

The U.S. 2013 Immigration Reform Act Impact on Foreign Nationals and Foreign Investment

By Lihua Tan and Navneet Chugh

This historical bipartisan achievement in US immigration reform will impact foreign nationals in specialty occupations or with certain education backgrounds, and also undocumented immigrants. Foreign entrepreneurs may enjoy more favorable policies; however, in hiring foreign workers, employers will see more restrictions.

On June 27, 2013, by a vote of 68-32, the U.S. Senate passed S.744, *the Border Security, Economic Opportunity, and Immigration Modernization Act*, the so-called "2013 Immigration Reform Act" (hereinafter, "the Act"). This is a historical bipartisan achievement in US immigration reform, and the Act is now pending at the House of Representatives for consideration. It significantly increases the number of non-U.S. citizens who could lawfully enter and work in the U.S. temporarily or permanently, and qualifies many undocumented immigrants in U.S. for legal status when certain conditions are met. Furthermore, it aims to attract more foreign investment and investors.

Impact on foreigners working in specialty occupations

The H-1B visa allows temporary employment of foreign workers in a specialty occupation (including most IT positions – Software Engineers, Programmers, System Analysts) which requires highly spe-

cialized knowledge, with at least a related bachelor's degree. According to Bloomberg, Indians and Chinese account for 53.52% and 9.12% of H-1B visas respectively. The current annual base cap for H-1 B visas is 65,000, and another 20,000 for those who have earned a Masters or higher degree in the U.S. Due to the high demand for such personnel, the quota is exhausted rapidly every year, sometimes as quickly as one week (as happened in April, 2013).

The proposed Act raises the base H-1B cap to 115,000 and the advanced U.S. degree holders to 25,000. The advanced degree must be in *the science, technology, engineering, and mathematics (STEM)* field. It also provides spouses of H-1B workers with work authorizations if the same reciprocal treatment is given by the H-1B worker's home country to U.S. workers (such as United Kingdom and certain European countries, but not India and China). Also, under current immigration law, once an H-1B worker loses their job, they usually are out of status immediately and needs to leave the U.S. However, the Act establishes a 60-day grace period for such workers whose

employment is terminated before the expiration of the worker's authorized admission. H-1B workers filing a petition to extend, change, or adjust the status during the grace period will be deemed to have lawful status while the petition is pending.

Impact on legal immigrants seeking permanent resident status

To live and work in U.S. permanently, all legally entered foreign nationals will need to apply for lawful permanent resident (LPR) status through family based or employment based Green Card application process. The current U.S. immigration law has an annual limit in both categories, with a per-country limit for preferred immigrants at 7%. In FY 2013, this number is 26,913. According to an Office of Immigration Statistics report, in 2012, there were a total of 1,031,631 persons who became LPRs of the United States, nearly 66% of whom obtained permanent residency based on a family relationship. The four leading countries of birth of new LPRs were Mexico (14%), China (7.9%), India (6.4%), and the Philippines (5.6%). Due to the per-country limit, there is always backlog/visa retrogression in family based applications for immigrants born in Mexico and the Philippines; and in employment based applications for those born in India and China.

The Act proposes to eliminate the backlog by exempting the following categories from the annual limits on employment-based immigrants: derivative beneficiaries of employment-based immigrants; aliens of extraordinary ability in the sciences, arts, education, business or athletics; outstanding professors and researchers; multinational executives and managers; doctoral degree holders in STEM field; and physicians who have completed the foreign residency requirements or have received a waiver..

It allocates 40% of the worldwide level of employment-based visas to: 1) advanced degree holders whose services are sought in the sciences, arts, professions, or business by an employer in the U.S. (including certain aliens with foreign medical degrees); and 2) aliens who have earned a master's degree or higher in a STEM field from an accredited U.S. institution of higher education within five years before the petition was filed, with an offer of employment in a related field.

For family-based immigrants, the Act raises per-country limit from 7% to 15% and caps for different family preferences: for example, unmarried sons and daughters (21 or over) of U.S. citizens (from 23,400 to 56,350); married sons and daughters (21 or over, under 31) of U.S. citizens (from 23,400 to 40,250);

unmarried sons and daughters of LPRs (from 26,266 to 64,400). It reclassifies the spouses and minor children (under 21) of Permanent Residents as immediate relatives, and not subject to the immigrant visa cap though it eliminates diversity visa program (green card lottery) and 4th preference (sibling of U.S. citizen).

Impact on undocumented immigrants

With around 11 million undocumented immigrants in U.S., the Act creates a Registered Provisional Immigrant (RPI) Status for qualified undocumented immigrants who were present in the U.S. on or before December 31, 2011, and have been continuously and physically present in U.S. until the dates when they are granted RPI statuses. They will need to have a relatively clean criminal record, have satisfied any applicable federal tax liability, clear national security and law enforcement reviews, etc., for a renewable visa valid for 6 years.

There are also special provisions for DREAM Act legalization. The DREAM Act allows undocumented children (usually referred as DREAMers) to apply protection from deportation and then apply for and receive permanent residency under certain conditions. On June 15, 2012, President Obama announced Deferred Action for Childhood Arrivals (DACA) program that his administration would stop deporting young undocumented aliens who match certain criteria previously proposed under the DREAM ACT. According to the U.S. Citizenship and Immigration Services ("USCIS"), from August 2012 to February 2013, 199,460 DACA applications were submitted, with Mexico being the number one country of origin of these DEARMer applicants, and South Korea numbered six. It is believed that, partially because of this, 71% of latinos voted for President Obama and helped him win re-election in key battleground states.

Impact on foreign investments with three major changes

First, the Act creates a new Startup or INVEST visa ("Investing in New Venture, Entrepreneurial Startups, and Technologies"), creating both temporary visa and permanent green card options for foreign entrepreneurs who attract a threshold level of financing from U.S. investors or revenue from U.S. customers. If their businesses continue to succeed and create jobs for U.S. workers, these entrepreneurs will be eligible for permanent resident status and eventually U.S. citizenship.

In a 2012 report, the *Partnership for a New*

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American Economy found that in 2011, immigrants (accounting for only 12.9% of the U.S. population) started 28% of all new U.S. businesses. In the US, immigrant entrepreneurs started one in every four small business and high-tech startups. More than 405 of Fortune 500 companies, from GE and Ford, to Google and Yahoo!, were founded by immigrants or their children.

Second, the Act makes the EB-5 immigrant investor program permanent. The EB-5 program was created by U.S. Congress in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors. 10,000 visas are yearly granted to qualified investors and their immediate family members who invest \$1,000,000 in a new commercial enterprise and create at least ten full-time U.S. workers. The investment need only be \$500,000 in rural areas or where an average unemployment rate of at least 150% of the national average rate has been experienced or in a Regional Center designated by the USCIS. The Act will increase the number of immigrant investor visas available each year through the aforementioned reforms to the employment-based immigration system, and the exemption for spouses and dependents on the worldwide cap will result in approximately 14,000 green cards made available each year for individual immigrant investors.

According to a White House report, EB-5 investments have been responsible for the infusion of at least \$6.8 billion of capital into the United States and the creation of at least 48,950 jobs for U.S. workers as of the end of FY 2012. The reforms will attract more foreign investment to the U.S. that will catalyze economic development and create jobs, potentially supporting more than 140,000 jobs for U.S. workers each year.

Third, the Act creates new restriction on temporary working visas like H-1B and L, which could negatively impact foreign (especially Indian) companies' investments in consulting industries. The restrictions require employers to recruit U.S. workers before hiring foreign workers on H-1B visas, and require H-1B dependent employers whose H-1B employees reach

certain numbers or percentages to pay significantly higher filing fees. In addition, it strengthens prohibitions against displacing U.S. workers, outplacement and outsourcing, requiring employers to pay higher wages to temporary H-1B workers, and helping to prevent U.S. workers from being undercut by cheaper labor. The Department of Labor (DOL) will also set up new procedures and mechanisms to detect and punish violators.

Among the top ten H-1B employers, according to DOL, four are Indian companies: Wipro, Infosys, TCS, and Mphasis. India will export as much as \$87 billion of IT services in the year ending March 2014 according to Indian National Association of Software and Services Companies. Infosys claims that about 60% of its revenue is from the U.S. The Act will overall affect such foreign investments in IT and other consulting industry.

The future of the Act and U.S. immigration reform

Currently, both Republicans and Democrats agree that U.S. immigration system is broken and needs to be fixed, although their approaches to solving this complex issue are different. The Democrat controlled Senate decided to pass a massive immigration reform act that addressed all aspects of immigration reform. The Republican controlled House is more conservative and against one Act to cover all aspects of immigration reform. In August, the House Judiciary committee, chaired by Bob Goodlatte (R-VA), released "Immigration Resource Kit", calling for Republicans not to pass the Senate Bill, but to work on individual bills addressing issues in specific fields. It is anticipated that the House may take some action on the Act when it reconvenes in October after recess. Still, the reform of U.S. immigration system is being carried out. **Both Republicans and Democrats are under severe pressure to boost economic output, and attract more voting shares from the rapidly growing immigrant population. In the long run, the U.S. immigration policy will become more pro-immigrant.**



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