

U.S. Immigration Policy on the Table at the WTO

By Sarah Anderson | November 30, 2005

In the contentious negotiations leading up to the December 13-18 World Trade Organization (WTO) summit, the big drama has centered around agricultural trade and whether the richer countries will grant expanded market access to commodities from the Global South. However, there has also been a battle brewing between developing countries and the U.S. government over immigration. Led by India, several countries are demanding expansion of U.S. visa programs for temporary professional workers.

How did immigration wind up on the table at the WTO? Under the global trade body's General Agreement on Trade in Services (GATS), governments can regulate the supply of services performed by foreigners. The technical term for this type of service trade is Mode 4. Thus far, the types of visas being discussed are those for executives and highly skilled professionals, such as Indian software engineers who have come to work in the Silicon Valley and other high-tech hubs in the United States. Some developing countries are pushing for the Mode 4 talks to cover less-skilled workers as well.

The wrangling over visas is just one more example of the WTO's mission creep. Global trade rules are no longer aimed merely at eliminating tariffs on goods that cross borders. The ultimate goal of GATS, for example, is to lift barriers to all manner of services by curbing national and local government controls on the entry of global banks, insurance companies, and other service providers into each country's markets. Other WTO rules limit government efforts to offer affordable generic medicines or to protect native plants and traditional handicrafts from being patented for profit by global businesses. And any domestic law, including public interest regulations, can be challenged under WTO rules as "an unfair barrier to trade."

With the Hong Kong WTO summit only weeks away, negotiators appear to be deadlocked on many issues. Regarding Mode 4, the White House has thus far committed only to maintaining its current level of H-1B professional visas—65,000. To no one's surprise, Washington is also holding steady on the L-1 program, which grants an unlimited number of visas for professionals transferring from one division to another within the same company.

Although the Bush administration's reluctance to expand its visa offer has been a disappointment to Indian and other developing country trade negotiators, U.S. officials might still be planning to use Mode 4 expansion as a bargaining chip. The time for pre-summit creative deals is running short, but the Mode 4 matter is not expected to go away. No matter what happens in Hong Kong, the issue is bound to re-emerge in future talks.

The inclusion of migration in WTO discussions has stirred up a complex debate featuring unusual bedfellows. Powerful U.S. corporate lobbyists have sided with developing country governments in favor of expanded Mode 4 access. On the other hand, many progressives here and abroad, including WTO critics and migrant rights groups, have come down on the same side as anti-immigrant groups and some congressional Republicans.



Opposition to Expanded Mode 4 Access

U.S. Congress

The biggest obstacle to U.S. concessions on Mode 4 is not the Bush administration but Congress, where many lawmakers in both parties feel that trade negotiators have no business meddling in immigration policy. The Constitution gives Congress the power to “establish a uniform rule of naturalization.”¹ The Supreme Court has interpreted this language to mean that Congress has the exclusive power to formulate policies pertaining to immigration. Although trade agreements must be approved by Congress, members have argued that their power is limited by “fast-track” trade authority, which requires an up or down vote without opportunity for amendments.

In 2003, lawmakers successfully pressured Robert Zoellick, then the top U.S. trade negotiator, to promise not to make any concessions in GATS negotiations that would require changes to U.S. immigration laws. However, when Zoellick left his position to become deputy undersecretary of state in late 2004, acting U.S. Trade Representative Peter Allgeier re-ignited the issue by hinting that the administration might be open to increasing Mode 4 access. In an April 19, 2005 letter to members of Congress, he stated that provisions on Mode 4 delivery of services were a “critical pillar” for successful negotiations in the current Doha round of WTO talks.

When Rob Portman was confirmed as the new U.S. trade representative, the Republican chairman of the House Judiciary Committee, James Sensenbrenner, along with John Conyers, the highest-ranking Democrat on the committee, pressured Portman to reconfirm the administration’s commitment not to negotiate immigration provisions that would require changes to U.S. law.² To date, no response from Portman has been made public.

In June 2005, some House members tried a new tactic to block U.S. trade officials from negotiating immigration matters. A bill introduced by Colorado Republican Thomas Tancredo would have prevented the trade representative from using any funds (including for staff time) to negotiate improved access for foreign business personnel. Tancredo is widely viewed as an anti-immigrant extremist, having once attempted to impose an all-out moratorium on immigration. And yet even with intense corporate lobbying against the bill, it came within 18 votes of passing.³ Todd Tucker of Public Citizen’s Global Trade Watch said that even more members sympathized with Tancredo’s position but insisted that they “should not have to reiterate through new legislation what they feel is their constitutional mandate.”⁴

Labor Unions

The U.S. labor movement’s opposition to increased market access under Mode 4 is based primarily on criticism of expanding the temporary worker visa program, which labor views as deeply flawed. The H-1B visa program was begun in 1990 to alleviate labor shortages by allowing entry to a modest number of professional and technical guest workers with college degrees. At that time, demand for information technology (IT) professionals was strong. Although the numbers vary from year to year, IT workers constitute about 60% of H-1B workers.⁵

Then the dot-com bust hit, and between March 2001 and April 2004, the industry shed 403,300 jobs. Although recession was the cause of some of those job losses, more than half occurred after economic recovery began in November 2001.⁶ Many IT workers argue that continued use of H-1B visas is motivated not by labor shortages but by employers’ desires for cheaper, more vulnerable foreign workers.

The AFL-CIO contends that employers have abused the H-1B program to displace U.S.

workers and exploit guest workers. The labor confederation has been sharply critical of the lack of government oversight to verify whether claims of labor shortages are legitimate and to ensure that employers pay guest workers prevailing wages and benefits. Although there is anecdotal evidence of U.S. companies applying for H-1B workers while laying off U.S. citizens, the actual impact of the H-1B program on U.S. jobs and wages has not been widely documented. In 2003, the General Accounting Office issued a report concluding that more research is needed. According to the report, “Although some employers acknowledged that H-1B workers might work for lower wages than their U.S. counterparts, the extent to which wage is a factor in employment decisions is unknown.”⁷

U.S. unions also argue that the visa program gives employers excessive power over guest workers. An H-1B visa requires a sponsoring U.S. employer and is good for three years with one three-year renewal allowed. After the visa expires, the foreign worker must remain outside the United States for at least one year. This arrangement gives employers tremendous power to retaliate against guest workers who attempt to join a union or ask for better wages or working conditions by threatening to withdraw the workers’ visas or deny renewal of visas in the future.⁸

The AFL-CIO has couched its opposition to increased Mode 4 access in a broader critique of the WTO. In 2002, for example, the AFL-CIO Executive Council adopted a GATS resolution that calls for negotiations to be suspended pending an assessment of potential impacts on economic and social development of poorer countries, provision of public services, government subsidies and procurement policies, services regulation, and the protection of worker rights, the environment, and human rights. With regard to Mode 4, the resolution states that the AFL-CIO opposes any new commitments regarding temporary entry until U.S. guest worker programs are reformed to “include

more rigorous labor market tests, involve labor unions in the labor certification process, and guarantee the same workplace protections for temporary workers that are available to all workers.”⁹

In 2003, the issue of negotiating visas through trade agreements was one of the few points of controversy in congressional debate over U.S. free-trade agreements with Chile and Singapore. The Labor Advisory Committee for Trade Negotiations and Trade Policy, through which unions give input to U.S. trade negotiators, strongly objected to provisions that created a new visa category for 6,800 Chilean and Singaporean professional guest workers. The committee complained that “this makes no economic sense for [U.S.] workers facing stagnant wages and high unemployment, and it is totally inconsistent with our right to engage in a full, democratic debate with our elected representatives on immigration issues.”¹⁰ Largely as a result of union pressure, the new visas for Chileans and Singaporeans are counted under existing guest worker quotas.

Migrant Rights Groups

Some migrant rights groups, such as the National Network for Immigrant and Refugee Rights (NNIRR), are critical of the inclusion of migration in WTO discussions because they feel that such negotiations reduce migrants to a commodity to be exported and imported. The NNIRR and other migrant advocates worked with trade activists to develop a statement on Mode 4 based on the idea that “migration policy must acknowledge migrants as human beings and address their dignity and human rights.” The statement also raises criticism (similar to the AFL-CIO’s) of the existing U.S. temporary guest worker programs and calls for a democratic and transparent process for developing migration policy. Whereas the AFL-CIO has focused on domestic consultation, the NNIRR statement also emphasizes the need for including international migrant communities and

advocates, labor unions, the International Labor Organization, and the United Nations in immigration discussions.

Advocates of Reduced Immigration

The Federation for American Immigration Reform (FAIR) cites two primary reasons for concern about Mode 4. The group feels that Washington's current offer of codifying existing provisions for H-1B and L-1 visas strips its power to restrict these programs in the future. For example, if there were a recession with mass layoffs of American workers, the U.S. government could not respond by lowering the number of such visas granted. Secondly, FAIR says that these types of visas "provide a major impetus to the outsourcing process, because the visa programs bring foreign workers to the United States, where they are trained in the operations of the company in order to facilitate outsourcing contracts with that company when they return abroad."¹¹ There is anecdotal evidence that this is occurring but no data on the extent of the trend. The Center for Immigration Studies raises the additional concern that by including visa matters in the WTO, U.S. trade officials open the door for other countries to challenge U.S. immigration laws as barriers to trade in services subject to the WTO dispute resolution mechanism.¹²

Promoters of Expanded Mode 4 Access

Coalition of Service Industries

The lead advocate for expanded Mode 4 access in the United States is the Coalition of Service Industries (CSI), which represents 43 corporations and business associations, primarily in the telecommunications and financial sectors. To address concerns in Congress about trade negotiators usurping power over migration, the CSI has insisted that increasing the number of H-1B visas would not constitute a change in immigration policy because H-1Bs are only for temporary entry and not permanent immigration.

And yet despite the CSI's work on Mode 4, the group's primary goal is to use GATS to expand opportunities (and eliminate barriers) for its members in foreign service markets. Wish lists prepared for a 2005 CSI conference on GATS included extensive details on what corporations hope to obtain regarding deregulation of insurance, banking, computer services, telecommunications, media, express delivery, and other service sectors but not a word about Mode 4.¹³ Likewise, a CSI press release glowingly reviewed the revised U.S. plan for GATS in May 2005 without even mentioning that the offer contained no new concessions on H-1B visas.

Supporting expanded U.S. commitments on Mode 4 may just be a shrewd way of currying favor with developing country governments that see the temporary professional visa programs as a way to boost valuable remittances. CSI members have traveled around the world to lobby developing country trade negotiators to make ambitious offers in services negotiations. The group has focused on India and in April 2005 issued a joint statement with the U.S.-India Business Council and the India-based National Association of Software and Service Companies (NASSCOM) that outlines their mutual goals in the WTO of achieving "full liberalization in Information Technology services and IT-enabled services."¹⁴ The close relationship with Indian business groups has no doubt been strengthened by the CSI position on Mode 4, no matter how thin it may be.

Major Employers of H-1B Workers

Microsoft Chairman Bill Gates is not in favor of raising caps on H-1B visas; he is for eliminating the caps entirely. Microsoft is likely the largest single employer of workers with this type of visa. The computer giant tops the list of companies that have applied for permanent residency for H-1B workers, followed by Oracle, Intel, and IBM.¹⁵ Gates suggests that limits on temporary visas for technology workers are

based on xenophobia: “It’s very dangerous. You can get this idea that the world is very scary; let’s cut back on travel...let’s cut back on visas.”¹⁶

The American Electronics Association, which represents companies in all aspects of the high-tech industry, is also in favor of expanded H-1B visas. In the words of AEA spokesman John Palafoutas, “America’s well-kept secret is that it has rarely produced enough American-born workers with the requisite science and engineering background to support its knowledge economy. Our safety valve has been the H-1B visa program.”¹⁷

Echoing employer groups, some economists have argued that expanded visa programs for service providers would be a boon to consumers and the economy. A University of Sussex professor estimates that an increase in quotas for skilled and unskilled temporary workers (equal to 3% of developed country work forces) could produce economic gains of \$150 billion.¹⁸ In a more narrowly focused study, Dean Baker of the Center for Economic and Policy Research estimated that reducing obstacles for the entry of four types of service providers—doctors, dentists, lawyers, and accountants—could save U.S. consumers \$160-270 billion per year.¹⁹ Both analyses are based in part on expected reductions in labor costs resulting from increased competition among workers. This, of course, translates into lower wages for U.S.-citizen service providers.

An Opportunity for Dialogue

Whatever the outcome of the Hong Kong WTO summit, the debate over GATS Mode 4 has created an opportunity to raise awareness of the expanding reach of the global trade body into policy areas that have profound impacts on virtually every aspect of life. Do we really want something as sensitive as migration decided in backroom deals, perhaps in return for lower tariffs on alfalfa? If asked, most people would

likely say “no.” The Mode 4 debate also raises the opportunity for progressives to work with partners in the Global South to develop not only a shared critique but also a shared positive agenda on international migration. In October 2005, the UN-sponsored Global Commission on International Migration issued a report that identifies principles for action to achieve rights-based migration policies.²⁰ This report should be viewed as an important starting point for a broader international dialogue involving migrants and other stakeholders.

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By Sarah Anderson and John Cavanagh (April 2004)

<http://www.fpif.org/briefs/vol9/v9n02outsource.html>

END NOTES

- ¹ Article I, section 8, clause 4.
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- ³ *Ibid.*
- ⁴ Personal email communication, June 20, 2005.
- ⁵ D. David Beckman, "Congress Allows H-1B Limit to Drop," *WashTech News*, September 30, 2003.
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- ¹¹ Federation for American Immigration Reform, "Immigration and Trade Agreements," November 2003.
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