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The H-1B Visa: Potential Overhaul Ahead?

BILLS WOULD ALLOW FOR INCREASE IN NUMBER OF FOREIGN WORKERS

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The business community is anxiously observing current activity in Congress, curious to find out whether new legislation might overhaul the H-1B visa program as part of a potential grand bargain on comprehensive immigration reform. Certain themes emerge from various proposals, signaling that major change is indeed possible.

The H-1B program permits employers to recruit or retain foreign professional workers for jobs that require at least a bachelor's degree in a field related to the beneficiary employee's course of study. The employer need not prove that a qualified U.S. worker is unavailable, unless the employer petitions for large numbers of H-1B workers or has been a willful violator of program requirements.

Employers must attest that they will pay the H-1B employee the greater of the offered wage or the prevailing wage and that employing the H-1B worker will not adversely affect working conditions of U.S. workers. Congress has amended H-1B program requirements several times, most recently in 2004, each time adding new requirements and increasing user fees.

The proposals pending in Congress signify that this trend will continue. Each bill would increase the overall numerical limitation of H-1B visa numbers, while imposing new requirements related to recruitment of U.S. workers, prevailing wage requirements, and user fees.

Proposals in the House and Senate

On June 27, the Senate passed the "Border Security, Economic Opportunity, and Immigration Modernization Act." This bill, which emerged from a bipartisan compromise reached among eight senators (Gang of Eight), received a great deal of attention due to the eleventh-hour Corker-Hoeven border surge amendment, which calls for adding 700 miles of fencing and, by September 30, 2021, increasing to 35,405 the number of Customs and Border Patrol Agents.

A bipartisan group, the Gang of Seven, is working on a corresponding bill in the House of Representatives. House Republicans, meanwhile, have not yet resolved whether to fix the broken immigration system through a comprehensive approach or to deal with particular immigration issues on a piecemeal basis.

Pending resolution of that debate, the House has taken action on two bills containing H-1B provisions. On April 15, H.R. 1227, the "Stopping Trained in America Ph.D.s From Leaving the Economy Act of 2013" (the STAPLE Act), introduced by Representatives Erik Paulsen, R-Minnesota, and Mike Quigley, D-Illinois, was referred to the House Subcommittee on Immigration And Border Security where it remains pending.

On June 28, the House Judiciary Committee approved H.R. 2131, the "Supplying Knowledge Based Immigrants and Lifting Levels of STEM Visas Act" (SKILLS Visa Act),

which was introduced by Representative Darrell Issa, R-California.

Potential Increase In Visas

All three measures pending in Congress propose significant increases in H-1B numbers. Current law sets a limit of 65,000 annually, plus 20,000 exempt numbers for beneficiaries who have earned an advanced degree in the U.S. Institutions of higher education, related or affiliated non-profit entities, as well as non-profit and government research organizations, are exempt from the cap. As of April 7, the U.S. Customs and Immigration Service received approximately 124,000 petitions, completely exhausting the 2014 fiscal year allocation during the first five days in which employers could file.

The Senate bill advances a market-based approach, increasing the base to 115,000 and ceiling to 180,000. The numbers will fluctuate up or down within this range depending on the preceding year's usage plus increases or decreases based on the volume of petitions received by milestone dates in each fiscal year. Increases may not take place, however, in any fiscal year in which the national occupation unemployment rate for Management Professional and Related Occupations, as published by the Bureau of Labor Statistics each month, averages 4.5 percent or greater over



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the 12-month period preceding the date that DHS sets the cap. As of June 2013, the BLS reports that the unemployment rate for this occupation group is 4.2 percent.

The Senate bill also increases the advanced degree exemption to 25,000. The exemption will be limited to H-1B workers, however, who earned their U.S. master's or advanced degrees in a science, technology, engineering or math (STEM) discipline.

The SKILLS Visa Act Increases the H-1B cap to 155,000 and expands the advanced degree exemption to 40,000. The exemption applies only to beneficiaries who have obtained a U.S. master's degree in a STEM field (preceded by a STEM bachelor's degree) or to beneficiaries with a U.S. doctorate degree in a STEM field or who have successfully completed a dental, medical, or veterinary residency program or obtained an MD, DDS, DMD, DO or DVM degree.

The STAPLE Act simply exempts from the H-1B cap all beneficiaries who have received in the U.S. a Ph.D. degree in a STEM discipline where the employer requires the doctorate-level degree to enter into employment.

Proposed Recruitment Requirement

The Senate Immigration Bill requires all H-1B employers to recruit for a 30-day period in good faith U.S. workers for the position using procedures that meet industry-wide standards as well as posting the job on a U.S. Department of Labor website. Employers must offer wages that are no less than those offered to the H-1B employee.

In addition, any employer whose workforce is composed of more than 15 percent H-1B workers in high skilled jobs would be considered a "Skilled Worker Dependent Employer" and must first offer the job to a U.S. worker who is equally or better qualified. Employers can exempt from these calculations those employees who intend to become permanent residents, as evidenced by the employer filing a permanent labor certification application (first step of the green card process) or immigrant petition. Neither of the two bills in the House proposes to

amend current law with respect to recruitment or non-displacement requirements.

Prevailing Wage Requirements

Both House and Senate proposals would increase prevailing wage rates. The current system for establishing prevailing wages, as set forth in The H-1B Visa Reform Act of 2004, required the U.S. Labor Department's prevailing wage data to set forth wages in four levels, depending on experience, education, and the level of supervision. The National Prevailing Wage Center issues prevailing wage determinations based on the employer's job description and minimum requirements.

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For example, where a professional position requires at most a bachelor's degree, plus two years of experience, the wage center likely will issue a Level 1 prevailing wage, which is the lowest. On the other hand, a job that requires a Ph.D. plus several years of experience would receive a Level 3 or 4 prevailing wage, the highest.

The Senate Immigration Bill would replace the current system with only three prevailing wage levels for general industry, but would retain the four-level system for teaching and research positions at institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, and government research organizations. In addition, it would require H-1B Dependent Employers to offer not less than Level 2 wages. The bill defines petitioners who employ 15 percent

of their workforce in H-1B status as H-1B Dependent Employers. (In contrast, H-1B Skilled Worker Dependent Employers, as defined in the Senate Immigration bill, employ 15 percent of their H-1B workforce in high skilled positions.)

The SKILLS Visa Act proposes to protect U.S. workers by establishing a three-level system in a manner that addresses Representative Issa's concern that H-1B employers use Level 1 wages too often. Entry-Level H-1B workers who are hired within a year of graduation are eligible for Level 1, 2 or 3 prevailing wages, but all other H-1B workers are eligible only for Level 2 or 3 wages.

Fees Increases

The Senate Immigration Bill would increase certain fees first introduced in 1998 by the "American Competitiveness and Workforce Improvement Act." Small companies would see an increase from \$750 to \$1,250 per petition and larger companies (more than 25 employees) would pay \$2,500 instead of the current \$1,500 fee.

The SKILLS Visa Act imposes a new requirement that all foreign educational credentials must be verified by a public or private entity designated by the U.S. Department of State and authorizes collection of a fee for this service.

Conclusion

It remains to be seen whether these measures will be taken up in the conference committee that will resolve differences in immigration bills passed by the House and Senate. Of course, the House must first pass an immigration bill, and on July 10 the House Republican Caucus leadership stated that "House Republicans affirmed that rather than take up the flawed legislation rushed through the Senate, House committees will continue their work on a step-by-step, common-sense approach to fixing what has long been a broken system." Employers should anticipate additional regulation and greater fees in exchange for raising the H-1B cap if the two chambers ever do come together to modify the H-1B program. ■