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A Politically Feasible Approach To H-1B Reform

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On Jan. 24, 2017, Silicon Valley Rep. Zoe Lofgren, D-Calif., (a former immigration attorney) introduced the "High–Skilled Integrity and Fairness Act of 2017." Lofgren believes her bill would both modernize the H-1B visa program to reflect the realities of 2017, while also reducing inequities among employment-based immigrants based on country of origin and/or visa type.

On the surface, these would seem like laudable goals. By contrast, certain sections of the immigration blogosphere view the Lofgren bill as a full-frontal assault on the H-1B program, with the goal of killing the program once and for all.[1] Other sections of the immigration blogosphere, pointing out the undeniable geographic reality of Lofgren's district (Silicon Valley), view her bill as a blunt-edged attempt to make use of the H-1B program feasible only for the wealthy tech giants and their immigration counsel who make sure Lofgren's campaign coffers are fully filled during her reelection campaigns.[2]

As immigration rhetoric on both sides of the debate rises to volcanic levels, with various groups trying to outdo each for the title of "Most Morally Outraged," reasoned analysis has become increasingly difficult to come by. So what is Lofgren's High-Skilled Integrity and Fairness Act of 2017 hoping to accomplish?

Elimination of Per-Country Caps for Employment-Based Green Cards

One of the more glaring inequities of the current U.S. employment-based green card allocation system are the per-country caps established by the Immigration Act of 1990 (IMMACT90).[3] As a result of per-country caps, individuals and their families from high-demand countries, such as China, India, Mexico and the Philippines face decades-long backlogs on both the employment- and family-based sides of the ledger.

Lofgren is proposing to scrap the per-country cap allocation on the employment-based side and replace it with a first-come, first-served system within current overall numerical limitations.

On the family-based side, the Lofgren bill would raise per-country cap from 7 percent to 15 percent annually.

If adopted, this portion of the Lofgren bill would represent a major step forward in addressing inequities in the current employment-based green card allocation system, as well as introducing more efficiencies into the process for employers, immigrants and the U.S. government as well.

Tightening the Noose around "H-1B-Dependent" Employers

This provision of the Lofgren bill is the one generating the most 'chatter" and is the one most misunderstood. The Lofgren bill is *not* setting a minimum salary for all H-1Bs at the level of $130,000, as has been misreported by even reputable news organizations such as the BBC[4], but is seeking to do so only for so-called "H-1B-dependent" employers who wish to receive exemptions from the U.S. worker recruitment and nondisplacement requirements when sponsoring new H-1B employees.[5]

Stripping out the legalese, H-1B-dependent employers can currently avoid U.S. worker recruitment and nondisplacement requirements by paying H-1B employees $60,000 or more annually. Lofgren seeks to raise this salary exemption level to $130,000 annually. Lofgren argues a minimum salary adjustment is necessary since the current minimum salary figure for H-1B-dependent employers was last adjusted in 1998, and arrives at the $130,000 figure based upon adding an arbitrary 35 percent premium to the most recent national annual wage for "computer and mathematical occupations" as determined through U.S. Department of Labor data analysis. This provision does not seem unreasonable.

The Lofgren bill will also set the level for H-1B dependency at 15 percent of a company's workforce and would also eliminate an exemption from the U.S. worker recruitment and nondisplacement requirements for H-1B-dependent employers based upon an H-1B worker's possession of a master's degree or higher.

Misunderstanding of the bill's salary provisions aside, the Lofgren bill is clearly targeting information technology consulting and outsourcing companies (which have traditionally been the subject of heightened scrutiny and can expect even more scrutiny under the Trump administration) that are seen as abusing the intentions of the H-1B program by underpricing H-1B labor at the expense of U.S. labor, and are also seen as requesting a disproportionate share of scarce H-1B numbers at the expense of Silicon Valley's high-tech aristocracy.

Heightened requirements for sponsoring H-1Bs have long applied to H-1B-dependent employers. The Lofgren bill, perhaps imperfectly, is a positive contribution toward updating and clarifying these special procedures for 2017 and beyond.

Changes to Prevailing Wage Requirements

The H-1B visa system has long been criticized, unfairly in my opinion, as a vehicle for companies to import low-wage foreign labor at the expense of U.S. workers. Many studies and anecdotal evidence suggest the opposite is true; H-1B workers actually cost more than U.S. workers when costs associated with H-1B workers (legal fees, extortionate U.S. government filing fees, etc.) are also factored in. Nevertheless, the current prevailing wage system is prone to abuse and gaming by unscrupulous companies and their "yes men" legal counsel by allowing companies to self-select which of the current four wage levels is most appropriate for a particular H-1B filing.

Best practice suggests that so-called Level 1 wage levels should be selected for very few, if any, H-1B filings. However, it should be noted that President Donald Trump's campaign platform on immigration cited statistics claiming that Level 1 wage levels were self-selected in 80 percent of H-1B filings. While I find this to be an extraordinary claim (our office has filed thousands of H-1Bs in the past five years and few, if any, utilized a Level 1 wage), even a figure of 40 percent of H-1B filings self-selecting Level 1 wages would indicate an inappropriate gaming of the system.

The Trump solution, and one which was also advanced by the Bernie Sanders campaign, was to ban the use of Level 1 wages for H-1B filings. The Lofgren bill hopes to address the concerns highlighted by the Sanders and Trump campaigns, under the rubric of "protecting American workers." The rationale is nonsense, since H-1Bs do not compete with U.S. workers, but the immigration law community should at least pay lip service to the notion.

While not specifically banning the use of Level 1 wages, the Lofgren bill hopes to make it more difficult for U.S. employers to game the prevailing wage system by recalibrating the current four-level wage system into a three-level wage system. I will leave it to the "quants" to figure out how much upward pressure on H-1B wages shifting to a three-level system would have, but the intention is clear. I believe a shift to a three-level wage system is a small price to pay in forestalling an even more direct and deleterious assault on the H-1B program.

Market-Based H-1B Visa Allocation

In my opinion, the Lofgren bill's formula for allocating H-1B visas based on "market-based" principles is the least defensible aspect of the bill. The Lofgren bill would create four categories of H-1Bs, of which category one (H-1Bs using a Level 3 wage) gets first priority, then category two (H-1Bs using a Level 2 wage) gets the leftovers from category one, then category three (H-1Bs using a Level 1 wage) can pick over the leftovers of category two, and category four being everybody else. Two subcategories are also to be created, with first priority given to H-1Bs with salaries at 200 percent of the prevailing wage within each category, and second priority given to H-1Bs at 150 percent of the prevailing wage. No clarity exists as to what level of priority an H-1B filing with a salary level between 100 to 149 percent of the prevailing wage would be handled.

Given that the Lofgren bill envisions the new H-1B systems as having only three wages categories, yet also envisions four categories of H-1B priority based on these three new wages categories, perhaps all H-1B filings in the 100 to 149 percent range regardless of whether they are using a Level 1-3 get dumped into the lowest priority category for H-1B visa allocation. Additional clarification will be needed.

Such an allocation system would be a huge administrative nightmare for U.S. Citizenship and Immigration Services, which would have to sort through all of these H-1B filings and categorize based on salaries before it can adjudicate any filings. USCIS has enough trouble randomly selecting 20,000 U.S. master's and 65,000 regular H-1B cap cases every year from the 240,000-plus that have been filed during the last few H-1B cap seasons. Imagine if USCIS had to actually open all 240,000-plus, then sort by wage and degree levels before being able to adjudicate any of them? The entire H-1B cap system would break down.

More importantly, in this current populist era of American politics, the Lofgren bill would essentially turn the H-1B into a visa category reserved exclusively for the fat cat corporations that reside in her district and contribute to her reelection campaigns. The top-table tech aristocracy would hardly blanch at this provision, merely seeing this as a cost of doing business that would give them greater access to scarce H-1B numbers, as the IT consulting and outsourcing companies would be priced out of the largest tranche of H-1Bs, unless they fundamentally alter their business models by raising H-1B wages (which would effectively eliminate their entire competitive advantage in the marketplace).

In fairness, the Lofgren bill attempts to address some of these concerns about H-1Bs becoming the fat cat corporate visa program by creating another special category of H-1Bs, by allocating 20 percent of the annual new quota to "small and startup" companies with 50 or fewer employees. While this sounds

noteworthy, it could easily be gamed through the creation of multiple subsidiaries and spinoffs (TechMegalith #1 LLC, TechMegalith #2 LLC, etc.) that might be misused to serve as “small and startup” companies for the purpose of competing for this 20 percent H-1B visa set-aside.

While there is legitimate concern that a handful of IT consulting and outsourcing companies are misusing the H-1B program by paying low-end wages and also using a disproportionate number of scarce H-1Bs, the solution proposed by the Lofgren bill would merely create an administrative nightmare at USCIS and render the H-1B program as the exclusive club of many of the tech giants in Lofgren’s Silicon Valley district. This cannot be viewed as progress in modernizing the H-1B program.

Expanding the Concept of “Dual Intent”

The Lofgren bill deserves praise for seeking to extend “dual intent”[6] to E-1, E-2, F-1, O-1 and P visa holders (but notably, not to E-3 Australians or TN’s from Canada or Mexico). The privilege of “dual intent” currently extends to only H-1B and L-1 visa holders. Extending “dual-intent” to these other visa categories will improve the process and ease the logistics associated with navigating the green card process for individuals holding these visa statuses.

On-the-Job Training

The Lofgren bill would permit experience gained on the job with a visa holder’s current employer to count toward “experience requirements” for a job in which an employer pursues labor certification on the basis of a lack of U.S. workers. This change would allow more employees to eventually apply for green cards in higher-preference categories, which is not as helpful as it sounds. This change would effectively eliminate the EB-3 category (jobs requiring a bachelor’s or two-years of experience), and see the EB-2 category (jobs requiring either a master’s degree or a bachelor’s plus five years of experience) become used even more than it already is. Coupled with the Lofgren bill’s proposed elimination of per-country caps for employment-based green card issuance, the net effect would be to see the EB-2 category use most, if not all, employment-based green cards not used by EB-1 category applicants (aliens of extraordinary ability, outstanding researchers and multinational managers). While this proposal is well-intended, the outcome would be less than optimal.

Congressional Overturn Matter of Simeio Solutions

On April 9, 2015, USCIS’ Administrative Appeals Office (AAO) issued the precedent decision, Matter of Simeio Solutions LLC (Simeio), which held that an H-1B employer must file an amended or new H-1B petition when a new "Labor Condition Application for Nonimmigrant Workers" (LCA) is required due to a change in the H-1B worker’s place of employment, even if a new LCA is already certified by the U.S. Department of Labor and posted at the new work location.[7] [8]

The Lofgren bill would overturn Matter of Simeio by abolishing the need for an employer to file an amended H-1B petition in the event of an employee worksite change, requiring the employer to simply secure a new LCA on behalf of the employee for the new worksite. Such a measure, if enacted, would reduce compliance costs for H-1B employers.

Conclusion

On balance, once the disgraceful efforts to use legislation to benefit the companies in Lofgren’s district at the expense of the rest of the country are stripped out, the “High-Skilled Integrity and Fairness Act of

2017" represents a major step forward in modernizing the United States' employment-based immigration system by removing many of the inequities that have long bedeviled the process. And while the proposed changes for "H-1B-dependent" employers are clearly targeted at a sub-set of IT consulting and outsourcing companies that use a disproportionate numbers of H-1B visas at the expense of the Silicon Valley establishment (even if these same companies utilize the services of these same IT consulting and outsourcing companies)[9], the proposed changes are sensible and politically feasible in today's febrile environment.

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[1] See http://redbus2us.com/h1b-bill-130k-wage-confusion-whats-reality-new-h1b-visa-bill-summary/, last accessed February 6, 2017.

[2] See https://www.opensecrets.org/politicians/contrib.php?cid=N00007479, last accessed Feb. 2, 2017. The vast majority of Lofgren's top 20 campaign donors are large tech companies who would not be subject to the bill's restrictions on "H-1B dependent employers" and would be best placed to maximize their H-1B visa haul in the "market-based" H-1B visa regime envisioned by Lofgren.

[3] Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7 percent of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2 percent, or 7,320.

[4] See "H-1B: Why a new US visa bill is causing panic in India" http://www.bbc.com/news/world-asia-india-38828181, last accessed Feb. 5, 2017.

[5] An employer is considered H-1B-dependent if it has: 1) 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; or 2) 26-50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or 3) 51 or more full-time equivalent employees of whom 15 percent or more are H-1B nonimmigrant workers. See https://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62C.pdf, last accessed Feb. 2, 2017.

[6] Dual-Intent is the concept that a person has the desire to both reside permanently in the U.S. at some point in the future, while also declaring that they fully intend to return to their home country once their current nonimmigrant status expires. A legal fiction, the dual-intent concept requires a person to hold diametrically opposed views (I want to stay, but I don't want to stay). See INA §214(b), which states in part: "Every alien (other than a nonimmigrant described in subparagraph (H)(i) or (L) of Section 101(a)(15)) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15)." The references to (H)(i) and (L) provide dual-intent to H-1B and L-1 visa holders.

[7] Matter of Simeio Solutions LLC 26 I&N Dec. 542 (AAO 2015).

[8]See also “USCIS Final Guidance on When to File an Amended or New H-1B Petition After Matter of Simeio Solutions LLC.” https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf, last accessed Feb. 5, 2017.

[9] See “The End of Employees,” The Wall Street Journal, Feb. 3, 2017, A1, A10. While not specifically addressing the placement of visa holding contractors/vendors by IT and outsourcing companies, the article details how Google, the third-largest contributor to Lofgren’s 2016 reelection bid, “has roughly equal numbers of outsourced workers and full-time employees.” It stands to reason that a certain quantity of these outsourced workers are visa holders placed at Google by IT and outsourcing companies, meaning that Google benefits from the perceived misuse and abuse of the H-1B program by the IT and outsourcing companies being targeted by the Lofgren bill.

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