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HR 3012: A GOOD BILL SADDLED WITH A BAD AMENDMENT

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As Cyrus Mehta noted in his December 7, 2011 blogpost regarding H.R. 3012, "How Fair is the Fairness for High-Skilled Immigrants Act?", although not a perfect bill, H.R. 3012 passed the House in November 2011 by a landslide. The bill, as passed by the House, would eliminate the employment-based per country cap entirely by 2015 and raise the family-sponsored per-country cap from 7% to 15%. The passage of this bill by a margin of 389-15 signaled the strong bipartisan concern with the significant inequities in the immigrant visa system with regard to individuals from certain countries, especially individuals from India and China sponsored for employment-based immigrant visas. Although the country limits addressed by H.R. 3012 were originally enacted for all countries, these limits have resulted in mind-boggling wait times for people from India and China. For example, for Indians in the employment-based third preference (EB-3) category, some have estimated the wait times could be up to 70 years!

The landslide, bi-partisan passage of H.R. 3012 in the House was also proof positive that Congress, despite the gridlock and often seething partisanship, is in fact deeply concerned with repairing our country's dysfunctional and unfair immigration system, especially in at a time when economic and global realities require the United States to reform the system to facilitate our ability to compete more effectively in the global economy. Both our "home-grown" and imported talent will mutually benefit from more reasonable access to visas for highly-skilled immigrant (and nonimmigrant) workers, as many U.S. business leaders such as Bill Gates have attested (see pages 12 to 14 of his testimony). Further proof of that fact is the strong support of entrepreneurs, both foreign

and domestic, by the Obama Administration, as demonstrated by the Start-Up America and Entrepreneurs in Residence initiatives.

Then along came Senator Grassley's hold on the bill in December 2011. After extensive negotiations, on July 11, 2012, Senator Grassley lifted his hold. To remove the hold, senators in favor of the original bill reached what may well be a sort of "Faustian bargain" with Senator Grassley. In order to agree to lift the hold on the bill, Senator Grassley demanded provisions that could severely hamper the already difficult H-1B nonimmigrant visa process and, in tandem with that, hamper U.S. businesses and their ability to compete in the global economy.

So, what's the big deal? This is what Senator Grassley had to say about the amendment he proposed:

> *here is agreement to include in H.R. 3012 provisions that give greater authority to program overseers to investigate visa fraud and abuse. Specifically, there will be language authorizing the Department of Labor to better review labor condition applications and investigate fraud and misrepresentation by employers. There is also agreement to include a provision allowing the Federal Government to do annual compliance audits of employers who bring in foreign workers through the H–1B visa program.*
>
> *I appreciate the willingness of other members to work with me to include measures that will help us combat visa fraud, and ultimately protect more American workers.*

Sounds fine, right? Protect American workers, combat fraud, what's wrong with that? There is of course nothing wrong with protecting American workers and preventing fraud. Supporters of the amendment seem to frame their support in the same way that people who criticize the Constitutional protections against unreasonable searches and seizures and self-incrimination frame those criticisms: if companies are not doing anything wrong, they have nothing to fear, right, from a search, seizure or questioning?

Senator Grassley's description of his proposed amendment is something of a gross oversimplification. First of all, the amendment covers issues already addressed by existing law so query whether the amendment will serve any

constructive purpose. The Immigration and Nationality Act ("INA") and implementing regulations, as well as the related rules promulgated by the Department of Labor ("DOL") addressing the process of obtaining approval of a labor condition application ("LCA"), the necessary first step of the H-1B sponsorship process, already include extensive protections for American workers and provisions to search out and punish fraud, if it does occur. Just to name a few examples, the existing rules require notice to "U.S. workers" (which, pursuant to the DOL regulations at 20 C.F.R. § 655.715, include citizens or nationals of the United States as well as green card holders, refugees, asylees, or "an immigrant otherwise authorized (by the INA or by DHS) to be employed in the United States" – it is unclear who Senator Grassley's term "American workers" includes), provide minimums for offered salaries to ensure that such salaries do not undercut the salaries of U.S. workers, and where employers are "H-1B dependent", the rules require, if such employers offer a salary of less than $60,000 per year, that they attest, and when called upon to do so, demonstrate, that they have made good faith efforts to recruit U.S. workers for the offered position (see 20 C.F.R. § 655.738-655.739)). Penalties for violations of the rules are already included in the statute and governing regulations (see INA § 212(n)(2)(C)).

So what does Senator Grassley's amendment do? The amendment changes, but does not clarify, the trigger for DOL review of an application from "only for completeness and obvious inaccuracies" to "for completeness, clear indicators of fraud or misrepresentation of material fact." The amendment does not define what might constitute "clear indicators of fraud or misrepresentation of material fact," although these may be similar to the ones some authors have observed that USCIS followed (and may still) as indicators of fraud in H-1B cases: companies grossing under $10 million per year, companies with less than 25 employees, companies established less than 10 years ago, etc. Grassley's amendment to the bill also changes the investigation process by removing the need for "reasonable cause" to conduct an investigation based upon a complaint, which continues to be the basis on which an investigation may be commenced. Thus, any complaint, reasonable or not, received by the DOL about an employer could serve as the basis for an investigation.

What does this mean for the process? It could bring the process of getting an LCA approved to a standstill and therefore limit or even prove fatal to an employer's ability to hire a highly skilled foreign worker on an H-1B

nonimmigrant visa. First, let us consider cap-subject cases. Each fiscal year, only 65,000 H-1B visas are available and time is usually of the essence because the H-1B cap "opens" on April 1, for an October 1 start date for cases subject to the cap, and in many years, the cap was often reached on or soon after that April 1 date, so there is great competition for these visas and having them ready to file on time is crucial. Currently, the process of getting an LCA approved takes about 7 business days. During this period, the DOL checks for obvious inaccuracies, checks the existence of the employer, salary details, and whether the employer has made the appropriate attestations, among other details. This 7-day period is a built-in delay of the process. Under the current laws, an investigation may be conducted for a period of up to 60 days (see INA § 212(n)(2)(G)(viii)). Under the proposed amendment, there appears to be no time limitation on the length of time an investigation may continue.

Without any sense of how long an investigation may take, and given the uncertainty of the trigger, an employer who is certain it wants to hire an individual for an October 1 start date, cannot build in more than 6 months of precautionary time for what could amount to a random investigation, because the current process does not allow an LCA to be prepared and submitted to the DOL for processing more than 6 months prior to the intended start date of the H-1B visa. For cases that are not cap subject, such as a company hiring an individual who already holds H-1B status, the risk is losing a highly-skilled prospective employee who may be desperately needed because of uncertain delay in the very first step of the process. The portability process created by the American Competitiveness in the 21st Century Act ("AC21"), which allows a change to a new employer immediately after that employer files an H-1B petition, cannot do anything for an employer looking to transfer someone's H-1B to their company if they cannot get the H-1B petition filed because the LCA process is held up by investigation. Viewed in this light, this amendment to a well-meaning bill would obstruct the flexibility promoted by AC21, the intent of which was to promote the United States' ability to compete in the 21st Century!

Senator Grassley's amendment also allows the DOL to conduct "surveys of the degree to which employers comply" with Grassley's new LCA regime. Exactly how such surveys would be conducted, who would be involved, and how long they might take is unstated. Under Senator Grassley's amendment, the DOL may also conduct annual compliance audits of any H-1B employer. Of course,

compliance audits are already a part of the existing rules. However, the new twist is that the DOL must conduct such annual compliance audits of "each employer with more than 100 full-time equivalent employees who are employed in the United States if more than 15 percent of the number of such full-time employees are H-1B nonimmigrants . . . ." Although there is a four-year period between allowed compliance audits for employers who pass muster, the amendment also provides for publication of the DOL's findings. Given the current anti-immigrant climate and the tendency of many people to blame foreign workers for the lack of available jobs, publishing results even of companies who are completely in compliance could lead to backlash against the companies, or could lead companies to avoid hiring foreign workers in the United States, and perhaps moving operations overseas or to Blueseed to avoid exposure.

Removing per-country limits on employment-based immigrant visas and increasing the limits on family-based immigrant visas are obviously laudable goals, but query what risks Senator Grassley's amendment poses. The reality appears to be that the amendment will not serve its stated ends but rather will serve to obstruct access to highly-skilled foreign workers and undermine U.S. businesses and their ability to compete in the global economy. Perhaps it would be best if H.R. 3012 were passed – without Senator Grassley's amendment.