GIBC
Global Immigration Benchmarking Council

BAL Corporate Immigration
Berry Appleman & Leiden LLP

COMPARISON OF HIGH-SKILLED IMMIGRATION PROVISIONS IN SENATE AND HOUSE BILLS			
Provision	**Current Law**	**S. 744 (as passed by Senate)**	**H.R. 2131 (SKILLS Act)(as passed by House Judiciary Committee)**
Green Card Backlog (Employment)	140,000 annual limit, which includes spouses and family members. Actual number of workers is approximately 65,000. Backlog is years (and many years at that) for most employment-based green card applicants.	Retains the 140,000 base, but reduces (or eliminates) the green card backlog through a number of exemptions, including: • Exempting existing EB-1 immigrants from annual cap; • Exempting all PhDs from annual cap (not just STEM); • Exempting all advanced degree STEM holders from U.S. universities; • Recapturing unused green cards from prior years (approx. 210k); • Exempting all family members of foreign workers; and • Eliminating the per-country limits. Certain STEM graduates from U.S. universities will not be subject to labor certification requirement.	Retains the 140,000 base. Creates a new visa category and allocates up to 55,000 additional green cards for: • Graduates of U.S. universities with PhD in STEM field; • Graduates of U.S. universities with master's degree in STEM field. Allocates an additional 15,000 green cards for EB-2 (professionals with advanced degrees and persons with exceptional ability) and an additional 15,000 green cards for EB-3 (professionals with a bachelor's degree and others). 4,000 green cards are set aside for health care workers in shortage areas. Eliminates the per-country limits for employment-based immigration. No exemption from labor certification for U.S. STEM graduates, but labor market test standard is changed for graduates of U.S. universities with PhD in STEM is changed (i.e. employer must establish that there is no "equally or better qualified" U.S.

			worker).
F-1 Student Dual Intent	Foreign students may not begin the green card process while in student status.	Permits "dual intent" for foreign students so that an employer can start the green card process while the student is still in school or working pursuant to Optional Practical Training. This may allow certain graduates of U.S. universities to avoid the H-1B visa category and move straight to a green card.	Permits "dual intent" for foreign students who are enrolled in course of study in a STEM field.
H-1B Cap Increase	Current H-1B base cap is 65,000 per year. Up to 20,000 master's degree or higher H-1B workers are exempt from the cap. Cap was hit in the first five days of FY 2014, and has been hit before the end of the fiscal year in every year except 2001-2003, when the cap was 195,000. H-1B workers who work at institutions of higher education or related or affiliated nonprofit entities, nonprofit research organizations or governmental research organizations are exempt from the annual cap.	Raises the H-1B annual limit to 115,000, which could adjust up to 180,000. If the cap is reached before the end of the fiscal year, additional visas (up to 20,000) will be made available immediately, and the annual ceiling would be higher in the subsequent fiscal year. Current master's degree exemption would be increased from 20,000 to 25,000. Definition includes the Department of Education's taxonomy within summary group of computer and information sciences and support services, engineering, mathematics and statistics, biological and biomedical sciences, and physical sciences. The bill makes no changes to other exemptions under current law. The amendment prevents the H-1B ceiling from going up in years when the national, monthly unemployment rate in "professional and management" occupations (BLS) has averaged more than 4.5 percent in the prior 12 months. For example, the H-1B cap would not have risen	Raises the H-1B annual limit to 155,000. The annual cap does not change from year to year. Increases the exemption for graduates of U.S. universities with master's degree to 40,000, but limits eligibility to STEM graduates.

		in FY 2011 and FY 2012.	
H-1B Portability	No grace period under current law.	Creates a 60-day grace period for H-1B workers who lose their job to obtain H-1B status through another employer.	No provision in bill.
H-4 Spousal Employment	Spouses of H-1B workers are not allowed to work. Only spouses of L-1 workers are allowed to obtain an Employment Authorization Document.	Authorizes spouses of H-1B visa holders (H-4s) to work, but allows the Secretary of State to deny work authorization to H-4 spouses if their home county does not offer reciprocal treatment to US citizens.	Authorizes spouses of H-1B visa holders (H-4s) to work.
Visa Revalidation	Foreign temporary workers must renew their visa outside of the U.S. Ability to revalidate within the U.S. was terminated after 9/11.	Requires the DOS to allow certain foreign workers to revalidate their work visas in the U.S. This will reduce costs and business delays that often arise when employees are required to renew their visas overseas at U.S. consulates.	No provision in bill.
Green Card Portability	A worker may change jobs or employers if the adjustment of status application (last stage) has been pending for at least 6 months.	Any employee who has an approved labor certification or immigrant petition may change jobs or employers without losing their place in line for a green card. Any employee who the government has determined meets the eligibility criteria for a green card (i.e. immigrant petition) may change jobs or employers without losing that eligibility, provided that the new job is in the same or a similar occupational classification.	Any employee who is the beneficiary of a labor certification, or an employment-based petition that was approvable when filed, shall retain his or her place in line (priority date).
Early Adjustment Filing	A worker may not file an adjustment of status application until the priority date is current	A worker may file an adjustment of status application irrespective of whether a green card number is available (upon payment of $500 fee).	A worker may file an adjustment of status application irrespective of whether a green card number is available, provided the immigrant petition has been approved and the worker is in H, L, O status or working pursuant to OPT on an F or M visa.

WAGES, ADMINISTRATIVE BURDENS AND FEES			
Wage Levels for H-1B Workers	Wage levels are based on actual job responsibilities and requirements for the position. The government publishes a wage survey that includes four tiers, ranging from entry-level up to fully competent.	Collapses the current 4-tier wage level system into a new 3-tier system. **New Wage System:** Level 1 = mean of bottom 2/3 wages (but no less than 80 percent of Level 2) Level 2 = mean of all wages Level 3 = mean of top 2/3 of wages Dependent employers must pay the new Level 2 wage (mean wage for all workers in the classification), irrespective of the job responsibilities or requirements for the position.	Collapses the current 4-tier wage level system into a new 3-tier system. The new prevailing wage model would apply to H-1B, L-1, TN, OPT and for green cards. **New Wage System:** Level 1 = mean of bottom 2/3 wages (but no less than 80 percent of Level 2) Level 2 = mean of all wages Level 3 = mean of top 2/3 of wages If 80 percent or more of the employer's workers in the same occupational classification, in the same area of employment (i.e. commuting area), are U.S. workers (defined as U.S. citizens or green card holders), then the employer may pay the actual wage – i.e. what the employer pays other employees with similar experience and qualifications for the specific employment in question. However, this wage may not be lower than the mean of the bottom 50 percent of wages under the government survey. Extends wage obligations to students working pursuant to Optional Practical Training (OPT).
Wage Levels for L-1 Transfers	Nothing in current law.	No provision in bill.	Requires employer to pay L-1 workers the higher of the actual wage level or the prevailing wage.

			Obligations are triggered if employee will be in the U.S. for a cumulative period in excess of 6 months over a 2 year period. Employee may remain on foreign payroll. Employer may take into account value of wages paid by the employer in the currency of employee's home country, the value of benefits in home country, employer-provided housing or allowances, employer-provided vehicles or allowances, and other benefits provided as an incident of the assignment in the U.S.
Degree Evaluation	Nothing in current law.	No provision in bill.	Secretary of State shall verify the authenticity of any foreign degree.
Bona Fide Business	Nothing in current law.	No provision in bill.	Requires H-1B employer to be licensed with any applicable State or local business licensing requirements. Requires H-1 employer to have gross assets of at least $50,000.
Subpoena Authority	Nothing in current law.	No provision in bill.	Secretary of Labor is authorized to issue subpoenas as may be necessary to ensure employer compliance.
B-1 in Lieu of H-1B	Nothing in current law. Authorized by Department of State policy guidance (Foreign Affairs Manual).	No provision in bill.	Prohibits issuance of a B-1 visa if applicant will provide services in an H-1B specialty occupation.
Filing Fees for High Volume	If company has more than 50percent H-1B or L-1, employer	Eliminates the current Border Security Fee (PL 111-230). If company employs more than 50	No provision in bill.

Users	is required to pay an additional $2,250 for certain L-1 petitions and $2000 for certain H-1B petitions.	workers: • Beginning in FY2015, company must pay additional $5,000 per L-1 and H-1B application if more than 30 percent and less than 50 percent of company's employees are H-1B or L-1. The fee goes into effect in FY2014 for L-1 workers. • For FY2015 through FY2017, company must pay additional $10,000 per L-1 and H-1B application if more than 50 percent and less than 75 percent of company's employees are H-1B or L-1. The fee goes into effect in FY2014 for L-1 workers.	
50/50 Numerical Limitations	There are no numerical limits based on visa usage.	If company employs more than 50 workers: • In FY2015, no more than 75 percent of the U.S. workforce may be in H-1B or L-1 status. • In FY2016, no more than 65 percent of the U.S. workforce may be in H-1B or L-1 status. • In FY2017, no more than 50 percent of the U.S. workforce may be in H-1B or L-1 status. • FY2017 and after, 50 percent limit on H-1B and L-1.	No provision in bill.
Non-Displacement Attestation	Nothing in current law for non-dependent companies. Dependent employer (15 percent or more H-1B) must attest that it did not displace	Every employer must attest that it is not: • displacing a public school teacher; • displacing a U.S. worker at a federal, state, or local entity where the government entity directs and controls the work of the H-1B	No provision in bill.

	and will not displace an essentially equivalent U.S. worker within the period 90 days before and after the filing of the petition. The employer does not have to attest if the H-1B worker will be paid at least $60,000 and/or has a master's or higher degree.	worker; • filing the H-1B with the intent or purpose of displacing a specific U.S. worker. H-1B skilled worker dependent (15 percent or more of skilled positions are filled by H-1B workers) must attest that that the employer did not displace and will not displace a U.S. worker during period 90 days before or after the petition is filed. An employer that is dependent (15 percent or more H-1B workers in total) must attest that the employer did not and will not displace a U.S. worker for 180 days before or after the petition is filed.	
U.S. Worker Recruiting Attestation	Nothing in current law for non-dependent companies. Dependent employer (15 percent or more H-1B) must attest that it has taken good faith steps to recruit and that it offered the job to any U.S. worker who applied and was equally or better qualified. The employer does not have to attest if the H-1B worker will be paid at least $60,000 and/or has a master's or higher degree.	All H-1B employers must recruit U.S. workers using industry-wide standards, and all H-1B employers must advertise on the DOL Internet site for 30 days. Requires an employer that is an H-1B skilled-worker dependent (15 percent or more of skilled positions are filled by H-1B workers) to attest that it offered the job to any U.S. worker who applied and who was equally or better qualified for the job.	No provision in bill.
H-1B Third Party Placement (outplacement)	Nothing in current law.	Every employer must pay a $500 fee for each petition filed on behalf of an H-1B worker that will be placed at a third-party worksite.	No provision in bill.

		An H-1B dependent employer (15 percent or more of the workforce composed of H-1B workers) may not place an H-1B worker at a third-party worksite.	
L-1 Third Party Placement (outplacement)	No restriction on placing an L-1 worker at a third-party site if the employer will control and supervise the L-1 worker and the placement does not constitute labor for hire.	Every employer must pay a $500 fee for each petition filed on behalf of an L-1 employee that will be placed at a third-party worksite. An L-1 dependent employer (15 percent or more L-1) may not place an L-1 worker at a third party worksite.	No provision in bill.
LCA Review	DOL may only review LCAs for "obvious errors or inaccuracies." DOL must certify LCA within 7 days.	LCAs would be reviewed for completeness and "evidence of fraud or misrepresentation of material fact." Bill would extend LCA processing time period from 7 to 14 days. However, an employer could proceed with an H-1B petition without waiting for LCA certification.	No provision in bill.
DOL Investigation Triggers	DOL may only investigate when: • There is a complaint from an aggrieved party • DOL receives specific, credible information from a reliable (i.e. known) source (other than DHS) • Secretary of DOL personally certifies that there is reasonable cause to believe employer is not in compliance.	Removes most limitations on DOL's ability to conduct an audit of an H-1B employer. For example: • Allows a DOL employee to be a "credible source," which means that employees can initiate investigations. • USCIS Director *shall* provide information to the DOL regarding any information contained in the materials submitted by employers of H-1Bs as part of the adjudication process that indicates the employer is not complying with the law, and DOL may initiate an investigation based on receipt of that information.	DOL (or DHS, where appropriate) may conduct random audits of H-1B or L-1 employers and may issue subpoenas to ensure compliance. If an employer is subject to 2 random audits, and there is no finding of a willful violation or misrepresentation of a material fact, then DOL may not audit that employer for 4 years.

DOL Statute of Limitations	Complaint must be filed within 12 months of when the alleged violation occurred.	Complaint must be filed within 24 months of when alleged violation occurred.	No provision in bill.
DOL Fines for LCA Violations	Civil monetary penalties range from $1,000 per violation, up to $35,000 per violation.	Doubles the existing fine structure for most violations and clarifies that workers are entitled to back pay for any violations.	No provision in bill.
Mandatory DOL Audits	No mandatory DOL audits.	DOL may conduct voluntary surveys of all employers. DOL is required to conduct annual audits of any employer that has more than 100 employees, if 15 percent or more are H-1 or L-1 status.	No provision in bill.
W-2 Submission	Nothing in current law.	An employer must file a W-2 individual wage report with USCIS on an H-1B employee's subsequent extension. Upon request from DHS, IRS and/or SSA may be asked to confirm whether the W-2 filed with USCIS matches the W-2 filed with IRS/SSA.	No provision in bill.
Fees to the States for STEM Education	Nothing in current law.	An employer must pay a $1,000 fee with each DOL labor certification, which shall go to States for STEM education and training. Fees related to L-1 outplacement ($500) and early adjustment ($500) shall go to States for STEM education and training.	Sense of Congress that portion of fees paid by employers should be devoted to supporting improvements in U.S. STEM education, including computer science education, at the K-12 and university level, in order to reduce dependence on foreign workers.
CIR Trust Fund Fee	Nothing in current law.	An employer must pay a $2,500 fee for each H-1B or L-1 petition. The fee is reduced to $1,250 for employers that have 25 or fewer employees.	No provision in bill.
Prohibition on	Nothing in current law.	An employer may not advertise that the	No provision in bill.

H-1B/OPT Advertising		position is only available to H-1B workers or that an individual who is in H-1B or OPT status will be given preference in the hiring process.	
Disclosure of H-1B and L-1 Information	Annual report regarding country or origin, occupations, educational levels, and compensation paid to H-1B workers during prior fiscal year.	The Bureau of Immigration and Labor Market Research (in USCIS) will publish a report of both H and L information, including but not limited to: • A list of H-1B employers, the occupational classifications for the H-1B positions, and the number of H-1B workers the employer sponsors for a green card; • A list of all H-1B employers that are dependent, skilled-worker dependent, or subject to the 30 percent/50 percent fee; • Gender breakdown by occupation and country of H-1B workers; • A list of employers with 15 percent or more of workers in L-1 status; and • Number of H-1B workers categorized by highest level of education. The Bureau will survey employers on good faith recruitment and report on best practices and recommendations for recruiting steps that employers can take to maximize hiring American workers.	No provision in bill.
State Workforce Agency Advertising	Nothing in current law.	The Secretary of Labor shall facilitate the posting of the job on the Internet website of the state labor or workforce agency where the position will be located.	No provision in bill.

TECHNICAL AMENDMENTS			
Dependent Employer Calculation		When calculating H-1B or L-1 dependency, or whether an employer is subject to additional H-1B or L-1 fees, foreign workers who are in the green card process ("intending immigrants") are excluded from the calculation. However, an employer must file immigrant petitions for at least 90 percent of the workers who are the beneficiaries of approved DOL labor certifications.	No change to definition of dependent employer.
H-1B Skilled Worker Dependent		Fifteen percent or more of total U.S. workers who are in Job Zone 4 or 5 (O*NET) are in H-1B status. Employer may exclude intending immigrants (see above). Job Zone 4 (considerable preparation needed): most occupations require a bachelor's degree, but it is not required. Position usually requires several years of experience. Examples include: accountants, sales managers, database administrators, teachers, chemists, and environmental engineers. Job Zone 5 (extensive preparation needed): most occupations require a master's degree or higher. Many require more than 5 years of experience. Examples include: librarians, lawyers, aerospace engineers, wildlife biologists, school psychologists, surgeons, treasurers, and controllers.	No change to definition of dependent employer.

U.S. Workforce Calculation		When calculating the total number of workers in the United States, all employees in any group treated as a single employer under section 414 of the Internal Revenue Code shall be counted.	No change to definition of dependent employer.
Effective Date		Clarifies that the new attestations and obligations regarding recruitment and non-displacement only apply to new hires and not existing employees.	New fee obligations apply to labor condition applications and petitions filed after effective date, to workers issued visas or otherwise provided status after the effective date.