Published on *The National Law Review* https://natlawreview.com

Congress Considers Removing Country Caps for Employment-Based Immigrant Visas and Proposes Changes to H-1B Visa Program

Article By:

Tieranny L. Cutler

Marissa E. Cwik

Andrea C. Davis

Melissa Manna

On July 10, 2019, the U.S. House of Representatives passed H.R. 1044, the Fairness for High-Skilled Immigrants Act of 2019, by a vote of 365 to 65. The bill is intended to reduce lengthy immigrant visa (green card) wait times by eliminating per-country caps for employment-based green cards. In addition, senators have reportedly reached an agreement on a version of a companion bill (S. 386) in the U.S. Senate that presently includes an amendment imposing tighter restrictions on recruitment and creating new reporting requirements for H-1B visa sponsors. If enacted, the legislation would take effect on September 30, 2019, and apply to fiscal year 2020.

The following is a summary of the key changes proposed by the House bill:

Immigrant Visa Process

- **Elimination of per-country caps for employment-based visas.** This is significant because under the Immigration and Nationality Act, employment-based green cards are currently limited to 140,000 per fiscal year. From that number, only 7 percent, or 9,800 visas, can be awarded to foreign nationals from any one country regardless of the size of the country or the demand. Under the proposed bill, immigrant visas would be issued on a first-come, first-served basis, regardless of nationality. While the elimination of the cap is intended to reduce wait times for individuals from countries with the highest volume of green card recipients, it may result in an increase in the waiting period for other foreign nationals.

- **Transition period for EB-2 and EB-3 visa categories.** The bill proposes a three-year transition period during which a certain percentage of EB-2 and EB-3 visas would be reserved for applicants from countries other than the two largest recipients for that visa category

(currently India and China). For fiscal year 2020, 15 percent would be reserved. In fiscal years 2021 and 2022, the percentage of reserved visas would shrink to 10 percent. Additionally, no more than 85 percent of the unreserved visas may be awarded to any one country.

In addition to mirroring the elimination of the per-country caps for employment-based visas, the Senate bill includes an amendment that would affect the H-1B process. The following is an overview of such proposed changes:

H-1B Process

- **Department of Labor (DOL) posting requirement.** Employers would be required to post information about the jobs being offered to H-1B candidates on the DOL's website for at least 30 days prior to filing a labor condition application (LCA). The public posting would require each job's description, occupational classification, minimum qualifications, salary, benefits, work location, and application process.

- **Restrictions on recruitment efforts.** An employer would not be able to include language in recruitment ads suggesting that a position is available only to H-1B workers or that the employer prefers or would prioritize H-1B workers. The employer would be prohibited from primarily recruiting individuals for the role who would be H-1B workers.

- **Expanded review of LCAs by the DOL.** The proposed legislation would expand the DOL's review of LCAs from merely looking to ensure completeness or spot obvious inaccuracies to looking for evidence of fraud or misrepresentations of material fact.

- **Information sharing.** S. Citizenship and Immigration Services (USCIS) would be required to notify the DOL if it uncovers information in an H-1B petition that suggests that an employer is not complying with the H-1B program's requirements.

- **Expanded DOL compliance audits.** The bill would mandate an annual compliance audit for employers with more than 100 full-time employees if more than 15 percent of the employees are in H-1B status. In addition, the DOL would have the authority to audit any employer that employs H-1B workers, regardless of whether the employer met the 100-employee or 15 percent threshold.

- **Protections for whistleblowers.** The bill would provide protections for whistleblowers who disclose information or cooperate in any investigation regarding a potential violation of an H-1B requirement.

- **Elimination of B-1 in lieu of H-1B.** Employers would no longer have the option of bringing employees to the United States in B-1 business visitor status to work on a short-term basis.

As the legislation evolves in the Senate, further changes may occur. In addition, it is not clear when, or if, the Senate bill will be put up for a vote, though recent movement on the bill indicates that a vote may take place in the near future.

National Law Review, Volume IX, Number 192