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PUTTING DISNEY AND H-1B VISAS IN PERSPECTIVE

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Most who read Julia Preston's New York Times article on Disney laying off its qualified programmers to be replaced with Indian programmers on H-1B visas at HCL America are understandably outraged. The fact that Disney axed its employees – an iconic American company that has promoted happiness, gentleness and well being– has let down people even more. There have been more than 3,000 mostly angry comments to the article.

If we put aside the Indian H-1B worker for a minute, no one will doubt that it is business reality for companies to contract out many of their functions, such as IT, accounting or human resources. This practice is not limited to employers using foreign labor, and it is a widespread practice for companies to cut costs by reducing overhead such as payroll and benefits. Would there be similar outrage if an American law firm contracted away its human resources functions and stopped hiring additional HR personnel? Or if an entrepreneur wanted to sell a newly designed stroller with interesting gizmos in the US market, but arranged to have the manufacturing done in China? While we all feel badly for the American workers who may have been laid off, this is an unavoidable part of the quantum advances that have been made in globalization and the information technology revolution, which does not just involve access to foreign skilled labor (even if outside the United States) but even automation and robotics. Tom Friedman once famously said this in his NYT column "Average is Over":

> *In the past, workers with average skills, doing an average job, could earn an average lifestyle. But, today, average is officially over. Being average just won't earn you what it used to. It can't when so many more employers have so much more access to so much more above average*

> *cheap foreign labor, cheap robotics, cheap software, cheap automation and cheap genius. Therefore, everyone needs to find their extra — their unique value contribution that makes them stand out in whatever is their field of employment. Average is over.*

This is not to suggest that the laid off American workers in the Disney episode were average, but it is fervently hoped that the benefits that accrue in contracting away functions in this new era of globalization will allow companies to engage in innovations that will ultimately benefit consumers, which in turn will create more, albeit different, jobs in the United States. Even Disney said that after its reorganization that allowed it to focus on more innovations, it had a net gain of 70 jobs and has created 30,000 new jobs in the past decade.

While the media highlights the cases of Disney and SoCalwhere US workers are laid off and replaced by H-1B workers of an IT consulting company, most employers hire H-1B workers to supplement their workforce and not to replace their workforce. The H-1B visa cap is too small with only a total of 85,000 annual slots, and I personally have represented employers and talented H-1B workers who can no longer be employed because they were not selected under the H-1B visa lottery. It is unfortunate that US employers lost talented foreign workers, many of whom have been educated at US universities. Lower costs, as is commonly believed, is not the driving factor in hiring H-1B workers . The employer has to pay the higher of the prevailing wage or the actual wage it pays similarly situated workers, and so it is generally difficult for an H-1B worker to replace a US worker because they are cheaper. The employer has to also pay filing fees ranging from upwards of $2,325 to $5550, plus lawyers' fees, besides the mandated prevailing wage.

Contrary to how the H-1B visa program is portrayed in the media, an employer does not have to first find a US worker before hiring an H-1B worker, or be concerned about displacing American workers at client locations such as Disney, unless the employer is dependent on H-1B workers or has been found to have been a willful violator. See INA 212(n)(1)(E), (F) and (G) & INA 212(n)(3)(A). But even a dependent H-1B employer or willful violator need not recruit for a US worker first, or be concerned about displacement, if it pays the H-1B worker over $60,000 or the worker has a Master's degree. See INA 212(n)(3)(B). The employer has to pay the higher of the prevailing or the actual wage among the workers that it employs and not which Disney employs. The

replacement H-1B worker relating to the skill needed for Disney's new technology platform need not have 10 years of experience, but probably less experience, and can be paid accordingly but still at the prevailing wage.

Critics of the H-1B program seize upon INA 212(n)(1)(A)(ii), which states that an employer "will provide working conditions for such nonimmigrant that will not adversely affect the working conditions of workers similarly employed." They argue that it is this provision that renders what happened at Disney to be in violation of the spirit of the law, if not the letter of the law. But this is hardly the case. INA 212(n)(1)(A)(ii) represents the second of four attestations that a non-dependent employer makes on a Labor Condition Application. 20 CFR 655.732(b) defines "working conditions" to "include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules." The first attestation is that the employer agrees to pay the higher of the prevailing or actual wage. The third attestation that the employer makes is that there is no strike or lock-out in the occupational classification at the place of employment. The fourth and final attestation requires the employer to provide notice to the bargaining representative, and if none exists, then it must be posted at the place of employment for 10 days.

INA 212(n)(1)(A)(ii) does not mandate that the employer has to first recruit US workers. Elsewhere in INA 212(n) it is clear that only a dependent employer or one found to be a willful violator, who has no exempt H-1B workers, is required to recruit US workers and be concerned about displacing American workers at client sites. See INA 212(n)(1)(E), (F) and (G). While it intuitively makes sense for the employer to be required to test the US labor market before hiring all H-1B workers and be concerned about displacing a US worker, the H-1B visa is a temporary visa, and there is also the countervailing policy interest for employers to be able to expeditiously hire foreign national workers to urgently execute projects. If they wish to sponsor them for permanent residence, there is an elaborate procedure for the employer to first certify that there was no willing or qualified worker for the position. H-1B workers have to also be paid the higher of the prevailing or actual wage, and at times the prevailing wage mandated by the Department of Labor seems to be higher than what it is in reality in many occupations.

The use of IT consulting companies is widespread in America (and even the US government contracts for their services), and was acknowledged by Congress

when it passed the American Competitiveness and Workforce Improvement Act of 1998 (AVWIA) by creating onerous additional attestations for H-1B dependent employers. The current enforcement regime has sufficient teeth to severely punish bad actors. 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" or "body 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 (including the protection of intellectual property rights of its pharmaceutical companies that keep life saving drugs high), but seems to restrict when it applies to service industries located in countries such as India that desire to do business in the United States through their skilled personnel. US companies and IT consulting companies should engage in more public relations efforts to highlight the overall benefits of their collaborations, which in the case of the Disney episode was admittedly not enough.

By continuing to limit and stifle the H-1B program, US employers will remain less competitive and will not be able to pass on the benefits to consumers. We need more H-1B visa numbers rather than less. We also need to respect H-1B workers rather than deride them, even if they work at IT consulting company, as they too wish to abide by the law and to pursue their dreams in America. The best way to reform the H-1B program is to provide more mobility to H-1B visa workers. By providing more mobility, which includes being able to obtain a green card quickly, H-1B workers will not be stuck with the employer who brought them on the H-1B visa, and this can also result in rising wages within the occupation as a whole. Mobile foreign workers will also be incentivized to start their own innovative companies in America, which in turn will result in more jobs. This is the best way to reform the H-1B visa program, rather than to

further shackle it with stifling laws and regulations, labor attestations and quotas.