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A Paradox in Employment: The Contradiction that Exists between Immigration Laws and Outsourcing Practices, and its Impact on the Legal and Illegal Minority Working Classes

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A Paradox in Employment: The Contradiction that Exists between Immigration Laws and Outsourcing Practices, and its Impact on the Legal and Illegal Minority Working Classes

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Introduction

The United States has a tradition of restrictive immigration laws designed to protect American jobs. It is time consuming, expensive, and difficult for non-citizens to gain an immigrant employment visa. Prior to being considered for an employment visa, skilled and non-skilled workers, the vast majority of the workforce, are put on a waiting list that, depending on the individual's country of origin, may be up to ten years long. Employment immigration is highly regulated. It is very difficult for an unskilled worker to obtain an immigration visa, and thus, illegal immigration has become very prevalent in the United States. Employment immigration restrictions require a high education level for most visa grantees, and thus, illegal immigration has become a popular avenue particularly for Mexicans and Latin Americans. With a high illegal immigration presence in the United States, an illegal minority working class has formulated.

Unlike immigration policy, in the United States, there is essentially no restriction or regulation on the outsourcing of jobs. American companies have the ability to send jobs that would otherwise be filled by American workers to countries such as China, India, or Ireland. Outsourcing enables companies to lower operating and worker costs, and thus, is often perceived to be economically advantageous. Many major corporations and manufacturers, particularly in the areas of Labor and Information Technology, have opted to outsource jobs through opening companies and factories outside of the United States.

The drastic distinctions between the United States' immigration and outsourcing policies have created a system where American companies are able to send unlimited jobs overseas, yet, have very restricted ability to bring workers to domestic offices and factories. While the impact and consequences of restrictive immigration and liberal outsourcing policies on our nation's economy is hotly disputed, the two policies appear to be in contradiction. Restrictive immigration policies seek to protect American jobs, while liberal outsourcing regulations permit, and some may argue encourage, employers to send jobs outside of the United States. As a result, the United States' outsourcing policy sabotages the purpose of American immigration laws. The uncertainty of the contradiction between immigration and outsourcing policy may be the cause of unusually high unemployment numbers, particularly in the minority working class.

This paper will argue that through application, the United States' immigration and outsourcing policies are contradictory in their goals and application. Furthermore, this paper will assert that the United States' outsourcing policy undermines employment immigration policy, and indirectly facilitates unemployment and economic despair. Part I of this paper will look at the United States' immigration policy, analyzing the history and purposes, the law's application to American employers, and its fundamentally discriminatory nature. Part II will discuss the growing trend and purposes of outsourcing, focusing on why employers outsource jobs, current outsourcing bills, and outsourcing's impact on the national economy. Part III of

this paper will firstly assess the contradiction between the United States' immigration and outsourcing policies. Secondly, Part III will evaluate the current unemployment rates, particularly in the minority working class, and argue for the needed increase of outsourcing regulation. Thirdly, Part III will discuss the presence of an illegal working class in the United States and will argue that less restrictive employment immigration laws will not harm U.S. jobs, will help alleviate current illegal immigration issues, and may serve to combat employer incentives to outsource.

Part I. Immigration

a. The History of Immigration Laws

Federal laws restricting immigration to the United States have existed since the late 1800's.¹ In the 1860's, the United States began construction of the first transcontinental railroad.² In order to meet workforce demands, the United States signed the Burlingame Treaty with China.³ The Burlingame Treaty enabled Chinese workers to come to the United States.⁴ Consequently, by 1868, over 12,000 Chinese citizens immigrated to the United States and were employed in the construction of the transcontinental railroad.⁵ As a result, a national racial animus towards Chinese workers formulated.⁶ American labor groups campaigned against Chinese immigration, arguing that Chinese workers were taking jobs from Americans.⁷ In response to the racially charged national sentiment, Congress passed the Chinese Exclusion Act in order to prevent the continued immigration of a hard working and cheap workforce.⁸ The Chinese Exclusion Act excluded only Asian citizens from immigrating to the United States, and was thus, through its mere conception, racially discriminatory.⁹ Though immigration is not discussed within the United States Constitution,¹⁰ in 1882, Congress passed the Chinese Exclusion Act, greatly restricting the ability of Chinese citizens to come to the United States.¹¹

¹ Thomas Alexander Aleinikoff, et al., *IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY* 193 (Thomson West, 6th ed. 2008) (The first laws restricting immigration were limited to “criminals, prostitutes, idiots, lunatics, and persons likely to become a public charge.”).

² *Immigration, Railroads and the West*, *ASPIRATION, ACCULTURATION, AND IMPACT IMMIGRATION TO THE UNITED STATES, 1780-1930* (Harvard University Library Open Collections Project) available at <http://ocp.hul.harvard.edu/immigration/railroads.html>.

³ *Fong Yue Ting v. United States*, 13 S.Ct. 1016, 1030 (1893) (Brewer, J. dissenting) (discussion of the Burlingame Treaty).

⁴ *Id.*

⁵ *Immigration, Railroads and the West*, *supra* note 2.

⁶ Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *Tex. L. Rev.* 1, 113-14.

⁷ *Id.*

⁸ *See* Act of Feb. 19, 1862, ch. 27 §§2158-2164, 12 Stat. 340 (1862).

⁹ *See id.*

¹⁰ Aleinikoff, et al., *supra* note 1 at 192 (“the Constitution of the United States includes no language that expressly grants Congress [the] authority [to restrict immigration].”).

¹¹ *See Fong Yue Ting v. United States*, *supra* note 3 at 1016 n. 1 (“An act to prohibit the coming of Chinese persons into the United States.”).

Despite the omission of any discussion of immigration in the Constitution, in *Chae Chan Ping v. United States*, the Supreme Court upheld the Chinese Exclusion Act, and held that Congress has the plenary and sovereign power to exclude any non-citizens.¹² The holding of *Chae* has never been overruled. Since *Chae*, the United States' immigration policies have operated under the presumption that there is a constitutional right to exclude.¹³

b. Overview of Current Employment Immigration Laws

In 1952, Congress passed the Immigration and Nationality Act (INA).¹⁴ Congress has delegated the power to grant employment, family based, and nonimmigrant visas to the Department of State.¹⁵ In 2002, with the passing of the Homeland Security Act,¹⁶ Congress delegated the Department of Homeland Security with both the responsibility of determining which non-citizens will be permitted across the United States border, and the task of enforcing that only admissible non-citizens enter the country.¹⁷

The Department of State categorizes and grants employment visas based on a non-citizen's profession and skill level. First preference visas are available to "priority workers."¹⁸ A first preference visa is available to non-citizen who has "extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by substantial national or international acclaim and whose achievements have been recognized in the field through extensive documentation."¹⁹ Additionally, the non-citizen must seek to work in the area of their extraordinary ability, and show that his or her admission will "substantially benefit prospectively the United States."²⁰

First preference visas are also available to "Outstanding Professors and Researchers" who have been internationally recognized, have a minimum of three years teaching experience in the academic area, and intend to come to the United States for (1) a tenured position in an institution of higher learning, (2) a comparable position to conduct research, or (3) conduct research at a comparable institute or private employer.²¹ Lastly, first preference visas are available for

¹² *Chae Chan Ping v. United States*, 130 U.S. 581, 606-09 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or retained on behalf of any one.").

¹³ See e.g., *Fong Yue Ting v. U.S.*, 13 S.Ct 1016, 1018 (1893); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (2002); *Kleindienst v. Mandel*, 92 S.Ct. 2576, 2583 (1972).

¹⁴ INA, 8 U.S.C. §§ 1101-1537.

¹⁵ Powers and duties of Secretary of State, 8 U.S.C. § 1104.

¹⁶ Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135 (2002). The Homeland Security Act was passed "in response to the September 11, 2001 terrorist attacks. The act brought together approximately 22 separate federal agencies to establish the Department of Homeland Security . . ." *The Homeland Security Act of 2001*, DEPT. HOMELAND SECURITY, http://www.dhs.gov/xabout/laws/law_regulation_rule_0011.shtm (last visited, Feb. 2, 2012).

¹⁷ Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135 §§ 3-1.2 – 3-1.3

¹⁸ 8 U.S.C. § 1153(b)(1).

¹⁹ 8 U.S.C. § 1153(b)(1)(A)(i).

²⁰ 8 U.S.C. §§ 1153(b)(1)(A)(ii), 1153(b)(1)(A)(iii).

²¹ 8 U.S.C. § 1153(b)(1)(B).

“certain multinational executives and managers” who have been employed by the company/firm for at least one year prior to applying for a visa, and who intend to continue working for the company/firm after admittance into the United States.²²

First preference employment visas generate the best opportunity for a non-citizen to come to the United States to pursue work because first preference visas are usually granted without delay. While first preference visas are generally considered the ideal visa application, the preference requires very specific and difficult to obtain criteria, and thus, is not available to the vast majority of visa applicants.²³ Specifically, non-citizens from countries with insufficient education systems are unlikely to have the qualifications necessary for a first preference employment visa.

Second preference visas are available to “aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.”²⁴ Generally, under the second preference, a non-citizen needs an advanced degree and “exceptional ability” in business, science, or arts which will “substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States” and whose employment is desired by a U.S. employer.²⁵ The requirement of a job offer can be waived under second preference where there is (1) a national interest, or (2) the non-citizen is a physician working in a shortage area.²⁶ Similar to first preference visas, second preference visas require a high level of education. Thus, non-citizens from impoverished countries are unlikely to qualify for a second preference visa.

Third preference visas are available for “skilled workers, professionals, and other workers.”²⁷ Third preference visas take the longest time to be granted by the Department of State²⁸ and have become very difficult to obtain. Third preference visas are for skilled labor workers with two years training, professionals with a college degree, and “other workers”.²⁹ “Other workers,” thus, presumably includes all workers without advanced degrees, such as blue collar, food service, or janitorial employees.³⁰ Though many immigrants fall into the “other workers” category, only 10,000 visas are made available annually to “other workers”.³¹ Thus, an arguably small number of visas are available for the largest employee immigrant category.

In order to come to the United States under a second or third preference employment visa, employers must obtain Labor Certification from the Department of Labor.³² Labor

²² 8 U.S.C. § 1153(b)(1)(C).

²³ See U.S.C.I.S., *Employment-Based Immigration: First Preference EB 1*, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnexto id=17b983453d4a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=17b983453d4a3210VgnVCM100000b92ca60aRCRD> (last visited Nov. 20, 2011) (listing procedure and evidentiary criteria required for the granting of a first preference employment visa).

²⁴ 8 U.S.C. § 1153(b)(2).

²⁵ 8 U.S.C. § 1153(b)(2)(A).

²⁶ 8 U.S.C. § 1153(b)(2)(B).

²⁷ 8 U.S.C. § 1153(b)(3).

²⁸ See U.S.D.S. *Visa Bulletin for April 2012*

http://www.travel.state.gov/visa/bulletin/bulletin_5674.html (last visited Mar. 23, 2012).

²⁹ 8 U.S.C. U.S.C. § 1153(b)(2).

³⁰ See *id.*

³¹ 8 U.S.C. U.S.C. § 1153(b)(3)(B).

³² 8 U.S.C. § 1182(a)(5)(A) (2002).

Certification became a requirement for second and third preference employment visas in 1952.³³ The purpose of Labor Certification is to ensure that immigrants are not taking jobs that could be filled by eligible and qualified American workers.³⁴ To meet this goal, employers must establish that (1) the employee is not taking a job that could be filled by a qualified U.S. citizen, and (2) that the immigrant's employment will not adversely effect the United States economy.³⁵ The Department of Labor has stated that to obtain Labor Certification, the employer must (1) "ensure that the position meets the qualifying criteria for the requested program," (2) complete the proper forms and provide corresponding evidence, and (3) "[t]he employer must ensure that the position offered equals or exceeds the prevailing wage for the occupation in the area of intended employment."³⁶

Labor Certification is a tedious and long process. Labor Certification can take several years, and thus, is not an efficient way for employers to gain employees.³⁷ Furthermore, the costs and time associated with labor certification likely deters employers from pursuing visas for potential employees.

To obtain labor certification, as required by second and third preferences visas, an employer must first fulfill the Program Electronic Review Management (PERM) process.³⁸ In most Labor Certification applications, the employer must assert that he has participated in recruitment measures to attempt to fill the job vacancy with a U.S. worker.³⁹ For professional positions, the PERM process requires that an employer (1) place a job order, and (2) advertise in a newspaper or professional journal.⁴⁰ Additionally, the employer must select three of ten additional recruitment methods to implement.⁴¹ For unprofessional positions, often third preference unskilled labor positions, the PERM process requires that the employer (1) place a job order, and (2) place two newspaper advertisements that were issued at least 30 days before, but

³³ Panteha Abdollahi, *The Labor Certification Process: Complex Ethical Issues for Immigration Lawyers*, 17 GEO. IMMIGR. L.J. 707, 709 (2003).

³⁴ *See id.*

³⁵ Aleinikoff, et al. *supra* note 1 at 709.

³⁶ U.S.D.O.L., *Foreign Labor Certification Questions and Answers* <http://www.foreignlaborcert.doleta.gov/qa.cfm#q2> (last visited Nov. 21, 2011).

³⁷ *Id.* ("The process to obtain an employment based permanent labor certification can sometimes take up to several years with the state agency and the DOL regional office (the longer processing times occur in states with the largest influx of immigrants, such as New York and Texas). For the employment-based permanent visa, the INS may take up to an additional 9 months to process the request. INS will provide "premium processing" for some visa categories with an additional fee. (").

³⁸ 20 C.F.R. § 656.17(e).

³⁹ 20 C.F.R. § 656.17(e).

⁴⁰ *Id.*

⁴¹ *Id.* (Additional recruitment methods are (A) job fairs, (B) posting on employer's website, (C) posting on a job search website, other than the employer's, (D) on-campus recruitment, (E) use of trade or professional organizations' resources, (F) employ a private employment firm, (G) implement an employee referral program with incentives, (H) post notice of job opportunity at campus placement offices, (I) use local and ethnic newspapers to advertise, (J) use radio and television advertisements).

no more than 180 days before applying for labor certification.⁴² Similar to the overarching effect of Labor Certification, the PERM process ensures that U.S. workers fill open jobs not only through its advertising requirements, yet also through discouraging employers from hiring non-citizens through requiring a time-consuming delay in approval.⁴³

When posting an advertisement, the advertisement must name the employer, provide an address to send resumes, provide a description of the vacancy, and indicate the geographic area of employment.⁴⁴ Advertisements may not “contain a wage rate lower than the prevailing wage rate,” “contain job requirements that exceed the job requirements or duties listed on [the application],” or “contain wages or terms and conditions of employment that are less favorable than those offered to the alien.”⁴⁵ In essence, through regulating advertisements, the Department of Labor protects both the non-citizens and U.S. workers. The PERM process protects non-citizens through ensuring that they are not being taken advantage of or forced into undesirable employment conditions. The PERM process protects U.S. workers through ensuring that a qualified U.S. worker fills a position before an employment immigrant visa is granted.

An employer must have successfully completed the PERM process prior to filing for Labor Certification with the Department of Labor. Thus, when beginning the PERM process, an employer must weigh whether the costs of PERM requirements, the delay in having a position filled, and the legal fees associated with filing for labor certification are worth investing on a potential employee.⁴⁶ The approval of both PERM and Labor Certification could, and most likely will, collectively take years to ascertain.⁴⁷ When waiting for Labor Certification approval, the employer is left with a vacant position, and thus, could potentially lose profits and income. Labor Certification is costly, requiring the filing of visa forms, the posting of advertisements, and the costs associated with other recruitment methods. Furthermore, the Labor Certification process could accumulate a large amount of attorney fees. Thus, because of its costly nature, Labor Certification is likely only to be achievable and pursued by large corporations.⁴⁸

⁴² *Id.*

⁴³ Rebecca P. Burdette, *New World for Labor Certification*, 43 *Hous. Law.* 18, 20 (2006) (“While a few PERM cases are approved within 2-4 weeks, most are taking roughly four months”).

⁴⁴ 20 C.F.R. § 656.17(f).

⁴⁵ *Id.*

⁴⁶ See International Office Northwestern University, *Cost and Timeline Table for Labor Certification*, Sept. 9, 2011, *PDF available at* http://www.northwestern.edu/forms/International/forms/Ftn_lpr_b1/Cost%20and%200timeline%20of%20Labor%20Certification.pdf&ei=AVEkT525BZDsQLymtSMAG&usg=AFQjCNG68wfNLF-Vc3CO2NB2e1RURexwwg&sig2=omLO56cHcxaR9_EI6WXfw (estimating that labor certification and other requirements for an employment visa would cost at least \$10,109).

⁴⁷ See *id.* (Estimating that that obtaining an employment visa would take 21-33 months).

⁴⁸ See U.S.D.O.L. Employment and Training Administration, Office of Foreign Labor Certification, *Foreign Labor Certification Annual Report October 1, 2009 - September 30, 2010*, 20 OFLC_2010_Annual_Report_Mapter.pdf (Listing the 25 employers with the highest number of applications certified. List includes, Apple Inc., Bank of America, Bloomberg L.P., Broadcom Corp., and Cisco Systems, Inc.).

Labor Certification, while a viable option for corporations and companies with enough revenue to pay for the associated costs, is unlikely to be a successful avenue for obtaining an employment visa for unskilled and nonprofessional workers. Currently, one-third of all PERM certifications are filled primarily by computer software and engineering positions.⁴⁹ While Labor Certification may be an avenue for professional and educated workers to obtain employment visas, it is highly unlikely that unskilled workers will be able to come to the United States through Labor Certification, and thus, employers must find other avenues, such as outsourcing, to employ non-skilled non-American workers.

c. Discrimination in Immigration Policy: Gaining Admission to the United States

The Federal Government's plenary power to exclude non-citizens is largely immune from judicial review.⁵⁰ In determining the admissibility of a non-citizen, government agencies can adopt discriminatory practices and policies, even if those policies would be struck down as unconstitutional when applied to U.S. citizens.⁵¹ The United States' immigration policy is deeply rooted in a tradition of racially discriminatory practices.⁵² Though the Supreme Court has held that employers cannot discriminate on the basis of a prospective employee's race or national origin,⁵³ government agencies use a visa applicant's national origin as the determining factor of whether admission to the United States will be granted. After filing for an immigration visa, a non-citizen's waiting period is determined by looking at the visa bulletin.⁵⁴

⁴⁹ *Id.* at 17.

⁵⁰ *Fiallo v. Bell*, 430 U.S. 783, 792 (1997).

⁵¹ *Matthews v. Diez*, 426 U.S. 66, 79-80 (1976) (In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

⁵² *Immigration, Railroads and the West*, *supra* note 2.

⁵³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

⁵⁴ U.S.D.O.S., *Visa Bulletin* http://travel.state.gov/visa/bulletin/bulletin_1360.html (last visited, Oct. 13, 2012).

Replica of the November 2012 Employment Visa Bulletin:

Employment-Based	All Charge-ability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	01SEP07	01SET04	C	C
3rd	22NOV06	15APR06	22OCT02	22NOV06	08AUG06
Other Workers*	22NOV06	01JUL03	22OCT02	22NOV06	08AUG06
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Targeted Employment Areas/Regional Centers and Pilot Programs	C	C	C	C	C

55

The bulletin “provides information regarding the cut-off dates which govern visa availability in the numerically limited visa categories and other immigrant visa related information,”⁵⁶ and categorizes individuals on the basis of (1) the type of visa they are applying for, and (2) their nationality.⁵⁷ Thus, the waiting period for an employment visa application is greatly impacted by an applicant’s nationality.⁵⁸ For example, in April 2012, it is projected that the Department of State will be considering Third Preference Category employment visas⁵⁹ to Philippine applicants who applied in April 2006, yet will only be considering Third Preference Category employment visas to Indians who applied in September 2002.⁶⁰ Thus, an individual’s nationality can greatly delay the consideration of his/her unskilled worker visa application.⁶¹

⁵⁵ U.S.D.O.S., *Visa Bulletin for November 2012*.

http://www.travel.state.gov/visa/bulletin/bulletin_5674.html (last visited, Oct. 13, 2012).

⁵⁶ *Visa Bulletin*, *supra* note 54.

⁵⁷ *See e.g., Visa Bulletin for April 2012*, *supra* note 55.

⁵⁸ *See id.*

⁵⁹ 8 U.S.C.A. § 1153(b)(3); *see infra* Part I, Sec. b.

⁶⁰ *Visa Bulletin for Nov. 2012*, *supra* note 55.

⁶⁰ *See id.*

⁶¹ *See id.*

Employment visa applicants who are educated and highly qualified can generally obtain an employment visa within a few months, while an individual who is uneducated and unskilled will have to wait at least six years.⁶² The delay in consideration of unskilled employment visa applications both deters employers from filing for an employment visa, and conveys a policy of strongly limiting the number of unskilled workers permitted to immigrate to the United States.

Using nationality and education/ability as a determining factor for employment immigration visas, the United States' employment visa protocol filters out many poor people of color from having the opportunity to come to the United States and obtain employment. In many respects, today's immigration policies prevent non-citizens from coming to the United States to better themselves and live the "American dream". While the United States' immigration policies likely have a disparate impact on many people of color, particularly those who lack graduate degrees, the current immigration policies are not challengeable under the Equal Protection Clause because non-citizens do not have a constitutional right to be admitted to the United States, and the federal government has the plenary power to exclude.⁶³

Part II. Outsourcing

a. History and Prevalence of Outsourcing

In an effort to keep costs down, United States employers and manufacturers have reverted to outsourcing jobs.⁶⁴ Outsourcing is an economically advantageous avenue for employers because it yields lower employment costs and lower factory and office expenses. In addition to cutting wages and general operation costs, many believe that the outsourcing of jobs results in the evasion U.S. taxes.⁶⁵

Regulation of outsourcing, like regulation of immigration, falls under the powers of the Federal Government.⁶⁶ Though many states have considered or passed legislature to restrict forms of outsourcing, such laws may be unconstitutional.⁶⁷ The Commerce Clause grants the federal government the exclusive power to regulate commerce between states and between the

⁶² *See id.*

⁶³ *Chae Chan Ping v. United States*, *supra* note 12.

⁶⁴ The term "outsourcing" lacks a generalized definition. Donald J. Marples, *Taxes and Offshore Outsourcing*, 2009 WL 548633, CRS RL 32587, at 2 (Jan. 30, 2009). One meaning of the word outsourcing refers to offshore outsourcing, in which an American employer/manufacture sends a job offshore. *Id.* For the purposes of this paper, any mention of outsourcing will be referring to offshore outsourcing.

⁶⁵ Roya Wolverson, *Outsourcing Jobs and Taxes*, COUNCIL ON FOREIGN RELATIONS, Feb. 11, 2011, <http://www.cfr.org/united-states/outsourcing-jobs-taxes/p21777> ("Foreign countries and territories that have no or nominal corporate tax rates are considered so-called "tax havens" in that they incentivize multinational corporations to transfer income abroad.").

⁶⁶ *See generally*, Michael A. Zuckerman, *The Offshoring of American Government*, 94 *Cornell L. Rev.* 165, (2008).

⁶⁷ *Id.*

United States and foreign countries.⁶⁸ Individual State restrictions on outsourcing may interfere with the Federal Government's ability to regulate commerce and engage in foreign relations. Thus, arguably, only the Federal Government has the authority to regulate and restrict outsourcing.⁶⁹

Outsourcing first became prevalent in the 1980's.⁷⁰ With the passing of the North American Free Trade Agreement, and the ability of American consumers to easily obtain goods from Canada or Mexico, pressure was placed on American companies to decrease product cost.⁷¹ Some argue that in response to demands for less expensive goods, many companies, such as General Motors, opted to close manufacturing plants in the United States and outsource jobs.⁷² In the 1990's, American companies began to focus on being "globally competitive", and thus, sought to cut costs in production and labor.⁷³

Outsourcing has become a commonplace practice in today's economy.⁷⁴ Some estimate that hundreds of thousands of American jobs are lost to outsourcing.⁷⁵ Furthermore, reports have shown that outsourcing has increased in recent years.⁷⁶ Some predict that in the next decade,

⁶⁸ U.S.C. Const. Art. I § 8, cl. 3

⁶⁹ See Zuckerman, *supra* note 72.

⁷⁰ Thomas Heffner, *History of Outsourcing in America*, ECONOMY IN CRISIS, Jan. 26, 2012, <http://economyincrisis.org/content/history-outsourcing-america>; Robert Hanfield, *A Brief History of Outsourcing*, THE SUPPLY RESEARCH COOPERATIVE (NC State University, Poole College of Management) June 1, 2006 <http://scm.ncsu.edu/scm-articles/article/a-brief-history-of-outsourcing>.

⁷¹ Heffner, *supra* note 70; see also Kim Geiger, *Trade, outsourcing and tariffs top '08 concerns*, msnbc.com, Aug. 4, 2008, http://www.msnbc.msn.com/id/26011549/ns/politics-briefing_book_issues_08/t/trade-outsourcing-tariffs-top-concerns/#.Tys4qEqnncE ("Some voters, particularly in Pennsylvania, Michigan, and other manufacturing states, frequently cite the connection between imported goods [after the passing of NAFTA] and the disappearance of manufacturing jobs in their states.").

⁷² See e.g., Heffner, *supra* note 70.

⁷³ See Rober I. Lerman and Stefanie R. Schmidt, *An Overview of Economic, Social, and Demographic Trends Affecting the US Labor Market*, THE URBAN INSTITUTE, available at <http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/trends/trendsVI.htm> ("The losses occur as some firms face lower prices and some workers must accept lower wages in the face of added competition. Were factors of production entirely mobile, firms and workers experiencing losses could shift away from their existing sectors toward more financially rewarding ones.").

⁷⁴ See Lou Dobbs Tonight, *Exporting America*, CNN <http://www.cnn.com/CNN/Programs/lou.dobbs.tonight/popups/exporting.america/content.html> (last visited, Jan. 29, 2012) (giving an extensive list of American companies that export jobs or outsource their company).

⁷⁵ Working America and the AFL-CIO, *Sending Jobs Overseas: The Cost to America's Economy and Working Families 6*, PDF available at <http://www.workingamerica.org/upload/OutsourcingReport.pdf>.

⁷⁶ *Id.*

“3.3 million jobs will be lost to outsourcing,”⁷⁷ and that “in the realm of IT outsourcing, 472, 632 jobs are expected to move offshore in the next four years.”⁷⁸ In 2003, Forbes reported that India, the Philippines, Russia, China, Canada, Mexico, and Ireland were among the top countries in which American companies outsource jobs.⁷⁹ The prevalence of outsourcing may be a natural result of restrictive immigration policies that prevent non-citizens interested in lower-paying jobs from coming to the United States.⁸⁰ Furthermore, the current “cut-costs” trend towards outsourcing, in conjuncture with restrictive employment immigration policies, may force American companies and manufacturers to choose between outsourcing jobs (a legal business tactic) or to employ undocumented non-citizens (an illegal business tactic).⁸¹

While outsourcing originally impacted only workers in the manufacturing industries, the improvement of technology has led to the outsourcing of higher skilled positions.⁸² Service or labor intense jobs are frequently outsourced because “[f]irms will see a larger decrease in production costs when they move these jobs to a country where labor costs are very low.”⁸³ Information-based jobs, such as customer service and billing, have experienced drastic outsourcing increases in the recent years because “[t]he internet and improved communication channels have allowed for easy accessibility of information.”⁸⁴

b. The Outsourcing Debate

⁷⁷ Gwyn VanderWeerd, *Analyzing the Debate over Offshore Outsourcing in the Service Industry: Is there a Reason for Concern?*, MAJOR THEMES IN ECONOMICS (2006) available at <http://www.google.com/url?sa=t&rct=j&q=jobs%20likely%20to%20be%20outsourced&source=web&cd=31&ved=0CCAQFjAAOB4&url=http%3A%2F%2Fbusiness.uni.edu%2F Economics%2FThemes%2Fvanderweerd.pdf&ei=OPorT7L-GYvtggfM6pXbDw&usg=AFQjCNHIUkpUbZJUv6Qvmrk1QxZItJrvZApdf>

⁷⁸ *The United States Outsourcing Controversy: Capitalism vs. Ethics*, MIRACLE TECHNOLOGIES <http://www.miraclegroup.com/article/the-united-states-outsourcing-controversy-capitalism-vs-ethics.html> (last visited, Feb. 2, 2012).

⁷⁹ Lisa DiCarlo, *Best Countries for Outsourcing*, FORBES.COM, Aug. 27, 2003, http://www.forbes.com/2003/08/27/cx_id_0827bestcountries.html.

⁸⁰ Sarah J. Rasalam, *Improving the Immigration Policy of the United States to Fulfill the Needs of America's Aging Baby Boomers: The Alternative to Outsourcing Grandmom*, 16 *Elder L.J.* 405, 405 (2009).

⁸¹ See generally, Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 *Berkley J. Emp. & Lab. L.* 1, (2009).

⁸² VanderWeerd, *supra* note 77, at 12.

⁸³ *Id.* at 13.

⁸⁴ *Id.*

Outsourcing, and its impact on the economy, has fueled political debate. In the 2012 State of the Union Address, President Barack Obama announced his intention to decrease outsourcing and bring jobs back to the country through an adjustment to the tax code.⁸⁵ President Obama announced that “every multinational company should have to pay a basic minimum tax.”⁸⁶ Additionally, President Obama stated that American manufacturers should get bigger tax cuts, as an incentive to keep manufacturing jobs in the United States.⁸⁷ The 2012 State of the Union Address clarified the Obama Administration’s stance on outsourcing and the current state of unemployment: “It is time to stop rewarding businesses that ship jobs overseas, and start rewarding companies that create jobs right here in America.”⁸⁸ Though outsourcing has long been a controversial practice, the Obama Administration’s vocal opposition to outsourcing may encourage legislators to pass, or, at least, seriously contemplate creating a law that restricts and/or regulates outsourcing.⁸⁹

Opponents of outsourcing assert that despite outsourcing’s drastically negative effects on American jobs, “[l]eaders of many of America’s largest and most profitable corporations have vastly increased their use of outsourcing at the same time as millions of manufacturing and service jobs have disappeared, the wages and salaries of American employees have stagnated, and wealth has become more concentrated than any time since the 1920’s.”⁹⁰ Many opponents claim that outsourcing harms the economy through sending jobs that would otherwise be given to American citizens, to other countries, increasing unemployment.⁹¹ Even conceding the uncertainty and lack of affirmative evidence regarding the impact of outsourcing policies, opponents assert that outsourcing negatively impacts U.S. employment rates through enabling companies to decrease U.S. employees.⁹² Thus, opponents argue that restrictions on outsourcing would help to relieve some of the unemployment and current economic despair. Furthermore, opponents of outsourcing argue that outsourcing is a nationally economically detrimental practice because it enables companies to evade taxes, and thus, deprive the United States’

⁸⁵ *Remarks by the President in State of the Union Address*, The White House Office of the Press Secretary, Jan. 24, 2012 available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address> (transcript).

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ *See infra* Part II, Sec. C.

⁹⁰ Working America, *supra* note 75, at 6-7.

⁹¹ *See* David Wessel, *Big U.S. Firms Shift Hiring Abroad*, April 19, 2011, WALL STREET JOURNAL.COM, <http://online.wsj.com/article/SB10001424052748704821704576270783611823972.html> (“While hiring, firing, acquiring and divesting in recent years, GE has been reducing the overall size of its work force both domestically and internationally. Between 2005 and 2010, the industrial conglomerate cut 1,000 workers overseas and 28,000 in the U.S.”).

⁹² David Dapice, *Debt and Unemployment: Is Global Capitalism Responsible? – Part II, Lingering high joblessness in US threatens global prosperity*, YALE GLOBAL, April 26, 2010, available at <http://yaleglobal.yale.edu/content/debt-and-unemployment-global-capitalism-responsible-part-ii> (asserting that even though the impact of outsourcing on unemployment is uncertain, it, in combination with foreign trade policies, has allowed companies to decrease the number of middle management employment positions).

economy of much needed revenue.⁹³

In addition to economic fears, opponents of outsourcing fear possible confidentiality breaches, particularly in the areas of financial and medical data processing.⁹⁴ Incidents of confidentiality breaches and blackmail attempts have fueled fears of informational outsourcing.⁹⁵ Similar to fear of information privacy breaches, legislatures have recognized that outsourcing manufacturing could threaten national security.⁹⁶ Thus, while outsourcing is economically advantageous for corporations and companies, opponents contest that it may reap negative, illegal, or dangerous consequences.

Proponents of outsourcing contend that outsourcing benefits the American economy through increasing productivity.⁹⁷ Further, proponents argue that the lower costs associated with outsourcing enables companies to be more innovative and to prevent closings and bankruptcies.⁹⁸ Proponents of outsourcing assert that restrictions on outsourcing would make it unfeasible for many American companies to stay in business.⁹⁹ Proponents assert that outsourcing enables the United States to be globally competitive.¹⁰⁰ Furthermore, proponents of outsourcing argue that

⁹³ See Wolverson, *supra* note 65.

⁹⁴ See, e.g., Jennifer Skarda-McCann, *Overseas Outsourcing of Private Information & Individual Remedies for Breach of Privacy*, 32 Rutgers Computer & Tech. L.J. 325, 325 (2006).

⁹⁵ *Id.* When U.S. companies send information for processing and record upkeep overseas, employees gain access to confidential client information such as social security numbers, credit card numbers, tax information, etc. *Id.* at 330-31.

⁹⁶ See Air Force One Built in America Act, H.R. 680, 111th Cong. (2009) (introduced in House); *infra* Part II, Sec. c.

⁹⁷ *The Future of Outsourcing, How its transforming whole industries and changing the way we work*, BLOOMBERG BUSINESSWEEK, Jan. 30, 2006, http://www.businessweek.com/magazine/content/06_05/b3969401.htm (“The new attitude is emerging in corporations across the U.S. and Europe in virtually every industry. Ask executives at Penske Truck Leasing why the company outsources dozens of business processes to Mexico and India, and they cite greater efficiency and customer service. Ask managers at U.S.-Dutch professional publishing giant Wolters Kluwer why they're racing to shift software development and editorial work to India and the Philippines, and they will say it's about being able to pump out a greater variety of books, journals, and Web-based content more rapidly.”); *Outsourcing Debate Tainted By Myths, Misconceptions*, FOX NEWS, Apr. 22, 2004, <http://www.foxnews.com/story/0,2933,117820,00.html> (“Many times, American companies will create new jobs specifically for overseas workers, jobs they'd never consider if forced by law to give them to Americans, because they'd be too expensive.”)

⁹⁸ *Id.* (“More aggressive outsourcers are aiming to create radical business models that can give them an edge and change the game in their industries. Old-line multinationals see offshoring as a catalyst for a broader plan to overhaul outdated office operations and prepare for new competitive battles.”).

⁹⁹ See *id.*

¹⁰⁰ See Heffner, *supra* note 70 (outsourcing enables companies to lower costs, and thus, be globally competitive).

restrictions would harm the American economy through dissuading foreign entities from establishing subsidiaries in the United States.¹⁰¹ Thus, outsourcing supporters argue that restricting outsourcing could result in the economic demise of American companies and manufacturers, and thus, indirectly result in the loss of many jobs currently held by U.S. citizens.

Even if it was determined that outsourcing is detrimental to U.S. jobs and economy, proponents of outsourcing argue that restrictions on outsourcing may violate international trade agreements.¹⁰² On January, 1, 1996, the United States became party to the World Trade Organization Government Procurement Act (GPA).¹⁰³ The GPA “obligates contracting parties, such as the United States, to give foreign suppliers, goods, and services ‘no less favourable’ treatment than those same goods or services would be given domestically.”¹⁰⁴ The GPA was enacted in response to “trade-restrictive effects of discriminatory procurement policies,”¹⁰⁵ and requires the United States to treat foreign companies as favorably as it would treat a U.S. company.¹⁰⁶ Currently, 53 nations, including the United States, are party to the GPA.¹⁰⁷ An additional 9 nations are currently negotiating accession to the GPA.¹⁰⁸ Proponents of outsourcing argue that a federal restriction on outsourcing would differentiate the United States’ treatment of domestic and foreign companies, and thus, would violate the GPA,¹⁰⁹ and potentially harm the United States’ foreign relationships.

While there is debate over the impact and benefits of outsourcing on the American economy,¹¹⁰ it appears clear that the benefits outsourcing provides to American corporations and companies may not be felt by the American workforce. Though there are no certain and definitive statistics regarding the number of U.S. jobs outsourced, the Wall Street Journal has reported that “[i]n all, U.S. multinationals employed 21.1 million people at home in 2009 and 10.3 million elsewhere, including increasing numbers of higher-skilled foreign workers.”¹¹¹ Thus, though the current outsourcing policies may enable American companies to stay in

¹⁰¹ Shannon Klinger and M. Lynn Sykes, *Legislation that Bans or Severely Restricts Outsourcing Raises Serious Policy Questions, May Violate the U.S. Constitution, and Risks Jeopardizing U.S. Obligations Under International Trade Agreements*, 9 NO. 1 ELEC. BANKING L. & COM. REP. 1 (2004).

¹⁰² *Id.*

¹⁰³ *Government Procurement: The Plurilateral Agreement on Government Procurement GPA, Parties and Observers to the GPA*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited, Mar. 23, 2012).

¹⁰⁴ Klinger, *supra* note 101.

¹⁰⁵ *Government Procurement: The Plurilateral Agreement, Overview of the Agreement on Government Procurement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm (last visited, Mar. 23, 2012).

¹⁰⁶ *Id.*

¹⁰⁷ *Government Procurement: The Plurilateral Agreement on Government Procurement GPA, Parties and Observers to the GPA*, *supra* note 103.

¹⁰⁸ *Id.*

¹⁰⁹ *See* Klinger, *supra* note 101.

¹¹⁰ *See Outsourcing, Where’s Uncle Sam?*, BLOOMBERG BUSINESSWEEK, http://www.businessweek.com/debateroom/archives/2007/02/outsourcing_whe.html.

¹¹¹ Wessel, *supra* note 91.

business and globally compete, American workers face grave unemployment.

c. Recently Proposed Regulation of Outsourcing

The debate over whether outsourcing is beneficial or detrimental to the United States economy and job market is not novel. Though outsourcing has been a point of contention in the last few political elections, relatively few legislative measures promoting the regulation of outsourcing have been introduced since the aftermath of the 2004 presidential election. With the focus on outsourcing in the 2012 State of the Union Address,¹¹² political debates and political support for and against outsourcing has intensified. In the upcoming months, the first regulations on outsourcing could be enacted.

Stop Outsourcing and Create American Jobs Act

Introduced in both 2010 and 2011, the Stop Outsourcing and Create American Jobs Act proposes an amendment to the Internal Revenue Code of 1986,¹¹³ which would “provide for the identification of corporate tax haven countries and increased penalties for tax evasion practices in haven countries that ship United States jobs overseas”¹¹⁴ The Act proposes harsher penalties to corporations that evade taxes through corporate and manufacturing presence in tax haven countries.¹¹⁵ Recognizing the need for transparency, the Stop Outsourcing and Create American Jobs Act proposes that the Secretary of the Treasury “develop and publish a list of countries that the Secretary determines to be corporate tax haven countries.”¹¹⁶

In addition to defining tax haven countries and modifying penalties for evading taxes through the use of tax haven countries, the Stop Outsourcing and Create American Jobs Act gives preference in federal contracts to American companies that do not, or have not recently outsourced jobs.¹¹⁷ The Act defines outsourcing as “laying off of a United States worker from a job, and the hiring or contracting for the same job to be performed in a foreign country.”¹¹⁸ Through Federal preference for American companies that do not outsource, the Stop Outsourcing and Create American Jobs Act promotes an anti-outsourcing policy that would be influential, yet, would not explicitly regulate nor prevent American companies from outsourcing jobs.

¹¹² See *Remarks by the President in State of the Union Address*, *supra* note 85.

¹¹³ Internal Revenue Code, 26 U.S.C. §§ 1-8023 (1986).

¹¹⁴ Stop Outsourcing and Create American Jobs Act of 2010, H.R. 5622, 111th Cong. (2010)(introduced in House); Stop Outsourcing and Create American Jobs Act of 2011, H.R. 3338, 112th Cong. (2011) (introduced in House).

¹¹⁵ *Id.* at § 3.

¹¹⁶ *Id.* at § 2.

¹¹⁷ *Id.* at §4(a) (“A Federal department or agency may give a preference in the award of a contract for the procurement of goods or services in a fiscal year to any potential contractor that has not engaged in outsourcing during the fiscal year preceding the fiscal year in which the contract is awarded.”).

¹¹⁸ *Id.* at § 4(c).

Air Force One Built in America Act

Introduced in 2009, in response to discussions of using a European manufacturer, the Air Force One Built in America Act¹¹⁹ was introduced.¹²⁰ The Air Force One Built in America Act would “require that the aircraft used as Air Force One by the President be an aircraft that is made in America by an American-owned company.”¹²¹ Though the Air Force One Built in America Act narrowly seeks to restrict the outsourcing of a particular item, it defends American manufacturing.¹²² Additionally, the Act recognizes the dangers and harms that may result from outsourcing, finding that “[o]utsourcing the production of a presidential aircraft that will contain important command and control military capabilities to foreign company constitutes a national security risk.”¹²³

Though not placing a restriction on all outsourcing, the Air Force One Built in America Act recognizes negative implications of outsourcing on American jobs.¹²⁴ Congress found that “[d]ecisions to outsource production almost never take into account the loss of jobs and the adverse economic impact it has on communities throughout America. In a time when the economy is in recession, the Nation cannot afford to lose more manufacturing jobs.”¹²⁵ Though never enacted, the Air Force One Built in America Act is predicated in national security concerns, and encompasses anti-outsourcing attitudes and arguments.

Protecting Jobs from Government Interference Act

Introduced in 2011 and passed in the House of Representatives, the Protecting Jobs From Government Interference Act seeks to “prohibit the National Relations Board from ordering any employer to close, relocate, or transfer employment under any circumstance.”¹²⁶ The Act seeks to further the interests of American companies that outsource jobs through preventing the NLRB from “order[ing] an employer (or seek an order against an employer) to restore or reinstate any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting,

¹¹⁹ Air Force One Built in America Act, H.R. 680, 111th Cong. (2009) (introduced in House, never enacted).

¹²⁰ See Peter Pae, *Foreign Maker of Air Force One? That may not Fly*, LOS ANGELES TIMES, Jan. 17, 2009, available at <http://articles.latimes.com/2009/jan/17/business/fi-airforceone17> (article detailing the debate over the hiring a European company to build the new Air Force One).

¹²¹ H.R. 680, *supra* note 119.

¹²² See *id.* at § 2(3) (“America’s aerospace industry leader, Boeing, has nearly 100 years of experience designing aircraft, and if asked to build an aircraft equivalent to any existing foreign aircraft, it would meet that challenge.”).

¹²³ *Id.* at § 2(4).

¹²⁴ *Id.* at § 2(6).

¹²⁵ *Id.*

¹²⁶ Protecting Jobs From Government Interference Act, H.R. 2587, 112th Cong. (2011) (passed in the House).

outsourcing, or other change regarding location. . .”¹²⁷ In essence, the Protecting Jobs from Government Interference Act seeks to ensure that an employer/manufacture’s ability to outsource jobs is not infringed by NLRB remedies. The Act was passed in the House of Representatives on September 15, 2011,¹²⁸ and was introduced to in the Senate on September 8, 2011.¹²⁹ If passed in the Senate, the Protecting Jobs from Government Interference Act would disable Labor Unions and employees from finding redress from outsourcing through action by the NLRB, and thus, would further the unrestricted ability of employers and manufacturers to engage in outsourcing.

Like outsourcing, the Protecting Jobs From Government Interference Act has sparked debate. When passed in the House of Representatives, the Act received support almost unanimously by Republicans, and was opposed primarily by Democrats.¹³⁰ In support of the bill, Representative John Kline (R-MN) stated “[t]his legislation represents an important step in the fight to get our jobs back on track. It tells job creators they don’t have to worry about an activist N.L.R.B. telling them where they can locate their business.”¹³¹ Representative Rush Holt (D-NJ), in opposition to the Act, stated that its enactment “would be devastating to workers across the country” as it “eliminates the only remedy to force companies to bring back work from overseas.”¹³²

The United States Call Center Worker and Consumer Protection Act

Introduced in 2011, the United States Call Center Worker and Consumer Protection Act¹³³ would require employees engaging in customer service communication to “disclose their physical location at the beginning of each customer service communication so initiated or received.”¹³⁴ Exempting U.S. located companies,¹³⁵ the bill “use[s] public disclosure to discourage outsourcing.”¹³⁶ In addition to location disclosure, the Act requires that after disclosure of location, if a customer requests a transfer, the entity must “transfer the customer to a customer service agent who is physically located in the United States.”¹³⁷ The United States Call Center Worker and Consumer Protection Act is influential in decreasing outsourcing through drawing the American public’s attention to where employees are working, and through

¹²⁷ *Id.* at § 2.

¹²⁸ H.R. Res. 372, 112th Cong. (2011) (passing H.R. 2587).

¹²⁹ S. 1523, 112th Cong. (2011).

¹³⁰ Steven Greenhouse, *In Boeing Case, House Passes Bill Restricting Labor Board*, NY TIMES, Sep. 15, 2011, <http://www.nytimes.com/2011/09/16/business/house-approves-bill-restricting-nlrb.html>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ The United States Call Center Worker and Consumer Protection Act, H.R. 2596, 112th Cong. (2011).

¹³⁴ *Id.* at § 5(a).

¹³⁵ *Id.* at § 5(b)(1).

¹³⁶ Patrick Thibodeau, *U.S. firms should disclose offshore hiring, says lawmaker*, NETWORKWORLD, Feb. 1, 2012, <http://www.networkworld.com/news/2012/020112-us-firms-should-disclose-offshore-255615.html?hpg1=bn>.

¹³⁷ H.R. 2596, *supra* note 133, at § 5(c).

giving consumers the power to speak to a representative in the United States. Through the Act, a consumer has the power and ability to show companies that they prefer representatives to be working in the United States.

Outsourcing Accountability Act of 2012

Much of the debate regarding outsourcing and its impact on the American economy results from the uncertainty surrounding the number of non-American workers hired. Many United States companies refuse to discuss or report the number of employees employed outside of the United States.¹³⁸ On February 1, 2012, the Outsourcing Accountability Act was introduced to the House of Representatives.¹³⁹

The Outsourcing Accountability Act proposes an “amend[ment] [to] the Securities Exchange Act of 1934¹⁴⁰ to require the disclosure of the total number of a company’s domestic and foreign employees.”¹⁴¹ Specifically, the Outsourcing Accountability Act would require that employers disclose “(A) the total number of employees” and “(B) the total number of such employees physically working in and domiciled in any country other than the United States, listed by number in each country” and “(C) the percentage increase or decrease in the numbers . . . from the previous reporting year.”¹⁴² While employers were previously required to provide employment numbers to the U.S. Securities and Exchange Commission, the Outsourcing Accountability Act would require employers to report the breakdown of which state and country each employee is domiciled and working.¹⁴³

Passing of the Act would constitute the first time that comparable outsourcing data would be available for lawmakers. Such data would, for tax break purposes, enable lawmakers to determine which companies are contributing to the production of jobs.¹⁴⁴ Supporters of the bill argue that its enactment would not be difficult for companies to implement, as some big companies have already started to gather information.¹⁴⁵ Further, supporters of the bill claim that its implementation will benefit American companies who do not outsource because “[t]here are supporters who want to support companies that support American workers.”¹⁴⁶

¹³⁸ Wessel, *supra* note 95 (“The growth of their overseas work forces is a sensitive point for U.S. companies. Many of them don’t disclose how many of their workers are abroad. And some who do won’t talk about it.”).

¹³⁹ Outsourcing Accountability Act of 2012, H.R. 3875 (2012).

¹⁴⁰ Securities Exchange Act of 1934, 15 U.S.C. § 78 (1934).

¹⁴¹ H.R. 3875, *supra* note 139.

¹⁴² *Id.* at § 2(a)(A)-(C).

¹⁴³ Thibodeau, *supra* note 136.

¹⁴⁴ Jia Lin Yang, *Proposed jobs bill would target foreign outsourcing by U.S. companies*, WASHINGTON POST WITH BLOOMBERG, Feb. 1, 2012, http://www.washingtonpost.com/business/economy/proposed-jobs-bill-would-target-foreign-outsourcing-by-us-companies/2012/01/31/gIQAPLHOHQ_story.html.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

Part III. The Contradiction Between Outsourcing and Immigration Regulation Policies, and its Impact on Legal and Illegal Minority Workers

a. The Contradiction Between Current Immigration and Outsourcing Policies

The interplay of the current employment immigration and outsourcing policies offers incentives for employers to outsource jobs rather than hire domestically. Outsourcing offers employers the opportunity to lower operation costs through opening factories or offices in foreign countries that have little to no property taxes, decreased insurance costs per employee, minimal employee wage requirements, and the freedom to evade discrimination hiring laws. In essence, an American company has the opportunity to “shop around” for the foreign location and employees that it prefers. Under the current legal framework, employers have no obligation to report where they are outsourcing jobs, how many jobs are being outsourced, or why he/she chose to outsource instead of hiring domestically.¹⁴⁷ Meanwhile, employers that are seeking to employ non-citizens are highly restricted from doing so domestically.¹⁴⁸ With the difficulty, costliness, and delay in the Labor Certification process, employers have no incentive and are unlikely to opt to apply for immigration visas over outsourcing jobs.¹⁴⁹ American companies desiring to remain in the United States are left in the difficult position of having to determine where to cut costs without outsourcing, something that is excessively difficult in today’s global market.¹⁵⁰

The current state of outsourcing undermines the goals of employment immigration. Through restrictive employment immigration laws, Congress has sought to protect American jobs from being taken by a newly arrived workforce.¹⁵¹ Yet, without any form of regulation or restriction on outsourcing, employers have the unrestricted option to move jobs offshore, and thus, to deprive Americans of their jobs. Furthermore, if the Protecting Jobs From Government Interference Act,¹⁵² which has already passed in the House of Representatives, becomes law, the National Labor Relations Board will be prohibited from “order[ing] an employer (or seek an order against an employer) to restore or reinstate any work, product, production line, or equipment, to rescind any relocation, transfer, subcontracting, outsourcing, or other change regarding location. . .”¹⁵³ Thus, employees will lose the ability to legally combat outsourcing and find relief for the loss of jobs. Though the purpose of employment immigration laws is to protect American jobs, the ability of employers to outsource renders the immigration goal unachievable.

¹⁴⁷ *Supra* Part II.

¹⁴⁸ *See supra* Part I, Sec. b.

¹⁴⁹ *See id.*

¹⁵⁰ *See* Wessel, *supra* note 95.

¹⁵¹ *See supra* Part I.

¹⁵² Protecting Jobs From Government Interference Act, *supra* note 126.

¹⁵³ *Id.* at § 2.

b. Impact on the Minority Working Classes, the Need for Increased Outsourcing Regulation and Less Restrictive Employment Immigration Laws

Unemployment is one of the foremost issues of today. In February 2012, the national unemployment rate was 8.3%.¹⁵⁴ In 2010, 8.7% of white workers were unemployed, while 16% of Black or African American workers 12.5% of Hispanic workers were unemployed.¹⁵⁵ While there are many potential causes and reasons for the discrepancy in unemployment percentages between white, Hispanic, and black workers, it is undisputed that unemployment is an issue that is greatly felt by minority working classes.

While there is a lot of uncertainty regarding the number of U.S. jobs outsourced, and the impact that outsourcing has on unemployment, it can be presumed that at least some outsourcing has negatively impacted the working class. From 2009-2011, the annual unemployment rate was 9.3%, 9.6%, and 8.9% respectively.¹⁵⁶ Though there is a lack of data to determine if outsourcing has caused the recent high unemployment rates, outsourcing has restructured the labor market through the elimination of positions, and thus, “some of the workers displaced by offshoring will have to change fields to obtain new jobs, which could prolong their period of unemployment.”¹⁵⁷ Thus, the current prevalence of outsourcing makes it difficult for unemployed individuals to re-obtain employment.

Though arguments for the benefits and detriments of outsourcing can easily be made on both sides, the only consensus appears to be that outsourcing’s impact on unemployment is uncertain. Only through passing legislation that enables government entities to collect data regarding the number of outsourced jobs, industries, and employee positions, can an accurate analysis on outsourcing’s impact on the economy and job market be ascertained. It is regularly acknowledged that outsourcing is a prevalent practice that is beneficial for employers, and that unemployment is national problem. Yet, only with further research can a definitive causal link between outsourcing and unemployment be affirmed or denied. With additional regulation/data collection, legislators can more accurately determine appropriate measures protect American workers from increased and prolonged unemployment.

The United States is home to a large number of out of status (or illegal) immigrants,¹⁵⁸

¹⁵⁴ Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, <http://www.bls.gov/cps/> (last visited, Mar. 25, 2012).

¹⁵⁵ *Id.*

¹⁵⁶ Bureau of Labor Statistics, *Labor Statistics From the Current Population Survey: Employment status of the civilian noninstitutional population, 1941 to date* <http://www.bls.gov/cps/cpsaat01.htm> (last visited, Mar. 25, 2012).

¹⁵⁷ Linda Levine, *Offshoring (or Offshore Outsourcing) and Job Loss Among U.S. Workers*, Congressional Research Service, Jan. 21, 2011, *PDF available at* http://www.forbes.house.gov__Offshoring_and_Job_Loss_Among_U_S_Workers.pdf.

¹⁵⁸ “Out of status” refers to non-citizens who entered the United States either (1) without inspection (most frequently thought of having crossed the border without a proper visa), or (2) non-citizens who entered the United States with a valid visa, yet remained in the United States after visa expiration. Out of Status non-citizens are often referred to as “illegal immigrants”, yet, most out of status non-citizens have violated immigration but not criminal laws.

many of which are part of the workforce. An estimated 11.2 million illegal immigrants, 4% of the current population, live in the United States.¹⁵⁹ Of the estimated 11.2 million illegal immigrants, 8 million are estimated to be in the work force, constituting 5% of the workforce.¹⁶⁰ Though it is illegal for employers to knowingly hire undocumented workers,¹⁶¹ sanctions and criminal actions will only be applicable where the employer had actual knowledge of the employee's undocumented status.¹⁶² Thus, to impose consequences on employers for hiring illegal immigrants may be difficult. Mexicans constitute 58% of the illegal immigrant population, with an estimated 6.8 million Mexicans illegally present in the United States.¹⁶³ After which, "[t]hey are followed by people from other Latin American countries at 23 percent, or 2.6 million; Asia at 11 percent or 1.3 million; Europe and Canada at 4 percent or 500,000; and African countries and other nations at 3 percent, or 400,000."¹⁶⁴ The majority of illegal immigrants work in low-skilled jobs.¹⁶⁵ The food service and janitorial industries' workforces are largely comprised of both legal and illegal immigrants.¹⁶⁶ Thus, the majority of the low-skilled jobs currently filled by illegal immigrants are positions that would require a third category employment visa,¹⁶⁷ which would be very hard, if not impossible, for a non-citizen to ascertain.¹⁶⁸ Thus, for many of the illegal immigrants present in the United States, legal entry was not a feasible option.

Though, in an effort to protect American jobs, immigration policy has traditionally been restrictive, research has shown that increasing immigration does not drastically affect domestic workers.¹⁶⁹ Furthermore, many have argued that a policy of less restrictive immigration laws would improve our nation's economy.¹⁷⁰ In his paper *The Welfare Economics of Immigration*

¹⁵⁹ Hope Yen, *Number of Illegal Immigrants Holds Steady in U.S.*, MSNBC.COM, Feb. 1, 2011 http://www.msnbc.msn.com/id/41371038/ns/us_news-life/t/number-illegal-immigrants-holds-steady-us/#.T3CBbyOnncE.

¹⁶⁰ *Id.*

¹⁶¹ The Immigration Reform and Control Act (IRCA) 8 U.S.C. § 1324 (1986).

¹⁶² *See Collins Foods Intern. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("To expand the concept of constructive knowledge to encompass this case would not serve the intent of Congress, and is certainly not required by the terms of the IRCA.").

¹⁶³ Yen, *supra* note 159.

¹⁶⁴ *Id.*

¹⁶⁵ Eduardo Porter, *Here Illegally, Working Hard and Paying Taxes*, NEW YORK TIMES, June 16, 2006 <http://www.nytimes.com/2006/06/19/business/19illegals.html?pagewanted=all>.

¹⁶⁶ *Id.*

¹⁶⁷ *Supra* note Part I, Sec. b.

¹⁶⁸ *Id.*

¹⁶⁹ Rachel M. Friedberg and Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, THE JOURNAL OF ECONOMIC PERSPECTIVES Vol. 9, No. 2 (Spring 1995) 23-44, PDF available at http://www.econ.brown.edu/~rfac/rachel_friedberg/flinks/friedberg_jep.pdf&ei=AY8lT-umGY-psAKxp-iMAg&usg=AFQjCNHhW5Uk52iAI8UqFwaQch7mYmWHg&sig2=9GOEAHzkJv9bJ5a8T0sHLg.

¹⁷⁰ *See e.g.*, Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized*

Law: A Theoretical Survey with an Analysis of U.S. Policy, Alan Skykes asserts that “[n]ot only would [a less restrictive immigration] policy ameliorate labor market inefficiencies caused by existing restrictions on legal immigration, but it would reduce the demand for the services of illegals and perhaps facilitate a significant reduction in the enforcement resources devoted to the perceived problem of illegal immigration.”¹⁷¹ Through making immigration laws less restrictive, employers would, in theory, have the opportunity and ability to find lower-hourly paid workers to fill less desirable positions.¹⁷² The larger population of potential employees may encourage and enable factories to stay in the United States, decreasing outsourcing to other countries, and thus, creating more jobs domestically.

Conclusion

The United States currently has a contradictory employment system in which it is expensive, tedious, and very difficult for a foreign employee to get an employment visa; yet, there is no restriction on American companies from sending jobs abroad through outsourcing. The current contradiction between immigration and outsourcing policies has created a system in which American employers have incentive to outsource jobs, and many non-citizens are given no legal option to come to the United States to work.

With the current high levels of unemployment, particularly in the minority working class, Congress needs to evaluate whether the contradictory nature of immigration laws and outsourcing policies, is a contributing factor to unemployment. Only through passing laws that permit the regulation/data collection of outsourcing can the costs and benefits of outsourcing accurately be obtained. Further, Congress needs to take legislative steps to decrease the restrictiveness of the employment immigration laws so that “unskilled” or “other workers” do not revert to entering the country out of status.

Movement of Labor, 3 UCLA J. INT’L L. & FOREIGN AFF. 371, 373 (Fall 1998/Winter 1999)(“Immigration barriers interfere with the free flow of labor internationally and thereby cause wage rates for the same class of labor to diverge widely among different countries. For any given class of labor, residents of high-wage countries could gain by employing more immigrant labor, and residents of low-wage countries could gain by selling more of their labor to employers in high-wage countries.”).

¹⁷¹ Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy* 43, CHICAGO, JOHN M. OLIN LAW AND ECONOMICS WORKING PAPER NO. 10 (2nd Series) PDF available at http://www.law.uchicago.edu%2Ffiles%2Ffiles%2F10.Sykes_.Immigration.pdf&ei=OHsIT4CMNoTpsQLbttiMAG&usg=AFQjCNECSTMrFMu9TS1mQok0OTE-dzKXJA&sig2=1EzxKnrBdGrvMFKhRootLg.

¹⁷² *Id.* at 379 (“The same theory indicates that free immigration would maximize the gains from trade in the labor market for a country with no market power in foreign labor markets. Immigration restrictions impose costs by driving up the cost of labor, which in turn drives up the cost of goods and services to consumers.”).