

## **Debunking the Myth of Mode 4 and the U.S. H-1B Visa Program**

Lori Wallach and Todd Tucker, Public Citizen's Global Trade Watch, March 2006.

This memo clarifies the U.S. law and policy regarding visas for foreign workers to perform work in the United States.<sup>1</sup> The purpose of this memo is to overcome confusion about how the U.S. H-1B system operates and which U.S. officials have the legal ability to make enforceable commitments regarding new rights for foreign worker to enter the United States to provide services.

Currently, misunderstandings about the H-1B visa system are being exploited by service industry and U.S. government representatives to try to trick other countries involved in negotiations on the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) into making offers regarding "liberalizing" their countries' service sectors in exchange for promises of new U.S. immigration rights for foreign workers. Yet, as this memo explains, under U.S. law, U.S. negotiators simply cannot deliver on such promises.

Mode 4 refers to delivery of services by movement of natural persons from one country to another to perform a service.<sup>2</sup> A bloc of developing countries is demanding that the United States and other developed countries offer new Mode 4 access for workers from the developing countries to enter the developed countries to perform service sector work. This demand for new Mode 4 access has been positioned as a condition in exchange for developing countries to offer the developed countries new access in Mode 3 (the right to establish a presence – i.e. set up or acquire a service business within another country.)

**The bottom line is that the *only* way that actual Mode 4 rights for entry of foreign workers into the United States can be guaranteed is for such a right - for instance establishment of a "GATS visa" – to be included in writing in the GATS text itself with a specific number of visa slots listed in the U.S. schedule of GATS commitments.** The United States did this in the Uruguay Round of negotiations, when 65,000 H-1B visas were committed. There are also three U.S. trade agreements that contain this sort of language: the North American Free Trade Agreement (NAFTA) and the U.S. Free Trade Agreements (FTAs) with Chile and Singapore. For instance, in the Chile and Singapore agreements, specific visa programs are established and specific numbers of visas (2,400 and 1,600 per year respectively) are listed in the trade agreements' text. However, this will never happen again. The U.S. Congress has made it crystal clear that Congress will no longer tolerate the making of U.S. immigration policy in the context of trade negotiations or agreements.

Absent the inclusion in the agreement of such specific commitments, if the United States schedules Mode 4 commitments in GATS, foreign workers could only actually make use of this "access" if there are visas available under *existing* U.S. immigration law. Thus, a Mode 4 "commitment" absent guaranteed immigration rights established in an agreement's text *is no commitment at all* – given if the existing visa programs' caps (set numbers of visas allowed per year) already have been filled, the Mode 4 rights will exist only on paper and workers will not be allowed to enter the United States to exercise the Mode 4 rights.

A citizen of a foreign country, wishing to enter the United States, generally must first obtain a visa, either a nonimmigrant visa for temporary stay, or an immigrant visa for permanent residence. (See

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<sup>1</sup> This memo synthesizes and summaries publicly available materials from the U.S. Department of Homeland Security and State Department, as well as certain private and academic materials, as noted.

<sup>2</sup> GATS Article I-2-d.

<http://uscis.gov/graphics/services/visas.htm> for a full list of U.S. visa types.) The immigration issues connected to GATS Mode 4 relate to U.S. temporary entry visa policies. The United States allows the following types of temporary entrants:

**Business or Pleasure Visitors:** The visitor visa is a nonimmigrant visa for persons desiring to enter the United States temporarily for business. The B-1 visa allows people working for a foreign firm (not to work for a U.S. firm) to come to the United States to do business – for instance to attend a business meeting or to install a computer system purchased from a foreign company. This visa can be used for up to one year, but only covers those working for a foreign company – i.e., not an employee of a foreign subsidiary in the United States, but the employee of the parent company overseas who visits the United States on business. The B-2 visa covers travel here for pleasure or medical treatment. Persons planning to travel to the United States for a different purpose, such as students, temporary workers, crewmen, journalists, and others, must obtain a different visa in the appropriate category. Travelers from certain eligible countries (nearly all Western European countries and Japan) may also be able to visit the United States without a visa, through the Visa Waiver Program, although if they seek to work in the United States different permissions are required.

**Temporary Workers, including H-1B:** The system for obtaining temporary work visas is controlled by the U.S. employer, not the foreign worker. A U.S. employer who wishes to hire foreign workers to temporarily perform services or labor or to receive training may file what is called an I-129 petition. Only an employer may request an H-1B visa, not a worker. As described below, the employer must certify certain conditions exist (mainly that they cannot find a U.S. worker to fill the job) to obtain such a visa.

H-1B visas cover “specialty occupations” and are the most common form of temporary worker. Similar sub categories of work visas can be obtained by employers using the I-129 petition, including for registered nurses (H-1C), nonagricultural workers performing services unavailable in the United States (H-2B), industrial trainees (H3), workers with extraordinary ability / achievement (O1), workers accompanying O1 workers (O2), internationally-recognized athletes or entertainers (P1), artists or entertainers in reciprocal exchange programs (P2), artists or entertainers in culturally unique programs (P3), and workers in international cultural exchange programs (Q1).

This system does not allow for any allocation of visas per country. The entire system is strictly “first-come, first-served” and when the overall cap is reached in each category that has caps (such as H-1B), applications from companies are no longer accepted. The Singapore and Chile FTAs initially had separate sub-categories of visas under this system, but now those guaranteed visa quotas have been rolled under the overall H-1B cap. This method of guaranteeing certain numbers of H-1B visas for Chilean and Singaporean workers under the FTAs would not work in the GATS context however, because GATS is a multilateral agreement that includes a Most Favored Nation (MFN) rule. This is one of the areas of confusion that is currently being used to lure countries to make Mode 3 commitments. Because of GATS MFN rules, if there was an increase in the guaranteed number of “GATS visas” for Mode 4 listed in the GATS text, this would simply provide an equal right to nationals from *all* WTO signatory countries to compete for whatever number of H-1B visas they could already apply for (and more if the GATS number was lower than the existing H-1B cap) under existing law. However, for reasons relating to the U.S. Constitution, described below, the U.S. Congress would not agree to an increase in the bound number of H-1B visas. Congress has exclusive authority to set the overall number of visas in each category allowed each

year and would not permit itself to be bound in a “trade” agreement to any minimum guaranteed number beyond that already committed.

**NAFTA Professionals:** Under the North American Free Trade Agreement, the nonimmigrant NAFTA Professional (TN) visa allows citizens of Canada and Mexico, to work as NAFTA professionals in the United States. Permanent residents, including Canadian permanent residents, are not able to apply to work as a NAFTA professional. Professionals of Canada or Mexico may work in the United States under the following conditions:

- Applicant is a citizen of Canada or Mexico;
- Profession is on the NAFTA list (NAFTA includes a schedule of covered professions);
- Position in the U.S. requires a NAFTA professional;
- Mexican or Canadian applicant is to work in a prearranged full-time or part-time job, for a U.S. employer, which must be certified via certain documents. Self employment is not permitted;
- Professional Canadian or Mexican citizen has the qualifications of the profession.

The requirements for applying for citizens of Canada and Mexico are different. There also are several other extended stay visa categories which we have noted below in an annex.

### **Requirements of the H-1B Visa**

The H-1B visa category is perhaps of most interest to countries seeking additional Mode 4 access.<sup>3</sup> It pertains only to workers in “specialty occupations” admitted on the basis of professional education, skills, and/or equivalent experience. To be considered for an H-1B visa, the applicant typically must have a bachelor’s degree or higher.

There are sharp limitations on what kinds of U.S. employees can obtain an H-1B visa to being in foreign workers. In addition to requiring higher education, H-1B visas are granted for a three-year period, with an option for a one-time renewal (i.e. the visa can be renewed for only one three year period, or a total of six years.)

Also, the U.S. employer must demonstrate that the primary purpose for the employee being in the country is employment, and that the employee is performing the work specified in documentation approved by the U.S. government at the specific work site for the compensation cited in the documentation.

The definition of the H-1B category of nonimmigrant entrant is set by Congress by statute. The applicable U.S. law is the Immigration Act of 1990.

The number of allowable H-1B visas is also set by Congress in this statute. The current H-1B cap for 2005 is 65,000 new entrants per year. Congress has changed the cap many times over the years. It takes an act of Congress to amend the H-1B cap, and there has been significant political pressure in the last five years to adhere to a lower cap. In 1999, the cap was raised from 65,000 to 115,000 for 1999 and 2000. The cap was raised again to 195,000 for fiscal years 2001, 2002, and 2003. The

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<sup>3</sup> For a comprehensive discussion by the OECD of the Mode 4 relevance of various U.S. temporary entry categories, see Julia Nielson and Olivier Cattaneo, “Current Regimes for Temporary Movement of Service Providers, Case Study: the United States of America,” Organization for Economic Cooperation and Development, prepared for the Joint WTO-World Bank Symposium on Movement of Natural Persons (Mode 4) Under the GATS, April 11, 2002.

cap reverted to 65,000 in fiscal year 2004, and has been filled early each year. On May 5, 2005, the Homeland Security Department obtained congressional approval to allow an additional 20,000 H-1B visas above the cap — but only for people who graduated with a masters’ degree from a U.S. university or college. In FY2006 and beyond, this “U.S. university advanced degree” category will be set aside within the cap, but for FY2005, the cap was retroactively upped 20,000.

Only U.S. employers can submit requests for H-1B visas, and there are substantial procedural hurdles that confront an employer wishing to do so.<sup>4</sup> First, the employer must collect a great deal of information about the prospective employee and provide that information and information about the firm for the U.S. Department of Labor to analyze. The firm must demonstrate that it will be able to pay the salary offered to the H-1B applicant by providing extensive financial documentation and a company history. The employee must submit documentation proving employment and education history, as well as lack of any kind of U.S. immigration violations, criminal record or wrongdoing.

Second, the employer must complete what is called a Labor Condition Attestation (LCA) with the DOL. This requires the company to prove:

- That it will be paying the H-1B applicant 100 percent of the prevailing wage or the actual wage, whichever is higher. The “prevailing wage” is determined by Department of Labor or comparable salary surveys, which show that the wage offered to the H-1B employee is the same as that paid to workers in the same specific job category within the specific geographic region.
- The firm must also show that it will offer the same benefits (i.e. health insurance) to the H-1B employee as they would a comparable non-H-1B employee. The “actual wage” is essentially the same concept, except that it includes more company-compiled detail on the job responsibility and functions that will be performed by the H-1B applicant.
- The firm must attest that the employment of the H-1B worker will not adversely affect the working conditions of other similarly employed workers; that there is no strike, lockout, or work stoppage affecting employees in the occupation at the work site; the employee is eligible to participate in the same benefits programs as similarly employed U.S. workers; and that a notice of the LCA filing has been provided to other workers at the location who may seek the position – with U.S. workers having priority consideration for such openings.

Some employers, especially those considered “H-1B dependent employers” where more than 15 percent of their company’s workforce are H-1B employees, must meet an even higher bar. Namely, they must prove:

- That they have not and will not lay off U.S. workers in the same occupational classification as the H-1B employee for the 90-day period preceding and the 90-day period following the filing of the LCA;
- That they will not send the H-1B worker to work at another employer’s work site if that second employer has laid off U.S. workers in that occupation; and

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<sup>4</sup> For a fuller description of this process, see “Requirements for An H-1B Specialty Worker Visa,” *Maggio & Kattar, P.C.*, at <http://www.maggio-kattar.com/pdfs/H-1B-Requirements.pdf>.

- That using industry-wide accepted standards, they have conducted good-faith efforts to recruit U.S. workers but have found none whose qualifications were equal to or better than those of the H-1B employee.

Furthermore, the firm must post in two conspicuous locations an announcement declaring its intention to seek to hire an H-1B employee, must keep detailed pay and other records for Department of Labor inspection, and must notify any union bargaining representative of the shop.

Third, when submitting the H-1B application, the firm must include a fee of \$750-1,500 “training and education fee” and a \$500 fraud prevention and detection fee, both of which help sustain the H-1B program.

Finally, approval by the Department of Labor of the attestation can take anywhere from three to sixteen weeks – subject to the cap noted above. Once approval is obtained, the H-1B worker must obtain a stamp from a U.S. consulate in his/her home country. Even if an H-1B visa has been approved for this worker, entry still is not guaranteed necessarily. Any changes in the workers’ employment situation, including change of location, pay, or any labor strife, must be notified to the Department of Labor.

As it is only specific U.S. employers that apply for the H-1B visas and approval is based on a variety of U.S. labor market conditions relating to specific job for which a visa is requested, there is simply no mechanism in the law to guarantee that employees of any specific country-of-origin will have a certain number of visas approved. As such, there simply is no way for the U.S. Trade Representative to guarantee a certain amount of H-1B access to any one country.

Congress has indicated that the special treatment given to Chile and Singapore – with actual specific visa guarantees provided in bilateral FTAs – will never be offered to any other country. Indeed, Congress only ultimately passed the Chile and Singapore FTAs *because* the Bush administration’s U.S. Trade Representative (USTR) committed that inclusion of immigration provisions in trade agreements would never be repeated.

The Republican and Democratic leaders of the congressional committees with jurisdiction over these issues only learned what U.S. negotiators had committed *after* the Chile and Singapore agreements were signed thanks to the closed “Fast Track” negotiating process. However, the past experience of having had immigration provisions sneaked into a trade agreement means that now these Members of Congress – and indeed the entire U.S. Congress – is extremely alert to ensure that this does not happen again. Consider the statement by House Judiciary Committee chairman F. James Sensenbrenner (R-Wis.) and ranking member Democrat John Conyers, Jr. (D-Mich.), two members of Congress who agree on almost nothing, but who sent a joint letter to the Bush administration recently to remind negotiators that immigration provisions will not be permitted in future trade agreements:

“Article I, section 8, clause 4 of the Constitution gives Congress the power to ‘establish a uniform Rule of Naturalization.’ [Sic] The Supreme Court has long held that this provision of the Constitution grants Congress plenary power over immigration policy. As the Court found in *Galvan v. Press* 347 U.S. 522, 531 (1954), ‘. . . [that] the formulation of policies [pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our

body politic as any aspect of our government.’ And, as the Court found in *Kleindienst v. Mandel* 408 U.S. 753, 766 (1972) (quoting *Boutilier v. INS*, 387 U.S. 118, 123(1967)), ‘[t]he Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’”

“The inclusion of immigration matters in bilateral or multilateral trade agreements undermines congressional authority to exercise its exclusive authority over this subject. In addition, consideration of immigration and antitrust matters in bilateral or multilateral trade agreements strips Congress of its ability to subject these proposals to the debate and amendment process so vital to creating sound policy. In fact, the constitutional basis of congressional immigration authority specifically requires the establishment of a ‘uniform’ immigration policy -- a constitutional mandate that is fundamentally assaulted whenever immigration provisions are negotiated on an ad hoc, bilateral, or multilateral basis in trade agreements. Finally, immigration provisions in trade agreements cannot be later modified by Congress without placing the United States in violation of those agreements. This limitation on congressional powers deprives Congress of the authority to revisit agreements to which the United States has acceded despite fundamentally changed national or international circumstances. This arrogation of power and divestiture of congressional authority is something that we and our colleagues have forcefully and repeatedly opposed. Additionally, while it has not presented itself as a problem to date, we further expect that USTR would refrain from negotiating intellectual property provisions, requiring substantive changes to U.S. law, within the framework of bi-lateral and multi-lateral trade agreements.”

“We were gratified that Ambassador Zoellick agreed with these principles and agreed that any changes to American immigration or antitrust law be only considered through the normal legislative process. It was only because of Ambassador Zoellick’s commitment that many members of the House and Senate agreed to support passage in the 108th Congress of legislation implementing the U.S.-Chile and U.S.-Singapore Free Trade Agreements. Having made this point sufficiently clear, we again extend an invitation to the Administration and to America’s international trading partners to submit to Congress their legislative proposals to liberalize temporary entry requirements, to make other changes to the Immigration and Nationality Act, or to alter America’s antitrust laws.”<sup>5</sup>

Given the level of extreme political irritation evidenced by this letter from members of the House Judiciary Committee, which sets U.S. immigration and temporary entry policy – and a similar level of ire expressed by the typically “free trade” Senators on the parallel Senate committee,<sup>6</sup> it is foreseeable that any immigration-related commitments USTR Portman might make to any country would be seen as an affront to Congress. More importantly, regardless of Congress’ emotional reaction to such a commitment, it is clear as a matter of policy that Congress would not accept a trade agreement including such a commitment – much less amend U.S. immigration law to make the commitment effective! It is worth noting that for a U.S. Mode 4 commitment to obtain *new* visa

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<sup>5</sup> Letter from Representatives F. James Sensenbrenner (R-Wis.) and John Conyers, Jr. (D-Mich.) to U.S. Trade Representative Rob Portman, dated May 19, 2005.

<sup>6</sup> See Letter from Sens. Dianne Feinstein (D-Calif.), Larry Craig (R-Idaho), Russell D. Feingold (D-Wis.), Byron Dorgan (D-N.D.), Saxby Chambliss (R-Ga.), Barbara Mikulski (D-Md.), and Jeff Sessions (R-Ala.) to USTR Rob Portman, dated Dec. 9, 2005.

rights to make that Mode 4 commitment actually usable would require *both* chambers of the U.S. Congress (House and Senate) to pass amendments to existing immigration law.

The bottom line is that the USTR cannot commit to real increased Mode 4 access – or honestly promise any given country (say, India) guaranteed visa quotas — because it simply is not within the Executive Branch’s authority to deliver on any such commitments. Only Congress can enact such policies, and the mood in Congress is diametrically opposed to any such policy.

Some service sector industry interests have suggested to developing country officials that GATS visas could be slipped in at the very end of the WTO negotiations so that the Fast Track process could then be used to create a crisis under which the U.S. Congress would be forced to swallow the immigration policies in the WTO given that the only other alternative would be to reject the entire WTO agreement. There are two reasons why developing country governments should flatly dismiss this concept. First, whether the U.S. Congress will approve any future WTO agreement is entirely unknowable and it is highly likely that Congress would reject and send back for renegotiation any WTO agreements containing immigration provisions.

The Central America Free Trade Agreement (CAFTA), an agreement of relatively small economic consequences for the United States, only passed by one vote<sup>7</sup> after an 18-month effort by the White House, a massive corporate lobbying campaign, and ultimately the President’s personal lobbying. (For the president to deign to come to Congress to personally beg for votes, instead of bringing members of Congress to the White House to ask them for support, is extremely rare. That President Bush had to personally visit Congress the day before the CAFTA vote reveals how extremely difficult it was for the White House to pass the agreement.) Meanwhile, already, blocs of Republican Congresspeople who *supported* CAFTA (such as Chairman Sensenbrenner) has stated that they would oppose any future trade agreement that contains immigration provisions. The element of surprise that was essential in allowing the Chile and Singapore FTAs to contain immigration provisions and still obtain approval is gone. Congress has put the Bush administration “on notice” regarding GATS. Plus, other Republican representatives who made up the slim CAFTA margin of passage have stated that they will oppose a new WTO Round if it changes U.S. anti-dumping laws (the Rules negotiations are aimed at doing this) or if it requires new limits on domestic agricultural supports – making passage of any WTO deal unpredictable.

Moreover, given the declining support in Congress for “more of the same” trade policies that a growing number in Congress deem to be failing, the Bush administration has its own domestic political problems to consider regarding its general approach to WTO negotiations. Thus, it would be suicidal for developing countries to make commitments on Mode 3 GATS access *now* in exchange for secret promises of Mode 4 access later, given that in the end, the Bush administration will have to give priority to what is politically possible at home – not what it may have promised in Geneva – in deciding its WTO end game.

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<sup>7</sup> The agreement passed 217-215. If one member of Congress that voted for the agreement were to have switched their vote to a no vote, the votes for and against CAFTA would have been tied and the measure would not have moved forward.

## **ANNEX: Additional Types of Extended Stay Visas**

Students Attending U.S. Schools: The Immigration and Nationality Act provides two nonimmigrant visa categories for persons wishing to study in the United States. The “F” visa is reserved for nonimmigrants wishing to pursue academic studies and/or language training programs, and the “M” visa is reserved for nonimmigrants wishing to pursue nonacademic or vocational studies.

Exchange Visitors: The Immigration and Nationality Act (INA) provides two nonimmigrant visa categories for persons to participate in exchange visitor programs in the United States. The “J” visa is for educational and cultural exchange programs designated by the Department of State, Bureau of Consular Affairs, and the “Q” visa is for international cultural exchange programs designated by the U.S. Citizenship and Immigration Services (USCIS).

Foreign National Entering the United States as the Fiancé (e) of a U.S. Citizen: The Immigration and Nationality Act (INA) provides a nonimmigrant visa classification, “K-1,” for aliens coming to the United States to marry U.S. citizens and reside in the United States.

K Nonimmigrant visas (LIFE Act): The Legal Immigration Family Equity Act and its amendments (LIFE Act) established a new nonimmigrant category within the immigration law that allows the spouse or child of a U.S. citizen to be admitted to the United States in a nonimmigrant category. The admission allows the spouse or child to complete processing for permanent residence while in the United States. It also allows those admitted in the new category to have permission for employment while they await processing of their case to permanent resident status.

T Nonimmigrant visas (VTVPA): This covers victims of a Severe Form of Trafficking in Persons and their relatives.

V Nonimmigrant visas (LIFE ACT): The Legal Immigration Family Equity Act and its amendments (LIFE Act) established a new nonimmigrant category (V) within the immigration law that allows the spouse or child of a U.S. Lawful Permanent Resident to live and work in the United States in a nonimmigrant category. The spouse or child can remain in the United States while they wait until they are able to apply for lawful permanent residence status (Adjusting Status), or for an immigrant visa, instead of having to wait outside the United States as the law previously required.