

NEWS & RESOURCES



United States

Senate Judiciary Committee to Debate Nonimmigrant Provisions of Reform Bill

May 14, 2013

Today, the Senate Judiciary Committee will begin debate and mark-up of Title IV of [S. 744](#), the employment-based nonimmigrant section of the comprehensive immigration reform bill. The Committee will consider an array of [proposed amendments](#) concerning the H-1B and L-1 programs and the optional practical training rules for F-1 students. Mark-up of the employment-based green card proposals is expected in the coming days, though no specific date has yet been set.

Among the key nonimmigrant amendments are proposals from Sen. Charles Grassley (R-IA) to further broaden the Department of Labor's authority to review and investigate employers' compliance with the labor condition application (LCA) regulations and to limit post-graduate employment options for F-1 students. Sen. Amy Klobuchar (D-MN) has proposed requiring H-1B employers to post offered positions on the websites of state workforce agencies.

Sen. Orrin Hatch (R-UT) is seeking to increase the H-1B cap baseline to 115,000, with a reformulated market escalator that would allow for just-in-time quota increases within a given fiscal year, based on immediate demand for H-1B numbers. He is also seeking more moderate restrictions on offsite placement of L-1B specialized knowledge workers, with a \$500 L-1B outplacement fee.

The markup will begin at 10:00 a.m. EDT and will be [streamed live](#). Fragomen will be closely following the proceedings and will provide updates on principal changes.



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United States

Legislative Update: Senate Continues Work on Immigration Reform as President Obama Urges "Now Is the Time"

February 15, 2013

This week, President Obama used the [State of the Union address](#) to reiterate his support for comprehensive immigration reform and highlight immigration as a key driver of economic growth and innovation, exhorting Congress that "[n]ow is the time to get it done."

The President spoke of border security and legalization for unauthorized immigrants, and also noted that "real reform means fixing the legal immigration system to cut waiting periods and attract highly-skilled entrepreneurs and engineers that will create jobs and grow our economy."

The [Senate Judiciary Committee](#) this week held a hearing on reform measures, featuring representatives of the high-tech community and immigrant advocacy groups. Steve Case, a founder of AOL and now CEO of a tech industry investment firm, spoke of the urgent need to attract innovators to the United States, and also called on Congress to address "the family and human issues that are at stake in this emotional debate."

Meanwhile, legislative activity continues. The Senate "Gang of Eight" are reportedly making progress on a comprehensive bill based on [principles](#) articulated last month. The Senate bill is expected as early as March.

Several new standalone business immigration bills were also announced this week. Reps. Jason Chaffetz (R-UT), Zoe Lofren (D-CA) and Raul Labrador (R-ID) are the sponsors of H.R. 633, a bill to eliminate per-country caps on employment-based immigrant visa numbers. Rep. Chaffetz was a sponsor of a similar bill, the [Fairness for High Skilled Workers Act](#), in the last Congress. Sen. Mike Lee (R-UT) has introduced a companion bill in the Senate, S. 293. Sen. Jerry Moran (R-KS) is the principle sponsor of the Start Up Act 3.0, which proposes new visa categories for STEM students and for entrepreneurs who secure funding and create U.S. jobs. These bills join the [Immigration Innovation \(I-Squared\) Act](#), introduced last week by Sens. Orrin Hatch (R-UT), Amy Klobuchar (D-MN), Marco Rubio (R-FL), Chris Coons (D-DE) and a growing bipartisan list of co-sponsors.



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United States

Senate Judiciary Committee Continues Markup of Employment-Based Provisions of Reform Bill

May 16, 2013

In two days of debate this week, the Senate Judiciary Committee considered an array of **proposed amendments** to the employment-based nonimmigrant and employment verification provisions of **S. 744**, the comprehensive immigration reform bill. See: <http://www.judiciary.senate.gov/legislation/immigration/amendments.cfm>

The Committee approved several key Department of Labor amendments, including a proposal to create a DOL hotline and website for complaints about LCA and other violations, a proposal to require employers to disclose their names and other details when posting H-1B positions to a mandatory recruitment website, and a plan to increase the proposed labor certification fee from \$500 to \$1,000. A proposal to require annual audits of at least one percent of all H-1B and L-1 employers (in addition to high-volume H and L employers, who are already subject to audits elsewhere in the bill) was defeated, as was an amendment to eliminate the provision permitting employers to exempt "intending immigrants" from the calculations for determining H-1B dependency and high-volume H-1B and L-1 usage.

A proposal to make the EB-5 Regional Center program permanent was approved, as was a bid to admit Hong Kong to the Visa Waiver Program. The Committee approved a proposal for a pilot program to conduct B-1/B-2 visa interviews by video conference, but imposed limits on a provision that would allow the State Department to waive visa interviews for selected nonimmigrants in the national interest.

Turning to the employment eligibility verification provisions of the bill, the Committee voted down an amendment that would have required all employers to use E-Verify within 18 months of the bill's enactment. It approved a plan to require annual accuracy audits of the E-Verify program and to require USCIS to report E-Verify nonconfirmations to Immigration and Customs Enforcement on a weekly basis, but a provision to require ICE to investigate every nonconfirmation was stricken. A proposal to delay the preemption of state and local employment verification laws was defeated.

The Committee will resume markup and debate on Monday, May 20, when it could consider some remaining nonimmigrant amendments among other proposals. Fragomen is closely monitoring the debate and will provide continuing updates.



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United States

Senate Immigration Bill Proposes Significant Employment-Based Reforms

April 18, 2013

The newly introduced Senate immigration reform bill seeks to attract and retain highly skilled and educated foreign nationals through more generous H-1B and employment-based green card quotas, but in exchange would impose an array of new obligations on H-1B and L-1 employers and substantially strengthen the enforcement authority of the Departments of Homeland Security and Labor.

The **Border Security, Economy Opportunity and Immigration Modernization Act** would also create a new visa category for lower-skilled temporary workers and require all employers to use E-Verify.

The bill will be the subject of hearings and debate in the coming days and weeks. One or more House reform bills are expected as well.

Key employment-based provisions of the bill are discussed below. If your organization has any questions about the Senate bill, please contact your designated Fragomen professional.

H-1B PROVISIONS

Higher H-1B cap with market escalator. The H-1B cap would be increased to a baseline of 110,000 in the first fiscal year after enactment. For each year thereafter, the cap could be adjusted upward by as much as 10 percent based on labor market demand, up to a ceiling of 180,000. Downward adjustment would also be possible if demand were to decrease, though the cap could not be lowered below 110,000. The cap exemption for holders of U.S. advanced degrees would be increased to 25,000, but would be limited to STEM graduates.

Broader test of H-1B dependency. In general, an employer whose workforce consists of 15 percent or more H-1B employees would be considered H-1B dependent, though employers with 50 or fewer employees would be subject to different dependency thresholds.

For purposes of the dependency calculation, "intending immigrants" – those for whom a labor certification had been pending for one year or more or had been approved – would not be counted if, in the year before the filing of the H-1B petition, the employer had filed immigrant worker petitions for at least 90 percent of those sponsored for labor certification during that year. Note that the one-year period does not appear to address longer-pending labor certifications.

The bill would eliminate the current dependency exemptions for foreign employees holding a U.S. advanced degree in a field related to the offered position or who are paid \$60,000 per year or more.

Nonprofit institutions of higher education, nonprofit research organizations, and healthcare organizations petitioning for certain healthcare occupations would be exempt from the dependency definition.

Non-displacement attestations for all H-1B employers. H-1B dependent employers would be required to demonstrate that they had not displaced and would not displace a U.S. worker within 180 days before or after the filing of an H-1B petition.

Non-dependent H-1B employers would be required to attest that they had not displaced and would not displace a U.S. worker within 90 days before or after the filing of an H-1B petition, unless they could demonstrate that the number of U.S. workers employed in the same job zone did not decrease during the previous year.

U.S. worker recruitment for all H-1B employers. All employers would be required to advertise each H-1B position on a Department of Labor website for at least 30 days and offer the position to any U.S. applicant equally or better qualified than the foreign national sought. H-1B dependent employers would be required to conduct additional recruitment of U.S. workers, and would no longer benefit from an exemption for employees holding U.S. advanced degrees or paid \$60,000 per year or more. "H-1B and OPT only" recruitment would be prohibited.

Limits on H-1B sponsorship. Employers with fifty or more employees in the United States would not be able to petition for additional H-1B employees if their workforce was comprised of more than 75 percent H-1B or L-1B workers in FY 2015, 65 percent in FY 2016 and 50 percent in FY 2017 and beyond. For purposes of the workforce calculation, H-1Bs and L-1Bs who are "intending immigrants" (defined above) would be counted as U.S. workers.

Nonprofit institutions of higher education and nonprofit research organizations would be exempt from the employment limitations.

Additional fees for high-volume H-1B employers. The bill would eliminate the current border security fee for high-volume H-1B employers and replace it with a new fee structure.

Employers with more than 50 workers in the United States would be subject to additional H-1B filing fees if the number of H-1B and L-1B employees exceeded a certain percentage. From FY 2014 through FY 2024, employers with 50 or more employees in the United States would pay an additional \$5,000 per H-1B petition if more than 30 percent but less than 50 percent of their employees were H-1B or L-1B workers. From FY 2014 through FY 2017, subject employers would pay an additional \$10,000 per H-1B petition if more than 50 percent but less than 75 percent of their employees were H-1B or L-1B workers. "Intending immigrants" (defined above) would be considered U.S. workers for purposes of the workforce calculation.

Nonprofit institutions of higher education and nonprofit research organizations would not be subject to the additional fees.

Restrictions on outsourcing of H-1B workers. H-1B dependent employers would be completely prohibited from placing, outsourcing, leasing or otherwise contracting for the services or placement of an H-1B employee. Non-dependent employers would pay a \$500 fee for each outsourced H-1B.

Significant new enforcement powers for DOL. DOL would be authorized to conduct more in-depth reviews of labor condition applications (LCAs), have expanded power to initiate and conduct LCA investigations and new authority to conduct compliance surveys and audits of H-1B employers.

DOL would be authorized to review LCAs for fraud, misrepresentation, and obvious inaccuracies. (Currently, the agency reviews LCAs for completeness and obvious inaccuracies only.) The agency would have longer – up to 14 days – to certify an LCA. Employers would be permitted to submit H-1B petitions without a certified LCA, though USCIS could not approve a petition until a certified LCA were submitted.

The agency would no longer have to demonstrate reasonable belief that willful, substantial or repeated violations had occurred in order to initiate an LCA investigation. The bill would permit the agency to conduct investigations based on complaints of LCA violations from anonymous sources, as well as complaints filed by DOL employees themselves. Complainants would have up to 24 months after an alleged violation to notify DOL – double the current limitation period. USCIS would be obligated to provide DOL with any information received during the H-1B adjudication process that indicates an employer had not complied with program rules. There would be no time limit on LCA investigations, and DOL would not be obligated to notify an employer of an LCA investigation if it determined that notice might interfere with the investigation.

The agency would conduct regular surveys of LCA compliance and publicly report the findings of those surveys.

Increased penalties for LCA violations. Most fines for LCA violations would be doubled, and H-1B workers harmed by any violation would be entitled to back wages.

New wage system. The current four-tiered wage system would be reduced to three wage levels, effectively increasing prevailing wages for H-1B workers at each level. Level 1 wages would be the mean of the bottom two-thirds of wages, or at least 80 percent of Level 2 wages. Level 2 wages would be the mean of all wages surveyed by the Department of Labor. (Under the current wage system, the mean is equivalent to Level 3 or greater.) Level 3 would be the mean of the top two-

thirds of wages surveyed. H-1B dependent employers would be required to pay at least Level 2 wages in the new system.

Spousal employment authorization. H-4 spouses would be eligible for employment authorization, but only if their country of citizenship has a program similar to the H-1B that grants reciprocal spousal benefits to U.S. citizens.

Grace period after early employment termination. H-1B nonimmigrants whose employment is terminated before their employer's petition expires would have a 60-day grace period within which to find new employment, change to a different immigration status or depart the United States.

L-1 PROVISIONS

Limits on L-1 outplacement. The bill seeks to limit employers' ability to place L-1s at another entity. As the provision is currently written, the conditions under which outplacement would be permitted are somewhat ambiguous; clarification is necessary and being sought. The apparent intention of the provision is to prohibit outplacement unless (1) the other entity is an affiliated company; or (2) the placement of the foreign national at an entity other than an affiliated company is not essentially an arrangement to provide labor for hire, the foreign worker is controlled and supervised by the petitioning employer, and the other entity attests that it has not displaced and will not displace a U.S. worker 90 days before or after the filing of the L-1 petition.

Limitations on L-1 sponsorship. Similar to restrictions proposed for H-1B employers, employers with 50 or more employees in the United States would be unable to petition for additional L-1B workers if the workforce was comprised of more than 75 percent H-1B or L-1B workers in FY 2015, more than 65 percent in FY 2016; or more than 50 percent in FY 2017 and beyond. "Intending immigrants" (defined above) would be considered U.S. workers for purposes of the workforce calculation.

Nonprofit institutions of higher education and nonprofit research organizations would not be subject to the employment limitations.

Additional fees for high-volume L-1 employers. The bill would eliminate the current border security fee for high-volume L-1 employers and replace it with a new fee structure like that proposed for H-1B employers, discussed above.

Employers with more than 50 workers in the United States would be subject to additional L-1B filing fees if the number of H-1B and L-1B employees exceeded a certain percentage. From FY 2014 through FY 2024, employers with 50 or more employees in the United States would pay an additional \$5,000 per L-1B petition if more than 30 percent but less than 50 percent of their employees were H-1B or L-1B workers. From FY 2014 through FY 2017, subject employers would pay an additional \$10,000 per L-1B petition if more than 50 percent but less than 75 percent of their employees were H-1B or L-1B workers. "Intending immigrants" (defined above) would be considered U.S. workers for purposes of the workforce calculation.

Nonprofit institutions of higher education and nonprofit research organizations would not be subject to the additional fees.

New L program enforcement authority for DHS. DHS would be authorized to conduct compliance investigations of L-1 employers and would be required to establish a system to receive complaints concerning L program noncompliance. DHS would also be required to conduct annual compliance audits of employers with more than 100 employees whose workforce contains more than 15 percent L-1 employees, and would be required to issue a report describing the findings of the annual audits.

Employers found to have violated L program regulations would be subject to penalties up to \$2,000 per violation and one-year debarment from the program. The penalties for material misrepresentations or willful failure to comply with program rules would be fines up to \$10,000 per violation and debarment for at least two years.

New requirements for new-office L-1 petitions. Petitions for L-1 nonimmigrants who will work at a new office would be limited to a validity period of 12 months, and could be approved only if the beneficiary had not been the beneficiary of two or more new office L-1 petitions during the preceding two years. In a codification of current policy, the petitioner would be required to show an adequate business plan, sufficient physical premises to carry out the business, and sufficient financial ability to commence doing business immediately upon approval of the petition.

BUSINESS VISITOR PROVISIONS

Multinational managers and executives would be eligible for admission as business visitors for up to 90 days to oversee or observe the operations of a related U.S. company. Employees of multinational companies could be admitted for up to 180 days to participate in leadership and development activities, even if not part of a formal or classroom training program. Remuneration from a U.S. source, other than for incidental expenses, would be prohibited.

Certain business visitors would be permitted to receive honoraria for academic activities of up to nine days or for appearances in U.S.-based media programming for not more than 60 hours in a six-month period.

EMPLOYMENT-BASED GREEN CARD PROVISIONS

Immigrant visa quota allocations and backlog clearance. The bill would retain the baseline employment-based (EB) immigrant visa quota of 140,000, but during the first several years after enactment, additional numbers would be available to clear the lengthy EB green card backlog. During FY 2015, there would be an immediate injection of thousands of unused immigrant visas from Fiscal Years 1992 to 2013. In addition, during the first four fiscal years after enactment, up to 120,000 immigrant visas from a new merit-based green card program would be available each year to employment-based immigrants. In subsequent years, the EB green card quota would be 140,000 plus unused family-based immigrant visa numbers from the previous year.

The bill would exempt several categories of employment-based immigrants from the annual quota, including all foreign nationals in the EB-1 category (foreign nationals of extraordinary ability, outstanding professors and researchers and multinational managers and executives); foreign nationals holding a doctoral degree in any field; foreign nationals with a U.S. master's degree or higher in a STEM field earned in the five years preceding the filing of an immigrant visa petition and a job offer in a field related to the degree; certain physicians; and the spouses and children of employment-based immigrants.

Forty percent of the EB immigrant visa quota would be allocated to advanced-degree professionals. Another forty percent of the quota would be allocated to professionals, skilled workers and other workers in the EB-3 category. The immigrant investor category and the special immigrant category would each be allocated ten percent of the EB green card quota.

Labor certification exemption for certain STEM graduates. Foreign nationals holding advanced degrees in STEM fields would be eligible for a national interest waiver of the labor certification requirement.

Labor certification fee. Employers would pay a fee of \$500 for each permanent labor certification. Fees would support STEM education initiatives, though a small percentage would be allocated to DOL and DHS to improve labor certification and immigrant visa petition processing times.

NEW W-1 VISA PROGRAM FOR LOWER-SKILLED TEMPORARY WORKERS

The bill would establish the W-1 visa for lower-skilled temporary workers. The W visa would be available for the employment of foreign temporary workers in lower-skilled occupations that do not require a bachelor's degree. Computer occupations would be excluded. The W visa would be capped at 20,000 in the first year and would increase to 75,000 in the fourth year. Thereafter, the annual cap would be determined by a market-based formula, one component of which would be by a new USCIS Bureau of Immigration and Labor Market Research. The cap could not fall below 20,000 or exceed 200,000.

To participate in the program, employers would be required to register with DOL and would be subject to requirements concerning wages and working conditions. Employers would be required to recruit U.S. workers by posting on a DOL website, placing a job order with a state workforce agency and conducting three other recruitment methods chosen from a prescribed list. Prospective W-1 nonimmigrants would be required to register with the State Department, pass a background check and affirm that they would work only in a registered position. W-1s would be admitted for an initial period of up to three years, with extensions available in three-year increments.

The current H-2A temporary agricultural worker program would be replaced by the new W-2 and W-3 categories.

OTHER EMPLOYMENT-BASED PROVISIONS

Premium processing of employment-based petitions. The bill would require USCIS to make premium processing available for all employment-based immigrant petitions and related administrative appeals.

Domestic visa revalidation. The bill would reinstate visa revalidation in the United States. E, H, L, O, P nonimmigrants, among others, would be eligible to seek a new visa within the United States if they are low-risk applicants eligible for a waiver of the visa interview.

Dual intent for F-1 students. F-1 students could be sponsored for employment-based green cards directly, without the need to change status to the H-1B visa category.

E-3 visa program for Irish citizens. The E-3 visa program would be opened to citizens of Ireland who have at least a high school education or two years of work experience.

Portability for O-1 nonimmigrants. O-1 nonimmigrants would be authorized to accept employment with a new employer upon the filing of a new O-1 petition.

Employment authorization during the pendency of an extension petition. E, H, J, L, O, P and TN nonimmigrants, among others, would be authorized to continue employment with the same employer while the employer's application or petition for an extension of stay is pending. The provision would expand on current regulations, which allow up to 240 days of additional employment authorization during the pendency of a timely-filed extension.

Deference to prior nonimmigrant approvals. In adjudicating H-1B and L-1 extensions, DHS would be required to give deference to prior approvals, unless there was a material error in a prior approval, a substantial change in circumstances, or new adverse information concerning the eligibility of the petitioner or beneficiary. DHS would retain the discretion to deny any extension.

MANDATORY EMPLOYMENT ELIGIBILITY VERIFICATION

The bill would make the E-Verify system mandatory for all employers and would preempt most state and local employment verification laws. Mandatory E-Verify would be phased in over five years according to workforce size. Employers with more than 5,000 employees would be required to use E-Verify within two years of enactment, employers with more than 500 employees within three years, and all employers within four years. It appears that the Form I-9 employment verification system would remain in place, at least during the phase-in period.

Employees would be required to present secure documents containing a digital photograph. Employers would be required to verify that the photo ID matches the photo stored in E-Verify. A safe harbor provision would protect employers against errors in verification as long as they were using E-Verify in compliance with program rules. Employers who hire or continue to employ unauthorized workers would face enhanced penalties.

NEWS & RESOURCES



United States

Senate Judiciary Committee Approves Immigration Reform Bill

May 22, 2013

After several weeks of hearings and mark-up, the Senate Judiciary Committee on Tuesday approved S. 744, the comprehensive immigration reform package, by a vote of 13 to 5. The bill now proceeds to the full Senate for debate, which is expected to begin next month.

The last hours of mark-up saw several amendments to the provisions of the bill affecting nonimmigrant workers. These are summarized below.

The H-1B cap. The final version of the bill includes a higher H-1B cap baseline of 115,000 and a new formula that will allow for quota increases of 5,000 to 20,000 within a fiscal year if demand exceeds the cap and the unemployment rate for managerial, professional and related occupations is less than 4.5 percent.

H-1B skilled worker dependency. Amendments to the bill introduce enhanced recruitment and non-displacement obligations for the "H-1B skilled worker dependent employer," which is defined as an employer whose skilled workforce – comprising full-time equivalent employees in occupations within Zones 4 and 5 of the Labor Department's O*NET database – is made up of 15 percent or more H-1B workers. Intending immigrants would not be included in the workforce calculation if their employer had filed permanent residence petitions for at least 90 percent of the labor certifications for which it received approvals within a given timeframe.

Recruitment. Employers would be required to post H-1B jobs on a DOL website, engage in good faith recruitment using industry-wide standards, and offer compensation at least equal to that offered prospective H-1B nonimmigrants. DOL would be required to facilitate the posting of H-1B jobs on the websites of state workforce agencies (SWAs). H-1B skilled-worker dependent employers would be required to offer a job opening for which an H-1B worker is sought to any to any equally or better qualified U.S. worker who applies for the position.


Non-displacement. An H-1B employer, other than one who is H-1B dependent or skilled-worker dependent, is prohibited from displacing a U.S. worker if the employer is: (1) filing an H-1B petition with the intent or purpose of displacing a specific U.S. worker from the position to be occupied by the beneficiary of the petition; (2) providing services to worksites operated by federal, state or local government employer entities that would direct and control the work of the prospective H-1B employee; or (3) a public school. H-1B skilled worker dependent employers would need to attest that they did not and would not displace a U.S. worker 90 days before or after filing an H-1B petition. For H-1B dependent employers, the non-displacement period would remain 180 days before and after filing.

Outplacement restrictions on H-1B dependent employers. The amended bill retains the prohibition against outplacement by H-1B dependent employers, but clarifies that dependent employers who are nonprofit institutions of higher education, nonprofit research organizations or health care providers petitioning for physicians or other health care workers would not be not subject to the restrictions, though they would be required to pay an outplacement fee.

H-1B spousal work authorization. The amended bill eliminates a provision that would have granted H-1B spousal work authorization only if the principal H-1B's home country provided reciprocal benefits to similarly situated spouses of U.S.

citizens. However, the bill allows the Department of Homeland Security, at the request of the State Department, to suspend H-1B spousal employment authorization for nationals of countries that do not provide reciprocal benefits.

L-1B outplacement. The amendment prohibits the outplacement of L-1Bs if 15 percent or more of an employer's full-time equivalent workforce is made up of L-1Bs, including intending immigrants. Otherwise, employers would not be permitted to outsource or outplace an L-1B unless: (1) the worker is controlled and supervised by the petitioning employer; (2) the placement is not an arrangement to provide labor for hire; and (3) the employer pays a \$500 STEM education and training fee.

 **Covered employers.** For purposes of the H-1B dependency and skilled-worker dependency calculations, intending immigrants are not included in the calculation if their employer is a "covered employer." The amended bill redefines covered employer to mean an employer who has filed I-140 petitions for at least 90% of current employees who were beneficiaries of applications for labor certifications that were approved during the one-year period ending six months before filing the H-1B or L-1 petition for which the number of intending immigrants is relevant.

Adjustment of status portability. The amended bill clarifies that, for purposes of adjustment portability, approved I-140 petitions remain valid even if withdrawn by the petitioning employer, provided that the adjustment applicant has a new job in the same or a similar occupational classification.

Adjustment filing before visa availability. Under the amended bill, a foreign national would be eligible to file an adjustment application concurrently with an immigrant petition or at a later point whether or not a visa number is available. If a visa number is not available at the time the adjustment is filed, the principal applicant would be subject to a supplemental fee of \$500; dependents would not be liable for the fee.

Effective date. The provisions of the bill would affect all petitions and applications filed on or after the date of enactment, but the H-1B recruitment and non-displacement provisions would not apply to extensions or other petitions or applications filed on behalf of existing employees.

What Is Next for S. 744?

The Senate immigration bill has several hurdles to overcome before it becomes law. The package approved by the Judiciary Committee on Tuesday is subject to additional changes on the Senate floor. If the bill is passed in the Senate, it will need to be reconciled with legislation passed by the House of Representatives. The House is at the early stages of crafting its own immigration bill, and it is not yet clear how much it will resemble the Senate's approach. For an analysis of the Senate bill as introduced and of amendments approved last week, see Fragomen's Client Alerts of [April 18, 2013](#) and [May 16, 2013](#).

Fragomen will continue to monitor the bill's progress through the Senate as well as future action by the House of Representatives. The provisions outlined above are subject to further changes as they wind their way through the legislative process, and, if enacted, would undoubtedly be subject to further interpretation as the federal agencies charged with implementation begin their work.

NEWS & RESOURCES



United States

President Obama Voices Support for Employment-Based Immigration Reforms as Senate Begins Work on the Details

January 29, 2013

Envisioning the United States as “a magnet for the best and brightest,” President Obama today voiced his support for the tenets underlying a bipartisan Senate proposal for immigration reform, but vowed his own reform bill if Congress cannot act quickly.

In a list of comprehensive reform principles released after the President's speech, the [White House called for specific reforms to the employment-based immigration system](#), including more immigrant visa numbers, the elimination of per-country quotas on immigrant visas, new visa programs for investors and entrepreneurs and a plan to “staple” green cards to the diplomas of foreign nationals who earn a U.S. advanced degree in a STEM field.

The President's address and the White House framework followed a week of intense immigration activity in the Senate that included key proposals on employment-based programs. On Monday, a bipartisan group of eight Senators unveiled a [framework for comprehensive reform](#), setting forth the guiding principles of an eventual Senate bill. Another Senate group today released a slate of detailed proposals to enhance the H-1B and employment-based permanent residence programs.

The Comprehensive Framework

The Senate framework for comprehensive reform is based on four pillars: a “tough but fair” path to citizenship for the undocumented population that is contingent on enhanced border security; a reform of the legal immigration system; the creation of a fraud-resistant employment verification system; and improvements in employment-based temporary programs.

Without going into great detail, the Senate framework calls for streamlined permanent residence for holders of U.S. advanced degrees in STEM fields and the reduction of backlogs in the employment-based permanent residence system generally. A plan for lower-skilled foreign workers would require sponsoring employers to demonstrate recruitment and non-displacement of U.S. workers. The framework also calls for a stronger employment verification system, including a “non-forgeable electronic means” to check the status and identity of new hires.

The plan was drafted by Senators Charles Schumer (D-NY), John McCain (R-AZ), Richard Durbin (D-IL), Lindsey Graham (R-SC), Robert Menendez (D-NJ), Marco Rubio (R-FL), Michael Bennet (D-CO) and Jeff Flake (R-AZ).

The I-Squared Act: A Detailed Proposal for Employment-Based Reform

Another bipartisan Senate group has released a detailed proposal to reform the employment-based temporary and permanent residence systems. [The Immigration Innovation Act of 2013 \(the I-Squared Act\)](#) is sponsored by Senators Rubio, Orrin Hatch (R-UT), Amy Klobuchar (D-MN) and Chris Coons (D-DE). Key components of the bill include:

H-1B reform. The I-Squared Act would increase the H-1B cap to a baseline of 115,000. A market-based escalator provision would allow for additional H-1B numbers up to a maximum of 300,000 in years when demand for the cap is high, and

reductions in additional numbers when demand is low. The bill would create an unlimited H-1B cap exemption for holders of U.S. advanced degrees by removing the current ceiling of 20,000.

The bill seeks to reduce hurdles in H-1B extensions and job changes by making it harder for USCIS to deny the extension of previously approved petitions and giving terminated H-1B workers a sixty-day transition period to find new employment.

H-4 spouses would be eligible for employment authorization.

The H-1B training and education fee would be increased to \$2500 for sponsoring employers with more than 25 employees. These funds would be used to promote STEM education and retraining of U.S. workers.

Nonimmigrant visa revalidation. The bill would reinstate the ability of E, H, L, O and P nonimmigrants to revalidate their visas from within the United States and avoid lengthy visa processing waits abroad.

Employment-based permanent residence reforms. The bill would reform the employment-based immigrant visa quota system by allowing for the recapture and roll-over of unused immigrant visas from prior years. Though the bill would add no new immigrant visa numbers, it would create quota exemptions for dependents of principal employment-based immigrants, holders of U.S. STEM advanced degrees, individuals of extraordinary ability and outstanding professors and researchers. The bill would also eliminate annual per-country quotas on employment-based immigrant visas.

The bill would end the current requirement that foreign students at U.S. universities prove they intend to return to their home country at the end of an academic program.

Next Steps for Comprehensive Reform

Though there is increasing momentum for a fast track to comprehensive reform, it is likely to take several months or more for a bill to move through the legislative process.

The Senate will now begin the work of drafting a detailed comprehensive reform bill, expected by March. The Senate Judiciary Committee is reportedly planning to hold a hearing on immigration reform as early as February 13. The I-Squared Act could be included in the Senate bill, but its favorable business immigration provisions would likely face opposition and potential amendments from legislators who support heightened restrictions on the H-1B and L-1 nonimmigrant programs. In past years, such proposals have included wage rules for L-1 employers and recruitment obligations extended to all H-1B employers.

If a reform bill is passed in the Senate, it will move to the House of Representatives, where it faces a tough battle. There is already vocal opposition from immigration hardliners in the House, who object to plans for the legalization of unauthorized foreign nationals.

Bipartisan Framework for Comprehensive Immigration Reform

Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet, and Flake

Introduction

We recognize that our immigration system is broken. And while border security has improved significantly over the last two Administrations, we still don't have a functioning immigration system. This has created a situation where up to 11 million undocumented immigrants are living in the shadows. Our legislation acknowledges these realities by finally committing the resources needed to secure the border, modernize and streamline our current legal immigration system, while creating a tough but fair legalization program for individuals who are currently here. We will ensure that this is a successful permanent reform to our immigration system that will not need to be revisited.

Four Basic Legislative Pillars:

- Create a tough but fair path to citizenship for unauthorized immigrants currently living in the United States that is contingent upon securing our borders and tracking whether legal immigrants have left the country when required;
- Reform our legal immigration system to better recognize the importance of characteristics that will help build the American economy and strengthen American families;
- Create an effective employment verification system that will prevent identity theft and end the hiring of future unauthorized workers; and,
- Establish an improved process for admitting future workers to serve our nation's workforce needs, while simultaneously protecting all workers.

I. Creating a Path to Citizenship for Unauthorized Immigrants Already Here that is Contingent Upon Securing the Border and Combating Visa Overstays

- Our legislation will provide a tough, fair, and practical roadmap to address the status of unauthorized immigrants in the United States that is contingent upon our success in securing our borders and addressing visa overstays.
- To fulfill the basic governmental function of securing our borders, we will continue the increased efforts of the Border Patrol by providing them with the latest technology, infrastructure, and personnel needed to prevent, detect, and apprehend every unauthorized entrant.
- Additionally, our legislation will increase the number of unmanned aerial vehicles and surveillance equipment, improve radio interoperability and increase the number of agents at and between ports of entry. The purpose is to substantially lower the number of successful illegal border crossings while continuing to facilitate commerce.

- We will strengthen prohibitions against racial profiling and inappropriate use of force, enhance the training of border patrol agents, increase oversight, and create a mechanism to ensure a meaningful opportunity for border communities to share input, including critiques.
- Our legislation will require the completion of an entry-exit system that tracks whether all persons entering the United States on temporary visas via airports and seaports have left the country as required by law.
- We recognize that Americans living along the Southwest border are key to recognizing and understanding when the border is truly secure. Our legislation will create a commission comprised of governors, attorneys general, and community leaders living along the Southwest border to monitor the progress of securing our border and to make a recommendation regarding when the bill's security measures outlined in the legislation are completed.
- While these security measures are being put into place, we will simultaneously require those who came or remained in the United States without our permission to register with the government. This will include passing a background check and settling their debt to society by paying a fine and back taxes, in order to earn probationary legal status, which will allow them to live and work legally in the United States. Individuals with a serious criminal background or others who pose a threat to our national security will be ineligible for legal status and subject to deportation. Illegal immigrants who have committed serious crimes face immediate deportation.
- We will demonstrate our commitment to securing our borders and combating visa overstays by requiring our proposed enforcement measures be complete before any immigrant on probationary status can earn a green card
- Current restrictions preventing non-immigrants from accessing federal public benefits will also apply to lawful probationary immigrants.
- Once the enforcement measures have been completed, individuals with probationary legal status will be required to go to the back of the line of prospective immigrants, pass an additional background check, pay taxes, learn English and civics, demonstrate a history of work in the United States, and current employment, among other requirements, in order to earn the opportunity to apply for lawful permanent residency. Those individuals who successfully complete these requirements can eventually earn a green card.
- Individuals who are present without lawful status - not including people within the two categories identified below - will only receive a green card after every individual who is already waiting in line for a green card, at the time this legislation is enacted, has received their green card. Our purpose is to ensure that no one who has violated America's immigration laws will receive preferential treatment as they relate to those individuals who have complied with the law.

- Our legislation also recognizes that the circumstances and the conduct of people without lawful status are not the same, and cannot be addressed identically.
 - For instance, individuals who entered the United States as minor children did not knowingly choose to violate any immigration laws. Consequently, under our proposal these individuals will not face the same requirements as other individuals in order to earn a path to citizenship.
 - Similarly, individuals who have been working without legal status in the United States agricultural industry have been performing very important and difficult work to maintain America's food supply while earning subsistence wages. Due to the utmost importance in our nation maintaining the safety of its food supply, agricultural workers who commit to the long term stability of our nation's agricultural industries will be treated differently than the rest of the undocumented population because of the role they play in ensuring that Americans have safe and secure agricultural products to sell and consume. These individuals will earn a path to citizenship through a different process under our new agricultural worker program.

II. Improving our Legal Immigration System and Attracting the World's Best and Brightest

- The development of a rational legal immigration system is essential to ensuring America's future economic prosperity. Our failure to act is perpetuating a broken system which sadly discourages the world's best and brightest citizens from coming to the United States and remaining in our country to contribute to our economy. This failure makes a legal path to entry in the United States insurmountably difficult for well-meaning immigrants. This unarguably discourages innovation and economic growth. It has also created substantial visa backlogs which force families to live apart, which incentivizes illegal immigration.
- Our new immigration system must be more focused on recognizing the important characteristics which will help build the American economy and strengthen American families. Additionally, we must reduce backlogs in the family and employment visa categories so that future immigrants view our future legal immigration system as the exclusive means for entry into the United States.
- The United States must do a better job of attracting and keeping the world's best and brightest. As such, our immigration proposal will award a green card to immigrants who have received a PhD or Master's degree in science, technology, engineering, or math from an American university. It makes no sense to educate the world's future innovators and entrepreneurs only to ultimately force them to leave our country at the moment they are most able to contribute to our economy.

III. Strong Employment Verification

- We recognize that undocumented immigrants come to the United States almost exclusively for jobs. As such, dramatically reducing future illegal immigration can only be achieved by developing a tough, fair, effective and mandatory employment verification system. An employment verification system must hold employers accountable for knowingly hiring undocumented workers and make it more difficult for unauthorized immigrants to falsify documents to obtain employment. Employers who knowingly hire unauthorized workers must face stiff fines and criminal penalties for egregious offenses.
- We believe the federal government must provide U.S. employers with a fast and reliable method to confirm whether new hires are legally authorized to work in the United States. This is essential to ensure the effective enforcement of immigration laws.
- Our proposal will create an effective employment verification system which prevents identity theft and ends the hiring of future unauthorized workers. We believe requiring prospective workers to demonstrate both legal status and identity, through non-forgable electronic means prior to obtaining employment, is essential to an employee verification system; and,
- The employee verification system in our proposal will be crafted with procedural safeguards to protect American workers, prevent identity theft, and provide due process protections.

IV. Admitting New Workers and Protecting Workers' Rights

- The overwhelming majority of the 327,000 illegal entrants apprehended by CBP in FY2011 were seeking employment in the United States. We recognize that to prevent future waves of illegal immigration a humane and effective system needs to be created for these immigrant workers to enter the country and find employment without seeking the aid of human traffickers or drug cartels.
- Our proposal will provide businesses with the ability to hire lower-skilled workers in a timely manner when Americans are unavailable or unwilling to fill those jobs.
- Our legislation would:
 - Allow employers to hire immigrants if it can be demonstrated that they were unsuccessful in recruiting an American to fill an open position and the hiring of an immigrant will not displace American workers;
 - Create a workable program to meet the needs of America's agricultural industry, including dairy to find agricultural workers when American workers are not available to fill open positions;
 - Allow more lower-skilled immigrants to come here when our economy is creating jobs, and fewer when our economy is not creating jobs;

- Protect workers by ensuring strong labor protections; and,
- Permit workers who have succeeded in the workplace and contributed to their communities over many years to earn green cards.

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The White House
Office of the Press Secretary

For Immediate Release

January 29, 2013

FACT SHEET: Fixing our Broken Immigration System so Everyone Plays by the Rules

America’s immigration system is broken. Too many employers game the system by hiring undocumented workers and there are 11 million people living in the shadows. Neither is good for the economy or the country.

It is time to act to fix the broken immigration system in a way that requires responsibility from everyone —both from the workers here illegally and those who hire them—and guarantees that everyone is playing by the same rules.

President Obama’s commonsense immigration reform proposal has four parts. First, continue to strengthen our borders. Second, crack down on companies that hire undocumented workers. Third, hold undocumented immigrants accountable before they can earn their citizenship; this means requiring undocumented workers to pay their taxes and a penalty, move to the back of the line, learn English, and pass background checks. Fourth, streamline the legal immigration system for families, workers, and employers.

Together we can build a fair, effective and commonsense immigration system that lives up to our heritage as a nation of laws and a nation of immigrants.

The key principles the President believes should be included in commonsense immigration reform are:

- Continuing to Strengthen Border Security:** President Obama has doubled the number of Border Patrol agents since 2004 and today border security is stronger than it has ever been. But there is more work to do. The President’s proposal gives law enforcement the tools they need to make our communities safer from crime. And by enhancing our infrastructure and technology, the President’s proposal continues to strengthen our ability to remove criminals and apprehend and prosecute national security threats.
- Cracking Down on Employers Hiring Undocumented Workers:** Our businesses should only employ people legally authorized to work in the United States. Businesses that knowingly employ undocumented workers are exploiting the system to gain an advantage over businesses that play by the rules. The President’s proposal is designed to stop these unfair hiring practices and hold these companies accountable. At the same time, this proposal gives employers who want to play by the rules a reliable way to verify that their employees are here legally.
- Earned Citizenship:** It is just not practical to deport 11 million undocumented immigrants living within our borders. The President’s proposal provides undocumented immigrants a legal way to earn citizenship that will encourage them to come out of the shadows so they can pay their taxes and play by the same rules as everyone else. Immigrants living here illegally must be held responsible for their actions by passing national security and criminal background checks, paying taxes and a penalty, going to the back of the line, and learning English before they can earn their citizenship. There will be no uncertainty about their ability to become U.S. citizens if they meet these eligibility criteria. The proposal will also stop punishing innocent young people brought to the country through no fault of their own by their parents and give them a chance to earn their citizenship more quickly if they serve in the military or pursue higher education.
- Streamlining Legal Immigration:** Our immigration system should reward anyone who is willing to work hard and play by the rules. For the sake of our economy and our security, legal immigration should be simple and efficient. The President’s proposal attracts the best minds to America by providing visas to foreign entrepreneurs looking to start businesses here and helping the most promising foreign graduate students in science and math stay in this country after graduation, rather than take their skills to other countries. The President’s proposal will also reunify families in a timely and humane manner.

Continuing to Strengthen Border Security

- Strengthen border security and infrastructure.** The President’s proposal strengthens and improves infrastructure at ports of entry, facilitates public-private partnerships aimed at increasing investment in foreign visitor processing, and continues supporting the use of technologies that help to secure the land and maritime borders of the United States.
- Combat transnational crime.** The President’s proposal creates new criminal penalties dedicated to combating transnational criminal organizations that traffic in drugs, weapons, and money, and that

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In his visit to Oklahoma following the devastating tornadoes, President Obama promises the people of Moore that America is standing by to help rebuild.

May 25, 2013 5:30 AM EDT

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In this week’s address, President Obama commemorates Memorial Day by paying tribute to the men and women in uniform who have given their lives in service to our country.

May 24, 2013 7:23 PM EDT

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smuggle people across the borders. It also expands the scope of current law to allow for the forfeiture of these organizations' criminal tools and proceeds. Through this approach, we will bolster our efforts to deprive criminal enterprises, including those operating along the Southwest border, of their infrastructure and profits.

Improve partnerships with border communities and law enforcement. The President's proposal expands our ability to work with our cross-border law enforcement partners. Community trust and cooperation are keys to effective law enforcement. To this end, the U.S. Department of Homeland Security (DHS) will establish border community liaisons along the Southern and Northern borders to improve communication and collaboration with border communities, boost funding to tribal government partners to reduce illegal activity on tribal lands, and strengthen training on civil rights and civil liberties for DHS immigration officers.

Crack down on criminal networks engaging in passport and visa fraud and human smuggling. The President's proposal creates tough criminal penalties for trafficking in passports and immigration documents and schemes to defraud, including those who prey on vulnerable immigrants through notario fraud. It also strengthens penalties to combat human smuggling rings.

Deporting Criminals. The President's proposal expands smart enforcement efforts that target convicted criminals in federal or state correctional facilities, allowing us to remove them from the United States at the end of their sentences without re-entering our communities. At the same time, it protects those with a credible fear of returning to their home countries.

Streamline removal of nonimmigrant national security and public safety threats. The President's proposal creates a streamlined administrative removal process for people who overstay their visas and have been determined to be threats to national security and public safety.

Improve our nation's immigration courts. The President's proposal invests in our immigration courts. By increasing the number of immigration judges and their staff, investing in training for court personnel, and improving access to legal information for immigrants, these reforms will improve court efficiency. It allows DHS to better focus its detention resources on public safety and national security threats by expanding alternatives to detention and reducing overall detention costs. It also provides greater protections for those least able to represent themselves.

Cracking Down on Employers Who Hire Undocumented Workers

Mandatory, phased-in electronic employment verification. The President's proposal provides tools for employers to ensure a legal workforce by using federal government databases to verify that the people they hire are eligible to work in the United States. Penalties for hiring undocumented workers are significantly increased, and new penalties are established for committing fraud and identity theft. The new mandatory program ensures the privacy and confidentiality of all workers' personal information and includes important procedural protections. Mandatory electronic employment verification would be phased in over five years with exemptions for certain small businesses.

Combat fraud and identity theft. The proposal also mandates a fraud-resistant, tamper-resistant Social Security card and requires workers to use fraud-and tamper-resistant documents to prove authorization to work in the United States. The proposal also seeks to establish a voluntary pilot program to evaluate new methods to authenticate identity and combat identity theft.

Protections for all workers. The President's proposal protects workers against retaliation for exercising their labor rights. It increases the penalties for employers who hire undocumented workers to skirt the workplace standards that protect all workers. And it creates a "labor law enforcement fund" to help ensure that industries that employ significant numbers of immigrant workers comply with labor laws.

Pathway to Earned Citizenship

Create a provisional legal status. Undocumented immigrants must come forward and register, submit biometric data, pass criminal background and national security checks, and pay fees and penalties before they will be eligible for a provisional legal status. Agricultural workers and those who entered the United States as children would be eligible for the same program. Individuals must wait until the existing legal immigration backlogs are cleared before getting in line to apply for lawful permanent residency (i.e. a "green card"), and ultimately United States citizenship. Consistent with current law, people with provisional legal status will not be eligible for welfare or other federal benefits, including subsidies or tax credits under the new health care law.

Create strict requirements to qualify for lawful permanent resident status. Those applying for green cards must pay their taxes, pass additional criminal background and national security checks, register for Selective Service (where applicable), pay additional fees and penalties, and learn English and U.S. civics. As under current law, five years after receiving a green card, individuals will be eligible to apply for U.S. citizenship like every other legal permanent resident.

Earned citizenship for DREAMers. Children brought here illegally through no fault of their own by their parents will be eligible for earned citizenship. By going to college or serving honorably in the Armed Forces for at least two years, these children should be given an expedited opportunity to earn their citizenship. The President's proposal brings these undocumented immigrants out of the shadows.

Create administrative and judicial review. An individual whose provisional lawful status has been

revoked or denied, or whose application for adjustment has been denied, will have the opportunity to seek administrative and judicial review of those decisions.

Provide new resources to combat fraud. The President's proposal authorizes funding to enable DHS, the Department of State, and other relevant federal agencies to establish fraud prevention programs that will provide training for adjudicators, allow regular audits of applications to identify patterns of fraud and abuse, and incorporate other proven fraud prevention measures.

Streamlining Legal Immigration

Keep Families Together. The proposal seeks to eliminate existing backlogs in the family-sponsored immigration system by recapturing unused visas and temporarily increasing annual visa numbers. The proposal also raises existing annual country caps from 7 percent to 15 percent for the family-sponsored immigration system. It also treats same-sex families as families by giving U.S. citizens and lawful permanent residents the ability to seek a visa on the basis of a permanent relationship with a same-sex partner. The proposal also revises current unlawful presence bars and provides broader discretion to waive bars in cases of hardship.

Cut Red Tape for Employers. The proposal also eliminates the backlog for employment-sponsored immigration by eliminating annual country caps and adding additional visas to the system. Outdated legal immigration programs are reformed to meet current and future demands by exempting certain categories from annual visa limitations.

Enhance travel and tourism. The Administration is committed to increasing U.S. travel and tourism by facilitating legitimate travel while maintaining our nation's security. Consistent with the President's [Executive Order](#) on travel and tourism, the President's proposal securely streamlines visa and foreign visitor processing. It also strengthens law enforcement cooperation while maintaining the program's robust counterterrorism and criminal information sharing initiatives. It facilitates more efficient travel by allowing greater flexibility to designate countries for participation in the Visa Waiver Program, which allows citizens of designated countries to visit the United States without obtaining a visa. And finally it permits the State Department to waive interview requirements for certain very low-risk visa applicants, permitting resources to be focused on higher risk applicants and creates a pilot for premium visa processing.

"Staple" green cards to advanced STEM diplomas. The proposal encourages foreign graduate students educated in the United States to stay here and contribute to our economy by "stapling" a green card to the diplomas of science, technology, engineering and mathematics (STEM) PhD and Master's Degree graduates from qualified U.S. universities who have found employment in the United States. It also requires employers to pay a fee that will support education and training to grow the next generation of American workers in STEM careers.

Create a "startup visa" for job-creating entrepreneurs. The proposal allows foreign entrepreneurs who attract financing from U.S. investors or revenue from U.S. customers to start and grow their businesses in the United States, and to remain permanently if their companies grow further, create jobs for American workers, and strengthen our economy.

Expand opportunities for investor visas and U.S. economic development. The proposal permanently authorizes immigrant visa opportunities for regional center (pooled investment) programs; provides incentives for visa requestors to invest in programs that support national priorities, including economic development in rural and economically depressed regions; adds new measures to combat fraud and national security threats; includes data collection on economic impact; and creates a pilot program for state and local government officials to promote economic development.

Create a new visa category for employees of federal national security science and technology laboratories. The proposal creates a new visa category for a limited number of highly-skilled and specialized immigrants to work in federal science and technology laboratories on critical national security needs after being in the United States for two years and passing rigorous national security and criminal background checks.

Better addresses humanitarian concerns. The proposal streamlines immigration law to better protect vulnerable immigrants, including those who are victims of crime and domestic violence. It also better protects those fleeing persecution by eliminating the existing limitations that prevent qualified individuals from applying for asylum.

Encourage integration. The proposal promotes earned citizenship and efforts to integrate immigrants into their new American communities linguistically, civically, and economically.

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