Explainer: Amendments to the Fairness for High-Skilled Immigrants Act, S. 386

On July 9, 2019, Senator Mike Lee (R-Utah) introduced the Fairness for High Skilled Immigrants Act, S.386, which seeks to equalize the employment-based (EB) green card backlog by eliminating categorical per-country caps. The bill has now been amended several times as Sen. Lee continues to try to pass it via a unanimous consent (UC) vote in the Senate. This page will serve as a regularly updated explainer on the changes made to the Fairness for High Skilled Immigrants Act and an overview on where things stand.

July 9, 2019: Senator Lee introduced S.386 in the Senate as an identical companion to H.R. 1044, which passed in the House convincingly the following day. The bill would:

- **Remove per-country caps** for EB green card categories. This would equalize the green card backlog, which is faced almost exclusively by Indian and Chinese applicants, some of whom must wait decades after their petitions are accepted.
- **Establish a transition period** of three years. The first year after enactment, 15% of EB-2 and EB-3 visas would be reserved for countries not affected by the backlog, or so-called "Rest of World" (ROW) applicants. In years two and three, 10% of EB-2 and EB-3 visas would be reserved for ROW applicants. After year four, USCIS would distribute all visas on a first come, first served basis.
- **Institute a "do no harm" provision,** which would ensure that all applicants who have already petitioned for a green card will be able to obtain status as soon or sooner than they would have had the bill not gone into effect. An Emory University immigration law professor estimated that this provision would protect as many as 150,000 ROW applicants.

More information on H.R. 1044 can be found here.

September 25, 2019: After objections from Senators Grassley (R-Iowa), Paul (R-Kentucky) and Perdue (R-Georgia), Senator Lee added an amendment to address their concerns. This amendment would:

- **Add additional employer restrictions to the H-1B visa program**. These include restricting employers from hiring H-1B employees without first advertising openings to workers already in the U.S., providing additional authority for the Department of Labor to review and investigate H-1B wage malpractice, and new fees for Labor Condition Applications (LCAs) that employers must pay to sponsor H-1B employees.
- **Provide a solution for foreign nurses**. The elimination of per-country caps could mean thousands of nurses, who often have no access to the H-1B program, would be suddenly thrown into a multi-year backlog. This amendment would exempt 5,000 Schedule A Shortage Occupations (primarily registered nurses) from the annual EB green card cap until nine years after enactment.

December 17, 2019: After an objection from Senator Durbin (D-Illinois) – and after he introduced his own green card backlog solution – Senators Lee and Durbin negotiated a second round of changes to the bill. These changes would:

- **Provide a new status** for nonimmigrant visa holders who are in the U.S. and waiting in the green card backlog. The new status would allow expanded travel rights and the ability to change employers. The new status would be available to EB-1, EB-2 and EB-3 applicants on most nonimmigrant visas who have had their I-140 green card petitions approved (the majority of the backlog), or if the I-140 petitions have been pending for more than 270 days. Petitioners would be required to have a job offer requiring a college degree and a signed letter from the employer that other employees have similar terms of employment. The dependent children of the new status recipients would be allowed to retain dependency status for the duration of the green card application process.
- **Implement new transition rules** for ROW applicants that are applying from outside the U.S., who would not be able to access the new status. For eight years after enactment, 5.75% of green cards would be reserved for ROW applicants outside of the U.S. About 18% of green card recipients apply from abroad. This change would not affect the three-year transition period in the initial bill.
- **Initiate additional reforms to the H-1B process.** The amendment would prevent "50-50" companies – those with over 50 employees and more than 50% of whom are on H-1B visas - from hiring any additional H-1B workers. The amendment also includes an anti-retaliation clause for H-1B whistleblowers and some additional wage reporting requirements for employers.

March 3, 2020: After a potential objection from Senator Cotton (R-Arkansas), and concerns from USCIS that the bill as amended would be difficult to implement, Senator Lee made a third round of changes to the bill. These most recent changes would:

- **Eliminate the "do no harm" clause** from the original bill, which would have protected an estimated 150,000 applicants who have already submitted petitions for EB green cards from any new wait times that come as a result of the bill. This provision will particularly affect ROW applicants who are not currently affected by the current green card backlog, but would face lengthy wait times of five years or more as soon as the bill is enacted.
- **Lengthen the transition period** from three to nine years. EB-2 and EB-3 green cards reserved for ROW applicants would increase from 15% to 30% in the first year, 10% to 25% in year two, 10% to 20% in year three, 0% to 15% in year four, 0% to 10% in years five and six, and 0% to 5% in years seven, eight and nine. This would offset some of the impact of eliminating the "do no harm" clause, as it would reduce waiting times for approximately 72,000 additional ROW applicants.[i]
- **Require a two-year** waiting period before early adjustment of status filings. The December 17, 2019 amendment initially allowed the new status to almost anyone on a nonimmigrant visa with a high skilled job offer and either an approved I-140 green card petition or a petition that has been pending for at least 270 days. The new language no longer offers status to those with pending I-140s, and would only allow early adjustment of status to those who have had approved I-140 petitions standing for two years. Most of

those affected by the backlog already have approved I-140s. However, as of June 30, 2018, there were still 45,889 pending I-140 petitions. According to USCIS, petitions typically remain pending for 150 to 435 days.

- **Delaying H-1B restrictions.** The bill would delay enactment of the December 17, 2019 amendment related to the "50-50" H-1B restriction for two years.

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[i] This number is calculated by:

(1) Determining the EB-2 and EB-3 green card cap. Each category accounts for 28.6% of the 140,000 overall EB green card total, so (.286 + .286) * 140,000 = 80,080.

(2) Summing the ROW reserve percentages over the ten-year transition period and multiplying by the annual EB2/EB3 green card cap. (.3 + .25 + .2 + .15 + .1 + .1 + .05 + .05 + .05) * (80,080) = 100,100.

(3) And subtracting this number from the ROW visas reserved from the original three-year transition period. 100,100 - (.15 + .1 + .1) * (80,080) = 72,072.