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‘Legal Dreamers’ See Renewed Chance for Relief in Legislation

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Children of temporary work visa holders have a new opportunity to achieve a legislative solution to the predicament of aging out of dependent status while their parents wait more than a decade for a green card.

So-called “legal dreamers” are often children of Indian nationals on specialty and intra-company work visas who came to the U.S. with their parents, and grow up while their parents wait out ever expanding green card backlogs. Once they reach the age of 21, these dependent H-4 and L-2 visa holders have the choice to either self-deport, leaving their families for a country with which they’re often unfamiliar, or start their own cycle of navigating the U.S. legal immigration system at the back of the line.

“The kids, just like kids being brought to the U.S. without legal status, didn’t know what they were getting into,” said Brent Renison, an attorney representing dependents who are at risk of aging out of the system in federal court. “The laws, especially for Indian nationals, are so difficult.”

The American Dream and Promise Act (H.R. 6), approved by the U.S. House last month, includes for the first time provisions that would allow those dependents, and green card holders’ now-grown children, the option of a faster path to citizenship.

Previous versions of legislation to create a pathway to citizenship for Deferred Action for Childhood Arrivals recipients— undocumented individuals brought to the U.S. illegally as children—only allowed someone who was “inadmissible or deportable” to qualify. But H.R. 6 now has language that expands eligibility to anyone who “is the son or daughter of an alien admitted as a nonimmigrant” under the permanent E-1 and E-2, H-1B specialty, and L-1 temporary work visa programs.

But success in the House may not translate into success in the Senate, where Democrats don’t have a filibuster-proof majority and previous supporters of the legislation are reticent to support an expanded legalization effort now.

Decades in Line

The central cause to the issue legal dreamers face is that green card backlog, the result of a per-country cap on employment-based green cards. No more than 7% of green cards available each year can go to immigrants from any one country, and there are only 140,000 employment-based green cards in total available each year.

According to data released by U.S. Citizenship and Immigration Services last year, as of April 2020 about 68% of the employment-based backlog was from India. Another 14% was from China, and the remainder from the rest of the world. For Indian nationals, that translates into an eight-decade wait, according to David Bier, an immigration policy analyst at the Cato Institute's Center for Global Liberty and Prosperity.

“We’ve had a ballooning H-1B population, and the primary affected group is Indian nationals, who make up about 50% of new applicants into the green card process every year but they only receive 7% of the green cards issued,” Bier said. “This disparity results in ever growing wait times for them. As those wait times become longer, more and more of their children hit that 21 year old threshold.”

At that point, children of those H-1B specialty visa holders have to figure out a way to maintain legal status in the U.S., perhaps on a foreign student visa, but then they’ll have to find their own way to get a green card, said New York immigration attorney Cyrus Mehta. “If they start all over again they’ll have to wait another 50 years. It’s a hopeless situation for H-4 children of parents born in India.”

In 2002, Congress passed the Child Status Protection Act to try and alleviate the aging out issue families were experiencing. In the case of employment-based green cards, the law essentially “freezes” a child’s age at the time their parents’ green card applications are filed, allowing anyone who turns 21 while that application is being processed to become a lawful, permanent resident.

But under the law, applications can only be filed when there’s a green card available. That leaves Indian immigrants and others trapped in the backlog stuck at square one.

The American Dream and Promise Act—passed by the House 228-197, largely though not entirely along party lines—would allow eligible legal dreamers to apply for the bill’s “conditional permanent resident” status, allowing them to live and work in the U.S., and eventually be able to apply for legal permanent residency, bypassing their current wait in the green card backlog.

Odds for Relief?

Without a legislative solution, affected families and individuals have turned to litigation in federal court. To date, however, that effort hasn’t yet yielded the relief they’ve sought.

Attorney Brent Renison’s case, *Nakka v. USCIS*, is currently before the U.S. District Court for the District of Oregon. Plaintiffs in that class action lawsuit are seeking equal treatment in the

way a child's age is calculated with respect to derivative immigrant status under the Child Status Protection Act.

In November Federal Magistrate Judge Youlee Yim You recommended dismissal and plaintiffs opposed that determination. Now Renison is awaiting judgment from U.S. District Judge Michael Simon.

“Unless something comes in to save us, it's going to take five years,” for any sort of conclusion, Renison said, noting that the issue could be solved with legislation or administrative action absent judicial rulings.

“You need a Congressional fix, and I think it's fair,” Mehta said. “This bill recognizes that even so-called legal dreamers should also be given a shot because the system is so imperfect.”

But in a scenario where a filibuster-proof majority of 60 votes is needed to pass a bill in the Senate, the outlook may be grim. Republicans who have supported dreamer legislation in the past are now calling for a pause on any legalization bills until action is taken at the Southern border.

Sen. Lindsey Graham (R-S.C.), a co-sponsor of the Senate Dream Act of 2021 (S. 264), “has repeatedly said he doesn't see any legalization efforts being successful at this time until the situation at the border is brought under control,” a spokesman for the lawmaker told Bloomberg Law. “The situation is so bad now we're spending all our time trying to keep it from getting worse.”

As it currently stands, S. 264 doesn't include legal dreamers in its conditional permanent status eligibility. That language could be added, though, as the bill winds its way through the chamber or as part of reconciliation between the two bills if the Senate measure were to pass.

Representatives for Sen. Richard Durbin (D-Ill.), the bill's other cosponsor and longtime advocate for DACA recipients, didn't respond to multiple requests for comment.

One possibility for relief could come from the unique circumstances of the pandemic itself, Mehta said. Unused family-based green cards should rollover to the employment-based green card pile, and it's anticipated that there could be 130,000 unused numbers due to the travel restrictions that have been in place over the last year.

Those extra green cards might not fix the problem entirely, “but there could be some great improvement” in the line moving, he said. Those numbers should be released with the new visa bulletin early next month.