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Trade, Labor and EU Law Perspectives

Permanent to Temporary: Does Trump's Proclamation on immigrants pass WTO muster?

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On 22 April 2020, the U.S. President, Donald Trump, announced a "*Proclamation suspending entry of immigrants who present risk to the U.S. Labour Market during the economic recovery following the COVID-19 Outbreak*" ("Proclamation"). Is the Proclamation compatible with the United States' WTO obligations? Specifically, is in line with obligations relating to the supply of services through the movement of natural persons, under Mode 4 of the General Agreement on Trade in Services ("GATS")?

In its present form the Proclamation covers only the category of "immigrant visa holders." Stated simply, "immigrant visa holders" are persons who enter the United States with the intent to live and work permanently. In contrast, non-immigrant visa holders are foreign nationals who enter the United States on a temporary basis for tourism, business, medical treatment and certain types of temporary work (who stay for three to six years or even longer, for instance, on H-1B and L-1 visas, fall under this category). The "GATS" Annex on Movement of Natural Persons ("Annex on MoNP"), excludes the application of the GATS to the natural persons "seeking access to employment market" of a Member, and to measures regarding "citizenship, residence or employment on a permanent basis."^[1] So, applying the Proclamation to immigrant visa holders would not violate WTO GATS obligations.

Section 6 of the Proclamation

Even though in current form the Proclamation only applies to immigrant visa holders, it is nonetheless likely to violate the U.S. trade obligations in future, with respect to non-immigrants. This is because the Proclamation contains potential authority for restrictive measures on non-immigrant visa holders. [Section 6 of the Proclamation](#) requires the Secretary of Labour and the Secretary of Homeland Security, in consultation with the Secretary of State to "review non-immigrant programs" and to recommend to the President other appropriate measures "to stimulate the US economy and ensure the prioritization, hiring and employment of US workers."^[2] Thus, in the aftermath of [COVID-19 and the resulting job losses](#), the United States could adopt restrictive measures for non-immigrants also..

GATS obligations

As part of its GATS Schedule, the United States has undertaken market access commitments in

Mode 4 pertaining to four categories of service suppliers; Managers, Executives, Specialists and persons travelling under the Specialty occupations. This means that foreign persons travelling to the United States as professionals (generally understood as temporary workers) in these categories are technically the “service suppliers” of other WTO Members. Because the GATS Annex on MoNP covers both “natural persons directly supplying services” and “natural persons employed by service suppliers,” foreign professionals working in U.S. firms and in foreign firms (i.e. firms having commercial presence, Mode 3 in GATS), both are covered by the U.S. commitments. The group covered by this commitment includes a large section of H-1B, L-1 visa holders employed in the IT and Management Consulting Sector.

Accordingly, if in the future, under Section 6 of the Proclamation, the United States adopts any measures on non-immigrants, it may run afoul of its GATS commitments under the GATS. If so, the countries that would be most affected are India and China, the biggest beneficiaries of the U.S. commitments.[3] In fact, a majority of the Indian IT professionals now working in the United States are classified under the non-immigrant visa category, specifically the H-1B or L-1 programmes.

Market Access in Mode 4 remains to be of vital importance to both India and China. Studies have revealed that the H-1B visa workers do not adversely affect U.S. workers. Nonetheless, visa issues have been a sensitive issue between India and the United States. In 2016, India challenged the increased visa fee for L-1 and H-1B programs before the WTO as a violation of the U.S. market access obligations under the GATS. The Proclamation, in Section 6, contains the seeds of future disputes. The unparalleled pandemic situation has triggered drastic measures world-wide. Any use of Section 6 must be carefully weighed against GATS commitments to prevent further harm to the U.S. economy.

[1] Para 2, Annex on Movement of Natural Persons Supplying Services under the Agreement, GATS.

[2] Section 6, *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*. The phrase, “stimulate the US economy” is not further defined in the Proclamation, and therefor is susceptible of broad interpretation.

[3] Mughda Variyar, *NASSCOM upset with Trump’s immigration ban, says IT workers ‘essential’*, CNBC Business (dated Apr. 23, 2020) available at <https://www.cnbc.com/information-technology/nasscom-protests-trumps-immigration-ban-says-it-workers-essential-5758721.html>. For the Financial Year 2021, Indian applicants comprised of 68% of H-1B registrations, followed by China with a share of around 13.2%; See also Number of Foreign College Students Staying and Working in U.S. After Graduation Surges, <https://www.pewresearch.org/global/2018/05/10/number-of-foreign-college-students-staying-and-working-in-u-s-after-graduation-surges/>; Under the Optional Training Programme (OPT), Indian graduates again constituted the largest share of “those authorized to work” (around 30% of the total) and Chinese graduates were the second largest (around 21%)

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