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US IMMIGRATION & NATIONALITY LAW

THE GRASSLEY-DURBIN BILL TO RESTRICT H-1B AND L VISAS IS THE WRONG SOLUTION AT THE WRONG TIME

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by
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We must lay out the welcome mat for the best and brightest from all over the world. Our corporations must be given the tools to attract the best and the brightest so that they can compete in the global market place. Those who are attracted to work in the United States must also be given the freedom and flexibility to maximize their potential through occupational mobility.

The U.S. is in a global battle for human capital much as the industrial economies of the 19th and 20th centuries revolved around the battle for natural resources. It is the nation that attracts and retains the human capital that will dominate the information economy of our digital age.

The proposed bill of Senators Grassley and Durbin will do exactly the opposite, http://durbin.senate.gov/showRelease.cfm?releaseId=311910
Introduced earlier on April 23, 2009, the H-1B and L Reform Act, S. 887, will restrict the ability of employers to use the H-1B and L visas. Although the H-1B visa is already over-regulated (to the extent that each time an H-1B worker goes to a new worksite, a notification must be posted in two conspicuous places), Sens. Grassley and Durbin seek to needlessly regulate it even further by requiring US employers to have first made a good faith attempt to hire US workers. It will also require employers to attest that they have not displaced US workers, ban H-1B only ads and prohibit employers from sponsoring further H-1B workers if half the employees are already on the H-1B or L visa. The bill will also make it easier for the Department of Labor (DOL) to conduct random

investigations and enhance penalties.

While one has become used to restrictions on the H-1B visa program over the years, including the imposition of similar provisions on TARP recipients or federal reserve funding earlier in 2009, S. 887 also seeks to restrict the L visa program, which till now has given much flexibility for corporations to transfer managerial and specialized knowledge personnel from overseas subsidiaries, branches and affiliates to the U.S. S. 887 will require an employer who transfers an L employee to the U.S. for a cumulative period of time in excess of over 1 year to pay the prevailing wage, for Skill Level 2 in the most recent Occupational Employment Statistics (OES) Survey. Incidentally, the Skill Level 2 requirement also applies to H-1B workers, and thus if someone is legitimately an entry level worker, and can qualify for the H-1B visa, the bill still requires the employer to pay the higher level wage even though a U.S. worker in a comparable situation may command the entry level wage. The full text of S. 887 may be found here, http://www.govtrack.us/congress/bill.xpd?bill=s111-887

While there is intuitive appeal to require employers to first attempt to recruit US workers and artificially higher wages, especially in these hard economic times, such a requirement will already hamper the ability of a US employer to hire talent globally and continue to remain a global superpower. Not many realize that the H-1B visa already requires an employer to pay the higher of the market wage or the wage it internally pays a similar worker. If such a requirement exists, and employers can get severely penalized for flouting the wage requirement, why would an employer still take the trouble to hire a foreign national when the wage it is required to pay must be on par with other similarly situated US workers?

Curiously, the H-1B visa is inappropriately called a Tguest worker visa,У which is a complete misnomer. The H-1B provision in the INA does not refer to this term. Also, the H-1B visa allows its holder to possess Tdual intent,У which in non-legal parlance means that he or she can, while having an intention to stay temporarily, also possess an intent to reside permanently in the US. Indeed, the H-1B visa serves as a bridge while the foreign national waits endlessly for the green card. And this occurs as a result of a very limited supply of employment-based green cards each year, further exacerbated by per country limits, as a result of which people born in countries like India and China suffer disproportionately and have to wait even longer than others. Employers who sponsored the H-1B worker for permanent residence already need to test the

US labor market through a process known as labor certification. Sens. Grassley and Durbin, through their proposed legislation, will require an employer to test the U.S. labor market twice over, the first time during the filing of the H-1B visa and the second time around when the employer desires to sponsor this individual for permanent residency. What a waste of time and resources.

And while we create more obstacles in the path of those who wish to work here and boost our economy, why would such a foreign national wish to remain in the U.S.? There is more and more of a tendency of such people to return home after they have gone to university in the U.S. Many of these folks are bright and have in the past started companies, which in turn have created hundreds of thousands of jobs for U.S. workers. According to an entrepreneur turned university researcher, Vivek Wadhwa, TMy research team documented that one quarter of all technology and engineering startups nationwide from 1995 to 2005 were started by immigrants. In Boston, it was 31%, in New York, 44%, and in Silicon Valley an astonishing 52%. In 2005, these immigrant founded companies employed 450,000 workers. Add it up. ThatXs far more than all the tech workers we gave green cards to in that period,У http://www.techcrunch.com/2009/08/30/free-the-h-1bs-free-the-economy/.

Critics of the H-1B visa say that it is a flawed program. For example, Ron Hira, an assistant professor of public policy at the Rochester Institute of Technology, in a Computerworld article, http://www.cio.com/article/490564/H_1B_Visas_Allow_Legal_Discrimination_Against_U.S._Workers, said that the "bill takes the necessary steps to clean up the corrupted H-1B and L-1 visa programs by closing major loopholes that have allowed firms to replace Americans with lower-cost foreign guest workers.У We fail to see the logic to Professor HiraXs statement, quite frankly, because as meticulous immigration attorneys, we always insist and advise our clients that they must abide by the higher of the prevailing or actual wage requirements. In fact, many employers pay much higher than the wages in the OES precisely because they compete for the best and the brightest, regardless of their nationality. It is disingenuous to always stereotype H-1B workers as low cost guest workers.

We too agree that the H-1B program is severely flawed. But rather than create more obstacles like Sens. Grassley and Durbin wish to do, we propose that it be simplified. Most other nonimmigrant work visas, such as the TN, E and O visas do not have a wage requirement. There is no needless intervention by the

Department of Labor in insisting that a TN, E or O visa holder be tethered to a piece of paper called the Labor Condition Application (LCA). Yet, no one complains about these visas as much as the H-1B visa.

We question whether the antagonism toward the H-1B visa, and now the L visa, is due to the high use by Indian nationals. Even Senator Durbin on his website picks up one off the cuff statement of the Indian Commerce Minister, Kamal Nath, who called the H-1B visas Tthe outsourcing visaУ to justify the introduction of the legislation. Indeed, the provision prohibiting an employer from filing additional H-1B visas, when half its employees are already on the H-1B, is aimed at Indian-based companies. The constant drumbeat of criticism against TIndian job shopsУ betrays more than a whiff of cultural parochialism that fails to appreciate the very real value that the Indian business model has brought to American business, which has betrayed no hesitation in taking advantage of it. This bills further flies in the face of the strong strategic ties that have been built between the U.S. and India in recent times.

Why not give more flexibility to the H-1B worker to change jobs? This would put the worker on the same footing as a US worker and not held captive to the same employer for years. Once the H-1B worker arrives to work for the company that sponsored him or her, the requirement that a new employer again go through the same tedious application procedure be eliminated if the worker is in the same or similar occupation. LetXs free the H-1B worker to work for another company without the need to file a new petition or to even start his or her own company in the same occupation. Also, while this H-1B worker is being sponsored for permanent residency, he or she could be allowed to continue the green card process if working in the same occupation much sooner than the law allows presently. Presently, Section 204(j) of the INA only allows Tgreen cardУ portability at the final stage of the process, when the adjustment application has been filed and has been pending for over 180 days. An Indian waiting in the EB-3 queue may have to wait for over a decade before being able to file an adjustment of status application. The law should be changed to allow job flexibility much earlier in the green card process. Once this happens, an H-1B worker will be on the same footing as a US worker. The employer will have less of an incentive to keep captive an H-1B worker. The market will determine the wage to be paid to an H-1B worker who would have an easier access to another employer. If the H-1B visa becomes truly portable, the protection of the market, via occupational mobility, replaces the false

protection of the LCA.

Finally, the L visa should remain intact as is. It has provided much flexibility for global businesses to transfer international personnel. Indeed, there have been sensible administrative decisions in the past that have held that it does not matter whether the source of the paycheck for an L is the US entity or the foreign entity, recognizing the flexibility necessary for corporations to transfer personnel to the U.S.. The USCIS already gives a hard time to employers in adjudicating L petitions presently, and there is no need for further intervention that will destroy our competitiveness.

In sum, we need sensible visa policies that will allow U.S. employers to remain competitive, hire the best talent globally, be innovative, which in turn will result in many more American jobs. While Congress and the media focus on the problem of illegal immigration, a far more significant story is playing out with profound implications for America's future. The national security of the United States, and a projection of its soft power, depends upon our competitive edge in science and technology. If we lose that, not only will America be unable to act as a global superpower in defense of key strategic interests, but also the fundamental underpinnings of our national economy will be seriously eroded. No nation can protect itself or preserve its allies without economic vitality. While immigration, by itself, is not nearly enough, it is, or can be if properly deployed, a powerful ingredient in a comprehensive program of economic preparedness to keep Uncle Sam on top in the flat world of the 21st century. The Grassley-Durbin proposal, unfortunately, is the wrong solution at the wrong time!

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