRE (Aug. 10, 2010, 1:12 PM), <http://www.businesswire.com/news/home/20100810006523/en/U.S.-India-Business-Council-Urges-Congress-Administration-Resist> [hereinafter U.S.-India Business Council].

<sup>117</sup> Agreement on Government Procurement, Apr. 12, 1979, 1235 U.N. T.S. 814.

<sup>118</sup> *U.S.-India Business Council*, *supra* note 116.

<sup>119</sup> *India-U.S. CECA Next Logical Step, Says Sharma*, THE HINDU (Nov. 10, 2010), <http://www.thehindu.com/business/Economy/article876730.ece>.

<sup>120</sup> Mehul Srivastava, *Anger Grows in India over U.S. Visa Rules*, BUSINESSWEEK (Feb. 24, 2009, 11:37 AM), [http://www.businessweek.com/globalbiz/content/feb2009/gb20090224\\_563564.htm](http://www.businessweek.com/globalbiz/content/feb2009/gb20090224_563564.htm).

Somers remarked on the measures as well, expressing how unfortunate it is “that the Congress passed a bill that not only links India to border security with Mexico, but also does not take into account the terrible economic impact this will have for the United States.”<sup>121</sup>

In encouraging the passage of the Supplemental Appropriations Act, Senator Schumer addressed the fears and complaints. He denounced the proposition that the purpose of the legislation was to target Indian companies stating, “[w]e are simply raising fees for businesses that use the H-1B visa to do things that are contrary to the program’s original intent, and that will be on any company from any country that does it.”<sup>122</sup>

#### VIII. RECOMMENDATIONS

With respect to employment, the United States’ domestic interests are paramount. This includes the encouragement of the H-1B visa program, but not the way it stands today. Further, it is simply bad public policy to sign a symbolic agreement with a country to strengthen bilateral ties, while internally passing legislation that limits reciprocity. Consequently, Asia-based companies will pull out their outsourced work from the United States to avoid the high fees attached to the H-1B visa application.

Keeping in line with the original intent of the H-1B visa program would solve many of these problems. There needs to be more oversight, harsher penalties, and greater enforcement of the safeguards for foreign workers inherent in the statute. While this may be very difficult and expensive to accomplish, it may be the only solution. Some have argued that making it easier to acquire a green card while on H-1B status will help to reform the current program.<sup>123</sup>

The program’s aim has been to encourage the immigration

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<sup>121</sup> *U.S.-India Business Council*, *supra* note 116.

<sup>122</sup> See 156 CONG. REC. S6998 (daily ed. Aug. 12, 2010) (statement of Sen. Charles Schumer).

<sup>123</sup> Bruce A. Morrison, *More Green Cards, Not H-1B Visas, Is the Real Fix*, U.S. NEWS AND WORLD REPORT (Dec 28, 2011), <http://www.usnews.com/debate-club/should-h-b-visas-be-easier-to-get/more-green-cards-not-h-1b-visas-is-the-real-fix>.

of exceptionally talented people, including scientists, engineers, and educators.<sup>124</sup> The program has helped entice the world's "best and brightest" to relocate to America in order to innovate and create wealth and jobs.<sup>125</sup> Congressman Goodlatte of Virginia explained that the best and brightest come to the United States, but then must face the task of procuring a green card, and will frequently leave the United States in search of other job prospects.<sup>126</sup> Knowing they will have to wait many years to get their green cards approved, it is ever more attractive for H-1B workers to leave the United States and go to other countries with more stable and predictable immigration laws.<sup>127</sup> Legislation that can increase the availability of green cards for highly skilled workers would be ideal.

The reform of United States immigration law is of utmost importance, but it is also important to allow India to solve its domestic problems without being bound to a rigid bilateral trade and investment treaty. Although India has reduced poverty by half since gaining independence, some 800 million Indians still live on less than \$2 a day.<sup>128</sup> One quarter of the world's malnourished people claim their residence in India and the adult illiteracy rate in India is close to forty percent.<sup>129</sup> Eleven percent of the population still lacks access to clean water.<sup>130</sup>

Additional safeguards in legal immigration law and amnesty must be in place to protect the labor markets of the United States and India, respectively. These employment practices are leading employees to suffer inconsistent wages, overtime violations, illegal discharges, and other conduct conflicting with the labor policy of the United States, which undermines the integrity of the laws and compromises the rights of both Indian and American employees.

A comprehensive investment treaty is a good idea for the

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<sup>124</sup> See Fulmer, *supra* note 51.

<sup>125</sup> *Id.* at 823.

<sup>126</sup> *Need for Green Cards*, *supra* note 45, at 2–3 (statement of Rep. Bob Goodlatte, Member, House Judiciary Committee).

<sup>127</sup> See *id.*

<sup>128</sup> Blake, *supra* note 27.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

future, but not necessarily one confined to India and the United States. A multilateral treaty that encourages other major powers, such as China and Russia, to engage in open trade would be the best solution for all parties. Whatever path the countries choose, it must be one that allows the United States to continue competing in the global market, while also allowing both India and the United States the freedom to handle domestic problems on their own.

#### IX. CONCLUSION

The United States and India share common interests, from international security to the free flow of commerce. India has joined the United States in becoming a major world power, and over the last decade, the two countries have worked together to strategize capitalizing on each other's growth. Ties have strengthened between the nations. However, much of that relationship rests on a flawed system of immigration and inconsistent international employment standards.

The United States and India signed the Framework, and only five months later, the United States passed legislation to increase fees on the H-1B visa, most frequently utilized by Indian businesses. Additionally, the state of Ohio made a statement in banning outsourcing within a week after the visa fee hike. The United States is sending mixed messages to India as well as to the rest of the world.

So long as the United States Administration keeps dialogue open and assuages the fears of the Indian business sector, the fierce debate will remain calm in the short-term. In the long run, however, the United States must overhaul its current immigration law, starting with the H-1B visa program. Eventually, a multilateral trade treaty should be reached, exponentially expanding the global marketplace, while allowing member countries to protect their own domestic interests.