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US visa troubles for Indian IT firms

Rising visa-rejection rates in America, doubling of visa fees and a spate of lawsuits are forcing Indian IT firms to reconsider their onsite staffing strategy. We spoke to Angelo Paparelli, a US-based business immigration lawyer, to comprehend the genesis of this backlash against Indian IT workers and the direction of employment-based immigration law in the USA. Angelo also discusses steps that need to be taken by stakeholders in Indian IT to address the current immigration issues.

Confluence of forces contribute to more visa denials for Indian IT

- Indian IT's visa woes are primarily a bureaucratic response to pressure from the media, politicians and US citizens who fear economic dislocation and job losses.
- This stems from bureaucrats who have given themselves the authority to interpret the immigration law in a stricter way than statutory provisions warrant.
- The desire of some Indian tech firms to stretch the visa rules and past cases of non-compliance with immigration laws have also contributed to elevated rejections.

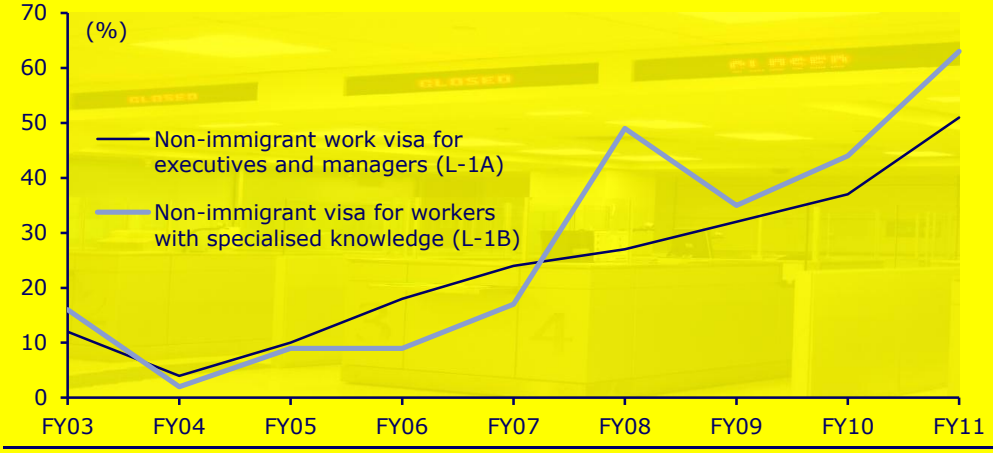
Don't expect any significant adverse visa legislation

- There has not been any significant lawsuit regarding the "B-1 in lieu of H-1" visa subcategory and, in that sense, the Infosys case is the first of its kind.
- The "B-1 in lieu of H-1" visa has grey areas and it is possible to posit a set of facts which can prove that rules have been either followed lawfully or have been abused.
- The direction of employment-based immigration legislation remains a concern, with past precedents indicating that election years are hunting grounds for such legislation.
- However, the vocal lobby of family immigration may not allow such laws to go through as they might lose leverage for negotiating better laws for undocumented workers.

Must-dos for India's government, IT firms and NASSCOM

- Indian IT companies must replicate what Japanese auto firms did in the late-1980s: create goodwill in the USA through job creation and charitable contributions.
- Companies must ensure that they are in compliance with immigration record-keeping and wage-payment obligations before pleading their case on restrictive visa rules.
- The Indian government needs to complain about immigration-related trade violations before the WTO and pressure the USA to grant the E-2 visa classification.
- Industry body NASSCOM should complain to Department of Homeland Security's Civil Rights & Civil Liberties office, alleging discriminatory treatment of Indian firms.

Rate of requests for evidence - High rates can negate benefits of lower rejection



Source: National Foundation for American Policy (NFAP)

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Angelo Paparelli

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Angelo is a partner in the Business Immigration Practice Group of Seyfarth Shaw LLP. A certified immigration law specialist (CA), Angelo is known among clients and peers for providing creative solutions to complex immigration law problems. He is also a litigation expert witness and has almost 20 years' experience representing major Indian and US IT consulting companies on immigration matters in the USA.

Angelo is a recipient of the Edith Lowenstein Memorial Award for Advancing the Practice of Immigration Law.

Angelo is also the founder and past president of the Alliance of Business Immigration Lawyers (ABIL). ABIL is a platform through which 40 global law firms and 1,000 professionals have joined forces in advancing best practices for their immigration clients.

Angelo also writes a blog, Nation of Immigrators[1], on America's dysfunctional immigration system.

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What is the genesis of the significant increase in the visa rejection rates over the past 18 months? We are seeing rejection rates as high as 40% for the Indian IT industry. Not just increased rejections but also greater instances of request for evidence (RFEs), and more examples of people being sent back from the port of entry have been observed.

Angelo Paparelli

A confluence of forces has contributed to these visa issues. We need to look at the different contributing factors in order to understand what's been happening.

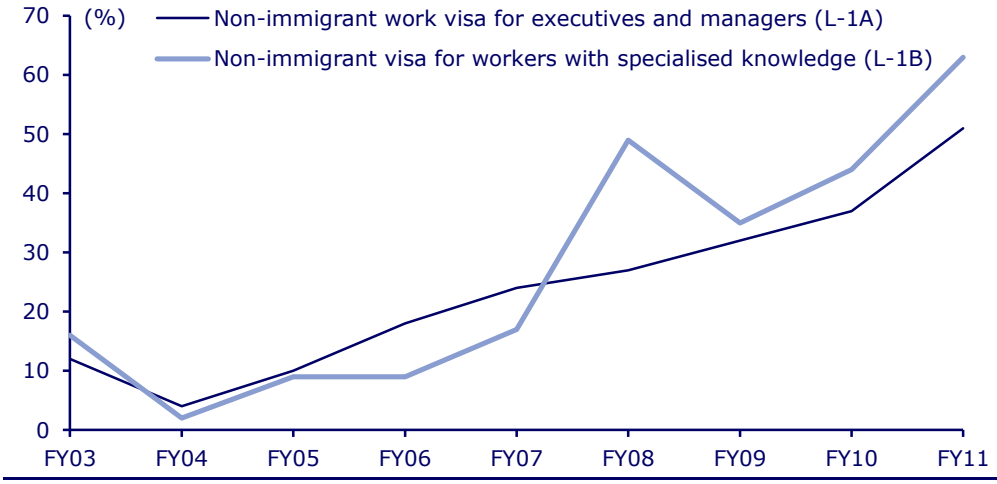
First, there has been a perception in Congress and the media that this area of the law has been rife with abuse, and fraud is not being addressed appropriately. One senator in particular, Senator Charles Grassley, has been actively highlighting this concern. He has been espousing an anti-business immigration policy, which is surprising in some respects, considering that he is a Republican. However, Senator Dick Durbin (a Democrat) has also joined him. Charles Grassley and Dick Durbin, some years ago, proposed legislation[2] that would increase the authority of the Department of Labor (DOL) over H-1B and L-1 visas.

Second, at the same time, we are dealing with a powerful economic recession, one which has been quite prolonged. In the United States, the history of immigration is the story of fluctuations of the economy that have led to demands to reduce the number of foreign workers allowed in when the economy is weak, so that Americans can be given preference for the fewer job opportunities that do exist. On the flipside, in times of high employment, when companies need to hire more workers than the available population, the pendulum swings in the other direction, and immigration tends to be less of a concern and thus more laxly regulated.

High RFE rates can negate benefits of lower rejection rates

Figure 1

Rate of requests for evidence



Source: NFAP

Third, there is also a domestic fear that the H-1B and the L-1 visas have allowed for the exploitation of American knowhow, thereby leading to direct termination of positions that Americans have held. There have also been claims in the media that some Americans were required to train their own replacements.

There are also other factors in play. In Congress for instance, there is a great deal of pressure to get the national borders under control. Regrettably, the Indian companies have felt the brunt of financing the additional resources needed for increased border vigilance. So the Homeland Security Supplemental Appropriations Bill (Public Law 111-230)[3] has pushed filing fees to unprecedented levels for companies with a large proportion of H-1B and L-1 non-immigrant workers, and these have tended to be the Indian companies. Although it is unlikely that the higher fees have been able to meet all the funding requirements for greater border security, it at least allowed the Democrats to convey that they can be as tough on border security as their Republican counterparts.

H-1B/L-1 visa fees were increased by over US$2,000 per application in August 2010 as part of the Border Security Bill

Figure 2

Fee structure for H-1B visas

Application/petition description	Original fees (US$)	New fees (US$)
Base filing fees	320	325
Fraud prevention and detection fees	500	500
AICWA Fee (American Competitiveness and Workforce Improvement Act of 1998)	1,500	1,720
Additionally under Public Law 111-230		
Applicable to petitioners with 50+ employees in the US and >50% of the petitioner's employees are in H-1B or L-1 status	na	$2,000
Total	**2,320**	**4,545**

Source: USCIS, redbus2us.com

CLSA

Do you get a sense that the US authorities want to effectively ban L-1 visas as a route for Indian IT companies to send employees to the USA? Why are L-1 visas getting such a greater degree of scrutiny?

Angelo Paparelli

To respond fully, I should provide a bit of historical background. Before 2002, the immigration function resided within the Department of Justice in an agency known as the Immigration and Naturalization Service (INS). Within six months after 11 September, 2001, Congress and the Bush White House agreed to eliminate INS in its current form and move the functions it performed into the new Department of Homeland Security (DHS). This led to the division of the erstwhile INS into three units, ie, US Customs and Border Protection (CBP), US Immigration and Customs Enforcement (ICE) and US Citizenship and Immigration Services (USCIS). USCIS is the agency that adjudicates requests for immigration benefits.

India has been singled out

Figure 3

L-1B visa denial rates for new petitions by country of origin

(%)	India	Canada	China	France	Germany	Japan	Mexico	UK
FY06	**1.7**	1.9	1.6	4.8	2.2	2.0	6.0	3.0
FY07	**0.9**	1.1	2.5	3.2	1.4	0.3	2.2	1.4
FY08	**2.8**	2.0	2.1	3.8	1.6	1.7	2.3	2.7
FY09	**22.5**	2.9	5.9	6.3	4.7	4.4	15.1	4.1
FY10	**10.5**	2.2	5.3	2.4	3.2	2.0	5.5	3.1
FY11	**13.4**	2.9	3.6	6.1	3.2	1.9	3.6	2.7

Note: L-1B is for employees with specialised knowledge. Source: NFAP

Over time, pressure on these three units, particularly the USCIS, has grown to align its mission more closely with the DHS' overarching mission of preventing any attacks on the "Homeland". Unfortunately, this has led to less

emphasis on customer service. As a result, even when rating the performance of the adjudicators, who decide cases within the USCIS, the government accords a 50% weighting to the ability of an adjudicator to identify suspected fraud or threats to national security (the other 50% is allocated to the quality of the adjudication, while speed is given no formal recognition in the performance appraisal system). So a greater push has developed on the part of adjudicators to be very careful in deciding to approve an immigration request or visa petition.

Figure 4

Requirements/regulations around H-1B and L-1 visas

	Qualification	Duration	Employment	Wage	Cap	Other
H1-B	4 years, graduate or equivalent	6 years total in 3-year increments	No constraints	Determined based on local prevailing wages and skill levels	65,000 annually	Single applications Cant prioritise
L1	Managerial or executive capacity Specialty knowledge capacity	7 years total First 3 years granted, then 2-year increments (any prior H1-B status counted in the 7 years)	Worked with employer for at least a year in a managerial or specialty worker role	Employer determined	No cap	Blanket application for all candidates

Source: USCIS, H1base.com

A perception among adjudicators has also grown that the L-1 visa category had become too accessible. The L-1 visa was created in the 1970s, and liberalised in 1990. In 1970, when the L-1 visa was created, Congress had expected very few individuals to qualify, and that the former INS would closely monitor eligibility. However, after 1990, the L-1A (which used to deal only with senior executives and certain managers of personnel), also included function managers. The definition of "specialised knowledge" needed to qualify for an L-1B visa also was expanded in the 1990 law. So although there is no water-tight definition of "specialised knowledge", the legislative history of the 1990 law showed that Congress repudiated the former INS requirement that specialised knowledge must be narrowly held within the organisation. Even if the knowledge is widely held within an organisation, but not known to competitors, it should now qualify as specialised knowledge.

In 2008, the AAO or Administrative Appeals Office (the administrative appellate body within the USCIS) published an opinion, one not technically a binding precedent, known as the "GST Decision"[4] involving an applicant from IBM's India subsidiary with experience in SAP. The AAO asserted that the older definition of "specialised knowledge" as instituted in 1970 still prevailed over the liberalised version enacted in 1990. This was seen as a roadmap to deny cases by the USCIS. Thereafter, the US Consulate in Chennai asked the Department of State visa office for guidance on L-1B's and the Department of State responded with a memorandum[5] which expressly stated *"If everyone is specialised, then no one is specialised."*

Most of the larger Indian companies have "blanket" L-1B visa applications, a benefit which eliminates the need to file an individual L-1B petition with USCIS. Thus, the State Department memo was addressed to the US consul in Chennai, although it was circulated to consulates across the globe. This may in part be the reason that the visa denial rate in India is significantly higher.

The National Foundation for American Policy (NFAP) released two reports[67] based on data from the State Department and the USCIS. The reports highlighted the disparate rate of refusals, requests for evidence etc. for Indian applicants compared to applicants from any other country. The higher denial rates, the NFAP found, cannot be justified solely by the higher number of visa applicants from India.

The challenges facing L-1 visa applicants have also been exacerbated by a power struggle within the USCIS. Post 9-11, the then-commissioner of INS issued a memo mandating "zero tolerance"[8] for any officer not strictly abiding by the agency's policies. But in the absence of clarity around seemingly conflicting agency policies, immigration bureaucrats chose the coda of "You can never lose your job for saying no". This practice then developed into the "culture of no" driving larger rates of denials, requests for evidence, petition revocations, etc.

CLSA **Can you elaborate a little on this power struggle within USCIS and how has that impacted policy around L-1 visas?**

Angelo Paparelli Over the last three years, the USCIS has been caught in an internal power struggle. President Obama had appointed Alejandro Mayorkas as the new director of USCIS in 2009. Mr Mayorkas, the son of Cuban immigrants and a former US attorney in Los Angeles, understands immigration legal issues very well. He has invested time and resources in making sure that the benefits and adjudications process works well. He has evaluated the prevalent "culture of no" and has chosen to better understand and identify the existing policies, and gauge whether the policies are truly effective or need to be changed.

Unfortunately, the initial thrust of his policy-assessment initiative focused on family immigration laws given that their advocates were larger in number and apparently more assertive. So the agency began to focus on naturalisation and other family-based immigration policies.

However, when the agency looked at employment-based immigration, Mr Mayorkas came to understand that the California Service Centre (CSC) had been the most aggressive at issuing rejections, requests for evidence (which asked for burdensome and often irrelevant information), and petition revocations, as well as conducting further investigations. A deeper dive revealed that the problem at the CSC came from the top and in 2010 Mr Mayorkas re-assigned the CSC's director and the deputy director to other locations without attributing fault on their part.

Supporters of the replaced personnel in USCIS reportedly then approached Senator Chuck Grassley, and complained that the new leadership was promoting a policy of "getting to a 'yes' and ignoring fraud". Senator Grassley filed a formal complaint[9] with the Secretary of Homeland Security against the replacement of the ex-director and her deputy, and requested an investigation by the Department of Homeland Security Office of Inspector General (OIG). The OIG report has been heavily criticised because the OIG conducted only an internal survey that lacked statistical validity and failed to interview external stakeholders. The OIG reported that some examiners felt pressured to reach a decision that was not supported by facts or law. Representative Zoe Lofgren - the ranking minority member of the House Immigration Subcommittee (and a former immigration lawyer) - also criticised the shortcomings of the report and maintained that its findings were unsound and unreliable. Significantly, although the OIG report attacked the former chief counsel of USCIS, it did not allege any wrongdoing by Mr Mayorkas directly.

Although the OIG report did not conclusively prove that CSC adjudicators were forced to "get to 'yes'", it still enabled officers to continue applying more stringent norms (as per the AAO's GST opinion) and issue requests for evidence and denials suggesting that if there are a large number of specialised knowledge visa applicants in a single company, then the company is abusing the L-1 category and that petitioner's further applications should be denied. Therefore, today the L-1B remains a subject of great controversy.

Even for the L-1A visa, CSC adjudicators are not granting approvals of function manager L-1s, notwithstanding the 1990 law, and are limiting the visa to "people managers" (managing either two levels of personnel or at least baccalaureates in case of line managers).

In January 2012, as a result of complaints from within the business community criticising the strict interpretation of the L-1B visa, Mr Mayorkas promised to issue updated L-1B guidance. He gave the impression that the forthcoming guidance would confirm that knowledge within an organisation need not be closely or narrowly held in order for an applicant to qualify for the L-1B. These criticisms originated from American companies looking to send IT workers from their offshore locations to the United States (as well as from Indian firms). However, nothing has come of it so far. In fact, Senators Grassley and Durbin, having learned of the proposed issuance of modernised L-1B guidance, recently wrote[10] to Mr Mayorkas urging him to follow the restrictive interpretation of the AAO's GST decision and subsequent State Department guidance.

While it may appear that some politicians urging restrictive interpretations and prosecutors pursuing alleged visa improprieties are looking to capitalise on this opportunity for their career advancement, the restrictive L-1 problems appear to stem primarily from Executive Branch bureaucrats who have arrogated to themselves the authority to interpret the law in a stricter way than the statutory provisions would warrant. It seems to be a bureaucratic response to pressures in the media and politics and from American citizens who fear economic dislocation and job losses.

To be sure, public pronouncements from the Obama administration have acknowledged that foreign entrepreneurs have created jobs in America. While political figures come and go, bureaucrats are career officials who remain for periods much more prolonged than one or two election cycles. Thus, although political commentary may indicate movement towards leniency on employment-based immigration, bureaucrats have yet to adopt a welcoming approach since they may feel that after the November 2012 elections, a new government may come in place with a new set of orders.

CLSA **There have been a number of lawsuits against Indian IT companies of late. What is your initial reading of these litigations against Indian companies?**

Angelo Paparelli What is happening with Indian tech companies is much the same thing that happened to the Japanese companies in the 1980s, particularly in the automotive and electronics industries. When faced with ever more restrictive work visa requirements, the Japanese firms followed a strategy which has not yet been embraced by Indian IT companies. Their strategy included hiring locally, making charitable contributions locally, and gaining favourable publicity about their good works and the jobs they created in order to change

public attitude towards Japanese companies in the United States. This helped to establish a favourable perception of Japanese companies. In fact, they have done such a good job with this strategy that the general public now tends to view Toyota or Honda as American companies (and to overlook the fact that they are headquartered and owned from abroad). The Japanese firms hired public-relations agencies and lobbyists to plead their case. Indian IT companies largely have not done this.

Moreover, there are different strata of Indian companies in terms of their sophistication in understanding US immigration laws and their dedication to scrupulous compliance with these laws.

I cannot comment on the Infosys case in particular since I am not involved and am unaware of the exact facts of the case. Reportedly, the case deals with alleged misuse of the B-1 visa category. A self-styled whistle-blower[11] has alleged that Infosys used the B-1 visa to circumvent the more heavily regulated H-1B and L-1 visa categories. Notwithstanding what the whistle-blower has asserted, it is possible to posit a set of facts that would allow business visitors on B-1 visas, quite lawfully, to render professional services under "B-1 in lieu of H-1" visa, which is a sub-category of the B-1 visa. On the other hand, it is also possible to conceive of a set of facts which can prove that B-1 visa rules had been abused.

CLSA **Can you give us some background on the B-1 in lieu of H-1 visa category?**

Angelo Paparelli The B-1 business-visitor visa category has existed since at least the 1920s. The H-1B (it was only called H-1 at that point) and L-1 categories have existed since 1970. But in 1990, Congress for the first time imposed an annual numerical H-1B visa quota and provided labour protections under this category. From 1970 to 1990, the INS was solely responsible for adjudicating these visa petitions, and US consular officers were then deciding if an L-1 or H-1 visa should be granted. The Department of Labor had no legal authority to oversee these two visa types. After 1990, however, the Labor Department was given the authority to investigate and penalise claims of employer violations of the H-1B labour protections.

Following enactment of the 1990 law, however, the former INS and the State Department issued companion proposed B-1 business-visitor regulations. The two agencies believed that the introduction by Congress of the quota for H-1B visas implied that the legislature intended to eliminate the B-1 in lieu of the H-1 visa subcategory of business visitor. Hence, INS and the State Department proposed to eliminate it. The business community vocally opposed the change and, as a result, both agencies never finalised their proposals. Thus, there has been no change in the B-1 in lieu of H-1 subcategory since that effort to eliminate it in the early 1990s and it remains valid under law.

So when Senator Grassley learned of the allegations against Infosys, what apparently troubled him most was the continued existence under law of the B-1 in lieu of H-1 subcategory, which (in his view) was open to abuse. Senator Grassley therefore wrote[12] to the State Department demanding the elimination of the B-1 in lieu of H-1, and the department responded that it would publish a draft regulation proposing to eliminate the B-1 in lieu of H-1 subcategory. However, no regulations have yet been published.

The "B-1 in lieu of H-1" subcategory originates from internal State Department practices and the former INS adjudications. Under an old INS cable involving an Indian citizen named Srinivasan, the B-1 in lieu of H-1 is permitted if there is an integrated international company with US operations and foreign operations (ie, integrated to a degree that the marketing, sales, distribution chains are in sync with each other) as long as (a) the business visitors hold at least a bachelor's degree or have the work experience equivalent in a field related to the services to be rendered; (b) they are paid and controlled solely from abroad, and (c) this short-term use of the business-visitor category is not a means of bypassing the usual work-visa petitioning requirements or working permanently in the United States.

The B-1 visa (including the B-1 in lieu of H-1 subcategory) allows a business visitor to enter the US for a year at a time and then extend their status by six months at a time, as opposed to the initial three-year stay allowed by the H-1B visa.

However, with incremental extensions, it may be theoretically possible for a business visitor to stay in B-1 visa in lieu of H-1B status, while paid wages which might not be in line with those of their American peers, but performing the same professional functions in the organisation's US operations as those with H-1B visas. The B-1 visa may also allow for multiple entries, so that every time the person travels overseas and returns, the act of being re-admitted conceivably could add up to another potential year to the tenure of the B-1 visa holder. Foreign companies dispatching such visitors should be cautioned, however, that this approach runs a high risk of being investigated, if the visa entries or extensions of stay become very frequent or prolonged in the aggregate.

Another caveat to consider: If a US customer exercises control over the rendition of services, that business visitor will be seen no longer as solely the employee of the foreign or domestic contractor, but as that of the US client under the "deemed employment" theory.

In sum, there are many ways for the US government to challenge the B-1 in lieu of H-1 visa if it so chooses. However, this subcategory remains legal for now so long as its requirements are scrupulously followed.

CLSA **Has there been any precedent of litigation around the B-1 visa?**

Angelo Paparelli An interesting case under the B-1 category involved the Bricklayers Union and another subcategory under the B-1 visa classification, in this case, for commercial or industrial workers, who are typically blue-collar workers. The B-1 visa for commercial or industrial workers can be used in situations where a purchase transaction takes place between a foreign seller and a US buyer of commercial or industrial equipment or machinery, and the contract of sale requires the seller to install, maintain and repair the equipment or train US workers in these functions.

Fearing the loss of jobs, the Bricklayers Union sued the State Department in Federal Court. After considering the legal issues, the judge came very close to striking the entire business-visitor category. The B-1 visa only survived because the State Department quickly settled with the Bricklayers Union. The settlement provided that the B-1 visa cannot be used for commercial or industrial workers in construction trades. At most, a person can come in with a B-1 visa to

supervise construction activity, but cannot engage in the actual construction work. Thus, except for non-supervisory construction work, the B-1 subcategory for commercial or industrial workers remains valid under State Department rules. Although the incentive behind this case was to protect the jobs of the union members in construction trades, the case can be cited as a theoretical precedent against the entire B-1 visa category. Any union could conceivably sue under this theory, stating that the B-1 visa violates the underlying purpose of immigration law, which is to protect domestic employment.

There has not been any significant lawsuit regarding the B-1 in lieu of H-1 subcategory. In that sense, the Infosys case may be the first of its kind.

CLSA **The direction of visa legislation remains a concern for Indian IT companies. Visa fees have already been doubled. There have been a number of stringent proposals like the 50:50 rule imposing expensive fees for border security under Public Law 111-230. What are the prospects that such stringent visa laws may be passed especially in light of the high unemployment rates and protectionist tendencies in the USA?**

Senator Grassley is from Iowa, a sparsely populated interior state with comparatively low levels of immigration. Iowa does not have the same diverse population and naturalised citizen population which exist in states like New York or California. Unless some new Tea Party movement to his right mounts a primary challenge (which appears unlikely), he is pretty much assured of re-election in the foreseeable future. Another opponent of employment-based immigration (also, ironically, a Republican) is Lamar Smith who chairs the House Judiciary Committee (which has authority over immigration matters).

If the business immigration community were to reach a compromise with these legislators, they might, for example, insist that the Department of Labor be given greater authority over immigration matters (such as L-1 visas, wage limits for L-1 visa holders, defining the floor wage as more than 100% of prevailing wages for that skill, or requiring that H-1B employers first try to recruit US workers before hiring H-1B workers, among others). The business immigration community wants to eliminate the per-country green-card quotas and extend the eligibility of the investor visa category (EB-5 Regional Centre) which is about to sunset. Because of the unusual rules of the Senate, one senator can put a hold on any piece of legislation. Senator Grassley is doing that apparently because he wants something back in return. Republican Smith is doing essentially the same in the House.

Immigration legislation is historically most likely in two instances:

1. **As a rider to an appropriations bill**. A larger bill gets passed and certain "ornaments" get added to that. Certain provisions get passed that way; the visa fee increase under Public Law 111-230 is an example of a rider to an appropriations bill.
2. **Lame duck Congress**. After the elections in November, till the new president steps in and the new Congress is convened (on or after 20 January of the following year), there is a "lame duck Congress." While the extreme partisanship we see today is unlikely to go away, members who are no longer going to be in Congress tend to vote based more on their conscience and less on the demands of their constituents. Members of

Congress therefore may be more likely to cut a deal during a lame duck session. For instance, the H-1B dependency rule was passed in a lame duck session when Republican Smith in the House directly negotiated with the Clinton White House. Even Spencer Abraham (a Republican senator, who was the chair of the immigration subcommittee at the time) was not included in these discussions. The deal allowed the IT community to get more H-1B numbers (the cap went up to 195,000 but has reverted to 65,000 plus 20,000 more persons with US masters or higher degrees) but adding new restrictions on H-1B dependent companies.

Such an event could happen again given historical precedent. Note, however, the potential obstacle presented by a fairly vocal lobby of family-based immigration and supporters of undocumented immigrants. Although this lobby supports greater employment-based immigration, they may not allow any such laws to go through as they fear losing their leverage for negotiating better laws for legalisation of undocumented workers.

Figure 5

Current discussion points on H-1B/L-1 visa in the USA

Concern	Recommendations	Indian IT Impact
H1-B visa programme is substituting American workers with cheaper resources from other countries	Create a centralised website where businesses would be required to post notice of their intent to hire H-1B workers American workers will know "if they have been impermissibly replaced by H-1B visa holders and identify employers who may be engaged in a pattern of discrimination against US workers"	Negative
Within the cap, more valuable employees may not get the H1-B visa while less valuable may	Allow employers to rank their applications for visa candidates so that they can hire the best qualified worker for the jobs in highest need	Positive
Allowed cap is used up within the first quarter reducing flexibility	Distribute the applications granted under the annual cap in allotments throughout the year (eg quarterly).	Neutral
Curtail fly-by-night operators	Establish a system whereby businesses with a strong track-record of compliance with H-1B regulations may use a streamlined application process	Positive
Wage arbitrage opportunities	Introduce wage floor for L-1 visas and stricter verification norms for H-1B	Negative
Non-conversion into legal permanent residency	Stricter norms for employers where immigration yield is low	Negative

Source: US Government Accountability Office

CLSA **In this backdrop, do you think it makes sense for Indian IT companies to engage more with Senators/Congressmen to put forth their case?**

Angelo Paparelli Yes, but Indian companies need to take one preliminary step which until now they seem to have been reluctant to pursue. As noted, I worked extensively with Japanese companies from the late 1980s. While the era before 11 September, 2001 was obviously different, the one key attribute of Japanese firms was that they largely tended to follow government requirements. The Japanese were also willing to do what their lawyers said was required. It is unclear if all or most Indian companies are like that. There may at times be a desire among some Indian companies to explore "How far can we stretch the rule?" Some lawyers will advise their clients to stretch the rule further than their peers at the bar would propose. Inevitably, there are numerous grey areas of immigration law and some areas are clearly out of bounds.

Particularly, the H-1B visa rules are among the most complicated non-immigrant visa laws, with a three-way sharing of authority between the State Department, the USCIS and Department of Labor. This means companies should hire outside experts to guide them on the law's requirements, and should authorise very careful internal audits of their processes by external legal experts.

Indian companies should not even consider approaching the US government or state government officials to plead their case of overly restrictive immigration rules until they have made sure they are in full compliance with immigration recordkeeping and wage-payment obligations and have begun to create the types of jobs that the Japanese created or made charitable contributions like the Japanese. Also, Indian companies need to be proactive in taking credit for good work that they have done in the United States. Please understand, however, that these are broad generalisations, which may not apply in a given case.

Indian IT sector has contributed to US economy

Figure 6

Total jobs[1] generated in USA by India IT

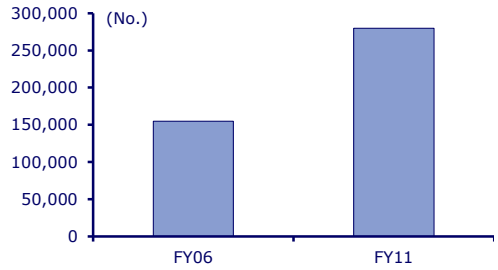
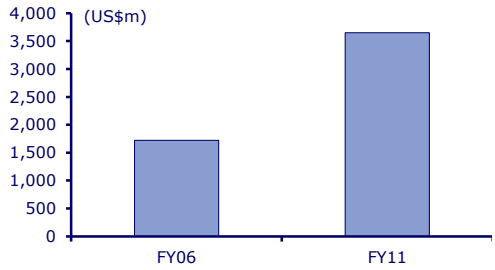


Figure 7

Total taxes paid by Indian IT firms in USA



[1] Direct and indirect. Source: NASSCOM

Indian IT companies should likewise rule out going to their legislators or the Executive Branch without first authorising a thorough internal immigration audit by competent outside legal auditors, making sure that any identified concerns are corrected, and developing a track record of hiring American workers. This is especially the case in the present era where we have FDNS (USCIS' Fraud Detection & National Security Directorate) making unannounced site visits to offices of American companies with employees on H-1B or L-1 visas and to US customers, demanding to see documents, taking photographs of the worksite and interviewing American and foreign employees.

At present, however, the Department of Labor does not have comparable authority to initiate a random audit of employer H-1B visa compliance practices. The Labor Department is prohibited from using a petition filed for an H-1B visa as the basis for an investigation. In case an American consular officer makes complaints to the Department of Labor, however, then a Department of Labor investigation can be initiated, but the department's investigators still cannot take and use any information on a work visa petition directly from the USCIS. So in essence there are two agencies administering the same set of visa categories but on two sets of regulations. And - quite regrettably - neither agency seems to fully understand the other agency's rules.

The enforcement arm of the USCIS, FDNS, investigates matters that are under the Department of Labor, without really understanding the Labor Department's regulations and without possessing any corresponding authority to regulate labour protections under the USCIS regulations. This leads to a great deal of confusion for employers concerning what is legal and what is not, especially in the H-1B area. Predictably, we can expect a greater number of such investigations, site visits, by FDNS, and it is foreseeable that such site visits may reveal evidence of apparent immigration law violations.

In sum, Indian companies need to do more to ensure that their own houses are in good order before they ask for any special consideration. Meantime, they should expect more visits to their business locations and customer worksites.

CLSA **What role can the Indian government play in helping IT companies with these visa issues?**

Angelo Paparelli It is entirely appropriate for the Indian government to complain about immigration-related trade violations before the WTO. It would also be helpful if the Indian government were to pressure the US government to negotiate a treaty that allows for E-2 visa benefits to be extended to these companies. The E-2 treaty-based visa category has existed for many decades. It involves two types of treaties: 1) Friendship, commerce and navigation (FCNs) treaties (some treaties date back to the 1800s such as the US treaty with Great Britain); or 2) bilateral investment treaties (BITs).

These treaties allow foreign companies to dispatch qualified individuals of the same treaty nationality to apply directly for E-2 visas at US consular posts requesting up to five-year validity periods with multiple entry, if the company has invested a substantial amount of capital in a US business, and needs to send executives, supervisors or persons of essential skills to the United States. As noted, companies can ask consulates directly, circumventing the USCIS entirely (except if someone needs to extend their E-2 periods of authorised stay). As an added benefit, the spouses of E-2 visa holders, like the spouses of L-1s, may apply to USCIS for unrestricted ("open-market") work permission. (Note that while an E-1 treaty exists for trading companies, its restrictions on percentage of trade between the USA and the treaty country make it far less useful than the E-2 classification).

E-2 visa applicants must be executives or supervisors or must fill jobs requiring essential skills, as opposed to positions requiring L-1B "specialised knowledge". The Japanese and many European countries have entered into such treaties with the United States. Attempts are reportedly now underway to extend the E-2 to category to citizens of Israel by enactment of a statute. For instance, as opposed to a treaty, a 1990 statute granted Australian firms and citizens the same benefits as the corresponding treaty-based FCN and BIT agreements. If this can be granted by law to Israel, then there is hopeful speculation that next on the list may be China and India. If that happens, then the H-1B and L-1 visa categories may no longer be as necessary and E-2 could become the preferred category. This is significant because the USCIS has less authority over the E-2 visa and the Department of Labor has no specific power over the E-2.

So to crystallise, the Indian government should consider a two-pronged approach:

1. Pursue the WTO claim
2. Pressure the USA to grant the E-2 visa classification

In addition, Indian trade associations such as NASSCOM should consider filing complaints with the Department of Homeland Security's Office of Civil Rights and Civil Liberties alleging a pattern of disparate and discriminatory treatment of Indian firms, visa applicants and individuals with work visa status when compared to other nationalities. This office investigates cases of alleged wrongdoing within the Department of Homeland Security,

regarding any deprivation of rights or discrimination. This office can make a set of policy recommendations to the Secretary of Homeland Security regarding any change in the way the agency operates with respect to particular nationalities.

CLSA **Lastly, what is your view on the legal teams of Indian IT companies amid these issues?**

Angelo Paparelli Unfortunately, Indian IT companies quite often seem to learn their immigration laws from each other's human-resources department. As is widely known, pressures are increasing in the legal industry to reduce fees - a phenomenon which is not unique to India but applies globally. When a company needs high-volume "commodity" legal services, the overarching tendency is to select the cheapest available legal services. Immigration legal services often fall in this commoditised, high-volume category.

There is also a tendency among companies to float a request for proposal (RFP) and hand over contracts for immigration legal services to the cheapest provider. Once that happens, the law firm also - because of agreed pricing constraints - has limited ability to invest in resources and the quality of work may as a result be sacrificed. This approach - all too often adopted by Indian companies - has tended to reduce or eliminate such key components of legal services as strategy, advocacy, compliance, defense against government investigations and enforcement, and consulting on important issues like the immigration consequences of corporate restructurings, and M&A activity, among others. These services require a higher degree of sophistication, and cannot be provided by an entry-level lawyer working at what are likely bargain-basement prices.

Sometimes, Indian IT companies have even hired paralegals (non-lawyers from law firms) to come in and "run" their immigration visa-procurement and immigration-compliance programmes. In such cases, the companies may be relying on an inexperienced person without bar admission to provide mass legal services and may be countenancing the unauthorised practice of law. Clearly, the enterprise should not depend on a paralegal to provide advocacy, auditing and strategic consulting services. If Indian companies in a bid to manage costs depend on substandard legal services, they must assume the not insignificant risk to reputation and government penalties that such a practice can create. Thus, Indian companies should consider strengthening their legal teams. Perhaps the Infosys case will serve, at least, as a partial wake-up call on why such reliance on non-lawyer personnel may be inadvisable.

Appendix 1: Visa statistics

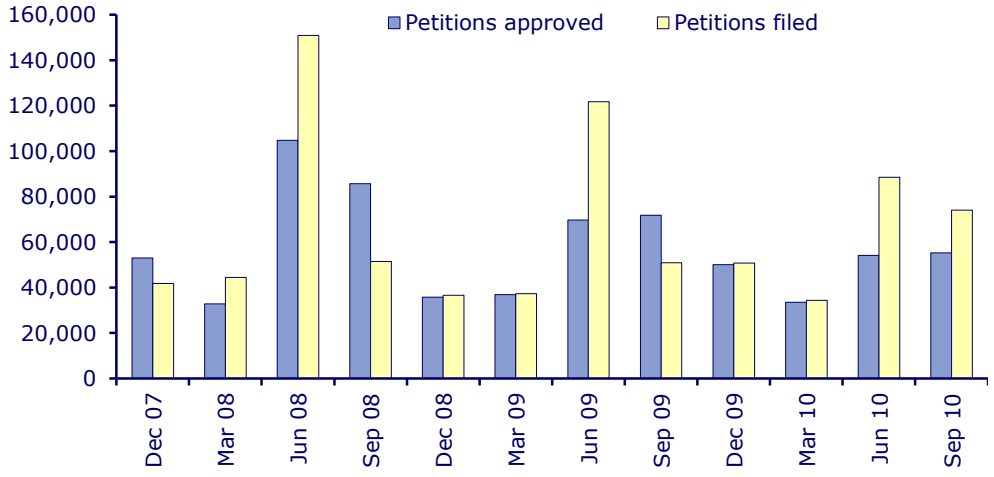
Indian techs remain big users of H-1B visas

H-1B visa approvals FY09-11

Company	Approvals
Cognizant	10,540
Infosys	8,413
Wipro	6,546
Microsoft	4,968
IBM	3,014
Larsen & Toubro	2,803
Deloitte	2,295
Accenture	2,243
Intel	2,163
Tata Consultancy	1,939
Ernst & Young	1,328
HCL America	1,222
Google	1,159
Oracle	1,110
Patni	986
Cisco	956
Satyam	948
Amazon	914
Syntel	876
Mphasis	869
UST Global	818
Apple	735
Goldman Sachs	730
Bloomberg	722
KPMG	691
PriceWaterhouseCoopers	682
Yahoo	592
Cummins	591
Qualcomm	576

H-1B usage it likely to spike-up as L-1 becomes more difficult to get

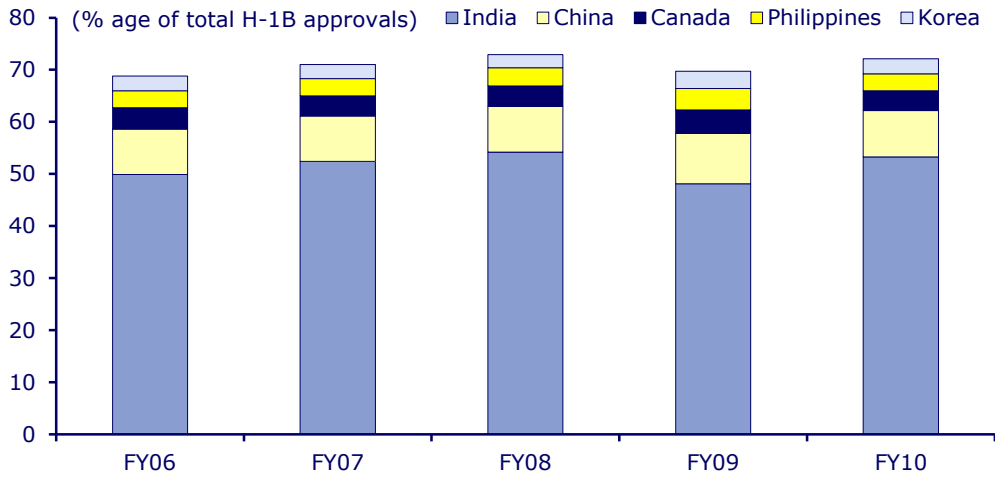
There is a spike in H-1B petitions in the June quarter



Source: USCIS

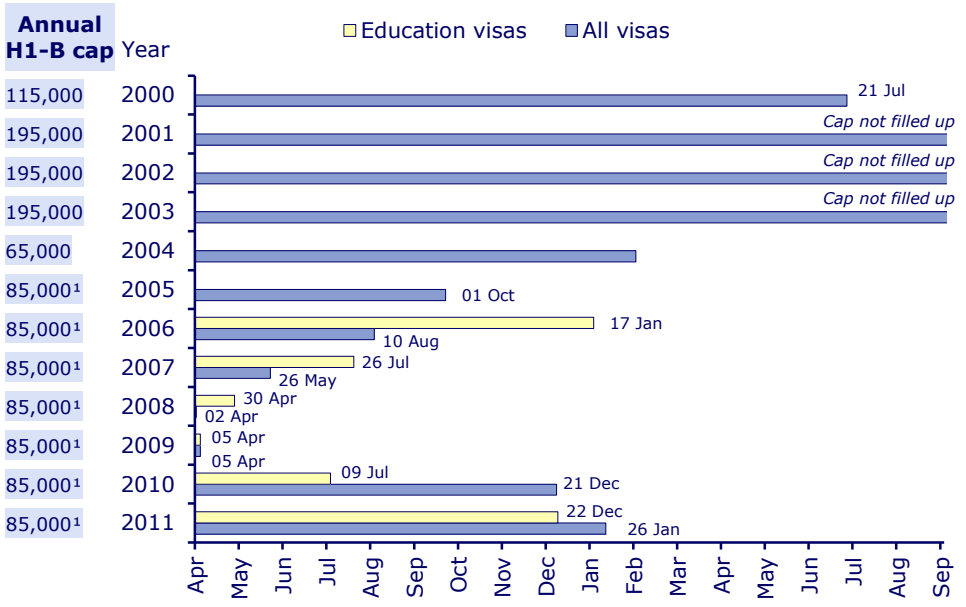
India remains dominant user of H-1B visas

India continues to claim a lion's share of H-1B visa approvals every year



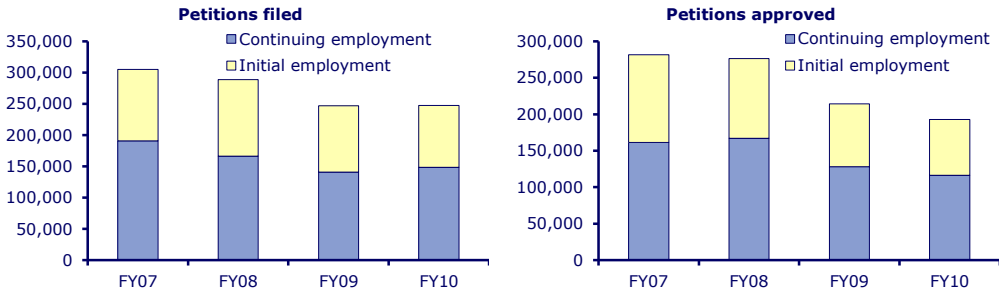
Expect accelerated usage of H-1B ahead as L-1 visas become scarce

Economic downturn has extended time taken to meet cap for H-1B visa petitions in 2011



Visa renewal forma big chunk of H-1B usage

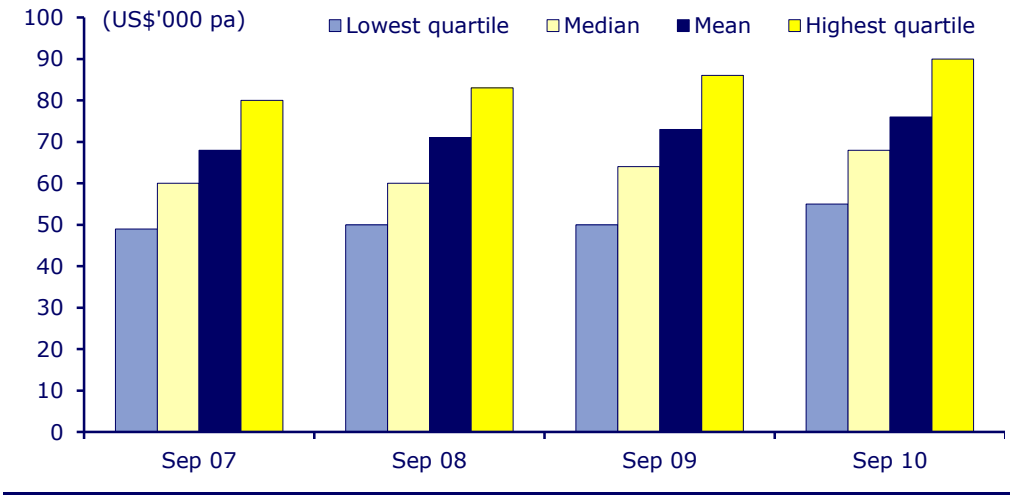
Existing employees make a larger share of H-1B visa petitions received and approved



Source: USCIS

Wages have expectedly gone up as technology boom continues in the USA

Average wages for computer-related occupations have moved up over the years



Source: USCIS

Change in wages

Occupation (US$)	FY09 avg wage offer	FY10 avg wage offer	% change
Computer software engineers, applications	80,342	84,808	5.56
Computer systems analysts	71,501	77,569	8.49
Computer software engineers, systems software	87,497	89,217	1.97
Computer and information systems managers	94,999	105,594	11.15
Computer programmers	64,706	67,547	4.39
Operations research analysts	69,435	73,590	5.98
Network and computer systems administrators	70,807	91,563	29.31

Prevailing wage for various occupations

Occupation	Prevailing wage (US$/hour)	Most frequent users of this category
Computer software engineers, applications	41.3	Google EBay Qualcomm Salesforce.com JCG Technologies
Computer systems analysts	37.16	Pero Software Solutions Enterprise Business Solutions JP Morgan Chase SAP America Sapient
Computer software engineers, systems software	44.36	Qualcomm Cisco Systems Motorola Juniper Networks Brocade Communications Systems
Computer and information systems managers	60.29	Motorola Cisco Systems Baha Industrie Capgemini Financial Services NIIT Technologies
Computer programmers	32.52	Corporate Computer Services ERP Analysts System Soft Technologies International Technology Solutions R Systems

Source: Office of Foreign Labor Certification

25-35 age bracket is the key user of H-1Bs

Distribution of visa approvals across age brackets

	FY07	FY08	FY09	FY10
Under 20	0.1	0.0	0.0	0.0
20-24	7.8	7.5	6.2	5.2
25-29	33.4	33.7	32.1	32.9
30-34	32.3	32.4	33.8	34.8
35-39	15.3	15.5	16.3	16.4
40-44	6.3	6.2	6.5	6.0
45-49	2.8	2.7	2.9	2.7
50-54	1.2	1.2	1.3	1.1
55-59	0.5	0.5	0.6	0.5
60-64	0.2	0.2	0.3	0.2
65 and over	0.1	0.1	0.1	0.1

Bachelor's degree and above are key users of H-1B

Distribution of H-1B visa approvals across educational qualifications

	FY07	FY08	FY09	FY10
No high school diploma	0.1	0.1	0.1	0.1
High school graduate	0.2	0.2	0.2	0.2
Less than 1 yr of college credit	0.0	0.0	0.0	0.0
1+ years of college credit, no diploma	0.3	0.2	0.2	0.3
Associates degree	0.2	0.2	0.3	0.2
Bachelor's degree	44.0	43.0	40.9	42.5
Master's degree	40.4	40.6	39.9	39.2
Doctorate degree	10.1	10.9	12.6	11.7
Professional degree	4.7	4.8	5.7	5.9

Source: USCIS

Five most frequently certified H-1B occupations

Occupation	H-1B applications certified	H-1B positions certified	Certified applications as % of all H-1B applications
Computer programmers	36,610	1,19,854	13.05
Computer systems analysts	33,733	96,406	12.03
Computer software engineers, applications	28,594	57,715	10.19
Computer software engineers, systems software	12,696	18,029	4.53
Financial analysts	6,601	8,305	2.35

Snapshot across countries

	India	South Korea	China	Canada	Mexico
Applications processed	31,996	5,301	4,558	4,128	4,952
Applications certified	28,930	4,610	4,052	3,658	3,306
Average annual wage offer (US$)	83,339	57,400	74,259	91,853	44,121
% working on H-1B Visa	90.52	36.98	80.33	74.58	24.41
% bachelors or higher	92.77	65.64	91.49	81.52	30.07
Age at certification	32	40	34	40	35
% of National Total Certified Apps	41.19	6.56	5.77	5.21	471.00
Certification rate (%)	90.42	86.96	88.90	88.61	66.76

Source: Office of Foreign Labor Certification

Appendix 2: Related articles

"Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program," Office of Inspections and Special Reviews, Office of Inspector General, Department of Homeland Security, OIG-06-22. http://www.oig.dhs.gov/assets/Mgmt/OIG_06-22_Jan06.pdf

USCIS National Teleconference: L-1B Specialized Knowledge. http://1.usa.gov/LgJLFv

1994 INS Puleo Memo on Interpretation of Specialized Knowledge: http://bit.ly/JAJDUq

2003 INS Ohata Memo (confirming Puleo Memo on Interpretation of Specialized Knowledge): http://bit.ly/KyiZeB

Article co-authored by Angelo A. Paparelli, "Success with L-1Bs in an Era of Increased USCIS Scrutiny": http://bit.ly/L6LXzC

1994 State Department Cable to Angelo Paparelli (confirming Puleo Memo on interpretation of specialized knowledge): http://www.nationofimmigrators.com/State%20Dept.%20Madras%20Cable.pdf

USCIS Ombudsman's 2011 Annual Report to Congress (p. 27 et seq.), showing charts with rates over time for USCIS Requests for Additional Evidence in L-1B cases): http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf

Blog posts by Angelo A. Paparelli on the L-1B category: "Missive from Mumbai: Why Are U.S. Immigration Agencies Attacking India and Hurting America?" http://bit.ly/tIJKDq

"Off-Message Immigration Bureaucrats Undermine the President's Jobs Push by Refusing L-1 Specialist Visas to Indian Citizens": http://bit.ly/nkxgLX

USCIS Policy Review Survey: http://1.usa.gov/aCBaKC

Blog post by Angelo A. Paparelli on B-1 in lieu of H-1 visa subcategory: "First, Do No (Immigration) Harm (to Business Visitors)" http://www.nationofimmigrators.com/immigration-reform/first-do-no-immigration-harm/

Responsive Blog Post by Angelo A. Paparelli, "The DHS Inspector General Report on Fraud Detection at USCIS: Pious Immigration Baloney," http://www.nationofimmigrators.com/uscis/the-dhs-inspector-general-report-on-fraud-detection-at-uscis-pious-immigration-baloney-1/

Article co-authored by Angelo A. Paparelli ("No More Waiting on Legal Immigration") on Obama Immigration Initiatives to Spur Jobs: http://www.seyfarth.com/dir_docs/publications/NoMoreWaitingonLegalImmigration.pdf

Endnotes

[1] Angelo Paparelli's blog. http://www.nationofimmigrators.com/

[2] H-1B and L-1 Visa Reform Act of 2009. http://www.govtrack.us/congress/bills/111/s887

[3] Homeland Security Supplemental Appropriations Bill. http://www.gpo.gov/fdsys/pkg/PLAW-111publ230/pdf/PLAW-111publ230.pdf

[4] Decision of Administrative Appeals Office in IBM GST case. http://bit.ly/qAgMD3

[5] State Department's guidance on L Visas and Specialized Knowledge. http://travel.state.gov/pdf/Guidance_on_L_Visas_and_Specialized_Knowledge-Jan2011.pdf

[6] National Foundation for American Policy Nov. 2011. "L-1 Visa Approvals Decline Significantly at U.S. Posts in India in 2011". http://bit.ly/v6848T

[7] National Foundation for American Policy February 2012. "Analysis: Data Reveal High Denial Rates For L-1 and H-1B Petitions". http://bit.ly/xJgRFP

[8] Zero Tolerance Policy. http://www.nationofimmigrators.com/Zero%20Tolerance%20Policy.pdf

[9] Senator Grassley's letter to DHS Secretary. http://www.grassley.senate.gov/about/upload/2010-10-14-Letter-to-Napolitano-DHS.pdf

[10] Letter from Senators Chuck Grassley and Dick Durbin to USCIS Commissioner Alejandro Mayorkas opposing expansive interpretation of L-1B specialized knowledge: http://bit.ly/L6UEtR

[11] Congressional testimony of Jack Palmer, Infosys Whistle-Blower: http://online.wsj.com/public/resources/documents/Testimony.pdf

[12] Senator Grassley's letter to Secretary, Department of State and Secretary, DHS http://www.grassley.senate.gov/about/upload/Immigration-04-14-11-Grassley-letter-to-State-DHS-B-1-H-1B-visas.pdf

Notes

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Key to CLSA/Credit Agricole Securities investment rankings: **BUY**: Total return expected to exceed market return AND provide 20% or greater absolute return; **O-PF**: Total return expected to be greater than market return but less than 20% absolute return; **U-PF**: Total return expected to be less than market return but expected to provide a positive absolute return; **SELL**: Total return expected to be less than market return AND to provide a negative absolute return. For relative performance, we benchmark the 12-month total return (including dividends) for the stock against the 12-month forecast return (including dividends) for the local market where the stock is traded.

28/05/2012