

Green Card Backlog Wouldn't End With Country-Cap Fix

By **Nicole Narea**

Law360 (July 15, 2019, 8:45 PM EDT) -- Eliminating per-country caps on employment-based green cards as outlined in recent legislation would slash wait times for Indian nationals, but to clear backlogs for all applicants the number of green cards available annually must be increased, attorneys say.

This month the House voted 365-65 to eliminate per-country caps on employment-based green cards, equalizing the amount of time any new applicant waits to receive their card, regardless of where they were born.

Currently, only 7% of the total employment-based and family-based green cards allocated per year can be offered to nationals from a single country. The Fairness for High-Skilled Immigrants Act would eliminate that 7% cap for employment-based green cards and increase the family-based green card cap to 15% per country.

Attorneys described the bill as a step toward ameliorating long backlogs and making the system more fair to countries like India. But it is not enough to fully clear backlogs across all countries, for which additional legislation increasing the number of green cards available is necessary but not politically feasible in the current environment.

"We're in a crazy time," said Laura Reiff, a shareholder at Greenberg Traurig LLP. "It's unfortunate that good legislation like this can't be paired with legislation that makes the system more reasonable and fair."

The House Bill

Allen Orr, an immigration lawyer in Washington, D.C., and a national officer for the American Immigration Lawyers Association, said that the original concept of the country caps, which were enacted in the 1960s, was not malicious — they were intended to foster diversity among immigrants to the U.S. But it has "proven in application to be discriminatory," he said.

He said that Indian nationals, some of whom have been in line for a green card for a decade or more, are essentially a captive workforce consistently renewing nonimmigrant visas with the same employer while they wait.

"It's involuntary servitude," he said. "If we care about skills, why does it matter where somebody is

born? As a person of color, I don't find [eliminating country caps] problematic."

Reiff said that if the House bill were enacted as is, there would be a shift to a "first-in-first-out" system under which more Indian nationals would be moved to the front of the line while other countries would move farther back. Chinese investors on EB-5 visas, for example, might see their wait times increase.

Paul Virtue, a partner at Mayer Brown LLP, said that it would most benefit information technology companies whose Indian employees are largely already in the U.S. on employment-based nonimmigrant visas.

Raising Overall Green Card Levels

But attorneys said that eliminating country caps does not ameliorate backlogs, which will only continue to grow in a tight labor market.

To do that, Congress could eliminate what is called the "derivative count" under which spouses and dependents of employment-based green card holders are counted against the overall annual cap on green cards, they said. The available employment-based green cards are statutorily set at 140,000 plus the number of unused family-based green cards from the previous year.

David Bier, an immigration policy analyst at the Cato Institute, said that spouses and dependents account for over half of the available employment-based green cards.

Reiff said that eliminating the derivative count along with the per-country caps would be a "much more equitable way" of distributing employment-based green cards and better reflect Congress' true intent in setting the cap, which is supposed to reflect the number of workers allowed in.

But Virtue said that even with those policies taken together, two countries would still dominate the system.

"It would have an even more dramatic effect in reducing backlogs, but it's not going to change the fact that Indians and Chinese would be the largest people benefiting," Virtue said. "That would be true for many years to come."

Reiff noted that it would be even better to have a market-based employment system under which the number of green cards available are not statutorily limited but fluctuate based on demand in the labor market. Such a measure, however, would likely be too politically controversial, she said.

Will It Pass in the Senate?

While eliminating per-country caps has been a policy goal for immigration attorneys for decades, Reiff said the "real prospects of this going anywhere are almost nil."

She noted that the Senate companion bill, S.B. 386, has been put on hold by its co-sponsor Sen. Rand Paul, R-Ky., who raised concerns about adverse effects for hospitals trying to hire nurses.

Under the current system, Bier said that most foreign nurses are Filipinos who do not tend to hit the annual 7% per-country cap, and therefore hospitals have been able to bring them to the U.S. in under a year.

He added that, in most industries, eliminating country caps would not be debilitating because workers could stay on H-1B skilled worker visas and wait about six years for an employment-based green card. But nurses and home health aides are not eligible for H-1Bs, so they would have to wait the full six years before they could work in the U.S. on a long-term basis with an employment-based green card, he said.

Paul has consequently proposed an amendment that would exempt nurses from the green card cap entirely and allow them to be immediately admitted to the U.S., but after Sens. Chuck Grassley, R-Iowa, and Mike Lee, R-Utah, rejected it, he put the bill on hold.

"Everyone admits we need nurses, so it's unclear why it wouldn't be resolved, but some people object to any increase in green cards," Bier said.

Grassley has also introduced language in the Senate bill that would impose more reporting requirements on H-1B applicants with the aim of weeding out fraud.

Reiff expressed skepticism that the bill would pass in the Democratic House with Grassley's amendment, but Bier said it might be less of an issue for Democrats as it is for some Republicans who do not want to see H-1Bs become more expensive.

Virtue acknowledged that fraud exists but said Grassley's proposal would "complicate the adjudication of H-1B cases and slow down the availability of qualified workers to fill much-needed positions."

And Orr questioned whether H-1B fraud was actually as prevalent as Grassley makes it out to be.

"When you look for something, you will find it," he said. "But that doesn't mean it's a large pool of people."

There are better ways to address fraud than imposing additional administrative burdens on H-1B petitioners and employers, particularly small businesses, he added.

--Editing by Philip Shea and Brian Baresch.