CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

HOW FAIR IS THE FAIRNESS FOR HIGH-SKILLED IMMIGRANTS ACT?

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H.R. 3012, the Fairness for High Skilled Immigrants Act, was passed in the House on November 29, 2011 by a landslide 389-15 vote. Introduced by Rep. Chaffetz (R-UT), it eliminates the employment-based per country cap entirely by 2015 and raises the family-sponsored per-country cap from 7% to 15%. If H.R. 3012 does become law, it will significantly decrease the wait times for certain countries in the employment-based preferences, especially India and China. Even wait times in the family-based preferences will get reduced.

H.R. 3012 only redistributes the allocation of visas, it does not increase the visas that are fixed in number each year. As a result of the existence of the per country limits, those born in India and China have been drastically affected by backlogs. Each country is only entitled to 7 percent of the total allocation of visas under each preference. Thus, a country like Iceland with only 300,000 people has the same allocation as India or China with populations of more than a billion people. For instance, in the Employment-based second preference (EB-2), those born in India and China have to wait for over 5 years to obtain green cards while all other nationalities do not have any wait times. The situation is even more dire in the Employment-based third preference for India (EB-3). Under the per country limit for India in the EB-3, only 2,800 visas can be allocated each year while an estimated 210,000 Indians, along with their dependants, are eligible for green cards. As a result, according to a report of the National Foundation For American Policy, the waiting time for a green card for an Indian under the EB-3 has been estimated to be 70 years, while it may be over 5 years for others.

As a result of such unmanageable waiting times, skilled foreign nationals in the pipeline for a green card, especially from India and China, have no incentive to

stay in the US even though they may be invaluable to their employers who have sponsored them by demonstrating that there were no US workers available for the position. Many of these skilled immigrants have graduated with degrees in science, technology, engineering and math (STEM), vital to US growth and innovation. Such skilled workers are generally on H-1B visas, but many are on other nonimmigrant visas such as the L visa too. Even though they are able to extend their H-1B visas beyond the six year limit while waiting for the green card under provisions in the American Competitiveness in the 21st Century Act (AC21) (and many are already past 10 years on the H-1B visa), they are generally bound to the same employer during the green card process and their spouses cannot work. If their children turn over 21, they lose the ability to remain on the H-4 dependent status and most likely will also be unable to derivatively get the green card along with the parent.

The passage of H.R. 3012 has been met with jubilation by Indians and Chinese, but those from the rest of the world may not be so happy. While Indians and Chinese may still need to wait, the waiting times will get more tolerable, but others who did not have to wait in the EB-2 will now need to wait. While it is hard to predict, there may eventually be waiting times of 1-2 years for all countries in the EB-2. While everyone in the EB-3 is subject to unreasonable waiting times, upon the elimination of the per country limits, Indians may still need to wait but it will not be for 70 years. Instead, it may be 10-12 years for all EB-3 nationals, according to the NFAP report. Those who have priority dates prior to November 2005 in the EB-3, according to the NFAP report, will need to wait only 1 to 2 more years instead of an additional torturous 11-18 years. While waiting times for Indian and Chinese may likely lessen, waiting times for all others may go up in both the EB-2 and the EB-3.

H.R. 3012 is thus not a perfect bill. It also has to be passed by the Senate before it becomes law, and there is an identical version introduced in the Senate. At present, Senator Grassley (R-1A), who has been a foe to skilled immigrant from India, including H-1Bs used by Indian IT companies, has placed a hold on legislation in the Senate. Senate procedures allow any member of the Senate to place such a hold on legislation, and it is uncertain whether Grassley will release his hold in the near future, although he is being persuaded to do so by colleagues and advocates. What is so significant about H.R 3012 is that it received bipartisan support and that too by a landslide, especially in a time when such bipartisan support on other measures is rare or non-existent. The

easy passage of H.R. 3012 also shows that there is concern about the unfairness and imbalance in the system towards certain countries, especially India and China. Indeed, although the country limits were originally enacted for all countries, it has resulted in invidious discrimination within the immigration system for Indians and Chinese.

Things may work out better than expected if H.R. 3012 became law, though, as we have lived without per country limits in recent times. Prior to Jan 1, 2005, the EB numbers were always current because AC 21, enacted in 2000, recaptured 130,000 numbers from 1998 and 1999, and the per country limits were postponed under a formula until the demand in the EB outstripped the supply. The lack of per country limits helped, but we also had the additional unused numbers. However, at that time, we also had a surge under the 245(i) program, which we do not have today. The notes in the January 1, 2005 Visa Bulletin, when there was retrogression in the EB-3 for the first time after AC21, explains it all.

In conclusion, even if H.R. 3012 imposes waiting times on others who were hitherto not affected in an unfair system while decreasing the wait times for Indians and Chinese, it is consistent with principles of fairness.

The words of Justice Jackson ring true with respect to H.R. 3012 too:

"The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."*Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112—113 (1949) (concurring opinion).

Of course, H.R. 3012 ought to be viewed as a first baby step towards more comprehensive immigration reform. Even if it does become law, and skilled immigrants continue to wait, who may not only be Indians or Chinese, Congress will realize that the ultimate solution is to increase the visa numbers, rather than to maintain fossilized quotas that never change and are oblivious to economic and global realities. If there is no consensus for an overall increase in the 140,000 visas that are allocated each year to EB immigrants, Congress can

exempt certain people from the numbers such as graduates with STEM degrees, or better still, dependent family members. Such carve outs too could restore further balance and integrity to the US immigration system.