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*Immigration*

## Foreign Outsourcing Is Unexpected Outcome of 1990 Immigration Act

Employer abuse of the H-1B visa program since the passing of the Immigration Act in 1990 has resulted in lower wages for all workers and follows a trend of employers looking to shed traditional employment responsibilities, panelists said Dec. 8.

''What we probably most miscalculated, as positive as those achievements were, is how many of these employment-based programs would be used to allow foreign temporary workers to be brought in to fill permanent jobs rather than temporary jobs,'' Jon Hiatt, chief of staff and executive assistant to the president of the AFL-CIO, said during a Migration Policy Institute event on the act.

The Immigration Act, signed by President George H.W. Bush, increased immigration levels by redesigning admissions categories and restructuring employment-based entry provisions for both permanent and temporary admissions.

Demetrios G. Papademetriou, senior fellow and president emeritus of the MPI, said one of the ''great innovations at the time'' was the H-1B highly skilled guestworker visa as a ''bridging category'' or ''transitional visa that allowed people entering on temporary visas to have the right to transition into permanent residency.''

Papademetriou, who was director for immigration policy and research at the Department of Labor when the law was passed, said the administration at the time talked about the EB-1 visa category—a permanent, employment-based visa—as a route for ''prospective Einsteins, artists, cultural icons, engineers and physicists,'' to come and work in the U.S.

''Thinking back on this, we did open up the system and made it more competitive internationally,'' Papademetriou said. ''I know that a lot of union representatives at that time tried to bring the [admission] numbers down to traditional requirements. The administration stood on the principle that, presumptively, H-1Bs and EB-1s would not compete with American workers,'' he said.

**Green Cards, Not Guestworkers.** Former Rep. Bruce A. Morrison (D-Conn.), who was chair of the House Judiciary's Immigration Subcommittee when the law was passed said in drafting the legislation the goal was to increase green cards and not foreign guestworkers.

''The notion was temporary visas should be used for temporary workers,'' and ''the H-1 had never been used that way,'' he said. ''The most important thing to say about H-1B is that we were trying to go away from it and get people to use green cards.''

Morrison said the architects of the 1990 act believed the way to protect the American workforce was to put in fees for the visas. He said they hoped that requiring fees instead of labor certification would be a deterrent for employers who might use the visa program to replace American workers.

''The way we believed we would protect the American workforce was to issue fees. I don't mean a few thousand dollars, I mean tens of thousands of dollars on employers so the economic choice would be clear: you'd only take this person if you couldn't find an American,'' Morrison said. ''We tried to do that, it was in our reported bill, and the Ways and Means Committee wouldn't allow us to set a fee,'' he said.

He said the vision of moving people to green cards and away from H-1B visas depended on whether there would be an expeditious process for getting green cards.

**Growth of Foreign Outsourcing Companies..** Morrison said ''deals made'' in subsequent 1998 legislation allowed the cap on H-1B visas to increase temporarily from 65,000 to 195,000 starting in fiscal year 2001. At the time, he said, there were no outsourcing companies that hired foreign workers with the express purpose of replacing American workers. Morrison said he believes these outsourcing companies are an artifact of the H-1B program.

''The lobbyists wrote things into the 1998 legislation that if you pay an annual salary of more than $60,000 you can displace American workers,'' Morrison said. ''You couldn't do that under general rules. There are ways to stop outsourcing, but it's a political question, not a legal question,'' he said.

He said the H-1B was a battleground then as it is now. ''I think it's a shame frankly that the American business community favors temporary visas over green cards. Green cards are the solution to the exploitation of people who are free agents in the labor market and who are not tied to particular employers,'' Morrison said.

''There is no regulatory scheme as good as the market, as free individuals choosing their employment,''

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Morrison said. ''That's what we wanted, that's what I think we need now. We are never going to write enough rules to stop the abuse of temporary visas.''

**Visa Portability 'Misguided' Argument.** He asserted that the visa portability argument—that H-1B workers should be allowed to change employers—is misguided because the H-1B is ''100 percent portable, but not really,'' because foreign workers need a sponsor for a green card.

''If you move jobs you lose your sponsor, so people are actually tied to their employer no matter what Congress writes,'' Morrison said. ''This is the thing that was the debate in 1990, and nothing has changed about the fundamental values: 'Do Americans want the people we bring into the country truly employed in the country, to be free agents in the labor market, or do we want them to be tied to employers who can decide their fate in the American economy and in the American civil society?' ''

Stephen W. Yale-Loehr, a professor of immigration practice at Cornell University Law School and of counsel to Ithaca, N.Y-based Miller Mayer, said immigration continues to be a problem in the U.S. because there isn't much flexibility for agencies to update immigration policy.

''Other countries are much more flexible with their immigration system; they allow their agencies to make more modifications without having to go back to their parliament or legislature,'' Yale-Loehr said. ''We've never had that. It's a failure of our congressional system and not just on immigration,'' he said.

He said he has clients who would like to apply for a national interest waiver or an O-1 visa but agency rules make it so difficult that employers and employees ''don't want to take the chance of losing on an O-1 or national interest waiver, so they go with the H-1B.''

O-1 visas go to guestworkers with extraordinary ability in the arts, motion picture or television industry, sciences, education, business or athletics. The national interest waiver allows immigrant workers to obtain an EB-2 permanent visa without going through the labor certification process and without needing an employer sponsor, if their admission is in the national interest.

''That's changing now,'' Yale-Loehr said. ''With the H-1B lottery, there is only a one-in-four chance of winning, so people are having to get more creative than they did a couple of years ago. That's forcing more people to use these other categories.''

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