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THE H-1B AND L-1 PUNITIVE SUPER FEE REARS ITS UGLY HEAD AGAIN

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Last December, Congress passed the Consolidated Appropriations Act (Public Law 114-113) ("Omnibus Bill") that set up the government's budget until October 2016. It is one of Congress's basic tasks to create the budget for the government - something it has failed to do without rancorous debate, shutdowns, threats of shutdowns, and political rigmaroles in the past five years. The passage of the recent bill was not immune to controversy as it only passed after close-to-deadline negotiations with new House Speaker Paul Ryan. And as is par for the course in large spending bills, lurking within the nearly 1000 page bill were pork barrel projects and controversial amendments. The full text of the bill is available here, but what concerns us lies at Section 411, entitled "9-11 Response and Biometric Entry-Exit Fee," and which includes the following language:

- *TEMPORARY L-1 VISA FEE INCREASE.—Notwithstanding section 281 of the Immigration and Nationality Act (8 U.S.C. 1351) or any other provision of law, during the period beginning on the date of the enactment of this section and ending on September 30, 2025, the combined filing fee and fraud prevention and detection fee required to be submitted with an application for admission as a nonimmigrant under section 101(a)(15)(L) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(L)), including an application for an extension of such status, shall be increased by $4,500 for applicants that employ 50 or more employees in the United States if more than 50 percent of the applicant's employees are nonimmigrants admitted pursuant to subparagraph (H)(i)(b) or (L) of section 101(a)(15) of such Act.*
- *TEMPORARY H-1B VISA FEE INCREASE.—Notwithstanding section 281 of the*

> *Immigration and Nationality Act (8 U.S.C. 1351) or any other provision of law, during the period beginning on the date of the enactment of this section and ending on September 30, 2025, the combined filing fee and fraud prevention and detection fee required to be submitted with an application for admission as a nonimmigrant under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)), including an application for an extension of such status, shall be increased by $4,000 for applicants that employ 50 or more employees in the United States if more than 50 percent of the applicant's employees are such nonimmigrants or nonimmigrants described in section 101(a)(15)(L) of such Act.*

In essentials, this confusingly worded section boils down to an increase in the H-1B and L-1 petition fees for certain employers who have 50 or more employees, more than 50% of whom are in H-1B or L-1 status. The provision not only reintroduces the super fee from Public Law 111-230 that sunset on September 30, 2015, but it ***doubled*** that super fee! However, unlike Public Law 111-230, These extra fees will be used to fund healthcare for 9/11 first responders and a new system to track entries and exits using travelers' biometric data. What left many immigration attorneys and businesses scratching their heads was the bill's language that left many things unclear: Should employers should pay the super fee right away because the statute says "*beginning on the date of the enactment of this section*..."? Would the super fee apply to extensions of status because the statute says "*including an application for an extension of such status*"? Are fraud fees now also required in extension of status petitions?

It took nearly a month, but on January 12, 2016 USCIS finally issued its interpretation of the statute in a website announcement that as of January 12, 2016 USCIS began accepting the super fee for eligible H-1B and L-1 petitions. The announcement included some helpful clarifications:

- The fee is **applicable only for initial or transfer filings**, not to extensions of status.
- The super fee was **not required for petitions filed prior to January 12, 2016**.
- The fraud fee is **not required in extensions**.

However, as of writing this blog, USCIS has yet to revise the Form I-129 and Form I-129S. Outside of this announcement there are no other instructions on

the USCIS website, and its page on H and L filing fees has not been updated. Nevertheless, USCIS provides only a 30-day grace period post the January 12 announcement where USCIS will merely RFE for missing fees. After February 11, 2016, USCIS will reject petitions with missing fees.

We accordingly provide the following practice pointers for employers affected by the new super fee to minimize the likelihood of RFEs and rejections or other processing delays:

- Employers should carefully complete the Form I-129, in particular Section 1, Numbers 1.d. and 1.d.1 of the H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement (page 19 of the 36-page I-129 form) and Numbers 4.a and 4.b of the L-1 supplement (page 22 of the 36-page I-129 form).
- Employers ought to make a careful count of their employees and their nonimmigrant statuses.
- When possible, employers should send filing fees in separate checks. In the event USCIS has received extra fees, it will simply return those extra checks to the employer without delaying the process. This way, employers can avoid RFEs or rejections of their petitions.

Given the severe increase in fees, employers affected by the change will have to reevaluate the business costs of filing these petitions. Once totaled, the filing fees can be exorbitant. An initial or transfer H-1B filing for affected employers will total **$6325 in filing fees alone**: ($325 basic filing fee; $500 fraud fee; $1500 ACWIA fee; $4000 super fee). Tack on the premium processing fee and the filing fees alone will total $7550! **For initial L-1 filings, the total filing fee would be $5325** in regular processing ($325 basic filing fee; $500 fraud fee; $4500 super fee). Meanwhile, other employers would pay anywhere from $825 to $2325 for initial H-1Bs and only $825 for initial L-1 petitions. The difference in costs is striking. Indeed, by enacting this super fee targeted at larger companies with nonimmigrant workforces, the U.S. has cemented its anti-immigrant and anti-business stance particularly with respect to India-based technology companies who are disproportionately affected by the punitive fees. Though it is a nation built on the backs of immigrants and their entrepreneurial spirit, the U.S. can't seem to reconcile its claim as the greatest country in the world with the spread of hypocritical and unjustifiable fear of foreign worker takeovers.

It is clear that this severe increase in fees has been aimed against India-based companies to punish them, without giving any thought to the fact that most of corporate America relies on them to run business efficiently, which in turn benefits the American consumer. It is this very business model that 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 U.S. promotes vehemently to other countries (including the protection of intellectual property rights of its pharmaceutical companies that keep lifesaving 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.

It is not necessarily the case that H-1B employees who work in the United States through these IT firms are taking jobs out of the United States. That has been the prevailing rhetoric, but the benefits that IT consulting firms and their H-1B workers provide by way of productivity gains, resulting in an increase in jobs elsewhere and a lowering of costs to the consumer, is often overlooked. As a recent *Times of India* editorial put it bluntly:

These workers are not feeding off the American economy, they are contributing to its innovation and productivity. Jobs are no nation's monopoly; if Indians work hard and well they are not breaching any globally mandated caste system. Indian companies pay taxes and create jobs in the US too. These controversies are not new. But an effective counter to America's Indophobia remains to be found.

The current rhetoric ultimately results in disparaging H-1B workers from India who are also here to work hard and pursue the American dream. It also affects H-1B adjudications, resulting in extra scrutiny, and denials of H-1B extension visa requests that hitherto were easily granted. While many recognize and justifiably condemn the absurd anti-immigrant rhetoric of Donald Trump, punitive efforts against India-based companies, resulting in stricter H-1B visa

adjudications of individual workers who are waiting for years in the crushing India employment-based second and third preference backlogs, must also be recognized as xenophobic. It is only then that anti-immigrant rhetoric, in the guise of protecting U.S. workers, will be acknowledged and the media, politicians and others who currently freely engage in this will get less of a free pass.

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