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IS TRUMP'S PROPOSED SCRAPPING OF THE H-1B LOTTERY IN FAVOR OF THE HIGHEST WAGE SUCH A GOOD IDEA?

Posted on January 17, 2017 by Cyrus Mehta

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Employers have already begun preparing for the upcoming H-1B visa lottery season. The annual H-1B cap is limited to 65,000 visas per year for applicants with bachelor's degrees, and an additional 20,000 for those with master's degrees from US universities. The filing period begins on April 1, 2017. H-1B petitions received during the first five business days of April – April 3 to April 7 – will be given consideration under the lottery. Based on last year's filings, the odds of getting an H-1B visa in the lottery is approximately 33%.

The H-1B lottery has been viewed as benefitting larger employers, mainly Indian IT firms that file a large number of petitions, over smaller employers who wish to focus on employing a single or few employees. A class action lawsuit, *Tenrec, Inc. v. USCIS*, challenging the annual H-1B lottery as contravening the INA, seeks to disrupt the status quo by allowing all employers to file on a first come first served basis. Under this plan, those who are not among the first 85,000 H-1B petitions received would be placed in a queue or wait list instead of being denied due to the quota having already been met. If this lawsuit is successful, it will certainly produce a long queue for the coveted 85,000 H-1B visas, and so most will still not benefit even after the lottery is dismantled.

Now Trump seeks to also disrupt the H-1B visa lottery, according to an article in Reuters. Specifically, Stephen Miller, senior advisor to the Trump administration, has suggested that the USCIS should abolish the H-1B lottery as we know it and replace it with a system which favors those who file on behalf of prospective employees with the highest wages. This proposal is similar to the

one made by IIEE-USA, which, in addition to giving priority to employers who are willing to pay higher wages, suggest that the USCIS should also give lower priority to H-1B dependent employers. Most H-1B dependent employers, who have more than 15% of their workforce on H-1B visas happen to be Indian IT companies. This is also similar to the proposed reordering of access to H-1B visas in the Grassley-Durbin bill, which seeks to curtail the H-1B visa program in many other counterintuitive ways, including imposing mandatory recruitment of US workers before an H-1B petition is filed. Although a preeminent commentator, Vivek Wadhwa, has praised the proposal on the grounds that Indian IT companies have been abusing the H-1B visa, we have several concerns about the proposed restructuring.

First, this preferential system would exclude entry-level professionals, some of whom have recently graduated from US universities. These entry-level professionals, while full of skill and talent, are not typically afforded higher wages at the beginning of their careers. If the H-1B program were to look unfavorably upon wage-earners commanding Level 1 wages in the DOL wage classification system, then we would be systematically excluding highly skilled, young workers that have the potential to positively impact the US economy and various professional sectors. While employers using the H-1B visa program have been criticized for excessively relying on the Level 1 wage, paying such a wage is not *per se* unlawful if the individual is being hired for a position with less than 2 years of experience and which requires supervision.

Second, by favoring foreign nationals with the highest wages, we may end up in a situation where a foreign national is making more than his or her American counterpart. Under the H-1B law, the employer must pay the higher of the prevailing or the actual wage. *See* INA 212(n)(1)(A)(i). If an employer wishes to bid for a worker by offering a higher than market wage, then the employer may have to adjust the wage for all similarly situated workers. This may not necessarily be a bad thing if all wages rise, but if the rise in wages is a result of an H-1B auction due to an artificial limitation in the number of visas, it could also have the effect of artificially distorting wages. It may also result in the inequitable result where American workers may be paid less than foreign H-1B workers, resulting not just in H-1B violations but also in discrimination lawsuits against employers. Therefore, under this proposal, the H-1B program may be criticized for causing imbalances between foreign and American workers.

Third, entrepreneurs who wish to obtain H-1B visas through their own startup

companies will also suffer under this proposal. Their startups may not be able to pay them a higher wage than necessary in order to compete for an H-1B visa. Still, these startups hold promise to become successful and create jobs if the founder is able to remain in the US on an H-1B visa. This is why the USCIS provides entrepreneurs to get sponsored through existing visas such as the H-1B in the Entrepreneur Pathways Portal. Although the USCIS has finalized a special parole rule for entrepreneurs, the final rule's preamble acknowledges that Entrepreneurs Pathways compliments the parole rule and the two can thus harmoniously exist. Even Wadhwa has stated that we are not encouraging startups and thus shooting ourselves in the foot, noting that "Google and Facebook can buy all the talent they want — it's the startups who are struggling... The good thing is we have a powerful innovation system, and there are good things happening in Silicon Valley anyway, but the bad news is there's a lot happening in other countries that would've happened here if we had let people come here. America gave a gift to the world."

Fourth, while it has become fashionable to throw IT companies under the bus these days, they have to also be part of the solution. The use of IT consulting companies is widespread in America (where 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 (ACWIA) 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 even if they abide by H-1B rules regarding wages. However, it is this business model that has provided reliability to companies in the United States and throughout the industrialized world to obtain top-tier talent quickly with flexibility, 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 when it's in their favor, 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.

The solution instead lies in increasing H-1B caps in Congress rather than reordering who can have access to H-1B visas under an artificially small quota. As we have previously blogged, by continuing to limit the H-1B program US employers will remain less competitive in the world markets. By limiting the availability of H-1B visas, employers are missing out on much-needed innovation in US industries, especially in the STEM fields. This failure to innovate within the US domain may encourage employers to look to overseas markets in order to develop and expand their companies. This is bad news for the US economy. H-1B workers have historically helped to improve the US economy, which in turn helps to create more jobs for Americans.

It is also a fact that more H-1B workers are needed in the IT sector as the United States does not produce enough computer professionals of their own. Most American IT workers are self-taught, as opposed to being formally trained at an institution, according to one US-based IT worker who spoke to the authors for this blog. Moreover, the United States has more venture capital investments for new companies than most other countries, but lack the domestic labor force to reap the benefits of such investment, thereby making the need to bring in H-1B workers ever more necessary to grow startup companies.

Lastly, the United States is no longer the only player in the game. The “Silicon Valleys” in China and India are vastly more agile for quick development and production, largely due to the availability of skilled workers. Meanwhile, American innovative companies are hamstrung for lack of them and are thus forced to move more of their research and development facilities overseas. The most talented will go to countries where they are more welcomed, which may no longer be the United States.

Increasing quotas in the employment-based preferences, along with the H-1B visa quota, is the best way to reform the H-1B visa program, rather than to further shackle it with reordered lotteries, stifling laws and regulations, labor attestations, and quotas. If there is a concern about IT companies displacing US workers, such as what happened at Disney, then increasing the wage of an exempt worker from $60,000 (which was set in the 1990 Act) to something higher might be palatable in exchange for more H-1B visas annually and no

further restrictions. If an H-1B dependent employer does not hire an exempt worker, then it needs to undergo an additional recruitment and anti-displacement attestation. This has been proposed in the Protect and Grow American Jobs Act sponsored by Congressman Issa, which increases the wage for an exempt H-1B employee from $60,000 to $100,000. If at all Congress wishes to impose restrictions on the H-1B visa, the Issa bill is preferable to the Grassley-Durbin bill.

Still, artificially raising wages above market wages would hurt the ability of US businesses to use the expertise of IT consulting companies in becoming more efficient, and thus passing on the benefits to consumers and even creating new jobs. Perhaps, the $100,000 wage can be lowered for certain exempt workers, such as those who have been sponsored for permanent residence through the dependent employer or those who have graduated in certain STEM disciplines.

Regardless of how one reorders access under the lottery, there will always be a shortage if the cap is limited to a mere 85,000 visas per year. For FY 2017, the USCIS received over 236,000 H-1B petitions, all vying for one of the 85,000 visas available. This means that some 151,000 or more people – highly qualified individuals with dreams and career aspirations – will likely be denied the ability to work in the US. This is not for lack of skill, this is not for lack of good moral character, but for an arbitrary cap system that limits their upward mobility and stifles US innovation in many fields. A system which seeks to provide preferential treatment to the highest paid foreign workers within the confines of an artificially low quota are unlikely to improve the position of US companies seeking to be competitive in global markets.