

THE REAL WORLD IMPACT OF PROPOSED HIGH-SKILLED IMMIGRATION RESTRICTIONS

EXECUTIVE SUMMARY

Will America remain a land of opportunity for highly skilled and ambitious immigrants? The answer may be “no” if some members of Congress have their way. Bills by influential U.S. senators would virtually end high-skilled immigration to the United States, accomplishing this through numerous new restrictions that would force foreign nationals to be paid far more than comparable U.S. professionals, to leave the country after graduating from U.S. universities, and to compel their employers to face so many legal obstacles that fear of lawsuits or government investigators would encourage the hiring of high-skilled foreign nationals to take place outside of the United States.

Recent bills in Congress to restrict high-skilled immigration are likely to produce significant unintended consequences for the U.S. economy. Although Congress may not move immigration legislation in 2016, it is important to analyze such bills because many will become the basis for legislation (or amendments to legislation) next year and beyond. U.S. workers, high-skilled foreign nationals and American employers would all be affected. With America already experiencing problems in growing its economy, preventing high-skilled foreign nationals from working in the United States would harm economic growth, entrepreneurship and job creation at a time the country can least afford it.

Efforts to restrict high-skilled immigration strike at the heart of America’s economic growth engine by seeking both to slow the growth of high-skilled labor and limit those workers who are most important to improving U.S. productivity. “Economic growth stems from two main sources: putting more people to work or enabling workers to operate more efficiently (i.e., better productivity),” explains *The Economist*. “With the workforce in many developed economies likely to stagnate or decline in the next two decades as the baby-boomer generation retires, a lot is riding on improvements in productivity.”¹

Economists Giovanni Peri (UC, Davis), Kevin Shih (UC, Davis) and Chad Sparber (Colgate University) concluded that H-1B visa holders significantly improve U.S. productivity: “The productivity growth and skill biased growth due to growth in foreign STEM workers may explain between 10 and 25 percent of the aggregate productivity growth and 10 percent of the skill-bias growth that took place in the U.S. during the period 1990-2010.”² In short, the entry of more high-skilled professionals would help the U.S. economy and allowing fewer to enter harms the economy. An important reason cited for slow U.S. economic growth is that U.S. business investment has lagged in recent years.³ Preventing companies from hiring key personnel in the United States would further discourage business investment in the U.S.

¹ “Working Hard for the Money,” *The Economist*, June 4, 2016.

² Giovanni Peri, Kevin Shih and Chad Sparber, “STEM workers, H-1B Visas and Productivity in U.S. Cities,” January 29, 2013.

³ “Make America Grow Again,” *The Wall Street Journal*, July 29, 2016.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

As notable as the contents of recent anti-immigration bills are the responsible positions held by their chief advocates, along with the lack of concern by the legislators for the consequences of the bills. Those consequences include the movement of jobs and investment out of the United States. These chief advocates for restrictive immigration legislation include Sen. Richard Durbin (D-IL), the Senate's second ranking Democrat, who has displayed intellectual inconsistency by advocating for legalizing many people who entered the country unlawfully at the same time he has proposed shutting the door to those seeking to stay or immigrate legally to fill high-skilled positions and who have received advanced degrees in science and technology fields from U.S. universities. Sen. Charles Grassley (R-IA) is Senator Durbin's coauthor and chairs the Senate Judiciary Committee. Senator Ted Cruz (R-TX), a leading GOP presidential candidate, has teamed up with Sen. Jeff Sessions (R-AL) to introduce a bill that would, in practice, virtually end high-skilled immigration to the United States. Sen. Sessions chairs the Senate's relevant immigration subcommittee and is a top advisor to GOP presidential candidate Donald Trump, who has stated he shares Sen. Sessions' antipathy towards high-skilled immigration by proposing a "pause" on such immigration.⁴ The Cruz-Sessions bill would force nearly all international students to exit the country or face deportation upon graduation from U.S. universities.

An analysis of recent legislation finds:

- S. 2394, sponsored by Senators Cruz and Sessions, would, in effect, expel international students from the United States after graduation by eliminating any method for them to stay and work in America. This would have a negative impact on the U.S. economy and on the ability of U.S. companies to grow and innovate inside the United States. Today, at U.S. universities, international students represent 77 percent of the full-time graduate students in electrical engineering and 71 percent in computer science.
- The Cruz-Sessions bill explicitly eliminates Optional Practical Training (OPT), a measure that allows international students to work for 12 months after graduation and to receive extensions of OPT status if working in a STEM (science, technology, engineering and math) field. All of America's major competitors for talent maintain programs to allow international students to stay and work after graduating.
- The most far-reaching provision of S. 2394 would bar high-skilled foreign nationals from working in the United States in H-1B status if they have earned a master's or bachelor's degree unless they first worked 10 years outside the United States. The reason this provision would virtually end high-skilled immigration to America is because nearly 90 percent of H-1B visa holders in FY 2014 had a master's or bachelor's degree, according to U.S. Citizenship and Immigration Services. To the extent individuals with Ph.D.'s receive H-1B visas it is primarily for jobs in academia, not with high tech or other companies.

⁴ "Immigration Reform That Will Make America Great Again," Website of Trump-Pence.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

- The bill would also require foreign nationals with Ph.D.'s to work outside of America for two years, pushing out of the country even those the bill's authors claim to prioritize. In addition, the legislation establishes a minimum wage of \$110,000 a year for any H-1B visa holder. This high minimum wage appears designed to serve only one purpose – to price high-skilled foreign nationals out of the U.S. labor market. The legislative language indicates requirement would also apply to universities and other non-profits, including hospitals. That would affect professors and imperil the contributions made by cancer researchers, of whom 40 percent are immigrants at America's top U.S. cancer institutes.
- While Sen. Ted Cruz and Sen. Jeff Sessions are both conservative Republicans who argue against making it easier for trial lawyers to sue employers or for the Department of Labor to litigate against companies, their bill contains multiple provisions aimed at making it easier to bring actions against employers. The goal appears to be to produce enough legal peril for employers that they will avoid hiring high-skilled foreign nationals in the United States. Of course, that would have the effect of denying opportunity to many individuals, while also encouraging many companies to expand resources abroad and place more people in other countries.
- S. 2394 would grant jurisdiction for addressing “civil actions by any person claiming misuse of the H-1B visa program” to each U.S. district, U.S. court of appeals and the U.S. Supreme Court and would smooth the way for trial attorneys by explicitly stating administrative remedies do not need to be exhausted prior to pursuing a civil action.
- Another provision of the Cruz-Sessions bill could have the unintended consequence of discouraging employers from offering severance to laid off employees. It is standard practice for employers to have employees sign nondisclosure and mutual nondisparagement agreements as part of severance arrangements. But S. 2394 invalidates such agreements in relation to “nondisclosure of such petitioner employer's potential misuse of the H-1B visa program.” Employers may decide not to offer severance to employees in any situation where a nondisclosure or nondisparagement agreements becomes suspect due to vague legal standards such as “potential misuse.”
- If enacted, both the Cruz-Sessions bill (S. 2394) and the Durbin-Grassley bill (S. 2266) would almost certainly violate U.S. commitments under the General Agreement on Trade in Services (GATS) in numerous ways, which would expose U.S. exporters to retaliation. Those violations, in S. 2394, include excluding individuals from obtaining an H-1B visa at a master's or bachelor's level if they had not first worked 10 years abroad, imposing a minimum wage of \$110,000 per year, prohibiting an H-1B professional from working for a U.S. employer if there has been a strike or lockout on the premises within

The Real World Impact of Proposed High-Skilled Immigration Restrictions

the past two years, and compelling employers to attest an H-1B professional would not displace a U.S. worker who was laid off during a period 2 years before or 2 years after the filing of an H-1B petition.

- S. 2266, the Durbin-Grassley bill, would, in practice, make it extremely difficult for multinational companies to transfer employees with “specialized knowledge” into the United States on L-1B visas. The bill accomplishes this by redefining “specialized knowledge” in a way that would allow few employees to qualify. USCIS adjudicators already have been denying a high percentage of petitions for employees in L-1B status in recent years. The measure betrays a fundamental misunderstanding of the global economy by assuming if Congress prevents a company from transferring into the United States an employee who already works for a company it would protect a U.S. worker. Not allowing companies to transfer their own employees where needed encourages employers to invest and operate more outside of the United States.
- S. 2266 compels employers to pay high-skilled foreign nationals mandated wages that are generally unconnected from the actual wage levels employers pay to similarly situated Americans, in many cases \$20,000 or more. Companies would be told to do without skilled foreign nationals, hire them outside the United States, pay U.S.-born employees well above the market wage, or pay U.S.-born employees much less than the mandated minimum wage they must pay to foreign nationals. This attempts to solve a problem that reliable research shows does not exist, while giving the U.S. Department of Labor significant authority to establish wage rates in the technology industry and other sectors. In sum, the bill would cause the United States to be a less attractive place for growth and investment.
- The Durbin-Grassley bill, S. 2266, contains numerous provisions that seek to empower the U.S. Department of Labor to micromanage the day-to-day operations and human resources policies of many of America’s leading companies. Such micromanaging would necessarily leave companies open to legal liability regardless of whether they do anything other than operate a business that employs high-skilled foreign nationals in the United States. These new bureaucratic requirements include prior permission required from the federal government to move personnel (Section 113), a ban on moving some personnel to a client worksite (Section 201), exposure to DOL legal action on hiring and dismissals (Section 101), limiting which employers can file for H-1B and L-1 petitions (Section 102), and requiring the use of a government website for company recruitment (Section 121).
- The likely GATS violations in S. 2266 include prohibiting employers from filing for H-1B or L-1 petitions if their workforce consists of more than 50 percent H-1B and L-1 visa holders, prohibiting the placement of H-1B visa holders on the site of another employer and requiring a waiver to move high-skilled foreign nationals to another office, new wage requirements that unilaterally change current U.S. commitments, requiring a nondisplacement attestation that covers a period 180 days after the filing a petition, rather than

The Real World Impact of Proposed High-Skilled Immigration Restrictions

the U.S. commitment of 90 days, and redefining the L-1B visa category almost out of existence through new legislative definitions designed to prevent employers from transferring personnel into the United States.

- The Visa Integrity and Security Act of 2016, H.R. 5203, while well-intentioned, includes new mandates that are onerous and overly burdensome without improving national security. The legislation passed the House Judiciary Committee in May 2016. One problem is that the bill changes the law so that approvals of visas overseas (by the State Department) or petitions inside the United States (by USCIS) would need to meet a far higher standard, such that many individuals might become unable to visit, work or reside in America. Section 5 of H.R. 5203 changes the standard by striking “to the satisfaction of the consular officer” and inserting “by clear and convincing evidence.” Scholars point out a “clear and convincing evidence” standard would be a “higher evidentiary standard than is necessary for victory in a civil case.”

Both S. 2394 and S. 2266 would grant almost unlimited investigative authority to U.S. Department of Labor investigators (and other agency officials). The issue for employers is not a lack of interest in hiring U.S. workers or treating them as valued employees, but proving to the satisfaction of a DOL investigator that a company has met an ambiguous legal standard (such as what is an “essentially equivalent” job) on personnel decisions inherently subjective in nature on recruitment, displacement and other issues. It seems clear a goal of the bills’ sponsors is to make sure U.S. companies become so concerned about legal liability that companies abandon interest in hiring high-skilled foreign nationals inside the United States.

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BACKGROUND

Obtaining H-1B status is generally the only practical way for high-skilled foreign nationals to work or remain in the United States long-term.⁵ That is the main reason keeping access to H-1B temporary visas is considered important. Making it difficult or, in practice, impossible for U.S. employers to petition for high-skilled foreign nationals in H-1B status is an attempt to end or sharply curtail the only practical route to allow an international student or a skilled individual educated abroad to stay and work long-term in America.

It is worth noting few restrictive proposals on H-1B visas simultaneously provide an expansive and streamlined way to obtain permanent residence as an employee. It would take significant changes in the law, including far higher numbers and exemptions from annual quotas for employment-based green cards, as well as far easier rules or exemptions from many current requirements, before employers could sponsor all of their highly skilled employees for green cards without the need for individuals to work first in H-1B status. Current estimated wait times, particularly for employment-based immigrants from India and China, are typically 6 to 10 years in the second employment-based preference (EB-2) and 6 to 70 years in third employment-based preference (EB-3), varying based on when an individual applied and the country of origin.⁶

A reasonable system for temporary work visas is necessary. Even if improvements were made to the employment-based green card process (for permanent residence), it would not make sense for the United States to have a system that allows highly skilled people to work in the country only if they intend to stay here for the rest of their lives as permanent residents. How many Americans would go to work in France or elsewhere if they would essentially be committing to stay in that country permanently to work?

High-skilled foreign nationals generally must possess at least a B.A. or its equivalent to work in the United States, whether working on short-term projects or as a prelude to being sponsored for permanent residence (or simply being employed long-term). With a renewal after working for three years, an individual can remain in H-1B status for up to 6 years. He or she can be extended in one-year increments beyond the 6 years if waiting for an employment-based green card.⁷

⁵ Other visa categories have restrictions that limit their applicability to most high-skilled foreign nationals, such as an L-1 visa, which requires working abroad for a company for at least a year and then qualifying as a manager, executive or an employee with “specialized knowledge.”

⁶ *Reforming America’s Legal Immigration System*, NFAP Policy Brief, National Foundation for American Policy, September 2015.

⁷ See also Stuart Anderson, *H-1B Visas Essential to Attracting and Retaining Talent in America*, NFAP Policy Brief, National Foundation for American Policy, May 2013.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

The rules for employing a high-skilled foreign national are quite complicated and include government and legal fees that can range up to \$8,850 for an initial petition and almost double that amount for an extension for the full 6 years, according to the Council for Global Immigration and the Society for Human Resource Management.⁸ The estimated cost to sponsor a foreign national all the way from an H-1B petition through the green card process for permanent residence could reach approximately \$36,000 to \$50,000, particularly if family members are also sponsored.⁹

In addition to those fees, an employer petitioning for an individual in H-1B status must pay “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question” or “the prevailing wage level for the occupational classification in the area of employment, whichever is greater. . .”¹⁰

A major problem for employers, high-skilled foreign nationals, and the U.S. economy is that Congress has not updated the law on H-1B visas in more than a decade. In 1990, Congress established a hard cap of 65,000 on new H-1B petitions. Despite a temporary increase in the annual limit for fiscal years 1999 through 2003, the 65,000 annual limit has remained in place, with the exception of an exemption for foreign nationals employed by non-profit and governmental research institutes and a 20,000 exemption for individuals with a master’s degree or higher from a U.S. university. As a result, the supply of H-1B visas has been exhausted for 14 consecutive fiscal years. When H-1B visas are exhausted, it means U.S. employers are often unable to retain or petition for many high-skilled foreign nationals, causing many individuals to leave the country and work abroad for the company or a competitor.

AMERICAN JOBS FIRST ACT (S. 2394) – SEN. CRUZ AND SESSIONS

In a press release announcing the American Jobs First Act of 2015 (S. 2394), Senator Cruz cited the recent cases of companies contracting out work at Disney and Southern California Edison and claimed the legislation would prevent layoffs at those and other companies in the future.¹¹ As addressed elsewhere, no immigration legislation, including S. 2394, which is co-sponsored with Sen. Jeff Sessions, will prevent layoffs or contracting out work more generally, since immigration policy plays a minor to nonexistent role in such decisions.¹² Since very little in the bill even seeks to address the situations that have been in the news, it’s clear the news stories have become a pretext

⁸ *Navigating the U.S. Employment-Based Immigration System*, Council on Global Immigration and the Society for Human Resource Management, 2015, pp. 62-63.

⁹ *Ibid.*

¹⁰ Section 212(n)(1) of the Immigration and Nationality Act.

¹¹ “Cruz, Sessions Introduce the American Jobs First Act of 2015,” press release, office of Sen. Ted Cruz, December 10, 2015. The companion bill in the House to S. 2394 is H.R. 4598, introduced by Rep. Mo Brooks (R-AL) and cosponsored by Rep. Steve King (R-IA), Rep. Walter Jones (R-NC), and Rep. Blake Farenthold (R-TX).

¹² Stuart Anderson, *Setting the Record Straight on High-Skilled Immigration*, NFAP Policy Brief, National Foundation for American Policy, August 2016.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

to enact much more radical reforms. Prior to cosponsoring this bill, Sen. Cruz had supported significantly increasing the annual limit on H-1B visas.

PURPOSE OF CRUZ-SESSIONS BILL: ENDING HIGH-SKILLED IMMIGRATION

If S. 2394 became law, the era of America as a land of opportunity for ambitious, highly educated immigrants would be over. Anyone reading the Cruz-Sessions bill, S. 2394, would understand the bill has only one real purpose – to end high-skilled immigration to the United States. Yes, it's possible if the bill became law that some highly skilled foreign nationals could still find a way to be employed in America, but the number would be small. The inability of employers to hire high-skilled foreign nationals, including international students after graduation, is likely to result in dramatic changes in business startups, the allocation of capital within the United States and America's leadership role in science and technology, including at U.S. universities, and would lead to the expansion of work taking place in countries other than America. A primary cause of slow economic growth in the United States is the lack of business investment. Companies invest where their talent is located and if U.S. law encourages companies to move their talent to other countries, then that is where more investment will take place.

A detailed examination of the bill shows that, if enacted, international students would be forced to leave the country upon graduation. Nearly 90 percent of individuals who typically receive H-1B visas will become ineligible because they have not worked out of the country for 10 years.¹³ The bill empowers the Department of Labor with greater investigative authority against employers and the legislation violates the General Agreement on Trade in Services in several ways. Any company that has laid off workers in the past two years could be ineligible to petition for a skilled foreign national, and companies would be exposed to frivolous lawsuits by granting trial lawyers greater opportunity to sue over company personnel decisions.

EXPELLING INTERNATIONAL STUDENTS FROM AMERICA

Today, at U.S. universities, international students represent 77 percent of the full-time graduate students in electrical engineering and 71 percent in computer science.¹⁴ In effect, the Cruz-Sessions bill would tell these highly educated individuals to pack their bags and leave the country after graduation. The bill explicitly eliminates Optional Practical Training (OPT), a crucial measure that allows international students to work for 12 months after graduation and to receive extensions of OPT status if working in a STEM (science, technology, engineering and math) field.¹⁵ (As

¹³ *Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2014 Annual Report to Congress*, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, February 26, 2015.

¹⁴ National Science Foundation, *Survey of Graduate Students and Postdoctorates in Science and Engineering*, <https://ncesdata.nsf.gov/webcaspar/>. U.S. students include lawful permanent residents. If one includes part-time students, 67 percent of graduate students in electrical engineering and 57 percent in computer science are international students.

¹⁵ Under Section 101 of S. 2394: "Employment authorization for aliens no longer engaged in full-time study in the United States.--Notwithstanding any other provision of law, no alien present in the United States as a nonimmigrant under section

The Real World Impact of Proposed High-Skilled Immigration Restrictions

discussed below, it bars the vast majority of foreign nationals from obtaining a work visa unless they first worked a decade abroad.)¹⁶

All nations that America competes with for talent maintain provisions in the law to make it easy for international students to work after graduation. Canada, for example, allows international students to work for potentially three years after graduation, utilizing the concept of open work permits.¹⁷ By asking all international students to leave America after graduation or face removal, the United States would be losing an enormous amount of human capital. It would be losing people whose education taxpayers indirectly subsidized. It would also likely set in motion a dynamic whereby many international students would no longer choose to become educated at U.S. universities, since an inability to work after graduation would mean an American education would become far less affordable. Students would be prevented from working in cutting edge fields in America, which would have been a primary draw of the United States in the first place. Without a sufficient number of students and graduate students to serve as researchers many academic programs in science and engineering might disappear for U.S. students, according to professors at U.S. universities.¹⁸

FOREIGN PROFESSIONALS CAN'T WORK IN AMERICA UNTIL THEIR MID-30S

S. 2394 would bar high-skilled foreign nationals from working in H-1B status in the United States if they have earned a master's or bachelor's degree unless they first worked 10 years outside the United States. Section 201 of the bill states, "Undergraduate and Masters Degrees Prohibited.--A nonimmigrant who only possesses an undergraduate degree (or the foreign equivalent of such degree), or a combination of undergraduate and master's degrees (or the foreign equivalents of such degrees) shall be ineligible for employment pursuant to a petitioner employer's H-1B visa, unless such nonimmigrant gained at least 10 years of relevant experience after obtaining such degree or degrees."¹⁹

This provision, as much as any other in the bill, would virtually end high-skilled immigration to America. That's because nearly 90 percent of H-1B visa holders in FY 2014 had a master's or bachelor's degree, according to U.S. Citizenship and Immigration Services.²⁰ Moreover, to the extent individuals with Ph.D.'s receive H-1B visas it is primarily for jobs in academia. America would lose many talented people forever if they were required to be outside the country for 10 years, according to Jyoti Bansal, founder of billion-dollar company AppDynamics. He noted that

101(a)(15)(F)(i) may be provided employment authorization in the United States pursuant to the Optional Practical Training Program, or any such successor program, without an express Act of Congress authorizing such a program."

¹⁶ Section 201 of s. 2394.

¹⁷ *The State of Immigration*, Business Roundtable, 2015.

¹⁸ Stuart Anderson, *The Importance of International Students to America*, NFAP Policy Brief, National Foundation for American Policy, July 2013.

¹⁹ Section 201 of S. 2394.

²⁰ *Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2014 Annual Report to Congress*.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

by their mid-thirties people would have already established careers and families in other nations.²¹ Cloudera co-founder Amr Awadallah points out if one wants to fuel talent in the private sector it would not make sense to favor those with Ph.D.'s over those with a bachelor or master's degree, since few tech companies find a Ph.D. necessary for their employees.²²

The bill would also require foreign nationals with Ph.D.'s to work outside of America for two years, pushing out of the country even those the bill's authors claim to prioritize. In addition, the legislation establishes a minimum wage of \$110,000 a year for any H-1B visa holder.²³ This high minimum wage could serve the purpose of pricing high-skilled foreign nationals out of the U.S. market. It appears the requirement would even apply to universities and other non-profits, including hospitals. That would affect professors and place in peril the entry of cancer researchers, 40 percent of whom are immigrants at America's top U.S. cancer institutes, and their important contributions.

CONSERVATIVE SENATORS UNLEASH TRIAL LAWYERS AGAINST EMPLOYERS?

While Sen. Ted Cruz and Sen. Jeff Sessions are both conservative Republicans who argue against making it easier for trial lawyers to sue employers or for the Department of Labor to litigate against companies, their bill contains multiple provisions aimed at making it easier to bring actions against employers. The goal would appear to be to produce enough legal peril for employers that they will avoid hiring high-skilled foreign nationals in the United States. Of course, that would have the effect of denying opportunity to many individuals, while also encouraging many companies to expand resources abroad and place more people in other countries.

As discussed elsewhere, the bill would significantly expand the investigative authority of the Department of Labor, including allowing them to second guess hiring or dismissal decisions of companies potentially years after the fact. The sponsors of the bill also would make it easier for employees and attorneys to sue companies over H-1B visas.

Under Section 203 of S. 2394, each U.S. district court is granted "jurisdiction to address civil actions by any person claiming misuse of the H-1B visa program." Similar authority is granted to each U.S. court of appeals and the U.S. Supreme Court. Importantly, the bill makes it easier to sue by explicitly stating administrative remedies do not need to be exhausted prior to pursuing a civil action. Under the bill an individual "shall have standing to pursue a civil action claiming misuse of the H-1B visa program . . . regardless of whether such person has exhausted all administrative remedies in connection with such claims."²⁴

²¹ Interview with Jyoti Bansal.

²² Interview with Amr Awadallah. See also Stuart Anderson, *Immigrants and Billion Dollar Startups*, NFAP Policy Brief, National Foundation for American Policy, March 2016.

²³ Section 101 of S. 2394. The level would be adjusted upward annually for inflation.

²⁴ Section 203 of S. 2394.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

“Not having to exhaust administrative remedies, such as filing a complaint and having it adjudicated by the Department of Labor, would make it much easier for trial attorneys and clients to sue companies that employ H-1B visa holders,” said Lawrence Z. Lorber, senior counsel, Seyfarth Shaw LLP. “The fact of an investigation or a lawsuit is generally a loss for a company regardless of the final disposition.”²⁵ Members of Congress should appreciate this, since they understand how investigations can harm or end political careers whether or not an elected official is convicted of an offense.

Another provision of the bill could have a large impact on whether employees continue to receive severance. The bill states that employers cannot ask U.S. workers “to sign any nondisparagement or nondisclosure agreement . . . that conditions receipt of any financial or nonfinancial benefit from the petitioner employer upon the nondisclosure of such petitioner employer’s potential misuse of the H-1B visa program.”²⁶

It is standard when employers offer severance to laid off workers to ask them to sign nondisparagement and nondisclosure agreements. Companies are under no legal obligation to offer severance payments and if enacted, S. 2394 could encourage employers to *not* offer severance if nondisparagement or nondisclosure agreements become legally suspect because of the legislation. How should a judge or employer interpret a term like “potential misuse of the H-1B visa program?”

Laid off employees could lose much-needed money and face other problems, including if future employers check on past employment. “Most nondisparagement clauses tend to be mutual and it could have a chilling effect on offering severance,” explains Lorber. “The standard in the bill, ‘potential misuse’ of H-1B visas is a such a vague standard the provision could have a far-reaching impact on these types of very standard clauses, an impact well beyond the intention of the bill’s authors.”²⁷

NUMEROUS PROVISIONS VIOLATE U.S. TREATY OBLIGATIONS

Under the General Agreement on Trade in Services (GATS), the United States made several commitments to maintain a relatively high degree of openness on high-skilled immigration, specifically measures related to H-1B and L-1 temporary visas. The United States made these commitments as part of an overall agreement with other nations, gaining in exchange commitments from other countries on other issues. “Passing legislation with measures that violate GATS risks retaliation against U.S. companies and can undermine U.S. efforts to open markets in other nations to American goods and services,” noted a National Foundation for American Policy legal analysis performed

²⁵ Interview with Lawrence Z. Lorber.

²⁶ Section 202 of S. 2394.

²⁷ Lawrence Z. Lorber.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

by experienced trade attorneys.²⁸ In 2016, the government of India filed a World Trade Organization (WTO) complaint against the United States over H-1B and L-1 visa fees that passed Congress.

Among the key commitments the United States made under GATS:

- “65,000 persons annually on a worldwide basis in occupations . . . consisting of (i) fashion models who are of distinguished merit and ability; and (ii) persons engaged in a specialty occupation, requiring (a) theoretical and practical application of a body of highly specialized knowledge; and (b) attainment of a bachelor’s or higher degree in the specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”²⁹
- “Specialty occupation aliens and their employers must be in compliance with all labour condition application requirements that are attested to by the established employer. These requirements are: a) wages paid to the person are the greater of: 1) the actual wage paid by the employer to individuals in that place of employment with similar qualifications and experience, or 2) the prevailing wage for that occupational classification in the area of employment; b) conditions of work are such that they will not adversely affect working conditions for those similarly employed; c) there is no strike or lockout in the course of a labour/management dispute in progress at the place of employment affecting the subject occupation; labour/management dispute in progress at the place of employment.”³⁰

Examining the commitments above, it is clear the Cruz-Sessions bill would put the United States in violation of GATS on a number of grounds. First, it would be a violation to exclude individuals from obtaining an H-1B visa at a master’s or bachelor’s level if they had not first worked 10 years abroad. Similarly, it would be a violation to require a two-year work requirement on those with Ph.D.’s. Second, placing a minimum wage of \$110,000 per year would also violate America’s GATS commitment on wages. The commitment is to allow foreign nationals to work on H-1B visas if they are paid “the greater of: 1) the actual wage paid by the employer to individuals in that place of employment with similar qualifications and experience, or 2) the prevailing wage for that occupational classification in the area of employment.”³¹

²⁸ See Jochum Shore & Trossevin, *Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments*, National Foundation for American Policy, June 2010.

²⁹ General Agreement on Trade in Services, the United States of America, Schedule of Specific Commitments, April 15, 1994. The commitment continues: “Persons seeking admission under (ii) above shall possess the following qualifications: (a) full licensure in a US state to practice in the occupation, if such licensure is required to practice in the occupation in that state; and (b) 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.”

³⁰ *Ibid.*

³¹ *Ibid.*

The Real World Impact of Proposed High-Skilled Immigration Restrictions

A third clear violation in the bill is prohibiting an H-1B professional from working for a U.S. employer if there has been a strike or lockout on the premises within the past two years.³² The U.S. commitment states that an H-1B professional can be prohibited in the case of an ongoing strike or lockout, not one that happened anytime in the past. The provision appears designed to make it more difficult to hire foreign nationals in general, not to protect against H-1B workers being used to break a strike.

A fourth violation in the bill would be to compel employers to attest an H-1B professional would not displace a U.S. worker who was laid off during a period 2 years before or 2 years after the filing of an H-1B petition.³³ That represents a 4-year period. Today, a nondisplacement attestation is in place for certain employers under specific conditions. But the GATS commitment that allows such an attestation is of a far shorter duration than the one described in S. 2394. Under the current U.S. GATS commitment, “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 US 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.”³⁴

There is another provision that appears to expand the prohibition to a very broad category, “the same or similar occupational classification.” That section of the bill states: “No employee in the same or substantially similar occupational classification for which the employer seeks H–1B nonimmigrants, has been displaced, furloughed, terminated without cause, or otherwise involuntarily separated without cause in any way at any point during the 2-year period ending on the date on which the petitioner employer filed such visa application.”³⁵

There is also a recruitment attestation in S. 2394 that may raise GATS compliance questions but, more importantly, as in the case of the 4-year window on layoffs, seem designed to place U.S. employers in legal peril should they decide to hire high-skilled foreign nationals. The provisions noted above apply not only to mass layoffs but potentially to any involuntary dismissal by an employer and, in the case of recruitment, anyone who claims they should have been hired. For a company to have to defend against government or other legal actions for potentially hundreds or thousands of individual personnel decisions over a period of many years would likely persuade the company to avoid this level of legal uncertainty. The likely consequence is to move the work outside

³² Section 101 of S. 2394.

³³ Ibid. “(E) (i) The petitioner employer— “(I) will not replace a United States citizen or lawful permanent resident with 1 or more nonimmigrants;“(II) will not contract with any third party to provide a nonimmigrant to replace any United States citizen or lawful permanent resident; and “(III) has not displaced, furloughed, terminated without cause, or otherwise involuntarily separated, and will not displace, furlough, terminate without cause, or otherwise involuntarily separate a United States citizen or lawful permanent resident employed by the petitioner employer during the 4-year period beginning on the date that is 2-years before the date on which the petitioner employer filed any visa petition supported by the application.”

³⁴ General Agreement on Trade in Services, the United States of America, Schedule of Specific Commitments, April 15, 1994.

³⁵ Section 101 of S. 2394.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

of the country – outside the micromanaging or second guessing of human resources choices by Department of Labor investigators or trial attorneys.

GRANTING UNLIMITED INVESTIGATIVE AUTHORITY TO DOL

Under current law, the U.S. Department of Labor has the authority to investigate U.S. employers for H-1B violations. Due to concerns that a federal investigation can be harmful to employers, particularly if the investigation is not with just cause, U.S. immigration law places some modest limits on DOL to ensure its investigative authority is not misused. S. 2394 eliminates virtually all limits on DOL investigative authority.

Currently, as described on the DOL website, the Department of Labor can investigate an employer for possible H-1B violations as follows:

“Under the H-1B program, when authorized to investigate, WH is responsible for ensuring that workers are receiving the wages promised on the LCA and are working in the occupation and at the location specified. WH can only initiate H-1B-related investigations as a result of one of four factors:

- WH receives a complaint from an aggrieved person or organization;
- WH receives specific credible information from a reliable source (other than a complainant) that the employer has failed to meet certain LCA conditions, has engaged in a pattern or practice of failures to meet such conditions, or has committed a substantial failure to meet such conditions that affects multiple employees;
- The Secretary of Labor has found, on a case-by-case basis, that an employer (within the last five years) has committed a willful failure to meet a condition specified in the LCA or willfully misrepresented a material fact in the LCA. In such cases, a random investigation may be conducted; or
- The Secretary of Labor has reasonable cause to believe that the employer is not in compliance. In such cases, the Secretary may certify that an investigation be conducted.”³⁶

The bill adds a catch-all phrase – “through any other method” – that could potentially make any limitations written into the law on DOL investigative authority moot. In Section 101 of S. 2394.³⁷

The bill also seeks to encourage many more complaints against employers by labor unions and others, including encouraging complaints about even theoretical or potential concerns, by explicitly stating that “A complaint may be filed by any aggrieved party, including— (I) any United States citizen or lawful permanent resident who believes his

³⁶ Wage and Hour Division, U.S. Department of Labor. <https://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62U.htm>.

³⁷ In Section 101 of S. 2394, it states, “The Secretary of Labor may conduct an investigation of any complaint alleged against a petitioner employer—(I) based on the independent judgment of the Secretary; (II) in response to a referral or complaint from the head of another Federal agency; or (III) through any other method that, in the Secretary’s discretion, shows cause for such an investigation.”

The Real World Impact of Proposed High-Skilled Immigration Restrictions

or her job has been eliminated or *could potentially* be eliminated as the result of the petitioner employer hiring or seeking to hire a foreign national pursuant to a nonimmigrant visa; (II) any trade association or union that represents any person described in subclause (I); and (III) any foreign national hired for work in the United States pursuant to a nonimmigrant visa who believes he or she is subject to potentially unlawful workplace conditions or requirements.”³⁸

The bill’s sponsors also want to make the mere fact of an investigation a potential grounds for punishment of employers: “In any situation in which the Secretary of Labor commences an investigation of a petitioner employer under this paragraph, the Secretary of Labor may— (I) cease processing any application that is submitted under this subsection and filed by such petitioner employer until the conclusion of such investigation; and (II) suspend such petitioner employer’s usage of currently issued H-1B nonimmigrant visas, until the conclusion of such investigation.”³⁹

PENALTIES DESIGNED TO DISCOURAGE USE OF H-1B VISAS

The fines and other punishments under S. 2394 are designed to deter employers from using H-1B visa holders in any capacity. This is particularly the case since the Department of Labor could accuse employers of violations that are highly subjective, hinging on whether an employee was “displaced” or dismissed without cause, or whether an H-1B is in the “same or similar occupational classification,” among other things.

One form of punishment, a “Finding of Material Failure Without Displacement,” which could involve paying an H-1B visa holder the wrong salary, would subject an employer to a fine of \$50,000 to \$100,000 per violation, immediate revocation of all H-1B visas “currently being used by the petitioner employer” and a prohibition on applying for H-1B visas for between 5 and 10 years.”⁴⁰

If there is a “Finding of Material Failure with Displacement,” the fines levied are between \$100,000 and \$500,000, all an employer’s H-1B visas are revoked, the employer is “permanently” barred from applying for H-1B visas, and the petitioner employer must “provide retroactive compensation for any displaced United States citizen or lawful permanent resident employee.”⁴¹

³⁸ Ibid. Emphasis added.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

DURBIN-GRASSLEY H-1B AND L-1 VISA REFORM ACT

S. 2266, the H-1B and L-1 Visa Reform Act of 2015, sponsored by Senators Charles Grassley (R-IA), Richard Durbin (D-IL) and others, would make it extremely difficult for high-skilled foreign nationals to work in the United States.⁴² The bill would accomplish this through a variety of means, including reducing the length of time an individual could work in H-1B status, defining almost out of existence the category (L-1B) that allows employees to be transferred into the United States, requiring high-skilled foreign nationals to be paid far higher wages than comparable U.S. professionals and micromanaging the business operations of any company that hires a high-skilled foreign national.

Perhaps as notable as the contents of recent anti-immigration bills and the apparent lack of concern for their unintended consequences, such as the movement of jobs and investment out of the United States, is the responsible positions held by their chief advocates. For years, Senators Richard Durbin and Charles Grassley have introduced versions of anti-immigration legislation often referred to as the Durbin-Grassley bill. Currently, Sen. Grassley serves as chair of the Senate Judiciary Committee, which has jurisdiction over immigration, and Sen. Durbin is assistant Democratic leader, “the second highest ranking position among the Senate Democrats.”⁴³ While Sen. Grassley is critical of immigration more generally, Sen. Durbin has strongly advocated for allowing those who entered the country unlawfully to stay in America, while at the same time sponsoring legislation to make it as difficult as possible for those with skills highly-sought by employers to ever work in America.

DEFINING THE L-1 VISA CATEGORY OUT OF EXISTENCE?

Given the global nature of business, it is important for multinational companies to have the ability to transfer into the United States employees with “specialized knowledge” on L-1B visas.⁴⁴ The notion that such employees are taking away jobs is questionable, since the employees already work for the employer outside the United States. The authors of S. 2266 seemingly attempt to define the L-1B category out of existence by establishing a new definition of “specialized knowledge” that USCIS adjudicators will likely determine few employees meet. This would harm the competitiveness of U.S. companies and discourage both U.S. and foreign multinational companies from investing resources in the United States. It also would appear to violate U.S. commitments under GATS.

In recent years, even without Congress making it more difficult, multinational companies have experienced significant problems in transferring employees into the United States. “The denial rate for L-1B petitions to transfer

⁴² The other sponsors are Senators Bill Nelson (D-FL), Blumenthal (D-CT) and Brown (D-OH). A companion bill in the House, H.R. 5657, is sponsored by Rep. Bill Pascrell (D-NJ) and Rep. Dana Rohrabacher (R-CA).

⁴³ Website of Senator Richard Durbin.

⁴⁴ An L-1A visa allows the intracompany transfer of an executive or manager.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

high-skilled employees into the United States increased to an historic high of 35 percent in FY 2014, according to data obtained from U.S. Citizenship and Immigration Services (USCIS),” according to a National Foundation for American Policy analysis. “In FY 2006 the denial rate for L-1B petitions was only 6 percent.” The problem has been particularly acute when employers attempt to transfer employees from India. “The denial rate for L-1B petitions to transfer employees of Indian origin is a remarkable 56 percent for FY 2012 through FY 2014, compared to an average denial rate of 13 percent to transfer employees from all other countries during the same period.”⁴⁵

Under current law, “For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.”⁴⁶

S. 2266 would substantially restrict the ability of employers to transfer in professionals by inserting a new, much more difficult standard to meet for any employer that needs to transfer an employee with “specialized knowledge” into the United States. First, under Section 210 of S. 2266 the word “advanced” is moved in front of “level of expertise” and, in addition, any knowledge or expertise must be “not readily available in the United States labor market,” thereby, in effect, adding a labor market test for the possession of certain types of knowledge. The relevant sentence reads: “knowledge possessed by an individual whose advanced level of the term ‘specialized knowledge’ - (l) means knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the employer’s product, service, research, equipment, techniques, management, or other interests of the employer are not readily available in the United States labor market.”⁴⁷

The bar is raised still higher in the bill by adding that the knowledge must be “clearly different from those held by others employed in the same or similar occupations” and that the knowledge “does not apply to persons who have general knowledge or expertise which enables them merely to produce a product or provide a service.”⁴⁸ It is not clear why the “knowledge or expertise” to produce a particular product or service would be considered “general.”

And, it seems, just in case a USCIS adjudicator still might be inclined to approve a petition under “specialized knowledge,” the bill’s authors add more and likely insurmountable hurdles for an employer and employee. Under S. 2266, “In order to meet the definition under clause (i), *the beneficiary shall be a key person with knowledge that is critical for performance of the job duties and is protected from disclosure through patent, copyright, or company*

⁴⁵ *L-1 Denial Rates Increase Again for High Skill Foreign Nationals*, NFAP Policy Brief, National Foundation for American Policy, March 2015.

⁴⁶ INA Section 214(c)(2)(B).

⁴⁷ Section 210 of S. 2266.

⁴⁸ *Ibid.*

The Real World Impact of Proposed High-Skilled Immigration Restrictions

policy.”⁴⁹ This new statutory definition is designed to limit entry into the United States to only a small number of people, ignoring that many people within large companies are important across a range of operations.

Another weapon placed into the hands of adjudicators would be to compel an employer to demonstrate how its “entire system and philosophy behind the procedures are clearly different from other firms.” How would a company be able to prove this affirmatively to an adjudicator, particularly since adjudicators are unlikely to be familiar with the technical operations of all of a company’s competitors? According to the bill: “Different procedures are not proprietary knowledge within this context unless the entire system and philosophy behind the procedures are clearly different from those of other firms, they are relatively complex, and they are protected from disclosure to competition.”⁵⁰

The relevant part of S. 2266 reads:

Section 214(c)(2)(B) of the Immigration and Nationality Act is amended to read as follows:

“(B)(i) For purposes of section 101(a)(15)(L), the term ‘specialized knowledge’--

“(I) means knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the employer’s product, service, research, equipment, techniques, management, or other interests of the employer are not readily available in the United States labor market;

“(II) is clearly different from those held by others employed in the same or similar occupations; and

“(III) does not apply to persons who have general knowledge or expertise which enables them merely to produce a product or provide a service.

“(ii)(I) The ownership of patented products or copyrighted works by a petitioner under section 101(a)(15)(L) does not establish that a particular employee has specialized knowledge. In order to meet the definition under clause (i), the beneficiary shall be a key person with knowledge that is critical for performance of the job duties and is protected from disclosure through patent, copyright, or company policy.

“(II) Different procedures are not proprietary knowledge within this context unless the entire system and philosophy behind the procedures are clearly different from those of other firms, they are relatively complex, and they are protected from disclosure to competition.”⁵¹

FOREIGN NATIONALS TO BE PAID MORE THAN U.S. COWORKERS

A fundamental problem in S. 2266 (and earlier House and Senate bills) is that employers are compelled to pay skilled foreign nationals mandated wages that are generally unconnected from the actual wage levels employers pay to similarly situated Americans. When companies are forced to pay artificially high wages they will either pay those wages and be left with fewer available resources to invest in the United States, or they will be encouraged to invest more resources overseas and perform more work outside of the United States. Neither would benefit the U.S. economy or U.S. workers overall.

⁴⁹ Ibid. Emphasis added.

⁵⁰ Ibid.

⁵¹ Ibid.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

Under current law, an employer of an H-1B visa holder must pay “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question” or “the prevailing wage level for the occupational classification in the area of employment, whichever is greater. . .”⁵² S. 2266 would change that substantially by requiring a wage to be paid that is at least the median of Level 2 under the federal government’s “OES” system.⁵³ This change in the law would substantially inflate the wages of high-skilled foreign nationals above the wages paid to their U.S. colleagues with similar experience. (See Appendix.)

An analysis by the National Foundation for American Policy found that under a similar provision in bills (S. 744 and H.R. 2131) in 2014, concluded, “The mandated minimum wage for a software developer (systems software) in the San Jose, California area would be \$128,294 per year for a Level 2 professional (some experience) . . . \$19,156 above current Department of Labor (DOL) Level 2 wages – or an 18 percent wage premium.”⁵⁴

Similarly, the analysis found that under the same provision in the 2014 legislation, in the Chicago area, “the new required Level 2 wage for a software developer (applications) would be 29 percent above the private survey market wage measured by Towers Watson Data Services (an increase of \$21,313).”

Many companies would be faced with difficult choices: “Do without skilled foreign nationals, hire them only outside the United States, pay U.S.-born employees well above the market wage, or pay U.S.-born employees much less than the mandated minimum wage they must pay to foreign nationals. All of this to attempt to solve a problem that reliable research shows does not exist, while giving the U.S. Department of Labor significant authority to establish wage rates in the technology industry and other sectors. In sum, the current proposals would cause the United States to be a less attractive place for growth and investment, make U.S. companies less competitive and produce other unintended consequences.”⁵⁵

In addition, these flawed provisions on salary are added to the L-1 visa category, making it more difficult to transfer employees from other countries into the United States. In fact, section 205 of S. 2266 seeks to import many of the bureaucratic provisions of the H-1B visa category into the L-1 visa category.⁵⁶ These measures are evidence that some members of Congress are decades behind in their understanding of how the global economy functions. Employers see a world with work to be done and a goal of accomplishing that work wherever it makes the most sense. Members of Congress see the world only as one of “jobs” and whether those jobs are going to be located in

⁵² Section 212(n)(1) of the Immigration and Nationality Act.

⁵³ Section 101 of S. 2266. OES stands for Occupational Employment Statistics. Its limitations as an accurate measure of market wages are explained in more detail in the Appendix.

⁵⁴ *Updated Analysis: The Impact of Immigration Legislation on Salaries and Competitiveness*, NFAP Policy Brief, National Foundation for American Policy, April 2014.

⁵⁵ *Ibid.*

⁵⁶ Section 205 of S. 2266.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

the United States. Ironically, strict immigration rules on high-skilled immigration encourages more work and investment to take place outside of the United States.

“Many L-1As are company founders and prevailing wage rules don’t make a lot of sense for them,” notes Greg Siskind, partner, Siskind Susser, P.C. “This will have a serious negative impact on entrepreneurial immigrants who want to expand their companies in to the U.S.”⁵⁷

MICROMANAGING NUMEROUS BUSINESS OPERATIONS AND POLICIES

The issue for U.S. employers is not whether they recruit U.S. workers or somehow give advantages in employment to foreign workers. The issue is defending to DOL investigators (or bureaucrats) potentially years after the fact personnel decisions that are inherently subjective. Immigration laws contain definitions, such as “essentially equivalent” jobs, that are open to many interpretations.

The Durbin-Grassley bill, S. 2266, contains numerous measures that seek to empower the U.S. Department of Labor to micromanage the day-to-day operations and human resources policies of many of America’s leading companies. Such micromanaging would necessarily leave companies open to legal liability regardless of whether they do anything other than operate a business that employs high-skilled foreign nationals in the United States. And it would not just be large companies that would be affected. As many as 20,000 or more employers in America hire at least one foreign national on H-1B visas. The goal of S. 2266 is to impose so much bureaucratic “overkill” that few employers would still choose to hire high-skilled foreign nationals. Moreover, limiting the ability of employers to send employees to the sites of customers if those employees are foreign nationals will interfere with existing contracts and makes U.S. companies less competitive.

Below are the more notable of these new bureaucratic requirements:

- Prior permission required from the federal government to move personnel (Section 113).
- Ban on moving some personnel to a client worksite (Section 201).
- Exposure to DOL legal action on hiring and dismissals (Section 101).
- Limiting which employers can file for H-1B and L-1 petitions (Section 102).
- Expanded DOL investigative authority (Section 108).
- Requiring the use of a government website for company recruitment (Section 121).

⁵⁷ Interview with Greg Siskind.

NUMEROUS GATS VIOLATIONS

As noted in the discussion of the Cruz-Sessions bill, under the General Agreement on Trade in Services, the United States is obligated to maintain a certain level of openness on high-skilled immigration. The Durbin-Grassley bill, S. 2266, ignores U.S. trade obligations and would likely cause the United States to be violation of the agreement if the bill became law.

Such violations would not only constitute poor lawmaking and invite retaliation against U.S. companies, but the measures themselves seem designed to make U.S. companies less competitive and encourage more investment outside of the country. There is no evidence any of these provisions would “protect” U.S. workers.

Below are some of the likely violations of GATS in S. 2266:

- Prohibiting employers from filing for H-1B or L-1 petitions if their workforce consists of more than 50 percent H-1B and L-1 visa holders.
- Prohibiting the placement of H-1B visa holders on the site of another employer and requiring a waiver to move high-skilled foreign nationals to another office.
- New wage requirements that unilaterally change current U.S. commitments.
- Requiring a nondisplacement attestation that covers a period 180 days after the filing a petition, rather than the U.S. commitment of 90 days.
- Redefining the L-1 visa category almost out of existence through new legislative definitions designed to prevent employers from transferring personnel into the United States.

Many of the measures in the Durbin-Grassley bill appear to target Indian-based companies. Passing such provisions would almost certainly be counterproductive at a time when India and the United States are poised to forge an even closer relationship on trade and national security issues. In June 2016, Prime Minister Narendra Modi was invited to speak before the U.S. Congress. He called the United States an “indispensable partner” and said that “Our independence was ignited by the same idealism that fueled your struggle for freedom.” On national security, he said, “The fight against terrorism has to be fought at many levels. And, the traditional tools of military intelligence or diplomacy alone would not be able to win this fight.” And he also advocated for even closer economic and military ties between the United States and India.⁵⁸

⁵⁸ “Indian Leader Hails U.S. in Address to Congress,” Voice of America, June 8, 2016.

DURBIN-GRASSLEY MEASURE WOULD HARM HEALTH CARE DELIVERY

S. 2266 would enact into law a measure that would have the effect of preventing many foreign physicians from practicing in the United States. The bill would amend section 214(g)(5) of the Immigration and Nationality Act by striking “is employed (or has received an offer of employment) at” an institution of higher education and replacing it with “is employed by (or has received an offer of employment from).”⁵⁹

While it is likely to have additional negative impacts the sponsors do not foresee, immigration attorney Greg Siskind points out that many teaching hospitals have their physician services provided by a physician group that is not a part of the hospital. “In many states, hospitals are prohibited from employing doctors under state corporate practice of medicine statutes,” he explains. “So the doctors working in these hospitals are getting their paychecks by outside entities that may be for-profit enterprises and wouldn’t independently qualify for the H-1B cap exemption. This language could have a serious negative effect on the delivery of health care to many Americans.” In other words, depending on the state, it may be impossible for a hospital affiliated with an institution of higher education to directly employ physicians.⁶⁰ Siskind points out another provision of S. 2266 could prevent physicians from obtaining an H-1B by requiring the issuance of a medical license prior to approval of the work visa, even though many states won’t issue the license until the work visa is approved.⁶¹

VISA INTEGRITY AND SECURITY ACT OF 2016

Like most legislation, the goal of the Visa Integrity and Security Act of 2016, H.R. 5203, is not the problem but rather its unintended consequences. Those who have studied the bill conclude the new mandates are onerous and overly burdensome without improving national security. The legislation passed the House Judiciary Committee in May 2016 and is sponsored by Representatives Forbes, Goodlatte, Gowdy, Marino, and Sensenbrenner.

To cite one example, the bill changes the law so that approvals of visas overseas (by the State Department) or petitions inside the United States (by USCIS) would need to meet a far higher standard, such that individuals could not visit, work or reside in America. Section 5 of H.R. 5203 changes the standard by striking “to the satisfaction of

⁵⁹ Section 105 of S. 2266.

⁶⁰ Interview with Greg Siskind.

⁶¹ Section 106 of S. 2266. According to Siskind, “USCIS requires proof of qualifying for a license before they’ll approve. They don’t always require you to present the license because sometimes states won’t issue the license until the work visa is approved. That’s very common for doctors and since this is the H-1B occupation most often requiring a license, it’s hard not to think this is targeted at physicians. This will create an impossible situation for doctors in many states. A doctor can’t actually begin practicing medicine until the license is in hand so there is no danger to the public and the current practice of requiring a letter from the licensing board verifying qualifying for the license ought to allay concerns about a doctor getting the visa not being able to actually practice.”

The Real World Impact of Proposed High-Skilled Immigration Restrictions

the consular officer” and inserting “by clear and convincing evidence”; and then by striking “to the satisfaction of the Attorney General” and by inserting “by clear and convincing evidence.”⁶²

A statement released by the Niskanen Institute explains the problem in the context of business immigration: “The higher burden would wreak havoc on the employment-based immigration system. Foreign workers who are receiving green cards in the United States must demonstrate that they fit into intentionally vague categories, such as ‘extraordinary ability’ or ‘outstanding.’ Demonstrating that a worker falls into these categories is exceptionally difficult under current law, requiring extensive documentation and supporting evidence. Again, this bill would have the Department of Homeland Security turn away foreign workers who it actually believed did have ‘extraordinary ability’ but could not meet the even higher test of proving it at a much higher evidentiary standard.”⁶³

The Niskanen Institute elaborates on the problem:

Section 5 of H.R. 5203 would significantly increase the burden of proof for visa applicants, raising it from the current “to the satisfaction” of the consular officer or the Secretary of Homeland Security under sections 291 and 214 of the Immigration and Nationality Act (INA) to the much higher “clear and convincing” standard. This change would impose a one-sized-fits-all approach upon all visa categories and injure genuine visa applicants, U.S. citizen sponsors, and U.S. industries.

The new standard is overly burdensome for visa applicants. For comparison, it is a much higher evidentiary standard than is necessary for victory in a civil case, which requires only “a preponderance of evidence,” meaning that it is more likely than not (or greater than 50 percent chance) that the facts support the plaintiff’s case. Clear and convincing would raise the standard to significantly more likely than not (or a much greater than 50 percent chance) that the facts support the visa application. The only higher standard than clear and convincing is “beyond a reasonable doubt,” which is required only for criminal trials to prevent the taking of life or liberty from the innocent.

In other words, H.R. 5203 would create the bizarre situation in which plaintiffs could receive hundreds of millions of dollars in damages based on less certain evidence than would be required for them to travel, work, or study in the United States. As a consequence of this unnecessarily burdensome standard, many legitimate visa applications will be delayed or denied. This will injure U.S. citizen sponsors and impose significant costs on the U.S. economy.”⁶⁴

PROTECTING AMERICAN JOBS ACT

The Protecting American Jobs Act, S. 2365, introduced by Senators Nelson and Sessions would reduce the annual 65,000 limit on H-1B petitions down to 50,000. There are several problems with this bill. First, the annual H-1B quota is already far too low. The 65,000 quota (and the 20,000 exemptions from the quota for individuals with advanced degrees from a U.S. university) has been exhausted every year for more than a decade. This bill would only make the problem worse. Second, as with other legislation examined, this bill would violate U.S. commitments under GATS (i.e., to maintain at least a 65,000 annual limit).

⁶² Section 5 of H.R. 5203.

⁶³ Statement for the Record of the Niskanen Center Submitted to House Committee on the Judiciary Markup of “Visa Integrity and Security Act of 2016,” May 25, 2016.

⁶⁴ *Ibid.*

PROTECT AND GROW AMERICAN JOBS ACT

Although similar in title to other bills, the “Protect and Grow American Jobs Act,” H.R. 5801, sponsored by Darrell Issa (R-CA), focuses on a more narrow part of the immigration code. Currently, companies considered “H-1B dependent” (employers with 15 percent or more of their workforce in H-1B status) are exempt from attestations related to nondisplacement and recruitment if the employee in H-1B status earns at least \$60,000 a year or has a master’s degree or higher. H.R. 5801 would raise the income threshold to \$100,000 and index it to inflation, while also eliminating the master’s degree exemption. This bill appears to be a political response to the layoffs at Southern California Edison, which have been blamed on the contracting company’s use of H-1B visas. However, as explained in other research, there is no evidence that any company that has decided to contract out work in the past (or would decide to do so in the future) would have had that decision affected by this bill.⁶⁵ “Companies decide to contract out for normal business reasons, including focusing on core competencies and gaining access to new technology and solutions,” as noted in a National Foundation for American Policy study. “Eliminating H-1B visas entirely would not reduce the instances of companies contracting out work or functions, according to experts on outsourcing, since the visas do not figure into company decisions on contracting out.”⁶⁶

CONCLUSION

Nearly all arguments against high-skilled immigration ignore a simple fact – the labor market is global. That is why immigration restrictions, such as the low quotas on H-1B visas and employment-based green cards, are ineffective in “protecting” U.S. workers. Companies unable to hire or retain a talented foreign-born individual can hire and place the individual abroad. This means immigration restrictions most harm startups and small companies without international offices, despite critics’ assertions that such restrictions will most hurt large companies.

In addition, U.S. workers will be harmed by these restrictions. More than half of the billion dollar startups in recent years had at least one immigrant founder.⁶⁷ That type of job creation would no longer take place in the United States. U.S. colleges would begin to lose their place of preeminence in science and engineering as more international students pursue studies in other countries or at least no longer stay in America post-graduation. U.S. students would have fewer programs available to them in certain fields. Stifling high-skilled immigration to America means stifling both innovation and dynamism, two things our country needs now more than ever.

⁶⁵ *Setting the Record Straight on High-Skilled Immigration*, NFAP Policy Brief, August 2016; H.R. 5801; Patrick Thibodeau, “Proposal Would Raise Minimum Wage for H-1B Dependent Firms from \$60K to \$100K, But it Faces Criticism,” *Computerworld*, July 22, 2016.

⁶⁶ *Setting the Record Straight on High-Skilled Immigration*, NFAP Policy Brief, August 2016.

⁶⁷ Stuart Anderson, *Immigrants and Billion Dollar Startups*, NFAP Policy Brief, National Foundation for American Policy, March 2016.

The Real World Impact of Proposed High-Skilled Immigration Restrictions

H-1B visas are generally the only practical way to work in the United States long-term. None of the recent bills in Congress that seek to restrict H-1B visas offer an alternative way for high-skilled foreign nationals to work in America. The U.S. system for offering permanent residence for high-skilled immigration contains hundreds of thousands of people in its backlogs, with wait times often lasting 6 years to more than a decade.⁶⁸ Without H-1B visas, those individuals could not work in America while they wait for an employment-based green card. Substantial reforms would need to be enacted before it would be possible for even most high-skilled foreign nationals to skip H-1B status and go straight to a green cards. Such reforms would need to include far more numbers, exemptions from quotas for large numbers of individuals, the end of per country limits, and the elimination of several bureaucratic obstacles. Even with such new categories, it would still be necessary to have a temporary visa category for high-skilled professionals, since it is unrealistic to expect people who may only work a few months or years to commit to residing in America permanently.

Provisions such as S. 2394's requirement that high-skilled foreign nationals work out of the country for 10 years and similar measures in the bill, along with new wage requirements and other provisions in S. 2266, are designed to make it almost impossible to hire high-skilled foreign nationals in America. A related goal of the bills offered by Senators Cruz, Sessions, Durbin and Grassley is to place employers in significant legal peril should they ever choose to hire any high-skilled foreign nationals, thereby making it likely few U.S. employers will do so.

That does not mean high-skilled foreign nationals will never be employed by U.S. companies anywhere or that U.S.-born professionals will benefit from these provisions. If these provisions ever became law it would encourage a significant shift in investment and resources to outside the United States. Employers will still hire many of the now-prohibited foreign-born individuals, just not in America. This will not be a boon to U.S. professionals, since with less investment and fewer startups operating in the United States there will be fewer job opportunities for Americans, unless those Americans want to move to those countries where the jobs and investment migrate.

The premise behind S. 2394 and S. 2266 is that America should not be a nation of immigrants. At least some members of Congress do not view high-skilled and highly educated foreign nationals as valuable human beings looking to make a better life and benefiting our nation with their contributions. Unfortunately, if some members of Congress have their way, America will no longer be a land of opportunity for highly skilled and ambitious immigrants.

⁶⁸ *Reforming America's Legal Immigration System*, NFAP Policy Brief, National Foundation for American Policy, September 2015.

APPENDIX

PROBLEM WITH NEW WAGE REQUIREMENTS IN S. 2266 (AND OTHER BILLS)

The core problem is bills in the House and Senate would mandate H-1B visa holders be paid wages based on a Congressional formula, using OES data collection, that does not involve surveying employers on the wages paid to individual employees based on their education, experience or other factors.⁶⁹ Surveys of individual employees based on education, experience and other factors are inherently more accurate than a statistical formula, whether or not they result in a higher or lower required wage. That is the central issue. Instead, the U.S. Department of Labor's Foreign Labor Certification (FLC) unit, a part of the Employment and Training Administration, uses data collected from the Occupational Employment Statistics (OES) program and then creates four levels of wages based on a formula.⁷⁰ That formula is inherently less accurate than a survey of the wages paid to individual employees at different levels of education and experience. The government formula, for example, may designate the average wage in an occupation as Level 3 whether or not individuals who are considered Level 3 typically earn that wage in that occupation and region. In short, House and Senate bills would require companies to use a methodology that neglects to take into account the salaries of individuals based on education and experience.

Current bills in Congress would make the wage levels provided by the Foreign Labor Certification unit even less reflective of real world market wages by reducing the current four levels down to three levels, mandating a minimum wage paid for every H-1B worker that is no less than 80% of the mean wage for the occupation, and generally not allowing the use of nongovernmental wage surveys, which are currently permitted under Department of Labor regulations.

Nongovernmental (private) surveys collect data from individuals at different education and experience levels, often 6 levels, and are used by companies to set compensation levels in the labor market. Companies consider nongovernmental wage surveys the "market" wage for individuals based on the job, the location and worker's education and experience. Importantly, nongovernmental or "private" surveys are used to help set compensation at companies more generally, not primarily for immigration purposes.

⁶⁹ This section is excerpted from *Updated Analysis: The Impact of Immigration Legislation on Salaries and Competitiveness*, NFAP Policy Brief, National Foundation for American Policy, April 2014.

⁷⁰ Section 212(p) of the INA lays out the Congressionally devised formula.

SECTIONS OF S. 2394 ON NONDISPARAGEMENT AND CIVIL ACTIONS

SEC. 202. BAR ON NONDISPARAGEMENT AND NONDISCLOSURE AGREEMENTS.

(a) In General.--A petitioner employer may not require a United States citizen or lawful permanent resident employee of such petitioner employer to sign any nondisparagement or nondisclosure agreement, regardless of its characterization or label, that conditions receipt of any financial or nonfinancial benefit from the petitioner employer upon the nondisclosure of such petitioner employer's potential misuse of the H-1B visa program.

(b) Patent or Trademark Affirmative Defense in Litigation.--

Notwithstanding subsection (a), a petitioner employer, as a defense in litigation, may affirmatively assert that an agreement described in subsection (a) was necessary to prevent the disclosure of any highly technical information that might be related to a pending patent or trademark application.

SEC. 203. UNITED STATES FEDERAL COURT JURISDICTION OVER CIVIL ACTIONS PERTAINING TO MISUSE OF THE H-1B VISA PROGRAM.

(a) In General.--Notwithstanding any other provision of law--

(1) each United States district court shall have jurisdiction to address civil actions by any person claiming misuse of the H-1B visa program;

(2) each United States court of appeals shall have jurisdiction to address appeals of civil actions by any person claiming misuse of the H-1B visa program for cases originating within a United States district court within that circuit; and (3) the Supreme Court of the United States shall have jurisdiction to address appeals of civil actions by any person claiming misuse of the H-1B visa program for cases originating from any United States court of appeals.

(b) No Exhaustion Requirement.--Notwithstanding any other provision of law, a person shall have standing to pursue a civil action claiming misuse of the H-1B visa program, in accordance with subsection (a), regardless of whether such person has exhausted all administrative remedies in connection with such claims.

(c) Rule of Construction.--Nothing in this section may be construed to affect or change any of the other jurisdictional, procedural, or administrative rules under title 28, United States Code, other than the specific establishment of jurisdiction of Federal courts, as provided in subsection (a).

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

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