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Today, the USCIS released its tentative new policy on the L-1B work visa, which is for intracompany transfers. There are a number of interesting issues involved.

The starting point is that the L-1 visas have no required wage floor, unlike the H-1B work visa and employer-sponsored green cards. Of course, the wage floors in the latter two ways of hiring foreign workers are little more than window dressing, but politics is politics, and USCIS clearly feels it must (appear to) address the issue.

Significantly, USCIS doesn't even propose that Congress impose a wage floor on L-1, let alone attempt to do so. On the contrary, they say in the above memo, "there may be valid business reasons for the wage discrepancy" between the L-1s and the other workers at the firm's U.S. operations. But while holding to that (questionable) view, the agency still wants to appear to be protecting the American worker. Thus they (and the 2004 legislation) take a "labor shortage" approach: To be admissible, the foreign worker must possess (by implication rare, though this is not in the statute) "specialized knowledge," a term that appears 86 times in the document.

USCIS' problem is, as with Congress and H-1B, that they want to (at least appear to) punish the Indian IT services firms, the rent-a-programmer companies, while facilitating business as usual for the American firms (including the American IT services firms, such as IBM). I disagree with singling out those firms, but again, the politics of the situation mean they have to dance around this, as they can't simply name the firms.

So a vital issue is whether the foreign worker constitutes "labor for hire." A key facet of the Indian IT services firms is that, as noted, they in effect "rent" programmers to client firms. The 2004 Act said this was fine, as long as the arrangement with the IT services firm has all the trappings of an employee-employer relationship, i.e. "the [foreign worker] will continue to be controlled and supervised principally by [the IT services firm]." Clearly, this is not a high bar to set, and can be (nominally) satisfied with minimal effort on the part of the IT services firm.

By the way, a few years ago I pointed out how easy it was for Tata Consultancy Services to claim that its foreign workers had specialized knowledge — TCS had set up its own propriety software development platform, thus automatically achieving "specialized knowledge" status for all its foreign workers.

It is interesting that at various points in the memo, USCIS seems to take an apologetic tone, along the lines of "The statute doesn't protect American workers well, but we can't change the law, so our hands are tied." If this indeed is what they are saying, it is the height of hypocrisy, as they have recently taken the law into their own hands multiple times, e.g. granting spouses of H-1Bs the right to work.

The sad truth is that USCIS is quite happy to have its hands tied in this regard. Neither they nor Congress want to reduce the flow of foreign tech labor into the country, but they do want to give the appearance of taking action. I predicted several years ago that in the end Congress will raise the H-1B (including indirectly, via special green cards for foreign STEM students), while justifying it by seeming to punish the Indian firms, yet not actually doing even that.