CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

H-1B BIGOTRY

Posted on October 10, 2009 by Cyrus Mehta

by
Cyrus D. Mehta*

There appears to be a troubling trend these days. Attacking the H-1B visa is code for keeping the Indians out. Leading the drumbeat against the H-1B are Senators Grassley (R-IA) and Durbin (D-IL), http://cyrusmehta.com/perseus/News.aspx. In his latest missive to the new USCIS Director, Senator Grassley makes H-1B bigotry politically respectable, http://tinylink.com/?I38d5pyKzi. While no one is denying the existence of fraud in the H-1B program, like in other visa programs, Senator Grassley finds fraud whenever he sees fit, especially when it concerns Indian computer consulting companies.

An IT consulting company may have several clients and can demonstrate that it is legitimately in the business of computer consulting. But it may not be able to pinpoint exactly where the H-1B beneficiary may work at the time of filing the petition. This does not mean that the company intends to commit fraud, as Senator Grassley thinks. When a law firm with many clients hires an associate, it is usually unable to ascertain with laser precision accuracy the client matter this associate will work on. Yet, the law firm has made a business judgment to hire an additional associate as it knows that a client will ultimately need the lawyer's services. If there is lag time in assigning this associate from one client matter to the next, the law firm still continues to hire the associate and pays him or her. No one would accuse the law firm of committing fraud. Such is the business model of many service related industries or professions, and it is difficult to understand why an Indian consulting company must pin point many months in advance, with extensive documentary proof from the client, where it will place its prospective H-1B employee when it has a history of assigning its workers on client projects and paying them regularly. And in the event of a lag

between work assignments, the H-1B law prohibits an employer from "benching" and must continue to pay the required wage. Congress contemplated time lags between assignments, and enacted a law that required the employer to pay during the unproductive period. Why should this now be considered fraud?

More recently, Steve Hamm and Moira Herbst of BusinessWeek wrote a disturbing article, *America's High-Tech Sweat Shops*, http://www.businessweek.com/magazine/content/09_41/b4150034732629.htm?campaign_id=technology_related. Their article focuses on bad apples in the H-1B program, who have already been prosecuted, which means that the existing law works against the abusers. Unfortunately, the article fails to highlight a single positive aspect of the H-1B visa, and there are many. Recently, the fact that four out of the six US Nobel prize winners were foreign born is a testament to the fact that this award has something to do with a smart immigration policy, http://immigrationimpact.com/2009/10/09/nobel-prizes-winners-and-immigration-policy/.In the experience of this writer, most H-1B employers want to play by the rules, which are hyper-technical, difficult to follow and complex. They have been designed to trap the unsuspecting H-1B petitioner, especially one that relies on many H-1B workers. Yet, employers comply with obtaining prevailing wage data to support the market-based wage, post notices at various worksites and often respond in great and meticulous detail to requests for evidence or notices of intent to deny! One wonders why an employer would go through all of these hoops and hurdles if it wanted to hire a worker on the cheap. None of these employers were profiled in the article.

It would be one thing if the BusinessWeek article focused on serious H-1B abuses (and there are enough teeth in the current law to punish such employers) in order to advance the rights of aggrieved Indian H-1B workers, but it gives prominence to Programmers Guild, which has links with NumbersUSA and other white supremacist organizations. The Programmers Guild cares two hoots about any immigrant worker; rather it wants to get rid of them. If you visit the Programmers Guild website, http://www.programmersguild.org/, they caricature Indian companies and the lawyers that represent them. It is difficult to understand how Programmer Guild, and its lawyer head John Miano, who are given so much play in the article, can effectively represent the interests of even US programmers when all I see on their website is whining about

immigrants. They have no seminars on cutting edge technology, entrepreneurship, job placement information, networking opportunities, nothing, except for anti-immigrant invective. It is not surprising that the BusinessWeek article is spewing the worst kind of racist invective against Indians. It appears to have hurt the sentiments of lots of hardworking Indian H-1B workers across the board as can be seen on one of the discussion boards of Immigration Voice, http://tinylink.com/?LunbQu2SHb. These same Indian H-1B workers from India are also hopelessly stuck in the Employment-based Second and Third Preference backlogs, which also work against India because of the per country limits in each of these categories.

The more one reads between the lines of the BusinessWeek article, it smacks of racist undertones such as the Brazilian disliking the curries of his Indian roommates, and the reporter having cheeseburgers with John Miano at a mid-century diner in "tony" Summit, NJ (which is code for those halcyon days prior to the 1965 Act after which Indians came to open their curry restaurants and H-1B sweat shops). Rather than profiling people who advocate for more restrictions on the H-1B program, especially its use by Indian companies, BusinessWeek could have also quoted people who could have spoken positively about the H-1B program and the value that these so called "body shops" have brought to American businesses, which have betrayed no hesitation in taking advantage of them. Also, the article does not clearly articulate that if a "body shop" plays by the rules, employs the H-1B worker and pays the required wage (higher of the prevailing or actual), posts the LCA, and charges a mark-up to the client, whether this can be characterized as fraud. Is there not a freedom for Indian companies, even Indian-owned companies, to contract and make a profit? Attacking the H-1B visa program is a convenient way to attack Indians and for xenophobes to disguise their fear or hatred of immigrants under the cloak of rational argument.

***Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Member of Cyrus D. Mehta & Associates, PLLC in New York City. The firm represents corporations and individuals from around the world in a variety of areas such as business and employment immigration, family immigration, consular matters, naturalization, federal court litigation and asylum. Mr. Mehta has received an AV rating from Martindale-Hubbell and is listed in Chambers USA, International**

WhoXs Who of Corporate Immigration Lawyers, Best Lawyers and New York Super Lawyers. Mr. Mehta is the Chair of AILAXs National Pro Bono Committee and is also the Co-Chair of the AILA-NY Chapter Pro Bono Committee. He is a former Chairman of the Board of Trustees of the American Immigration Law Foundation (2004-2006). He was also the Secretary and member of the Executive Committee (2003-2007) and the Chair of the Committee on Immigration and Nationality Law (2000-2003) of the New York City Bar. He is a frequent speaker and writer on various immigration-related issues, and is also an Adjunct Associate Professor of Law at Brooklyn Law School where he teaches a course entitled TImmigration and Work.У All opinions expressed herein are the personal views of Cyrus D. Mehta and do not represent those of the organizations he has been part of in the past and presently.

The author thanks Gary Endelman and Vivek Wadhwa for their encouragement and input.