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The H-1B Visa Cap Impedes A Company's Ability To Meet Competition In The Global Marketplace

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It is not uncommon for businesses to find that they cannot fill an employment position in a specialized field, despite a diligent search, with a citizen of the United States. In such cases, the H-1B visa may be used to afford access to qualified non-resident or non-citizen candidates for such positions where the prospective employee is a resident and citizen of a foreign country who possesses "highly specialized knowledge" in a specialized field with at least a bachelor's degree or higher. Unfortunately, while the H-1B¹ visa may respond to a company's specialized employment needs, such relief may prove to be illusory due to the limited number of H-1B visas that can be issued on an annual basis. As illustrated below, arbitrarily placing a cap or quota on the H-1B visas does nothing to protect American workers, and in fact serves only to impair the American employers' ability to remain competitive in the global economy.

The H-1B visa is a non-immigrant employment visa for United States employers seeking to hire skilled temporary workers for the performance of spe-

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cialty occupations. The duration of an H-1B visa is three years and can be extended on a one-time basis for an additional three years.² The H-1B visa is not meant to be a vehicle for hiring lower wage substitutes for qualified

United States citizens or legal permanent residents. To that end, the application process includes restrictive attestation requirements designed to protect existing American employees and the prospective foreign H-1B visa petitioners. Significantly, before hiring a prospective H-1B visa applicant, the prospective employer must attest, as part of its Labor Condition Application for the employee, that: (1) it will pay the required wage rate and benefits to the H-1B employee; (2) the employment of the H-1B employee will not adversely affect the working conditions of other similarly situated workers; (3) it has taken "good faith steps" to recruit U.S. citizens or legal permanent residents to fill the current "specialty occupation" vacancy for which the H-1B employee is sought; and (4) it has not displaced an American employee "employed by the employer" during a period commencing ninety (90) days before the filing of the H-1B visa petition and ending ninety (90) days thereafter.³

Assuming compliance with the attestation requirements and the Labor Condition application, the employer may proceed with the submission of a Petition



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For a Nonimmigrant Worker (Form I-129), to the U.S. Citizenship and Immigration Service ("USCIS") for the issuance of a H-1B visa required for it to hire qualified foreign workers capable of fulfilling "specialty occupation[s]."⁴ A "specialty occupation" has been defined by Congress as any "occupation that requires (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."⁵ While the vast majority of H-1B visas are issued to workers in the information technology and computer industries,⁶ other professionals such as engineers, accountants, lawyers, librarians, psychologists, financial analysts, and journalists might also qualify for H-1B visas.⁷ The H-1B visa's application to a wide spectrum of fields and professions led one group of commentators to call it "the utility in-fielder" of the business immigration world "with [the] power, speed, and the flexibility to handle many positions."⁸

Notwithstanding its acknowledged utility, the H-1B visa application process is the subject of considerable debate. Despite the wide application of the visa, the H-1B visa petitioner is not guaranteed the issuance of a visa. Quotas on the number of visas that can be issued prompts competition between H-1B visa petitioners to be the first in line for the limited number of available H-1B visas in any given fiscal year, often resulting in undue

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delays in the application process for qualified candidates.

Since the enactment of the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"),⁹ arbitrary quotas or "caps" have been in place for the number of H-1B visas issued per year. After the enactment of ACWIA, the then-existing H-1B visa was ill-suited to meet the demands of industry in hiring skilled temporary workers for specialty occupations.¹⁰ In the years following the passage of the ACWIA, it was not uncommon for the annual cap to be exceeded in a given year during the first months of that year.¹¹ Because of these deficiencies, the high-tech industry lobbied Congress to increase the annual cap on skilled workers under the H-1B visa.¹² These efforts, however, were met with staunch opposition from pro-labor and anti-immigrant lobbies from both sides of the political spectrum.¹³ Ultimately, a compromise was reached by amending ACWIA. The new amendment, which became known as the American Competitiveness in the Twenty-First Century Act of 2000 ("AC 21"),¹⁴ arbitrarily raised the cap from 65,000 to 115,000 for fiscal years 1999 and 2000 and then, arbitrarily reduced it to 107,500 in fiscal year 2001.¹⁵ In time, however, the cap was again outpaced by the brisk American economy, particularly in industries that had acute demands for H-1B skilled workers.¹⁶ As a result, the limit on H-1B visas was again increased to 195,000 for fiscal years 2001 through 2003.¹⁷

While this increase was a temporary "improvement," it was not a solution to the problems faced by American employers, who remain unable to fill a wide array of "specialty occupations" with skilled workers. This dilemma spurred many employers to begin to move toward outsourcing their employment needs to the countries of origin for their H-1B visa applicants.¹⁸ A natural criticism of the cap is that the numbers set by Congress "fail to accurately predict the needs of industry. Given the artificial limits set by Congress for H-1B visas, industry has been,

and continues to be, uncertain about whether it will have a sufficient number of skilled workers on a year-to-year basis. A logical consequence of this uncertainty and confusion is the movement of high-tech firms overseas, closer to their ready source of skilled human capital."¹⁹ While cognizant of these dangers, but still missing the "big picture," Congress enacted the H-1B Reform Act of 2004,²⁰ which exempted up to 20,000 petitioners from the H-1B visa who had attained advanced graduate degrees from United States universities.

These measures fall short of the mark. Congress' actions in this regard have been ineffective at best, with ever-fluctuating H-1B cap numbers that do not adequately address the needs of a competitive marketplace. For the fiscal year 2007, the H-1B statutory cap has been reduced to the minimum number of 65,000.²¹ The significance of the limits on the number of H-1B visas that can be issued is well-illustrated by the fact that on April 1, 2006 USCIS began accepting advance filings of H-1B applications for employment in fiscal year 2007 (i.e., for employment that will begin on or before October 1, 2006)²². Only two months later, on June 1, 2006, the mandated cap of 65,000 visa petitions was reached.²³ As the manner and rate at which the fiscal year 2007 H-1B visas were exhausted indicates, existing structure for the issuance of visas is wholly inadequate and unresponsive to the needs of American industry to remain competitive in ever expanding world-wide markets.

The arbitrary nature of Congressional attempts to increase and decrease the cap has not addressed the needs of American employers in their push to remain competitive in the twenty-first century. The only way that American employers can remain competitive in the global economy is through a flexible, laissez-faire approach where the marketplace dictates the demand for skilled temporary workers instead of a cap regulated arbitrarily by Congress.

¹ See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (1994). See also, *Steel on Immigration*, §3:13, 3-73-74.

² See 8 U.S.C. § 1184(g)(4).

³ See 8 U.S.C. § 1182(n)(1).

⁴ See 8 U.S.C. § 1184(i).

⁵ See id.

⁶ See *Simone M. Schiller*, Does the United States Need Additional High-Tech Work Visas or Not? A Critical Look at the So-Called H-1B Visa Debate, 23 *Loy. L.A. Int'l & Comp. L. Rev.* 645, 653 (Oct. 2001) (hereinafter "Schiller") ("The majority of H-1B visas are issued for occupations in systems analysis, computer programming, and electrical or electronic engineering occupations, from India, China, Canada, the United Kingdom, and the Philippines."); see also, *Jung S. Hahn*, American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests under the New H-1B Visa Program, 85 *Cornell L. Rev.* 1673, 1675 (Sept. 2000) (hereinafter "Hahn") (noting a trend with regard to the demand in the high-tech sector for H-1B visas).

⁷ See *Austin T. Fragomen, Jr., et al.*, Immigration Law and Business Database, 1 *Immig. Law & Business* §2:45 (Oct. 2006).

⁸ See *John F. Horyto and Michael E. Stroster*, Get Into The Game, 84-AUG *Mich. B.J.* 26, 27 (Aug. 2005)

⁹ See *American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA")*, (Pub.L. 105-277, 112 Stat. 2681-653 (Oct. 21, 1998)).

¹⁰ See *Schiller* at 646-47.

¹¹ See id. at 646.

¹² See id.

¹³ See *Hahn* at 1684 (citation omitted).

¹⁴ See *American Competitiveness in the Twenty-First Century Act of 2000 ("AC 21")*, Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

¹⁵ See *Austin T. Fragomen, Jr. et al.*, *H-1B Handbook at §1:10* (hereinafter "Handbook").

¹⁶ See id.

¹⁷ See id.

¹⁸ See *Michael Meehan*, Outsourcing Information Technology to India: Explaining Patterns of Foreign Direct Investment and Contracting in the Software Industry, 2 *B.Y.U. Int'l L. & Mgmt. Rev.* 285 (Spring 2006).

¹⁹ See *Hahn* at 1692.

²⁰ See *Consolidated Appropriations Act, 2005 (Includes L-1 Visa and H-1B Visa Reform Act, and the H-1B Visa Reform Act of 2004)*, Pub. L. No. 108-447, 118 Stat. 2809 (Dec. 8, 2004).

²¹ See 8 U.S.C. § 1184(g)(1)(A)(2006) ("The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)...may not exceed 65,000."). Of that number, 6,800 H-1B visas are earmarked for citizens of Chile and Singapore under the Chile and Singapore Free Trade Acts. See *United States-Chile Free Trade Agreement Implementation Act*, Pub. L. No. 108-77 (Sept. 3, 2003); and *United States-Singapore Free Trade Agreement Implementation Act*, Pub. L. No. 108-78 (Sept. 3, 2003). Any unused Chilean or Singaporean H-1B visas will revert to the general pool of H-1B applicants and will be available on the first day of the next fiscal year.

²² See *Handbook* § 1:19.

²³ See *USCIS Press Release*, USCIS Reaches H-1B Cap, www.uscis.gov/graphics/publicaffairs/newsrels/FY07H1BCap_060106PR.pdf (visited Oct. 31, 2006).