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WORKABLE OR UNWORKABLE? THE H-1B AND L-1 VISA PROVISIONS IN BSEOIMA, S. 744

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The Senate Immigration Bill, S. 744, entitled the Border Security, Economic Opportunity, and Immigration Modernization Act (BSEOIMA) has been applauded by immigration advocates for bringing much needed changes to the broken immigration system. Although the bill does not have everything that everyone wants, S. 744 offers a pathway to legalization for the 10 million undocumented, a new W visa to allow for future flows of lower skilled immigrants and attempts to clear up the backlogs in the employment and family preferences. It also reforms the existing system in many ways by removing the 1 year bars to seeking asylum, creating a startup visa for entrepreneurs, clarifying a contentious provision under the Child Status Protection Act, providing greater discretion to both Immigration and Judges to terminate removal proceedings, among many other beneficial provisions. We refer readers to David Isaacson's insightful blog post, SOME PRELIMINARY OBSERVATIONS REGARDING THE PROPOSED "BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT.Unfortunately, the H-1B visa, and accompanying L-1 visa proposals in BSEOIMA have not been received with the same jubilation as other parts of S. 744. The main concern on everyone's mind is how the bill would deal with the shortage of H-1B visa numbers. For FY14, which commences on October 1, the H-1B cap was reached on April 5, 2013. S. 744 increases the H-1B cap undoubtedly, but this increase is accompanied by changes to the H-1B and L visa programs, which may make it more difficult to obtain H-1B and L visas quickly. A nonimmigrant visa ought to provide a quick pathway for a much needed worker to be employed in the US. This BSEOIMA fails to do. BSEOIMA increases the H-1B ceiling to 110,000, which could go all the way up to 180,000.

However, any increase or decrease in H-1B visa numbers cannot be more than 10,000 visas from the previous year. The market based adjustments from year to year, according to the succinct BAL summary, will be based on the number of H-1B visa petitions in excess of the cap and the average number of unemployed persons in "management, professional and related occupations" when compared to the previous year. Moreover, BSEOIMA will also increase the Master's cap from 20,000 to 25,000, but this new cap will only be applicable to those who have graduated from universities with advanced degrees in STEM (Science, Technology, Engineering and Math) fields. This would be a significant improvement from what we have today, which is a paltry 65,000 H-1B visas plus 20,000 for advanced degree holders, which under current law is not restricted to only STEM degree holders. The Society of Human Resource Management found in a recent national survey that 2/3 (66%) of employers hiring full-time staff experienced difficulty in recruiting scientists, engineers, and cutting-edge technical experts, an increase from 52% in 2011. Until this gap between demand and supply is closed, the US economy cannot reach its true potential.

The current H-1B base cap dates back to 1990 when the American economy was only 1/3 its current size and when the importance of STEM talent was nowhere as evident as it is today. Our H-1B policy predates the full impact of the Internet and the transition to a knowledge based economy. While we welcome the concept of an H-1B cap escalator, it is overly complex and its lack of precision will not accurately predict or reflect the actual and ever-rising demand for world-class expertise. For this reason, Congress would be well-served to adopt the methodology set forth in the bipartisan Immigration Innovation (I-Squared) Act (S. 169) which simply and elegantly links H-1B annual adjustments to how fast the H cap had been reached that same year. Unfortunately, in exchange for an increase in H-1B visas to 110,000, with further adjustments based on a market based adjustment formula, BSEOIMA imposes significant restrictions to accessing the H-1B visa for all employers, as well as L-1 visas for some employers, which will adversely affect corporate immigration practice. Unlike the 4 level wage system we have today, BSEOIMA will replace it with 3 wage levels, and all non-DOL wage surveys must be specifically sanctioned by DOL. The new Level 1 wage shall be the mean of the lowest two thirds of wages surveyed but can't be less than 80% of the mean of the wages surveyed. This is clearly wage inflation with a vengeance. Dependent employers will only be able to pay new Level 2 wages, which is the mean of all

wages. The third level shall be the mean of the highest two thirds of wages surveyed. All employers will have to now attest that they have recruited for the position before filing an H-1B petition via an internet posting for 30 days, including advising where applicants can apply for the job. Dependent employers will have to undergo additional recruitment steps. The employer must offer a job (not just decline to hire the H-1B beneficiary) to any US worker who applies and who is "equally or better qualified." One can imagine how this will be interpreted by the DOL when an employer takes the top graduate of Wharton in a Bachelor's program and turns down a U.S. applicant with an MBA from the University of Podunk. Or, a law firm employer offers a position to a JD from a national law school over someone with comparable grades and achievements from a local law school. Will an employer dare to take the chance that might not be viewed as legitimate by the DOL? There is more. The period within which an H-1B complaint can be brought against the H-1B employer is lengthened from 12 to 24 months, even when DOL itself complains or when the source remains anonymous. This can also encourage malicious complaints from restrictionist organizations, and is bound to result in many more H-1B investigations especially when the bill authorizes annual H-1B compliance audits for any employer with more than 100 employees if more than 15% are in H-1B status. The advertisement must contain all requirements including the higher than market wage salary. The compelling rationale for all this is the obvious desire to discourage H1B sponsorship by making it more expensive, more invasive, and less concerned with protection of business norms.

Non-dependent employers will also be subject to the non-displacement attestations, which until now have only been applicable to dependent employers or willful violators. Employers will need to attest that they have and will not displace a US worker within the 90 day period before and after filing an H-1B visa petition, but they will not be subject to such a non-displacement attestation if the number of US workers employed in the same O*Net job zone as the H-1B worker have not decreased during the past one year ending on the date of the filing of the labor certification application. Dependent employers will be subject to a longer non-displacement period of 180 days, and they will not be able to take advantage of the non-reduction of workforce in the same job zone exception available to non-dependent employers. We saw when similar recruitment and non-displacement attestations were imposed on certain financial institutions and other entities that were bailed out by the US

government under the Troubled Asset Relief Program (TARP) that they stopped using the H-1B visa program and even rescinded offers to foreign MBAs who were graduating from top business schools. BSEOIMA seems to abhor the notion of "outplacement" of H-1B workers and L-1 workers, even while assigning workers to third party client sites is part of the business model of certain industries such as IT consulting. Dependent employers may not "place, outsource, lease, or otherwise contract for services or placement of an H-1B nonimmigrant employee." A non-dependent employer must pay $500 if "outplacing" an H-1B worker. This model has been readily embraced by American companies, and provides efficiency by allowing companies to utilize skilled IT resources whenever needed. Consumers benefit, and it also allows companies to hire US workers higher up in the food chain.

The definition of "Dependent Employer" will remain the same: 1) Employer with 25 or fewer full time employees who hire more than 7 H-1B nonimmigrants; 2) Employer with at least 26 but not more than 50 full time employees who hire more than 12 H-1B nonimmigrants; 3) Employer with at least 51 full time employees who hire at least 15% of H-1B nonimmigrants.
Moreover, BSEOIMA seeks to ultimately bar a category of so called "super dependent" H-1B or L-1 employers by FY 2017 from filing new H or L petitions if more than 50% of their workforce are in H-1B or L status and hire 50 or more employees. For the first time, there will be a restriction on L employment too as a result. There is a sliding scale for this over the next few years: (1) if the employer employs 50 or more employees, and there is no distinction between full or part-time, the number of H-1B and L-1B, but not L1A, employees together cannot exceed 75 % of the total number of employees for FY 2015; (2) 65 %of total number of employees for FY 2016 and (3) 50% of total number of employees after FY 2016 which starts on October 1, 2017 . This does not apply to universities or non-profit research centers.The filing fees for the H-1B and L go way up in a clear effort to discourage such visa sponsorship. For FY 2014-FY 2024, the H-1B and L filing fee will be $5000 for an employer that employs 50+ employees in the USA if more than 30% but less than 50% of such employees are in H or L status. From FY 2014-FY 2017, the filing fee goes up to $10,000 per H-1B or L petition if the employer employs 50+ employees, again no distinction between full or part time, if more than 50% but less than 75% of such employees are in H1B or L status. BSEOIMA goes beyond the L-1 Visa Reform Act of 2004 which allowed outplacement of L-1B workers so long as the L1

beneficiary remained under the direction and control of the petitioner. Here, even if this was the case, such secondment would be limited to an affiliate, subsidiary or parent of the L1 petitioner. All L employers who place L-1s at third party sites are now subject to a displacement obligation of 90 days before and after the L petition was filed. For a new office L, the L beneficiary could not have been the beneficiary of 2 or more L petitions in the immediately 2 preceding years. For the first time, BSEOIMA introduces an explicit provision for L investigations that can be based on anonymous sources. In addition, DOL shall conduct annual L compliance audits for each employer with more than 100 employees if more than 15% are in L status. Non-compliance with new L restrictions can lead to fines up to $2000 per violation and a 1 year debarment + an obligation to make the employee whole through payment of lost wages and benefits. A willful misrepresentation of a material fact on an L petition can result in $10,000 fine and 2 year debarment. The DHS Inspector General must prepare a report on fraud and abuse in Blanket L program within six months of enactment. The opponents of immigration have long sought to impose on the L-1 visa many of the same straightjacket restrictions that have suffocated the H-1B. Now it seems they have a major victory. While these provisions against dependent employers are designed to put certain industries out of business that rely on H-1B and L workers, BSEOIMA introduces the concept of "intending immigrant" which does provide some respite. If an employer has an H-1B or L employee who is an "intending immigrant," that worker is not counted in the employer's dependency or "super dependency" calculation. With respect to not counting an alien from the dependent calculation who is the subject of the labor certification, the employer has to qualify first as a "covered employer" who is an employer of an alien, which during the one year period that the employer filed a labor certification application for such alien, has filed I-140 petitions for not less than 90% of the total labor certifications filed during that one year period. However, labor certification applications pending for longer than 1 year may be treated for the calculation as if the employer filed an I-140 petition. The purpose of this "covered employer" definition is to probably ensure that employers do not file labor certifications without pursuing permanent residency on behalf of their employees. In reality, most employers who take the trouble to file labor certifications will go ahead and file the I-140 petition within the 180 day expiration period. It is clear that Professor Ron Hira, a critic of the H-1B and L visa program, was engaging in sophistry in his testimony before the Senate committee when he said that it would be easy for

employers to avoid becoming dependent employers through paper pushing!!The question is what happens to the "covered employer" status if an I-140 petition (among the 90%) gets denied based on an ability to pay issue or a 3 year degree issue. All that the definition of "covered employer" requires is that the I-140s have been filed for no less than 90 percent of the aliens for whom a labor certification was filed during the 1 year period. With respect to not counting an alien who is the beneficiary of a pending or approved I-140 petition from the dependency calculation, the employer does not have to establish that it is a "covered employer."

A pending or approved I-140 petition on behalf of a foreign national will remove that person from the employer's dependency calculation. There is a possibility that an amendment might be proposed during the markup phase to remove the "intending immigrant" concept, and so every attempt must be made to preserve this concept in BSEOIMA, so as to give dependent employers some chance to legitimately do business in the US. H-4 spouses will be able to apply for work authorization, but only if the spouse is a national of a country that permits reciprocal employment. While H-4 spouses who are Indian nationals will benefit from this provision (as Indians have been most affected under the EB-2 and EB-3 backlogs), it is worth noting that India does not currently provide employment authorization to spouses of those who hold an Indian employment visa. However, unlike the US with many nonimmigrant visa categories that authorize work, there is only one temporary employment visa category in India. The Indian employment visa does not parallel the H-1B visa in any way. It is difficult to understand why this proviso has been inserted in the bill when spouses of L-1 visa holders (as well as E and J-1 visas) can seek employment authorization without regard to whether the spouse's country permits reciprocal employment. Regardless of a few bad actors, there has been an unjustified anti-India sentiment in immigration policy for a few years. This is the genesis behind all the adverse provisions against H-1B dependent employers in BSEOIMA, who otherwise try very hard to comply with the existing complex rules in place. This sentiment was reflected in the Neufeld memo that was specifically aimed against IT consulting, along with the jaundiced way that Indian equivalent degrees have been viewed by the USCIS. Then, even after an H-1B petition is approved, upon responding to a lengthy RFE and FDNS site visit, the visa applicant is delayed at the US consular post in India (although BSEOIMA brings back visa revalidation in the US for certain work visa

categories). All this happened only since 2009 when all along before that there was no issue of H-1B workers being placed legitimately at third party sites, which is indeed how the business model works to the benefit of US businesses and consumers.

Clearly, the success of the Indian IT global model has led to a backlash in the same way that Japanese car makers were viewed in the late 1980s. The IT global giants along with the smaller IT firms have been "tainted" by the same brush. There is no doubt that corporations in the US and the western world rely on Indian IT, which keeps them competitive. Spurred on by Senators Durbin and Grassley, the architects of BSEOIMA have unwittingly prepared the way for a massive dislocation of the American economy which will no longer be able to benefit from the steady supply of world class talent that the Indian IT providers most directly harmed by this legislative vendetta have always supplied at prices that American business and its consumers could afford. What has gone unnoticed by the so-called Gang of 8 in the Senate is the fact that the ability of American companies to maintain their competitive edge has been due in no small measure, to the very Indian IT global model that BESEOIMA seeks to destroy.
One can also recall Senator Schumer's infamous slip of tongue when he referred to Indian IT companies as "chop shops" instead of job shops at the time Congress outrageously raised the filing fees for certain L-1 and H-1B employers (to fund a couple of drones on the Mexican border), as if job shops is not enough of a pejorative. Senator Durbin also falsely insinuated this week that highly regarded employees of companies like Infosys pay to come to the US. These sentiments will now become part of the law, and it is not hard to guess the senators who have inspired these provisions, further supported by the diatribe of Professor Ron Hira, who spew outrageous falsehoods in the guise of academic scholarship. Perhaps, one can look at the other side of the picture and find out how the H-1B visa program has benefitted the US and even creates jobs. It is unfair to assume that an employer who depends on H-1B workers in engaging in fraud. Interestingly, under BSEOIMA even "non-Indian non-dependent non-fraudulent employers" will need to go through more bureaucratic red tape, and will have to actually offer the job to a qualified US worker (unlike a PERM where all that happens is that the application is not filed) before being able to file the H-1B petition. The provisions that were previously enacted to target dependent employers in 1998 have now been expanded to

cover all employers.

Unfortunately, the H-1B provisions, in an otherwise good Senate immigration bill, reflect a complete lack of understanding of the role of globalization and free trade in services during the second decade of the 21st century, which can benefit the US, India and the world. We need to draw attention to this fact in the hope that these discriminatory provisions against Indian IT, which are also inconsistent with principles of free trade and in violation of GATS, can be eliminated. Indeed, BSEOIMA has extended the additional recruitment attestations that have only applied to dependent employers to all employers, along with artificially forcing employers to pay higher than market wages for H-1B workers.

BSEOIMA seems to give more emphasis on green card sponsorship rather than prolonging the temporary visa status of foreign national workers. To some extent, this is a good thing. By allowing foreign nationals to obtain green cards, it gives them mobility and to not be bound to one employer for many years. There is also a good provision that allows an H-1B who has been terminated to be accorded a grace period of 60 days, and an application to extend, change or adjust status during that period shall be deemed to have been lawful H-1B status while that application was pending. Indeed, many employers may be able to avoid the H-1B process altogether by directly sponsoring STEM advanced degree students on an F-1 visa for a green card without even having to go through the labor certification process. BSEOIMA also allows F-1 students to have dual intent, and so their desire to obtain green cards will no longer impede their ability to obtain an F-1 visa at a US consular post overseas. PhDs, regardless of whether they got the degree from a US institution or not, can also avail of this fast track green card and they do not also need to have their PhDs in a STEM field. Still, not all employers can rely on PhDs and students in the US who graduate with STEM advanced degrees. They will need to rely on the H-1B visa, and to some extent on the L-1B visa, and BSEOIMA will clearly not quell the demand of US companies for IT services and expertise through consulting companies. It remains to be seen whether the H-1B and L provisions in BSEOIMA prove to be workable or not. Everyone thought that when the Labor Condition Application was introduced in the Immigration Act of 1990, that the H-1B visa would become unworkable. Yet, H-1Bs have continued to chug along for 22 years, and if the new provisions get enacted, it is hoped that the government agencies administering the new H and L visa programs will

interpret the provisions in a way that will allow them to work.

BSEOIMA is a transformational document heralding a fundamental realignment of US immigration policy. The paradigm shifts from family ties to merit-based strategies designed to invigorate the economy. Before, it had been easier to come for temporary work reasons and difficult to stay permanently. Now just the reverse will be true. Years ago, the H-1B was a lightning rod for critics while the L-1 sailed on smoothly in calm seas. No longer. For the first time, the L and the H are fused in the minds of its critics. At a time when our permanent immigration model is more open to STEM talent as never before, our H and L policy reflect a pervasive insularity that will contradict our trade commitments, slow down our innovation, and increase the intrusiveness of government regulators as they audit the legitimacy of immigration sponsorship decisions by those American employers who seek to take advantage of this brave new world. For this reason, while BSEOIMA has much to commend it, what it gives on the permanent side of the ledger, it takes away on the H and L side. This lack of internal consistency must be resolved before it is born.