

Senate law a crippling blow for guest worker program

SUMAN GUHA MOZUMDER

Economists, policy researchers and lawyers last week decried the amendment to the Troubled Assets Relief Program that will make it harder for companies receiving TARP funds to hire skilled foreign workers on temporary work permits known as H1B visas.

The amendment, co-sponsored by the Republican Senator from Iowa, Charles Grassley, and the Independent Senator from Vermont Bernie Sanders, was sparked by an Associated Press story that detailed how big American banks have brought foreign workers to the United States in the last six years before the financial crisis. The amendment was passed by a voice vote in the Senate.

'Wall Street caused the crisis, millions of people lost jobs, including 100,000 in financial institutions. Now, they want to bring in foreign workers,' Senator Sanders said in a statement.

Sanders' office said in a statement that an investigation by AP found that a dozen banks now receiving more than \$150 billion in bailouts requested visas for more than 21,800 foreign workers over the past six years to replace



H1B visa holders in happier times

PARESH GANDHI

laid-off American employees.

'The very least we can do is to make sure that banks receiving a taxpayer bailout are not allowed to import cheaper labor from overseas while they are laying off American workers,' Sanders said.

The amended legislation would require bailed-out banks to hire only Americans for two years.

'Hiring American workers for limited available jobs should be a top priority for businesses taking taxpayer money through the TARP bailout program. With the unemployment rate at 7.6 percent, there is no need for companies to hire foreign guest workers through the H1-B program when there are plenty of qualified Americans looking for jobs,' Grassley said.

The US economy lost 598,000 jobs in January as the jobless rate rose to 7.6 percent, bringing total job losses since the recession started in December 2007 to 3.6 million, according to a Department of Labor report released in February.

But people like Stuart Anderson, executive director of the National Foundation for American Policy, an Arlington,

Virginia-based policy research organization, disputed the AP report, saying analysis found that the AP report that created the whole controversy by overstating the current use of H-1B visas.

Anderson said the AP story combined six years of past data and focused on applications filed with the Department of Labor, which often exaggerate actual visa usage because employers may file applications for multiple geographic areas for one individual to comply with H1B wage rules.

'If one uses the data from the immigration service on actual new H1B petitions used by these companies, you'll see none of the large TARP recipients use anything but a negligible number of new H1B visas each year when measured against the size of their labor force,' Anderson told *India Abroad*.

The American Immigration Lawyers Association was equally critical of the AP story. 'The articles leave the false impression that as the banks were taking bailout money, they were simultaneously firing US workers and hiring cheap foreign labor. The AP articles are based on faulty

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GEORGE JOSEPH

Samir Kohli and Girija Subramiam are among the growing number of H1B visa holders who, disgusted at the inordinate delays in processing their Green Card applications, have decided to leave the country.

'I came here ten years ago,' says the Maryland-based Subramiam, who is busy with plans to move to Canada. 'I am a telecommunication engineer with a US graduate degree. I have two properties in the US. How long can I wait for a Green Card, so I can start my own company? I can't wait till I am 50!'

'The process is never-ending, and the wait is no longer worth it,' says Kohli, who will return to New Delhi February 17. 'I don't feel bitter - everything happens for a reason, and there is no point in being mad at the system.'

Subramiam, who has an engineering degree in electronics from Mumbai, came on a student visa and after getting her masters degree, changed it to an H1B visa. An expert in satellite communication, she once

Red flags on Green Cards

worked for Lockheed Martin. Later, she joined Texas Instruments and that company filed for her Green Card in the EB-3 category, for professionals who hold a US baccalaureate degree or foreign equivalent.

She, however, qualified for the EB2 category, for individuals with advanced degrees and at least five years progressive experience in a profession, or who have exceptional ability in the sciences, arts, or business and will substantially benefit the United States.

Her company did not apply in the EB2 category, as the other was easier to file. However, EB3 involves processing delays; she had to wait for three-and-a-half years just to get the labor certification. Her application then went to the backlog reduction center, and after much confusion, she got her I-140 approved in a year-and-a-half.

She then moved to another company using the provisions of the American

Competitiveness in the Twenty First Century Act (AC21), but the USCIS refused to approve the transfer. 'They flouted their own rules in this,' Subramiam says. 'If you do not allow the market forces to work in the employment field and allow workers to move out, the employers will exploit the workers.'

She said talk of America as a country of immigrants is meaningless. 'There is no transparency in the system; a lot of body shopping is going on. We waited in queue, while illegals got special amnesty in 2001. Now I have reached a point of frustration,' she says.

She plans to sell the two homes she owns, but with the real estate market down, that is easier said. 'If I don't get good prices now, I might have to come back later when the market is better,' she said.

Moving to Canada is, for her, no hardship - with her qualifications and area of spe-

cialization, she is sure to get a job. But that, she says, is not the point. 'I want to start something of my own,' says Subramiam, who incidentally was a volunteer on the Mall, in Washington, DC, for President Barack Obama's January 20 inaugural.

Ironically, the company that she works for now has been actively trying to hire one more person with her qualifications, but after a year of head hunting, hasn't managed to find a suitable candidate. When she leaves, the company will struggle further.

Kohli, meanwhile, came to the US in 1999 on an H1B visa. After one-and-a-half years in New Jersey, he moved to Atlanta. His I-140 has been approved, but to move to another company is not easy, since the regulations insist that the job profile has to be exactly identical.

He now plans to start a company in New Delhi, with US clientele. Harassment and exploitation of people on H1B visas is rampant, he says. 'Sometimes, you cannot travel. You have to go to India to get the visa stamped. You begin to realize that all this is not worth your while.'



Waking up from the American dream



LUCY NICHOLSON/REUTERS

AYOTI MITTRA

Since early December 2008, Sreehari Gopalakrishnan has applied to 176 firms, and the rate of call back has steadily declined.

"Earlier, it used to be from 20 to 30 places but now it is less than 10 per cent," says Gopalakrishnan, an analyst with a firm in Connecticut that does relocation management. With the current economic downturn and the housing slump, his company has several houses in its inventory worth millions of dollars.

His current firm hired him over three years ago on an H1B visa. When the visa expired in December 2008, the company gave him an extension for two months. "They knew me and liked my work, so they gave me the extra time," said Gopalakrishnan. However, that extension expires at the end of February.

His firm cannot ask for another extension. It has filed for a Green Card in his name, but that application is still in its final stages of processing. The company has over 200 people working on H1Bs, he says, of whom many have been asked to leave, while others await with anxiety the day their employment will be terminated.

Gopalakrishnan has been sending out job applications at a frenetic pace, but responses are increasingly few and far between, he says. Many of the companies that do respond are eliminated because of his visa scenario. "No one wants to go that extra mile of sponsoring you," he says, adding that companies prefer workers who have residency. In some cases, he says, he reached the last round of interviews, but then lost out because of his visa situation.

As the problem mounts, workers in US companies have begun seeking jobs in Canada, various European countries and also in Asian countries like Hong Kong. "They are not hit as bad,"

Gopalakrishnan says. "Plus, the grass is always greener on the other side."

For Varun Sharma, an associate with Merrill Lynch on an H1B visa, the next few weeks will be crucial. As on date, his position with Bank of America seems secure – but that can change overnight, he says. Against the background of talk that companies caught up in the financial crunch will first lay off guest workers, tensions have been mounting.

"When such talk begins, you realize that this is not your country; that you can get kicked out at any time," Sharma says. "In this situation, there is considerable anxiety, fuelled by rumors."

Sharma believes that his visa will automatically transfer from Merrill Lynch to Bank of America, but even so he has started taking measures to guard against potential problems. "I was never extravagant, but now I am even more careful," says Sharma, discussing the ways he has been cutting down on spending. "I don't randomly spend \$100 like I used to." Friends who took cabs to work now take the subway, he says. "It is a tough time. Everybody has to cut down."

Friends who have been laid off have begun seeking jobs in India. "People are not talking about it clearly, but they are considering options back home even if the pay is less," he says. Others are looking for opportunities in small hedge funds, and are willing to work for really low pay.

Sharma believes he is safe, but has been keeping his eyes open for opportunities. He visited the London office of Merrill Lynch to see how operations there are doing. "I am obviously talking

to people, but not as seriously," says Sharma, arguing that he is reluctant to jump ship because those who survive the recession will likely emerge stronger.

"It is only a matter of time," he believes. "The recovery will not be as fast as we wish, but the economy will recover." He believes that people from India who seek work visas need to understand that the US is not the dreamland people perceive it to be; when you get here, he says, you are forced to tone down your expectations. "When I came here, I wanted to buy a car in my second year and a home in my fourth year, but all that has to change," said Sharma.

The situation is far more critical for those who have lost their jobs, and have a deadline to vacate the country. Vivek Joshi never imagined that on February 6, he would come in to work and realize that he no longer had the job he has been doing for two years, in the Minneapolis office of a consulting firm.

Joshi worked with the company's health and financial services, setting up business processes. On that day, he was asked to leave, without any notice. "They have provided me a severance package which they are going to provide as a lump sum amount," said Joshi. He now has 30 days to look for another job so that he can transfer his H1B and remain in the US – and he cannot afford to be picky. Any firm that will transfer his visa, and give him employment commensurate with his qualifications and experience, will do, he says.

'When such talk begins, you realize this is not your country; you can get kicked out any time'

Guest workers cannot overstay their welcome

GEORGE JOSEPH

John Miano, founder and treasurer of The Programmers Guild, an organization of technology workers that oppose the guest worker programs, sees nothing wrong in laying-off workers who are on H1B visas.

"The situation you describe, where someone who is on a guest worker visa loses his job and has to return home, is a natural consequence of a guest worker system. If guest workers do not return home when their employment ends, they are not really guest workers," said the New Jersey-based Miano, arguing that 'guest workers' cannot overstay their welcome.

"The problem, of course, is that a large number of people who come on H1B visas do so with the expectation of remaining permanently. The current H1B and Green Card systems are designed to benefit lawyers, not potential immigrants," he said.

Miano calls for a reduction in the number of H1Bs allowed each year. "Many politicians have called for market-based caps on H1B visas. Clearly, the caps need to be adjusted downward to reflect the reality of the job market," he argues. "The H1B system is in serious need of reform. The current system does not work for H1B holders, employers or US workers. It's a system intended to benefit lawyers."

Ron Hira, an Indian American who is assistant professor of Public Policy at Rochester Institute of Technology, however believes sending back those on H1B visas "is terribly unfair to those workers and not very smart policy on the part of America."

He is not a supporter of making the H1B program permanent, but supports giving permanent residence (Green Card) to those on H1B rather than bringing in new people each year. "The H1B program has many flaws, but its biggest one is that the employer, rather than the worker, holds the work visa. That's why America should increase permanent immigration rather than rely on work permits," he said.

Experts say that while no one can predict how long the economic crisis will continue, it is a sure bet that the labor markets tend to take longer to recover. The bottom line, says Hira, is that the worst on the job front is yet to come.

Philadelphia attorney Morley J Nair is not a fan of the H1B program either, but his grouse relates to the clunkiness of the program. Getting a visa is a ten-step process and besides, it involves considerable time, money and effort, he says. "Even then, at the end your client may not win in the lottery. Then all your efforts are lost," he noted.

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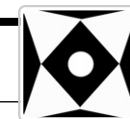
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Satyam employees in Green Card fix

GEORGE JOSEPH

Of the approximately 11,000 employees of Satyam USA, 7,000 are on H1B visas, says Mathew Daniel, a vice president of US operations with the company.

Though Satyam has been facing considerable problems following the confession by its chairman Ramalinga Raju of fraud, Daniel says Satyam has no plans to lay off any employees. Though insurance giant State Farm became the latest client to withdraw its contract with the scandal-tainted company, Daniel said Satyam has acquired 15 new clients in January alone.

On the ground, though, reports suggest that many Satyam employees have begun shopping around for alternate employment. Further, those applied for Green Cards through the company could face problems, according to Buffalo, New York-based attorney Danielle Rizzo. "Satyam's fraud has created a minefield of immigration problems for its foreign national employees in the United States," she said.

"It is possible that Satyam's I-140 petitions, whether pending or approved, will be denied or revoked for fraud. An essential piece of an I-140 petition is the petitioner's

showing that it has the ability to pay the beneficiary's proffered wages. Satyam has admitted to accounting fraud, meaning that the I-140 petitions all necessarily relied on fraudulent documents," Rizzo said.

"I think the chances of I-140 revocation, even for approved petitions, are quite high. Even though it is not the employees' fault, the petition is filed by the employer and one of the key requirements in an I-140 is the employer's submission of evidence of its ability to pay.

"USCIS regulations require that evidence of ability to pay be submitted in the form of audited financial statements, federal income tax returns, or an annual report filed with the SEC. Clearly any of these documents would have contained fraudulent financial information. It is not only the beneficiary's fraud that would invalidate a petition but the petitioner's as well," she said.

Some of Rizzo's clients have filed petitions on behalf of former Satyam employees. "We have filed for more than two dozen people. Other law offices might also be filing for Satyam employees. We can assume that a sizeable number of workers are mov-

ing out," she said.

Those working at State Farm are among the ones leading the rush to the exit. Satyam can farm them out to other clients, but that requires approval from the USCIS, which may not be forthcoming.

The American Competitiveness in the Twenty First Century Act (AC21) permits post-6th year H-1B extensions in three-year increments if their I-140 petition has been approved, and whose priority date is not current. But if the USCIS cancels their I-140 approval later, the employees lose their legal status. They have to start the labor certification process all over again.

The AC21 also allows portability, meaning one can move to another company if his I-140 is approved and his I-485 petition has been pending for 180 days. But if the I-140 is revoked or withdrawn, it is not portable, except if it is withdrawn after the I-485 has been pending for 180 days.

"But revocation for fraud is not a withdrawal; thus the I-140 would no longer be valid for permanent portability purposes. Based on the high likelihood that Satyam's I-140 petitions will all be revoked, the safest course of action for former Satyam employees would thus be to start a new green card

application from scratch as soon as possible with a new employer," Rizzo said.

Revocation of an approved I-140 for fraud also results in the beneficiary losing the priority date established by the petition, and underlying labor certification. Satyam employees who find new US employers can start the green card process afresh with a new PERM application. However, if the Satyam I-140 petition is revoked prior to their receipt of a Green Card, the earlier priority date is likely to be lost.

"It would appear that as US companies terminate their contracts with Satyam, there will be US consulting companies vying for those contracts who are more than willing to sponsor former Satyam employees for non-immigrant status and potentially also for new Green Card applications," Rizzo noted. "Because of the legal complications created by Satyam's fraud, however, each of these cases must be carefully analyzed by an immigration attorney."

Officials with Satyam say they foresee no such problems. The Securities and Exchange Commission has not taken any action against the company in the US, and unless the SEC takes action, the USCIS cannot take cognizance, they point out.

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interpretations of publicly available data, and totally ignore the strong labor market protections required to bring H1B professionals to the US," AILA said in a statement.

Saying that Congress had taken a disturbing step backwards to an era of employment protectionism by adopting the Sanders and Grassley amendment, AILA said the Senate had caved to an old reactionary instinct: 'when times get tough, turn inward, put on the blinders, and hunker down. Unfortunately, we know empirically that this instinct is deeply counterproductive to economic growth and creates a climate of jingoistic divisiveness.'

A March 2008 NFAP report showed that for every H1B position requested by an S&P 500 US technology company, overall employment at the company increased by five workers. The report also found that among companies in the study sample experiencing layoffs, for every H1B position requested, total employment was estimated to be two workers more than it otherwise would have been.

"The amendment sends a message that populism is alive and able to inflict damage, in this case on companies already experiencing financial difficulties," Anderson said. "To the extent the federal government micromanages the operations of these firms, whether with new rules on executive pay or immigration restrictions, that will only make recovery more difficult for these companies."

Anderson said what the amendment does is require these companies to abide by the stricter set of H1B rules that H1B depend-

ent companies must operate under. "The one that could be most damaging is preventing a company from hiring an H1B visa holder if a US professional was laid off in an 'essentially equivalent job' during the prior 90 days," he said.

"Given the ambiguity of terms like 'essentially equivalent job,' financial institutions may feel it will be difficult to prove later to the Department of Labor that one job wasn't 'essentially equivalent' to another and, therefore, because of the potential legal liability may not hire H1B professionals even if they will do substantially different work from the laid off individuals," he said.

Philadelphia-based immigration attorney Morley J Nair questioned the need for the restrictive amendment as part of the stimulus package. "The several hoops that US H1B employers have to jump through before they can actually get an H1B alien from a foreign country like India into the US to work for them should be reason enough for them to hire qualified and willing US workers if they are available," he said.

Anderson does not think companies will lay off current H1B workers on purpose. "I think the effect of the provision will be to

H-1B Visas and Financial Institutions

H-1B Petitions Received by Financial Institutions in 2007

Financial Institution	H-1B Petitions for New Professionals in 2007	New H-1B Petitions in 2007 as Percentage of Total Workforce	Total Employment (2007)
Citigroup	185	0.05 percent	387,000
Bank of America	66*	0.03 percent	210,000
AIG	25	0.02 percent	116,000
JPMorganChase	236	0.14 percent	180,667
Wells Fargo	14	0.01 percent	159,800
Goldman Sachs	227	0.74 percent	30,522
Morgan Stanley	139	0.29 percent	48,256
PNC Financial	13	0.05 percent	28,320
US Bancorp	0	0 percent	n/a
GMAC	9	0.03 percent	26,700
SunTrust	5	0.02 percent	32,323
Capitol One	0	0 percent	17,800

Source: USCIS, Hoovers, National Foundation for American Policy. List of recipients of TARP funding from CNBC. USCIS data for 2007 are for initial beneficiaries of H-1B petitions. Total employment data can include overseas offices. *Bank of America has a global equities affiliate that used 51 new H-1B petitions in 2007

limit or eliminate H1B hiring by these financial institutions because the rules are difficult to comply with," he said.

AILA said the amendment could not be the answer to the current economic ills. "Instead of seeing the current economic calamity as a global problem and immigrants as part of the collective solution, the Senate unwisely chose to restrict the financial industry's access to top-flight global talent who can help create jobs for US workers," it said.

Vivek Wadhwa, an executive in residence and adjunct professor for the Pratt School

of Engineering at Duke University, and a Wertheim Fellow at the Labor and Worklife Program at the Harvard Law School, has long been a votary of legal immigration that he strongly believes spurs innovation and entrepreneurship.

In a *BusinessWeek* column last week, Wadhwa said placing limits on bringing foreign workers to the US is not the answer to the country's rising unemployment rate, and may undermine efforts to spur technological innovation.

"When American workers who have the skills to file patents and develop new technologies get laid off, they often start new companies. And these companies generate employment and help the

economy recover," he wrote. "When workers on H1B visas get laid off, they usually have no choice but to return home and start their companies outside the US. So they are planting the seeds for future economic growth in their home countries, seeds that could easily have been planted in the US," Wadhwa said.

"So the critics of skilled immigration may get their wish. We will scare away the world's best and brightest who have always flocked to our shores. But the next Silicon Valley won't be located in the US. It will likely be in Hyderabad or Shanghai."