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

B-1 IN LIEU OF H-1B VISA IN JEOPARDY: DON'T THROW THE BABY OUT WITH THE BATHWATER

Posted on May 26, 2011 by Cyrus Mehta

By Cyrus D. Mehta and Myriam Jaidi

The "B-1 in lieu of H-1B" visa has been an important and legitimate source of flexibility facilitating the needs of global businesses and business travelers, with significant benefit to the United States economy. The April 14, 2011 letter from Senator Charles E. Grassley to Secretary of State Hilary Clinton and Secretary of Homeland Security Janet Napolitano in light of the lawsuit against Infosys, may threaten the existence of this important category. We write to clarify its utility for American businesses in a globalized world, and strongly urge that the "B-1 in lieu of the H-1B" not be eliminated as this will undermine US competitiveness.

As we noted in a recent article on the B-1 category, the B-1 business visa remains one of the "most ill-defined" visas but plays a very important role in providing flexibility to business travelers. While the B-1 visa is associated with visiting the US to participate in meetings and negotiate contracts, the "B-1 in lieu of H-1B" was created to facilitate travel to the US of individuals who would otherwise qualify for an H-1B visa, but only needed to come to the United States for a limited period of time. In the current controversy over the US of the B-1, scant attention has been paid to the "B-1 in lieu of the H-1B," which permits broader activities than the regular B-1 visa, albeit for a short period of time. Indeed, many of the activities that have been alleged to be outside the scope of the B-1 may be permissible under the "B-1 in lieu of the H-1B." Hence, what has been alleged to be fraud may not really be the case if viewed under activities permissible under the "B-1 in lieu of the H-1B."

The "B-1 in lieu of the H-1B,", which is in 9 Foreign Affairs Manual § 41.31 Note 8, and available on the US Consulate, Mumbai, website is tightly regulated and

involves strict requirements. First, qualified individuals must otherwise qualify for an H-1B visa, meaning they must be working in a specialty occupation and qualify for the position by means of a bachelor degree in a specific field required for the occupation. In addition, they must show nonimmigrant intent (established by showing significant ties to their home country, including establishing that they have a residence abroad that they have no intent to abandon), must be regularly employed abroad and their salary must be paid by their employer abroad. They may perform work in the United States only for a limited time and only if they continue to be paid abroad, and not by the United States entity for which they are performing services. These are not simple showings to make, especially to consular officers trained to spot applicants who may wish to stay beyond the term of their B-1 visa status.

One issue raised in the controversy concerning the "B-1 in lieu of H-1B" is the absence of the prevailing wage obligation by the employer. The H-1B visa is one of the few visa categories that requires that nonimmigrants in this status be paid at least the "prevailing wage" (the average rate of wages paid to workers similarly employed in the geographical area of intended employment) and to have a labor condition application (LCA) certified before the petition may proceed. Prevailing wage data is available from many sources, including the Department of Labor's Foreign Labor Certification Data Center, available here: http://www.flcdatacenter.com/. Other temporary nonimmigrant work visa categories such as the O-1, TN, L, E, P and others do not require an LCA or a promise to pay the prevailing wage in order to be approved. Thus, contrary to Senator Grassley's assertions, the fact that an LCA is not required for the "B1 in lieu of H-1B" is not so unusual within the US nonimmigrant visa system, and if properly applied, should not be viewed as an attempt to skirt the rules, nor should it be mischaracterized as a loophole.

The category plays an important role in filling a gap in the available visa categories for short-term, professional workers. Moreover, it can only be used by a multinational business that has the ability to regularly employ the individual at an overseas entity while he or she is in B-1 status. There are other companion "in lieu of" B-1 categories such as the "B-1 in lieu of the H-3" and the "B-1 in lieu of the J-1." These B-1 categories allow for short term training assignments in the US without the need for a US employer to file a lengthy petition or obtain authorization through a J sponsor. All of these are extremely useful and legitimate short term B-1 uses that allow a US business to remain

competitive and responsive to spontaneous short-term needs in a globalized economy. We urge that the baby not be thrown out with the bathwater just because of ex-parte allegations by a plaintiff in one law suit against an IT consulting company, which has led to further investigations by the US authorities.

The Department of State's (DOS) response to Senator Grassley's missive is troubling in that it conveys that the "B-1 in lieu of H-1B" may be at risk. In a letter by Joseph Macmanus, Acting Assistant Secretary for Legislative Affairs, he says that DOS is "working with the Department of Homeland Security (DHS) to consider removing or substantially amending the FAM note" allowing the B-1 in lieu of H-1B category. However, all hope is not lost as Mr. Macmanus points out that problems with the B-1 category usually result from misrepresentation in the visa application, not from a misapplication of visa law. In addition, Mr. Macmanus's letter makes clear that consular officers are carefully trained to determine whether issuing a B-1 visa or a "B-1 in lieu of H-1B" is appropriate. These categories are not taken lightly and have strict requirements, carefully enforced, with fewer than 1000 "B-1 in lieu of H-1B" visas issued each year worldwide. This restrictive view of the category is sometimes too carefully enforced to the detriment of companies that need individuals from their foreign entities to come to the United States entity for training that is unavailable at the foreign entity, and that is crucial to the global operations of the company as a whole.

We hope that the DOS and DHS continue to recognize and defend the importance of the "B-1 in lieu of H-1B" and other companion "lieu of" categories to international commerce and the benefits that accrue to the United States economy, rather than eliminate it or read it out of existence as a knee jerk reaction to a Senator's objections, especially one who has generally been opposed to the existence of the H-1B and L visa programs.