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Bill Aims To End Decades-Long Waits For High-Skilled Immigrants

Stuart Anderson

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Should some people wait 20 years or longer for an employment-based green card so others born in a less populous country can wait not at all? Those are the moral and practical issues raised by a new bill that aims to correct what many consider the most irrational provision in U.S. immigration law – the per-country limit.

Under current U.S. immigration law, how long a person waits for an employment-based immigrant visa (green card) is determined by where you were born. An engineer from Iceland might wait less than a year for a green card, while an engineer from India can endure a wait of a decade or much longer.

Background: Per-country limits and low annual limits (140,000 annual employment-based green cards, about half of which go to dependents) combine to create long wait times for immigrants, with waits for Indians the longest. What are per-country limits? “The INA [Immigration & Nationality Act] also specifies per-country limits equal to 7% of the combined total number of visas allotted to family and employment-based preferences,” according to the U.S. Department of Homeland Security. “In 2017, these limits amounted to 25,620 immigrants from any single country.”

What Are the Consequences of the Per-Country Limit? The per-country limit serves no economic purpose and harms the competitiveness of U.S. companies attempting to attract and retain outstanding talent. It is one reason why more high-skilled Indian nationals are going to Canada. Those waiting for green cards may not be able to advance in their careers or start a business. Jyoti Bansal once told me in an interview he waited seven years for his green card to start AppDynamics, which today has 1,400 employees and was acquired by Cisco in January 2017 for \$3.7 billion.

According to the Department of State's February 2019 Visa Bulletin, Indians who filed green card applications in the employment-based second preference (EB-2) as far back as April 2009 are just now becoming eligible to receive a green card. However, based on the number of cases in the queue compared to the per country quota, the wait or backlog in the category could significantly increase. The priority dates in the Visa Bulletin do not progress forward on a predictable month-to-month basis and can even “retrogress” (move backwards).

Under current immigration law, Indians in the employment-based second preference category theoretically could wait 119 years for permanent residence (a green card), while an Indian in the employment-based third preference (EB-3) could wait 20 years for a green card, according to an analysis by the National Foundation for American Policy. In other words, on paper, an Indian in the employment-based second preference could wait until the year 2138 for a green card, which is farther out than the setting for most science fiction novels.

Of course, these wait time calculations are meant for illustrative purposes and should be read with that in mind. Continued long wait times would generate obvious real-world reactions, such as many high-skilled immigrants leaving the country and abandoning dreams of raising a family in America. Continuing negative impressions of a realistic chance to gain permanent residence in the United States would also require U.S. companies to shift more resources abroad, since talented foreign-born scientists and engineers would grow less interested in working in America because of immigration restrictions. Simply put, individuals and companies would react to government immigration restrictions and, in fact, have already been doing so.

The analysis is based on data recently made available by U.S. Citizenship and Immigration Services (USCIS) and builds on research from David Bier of the Cato Institute. The numbers here differ slightly from Bier's research, because data for FY 2018 on green cards by category have now become available, but are in agreement on the big picture, which shows long wait times for Indian employment-based immigrants.

Calculating the wait times involved dividing the backlog of principals and dependents for EB-2 (433,368) and EB-3 (115,273) by the average annual number of Indians who received permanent residence in the employment-based second and third preferences for fiscal years 2016, 2017 and 2018 (3,635 for EB-2 and 5,747 for EB-3). If one wants to group the categories together and assume, for example, that individuals from EB-2 would refile into the EB-3 category, then that would likely raise the wait time for those currently in the EB-3 backlog, resulting in a 58-year wait time for the two categories. (EB-2 is for "members of the professions holding advanced degrees or persons of exceptional ability," and EB-3 is for "skilled workers, professionals, and other workers.")

What Does the New Bill Do? The Fairness for High-Skilled Immigrants Act of 2019 (H.R. 1044), introduced by Rep. Zoe Lofgren (D-CA), Rep. Ken Buck (R-CO) and 112 other initial House sponsors, would, after a transition period, eliminate the per-country limit for employment-based immigrants and raise the per-country limit from 7% to 15% for family-based immigrants. (The bill text can be found here.) A companion Senate bill (S. 386) introduced by Sen. Mike Lee (R-UT) and Sen. Kamala Harris (D-CA) has 14 co-sponsors. The bill does not change the number of family or employment-based green cards issued in a year.

How Does the Bill Seek to Address Critics? It would be difficult to say a bill that garnered over 300 cosponsors during the last session of Congress has significant opposition. Still, despite this support, bill sponsors have attempted to preempt critics' concerns. First, the bill includes a provision that states no one who is the beneficiary of an employment-based immigrant visa approved before the bill's enactment shall receive a visa later than if the bill had never been enacted. Second, the bill contains transition rules. In FY 2020, 15% of the immigrant visas in EB-2, EB-3 and EB-5 are reserved for beneficiaries from countries that are "not one of the two states with the largest aggregate numbers of natives who beneficiaries of approved petitions" in those categories. The provision is 10% in FY 2021 and FY 2022.

A National Foundation for American Policy analysis of the bill and other data leads to the following conclusions if the bill were to become law this year:

Indians in the EB-2 and EB-3 would be limited to no more than approximately 29,000 immigrant visas in FY 2020 and 31,000 in FY 2021 and 2022. In practice, they are likely to get fewer than that total because of the provision that guarantees no one who is the beneficiary of an employment-based immigrant visa approved before the bill's enactment will get a visa later than if there had been no bill.

After the transition period ends, the United States will adopt an employment-based immigration system that operates, in general, on a first come, first serve basis. In FY 2023 and 2024, up to about 40,000 immigrant visas could go to Indians in EB-2 and EB-3 who have been waiting many years for their green cards. However, it is likely 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.

In 2023 and later the agency may process cases for individuals from a variety of countries (depending on when people filed), since as Kevin Miner, a partner with the Fragomen law firm, told me in an interview USCIS does not necessarily process cases based on which is the older priority date. Miner notes if the bill becomes law, someone from Sweden with a January 2018 priority date could be processed before an Indian national with a 2010 priority date if both filed for adjustment of status at around the same time and their applications and security checks are both complete. In addition, because of the time it takes to process, for people whose employers filed for them in FY 2020, 2021 and 2022, applications for immigrants from various countries will get mixed in with the Indian applications and will get approved during FY 2023 and later.

By (or during) 2023, all Indians waiting in the EB-3 backlog prior to the bill's enactment may have received green cards. That could leave approximately 290,000 Indians who were in the EB-2 backlog prior to the bill's passage remaining in the backlog, some number of whom could decide to refile in the EB-3 category. (If Indians in EB-2 refile sooner, then that could affect Indians in EB-3.) Effectively pooling the numbers in the EB-2 and EB-3 category from FY 2024 forward would likely eliminate by FY 2027 or FY 2028 the entire backlog of Indians who were waiting in those two categories prior to the bill's enactment. How quickly that backlog is eliminated depends on how many people from countries other than India receive green cards in FY 2020 and later.

In sum, within 5 to 7 years after the transition period ends under the bill, the entire employment-based immigrant backlog that existed as of the date of enactment likely will have ended. No one will need to wait decades for permanent residence simply because they are Indian.

What Will be the Impact on Family Immigrants? As noted, the bill increases the per-country limit on the family side to 15% from the current 7%. That represents an increase from 25,620 immigrants from a single country in the family and employment-based preferences combined, to 15% of 226,000 in the family preference alone, or 33,900. (In practice, the combined limit under current law for a country is not actually 25,620 due to a few exceptions to the per-country limit.) There are no transition rules or provisions for those with previously approved family-based immigrant visas under H.R. 1044.

Raising the family per-country limit to 15% would help U.S. citizens waiting the longest for their close relatives in the family-sponsored preference visa categories. The State Department is currently processing cases for Mexican and Filipino siblings (the F4 category) and married sons and daughters (F3) of U.S. citizens with priority dates (essentially when sponsors applied) between 1995 and 1998, according to the [February 2019 Visa Bulletin](#). In the F1 category (unmarried sons and daughters of U.S. citizens), the priority dates are March 2007 for the Philippines and August 1997 for Mexico. For comparison, the priority date in the F1 category is September 2011 for India, China and all other countries and between 2004 and 2006 in the F3 (married sons and daughters) category and F4 (brothers and sisters) categories for India, China and all other countries.

While the new 33,900 family per-country limit will help U.S. citizens with relatives waiting in Mexico and the Philippines, it should not overwhelm or shut out U.S. citizens with relatives in other countries. Analyzing FY 2018 [data](#) leads to the conclusion that if H.R. 1044 had been in effect, Mexicans would have received about 19,100 more immigrant visas in the family preference categories in FY 2018 and Filipinos would have received approximately 21,600 more immigrant visas. One can expect it will take many years before the backlogs for Mexicans and Filipinos in some of the categories cited above become appreciably lower, based on the most recent [State Department data](#).

“I think the allocations in the family-sponsored preference F1, F2, F3, and F4 would remain the same, but that within each category you would see a higher percentage of cases go to people from currently backlogged countries, which are Mexico, the Philippines, and to a lesser extent India,” said Kevin Miner. The wait in the family third and fourth preferences would still be longer than in the other preference categories but under H.R. 1044 U.S. citizens would not wait as long if their relatives are from Mexico or the Philippines. (F2 is the category for the spouses and children, and unmarried sons and daughters of permanent residents.)

The Bottom Line: The current per-country limit for employment-based immigrants exacts an enormous human toll on highly skilled individuals who have worked for years, contributed to the U.S. economy and want to become American citizens. Many people would view eliminating the per-country limit for high-skilled immigrants as an important first step, one that includes increasing the level of H-1B visas and employment-based green cards, to make America and its companies more competitive in the world economy.