

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments



Legal Analysis by

Jochum Shore & Trossevin, PC

For

The National Foundation for American Policy

June 2010

LEGAL ANALYSIS: PROPOSED CHANGES TO SKILLED WORKER VISA LAWS LIKELY TO VIOLATE MAJOR U.S. TRADE COMMITMENTS

By Jochum Shore & Trossevin, PC

EXECUTIVE SUMMARY

Current legislative proposals to place new restrictions on employers petitioning for skilled foreign nationals on H-1B and L-1 visas contain provisions likely to violate U.S. commitments under the General Agreement on Trade in Services (GATS). Passing legislation with measures that violate the GATS risks retaliation against U.S. companies and can undermine U.S. efforts to open markets in other nations to American goods and services.

This analysis by trade attorneys at the Washington, D.C.-based law firm of Jochum Shore & Trossevin, PC examined S. 887, a bill introduced by Senators Richard Durbin (D-IL) and Charles Grassley (R-IA), the Employ America Act (S. 2804), and proposals to raise the fees on H-1B visas. In addition, key provisions in S. 887 are contained in a draft legislative proposal on immigration reform offered by a group of Democratic Senators.

The analysis found legislative provisions that carry a significant likelihood of being ruled inconsistent with U.S. commitments under the GATS, including changing H-1B wage rules to require employers to pay median average wages for the occupation and median wages for skill level 2 (S. 887); changing 90-day nondisplacement rule for H-1Bs to 180 days (S. 887); prohibiting new H-1B or L-1 visas for employers with more than 50 percent of U.S. workforce in H-1B or L-1 status (S. 887); new office requirements for L-1 visa holders (S. 887); broad no layoff restrictions (S. 2804) and, depending on level and justification, higher H-1B fees (past Senate floor amendments).

The analysis takes no position on whether such proposed legislative changes constitute sound immigration policy. However, it explains why passing such legislation would be highly vulnerable to challenge from WTO 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. As such, the analysis and its conclusions should be considered in deliberations over possible changes to U.S. immigration policy.

PROPOSED LEGISLATIVE CHANGE	CONCLUSION
Changing H-1B wage rules to require employers to pay median average wage for occupation and median wage for skill level 2. (Sec. 101, S. 887)	Significant likelihood the provisions would be found inconsistent with the U.S. commitments under GATS.
Changing 90-day nondisplacement rule for H-1B to 180 days (Sec. 101, S. 887); restriction on outplacement of H-1Bs. (Sec. 101, 112, 113, S. 887)	Significant likelihood the provisions would be found inconsistent with the U.S. commitments under GATS.
Employer with more than 50 employees could not employ another H-1B nonimmigrant if the sum of their H-1B and L-1 visa holders is more than 50 percent of their total U.S. workforce. (Sec. 102, S. 887)	Significant likelihood the provision would be found inconsistent with the U.S. commitments under GATS.
Requirements for new offices for L-1 visa holders, including demonstrating the "financial ability to commence operations immediately upon approval of the petition." (Sec. 202, S. 887)	Significant likelihood the provisions would be found inconsistent with the U.S. commitments under GATS.
New wage requirements for L-1 visa holders. (Sec. 205, S. 887)	Significant likelihood the provisions would be found inconsistent with the U.S. commitments under GATS.
Across-the-board no layoff restriction. (S. 2804)	Significant likelihood the provisions would be found inconsistent with the U.S. commitments under GATS.
Outplacement restrictions on L-1 visa holders. (Section 201, S.887)	Raises significant GATS concerns.
Increasing visa fees. (Past Senate floor amendments)	Depending on fee level and justification, could result in GATS inconsistency.

BACKGROUND ON GATS

The General Agreement on Trade in Services (GATS), which has been in force since January 1995, established for the first time, the multilateral rules governing trade in services. The GATS is an integral part of the Marrakesh Agreement establishing the World Trade Organization (WTO)¹ and is binding on all its Members. As stated in its preamble, the GATS is designed to promote economic growth and development through a framework that is conducive to the expansion of international trade in services.²

A more detailed description of the GATS is contained in Annex 1 to this report. Generally, however, the GATS covers all measures applied by WTO members affecting trade in “services,”³ which are defined based on four modes of supply.⁴ The relevant modes of supply for purposes of this analysis are: *Mode 3* (the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member), and *Mode 4* (the supply of a service by a service supplier of one Member, through presence of natural persons of a Member).

Structurally, the GATS consists of both general obligations and disciplines, and the specific commitments of each Member. General commitments include an obligation to administer laws, regulations, or administrative actions affecting service sectors for which a Member has made specific commitments, reasonably, objectively and in an impartial manner. Specific commitments are set forth in each Member’s schedule and fall into two categories: market access⁵ and national treatment.⁶ Generally, one can view market access commitments as relating to *entry into* the market, while national treatment commitments relate to equality of competitive opportunity *within* the market.

Where a Member has made market access commitments, there are certain types of measures a Member cannot adopt, unless otherwise specified in its schedule, including “limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test.”⁷ There is also a specific annex to GATS on the movement of natural persons supplying services under Mode 4. The Mode 4 Annex clarifies that Members retain the right to regulate the entry and temporary stay of individuals within their borders, *provided* that such measures are not applied in such a manner as to nullify or impair benefits accruing under the terms of a specific commitment.⁸ Note also that, while it is clear that Mode 4 covers employees of foreign-owned service providers, there is some debate as to whether foreign employees of domestic service providers are covered.

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

There are general exceptions to the GATS for the adoption and enforcement of certain types of measures, including measures necessary to ensure compliance with GATS-consistent laws and regulations, including those to safeguard against deception and fraud. These exceptions are “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services. . . .”⁹

Finally, if a WTO Member believes that another Member has deployed a trade “measure” that is inconsistent with its GATS commitments, the complaining Member may invoke the WTO dispute settlement mechanism for redress.¹⁰ If the measure is found to be inconsistent with the GATS, the Dispute Settlement Body will recommend that the Member bring its measure into conformity with the Agreement.¹¹ If the Member fails to bring the measure into conformity with the GATS, the Complainant may seek authority from the Dispute Settlement Body (DSB) to retaliate against the other Party.

H-1B AND L-1 VISAS IN THE CONTEXT OF GATS

H-1B and L-1 Visas are temporary visas used by employers to enable skilled foreign nationals to work in the United States. The United States has made commitments under the GATS relating to the temporary admission of nonimmigrant specialty workers (H-1B) and intra-company transferees (L-1). As discussed further below, the United States has made commitments under GATS regarding the entry of foreign nationals that are consistent with U.S. law on H-1B and L-1 visas under the Immigration and Nationality Act (INA) of 1952, as amended.¹²

H-1B visas allow skilled foreign nationals to work temporarily in the United States. The H-1 nonimmigrant category was first created under the Immigration and Nationality Act (INA) of 1952 to assist U.S. employers needing temporary workers.¹³ The Immigration Act of 1990 amended the law by, among other things, creating the H-1B category for nonimmigrants (temporary visa holders) who intend to work in specialty occupations or as fashion models “of distinguished merit and ability.”¹⁴

A wide range of highly skilled foreign nationals potentially qualify for the H-1B visa category. The INA defines “specialty occupation” as an occupation that requires “(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”¹⁵

In order to obtain H-1B status, the foreign national’s prospective employer must submit a “labor condition application” to the Secretary of Labor. As part of that application, the employer must agree to pay wages that are at least “the actual wage level paid by the employer” to similarly situated employees or “the prevailing wage level” in the area, whichever is greater.¹⁶ After obtaining a certified Labor Condition Application, the employer submits a

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments
petition to U.S. Citizenship and Immigration Services (USCIS). Upon approval of the petition, the worker may receive H-1B status in the United States or obtain the visa abroad.

In general, the period of authorized admission of an H-1B professional may not exceed six years.¹⁷ However, the American Competitiveness in the Twenty-First Century Act (AC21) removed the six year limitation for certain aliens whose labor certification applications or employment-based immigrant petitions remained undecided due to lengthy adjudication delays.¹⁸

There is an annual statutory cap of 65,000 on H-1B nonimmigrant visas for foreign professionals. There are exemptions from the 65,000 cap for workers employed by institutions of higher education, related or affiliated non-profit organizations, and non-profit research or governmental research organizations. In addition, legislation in 2004 provided for exemptions from the H-1B cap for up to 20,000 foreign nationals who graduated from U.S. universities with a Master's or higher degree.¹⁹

The L-1 visa classification enables international companies to transfer employees to the United States temporarily to continue to work for a parent branch, affiliate, or subsidiary of the same company. Under the Immigration and Nationality Act (INA), the sponsoring employer must demonstrate that the worker, within the three years preceding the transfer, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized capacity, for one continuous year.²⁰ The L-1A category is for workers coming to the U.S. to fill a managerial or executive position; workers coming to work in a position that requires specialized knowledge are eligible for the L-1B visa category.

The law creating the L-1 category does not require that the petitioning companies have any operations in the United States, or even operate in more than one country at the time the application is submitted. It merely requires that the worker be coming to the U.S. to continue to serve the employer, or a subsidiary, parent, or affiliate, in a capacity that is managerial, executive, or involves specialized knowledge.

The L-1 visa classification differs from the H-1B category in several important ways. First, an L-1 petitioning employer is not required to obtain a certified Labor Condition Application from the Department of Labor, and is therefore not obligated to attest to the obligations regarding wages and employment terms. Second, there are no statutory numerical limits on the number of L-1 nonimmigrants that may be admitted each fiscal year. Third, Congress has sought to impose limits on when L-1B nonimmigrants may be placed at third-party worksites, a restriction that has not been imposed on H-1B visa holders.²¹

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

ANALYTICAL FRAMEWORK FOR EXAMINING LEGISLATIVE PROPOSALS UNDER THE GATS

As discussed earlier, the GATS contains both general commitments and specific commitments found in each WTO Member's schedule. In analyzing the consistency of the legislation with U.S. commitments under the GATS, we have focused our analysis on the United States' Schedule of Specific Commitments²² ("US Schedule"), but address other provisions where appropriate.

In addition, the legislation relates most directly to access to the U.S. market, specifically through the presence of natural persons (Mode 4). Our analysis therefore focuses on U.S. commitments on market access through mode 4. Where appropriate, however, we also discuss whether restrictions on the presence of natural persons could give rise to a violation of sector-specific U.S. commitments on market access through a commercial presence in the United States (Mode 3).

Finally, we discuss the extent to which any potential GATS-inconsistency might fall within the general exceptions, particularly the exception to ensure compliance with laws and regulations through the prevention of fraud.²³

In analyzing the consistency of the legislation with U.S. commitments under the GATS, there are also several important points to bear in mind:

- As discussed above, where a Member undertakes market access commitments, the Member is prohibited under Article XVI from maintaining certain types of measures, unless otherwise specified in its schedule, including quantitative limitations on the total number of natural persons that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas.²⁴ Thus, numerical ceilings should be specified in the U.S. Schedule.²⁵
- With respect to Mode 4 (presence of natural persons), many Members, including the United States, have chosen to schedule their bound commitments in the form of undertakings rather than in the form of market access limitations. This is sometimes referred to as a "positive list" approach to scheduling commitments, *i.e.*, there are no commitments (*i.e.*, the Member is "unbound") except those specified in the schedule.²⁶
- The GATS does not prohibit regulation of the entry and movement of persons, including measures to ensure orderly movement of persons and the integrity of a Member's borders, *provided* such measures do not nullify or impair the benefits under a specific commitment.²⁷

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

- The GATS does not apply to measures affecting natural persons seeking employment in the United States (as opposed to providing services), or governing citizenship, residency or permanent employment.²⁸

With those principles in mind, the following is an analysis of the consistency of specific provisions of legislation and their consistency with the United States' commitments under the GATS.

U.S. MARKET ACCESS COMMITMENTS IN MODE 4

Market access through the presence of natural persons has been a sensitive issue in the GATS. Most WTO Members, including the United States, have made limited commitments in that area. Generally, the U.S. commitments on Mode 4 are found in the horizontal section of the U.S. Schedule, a copy of which is included in Annex 2 to this report. The U.S. Schedule indicates that there are no commitments (*i.e.*, the U.S. is “unbound”) with respect to Mode 4, except for specified market access commitments relating to the temporary entry and stay of certain categories of individuals.²⁹ The United States is bound by those specified commitments and therefore may not adopt or maintain measures that would conflict with those commitments, or nullify or impair the benefits accruing to WTO members under those commitments.³⁰ The elements of the U.S. Mode 4 commitments most relevant to this analysis are those granting market access through:

- Intra-corporate transfers of managers, executive and specialists for a period of up to 5 years (three years initially, with the possibility of a two-year extension);
- Managers or executives engaged in establishing a commercial presence, with operations to begin within one year;
- Entry of up to 65,000 persons annually (worldwide) who are engaged in “specialty occupations” as set out in 8 USC § 1101(a)(15)(H)(i). Entry is limited to three years and subject to compliance with labor certification requirements, including: (1) wages must be the greater of the actual wage paid by the employer to individuals with comparable qualifications, or the prevailing wage for the occupation; (2) the employer must not have laid off or otherwise displaced workers in the subject occupation during the period 90 days prior to and 90 days following the filing of the visa petition.

As noted above, these commitments generally reflect U.S. law as it existed in 1994 when the WTO agreements were finalized.³¹ The first two commitments describe persons who would fall within the U.S. L-1 visa category, and the third is specifically tied to persons that qualify for an H-1B visa.

LEGISLATIVE PROVISIONS MOST LIKELY TO BE INCONSISTENT WITH U.S. COMMITMENTS UNDER THE GATS

1. **S. 887 – H-1B Visas.** Sponsored by Senators Durbin and Grassley, this is the primary bill introduced in the 111th Congress that would modify current provision of high-skilled temporary visas. The following analysis covers the key proposed changes to current law.

a. Section 101(a) – Prevailing Wage. Recall that the U.S. Schedule contains commitments on market access for temporary workers in “specialty occupations” subject to a requirement that wages for such workers are the greater of the actual or prevailing wage. The legislation would modify this current wage requirement by adding two additional benchmarks: the median average wage for the occupation in the area of employment, and the median wage for skill level 2 in the occupational classification.

The Explanatory Note on scheduling GATS commitments cites as an example of a limitation on the number of natural persons: “Foreign labour should not exceed x percent *and/or wages xy percent of total.*”³² This appears to reflect an understanding that wage restrictions can, like a numerical quota, operate to restrict market access commitments and therefore should be scheduled. Thus, the United States specifically included the existing minimum wage requirement in the U.S. schedule.³³ This horizontal commitment is a specific undertaking for H-1B visas holders and therefore tighter wage requirements would be inconsistent with that commitment.

If either of the proposed new wage benchmarks could potentially be higher (*i.e.*, more restrictive) than both the actual and prevailing wage, as determined under current law, then there is a significant likelihood that the new provision is inconsistent with the U.S. commitments. Even if application of the new requirement would not exceed the bound requirement in every instance, if it may do so in some cases that is likely to be sufficient to render the provision inconsistent with U.S. obligations under GATS.³⁴

b. Section 101(d)(1) – Certification of No Layoffs. As noted above, with respect to H-1B visas, the U.S. Schedule explicitly states that the required certification of no layoffs³⁵ or other displacement³⁶ is to cover the period 90 days before and after the filing of the visa petition, which is the current statutory requirement.³⁷ In scheduling this restriction the United States has implicitly acknowledged that such certifications can operate to limit, and possibly preclude, scheduled Mode 4 market access, operating as a quantitative restriction. Having undertaken an explicit commitment regarding no layoff/displacement requirements for H-1B visas, the United States is obligated not to take actions inconsistent with that commitment. By doubling the period from 180 to 360 days, the legislation would significantly increase the

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

restriction on market access through H-1B visas. There is therefore a strong likelihood that, if challenged, the proposed change would be found inconsistent with the U.S. commitments under the GATS.

c. Sections 101(d)(2), 112(3) and 113 - Restriction on Outplacement. Under the current statute, “H-1B dependent employers”³⁸ must state in the labor condition applications supporting a petition that they will not place the nonimmigrant with another employer if the nonimmigrant is to perform duties at the other employers facility *and* there are indicia of an employment relationship between the nonimmigrant and the other employer, unless the applicant has inquired of the other employer and not learned of any displacement, or intention to displace a U.S. worker within the period 90 days before and after placement of the nonimmigrant.³⁹ The legislation would make several changes to that provision.

First, it would replace the application process with a prohibition/waiver process, *i.e.*, outplacement would be prohibited absent a waiver and, second, it would extend that process to all H-1B visas. The waiver process is to be completed within 7 days and the requirements are similar to the current law in that the nonimmigrant must not be controlled or supervised principally by the other employer and the placement is not essentially an arrangement for hire. The legislation would, however, also tighten the outplacement restrictions by increasing the “nondisplacement” requirement from a total of 180 days to 360 days. Section 112(3) would make conforming amendments to the enforcement provisions to reflect the stricter “nondisplacement” requirement.

A 7-day waiver requirement for outplacement does not *per se* appear to raise GATS concerns.⁴⁰ To the extent that the proposed waiver system is designed to prohibit what would essentially be employment by a different employer, it should not be in conflict with U.S. GATS commitments. Certain aspects of the proposed prohibition/waiver system do, however, raise significant concerns. Specifically, the 360-day “nondisplacement” waiver requirement is not relevant to the nature of the nonimmigrant’s relationship to the other employer (*i.e.*, service provider *v.* employee). It could, however, operate to limit, or preclude, Mode 4 market access and is more restrictive than the specific U.S. commitment on layoff/displacement, discussed above. The provision in the legislation therefore appears to be inconsistent with U.S. obligations under the GATS.

Moreover, the GATS requires that measures to regulate the entry of natural persons are not applied in a way that nullifies or impairs benefits accruing under a specific commitment.⁴¹ Depending on how terms such as “displacement” and “labor for hire” are interpreted and applied, the stricter “nondisplacement” provision could nullify or impair U.S. sector-specific market access commitments under Mode 3 (a

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

commercial presence in the United States), particularly in cases where the nonimmigrant employees have essential knowledge of the service provider's proprietary products or systems.

For example, the United States has no restrictions on market access to provide computer and related services through a commercial presence. Placing a nonimmigrant specialist with proprietary knowledge of the foreign companies technology on site for an extended period may be essential to providing installation and technical support services to U.S. customers. That nonimmigrant may replace a U.S. worker that was knowledgeable in the company's old computer system, but not in the new system. If the U.S. worker were considered to have "substantially equivalent qualifications and experience," however, that would constitute a "displacement" as defined in the current statute and would preclude a waiver for the H-1B service provider. Similarly, if an extended placement were deemed to be essentially "labor for hire" no waiver would be granted. As a result, the new requirement could operate to impair access to the U.S. market for computer and related services through a commercial presence in the United States in violation of the specific U.S. commitments for that sector. Thus, to ensure GATS-consistency, in addition to amending the "nondisplacement" requirement, terms such as "labor for hire" and "substantially equivalent qualifications and experience" should be clearly defined.

d. Section 102 - Limitation on Percentage of H-1B Workers. As discussed above, quantitative restrictions on the presence of natural persons are to be set forth in a Member's schedule and the United States has, in fact, scheduled a worldwide limitation on H-1B workers consistent with current U.S. law. The legislation would add an additional, unscheduled quantitative restriction on H-1B visas that would be applied on an employer-specific basis. Under the legislation, a service provider with more than 50 employees could not employ another H-1B nonimmigrant in its U.S. if the sum of their H-1B and L-1 visa holders is more than 50 percent of their total U.S. workforce. The restriction would apply *in addition to* the scheduled limit of 65,000 H-1B visas, thereby establishing a more restrictive numerical limitation on H-1B visas. There is a significant likelihood the more restrictive "50-50" numerical limitation would be found inconsistent with the specific commitment in the U.S. Schedule and therefore a violation of GATS.

2. S. 887 – L-1 Visas

a. Section 201 - Restrictions on Outplacement. Under current law, outplacement of L-1 visa holders serving in a capacity involving "specialized knowledge" is prohibited if the alien will be controlled and supervised principally by the other employer or the outplacement is essentially an arrangement to provide labor for hire. The legislation would prohibit outplacement of L-1 visa holders for a period of more than one year absent a waiver, if the alien: (1) will serve in a capacity requiring specialized knowledge; and (2)

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

will be stationed primarily at the worksite of another employer. In addition, a waiver requires, *inter alia*, that the employer of the L-1 visa holder establish that the employer at the site where the L-1 visa holder would be placed has not, and does not intend to displace a U.S. worker within 180 days after the date of the outplacement of the L-1 visa holder.

This prohibition/waiver system is similar to the one discussed above for H-1B visas and, likewise, should not raise GATS concerns to the extent that it operates only to restrict employment by a non-petitioning employer, not to restrict Mode 4 market access for the provision of services. In fact, unlike the H-1B provision, there is a specific reference in the L-1 provision to the outplacement not being an arrangement to provide labor for hire “rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.” That clarification is helpful to ensure that the provision does not restrict Mode 4 market access. Nevertheless, further definition of such terms as “labor for hire” would be useful.

The “nondisplacement” provision, however, raises concerns regarding U.S. market access commitments. The U.S. has undertaken to permit Mode 4 market access through temporary intra-corporate transfer of managers, executives and specialists, which are categories covered by L-1 visas. As discussed above, “nondisplacement” provisions can operate to limit, or preclude, Mode 4 market and thus could nullify or impair the market access granted for L-1 visa holders. It would appear therefore that such a restriction on the U.S. commitment should be scheduled, as the U.S. did in the case of temporary entry of persons in “specialty occupations.” The United States did not schedule any such restriction on intra-corporate transferees. In addition, as discussed in the context of the H-1B visa provision, a “nondisplacement” provision could give rise to a GATS violation with respect to sector-specific commitments on market access through a commercial presence in the United States (Mode 3), depending on how terms such as “substantially equivalent qualifications” are interpreted and applied. Thus, as currently drafted, the restrictions on outplacement of L-1 visa holders could be inconsistent with U.S. obligations under the GATS.

b. Section 202 – Restrictions on Personnel Engaged in Establishing a New Office. The legislation would create a new statutory provision that would: (1) allow managers and executives coming to open a new office a visa for one-year if: (1) the manager/executive has not received two or more L-1 visas within the immediately two preceding years, and (2) the employer has an adequate business plan, sufficient premises, and the “financial ability to commence operations immediately upon approval of the petition.” The initial one-year stay may be extended upon the filing of a subsequent application containing certain evidence of the ongoing operations of the new office and the continuing eligibility of the visa holder.

The U.S. Schedule contains explicit commitments regarding intra-corporate transfers of managers and executives that provide for initial entry of up to three years, with the possibility of a two-year extension. The schedule also contains a specific provision concerning managers and executives engaged in establishing new offices. Managers and executives establishing a new offices fall into both categories, *i.e.*, they are both intra-corporate transferees and persons engaged in establishment. In such cases, the commitments regarding intra-corporate transferees should still apply, provided the additional requirements for transferees establishing new offices are met.

Recall that the U.S. Schedule undertakes to permit intra-corporate transferees to remain for a period of three years, with a possible extension of up to two years. Additionally, “persons engaged in establishment” must provide proof of “the acquisition of physical premises for the entity that shall commence its business operations *within one year of the date of entry of that person.*” With those commitments in mind, two aspects of the legislation raise concerns: (1) certain criteria for granting and extending the L-1 visa, and (2) the restriction on two or more L-1 visas in two years.

Regarding granting and extending L-1 visas for persons establishing new offices, there are two problematic provisions in the legislation: (1) for the initial one-year visa, the requirement to demonstrate the “financial ability to commence operations immediately upon approval of the petition”; and (2) for the extension application, the requirement to provide evidence that the employer has been doing business at the new office “beginning on the date on which the petition was approved.”

For temporary entry of persons engaged in establishment, the U.S. Schedule requires only proof of “physical premises” that will commence operations *within one year of the date of entry* of such persons. There is no requirement of proof that, *at the time of entry*, the service provider has all of the financial resources necessary to commence operations immediately. The U.S. Schedule therefore grants service providers the flexibility to send managers/executives to “establish” offices provided they have a location and will have – within one year – the ability to commence operations. The legislation would remove that flexibility by denying an L-1 visa unless the financial resources “to commence operations immediately” are in place at the time the petition is approved. This appears to be related to the requirement, discussed below, that new offices be operational before entry of the L-1 visa holder.

The U.S. Schedule grants market access for managers and executives establishing new offices provided they prove that operations will commence within one year from the date of entry. The U.S. has also undertaken to permit access for managers and executives for a period of three to five years. Those

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

commitments enable service providers to send managers and executives to the United States for three to five years to *establish* a new office, as opposed to running an existing office. The legislation would condition extending a manager or executives stay for a period longer than 12 months on proof that the new office was operational as of the date the visa petition was approved, *i.e.*, the office was “established” *before* the L-1 visa holder entered the United States. Thus, a manager or executive coming to the U.S. to establish a new office, *i.e.*, one that is not operational at the time the petition is approved, could not stay in the United States for longer than 12 months. That new requirement therefore would seriously impair, and perhaps nullify the Mode 4 market access granted for service providers establishing new offices in the United States by restricting the period of stay for managers and executive engaged in establishment to 12 months, rather than the three to five years explicitly provided for in the U.S. Schedule. Thus, this provision, together with the financial resources provision discussed above, raises serious concerns about consistency with the GATS.

The categorical prohibition against new L-1 visas for persons that have been granted two or more L-1 visas in the immediately preceding two years is also a concern. First, the U.S. Schedule grants access for up to three years, with a possible extension for up to two more years. The provision could, in effect, preclude temporary entry of a manager, executive or specialist who has been in the United States for less than three years and, therefore, appears to be inconsistent with the U.S. commitment. Although there may be concerns about circumvention of the three to five year limits on the duration of entry, a ban after two one-year entries, without any opportunity to establish legitimate reasons for the need for multiple visas, could be viewed as unreasonably restrictive. This issue is discussed further in the section below on general GATS exceptions.

c. Section 205 – Wage Requirements. For L-1 visa holders employed for more than one year, the legislation would impose wage requirements identical to those for H-1B visa holders (both the wage requirements under current law for H-1Bs and the new wage rules for H-1Bs sought to be established in S.887). As discussed above, the fact that the United States and other WTO Members have scheduled minimum wage requirements appears to reflect an understanding that such measures can operate as a limitation on specific market access commitments and therefore should be scheduled. Thus, introducing unscheduled minimum wage requirements for L-1 visas raises significant concerns about consistency with U.S. GATS obligations.

A final word on S. 887. Descriptions of new restrictions on H-1B and L-1 visas that appeared the same as several elements in S. 887 were contained in a document on immigration reform released in May 2010 by Democratic Senators Harry Reid, Charles Schumer, and Robert Menendez. The elements in the document that appeared to

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

mirror provisions from S. 887 include new wage requirements for H-1B and L-1 visa holders, lengthening the nondisplacement attestation to cover 180 days rather than 90 days, and limiting the hiring of H-1B or L-1 visa holders to 50 percent or less of an employer's workforce. Absent legislative language on any new bill it is not possible to evaluate the proposal. However, to the extent those or other provisions are the same as the ones discussed in this analysis the conclusions on their likelihood of being found inconsistent with U.S. commitments under the GATS would be the same.

3. S. 2804. Introduced by Senators Sanders and Grassley, S. 2804 (The "Employ America Act") would require employers to certify that they have not, and will not, lay off a large number of employees prior to hiring foreign workers in the United States. The key provisions of the legislation are: (1) no visa authorizing employment in the United States may be approved unless the employer certifies that it has not provided a notice of a mass layoff pursuant to the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.) during the 12-month period immediately preceding the date on which the alien is scheduled to be hired, and the employer does not intend to provide a notice of a mass layoff pursuant to such Act; (2) if an employer provides a notice of a mass layoff pursuant to the Worker Adjustment and Retraining Notification (WARN) Act after the approval of a visa, any visas approved during the most recent 12-month period for such employer will expire in 60 days; and (3) there is an exemption for employers that certify, under penalty of perjury, that there will be no reduction in the number of employers' workers who are U.S. citizens as a result of the mass layoff.

This legislation is an across-the-board no-layoff restriction on the issuance, and continuing validity of, visas authorizing employment in the United States. There is no exemption in the legislation for temporary entry under the categories covered in the GATS. The legislation would establish a no layoff requirement that is stricter than the requirement in the U.S. Schedule for H-1B visas and would create an additional, unscheduled restriction on L-1 visas. As discussed above, creating a stricter no layoff requirement for temporary entry of persons in specialty occupations (H-1B visas) would conflict with the U.S. scheduled commitment. In addition, the U.S. has undertaken to permit Mode 4 market access through temporary intra-corporate transfer of managers, executives and specialists. A new requirement to certify to no actual or intended mass layoff notification within 12 months can operate to significantly limit, or preclude, that Mode 4 market access. It is reasonable to conclude, therefore, that such a restriction on the U.S. market access commitment should be scheduled, as the U.S. did in the case of temporary entry of persons in "specialty occupations." Thus, by creating a new, unscheduled restriction on Mode 4 market access, the legislation presents a significant likelihood it would be found inconsistent with U.S. obligations under the GATS.

4. Visa Fees. High visa fees could raise concerns about potential inconsistency with GATS Article VI, which requires that Members ensure that "all measures of general application affecting trade in services are

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments administered in a reasonable, objective and impartial manner.” The term “affecting” trade in services has been interpreted broadly,⁴² and a high visa fee, like a high tariff, could affect the provision of services through the presence of natural persons or, in some instances, the establishment of a commercial presence. Thus, absent a reasonable justification, such as administrative costs, raising H-1B fees to \$10,000 would appear to be simply a means of limiting access to visas, which would in turn limit Mode 4 market access, and potentially Mode 3 market access in certain sectors.

Visa fees could also violate the GATS if they are applied in a manner that nullifies or impairs benefits accruing to Members under the terms of a sector-specific commitment. At some level, visa fees could operate to impede, if not entirely preclude, supplying services in a particular sector through the presence of natural persons, and might also impede the ability to establish a commercial presence in the United States. How high is too high? The answer may depend upon the specific services sector at issue. Even a \$10,000 fee, as some have proposed, could be problematic and higher fees, such as the \$50,000 fees some interest groups have discussed, would be even more difficult to justify as anything other than a means to restrict temporary nonimmigrant workers. Moreover, to the extent these higher fees remain almost exclusively to fund scholarship and job training and not administrative functions it will be difficult to justify such fee increases. Thus, significant fee increases could trigger a GATS violation.

EXCEPTIONS

As discussed above, the General Agreement on Trade in Services provides for certain general exceptions to obligations under the Agreement. Analyzing the applicability of the exceptions to a particular measure is a two-step process. First, it is necessary to determine whether the measure falls within one of the 5 listed categories of exempted measures. If so, it is then necessary to determine whether, in accordance with the chapeau to Article XIV, the measure is not applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries, or a disguised restriction on trade in services. For purposes of the current analysis, the “disguised restriction on trade” is likely to be the more relevant criterion.

The stated purpose of S. 887 is protection against fraud and abuse. Of the listed exceptions, therefore, the one most relevant would be the exception for measures “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement including those relating to the prevention of deceptive and fraudulent practices”⁴³

We note at the outset the distinction in Article XIV between the laws being enforced and the GATS-inconsistent measures being taken to enforce those laws. Only measures to secure compliance with laws or regulations that are themselves not inconsistent with the GATS fall within the exception. Therefore, assuming the current law is

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

GATS-consistent, the first question is the whether potentially GATS-inconsistent provisions in the legislation are measures to ensure compliance with the law or are substantive changes in the law.

Most of the provisions discussed in this analysis, (e.g., H-1B quantitative restrictions, new or stricter minimum wage requirements, new or stricter no layoff/displacement requirements), are substantive changes to requirements in the existing law – not compliance or “anti-fraud” provisions. Some appear to be designed specifically to limit access to H-1B and L-1 visas. In fact, the stated purpose of S. 2804 is the protection of U.S. workers and the mechanism for doing so is to tighten restrictions on foreign workers. There would therefore be a strong case to be made that such provisions do not fall within the general exception. GATS violations caused by the tighter restrictions on Mode 4 market access, and potentially the establishment of a commercial presence in the United States, would therefore not be justified under Article XIV.

One possible exception would be some of the outplacement provisions (e.g., prohibition against “labor for hire”), which could reasonably be characterized as compliance measures necessary to ensure that nonimmigrant workers are, in fact, to be employed by the petitioning employer. Another potential “compliance” measure would be the prohibition on granting an L-1 visa for temporary entry to establish a new office, if the manager or executive was granted two or more visas in the previous two years. That provision does not, on its face, change the existing rule that L-1 visas can be issued for three to 5 years, and it could operate to prevent evasion of the existing limitations on the duration of L-1 visas by using a succession of L-1 visas for the same employee. Whether an outright ban is “necessary” to prevent evasion is questionable, however, and could have the effect of limiting the market access granted under the U.S. Schedule. A less trade-restrictive approach would be to establish a process in which a service provider could demonstrate a legitimate business reason for the multiple visas (e.g. establishing multiple new locations). Such a process would eliminate evasion without hindering legitimate use of Mode 4 market access.

CONCLUSION

A number of provisions in legislation proposed to change U.S. law on H-1B and L-1 visas present a significant likelihood of being found to be inconsistent with U.S. commitments under the General Agreement on Trade in Services. While it is possible some measures could be made compliant with U.S. obligations under GATS to the extent the legislation’s goal is to restrict the use of H-1B and L-1 visas, even amended legislation could run into serious GATS problems. As the above analysis demonstrates, to ensure consistency with U.S. obligations under the GATS there is a need to closely review any legislation on H-1B and L-1 visas. Passing legislation with measures that violate GATS risks retaliation against U.S. companies and can undermine U.S. efforts to open markets in other nations to American goods and services.

ANNEX 1

BACKGROUND ON

THE GENERAL AGREEMENT ON TRADE IN SERVICES

The Generalized Agreement on Trade in Services (GATS), which has been in force since January 1995, established for the first time multilateral rules governing trade in services. The GATS is an integral part of the Marrakesh Agreement establishing the World Trade Organization (WTO)⁴⁴ and is binding on all WTO Members. As stated in its preamble, the GATS is designed to promote economic growth and development through a framework that is conducive to the expansion of international trade in services.⁴⁵

The GATS covers all measures applied by WTO members that affect trade in services.⁴⁶ “Services” is defined based on four modes of supply⁴⁷:

Mode 1 - Cross border trade: The supply of a service from the territory of one Member into the territory of any other Member;

Mode 2 - Consumption abroad: The supply of a service in the territory of one Member to the service consumer of any other Member;

Mode 3 - Commercial Presence: The supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member;

Mode 4 - Presence of natural persons: The supply of a service by a service supplier of one Member, through presence of natural persons of a Member

STRUCTURE OF GATS

The GATS consists of general obligations and disciplines (Articles II-XV) and specific commitments, which are found in each Member’s schedule and governed by Articles XIX-XXI. The following is a summary of the GATS provisions that may be most relevant to an analysis of proposed amendments to U.S. laws governing the temporary entry of managers, executives and specialists.

GENERAL OBLIGATIONS OF GATS SIGNATORIES

Below are some of the key articles that relate to the general obligations of GATS signatories.

Article II. Most-Favored-Nation Treatment (MFN) treatment is a cornerstone of all the WTO agreements. For services, this obligations is set forth in Article II of GATS. It requires that a Member must immediately and unconditionally accord each WTO Member treatment no less favorable than it accords to services and service suppliers of any other WTO Member. This is considered an unconditional general obligation and applies regardless of the existence of specific commitments.⁴⁸

Article VI. Article VI concerns the administration of domestic laws and regulations. It requires that any domestic law, regulation, or administrative action, affecting sectors for which a Member has made specific commitments, be administered reasonably, objectively and in an impartial manner. To ensure this, each Member is required to establish, in accordance with its constitution and judicial system, a process to review domestic measures, and where justified, administer appropriate relief. Furthermore, if the supply of a scheduled service is subject to authorization, Members must decide on applications within a reasonable period of time. Article VI, also seeks to ensure that domestic regulatory requirements, such as licensing and qualification requirements, do not unnecessarily burden or hinder the supply of services in sectors with specific commitments. Finally, where specific commitments regarding professional services are undertaken, Article VI requires Members to provide adequate procedures for verifying the competence of professionals of other Members.

Article XIV. Article XIV provides a general GATS exception for the adoption and enforcement of five types of measures, including measures necessary to (1) protect public morals or maintain public order, (2) protect the health or life of humans, animals, and plants, (3) safeguard against deception and fraud, (4) protect confidential personal data, records, and accounts, and (5) safety. These exceptions are “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services. . . .”

Article XIV bis. Article XIV *bis* contains a general security exception under which Members are not obligated to provide information deemed contrary to national security interests, or prevented from taking steps to ensure those interests remain intact. In addition, no Member is prohibited from taking measures in order to maintain peace and security as outlined by the United Nations Charter.

SPECIFIC OBLIGATIONS OF GATS SIGNATORIES

Below are key articles related to the specific obligations undertaken by the United States and other GATS signatories.

Article XVI (Market Access). Article XVI requires a Member to accord services and service suppliers of WTO Members the market access specified in its schedule of commitments. Article XVI also lists six types of measures a Member cannot adopt where it has made market access commitments, unless otherwise specified in its schedule. They are: (1) limiting the number of service suppliers, (2) limiting the total value of service transactions or assets, (3) limiting the total number of service operations or service output, (4) limiting the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test, (5) restricting or requiring legal entities or joint ventures for service suppliers, and (6) placing limits on foreign investments and shareholding.

Article XVII (National Treatment). Article XVII provides that, where commitments are made, a Member must accord services and service suppliers of WTO Members treatment no less favorable than it accords its domestic services and services suppliers, subject to condition and qualifications set forth in its schedule. This means that, absent a scheduled condition or qualification on national treatment, a Member may not take measures that modify the conditions of competition such that foreign services and service suppliers are at a competitive disadvantage.⁴⁹ Note, however, that specific national treatment commitments are not interpreted to require a Member to compensate for any inherent competitive disadvantages resulting from the foreign character of the services or service provider.

Article XX. Article XX requires each Member to submit a schedule, by sector and mode of supply, of the commitments it is undertaking on market access and national treatment. While Article XX identifies the specific elements that must be specified in schedules, Members are free to tailor sector coverage and substantive content of their commitments in accordance with national policy objectives and constraints.⁵⁰

Annex on Movement of Natural Persons Supplying Services Under the Agreement (“Mode 4 Annex”). Pursuant to the Annex on Mode 4, the obligations under GATS do not extend to measures that affect persons seeking access to the employment market (as opposed to providing services) or those governing citizenship, residence, or permanent employment. As such, Members retain the right to regulate the entry and temporary stay of individuals within their borders, provided that such measures are not applied in such a manner as to nullify or impair benefits accruing under the terms of a specific commitment.⁵¹ Note that, while it is clear that mode 4

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments covers employees of foreign-owned service providers, there is some debate as to whether foreign employees of domestic service providers are covered.

ENFORCEMENT OF COMMITMENTS

If a WTO Member deploys a trade “measure” that is thought to be inconsistent with its GATS commitments, another Member may invoke the WTO dispute settlement mechanism for redress.⁵² Only governments may be parties to WTO dispute settlement; there is no private right of action. The government parties must enter into consultations for a period of 60 days to attempt to negotiate a settlement of the controversy.⁵³ For example, the offending measure could be removed. If no mutually satisfactory outcome is reached during the consultation stage, the Complainant may request the formation of a Panel, under the auspices of the WTO Dispute Settlement Body (DSB) to hear the case.⁵⁴ The Panel will issue a report of its findings as to the consistency of the measure with covered agreements. The Panel decision may be appealed to an Appellate Body.⁵⁵ If the measure is found to be inconsistent with a covered agreement by the Panel or the Appellate Body, the Dispute Settlement Body will recommend that the Member bring its measure into conformity with the Agreement.⁵⁶

REMEDIES AVAILABLE TO PREVAILING PARTY

If a Member fails to bring a measure into conformity with its obligations under GATS, the Complainant may seek authority from the DSB to retaliate against the other Party. Typically, retaliation takes the form of the suspension of obligations under the relevant agreement. Thus, for example, in the case of a GATS violation, the Complainant may be authorized to suspend an equivalent level of commitments (e.g., market access) to services or service suppliers of the Member in violation. In certain circumstances, however, the DSB may authorize cross-retaliation, e.g., suspension of commitments under the GATT relating to trade in goods, or commitments under the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS).

END NOTES

Note: Lynden Melmed, partner at BAL Corporate Immigration and former Chief Counsel of U.S. Citizenship and Immigration Services, provided background information and reviewed the sections pertaining to immigration law.

¹ The World Trade Organization (WTO) is an international body, which oversees the regulation of trade among its signatories. As such, the WTO provides its Member States with the framework to: (1) negotiate and formalize trade agreements; and (2) resolve disputes arising from them. Presently, the WTO has 153 Member States and 30 countries seeking membership. The WTO is the successor organization to the 1947 General Agreement on Tariffs and Trade (GATT). The GATT agreement, like the GATS, is now under the umbrella of the WTO.

² Members, Recognizing the growing importance of trade in services for the growth and development of the world economy; Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries... Hereby agree as follows. (See Preamble to the GATS).

³ The GATS is applicable to all actions of a Member State which affect the multilateral trade in services, irrespective of whether the particular measure is taken by the Member State's central, regional, or local government, or its non-governmental bodies exercising delegated powers. The GATS, however, is not applicable to: (1) services supplied in the exercise of government authority, and (2) measures affecting air traffic rights and services directly related to said rights. (See GATS Article 1:3:a and b, and Annex on Air Transport Services).

⁴ See GATS Article I:2.

⁵ See GATS Article XVI, which states: "With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." Schedules are interpreted in accordance with the customary rules of treaty interpretation. See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005) ("Gambling Services"), paras. 159-60. These rules are found in Article 31 of the Vienna Convention on the Law of Treaties, which requires a treaty to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

⁶ See GATS Article XVII, which states: "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

⁷ GATS Article XVI:2(d).

⁸ Because U.S. Mode 4 commitments are central to this analysis, we set out here the full text of the Annex on Mode 4:

(1) This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.

(2) The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

(3) In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

(4) The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.

⁹ See GATS Article XIV.

¹⁰ See WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”).

¹¹ DSU, Article 19.

¹² In 1994, the INA did not require an employer seeking to hire an H-1B worker to attest that it had recruited U.S. workers and that it had not displaced any U.S. workers. Those attestations were, however, included in the U.S. GATS commitments that went into effect in 1995. As such, there was no conflict between U.S. immigration law and the U.S. GATS commitments when, in 1998, Congress amended the INA to require employers with more than 15 percent of their workforce on H-1B visas to attest that they had conducted recruitment for U.S. workers and had not displaced any U.S. workers.

¹³ Immigration and Nationality Act of 1952 (McCarran-Walter Act), P.L. No. 82-414, June 27, 1952, c.477, 66 Stat. 163, Title 8 U.S.C. 1101 et. seq. (As Amended).

¹⁴ See Immigration Act of 1990, P.L. 101-649, Nov. 29, 1990, 104 Stat. 4978.

¹⁵ 8 U.S.C. § 1184(i)(1). The term “specialty occupation” is further defined in agency regulations at 8 C.F.R. § 214.2(h)(4)(ii) as: An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

¹⁶ 8 U.S.C. § 1182(n)(1)(A) (2000). The INA charges the Secretary of Labor with investigating and resolving any complaints over the employer's compliance with those conditions. 8 U.S.C. § 1182(n)(2)(A).

¹⁷ 8 U.S.C. § 1184(g)(4).

¹⁸ Pub. L. No. 105-277, 112 Stat. 2681 (div. C, title IV).

¹⁹ Pub. L. No. 108-447.

²⁰ 8 U.S.C. § 1101(a)(15)(L).

²¹ Omnibus Appropriations Act for Fiscal Year 2005, Public Law 108-447, 118 Stat. 2809. In 2004, Congress enacted the L-1 Visa Reform Act which, among other things, renders an L-1 nonimmigrant ineligible for the visa category if the worker will be "stationed primarily" at the worksite of another employer and (i) the alien will be principally under the control and supervision of the unaffiliated employer, or (ii) the placement at the non-affiliated worksite is essentially an arrangement to provide labor for hire, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

²² The US Schedule is contained in WTO documents GATS/SC/90, GATS/SC/90/Supp.1, GATS/SC/90/Supp.2 and GATS/SC/90/Supp.3. A consolidated version of the US Schedule, compiled for negotiating purposes, is contained in S/DCS/W/USA (27 February 2003).

²³ As described above in section I, there are additional exceptions in GATS Article XIV and Article XIV *bis* that could be (albeit less likely) invoked in defense of proposed reforms.

²⁴ See GATS Article XVI:2(d). See also, Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164 (3 September 1993) at para. 6.

²⁵ See Scheduling of Initial Commitment in Trade in Services: Explanatory Note Addendum, MTN.GNS/W/164/Add.1, at para. 3. The prohibition on quantitative restrictions refers to maximum limitations. Minimum requirements such as those common to licensing criteria (*e.g.* minimum capital requirements for the establishment of a corporate entity) do not fall within the scope of Article XVI (market access). If such a measure unjustifiably discriminates in favor of domestic service providers within the meaning of Article XVII (national treatment), and, if it cannot be justified it should be scheduled as a limitation on national treatment.

²⁶ *Id.* at para. 4. In contrast, under a "negative list" approach a Member makes a general commitment to market access in a sector or mode, except for scheduled restrictions.

²⁷ Mode 4 Annex at para. 4. Some of the current reform proposals dealing with the applications process address issues for which there is no specific commitment, *e.g.*, Section 101(b) (Internet posting), Section 102 (prohibition on preference for H-1B visa holders in recruiting), and would likely be considered GATS-consistent regulation.

²⁸ Mode 4 Annex at para. 2 ("The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.")

Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments

²⁹ There are some additional sector-specific restrictions on access through Mode 4 (e.g., residency, citizenship and licensing requirements) that are not applicable to the current analysis.

³⁰ See GATS Article XVI and Mode 4 Annex.

³¹ The agreements entered into force January 1, 1995.

³² See Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164 (3 September 1993) at para. 6 (emphasis added).

³³ Minimum wage requirements are found in the schedules of other WTO Members as well.

³⁴ See, e.g., *US- FSC*, WT/DS108/AB/RW, 14 January 2002, at para. 221 (the Appellate Body found in an analogous situation that a measure can be inconsistent with GATT Article III:4 (national treatment) even if unfavorable treatment did not result in every instance).

³⁵ “Lay off” means to cause the worker’s loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract” 8 U.S.C. § 1182(n)(4)(D).

³⁶ A worker is “displaced” if: “the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrant is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.” 8 U.S.C. § 1182(n)(4)(B).

³⁷ See 8 U.S.C. § 1182(n)(1)(E)(i).

³⁸ This term is defined at 9 U.S.C. § 1182(n)(3).

³⁹ See 8 U.S.C. § 1182(n)(1)(F).

⁴⁰ Similarly, as noted above, other provisions dealing with the application process, such as Internet posting requirements, and a prohibition on giving preference to H-1B visa holders in recruiting, do not appear to raise concerns under the GATS.

⁴¹ See GATS Mode 4 Annex at para. 4. It is also important to be mindful of the obligation in GATS Article VI that measures are to be administered in a reasonable, objective and impartial manner.

⁴² See, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R (31 May 2000) at para. 158.

⁴³ As noted above (footnote 6), there are also exemptions for measures necessary to protect human life and safety. Although immigration can be a security issue, the legislation itself does not indicate that is a goal of the reforms and the nature of the proposed reforms do not appear to address such concerns. Even if one were to argue that immigration fraud might heighten security issues, because fraud is already listed as a potential basis for an exception it would not add anything to the analysis.

⁴⁴ The World Trade Organization (WTO) is an international body, which oversees the regulation of trade among its signatories. As such, the WTO provides its Member States with the framework to: (1) negotiate and formalize trade agreements; and (2) resolve disputes arising from them. Presently, the TWO has 153 Member States and 30 countries seeking membership. The WTO is the successor organization to the 1947 General Agreement on Tariffs and Trade (GATT). The GATT agreement, like the GATS, is now under the umbrella of the WTO.

⁴⁵ *Members, Recognizing* the growing importance of trade in services for the growth and development of the world economy; *Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries... Hereby agree as follows. (see Preamble to the GATS).

⁴⁶ The GATS is applicable to all actions of a Member State which affect the multilateral trade in services, irrespective of whether the particular measure is taken by the Member State's central, regional, or local government, or its non-governmental bodies exercising delegated powers. The GATS, however, is not applicable to: (1) services supplied in the exercise of government authority, and (2) measures affecting air traffic rights and services directly related to said rights. (see GATS Article 1:3:a and b, and Annex on Air Transport Services).

⁴⁷ See GATS Article I:2.

⁴⁸ Members are allowed to seek exemptions to MFN treatment at the time of accession. Such exemptions cannot exceed a period of ten years.

⁴⁹ Pursuant to Article XVII, a Member may meet this requirement by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers. Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Members compared to like services or service suppliers of another Member.

⁵⁰ The elements specified in Article XX are: (a) terms, limitations and conditions on market access; (b) conditions and qualifications on national treatment; (c) undertakings relating to additional commitments; (d) where appropriate the time frame for implementation of such commitments; and (e) the date of entry into force of such commitments. Measures limiting both market access and national treatment are to be listed under limitations on national treatment, but are considered to condition or qualify market access as well.

⁵¹ Because U.S. mode 4 commitments are central to this analysis, we set out here the full text of the Annex on Mode 4:

(1) This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.

(2) The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

(3) In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

(4) The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.

⁵² See Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”).

⁵³ DSU, Article 4.

⁵⁴ DSU, Article 6.

⁵⁵ DSU, Article 17.

⁵⁶ DSU, Article 19.

ABOUT THE AUTHORS

Jochum Shore & Trossevin is a Washington, D.C.-based law firm focusing on trade regulation and trade litigation. Marguerite Trossevin is a founding member of Jochum Shore & Trossevin, PC and Black Swan, LLC. Ms. Trossevin was formerly Deputy Chief Counsel for Import Administration at the U.S. Department of Commerce, where she served as a senior legal adviser for over ten years. As Deputy Chief Counsel, Ms. Trossevin managed and litigated numerous disputes before the World Trade Organization (WTO) and has extensive expertise in the WTO agreements. She is also an adjunct Professor at Georgetown University Law School. Ms. Trossevin was admitted to the District of Columbia Bar in 1985 and to the Maryland Bar in 2003. A graduate of Villanova University School of Law, Ms. Trossevin earned her J.D., cum laude, in 1985.

James Jochum is a founding member of both Jochum Shore & Trossevin PC and Black Swan LLC. Mr. Jochum was appointed by President Bush to two senior trade positions, Assistant Secretary of Commerce for Import Administration and Assistant Secretary of Commerce for Export Administration. As Assistant Secretary of Commerce for Import Administration, Mr. Jochum led the agency responsible for implementing the U.S. trade remedy laws. Prior to joining the Bush Administration, Mr. Jochum served as International Trade Counsel and Legislative Director for U.S. Senator Charles Grassley (R-IA), the current chairman of the Senate Finance Committee. Mr. Jochum received his Juris Doctorate degree, with high honors, from the University of Iowa College of Law and a B.A. in Political Science (Order of the Coif) from the University of Iowa.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com.