Summary of Provisions of The Fairness for High-Skilled Immigrants Act (HR 1044/S. 386) as Passed by the House and Senate

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. A modified version of H.R. 1044 (S. 386) was passed by unanimous consent in the Senate on December 2, 2020. AILA is providing the below summary of the major provisions in the two different versions of the bill, which will need to be reconciled and signed by the President before it can become law. For more background and analysis of this legislation please see AILA's Featured Issue page on Legislation Impacting the Per-Country Numerical Limitation.

Section	House Passed Version[1]	Senate Passed Version
Section 2 – Elimination of Per Country Caps	**1.** Increases Family-Based Per Country quota from 7 to 15 percent. Does not include a transition provision. **2.** Eliminates the country-specific offset created under the Chinese Student Protection Act of 1992. **3.** Effective date FY 2020. **4.** Eliminates per-country cap for all EB categories. **5.** Sets forth a 3-year transition period where 15 percent of all EB-2, EB-3, and EB-5 are reserved for the first year after enactment for nationals from countries, other than India and China, and 10 percent of the total of EB-2, EB-3 and EB-5 for nationals	**1.** Same. **2.** Same. **3.** Delays the effective date to the first day of the second fiscal year after enactment. **4.** Same. **5.** Expands the EB transition period to 9 years, reserving from 30 – 5 percent for nationals from countries, other than India and China, but only for EB-2 and EB-3 petitions. Preserves language that no more than 25 percent of the reserved visas can go to a single country and no more than 85

[1] For more detailed analysis of the as-passed provisions of HR 1044 in the House and S. 386 as of July 2019, please see https://www.aila.org/infonet/aila-section-by-section-summary-of-hr-1044. A section by section analysis of HR 1044 is available here - https://www.aila.org/infonet/aila-section-by-section-summary-of-hr-1044.

Section	House Passed Version	Senate Passed Version
	from countries other than India and China in the second and third year. During this period no more than 25 percent of the reserved visas can go to a single country and no more than 85 percent of the unreserved visas can go to nationals of one country. **6.** Creates special rules to prevent unused visas. **7.** States that beneficiaries with approved EB immigrant visa petitions will not receive the visa later under the new rules than the prior rules – "do no harm" provision.	percent of the unreserved visas can go to nationals of one country. **6.** Same. **7.** For the first 9 years after enactment, reserves 5.75 percent of the total EB-2 and EB-3 visas to individuals from backlogged countries, other than India and China, prioritizing spouses and minor children of immigrants already in the United States and immigrants awaiting visas abroad. **8.** Creates a set aside of at least 4,400 visas for Schedule A professionals, as well additional visas for their immediate relatives that was not included in the House Bill for the first 7 fiscal years after enactment.
Section 3 – LCA Posting Requirements[2]	**1.** No similar section.	**1.** Within 180 days of enactment, DOL must establish a searchable website for posting H-1B positions. This time frame may be extended by the Secretary once by up to 30 days. DOL will provide notice of when it is operational.

[2] A more detailed explanation of the H-1B amendments added by Senator Grassley may be found here: https://www.aila.org/infonet/summary-grassley-provisions-in-amendment-hr1044.

Section	House Passed Version	Senate Passed Version
		2. Employers filing petitions on behalf of H-1B workers, who have not already been counted against the H-1B cap (unless eligible for a new full 6 year period) or are eligible for H-1B portability, 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. Such information will include: • Occupational classification • Required education, training, experience • Salary or wage range, benefits offered • Employment location • Process to apply for position.
Section 4. H–1B Employer Petition Requirements	**1.** No similar section.	**1.** Codifies requirement that the wage determination methodology on prevailing wages must be provided by employers filing a Labor Condition Application (LCA). **2.** Requires that any advertising of or recruiting for an H-1B position does not state that the position is only

Section	House Passed Version	Senate Passed Version
		open to H-1Bs or that H-1Bs are preferred. **3.** Allows DOL to request an employer's W-2 wage and tax statements with respect to the H-1B workers it employs. **4.** Prohibits employers with more than 50 employers who employ more than 50 percent of their workers in H-1 or L status from petitioning for additional H-1B workers. This provision would take effective 180 days after enactment and does not apply to anyone who is currently employed as an H-1B. **5.** Creates a fee for LCAs to recover costs of adjudications, as well as administration, oversight, investigation, and enforcement. **6.** Eliminates the use of B-1 in lieu of H-1B.
Section 5. Investigations of H-1B complaints	**1.** No similar provision.	**1.** Strengthens whistleblower protections for employees who report violations of the LCA process by employers.

Section	House Passed Version	Senate Passed Version
		2. Increases information sharing between USCIS and DOL regarding employer H-1B non-compliance.
Section 6 – Labor Condition Applications	**1.** No similar section.	**1.** Expands DOL authority to review LCAs to include scrutiny of clear indicators of fraud or misrepresentation of material facts. **2.** Employers must pay the actual wages based on individuals who have the same or substantially similar responsibilities as the H-1B in the geographic area, considering experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. **3.** Increases the penalties for LCA violations by three times the existing amount. **4.** Expands DOL's investigative authority for LCA violations: • 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

Section	House Passed Version	Senate Passed Version
		conducted for a period of at least 4 years. • Requires audits of employers who employ more with 100 employees if more than 15% of their employees. • Allows investigations based on anonymous sources that are not from workers or other harmed parties. • Permits DOL to audit or investigate based on information in an LCA. • Eliminates the certification by DOL Secretary requirement for reasonable cause for an H-1B investigation.
Section 7 – Early Adjustment Provisions		**1.** Allows certain nonimmigrants (E, F, H, J, L, M, O, P, R or TN) whose I-140 petitions have been approved for two years, and their derivatives, to file an adjustment application, with the ability to apply for work authorization and advance parole, even if the visa is not immediately available.

Section	House Passed Version	Senate Passed Version
		2. Preserves the age of a child upon filing an early adjustment application for adjustment purposes. **3.** To qualify for an EAD, the principal applicant must file an I-140 Supplement J, with a fee of $2,000, to demonstrate that the duties, hours, and compensation of such individuals are 'commensurate' with those offered to United States workers employed by the employer in the same area of employment. EADs are granted for 3 years and may be renewed. If a Supp J has not been submitted within 12 months of approving the adjustment of status application, a new one must be filed before AOS can be granted. **4.** Work authorization under this provision may only be granted to individuals who were eligible for work authorization at the time the EAD application is filed. **5.** This section takes effect 1 year after enactment and expires 9 years after enactment. However, if an individual was eligible during the effective

Section	House Passed Version	Senate Passed Version
		period, they continue to be eligible despite expiration.
Section 8 – Cap on Adjustments from H-1B status or H-4 Dependents.	**1.** No similar section.	**1.** Places a cap on the number of individuals who held H-1B nonimmigrant status in the past two years or is the H-4 dependent of such H-1B nonimmigrant who can adjust status to permanent residence or be granted an immigrant visa to 50 percent of the total number of employment-based immigrants admitted in a fiscal year. **2.** Creates an exception from this cap for medical professionals and individuals granted national interest waivers from this cap. **3.** The section allows for a transition provision that caps the total at 70 percent in the first 9 fiscal years following enactment of the bill. **4.** Allows for unused employment-based immigrant visas to be used by these H-1B and H-4 nonimmigrants.
Section 9 – Prohibition on Adjustment of Status of Chinese Nationals.	**1.** No similar section.	**1.** Prohibits the adjustment of status of any individual who is "affiliated with the military forces of the People's

Section	House Passed Version	Senate Passed Version
		Republic of China or the Chinese Communist Party".