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Study Claims Senate Visa Proposals Could Violate GATS, Grassley Objects

Limitations on visas for highly skilled workers proposed as part of an immigration reform outline that Senate Democrats prepared in April to attract bipartisan support would likely violate U.S. commitments under the General Agreement on Trade in Services (GATS) and could invite trade retaliation, according to a study by the **National Foundation for American Policy (NFAP)** released on June 16.

The group describes itself as a non-partisan, non-profit think tank, and hired the law firm of Jochum Shore & Trossevin to write the study. The congressional immigration reform bill outline proposes to add new restrictions on the uses of the visas, such as expanding restrictions on issuing visas related to domestic layoffs and raising minimum wages for visa recipients. The NFAP study claims that these are inconsistent with the limited restrictions the U.S. included in its GATS schedule.

The new restrictions would serve to nullify and impair market access granted other WTO partners under the GATS and could spur a WTO dispute settlement case from such countries as India, according to Marguerite Trossevin, an attorney who prepared the study.

Stuart Anderson, the executive director of the NFAP who worked at the Immigration and Naturalization Service under the Bush administration said in the press call that if immigration legislation does stall this year, as many predict, there is an increased chance members will try to attach the legislation to other bills that must be passed.

Business organizations such as the U.S. Chamber of Commerce have long opposed restrictions on H-1B visas and a Chamber representative said this week the study would prove a valuable tool in combating the restrictions in Congress. According to Anderson, the Chamber did not help finance the study despite its general support for its findings. Randy Johnson of the Chamber of Commerce, who participated in the press conference, said that business associations “have not focused on this possible conflict to the extent we should have” and the Chamber would now raise it to members of Congress. He said there is a serious risk that the provisions could become law this year. “This study is a real eyeopener,” he said, noting that potential trade retaliation from a WTO case could affect a wide swath of U.S. services companies.

The 26-page outline for comprehensive immigration reform was unveiled in late April by Senate Majority Leader Harry Reid (D-NV), Sen. Charles Schumer (D-NY) and Sen. Robert Menendez (D-NJ) as the basis for an immigration bill that would include tough enforcement provisions to attract Republican support.

The outline lays out proposed new restrictions on H-1B visas in general terms in a way that NFAP says refers to two previously introduced bills: S. 887 sponsored by Sen. Richard Durbin (D-IL) and Senate Finance Committee Ranking Member Charles Grassley (R-IA), and S. 2804 sponsored by Sen. Bernie Sanders (I-VT) and Grassley. Sanders has already attempted to attach S.2804 to tax extenders legislation this year.

Grassley's staff this week rejected the NFAP analysis. "Senator Grassley considers each bill to be consistent with existing U.S. commitments under the General Agreement on Trade in Services," a Grassley spokeswoman said. "Senator Grassley will continue fighting for American workers in this time of unacceptably high unemployment, and he will do so in a manner consistent with our international obligations."

The NFAP study concludes that the proposed outline on H-1B highly skilled worker visas and L-1 intracompany transfer visas appear to nullify and impair U.S. Mode 4 commitments under GATS by introducing restrictions not reflected in the U.S. schedule.

In the GATS, the U.S. committed to permit entry using H-1B visas of up to 65,000 persons annually engaged in set "specialty occupations." The GATS commitment contains limitations on the wage paid and specifies that the wage must be equal to pay for comparable employees or to the prevailing wage. It also states that the employer sponsoring the visa applicant cannot have laid off workers in the 90 days prior and 90 days after the visa petition, amounting to a total of 180 days of layoff restriction.

On H-1B visas, S.887 would among other things extend the layoff restriction to a total of 360 days and raise the wage requirement to the median average wage or the median wage in the Department of Labor's "level 2" for that occupation. It would also forbid employers with more than 50 employees from being sponsoring H-1B visas if more than 50 percent of their current employees hold H-1B visas. The bill would also apply the wage provisions to L-1 visas which are visas available to employees of companies that have offices in both the United States and their home country or for managers that are attempting to set up a company's first-time office in the United States. These managers would not be granted visas if they had received two or more L-1 visas in the two prior years, according to the outline.

Additionally, for a one-year L-1 visa, companies would have to show to show the ability to commence operations upon approval of the visa. For extensions, the outline would require employers to be doing business at the new office on the date of visa application.

Trossevin added that this provision would defeat one of the main purposes of L-1 visas, which are to allow managers to enter the U.S. to set up new enterprises.

S. 2804 would require employers petitioning for H1-B and L-1 visas not to have notified a mass layoff under the Worker Adjustment and Retraining Notification Act (WARN) in the previous year and to declare they do not intend to file a WARN notice at this time.

Furthermore, if any WARN act notice is file, existing visas will be made to expire in 60 days. The layoff requirement is stricter that the GATS commitments for H1B and would create a layoff restriction for the first time for L-1.

Trossevin said that WTO members such as India, which heavily uses H1-B visas, could come under domestic pressure to bring a WTO case from domestic firms. She indicated that a case could be brought even though such a move could hamper developing country's goal raising of the U.S. 65,000 cap on H1-B visas. India has pushed for the cap to be raised in bilateral talks and in the context of the WTO Doha round.

Trossevin also noted that if the U.S. were to try to withdraw its GATS commitment as it did for Internet gambling in the wake of the Antigua gambling case, it would have to make costly offsetting concessions toother WTO members. -- Erik Wasson

Opinion

Trade And Immigration Are Not Separate Issues

Stuart Anderson, 06.30.10, 3:32 PM ET

As President Barack Obama attempts to jumpstart immigration legislation, a new controversy is brewing. The reason is many people assume trade and immigration are separate issues. They're not. Even in the U.S. Congress and at federal agencies, few officials realize that under a trade pact signed by the U.S. government in 1994, the U.S. risks trade retaliation if it fails to admit, within certain limitations, high-skilled foreign nationals to work in America. This 1994 trade pact stands like a roadblock on the highway for members of Congress who seek to enact new curbs on foreign-born professionals, researchers and scientists. Will influential U.S. senators attempt to run it?

Under the General Agreement on Trade in Services (GATS), the U.S. agreed to admit at least 65,000 foreign nationals on skilled temporary visas known as H-1Bs. Those admitted must be paid the higher of the prevailing or actual wage paid to similar U.S. workers. The treaty also allows the U.S. to require employers to recruit U.S. workers and not lay off Americans in the same job within 90 days of hiring individuals on H-1B visas. In addition, the U.S. government agreed to allow foreign companies to transfer into America from abroad executives, managers and individuals with specialized knowledge on L-1 visas.

International students earn one-half to two-thirds of advanced degrees from U.S. universities in key technology fields. And individuals who earn their degrees abroad are also important contributors to U.S. growth and innovation. Despite this, some U.S. legislators want to prevent skilled professionals from working in America. The controversy over these treaty commitments has not come to a head for only one reason--restrictive immigration measures against highly skilled foreign nationals have yet to become law. But that could change.

Sen. Bernard Sanders. I-Vt., recently attempted to attach his anti-immigration bill, S. 2804, as an amendment to tax legislation. The Sanders bill goes well beyond the job-specific layoff restrictions in the U.S. commitments under the GATS. It would prohibit any new work visa (and even the termination of existing ones) if during the previous 12 months a company filed a layoff notice under the Worker Adjustment and Retraining Notification (WARN) Act. For larger companies, closing down an unprofitable facility with 50 or more employees can easily trigger such a notice.

Sens. Richard Durbin, D-Ill., and Charles Grassley, R-Iowa, have also produced legislation, S. 887, which would institute a variety of changes to H-1B and L-1 visa law. It would require a higher wage to be paid to H-1B and L-1 visa holders than under current law, issue new rules on H-1Bs and layoffs, and prohibit new H-1B and L-1 visas for employers with more than 50 percent of their workforce in H-1B or L-1 status.

Now that comprehensive immigration reform appears dead in Congress, it is more likely that Sens. Sanders, Durbin and Grassley will attempt to attach their immigration bills to other pieces of legislation. Durbin and Grassley already convinced Sens. Harry Reid, D-Nev., Charles Schumer, D-N.Y., and Robert Menendez, D-N.J., to include these portions of their bill in a Democratic document released in May 2010 outlining immigration reform proposals.

A new legal analysis released by my organization, the **National Foundation for American Policy (NFAP)**, found key provisions of both the Durbin-Grassley bill and the Sanders legislation would violate U.S. commitments under the General Agreement on Trade in Services. In addition, the study found attempts to raise the current $1,500 training/education fee employers pay to hire H-1B visa holders could also violate the GATS. Trade lawyers at the Washington, D.C.-based law firm of Jochum Shore & Trossevin, PC, performed the analysis.

The legal analysis took no position on whether such proposed legislative changes constitute sound immigration policy. But it does conclude that passing such legislation would be highly vulnerable to challenge from World Trade Organization members whose companies use H-1B or L-1 visas to perform services in the U.S.
Such a challenge, if successful, could lead to retaliation against U.S. exporters and harm America's reputation on trade issues. This has alarmed business groups. "The U.S. Chamber of Commerce is very concerned that provisions in proposed immigration reform bills may violate international trade agreements," said Randel K. Johnson, senior vice president of labor, immigration and employee benefits, U.S. Chamber of Commerce, who participated in a press briefing discussing the legal analysis.

Under U.S. trade commitments, market access includes allowing employers to hire individuals from another nation to work and provide services in America. If a World Trade Organization (WTO) member believes that another member is violating a U.S. commitment under the GATS commitments, then the complaining member may use the WTO dispute settlement mechanism. If the measure is found inconsistent with the GATS, the Dispute Settlement Body will recommend that the member bring its measure into conformity. If the member fails to bring the measure into conformity with the GATS, the complainant may seek authority to retaliate against the other party.

Sen. Grassley's office responded to the study by saying, "Sen. Grassley considers each bill to be consistent with existing U.S. commitments under the General Agreement on Trade in Services." And that "Sen. Grassley will continue fighting for American workers in this time of unacceptably high unemployment, and he will do so in a manner consistent with our international obligations." With any luck, members of Congress will try to pass legislation that strengthens America's competitiveness by keeping the door open to highly skilled professionals, scientists and researchers. Attempts to restrict such skilled individuals will undermine efforts to compete in the global economy and risk a trade war at a time when the United States and its global partners can least afford it.

Stuart Anderson is executive director of the National Foundation for American Policy, a nonpartisan research group based in Arlington, Va.