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HOUSE AND SENATE LEGISLATION ON HIGH SKILL IMMIGRATION

EXECUTIVE SUMMARY

If Congress takes up immigration reform legislation later this year, employers and the U.S. economy will benefit from several provisions on high skilled immigration. Key parts of the bills would open the door to more highly skilled individuals. However, other aspects of the legislation will, at minimum, complicate the hiring and recruitment process. The best approach for growth, innovation and the U.S. economy would combine the best features of the House and Senate bills. That would mean 1) selecting the less-restrictive House approach to H-1B visas, after changing the requirement that foreign nationals should be paid more than their U.S. counterparts, 2) adopting the Senate approach to employment-based green cards, since that provides more green cards and will eliminate the current backlog, and 3) taking the best elements of the House and Senate measures on immigrant entrepreneur visas, particularly the provision in S. 744 to permit a renewable temporary status for a foreign-born entrepreneur. S. 744 passed the U.S. Senate in June 2013, at nearly the same time the House Judiciary Committee passed H.R. 2131, the SKILLS Visa Act. Neither H.R. 2131 nor other House immigration bills have moved to the House floor. A grant from the Ewing Marion Kauffman Foundation funded the research for this NFAP paper. The contents of this publication are solely the responsibility of the National Foundation for American Policy.

NEW MEASURES	H.R. 2131 (passed Judiciary Com.)	S. 744 (passed Senate)
H-1B Visas	H-1B cap would increase from 65,000 to 155,000; exemption for master's degree from U.S. university (only STEM) increased from 20,000 to 40,000.	H-1B cap would rise to 115,000, but could go up to 180,000 (in 20,000 increments) depending on unemployment rate for professionals; exemption for master's degree from U.S. university increased from 20,000 to 25,000.
Employment-Based Green Cards	H.R. 2131 would eliminate the per country limit and add 85,000 more employment-based green cards, including 55,000 for individuals with master's degree or higher from a U.S. university in a STEM field. (It will be effectively 80,000 until a 5,000 a year subtraction for NACARA green card recipients expires.) Could utilize unused entrepreneur visas.	S. 744 would eliminate entire employment-based immigrant backlog and provide sufficient future green cards via exemptions from the 140,000 annual quota for dependents, Ph.D.s, advanced degree holders in STEM fields and current EB-1 immigrants; also would eliminate per country limit.
Entrepreneur Visas	Adds 10,000 green cards for entrepreneurs who create 5 qualified jobs and raise at least $500,000 from a venture capitalist or other qualified investor.	Adds 10,000 green cards for entrepreneurs who create 5 qualified jobs and raise at least $500,000 from a venture capitalist or other qualified investor. But provides additional options for those who don't meet those criteria and establishes a new temporary category for entrepreneurs who attract at least $100,000 in "qualified" investments or create at least 3 qualified jobs and generate $250,000 in revenue.
New Restrictions/Regulations	Requires skilled foreign nationals to be paid higher than U.S. workers and imposes the requirement on H-1B, L-1 and TN visa holders.	Requires foreign nationals (H-1B) to be paid more than U.S. workers, grants DOL almost unlimited investigative authority and mandates "good faith" recruitment. A series of measures aimed at some employers (generally those with 50 percent or more H-1B/L-1 visa holders in workforce) are likely to violate U.S. commitments under the General Agreement on Trade in Services (GATS). The likely GATS violations include higher fees, prohibiting new H-1B and L-1 petitions, and barring those employers from performing work for U.S. clients off-site.

Source: S. 744, H.R. 2131; National Foundation for American Policy.

PROBLEMS IN THE CURRENT EMPLOYMENT-BASED IMMIGRATION SYSTEM

Three primary problems plague America's employment-based immigration system – insufficient high skill temporary visas, long waits for green cards, and the absence of an immigration category for entrepreneurs. Legislation in Congress seeks to address these problems and parts successfully do so in a reasonable manner. However, other parts of those bills, particularly provisions in S. 744, the Senate-passed immigration bill, could make it more difficult to hire and retain skilled foreign nationals due to proposed restrictions. Below is a look at three key areas of high skill immigration and the current issues that need to be addressed in employment-based immigration.

AN INSUFFICIENT H-1B VISA QUOTA

Without H-1B temporary visas the vast majority of skilled foreign nationals could not work or remain in the United States.[1] H-1B status, which is generally good for up to 6 years (with a renewal after three years), enables foreign nationals to work in the United States on short-term projects, for longer-term work, or as a prelude to permanent residence (commonly known as a green card).

By law, companies that hire H-1B professionals must pay the higher of the prevailing wage or actual wage paid to "all other individuals with similar experience and qualifications for the specific employment in question."[2] Employers must also comply with a series of complex rules related to, among other things, the placement of employees at off-site facilities. Going back to the 1950s, H-1s typically could not come to the United States if they intended to stay permanently. In 1990, Congress changed the law to provide "dual intent," which allowed H-1B visa holders to intend to become permanent residents.

Importantly, although the Immigration Act of 1990 was positive on employment-based green cards, Congress also imposed an annual limit of 65,000 on H-1B visas, without any clear idea whether that number would be sufficient in later years. Congress also added new labor condition application requirements. "From an employer's perspective, the changes to H-1 were not positive. The new requirements delayed the application process and were essentially protectionist in nature," recalled Warren Leiden, of counsel, Berry Appleman and Leiden, and executive director of the American Immigration Lawyers Association when the 1990 Act became law.[3] In 1998, Congress exempted U.S. universities and non-profit research institutes from the 65,000 cap. In 2004, Congress exempted up to 20,000 H-1B professionals a year from the cap if they had a master's degree or higher from a U.S. university.

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[1] While other visa categories exist, they carry significant restrictions that limit their applicability to most skilled foreign nationals, such as an L-1 visa, which requires working abroad for a company for at least a year and then qualifying as a manager, executive or an employee with "specialized knowledge" under USCIS regulations to reenter the United States.
[2] Section 212(n)(1) of the Immigration and Nationality Act.
[3] Interview with Warren Leiden via email.

Table 2
H-1B VISAS ISSUED AGAINST THE CAP BY YEAR

Year	CAP*	#Issued	#Unused
1992	65,000	48,600	16,400
1993	65,000	61,600	3,400
1994	65,000	60,300	4,700
1995	65,000	54,200	10,800
1996	65,000	55,100	9,900
1997	65,000	65,000	0
1998	65,000	65,000	0
1999	115,000	115,000	0
2000	115,000	115,000	0
2001	195,000	163,600	31,400
2002	195,000	79,100	115,900
2003	195,000	78,000	117,000
2004	65,000	65,000	0
2005	65,000	65,000	0
2006	65,000	65,000	0
2007	65,000	65,000	0
2008	65,000	65,000	0
2009	65,000	65,000	0
2010	65,000	65,000	0
2011	65,000	65,000	0
2012	65,000	65,000	0
2013	65,000	65,000	0
2014	65,000	65,000	0
2015	65,000	65,000	0

Source: Department of Homeland Security; National Foundation for American Policy.
*Does not include exemptions from the cap. Exemptions from the cap include those hired by universities and non-profit research institutes and 20,000 individuals who received a master's degree or higher from a U.S. university.

Still, even with these changes, the low annual quota of 65,000 has been reached before the end of each fiscal year – often before the start of a fiscal year – for more than a decade. This has meant for several months at a time (or over a year) employers could not hire skilled foreign nationals to work in the United States on new H-1B visas.

This is a continuing problem for employers. From FY 1997 to FY 2015, employers exhausted the supply of H-1B visas every year, except when the ceiling was temporarily increased for the years FY 2001 to FY 2003. This year, on April 7, U.S. Citizenship and Immigration Services (USCIS) announced it had received "a sufficient number of H-1B petitions to reach the statutory cap for fiscal year (FY) 2015," as well as the exemption for 20,000 advanced degree holders.[4] That was approximately 6 months before the 2015 fiscal year began on October 1, 2014. No petitions for new cases would be accepted. Employers would need to wait for the results of a lottery to find out if their filings for skilled foreign nationals would result in H-1B status for a desired professional.

The low annual quota encourages increased investment outside the United States. As noted in a 2013 NFAP report, companies make investment decisions based on predictability; jobs flow based on those investments.[5] To deal with the H-1B cap, large employers develop contingency plans, such as hiring foreign nationals and placing them outside the United States or, if the individuals qualify, allowing them to work for a time in Optional Practical Training (OPT) status as a recent graduate.

The situation is worse for smaller employers. The National Venture Capital Association surveyed 600 smaller companies that received venture capital investment and found 43 percent of the companies "said the lack of H-1B visas influenced the company's decisions to place or hire more personnel in facilities located outside the United States." The study noted the proportion would likely have been higher "except that many of the privately-owned companies in the survey are newer or of a size where a foreign facility is not a viable option."[6]

The survey found contrary to the low H-1B limit preventing the "outsourcing" of jobs, many companies say the restrictions themselves move work outside the United States. "We recently opened an office in India for software developers. We were forced to do this because we simply could not find qualified people in the U.S. who met our specific technical needs," noted one company. Another said, "We have decided to hire more in the India office as a result and plan on expanding that office instead of our New York or Philadelphia office."[7]

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[4] "USCIS Reaches FY 2015 H-1B Cap," Press Release, U.S. Citizenship and Immigration Services, April 7, 2014.
[5] Stuart Anderson, *H-1B Visas Essential to Attracting and Retaining Talent in America*, NFAP Policy Brief, National Foundation for American Policy, May 2013.
[6] Stuart Anderson, *American Made 2.0: How Immigrant Entrepreneurs Continue to Contribute to the U.S. Economy*, National Venture Capital Association, July 2013.
[7] Ibid.

Table 3
H-1B Statistics in a Snapshot

H-1B-Led Productivity Gains	Growth in foreign STEM workers "may explain between 10 and 25 percent of the aggregate productivity growth . . . that took place in the U.S." from 1990-2010." (Peri, Shih, Sparber)
H-1B and Increased U.S. Jobs	Each additional 100 approved H-1B workers associated with an additional 183 jobs among U.S. natives from 2001-2010. (Zavodny)
H-1B and Increased U.S. Wages	"An increase in foreign STEM workers of 1 percent of total employment increased the wage of native college educated workers (both STEM and non-STEM) over the period 1990-2000 by 4 to 6 percent." (Peri, Shih, Sparber)
H-1B Professionals Earn Comparable or Higher Wages Than U.S. Workers in Same Age Grouping	Median salary Electrical/Electronics Engineering age 20-39 H-1B: $80,000 vs. U.S. worker: $75,000. Median salary Systems Analysis/Programming age 20-29: H-1B: $60,000 vs. U.S. worker: $58,000. (GAO)
H-1B and Patents	"A 10 percent growth in H-1B admissions correlates with an 8 percent growth in Indian invention" relative to firms outside of the computer sector less reliant on H-1Bs. (Kerr and Lincoln)
New H-1B Visas in U.S. Labor Force	New H-1B visa holders are 0.087 percent of U.S. labor force. (DOL)
H-1B Employer-Paid H-1B Fees	$4 billion in H-1B fees paid since 1999 (estimate) (USCIS)
H-1B Employer Fees for Scholarships	63,800 scholarships for U.S. students since 1999. (NSF)
H-1B and Taxes	Foreign-born with B.A. pays $9,335 more a year in taxes than benefits received; $20,254 more with M.A. (Zavodny)
Onsite Audits of H-1B Employers	14,433 H-1B site visits in FY 2010 and 15,648 in FY 2011. (USCIS)
Percent of H-1B Visa Audits Referred for Fraud Investigations (FY 2010)	1 percent (USCIS)
Months Employers Wait for a Foreign Professional When H-1B Unavailable	15 to 18 months to start work on new H-1B for FY 2014 and FY 2015; FY 2003 last year annual cap not reached. (USCIS)
2011 Intel Science Talent Search Finalists With H-1B Parent	60 percent of the 2011 finalists had a parent who entered U.S. on H-1B visa; 30 percent of the finalists had U.S.-born parents. (NFAP)

Source: National Foundation for American Policy. Data sourced in table.

Overall, the market has determined the use of H-1B visas. When Congress raised the limit to 195,000 a year in FY 2002 and 2003, in both years fewer than 80,000 visas were issued against the cap, leaving 230,000 H-1B visas unused in those two years. Firms did not hire more H-1Bs in those years simply because the cap was higher. (See Table 2.) Contrary to arguments that H-1B visa holders are not highly skilled, official data for FY 2011 show 58 percent of recent H-1B professionals earned a master's degree or higher, according to the Department of Homeland Security. Forty-two percent earned a master's degree, 11 percent earned a Ph.D. and 5 percent a professional degree.[8]

[8] *Characteristics of Specialty Occupational Workers (H-1B): Fiscal Year 2011*, Department of Homeland Security, March 12, 2012, p. 10.

In addition to being required to pay H-1B visa holders wages the same as comparable U.S. professionals, employers typically pay up to $6,000 in various government and legal fees for individual H-1B petitions and potentially up to $30,000 to $50,000 if they sponsor individuals for permanent residence.[9] In addition, U.S. Citizenship and Immigration Services possesses audit authority to enforce compliance with H-1B visa rules. While USCIS audited more than 14,000 H-1B cases in FY 2010, only 1 percent of the cases audited (192) were referred for a fraud investigation.[10]

Of course, U.S. employers hire many Americans. But to work alongside U.S. professionals, to find people with particular skills, and to compete globally, hiring foreign nationals, particularly those graduating from U.S. universities, means utilizing the immigration system often becomes necessary. To avoid hiring skilled foreign nationals U.S. employers would need to ignore 50 to 70 percent of the potential labor pool in science and engineering fields. Today, international students account for 71 percent of the full-time graduate students (master's and Ph.D.s) in electrical engineering, 65 percent in computer science, 61 percent in industrial engineering, and more than 50 percent in economics, chemical engineering, materials engineering and mechanical engineering at U.S. universities, according to the National Science Foundation.[11]

LONG WAITS FOR EMPLOYMENT-BASED GREEN CARDS

Another major problem in the nation's immigration system is providing a sufficient number of employment-based green cards for highly skilled foreign nationals. Simply put, the wait times for permanent residence are so long that individuals may conclude, with reason, that America is not the place to fulfill their career ambitions.

The long waits for employment-based green cards are caused by two primary factors: 1) the 140,000 annual quota is insufficient and 2) the per country limit, which restricts the number of green cards available to skilled immigrants from one country to 7 percent of the total. Due to the per country limit, skilled foreign nationals from India, China and the Philippines can wait years longer than nationals of other countries.

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[9] *Navigating the U.S. Employment-Based Immigration System*, Council for Global Immigration and the Society for Human Resource Management, 2013, pp. 62-63.

[10] American Immigration Lawyers Association, "USCIS Fraud Detection & National Security (FDNS) Directorate Answers AILA Administrative Site Visit & Verification Program (ASVVP) Questions," June 7, 2011, available at AILA InfoNet Doc. No. 11062243. USCIS has not released data on the number of fraud referrals that resulted in actual findings of fraud; quotation from R. Blake Chisam, *DOL Threatens Personal and Commercial Privacy in Proposal Directed Against Skilled Foreign Nationals*, NFAP Policy Brief, September 2012, p. 15. Only 3.5 percent (495) of the visas were revoked, which attorney R. Blake Chisam explains, "is an agency action that is not limited to fraudulent petitions, but may relate to petitions in which the H-1B worker simply no longer works for the petitioner."

[11] National Science Foundation, Survey of Graduate Students and Postdoctorate, webcaspar.nsf.gov. 2011 data.

The third employment-based preference (EB-3) is the most common category and includes "professionals and skilled workers."[12] A 2011 NFAP report gained attention with its conclusion that "A highly skilled Indian national sponsored today for an employment-based immigrant visa in the 3rd preference could wait potentially 70 years to receive a green card."[13] Examining the State Department Visa Bulletin since 2011 indicates that the potential for a 70-year wait time may still be true today. That is because it is likely the backlog for Indians in the EB-3 category still exceeds 200,000 and, due to the per country limit, typically fewer than 3,000 individuals can receive green cards per year.

Table 4
Current Estimated Wait Times for Employment-Based Green Cards

Category	INDIA	CHINA	PHILIPPINES	REST OF WORLD
EB-2 (Employment-Based Second Preference)	9 to 10 years	5 years	Current	Current
EB-3 (Employment-Based Third Preference)	10 to 70 years	2 to 6 years	2 to 7 years	2 to 6 years

Source: National Foundation for American Policy estimates; June 2014 State Department Visa Bulletin. Waiting times affected by demand, quotas, per country limit and when an individual applied. Outer range of estimates is for those who apply today. EB-3 estimates for the Philippines is based on recent movement in the Visa Bulletin, which means the estimate could change based on demand on the category.

To stay within the annual immigration quotas, the State Department uses the monthly Visa Bulletin to publish cut-off dates to indicate when individuals can file the final part of their green card application and receive permanent residence. For employment-based immigrants the cut-off or priority date is often the date upon which a labor certification application was filed with the Department of Labor. In June 2011, only Indian-born professionals in the third preference with a priority date on or before April 22, 2002 could apply for permanent residence. Three years

[12] Under the law, there are 5 employment-based preferences: First Preference (EB-1, priority workers); Second Preference (EB-2, worker with advanced degrees or exceptional ability); Third Preference (EB-3, professionals, skilled workers and other workers); Fourth Preference (EB-4, special workers, such as religious workers); and the Fifth Preference (EB-5, employment creation or investor visas). A total of 40,040, or 28.6 percent of the 140,000 annual quota is used by each of the first, second and third preferences. However, the first preference can use any numbers not utilized by the fourth and fifth preferences, which are limited to 7.1 percent (or 9,940) each. The second preference (EB-2) can use any numbers not utilized by EB-1, while EB-3, the third preference, can use any visa numbers not utilized by the EB-2 category.

[13] The 70-year wait estimate is derived from calculating that there exists a backlog of 210,000 or more Indians in the most common skilled employment-based category (the 3rd preference or EB-3) and dividing that by the approximately 2,800 Indian professionals who receive permanent residence in the category each year under the law.

later, in the June 2014 Visa Bulletin, the new "cut-off date" for filing for Indians in the third preference had only advanced about 18 months, to October 15, 2003.

A cut-off date in October 2003, indicates a foreign national has likely been working in the United States in H-1B temporary status while waiting more than a decade for a green card in the EB-3 category to become available. It is possible during this time he or she has been concerned about changing jobs or employers for fear of needing to start the immigration process over again, and a spouse still may be ineligible to work or, in some states, even drive a car.[14]

The situation also has not improved for Indians in the employment-based second preference (EB-2), which includes workers with "advanced degrees or exceptional ability."[15] In June 2011, the cut-off date for Indians in the EB-2 category was April 22, 2002, while the June 2014 Visa Bulletin shows a new priority date for filing of October 15, 2004. That means an individual from India has been waiting close to 10 years already for a green card in the employment-based second preference category while working in a temporary status.

The situation has also not improved for Filipino professionals. Between June 2011 and June 2014, the cut-off date for Filipinos in the employment-based third preference has only moved from September 15, 2005 to January 1, 2008. That means, for example, hospitals sponsoring Filipino nurses for green cards have been waiting more than 6 years for the nurses to arrive and begin working in the United States. (Most nurses do not qualify for temporary work visas.)

At least temporarily, the situation has improved for foreign nationals applying for permanent residence in the third preference (EB-3) from countries other than India and the Philippines. The March 2014 Visa Bulletin listed September 1, 2012 as a cut-off for the "rest of the world" in the EB-3 category, a 7-year improvement over March 2011. However, the Visa Bulletin noted this improvement may be short-lived: "This cut-off date has been advanced over four and one half years since last spring in an effort to generate new demand. After such a rapid advance of a cut-off date applicant demand for number use, particularly for adjustment of status cases, can be expected to increase significantly. Once such demand begins to materialize at a greater rate it could have a significant impact on this cut-off date situation. Little, if any forward movement of this cut-off date is likely during the next few months."[16] In fact, the June 2014 Visa Bulletin showed the cut-off date had moved backwards to April 1, 2011 for foreign nationals applying for green cards in the third preference (EB-3) from countries other than India and the Philippines.

[14] USCIS recently announced a proposal to permit work authorization for certain spouses of H-1B visa holders.
[15] Typically the person must have an advanced degree and the job must require it to qualify for EB-2, note attorneys.
[16] State Department Visa Bulletin, March 2014.

Skilled immigrants from China have experienced improvement in recent years in the employment-based third preference. The "cut-off date" moved from May 15, 2004 in the June 2011 Visa Bulletin to October 1, 2006 in the June 2014 Visa Bulletin. Although an advance of only two years, the cut-off date until recently had been October 1, 2012 for China in the EB-3 category. There has been no improvement in the employment-based second preference (EB-2) category, where the cut-off date for China in the June 2014 Visa Bulletin was May 22, 2009, less than a three-year improvement since June 2011.

Today, as was the case in June 2011, the EB-2 category is "current" for individuals from countries other than India and China, meaning such individuals do not have any significant wait to receive an immigrant visa. In contrast skilled foreign nationals from India in the EB-2 have been waiting close to 10 years for a green card, while those from China have been waiting about 5 years.

NO CATEGORY FOR IMMIGRANT ENTREPRENEURS

Another problem in the employment-based immigration system is a lack of a temporary visa or green card (permanent residence) category suitable for the typical foreign-born entrepreneur under U.S. immigration law. Neither U.S. Citizenship and Immigration Services nor its predecessor, the Immigration and Naturalization Service, has generally approved H-1B status for a foreign national to be a founder/CEO of a startup company, although administration officials say the situation has improved. A 2010 policy memorandum released by U.S. Citizenship and Immigration Services further complicated the issue.[17]

Other visa categories also present problems for entrepreneurs. An entrepreneur can only use an L-1 temporary visa (for intracompany transferees) if the company already has a separate office abroad the foreign national has worked in for at least a year. An E-2 visa for treaty investors also has limitations for use as an entrepreneur visa. An E-2 is designed as a temporary visa and its holder is assumed to not seek to stay permanently in America. The category is not available to national of all countries. For example, nationals from China and India are ineligible for an E-2 visa.

[17] Memorandum to Service Center Directors, "*Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*," (January 8, 2010). Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15)(AFM Update AD 10-24). While the intention of the memo was primarily to restrict situations where companies leased employees to another company without directing the work of those employees, the memo ended up being much broader in its impact. The memo, known as the Neufeld memo, focuses on the notion of whether an employer "controls" the employee working on an H-1B visa. In a small policy change announced in August 2011, U.S. Citizenship and Immigration Services announced it would now permit H-1B temporary visas to be issued if an entrepreneur can show a board of directors "controls" him or her. http://www.dhs.gov/ynews/releases/20110802-napolitano-startup-job-creation-initiatives.shtm. Many startups do not have an expansive board and usually the founder is chairman of the board. It remains unclear how often the agency would approve an H-1B petition in such circumstances.

The Government Accountability Office (GAO) reported on "cases in which entrepreneurs attempting to establish very early-stage technology start-ups were unable to obtain H-1B or other work visas for themselves and either relocated the project abroad or had to abandon the start-up."[18] Many attorneys and U.S. investors could tell similar stories. In his book *The Immigrant Exodus: Why America is Losing the Global Race to Capture Entrepreneurial Talent*, Vivek Wadhwa wrote, "At almost every entrepreneurship event in Silicon Valley, I meet skilled immigrants on temporary visas who have great ideas but can't start companies because of their visa restrictions." Wadhwa points out that when he immigrated to the United States, "America was the only viable destination for serious technology entrepreneurs . . . Now more than ever before, the United States needs immigrant entrepreneurs to retain its competitive edge. But now these entrepreneurs need America less than ever before." When Wadhwa came to America in the 1980s, it took only 18 months for him to receive his green card. (Xerox sponsored his application.)[19]

Overview of Senate and House Bills

S. 744, which passed the U.S. Senate in June 2013, is a lengthy bill dealing with border security, legalization of undocumented immigrants and other issues. S. 744 improves parts of the employment-based immigration system, such as by providing more H-1B visas and green cards. But it also would impose new restrictive measures that have raised concerns among employers. H.R. 2131, the SKILLS Visa Act, passed the House Judiciary Committee in June 2013 but has not proceeded to House floor action. H.R. 2131 increases employment-based green cards but much less so than S. 744. And while both bills increase the annual level of H-1B visas, the House bill contains fewer new restrictive measures than S. 744, although both contain provisions that would potentially distort the labor market by requiring inflated salaries to be paid to skilled foreign nationals. Both bills would establish new ways for foreign-born entrepreneurs to stay in the United States, although the Senate bill's provisions on immigrant entrepreneurs appear to be more pro-growth. Below is a more detailed discussion of the two bills.

H-1B Visas: Higher Numbers, More Bureaucracy, Inflated Wages

In the first week of April 2014, U.S. Citizenship and Immigration Services received 172,500 H-1B applications for jobs slated to start 6 months in the future, on October 1, 2014 (FY 2015).[20] Given the fiscal year lasts almost 18 more months beyond the first week of April, that means the number of additional H-1B visas in both S. 744 and H.R. 2131 are likely to be insufficient to satisfy the demand for skilled foreign nationals. As noted earlier, an H-1B petition is often the only practical way for a skilled foreign national to work in the United States long term.

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[18] *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Government Accountability Office, GAO-11-26, January 2011, p. 23.
[19] Vivek Wadhwa, *The Immigrant Exodus: Why America is Losing the Global Race to Capture Entrepreneurial Talent*, Wharton Digital Press: Philadephia, PA, 2012, p. 16.
[20] "USCIS Reaches FY 2015 H-1B Cap," Press Release, U.S. Citizenship and Immigration Services, April 10, 2014.

House and Senate Legislation on High Skill Immigration

S. 744 would raise the annual limit on H-1B visas to 115,000, but would allow the cap to rise eventually up to 180,000 over a period of years if certain conditions are met. If all petitions are not used in a year, the annual limit could decrease by up to 20,000 the following year under the Senate bill. On the other hand, the cap would increase by up to 20,000 (during a year) if all visas are exhausted before the end of a fiscal year (something that has happened in every year since FY 2004).[21] That would become the new level in the following fiscal year. However, under S. 744 that increase in visas can only occur if the monthly unemployment rate in the "Professional and Management" occupation category measured by the Bureau of Labor Statistics (BLS) has not exceeded 4.5 percent in the previous 12 months. Based on an examination of BLS unemployment data, that stipulation would have prevented an increase in the H-1B annual limit from FY 2010 through FY 2012.[22] It would be unlikely to prevent an increase in FY 2015, for example, since the unemployment rate in that category was 3.9 percent in January 2013 and 3.1 percent in January 2014, according to BLS.[23] S. 744 would also increase the current annual exemption for those earning a master's degree or higher from a U.S. university from 20,000 to 25,000.

The House bill would increase the H-1B visa cap in a more straightforward manner. Under H.R. 2131, the annual limit would rise from 65,000 to 155,000 (with no annual fluctuations) and the exemption for those with a master's degree or higher would rise from 20,000 to 40,000, although it would be narrowed to include only those with advanced degrees in science, technology, engineering or math (STEM) fields.

A key problem with the House and Senate legislation is that both bills would artificially inflate the wage required to be paid to skilled foreign-born professionals.[24] That would distort the labor market for both U.S. and foreign skilled workers and provide the U.S. Department of Labor enhanced power to set wage rates at many of America's companies. The premise that H-1B visa holders earn less than comparable U.S. professionals is not supported by the research. New mandated minimum wages for skilled foreign nationals would likely make it more difficult for U.S. companies to compete in the global marketplace and to increase jobs and investment in the United States.

The core problem is the bills would mandate H-1B visa holders be paid wages based on a Congressional formula that does not involve surveying employers on the wages paid to individual employees based on education, experience or other factors. Surveys of individual employees based on education, experience and other factors are inherently more accurate, whether or not they result in a higher or lower required wage. That is the central issue. Instead, the U.S. Department of Labor's Foreign Labor Certification (FLC) unit, a part of the Employment and Training Administration, uses data collected from the Occupational Employment Statistics (OES) program to create

[21] Section 4101 of S. 744.
[22] Examination of historical BLS data.
[23] Labor Force Statistics from the Current Population Survey, Bureau of Labor Statistics, U.S. Department of Labor. http://www.bls.gov/web/empsit/cpseea30.htm.
[24] See *Updated Analysis: The Impact of Immigration Legislation on Salaries and Competitiveness*, NFAP Policy Brief, National Foundation for American Policy, April 2014.

four levels of wages based on a formula.[25] The bills would make the wage levels provided by the Foreign Labor Certification unit even less reflective of real world market wages by reducing the current four levels down to three levels, mandating a minimum wage paid for every H-1B worker that is no less than 80% of the mean wage for the occupation, and generally not allowing the use of nongovernmental wage surveys, which are currently permitted under Department of Labor regulations.[26] The House bill would expand the wage requirement to L-1 and TN (NAFTA) visa holders.

Beyond the attempt to inflate the wages of skilled foreign nationals, the House bill contains no other restrictive measures on H-1B visas, while the Senate bill contains several new restrictions and would vastly expand investigative authority for the Department of Labor to enforce those restrictions. Several of the provisions in S. 744 may violate U.S. trade commitments (on access to H-1B and L-1 visas) under the General Agreement on Trade in Services (GATS), which could lead to a challenge before the World Trade Organization (WTO) and retaliation against U.S. exporters.

New restrictions on H-1B visas contained in S. 744 include:

Nondisplacement: All employers must attest they will not file an H-1B with the "intent" to displace a specific U.S. worker. How the Department of Labor will divine "intent" is unknown. An employer that is "H-1B skilled worker dependent" – a new legal term meaning H-1B professionals fill 15 percent or more "skilled" positions – must attest no displacement of a U.S. worker has or will take place within 90 days of filing for an H-1B.

In the case of H-1B dependent employers (those with 15 percent or more of their workforce in H-1B status), S. 744 would require attesting no displacement before or after 180 days of filing an H-1B petition.[27] A 2010 legal analysis by trade attorneys at the Washington, DC.-based law firm of Jochum Shore & Trossevin, PC for the National Foundation for American Policy examined the same provision in an earlier bill and concluded, "With respect to H-1B visas, the U.S. Schedule explicitly states that the required certification of no layoffs or other displacement[28] is to cover the period 90 days before and after the filing of the visa petition, which is the current statutory requirement . . . Having undertaken an explicit commitment regarding no layoff/displacement requirements for H-1B visas, the United States is obligated not to take actions inconsistent with that commitment. By doubling the period from 180

[25] Section 212(p) of the INA lays out the Congressionally-devised formula.
[26] Nongovernmental surveys collect data from individuals at different education and experience levels, often 6 levels, and are used by companies to set compensation levels in the labor market. Companies consider nongovernmental wage surveys the "market" wage for individuals based on the job, the location and worker's education and experience.
[27] Section 4211 of S. 744.
[28] A worker is "displaced" if: "the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job." 8 U.S.C.§1182(n)(4)(B).

to 360 days, the legislation would significantly increase the restriction on market access through H-1B visas. There is therefore a strong likelihood that, if challenged, the proposed change would be found inconsistent with the U.S. commitments under the GATS."[29]

Recruitment: During the Senate Judiciary Committee markup of S. 744, an amendment by Senator Orrin Hatch (R-UT) scaled back the original scope of the recruitment attestation. However, the Senate bill still establishes a new vague standard on recruitment that could leave companies legally vulnerable. Section 4211 of S. 744 requires an employer to attest it "has taken good faith steps to recruit United States workers for the occupational classification for which the nonimmigrant or nonimmigrants is or are sought, using procedures that meet industry-wide standards . . . " What are "good faith steps'? What are "industry-wide standards"? No employer today can know the answer to these questions until the Department of Labor promulgates regulations. Moreover, as discussed below, S. 744 provides the Department of Labor with virtually unlimited enforcement power to investigate employers that hire H-1B visa holders. This means that years after the fact, a particular hiring decision may need to be defended to Department of Labor investigators based on unclear standards.

While implementation would determine whether the new recruitment standard goes beyond current U.S. commitments under GATS, S. 744 would establish for some employers an even more stringent recruitment measure that could also raise GATS concerns. The bill states that if an employer is H-1B "dependent" it must offer the job to "any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought."[30] Determining whether a U.S. worker who applied was "equally or better qualified for the job" would require a subjective judgment that ultimately would rest with the U.S. Department of Labor.

Outplacement Restrictions: S. 744 attempts to prevent at least a segment of employers from utilizing H-1B or L-1 visa holders to provide services to U.S. clients. In section 4211 of S. 744 it states, "An H-1B-dependent employer may not place, outsource, lease or otherwise contract or otherwise contract for the services or placement of an H-1B nonimmigrant employee." S. 744 places a similar restriction on L-1 visa holders. (An employer that is not an H-1B dependent company can place an employee at another site by paying a "fee of $500 per outplaced worker."[31])

A legal analysis examining a less restrictive measure against outplacement in earlier legislation found serious GATS concerns. That means there is a strong likelihood the H-1B and L-1 measures against outplacement in S. 744 would be found in violation of the U.S. commitment under GATS. "The GATS requires that measures to regulate the entry

[29] Jochum Shore & Trossevin, *Legal Analysis: Proposed Changes to Skilled Worker Visa Laws Likely to Violate Major U.S. Trade Commitments*, National Foundation for American Policy, June 2010. Hereafter referred to as Jochum Shore & Trossevin. *See* 8 U.S.C. § 1182(n)(1)(E)(i).
[30] Ibid.
[31] Section 4211 of S. 744.

of natural persons are not applied in a way that nullifies or impairs benefits accruing under a specific commitment."[32] The analysis also noted, "For example, the United States has no restrictions on market access to provide computer and related services through a commercial presence. Placing a nonimmigrant specialist with specialized knowledge of the foreign companies on site for an extended period may be essential to providing installation and technical support services to U.S. customers."[33]

As discussed in an earlier NFAP analysis of S. 744, inherent in the Senate bill's provisions is a belief that specialization is bad, a belief we know is contrary to what makes companies effective in the modern economy. Should companies produce every good and service they need in-house? If it is agreed that specialization and the buying of services is legitimate, then what if to buy those services there is a need for workers beyond those readily available in the U.S. workforce, perhaps due, in part, to the travel demands of such jobs?

Why would American companies become more competitive or profitable if they limited the use of the specialized services they now use, as the Senate bill proposes? And if companies would not become more competitive or profitable but rather less efficient, that means we would likely see a decrease in the employment of U.S. workers, since generally only growing and profitable companies are able to increase their hiring. Pointing to the variety of provisions in S. 744 aimed at preventing contracting for services if performed by foreign nationals, Blake Chisam of Fragomen, Del Rey, Bernsen & Loewy, LLP, said, "The bill would interfere with existing contracts and harm not just employers who use H-1B and L-1B visas, but those businesses that rely on the expertise of companies to help them run their information technology, human resources and finance systems. The provisions would harm small and large businesses alike."[34]

50-50 Rule and Visa Fees: S. 744 would prohibit employers from petitioning for an H-1B visa if they have 50 or more employees and at least 50 percent of their workforce in the United States in H-1B or L-1 status exceeds 50 percent in FY 2016 or later (known as the 50-50 rule).[35] A similar provision in S. 744 would preclude filing petitions for individuals to work in L-1 status. The 2010 legal analysis by Jochum Shore & Trossevin concluded, "There is a significant likelihood the more restrictive '50-50' numerical limitation would be found inconsistent with the specific commitment in the U.S. Schedule and therefore a violation of GATS."[36] As the analysis noted, "[Q]uantitative

[32] Jochum Shore & Trossevin. *See* GATS Mode 4 Annex at para. 4. There is an obligation in GATS Article VI that measures are to be administered in a reasonable, objective and impartial manner.
[33] Ibid.
[34] Interview with Blake Chisam.
[35] Section 4213 of S. 744. Section 4213 states, "If the employer . . . employs 50 or more employees in the United States, the sum of the number of such employees who are H-1B nonimmigrants plus the number of such employees who are nonimmigrants described in section 101(a)(15)(L) may not exceed—(I) 75 percent of the total number of employees, for fiscal year 2015; (II) 65 percent of the total number of employees, for fiscal year 2016; and (III) 50 percent of the total number of employees, for each fiscal year after fiscal year 2016."
[36] Jochum Shore & Trossevin.

restrictions on the presence of natural persons are to be set forth in a Member's schedule and the United States has, in fact, scheduled a worldwide limitation on H-1B workers consistent with current law. The legislation would add an additional, unscheduled quantitative restriction on H-1B visas that would be applied on an employer-specific basis."[37] Simply put, to be compliant with GATS, the United States would have needed to place such a quantitative employer-specific restriction as appears in S.744 in its Member's schedule for GATS, which was not done when GATS was agreed upon.

Similarly, the high fees imposed on companies that fall into the 50-50 category also raise GATS concerns. S. 744 imposes a variety of new fees on H-1B and L-1 visas that are unrelated to funding, to application processing, or other basic administrative functions. Under Section 4305 of S. 744, in fiscal year 2014, an employer must pay $5,000 for each L-1 application submitted if the employer has 50 or more employees and "more than 30 percent and less than 50 percent of the applicant's employees are H-1B nonimmigrants or L nonimmigrants." In fiscal years 2014 through 2017, the application filing fee is $10,000 if the employer has 50 or more employees and "more than 50 percent and less than 75 percent of the applicant's employees are H-1B nonimmigrants or L nonimmigrants."[38]

Attorney Stephen Claeys explained in his legal analysis of a (smaller) fee increase imposed in 2010: "Arguments by supporters of the increased fees against the above GATS-related concerns are not convincing. One argument is that the fee increases can easily be borne by those companies applying for the visas, so they do not constitute much of a restriction. However, the fact that the increased fees were explicitly imposed to restrict the availability of certain L-1 and H-1B visas undermines this argument."[39]

Claeys's analysis on the earlier fee concluded: "Moreover, the additional visa fees may violate the United States' general commitment under GATS to ensure that 'all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.' The increased visa fees certainly affect the provision of services, but the justification for the fees (restricting the availability of L-1 and H-1B visas) is unlikely to be found reasonable. Further, the increased fees could violate GATS if they nullify or impair benefits to a WTO Member under the terms of a sector-specific commitment. This violation is likely because the fees are targeted at only those companies with 50 or more employees in the United States and if more than 50 percent of those employees are nonimmigrants working on H-1B or L-1 visas. The combination of the amount of the fees and their limitation to certain companies makes it possible that they impede, if not entirely preclude, a company from a WTO Member

[37] Ibid.
[38] Section 4305 of S. 744. Under Section 4233, which falls under "Chapter 3 – Other Protections in the bill," employers must pay $5,000 or $10,000 for each H-1B application similar to the measure described above for L-1 applications.
[39] Stephen Claeys, *Legal Analysis: Fee Increase on H-1B Visas Likely Violates U.S. Commitments Under GATS*, National Foundation for American Policy, NFAP Policy Brief, January 2011.

from supplying services in a particular sector through the presence of natural persons, or establishing a commercial presence in the U.S."[40]

Unlimited DOL Investigative Authority: While not a specific restriction, employers should be concerned about the significant expansion in investigative authority granted to U.S. Department of Labor (DOL) investigators under S. 744. Under the Senate legislation, DOL investigators will now operate without any of the current constraints on their investigative authority, a particular concern given that the bill would institute several new restrictions.

Under current law, Department of Labor investigators must receive a complaint from an aggrieved party to investigate an employer, or receive specific, credible information from a known and credible source and a certification from the Secretary of Labor.

In the Senate bill, a Department of Labor employee may investigate any employer, in essence, whenever he or she chooses to, since the new standard allows DOL employees themselves to be a credible source and there is no requirement for a certification from the Secretary of Labor. Moreover, individuals providing information against an employer do not need to identify themselves. Finally, DOL investigations can cover a 24-month period (up from 12 months) and no longer need to be completed within 90 days.

As noted earlier, U.S. Citizenship and Immigration Services each year audits thousands of employers of H-1B visa holders, often multiple times. And while USCIS audited more than 14,000 H-1B cases in FY 2010, only 1 percent of the cases audited were referred for a fraud investigation, which raises questions about the need to grant the Department of Labor vast new authority.[41]

A Department of Labor investigation or any government investigation can be burdensome and an impediment to companies focusing on their core business responsibilities even if an employer has not committed any violation. No one denies some level of enforcement authority is necessary. Congress decided to grant the Department of Labor a level of investigative authority that balanced the interests of oversight, while guarding against overreach. But without serious limits, combined with the subjective nature of the new requirements in the bill, the legal departments of many employers could decide it is safer not to petition for foreign nationals on H-1B visas.

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[40] Ibid.

[41] American Immigration Lawyers Association, "USCIS Fraud Detection & National Security (FDNS) Directorate Answers AILA Administrative Site Visit & Verification Program (ASVVP) Questions," June 7, 2011, available at AILA InfoNet Doc. No. 11062243. USCIS has not released data on the number of fraud referrals that resulted in actual findings of fraud; quotation from R. Blake Chisam, *DOL Threatens Personal and Commercial Privacy in Proposal Directed Against Skilled Foreign Nationals*, NFAP Policy Brief, September 2012, p. 15. Only 3.5 percent (495) of the visas were revoked, which attorney R. Blake Chisam explains, "is an agency action that is not limited to fraudulent petitions, but may relate to petitions in which the H-1B worker simply no longer works for the petitioner."

EMPLOYMENT-BASED GREEN CARDS: PROBLEM SOLVED IN SENATE BILL, HOUSE BILL MAKES SIGNIFICANT DENT IN PROBLEM

S. 744 would eliminate the entire employment-based immigrant backlog, which would be a remarkable achievement, and likely would supply enough additional avenues for permanent residence to prevent future employment-based green card backlogs from developing. It would also eliminate the per country limit for employment-based immigrants. The Senate bill nominally retains the 140,000 annual limit on employment-based green cards but, in effect, significantly increases that limit through a series of exemptions. Current EB-1 (employment-based first preference) immigrants, individuals with a Ph.D., individuals with a master's degree or higher in a STEM field from a U.S. university, and dependents (spouse and children under 21) would be exempt from the 140,000 quota. In addition, the bill would recapture approximately 200,000 or more employment-based green cards that went unused in previous years to be used for backlog reduction.

"CBO expects that the increase in the number of visas available each year plus the availability of recaptured visas (totaling about 250,000) would enable everyone in the backlog for employment-based visas to be admitted by the end of 2016," according to the Congressional Budget Office.[42]

In the House bill, in addition to the current 140,000 annual limit, H.R. 2131 would create a new visa category with as many as 55,000 more green cards a year for those with a master's degree or Ph.D. in a STEM field from a U.S. university. The House bill would also add 15,000 more green cards in the EB-2 category and an additional 15,000 green cards in the EB-3 category. That is, in theory, an increase of 85,000 green cards a year. However, instead of 5,000 green cards a year being subtracted from the Diversity category for those who receive permanent residence under the Nicaraguan and Central American Relief Act (NACARA), that 5,000 a year (so long as it lasts) would be deducted from the employment-based green card limit under the House bill. Unused green cards for immigrant entrepreneurs, limited to 10,000 annually, could become available to other employment-based immigrants.

By adding more green cards to the system, H.R. 2131 makes positive reforms that will likely make the employment-based second preference (EB-2) current within one to two years. Eliminating the per country limit for employment-based immigrants will also reduce the wait time for individuals from India, China and the Philippines. However, it is likely wait times for foreign nationals in the EB-3 category will persist even if H.R. 2131, as it is currently written, becomes law. That is because the House bill increases the number of employment-based green cards less than does the Senate bill. Moreover, if one assumes approximately half of the additional 110,000 new H-1B visa holders admitted annually under H.R. 2131 are sponsored for green cards, and that they average one dependent each, the

[42] Congressional Budget Office Cost Estimate of S. 744, Congressional Budget Office, June 18, 2013.

number of new green card applicants each year could outstrip the number of new green cards provided by H.R. 2131.

H.R. 2131 does not take the opportunity either to reform the bureaucratic labor certification process or exempt more employment-based immigrants from its requirements. Given the labor certification process can cost tens of thousands of dollars and even immigration critics do not believe it "protects" U.S. workers, it would be a pro-growth reform to exempt as many employment-based immigrants as possible from its requirements, as was done to an extent in S. 744, and to simplify the process for others.[43]

Both S. 744 and H.R. 2131 would allow "dual intent" for international students (only for those in STEM fields in the House bill), a reform that would facilitate visa processing for such students and potentially help some portion to be sponsored directly for green cards. Allowing the spouses of H-1B visa holders to work, a provision in both S. 744 and H.R. 2131, would eliminate one of the major drawbacks experienced by those in H-1B status waiting for green cards. Other positive reforms that appear in both bills would increase the ability of foreign nationals to retain their priority dates if they change jobs and allow green card applicants to file for adjustment of status prior to reaching their priority dates. Both reforms are positive in that they would enhance the labor mobility of those waiting in green card backlogs.

Immigrant Entrepreneur Visas: New Category Established in Both Bills But Senate Provides More Options

As noted earlier, there is currently no appropriate visa category for many foreign nationals with business ideas or capital who want to start businesses in the United States. Both S. 744 and H.R. 2131 would change that in important ways. Both bills would allocate up to 10,000 new green cards a year for those who could demonstrate achieving specific levels of job creation or capital investment. The Senate bill also would allow individuals to remain in temporary status for a longer period of time after starting a business.

Temporary status provisions for entrepreneurs in S. 744 could be one of the bill's most important features. Under section 4801 of S. 744, an alien can gain temporary status as an entrepreneur if he or she has attracted $100,000 in "qualified" investments, such as from a venture capitalist, or if the alien has created at least 3 "qualified" jobs and generated at least $250,000 in revenue. Importantly, the initial 3-year grant of temporary status can be renewed an additional 3 years if the alien has created 3 jobs and raised $250,000 in qualified investments or created 3 jobs and generated $250,000 in revenue. There is also discretion to provide additional renewals for up to two years.

[43] *Navigating the U.S. Employment-Based Immigration System*, Council for Global Immigration and the Society for Human Resource Management, 2013, pp. 62-63. The estimated cost to sponsor a foreign national all the way from an H-1B petition through the green card process for permanent residence could reach approximately $50,000.

The advantage of the temporary visa in section 4801 in S.744 is that it provides objective criteria, such as jobs created and money raised or generated, and does not have an annual cap that could devolve into backlogs and the unavailability of visas, which would defeat the purpose of providing a reliable means for foreign-born entrepreneurs to grow their businesses in the United States. Maintaining this part of the Senate bill should be a priority for those favoring pro-growth economic policies.

To qualify for a green card under section 4802 of S. 744, an alien must be an entrepreneur who has been in valid temporary status for at least two years and who, in the previous three years, has had a significant ownership stake in a U.S. company that has created at least 5 jobs for U.S. workers. In addition, the entrepreneur must have received at least $500,000 in investment from a "qualified venture capitalist" or other designated investor under the bill. As an alternative, the alien would be eligible for a green card if he or she has created at least 5 qualified jobs and generated at least $750,000 in annual revenue in the United States (and no more than two other aliens received temporary status as an entrepreneur based on the same business entity). Another alternative is if the alien holds an advanced degree in science, technology, engineering, or mathematics. Such aliens can receive a green card if he or she creates 4 qualified jobs and attracts $500,000 from a qualified investor or created 3 jobs and generated at least $500,000 in annual revenue.[44]

To qualify for a green card under section 102 of H.R. 2131, the alien must create 5 jobs for U.S. workers and raise at least $500,000 from a qualified venture capitalist or other designated investor, similar to S. 744. However, H.R. 2131 uses a different method for granting permanent residence to entrepreneurs than S. 744. It is perhaps less favorable because it uses the method now employed for immigrant investor green cards (EB-5), whereby aliens are granted "conditional" permanent residence and after two years must have the condition removed. H.R. 2131 also does not have the provision for temporary status for entrepreneurs available in the Senate bill.

CONCLUSION

Combining the best features of the House and Senate bills on high skill immigration would be good for growth, innovation and the U.S. economy. That would mean 1) selecting the House approach to H-1B visas, after changing the requirement that foreign nationals should be paid more than their U.S. counterparts, 2) adopting the Senate approach to employment-based green cards, and 3) taking the strongest elements of the House and Senate measures on immigrant entrepreneur visas, particularly the provision in S. 744 to permit a renewable temporary status for a foreign-born entrepreneur.

[44] Section 4802 of S. 744. Section 4802 of S. 744. Moreover, no more than three other aliens could have received temporary status as an entrepreneur based on the same business entity.
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APPENDIX

Employment-Based Categories (Current Law)

EMPLOYMENT-BASED PREFERENCE CATEGORY	ANNUAL LIMIT (140,000, including dependents)
First	28.6 percent (plus unused 4th and 5th preference)
Second	28.6 percent (plus unused 1st preference)
Third - Skilled Workers, Professionals (Other Workers)	28.6 percent (plus unused 2nd and 3rd preference)
Other Workers (lower-skilled, part of third preference)	No more than 10,000, but has been 5,000 since 1997 NACARA legislation
Fourth (Certain Religious Workers)	7.1 percent
Fifth (Employment Creation/Investor Visas)	7.1 percent

Source: U.S. Department of State.

H-1B Visa Limit (Current Law)

CATEGORY	ANNUAL LIMIT
H-1B Visas	65,000
Exemption for foreign nationals with master's degree or higher from U.S. university	20,000
Employer is a university, governmental or non-profit research organization	No annual limit

Source: U.S. Citizenship and Immigration Services.

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