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SMALL VISA INCREASE, MAJOR LABOR MANDATES, LIKELY GATS VIOLATIONS AND A $4.8 BILLION TAX INCREASE: AN ANALYSIS OF THE SENATE BILL'S PROVISIONS ON H-1B AND L-1 VISAS

EXECUTIVE SUMMARY

While most observers have focused on the Senate immigration bill's approach to illegal immigration, less attention has been paid to S. 1348's provisions on H-1B and L-1 visas. As currently crafted, S. 1348 is a not a good bill for U.S. companies that hire skilled foreign-born professionals. The bill provides an insufficient level of additional H-1B temporary visas, imposes unprecedented new labor requirements, contains likely violations of the General Agreement on Trade in Services (GATS) and enacts a $4.8 billion tax increase over 5 years on companies that employ H-1B visa holders.

A ONE DAY INCREASE IN H-1B VISAS

The Senate bill will add 50,000 visas to the H-1B cap, bringing the annual limit to 115,000 the first year of the bill. However, in April 2007, several months before the coming fiscal year, U.S. Citizenship and Immigration Services received approximately 120,000 applications for H-1Bs *on the first day*, indicating the Senate's H-1B increase will not last a full 24 hours. While the bill does not eliminate the current exemption from the H-1B cap of 20,000 visas for those with advanced degrees from U.S. universities, as some first thought, it does not expand that exemption – or add new ones – as did last year's Senate-passed immigration bill.

The bill contains a complicated "escalator" provision that can increase the annual H-1B limit by 15 percent during a fiscal year (if the limit is reached in the first part of the year) and at the start of the following fiscal year. But under the legislation the annual H-1B limit cannot exceed 180,000.[1]

$4.8 BILLION TAX INCREASE OVER 5 YEARS

As part of S. 1348, the Senate voted in favor of an amendment by Senator Bernard Sanders (I-VT) to, in effect, increase from (the current) $1,500 to $5,000 the scholarship/training fee that U.S. companies pay for each H-1B professional they hire (and visa renewals). The fee originated at only $500 as recently as FY 1999. A National Foundation for American Policy analysis, based on receipt data received from the Department of Homeland Security, shows the higher fee will cost companies $4.8 billion over 5 years.[2] This tax increase on the hiring of H-1B professionals represents an enormous extraction of wealth from the most innovative companies in America and is designed to make hiring H-1B professionals prohibitively expensive.

To date companies have received little credit for the nearly $2 billion in these fees they have paid just since 1999, funding 40,000 scholarships. Those fees paid toward education and training are in addition to company philanthropy and the $91 billion a year in local taxes companies pay to support public education.[3]

NEW LABOR MANDATES

Under current law, H-1B professionals must be paid the *higher* of the prevailing wage or the actual wage paid to similarly employed Americans. In examining DOL enforcement data, one does not see escalating H-1B abuse, as some allege, but modest problems that are addressed through agency enforcement. In fact, the back wages owed to H-1B employees via enforcement actions actually declined from FY 2005 to FY 2006, covering only $4.6 million in back wages, a small total in the context of an economy with a GDP of over $12 trillion. In DOL investigations, approximately 90 percent of cases with violations are found to be paperwork offenses or misread employer obligations, not "willful" violations, and of these dozen or so willful violations each year none have been committed by companies with household names. Back wages were owed to fewer than 1 percent (0.28 percent) of the individuals who received H-1B status between FY 1999 and FY 2002. In examining all DOL final agency actions of alleged abuse between 1992 and 2004, the average amount of back wages owed to an H-1B employee was only $5,919 – that is about the amount of money U.S. employers typically pay in H-1B legal and government-imposed fees, undermining claims of significant abuse and vast underpayment.[4]

U.S. professionals in information technology (IT) are doing well economically and are among the best-compensated workers in the world. "Software engineers have the best jobs in America," according to a 2006 *Money* magazine survey. American professionals in "computer and mathematical" occupations are at virtual full employment, with a low annual unemployment rate of 2.4 percent in 2006. U.S. salaries in computer and math occupations increased by 2.4% between May 2004 and May 2005. Overall, the market has determined the use of H-1B visas. When Congress raised the limit to 195,000 a year in FY 2002 and 2003, in both years fewer than 80,000 visas were issued against the cap, leaving 230,000 H-1B visas unused in those two years. Firms did not hire more H-1Bs just because the cap was higher. If, as critics allege, companies saved money because hiring H-1Bs is cheaper, then businesses should have used more H-1Bs when the economy worsened in 2002 and 2003, not fewer, as the data show.[5]

Despite this evidence, S. 1348 includes new restrictions on H-1B visas that could make the visas virtually unusable for many employers. Back in 1998, after much debate and consideration, Congress decided to enact measures that would limit certain attestations to past willful violators and companies with more than 15 percent of H-1Bs on their workforce, so-called "H-1B dependent" companies. The attestations are on "recruitment" and "nondisplacement" (no layoff of a U.S. worker within a certain time period of hiring an H-1B professional for a job). Congress specifically limited the attestations to willful violators and H-1B "dependent" companies (though 15 percent is likely too low a threshold for dependency) because it believed such measures would be exceedingly difficult for fast-moving tech companies to comply with, given the broad scope the Department of Labor would apply to terms like "essentially equivalent" jobs.

On "nondisplacement," an analysis of the current statute by the law firm of Paul Hastings helps explain the problem: "Employers must prove that job departures are voluntary and are not "constructive discharges"; they must demonstrate when discharges are performance related; they must demonstrate the nature of a contract whose ending results in personnel changes; they must demonstrate when offers of different jobs within the same company are bona fide; they have to demonstrate (according to a highly subjective DOL regulatory standard) whether two jobs are "essentially equivalent," requiring analysis of the job requirements, the typical characteristics of employees performing those jobs, etc.; they must assess and document what are relevant "areas of employment" for the displacement analysis; they must assess and document issues of "direct" versus "secondary" displacement; and far more."[6]

The bill would change the "nondisplacement" attestation to make it even more unworkable for all employers. It would expand the "nondisplacement" attestation to 180 days (essentially before/after filing an H-1B petition/application) from the current 90 days, which, again, now applies only to willful violators and H-1B dependent employers. This means that a company would become liable under sketchy definitions like "essentially equivalent" job for any individuals they dismissed over the course of a year. In the days of flexible job functions and multiple locations such a provision would cause a General Counsel to conclude his or her company may be unlikely to be in compliance if they hire any H-1B professionals. The safer alternative would be to expand outside the United States rather than risk such legal liability. As discussed below, this and certain other provisions of S. 1348 likely violate U.S. commitments under the General Agreement on Trade in Services (GATS).

In addition, S. 1348 expands the current law "recruitment" attestation to all employers (not just willful violators and "H-1B-dependent" companies as under current law). By definition, with the exception of "H-1B dependent" companies, employers applying for H-1B visas already have 85 to 99 percent of their domestic payrolls filled with U.S. workers, so it's clear they are regularly recruiting Americans. "The main problem with imposing a new recruitment attestation on all employers is not that companies are not recruiting U.S. workers – they obviously are – it's the enormous time and effort of satisfying the Labor Department's inevitable bureaucratic requirements and being exposed to the legal risk of failing to do so after the fact in a later audit," said Warren Leiden, partner, Berry, Appleman and Leiden.[7]

There is a significant disconnect between the rhetoric of advocates for these provisions and the actual language of the bill. Senators Richard Durbin (D-IL) and Charles Grassley (R-IA) have excoriated Indian companies for allegedly using H-1B visas for "outsourcing." But these firms, as H-1B dependent companies, already must comply with the law's recruitment and nondisplacement attestations, so expanding these attestations would affect only other employers of H-1B visa holders. (A recent NFAP analysis showed these "outsourcing" companies used only about 15,000 new H-1B visas for initial employment in 2006 and are unlikely, for a variety of reasons, to be causing U.S. job losses.)[8] It appears the attacks on certain companies for "outsourcing" have been designed to tar H-1B visas in general, not to identify and solve real problems.

The new "recruitment" and "nondisplacement" attestations in S. 1348 are unnecessary. Under current law, all employers already are required to pay the higher of the prevailing or actual wages paid to similarly employed Americans and face debarment from the use of H-1B visas and a $35,000 fine per violation if they dismiss an employee simply to hire an H-1B professional below the legally permissible wage. Moreover, if a company wishes to sponsor an individual for permanent residence it is at that stage the more elaborate recruitment requirements imposed by the Department of Labor must be satisfied. To burden U.S. companies in this way makes little sense unless the goal is to prevent them from using H-1B visas in the first place.

CERTAIN PROVISIONS OF SENATE BILL LIKELY VIOLATE U.S. OBLIGATIONS UNDER GATS

S. 1348 includes two or more provisions that likely violate U.S. obligations taken under the General Agreement on Trade in Services (GATS). A part of GATS includes a U.S. commitment on the movement of people, including H-1B visas. Under GATS, the United States has agreed to permit at least 65,000 persons annually to be admitted to work on H-1B visas and not to enact labor provisions or entry requirements more restrictive than its commitment.

S. 1348 makes a restrictive underlying change to the entry of H-1B visa holders by changing the degree and experience requirements for obtaining H-1B status. The legislation would delete the current allowance for equivalencies to a degree through experience. Under current law and in GATS it states: "Persons seeking admission under (ii) above shall possess the following qualifications: ... completion of the required degree, or *experience in the specialty equivalent to the completion of the required degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty*."

The italicized part of current law cited above, which is also contained in the United States' GATS commitment, is deleted under the Senate bill. Like most of the H-1B provisions in S. 1348 removing the experience equivalency simply makes the law more restrictive without a coherent reason.[9] It would prevent people from qualifying for H-1B visas without a four-year degree in the specific specialty. This could block the entry not only of those with years of experience but with less than a four-year degree but could also prevent an individual with a degree, for example, in electrical engineering to be hired for anything other than electrical engineering job, as opposed to a job in a related field, such as computer science. This change in the law substitutes the judgment of the bill's drafters for the judgment of thousands of employers around the country.

This change would not only violate GATS but they would represent bad policy. Companies will find ways to hire people who are indispensable to their operations. The Senate bill simply tells them to place these individuals and their innovations outside the United States.

Another area where the Senate bill likely violates GATS is in the inclusion of "180 days" in the nondisplacement attestation. Under GATS it would be permissible for the United States to require an attestation that states the following:

> "…d) the employer has not laid off or otherwise displaced workers in the subject occupation in the previous six months and will not lay off or displace any U.S. worker during the 90-day period following the filing of an application or the 90-day periods preceding and following the filing of any visa petition supported by the application. . ."

In fact, as noted earlier, current law has a 90-day period for nondisplacement that applies to past willful violators and H-1B dependent companies. The Senate bill goes well beyond what is allowed under GATS. In section 420 of S. 1348, which has a subtitle "EXTENDING TIME PERIOD FOR NONDISPLACEMENT," the bill strikes "90 days" and inserts "180 days."

Not only does this part of the bill violate GATS but it is transparently intended to make it unlikely many employers will want to risk the liability of using H-1B visas. The intention of those responsible for inserting these and related measures into the bill appears to be preventing U.S. employers from using H-1B visas in general.

It is possible other provisions in the bill may violate GATS, such as a section that, at minimum, prohibits companies from applying for H-1B visas if their workforce is over a certain percentage of H-1B visa holders in the United States. In fact, the provision could be read as telling employers with more than 50 percent of their workers in H-1B status that they must fire current workers until the companies get down below the 50 percent threshold or at least must fire them if the companies want to file or renew any H-1B applications.[10] Since some of the provisions of the bill seem directed at companies headquartered in the same nation (India) one can anticipate some form of retaliation against U.S. companies. After all, nationalists and protectionists are also elected to public office in places other than the United States.

Under GATS, the United States can be less restrictive than an obligation but enacting legislation that is more restrictive is a violation. For a provision to be found in violation, a complaint must be filed by a nation and later ruled to be in violation by a dispute panel, unless the two nations agree on a resolution without a formal ruling. It would not be responsible for Congress to knowingly pass provisions that violate U.S. trade obligations, particularly if the United States wants to maintain standing in arguing against trade violations committed by other nations.

Presumption of Immigrant Intent for H-1B and L-1 Visas

Under current law an individual can be granted an H-1B or L-1 visa from a consular officer or obtain an extension of such a visa even if he or she has greater connections in the United States than abroad or he or she plans to stay in the United States and pursue a green card (permanent residence). The bill requires inspectors, adjudicators and consular officers to analyze a person's connections and if they conclude the individual has greater connections abroad, then the admission, application or extension will be denied. If allowed to become law, then this could be a significant blow to the ability of American companies to attract and retain talent. This provision could prevent many current H-1B professionals and L-1 executives and managers from being admitted or re-admitted to the United States.[11]

Mandated Investigations of Companies, Expanded Investigative Authority and Increased Fees

S. 1348 significantly expands investigative authority for both H-1Bs and L-1 visas. For the most part H-1B investigations by the Department of Labor today are "complaint-driven," meaning a complaint is filed by someone with knowledge a transgression may have taken place. However, current law also allows the Secretary of Labor to approve an investigation when receiving credible evidence a violation may have occurred. In contrast, S. 1348 removes virtually all constraints in this area by allowing the Secretary of Labor to investigate all H-1B employers without any evidence or information related to wrongdoing if it labels such investigations "audits." Note that in the real world government investigations can be costly and time-consuming even for those in full compliance with the law, particularly given how complicated and ambiguous parts of the law are (and may become). In fact, the bill appears to eliminate current safe harbors for even "good faith" technical or procedural failures under the law.[12]

Going further, the bill actually *mandates* that the Department of Labor investigate at least 1 percent of companies that hire H-1B visa holders and all H-1B dependent companies, without regard to evidence of any wrongdoing.[13] It would also double current penalties for H-1B violations and permit DOL employees to be the basis of information leading to an investigation.

The bill states the Secretary of Homeland Security can initiate an investigation of any employer that employs L-1 visa holders. It also adds new whistleblower protections for L-1s (and expands existing whistleblower protections for H-1Bs) and limits the time period of approvals for L-1s in new offices. The bill would mandate fines of $2,000 to $10,000 for certain L-1 violations, as well as suspension for one to two years from filing L-1 petitions.

CONCLUSION

As of this writing, S. 1348 is a disappointing bill for those who believe the competitiveness of U.S. companies is tied to attracting and retaining the best talent from around the world. With a point system that will end the ability of companies to sponsor specific valued employees for green cards, only a small increase in H-1B visas and numerous provisions designed to make life more difficult for employers that hire foreign-born professionals, scientists and engineers the legislation contains more minuses than pluses.

END NOTES

[1] Section 409 of S. 1348 states: "…if the total number of visas allocated for that fiscal year are allotted within the first half of that fiscal year, then an additional 15 percent of the allocated number shall be made available immediately and the allocated amount for the following fiscal year shall increase by 15 percent of the original allocated amount in the prior fiscal year."

[2] The $3,500 additional tax is on the hiring of an H-1B visa holder and renewals of H-1B status. When taking into account the rise in H-1B visas in the bill, including the "escalator" provisions, the projected additional tax paid by companies would be: Year 1: $849 million; Year 2: $919 million; Year 3: $999 million: Year 4: 1.02 billion; Year 5: 1.02 billion, for a total of $4.8 billion over 5 years. This does not factor in an increased level of renewals, which would mean a higher total over 5 years. Whether this high a fee violates GATS may be worthy of further research.

[3] See http://www.nfap.com/pdf/0507brief-business-immigration.pdf.

[4] All information is from the U.S. Department of Labor. For a more complete discussion of these and other H-1B issues, one can go to the May 2007 National Foundation for American Policy analysis on H-1Bs at: http://www.nfap.com/pdf/0507h1Bstudy.pdf.

[5] Ibid.

[6] Paul Hastings.

[7] Interview with Warren Leiden.

[8] http://www.nfap.com/pdf/0507h1Bstudy.pdf.

[9] Appreciation to Crystal Williams for clarifying the differences between current law and the bill on equivalency.

[10] In Section 420 the bill states: "If the employer employs not less than 50 employees in the United States, not more than 50 percent of such employees are H-1B nonimmigrants."

[11] Appreciation to Daryl Buffenstein for clarifying the bill's immigrant intent provisions.

[12] American Council on International Personnel.

[13] In Section 421, under "Audits," the bill states: "The Secretary may conduct surveys of the degree to which employers comply with the requirements under this subsection and may conduct annual compliance audits of employers that employ H-1B nonimmigrants. The Secretary shall conduct annual compliance audits of not less than 1 percent of the employers that employ H-1B nonimmigrants during the applicable calendar year." It is unlikely that Members of Congress or any other group of people would think it appropriate to require the government to investigate a minimum percentage of them each and every year.

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