

ANALYSIS: SENATE BILL'S H-1B AND L-1 VISA PROVISIONS ARE A REVERSAL OF FORTUNE FOR AMERICAN COMPETITIVENESS

While the employment-based green card provisions in the new Senate bill would reduce the permanent resident backlog and aid employers when seeking to sponsor graduate students from U.S. universities in science and engineering, the legislation will make it difficult for employers to hire the vast majority of other foreign nationals. Under the bill, for the highly skilled who want to work in America but did not obtain an advanced degree from a U.S. university, it would have been much easier to have entered or stayed in the country illegally prior to December 31, 2011, since employers of such individuals would not be subject to the bill's numerous new restrictions.¹

H-1B visas are often the only practical way to hire a foreign national to work long-term in the United States. While the exemptions from the employment-based green card quotas for certain foreign nationals may provide new options for those with an advanced degree in a science, technology, engineering or math (STEM) degree from a U.S. university, for most other individuals an H-1B visa will remain the only avenue to work in the United States. Unless there is a specific intention to prevent those who fall outside the parameters of the green card provisions from working in the United States, then the Senate bill's sponsors simply fail to appreciate the ramifications of the bill and its impact on the ability of U.S. companies to keep resources in the United States and compete in the global economy.

PROBLEMS WITH NEW RECRUITMENT AND NONDISPLACEMENT ATTESTATIONS

At minimum, Congress should avoid enacting immigration measures so restrictive as to encourage U.S. employers to hire skilled foreign nationals abroad rather than in the United States. Two such actions would be to apply "recruitment" and "nondisplacement" attestations to all U.S. employers, as the Senate bill does.

There is an instructive precedent for these restrictive measures. In 2009, after Congress imposed new requirements (attestations) related to "recruitment" and "nondisplacement" on U.S. financial institutions that received bailout funds, Bank of America, viewing the new H-1B restrictions as too difficult to comply with, rescinded job offers to 50 international graduate students; other banks responded by hiring foreign-born graduates and placing them in offices abroad. "Recent changes in legislation made it necessary for Bank of America to rescind job offers it had made to students requiring H-1B sponsorship," a Bank of America spokesman said at the time.²

¹ The bill's formal name is the the Border Security, Economic Opportunity, and Immigration Modernization Act. Lynden Melmed and Blake Chisam's assistance with particular provisions of the legislation is appreciated.

² "BofA Withdraws Job Offers to Foreign MBA Students, *The New York Times*, March 9, 2009.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

In 1998, after much debate and consideration, Congress enacted measures that would impose certain attestations on past willful violators and companies with more than 15 percent of their workforce in H-1B status, so-called “H-1B dependent” companies. Congress specifically imposed the attestations on only willful violators and H-1B dependent companies because it believed such measures would be exceedingly difficult for fast-moving tech companies to comply with, given the broad scope the Department of Labor would apply to ambiguous terms and inherently subjective decisions.

In essence, the nondisplacement attestation in current law requires companies to attest they will not lay off a U.S. worker within a certain time period of hiring an H-1B professional for a job. Specifically, current law states that an H-1B dependent company or past willful violator must attest that “the employer did not displace and will not displace a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application.”³

The problem for employers arises from the legal ambiguities surrounding the statute and regulations. An analysis of the current statute by the law firm of Paul Hastings helps explain the problem: “Employers must prove that job departures are voluntary and are not ‘constructive discharges’; they must demonstrate when discharges are performance related; they must demonstrate the nature of a contract whose ending results in personnel changes; they must demonstrate when offers of different jobs within the same company are bona fide; they have to demonstrate (according to a highly subjective DOL regulatory standard) whether two jobs are ‘essentially equivalent,’ requiring analysis of the job requirements, the typical characteristics of employees performing those jobs, etc.; they must assess and document what are relevant “areas of employment” for the displacement analysis; they must assess and document issues of ‘direct,’ versus ‘secondary’ displacement; and far more.”⁴

While there is a potential and complex safe harbor in the Senate bill if the number of U.S. workers in the same “job zone” as the H-1B has not decreased during in the previous one-year period, that “safe harbor” has no bearing on whether a U.S. worker was fired and replaced by an H-1B visa holder, which is the assumed intention of the provision. There is no evidence of a need to expand the scope or application of the nondisplacement attestation. In the days of flexible job functions and multiple locations such a requirement can cause a General Counsel to conclude his or her company may be unlikely to be in compliance if they hire H-1B professionals. The safer alternative would be to expand outside the United States rather than risk such legal liability.

³ Section 412 of the American Competitiveness and Workforce Improvement Act, passed in 1998. The statute defines displacement as follows: “The employer is considered to ‘displace’ a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought.” (“Nonimmigrants are temporary visa holders, such as those on H-1B visas, and do not have the right to stay in the country permanently without becoming lawful permanent residents.”)

⁴ Analysis provided by Paul Hastings.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

In fact, current law already addresses the main concerns of critics. Under Section 413 of the American Competitiveness and Workforce Improvement Act (passed in 1998), a company found committing a “willful” violation of the law regulating the proper wages for H-1B visa holders and displacing a U.S. worker is barred for *three years* from hiring any foreign nationals in the United States and faces up to a \$35,000 fine per violation.⁵

Another measure the Senate bill would enact is to expand a “recruitment” attestation to all employers, rather than applying it only to willful violators and H-1B-dependent companies as under current law. This is not a small matter. In 1998, the H-1B visa bill was held up for approximately 6 months over the recruitment (and nondisplacement) attestation. A compromise was reached to impose the two attestations on a smaller segment of employers – primarily those with more than 15 percent of their workforce on H-1B visas – not on all companies that hire skilled foreign-born professionals, scientists and researchers.

Under current law, those (H-1B dependent) companies to which the recruitment attestation applies must attest when petitioning for an H-1B visa holder that the employer “has taken good faith steps to recruit, in the United States using procedures that meet industry-wide standards . . . [and] has offered the job to any United States worker who applies and is equally or better qualified for the job . . .”⁶

Such an attestation when applied to all employers could deter companies from hiring a foreign national even when he or she is the best person for a job. “The main problem with imposing a new recruitment attestation on all employers is not that companies are not recruiting U.S. workers – they obviously are – it’s the enormous time and effort of satisfying the Labor Department’s inevitable bureaucratic requirements and *being exposed to the legal risk of failing to do so after the fact in a later audit*,” said Warren Leiden, partner, Berry Appleman & Leiden LLP.⁷

As noted, part of the recruitment attestation is a provision that requires an employer to offer a job to any equally qualified U.S. worker who applies. This raises several questions:

- Who decides whether a person is equally qualified? Ultimately not the employer but a U.S. Department of Labor investigator.
- What if a U.S. worker is qualified but not the best person for the job? Again, an employer will need to justify the hiring decision to the U.S. Department of Labor.

⁵ Section 413 of the American Competitiveness and Workforce Improvement Act.

⁶ Section 412 of the American Competitiveness and Workforce Improvement Act. In addition, the attestation states the employer must offer “compensation that is at least as great as that required to be offered to H-1B nonimmigrants under subparagraph (A), United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought; and (II) has offered the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.”

⁷ Interview with Warren Leiden. Emphasis added.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

- What if an employer engages in recruitment on U.S. college campuses and seeks to hire all the best applicants it finds? If any of the best applicants are foreign-born students who will need H-1B visa it is unclear whether offering a job to those foreign nationals would be permitted under the bill without having first met other steps on recruitment established in the bill or by the Department of Labor via regulation.

There are likely many other questions and concerns employers have about how the recruitment and nondisplacement attestations would work in practice and their impact on normal business decisions.

The Economist recently wrote about a study of the world's most successful companies that helps illustrate the problem with permitting the Department of Labor to dictate recruitment practices: "Above all, these firms are fanatical about recruiting new employees who are not just the most talented but also the best suited to a particular corporate culture. These firms' bosses spend a disproportionate amount of time on the recruitment process . . . Each McKinsey applicant can be interviewed eight times before being offered a job; at Goldman, twice that is not unheard of. At Capital Group a serious candidate is likely to be seen by 20 people, some more than once. Recruitment, these firms believe, is the start of a lifelong relationship."⁸

EMPLOYEES TRANSFERRED INTO COUNTRY PLACED IN VIRTUAL QUARANTINE

In the global economy, employee mobility is crucial. In the new Senate bill, employee mobility could violate U.S. immigration law. In the legislation the intention is to make it unlawful for an existing employee transferred into the country on an L-1 visa to be "placed" at another worksite unless the other employer is an affiliate of the original company. In practice, that means any employer who transfers an existing employee into the country could not let the employee go work on a project or product installation at a customer or client worksite, even if the individual is a manager or possesses specialized knowledge needed for the project. A similar outplacement prohibition in the bill is directed against H-1B visa holders working for H-1B dependent employers.⁹ Both provisions not only violate an understanding of the need to move people expeditiously for work in a fast-paced economy but also may violate U.S. commitments under the General Agreement on Trade in Services (GATS).

Inherent in the Senate bill is a belief that specialization is bad, a belief we know is contrary to what makes companies effective in the modern economy. Should companies produce every good and service they need in-house? The answer is as obvious as whether families should grow all their food at home rather than buy food from a store. If it is self-evident companies should purchase some services outside, particularly services not

⁸ "Simply the Best," *The Economist*, April 13, 2013.

⁹ Under the bill an employer that is not H-1B dependent can place an H-1B visa holder at another site but only after paying a \$500 fee.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

central to the company's core business, then the question is whether such purchases should only be permitted if the services are purchased from American citizens or companies that use primarily American citizens.

If it is agreed that specialization and the buying of services is legitimate, then what if there are not a sufficient number of qualified U.S. workers willing or available to work on projects in different parts of the country for relatively short periods of time, before moving on to other projects? That appears to be the case today, which is why some companies use more H-1B visas than others and why other companies use foreign nationals on both L-1 and H-1B visas to perform work for clients and customers. Why would American companies become more competitive or profitable if they limited the use of the specialized services they now use, as the Senate bill proposes? And if companies would not become more competitive or profitable but rather less efficient, that means we would likely see a decrease in the employment of U.S. workers, since only growing and profitable companies are able to increase their hiring.

Pointing to the variety of provisions aimed at preventing contracting for services if performed by foreign nationals, Blake Chisam of Fragomen, Del Rey, Bernsen & Loewy, LLP, said, "The bill would interfere with existing contracts and harm not just employers who use H-1B and L-1B visas, but those businesses that rely on the expertise of companies to help them run their information technology, human resources and finance systems. The provisions would harm small and large businesses alike."¹⁰

UNLIMITED DOL INVESTIGATIVE AUTHORITY

U.S. Department of Labor (DOL) investigators, who under the Senate legislation will now be without constraints in their investigative authority, will enforce the bill's new and burdensome provisions. Under current law, Department of Labor investigators must receive a complaint from an aggrieved party to investigate an employer, or receive specific, credible information from a known and credible source and a certification from the Secretary of Labor.

Under the Senate bill, a Department of Labor employee may investigate any employer, in essence, whenever he or she chooses to, since the new standard allows DOL employees themselves to be a credible source and there is no requirement for a certification from the Secretary of Labor. Moreover, individuals providing information against an employer do not need to identify themselves. Finally, DOL investigations can cover a 24-month period (up from 12 months) and no longer need to be completed within 90 days.

¹⁰ Interview with Blake Chisam.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

U.S. Citizenship and Immigration Services possesses unlimited audit authority of H-1B visa compliance. While USCIS audited more than 14,000 H-1B cases in FY 2010, only 1 percent of the cases audited (192) were referred for a fraud investigation, raising questions about the need to grant the Department of Labor vast new authority.¹¹

To understand why it is reasonable to be concerned about unconstrained Department of Labor investigative authority note that the USCIS conducted over 30,000 site visits to employers using H-1B visas in FY 2010 and FY 2011.¹² Many employers received multiple visits. "Several members report numerous site visits for a single employer in one location," noted the American Immigration Lawyers Association. "A large U.S. professional services provider reports well over 100 site visits in calendar year 2011. In all cases, no fraud was found and no compliance issues were found."¹³

A Department of Labor investigation or any government investigation can be burdensome and an impediment to companies focusing on their core business responsibilities even if an employer has not committed any violation. No one denies some level of enforcement authority is necessary. Congress decided to grant the Department of Labor a level of investigative authority that balanced the interests of oversight, while guarding against overreach. But without serious limits, combined with the subjective nature of the new requirements in the bill, the legal departments of many employers may decide it is too perilous to petition for foreign nationals on H-1B visas.

REQUIRING FOREIGNERS TO BE PAID MORE THAN AMERICANS

If some thought it was a concern that a foreign national was being paid less than a nearby employee, then imagine how U.S. employees will feel when the law requires foreigners to be paid more than them. Under U.S. law, an employer must pay an H-1B visa holder the higher of the prevailing or actual wage paid to a U.S. worker with similar experience and qualifications in that area. The Senate bill upends that requirement by requiring an employer to pay a foreign national on an H-1B visa a higher wage than a comparable U.S. professional.

The current 4-level calculation for prevailing wage would be replaced in the bill with three levels, which effectively pushes the wage levels higher. Depending on the occupation and region, the salary difference could be

¹¹ American Immigration Lawyers Association, "USCIS Fraud Detection & National Security (FDNS) Directorate Answers AILA Administrative Site Visit & Verification Program (ASVVP) Questions," June 7, 2011, available at AILA InfoNet Doc. No. 11062243. USCIS has not released data on the number of fraud referrals that resulted in actual findings of fraud; quotation from R. Blake Chisam, *DOL Threatens Personal and Commercial Privacy in Proposal Directed Against Skilled Foreign Nationals*, NFAP Policy Brief, September 2012, p. 15. Only 3.5 percent (495) of the visas were revoked, which attorney R. Blake Chisam explains, "is an agency action that is not limited to fraudulent petitions, but may relate to petitions in which the H-1B worker simply no longer works for the petitioner."

¹² USCIS Fraud Detection & National Security (FDNS) Directorate Answers AILA Administrative Site Visit & Verification Program (ASVVP) Questions, June 7, 2011, and AILA Verification and Documentation Liaison Committee, USCIS NDNS Meeting, March 28, 2012. According to USCIS, "14,433 H-1B site visits were conducted in FY 2010" and 15,648 were conducted in FY 2011.

¹³ *Ibid.*, June 7, 2011.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

substantial. For example, examining the Department of Labor's database finds an electrical engineer in Silicon Valley at the new Level 2 wages would be paid at least \$111,842 under the bill, rather than at least \$93,059 under current law, a difference of more than \$18,700.¹⁴ H-1B dependent employers must pay all H-1B visa holders at least the new Level 2 wage.

Forcing employers to pay higher wages for foreign talent will encourage companies to place more engineers and other skilled foreign nationals abroad, where more investment dollars will flow. That will not benefit U.S.-born professionals in the technology field. As noted in an analysis of another bill, inflating U.S. salaries to match the mandatory inflated salaries for foreign nationals is a possible response, but with only so much compensation within a company to go around, it would then likely result in less hiring overall, not a positive development for U.S. professionals.¹⁵ As George Mason University economist Donald Boudreaux wrote in response to Ralph Nader's call for a 47 percent increase in the minimum wage: "From where comes the money to pay the higher wages . . . ? Mr. Nader apparently assumed that it materializes out of thin air, for he doesn't even mention the possibility that firms that are obliged to spend more on wages will spend less on inventory, factory expansion, and other activities."¹⁶

The measure to inflate H-1B wages is designed to price foreign nationals out of the job market, not to respond to actual evidence of employers paying H-1B visa holders far lower than comparable U.S. professionals, which would violate the law. In a 2011 report, the Government Accountability Office (GAO) found in the category Systems Analysis, Programming, and Other Computer-Related Occupations, the median salary for an H-1B professional is higher (\$60,000 vs. \$58,000) than for a U.S. professional in the age group 20-29 and the same (\$70,000) in ages 30-39. It found similar results for electrical engineers.¹⁷

POTENTIAL GATS VIOLATIONS IN SENATE BILL

Under the General Agreement on Trade in Services (GATS) the United States is committed to provide a specific degree of access to H-1B and L-1 visas. As such, new immigration law restrictions could place the United States in violation of that agreement and subject the U.S. to a challenge before the World Trade Organization (WTO). "Such a challenge, if successful, could lead to retaliation against U.S. exporters and harm America's reputation on trade issues," noted a legal analysis by Jochum Shore & Trossevin PC for the National Foundation for American

¹⁴ U.S. Department of Labor.

¹⁵ Stuart Anderson, "Requiring Foreigners to be Paid More Than Americans," *Forbes*, March 27, 2013.

¹⁶ Donald Boudreaux, Letter to the Editor, *Wall Street Journal*, April 16, 2013 (unpublished).

¹⁷ *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Government Accountability Office, GAO-11-26, January 2011, Table 1.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

Policy. "As such the analysis and its conclusions should be considered in deliberations over possible changes to U.S. immigration policy."¹⁸

The 2010 legal analysis examined a number of provisions in previous legislation that are the same or similar to those in the Senate bill and concluded there was a "significant likelihood the provisions would be found inconsistent with U.S. commitments under GATS." Among these provisions included in the current Senate bill:

- Changing the H-1B wage rules.
- Changing the 90-day nondisplacement rule for H-1B to 180 days for H-1B dependent employers.
- Employers with more than 50 employees could not employ another H-1B nonimmigrant if the sum of their H-1B and L-1 visa holders is more than 50 percent of their total workforce.
- Outplacement restrictions on L-1 visa holders. (A similar restriction on H-1B visa holders not examined).
- Large increase in H-1B visa fees.

The list above is not intended to be inclusive of all potential or likely GATS violations in the Senate bill. A more thorough analysis than permitted here would be necessary. In sum, the bill raises significant issues for its practical impact on employers and the U.S. economy, as well as for U.S. trade obligations.

DISTINCTIONS IN TREATMENT BASED ON PLACE OF EDUCATION

To obtain their green cards, over 90 percent of employment-based immigrants each year adjusted their status inside the United States from a temporary visa category, primarily H-1B and L-1 status.¹⁹ That makes it strange for the Senate legislation to exalt green card recipients while implying Americans should, in effect, run and hide from those seeking temporary visas. In fact, often the only way previous employment-based immigrants could work in America prior to receiving their green card, with infrequent exceptions, was if they first obtained H-1B and L-1 status. In effect, since the new rules in the Senate bill would make it far more difficult to obtain a temporary visa, many individuals who in the past would have become permanent residents will be unlikely to do so in the future.

Under the Senate bill, an Indian or Chinese national with a master's degree in electrical engineering from a U.S. university can be sponsored for a green card and likely start working on Optional Practical Training (OPT) while awaiting processing. However, an employer wishing to hire an Indian or Chinese national who received the same degree at Oxford or the University of Cambridge would need to comply with a variety of new rules and attestations

¹⁸ 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.

¹⁹ 2012 Yearbook of Immigration Statistics, U.S. Department of Homeland Security.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

on recruitment, nondisplacement, and wages that would make it far more difficult for the person to work in America. In addition, there could be limits on whether the individual could work on a client or customer site and for some employers there might be an absolute bar on hiring the foreign national to work on an H-1B or L-1 visa. Due to the Senate provisions, it is much more likely such individuals would be employed outside the United States than they would ever work in America.

The Senate bill cannot prevent companies from setting up or expanding operations to hire individuals educated in India, China or other countries. One might ask given the growing pool of talent in Asia whether the Senate bill risks shutting off a future source of talent eager to work in and for America, and instead will compel labor and investment decisions to be made that would not be beneficial to the U.S. economy.

An important technical point: Individuals now waiting for green card processing could be forced to leave the country if they require a renewal of H-1B status to keep working and their new employer cannot meet the new conditions established in the Senate bill. The portability provisions in the bill would not help such individuals if a new employer were not able to comply with the bill's new H-1B provisions.

AN H-2A VISA IN EXCHANGE FOR ONE WEEK'S WORTH OF NEW H-1B VISAS?

The key legislative issue involving H-1Bs has been the annual quota of 65,000, which is low relative to the size of the U.S. labor force (the annual flow of H-1Bs is equal to approximately 0.08 percent of the U.S. labor force). It also includes an exemption of 20,000 for advanced degree holders from U.S. universities. In April 2013, U.S. Citizenship and Immigration Services received approximately 124,000 H-1B petitions, about 40,000 over the combined 85,000 annual limit, which required USCIS to set up a lottery system to "select a sufficient number of petitions needed to meet the caps."²⁰

The new Senate bill would effectively increase the annual H-1B limit to 135,000 – 110,000 for the annual quota and 25,000 for advanced degree holders in a STEM field from a U.S. university. In essence, 135,000 vs. the 124,000 petitions received at the beginning means the Senate bill would provide approximately a week's worth of H-1B visas for employers. While it's possible the H-1B cap could increase above 110,000 under the bill, it could go up no more than 10,000 a year and would only do so under a complicated formula that has yet to be tested.

In exchange for that increase is a variety of new bureaucratic measures that may cause employers to avoid using the H-1B visa category if possible. The likely result will be more work and resources sent outside the United States, presumably the opposite of what the bill's authors intended. If one believes employers will use any visa

²⁰ "USCIS Reaches FY 2014 H-1B Cap," Press Release, U.S. Citizenship and Immigration Services, April 8, 2013.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

category no matter how rule-intensive, legally perilous and bureaucratic, then one need look no further than the H-2A visa category for agricultural employers.

There is no numerical limitation on the number of workers who can be admitted annually under the H-2A visa category. Yet in FY 2012, only 65,345 H-2A visas were issued, even though it is difficult for growers to find legal workers in the United States and data show more than half of the workers for certain crops are in the country illegally.²¹ The reason the H-2A category is so underutilized is due to how arduous and bureaucratic employers find the visa. Ironically, while measures in the bill on agriculture try to direct U.S. immigration law away from the current problems with the H-2A visa, the legislative text on H-1B and L-1 visas moves the law in the direction of the bureaucracy and difficulty of the current H-2A visa category.

CONCLUSION

The Senate immigration bill contains many positive features on employment-based green cards, including exemptions from the quota for those with an advanced STEM degree from a U.S. university and the dependents of those sponsored, as well as an allotment of green cards for immigrant entrepreneurs. Unfortunately, these positive provisions, which may not remain intact by the end of the legislative process, are undermined by the new restrictions on H-1B and L-1 visas in the bill. The H-1B and L-1 visa categories are important because it is not practical for every high skilled foreign national who might work in America to become a permanent resident, nor will every potentially valuable contributor born abroad be eligible for one of the few exemptions from the employment-based green card quotas. There needs to remain a realistic way for highly skilled foreign nationals of all types to work in America if companies are going to compete effectively in the global economy and create more jobs and innovation in the United States.

²¹ U.S. Department of State. <http://www.travel.state.gov/pdf/FY2012NIVWorkloadbyVisaCategory.pdf>.

Analysis: Senate Bill's H-1B and L-1 Visa Provisions Are a Reversal of Fortune for American Competitiveness

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