

Business Standard

H-1B visa issue: How Indian IT ends up at wrong end of the stick

It would be a while before the legislation reaches the White House for a final presidential nod

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US president Donald Trump's election promise to protect American jobs moved a step closer with the judicial committee of US House of Representatives approving The Protect and Grow American Jobs Act (HR 170). The Bill, proposing to further curb the issue of H1-B visas, has a sting in its tail for Indian industry, creating an "unequal playing field" among information technology (IT) services and outsourcing companies targeting the US market.

It would be a while before the legislation reaches the White

House for a final presidential nod. However, the broad contours of the Bill, introduced by Republican Congressman Darrell Issa, are not very encouraging for Indian IT companies, with higher cost and compliance implications.

"This is a challenging Bill for India-centric companies. It puts the burden of compliance on H1-B visa-dependent companies, creating an uneven playing field among competitors," says Shivendra Singh, vice-president, global trade development at Nasscom, the IT sector's apex association. Experts say IT companies that do not rely largely on H1-B visas for servicing of clients might get a competitive advantage. "We want all companies to be treated equally," says Singh.

The Bill seeks to hike the minimum wage requirement for exemption from hiring US workers first by 50 per cent, to \$90,000 per annum from the current \$60,000. Current law requires H-1B dependent employers to attest they will not displace any US employee for 90 days before and after filing of the H-1B petition. An exemption is available if the H-1B employee receives yearly pay wage of \$60,000 or higher. Further exemption from this provision is granted to a H-1B employee with a master's degree. Indian IT companies normally pay more than \$60,000 and avail of the exemption.

Darrell Issa's Bill proposes to strengthen the non-displacement clause on multiple fronts. This includes increasing the tenure applicability of attestation to 90 days before the H-1B petition is filed and during the entire period of an H-1B worker's employment. It seeks primary and secondary non-displacement. This means non-displacement at a H-1B dependent employer's workplace, as well as client worksites. The Bill also calls for elimination of all exemptions, making attestations mandatory for H-1B dependent employers.

The criteria of defining a 'H1-B dependent' employer has also been lifted to companies having 20 per cent of their US headcount on visas, from the current 15 per cent. This provision is likely to help US tech companies, as many Indian companies have 40 per cent or more employees on visas, say analysts.

A recent note by Kotak Institutional Equities called the Bill "draconian" and said it was structured to harm Indian IT companies. "We find it even more draconian than our initial view as it seeks to (1) strengthen the non-displacement clause and make it mandatory for all applications for H-1B dependent employers and (2) increase investigations. If passed, this can have severe negative consequences," the note added.

Vikram Shroff, head of HR law practice at Nishith Desai Associates, says since the Bill was first introduced in January 2017, leading IT companies would have already factored in and started preparing for a more restrictive visa regime. "The timings of this development should provide adequate cushion for Indian companies while preparing for the FY19 H-1B visa window in April 2018," he says. Experts hope the US government will not introduce any more restrictions, given that there are half a dozen other Bills on the H-1B visa programme that are also being considered.

More, Indian IT companies have been tweaking their business and delivery models over the past two to three years. "They have been transforming delivery models for the past few years through use of technologies around cloud, artificial intelligence and robotics," says Raja Lahiri, partner, Grant Thornton. Top companies have been hiring locals and preparing for the change but smaller companies might find this transformation difficult, he adds.

Nasscom plans to raise the decibel count in highlighting the minuses in the proposed legislation. Saying it was "being driven by myths, not reality," the industry body warned that "the Bill could harm US businesses, imposing an extraordinary amount of bureaucratic red tape, disrupting the marketplace, threaten US jobs and stifle US innovation by unfairly and arbitrarily targeting a handful of companies".

In a note, Nasscom says "the high-skill visa programmes are not a major cause of US unemployment, and IT specialists working on temporary visas are not 'cheap labour'." Given Trump's public support for saving of American jobs, Indian IT industry has an uphill task to drive home these points to US policymakers.

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- Required wages:** Bill proposes that H-1B dependent employers pay a mean wage level for the occupational classification in the area of employment. It will likely result in some wage inflation for Indian IT companies, especially in states such as California where the mean wage level is significantly higher
- Change in 'H-1B dependent employer' definition** to an employer having more than 20 per cent of US headcount on H-1B visas, as against 15 per cent at present. Most Indian IT companies have more than 40 per cent of US employees on visas
- Periodic investigations:** The new Bill also proposes higher scrutiny and audits for H-1B dependent employers
- Report on H-1B dependent employers:** The Secretary of Labour and the Secretary of Homeland Security shall publish a joint report, annually, on the use of the H-1B programme by H-1B dependent employers
- Exemption from the requirement that US workers be recruited first:** Bill proposes an exemption from the requirement that US workers be recruited first; be available at a higher wage