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THE MANY PROBLEMS SURROUNDING THE H-1B VISA CAP

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Everyone was rushing to file H-1B visa petitions between the April 1-5 window as there was a sinking feeling that the USCIS would receive more than the 65,000 cases allocated under the H-1B annual cap as well as more than the 20,000 cases under the additional Master's cap. Just as we were emerging from the H-1B filing madness – as we were all underwater working desperately hard for our clients – USCIS announces on April 5 itself that both the caps have been reached.

This means that all H-1B cases properly filed between April 1-5, 2013 will be subject to a randomized lottery. It also means that those not selected, will need to wait to file next April 2014. If we do not get more H-1B visa numbers from Congress, people rejected this year could stand a chance of being rejected next year in 2014 too based on the randomized lottery. Those who will be selected, and the chances of being selected depend on how many more H-1B cases USCIS received over 85,000, can only start their H-1B employment on October 1, 2013.

If a company now wishes to hire a badly needed engineer from abroad, it will need to wait till October 1, 2013 before this person can come on board, and that too if this worker was lucky enough to be selected under the lottery. It is self evident that the cap hinders the ability of a company to hire skilled and talented workers in order to grow and compete in the global economy. The hiring of an H-1B worker does not displace a US worker. In fact, research shows that they result in more jobs for US workers.

It is also ironic that the USCIS should announce the H-1B cap on the same day that the job report for March 2013 was announced. The US added a dismal 88,000 jobs in March, but US employers clearly filed more than 85,000 H-1B

cases this week for jobs that they can only fill on October 1, 2013. It will be interesting to further understand why there has been this demand for H-1Bs when the job report was so anemic. The H-1B cap was reached much quicker this year, and the last time the cap was reached so quickly was in 2008. It's clear that the economy has revived notwithstanding the March job report, and business immigration lawyers, who rush to file H-1B cases on behalf of US employers, tend to see upticks and downturns in the economy faster than others! Some more analysis is needed on the latest job report.

Still, it makes absolutely no sense to impose an H-1B cap. Let the market do the job of determining how many H-1Bs can enter the US based on the fluctuating demands of employers. At one point, when the H-1B cap prior to 2003 was 195,000 for a few years, this quota was never filled. Therefore, H-1B quotas do not necessarily dictate how many H-1B visa cases will be filed. It is market conditions that determine H-1B usage. Based on the lessons from the H-1B cap, it does not make sense to impose arbitrary caps at all, especially with respect to other temporary visas. In the negotiations involving comprehensive immigration reform regarding low skilled workers, business and labor trumpeted that a deal had been reached on future flows. When times are good, according to the deal, employers would be able to benefit from 200,000 workers; and when times are not so good they would only be able to get 20,000 workers. While a flexible cap based on market conditions is still better than a fix cap, such as the H-1B cap, there is no way of knowing whether businesses may need more than 20,000 low skilled workers even when there is an economic downturn. And when times are good, there is no way of knowing whether 200,000 visas would be sufficient.

The H-1B cap also arbitrarily forces employers to make hiring decisions for positions that will only materialize after 6 months. In certain industries, such as IT consulting, employers may not yet have an assignment for a worker who may be placed at a third party client site. Yet, an H-1B petition filed without being able to specify with laser precision the work site will be less likely to be approved by the USCIS. Indeed, in recent times, an employer who designated its headquarters as the worksite, when the intention was to place the H-1B worker at client sites, have been criminally prosecuted for not stating its true intentions and for also not paying the workers the H-1B wage until they were assigned to a client.

While the allegations made in the indictment against this employer are

particularly egregious, many bona fide IT consulting employers are unable to precisely locate the work assignment six months ahead of time even though they do have a legitimate roster of clients, ongoing work and have every intention to pay the H-1B worker the required wage as soon as he or she arrives in the US on October 1, 2013. Such employers who genuinely indicate in their H-1B petitions that they may not have a current assignment but do have the ability to offer a position on October 1, 2013, should not be penalized by wholesale denying their H-1B petitions or to be perceived as engaging in fraudulent conduct. After all, the concept of a fixed worksite has become quite antiquated in the second decade of the 21st century as H-1B workers in certain industries can be mobile, work out of their laptops from remote locations, and visit the client location whenever necessary. It is hoped that future H-1B rules give way to the more contemporary notion of a workspace rather than a physical worksite.

Finally, IT consulting employers who hire professional workers from India unfortunately seem to be getting more of a rap for indiscriminately using up the H-1B visa. However, it is this very business model has provided reliability to companies in the United States and throughout the industrialized world to obtain top-drawer talent quickly with flexibility and at affordable prices that benefit end consumers and promote diversity of product development. This is what the oft-criticized "job shop" readily provides. By making possible a source of expertise that can be modified and redirected in response to changing demand, uncertain budgets, shifting corporate priorities and unpredictable fluctuations in the business cycle itself, the pejorative reference to them as "job shop" is, in reality, the engine of technological ingenuity on which progress in the global information age largely depends. Such a business model is also consistent with free trade, which the US promotes vehemently to other countries, but seems to restrict when it applies to service industries located in countries such as India that desire to do business in the US through their skilled personnel.

Negotiations in the Senate regarding high skilled workers in a comprehensive immigration reform proposal suggest that a future H-1B visa for employers who rely on H-1B workers may be more restrictive or they be subject to a much higher fee. If there is so much opprobrium against the use of H-1B visas by offshore IT consulting companies, why not create a whole new visa category that will be linked to free trade in services. This visa, which we can call a Service

Visa, can be somewhat more restrictive than the H-1B visa by requiring a lesser duration of time and perhaps require that the worker be employed at the foreign entity before such a visa can be used. It also need not allow “dual intent” and require the worker to have ties with the home country. If such a worker is to be sponsored for a green card, he or she may have to first switch to the H-1B visa.

In conclusion, H-1B caps are generally bad for US employers and for the economy, and this one on April 5, 2013 has been particularly nasty. They do not allow employers to function and compete in a more natural market for skilled workers. The H-1B cap has not been raised for a long time, and it is time that we creatively reform the system rather than forcing employers to madly rush to file H-1B petitions in early April each year, only to find their fate being determined by a randomized lottery with respect to workers they so badly need to remain competitive.