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STILL WAITING: GREEN CARD PROBLEMS PERSIST FOR HIGH SKILL IMMIGRANTS

EXECUTIVE SUMMARY

Over the past several months, skilled foreign nationals have seen no improvement in their prospects for obtaining green cards and, in fact, wait times are likely to increase in employment-based immigration categories. The U.S. Department of State reports a wait time may be developing for prospective immigrants in the employment-based first preference (EB-1) category, which previously had no backlog. In another new development, skilled foreign nationals from countries other than China and India in the employment-based second preference (EB-2) will soon experience backlogs. And for at least the rest of Fiscal Year 2012, the U.S. Department of State is not accepting new green card applications for nationals of China and India in the EB-2 category.

An October 2011 analysis by the National Foundation for American Policy concluded wait times for employment-based green cards sponsored today can last 5 years or even decades, depending on the category and country of origin. The analysis found projected waits for Indians of 8 years or more in the EB-2 category and up to 70 years for Indians in the EB-3 (employment-based third preference) category if sponsored today for an employment-based green card, while a Chinese immigrant sponsored today in the EB-3 category could wait two decades.

Some have argued that providing green cards to highly skilled foreign nationals harms the job prospects of Americans. However, that argument ignores that skilled scientists, researchers and professionals help create more jobs and innovations. Moreover, such individuals are hired as part of the normal recruitment process, complementing, not replacing, Americans. Another argument made is that the green card problem is not dire, since many foreign nationals stay in the United States years after receiving a Ph.D. But foreign nationals with Ph.D.s are more likely to work in academia and represent only about 13 percent of H-1B visa holders annually. The 5-year stay rate for Indians earning Ph.D.s at U.S. universities in science and engineering declined from 89 percent for those who received a doctorate in the year 2000, to 79 percent for Indian recipients of Ph.D.s in 2004. Even if Ph.D.s from India and China were staying in the U.S. at the same rate as before it would not be relevant to the green card problems experienced by foreign nationals at the masters and undergraduate levels.

Congress can make two reforms to alleviate the long wait times for skilled immigrants: 1) eliminate the per country limit for employment-based immigrants and 2) provide an exemption from employment-based green card quotas for foreign nationals who earn a masters degree or higher in science, technology, engineering or mathematics (STEM) from a U.S. university. Recently introduced bills would make such reforms. Without changes to the law, the long wait times for high skilled foreign nationals, including those educated in America, will continue. This threatens to deprive the country of talented individuals who will choose to make their careers in other nations.

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BACKGROUND

The waits for employment-based green cards are caused by two key factors. First, the annual quota of 140,000 is too low for the number of skilled foreign nationals employers seek to sponsor for permanent residence. The 140,000 annual limit was set by Congress in 1990 and includes both the principal and dependent family members, with dependents typically using half or more of the slots.¹ The Gross Domestic Product (GDP) of the United States has nearly tripled (in nominal dollars) since 1990, from \$5.8 trillion to over \$15 trillion in 2012, but the employment-based immigrant visa category has remained at 140,000 visas annually.²

The second factor causing long waits for certain employment-based immigrants is the per country limit. Under the per country limit, as described in the Immigration and Nationality Act, in Section 202(a), “[T]he total number of immigrant visas made available to natives of any single foreign state . . . may not exceed 7 percent . . . of the total number of such visas made available under such subsections in that fiscal year.”³ In most cases, that limits employment-based immigrants from one country to approximately 10,000 a year.⁴ In practice, individuals from countries with large populations can wait several years longer than people from smaller population countries. Nationals from China and India are most affected by the per country limit. Under the law, China and India are allotted the same number of green cards as Iceland and Luxembourg.

There are 5 employment-based preferences:

- First Preference (EB-1, including outstanding researchers and professors, aliens of extraordinary ability)
- Second Preference (EB-2, workers 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)
- Fifth Preference (EB-5, employment creation or investor visas).

A visa number generally is “available” for an individual with a priority date earlier than the date listed in the State Department’s most recent visa bulletin.⁵ (A priority date is usually triggered by the date a labor certification application or an immigrant petition is received by the federal government.) While 40,040, or 28.6 percent of the 140,000 annual quota is used by each of the first, second and third preferences, the first preference can utilize numbers unused by the fourth and fifth preferences, which are limited to 7.1 percent (or 9,940) each. Also, the

¹ Note: In some years not all the green cards available were issued, resulting in over 300,000 unused employment-based green cards over the past two decades.

² International Monetary Fund, report for selected countries and subjects.

³ Section 202(a)(2) of the INA.

⁴ Section 202(a)(3) of the INA allows nationals from one country to exceed the ceiling if additional employment-based visas are available.

⁵ Copies of any visa bulletin referred to in this paper can be found at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

Still Waiting: Green Card Problems Persist for High Skill Immigrants

second preference (EB-2) can utilize numbers not used by EB-1, while EB-3, the third preference, can use visa numbers not utilized by the EB-2 category. The wait times are longest for the EB-3 category because individuals with advanced degrees can be included in the category, as well as other skilled workers. “The criteria for EB-2 is that the position requires the advanced degree, not just that the employee has a masters or higher,” according to Warren Leiden, partner, Berry Appleman & Leiden.⁶

WHAT ARE THE CURRENT ESTIMATED WAIT TIMES?

Long wait times carry implications for whether or not highly skilled foreign nationals, including international students, will be able to make their careers in the United States. As noted, the waits are longest for those affected by the per country limits – overwhelmingly skilled foreign nationals from India and China. An October 2011 analysis by the National Foundation for American Policy concluded, “Waits for employment-based green cards today can last 5 years or even decades, depending on the category and country of origin.”⁷ In the employment-based second preference (EB-2) category, the analysis found the projected waits for Indian and Chinese nationals to be 8 years or more. In the employment-based third preference (EB-3) category, the analysis estimated the wait times for Indians sponsored today could be as long as 70 years, while the waits for a Chinese national sponsored today could be approximately 20 years.⁸

Since that analysis, a number of developments indicate wait times are likely to lengthen in both the EB-1 and EB-2 categories. That will include imposing wait times on individuals who have in the past received green cards with no waiting beyond standard processing times (i.e., no backlogs).⁹ As noted earlier, the U.S. Department of State establishes cut-off dates to keep the number of green cards awarded in a year within the numerical limits set by Congress. In effect, by setting cut-off dates the State Department is able to turn on and off the flow of applicants. In the *June 2012 Visa Bulletin*, the U.S. Department of State reported:

- **“Employment First:** Based on the current rate of demand, it may be necessary to establish a cut-off date at the end of the fiscal year in an effort to limit number use within the annual numerical limit.”
- **“Employment Second:** Based on the current rate of demand, it may be necessary to establish a cut-off date for this category for all countries other than China and India. Such action may be required at any time during the next few months.”¹⁰

⁶ Interview with Warren Leiden.

⁷ See Stuart Anderson, *Waiting and More Waiting: America's Family and Employment-Based Immigration System*, National Foundation for American Policy, October 2011, and Stuart Anderson, *Keeping Talent in America*, National Foundation for American Policy, October 2011.

⁸ The estimate of the 70 year wait was derived by calculating an approximate backlog of Indian nationals in the EB-3 category of 210,000 (principals and dependents, while under the per country limit, generally no more than 2,800 Indians can receive permanent residence in the EB-3 category each year. On average, fewer than 3,000 green cards annually in that category in 2009 and 2010.

⁹ Labor certification through the Department of Labor could be required.

¹⁰ *June 2012 Visa Bulletin*, U.S. Department of State, Washington, D.C., June 2012.

Still Waiting: Green Card Problems Persist for High Skill Immigrants

Since the June bulletin, the State Department has indicated the availability of green cards for skilled immigrants is likely to worsen. “The State Department is expected to impose a worldwide priority date cut-off for the EB-2 category in July, when demand is likely to exceed the number of remaining EB-2 immigrant visas. According to a senior official, EB-2 could become unavailable worldwide before the end of this fiscal year if high demand persists,” reported the law firm Fragomen, Del Rey, Bernsen & Loewy, LLP.¹¹ NFAP confirmed this information with the State Department.

In fact, in the *July 2012 Visa Bulletin*, the State Department reported: “Continued heavy demand for numbers in the Employment Second preference category has required the establishment of a Worldwide cut-off date for the month of July. This action has been taken in an effort to hold number use within the annual numerical limit. Should there be an increase in the current demand pattern, it may be necessary to make this category completely ‘unavailable’ prior to September 30, 2012. The China and India Employment Second preference categories are already ‘unavailable’, and will remain so for the remainder of the fiscal year.”¹²

These are significant developments, depending on the future course of applications and the demand in the U.S. economy for such individuals. The State Department reports that after accepting applications in the employment-based second preference for individuals from India and China, the category has experienced a “retrogression,” meaning the cut-off dates listed in the Visa Bulletin have gone backwards for applicants. That means longer waits.

The *June 2012 Visa Bulletin* states, “Despite the retrogression of the China and India Employment Second preference cut-off date to August 15, 2007, demand for numbers by applicants with priority dates earlier than that date remained excessive.” The bulletin explains the reason: “Such demand is primarily based on cases which had originally been filed with the U.S. Citizenship and Immigration Services (USCIS) for adjustment of status in the Employment Third preference category, and are now eligible to be upgraded to Employment Second preference status. The potential amount of such ‘upgrade’ demand is not currently being reported, but it was evident that the continued availability of Employment Second preference numbers for countries other than China and India was being jeopardized. Therefore, it was necessary to make the China and India Employment Second preference category ‘Unavailable’ in early April, and it will remain so for the remainder of FY 2012.”¹³

It is possible the movement of individuals from the EB-3 to the EB-2 category will lessen the wait times in the employment-based third preference category. That may not have a noticeable impact for certain nationals being

¹¹ Client Alert, Fragomen, Del Rey, Bernsen & Loewy, LLP, June 6, 2012.

¹² July 2012 Visa Bulletin.

¹³ June 2012 Visa Bulletin.

Still Waiting: Green Card Problems Persist for High Skill Immigrants

sponsored today in the EB-3 category, given the potentially decades-long waits for Indian and Chinese professionals.

RESPONDING TO ARGUMENTS THE GREEN CARD PROBLEM IS NOT DIRE

A January 2012 report on the stay rates of foreign Ph.D.s implied that it may be unnecessary for Congress to reform America's employment-based immigration system. However, the facts do not warrant such a conclusion. Simply put, all is not well among those waiting for green cards.

The study by Michael Finn of the Oak Ridge Institute for Science and Education estimates the stay rates of foreign nationals who have received Ph.D.s in science and engineering at U.S. universities by matching National Science Foundation data and U.S. tax records.¹⁴ The study is part of a series and Finn should be commended for providing documentation that many highly educated individuals stay in the United States, pursue the American Dream and contribute to our society, culture and economy.

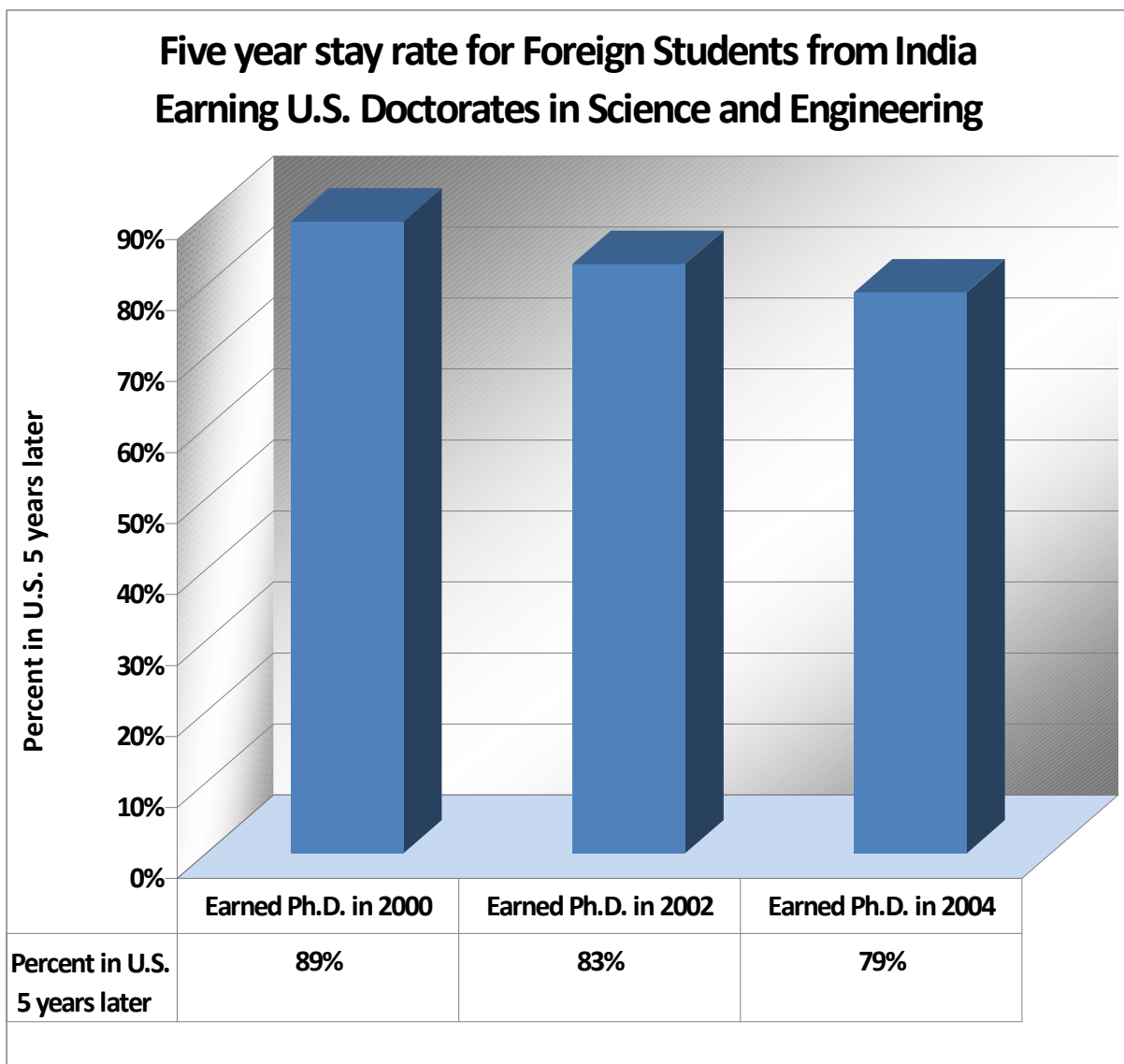
However, Michael Finn's latest study appears to be too optimistic about the continuation of this positive story when it concludes, "China and India are countries of special interest because they account for a large and growing share of new doctorate recipients and are subject to some restrictions not faced by most other countries when seeking permanent resident status. When comparing the history of stay rates for these two countries with that of all other countries, however, there is no apparent evidence that visa restrictions have reduced stay rates for China and India."¹⁵

Several factors may have been overlooked in arriving at the conclusion above. First, table 7 of the report shows the 5-year stay rate is actually 10 percentage points lower for Indian nationals who received a Ph.D. in science and engineering in 2004 than for those who received their Ph.D.s in 2000. This is relevant because it more likely covers the time period when green card backlogs expanded and waiting times increased for nationals of India. A total of 89 percent of Indians who received a U.S. Ph.D. in 2000 in science and engineering were still in America 5 years later (in 2005). However, for Indians who received their U.S. Ph.D. in 2002, a total of 83 percent were in the United States 5 years later (in 2007). And the percentage drops to 79 percent of Indians who received a U.S. Ph.D. in science and engineering in 2004 and were still in America 5 years later (in 2009). For China, the 5-year stay rate dropped from 95 percent for those who received their U.S. Ph.D. in 2000 to an 89 percent 5-year stay rate for Chinese receiving their U.S. Ph.D. in 2004.

¹⁴ Michael G. Finn, *Stay Rates of Foreign Doctorates from U.S. Universities, 2009*, Oak Ridge Institute for Science and Education, 2012.

¹⁵ *Ibid.*, i. Executive Summary.

Table 1
Stay Rates for Indian Ph.Ds



Source: Michael G. Finn, *Stay Rates of Foreign Doctorates from U.S. Universities, 2009*, Division of Science Resources Statistics of the National Science Foundation, January 2012, Table 7.

Still Waiting: Green Card Problems Persist for High Skill Immigrants

Second, even if Ph.D.s from India and China were staying in America at the same rate as before it still would not tell us anything about the green card problems experienced by those at the masters and undergraduate levels. From 2000 to 2012, any Ph.D. eligible for the employment-based first preference (EB-1) did not have to wait long for a green card because unlike the EB-2 and EB-3 categories, the EB-1 category did not have a backlog. As noted earlier, the State Department indicates that may soon change in the EB-1 category, undermining arguments for the status quo.¹⁶

It is far more common for private sector employers outside of academia to hire foreign nationals with a masters or Ph.D. According to H-1B temporary visa statistics released by U.S. Citizenship and Immigration Services, in FY 2009, 13 percent of H-1B visa holders earned a Ph.D., compared to 40 percent for masters, 41 percent for a bachelor's and 6 percent for a professional degree.¹⁷ "Ph.D.s are generally sought out by those pursuing academic careers but individuals seeking to work in the private sector often pursue masters degrees because that is what industry expects," said Greg Siskind, partner, Siskind Susser.¹⁸

Third, because of the length of the degree program, doctoral recipients have typically been in the United States for several years by the time they complete their doctorate. That means foreign-born Ph.D. recipients would be more likely to gain permanent residence via family sponsorship, either through marriage or through other relatives in the United States, than those obtaining other degrees.

Fourth, the fact that India and China have higher stay rates than Ph.D. recipients from other countries does not mean green card problems are not present. Rather it may reflect an interplay of various factors, including a traditionally strong desire of Indians and Chinese to stay in America coupled with greater opportunities in the U.S. labor market in their fields of greatest interest. Indian and Chinese nationals are more likely than students from other countries to enter fields (electrical engineering, computer science, etc.) in the highest demand in the U.S. labor market. The Institute of International Education, examining combined undergraduate and graduate level data, found 36.9 percent of Indian students in the U.S. and 19.2 percent of Chinese students majored in engineering in the 2010/2011 academic year. That compares to only 7.7 percent of Canadian students and 7.9 percent of Brazilian students in the U.S. in engineering.¹⁹ Similarly, while 19.8 percent of Indian students and 10.6

¹⁶ An individual with a Ph.D. would not automatically be eligible for the EB-1 category.

¹⁷ *Characteristics of H-1B Specialty Occupation Workers*, Fiscal Year 2009 Annual Report, U.S. Citizenship and Immigration Services, April 10, 2010, p. 9.

¹⁸ Interview with Greg Siskind. Note: H-1B visas have been unavailable for portions of recent fiscal years.

¹⁹ Institute of International Education. (2011). "Fields of Study for the Top 25 Places of Origin, 2010/11." *Open Doors Report on International Educational Exchange*. Retrieved from <http://www.iie.org/opendoors>. IIE uses the term "field of study."

Still Waiting: Green Card Problems Persist for High Skill Immigrants

percent of Chinese students majored in math/computer science in 2010/2011 at U.S. universities, only 2.4 percent of Canadian students and 3.0 percent of Brazilian students did the same.²⁰

Fifth, the study does not contain data on visa status, which means individuals staying in the United States could be on temporary visas rather than having received permanent residence. Most of the estimates in the paper involve the first five years after being awarded a Ph.D. However a person may be in H-1B status for at least 6 years and can receive annual extensions beyond those 6 years if he or she has a pending green card application. And prior to H-1B status the individual could receive Optional Practical Training (OPT) for more than a year. In addition, the study captures individuals who have returned to the United States after a period abroad, which is more common as scientific careers become more global. The high retention rates ten years after degree completion imply a high rate of obtaining permanent visas, even if at the 10-year mark some will still have temporary visas. But the data in the study stop in 2009, meaning the 10-year rate in the study reflects the experience of those earning Ph.D.s in 1999, and thus less likely to be affected by the green card difficulties reported in recent years.

Another argument made against providing more green cards to highly skilled foreign nationals is that doing so would harm the job prospects of Americans. However, that argument ignores that skilled scientists, researchers and professionals help create more jobs and innovations. Moreover, such individuals are hired as part of the normal recruitment process, complementing, not replacing, Americans. A recent economic analysis supports the view that immigrants help expand economic opportunities for others.

A study by Madeline Zavodny, a professor of economics at Agnes Scott College, concluded, “Immigrants with advanced degrees boost employment for U.S. natives. This effect is most dramatic for immigrants with advanced degrees from US universities working in science, technology, engineering, and mathematics (STEM) fields.”²¹

The research performed for the American Enterprise Institute and the Partnership for a New American Economy examined employment data in the United States for the year 2000 through 2007. The analysis found, “An additional 100 foreign-born workers in STEM fields with advanced degrees from US universities is associated with an additional 262 jobs among U.S. natives. While the effect is biggest for US-educated immigrants working in STEM, immigrants with advanced degrees in general raised employment among US natives during 2000-2007.”²²

The research also found, “An additional 100 immigrants with advanced degrees in STEM fields from either U.S. or foreign universities is associated with an additional eighty-six jobs among U.S. natives. An additional 100

²⁰ Ibid.

²¹ Madeline Zavodny, *Immigration and American Jobs*, American Enterprise Institute and Partnership for a New American Economy, December 2011, p. 4.

²² Ibid., p. 4.

Still Waiting: Green Card Problems Persist for High Skill Immigrants

immigrants with advanced degrees – regardless of field or where they obtained their degrees – is associated with an additional 44 jobs among U.S. natives.”²³

WHAT HAS CONGRESS DONE ON THIS ISSUE?

The annual limit of 140,000 employment-based immigrant visas has remained in place since the Immigration Act of 1990. Despite increased attention to the issue, Congress has not permanently raised the 140,000 limit or provided exemptions to the annual quota.²⁴ As a result, years of backlogs have developed, particularly for individuals from India and China. The problem affects not just employers in high technology, but also health care providers, financial firms, manufacturers, pharmaceutical companies and many others. It also affects the individuals sponsored for the green cards, who live in legal limbo, which is difficult on spouses and children. Individuals waiting in temporary status for their green cards may be limited in their advancement opportunities because a promotion could require starting the green card process again.

On November 29, 2011, the U.S. House of Representatives passed H.R. 3012, the Fairness for High Skilled Immigrants Act, by a vote of 389-15. The legislation would eliminate the per country limit for employment-based immigrants over a four year period.

The bipartisan bill, sponsored by Rep. Jason Chaffetz (R-ID), Rep. Zoe Lofgren (D-CA), House Judiciary Committee Chair Lamar Smith (R-TX) and others has yet to become law. Senator Charles Grassley (R-IA) has blocked the bill in the Senate. Sources indicate Grassley is seeking new restrictions or requirements on temporary work visas in exchange for letting the bill proceed in the Senate. “I have concerns about the impact of this bill on future immigration flows, and am concerned that it does nothing to better protect Americans at home who seek high-skilled jobs during this time of record high unemployment,” Senator Grassley said in a statement in November 2011.²⁵

THE IMPACT OF REFORMS

Unlike the long-term problems in entitlement programs such as Social Security, the solutions to reducing the long wait times for employment-based green cards are easy to implement and have received bipartisan support. These solutions center around two areas: eliminating the per country limit and providing more green cards.

²³ Ibid., p. 4.

²⁴ Some temporary relief on green cards was provided in the past, including additional immigrant visas that went primarily to foreign nurses.

²⁵ Matt Canham, “Key Senator Blocks Lee-Chaffetz Immigration Bill,” *The Salt Lake Tribune*, December 1, 2011.

Still Waiting: Green Card Problems Persist for High Skill Immigrants

An October 2011 analysis of H.R. 3012 by the National Foundation for American Policy concluded phasing out the per country limit would likely equalize the wait times in the EB-2 category at about two to three years without regard to country of origin (as opposed to potential waits of 6 to 8 years or more for Chinese and Indian nationals in the EB-2 category). In the EB-3 category, eliminating the per country limit would lower the typical wait for Indians applying today in the EB-3 category from (potentially) 70 to 12 years. While 12 years is still a long time, it would provide green cards sooner to Indian and Chinese nationals waiting the longest in the third preference.²⁶

Providing additional green cards or an exemption from the annual limit for foreign nationals with an advanced degree from a U.S. university in a science, technology, engineering or mathematics (STEM) field, while also eliminating the per country limit, would have a significant impact on employment-based green card backlogs, if the numbers were sufficiently large. Because visas “fall down” from the upper categories, it would help not only those with advanced degrees from U.S. universities but also other employment-based immigrants.

The October 2011 NFAP analysis estimated, “An exemption of at least 50,000 for advanced degree STEM graduates would eliminate the backlog in the employment-based second preference (EB-2) and make the category current within three years. It would also eliminate the employment-based third preference (EB-3) backlog and potentially make the category current within 10 years.”²⁷

The analysis estimated that 25,000 additional green cards for holders of U.S. advanced STEM degrees would likely “eliminate the backlog and make the EB-2 category current in 4 years.” The October 2011 analysis concluded, “In the EB-3 (employment-based third preference) category, an exemption of 25,000 would likely eliminate the backlog and make the EB-3 category current in 20 years. Wait times would lessen over the years under both a 25,000 or 50,000 exemption.”²⁸

A number of bills introduced in Congress would make the types of reforms discussed above. These bills include:

- H.R. 2161, a bill authored by Rep. Zoe Lofgren (D-CA), would eliminate the per country limit and establish an exemption from the 140,000 annual employment-based green card quota for aliens who possess, “a

²⁶ See *Keeping Talent in America*.

²⁷ Ibid. The analysis added: “This is a conservative estimate that assumes the annual flow of sponsored individuals and dependents matches the current quota for EB-2 (50,000) and EB-3 (35,040). To the extent the annual flow is higher or lower, that would change the impact of a STEM exemption on backlogs and wait times.”

²⁸ For more information on immigration backlogs see Stuart Anderson, *Waiting and More Waiting: America’s Family and Employment-Based Immigration System*, NFAP Policy Brief, October 2011: “A caveat to these estimates is that if demand rises whether because of the economy or the exemption itself, then the reduction in the backlogs and wait times would be less.”

Still Waiting: Green Card Problems Persist for High Skill Immigrants

graduate degree at the level of master's or higher in a field of science, technology, engineering, or mathematics from a United States institution of higher education . . .²⁹

- S. 3217, the Startup Act 2.0, introduced by Senators Jerry Moran (R-KS), Mark Warner (D-VA), Marco Rubio (R-FL) and Chris Coons (D-DE), would provide 50,000 green cards for foreign nationals with a STEM degree from a U.S. university and eliminate the per country limit.³⁰
- S. 3192, introduced by Senators Lamar Alexander (R-TN) and Chris Coons (D-DE), would provide an exemption from the employment-based green card quota for STEM graduates from U.S. universities.
- S. 3185, introduced by Sen. John Cornyn (R-TX), would take 50,000 green cards from the Diversity Lottery and allocate them to individuals with an advanced degree from a U.S. university in a STEM field.
- “Judiciary Chairman Lamar Smith, R-Texas, and committee member Tim Griffin, R-Ark., are working on a bill that would shift up to 50,000 green cards from a visa lottery open to countries around the world and funnel them to highly skilled workers,” according to *Congressional Quarterly*.³¹

Absent changes in the law by Congress, the long wait times for high skilled foreign nationals, including those educated in America, will continue. At a time when there is fierce competition around the world to hire highly skilled individuals, this threatens to deprive the country of talented individuals who will choose to develop innovations, make their careers and raise their families in other nations.

²⁹ Section 101 of H.R. 2161.

³⁰ See also H.R. 5893.

³¹ David Harrison, “Smith, Griffin Seek to Ease Path for Highly Skilled Foreign Workers,” *Congressional Quarterly*, May 29, 2012.

Still Waiting: Green Card Problems Persist for High Skill Immigrants

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

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