

Border Security, Economic Opportunity, and Immigration Modernization Act of 2013

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The first major immigration proposal in several years contains sweeping changes, with the president potentially signing a version by mid-June.

On April 17, a bipartisan group of senators known as the "Gang of Eight" introduced the first major immigration proposal in several years, aimed at comprehensively overhauling the nation's immigration laws. The group of lawmakers—Senators Charles Schumer (D-N.Y.), John McCain (R-Ariz), Richard Durbin (D-Ill.), Lindsey Graham (R-S.C.), Robert Menendez (D-N.J.), Marco Rubio (R-Fla.), Michael Bennet (D-Colo.), and Jeff Flake (R-Ariz.)—met in numerous closed-door sessions over the last several months to hammer out differences on a wide range of issues, from border security to H-1B program changes. The 844-page proposal, S. 744, can be viewed [here](#).

Hearings on the bill will begin on April 19, and the legislation could be marked up as early as May. Assuming the Senate approves the bill by a sufficiently wide majority, and if there are no major obstacles in the House of Representatives, President Barack Obama could sign a version of comprehensive immigration reform by mid-June. Most of the provisions of the bill would take effect 180 days after the bill is signed by President Obama.

The Senate bill contains sweeping changes that are difficult to distill completely in a summary. Moreover, it is important to bear in mind that any final bill that Congress sends to President Obama for signature may contain major alterations from the Senate proposal. However, some of the major highlights of the Senate bill are provided below.

Border Security and Legalization

- S. 744 provides for the creation of a registered provisional immigrant (RPI) program to legalize undocumented immigrants who have been physically present in the United States (except for certain absences) since December 31, 2011. Certain individuals who were present in the United States before that date but who were deported for noncriminal reasons may also apply, provided they have family members living in the United States. The spouse and minor children of an applicant for this program may apply, provided they meet the requirements. In order to be eligible, an applicant must not have been convicted of a serious crime, must pass a background check, must pay any assessed tax liability, and must pay application fees and a \$500 fine. Initial registration will be valid for six years and subject to renewal. An RPI will receive unrestricted work authorization and travel permission. An employer who knows that an employee has applied for RPI status will not be in violation of the law if the employer continues to employ the applicant while the application is pending.
- RPIs will be permitted to become lawful permanent residents (LPRs) (green card holders) after 10 years, provided that certain border security milestones are reached and current employment and family immigration backlogs are cleared. The proposal requires the secretary of the U.S. Department of Homeland Security to develop a "Comprehensive Southern Border Security Strategy" and a "Southern Border Fencing Strategy," and both must be operational before RPIs may become LPRs. RPIs may become citizens after having been LPRs for three years.
- Undocumented individuals who (i) entered the United States before the age of 16, (ii) completed high school or the equivalent, and (iii) completed at least two years toward a bachelor's degree or served in the U.S. military for four years may obtain RPI status and apply for permanent residence after five years without penalties or border security triggers. These individuals may also apply for citizenship as soon as they obtain their green cards. This provision is commonly known as the DREAM Act.
- Undocumented agricultural workers who can demonstrate that they worked a minimum of 100 work days or 575 hours in the two years prior to enactment may be eligible for a "Blue Card," and undocumented agricultural workers who work for at least 100 days a year for five years or 150 days a year for three years may become LPRs.

Changes to Legal Immigration

- S. 744 proposes to create two "merit-based" immigration systems. These

systems will exist in parallel with the current employment and family-based systems, as amended by the bill. "Merit-based points track one" will set aside 120,000 immigrant or permanent resident visas annually (with a possible increase up to 250,000) for individuals who can demonstrate that they have sufficient points to qualify. Points will be awarded for factors such as education, achievement, employment, family in the United States, and length of residence. Half of the points-based visas will be for high-skilled workers and half will be for lesser-skilled workers. "Merit-based track two" will be a system for allocation of immigrant visas to clear out the backlog of long-pending employment-based and family-based cases filed prior to enactment.

- S. 744 proposes to eliminate the per country quota limits on employment-based immigrant (green card) visas. This provision will benefit nationals of India and China who are disproportionately affected by these limits due to the large number of immigrants who come to the United States from these two countries. The bill will also increase from 7% to 15% the per country quota limits for family-based immigrants.
- The diversity visa lottery will be eliminated.
- Spouses and children of LPRs will be considered to be immediate relatives and will be eligible to immigrate immediately to the United States.
- The sibling category of family immigration will be phased out in 18 months.
- A new temporary visa, the V visa, will allow families with approved immigrant petitions to come to the United States temporarily while awaiting final permanent residence processing.
- Certain categories will be exempt from the annual cap on permanent employment-based immigration. The exempted groups include spouses and children of employment-based visa applicants, foreign nationals with extraordinary ability, outstanding professors and researchers, foreign nationals with doctoral degrees, and certain foreign physicians.
- Foreign nationals with master's degrees in science, technology, engineering, or mathematics (STEM) will be exempt from labor certification. Note that the list of STEM degrees in the current proposal does not include the life sciences.
- The EB-5 program, which grants green cards to certain investors, will be permanently reauthorized. Other special programs for doctors and religious workers will also be reauthorized.

Employment Verification

- S. 744 provides for the replacement of Form I-9 with a new form, which includes a reduction in the number and types of acceptable identity and employment eligibility documents.
- A new mandatory electronic Employment Verification System (EVS) based on the current E-Verify system will include an enhanced photo tool that incorporates

U.S. Citizenship and Immigration Services, State Department, and enhanced driver's license photos. Use of the system will be required for all employers, and the system will be phased in over a five-year period, based on the size of the employer:

- Employers with more than 5,000 employees: two years after regulations are published
 - Employers with more than 500 employees: three years after regulations are published
 - All other employers: no later than four years after regulations are published
 - Critical infrastructure employers: no later than one year after regulations are published
- S. 744 expands and clarifies employer good-faith defenses for paperwork and *de minimis* violations. At the same time, the proposal contains significant increases for the following: civil penalties for violations based on knowingly violating the unlawful employment provisions or the employment verification provisions of the act; criminal penalties for egregious violations of the act combined with federal wage and hour or Occupational Safety and Health Administration (OSHA) violations; civil and criminal sanctions for pattern or practice violations combined with federal wage and hour or OSHA violations; and employer sanctions for unlawful discrimination on the basis of national origin or citizenship or for unfair immigration-related employment practices.
 - Most state and local government laws that seek to sanction employers for the employment of unauthorized aliens will be preempted, but states will be permitted to tie licensing authority to the proper use of EVS.
 - The Social Security Administration will be required to develop a new fraud-, tamper-, and identity theft-resistant Social Security card within five years of enactment.

Changes to Temporary Immigration

- S. 744 will increase the annual cap on new H-1B petitions starting in the 2015 fiscal year from 65,000 to 110,000 and will allow this cap to be increased to a maximum of 180,000 new petitions annually, based on a "high skilled jobs demand index." The 20,000 cap for holders of advanced degrees from U.S. universities will be replaced with a 25,000 cap for holders of advanced degrees in STEM fields from U.S. universities. The bill also will impose new recruiting and nondisplacement requirements on all H-1B employers.
- Limits will be placed on the number of H-1B and L-1 workers an employer may employ. If the employer employs 50 or more employees, the percentage of its workforce comprising H-1B workers may not exceed 75% in 2015, 65% in 2016, and 50% after 2016 ("intending immigrants" will not be included in these calculations).

- H-1B "dependent" employers of H-1B workers (generally, employers whose H-1B workers amount to 15% or more of the total workforce) will have new stringent wage obligations, increased filing fees, additional recruitment obligations, and a prohibition on "outplacement" of H-1B workers.
- Certain H-4 spouses of H-1B nonimmigrants will be granted employment authorization.
- "Deference" will be granted to prior approvals of H-1B and L-1 petitions. This means that extension petitions filed by the same petitioners for the same employees should not be denied absent a finding of material error, changed circumstances, or new material information.
- Terminated H-1B employees will be granted a 60-day grace period from termination, during which they will be considered to be in legal status.
- Visa revalidation (obtaining a visa renewal) while remaining in the United States will be made available to A, E, G, H, I, L, N, O, P, R, and W nonimmigrants.
- A new \$500 "STEM education and training" fee will be payable for labor certification applications.
- A prohibition on the "outplacement" of L-1 workers will be introduced.
- The requirements for approval of an L-1 petition for employment at a "new office" will be significantly heightened.
- "Dual intent" will be permitted for F-1 students, removing the prohibition on immigrant intent for such students.
- Portability, or the ability to accept employment with a new employer upon the filing of a nonimmigrant petition, will be made available to O-1 nonimmigrants as it is currently for H-1B nonimmigrants.
- For most temporary work visa categories, employees in these categories may continue to work for the same employer during the pendency of any extension of stay.
- S. 744 will extend visa eligibility based on Free Trade Agreements to nationals of Ireland (E-3 visa) and Korea (E-5 visa) and will allow the president to extend eligibility to nationals of other countries upon signing Free Trade Agreements in the future with such countries (E-4 visa). Unlike the E-3 visa classification currently available to nationals of Australia, which is reserved for persons with bachelor's or higher degrees, the new E-3 visa for Irish nationals will be available to non-degreed individuals. The bill will also provide a special exemption for all E visa applicants who have previously violated U.S. immigration law, making it easier for such persons to obtain a waiver of inadmissibility.
- A new visa category, W or new worker visa, will be created. This will be available to lesser-skilled foreign workers performing services or labor for a

registered employer in a registered position (possibly excluding "computer occupations") and will be valid for three years, with extensions available in three-year periods. 20,000 W visas will be available initially; this will be increased to 75,000 within four years, with an increase of up to 200,000 being available based on various indices. W workers working in "shortage occupations" will be exempt from the cap. Spouses and children of W nonimmigrants will be granted employment authorization. W-2 and W-3 visa categories will also be created for temporary agricultural workers to replace the H-2A program. These categories will not allow spouses and children to accompany the worker.

- Special visa categories will be created for Canadian retirees and other retirees who purchase property, but who will not work, in the United States.
- The INVEST nonimmigrant visa will be created. This will be available to overseas entrepreneurs who plan to start their own companies in the United States and who can demonstrate that at least \$100,000 has been invested in the relevant business or that such a business has generated no fewer than three jobs and \$250,000 in revenue. The INVEST visa will be valid for three years and may be extended if the entrepreneur can meet certain job creation and revenue benchmarks. An INVEST immigrant visa (green card) will be made available if the entrepreneur can meet certain job creation and revenue benchmarks.

As mentioned above, S. 744 will likely go through many changes as it moves through Congress in the legislative process. We will continue to monitor and inform our clients of new developments on this proposed legislation.

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