

National Foundation for American Policy

January 6, 2011

Contact: Stuart Anderson, 703-351-5042, press@nfap.com

New Research Finds High Skill Visa Fee Increases Would Likely Violate Major U.S. Trade Commitments

Legal Analysis Carries Implications for WTO Trade Dispute and Future Legislation on H-1B and L-1 Visas

Arlington, Va. – The significant increases in H-1B and L-1 fees enacted by Congress in August 2010, likely violate U.S. commitments under the General Agreement on Trade in Services (GATS), according to a new study released today by the National Foundation for American Policy (NFAP), an Arlington, Va.-based policy research group. The legal analysis was performed by Stephen Claeys, an expert in trade matters related to U.S. commitments under the World Trade Organization (WTO) and a former Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations in the U.S. Department of Commerce. The analysis takes no position on whether increasing these visa fees constitutes sound immigration policy.

“Legal Analysis: Fee Increase on H-1B Visas Likely Violates U.S. Commitments Under GATS” can be found on the NFAP website at www.nfap.com.

The legislation (Public Law 111-230) increased the filing fee and fraud prevention and detection fee by \$2,000 for H-1B visas and by \$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.

“Since Congress may look to raise such fees on the same or a broader set of employers in the future, the finding of a likely inconsistency with U.S. obligations under the GATS may be particularly important,” said Stuart Anderson, executive director of the National Foundation for American Policy. In fact, even since the passage of Public Law 111-230 in August, Congress extended the fees an additional year, until 2015, in legislation aimed at funding healthcare for 9/11 first responders.

“Even if Congress were to expand the number of employers subject to these new fees to include companies that employ a smaller percentage of H-1B and L-1 visa holders in their workforces, the United States would still be restricting the availability of H-1B and L-1 visas to a greater extent than they were available when the U.S. joined the GATS in 1994,” according to the legal analysis. “As a result, the United States would continue to be in violation of its GATS commitments.”

The money from the new fees goes into the U.S. 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 United States made a commitment under the GATS to allow the temporary admission of (nonimmigrant) specialty workers under the H-1B and L-1 visa provisions. This commitment generally reflects U.S. law as it existed in 1994 when the GATS and other World Trade Organization (WTO) agreements were finalized. 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. Accordingly, restricting the availability of H-1B and L-1 visas through the increased fees could violate this commitment under GATS.

Moreover, the additional visa fees may violate the United States’ general commitment under GATS to ensure that “all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.” The increased visa fees certainly affect the provision of services, but the justification for the fees (restricting the availability of L-1 and H-1B visas) is unlikely to be found reasonable. Further, the increased fees could violate GATS if they nullify or impair benefits to a WTO Member under the terms of a sector-specific commitment. This violation is likely because the fees are targeted at only those companies with 50 or more employees in the United States and if more than 50 percent of those employees are nonimmigrants working on H-1B or L-1 visas. The combination of the amount of the fees and their limitation to certain companies makes it possible that they impede, if not entirely preclude, a company from a WTO Member from supplying services in a particular sector through the presence of natural persons, or establishing a commercial presence in the U.S.

Violations could result in retaliation against U.S. exporters and otherwise diminish the United States' reputation on trade matters. If a WTO Member believes that another Member has violated its GATS commitments, the complaining Member may invoke the WTO dispute settlement mechanism for redress (private parties do not have this right). If the action is found to be inconsistent with the GATS, the WTO Dispute Settlement Body (DSB) will recommend that the Member bring its measure into conformity with GATS.

If the Member fails to bring the measure into conformity with the GATS, the Complainant may seek authority from the DSB to retaliate against the other Member. The amount of retaliation is equal to the amount that the complaining Member's benefits are impaired. Thus, if the additional fees are found to violate U.S. commitments under GATS, the United States must be prepared to either compensate other WTO Members to the extent that their benefits under the GATS are diminished, or face retaliation from those Members to that same extent. Retaliation could be in the form of other WTO Members limiting U.S. service companies' access to those countries' markets, increased duties on U.S. goods, or other actions.

Arguments by supporters of the increased fees against the above GATS-related concerns are not convincing. One argument is that the fee increases can easily be borne by those companies applying for the visas, so they do not constitute much of a restriction. However, the fact that the increased fees were explicitly imposed to restrict the availability of certain L-1 and H-1B visas undermines this argument. Other arguments raise the policy reasons for changing the availability of L-1 and H-1B visas and ending the alleged abuse of the visas by certain companies. These arguments, regardless of whether they have merit, are irrelevant as to whether the United States is violating its GATS commitments.

Finally, some supporters of the higher H-1B and L-1 fees argue that the WTO Members who are more likely to assert that the higher fees violate GATS may not themselves be fulfilling their obligations under GATS or other WTO agreements. This argument is likewise not relevant. The fact that some believe another WTO Member may not be living up to its commitments under GATS or another WTO agreement does not allow the United States to unilaterally violate its own commitments under GATS.

The report's author Stephen Claeys is president of Cadence Global Strategies PLLC and an adjunct professor at the American University School of International Service, where he teaches about globalization and international economic competitiveness. He obtained his law degree from Northwestern University and his Bachelors of Arts degree in government and international studies from the University of Notre Dame.

About the National Foundation for American Policy

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, former U.S. Senator and Energy Secretary Spencer Abraham and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com.

2111 Wilson Blvd., Suite 700, Arlington, VA 22201
phone: (703) 351-5042 fax: (703) 351-9292 www.nfap.com