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SQUARING THE IMMIGRATION CIRCLE: NEW HOPE FOR AN OLD SYSTEM

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The Immigration Innovation Act of 2015 (S. 153) ("I-Squared" Act) was introduced by Senators Hatch (R-UT), Klobuchar (D-MN), Rubio (R-FL), Coons (D-DE), Flake (R-AZ), and Blumenthal (D-CT). When partisan rancor is the norm in Congress, the I-Squared Act is genuinely bipartisan, and endeavors to provide critical reforms needed in the area of high-skilled immigration. Soon employers will be scrambling again on April 1, 2015 to file their H-1B petitions in the hope that they will be selected in the cap lottery. H-1B numbers will get exhausted six months before the start of the new fiscal year on October 1, 2015. The I-Squared Act will raise H-1B numbers so as to avoid these unnecessary scrambles for the H-1B visa. What is unique is that the H-1B numbers will not be the subject of an arbitrary cap just picked from a hat, but will fluctuate based on actual market demand. The cap will not go above 195, 000, but not below 115,000.

Among the bill's provisions are the following, although we refer readers to Greg Siskind's detailed summary:

- Increases the H-1B cap from 65,000 to 115,000 and allows the cap to go up (but not above 195,000) or down (but not below 115,000), depending on actual market demand.
- Removes the existing 20,000 cap on the U.S. advanced degree exemption for H-1Bs.
- Authorizes employment for dependent spouses of H-1B visa holders.
- Recognizes that foreign students at U.S. colleges and universities have "dual intent" so they aren't penalized for wanting to stay in the U.S. after graduation.

- Recaptures green card numbers that were approved by Congress in previous years but were not used, and continues to do so going forward.
- Exempts dependents of employment-based immigrant visa recipients, U.S. STEM advanced degree holders, persons with extraordinary ability, and outstanding professors and researchers from the employment-based green card cap.
- Eliminates annual per-country limits for employment-based visa petitioners and adjusts per-country caps for family-based immigrant visas.
- Establishes a grant program using funds from new fees added to H-1Bs and employment-based green cards to promote STEM education and worker retraining.

What we are dealing with is a global battle for talent. More than any other single immigration issue, the H-1B debate highlights the growing and inexorable importance of a skilled entrepreneurial class with superb expertise and a commitment not to company or country, but to their own careers and the technologies on which they are based. They have true international mobility and, like superstar professional athletes, will go to those places where they are paid most handsomely and given a full and rich opportunity to create. We are no longer the only game in town. The debate over the H-1B is, at its core, an argument over whether the United States will continue to embrace this culture, thus reinforcing its competitive dominance in it, or turn away and shrink from the *competition* and the benefits that await. How can we, as a nation, attract and retain that on which our prosperity most directly depends, namely a productive, diverse, stable and highly educated work force irrespective of nationality and do so without sacrificing the dreams and aspirations of our own people whose protection is the first duty and only sure justification for the continuance of that democracy on which all else rests? This is the very heart of the H-1B maze. The H-1B has become the test case for all employment-based immigration. If we cannot articulate a rational policy here that serves the nation well, we will likely not be able to do it anywhere else. The ongoing H-1B debate is really about the direction that the American economy will take in the digital age and whether we will surrender the high ground that America now occupies.

Until now, the ever-increasing fees and hyper-regulation imposed by Congress and the USCIS on H-1B employers have been justified by the simple but stubbornly held, if unstated, conviction that the hiring of foreign workers is contrary to the national interest and should be punished. Beyond that, the

USCIS and DOL, not to mention the legacy INS, have always and continue to believe that the infliction of such punishment was the best, perhaps the only way, to shield US workers from such "illicit" activity. No government should have to apologize for trying to protect its own citizens. The true objection to what the USCIS and DOL have done is that their efforts, however well intentioned, have done precious little to help, but much to hurt, the very objects of their stated concern.

What is also remarkable about the I-Squared Act is that it raises the H-1B cap without undermining the H-1B visa program the way we know it. Unlike what S. 744 tried to do to muddy the H-1B visa, there are no provisions that would force employers to pay higher than market wages, or subject dependent employers to artificial and onerous recruitment requirements. The bill also incorporates ideas that have been floated in the context of bringing about administrative reform. Most notable is that I Squared exempts dependents from being counted in the employment-based preferences, which is something that we have advocated for several years. It is always preferable if Congress is able to bring about this change than to have the Administration find a justification for not counting family members under the current INA, and possibly even being sued for doing so. The bill also seeks to recapture unused visa numbers, and these have been estimated to be at least 200,000.

The bill would also allow for early adjustment filing by deeming an immigrant visa to be immediately available if the visa has not been used up during the fiscal year. This is precisely what we have also been advocating for facilitating early adjustment filings administratively. So long as there is even one visa that has gone unused, there should be a deeming of visa availability, thus allowing a foreign national to be able to file an early adjustment of status application before the State Department's Visa Bulletin announces them current. Of course, if Congress can bring about the innovation through the I Squared Act, so much the better. This redefinition of visa availability would also inject new and badly needed relevancy into the age-freezing formula of the Child Status Protection Act which, despite petition approval, does not operate where there are visa backlogs. Under the Child Status Protection Act, one needs an approved petition and a visa number to freeze the age of the child. If there is retrogression after such visa availability, the age remains frozen. However, if the visa availability is redefined, then the danger of aging out is removed. It will do little good to allow the parent(s) to apply for adjustment of status if their

kids age out and have to leave. Interestingly enough, the I-Squared Bill will be the one and only definition of visa availability that Congress has ever authored.

The bill will also bring some respite to H-1B workers whose jobs get suddenly terminated. At present, there is no respite and an H-1B worker is in violation of his or her status upon termination. The bill will grant a 60 day grace period if the H-1B is terminated before the I-94 expires during which time a new employer can file a petition to extend or change status. This is the first step. We also urge that Congress passed a startup visa for entrepreneurs who wish to set up innovative businesses in the US. The H-1B visa is ill-suited for startups due to the need for the employer to establish control over the H-1B worker's employment, which is difficult to demonstrate if the foreign national is the founder and owner of the entity.

The bill will also prohibit USCIS and DOS from denying subsequent petitions, visa or applications involving the same petitioner and beneficiary unless there was a material error relating to the approval of the prior petition, a material change in circumstances has occurred or new material has been discovered which adversely affects the eligibility of the employer or the worker. Although this bill has bipartisan support, it remains to be seen whether it will pass Congress. Republicans will want to introduce an amendment to abolish the Deferred Action for Parents Accountability (DAPA) program and Democrats may want to include provisions to make it more comprehensive such as legalizing undocumented persons. If both parties want to be able to demonstrate and can get something done, it would behoove them to pass this bill so as to avoid another H-1B cap quagmire looming ahead of us. Additionally, this bill will also help to further strengthen the American economy.

Section 102 of the I-Squared Bill would allow both H-4 and L-2 spouses to work, providing them with an "employment authorized endorsement of other appropriate work permit." Does this mean a need to get an Employment Authorization Document? Who knows? We welcome this development even though there is nothing in the INA right now that prevents an H-4 spouse from working. This prohibition is purely an act of regulation. While the USCIS has proposed to allow H-4 employment in select instances, the I-Squared version of H-4 employment authorization is a distinct improvement. I-Squared improves the USCIS proposed rule as it would allow H-4s to obtain EADs without preconditions. The proposed USCIS rule imposes preconditions where the principal must either have to have an approved I-140 or be filing for an H-1B

extension beyond the 6th year under the American Competitiveness in the 21st Century Act. Both versions unnecessarily limit H-4 employment to spouses rather than extending it to teen age children.

Much as with the notion of a flexible H-1B cap, this reframing of visa availability is not so much an attempt to create a new immigration law as to bring new depth and definition to the existing INA, thus indicating yet again that the value of incremental change is to function as an improvement upon existing legislation. While I-Squared does not overly challenge the tyranny of priority dates, it does so indirectly by updating our understanding of visa availability and exempting EB-1 extraordinary ability and outstanding researchers from being subject to the crushing weight of the numerical employment based caps, as well as advanced degree holders with STEM degrees . The concept of family unit is advanced by not counting family members against the employment-based immigrant visa caps but it would be even better if family members were similarly exempt as a factor in the family-based quota limits.

While I-Squared does not explicitly link H-1B allotments to domestic economic conditions, it does so on a de facto basis by allowing the H-1B cap to rise or fall in connection with increases or decreases in H-1B sponsorship which themselves are a direct function of business profitability. While I-Squared does not make the H-1B truly portable, it does grant a temporary 60 day basis for the H-1B worker to find a new job without falling out of status. While I-Squared does not explicitly sanction consular reviewability, it makes it unnecessary for E, H, L, O or P visa holders to go to a consulate in the first place in order to renew their existing visas by restoring the pre-9/11 practice of visa revalidation. While I-Squared retains the INA 214(b) presumption of intending residence or immigrant intent, it exempts F-1 students from the obligation to maintain an unabandoned foreign residence abroad. Dual intent is not eliminated but students now come within the protection of its sheltering arms. The concept of the per country cap is partially retained but only on the family based side of the ledger. Let's take the next step and extend this reductive methodology to FB quotas. The priority date system remains in place but the INA now will define visa availability so long as any visa number allocated to employment-based preference immigrants has not yet been issued for that fiscal year. Beyond that, US advanced degree STEM holders are no longer counted against the overall EB limits. In sum, I-Squared is a classic example of legislative remediation that retains the frame of what was not working while infusing it

with new meaning and greater adaptability to meet and answer the challenges of the 21st century.

This is pre-eminently a time for innovation. Try something, if that does not work, well then, try something else. True and lasting change is what America needs. In a global economy, all forms of capital, including intellectual capital, flow to their optimum destinations according to the laws of supply and demand. The American economy does not operate in a vacuum and assumptions to the contrary, the very assumptions that have dominated the nativist response to date, only enrich our foreign competitors while we all lose. The USCIS and DOL care about American workers but do not effectively express such concern through policies that make US companies less competitive and the US itself less desirable as a place for the world's creative elite to live and work. There is a better way where everyone benefits. We can, if we think and act anew, transform immigration policy from an endless source of controversy to a flexible weapon in our economic arsenal so that everyone profits. For those who think a new way is too complex, do we not have complexity now and towards what end? For those who shrink from the demands of change, or doubt what they can do to chart a new course, let them listen to the wise words of Robert Frost in his immortal poem *The Road Not Taken* that can, if we have the will and wisdom to hear it, still speak to us today: " Two roads diverged in a wood, and I – I took the one less traveled by, And that has made all the difference."