Insights, News & Events

BIDEN'S PROPOSED LEGISLATION IS NEXT STEP ALONG IMMIGRATION REFORM PATH

Insights
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President Biden promised sweeping changes to U.S. immigration law should he be elected president. In accordance with these campaign promises, Democratic lawmakers have just introduced a sweeping immigration bill backed by the president. The U.S. Citizenship Act of 2021 reflects some of the priorities outlined by the president in an executive order issued on his first day in office. The bill's lead sponsors — Sen. Bob Menendez, D-N.J., and Rep. Linda Sanchez, D-Calif. — just unveiled the legislation to provide an earned path to citizenship, address the root causes of migration and responsibly manage the southern border, and reform the immigrant visa system, among other things. However, the legislation faces an uphill battle in the closely divided Congress, with some lawmakers already suggesting a piecemeal approach might win more bipartisan support. What do employers need to know about the proposals contained in this legislation?

Potential Changes To The Green Card Process

First and foremost, there are many provisions in this bill which could significantly change the employment-based immigration system if enacted, particularly with respect to employees who are seeking U.S. Lawful Permanent Resident status (i.e., obtaining a "Green Card").

Service Focus

Immigration

Increased Visa Numbers

A key requirement for a Green Card application to be granted is that an immigrant visa "be immediately available" to the alien. Availability is of central importance because there are only a certain, limited number of immigrant visas available per year. Applications for immigrant visas are broken down into a number of categories; whether an immigrant visa is immediately available is determined by reference to the category in which the applicant is attempting to immigrate. Additionally, the number or visas available in each category is currently allocated on a per-country basis that relates back to the alien's country of birth (as opposed to citizenship).

Under the current law, 7% of the authorized total is designated as a ceiling number beyond which individuals born in a particular country may not receive an immigrant visa in a given fiscal year. An immigrant visa is "immediately available" if the limit in the alien's particular category has not yet been reached, also considering their country of birth. If, however, demand has outstripped supply in a category, then an immigrant visa is not immediately available and a waiting list will be formed. One's place in line is determined by the so-called "priority date," or date of filing of an alien's immigrant petition or labor certification. Once demand has outstripped supply, no further immigrant visas in that category will be granted until the supply has caught up to the priority date.

The U.S. Citizenship Act of 2021 would make several important changes to the current immigrant visa allocation system. For starters, the worldwide number of employment-based immigrant visas available per year would be raised from 140,000 to 170,000. The bill also would add in all unused employment-based immigrant visas from Fiscal Years 1992 through 2020; this number is estimated to potentially be higher than 220,000.

Another critically important change would be the elimination of the per-country limit. This would have

the effect of greatly reducing the wait times for employment-based immigrants from India, China, and the Philippines. There are many citizens of these countries attempting to immigrate to the United States; under the current per-country limit, India (a country with a massively large population) is allocated the same number of immigrant visas per year as is, for example, Iceland (a country with a very small population).

Other Key Proposed Changes

There are several other important proposed changes which would increase the number of immigrant visas available per year:

- Spouses and children of both family and employment-based permanent residence applications would be exempted from the numerical limits (under the current law, such individuals are counted towards the limits). This could have the effect of more than doubling the amount of immigrant visas available per year, with respect to employment-based immigration.

- Anybody who has an approved I-140 Immigrant Petition with a priority date over 10 years old would be eligible to immediately apply for a Green Card; this would benefit many Indian Citizens seeking U.S. Green Cards.

- Graduates of an accredited U.S. university with a Doctoral (i.e., Ph.D.) Degree in a STEM (Science, Technology, Engineering, and Mathematics) field would be eligible to apply for Green Cards without any consideration of numerical limits on the number of immigrant visas available. F-1 student visa holders would also be considered "dual intent," meaning that they would be permitted to be openly attempting to obtain a Green Card while maintaining their F-1 student status.

- The number of "diversity" visas (also known as the "Green Card lottery") would increase from 55,000 per year to 80,000.

- The bill would create a pilot program to admit up to 10,000 immigrants to live and work in economically depressed areas.

Expanding The Path To Permanent Residence For Nonimmigrant Visa Holders

Currently, holders of H-1B status are eligible to keep extending their status past the normal six-year limitation of authorized stay in H-1B status, if they have commenced the permanent residence process before certain deadlines. If they meet this requirement, they are then able to keep extending their H-1B status until they are ultimately eligible to file for a Green Card (which can be much longer than six years, particularly as Indian Citizens are concerned). Under the current immigration law, H-1B status is the only nonimmigrant status afforded this opportunity.

Under the proposed law, the opportunity to extend a person's stay past the normal time limits (provided that they are in the process of seeking a Green Card) would be broadened to include holders of F-1 student visas, L-1 intracompany transfer visas, and O-1 extraordinary ability visas. This would be especially important for holders of L-1 intracompany transfer visas, as the normal time limits inherent in those categories (seven years for an L-1A manager, and five years for an L-1B specialized knowledge worker) often do not permit an individual holding one of these visas to remain in the U.S. until eligible to apply for a Green Card; this issue is particularly acute for Indian and Chinese citizens.

Another key change would be to better protect children of individuals who face long waits to be eligible to apply for Green Cards. As a general rule, children are eligible to file for Green Cards along with their parents until the reach age 21. Currently, there is a law called the Child Status Protection Act which does protect some, but not all, children who reach age 21 before the Green Card is issued. Under the proposed law, a child of a nonimmigrant worker would be eligible to extend their own derivative nonimmigrant status, regardless of age, so long as the parent continues to lawfully

maintain their own status, and the child was younger than 18 when they were initially granted their own nonimmigrant status in order to accompany or follow their parent to the U.S.

One problematical provision, however, would allow the Secretary of Homeland Security to establish procedures for "temporary limiting" employment-based immigrants from entering the country and/or applying for Green Cards "in geographic areas or labor market sectors that are experiencing high levels of unemployment." How this provision could be utilized, or potentially abused, is quite unclear, especially since what is meant by "high levels of unemployment" is not actually defined in the bill.

Agricultural Workers

One proposal in President Biden's bill that is sure to spur debate is entitled "The Agricultural Workers Adjustment Act." If passed, this proposal will clear the way for currently undocumented agricultural workers, and their families, to apply for Green Card status. Workers will have to prove that they have been physically present in the United States since January 1, 2021 and must show that, within the five years immediately preceding their application, they "performed agricultural labor or services for at least 2,300 hours or 400 work days."

Agricultural workers seeking permanent resident status under this program will have to pass criminal and national security background checks. As for those who have been removed from the United States, the bill includes a provision whereby those individuals may qualify for a Green Card "for humanitarian purposes, to ensure family unity, or [for the] public interest." The bill also envisions possible application from outside the country where an individual who otherwise qualifies for a Green Card under the proposed program has been removed from the country.

Given that there are an estimated 1.25 million undocumented agricultural workers in the United

States, this proposal, if passed, would create challenges for agricultural employers when employees currently working under a name and Social Security Number present documentation with a "new" name and Social Security Number.

Penalties For Violation Of Other Federal Laws

If the bill passes, employers will have yet another incentive to comply with federal, state, and local employment laws. The bill contains a provision under which the government can impose a fine up to $5,000 per violation where a federal, state, or local government agency finds that an employer violated any "laws concerning wages and hours, labor relations, family and medical leave, occupational health and safety, civil rights, or nondiscrimination" with regard to any undocumented noncitizen. This fine would be separate and apart from any penalties imposed by governmental agencies for violation of the underlying statutes themselves.

Possible Overhaul Of Form I-9 And E-Verify

Finally, the bill envisions the establishment of a "Commission on Employment Authorization," consisting of presidential and congressional appointees, to examine the current processes for employment authorization and proposed changes. The goal of the Commission is to "respect the rights of employment-authorized individuals to work in the United States," and to protect workers' rights to be free from race and national-origin discrimination.

The Commission will be charged with submitting a report with specific policy recommendations as well as "recommendations for improvements to existing employment verification systems, such as the I-9 process and E-Verify, to ensure that workers are not denied employment on the basis of false positives." At the end of the process, the government would be required to determine which recommendations are "most likely to improve existing employment verification systems," keeping in mind whether such

recommendations are “feasible within existing budget restraints.”

Of course, as of now the proposals contained in the Senate and House bills are just that – proposals. We will continue to monitor the bills as they make their way through the two houses of Congress, and we will report major updates and changes made to the bills, so make sure you are subscribed to Fisher Phillips’ alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Immigration Practice Group.

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