The H-1B and L-1 Visa Reform Act of 2020

SECTION BY SECTION

SECTION 1 – Short Title and Table of Contents

The short title of the bill is the H-1B and L-1 Visa Reform Act of 2020.

TITLE I – H-1B VISA FRAUD AND ABUSE PROTECTIONS

SUBTITLE A – H-1B EMPLOYER APPLICATION REQUIREMENTS

SECTION 101 – Modification of Application Requirements

The bill changes the wage requirements for H-1B workers. Employers would have to pay the highest wage from three categories: 1) the locally-determined prevailing wage level for the occupational classification in the area of employment; 2) the median average wage for all workers in the occupational classification in the area of employment; or 3) the median wage for skill level 2 in the occupational classification found in the most recent OES survey.

Under current law, the employer of an H-1B worker must attest to the U.S. Department of Labor that it will provide working conditions for the H-1B worker that will "not adversely affect the working conditions of workers similarly employed." The bill clarifies this requirement by providing that that working conditions of similarly employed United States workers may not be adversely affected by the hiring of the H-1B worker.

This section requires that all jobs for which an H-1B worker is sought be posted on a website established by the Department of Labor. The employer, at the time of filing a labor condition application, must have posted the job for at least 30 calendar days, and must include a detailed description of the position, including the wages and other terms and conditions of employment; the minimum education, training, experience, and other requirements for the position; and the process for applying for the position.

Under current law, only H-1B "dependent" employers (e.g. an employer with more than 50 full-time employees of which 15% or more are H-1B employees) have to prove that they have tried to recruit American workers for a job offered to an H-1B worker. This section extends the recruitment requirement to all employers.

This section amends current law to prohibit the replacement of American workers with H-1B workers.

This section also expands the general "non-displacement" prohibition by changing the period of time during which an employer who hires H-1B workers may not lay off or displace their current American workers. Current law mandates that an employer may not displace a U.S. worker employed by the employer within a 90 day period before or after applying for H-1B visas. This

provision would increase that period to 180 days before and after the date the H-1B worker is placed at the worksite, giving increased security to U.S. workers.

This section would generally prohibit the outsourcing or leasing of H-1B workers to other employers. However, the bill also provides an avenue for employers to seek a waiver from the outsourcing prohibition, provided the employer can show that no U.S. workers will be replaced as a result and that the worker will not be a de facto employee of the employer with which the worker will be placed.

SECTION 102 – New Application Requirements

This section prohibits employers from placing advertisements for jobs in the United States that recruit only H-1B visa holders or indicate H-1B visa holders will be given preference in the hiring process.

This section prohibits an employer with more than 50 employees in the U.S. from hiring additional H-1B or L-1 workers if the employer's U.S. workforce is more than 50% H-1B and L-1 nonimmigrants.

This section provides that companies petitioning for H-1B workers that have previously employed H-1B visa holders must provide a copy of such earlier workers' W-2 forms to the Department of Labor to prove that they paid the earlier H-1B workers the appropriate wage. This will help verify that proper salaries were paid before the employer is allowed to bring in more workers under the program.

SECTION 103 – Application Review Requirements

This section provides more protection against fraud and misrepresentation by applicants. Under current law, the Secretary of Labor may review Labor Condition Applications only for "incompleteness" or "obvious inaccuracies." This section allows the Secretary to review applications for "indicators of fraud or misrepresentation of material fact," giving the Labor Department more authority to investigate an application. This section also gives the Labor Department 14 days (rather than seven) for certifying the application.

SECTION 104 – H-1B Visa Allocation

This section designates specific categories of H-1B workers who, because of their education, training, or economic value, are of the highest national priority and must be given preference in the allocation of H-1B visas.

This section also amends the law to provide the Secretary of Homeland Security with discretion to allocate H-1B visas in any manner or order the Secretary deems appropriate (subject

to the H-1B priority categories described above). This provision would give explicit authority to the Secretary to implement an H-1B lottery or registration system.

SECTION 105 – H-1B Workers Employed by Institutions of Higher Education

The provision at section 214(g)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. sec. 1184(g)(5)(A)) exempts from the H-1B cap aliens who are employed (or who have received an offer of employment) "at" an institution of higher education or a related or affiliated nonprofit entity. This section would amend this provision to require the nonimmigrant be employed "by" an institution of higher education or a related or affiliated nonprofit entity. This would prevent the possibility that this H-1B cap exemption could apply to people who work physically *at* an exempt institution, but are not actually employed *by* the institution.

SECTION 106 – Specialty Occupation to Require an Actual Degree

This section amends the law to require that in all cases a college degree directly related to a specific occupation would be a requirement for entry into the occupation in order for that occupation to be considered a "specialty occupation" eligible to be filled by H-1B workers.

Currently, INA 214(i)(1) defines a "specialty occupation" as a job that requires "theoretical and practical application of a body of highly specialized knowledge" and attainment of a bachelor's degree *or its equivalent*. Under the regulations at 8 CFR 214.2(h)(2)(iii)(A)(1), DHS requires only that the degree or its equivalent be "normally' the minimum requirement for entry into the particular position.

Additionally, this section eliminates ambiguity in the current language at INA 214(i)(2), clarifying that an H-1B worker needs either a license or a college degree.

SECTION 107 – Labor Condition Application Fee

This section authorizes the Department of Labor to charge a reasonable fee for the processing and adjudication of H-1B Labor Condition Applications. The money will be put into a special account and may be used only for expenses associated with the administration, oversight, investigation, and enforcement of the H-1B nonimmigrant visa program.

SECTION 108 – H-1B Subpoena Authority of the U.S. Department of Labor

This section grants subpoena authority to the Department of Labor for use in H-1B investigations.

SECTION 109 – Limitation on Extension of H-1B Petition

This section allows for a 3-year extension of the initial 3-year H-1B period of stay only if the H-1B worker is the beneficiary of an approved employment-based immigrant petition.

SECTION 110 – Elimination of B-1 in Lieu of H-1

Despite the statutory prohibition on B-1 visa holders coming to the U.S. to perform skilled or unskilled labor, current State Department field guidance authorizes consular officers to grant B-1 visas to foreign workers who should otherwise be seeking H-1B visas in cases where the worker is employed by a foreign company and is coming to the U.S. to work at a U.S. client of that foreign company. Specifically, the State Department's Foreign Affairs Manual (FAM) states that to qualify for such "B-1 in lieu of H-1B" visas, "the employee must customarily be employed by the foreign firm, the employing entity must pay the employee's salary, and the source of the employee's salary must be abroad." Under this low threshold, companies could import foreign workers via the B-1 business visitor visa and evade the H-1B visa cap and prevailing wage requirements that would otherwise apply to such workers so long as the workers could show that their paychecks were still coming from their foreign employer. This provision closes this loophole by explicitly prohibiting B-1 visas from being issued to people coming to the U.S. to perform work that should be done in H-1B status.

SUBTITLE B – INVESTIGATION AND DISPOSITION OF COMPLAINTS AGAINST H-1B EMPLOYERS

SECTION 111 – General Modification of Procedures for Investigation and Disposition

The bill removes burdensome requirements for initiating DOL investigations. Under current law, the Secretary of Labor is allowed to initiate investigations of H-1B employers only in certain limited circumstances. For an investigation to commence, the Secretary of Labor has to personally certify that reasonable cause exists and must personally approve commencement of the investigation. The bill strikes the personal certification requirement and allows delegation of authority to initiate investigations.

The bill would enhance the Department of Labor's ability to enforce worker protections by allowing random audits. DOL would have to do compliance audits of not less than one percent of employers that employ H-1B nonimmigrants during a calendar year. If a company has more than 100 employees in the U.S., and more than 15% are H-1Bs, then the Secretary has to do annual compliance audits of these employers. The audits would be available to the public.

This section would also require the Department of Labor to establish a DOL hotline for displaced U.S. workers.

SECTION 112 –Investigation, Working Conditions and Penalties

This section modestly increases penalties for violators of H-1B program conditions. Administrative fines per violation would increase from $1,000 to $5,000 and from $5,000 to $25,000 for willful misrepresentation. Additionally, the maximum fine for a willful failure or misrepresentation resulting in the displacement of a U.S. worker would increase from $35,000 to $150,000.

SECTION 113 –Waiver Requirements

The bill would generally prohibit the outsourcing or leasing of H-1B workers to other employers. The business that brings in the visa holder is responsible for that worker and should not be permitted to place the worker with another employer. This section lays out the process by which an employer may obtain a waiver from the Department of Labor of the outsourcing prohibition. The waivers would have to be approved within seven days.

SECTION 114 – Initiation of Investigations

Under current law, the Secretary of Labor may only initiate an investigation of an H-1B employer if the identity of the source of credible information is known to the Secretary of Labor. The Secretary must also have reason to believe that the employer has committed a willful failure to meet the requirements under the law, has engaged in a pattern or practice of failures to meet the conditions required, or if the failure is substantial enough to affect multiple employees. The bill strikes these conditions for the Secretary of Labor to initiate an investigation, providing more authority to investigate program compliance. It also strikes a provision in current law prohibiting DOL from starting an investigation of an employer for H-1B noncompliance based on information from DOL employees.

The bill still requires the Secretary of Labor to provide notice to the employer of the intent to conduct an investigation. The notice to the employer will provide enough details to allow the employer to respond to the allegations before an investigation begins. The bill still requires the Secretary of Labor to provide an employer with an opportunity for a hearing, but changes the amount of time provided to give notice to the employer from 120 to 60 days.

SECTION 115 –Information Sharing

This section increases information sharing between DHS and the Department of Labor. It would require U.S. Citizenship and Immigration Services to share information about H-1B petitions with the Department of Labor, allowing DOL to initiate investigations after receiving information indicating noncompliance.

SECTION 116 – Conforming Amendment

SUBTITLE C– OTHER PROTECTIONS

SECTION 121 – Posting Available Positions Through the Department of Labor

This section authorizes the Department of Labor to establish a searchable internet website for posting positions that employers are seeking to fill with an H-1B visa holder. The agency must create the site within 90 days of enactment and it shall be available to the public without charge.

SECTION 122 – Transparency and Report on Wage System

This section requires employers to share all immigration paperwork exchanged with federal agencies with former, current, or prospective employees who are also beneficiaries of an employment-based nonimmigrant petition filed by the employer. It also requires the GAO to prepare a report analyzing the accuracy and effectiveness of the Labor Department's current job classification and wage determination system.

SECTION 123 – Requirements for Information for H-1B and L-1 nonimmigrants.

This section would require the consulate abroad where the H-1B or L-1 worker is applying for his or her visa to provide the applicant with a brochure of rights. The employee would also receive copies of his immigration paperwork, and a list of employer obligations (including wage and working condition requirements). If the alien is already present in the United States, the responsibility to provide the information falls on the Department of Homeland Security.

SECTION 124 – Additional Department of Labor Employees

This section authorizes the Secretary of Labor to hire up to an additional 200 employees to administer, oversee, investigate, and enforce programs involving the H-1B visa program. The cost of hiring the additional staff would be paid for by funds from the account established to receive Labor Condition Application fees authorized under section 107.

SECTION 125 - Technical Correction

SECTION 126 – Application

TITLE II – L-1 VISA FRAUD AND ABUSE PROTECTIONS

SECTION 201 – Prohibition on Replacement of United States Workers and Restricting Outplacement of L-1 Nonimmigrants

This section generally prohibits employers from placing, outsourcing, or leasing an L-1 visa holder to another employer. A waiver is available, provided the employer can show that no U.S. workers will be replaced as a result of the placement and that the worker will not be a de facto employee of the employer with which the worker will be placed.

This section amends current law to include a prohibition on the replacement of American workers with L-1 workers.

This section also establishes a "non-displacement" prohibition for L-1s like the one already in place for H-1B workers. Under this provision, an employer who directly employs the L-1 workers, or with whom L-1 workers have been placed, may not lay off or displace any American workers within a 180-day period before or after the L-1 workers start working.

SECTION 202 – L-1 Employer Petition Requirements for Employment at New Offices

This section is intended to ensure that those who seek an L-1 visa to open a new U.S. office of an overseas company are actually doing so. It makes an L-1 visa valid for no more than 12 months if a U.S. branch or affiliate does not already exist. An extension of an L-1 visa granted for purposes of opening a new office may be granted only if the visa holder presents certain evidence of business activities that have been undertaken at the new office during the first year of operation.

SECTION 203 – Cooperation with Secretary of State

This section would require the Departments of Homeland Security and State to work together to verify the existence or continued existence of a company or office in the U.S. or in a foreign country that is an L-1 entity or affiliated with the L-1 entity.

SECTION 204 – Investigation and Disposition of Complaints Against L-1 Employers

This section provides authority, including subpoena authority, to the Secretary of Homeland Security to conduct investigations and audits of compliance with the L visa program. The Secretary can initiate an investigation based upon credible evidence, and must conduct annual compliance audits of not less than one percent of employers who hired L visa workers.

SECTION 205 – Wage Rate and Working Conditions for L-1 Nonimmigrants.

The bill sets a minimum wage level that employers must pay L visa workers (identical to the bill's requirement for H-1B workers). This will discourage employers from using the L visa as a source of cheap labor.

SECTION 206 – Penalties

The bill attaches penalties on employers who violate L visa rules (up to $25,000 per violation and no petitions approved for future workers). The employer is liable to the employees harmed for lost wages and benefits.

SECTION 207 – Prohibition on Retaliation Against L-1 Nonimmigrants

This section establishes a prohibition against retaliatory acts by employers against L-1 employees who report employer violations of L-1 program rules.

SECTION 208 – Adjudication by Department of Homeland Security of a Petition Under Blanket Petition

Currently, USCIS adjudicates applications by employers for "blanket" L status, but State Department consular officers adjudicate the L-1 eligibility of aliens seeking admission as intracompany transferees for an employer with blanket L status. In the interest of program integrity and consistency of adjudications, all adjudications of L-1 eligibility should be handled by DHS. This provision amends the law to clarify that DHS, not State, will adjudicate L-1 petitions filed on behalf of employees of companies with approved blanket petitions.

SECTION 209 – Reports on Employment-Based Nonimmigrants

This section greatly expands existing reporting requirements on statistics relating to the H-1B and L-1 visa programs.

SECTION 210 – Specialized Knowledge

This section changes the current, overly broad definition of "specialized knowledge" to one that reflects more accurately original Congressional intent that the category be limited and reserved only for truly key personnel.

SECTION 211 – Technical Amendments

SECTION 212 – Application