THE EMPLOY AMERICAN WORKERS ACT: PROTECTIONIST TURDUCKEN, IMMIGRATION STYLE

By Angelo A. Paparelli and Ted J. Chiappari*

Despite the loss of millions of jobs, the global destruction of asset values and plummeting consumer confidence, America's rickety economy still boasts full employment in at least one thriving industry sector. The 100 senators and 535 House members of the U.S. Congress, sausage makers extraordinaire who graduated from the Bismarck school of culinary arts,[1] continue to produce meaty, tummy-busting legislation. The latest menu of statutory supermeals, prepared and filmed in the Washington equivalent of Iron Chef's Kitchen Stadium, will be savored or regurgitated, as the case may be, by a famished business community and a malnourished public. Recent comestibles from the Congressional commissary are EESA (the Emergency Economic Stabilization Act),[2] ARRA (the American Recovery and Reinvestment Act)[3] and lodged deep within the latter, EAWA (the Employ American Workers Act).

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[1] Otto von Bismarck is reputed to have said, "If you like laws and sausages, you should never watch either one being made." See, *Respectfully Quoted: A Dictionary of Quotations*. 1989, available at www.bartleby.com/73/996.html (all web links cited in this article were accessed from Feb. 14-16, 2009).

[2] Public Law 110-343.

[3] HR 1, the American Recovery and Reinvestment Act of 2009.

EESA, cooked on the run in the final weeks of the Bush Administration, came conveniently equipped with a TARP (Troubled Assets Relief Program), for no multi-course meal can be comfortably consumed without shelter from economic storms. ARRA, direct from the kitchens of the Obama Administration, resembles that classic American dish, turducken,[4] because it encases EAWA within itself and incorporates by reference a flock of other immigration laws. EAWA, nestled in ARRA at § 1611, is a spicy bird that may please employment lawyers in the plaintiffs bar and some constituents, but promises severe immigration dyspepsia for recipients of TARP dollars or Federal Reserve funding.

The authors of this article, risking comparisons to Anton Ego, the supercilious food critic in the animated film Ratatouille, will assail EAWA in the analysis below because it embodies the ultimate truth behind the law of TANSTAAFL – "There Ain't No Such Thing as a Free Lunch."[5]

In three sentences, EAWA packs a legislative punch:

- EAWA adds artificial and burdensome recruitment and paperwork obligations on the already weakened backs of the very industries – banking, financial services and other "too-big-to-fail" firms – which Congress and the Federal Reserve intended to rescue through the creation of extraordinary legislation and generous credit facilities. (TARP recipients include major banks and stock brokerages, two auto companies, Chrysler and General Motors, GMAC [GM's financing arm], and AIG, a global insurance company. Recipients of Federal Reserve funding comprise a vast cohort of banks and other financial institutions nationwide.)[6]

- EAWA forces recipients of TARP and Fed funds to hire U.S. workers who apply for jobs and are equally or better qualified than the foreign professionals in H-1B visa status whom the fund recipient proposes to hire.

- EAWA allows refused job applicants to file complaints with the Attorney General (AG) alleging unlawful refusal to hire or misrepresentation concerning a hiring decision, establishes a procedure for binding federal arbitration if the AG finds reasonable cause to believe that the statutory violations alleged in the complaint occurred, and permits imposition of unspecified "administrative remedies," including civil fines and debarment from the employment-based immigration system, as the AG "determines to be appropriate."

- EAWA also requires recipients of TARP and Fed funds to micro-monitor the hiring and layoff practices of the business customers at whose sites they post foreign workers.

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[4] According to *Wikipedia*, the ephemeral open-source lexicographer, a "turducken is a dish consisting of a partially de-boned turkey stuffed with a de-boned duck, which itself is stuffed with a small de-boned chicken. The thoracic cavity of the chicken and the rest of the gaps are stuffed, sometimes with a highly seasoned breadcrumb mixture or sausage meat, although some versions have a different stuffing for each bird." See, http://en.wikipedia.org/wiki/Turducken.

[5] Again, according to *Wikipedia*, "TANSTAAFL is an acronym for the adage 'There Ain't No Such Thing As A Free Lunch' originating in the 1940s and later popularized by science fiction writer Robert A. Heinlein in his 1966 novel The Moon Is a Harsh Mistress, which discusses the problems caused by not considering the eventual outcome of an unbalanced economy." See, http://en.wikipedia.org/wiki/TANSTAAFL.

[6] A complete list of TARP recipients is available at: www.treas.gov/initiatives/eesa/agreements/index.shtml.

Specifically, EAWA makes it "unlawful for any recipient of funding" under Title 1 of EESA or § 13 of the Federal Reserve Act[7] to hire any foreign worker in H-1B visa status unless the recipient complies with an array of burdensome strictures imposed on "H-1B dependent" employers. Under EAWA, past and future recipients of either TARP or Fed funds are treated as H-1B dependent employers if, after receiving these funds, they "hire" any new H-1B workers.[8] Worse yet, EAWA eliminates a helpful exit strategy that relieves compliance with the H-1B dependency rules. It does not allow the otherwise applicable avoidance of dependency burdens by hiring workers with advanced degrees (masters, Ph.D., J.D., or equivalent) or by paying at least $60,000 per year.[9] Fortunately, however, EAWA will sunset in two years from the date of enactment.

EAWA imposes these obligations by incorporating two foul fowl into the turducken: (1) a Clinton era immigration statute (the American Competitiveness and Workforce Improvement Act [ACWIA]) that kowtowed unabashedly to labor interests in return for a sop to the business community – a temporary increase (long since expired) in the annual H-1B visa quota,[10] and (2) 48 pages of mind-numbing Labor Department commentary and regulations, published just 30 days before the end of Pres. Clinton's term, interpreting ACWIA in an unbalanced, decidedly pro-labor way, contrary to the clearly stated legislative history.[11]

To understand the additional burdens imposed by EAWA, a short discourse on the H-1B visa category is necessary.[12] The H-1B nonimmigrant classification allows businesses to employ for six years or more a wide variety of professional workers who hold a relevant bachelor's or higher degree (or the work experience equivalent) in a host of "specialty occupations." Covered occupations include engineers,

[7] 12 U.S.C. §342 et seq.

[8] A defined term in EAWA, "hire" means to "permit a new employee to commence a period of employment." See, EESA, § 1611(b)(2). Apparently, this definition is intended to allow existing H-1B employees of business that received or will receive TARP or Fed funds to be allowed to extend their periods of authorized stay in H-1B visa status, without triggering the H-1B dependency requirements.

[9] ARRA at § 1611(b)(1), making inapplicable the second sentence of Immigration and Nationality Act (INA) § 212(n)(1)(E)(ii); 8 U.S.C. §1182(n)(1)(E)(ii).

[10] For a detailed summary of the ACWIA's provisions, see Angelo A. Paparelli & Yoshiko I. Robertson, "The Labor Department's Role in the H-IB Visa Program: Protector of Workers or 'Enemy of the Future'?" 76 Interpreter Releases 785 (May 24, 1999).

[11] The DOL's H-1B dependency regulations including the agency's interpretations, entitled "Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the U.S.," are found in an interim final rule at 65 Fed. Reg. 80109–80254 (Dec. 20, 2000), reported on and reproduced in 78 Interpreter Releases 41 (Jan. 8, 2001). In the Labor Department's Notice of Proposed Rulemaking (NPRM) leading up to publication of the interim final rule, 64 Fed. Reg. 628 (Jan. 5, 1999), the DOL incorporated a number of interpretations of ACWIA set forth by Congressman Lamar Smith, 144 Cong. Rec. E2323 (daily ed. Nov. 12, 1998), to whom the Department refers as the "sponsor" of the bill that became ACWIA. In contrast, the Department ignored in the NPRM almost all interpretations and comments made by another principal sponsor, Senator Spencer Abraham,144 Cong. Rec. S12748 (daily ed. Oct. 12, 1998), to whom the DOL refers only as a "member of Congress."

[12] In-depth discussion of the H-1B visa category can be found in Karen Weinstock, The H-1B Book, (2008-2009 ed., ILW.COM) and Martin J. Lawler, Professionals: A Matter of Degree, (4th ed., AILA 2003).

computer programmers, accountants, actuaries, lawyers, bankers, insurance executives, economists, technical writers, scientists, doctors, teachers and architects. The basic H-1B visa category requires no test of the local labor market because in the original version of the law these professional workers were described as persons of "distinguished merit and ability" (who presumably were considered to be in short supply) and because the national quota of new H-1B workers in for-profit companies is in any case limited to only 65,000 H-1B employees per year (plus a 20,000 annual allocation of H-1B visas for professionals with a master's or higher degree from a U.S. educational institution).[13]

Employers who use the H-1B visa category sparingly (meaning they are not considered by Congress as too "dependent" on it and have not been adjudged in the last five years to have willfully violated its provisions)[14] must still comply with a host of basic labor protections intended to avoid any undermining of the wages and working conditions of U.S. workers.

The basic H-1B employer obligations include (1) payment of at least the local prevailing wages during the period of H-1B petition approval (even in nonproductive periods such as plant closures and work furloughs), (2) public disclosure of compensation, benefits and working conditions, (3) treatment of nonimmigrants on par with U.S. workers performing the same job at the work site, (4) responsibility for return transportation to the home country (if the worker is laid off), (5) payment of government filing fees and attorney fees for the preparation and submission of required H-1B paperwork, (6) a ban on the imposition of a penalty (but allowance of legitimate liquidated damages under applicable state law) if the H-1B worker resigns from employment prior to the end of the approved H-1B validity period, and (7) exposure to investigations, administrative litigation, fines, back wages, multi-year debarment from importing additional foreign workers and (in the DOL's view) other unspecified "make whole" remedies.[15] H-1B labor protections are enforced by the Wage and Hour Division of the U.S. Department of Labor (DOL), by immigration agencies within the Department of Homeland Security (DHS), and by U.S. Attorneys who prosecute criminal violations of federal law.

H-1B dependent employers, now including (as a result of EAWA) the recipients of TARP and Fed funding, must follow the basic H-1B labor protections and a host of special rules.[16] Dependent entities must take

[13] See generally, the U.S. Citizenship and Immigration Services H-1B regulations found at 8 CFR §214.2(h).

[14] In general, H-1B dependent employers are businesses whose H-1B workforce constitutes at least 15% of all full-time-equivalent (FTE) U.S. workers (including U.S.-based employees in entities forming part of an affiliated family of commonly controlled businesses as defined by the Internal Revenue Code). This threshold applies to businesses that employ 51 or more U.S. workers. For firms with fewer employees, H-1B dependency is determined by the ratio of H-1B workers to all FTE U.S. and H-1B workers. Employers of up to 25 FTEs are H-1B dependent if they employ eight H-1B workers, whereas businesses employing 26 to 50 FTEs are dependent if their H-1B workforce consists of 13 or more H-1B workers. This article will not separately discuss the dependency rules applicable to employers found to be "willful violators" of the H-1B visa category because these rules are essentially identical to those covering H-1B dependent employers.

[15] See generally, INA §§ 101(a)(15)(H)(i)(b), 212(n), 212(p) and 212(t); 8 U.S. C.§§ 1101(a)(15)(H)(i)(b), 1182(n), 1182(p) and 1182(t). The DOL H-1B regulations are codified at 20 CFR §§ 655.700 et seq. and 655.800 et seq.

[16] For an extensive analysis of the H-1B dependency rules, see James Vazquez-Azpiri & Angelo A. Paparelli, "Awakening a Slumbering Giant: The Department of Labor's Interim Final Rule on H-IB Dependency," 78 Interpreter Releases 685 (Apr. 23, 2001).

affirmative steps to recruit for, and offer employment to U.S. workers (defined as U.S. citizens or nationals, lawful permanent residents, refugees, asylees and other immigrants authorized to work) who are equally or more qualified than the prospective H-1B employee. An aggrieved applicant who believes he or she was denied a job that went to an equally or less qualified H-1B nonimmigrant may file a complaint to the AG alleging a failure to hire the complainant or a misrepresentation of material fact concerning the dependent employer's duty to offer employment to the U.S. worker.[17] If the AG finds reasonable cause to believe that the alleged failure to hire or the misrepresentation occurred, he is required to initiate binding arbitration by requesting the Federal Mediation and Conciliation Service (FMCS) to appoint an arbitrator and to pay the fees and expenses of the arbitrator.[18]

H-1B dependent employers must also refrain from engaging in prohibited forms of displacement (laying off) of U.S. workers. The nondisplacement rules are of two types: primary and secondary. They apply to a dependent employer's direct hiring of an H-1B worker (primary nondisplacement). They also cover the assignment of an H-1B employee at a customer's worksite (secondary nondisplacement) if there are "indicia of employment" in the relationship between the customer and any dependent employer's H-1B workers seconded to the customer's facility.

Displacements apply to jobs that are "essentially the equivalent of the jobs for which [H-1B worker(s)] is or are sought." A job is considered the essential equivalent of another job if it "involves essentially the same responsibilities, was held by a U.S. worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job." In determining whether different jobs are essentially equivalent, the DOL applies an Equal Pay Act analysis.[19] Job displacements are prohibited for a 180-day blackout period, viz., for 90 days before and 90 days after the direct hiring or the placement at the customer location of the particular H-1B worker.

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Many in the punditocracy have decried the federal government's response to the global economic crisis and, paraphrasing Goldilocks' critique, have asserted that the curative fiscal and monetary porridge is either too little or too late but just not right. Many economists and business groups complain that ARRA's protectionist measures (such as its "Buy American" requirements to purchase iron, steel, and manufactured goods for use in public construction and public works projects) will invite retaliation by our global trading partners and thereby worsen the economic crisis.[20]

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[17] See INA §§ 212(n)(1)(E), (n)(5); 8 U.S.C. §§ 1182(n)(1)(E) and 1182(n)(5). See also 20 C.F.R § 655.705(b).

[18] Id. The operative section, INA § 212(n)(5); 8 U.S.C. § 1182(n)(5)A, also provides for limited judicial review. A search, however, of the U.S. Department of Justice and the FMCS websites, respectively, www.doj.gov and www.fmcs.gov, found no form of complaint, special rules of procedure or any reported decisions on point addressing this AG-driven process for adjudicating refusal-to-hire and misrepresentation claims by U.S. workers against H-1B dependent employers.

[19] See 65 Fed. Reg. at 80149.

[20] See ARRA § 1604. For criticism of ARRA's protectionist measures, see, e.g., Doug Palmer, "Business groups scold Congress on 'Buy American,'" Reuters, Feb. 16, 2009 (accessible at:

Internationalists have also attacked the U.S.'s dysfunctional and unresponsive employment-based immigration laws as a "brain-dead immigration system" (Fareed Zakaria)[21] and, in particular, EAWA's protectionist H-1B provisions, as "S-T-U-P-I-D" (Thomas Friedman).[22] For TARP and Fed-Funds recipients, it remains to be seen whether EAWA's H-1B provisions will cook their geese inside the turducken.

http://www.reuters.com/article/reutersINCOnlineReport/idUSTRE51F4BF20090216) ("The 'Buy American' provisions ... will signal to our trading partners around the world that the United States is returning to the bad old days of protectionism and economic nationalism," quoting Gary Shapiro, President of the Consumer Electronics Association).

[21] Fareed Zakaria, "World View: Worthwhile Canadian Initiative," Newsweek, p. 31, Feb. 16, 2009 ("[S]o the brightest Chinese and Indian software engineers are attracted to the United States, trained by American universities, then thrown out of the country and picked up by Canada – where most of them will work, innovate and pay taxes for the rest of their lives").

[22] Thomas L. Friedman, "The Open-Door Bailout," New York Times, Feb. 10, 2009 (accessible at: http://www.nytimes.com/2009/02/11/opinion/11friedman.html?_r=1;)("In an age when attracting the first-round intellectual draft choices from around the world is *the* most important competitive advantage a knowledge economy can have, why would we add barriers against such brainpower — anywhere? That's called 'Old Europe.' That's spelled: S-T-U-P-I-D" [italics in original]).