Per-Country Limits – Should They Stay, or Should They Go?

By Ron Matten

Congress is considering a major change that will correct a significant historical wrong against Indians and Chinese by impacting all other intending immigrants.

FAIRNESS FOR HIGH SKILLED IMMIGRANTS ACT

Senators Mike Lee (R-Utah) and Kamala Harris (D-Calif.) recently introduced the Fairness for High Skilled Immigrants Act (FHSIA) (S. 386), while Representatives Zoe Lofgren (D-Calif.) and Ken Buck (R-Colo.) introduced similar legislation (H.R. 1044) in the House, to eliminate per-country limits on employment-based immigrant visas.

On February 7, 2019, Compete America, a coalition of American employers, issued a statement on these bills, noting, "The proposed bill offers a sensible reform to address per country cap backlog issues for permanently employed foreign professionals already working in the United States, who have fully approved green card petitions. These are not new immigrants; they are part of our workforce today,"

The overall number of visas will not be increased, so who are the winners and losers of this legislation?

THE ORIGINS OF PER-COUNTRY LIMITS

Since the beginning of U.S. history, our nation's immigration laws have been discriminatory. At the turn of the 20th century, the Supreme Court had to intervene to extend birthright citizenship to Chinese. After World War II, U.S. immigration laws finally shed a system that overtly discriminated on the basis of race and ethnicity, and adopted a system that was intended to ensure diversity of the nationalities coming to our shores. The 1965 Immigration and Nationality Act, also known as the Hart-Celler Act, established a per country system, which in the current Act at Section 202(a)(2) prescribes a 7% limit per country for the total allocation of 140,000 employment-based immigrant visas.

In an October 2015 article, the Migration Policy Institute stated, "[T]he Hart-Celler Act … literally changed the face of America. It ended an immigration-admissions policy based on race and ethnicity."

The 1965 INA replaced a system of national origin quotas with the intent of ensuring broader diversity of immigrants. For example, the 1924 Act allocated 65,000 out of 150,000 visas to England.[i] While the earlier laws directly favored Northern and Western Europe while disfavoring Asians, the 1965 Act was intended to treat each country equally. But the 7% per-country limits quickly created a new system of national favoritism. According to the Cato Institute, by allocating the same percent to each country, the bloc of 28 European nations has access to 78,456 EB-2 visas annually while India, with double the population, only receives 2,879.

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The current legislation does nothing to change the size of the pie, but it would change who gets a bigger piece and who gets a smaller piece. Is there a moral argument to pass this legislation? To reject it?

PREFERENCE CATEGORIES

Employment-based immigration is based on a system of priorities – called preference categories –intended to ensure our nation attracts the top global talent while protecting U.S. workers. The per-country limits help evenly distribute visas amongst all countries. On its face, this seems fair. In practice, these limits have resulted in severely disproportionate wait times for people born in India and China. The consequence of per-country limits is exacerbated by the shortage of Science, Technology, Engineering and Mathematics ("STEM") workers.

According to a 2018 Emerson Survey, "In manufacturing alone … as many as 2 million [STEM] jobs may go unfilled, due to difficulty finding people with the skills in demand."

THE EXTREMELY DISPROPORTIONATE IMPACT ON INDIAN AND CHINESE IMMIGRANTS

As the number of Indians and Chinese filling STEM positions increased, both countries quickly reached their per-country limit. The backlog for Indian workers is now estimated at 150 years. Meanwhile, workers with identical credentials from other countries face no backlog.

Should a country with a population under a million like Luxembourg receive an equal share of high-skilled employment green cards as a country with a population over a billion, like India or China? Shouldn't the preference system ensure access to most-needed workers without regard to nationality?

WHAT WILL HAPPEN IF THE LAW PASSES?

Currently two identically qualified and skilled employees for the same company in the same job can have vastly different experiences. A Canadian might obtain their green card in a year. Meanwhile, it will take over ten years for an Indian. FHSIA will address this inequity. But new inequities will be created.

"Canada would be immediately reduced to zero – indefinitely. … After [2021], there would be [no visas] for Canada in any employment-based immigration category until the backlog equalizes for all nations. … In the EB-2 [advanced-degree professionals] category alone, where applications for Canadians are now current, there would be a 12 year wait," says Andy J. Semotiuk, a Forbes.com contributor and fellow immigration attorney.

Eliminating the per-country limit would lead to at least a 12-year wait for any new applicant. During that time, nearly every employment-based immigrant visa would go to India or China. Fixing one wrong only creates a new wrong.

UNINTENDED CONSEQUENCES

In this new reality, could companies decide to go elsewhere? Would a company establish a US subsidiary if its CEO cannot immigrate? The company might instead choose a country with more favorable immigration laws, such as Canada, to build a new manufacturing plant or service delivery facility.

The law could also have a devastating impact on recipients of Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS), who would be unable to obtain green cards before their benefits expire.

The current law is unfairly impacting India and China. Some even say that the current system is racist . However, simply eliminating per-country limits only creates new problems. FHSIA is needed to immediately correct one wrong. Yet, Congress must just as urgently come up with a more comprehensive solution that doesn't simply trade one problem for another. This could mean everything from increasing the overall number of visas to modernizing the prioritization system so that it adapts in real time to labor market needs.

OTHER OPTIONS

On May 16, 2019 President Trump proposed a new merit-based points system. The Washington Post reported that the "new White House proposal does not change the net level of green cards allocated each year, but rather prioritizes high-skilled workers over those with family members who are U.S. citizens." According to CNN, the system is "based on the Canadian, Australian and New Zealand systems."

I personally favor a points-based system, because in theory it could do a better job of matching the country's values and the labor market's needs with global talent. But questions remain: Who would decide the weighting of the categories in the points matrix? According to the New York Times, the President's proposal "would vastly scale back the system of family-based immigration." This aspect is sure to face stiff opposition from some. Even only considering the visas allocated to employment-based immigrants, there will be challenges to an effective implementation. In a system steeped in bureaucratic slowness, how do you implement a points system that is dynamic enough to reflect ever-changing market needs?

Given the administration's history of targeting certain countries and ethnic groups, especially those from Latin America and the Middle East, some are concerned that a points system could mask inherent racism and discrimination against certain countries. In his article, "Points-based immigration was meant to reduce racial bias. It doesn't", Justin Gest cites various studies that predict that points-based systems will heavily favor highly educated and skilled workers who happen to come from highly developed – and predominantly white – nations. Other studies indicate that points systems are inherently biased against women. But these results do not necessarily have to be the case. A look to the north shows that Canada's point system results in a primarily non-European immigrant population. According to Stats Canada, the 2016 Census showed that "Africa ranks second, ahead of Europe, as a source continent of recent immigrants to Canada, with a share of 13.4% ... Asia (including the Middle East) remains, however, the top source continent of recent immigrants accounting for 61.8%."

In order to avoid unintended – or perhaps intended – biases, I would advocate for a points system that is transparent, highly dynamic, and based on clear and objective labor market indicators. Perhaps a bi-partisan committee that measures and adjusts the factors and points on a quarterly or monthly basis, where the public is also given an opportunity to provide feedback, so that any claims of immoral bias would have to be addressed on the public record.

In any case, there needs to be a solution that is appropriate for the economy in 2019 and beyond. The current bills, which merely eliminate per-country limits, trade one injustice for another and leave much to be desired in achieving a fairer system.

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[i] The Congressional Record includes the following statement from the 1965 Act's co-sponsor, Mr. Celler: "Out of an immigration pie of about 150,000 authorized immigrants a year, they sliced that pie into huge pieces and tiny miniscule pieces. England got 65,000 out of the 150,000. Germany got 25,000. Ireland got 17,000. All the rest of the national, over 100 nations throughout the world, got only 49,000." See page 21755 of https://www.govinfo.gov/content/pkg/GPO-CRECB-1965-pt16/pdf/GPO-CRECB-1965-pt16.pdf [visited 4/26/2019].