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UNITED STATES – MEASURES CONCERNING NON-IMMIGRANT VISAS

REQUEST FOR CONSULTATIONS BY INDIA

The following communication, dated 3 March 2016, from the delegation of India to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

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Upon instructions from my authorities, I hereby wish to convey the request of the Government of India for consultations with the Government of the United States of America pursuant to Article 1 and Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and Article XXIII of the *General Agreement on Trade in Services* ("GATS"), with respect to but not limited to the following measures of the United States of America: (1) measures imposing increased fees on certain applicants for L-1 and H-1B categories of non-immigrant visas; and (2) measures relating to numerical commitment for H-1B visas. These measures are described in greater detail below.

I Measures relating to Fees for L-1 and H-IB Visas

1. The Consolidated Appropriations Act, 2016 (Public Law 114-113) (hereinafter referred to as the "2016 Act") requires applicants of non-immigrant visas in the L-1 and H-1B visa categories, to pay higher filing fees and fraud prevention and detection fees under certain specified circumstances. This measure was brought into effect on 18 December 2015, under Division O of the 2016 Act, which, under Title IV, titled the "James Zadroga 9/11 Victim Compensation Fund Reauthorization Act", introduced amendments to the Air Transportation Safety and System Stabilization Act (49 U.S.C. 40101), by adding section 411, titled "9-11 Response and Biometric Entry Fee". This amendment mandates that effective from December 18, 2015, and ending on 30 September 2025, notwithstanding the provisions of the Immigration and Nationality Act (8 U.S.C. 1351), or any other provision of law, the combined filing fee and fraud prevention and detection fee required to be submitted shall be as follows:

(a) For applications for admission, as well as for extension of the visa status, as a non-immigrant under section 101(a)(15)(L) of the Immigration and Nationality Act[1] (hereinafter the "INA"), the combined filing fee and fraud prevention and detection fee, shall be increased by USD 4,500 for applicants that employ 50 or more employees in the United States, if more than 50 percent of the applicant's employees are non-immigrants admitted pursuant to section 101(a)(15)(L) or section 101(a)(15)(H)(i)(b) of the INA[2]; and

(b) For applications for admission, as well as for extension of the visa status, as a non-immigrant under section 101(a)(15)(H)(i)(b) of the INA, the combined filing fee and fraud prevention and detection fee, shall be increased by USD 4,000 for applicants that employ 50 or more employees in the United States, if more than 50 percent of the applicant's employees are non-immigrants admitted pursuant to section 101(a)(15)(H)(i)(b) or section 101(a)(15)(L) of the INA.

[1] 8 U.S.C. section 1101(a)(15)(L)
[2] 8 U.S.C. section 1101(a)(15)(H)(i)(b)

2. The afore-mentioned measures under Public Law 114-113 were preceded by measures under Section 402 of the Emergency Border Security Supplemental Appropriations Act, 2010 (Public Law 111-230), which were valid for the period between 13 August 2010 and 30 September 2015, and required applicants of non-immigrant visas in the L-1 and H-1B visa categories, to pay higher filing fees and fraud prevention and detection fees under the following circumstances:

(a) For applications for admission as a non-immigrant under section 101(a)(15)(L) of the INA, the fees were increased by an additional USD 2,250 for applicants that employ 50 or more employees in the United States, if more than 50 percent of the applicant's employees are non-immigrants admitted pursuant to section 101(a)(15)(L) or section 101(a)(15)(H(i)(b) of the INA; and

(b) For applications for admission as a non-immigrant under section 101(a)(15(H(i)(b) of the INA, the fees were increased by an additional USD 2,000 for applicants that employ 50 or more employees in the United States, if more than 50 percent of the applicant's employees are non-immigrants admitted pursuant to section 101(a)(15)(H(i)(b) or section 101(a)(15)(L) of the INA.

3. Both sets of measures, under Public Law 111-230 and Public Law 114-113, impose higher fees on applicants for H1B and L1 visas, based on an assessment of nationality of their workforce. The main difference is that the current measures under Public Law 114-113, has increased the earlier fees under Public Law 111-230 by two-fold, and makes the enhanced fees applicable for extension of the visa status as well.

4. The current measures, as with the earlier measures, appear to: (i) be inconsistent with the terms, limitations and conditions agreed to and specified by the United States in its Schedule of Specific Commitments under the GATS, (ii) accord to juridical persons of India having a commercial presence in the United States treatment that is less favourable than that accorded to juridical persons of the United States engaged in providing like services in sectors such as the Computer and Related Services sector with respect to which the United States has taken commitments in its Schedule of Specific Commitments, and (iii) affect the movement of natural persons seeking to supply services in a manner that is inconsistent with the United States' commitments in its Schedule of Specific Commitments. These measures also appear to nullify or impair the benefits accruing to India directly and indirectly under the GATS.

5. The Government of India is of the view that these and comparable measures, (as well as any amendments, related measures, or implementing measures), taken by the United States are not in conformity with at least the following provisions of the GATS: Articles XVI, XVII, XX, and paragraphs 3 and 4 of the GATS Annex on Movement of Natural Persons Supplying Services. These measures also appear to be inconsistent with Articles III:3, IV:1 and VI:1 of the GATS.

II Measures relating to Numerical Commitment for H-1B Visas

6. In its Schedule of Specific Commitments under the GATS, the United States has specified in respect of its horizontal commitments under Mode 4, in the category of Fashion Models and Specialty Occupations, that it would allow "up to 65,000 persons annually on a worldwide basis in occupations as set out in 8 U.S.C. section 1101(a)(15)(H)(i)(b)". This provision is reflected under 8 U.S.C. section 1184(g)(1)(A) of the INA.[3]

7. This numerical commitment has however been subsequently modified pursuant to the United States' Free Trade Agreements with Singapore and Chile. Under section 1184(g)(8)(B)(ii) of the INA[4] as amended, the Secretary of Homeland Security is required to establish annual country-specific numerical limits for initial applications for admission under section 101(a)(15)(H)(i)(b1) of the INA[5] for nationals of Chile and Singapore, which shall not exceed 1,400 for nationals of Chile and 5,400 for nationals of Singapore. Section 1184(g)(8)(B)(iv) of the INA[6] provides that the numerical limits specified by the Secretary of Homeland Security under section 1184(g)(8)(B)(ii),

[3] 8 U.S.C. section 1184(g)(1)(A)
[4] 8 U.S.C. section 1184(g)(8)(B)(ii)
[5] 8 U.S.C section 101(a)(15)(H)(i)(b1)
[6] 8 U.S.C. section 1184(g)(8)(B)(iv)

would be reduced from the worldwide annual numerical limitation of 65,000 H-1B visas as provided under section 1184(g)(1)(A) of the INA.

8. In addition to the above reduction, section 1184(g)(8)(D)[7] of the INA provides for a further reduction from the worldwide annual numerical limitation of 65,000 H-1B visas under section 1184(g)(1)(A), when a national from Singapore or Chile is granted an extension after having obtained five or more earlier extensions.

9. The measures under section 1184(g)(8)(B)(iv) of the INA and section 1184(g)(8)(D) of the INA appear to be inconsistent with the United States' Schedule of Specific Commitments to the GATS in respect of the numerical commitment of entry for natural persons available annually on a worldwide basis in occupations set out in section 1101(a)(15)(H)(i)(b) of the INA. These measures also appear to raise the overall barriers for service suppliers from India seeking entry into the United States under section 1101(a)(15)(H)(i)(b) of the INA, compared to the level applicable prior to the implementation of the United States' Free Trade Agreements with Singapore and Chile. These measures also appear to nullify or impair the benefits accruing to India directly or indirectly under the GATS.

10. The Government of India is of the view that these and comparable measures taken by the United States are not in conformity with at least the following provisions of GATS: Articles II, V:4, XVI and XX and paragraph 3 and 4 of the GATS Annex on Movement of Natural Persons Supplying Services. These measures also appear to be inconsistent with Articles III:3 and IV:1 of the GATS.

11. For the measures cited in this request, this request also covers any amendments, replacements, extensions, successor or implementing measures or other related measures. The Government of India reserves its right to raise additional factual claims and legal matters during the course of the consultations and in any future request for panel proceedings.

12. We look forward to receiving your reply to the present request and to setting a mutually convenient date and venue for consultations.

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[7] 8 U.S.C. section 1184(g)(8)(D)