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# POLICY ANALYSIS: HOW SENATE AND HOUSE APPROACH HIGH SKILLED IMMIGRATION

On June 27th, the Senate approved a comprehensive immigration reform bill, the "Border Security, Economic Opportunity, and Immigration Modernization Act" (S. 744). The legislation, which includes extensive revisions to high-skilled immigration, passed by a vote of 68-32. Just hours later, the House of Representatives Committee on the Judiciary completed markup of the SKILLS Visa Act (H.R. 2131). The House bill has been referred to the Committee on Education and the Workforce.

Though the SKILLS Visa Act may evolve as it moves through the House, it is expected that substantial differences will remain in how the House and Senate bills would regulate high skilled immigration and protect U.S. workers. Below is analysis of where there is common ground between the two bills and, more importantly, where there are core policy differences that would require resolution through conference committee.

Fast Track for Graduates of U.S. Universities: Both the House and Senate would allow certain foreign students to move straight to a green card without needing to first obtain H-1B status. The bills accomplish this goal by granting "dual intent" to foreign students, which will enable employers to start the green card process while the students are still in school or working pursuant to Optional Practical Training. The Senate legislation is broader for two reasons. First, the Senate bill would grant dual intent to all foreign students, whereas the House bill would limit dual intent to foreign students who pursue a course of study in a field of science, technology, engineering, or mathematics (STEM). Second, the Senate bill would exempt STEM graduates from the labor certification requirement. Both bills would reduce or eliminate green card wait times for foreign graduates of U.S. universities who earn advanced degrees in STEM fields.

Green Card Backlog: The single biggest difference between the House and Senate legislation is the extent to which each bill would reduce the green card backlog for employment-based immigrants. The Senate bill would retain the base worldwide level of employment-based green cards of 140,000, but it would recapture unused green cards from previous years, exempt spouses and children from the annual cap, eliminate the per-country limits, and other exemptions. These changes would effectively reduce or eliminate the employment-based backlog for all employment based immigrants. On the other hand, the House, which is more concerned about maintaining existing immigration levels, would only allocate an additional 85,000 green cards per year towards employment-based immigration. Both the House and Senate bills would enable employment-based immigrants to file their adjustment of status applications at any time, which will enable employees caught in the backlog to move more easily between employers. The



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House would offset those additional visas by eliminating the Diversity Visa program and phasing out the family preference category for siblings of U.S. citizens.

H-1B Numbers: Both the House and the Senate would increase the number of H-1B visas that are available each year. The Senate bill would the H-1B annual limit to 115,000, but it includes an escalator that would result in additional visas being made available immediately if the cap is reached early in the year. The Senate H-1B cap could go up to 180,000 in subsequent years. The bill also exempts up to 25,000 aliens with advanced degrees in STEM fields from the cap. The House bill would increase the H-1B visa cap to 155,000, but unlike the Senate bill, does not provide for annual adjustment. The House bill would increase the exemption from numerical limitations for aliens with advanced degrees in STEM fields to 40,000.

DOL Enforcement Authority: Both the House and the Senate would make it much easier for the Department of Labor (DOL) to audit employers. The Senate bill removes most restrictions on the ability of DOL to initiate an investigation, while the House expressly permits random audits of employers.

H-1B Wage Obligations: Both the House and Senate would mandate higher wage obligations for H-1B workers. Both chambers would create a new three-tier system for determining wage requirements, and the practical effect would be to eliminate today's Level 1 (entry level) wage for all companies. The House bill, meanwhile, clarifies that employers may continue to rely upon private wage surveys and would also eliminate the prevailing wage obligation for an employer that can show that 80 percent of its workforce in the occupation and at that location are U.S. workers.

L-1 Restrictions: The Senate and the House bills approach the regulation of L-1 workers in very different ways. Concerned about alleged abuses by IT consulting companies, the Senate is focused on restricting third-party placement and would require all employers to pay a $500 fee if an L-1 worker will work at a third-party location. No similar restriction is found in the House bill, which is instead focused on wage obligations for L-1 workers. However, the House bill would extend the prevailing wage system (described above) to any L-1 worker who spends more than 6 months in the U.S. over a two year period. In calculating prevailing wages for the L-1 worker, the House would permit an employer to consider home country wages and benefits, along with house and travel allowances in the U.S.

H-1B Outplacement: Consistent with its approach on L-1 outplacement, the Senate bill would require any employer that places an H-1B employee at a third-party worksite to pay a $500 fee per H-1B worker. The House bill, on the other hand, contains no new fee or restriction on the ability of an employer to place an H-1B worker at third party worksites.

U.S. Worker Recruiting: Under the Senate bill, every H-1B employer would be required to recruit U.S. workers using industry-wide standards and advertise on the Department of Labor website. The House bill contains no new restrictions or obligations regarding U.S. worker recruiting.

U.S. Worker Displacement: Under the Senate bill, every H-1B employer would be required to attest that the company is not filing the H-1B petition with the intent or purpose of displacing a specific U.S. worker and that the H-1B worker will not displace a public school teacher or certain U.S. workers at federal, state, or local entities. The House bill contains no new restrictions or obligations related to the displacement of U.S. workers.

Heightened Obligations for Companies Dependent on Foreign Workers: One fundamental difference between the bills is that S.744 penalizes companies that are heavily dependent on temporary visas and/or that place temporary workers at third-party worksites (e.g. IT consulting where employees often work at the client location). Meanwhile, the House treats all employers the same and imposes no new requirement or obligation tied to a company's business model or reliance on foreign workers.

*Super Dependent Companies:* The Senate bill creates a hard ceiling on the percentage of workers that a company may employ on temporary visas. The legislation would prohibit any company from having more than 50 percent of its U.S. workforce in H or L status, and it would impose substantial new fees ($5000 per worker) on any company that has more than 30 percent of its workforce in H-1B or L-1 status.

*Dependent Companies:* Under the Senate bill, a company that is H-1B dependent (15 percent or more of U.S. workers are H-1B) would be: (i) subject to mandatory DOL audits each year, (ii) required to pay new Level 2 wages for all H-1B workers, and (iii) barred from placing H-1B or L-1 workers at third-party worksites.

*H-1B Skilled Worker Dependent Companies:* Under the Senate bill, a company that is H-1B Skilled Worker Dependent (15 percent or more of U.S. workers in DOL O*NET Job Zone 4 or 5 are H-1B) would be required to attest that it: (i) offered the job to any U.S. worker who applied and who was equally or better qualified, and (ii) did not displace and will not displace a U.S. worker during the period 90 days before or after the H-1B petition is filed. Job Zones 4 and 5 are typically professional positions.

*Calculations:* One overall policy theme in the Senate bill is that that green cards are preferable to temporary visas. The Senate bill would therefore allow an employer to exclude workers who are in the green card process from the H-1B or L-1 count when determining whether the company is dependent on foreign temporary workers. This policy will encourage more companies to sponsor their H-1B or L-1 workers for green cards to avoid the numerous restrictions described above.