



How Much Can Indians Gain From The Recently Passed s386 Bill?

While the passing of the bill in the US Senate that removed the country cap for employment-based green card category is good news for Indians, the recent update has made them to be cautious.

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The passing of the S386 bill by the US Senate on December 2 that eliminates the country cap for employment-based green cards should have Indians on cloud nine. While some of them rejoiced, the recent update saw many of them guarded.

They had a reason to be so. While the bill has got unanimous consent in the Senate, the uncertainty around passing the bill, which requires both Houses to come to a compromise, is keeping the celebrations muted.

What is the significance of S386?

S386, Fairness for High-Skilled Immigrants Act, is one of the most important bills that has the potential to clear a massive green card backlog for Indians in the employment-based category. According to a recent report by the US immigration policy think-tank Cato Institute, there are about 8 lakh Indians in the employment-based category.

There is a country cap of 7 percent for green cards in the US.

The bill was proposed in February 2019 by 14 Senators like Senator Mike Lee and Vice President-Elect Kamala Harris. At the same time, a similar bill (H.R.1044) that aimed to remove the country cap was passed in the House of Representatives in July 2019, sponsored by Representative Zoe Lofgren. As is the process, the bill was sent to the Senate for approval.

At the Senate, it was amended with provisions of S386 and newer provisions were added and was passed on December 2, 2020. This is currently with the House of Representatives, which will need to pass the bill before it goes to the Senate again for approval to become a law.

However, the marked difference between the two versions is likely to challenge the passage of the bill in the House. Rep Lofgren has already indicated that the version is not to her satisfaction.

Impact on Indians

A major change is to ensure that H-1B visas are not abused by companies. The new rule includes a 50-50 clause.

If a company has more than 50 employees, it cannot have over 50 percent of the employees on H-1B or L-1 visas. This would be applicable not just to a company but the entire group would be treated as a single employer as long as they are filing tax as a single entity.

For instance, a company can have more than one subsidiary in the US. The group company cannot have more than 50 percent employees as H-1B workers.

According to Cyrus Mehta, an immigration attorney in the US, this could have serious implications for Indian H-1B workers. In a tweet, he pointed out that the 50-50 clause will destroy the IT consulting industry and impact the ability of Indian H-1B workers who work there to extend the H-1B status.

The new rule applies not only to the new H-1B applicants but also to extensions and transfers that would need the company to initiate a new Labor Condition Application (LCA), one of the steps needed to get H-1B visas. As per the new rule, going by the Mehta commentary, every new extension will have to follow the 50-50 rule before it is approved.

Though larger IT services firms should be able to work around this with localisation and offshoring strategy, the new rule, if passed, would make it tough to get more H-1B workers to the US.

This is going to be a challenge to Indian H-1B workers and IT services firms, especially the small ones, which might have to restructure their workforce to comply with the new rule.

China clause

One of the key challenges could also be the China clause the Senate had introduced. It was not present in the initial draft. "Prohibition on admission or adjustment of status of aliens affiliated with the military forces of the People's Republic of China or the Chinese Communist Party," the amended bill reads.

Deadline to get the bill passed

Both the Houses have a hard timeline of January 3, the last day the current government can take any action, pointed out Joel Yanovich, immigration attorney, Murthy Law Firm in the US. Failing this, the entire process needs to start again, he added.

If the process starts again, it could take months, if not years. But it is impossible to say how long it would take at this point. The current bill has taken more than a year to be passed in the Senate.

Will those who are already in line get their green card faster?

When implemented, those who have the oldest priority dates will get their green cards first. However, the massive backlog would still take years to clear. The only difference is that with the per-country cap removed, it would take the same time for everyone, irrespective of the country of birth to get their green card. Currently, countries with fewer applicants get their green cards within a couple of years, compared to the decades it takes for Indians.

“It is very difficult to predict how quickly dates would move for Indians, or how long the wait would be for all employment-based applicants, once the per-country caps are completely eliminated,” said Yanovich of Murthy Law firm.