



APR 21 2015

The Honorable Richard J. Durbin
United States Senate
Washington, D.C. 20510

Dear Senator Durbin:

Thank you for your correspondence of April 9, 2015 to Secretary Perez expressing your concern regarding Southern California Edison (SCE) and other U.S. employers purportedly displacing American tech workers and replacing them with H-1B visa holders. You note that according to the reports you have received the H-1B employees may be employed by foreign-owned IT consulting companies.

The Secretary's authority to investigate and enforce the H-1B program may only be exercised within the statutory framework of the Immigration and Nationality Act (INA). The INA specifically limits the circumstances under which investigations may be conducted. We have carefully considered the bases for opening an investigation here. Investigations may be conducted if a complaint is received from an aggrieved party that is adversely affected by the employer's alleged non-compliance,¹ or from a credible source that is likely to have knowledge of the employer's employment practices or its compliance with H-1B requirements.² In either case, the Wage and Hour Division (WHD) must find that a reasonable basis exists to believe a violation occurred. Alternatively, an investigation may be initiated when the Secretary of Labor "has reasonable cause to believe that the employer is not in compliance" and personally certifies that reasonable cause exists.³ Finally, random investigations of willful violators may be conducted.⁴ We also considered whether we could initiate a complaint in line with the *Alden Management Services Inc. v. Chao*⁵ case, which held that the H-1A "aggrieved party" provision allowed the filing of complaints without an aggrieved party. Unlike the H-1A provision, the H-1B statute was amended in 2004, to specifically delineate the avenues of complaint. See Section 1182(n)(2)(F) in 1998 and Sections 1182(n)(2)(G)(i) and (ii). The specificity of these statutory provisions demonstrates that the H-1B provisions of the INA do not allow investigation under any other circumstances.

The Secretary places the utmost priority on protecting and enhancing the welfare of the U.S. workforce. However, at present, the Department lacks a basis to initiate an investigation. WHD has not received a complaint from an aggrieved party or a credible source, and other avenues for investigation are not appropriate at this time. However, as always, WHD would process any

¹ See INA §212(n)(2)(A), 8 U.S.C. § 1182(n)(2)(A).

² See INA §212(n)(2)(G)(ii), 8 U.S.C. § 1182(n)(2)(G)(ii).

³ See INA §212(n)(2)(G)(i), 8 U.S.C. § 1182(n)(2)(G)(i).

⁴ See INA §212(n)(2)(F), 8 U.S.C. § 1182(n)(2)(F).

⁵ 532 F.3d 578 (7th Cir. 2008).

complaint from an aggrieved party or credible source, and consider any information that might justify a Secretary-initiated, or random (based on evidence of willful violations), investigation.

Presently, we understand that the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) at the Department of Justice may be better positioned to address issues you and others have brought to our attention. Therefore, WHD has referred the matter of SCE and its contractor consultants to OSC for investigation. If WHD obtains appropriate further information from OSC or another source, it may open an investigation at that time.

As to whether any obstacles in existing law would affect an investigation of this kind, Congress has enacted specific but limited provisions that govern the displacement of U.S. workers, and different rules are applicable for employers that are “H-1B dependent.” Typically, consulting companies that contract with U.S. firms to supply H-1B IT workers are dependent employers. It is unlawful for any H-1B employer, regardless of H-1B dependence, to commit a “willful” violation of the statute in the course of displacing certain U.S. workers. 8 U.S.C. § 1182(n)(2)(C)(iii). It is also unlawful for a dependent employer, as defined by the INA, or an employer previously found to have committed a willful violation of the statute, to displace certain U.S. workers. Such employers are also required to inquire about displacement prior to providing workers to a secondary employer. However, employers are only prohibited from displacing U.S. workers within the period beginning 90 days before and ending 90 days after the filing of the visa petition. In addition, even dependent employers and willful violators are not prohibited from displacing U.S. workers if they pay the H-1B worker(s) at least \$60,000 per year or the worker(s) have a relevant master’s degree. *See* 8 U.S.C. § 1182(n)(1)(E)(ii), and 8 U.S.C. § 1182(n)(3)(B).

I hope this has been a helpful response to your letter. If you have any additional questions or concerns, please feel free to contact me at (202) 693-5260.

Sincerely,



M. Patricia Smith
Solicitor of Labor