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US IMMIGRATION & NATIONALITY LAW

SENATE AMENDMENT 306 TO FURTHER RESTRICT THE H-1B VISA PROGRAM: SOUND ECONOMICS OR DOBBSIAN ECONOMICS?

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by

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In a time when hundreds of thousands of U.S. workers are losing their jobs each month in an economic disaster that pundits analogize to the Great Depression,[2] we might expect our Congress to look to Keynesian model of recovery. But with the evaporation of so much capital from our financial system, the public wants blood. And similar to policy debates that surrounded comprehensive immigration reform in 2007, Congressional debate over the American Recovery and Reinvestment Act of 2009 has closely tracked the media blame game. With reactionary pundits like Lou Dobbs, Bill O'Reilly and others leading our national discourse, who reflexively rail against immigration in their nightly programs it is not surprising that the debate would degenerate into partisan bickering, pandering and scapegoating based on media half-truths.

A specific example, the Sanders-Grassley Amendment ("SA 306"), was introduced on February 4, following a widely circulated story of the Associated Press ("AP"), entitled *AP Investigation: Banks sought foreign workers*.[3] The AP story reported on February 1, 2009, the day before the Senate began its deliberation over the stimulus bill, that as they laid off more than 100,000 U.S. workers and took $150 billion of taxpayer money, 12 banks recruited foreign labor for high-paying jobs through the H-1B program. The reporters claimed that they had "reviewed visa applications" filed by these 12 banks with the U.S. Department of Labor ("DOL") to request visas on behalf of 21,800 foreign nationals. However, DOL does not actually adjudicate H-1B visa applications or issue the

visas. Rather, U.S. Citizenship and Immigration Services ("USCIS") adjudicates these applications after the DOL certifies the Labor Condition Application ("LCA"), which is a precursor to the H-1B petition.[4] The number of LCAs certified by the DOL does not reflect the number of H-1B petitions ultimately approved by USCIS; for example, employers must oftentimes file multiple LCAs for a single employee to cover distinct areas of intended employment. Accordingly, DOL warns that a review of its data does not accurately represent "the number of work visas issued by " and "does not provide direct evidence that these employers actually hired the workers."[5]

To be fair, the AP reporters admitted that "the actual number is likely a fraction of the 21,800 foreign workers." Moreover, they subtly noted that the 21,800 figure is a six-year tally, whereas the total number of LCAs actually filed with DOL by these 12 banks in both 2007 and 2008 was just over 7,400. Citing a study of the National Foundation for American Policy ("NFAP"), the American Immigration Lawyers Association ("AILA") responded to the AP article by noting, "he largest financial institution in the country, in terms of employees, actually received a grand total of 155 approved petitions for new H-1B professionals in 2007, out of a total workforce of 387,000! Bank of America received approved petitions for 66 new H-1B professionals in a total workforce of 210,000."[6] But these subtleties were lost on Sen. Sanders, who focused exclusively on the inflammatory 21,800 figure to propose SA 306, which was agreed to by a voice vote on February 6 and to reads as follows:

SEC. __. HIRING AMERICAN WORKERS IN COMPANIES RECEIVING TARP FUNDING.

> *(a) Short Title.-This section may be cited as the "Employ American Workers Act".*
> *(b) Prohibition.-*
> *(1) **IN GENERAL**.-Notwithstanding any other provision of law, it shall be unlawful for any recipient of funding under title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110-343) or section 13 of the Federal Reserve Act (12 U.S.C. 342 et seq.) to hire any nonimmigrant described in section 101(a)(15)(h)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(h)(i)(b)) unless the recipient is in compliance with the requirements for an H-1B dependent employer (as defined in section*

> *212(n)(3) of such Act (8 U.S.C. 1182(n)(3))), except that the second sentence of section 212(n)(1)(E)(ii) of such Act shall not apply.*
> *(2) **DEFINED TERM**.-In this subsection, the term "hire" means to permit a new employee to commence a period of employment.*
> *(c) Sunset Provision.-This section shall be effective during the 2-year period beginning on the date of the enactment of this Act.*[7]

As shown, the amendment restricts a U.S. employer who has received any stimulus funding from hiring an H-1B employee for 2 years unless it first complies with the H-1B dependency provisions of INA § 212(n)(3).[8] These provisions treat such financial institutions as H-1B dependent employers and subjects them to the same compliance requirements as those who have been found by DOL to have violated their LCA obligations or who employ 15% to 32% of their full-time workforce in an H-1B capacity.[9] These additional requirements include the active and passive recruitment of U.S. workers and bar the placement of H-1B workers outright at a work site that has experienced a layoff of similarly employed individuals within the 90 days preceding or following the filing of the LCA. Congress, however, set forth two exemptions of these additional requirements where (1) an employer seeks to employ and individual who has earned a Master's or higher degree, or its equivalent, in a specialty related to the intended employment, or (2) the employee will earn an annual salary of $60,000 or more.

SA 306 categorically requires the recipients of stimulus funding to recruit U.S. workers for each and every position prior to hiring a foreign national in H-1B status and explicitly removes the educational and salary exemptions, from which other dependent employers can still benefit. In today's economic climate, no one would argue against legislation intended to help U.S. workers. However, the public should still oppose meaningless, nationalistic legislation that further erodes the world's image of the U.S. as the very pillar of economic mobility that has attracted motivated, educated professionals to join our workforce and stimulate our economy.

The amendment is meaningless first because it fails to address an identified problem. As the statements of Sen. Sanders at the time he proposed this amendment make clear, he relied exclusively on a Lou Dobbish piece of "news" that misrepresented data to scapegoat foreign workers and the businesses

who employ them. Moreover, there are already enforcement provisions in place through which the DOL may address abuses of the H-1B program to the detriment of U.S. workers. Subpart I of the DOL's H-1B regulations, 20 C.F.R. §§ 655.800 to 655.855, enlist detailed procedures for penalizing willful violators and H-1B dependent employers who fail to meet their obligations to recruit U.S. workers. As so frequently happens, the problem is not the law already in the books, but rather with the systematic failure of executive agencies to properly enforce the law with the tools they have already been provided. As a consequence, all are suspect because of the misdeeds of some.

Another problem is that this amendment precludes foreign nationals who are already physically present in the U.S. in H-1B status, and may have been for many years, from seeking to transfer their employment to a U.S. employer who has received stimulus funding, regardless of the skills that individual may bring with him or her and the need that prospective employer may have. As recently as 2000, Congress sought to stimulate the economy by increasing the mobility of our H-1B workforce through the addition of H-1B job flexibility provisions to the Immigration and Nationality Act ("INA"). *See* INA § 214(n). When those provisions were adopted, Sen. McCain himself offered the following comments:

> *I am convinced that the best thing government can often do to advance the fortunes of the private sector is to stay out of its way. I support this bill because it makes progress toward that end, by improving companies' flexibility to hire the talent they need, while providing for the regulatory framework and new educational opportunities to protect and promote American workers . . . his legislation gets government out of the way of American companies, universities, and research labs which simply cannot hire the skilled professionals they need in the domestic labor market because of an arbitrary, anachronistic cap on H-1B visas that does not reflect the forces of supply and demand in the American economy today.*[10]

True, we are in a different time. However, in light of the struggle ahead, and despite the obvious need for better regulation of our financial and automotive industries, businesses should be afforded greater freedom in their choices they make to recruit and retain the best talent. The enormous loss of jobs is a national tragedy, but the H-1B program generates an enormous income for the

U.S. government, a large percentage of which is earmarked for educational and training programs for U.S. workers that is administered directly by DOL.[11] Beyond the "H-1B Training Fee," the opportunity costs for even passively recruiting foreign talent is already enormous and will increase dramatically.

The H-1B dependency regulations require at least some active recruitment. The degree of recruitment necessary is generally defined by DOL regulations as that which is normal to the industry at-large, which DOL indicates should include the following:

> *irect communication to incumbent workers in the employer's operation and to workers previously employed in the employer's operation and elsewhere in the industry; providing training to incumbent workers in the employer's organization; contact and outreach through collective bargaining organizations, trade associations and professional associations; participation in job fairs (including at minority-serving institutions, community/junior colleges, and vocational/technical colleges); use of placement services of colleges, universities, community/junior colleges, and business/trade schools; use of public and/or private employment agencies, referral agencies, or recruitment agencies ("headhunters")*

20 C.F.R. §655.739(d)(2)(i). With each initial filing, the government imposes filing fees of $2,320. This does not include legal fees. Thus, one can readily imagine the disincentive already in place to recruit foreign nationals through the H-1B program, rather than U.S. workers.[12] When coupled with the costs of recruitment, simply in terms of potential recruiters' fees and Human Resources salaries paid out to put in place such a system, it is easy to imagine an employer abandoning the idea of hiring a foreign worker.

If these enormous filing fees were not disincentive enough, the employer must also undertake to develop a compliance program to properly document its determinations of "industry standards" and that it gave "full and fair consideration" to all U.S. applicants. This may not seem like much, but it involves considerable time and expense to develop a program that duly meets DOL requirements. This is especially true for those employers, who seek to hire only a few foreign nationals out of a workforce of thousands. As the AP story

showed us, no U.S. applicant will feel that s/he received full and fair consideration when s/he discovers that the prospective employer hired a foreign worker in his or her stead. And all it takes is one complaint from a current or former employee to embroil the employer in costly hearings before an Administrative Law Judge.

Subjecting certain U.S. employers to the H-1B dependency provisions, regardless of their past history of compliance with their LCA obligations or the percentage of H-1B workers employed in their total workforce, will most likely curtail the usefulness of the H-1B program - a program put in place to address shortages of qualified professional workers. SA 306 will likely chill employers' willingness to sponsor qualified professionals for employment in the U.S. by substantially increasing the already prohibitive transaction costs of hiring H-1B employees. As AILA explained in its response to the AP article, this may, in turn, substantially lessen our country's influence in the global marketplace and harm the overall competitiveness of U.S. businesses, which might benefit from the skills and talents of foreign workers.

Also, despite the requirements of SA 306, an employer who accepted stimulus funding may still be able to engage a consultant who has been sponsored for H-1B status by another U.S. employer. Specifically, where a consultancy is not H-1B dependent and did not receive stimulus funding, it is not subject to the H-1B dependency regulations under INA § 212(n)(3) or SA 306. As such, it should be legally permissible for this consulting company to place, for example, a Computer Programmer at a well known but troubled global financial institution even despite the layoffs and DOL's regulatory prohibition against the secondary displacement of U.S. workers. Moreover, even if the consultancy is H-1B dependent, if it did not receive any stimulus funds, it may still place an exempt employee, one who earns more than $60,000 or possesses a Master's degree or higher, at such a bank. Also, the bank itself, with branches, subsidiaries or affiliates all over the world, remains free to transfer foreign nationals from its banks abroad to the U.S. through the L-1 program, or to hire foreign nationals who have been authorized by USCIS to accept employment that is not specific to any particular employer, such as adjustment of status applicants with an Employment Authorization Documents or foreign students with Optional Practical Training.

To try to close these loopholes in SA 306 would show the amendment for what it is, the result of a nationalist, isolationist agenda predicated upon flawed data

to feed bias. As AILA suggested, the immigration bar would welcome "a proper, well-documented study on H-1B visa numbers and usage, and an agreement on the appropriate amount of H-1B visas needed to meet real and legitimate need, in the context of employment rate rise or fall." The H-1B dependency provisions were put in place to target employers who were relying on an H-1B workforce or who had willfully violated their obligations under DOL regulations. It should not be arbitrarily imposed upon other employers who do not meet these criteria.

In conclusion, it is important to note that the Senate companion bill has not yet passed the Senate, and even after it has, it must be reconciled with the House bill before it is signed into law by the President. Nevertheless, Sen. Grassley, the co-sponsor of SA 306, ominously indicated that he was working with Sen.

Durbin "on a reform of the H-1B program."[13] Although Sen. Grassley's comments during the Senate's consideration of SA 306 showed that he offered a more thorough and balanced consideration of this issue, the fact that he co-sponsored such an amendment should give pause to reflect upon where this country is headed. National policies should not be set by irresponsible reporting by the media. Where the public wants a clear departure from pork spending in a comprehensive stimulus bill, it should be equally concerned to exclude hateful pieces of legislation that have their own very real economic and social costs.

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[2] See U.S. Department of Labor, Bureau of Labor Statistics, THE EMPLOYMENT

SITUATION: January 2009 (Feb 6, 2009) (available at http://www.bls.gov/news.release/empsit.nr0.htm), which begins as follows: Nonfarm payroll employment fell sharply in January (-598,000) and the unemployment rate rose from 7.2 to 7.6 percent, the Bureau of Labor Statistics of the U.S. Department of Labor reported today. Payroll employment has declined by 3.6 million since the start of the recession in December 2007; about one-half of this decline occurred in the past 3 months. In January, job losses were large and widespread across nearly all major industry sectors.

[3] Frank Bass And Rita Beamish, *AP Investigation: Banks sought foreign workers*, Associated Press (Feb. 1, 2009) (available at http://www.usatoday.com/money/topstories/2009-02-01-1127659341_x.htm).

[4] The DOL certifies an LCA upon its receipt of an employer's attestation that it will pay the named worker(s) the required wage and employ him or her with the same benefits and in working conditions already established for U.S. workers who are similarly qualified and employed. Contrary to the AP report, the required wage is the higher of the prevailing wage, an arithmetic mean of reported wages for similar occupations in defined geographical areas, or the actual wage that the employer pays similarly qualified and employed individuals.

[5] Available at http://www.flcdatacenter.com/CaseData.aspx.

[6] AILA InfoNet Doc. No. 09020567 (posted Feb. 5, 2009) (available at http://www.aila.org/content/default.aspx?docid=27929).

[7] Available at http://thomas.loc.gov/ (The final text of the amendment softened from an unqualified 1-year prohibition on hiring H-1B workers by stimulus recipients).

[8] See 20 C.F.R. §§ 655.736 to 655.739.

[9] Pursuant to INA § 212(n)(3), and H-1B dependent employer is any U.S. employer who employs more than 7 H-1B nonimmigrants (out of a full-time staff of 25 or less), more than 12 H-1B nonimmigrants (out of a full-time staff of 26 to 50) or who employs more than 51 full-time equivalent employees of whom 15% or more are H-1B nonimmigrants.

[10] Congressional Record, pp. S9645-96, October 3, 2000.

[11] Why not increase the penalties for those individuals and companies who perpetrate fraud on this worthwhile program. See U.S. Department of Labor, Office of Inspector General, Semiannual Report to the Congress, October 1, 2006 - March 31, 2007, vol. 57 (April 2008).

[12] For H-1B purposes, DOL regulations define U.S. worker as "an employee who is either: (1) A citizen or national of the United States, or (2) An alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under section 207 of the INA, is granted asylum under section 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the United States. 20 C.F.R. § 655.715 (emphasis added). Accordingly, all nonimmigrants are excluded from the definition, but the worker need not be a U.S. citizen.

[13] Congressional Record, p. S1622, February 5, 2009.