

## **National Journal**

### **Study Claims Work Visa Fees Violate Trade Agreement**

by Fawn Johnson

Thursday, January 6, 2011 | 9:30 p.m.

Lawmakers may be surprised to learn that trade agreements could limit what Congress does on immigration, but that's exactly what a policy research group argued Thursday. Last year's significant increase in work-visa filing fees likely violates U.S. commitments under the General Agreement on Trade in Services, according to a report from the **National Foundation for American Policy**, which studies workforce and immigration issues.

The report is the latest in a series of protests about the fees—likely to fall on deaf ears—from businesses and other proponents of skilled foreign worker visa programs. Filing fees for H-1B and L-1 visas were increased above \$2,000 in August as part of a \$600 million border security bill. NFAP's new report said the fee increase runs afoul of the U.S. commitment under GATS to allow the temporary admission of specialty workers under those programs.

Last year, the business community said the H-1B fee increase was a political ploy and argued that skilled foreign workers actually contribute to the economy rather than steal jobs. It didn't work. When the bill passed, the fragile economy and forthcoming midterm elections made foreign workers an easy target for lawmakers looking to fund the politically popular border security bill.

Even without the economic angst, skilled foreign worker visas are a public relations hot potato. The AFL-CIO and many Democrats are opposed to guest-worker programs, saying they create an underclass of workers and make it easy for companies to ignore American job applicants. Sen. Chuck Schumer, D-N.Y., argued in August that the H-1B fee increase would prevent bad-actor companies from running "a glorified international temp agency for tech workers."

Ironically, it's Schumer's comments that bulk up the thesis of NFAP's argument that the United States is departing from the GATS framework. Schumer said he wanted "to make it more expensive" for companies to bring in foreign workers that would compete for American jobs. In GATS, the United States said it would stick to its existing visa policies.

"What the U.S. essentially did was say, 'OK, we will make an obligation to follow the availability of visas, the visa structure that was in place in 1995,' " when GATS went into effect, said the report's author Stephen Claeys, a former Commerce Department official

and international trade professor at American University. Fast forward to the border security debate. “The purpose given for these fees was to make these visas less available and more difficult to procure,” Claeys said.

Even without Schumer’s statements, Claeys said foreign countries (like India, which protested the fee increase) could bring complaints to the World Trade Organization.

“The fact that he made the comments makes the argument stronger. Not only did the U.S. increase these fees and therefore kind of step back from its obligation, but it did so to make these visas less available,” Claeys said.

NFAP issued another report last year outlining areas where a number of immigration bills could violate trade agreements, but the argument remained theoretical because no legislation had actually become law. With the border security bill’s enactment, it’s now a practical possibility that a country could retaliate against U.S. exporters or complain to WTO, but it’s still not clear whether it will actually happen. Over the past 10 years, Congress has tinkered with the skilled worker visa programs on a number of occasions—including implementing vast changes in the annual numerical caps—without inviting trade-related accusations.

Still, the trade argument could pick up steam if the fees continue to go up. Tech companies and other businesses that rely on H-1B workers are worried that the visa program will become an easy funding trough from which lawmakers can feed their pet bills. To justify their worries, they need look no further than the 9/11 responders health care bill that was passed in December. It extends the current H-1B visa fees to 2015, one year past the sunset date in the border security bill.

## **Inside US Trade**

### **Study: Visa Fee Hikes May Subject U.S. To WTO Dispute Settlement Action**

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January 6, 2011

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Two U.S. laws passed last year that raise the fees required to obtain visas for skilled foreign workers may violate U.S. commitments to the World Trade Organization's General Agreement on Trade in Services (GATS) and could propel countries like India toward dispute settlement, according to a legal analysis released this week.

The analysis, by the **National Foundation for American Policy**, comes at the same time that India is signaling in local press reports that it is considering pursuing WTO consultations over the visa rate hikes.

Public Law 111-230, passed in August 2010, boosts the filing fee and fraud prevention and detection fee by \$2,000 for H-1B visas and by \$2,250 for L-1 visas. The increases only apply to U.S. employers with 50 or more employees in the U.S. and more than 50 percent of employees on H-1B or L-1 visas.

The fee increases, which began with the law's entry into force last year and are to remain in effect until Sept. 30, 2014, are intended to pay for the additional expenses of strengthening security along the U.S. border with Mexico. The hikes would be further extended to 2015 under another piece of legislation that passed at the end of last year to fund healthcare expenses for 9/11 first responders.

The author of the analysis, Stephen Claey's, identified two major arguments countries like India could use in a potential WTO challenge. India has an interest in the price of these visas because many Indian companies rely on them.

India could argue that the laws "nullify or impair" the benefits the U.S. has granted to other WTO members as a result of the commitments it made under the GATS, according to Claey's. The commitments the U.S. made under the GATS include entry of up to 65,000 persons annually under the H-1B visa program and entry for an unlimited number of L-1 visa holders.

Claey's argued in a teleconference yesterday (Jan. 6) that the fee increase, coupled with its application only to companies with 50 or more employees with at least 50 percent of the employees working on H-1B and L-1 visas, will have the effect of impeding and maybe even precluding a foreign company from providing services in the United States.

India could also charge that the fee increases violate GATS Article VI, which requires that WTO members ensure that "all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner," Claey's said.

To bolster his argument that the fee increase could violate the "reasonable" standard in GATS Article VI, Claey's cited a floor statement of Sen. Charles Schumer (D-NY) last year, when Schumer said the purpose of the fees was not only to fund border improvements but to restrict the availability of H-1B and L-1 visas and create U.S. jobs.

Claey's argued that a WTO panel would likely determine that this justification for the fee increase is not "reasonable" under GATS Article VI.

When asked if Schumer's floor statements could actually be considered as supporting evidence in a WTO dispute settlement case, Claey's said it could be considered, and added that any trading partner looking to bring a case against the U.S. on the fee increases certainly would raise Schumer's comments.

"It can be presented, it can certainly be considered," Claey's said.

For its part, the Confederation of Indian Industry (CII) criticized the passage of the James Zadroga 9/11 Health and Compensation Act as a "protectionist" measure.

The 9/11 bill will also levy a 2 percent tax on foreign manufacturers selling to the U.S. government that are based in countries that are not a party to the WTO Government Procurement Agreement.

The extended fee increase and extra tax would help fund the \$4.2 billion bill.

"The provisions clearly go against the Indian companies," CII president Chandrajit Banerjee said in a press release. "It is unfortunate to see this protectionist position by the U.S., especially coming soon after a very reassuring visit of President Obama to India recently."

H-1B visas are intended for highly skilled workers from foreign countries wanting to come to work in the U.S. L-1 visas allow companies to transfer employees to the U.S. to work for a parent branch, affiliate or subsidiary of the same company.

## Information Week

### U.S. Visa Fees May Violate Trade Agreement

**Increases for the H-1B and L-1 permits for foreigners working in the U.S. may not meet requirements of the General Agreement on Trade in Services, finds legal analysis.**

By [Elizabeth Montalbano](#) , [InformationWeek](#)  
January 6, 2011 02:00 PM

Legislation attaching new fees to U.S. visas for foreign workers may be in violation of an international trade agreement, according to a new study.

Passed in August 2010, Public Law 111-230 increases the filing fee and fraud prevention and detection fee by \$2,000 for H-1B visas and by \$2,250 for L-1 visas. The law only applies to companies that employ 50 or more workers in the United States where more than 50% of those workers are in H-1B or L-1 status.

These fee increases likely violate U.S. commitments under the General Agreement on Trade in Services (GATS) in several ways, according to a [legal](#)

[analysis](#) written by analyst Stephen Claeys for the **National Foundation for American Policy**.

GATS is a multilateral agreement governing trade in services among World Trade Organization (WTO) members, including the United States; it went into effect in January 1995.

When the law raising fees visas was passed, one of its proponents, Sen. Charles Schumer, D-NY, said its intention was to make visas less available to foreign workers so companies would have to hire U.S. citizens, Claeys said, speaking on a conference call about his research Thursday.

This intent to "make these visas less available and more difficult to procure" violates GATS because it willfully restricts the entry of foreign workers, he said. "The U.S. made a [commitment] that all of its measures would be made in impartial manner," he said. "Increasing them to make them less available would not meet that standard."

The law also appears to violate GATS because it could nullify or impair benefits of other WTO members, whereas the agreement stipulates that any country signing the agreement must not take this type of action, he said.

Claeys said that the law's fee increase for companies with more than 50% of employees having a visa status could affect companies only in a certain sector, which might impact a WTO member with much of its industry in that sector.

He added that these potential violations don't mean that the U.S. is not allowed to change its immigration or foreign-worker visa policies. It merely raises awareness of potential discrepancies between a law that's been passed and the trade agreement in which the country participates.

"The U.S. made these obligations under the GATS and these visa fee increases are potentially violating these obligations," he said.

**The Economic Times (India)**

**January 7, 2011**

## **'US violated GATS by increasing H1B, L1 visa fee'**

WASHINGTON: The United States seems to have violated its commitment under the General Agreement on Trade in Services (GATS) by substantial fee increase in certain categories of H-1B and L1 visas, an eminent American think-tank said today, backing India's argument that such a move is discriminatory and restrictive.

"Significantly increasing the fees for certain H-1B and L-1 visas may be likely to violate US obligations under GATS," said the National Foundation for American Policy, a Washington-based think tank in its report on the increase in H-1B and L1 visa fee.

Signed into law by the US President Barack Obama last year under the Mexico Border Protection Bill , the act increased USD 2,000 for H-1B visas and by USD 2,250 for L-1 visas, but only for employers that employ 50 or more employees in the United States and more than 50 percent of the employees are in H-1B or L-1 status.

"The United States specifically committed in its GATS schedule to allow the temporary entry and stay of individuals under the H-1B and L-1 visa provisions, as they existed when the United States joined the GATS in 1994. Accordingly, additionally restricting the availability of H-1B and L-1 visas could violate this commitment," said the report.

"As a result, a WTO Member whose companies use H-1B and L-1 visas to perform services in the United States may challenge this provision at the World Trade Organization," the report concluded.

Such a challenge could result in retaliation against U S exporters and limit market access for US goods and services, it said.

The report also strengthens the argument of India and the Indian companies that such a legislation is discriminatory and restrictive.

India has already announced its intentions to approach the WTO on this issue.

The hike affected outsourcing companies like [Wipro](#) , Tata , Infosys , Satyam but had no impact American companies, said a joint statement issued by Schumer and Gillibrand.

The money from the new fees goes into the US Treasury and was part of legislation to increase border security personnel, equipment, technology, infrastructure, and other resources along the United States southwestern border.

"However, the ultimate purpose of the new fees is not to cover expenses for increased border security. Senator Charles Schumer (NY-D), who introduced the amendment to include the higher fees in the legislation, explicitly stated that the purpose of the fees is to restrict the availability of L-1 and H-1B visas. Thus, Congress' overall intent was reducing the visas' availability, not budget neutrality," the report said.

"The United States made a commitment under the GATS to allow the temporary admission of (non-immigrant) specialty workers under the H-1B and L-1 visa provisions. This commitment generally reflects US law as it existed in 1994 when the GATS and other World Trade Organization (WTO) agreements were finalized," it said.

Because the United States is bound by this commitment under GATS, it may not now adopt or maintain measures that would conflict with that commitment, or nullify or impair the benefits accruing to WTO members under the commitment, the report said.

Accordingly, restricting the availability of H-1B and L-1 visas through the increased fees could violate this commitment under GATS, it added.