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Comprehensive Immigration Reform Under S. 2611

It Could be a Sea Change for Employment-Based Immigration *(If It Passes)*

> While the national debate over Comprehensive Immigration Reform has focused on important issues of legalization and enforcement, S. 2611 also contains a number of new provisions that would dramatically improve the immigration landscape for employers seeking to employ professional-level foreign workers.

On May 25, 2006 the United States Senate approved a landmark immigration bill which would overhaul much of our current immigration system. Titled the "Comprehensive Immigration Reform Act of 2006" (S. 2611), the Senate bill — which is nearly 800 pages in length — would significantly expand opportunities and visa availability for new graduate students in the sciences, technology, engineering and mathematics fields. It would also increase visa numbers for H-1B temporary workers and for individuals seeking permanent residence through employment based sponsorship.

The Senate bill is now unfortunately stalled in Congress by the House of Representatives, which previously passed its own bill that focuses solely on enforcement. The reconciliation of these two bills may not occur until after the mid-term elections this Fall. We are, however, cautiously optimistic that if the two pieces of legislation can be reconciled on substantive differences involving enforcement, legalization and a guest worker program, then the business-favorable provisions of S. 2611 are likely to survive (or be passed in separate legislation). Described below are the most relevant and important portions of these provisions, which affect U.S. businesses that employ highly-skilled workers.

New F-4 and J-STEM Student Visa Categories

Under current rules, foreign students (F-1) and exchange visitors/scholars (J-1) must continue to demonstrate that they have a foreign residence that they do not intend to abandon, and to which they will return at the conclusion of their studies. As a result it is difficult to transition from F-1 or J-1 nonimmigrant status to US permanent resident status ("Green Card") status. Typically F-1 and J-1 students need first to transition to H-1B visas to retain continued employment eligibility and to begin to pursue their Green Cards. The Senate bill would change the dynamics significantly for students pursuing advanced degrees in a STEM (Sciences, Technology, Engineering or Mathematics) field by adding a new F-4 and J-STEM student visa categories.

F-4 or J-STEM visa holders would be allowed to pursue permanent residence without jeopardizing their nonimmigrant status and reentry into the U.S. S. 2611, in fact, encourages F-4 and J-STEM holders to seek sponsorship following completion of a graduate program by actually extending the validity of the F-4 or J-STEM visa holders' status and work authorization provided a Labor Certification or an Immigrant Petition (the initial stages in a Green Card application) has been filed on behalf of the F-4 or J-STEM visa holder within one year of completion of the graduate program.

The law further allows F-4 and J-STEM visa holders to apply for adjustment of status (regardless of visa availability) and to seek advance parole to travel and reenter the U.S. during the pendency of the adjustment of status application's adjudication. Further, F-4 and J-STEM visa holders can secure employment authorization in renewable three-year increments should there be a backlog in immigrant visa availability. Finally, the new rules would waive the two-year foreign residence requirement for new J-STEM visa status holders. This benefit would also extend to current J-1/J-2 visa status holders who are subject to the home residence rule if the J visa status holders would have otherwise qualified for the J-STEM program and have not yet completed their program at the time of new law's enactment.

More H-1B Visas and a Market-Based Escalator Provision to Adjust to Demand

Under S. 2611 the H-1B cap would increase from its current level of 65,000 visas to 115,000 visas per fiscal year. The bill also includes a market-based escalator provision that would increase the next fiscal year's quota to 120% of the current year quota, should the cap be reached in a given fiscal year. Thus, if all 115,000 visas were used up in a fiscal year, the next fiscal year the H-1B cap would increase to 138,000. If the numerical limitations are not reached in the given fiscal year the rate would remain the same for the following fiscal year.

S. 2611 also exempts from the overall H-1B cap foreign professionals who have earned a U.S. master's degree or higher from an accredited U.S. institution of higher education, or who have earned a medical specialty certification through post-doctoral training and experience in the U.S. Further, the bill would change the 20,000 H-1B cap exemption that currently applies only to U.S. advanced degree holders to include holders of foreign-based advanced degrees that are equivalent to a U.S. Master's degree (or higher).

Protection for L-1 Intracompany Transferees Visa Holders

At present, L-1 intracompany transferee visa holders may only remain in the U.S. for up to five years if admitted in L-1B (Specialized Knowledge) status or seven years if admitted in L-1A (Manager/Executive) status. Like their H-1B counterparts, L-1 visa holders seeking permanent residence must maintain valid nonimmigrant status and work authorization until the completion of the green card process. Unlike their H-1B counterparts, L-1 nonimmigrants are not protected against lengthy delays in the Labor Certification or Immigrant Petition process nor from per country limits on visa availability which impede their ability to convert to permanent residence.

Should S. 2611 be enacted, L-1 visa holders would be able to receive extensions beyond the five and seven year limits in one year increments if a Labor Certification or Immigrant Petition had been filed and is/was pending for more than 365 days prior to the five-year or seven-year L-1 stay limit.

Longer Practical Training Available to F-1 Students

S. 2611 would increase the available post-completion optional practical training available to F-1 students to 24 months instead of 12 months. This would protect an individual from the vagaries of the H-1B cap.

An Overhaul of the Immigrant Visa Category

An increase in the total number of available immigrant visas, new immigrant visa allocations per category, higher per country immigrant visa limits, the addition of cap exempt immigrant visa categories, and streamlining of the adjudications process are some of the changes we would see in S. 2611 in employment-based immigrant visa restrictions. These provisions would dramatically reduce immigrant visa waiting times and shorten the path to lawful permanent residence in the U.S.

At present, there are 366,000 immigrant visas (or Green Cards) made available annually to applicants under the employment-based and family-based categories. Of the 366,000 immigrant visas, 226,000 are reserved for the family-based categories and 140,000 are reserved for the employment-based categories. Under both categories spouses and children who immigrate with the principal applicant are counted against the annual quota.

Most applicants today are experiencing long wait times — often years in the Green Card process. This is because the demand for immigrant visas currently far exceeds the supply of immigrant visas made available each year. S. 2611 would ameliorate this situation by increasing the total number of immigrant visas in both the family-based and employment-based categories. The Senate bill would more than double the total number of family based immigrant visas to 480,000 and more than triple the level of employment-based immigrant visas to 450,000 annually. Further, in the employment-based immigrant visa category, spouses and children would not be counted against the annual quota, but instead be allotted up to 200,000 immigrant visas. Once all 650,000 immigrant visas have been used by principals and their spouses and children in the given fiscal year, no more immigrant visas would be issued to principals for that fiscal year.

S. 2611 would change the current allocation of employment-based immigrant visas under each preference category by increasing overall visa numbers available to foreign nationals who are sponsored in lower-skilled jobs.

Finally, S. 2611 would exempt entirely from the annual employment-based immigrant visa quota foreign nationals who qualify for an immigrant visa under any of the following categories:

- ✔ Shortage occupations (currently nurses and physical therapists) with a permanent job offer;
- ✔ Persons with Medical Specialty Certification gained through post-doctoral U.S. training and experience with a permanent job offer;
- ✔ Holders of a U.S. Master's degree or higher with a permanent job offer;
- ✔ Outstanding Researcher/Professors with an offer of a permanent research position or tenure-track teaching position;
- ✔ Persons with Extraordinary Ability in the Arts, Sciences or Athletics;
- ✔ Persons with Exceptional Ability or an Advanced Degree whose contributions and work is in the National Interest.

As you can see, S. 2611 contains some extraordinarily favorable provisions for employers who hire foreign nationals in professional-level positions. While the national debate rages over other important issues such as legalization, guest-worker programs and border security, we are hopeful that some or all of the employment-based provisions of the Senate bill survive the legislative process and are enacted into law.

A significant hopeful sign is the recent introduction of the SKIL Bill (Securing Knowledge Innovation and Leadership) in the House of Representatives by several Republican members. Their bill would retain many of the same ameliorative provisions for employment-based immigration introduced in S. 2611 including: H-1B and employment-based immigrant visa exemptions for U.S. educated foreign workers with Master's or higher degrees; a market-based H-1B cap; increase of foreign students' post curricular optional practical training from 12 months to 24 months; and exempting immigrant spouses and children from the annual visa quota in employment-based cases, thus making more visas available to the sponsored workers whose skills are sought.

We will keep you informed of developments in this area through future issues of the *Immigration Quarterly* or special bulletins on our website.

The Morse, Barnes-Brown & Pendleton, PC, **Immigration Practice Group** provides sophisticated legal services and practical advice to employers of all sizes, ranging from technology start-ups to Fortune 500 companies.

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