

**U.S. GREEN CARD DELAYS WORSEN FOR
EMPLOYMENT-BASED IMMIGRANTS: OPTIONS
AVAILABLE FOR CONGRESS TO FIX THE PROBLEM**

EXECUTIVE SUMMARY

Today, many of the world's most talented people come to America and are told to wait five years – or leave the country. The enormous backlogs and wait times for employment-based green cards sends a signal to many international students and other outstanding individuals that America may not be the place to build your career or raise your family. Given the importance of foreign-born scientists and engineers to the U.S. economy, failure to solve this problem threatens the level of innovation that takes place in America and the competitiveness of many U.S. companies.

Even if Congress provides increases in employment-based immigration quotas it does not appear the backlogs for nationals from certain high volume countries will be eliminated in the near term due to the impact of the per country limits. Without changes in the per country limits it appears that if Congress passes new increases in employment-based numbers we may have a situation where, for example, a Moroccan computer professional might receive his green card in one year, while an Indian engineer might wait four years. In essence the Indian would be penalized for having been born in a country with a large population.

Given what we know about the possible extent of the employment-based backlogs and the likely impact of the per country limits in preventing timely elimination of those backlogs, it may be time to consider eliminating the per country limits for employment-based immigrants. Eliminating the per country limits would make the policy consistent with H-1B visas, which have no per country limitations, and would also establish a policy going forward that is unlikely to result in employees from large countries experiencing longer waits for green cards than individuals from small nations. Making employment-based green card categories current for skilled immigrants could provide important competitive advantages for U.S. employers battling for talent against foreign competitors.

BACKGROUND

Today, many of the world's most talented people come to America, wish to join our society, and are told to wait five years or more for a green card (permanent residence). This sends a signal to many international students and other outstanding individuals that America may not be the place to build your career or raise your family. Given the importance of foreign-born scientists and engineers to the U.S. economy, failure to solve this problem threatens the level of innovation that takes place in America and the competitiveness of many U.S. companies.

Patricia McDermott, a manager at Keane, Inc., which has an estimated 225 sponsored employees "in limbo" waiting for employment-based green cards, says the waits inflict an enormous "human cost" on individuals and their families.¹ These individuals and others like them were generally first hired on H-1B temporary visas, which

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are good for only two three-year periods but can be extended if a green card application is pending. For H-1B professionals to stay in the country permanently they must be sponsored for permanent residence (green card) by an employer. (Some foreign nationals may qualify in categories that do not require employer sponsorship.)

Those waiting for their green cards cannot travel freely nor, in most cases, can they transfer positions or have their spouses work.² This also harms innovation, as those with new ideas cannot go on to start new companies or gain venture capital, as in the past. A study released by the National Venture Capital Association found that since 1990 one in four (25 percent) of America's publicly traded venture-backed companies had at least one immigrant founder.³ Individuals are often hesitant to change jobs, since that would often trigger the start of a new application and waiting period.

WAIT TIMES FOR EMPLOYMENT-BASED IMMIGRANTS

By law, the current annual limit on employment-based immigrant visas (green cards) is 140,000. This has demonstrated to be well below demand, creating backlogs of 5 years or more in key categories. Such wait times make it virtually impossible for individuals to be hired directly on green cards. (The 140,000 figure includes spouses and minor children of the sponsored immigrant.) The wait times do not include "labor certification" processing at the U.S. Department of Labor.

Table 1 represents NFAP's current estimates of likely wait times. In certain categories, the unavailability of green cards has worsened significantly in the past two years. An employment-based immigrant in the Skilled Workers and Professionals category (3rd preference) can expect to wait at least 5 years for a green card from most countries but 6 years from India, which is longer than the wait projected last year for potential immigrants from India. These wait times are likely to worsen further absent legislative changes by Congress. The wait times for Priority Workers (1st preference) and Advanced Degree Holders and Persons of Exceptional Ability from China and India range from 1 to 3 years.⁴

Wait times are based on "cut-off dates." To stay within the numerical limits, after estimating the demand in a category, the State Department assigns a "cut-off" date that leads to processing only applications filed prior to that date. Per-country limits for employment-based immigrants are generally set at 7% of the 140,000 annual limit, though they can exceed 7% if visa slots would otherwise be left unused for skilled workers.⁵

Table 1: Wait Times for Employment-Based Immigrants

	China	India	Mexico	Philippines	All Other Countries
Priority Workers (1st Preference)	Numbers Immediately Available to Qualified Applicants	Numbers Immediately Available to Qualified Applicants	Numbers Immediately Available to Qualified Applicants	Numbers Immediately Available to Qualified Applicants	Numbers Immediately Available to Qualified Applicants
Advanced Degree Holders and Persons of Exceptional Ability (2nd Preference)	2 year wait (Processing applications before April 2005)	4 year wait (Processing applications received before January 2003)	Numbers Immediately Available to Qualified Applicants	Numbers Immediately Available to Qualified Applicants	Numbers Immediately Available to Qualified Applicants
Skilled Workers and Professionals (3rd Preference)	5 year wait (Processing applications before August 2002)	6 year wait (Processing applications before May 2001)	6 year wait (Processing applications before May 2001)	4 year wait (Processing applications before August 2003)	4 year wait (Processing applications before August 2003)
Other Workers	Unavailable	Unavailable	Unavailable	Unavailable	Unavailable

Source: U.S. Department of State Visa Bulletin, May 2007; National Foundation for American Policy. Once a number/visa is available processing can take from 2 months at an overseas post to longer periods with U.S. Citizenship and Immigration Services. Wait times are approximate. The wait times do not include "labor certification" processing at the U.S. Department of Labor.

THE CURRENT BACKLOG

In this NFAP analysis, by "backlog" we refer to a long list of applicants registered on immigrant visa waiting lists whose turn cannot be reached because of the annual numerical limitations on immigration. By definition, an alien cannot be registered on an immigrant visa waiting list until the petition filed on his/her behalf has been approved by U.S. Citizenship and Immigration Services (USCIS).

The information on the current wait times for employment-based immigrant visas in Table 1 is based on the U.S. Department of State Visa Bulletin (May 2007). As one can see, for most countries the wait in the third preference (the most common skilled employment-based category) is 5 years or more. But it's possible that even these estimates understate the true eventual waiting times, since, as GAO has pointed out, "The availability of visas issued by the Department of State will not affect the backlog as defined by U.S. Citizenship and Immigration

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Services (USCIS) because USCIS excludes from its count of backlog those cases for which a visa is not available.”⁶

A key reason for this is the existence of “per country” limits. As GAO explains: There are also annual numerical limitations on the number of visas that can be allocated per country under each of the preference categories. Thus, even if the annual limit for a preference category has not been exceeded, visas may not be available to immigrants from countries with high rates of immigration to the United States, such as China and India, because of the per country limits.”⁷

While we do not know the precise extent of the State Department backlog of employment-based immigrant cases (and the number cases not yet adjudicated at USCIS), it is fair to assume it is quite large by examining a few facts. 1) Approximately 120,000 individuals a year have received new approved H-1B petitions for initial employment in each of the past 6 years, according to the Department of Homeland Security.⁸ 2) It is estimated that half or more of these individuals have been (or will be) sponsored for a green card by their employers. 3) There are no per country limits on H-1B visas and, logically, the bulk of these temporary visas go to nationals from countries with large populations and sound technical educational systems. Many such individuals come to the United States first as international students before being recruiting on campuses after graduation. India has accounted for approximately half of H-1B professionals each year. In FY 2005, approximately 57,000 H-1B petitions were approved for initial employment for professionals from India and about 11,000 for those from China. 4) H-1B petitions do not count spouses or children, which when counted for immigration estimates usually are calculated as 1.2 dependents per principal immigrant.

Adding these factors together, it is not unreasonable to assume there could be as many as 150,000 to 200,000 Indian nationals in the United States waiting for an employment-based green card. Nationals from China and Mexico are more likely to be backlogged in the tens of thousands. These figures could be higher for a number of reasons, since individuals could also be in the United States on other visa types (L-1 or J-1) and be sponsored for a green card.

Given that under the current employment-based green card quotas and per country limits as few as 1,275 professionals from India or China may end up receiving a green card in a preference category in a given year (2,803 counting dependents), it's clear that absent significant Congressional action the wait for individuals from particular countries will be extremely long indeed.

UNDERSTANDING THE IMPACT OF PER COUNTRY AND ANNUAL LIMITS

In 1990 the existing system of separate ceilings on “family-based” and “employment-based” immigration was established, with the per country ceiling applicable across both systems.

Currently, the overall annual limitation on family-based immigration is 226,000 and, as noted, 140,000 for employment-based immigration. Each preference is assigned a percentage of the overall total. Within those totals, there is a limit (the per country ceiling) of 7% on immigration by natives of any single foreign state. The per country ceiling is pro-rated among the preferences, so that in each preference under both overall limitations natives of any single foreign state are limited to 7% of the visa numbers available for that preference.

In the 109th Congress the Senate considered and passed S. 2611, an omnibus immigration bill that included large increases in the annual numerical limitations on immigration, primarily designed to address the significant backlogs on family and employment-based immigration. (In addition, the bill also included provisions expanding classes of employment-based immigrants exempt from the annual numerical limitations.) S. 2611 never became law, since the House and the Senate never held a conference to reconcile S. 2611 with a House-passed omnibus immigration bill.⁹

S. 2611 has not been reintroduced in the current Congress, but a similar (but not identical) bill, H.R. 1645 (the STRIVE Act), has been introduced in the House and it is expected that there will further debate and consideration of omnibus immigration legislation before the 110th Congress ends, including consideration of portions of S. 2611.

Currently, the annual overall limitation on employment-based immigration of 140,000 is apportioned among five preference classes. The first three are reserved for needed workers and their spouses and children.

Some argue that even proposed major increases in employment-based immigration will not totally eliminate the current backlogs in the first three employment-based preferences since the per country ceiling will prevent natives of selected foreign states from benefiting from the increases. The foreign states involved are China, India, Mexico and the Philippines. All are countries from which demand for immigration across both limitations exceeds the current per country ceiling.

Under the current system the per country ceiling on the first three employment-based preference is 2,803 per preference, a total of 8,409. Using the State Department’s estimate that a worker in those three preferences has an average of 1.2 dependents (spouse & children), roughly 1,275 actual needed workers in each preference from each of the four foreign states concerned become permanent residents, a total of 3,825.

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Under S. 2611, the per country ceiling would be increased from 7 percent of the overall limitation to 10 percent. Because of the major increase in the overall employment-based limitation and changes in the apportionment of the limitation among the preferences, the new total for each of the four foreign states would be 6,750 each for the first two preferences and 15,750 for the third preference, a total of 29,250.

More important, under S. 2611, the spouses and children of employment-based immigrants would be exempt from both the overall employment-based limitation and the per country ceiling. Thus, the number of actual needed workers from each of the four foreign states will increase from roughly 3,825 to 29,250, approximately a seven-fold increase.

In addition, a separate provision of S. 2611 will exempt some of the needed second and third preference workers themselves from all numerical limitations for a ten-year period.¹⁰ However, the bill also put in place a 650,000 ceiling on all employment-based immigrants, regardless of whether they are exempt from other numerical limitations.¹¹

The STRIVE Act increases the limits on employment-based immigration and includes exemptions from the cap. But it is not clear how extensive some of the exemptions will be used initially, given their specificity. For individuals not exempt from the new annual employment limit, the STRIVE Act allows the per country limit to rise from 7 percent to 10 percent. Like S. 2611, the STRIVE Act also puts in place a 650,000 ceiling on all employment-based immigrants, regardless of whether they are exempt from other numerical limitations.

BOTTOM LINE ASSESSMENT

Despite the employment-based immigration increases proposed in S. 2611 and the STRIVE Act, it does not appear the backlogs for nationals from certain high volume countries will be eliminated in the near term due to the impact of the per country limits. It also appears that with the new increases in numbers we may have a situation where, for example, a Moroccan computer professional might receive his green card in one year, while an Indian engineer might wait four years. In essence, the Indian would be penalized for having been born in a country with a large population.

Given what we know about the possible extent of the employment-based backlogs and the likely impact of the per country limits in preventing timely elimination of those backlogs, it may be time to consider eliminating the per country limits for employment-based immigrants.

THE CASE FOR MAINTAINING THE CURRENT PER COUNTRY LIMITS FOR EMPLOYMENT-BASED IMMIGRANTS

One could argue that individuals from some countries should not represent an overwhelming number of the nation's immigrants in a category, in this case, the employment-based category. It could also be argued that if we are going to maintain the per country limits for family immigration, then we should keep them for employment-based immigration as well. Finally, one could state that Congress established per country limits for a reason and may not want to jettison something that has been a part of the law for many years.

THE CASE FOR ELIMINATING PER COUNTRY LIMITS FOR EMPLOYMENT-BASED IMMIGRANTS

Counterbalancing the tendency of Congress to want to maintain provisions that have existed in law for many years, there is a compelling case to be made for simply eliminating the per country limits for employment-based immigrants. First, back in 2000, Congress made the per country limits moot or inoperable in any year when utilizing the per country limits would result in employment-based visas going unused. This was done because in some years, only 90,000 of the 140,000 employment-based limit would be used, while would-be immigrants from India and China were unable to obtain green cards even though 50,000 visa slots would simply go unused.¹²

Second, in addition to a policy of not applying the per country limits when employment-based green cards would go unused, Congress already permits hiring on H-1B temporary visas to be made without regard to nation of origin. It is not surprising that nationals of countries with large populations are among the most numerous recipients of U.S. company job offers and H-1B visas. Since so many H-1B professionals are later sponsored for green cards by employers there is a disconnect in U.S. policy between the start of the path to permanent residence (H-1B temporary visas that include no per country limits) and the path's final destination (green card quotas with strict per country limits).

Third, the purpose of the per country limits for family-based limits seem different than those for employment. In the family categories the purpose is to prevent one or a few countries from crowding out individuals from other countries. In the employment-based categories, U.S. employers are hiring based on merit, without regard to race, religion or nationality. In fact, it is a moral and legal hallmark in America that hiring be accomplished without regard to such factors. Ironically, if U.S. companies decided among themselves to offer green cards to only a certain number of Indians or Chinese in a given year, then they would face both public and legal scorn. However, in essence, the U.S. government is mandating such a policy for U.S. companies.

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Fourth, there is a practical issue with regards to what is the intent of U.S. policy or new legislation. If the intent is to eliminate or significantly reduce the employment-based backlog, then that goal may be incompatible with maintaining per country limits for employment-based immigration at 7 percent or even 10 percent.

POLICY OPTIONS

1) Maintain the Status Quo. Congress could decide to maintain the status quo and not increase employment-based green card quotas, add new exemptions from the quotas, or raise the per country limits. Such a policy will allow current backlogs to worsen and likely lead to more professionals and researchers leaving the United States out of frustration or deciding not to come to America in the first place.

2) Raise Quotas and Add Exemptions But Change Per Country Limits Minimally. This is the approach taken in S. 2611 and the STRIVE Act. It is not clear whether increasing the per country limit from only 7 to 10 percent was made because the two bills' authors thought this would be sufficient to eliminate the backlogs or for other reasons. Analysis shows that raising the per country limit only to 10 percent, despite the other quota increases and exemptions added to the law, may still result in significant wait times for a number of years for engineers and scientists from India and possibly China and other countries. Such a policy would likely have an effect similar to that mentioned above but much less so given the quota increases and exemptions.

3) Clear the Employment-Based Backlog by Declaring Current Registrants Non-Quota. C.D. Scully, a former high ranking State Department official in the Visa Office, notes that a proposal to declare current registrants "non-quota" (to exempt them from numerical limitations on immigration) coupled with more modest increase in the employment-based immigration system might prove less contentious than the increases proposed in S.2611 or even in H.R. 1645 (the current bill). Such a proposal could be limited to registrants physically present in the United States on a specified date, which would likely include almost all backlogged applicants in the first three employment-based preferences, as well as a substantial number of those backlogged in the family-based preferences.¹³ Whether or not this proves less contentious politically is for elected officials to decide but it is offered here as a policy option.

4) Raise Quotas and Add Exemptions and Eliminate Per Limits for Employment-Based Immigration. If the goal is to come close to making employment-based green card categories current by substantially reducing or doing away with the current employment-based green card backlogs, then eliminating the per country limits for skilled employment-based immigrants is likely the best alternative to achieve that result. As discussed above, Congress already has a partial policy, particularly on H-1B visas, of taking no stand on the country of origin of the skilled foreign nationals hired by U.S. employers. Eliminating the per country limits would make the policy consistent with H-1B visas and would also establish a policy going forward that is unlikely to result in employees

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from large countries experiencing longer waits for green cards than individuals from small nations. Making employment-based green card categories current for skilled immigrants could provide important competitive advantages for U.S. employers battling for talent against foreign competitors.

APPENDIX

A SHORT HISTORY OF NUMERICAL QUOTAS

The concept of a numerical limit both on immigration generally and on immigration from individual countries dates back to the beginning of our modern immigration system. The First Quota Law of 1921 and the Immigration Act of 1924 established the “national origins” quotas – a fixed annual limit on immigration by natives of a country. Some countries had large quotas – e.g.; the United Kingdom, Germany – most had much smaller, even miniscule, quotas. In 1952 the Immigration and Nationality Act perpetuated the “national origins” quota system. In all three cases, immigration by natives of independent countries of the Western Hemisphere was unlimited.

Throughout, there was a system of preferences within each quota. The specifics of which classes of immigrants – relatives of varying degrees (now referred to as “family-based”) and types of needed workers (now referred to as “employment-based”) – varied from enactment to enactment, but in all cases the two types were in a single order.

The Immigration Act of 1965 made a series of substantial changes in the old system. First, it abolished the “national origins” quota system and substituted for it overall hemispheric limitations – 120,000 for the Western Hemisphere; 170,000 for the Eastern Hemisphere. Under the Eastern Hemisphere limitation, there were seven preferences – the first, second, fourth and fifth preferences were “family-based”; the third (professional-level workers) and sixth (skilled and unskilled workers) were “employment-based.” The seventh was for refugees. At the same time, a ceiling of 20,000 was established on immigration under the limitation by natives of any individual foreign state (the per country ceiling). The purpose of the 20,000 per country ceiling was essentially to prevent pent-up demand from former small-quota countries from effectively shutting out immigration from the others.

Initially, the system of preferences and per country ceilings did not apply to the Western Hemisphere, but was applied to that Hemisphere also in 1976. In 1978, the two parallel systems were merged into a single worldwide system, with an over all ceiling of 290,000.

In 1990 the existing system of separate ceilings on “family-based” and “employment-based” immigration was established, with the per country ceiling applicable across both systems.

END NOTES

¹ Interview with NFAP.

² The problem of such individuals being able to “travel freely” is related to administrative problems at USCIS.

³ Stuart Anderson and Michaela Platzer, *American Made*, National Venture Capital Association, November 2006.

⁴ Today, it is also not possible to hire individuals directly on green cards for lower skilled positions, given the processing and backlogs in the Other Workers category, which is statutorily limited to 10,000 a year. Of the 10,000 in the Other Workers category, 5,000 have been made available to qualified Central Americans under the Nicaraguan Adjustment and Central American Relief Act, passed in 1997. The State Department now lists visas for Other Workers as “unavailable” for the rest of the 2007 fiscal year. Unlike for high skilled occupations, there are no equivalent temporary visa categories for jobs in hotels, restaurants, or agriculture, except for H-2A, the cumbersome agricultural guest worker visa, and H-2B, which is limited to temporary and seasonal, non-agricultural jobs.

⁵ Under Section 202(a)(5) of the Immigration and Nationality Act, “If the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 203(b) for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.”

⁶ *Immigration Benefits*, Government Accountability Office, November 2005 (GAO-06-20), p. 43. In this context the USCIS “backlog” refers to the administrative backlog of unadjudicated petitions at USCIS. Those would be in addition to the State Department visa waiting list.

⁷ Ibid.

⁸ *Characteristics of Specialty Occupation Workers (H-1B): FY 2005*, Office of Statistics, Department of Homeland Security, November 2006, Table 4-A. The number is higher than the 65,000 annual limit due to exemptions from the annual numerical limitations.

⁹ For an analysis of the numerical impact of S. 2611 go to:

<http://www.nfap.com/researchactivities/studies/NFAPPolicyBriefImmigrationNumbersInContext0606.pdf>

¹⁰ Section 505 of S. 2611 would exempt from the numerical limitations all needed workers “seeking admission to the United States to perform labor in shortage occupations designated by the Secretary of Labor for blanket certification under section 212(a)(5)(A)...” Only needed workers in the second and first employment-based preference are subject to determinations by the Secretary of Labor under section 212(a)(5). Workers in the first

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employment-based preference are exempt from the determination. The term “blanket certification” in section 505 is a reference to the Department of Labor’s Schedule A, a list of professions in nation-wide short supply. Second and third preference needed workers qualified in those professions are automatically certified upon a showing of qualification in the profession and do not require an individual determination as to their proposed employment. Currently, there are three listing under Schedule A – physical therapists, professional nurses, and workers in any science or art (except a performing art) who have practiced the science or art for at least one year and have demonstrated exceptional ability in the science or art, according to standards established by the Secretary of Labor. It is not possible to quantify specifically how many such workers will benefit or of which countries they will be natives. However, at least some second preference workers from each of the four foreign states concerned will benefit.

¹¹ It is likely the 650,000 limitation, when combined with exemptions from the employment-based limits, will, at minimum, prove exceedingly difficult for the State Department to administer.

¹² Section 202(a)(5) of the Immigration and Nationality Act. See note 5.

¹³ C.D. Scully’s suggestions and history on the per country limits are appreciated. He notes that between 1952 and 1965, as agitation increased to abolish the old “national origins” quota system, one of the points made by those in favor of abolishing them was the backlogs that had built up under the oversubscribed quotas. The opponents of abolishing the “national origins” quotas staved off what became the 1965 Act for a number of years by what was then called “non-quota relief.” Several acts were passed declaring that anyone registered on certain quota waiting lists with a registration date earlier than a specified date was “non-quota”, i.e., not subject to the numerical limitations on immigration.

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