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MEET OUR NEW FRIEND: WHO IS AN "H-1B SKILLED WORKER DEPENDENT EMPLOYER" IN SENATE IMMIGRATION BILL, S. 744?

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Since we last wrote about the H-1B visa provisions in Senate Immigration Bill, S. 744, Workable Or Unworkable? The H-1B And L-1 Visa Provisions In BSEOIMA, S. 744, there have been several changes to this portion of the bill. The amendment proposed by Senator Hatch (after reaching a compromise with Senator Schumer), which passed the Judiciary Committee, sought to water down some of the restrictions that would otherwise make the H-1B visa program unworkable. Seeking to advance the interests of the many high tech companies that have settled in Utah, an accommodation with Senator Hatch implicitly held out the promise of attracting other GOP Senators to vote for the bill when it reached the Senate floor. A bi-partisan Senate bill that passed with 70 votes might serve to provide political cover for embattled Speaker John Boehner to maneuver around the objections of Republican obstructionists and pass CIR with the aid of Democratic votes.

The main concern of many technology companies in Silicon Valley was that the new recruitment requirement would make it impossible for them to use the H-1B visa program, despite the increase in the H-1B visa cap. Under the bill's original provision, the employer would first have to offer the job to any US worker who applied, who is equally or better qualified than the nonimmigrant H-1B worker. It was feared that this would allow the Department of Labor (DOL) to micromanage the employer's recruitment processes, and also determine who an equally or better qualified US worker would be rather than leave it to the employer's best judgment. To the extent that the Hatch amendment shifted power over the H-1B away from the DOL in favor of more market-oriented

forces, it represents a significant attempt to rely upon such influences rather than direct federal regulation as the operating principle of protection for US workers in the immigration context.

As a result of the Hatch amendment, an employer who is not an H-1B Skilled Worker Dependent Employer (SWDE) or a Dependent Employer (DE), which we will explain below, is required to use recruitment procedures that meet industry wide standards and offer compensation that is at least as great as that required to be offered to H-1B nonimmigrants. It no longer requires such an employer to offer the job to an equally or better qualified US worker. Still, it is hard to determine how this would be interpreted by the DOL Does the employer need to establish that there were no qualified US workers who applied or does the employer only need to demonstrate that it does normally also recruit US workers for the same position? We believe that the latter interpretation is more consistent with the language of the Hatch amendment. An employer that is not a SWDE and not a DE will not be subject to the non-displacement attestation unless it files the petition with the intent or purpose of displacing a specific US worker for the position to be occupied by the beneficiary, or workers are displaced who provide services at worksites owned, operated, or controlled by a Federal, State, or local government entity that directs and controls the work of the H-1B worker, or workers are displaced who are employed as public school kindergarten elementary, middle school or secondary school teachers.

But here's the catch. The Hatch amendment also creates a new concept – the SWDE. The SWDE is different from the H-1B dependent employer (DE) as we have known it under the existing law. An SWDE is "an employer who employees H-1B nonimmigrants in the United States in a number that in total is equal to at least 15 percent of the number of its full time equivalent employees in the United States employment in occupations contained within Occupational Information Network Database (O*Net) Job Zones 4 and Job Zones 5." Under this definition, many employers will be SWDE even if they are not dependent employers. Even if they hire thousands of US workers at lower skill levels, one needs to count how many workers are hired at Job Zone 4 and 5, and if the number of H-1B workers exceed 15% of that number, the employer becomes a SWDE. One can imagine the kind of intricate investigations and calculations that an immigration attorney may need to make on behalf of an employer client to find out how many people it hires at Levels 4

and 5 so as to determine whether the employer is a SWDE or not. As long as an employer employs even one US worker at a Level 4 or 5 positions, the hiring of an H-1B worker will render this employer a SWDE (as the hiring of this one H-1B worker will be more than 15% of the number of employees hired in Level 4 or 5). Once the employer is a SWDE, such an employer would be required to have offered the job to any US worker who applies and is equally or better qualified for the job than the H-1B worker..

The SWDE is not based on a gradation like the traditional Dependent Employer (DE) as defined in Section 212n)(3) of the Immigration and Nationality Act:

- An employer is considered H-1B-dependent if it has: 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; or
- 26 – 50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or
- 51 or more full-time equivalent employees of whom 15 percent or more are H-1B.

To qualify as an SWDE, you do not have the less than 25, 12-50 and 50+ to do the calculation. Under the new SWDE definition where you need 15%, even if you have 1 employee in Job Zone 4 or 5, and hire one H-1B, you become a SWDE. This never happened under the DE definition, as you needed to have 7 H-1Bs if less than 25, or 12 H-1Bs if between 25 and 50, or 15% after that. Unlike the DE category, which was supposed to be the exception rather than the norm, the SWDE is more easily satisfied precisely.

Our colleague David Isaacson properly points out that, because of the different rules for small numbers, it will be relatively easy for a small employer to be a SWDE but not a DE. If an employer has 20 or 25 full-time equivalent employees (FTEEs), and 5 of them are H-1Bs who are not intending immigrants, then that employer will be a SWDE even if all of its U.S. workers are in Job Zone 4 or 5, because the 5 H-1Bs are necessarily more than 15% of however many of the 20 or 25 total FTEEs are in Job Zones 4 or 5, but that employer won't be a DE because it has fewer than 7 non-intending-immigrant H-1Bs and one must have more than 7 to be a DE. It is also possible to be a SWDE and not a dependent employer as a large employer, if your total number of H-1B employees who are not intending immigrants is more than 15% of your total "number that in total is equal to at least 15 percent of the number of its full-time equivalent

employees in the United States employed in occupations contained within Occupational Information Network Database (O*NET) Job Zone 4 and Job Zone 5" but is less than 15% of your overall FTEEs, because of your employees in Job Zones 1 through 3 who count towards the denominator of the DE calculation but not the denominator of the SWDE calculation.

Is a dependent employer in a more advantageous position than a SWDE after the Hatch amendment? As a practical matter, it would be very difficult for an employer to be a dependent employer without being a SWDE. So long as an employer hires at least one US worker in a Job Zone 4 or 5 positions, as noted earlier, the hiring of even one H-1B worker would make this employer a SWDE. But there may exist a company that does not hire anyone in a Level 4 or 5 Job Zone. Although Level 4 or 5 Job Zones generally require bachelor's degrees, or higher, there are many Level 3 occupations in O*Net that may require bachelor's degrees some times, but not all of the time. For instances, Business and Operations Managers, Lodging Managers or Food Service Managers are in Zone 3, which can qualify under the H-1B visa, and one can conceive of a hotel establishment hiring both US workers and H-1Bs for such positions that are only in Zone 3.

Has the SWDE made the traditional H-1B employer definition redundant? That might be an incautious overstatement for notable differences still remain. The SWDE has to attest that for 90 days before and after the filing of the Labor Condition Application, it has not and will not displace a US worker. By contrast, an employer who is a dependent employer but not a SWDE, will have to attest that for 180 days before and after the filing of the Labor Condition Application, it has not and will not displace a US worker. Also, strangely, the bill as it exists in its current form, does not require a dependent employer to first offer the job to an equally or better qualified US worker. Is this an oversight where a dependent employer is exempt from the more onerous recruitment procedures that SWDE have to go through, but is still subject to a more vigorous anti-displacement attestation? Only a dependent employer, but not a SWDE, is prohibited from outplacing H-1B workers to third party sites.

The SWDE definition was introduced to catch US-based tech companies than the Indian IT companies, as the latter are in any event dependent employers. In a twist of fate, while the Indian IT companies have been most affected by the H-1B provisions in the bill, the SWDE concept may wind up most severely affecting the very IT giants in this country who looked to Senator Hatch for

legislative relief. The end result may well be to subject them to recruitment obligations that would otherwise not have applied under the traditional H-1B dependent employer definition. Such are the unintended consequences of a compromise that Senator Hatch had to make with other Gang of 8 members, such as Senator Durbin, who have been vehemently opposed to the H-1B visa program. In exchange for a more liberal recruitment regime, the law will make more employers SWDEs and subject them to the restrictive recruitment procedures. Not only may Facebook and Google, to name but two of many such companies, have to adjust to this unwelcome and rude surprise, but it is likely that many IT start-ups, the very entrepreneurs that the Obama Administration claims to want to encourage, will find their growth stymied by the SWDE recruitment obligations that likely were never intended by Senator Hatch to apply to them at all.

This bring us finally to the definitions of “covered employer” and “intending immigrant.” A SWDE will not be subject to the more onerous recruitment requirement, and a DE as well as an SWDE will not be subject to the anti-displacement attestations if they fall under the definition of “covered employer” and are filing an H-1B visa for an “intending immigrant.” The Hatch amendment slightly modified the definition of a “covered employer,” in fact making it easier for a SWDE or DE to get out of the more restrictive requirements. An “intending immigrant” is one who intends to live and work permanently in the US as demonstrated by a pending or approved labor certification that was filed by a “covered employer.” An intending immigrant can also be the beneficiary of a pending or approved I-140 petition A “covered employer,” as amended by Hatch, is an employer who during the year before filing the labor certification on behalf of the intending immigrant, has filed an immigrant visa petition for 90 percent of current employees who were beneficiaries of approved labor certifications during the one year ending six months before the petition in question is filed.

How does this work? The employer who is filing an H-1B on behalf of an “intending immigrant” (for whom a labor certification or an I-140 petition has been filed or approved) needs to look back six months. If the employer had approved labor certifications during the one year period ending six months prior to filing the H-1B petition, and filed immigrant visa petitions for 90% of them during that look back period six months prior, the employer qualifies as a covered employer. One can conceivably argue that if the employer did not have

any approved labor certifications during that look back period, it might still qualify as a covered employer. The covered employer definition applies only to approved labor certifications, out of which 90% have I-140s filed on their behalf. So, if there are no approved labor certifications or no labor certifications even filed, the employer may still be a covered employer, provided the beneficiary of the H-1B petition currently has an approved or pending labor certification or I-140 petition filed on his/her behalf.

The Senate Judiciary Committee's report on BSEOIMA has some alarming language regarding the "covered employer" definition:

> *"Intending immigrants are not counted as H-1B or L nonimmigrants for the purposes of determining whether an employer is an H-1B dependent company or a L visa dependent company. Intending immigrants are defined as persons for whom their employer has started the green card process, including those for whom an Immigrant Petition for Alien Worker (Form I-140) or Application to Register Permanent Residence or Adjust Status (Form I-485) has been filed. However, employers may only take advantage of this counting rule if the employer has actually filed immigrant status petitions for not less than 90 percent of current employees for whom the company filed labor certifications in the previous year."*

Despite this language in the report, it can still be argued that Congress has intended that an employer who has approved labor certifications in the "look back" period follow through with the green card process (as opposed to nominally only filing labor certifications), and thus the requirement that the employer has filed I-140 petitions for not less than 90% of the relevant approved labor certifications. Congress just does not want an employer to push paper and file labor certifications, but to actually carry through with the green card process for its employees. However, if there is no filed or approved labor certification during the relevant period, an employer should still be treated as a "covered employer." If interpreted literally, only a covered employer can invoke the "intending immigrant" exception. Because the Hatch-Schumer amendment narrowed the definition of "covered employer" to require a labor certification as a condition precedent to an I-140 submission, the eligibility of any I-140 petition that does not depend on a labor certification approval is suddenly and surprisingly called into question. Thus, outstanding researchers, persons of extraordinary ability, beneficiaries of approved national interest waivers, multinational managers, and advanced US degree STEM

holders, may never be considered as "intending immigrants" as no labor certifications need to be filed on their behalf. The very people we need to keep most will not benefit. At a time when there are more green card routes around PERM, can it possibly be that H-1B status will be withheld, or made more difficult, from those who take advantage of these new options? Surely this cannot be the intended result of such imprecise drafting. The most vociferous critics of the H-1B programs, such as the IEEE, claim to favor unlimited green cards for advanced US STEM degree holders. Will it be necessary for them to forego, or so drastically curtail, the H category entirely in order to arrive the finish line? Despite this, as explained above, we believe that an employer who files no labor certifications can still seek protection under the chimera of "covered employer." Moreover, despite not having to file a labor certification for the priority worker, the employer may have filed labor certifications for other sponsored employees so that the mantle of "covered employer" does not have to be alien centered so long as it applies generally to the employer in question. Doubtless, it may take a technical amendment to simplify the matter and to bring clarity to the perplexed.

Notwithstanding the exception that has been created for employers to get out of the more restrictive H-1B requirements, it would not be easy for an employer to file a labor certification in order to create an intending immigrant. It takes 60+ days of recruitment before an employer can file a PERM labor certification. An employer who wishes to quickly hire an H-1B worker, may not be able to wait for that long to file a labor certification before filing an H-1B petition, and may rather go through the recruitment requirement for an SWDE under the H-1B provision. Moreover, for a permanent labor certification, the employer has to demonstrate that there were no minimally qualified US workers who applied for the job, which is even more onerous than the recruitment requirement for a SWDE, where the standard is equally or better qualified. On the other hand, a SWDE would not have a choice and may be compelled to file a labor certification to establish that the worker is an "intending immigrant." For instance, an employer whose business model relies on outplacement of employees to client sites will need to first have an "intending immigrant" before it can file an H-1B visa petition.

While an employer may ultimately desire to file for green cards on behalf of their employees, the H-1B visa, like dating before marriage, allows time for both the employer and employee to try each other out before making a

commitment to sponsor the worker for permanent residence and expend resources, including considerable governmental resources to process and adjudicate a labor certification application. BSEOIMA will turn this logical progression upside down. Employers will be forced to start the green card processing for potential H-1B workers even before they have come on board under the H-1B visa, where they can be tested out first. BSEOIMA is transformational as it gives more emphasis to green card sponsorship than temporary sponsorship. Employers will look to ways to avoid the H-1B process altogether, as well as the PERM labor certification process. They will be able to directly sponsor STEM advanced degree students on an F-1 visa for a green card without even having to go through the labor certification process. A merits based point system will kick in four years after BSEOIMA takes effect, which will also allow employers to bypass the H-1B and PERM labor certification. Even for those employers who must resort to the H-1B visa, they may not have to depend on the H-1B visa for too long as one of the provisions in the Hatch amendment will allow a foreign national to apply for adjustment of status even before the priority date becomes current. If the foreign national gets an employment authorization after filing for adjustment of status, it may obviate the need to apply for a renewal of the H-1B status. Finally, BSEOIMA may have unintended consequences for the Indian heritage IT firms, which it seeks to disrupt and put out of business. These firms, besides being forced to file for more green cards, will change their business models and will hire more US workers or will merge with firms that would reduce their dependence on H-1B workers. Thus, in the long run, these firms may be more competitive in the US rather than weakened.

If BSEOIMA does take effect, how will it impact existing H-1B workers? The new recruitment and displacement provisions won't kick in for existing workers. So, even if an employer files an extension for existing employees, these new provisions will not apply even after enactment. On the other hand, the ban on outplacement will take effect even for existing employees with respect to any application filed after enactment. It would thus be incumbent on employers to start planning in advance and file labor certifications on behalf of H-1B employees they were in any event planning to file in the future. This would allow a SWDE to become a covered employer and thus be able to file H-1B visas under the more liberal provisions. Still, BSEOIMA has made the H-1B visa, which was already complex, even more maddeningly difficult. The whole idea of a

temporary visa is to provide employers with flexibility to bring in much needed foreign skilled workers. BSEOIMA utterly and completely fails in this department, and it remains to be seen whether employers will be able to cope with this new temporary visa regime, or whether the drumbeat for further reform will begin soon after the law's enactment.