



## **Fairness for High-Skilled Immigrants Act of 2019 H.R. 1044 and S. 386 Key Considerations and Anticipated Impact**

### **I. H.R. 1044 - Fairness for High-Skilled Immigrants Act of 2019**

On July 10, 2019, the U.S. House of Representatives passed the [Fairness for High-Skilled Immigrants Act of 2019 \(H.R. 1044\)](#) by a vote of 365 to 65, garnering support from 224 Democrats and 140 Republicans. If enacted, the bill would eliminate the per-country limit for all employment-based immigrants and increase the per-country limit for all family-sponsored immigrants from 7 percent to 15 percent.

For employment-based visa applicants, the bill establishes a three-year transition period to ease the elimination of the per country cap, as follows:

- **FY2020:** 15% of all EB-2, EB-3, and EB-5 visas shall be allotted to immigrants who are natives of a foreign country that is not one of the two countries with the largest aggregate numbers of natives who are beneficiaries of approved immigrant visa petitions under such employment-based preference categories.
- **FY2021 & FY2022:** 10% of all EB-2, EB-3, and EB-5 visas shall be allotted to immigrants who are natives of a foreign country that is not one of the two countries with the largest aggregate numbers of natives who are beneficiaries of approved immigrant visa petitions under such employment-based preference categories.
- During the transition period, no more than 85% of visas shall be allotted to immigrants from any single country.

H.R. 1044 would also eliminate a provision in the Chinese Student Protection Act of 1992 which requires that the annual immigrant visa limit for China be reduced by 1,000 visas annually to offset status adjustments under such Act.<sup>1</sup>

One main feature of H.R. 1044 that differentiates it from previous version is the inclusion of a “do no harm” provision, which provides that beneficiaries of an employment-based immigrant visa petition *approved before the bill’s enactment* shall receive a visa no later than they otherwise would have received such visa

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<sup>1</sup> The Chinese Student Protection Act was signed into law in 1992 after the Tiananmen Square protests to allow certain Chinese nationals who arrived in the U.S. before April 11, 1990 to stay and adjust their immigrant status. The Chinese Student Protection Act requires an offset of 1,000 visa numbers from the China employment-based visa annual limit each fiscal year to account for immigrant visas issued to Chinese students in the United States under that Act. In October 2018, Charles (Charlie) Oppenheim, Chief of the Visa Control and Reporting Division, U.S. Department of State, indicated at the AILA/IIUSA EB-5 Industry Forum that there were about three more years left for China to “pay off” those visas. See *2018 EB-5 Update: Ten Things to Learn from New U.S. Department of State Data*, AM. IMMIGRATION LAWYERS ASS’N (Oct. 31, 2018), published on AILA InfoNet at [Doc. No. 18110100](#).

had this bill not been enacted. The “do no harm” provision does not apply to pending employment-based petitions or any family-sponsored petitions.<sup>2</sup>

With H.R. 1044’s passage in the House, the bill has moved to the Senate, where a companion bill (S. 386) has yet to be voted out of committee. If enacted, this bill would take effect as if enacted on September 30, 2019 and would apply to each subsequent fiscal year beginning with FY2020.

## II. S. 386 - Fairness for High-Skilled Immigrants Act of 2019

On February 7, 2019, Senators Mike Lee (R-UT), Kamala Harris (D-CA) and 13 bipartisan members introduced a companion bill in the Senate, the [Fairness for High Skilled Immigrants Act of 2019 \(S. 386\)](#). One main difference between the House and Senate version of the Fairness for High-Skilled Immigrants Act is the three-year transition period for employment-based visa applicants. While the House version provides a three-year transition period for the EB-2, EB-3, and EB-5 visa categories, the Senate version only provides a three-year transition period for the EB-2 and EB-3 visa categories, and does not offer a three-year transition period for EB-5 visa applicants.<sup>3</sup> Like the House version, however, the Senate version includes a “do no harm provision,” which would protect all employment-based visa applicants already in the immigrant visa queue, including EB-5 visa applicants, provided that the applicant is the beneficiary of an employment-based immigrant visa petition approved *before* the bill’s enactment.

Another key difference between the House and Senate version of the bill is that Senate version was recently amended to include provisions relating to the H-1B visa program. On July 9, 2019, Senator Chuck Grassley (R-IA) [filed an amendment to S. 386](#) in order to address longstanding concerns that the Senator has with the H-1B program.<sup>4</sup> The amendment filed by Senator Grassley adds the following H-1B related provisions to S. 386, among others:

- **Internet Posting:** Employers filing petitions on behalf of workers who have not already been counted against the H-1B cap will be required to post information about the job for which an H-1B worker is sought on a newly established searchable DOL website for at least 30 days before submitting an LCA.
- **LCA Fee:** Requires an administrative fee to be paid at the time of filing an LCA to cover the average paperwork processing costs and other administrative costs
- **W-2 Reporting:** Provides DOL with the authority to obtain an employer’s W-2 wage and tax statements with respect to the H-1B workers it employs
- **Eliminates B-1 in lieu of H-1**
- **Whistleblower Protections:** Strengthens whistleblower protections for employees who report violations of the LCA process by employers
- **Information Sharing:** Increases information sharing between USCIS and DOL regarding employer H-1B non-compliance
- **LCA Review:** Expands DOL authority to review LCAs to include scrutiny of clear indicators of fraud or misrepresentation of material facts

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<sup>2</sup> Based on AILA’s conversations with those who have worked closely on the bill, the “do no harm” provision was not included as drafters considered it to be unnecessary to reduce the green card backlog for family-sponsored applicants in addition to the increase of the per-country limit from 7% to 15%.

<sup>3</sup> The EB-5 visa category was apparently omitted from the three-year transition period in the Senate version of the bill due to reservations about the EB-5 visa program by certain Senators.

<sup>4</sup> Senator Grassley has expressed reservations about prior versions of this legislation, including placing a hold on it the last time it passed the House in 2011. *See H.R. 3012 – Fairness for High-Skilled Immigrants Act (Updated 7/18/12)*, AM. IMMIGRATION LAWYERS ASS’N (Sept. 22, 2011), published on AILA InfoNet at [Doc. No. 11092862](#). Senator Grassley lifted his hold in June 2012 after reaching a similar deal on H-1B language with Senator Chuck Schumer (D-NY), but the bill never made it to a vote.

- **Audits and investigations:** Permits DOL to conduct annual compliance audits of H-1B employers, but if no willful failure is found, no further annual compliance audit shall be conducted for a period of at least 4 years
- **Increases the penalties for LCA violations**
- **Expands DOL’s investigative authority for LCA violations**

While S. 386 enjoys bipartisan support in the Senate with more than 34 Senators cosponsoring the bill (15 Democrats and 19 Republicans), the future of the bill remains highly uncertain as several Senators on both sides of the aisle have placed holds on the bill. On June 27, 2019, Senator Lee (R-UT), the primary sponsor of the bill, attempted to get the bill passed on the Senate floor by unanimous consent. Senator Rand Paul (R-KY), however, objected to moving the bill forward based on his desire to amend the legislation to include a provision for immigrant nurses, ultimately preventing the bill from advancing by unanimous consent. With active opposition in the Senate to the bill as currently drafted, it is uncertain whether this bill will ever receive a vote.

Presenting further obstacles to the passage of S. 386 in the Senate, on July 11, 2019, Senator Paul introduced his own immigration bill, the [Backlog Elimination, Legal Immigration, and Employment Visa Enhancement \(BELIEVE\) Act, S. 2091](#), which would not only eliminate the per-country numerical limitation for employment-based immigrants, but would also increase the number of employment-based green cards available each year, exempt certain health care workers and certain spouses and children from counting against the worldwide limitation on the number of employment-based visas, and allow spouses and children of E, H, and L visa holders to pursue employment. While S. 2091 has not garnered any cosponsors since its introduction, it has the potential to detract momentum from S. 386 and expand the focus of the debate in the Senate beyond the narrow scope of S. 386.

While passage of S. 386 remains uncertain, in the event it was to pass in its current form in the Senate, a conference committee would need to be convened to reconcile the House and Senate bills, which could present further challenges to the passage of this legislation. In addition, even if a version of this bill were to pass the House and the Senate, it will still need to be signed into law by the President, which could present further challenges to the bill’s passage.

### **III. Anticipated Impact of the Fairness for High-Skilled Immigrants Act of 2019 on Current Visa Backlog and Future Immigration Flows**

AILA’s Government Relations team is not aware of a comprehensive, independent, and publicly available analysis regarding how the House and Senate versions of the Fairness for High-Skilled Immigrants Act of 2019 would impact both the current employment-based and family-sponsored immigrant visa queues as well as future immigration flows, and the U.S. economy more broadly.<sup>5</sup> The Congressional Research Service has recently published two reports regarding the numerical limitation on immigrant visas, however, these reports only address the potential impact of adjusting or eliminating the per-country cap on employment-based immigration only, and not on family-sponsored immigration and lack a comprehensive analysis regarding the potential wait times that employment-based and family-sponsored applicants may experience in the near future and more distant future if the per-country limitation is eliminated.<sup>6</sup> Furthermore, both reports were published before the introduction of H.R. 1044 and S. 386 and therefore do not take into consideration the impact of the “do no harm” provision on employment-based immigrants.

<sup>5</sup> AILA’s Government Relations team has contacted Charles (“Charlie”) Oppenheim, Chief of the Immigrant Visa Control and Report Division at the U.S. Department of State. Although Charlie indicated that he has previously done some analysis and has briefed the Hill in the past on these bill concepts, he is not able to share his data.

<sup>6</sup> See Carla N. Argueta, Numerical Limits on Permanent Employment-Based Immigration: Analysis of the Per-Country Ceilings, Congressional Research Service, July 28, 2016, <https://fas.org/sgp/crs/homesecc/R42048.pdf>; William A. Kandel, Permanent Employment-Based Immigration and the Per-Country Ceiling, Congressional Research Service, updated December 21, 2018, <https://crsreports.congress.gov/product/pdf/R/R45447>.

AILA's Government Relations team acknowledges the difficulties in accurately and comprehensively projecting the effects of revising the per-country limits. There are, however, a handful of piecemeal analysis that have been conducted on the impacts of the bill on employment-based and family-based visa applicants, which are discussed in more detail below. The analysis is the same for both the House and Senate versions of the Fairness to High-Skilled Immigrants Act (H.R. 1044 and S. 386), except as noted below.

#### **a. Impact on Employment-Based Visa Applicants**

If enacted, the Fairness for High-Skilled Immigrants Act of 2019 would move green card wait times forward for foreign nationals who have waited the longest in the green card lines, particularly those from India and China awaiting a visa in the EB-2, EB-3, and EB-5 visa backlogs. During the three-year transition period, Stuart Anderson, Executive Director of the National Foundation for American Policy (NFAP), estimates that Indians in the EB-2 and EB-3 visa categories would receive no more than approximately 29,000 immigrant visas in FY2020, and 31,000 in FY2021 and 2022 of the approximately 40,040 total visas that are made available each year under each visa category.<sup>7</sup> In practice, Anderson notes that they are likely to receive fewer visas than that in light of the "do no harm" provision which guarantees that no one who is the beneficiary of an approved employment-based immigrant visa petition before the bill's enactment will receive a visa later than if there had been no bill.

Once the bill's three-year transitional period ends on September 30, 2022, the employment-based immigration system will operate, in general, on a first-come, first-serve basis. Anderson concludes that within 5 to 7 years after the three-year transition period ends, the entire employment-based green card backlog that existed as of the date of the bill's enactment likely will have ended. Countries which previously have not experienced a significant wait time in the employment-based preference categories will likely see an increase in wait times. However, it is uncertain how long wait times will increase overall for a green card to become available. In a recent report published by the CATO Institute in June 2019, immigration policy analyst David Bier estimates that eliminating the per country cap would result in an average wait time of six or seven years for all applicants processing in the EB-2 and EB-3 visa categories.<sup>8</sup>

In FY2023 and FY2024, Anderson estimates that up to 40,000 immigrant visas could go to Indians in the EB-2 and EB-3 visa categories. This represents nearly all of the approximately 40,040 total visas that would be made available in FY2023 and FY2024 for the EB-2 and EB-3 visas categories. Anderson notes that it is likely that some number of Chinese and Filipinos and other individuals in the pipeline may have priority dates that could allow them to obtain green cards in the EB-2 or EB-3 category in 2023 and the years that follow. According to Anderson, by (or during) 2023, all Indians waiting in the EB-3 visa backlog prior to the bill's enactment may have received green cards. That could leave approximately 290,000 Indians who are in the EB-2 backlog prior to the bill's passage remaining in the backlog, some of whom could decide to refile under the EB-3 category. Effectively pooling the numbers in the EB-2 and EB-3 category from FY2024 forward would likely eliminate by FY2027 or FY2028 the entire backlog of Indians who were waiting in those two categories prior to the bill's enactment. How quickly the backlog is eliminated depends on how many people from countries other than India receive green cards in FY2020 and later.

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<sup>7</sup> Stuart Anderson, *Bill Aims to End Decades-Long Waits for High-Skilled Immigrants*, FORBES (Feb. 15, 2019), <https://www.forbes.com/sites/stuartanderson/2019/02/15/bill-aims-to-end-decades-long-waits-for-high-skilled-immigrants/#38cf9317b856>.

<sup>8</sup> David J. Bier, *Immigration Wait Times from Quotas Have Doubled*, CATO INSTITUTE (June 18, 2019), <https://www.cato.org/publications/policy-analysis/immigration-wait-times-quotas-have-doubled-green-card-backlogs-are-long>. It is unclear if Bier's estimate takes into account that a significant part of the EB-2 and EB-3 visa backlog for India and China would be reduced during the three-year transition period proposed by the House and Senate bills before the employment-based per country cap is completely eliminated. If the reduced backlog is not accounted for in the CATO estimate, then the EB-2 and EB-3 wait time following the elimination of the per country cap for these categories would likely be less than the CATO estimate.

With respect to the impact of H.R. 1044 on the EB-5 investors, one analysis conducted by Suzanne Lazicki, concludes that if H.R. 1044 is enacted, future EB-5 investors from any country who file shortly after the date of the bill's enactment would wait approximately 7-8 years for an EB-5 immigrant visa to be issued.<sup>9</sup> The anticipated impact on the EB-5 visa category would be somewhat different in the Senate version because it does not include EB-5 applicants in the three-year transitional period; however, based on discussions with those more familiar with the bill, AILA has been told that the difference should not be significant given the application of the "do no harm" provision to all approved employment-based petitions, including Form I-526 petitions.

#### **b. Impact on Family-Sponsored Visa Applicants**

If enacted, the Fairness for High-Skilled Immigrants Act of 2019 would increase the per-country limit for family-sponsored immigrants from 7% to 15%, which represents an increase from 15,820 to 33,900 family-sponsored green cards that a single country could receive in a single fiscal year. This would result in a higher number of immigrant visas being allocated to individuals from the most backlogged countries, which are Mexico, the Philippines, and to a lesser extent India, who generally have been waiting the longest in almost all of the family-sponsored preference categories.

Anderson estimates that if the bill had been in effect in FY18, Mexicans would have received about 19,100 more immigrant visa in FY2018 in the family preference categories and Filipinos would have received approximately 21,600 more immigrant visas as a result of the increase of the family-based per-country limit to 15%.<sup>10</sup> According to Anderson, while the new family per-country limit under the Fairness for High-Skilled Immigrants Act of 2019 will help individuals born in Mexico and the Philippines, "it should not overwhelm or shut out individuals born in other countries."<sup>11</sup> Anderson does not, however, indicate specifically in his research how much additional time applicants born in countries other than Mexico and the Philippines could anticipate waiting for a green card to become available if the Fairness for High-Skilled Immigrants Act of 2019 is enacted. In a discussion with AILA in 2011 regarding a previous version of the bill, H.R. 3012, which sought to raise the per-country limit for family-sponsored applicants from 7% to 15%, DOS indicated that the family categories "would not see any significant negative impact."

In sum, H.R. 1044 would help to reduce significant visa backlogs in the family-based preference categories, particularly for individuals born in Mexico and Philippines. Individuals born in countries other than Mexico and the Philippines will likely experience an increase in their wait time for a visa, though it is uncertain how much additional wait time such individuals will experience if H.R. 1044 is enacted.

**This analysis has been provided solely as background information on the Fairness for High-Skilled Immigrants Act of 2019 for AILA members. It is not intended for further distribution or to be used for any other purpose.**

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<sup>9</sup> Suzanne Lazicki, *Country Cap Discussion (H.R. 1044, S. 386, S. 2091)* (July 3, 2019), LUCID PROFESSIONAL WRITING <https://blog.lucidtext.com/2019/07/03/per-country-cap-discussion-hr-1044/> (note that a comprehensive analysis of the impact of removing the per-country cap on EB-5 investors was conducted by Invest in the USA (IIUSA) in January 2019 before the introduction H.R. 1044 and S. 386, however, their analysis fails to take into consideration the three-year transitional period set forth in H.R. 1044, as well as the "do no harm" provision for applicants who have an approved I-526 petition at the time of the bill's enactment).

<sup>10</sup> Anderson, *supra* note 7.

<sup>11</sup> Anderson, *supra* note 7.