FAIR
Federation for American Immigration Reform
Policy Analysis

Congress Should Not Eliminate Per-Country Caps

EXECUTIVE SUMMARY

The *Immigration Visa Efficiency and Security Act* (IVES Act) was introduced in December 2023 by Congressman Rich McCormick (R-Ga.). The bill would eliminate the per-country caps for employment-based visas and double the per-country cap on family-based visas, ostensibly to make the immigration system more "equitable." The IVES Act represents the third attempt in as many Congresses to rally support for these harmful policies, with the *Fairness for High-Skilled Immigrants Act* and *Equal Access to Green Cards for Legal Employment Act* (EAGLE Act) serving as its predecessors.

Proponents of the IVES Act claim that removing per-country cap for employment-based immigration will help the economy by providing green cards to foreign nationals who add value to the U.S. They also argue that foreign workers in the U.S. have to wait years for their green card, and during that time, cannot advance their careers, change employers, start a new business, or visit loved ones back home.

Per-country caps, however, serve an important role in our immigration system. They were added to the Immigration and Nationality Act (INA) in 1965 to create a basic rule of fairness: that no country or group of countries should be able to dominate or manipulate our immigration system. Eliminating those caps will allow the nationals of the two countries with the largest number of employment-based applications – India and China – to gobble up the large majority – as much as 90 percent – of the immigrant visas allowed each year. Meanwhile, workers from every other country in the world will be virtually shut out from the employment-based system, as they will be pushed further down the line.

Proponents also claim that the IVES Act will not harm American workers. However, the bill would alter our employment-based immigration system so dramatically that the only realistic way for a foreign national to obtain an employment-based green card would be to go through the H-1B program, which has long had flaws that allow employers to replace Americans with foreign workers who are underpaid and less qualified.

Minor reforms to the H-1B program do not change the outcome. Any H-1B visa reform effort must truly change the deeply-flawed program or end it altogether and ensure that large tech corporations do not supplant American workers with cheap foreign labor. And most importantly, Congress should focus their legal immigration reform efforts on the entire system, finally moving us toward a merit-based system.

Ultimately, the IVES Act is just one more effort to import cheap foreign labor at the urging of business lobbyists and activist groups. Ignoring the lessons of past failures with the EAGLE Act in 2022 and the *Fairness for High-Skilled Immigrants Act* before that, the IVES Act's supporters seem determined to continue down the same path.

WHAT THE IVES ACT DOES

The IVES Act would eliminate per-country caps on employment-based visas, and raise the family-based visa cap from seven to fifteen percent. As a result, the large majority (over 90%) of employment-based green cards will be issued to nationals of two countries: India and China. Family-based visas will be concentrated among a handful of countries, with Mexico, the Philippines, India and China being the primary beneficiaries. This monopoly on green cards would extend for decades (and conceivably grow) as new immigrants would seek to sponsor their extended relatives from the same countries.

The IVES Act would also implement several of the same minor reforms to the H-1B program as its predecessors in an attempt to fix the "funnel" that feeds into employment-based green cards. The bill would:

- Require employers to post a job opening on a government website;
- Prohibit H-1B employers from advertising that a position is limited to H-1B applicants, or that H-1B applicants are preferred;
- Prohibit an employer from petitioning for an H-1B worker if more than half of their employees are nonimmigrants; and
- Give additional authority to the Secretary of Labor to investigate noncompliance.

In addition, the IVES Act includes two sections regarding the H-1B program that differentiate it from its predecessors.

First, the bill increases the wage level for H-1B workers from $60,000 to $90,000 in order for the workers to be considered "exempt" from certain hiring practices. For example, if an H-1B worker makes $60,000 today, the employer is not required to first recruit or hire an equally or better qualified U.S. worker. Proponents of the bill believe a small change in the wage level (especially considering inflation) will deter employers from abusing the H-1B program and better protect foreign nationals. However, it retains the flawed approach

of allowing some employers to bypass the labor market test before petitioning for an H-1B visa.

Second, the bill prohibits the issuance of visas to nationals from "foreign adversary countries" for employment in any matter with respect to national interest. This provision seeks to prohibit nationals from foreign adversary countries, such as China, from obtaining visas to work in cybersecurity, energy, national defense, or other areas of vital national security interest. The prohibition, however is dependent on the Department of Homeland Security (DHS) Secretary's discretion, and may never actually be used or enforced.

BACKGROUND

A. What are Per-Country Caps?

Per-country caps were added to the INA of 1965 to create a basic rule of fairness: that no country or group of countries should be able to dominate or manipulate our immigration system. The per-country caps limit a single country to an annual cap of seven percent of family-based immigrant visas (226,000 annual total) and seven percent of employment-based immigrant visas (140,000 annual total). Because of the caps and high demand in certain countries, applicants in India or China, for example, will wait longer to obtain their visas. However, certain exceptions to the per-country cap are built into the INA that allow green cards unused by a country to be allocated to those waiting in line elsewhere. That means applicants from India and China typically receive more visas than the seven percent cap would otherwise allow.

B. What is an H-1B Visa?

The H-1B visa category was enacted in 1990 to allow U.S. employers to sponsor foreign nationals to work temporarily in specialty occupations, such as architecture, engineering, and science. A majority of the visas – 66 percent – go to those who work in computer-related fields.

Today, the H-1B category has an annual statutory cap of 65,000 visas, and an additional 20,000 visas are available to those with advanced degrees. The cap does not apply to thousands of H-1B workers who are exempt, such as those who work for nonprofits or universities. H-1B visas are valid for three years but can be extended for an additional three years.

Importantly, H-1B visas are one of the few visas that Congress deemed "dual intent." This means that even though an H-1B visa is temporary and the foreign worker commits to returning to his or her home country, an H-1B visa holder may apply for a green card to permanently stay in the U.S. In addition, the law allows an H-1B worker to stay in the U.S. beyond the statutory maximum of six years if the worker was sponsored by his employer

for a green card at least a year before the H-1B visa expires. Combined, these measures provide H-1B visa holders a pathway to citizenship, one that does not require them to ever leave the U.S. This, in turn, creates high demand for the H-1B visa, and an even higher demand for employment-based green cards.

C. Problems with the H-1B Visa Program

The H-1B visa program was intended to complement the U.S. workforce – not replace it. Nevertheless, the H-1B visa lobby, primarily tech giants and outsourcing firms, frequently claim that a sustained influx of foreign guest workers is necessitated by labor shortages and that America's economic growth would suffer without foreign "top talent" that the program supposedly brings into the country. In fact, the program does not *supplement* the U.S. workforce. Rather, it *supplants* able-bodied Americans with foreign workers who are beholden to their employers by virtue of their presence in the U.S. depending upon employer sponsorship.

Figure 5. Top Ten Countries of Birth of Approved H-1B Beneficiaries, FY 2022

Rank	Country	Number	Percent	By Gender
	All Countries	**441,502**	**100**	71%
1	India	320,791	72.6	76%
2	China	55,038	12.5	53%
3	Canada	4,235	1.0	61%
4	South Korea	4,097	0.9	55%
5	Philippines	3,501	0.8	41%
6	Mexico	3,203	0.7	56%
7	Taiwan	3,016	0.7	70%
8	Brazil	2,521	0.6	64%
9	Pakistan	2,505	0.6	77%
10	Nepal	2,057	0.5	72%

Male Female

Note: For a complete list of countries of birth of H-1B beneficiaries, see appendix D, table 4a
Source: DHS, USCIS, CLAIMS 3, accessed November 2022

Multiple studies have shown that H-1B workers are paid less than their American counterparts. One recent study shows that H-1B workers were underpaid by at least $95 million in 2021. This is because H-1B employers have long exploited loopholes in the system that allow them to depress wages and import cheap foreign labor. Meanwhile, the Department of Labor (DOL) consistently fails to enforce wage rules to protect H-1B and U.S. workers.

In addition, the H-1B program does not bring the best and brightest to the U.S., mainly due to the random lottery process used to select visa applicants. As the Department of Homeland Security argued in 2020, random selection "contradicts the dominant legislative purpose of the statute because the intent of the H–1B program is to help U.S. employers fill labor shortages in positions requiring *highly skilled* or *highly educated* workers." Instead Congress should work toward a merit-based distribution system that rewards higher wages and attracts the best and brightest around the world.

Finally, the combination of several factors has led to the unfair monopolization of the H-1B program by two countries: India and China. These factors include the high demand from these populous countries, the emergence of "body shop" firms that make money by placing foreign workers in U.S. jobs, and the lottery system as described above. In Fiscal Year (FY) 2022, nationals from China and India accounted for 72.6 percent and 12.5 percent, respectively, of approved H-1B visas—a combined 85.1 percent. To put this into perspective, the country with the next highest number of approvals was Canada with 1 percent.

Thus, while perhaps well-intentioned, the H-1B program has evolved into a fraud-ridden program that allows H-1B employers, primarily tech giants, to supplant able-bodied Americans with foreign workers, driving down wages and hurting American workers in the process.

Although, the H-1B reforms proposed in the IVES Act are not necessarily harmful, they do not go far enough in addressing the need for overhaul of the current program. The H-1B visa program has historically been rife with abuse, and fails to bring in the best and the brightest through a random lottery. Without shifting towards merit-based allotment, the program will continue to be problematic. Minor changes to a program in need of major reform are not a recipe for success, and even significant reforms would not justify the removal of the per country cap for employment-based visas.

WHY REMOVING PER-COUNTRY CAPS IS HARMFUL

Eliminating per-country caps for employment-based green cards would undo longstanding law meant to ensure fairness in the immigration system. Without the cap in place, green cards will simply be given out based on demand. And, because the majority of aliens in the employment-based green card queue are Indian and Chinese nationals in the U.S. via the H-1B program, this change would offer those foreign nationals the large majority (over 90 percent) of employment-based green cards. Applicants from other countries would be pushed further down the line, likely waiting years longer for a chance at a green card.

In addition, American workers will be hurt by eliminating the employment per country caps. American workers struggling to find work in a tech industry that is increasingly oversaturated with H-1B workers will have an even harder time finding fair wages and employment. Eliminating per-country caps would push Americans further down the priority list, and feed into big tech's addiction to cheap foreign labor.

The real beneficiaries of eliminating the employment per-country caps will be the tech industry and nationals of India and China. Without a per-country cap, Indian and Chinese nationals will monopolize employment-based green cards.

The end result of eliminating per-country caps will be to drive **ALL** employment-based green card applicants into the H-1B program. For Indian and Chinese workers, becoming an H-1B worker becomes much more desirable because the wait time to convert to a green card will have dropped dramatically. For individuals from the rest of the world, it will become unrealistic to apply for an employment based-green card any other way because the wait will be years and the job will likely be gone. So, in order to take that job in the United States, workers will have to have their employer sponsor them as an H-1B worker first, allowing the worker to come to the U.S. immediately.

If the H-1B program becomes the only practical way to get an employment-based green card, some foreign nationals will be shut out altogether. The H-1B program requires that the beneficiary work in a "specialty occupation" and meet certain educational requirements. Not all workers who are recruited by U.S. employers will meet these requirements. Those who do not qualify for an H-1B visa will essentially be precluded from ever obtaining an employment-based green cards, only deepening the inequities of our immigration system.

Furthermore, eliminating per country caps will not reduce the backlog. Applications for employment-based green cards will continue to increase and the queue will grow. The only difference will be the distribution of the green cards. Under the IVES Act, the overwhelming majority of the recipients will be from India and China, and the rest of the world will be moved to the end of the line, which was caused by their monopolization of the H-1B program.

Thus, while the backlog currently affects only a few countries, the IVES Act will ensure that the backlog burdens all countries. It will undermine the employment-based immigration system for applicants from the rest of the world for the sole purpose of shifting more green cards to India and China.

Before too long, the elimination of the per-country caps will place so much pressure on the system that special interests will come back to Congress with demands to increase the H-1B cap or increase the cap on employment-based green cards—or both. This would further accelerate the displacement of American tech workers, and undermine benefits of a tightening labor market for American workers. It could squeeze many Americans out of that market almost entirely.

CONCLUSION

Ultimately, eliminating per-country caps under the IVES Act would not advance America's national interest. In reality, it will undermine fairness in our immigration system by creating a preference for workers from one or two nations at the expense of all other workers across the globe. It would also do nothing to reduce the line for employment-based

green cards but would create more competition for American workers, particularly in the tech industry.

Even open-borders groups have come out strongly against bills like the IVES Act. When the EAGLE Act was considered last year, the American Immigration Lawyers Association (AILA) noted that the bill "does not strike the right balance of eliminating per-country limitations without adversely impacting others." Rep. Yvette Clarke (D-N.Y.), chair of the Congressional Black Caucus Immigration Taskforce, likewise came out against the bill in December 2022, writing that it runs contrary to the goal of establishing a fair and just immigration system. And the American Hospital Association has said that the bill "would negatively impact nurse immigration, and thereby adversely affect the ability of America's hospitals and health systems to provide care in communities across the country."

Adding H-1B provisions does not justify eliminating the per-country caps. As the economy struggles, any reform effort must truly change the deeply-flawed H-1B program, which is a key pipeline for such green cards. Rather than ensuring American workers get the first opportunity at jobs before an employer imports a foreign national, the IVES Act provides no meaningful reforms and, in fact, reinforces the broken system.

Finally, the current employment green card system needs to be replaced by one that is merit-based, offering a reasonable number of green cards to highly qualified applicants. Instead of doing so, the IVES Act once again maintains the current dysfunctional system, doing nothing for American workers while further strengthening foreign workers' place in the American labor force – it must be rejected.