

Inside The Immigration Reform Bill's Business Provisions

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The U.S. Citizenship Act, an immigration reform bill supported by President Joe Biden, was unveiled on Feb. 17 by Sen. Bob Menendez, D-N.J., and Rep. Linda Sanchez, D-Calif.

The bill is a key element of the president's promise to pursue immigration legislation that addresses the status of the undocumented population in the U.S.

Among other things, the bill creates a legalization program for undocumented immigrants, addresses the status of undocumented people who were brought into the country as young children — known as Dreamers — and temporary protected status recipients, reforms the asylum system, and raises the refugee cap.

It also introduces several provisions related to business immigration. The potential impact of those provisions is the focus of this article.

Background

Business immigration rules have not been reformed by Congress in more than 30 years. The long backlogs in processing employment-based green cards, also referred to as immigrant visas in this context — particularly for nationals of India and China — have been the focus of intense debate in Congress.

Under the current immigration laws, no more than 7% of green cards can be allocated to citizens born in the same country per year. Not surprisingly, China and India — the two most populated countries in the world that contribute a high number of high-skilled immigrants to the U.S. — experience the longest backlogs.

Last year, the U.S. Senate^[1] and the U.S. House of Representatives^[2] passed two different versions of the Fairness for High-Skilled Immigrants Act, which attempted to solve this issue. Ultimately, the two chambers were unable to reconcile their versions of the bills and the bills expired at the end of 2020. The same issue is now addressed in the U.S. Citizenship Act.



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Reforms of Employment-Based Green Cards

The bill eliminates the per-country caps for employment-based immigrants and offers several different ways of increasing the number of employment-based green cards available to U.S. businesses and their foreign national employees.

The bill provides a modest outright increase in the number of employment-based green cards per year — from 140,000 to 170,000 — and all of the increase goes to the unskilled workers category — from 10,000 to 40,000.

The number of green cards is reallocated in such a way that fewer green cards will go to "individuals of extraordinary ability," EB-5 immigrant investors and applicants with advanced degrees and more green cards will be reserved for applicants with a bachelor's degree or no degree at all because those applicants have experienced the longest backlogs.

The bill allows for a recapture of any unused employment-based immigrant visas from 1992 to 2020 in an effort to eliminate backlogged immigrant visa applications, some of which have been pending for decades.

The U.S. Department of State has not publicly announced how many visas went unused in the past 28 years, but estimates put the number between 200,000 and 300,000.[3] The recapture will undoubtedly make a significant impact on the current backlog of employment-based green cards, which is estimated to be close to 1 million applications.

The bill exempts spouses and children of employment-based green card applicants from the annual quota. This will likely more than double the number of available employment-based green cards as only the principal applicants will be counted against the statutory limit.

The bill proposes to exempt from numerical limits all noncitizens who have earned doctoral degrees in science, technology, mathematics and engineering, or STEM, fields from accredited U.S. institutions of higher education. This means that, even if there is a backlog in employment-based green card applications, if a noncitizen earns a Ph.D. in a STEM field, they can jump to the front of the line.

The bill also proposes something that has never been done before in U.S. immigration: a five-year pilot program that would allow for 10,000 additional employment-based immigrants per year "whose employment is essential to the economic development strategies of their local communities."

This would empower states and local jurisdictions to supplement their labor force to meet their development goals, and it would allow them to have input in a system that has long been operated only by federal authorities.

Finally, the bill eliminates numerical limitations on applicants whose immigrant visa petitions have been approved and whose wait time for a green card has exceeded ten years. The provision would allow them and their immediate families to jump to the front of the line.

For example, currently, the longest wait time for an employment-based immigrant visa is for Indian professionals with an advanced degree: Those who filed their green card petitions in early 2010 are just now becoming eligible to complete the final step of the green card process. This provision, if passed,

would essentially cap any wait for an employment-based green card to ten years, bringing some predictability to the process.

Potentially Restrictive Provisions

The legislation has at least two provisions that have drawn skepticism from the business community. The Fairness for High-Skilled Immigrants Act phased out the country caps over the course of nine years by gradually increasing the percentage of immigrant visas reserved for citizens of the same country and ultimately eliminating the caps all together.

The U.S. Citizenship Act does not contain any such ramp-up provision. Without it, immigration practitioners are concerned that the backlogged applications will take up all available immigrant visas for at least several years, making employment-based green card unavailable for any new applicants, no matter what country they came from.

The provisions described above will help alleviate this issue, but without increasing the number of immigrant visas more significantly, a new backlog made up of new applicants is all but inevitable.

Additionally, the bill authorizes the U.S. Department of Homeland Security secretary to essentially override the statutory allocation of employment-based green cards by temporarily reducing them for all employment-based immigrants except for individuals of extraordinary ability and EB-5 immigrant investors.

The bill allows such a redaction for geographic areas or labor market sectors that are experiencing high levels of unemployment, but it does not define what levels trigger this authority.

The newly proposed authority would restrict entry on new immigrant visas from abroad, in a way similar to the statutory authority in Immigration and Nationality Act Section 212(f), which allows the president to suspend entry of individuals or classes of individuals whose entry the president determines to be detrimental to the U.S.

However, it would also apply to issuance of green cards in the U.S. — something that Section 212(f) does not allow. Therefore, as it applies to green card applicants, the proposed authority would be broader than Section 212(f).

The authority the bill would give the DHS secretary to temporarily reduce employment-based immigration is especially surprising in light of provisions in the bill that significantly restrict the president's authority to suspend entry of individuals under Section 212(f).

Undoubtedly in response to President Donald Trump's extensive use of Section 212(f), the bill requires the president to report to Congress within 48 hours regarding any such proposed suspension, requires the president to narrowly tailor such a suspension, and allows for U.S. businesses and individuals to challenge the suspension in court.

While severely limiting — if not eliminating — the president's 212(f) authority, the bill inexplicably grants the DHS secretary broad authority to override the statutory distribution of most employment-based green cards. This will certainly make the green card process less predictable and will be a concern for U.S. businesses and foreign national applicants.

Reforms of Temporary Work Visas and Student Visas

In addition to reforming the immigrant visa rules, the bill proposes changes to several nonimmigrant visas. It is notable that the bill does not increase the number of H-1B visas or substantively reform the H-1B visa program — something that many in Congress have called for in the past.

The provisions summarized below address some aspects of the H-1B visa, but do not alter the core rules that govern the program.

The bill grants employment authorization to H-4 visa holders — spouses and children of H-1B employees — and protects H-4 children from aging out while their parents' green card applications are pending. This is welcome news to H-1B employees and their families.

The current H-4 work eligibility provision is extremely narrow and only benefits those who are married to H-1B employees whose green card applications are backlogged. This new provision would allow H-4 dependents to obtain work authorization incident to their own status.

The bill will also prevent the situation where H-4 children are denied the ability to live in the U.S. when they turn 21 years old if their parents' green card applications are not adjudicated by then, even if those children have spent the vast majority of their lives in the U.S.

The bill allows DHS to restructure the H-1B lottery to prioritize higher-paid employees. This is the approach that the Trump administration took in a regulation finalized shortly before Jan. 20 this year. The Biden administration postponed the regulation until Dec. 31, 2021, so it will not affect this year's H-1B lottery, but it may very well apply to next year's lottery.

The regulation is likely to be challenged in court, but this statutory provision would bolster the administration's chances of withstanding such a challenge.

Estimates based on previous years' H-1B lotteries have shown that, if H-1B visas are allocated by wages, starting from the highest paid employees, many entry-level employees — usually, recent graduates — would never be eligible for H-1B visas. This provision would also hurt small businesses and start-ups because they are often unable to pay their employees as much as large companies do.

Institutions of higher learning are also opposed to this provision because it would make studying in the U.S. less attractive to foreign students: If they know that they will most likely be unable to obtain an H-1B visa after graduation, they may not come to the U.S. to pursue their degrees.

Ironically, this provision may lead to companies being forced to offer their H-1B employees higher wages than their U.S. workers, in order to maximize their lottery chances. This would lead to an effect adverse to what the legislation is trying to achieve, and it would not be legal in the states that require equal pay for similarly situated employees.

At the same time, the bill offers a provision that would be very welcomed by U.S. institutions of higher education: It converts the F-1 foreign student visa from a strictly nonimmigrant visa to a dual intent visa.

This means that foreign students will no longer be required to prove to a consular officer or to the DHS that they plan to return to their home country upon completion of their studies — something that is sometimes hard to prove, especially if their chosen degree program may take many years.

Instead, they would be allowed to pursue their studies on a student visa with a future intent of applying for a green card upon completion of their studies.

Another provision would allow F-1 foreign students, H-1B workers and O-1 nonimmigrants — individuals of extraordinary ability — to extend their nonimmigrant status if their green cards have been pending for at least a year.

This is another attempt to resolve the green card backlogs, and it would make it easier for these categories of nonimmigrants to continue working for their U.S. employers while their green cards are adjudicated by the DHS.

Comprehensive Reform Versus Piecemeal Legislation

It remains to be seen which business immigration provisions will survive and which ones may be stripped from the bill, especially if it is broken up into several legislative proposals.

A piecemeal approach where separate bills address different populations of immigrants — such as Dreamers, temporary protected status recipients or agricultural workers — is a more likely pathway for immigration reforms to be achieved in Congress.

There is a high likelihood that at least the Development, Relief, and Education for Alien Minors, or DREAM, Act will become law in 2021, particularly if another legal challenge to the Deferred Action for Childhood Arrivals program reaches the U.S. Supreme Court.

However, given the equally divided 50-50 Senate makeup, a bipartisan agreement must be struck in order to meet the 60-vote threshold for Senate passage. The Democrats' willingness to meet Republican demands on border security within bipartisan negotiations of the bill will be key to success or failure of the legislative efforts.

The U.S. Citizenship Act notably does not allocate any additional funding to border security, and calls for an increase in technology on the southern border rather than an increase in the number of border patrol agents or physical barriers.

While it is much less likely that business immigration bills will become law in the near future, there are a few immigration bills that could be enacted by this Congress due to existing bipartisan support.

For example, the Farm Workforce Modernization Act, which reforms the H-2A agricultural guest worker program, passed the House last Congress with the support of 34 Republicans and is expected to once again move to the floor for a House vote in the coming weeks. There is broad bipartisan support in Congress for reforming the H-2A program.

Another bill, the Healthcare Workforce Resilience Act, was introduced last year by a bipartisan group of senators. It would recapture unused immigrant visas for medical professionals at the front lines of the COVID-19 pandemic. It may have a chance in this Congress as well.

Individual statutory provisions within the U.S. Citizenship Act that address employment-based green card applicants will have the greatest potential for enactment if they are folded into another bill that has a better chance of passage, such as the DREAM Act. For example, the Fairness for High-Skilled

Immigrants Act, which eliminates the per-country caps on green cards, nearly became law last year and will likely see floor action again this Congress.

Unfortunately, other provisions like employment authorization for H-4 visa holders may not be that popular in Congress, especially while unemployment levels are high, because H-4 visa holders will compete for jobs against U.S. workers in an open labor market.

Whatever the path to reform, business immigration rules need to be addressed by Congress as many are outdated and no longer meet the needs of the business community or the country as a whole. The question is, will these provisions be the last ones to be considered, and if so, will there be enough bipartisan support to enact any of them into law? We should know more on this in the next few months.

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[1] <https://www.congress.gov/116/bills/hr1044/BILLS-116hr1044eas.pdf>.

[2] <https://www.congress.gov/116/bills/hr1044/BILLS-116hr1044eh.pdf>.

[3] <https://www.cato.org/publications/study/deregulating-legal-immigration-blueprint-agency-action>.