US Immigration Overview

US creates more visas for high-skilled workers

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In October 2000, the US took a giant step toward the globalisation of the high-skill and high-tech workforce. A new immigration law, appropriately entitled the American Competiveness in the 21st Century Act ('AC21') puts the US Congress on record as being in favour of dramatically increasing the numbers of highly educated and highly skilled immigrant workers. The new law mandates much faster processing times for most work visas. All of the changes in the law should have the effect of making it easier for employers to further internationalise their payrolls in the US. The new law will ease processing of cases for multinational transfers of workers who already have overseas experience working for affiliates of US employers (typically in the L-1 category) as well as newly-hired non-US workers (typically in the H-1 category).

Changes to the H-1 visa programme

The new law will especially benefit employers who are actively recruiting workers who can meet the qualifications of the H-1 'specialty occupation' category. The H-1 category has for many years been the most commonly used work visa for newly-hired international workers in the US. To qualify as a 'specialty occupation', the position must require the completion of a US four-year university degree or its equivalent and the sponsored worker must actually have a US bachelor's or higher degree or a foreign equivalent, or an acceptable combination of appropriate education and work experience.

While many of the provisions of the new law will benefit all categories of employment-based immigration, the H-1 'specialty occupation' category has received the most attention. The H-1 category has been improved in three ways:

- The annual quota numbers have dramatically increased. From an original quota of 65,000 new H-1 workers per year first established in 1990, the quota numbers were increased to 115,000 per year in 1998 and further increased in 2000 to 195,000 new H-1 visas per year. Since an H-1 work status is now valid for up to six years or more, the new law could result in the employment of more than one million H-1 workers in total on US payrolls by 2004.
- The completely new concept of 'H-1 portability' is now part of US law. This new feature will allow many H-1 workers to change employers instantly when a new employer files a new H-1 petition with the Immigration and Naturalisation Service (INS). Under the previous law a new employer often had to wait for four months or more for the final INS approval of the H-1 petition before the transferred H-1 worker could begin work.

In another H-1 innovation the US has created two unprecedented categories of 'added-time H-1s'. Under these new rules many H-1 workers who have reached their six-year limit may stay and continue to work in the US as H-1 workers for as long as it takes the INS to complete processing of their permanent residence cases. The benefited groups include H-1 workers who are prevented from getting their 'green cards' because of INS processing delays exceeding 365 days, as well as H-1 workers who are unable to obtain 'green cards' solely because of per country quota limits. (Per country quota limits have been a growing problem in recent years, especially for nationals of India and China.)

Under the new rules, tens of thousands of 'added time H-1' visas can be created for workers who will now be able to work in the US for seven to 10 years or even longer in the H-1 category.

'Free agency' for immigrant workers?

In another sweeping innovation that could effectively turn many employment-based immigrant workers into 'free agents' (even before their permanent residence cards are approved), AC21 has introduced a new option for many sponsored workers to change employers while their cases are still pending.

Currently, complete processing of an employment-based permanent residence case may take two to three years or longer from commencement to final approval. The new law allows most employment-based immigrants to switch to a new employer sponsor if their permanent residence applications have been pending for more than 180 days at the INS. Essentially the sponsored worker becomes a 'free agent' eligible to work for any employer in the US so long as the offered employment is in the 'same or similar occupational classification' as the original application. It remains to be seen how much future INS or Department of Labor (DOL) regulations may attempt to restrict this generous statutory mandate.

New 'superfees' for superfast processing

In additional legislation that passed the US Congress in December 2000, the INS was given a significant increase in funding and manpower to help it address processing backlogs that continue to grow despite dramatic budget increases in the past decade. The INS has more than doubled in size in the last 10 years and is now larger than the FBI. Nevertheless, current backlogs exceed two million cases, and many applications that formerly were processed in one to two months or less are currently still waiting in the processing queue for six months to two years or more after filing.

One of the innovations that Congress has created to address the INS backlogs could greatly benefit most employment-based applicants. The 2001 INS

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budget legislation authorises the agency for the first time to allow employers to pay extra fees to obtain faster processing of work visa cases. The new Premium Processing Charge was quickly nicknamed the 'superfee'. The employer would pay the 'superfee' of US$1,000, in addition to the usual fee, and would be assured that the INS would make a final decision on the case in 15 days or less.

If this new expedited processing system works as planned, processing time for many work visas could improve dramatically. Many cases that currently take six months or more could be completed in two weeks or less. Initial pilot testing of the premium processing 'superfast/superfee' programme is expected in the summer of 2001.

It is important to note that all of these new immigration benefits are targeted primarily at workers who have at least a four-year university education. There is little in the new law that will facilitate temporary or permanent work visa issuance for lesser-skilled workers. Employers who need help with positions that do not require at least two years of occupation-specific training or education continue to struggle with the cumbersome and largely unsatisfactory H2B 'Temporary Worker' and permanent 'Other Worker' classifications.

A brief history of US immigration policy

Historically, US immigration policy has been characterised by long periods of comparative openness, interrupted by periods of restriction. For more than 200 years from the mid-17th century until the late 19th century American immigration policy was essentially one of 'open borders'.

In the late 1800s a series of laws were adopted strengthening the role of the federal government in controlling immigration and excluding various groups (eg convicts and prostitutes – 1875; Chinese labourers – 1882). No numerical limits existed until the 1920s, when a 'national origins' quota system was enacted. The effect of this quota system was to facilitate immigration from Northern and Western Europe and restrict immigration from the rest of the world. The 'national origins' quota was in effect until 1965.

The current highly regulated system of legal permanent immigration, established in 1952 in the McCarran-Walter Act, gives priority to close family connections (parents, spouses and children of US citizens and permanent residents), selected refugees/asylees and employment-sponsored immigrants.

During the past two decades, immigration policy has been at the centre of American political debate, resulting in three major new pieces of legislation. The first, the Immigration Reform and Control Act of 1986 (IRCA), included a generalised 'amnesty' or legalisation of more than 2 million illegal immigrants and introduced the new concept of 'employer sanctions' to be enforced against employers who hire unauthorised workers. The second major law change, the Immigration Act of 1990 (IMMACT 90), created many new employment-based immigration categories and more than doubled the available quota for skill-based and independent immigrants.

In 1996 the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) made sweeping changes in the US immigration system. Key provisions included broad new restrictions on judicial review of INS administrative decisions, expedited deportation procedures, summary review of asylum claims, stringent new curbs on the use of government-funded social services by both legal and illegal immigrants and huge increases in staffing, resources and technology for border control.

The many new restrictions in the 1996 law (IIRAIRA) were aimed primarily at curbing illegal immigration. There is continuing concern among human rights groups and others in the US that the severe new restrictions of the 1996 law are being arbitrarily applied by the INS to exclude or obstruct the lawful admission of many temporary visitors and permanent residents for trivial, technical or inadvertent violations of the obscure and complex US immigration code.

The current US immigration system

The current US immigration programme is probably the most bureaucratised and technically complicated immigration legal system in the world. Its only close rival for complexity in the US legal system is the US federal tax code administered by the IRS. The US tax laws, while very complex, are relatively coherent (as compared with US immigration laws) and are administered by a single federal agency. Consequently, there is substantially uniform application of US tax laws worldwide. Unhappily, the situation with US immigration laws is very different.

US immigration laws are administered by several different federal agencies, which frequently have competing and overlapping jurisdiction over the same cases. These separate agencies include the Department of Justice (including the INS), the Department of Labor, the Department of State, and US Consular Offices abroad, among others. In addition, many US immigration decision-makers in all agencies and at all levels are vested with broad discretion in individual cases. The result is that apparently similar cases can produce very different outcomes depending upon many factors other than the basic facts of the case.

The current US immigration law places all persons in the world into one of two categories – US citizens (including US nationals such as natives of Puerto Rico) and non-US citizens. The non-citizens are called 'aliens'. Every non-citizen needs the permission of the US government to enter, stay, or be employed in the US.

All non-citizens are further divided into two subcategories: non-immigrants (persons who presently do not intend to immigrate permanently to the US) and immigrants (persons who presently do intend to immigrate permanently to the US). The US law presumes that all non-citizens seeking entry to the US are immigrants, unless they can prove they are non-immigrants to the satisfaction of often sceptical US consular and immigration officials. Presumed 'immigrants' who are not in possession of valid permanent immigration visas are generally barred from entering the US. Permanent immigrant visas are often difficult and time-consuming to obtain on behalf of any person who lacks a US citizen parent or spouse.

Permanent residence options

The phrases 'legal immigrant', 'lawful permanent resident', 'immigrant visa' holder or 'green card' holder are all terms commonly used to refer to a person who has been granted the legal right to live and work permanently in the US, ie a 'Permanent Resident'. To obtain Permanent Resident Status, a person must generally be eligible in an immigrant category and be admissible to the US. Certain present or past conduct including, for example, drug abuse, criminal conduct, giving false information to the immigration authorities or receipt of welfare assistance can create admissibility problems. The new 1996 law greatly increases the severity of admissibility restrictions. A person with a history of any criminal conviction more serious than a minor traffic violation, or even a minor technical past violation of immigration rules (eg a one-day overstay of a prior visa, incomplete or incorrect information on any prior visa application, minor casual unauthorised employment) should now proceed with great caution.

During the past decade approximately 800,000 people each year have obtained Lawful Permanent Resident Status in the US (evidenced by the legendary 'Green Card') using one of the more than 50 alternative pathways to legal permanent immigration to the US. These numbers exceed the combined totals for legal permanent immigration to all other developed countries in the world put together. The alternative pathways to permanent residence in the US can be divided into five main groups (i) employment-based immigration, (ii) family-based immigration, (iii) investment-based immigration, (iv) special categories and (v) the Permanent Immigrant Visa Lottery.

The issuance of immigrant visas for permanent residence in the US is subject to both worldwide and per country annual limits for each category of sponsorship according to an extremely complex formula of priorities. Waiting times for fully qualified immigrants can range from one day to more than 10 years.

Employment-based permanent immigration

Processing delays continue to plague the most popular employment-based permanent immigration programmes. The Labor Department controls administration of the 'Labor Certification' programme widely used by employers to meet government requirements to document the unavailability of US workers as a prerequisite to many employment-based permanent visas.

Partly as a consequence of the increasingly unsatisfactory Labor Certification programme, interest in alternative employment-based categories that do not require Labor Department approval continues to grow. These 'Priority Worker' categories, first functionally available in 1991, include categories for 'Extraordinary Ability', 'Outstanding Professor or Researcher' and 'Transferred Multinational Executive or Manager'. The 'Advanced Degree Professional' and 'Exceptional Ability' 'national interest' categories present additional opportunities for permanent immigration to the US that do not require a Labor Certification.

While these 'Labor Certification exempt' cases are documentarily and technically demanding, properly prepared cases can in many cases be approved six months to two years faster than the same case submitted through the Labor Certification process. In addition, three of these new categories, 'Extraordinary Ability', 'Advanced Degree Professional national interest' and 'Exceptional Ability national interest' also permit self-sponsorship by qualified independent individual immigrants.

Under current law, most employment-based immigrants use one of the following categories of admission:

The 'Extraordinary Ability' category – certain immigrants with "extraordinary ability and achievements in the arts, sciences, business or athletics" who intend to enter the US to continue to work in their field. Note: this category and the other Labor Certification exempt categories generally require extensive documentation of the individual beneficiary's eligibility.

The 'Outstanding Professor or Researcher' category – certain immigrants with at least three years experience in teaching or research in their field entering a tenured or tenure-track or "comparable teaching or research position" in academics or private industry.

The 'Transferred Multinational Executive or Manager' category – certain executives or managers with at least one year of prior qualifying experience with their sponsoring employer as an overseas executive or manager within the past three years.

The 'Advanced Degree Professional' category – certain members of the 'professions' holding advanced degrees (ie Master's degree or higher, or the equivalent) who are sponsored by an employer. This category usually requires a Labor Certification. However, if the applicant can establish that his or her admission will be 'in the national interest', a Labor Certification is not required.

The 'Exceptional Ability' category – certain immigrants with exceptional ability in the arts, sciences, or business who are sponsored by an employer. This category generally also requires a Labor Certification, which may be waived in a suitable 'national interest' case.

The 'Professional' category – members of 'professions' who are sponsored by an employer. In general, a profession is an occupation which requires education or experience equivalent to at least a four-year US college degree in a field specific to that occupation. Labor Certification is required. At present this category is combined with the 'Skilled Worker' category below for quota purposes.

The 'Skilled Worker' category – workers whose jobs require a minimum of two years of specific training or experience who are sponsored by an employer. Labor Certification is required.

The 'Other Workers' category – workers whose jobs require less than two years of specific training or experience who are sponsored by an employer. Labor Certification is required. Generally, workers in this category can anticipate a wait of 10 years or more before they will be eligible to immigrate.

Family-based permanent immigration

The Family-based categories require sponsorship by a close relative of the applicant who is already a US citizen or permanent resident ('Green Card' holder). Qualifying 'close relatives' who may sponsor others include spouses, parents, adult children and, in some cases, siblings.

Apart from ever-increasing backlogs and ever-longer visa quota waiting times for the brothers and sisters of US citizens (now estimated to exceed 10 years for newly filed applications) and for the spouses and children of US permanent residents (now exceeding five years delay), there have been no major changes in the family-based immigration categories since 1991. In December 2000, as part of the Legal Immigration and Family Equity Act (LIFE), some partial remedial benefits were granted to facilitate family reunification of spouses and children of US citizens and permanent residents.

Investment-based immigration

This programme, which has been allocated at least 10,000 Green Cards per year since its creation in 1990, has attracted few applicants. The primary reasons for its failure are the extremely high capital requirements (a minimum of US$500,000 to US$1 million capital 'at risk'), the onerous regulatory requirements (including the required creation of a minimum of 10 full time jobs for US workers for a minimum of two years' duration), the availability of simpler, faster, more reliable and less costly US immigration alternatives, and the availability of much simpler and less costly alternative investor immigrant programmes in other countries, especially Canada and Australia. This category is conditional for the first two years of the investment.

Special categories (refugees/asylees and others)

Historically, the US Congress has from time to time created special immigration categories to benefit very specific groups. Recently, special pathways to permanent residence have been made available to certain displaced Tibetans, certain Hong Kong bank employees, certain Soviet scientists, approximately 50,000 PRC Chinese nationals in the US since April 1990 and their families, and Cuban refugees, among others. The foregoing categories are in addition to applications under the US general asylum/refugee programme.

Recent changes in the asylum process now lead to fast denials of marginal or poorly documented applications, send failed applicants quickly into deportation proceedings and delay the issuance of benefits such as work permits to pending applicants. The combined effect of these asylum changes has been to greatly diminish the numbers of new asylum applicants.

Permanent immigrant visa lottery

Millions of applicants from more than 100 countries compete annually for 55,000 permanent immigrant visas in the 'Green Card Lottery'. The State Department randomly selects approximately 110,000 individual applicants from among the millions of applications properly filed by mail each year as 'finalists'. Applicants may be (legally or illegally) in or outside the US. If selected, a 'finalist' must complete all other required immigration paperwork successfully before October 1 of the applicable year or this visa opportunity is irrevocably lost.

Temporary work visa categories

Currently over 20,000,000 people enter the US legally each year in one of more than 100 different temporary categories. Most of the temporary visitor categories do not permit US employment. However, temporary work permits (usually restricted to a particular employer, worksite and position) are available in many cases.

Repeatedly in recent years, proposals by the US Labor Department have sought to make the rules for the H-1 Temporary Worker category and the L-1 Multinational Company Transferred Employee category more restrictive than current US law. As these are two of the visa categories most often used by employers to obtain work permits in the US for their international personnel, even small changes here could have an important impact on immigration planning for companies with US operations.

The following temporary visa categories are the most commonly used by businesses for their key employees.

B-1 Temporary Visitor for Business – US-based employment activities are generally forbidden to 'B-1' visitors. Usually limited to short duration visits of a few days to six months per visit.

B-2 Temporary Visitor for Pleasure – no work permit is possible. This is the most commonly used category, the classic 'tourist' visa. Usually limited to six months stay per visit.

E-1 Treaty Traders – very useful for executives, managers and key employees with 'essential skills'. Especially popular with Japanese, UK and German companies. This category requires a qualifying treaty between the US and the applicant's home country, a qualifying US business operation and proof of "substantial trade" activities between the US and the home country by the sponsoring employer.

E-2 Treaty Investors – similar to E-1 category and often used by entrepreneurs. Instead of the E-1's "substantial trade" requirement, the key element for E-2 is proof of a "substantial investment" in US business activities by the qualifying employer.

F-1 Student – limited work permission is possible.

H-1B Temporary 'Specialty Occupation Worker – requires that both worker and job must meet minimum required bachelor's degree equivalence test. This is the category most often used by employers for newly-hired international managerial and professional employees.

H-2B Temporary Worker Performing Temporary Services – little used because of requirement of Labor Certification; however, no specific education or skill level is barred.

H-3 Temporary Trainee – rarely used special purpose category for limited duration training programmes.

J-1 Exchange Visitor – frequently used by large multinational employers and research universities.

Beware of a two-year home country residence requirement applicable in many cases. Employment permitted in many cases.

L-1 Intracompany Transferee (available for executive, managerial, and 'specialised knowledge' personnel) – often the 'first choice' category for transferred international employees because of high approval rates and fast turn-around. Like the related Permanent Immigration category for 'Transferred Multinational Executives and Managers', this category requires at least one year of qualifying experience with the sponsoring employer as an overseas employee within the preceding three years. Not available for new hires.

O Extraordinary ability in the sciences, arts, education, business, or athletics – rarely used category, may require as much documentation as a sponsorship in Extraordinary Ability permanent category.

TN NAFTA-based temporary work category for certain Canadian or Mexican professionals and business workers. Roughly equivalent to H-1B Temporary Worker category. Easier rules for Canadians, more difficult rules for Mexicans.

WT/WB Visa Waiver for Tourism or Business – note 90-day absolute time limit and absolute bar on any change of status or extension of time in US beyond 90 days.

Careful well-informed evaluation and selection of the most appropriate visa category several weeks in advance of a US employment assignment is highly recommended as multiple options with differing processing times and difficulty are frequently available in each case.

Accordingly, prudent employers will address immigration and visa issues well in advance of any planned international personnel moves to the US. Wise employers will also implement scrupulous immigration compliance plans to avoid running afoul of the potentially harsh US immigration enforcement rules.

Employer sanctions

'Employer sanctions' are a nickname for a part of the November 1986 Immigration Reform and Control Act requiring employers to hire only US citizens or non-citizens with INS employment authorisation and to complete I-9 forms for every new employee hired after November 1986. Generally, the I-9 Form must be completed by both the employer and worker within three days of the employee's first day on the job. All employers in the US are required to comply with this law. Employers who fail to comply with the law can be fined thousands of dollars or, in extreme cases, subject to criminal prosecution. Even employers who have only US citizen workers can be fined thousands of dollars for 'paperwork violations'.

Overcautious employers cannot safely comply with the law by requiring 'too much documentation' or by demanding that workers produce any particular type of work authorisation (eg a 'Green Card') or by hiring only US citizen workers because they may be prosecuted by the US Justice Department's Office of Special Counsel for immigration-related employment discrimination.

Conclusion: emerging trends in US immigration policy and enforcement

While Congress has attempted to ease the way for high tech and skilled workers, some parts of the US immigration bureaucracy are not yet supportive of this new 'immigration-friendly' posture. The US Department of Labor in particular seems out of step with congressional intent. In December 2000 the DOL published new complex and troubling regulations governing an employer's compliance responsibility under the H-1 rules. The new DOL rules will complicate H-1 compliance for some employers, especially those with a high percentage of H-1 workers (so-called 'H-1 dependent employers'), but are not expected to severely encumber the H-1 system for most employers.

In the 1990s, much of the US was awash in a wave of nativist immigrant-bashing which was further aggravated by electioneering by desperate or opportunistic political candidates appealing to 'America first' sentiments. Only vigorous opposition by many groups in the spring of 1996 prevented the enactment of proposed drastic restrictions to temporary and permanent legal immigration. Key participants in the policy debate over US immigration legislation included the US business community, the American Immigration Lawyers Association, and many human rights and ethnic organisations. Anti-immigration, nativist rhetoric has unfortunately become a staple of American politics in recent years and more restrictionist proposals are likely to be advanced for years to come, especially at times of rising unemployment or other social distress.

Much unfinished immigration business is still on the US legislative agenda in 2001. In coming years, the Congress is expected to take up the subject of reform and restructuring of the burgeoning US immigration bureaucracy, possibly splitting the INS into two different agencies. The leading proposal would create a new Immigration Services Agency focused solely on immigration services and benefits (work permits, visas, etc). Meanwhile, all immigration enforcement activities (deportation, detention, fraud investigations, border control and employer sanctions compliance) would be consolidated in a new Immigration Enforcement Agency.

Also on the agenda is legislation to facilitate the migration of lesser-skilled workers, especially from Mexico, as well as proposals for a generous 'legalisation or amnesty' for thousands of undocumented workers who currently work in the US illegally.

The US now has a president who was elected by a minority of the American voters, and a national legislature that is almost exactly balanced between Republicans and Democrats.

In light of growing labour shortages driven by the relentless demographics of a steadily ageing population combined with a high-growth economy and the increasing involvement of recent immigrants in the US electoral process, immigration politics and immigration legislation are likely to stay at the forefront of American public policy for years to come. Further changes in the US immigration system are likely in the early years of the 21st Century.