Client ALERT

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Immigration Newsflash

New Senate L-1 Bill

The Chairman of the United States Senate Immigration Subcommittee, Senator Saxby Chambliss (R-GA), today introduced a bill on the subject of L-1 visas. The introduction of this bill is a logical consequence of the recent hearing held by the Subcommittee on the subject, at which Chairman Chambliss presided. At that hearing, the Global Personnel Alliance (GPA), a consortium of internationally active companies interested in global personnel mobility, testified that the L-1 program is essential to maintaining the international competitiveness of U.S. companies and to attracting employment-generating foreign investment. Daryl Buffenstein, of Paul Hastings, who testified for GPA, urged the Subcommittee to target any legislative solution very specifically to the perceived abuse, rather than enacting overly broad changes that would harm legitimate users. GPA's testimony is attached at the end of this alert.

The Chambliss bill, unlike the other L-1 bills introduced to date, is careful to preserve legitimate L-1 usage, while containing sensible provisions to curtail any potential abuses. In particular, the bill would prohibit L-1 classification for an alien who will work primarily at the worksite of another (unaffiliated) employer if the alien will be controlled and supervised principally by such unaffiliated employer, or if the purpose of the off-site arrangement is merely to provide labor, rather than to provide specialized knowledge in connection with a product or service of the petitioning company. The bill would also repeal a change made in January 2002, which reduced to six months the period of required employment abroad in cases where the employer has filed a blanket petition. The effect of this change would be to require at least 12 months of prior employment for any L-1 classification, whether pursuant to a blanket or individual petition.

The Chambliss bill steers clear of several needless and harmful provisions that have appeared in other L-1 bills, such as an annual numerical quota or cap on L-1 admissions, involving the Department of Labor (DOL) in administration of the L-1 visa program, reducing the period of stay permissible for L-1s, and eliminating the ability of companies to use blanket petitions.

Possible Delay in Implementation of Machine Readable Passport Requirement

The Department of State has announced that it is considering whether to delay until October 26, 2004 the implementation of a rule requiring travelers to hold a machine readable passport for travel under the visa waiver program. The rule, mandated by the USA Patriot Act of 2001, is currently scheduled to become effective on October 1, 2003, and requires travelers entering the United States under the Visa Waiver Program to possess a machine-readable passport. Any traveler without a machine-readable passport would be required to obtain a visa before coming to the United States. Although, as of the date of this Alert, no final decision has been reached, all indications are that the implementation of this rule will be delayed.

It should be noted that individuals entering the U.S. under the visa waiver program using a Belgian passport must possess a machine readable passport, notwithstanding the potential delay in the implementation of this rule. The requirement for Belgian passports to be machine readable for purposes of visa waiver travel has been in effect since May 2003.

Immigration Agencies Change Names

The Department of Homeland Security (DHS) has announced name changes for the bureaus which make up the immigration service. The Bureau of Citizenship and Immigration Services, or BCIS, will now be known as United States

Citizenship and Immigration Services, or USCIS. The Bureau of Customs and Border Protection, or BCBP, will now be known as Customs and Border Protection, or CBP. Finally, the Bureau of Immigration and Customs Enforcement, or BICE, will now be known as Immigration and Customs Enforcement, or ICE. Filing fee checks made out to the BCIS are still being accepted, as are checks made payable to USCIS, DHS, or the Immigration and Naturalization Service.

Changes to H-1B Program Scheduled to Become Effective October 1, 2003

Unless Congress acts before October 1, 2003, several significant changes to the H-1B program will become effective on that date as the result of the sunsetting of certain provisions of the American Competitiveness in the 21st Century Act ("AC 21"). These changes would include:

- Decrease in the H-1B cap, such that no more than 65,000 H-1B petitions can be approved in a fiscal year. This would begin with the 2004 fiscal year, which starts on October 1, 2003;

- Elimination of the $1,000 additional H-1B filing fee, such that the standard non-premium filing fee for an H-1B petition would be $130 consistent with the fee for other nonimmigrant petitions;

- Elimination of the requirement for additional labor condition application attestations to be made by H-1B dependent employers; and

- Elimination of the ability of the Department of Labor to commence an investigation into labor condition application compliance of an employer without a specific complaint about that employer.

Congressional action, while improbable before October 1, 2003, is certainly possible. While Congressional attention has focused primarily on the L-1 issue, the Senate Judiciary Committee held a hearing this week on the H-1B program.

The information in this Alert is not intended to be legal advice. However, if you require legal assistance or would like additional information about immigration matters, please contact your local Paul Hastings representative or ***Daryl Buffenstein*** *at 404-815-2232 or via email at darylbuffenstein@paulhastings.com.*

Statement of Daryl R. Buffenstein

On Behalf of the Global Personnel Alliance Hearing before the Senate Committee on the Judiciary Subcommittee on Immigration and Border Security on:

"The L1 Visa and American Interests in the 21st Century Global Economy"
July 29, 2003

Introduction

Mr. Chairman and Members of the Subcommittee, good afternoon. My name is Daryl Buffenstein. I am appearing on behalf of the Global Personnel Alliance (GPA). GPA is a loose consortium of internationally active companies interested in global personnel mobility. These are companies for which national immigration policy is important because of the effect of such policy on their ability to compete internationally and to create employment in the United States. GPA includes companies in a wide range of industries. GPA's member companies range in size from Fortune 500 companies to smaller and even closely held businesses, and include business organizations such as chambers of commerce. GPA was initiated as a way for these companies and business organizations to share information concerning international personnel issues and policies.

We appreciate the opportunity to participate in this hearing concerning "The L-1 Visa and American Interests in the 21st Century Global Economy." It is clear to us, Mr. Chairman, that you and your colleagues are approaching this important issue with the proper care. GPA believes that this issue cannot properly be addressed without a clear understanding of the benefits to the United States economy, and the benefits to United States workers, that the L-1 visa has provided.

There have recently appeared widely publicized charges in the media that the L-1 visa has been misused in ways that result in the displacement of United States workers. Our purpose is not to question or dispute any facts asserted by other witnesses here today, and we have profound sympathy for anyone who loses a job, for whatever reason. There may well be circumstances

where people have been incorrectly classified in the L category.

But we believe that there is another, much bigger story to tell. The story of the L-1 is the story of job creation. It is the story of bringing jobs to the United States, and of keeping here, in this country, jobs that would otherwise move elsewhere. The legitimate use of the L-1 visa is critical to the ability of companies to transfer needed managerial and specialized expertise to their United States operations. The story of the L-1 visa is the story of strengthened competitiveness for United States companies in domestic and international markets, the story of exports generated by new technologies, know-how and expertise imported from abroad, of how we have nurtured research and development on our own shores. It is the story of the States' successful efforts to attract employment-generating investment by international companies. Especially at a time when these factors are so critical to our fragile economy, it is essential that this Subcommittee exercise steady leadership, conduct a sober review of any problem and a careful analysis of tailored solutions, and ensure at all costs that we do not throw the baby out with the bathwater.

The role of the L-1 Visa in Economic Development: State Efforts to Attract Foreign Investment

Consider first the employment-generating role of foreign investment. The L-1 visa provisions were originally enacted in 1970 to permit U.S.-based companies to cross-fertilize knowledge and expertise by transferring key managers and specialists among their various affiliates. In the past thirty years however, there has been a significant transformation in the global economy, and the role of the United States in that economy has become more complex and multi-dimensional. Thirty years ago there was relatively little foreign investment in the United States. Now, for good reason, the States compete vigorously, with each other and with other countries around the globe, for employment-generating foreign investment. That reason is jobs. It is the rare governor who has not taken at least several, and usually numerous, missions abroad to seek foreign capital, know-how and expertise in the form of employment-creating investments. Indeed, many states (California, New York and Georgia, to list but three examples) have offices and staff strategically placed in key cities abroad with the sole function of promoting those states as an ideal environment for locating marketing, distribution, and eventually manufacturing facilities.

Successful investments necessarily involve people. Without the select cadre of key executives, managers, and specialists who are involved in these transfers, there would be, quite simply, no investments and therefore no jobs. And many, if not most, of these people are here on L-1 visas. They are very few in number relative to the jobs they create. But they are truly essential to economic development out of all proportion to their number. Georgia and Massachusetts each have well over 223,000 jobs created by exactly that kind of international investment. There are over 259,000 jobs in Ohio, over 437,000 jobs in Texas, over 470,000 jobs in New York, and almost three-quarters of a million jobs in California, created or sustained by international investment. The distinguished members of this subcommittee alone represent states in which substantially over 3 million jobs have been created by foreign investment. Foreign investment has created overall approximately six and a half million jobs in the United States: jobs in manufacturing; jobs in research and development; jobs in transportation; jobs in every sector and every industry; and, of course, jobs in information technology. It is probable that these figures vastly under-report the job-generating impact of foreign investment since they are gleaned from Bureau of Economic Analysis reports filed by the investing companies, many of which appear to be unaware of the required filings. But given these numbers it is significant that in no year to date have there been as many as 60,000 L-1 visas issued. And this is 60,000 in a labor market of over 200 million.

As described above, these L-1 visa holders are usually only a small fraction of the workforce in a particular business, but contribute to job creation out of proportion to their number. A South Carolina-based company established by a German investor, for example, has 470 employees in the United States (including manufacturing facilities in Ohio) and only one L-1 visa holder. The company is a manufacturer of power transmission equipment, including conveyor systems for baggage handling and other uses. The L-1 visa holder has contributed significantly to sales and employment by bringing specialized knowledge of the design, manufacture and marketing of this specialized product in Sweden. Companies like this are picture postcards for the efforts of states like South Carolina and Ohio to attract foreign investment, and of the pivotal role played by the L-1 visa in that effort. This is the second such United States assignment for this individual.

Another European company, headquartered in Georgia, has 750 employees in the United States, and is a diversified manufacturing conglomerate, producing products as diverse as LED screens for stadium walls, medical monitors, food sorting equipment, and specialized avionics and air traffic control systems. The company recently acquired a manufacturing facility in Utah that has approximately 100 employees. By introducing new digital signage technologies from its overseas operations through the medium of a few L-1 visa holders, the company is hopeful that this facility can as much as triple its employment numbers to a workforce of up to 300 in the next two to three years. Yet another European-owned company for example, has over 700 employees in the United States, and less than a dozen on L-1 visas. These include specialists in a unique "sputtering" process, which metalizes

film for armor-coated windows and is used for safety in government buildings, including the Capitol itself.

The story of the L-1 visa as a mechanism promoting employment-generating international investments in the United States is a compelling one. There are as many examples as there are international companies. In Georgia alone, for example, there are well over 1,500 such companies, and close to 600 of these are manufacturing facilities. Any changes in federal immigration law and policy should be carefully crafted so as to assist and not impede the States' efforts in this regard.

The Role of the L-1 Visa in Maintaining U.S. Competitiveness Internationally

The role of the L-1 visa in facilitating the competitiveness of United States companies in international markets is even more compelling. Many more jobs are at stake. The L-1 visa is critical to the promotion of United States exports. It is essential to enable corporate research and development to remain and flourish in the United States. It directly affects the ability to keep manufacturing in the United States. In an increasingly global economy the choices are often stark. If we do not permit the technology and know-how to move to where it is needed for manufacturing or research and development, those activities often will have to move to the technology and know-how. In short, L-1 usage by American companies is overwhelmingly a mechanism of job creation. It is critical to the international competitiveness of American businesses, from large multinationals to small United States companies with operations abroad. And again, L-1 visa holders, typically only a tiny fraction of the workforce of the business, contribute to job creation in this country out of all proportion to their number. Plans to restrict this visa category would place in peril the major benefits that caused the Congress - out of the country's own economic self-interest - to create the L visa in the first place.

The pivotal role of the L-1 visa in fueling exports is easily explained. To produce and sell products for foreign markets, American companies must have knowledge of foreign operating conditions, consumer preferences, competing products, the regulatory environment and other expertise relating to those markets. Without access to a select number of persons from those markets with such knowledge, American business and industry is at a severe disadvantage vis-à-vis its foreign competitors. Business opportunities are found and lost with stunning rapidity, and the flexibility to respond promptly to problems and opportunities is of paramount importance. The business community is already encumbered by logistical difficulties in securing the expeditious transfer of personnel needed to facilitate employment or exports. The regular petition process at BCIS Service Centers is slow and difficult. The application procedure at Consulates abroad has become more complex and time-consuming as a result of recent events. Requests for further information are frequent and not always logical. The leadership of BCIS Homeland Security is well motivated and dedicated to efficiency, but is hampered badly by a lack of resources. The appeals process is cumbersome and even slower. Further unnecessary restrictions will literally handcuff American business on international markets.

Examples abound across every industry. The ability to compete internationally is, for example, fundamental to the survival of the automotive component parts industry. A major manufacturer in the Midwest provides a living to over 60,000 employees. A select cadre of only three dozen L-1 visa holders plays a role that is very important to those jobs. Some of them are here to infuse into the United States manufacturing and marketing operations key knowledge of foreign operating conditions, including development and design expertise consistent with user requirements in South America and Asia. Such a role cannot, by definition, be performed by anyone who has not worked extensively with the company in the foreign market, and that role is necessary to facilitate many millions of dollars of competitive exports. Others bring to the United States operations processes and technologies developed in European plants. One is a key manager who coordinates global product and brand management activities and uses an L-1 visa to divide his time between Canada and the United States. Without these L-1 visa holders it would be difficult, indeed impossible, for these companies to sustain its employment levels in the United States.

Indeed, many L-1 visa holders divide their time between United States and foreign operations, but are critical to the economic health of American companies. A relatively small paper products manufacturer, for example, has barely over 2,000 employees and half a dozen L-1B workers. These specialists are experts in the design and operation of complex and expensive machinery designed and customized abroad valued in the hundreds of millions of dollars. They divide their time between the United States and abroad. Without them the manufacturing process would grind to a halt.

The use of L-1 visas to bring persons key to product research and development to the United States directly permits such operations to remain here. The world's leading animal health company moved its headquarters from the UK to the United States. In one particular facility in a small Southeast town, where there are approximately 600 American workers employed in research and manufacturing, an L-1B holder plays a very key role in the manufacture of vaccines. His knowledge of manufacturing techniques and research parameters developed abroad is used to design and implement efficient and accurate manufacturing procedures in the United States. This allows the company to manufacture these vaccines in the United States, rather than manufacturing them in

Europe, thus creating jobs here. Without the type of knowledge transfer that is at the heart of this L-1B visa holder's job, many of these manufacturing jobs would have had to remain or move abroad. He is one of only three L-1B visa holders in this particular manufacturing facility. Similarly, a manufacturer of food products has a key research and development facility in the Midwest, which is in turn critical to the company's manufacturing facilities. All of the research was previously performed in Europe. A very small group of L-1B visa holders were transferred to start the research and development facility here, and this facility has now created substantial employment. Likewise, a California manufacturer of lenses brought one of its employees to this country on an L-1 to start test laboratories in Kentucky. Those laboratories now employ more than fifty people in that state. These jobs would not exist for Kentucky workers if the company had been forced to build its laboratory abroad in order to use the necessary leadership and development expertise of the L-1 executive.

These examples are representative of the daily business experience across this nation, in literally every industry, including information technology. One software company, a California-based company with approximately 500 employees, brought a specialized employee from its European operations to transfer new product technology to the company so that software developers in the United States could then develop products using that technology. Without this transfer, the development would be taking place in Europe and the jobs would go there instead.

A major United States airline offers a vivid example of how the L-1 visa fits into the business operations of a large United States employer, and is vital for such companies to improve their international competitiveness. This carrier employs approximately 60,000 people, and well over 58,000 of those are employed in the United States. However, the airline's continued success in a global economy, and ultimately its economic recovery, is dependent upon its continued ability to use effectively the expertise of its employees around the world. This includes the flexibility to bring a select few key employees to the United States when the specialized knowledge or leadership experience of those employees is needed. The L-1 visa is critical to this objective.

Today this airline has 12 employees in L-1 status, which amounts to a mere 0.0002% of its United States workforce. Those 12 employees, however, bring valuable expertise to its operations, which in turn enables it to maintain its competitive position in the market place, to maintain existing jobs for United States workers, and to create additional employment opportunities in the United States. For example, the airline brought a pricing analyst from the United Kingdom to its United States headquarters in L-1 status. The pricing analyst possessed highly specialized, proprietary knowledge of the airline's European markets, an expertise not previously available to this airline's pricing team in the United States. The pricing analyst worked with the airline's United States pricing group to formulate more competitive fares for its European markets, which improved its ability to compete more effectively with other carriers for traffic to this region. During his assignment, the analyst remained on the U.K. payroll, but received tax and cost of living adjustments to equalize his pay, as well as a substantial housing allowance. Following the conclusion of the analyst's United States assignment (which was less than five years in duration), the analyst was returned abroad. The L-1 visa allowed the airline to bring this employee to the United States in a capacity that enabled the employee to effectively work and collaborate with United States colleagues. With the unprecedented financial challenges facing the airline industry, this airline's continued ability to draw upon the expertise of its non-United States workers, such as this pricing analyst, is more important than ever before.

Placing L-1 Employees at the Site of a Second Employer

All of the media reports that focus on the displacement of American workers involve a very particular arrangement in which the L-1 visa holder appears to be providing simple contract employment to a third party. If that is in fact the arrangement, it would seem to be a misuse of the L-1 visa. The L-1 was not meant to permit companies to bring in workers of generic expertise who are then transferred to the worksite of another, unaffiliated company that effectively becomes the employer, save for actually paying the worker's salary. The core purpose of the L-1 is instead to permit multinational companies to bring to United States operations their managers, executives, and employees with specialized knowledge of the company's products, systems, and other traits. This problem, if indeed it is shown widely to exist, could be addressed through a carefully tailored statutory definition of the necessary employment relationship.

Yet there are innumerable situations in which it is entirely legitimate, indeed essential, for a multinational corporation to place a manager or executive, or a focused group of specialists in company processes, at the site of another company. It could seriously harm international competitiveness and job creation, and would not increase protection for the American worker, to forbid these sorts of arrangements. For example, a manufacturer of lenses, based in California, is engaged in a partnership with another United States company to develop and manufacture coating for lenses. This manufacturer's global leader for this particular product development is in this country on an L-1 visa. He sits in an office at the joint venture partner company, and works very closely with the partner company's employees. As a result, he has been able to direct these critical development efforts, working closely with the partner's key employees. Without this L-1 visa, and without the ability to work directly at the site of the partner company,

that development project would not have gone forward in this country. Instead, the work would have gone forward in another country, since this particular person has expertise that is indispensable to lead the project. The project is expected to create hundreds of new manufacturing and high-paying testing and research jobs in this country

There are many other circumstances in which having an L-1 visa holder work at the site of another employer is an integral and legitimate part of that person's job for the petitioning employer, and where eliminating the ability to do so will harm job opportunities for United States workers. For example, half a dozen airlines have established a Sky Team joint venture that is vital to the participating United States carrier's ability to realize synergies and fill excess capacity. This concept is vital to the international competitiveness of the participating United States airline, and therefore to its ultimate survival. Under some of the proposals now circulating in Congress, however, the airline would be prohibited from transferring an international specialist with knowledge of its cargo economics and capacities to the United States on an L-1 visa if that specialist would be deployed at the joint venture, even if all of the airline's other employees at the joint venture were United States employees.

Another example of L-1 employees working off-site goes to the heart of a phenomenon of integral importance to the States' efforts to attract employment-generating foreign investment. Some of the largest manufacturing facilities in the United States are preceded by the initial establishment of a small representative or marketing office, to which a solitary L-1 is transferred. Soon thereafter a distribution relationship with an independent distributor is arranged. The L-1 specialist is deployed at the site of the distributor to assist in the marketing of the product and to monitor and observe its debut in the United States marketplace. The next step might be to conduct assembly in the United States, perhaps in conjunction with the distributor, and the final step would be a full fledged manufacturing facility employing, to the delight of the host state, numerous United States workers. The natural development of this scenario could be precluded by provisions prohibiting the petitioning company from stationing that initial L-1 employee at its distributor.

It can also be critical to preserve the ability of a manufacturer to deploy customer service engineers at the site of its customers. For example, a major manufacturer of automotive parts based in the Midwest petitions for an L-1 visa for a technical expert who has highly specialized knowledge of the design modifications and engineering relating to the functioning and operating of heavy duty truck parts in difficult operating conditions abroad. It is necessary to infuse this knowledge into the United States company's operations in order to improve its production processes and its foreign sales. In accordance with standard practice, the parts manufacturer wishes to deploy the L-1 engineer temporarily as a customer service engineer at the site of its United States customer, a truck manufacturing plant. The customer service engineer would be bringing in key knowledge of these parts to the customer's plant so that the manufacturing line is kept moving. The role is critical to production and jobs at both the parts manufacturer and the truck manufacturer.

Existing administrative policies quite properly recognize that these sorts of situations represent legitimate uses of the L-1B, though the visa holder is actually placed at the site of, and is involved in operations at, the site of another employer. Yet, certain bills recently introduced, in a well-intentioned effort to target the distinct situation involving "job shops," would forbid off-site work so broadly as to eliminate these fully legitimate arrangements. H.R. 2152, for example, would restrict the placement of an L-1 visa holder with another employer where there are "indicia of an employment relationship" between the L-1 holder and the other employer. This prohibition, which has been defined administratively in regulations governing the separate H-1B program, could be triggered simply by such factors as working at the site of the other company, during the same hours as its employees, or on matters that are "part of the regular business" of the other company. Those are factors that may be present in a perfectly valid off-site placement, but one where it is clear that the L-1 visa holder is employed by his own company, and not by the other. We agree that a red flag can fairly go up when a company seeking an L-1 plans to place the visa holder off-site. But it cannot be its own restriction, as existing administrative practice emphasizes. Any changes to the statute should be carefully drawn instead to test whether an off-site arrangement is one where the L-1 applicant would be effectively employed by the company to whose workplace he would be sent, and not by the company seeking the L-1 visa. While H.R. 2152 is properly tailored in that it does not seek to reach beyond the "job shop" issue, its approach to that problem is overly broad and very likely to impede legitimate uses of the L-1 that involve placement of the L-1 visa holder at the site of a partner company.

Other Proposed Limitations

Other proposed limitations on the L-1 visa would reach far beyond the off-site employment situation, and would instead severely restrict the availability of the L-1 for needs that unquestionably lie exclusively within the petitioning company itself. Indeed, these proposals would badly damage the value of the L-1 visa to the United States economy and to United States employees.

One such proposal would eliminate the availability of "blanket" L petitions for qualified companies. The blanket petition has provided an important savings of government adjudications resources, and much more efficient processing for qualified companies. The proposal to abolish it is apparently based on the mistaken belief that approval of a blanket L petition automatically authorizes the petitioning company to bring in a flood of L workers. But the blanket L petition does no such thing. It merely permits the government to decide in a single adjudication certain common issues about the petitioning organization. For qualified businesses that meet certain requirements regarding size or previous L-1 activity, the blanket petition is simply a determination that the various entities included in the petition have a parent, subsidiary or affiliate relationship to one another. Approval of a blanket petition does not itself result in the granting of a single L-1 visa. Instead, each person seeking an L-1 visa must still go before a government officer and qualify individually for L-1 classification. The blanket petition simply frees the government to focus on those eligibility requirements, rather than having to decide again, over and over with each such petition, the same question about the petitioning organization's corporate relationships. Eliminating the blanket petition would worsen the already massive caseload of the Bureau of Citizenship and Immigration Services, at a time when it is struggling to find new efficiencies, and would subject businesses to unnecessary additional delays, with no gains whatsoever for worker protection. On the other hand, there could usefully be some examination of the extent to which reducing, at the beginning of 2002, the required period of employment abroad to only six months in the case of blanket petitions, might have resulted in the alleged instances in which an off-site job shop arrangement has resulted in abuse.

Another proposed change to the L category would impose a requirement that an L-1 visa holder possess a degree. Again, this proposal has nothing whatsoever to do with the "job shop" allegations, and would impede rather than fulfill the proper functioning of the L-1 visa. The proposed degree requirement apparently is based on the notion that, since the H-1B category requires a bachelor's degree or its equivalent, the L-1 should not have a lesser standard. This is a false logic. The L-1 category does not have a lesser standard; it has a different one. The H-1 category is for workers in specialty occupations, and it is thus the nature of the job type, broadly, that is important. The degree requirement is the very trait that defines a certain occupation as a "specialty occupation", and therefore an appropriate H-1 occupation. With the L-1 visa, by contrast, it is the nature of the worker's role and capabilities within the particular company that is determinative; that is, whether the employee is one of the company's managers or executives, or an employee holding specialized knowledge of that particular company's products and systems. These persons may have degrees, but often do not. They usually have achieved such company specialization, or position of leadership, independent of their formal educational background. They should not be denied an L-1 for reasons having to do with an entirely separate visa category.

Some have proposed an annual cap on L-1 visas. Even putting aside the problems of administration, such a cap would mean that, for some period of each fiscal year after the cap was reached, L-1 visas would simply be unavailable. This would unnecessarily disrupt business processes, decrease flexibility to respond to time-sensitive business opportunities, and reduce competitiveness, and is not tied in any way to the "job shop" problem that has prompted attention to the L-1 visa. This sort of flat numerical limit would be particularly inappropriate and unnecessary since L-1 visa holders make up such a small proportion of the non-immigrants working in this country, they typically make up only a tiny percentage of the workforce of their companies, and the L-1 visa results in more American jobs, not fewer. It would quite literally be a cap on productivity.

Still other proposals, even more far-reaching, are being introduced with alarming rapidity. Identical bills introduced late last week in both the House and the Senate, the contents of which became known only yesterday, would go in yet a different direction. Beyond including the "indicia of employment" test, these bills would impose on companies filing petitions for L-1 workers the same requirements as are currently imposed on H-1B dependent employers. These include, most significantly, requiring companies petitioning for L-1B specialized knowledge employees to attest that they have recruited, using industry-wide standards, in the United States in advance of seeking to transfer an L-1. While there is some basis for doing this in the context of a business that is dependent on the hiring of large numbers of H-1B workers to fill shortages that exist generically within particular specialty occupations, it makes no sense in the L-1 category. It would requires these companies to attest to an impossibility. By definition, the L-1 specialized knowledge category should involve persons who have already acquired specialized internal knowledge having to do with the particular company and that knowledge does not exist outside that company. At best, this requirement would impose on companies the need to undertake a futile outside search for an employee with internal company knowledge. Such an employee will not exist outside the company, and such search will bring only delay.

If even some of the provisions of bills recently introduced were enacted into law, the critical competitive advantage described in the above examples could not have been realized. The airline pricing analyst, for example, would have been denied an L-1 visa, for lacking a degree. Even if he had a degree, the new competitive pricing project would have been delayed for a very long time, with disastrous consequences, if for example a cap were in place and the need for the project first arose after the cap was reached for that fiscal year. Moreover, it would have been impossible to recruit for such expertise in advance of transferring this

analyst, because the need to be filled was for a person possessing not only specialized knowledge of the European pricing market, but one with in-house, confidential, and proprietary knowledge of that particular company's market position, pricing strategies, and other practices. And, with the exception of the one overly broad "indicia of employment" test discussed above, none of these proposals is even addressed to the "job shop" allegations underlying the current concerns about the L-1 visa program. In what may be undue legislative haste to address a problem the dimensions of which are not clearly known, still more proposals are being introduced regularly, including the new proposal introduced in the Senate and House at the end of last week.

Conclusion and Recommendations

We have done our best to gather and present to you important information about the role of the L-1 visa in the daily life of the business world, and the contribution that this visa makes to the United States economy and to creating jobs for United States workers. Unnecessarily restricting L-1 visas will surely cost jobs and harm exports. It is important to remember, though, much of what you are hearing today is, to a large extent, anecdotal. No clear empirical picture of the problem exists. Perhaps the wisest step the Congress could take at this stage would be to mandate a methodical evaluation of L-1 usage. Then any problems could be more clearly understood and better measured, and any legislative corrections could address such problems precisely, and not in ways that are overbroad, far removed from the problem, and harmful rather than helpful to the American economy.

A brief word on the issue of L-1 numbers reinforces the need to acquire good data. There has been a lot of confusion on this subject, with some articles referencing very high numbers that in fact reflect the number of L-1 admissions, not new L-1 petitions. Intracompany transferees tend to travel with great frequency, and every time they return to the United States after a brief business trip abroad, that counts as another admission. Counting admissions, therefore, greatly distorts the picture of the L-1 presence in this country. In addition, many L-1 beneficiaries are not based permanently in the United States but, rather, divide their time between their existing jobs abroad and their functions in the United States. These situations may involve projects that require periodic involvement from the specialist abroad who brings key knowledge to the United States, or an executive who is the managing director of a foreign company with a manufacturing subsidiary in the United States and who also functions as the President of the United States subsidiary, but who works at that subsidiary for only a week every quarter. Some articles have cited figures that apparently include L-1 visa holders and their spouses and families. Even the visa issuances counted by the State Department may be inflated, since they may include reissuances or revalidations of visas previously given.

In short, Congress is in a position of disadvantage on this subject because of a lack of clear information, and the absence of such information is increasing the risk of legislation that is harmful to the United States economy without protecting American workers. We would suggest that, rather than legislating without a clear picture, Congress should first ask that that picture be drawn properly. It would serve the legislative process well to know, for example, how many first-time L-1 petitions are granted each year, in addition to how many admissions there are, or how many amended petitions or petitions for extensions there are. It would be useful to know how many L-1 visas are used by workers for United States-based companies, and how many by foreign companies expanding into the United States; where in the country L-1 visa holders are working, and in what occupation. It may be particularly useful to have information concerning the number of L-1B aliens admitted under the blanket petition process as a result of the new, reduced experience requirement enacted some eighteen months ago.

If this Subcommittee concludes that the L-1 category is in need of alteration, such legislation should obviously be narrowly tailored to the problem as it may appear to exist. If further information bears out the problem that has been reported in the press, we expect that this tailored solution could be achieved through a narrowly crafted statutory test that falls short of the overbroad "indicia of employment" test contemplated in H.R. 2152, but that would prohibit L-1 transfers where control over the transferred employee is yielded so much that the employee is effectively employed by the outside company and specialized knowledge of the petitioning company is not truly necessary to the assignment.

We appreciate this opportunity to contribute to the Subcommittee's work on this valuable visa category, and we look forward to working together with you and your able staff as your efforts continue.