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Impact of US Senate Immigration Bill on Outsourcing

Introduction

On the day the US Senate passed its comprehensive immigration-reform bill[1] this June, undocumented immigrants watching the vote from the Senate gallery burst into applause and chanted "Yes we can!" They had good reason to cheer, given the bill's promise of a path to citizenship for millions of immigrants now living in the country illegally. But that promise is just one of several reforms the bill proposes, and affected groups are finding less to applaud in some of the others. In particular, much of the IT outsourcing industry faces significant disruptions if the bill's temporary-work-visa provisions become law. Outsourcing companies based in India —Wipro, Infosys, and TCS, to name a few of the largest such companies — constitute a major segment of the industry, and they rely heavily on Indian employees to fill both the managerial and technical ranks of their US labor forces. The bill would place a number of restrictions on the H-1B and L-1 skilled-worker visas that allow those employees to enter and remain in the country.

Just what the long-term effects of these restrictions might be is difficult to say. If all goes as the bill's proponents hope, the end result will be a rise in the number of US workers hired for the jobs now done by H-1B and L-1 employees. On the other hand, outsourcing companies might choose to move many of those jobs offshore and never bring them back. In either case, US businesses that rely on India-based outsourcing are in for a period of abrupt adjustment if the measures go through. For some of those businesses, responding to the likely changes may mean making adjustments now to their service-provider relationships. For others it may also mean working for legislative changes while time remains to do so. Either course of action, however, begins with a key first step: Understanding the new rules and just what they require.

What the Proposed Rules Aim to Change

The immigration bill (officially the Border Security, Economic Opportunity, and Immigration Modernization Act) devotes most of its nearly 1,200 pages to issues related to foreigners seeking to build a permanent life in the United States. One section, however — Title IV, subtitled "Reforms to Nonimmigrant Visa Programs" — deals entirely with people brought here to earn a temporary living. The language of that section singles out no particular country or industry, but its effects will land hardest on the India-based IT outsourcing industry.

In typical variants of that industry's business model, the majority of a company's employees work offshore while the US-based remainder, most of them here on three-year H-1B or five-year L-1 visas, work closer to the customer. This reliance on visa-holding workers has provoked two principal complaints from the US IT industry. The first is that it drives Indian outsourcing companies to acquire a disproportionate number of the H-1B visas available annually, making it difficult for top US

technology producers (Google and Microsoft, for example) to draw on overseas labor pools to fill R&D and other higher-skilled positions. The second is that it puts both US outsourcing providers (such as IBM, Accenture, and HP) and US outsourcing workers at a competitive disadvantage against lower-cost temporary foreign workers and the firms that depend on them. The bill addresses the first complaint with an increase in the yearly cap on H-1B visas from 65,000 to as many as 180,000. It addresses the second with a series of restrictions on H-1B and L-1 visas that both decreases their availability to outsourcers and increases the costs of using them.

The restrictions could have a dramatic effect on Indian companies' profits. The National Association of Software and Services Companies (NASSCOM), an Indian IT trade group, has estimated that the new rules might cost India's outsourcers a quarter of their worldwide revenue. Others say the sector's profit margins could shrink by a full percentage point. In the months before the Senate passed the bill, India's ambassador to the United States went on record with his opposition to the visa provisions, and other Indian interests warned their passage into law might start a trade war.

That the provisions nonetheless came through the final vote undiluted suggests the strength of their support. The recent adoption of similarly targeted visa restrictions in Australia and Canada is further evidence of the political headwinds the Indian IT sector is up against. The US House of Representatives is expected to pass its own immigration legislation, and though that chamber's Republican leadership has warned that any House version will differ significantly from the Democratic-controlled Senate's on controversial issues like citizenship for the undocumented, nothing in the public commentary on the bill suggests restricting visas for outsourcers will be a point of serious disagreement. Even if House Republicans balk and pass no comprehensive immigration-reform bill this year, support for independent legislation on H-1B visas could persist and possibly bear fruit in the next session. If on the other hand a compromise bill does emerge, the new visa rules could become law as early as the first months of 2014.

What the Proposed Rules Specifically Require

The near-tripling of the annual cap on H-1B visas from 65,000 to a maximum of 180,000 may be the most eye-catching feature of the bill's nonimmigrant-visa provisions. But for outsourcing providers, it is the bill's restrictions on using those visas that will have the greatest impact. Four measures in particular are likely to cause significant near-term disruption to the operations of India-based outsourcers, while additional restrictions may aggravate their impact:

PROHIBITIONS ON "OUTPLACEMENT" OF A COMPANY'S VISA-HOLDING EMPLOYEES[2]

If 15 percent or more of a company's workers in the United States hold H-1B visas, the bill defines the company as "H-1B dependent" and prohibits it from "plac[ing], outsourc[ing], leas[ing], or otherwise contract[ing] for the services or placement" of an H-1B visa holder with another employer. The bill refers to such arrangements, somewhat idiosyncratically, as "outplacement," and it prohibits them on nearly the same terms for workers holding L-1 visas. What these provisions appear to mean, at minimum, is that companies with a significant percentage of visa-holding employees — which at present includes all the largest Indian outsourcing companies — will no longer be able to send those employees to work in their customers' offices. This onsite work accounts for roughly half of Indian outsourcing's revenues in the United States. And though the companies would still be able to have visa-holding employees deliver services out of their own US sites, the bill's language leaves unclear whether under certain circumstances even offsite arrangements such as these might count as

outplacement. Also unclear is whether the restrictions would apply to existing placements or only to those undertaken after the bill's enactment. Under any plausible interpretation, however, Indian outsourcers would have to scramble to find scarce US replacements for outplaced foreign workers, and services in the meantime could suffer delays and interruptions.

LIMITS ON THE PERCENTAGE OF A COMPANY'S EMPLOYEES THAT ARE VISA HOLDERS[3]

As of 2015, the bill would cap the combined number of H-1B and L-1 employees at 75 percent of a company's US workforce. In 2016, the cap would decrease to 65 percent, and from 2017 on, the maximum would be 50 percent. For companies with high percentages of nonimmigrant-visa-holding employees, which again means most of the top Indian outsourcers, the immediate difficulty will, again, be to find enough US replacements to keep their stateside staff numbers and service quality at existing levels.

HIGHER WAGES FOR H-1B WORKERS[4]

Under a new three-level wage system for H-1B employees, H-1B-dependent companies would be required to pay H-1B visa holders at the second level, or 100 percent of average prevailing wages in the worker's job category as determined by the Department of Labor. This rule would effectively raise the cost of H-1B labor for Indian outsourcers by an estimated 5 percent to 15 percent. Companies might absorb the extra costs or, again, pass them on to customers, but either way, those costs will further erode the advantages of relying on a nonimmigrant-visa-holding workforce.

HIGHER FEES FOR VISA APPLICATIONS[5]

For companies employing H1-B and L-1 workers at a combined rate of 30 to 50 percent of their US workforce, the bill would create a filing fee of $5,000 for every new H-1B or L-1 visa application. If the rate is more than 50 percent (in the years before exceeding 50 percent is prohibited outright), the fee will be $10,000 per application. Given that visa applications by the top India-based outsourcers ranged from 2,000 to over 9,200 per employer, these fees could become an onerous expense. Companies may seek to pass that expense to their customers, but that might only trade a financial cost for a relational one, pushing US buyers away toward non-Indian competitors or otherwise fraying business ties.

ADDITIONAL RESTRICTIONS

Further burdens on the use of nonimmigrant visas include requirements that employers (i) actively recruit US workers prior to hiring an H-1B worker,[6] (ii) post the open position to a designated Department of Labor job-search website as part of their recruitment efforts,[7] and (iii) advertise to their own employees a toll-free Department of Labor hotline for reporting noncompliance with any H-1B-related provisions.[8] The bill requires of H-1B-dependent employers in particular that they (i) attest, when hiring an H-1B worker, that no US citizen employed by the hirer was or will be displaced in the period beginning 180 days before and ending 180 days after the hire (twice as long as the nondisplacement period required for all other employer types)[9] and (ii) submit to annual Department of Labor compliance audits, with results made available to the public.[10] None of these provisions is likely in itself to have the same direct impact on outsourcers as those discussed above. (Indeed, the nondisplacement pledge seems almost superfluous given the urgent need for US workers that will face H-1B-dependent companies if the bill is enacted.) But because the function of these softer measures generally is to bolster the transparency and thus the enforceability of the H1-B regulatory regime, they would no doubt act to amplify the bill's more substantive effects.

How the Proposed Rules Might Play Out Over Time

Should the immigration bill become law, the immediate consequence is bound to be disruption in the US outsourcing market. By some estimates the US economy will this year create twice as many jobs requiring computer-science degrees as US colleges will create computer-science graduates. Under those conditions, the odds are slim that Indian outsourcers hemmed in by the new regulations could hire enough US workers in a short-enough time to avoid at least some interruption in the course of business as usual. If the bill becomes law, those outsourcers and their customers will have to make some quick and possibly jarring course corrections. In the near term, the Indian providers will likely have to rebalance their workforces, doing offshore and remotely much of the work they now do stateside and onsite, and the customers will either learn to live with the adjustments or look elsewhere for their outsourcing services.

The livelier question is what happens after that. In the rosiest scenario, all goes as planned: The new restrictions on temporary work visas create new demand for trained US IT workers, and the labor market, helped along by growing investments in STEM education, rises to meet that demand. Responding to continued customer demand for onshore service, Indian outsourcers gradually replenish their US workforces with the rising crop of qualified US workers until eventually the outsourcing market returns to its former configuration — the only difference being that its workers now, in aggregate, are more American and better paid.

Other scenarios, however, are no less likely. In one, the shock of the new regime proves fatal to many if not most of the Indian providers' US operations: Adjustments are too few or too late, too many customers lose patience too soon, and one by one the visa-dependent outsourcers cede the US market to the competition. For those outsourcers that remain — US providers, and perhaps one or two of the biggest Indian firms — this thinning of the herd creates opportunities. For customers, however, it limits them. With fewer providers to choose from, businesses lose market power they might otherwise apply to keeping the higher costs of the re-Americanized workforce from being passed to them.

Yet, in a third scenario, the promised repatriation of IT outsourcing jobs never materializes. Instead, drawing on technological and legal innovation, Indian firms find ways to work around the newly legislated obstacles to retaining foreign workers. Faster, smarter telecommunications and other technological adaptations whittle away at the advantages of onshore service over offshore, eliminating customer demand for a replenished US workforce. Meanwhile, instead of forcing Indian outsourcers to withdraw their visa-holding workers from onsite projects, the prohibition on outplacement drives them to seek out its loopholes. Firms might, for example, draft new contracts granting the provider property rights in some portion of the customer's office space (thus turning an onsite placement into an offsite one). Or they could make strategic adjustments to the promised services, so as to put them just outside the legislation's definition of outplacement.

Whatever scenario prevails, however, there can be no shrugging off the consequences of the immigration bill for the outsourcing industry. Sooner or later, and in one form of legislation or another, the bill's work-visa provisions are likely to become law. In the shake-up that follows, customers and providers alike will find themselves at a disadvantage if they have not identified and planned for the consequences they are likeliest to face.

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Endnotes

[1] S. 744, 113th Cong. (2013), available at http://www.govtrack.us/congress/bills/113/s744.

[2] *See* S. 744 §§ 4211(d), 4211(e), 4301.

[3] *See* S. 744 §§ 4213, 4304.

[4] *See* S. 744 § 4211(a)(1)–(2).

[5] *See* S. 744 §§ 4233(a), 4305(a).

[6] S. 744 § 4211(c)(2).

[7] *Id.*

[8] S. 744 § 4221.

[9] S. 744 § 4211(c)(1).

[10] S. 744 § 4221.