Immigration Innovation Act of 2018
S. 2344
Section-by Section

TITLE I: EMPLOYMENT-BASED NONIMMIGRANT VISAS

Sec. 101: Market-Based H-1B Visa Limits

MARKET-BASED H-1B LIMITS

- Amends INA §214(g) to replace the cap with a market-based calculation for each FY:
    - **Base Allocation**: Equal to the sum of (the base allocation for the most recent FY) + (the allocation adjustment for the most recent FY).
    - Sets base allocation minimum at 85,000 and maximum at 195,000.
    - **Allocation Adjustment**:
        - If the cap is met by May 15, an additional 30,000 visas will be made available on October 1.
        - If the cap is met between (and inclusive of) May 16 and September 30, an additional 20,000 visas will be made available on October 1.
        - If the cap is met between (and inclusive of) October 1 and November 30, an additional 10,000 visas will be made available on December 1.
        - If the cap is met between (and inclusive of) December 1 and January 29, an additional 5,000 visas will be made available on February 1.
        - If the number of petitions approved for a FY is 5,000 – 9,999 fewer than the cap, the cap will be reduced for the next FY by 5,000.
        - If the number of petitions approved for a FY is 10,000 – 19,999 fewer than the cap, the cap will be reduced for the next FY by 10,000.

AILA Doc. No. 18012937. (Posted 1/29/18)

- If the number of petitions approved for a FY is 20,000 – 29,999 fewer than the cap, the cap will be reduced for the next FY by 20,000.

- If the number of petitions approved for a FY is 30,000+ fewer than the cap, the cap will be reduced for the next FY by 30,000.

- Retains the general numerical limitation (20,000) on individuals with master's degrees from U.S. institutions.

- Adds a new unlimited number of exemptions for individuals with U.S. master's degrees, if the employer certifies that it has filed or will file an I-140 petition on behalf of the employee.

    - H-1Bs granted under this exemption will be approved for 1 year initially, and may be extended if the employer provides evidence of the filing of a non-frivolous labor certification or I-140 petition that has not been denied.

- Eliminates the statutory reductions in H-1B numbers associated with H-1B1s.

PRIORITIZATION OF H-1Bs

- Amends INA §214(g)(3) to replace the language requiring visas to be issued "in the order in which petitions are filed" with language permitting visas to be issued "in a manner and order established by the Secretary by regulation" but requiring petitions to be considered in the following order, when the number of petitions received during the first 5 business days of the filing period exceeds the numerical limitation for that FY:

    - Individuals who have earned a U.S. master's or higher, who are subject to the numerical limitations (not in the 20,000 or exempt due to employer agreeing to sponsor the employee for a green card within one year).

    - Individuals who have earned a foreign doctoral degree (equivalent to a U.S. doctoral degree) in a specialty related to the employment.

    - Individuals who have earned a U.S. bachelors in a STEM field.

    - Other petitions.

PENALTIES FOR FAILURE TO WITHDRAW

- Adds new INA §214(g)(9)(D)(i)-(v) to impose upon employers who have 5 or more cap-subject petitions approved in a FY, a penalty for each petition where the visa holder works in the U.S. less than 25% of the first year of the approval period.

- **Penalties**: $10,000 for each petition for the first FY of noncompliance; $25,000 for each petition after the first FY of noncompliance. Penalties are deposited into the "Promoting American Ingenuity Account." [established under INA §286(w)].

- **Debarment**: Employers subject to the penalty in any 3 fiscal years are barred from submitting H-1B petitions in the FY following the third year of noncompliance.

- **Exceptions**: Employer will not be subject to the penalty if they timely withdraw the petition because of an unexpected change in need; the employee commences work for the employer in a different lawful status; or the employee quits or resigns. BUT: Withdrawal protections do not apply to employers who:
    - Have 20-49 approved cap petitions for a FY and withdraw more than 25%, or withdraw more than 10% because the employee resigned in the first 3 months.

    - Have more than 50 approved cap petitions for a FY and withdraw more than 20%, or withdraw more than 5% because the employee resigned in the first 3 months.

- Employer withdrawing a petition must describe the circumstances that resulted in the unexpected change in need, the new visa status, or the employee's decision to resign.

- Unused visas from withdrawn petitions shall be assigned to another employer in the current or following FY.

- **Reporting**: Requires each employer that has five or more approved cap-subject H-1B petitions to submit an annual report to DHS that identifies:

    - The date on which each H-1B worker approved during the most recent FY began working; and

    - The total period of employment for each H-1B in the first year of available work authorization.

- **Effective Date**: 1 year from date of enactment.

REPORTING REQUIREMENTS FOR DHS

- Requires DHS to publish data summarizing H-1B adjudications each FY; timely adjust visa allocations; and identify the number of petitions withdrawn that may be reassigned another employer.

PROHIBITION ON DISPLACEMENT

- Amends INA §212(n)(1) [**labor condition application**] prohibiting employers from:

- Hiring H-1Bs "for the purpose and intent to" replace a U.S. worker, other than through the promotion or voluntary transfer, departure, or retirement of the U.S. worker; and

- Conditioning a current employee's pay, bonus, severance, compensation, or performance review on the employee's willingness to train the H-1B, but only where the employer has the "purpose and intent" to replace the employee with the H-1B worker, other than through the promotion or voluntary transfer, departure, or retirement of the employee.

- Agency initiating an enforcement action bears the burden of proving the employer's purpose and intent.

- Permits use of funds from the "Fraud Prevention and Detection Account" [established under INA §286(v)] for enforcement of these provisions.

EMPLOYMENT AUTHORIZATION FOR H-4s

Sec. 102: Employment Authorization for Dependents of H-1B Nonimmigrants

- Adds new INA §214(c)(2)(G) to provide work authorization to spouses of H-1Bs where the H-1B has a pending or approved LC or I-140 petition.

- Requires the H-4 employer to certify that it is offering and will pay the spouse the greater of the actual wage paid to similarly situated employees or the prevailing wage for the occupational classification and education/experience required.

Sec. 103: Eliminating Impediments to Worker Mobility

EFFECT OF NEW JOB SITE

- Amends INA §214(c)(10) to clarify that an amended H-1B petition is not required if:

    - The employer is involved in corporate restructuring (merger, acquisition, or consolidation);

    - A new corporate entity takes over the interests and obligations of the petitioning employer, and all other terms/conditions of employment remain the same; or

    - The H-1B worker moves to a new place of employment with the same employer and the employer secures a valid, certified LCA prior to commencing employment.

DEFERENCE TO PRIOR APPROVAL

- Adds new INA §214(c)(15) to prohibit DHS and DOS from denying a subsequent petition, visa, or application for admission for H-1Bs and L-1s involving the same

employer and employee unless there was (1) a material error with the prior approval; (2) a substantial change in circumstances that renders the nonimmigrant ineligible; or (3) new material information is discovered that impacts eligibility of the employer or nonimmigrant. Must provide written notice of such findings.

GRACE PERIOD

- Adds new INA §214(n)(3) to provide a 60-day grace period for H-1Bs whose employment ends prior to the end of the authorized period of admission. If a new employer files a petition to extend, change, or adjust the nonimmigrant's status during the 60-day period, the nonimmigrant "shall be deemed to have retained such legal status."

DEFINITIONS

Sec. 104: Definitions

- Creates new definition of "**Intending Immigrant**," for purposes of calculating the number of aliens employed by an employer, as an alien who intends to work and reside permanently in the United States as evidenced by a pending or approved LC or I-140 filed by a "covered employer."

- Defines "**Covered Employer**" as an employer that has filed I-140 petitions for no less than 90% of current employees who have LCs that were approved during the 1-year period ending 6 months before the filing of an application or petition for which the number of intending immigrants is relevant.

    - For all calculations of H-1B and L-1 nonimmigrants, an "**Intending Immigrant**" shall be counted as an LPR, and not as an H-1B or L-1.

    - For all calculations of the number of employees or U.S. workers employed by an employer, "all of the employees in any group treated as a single employer" under Internal Revenue Code §414(b), (c), (m), or (o) shall be counted.

- Defines "**Immigrant Status Petition**" as an EB-1, EB-2, or EB-3 petition.

- Defines "**Labor Certification**" by reference to INA §212(a)(5)(A).

- Defines "**STEM**" as the academic and professional disciplines of science (not including social sciences), technology, engineering, and mathematics.

H-1B DEPENDENT EMPLOYERS/EXEMPT H-1B NONIMMIGRANTS

- Amends INA §212(n)(1)(E) to provide that the additional attestations (non-displacement, recruitment of U.S. workers) required by H-1B dependent employers do not apply if all H-1Bs sought in the application are "**Exempt H-1B Nonimmigrants**." However:

- **Super Dependent Employers**: Employers with more than 50 employees and more than 50% H-1Bs, must always attest to and document evidence of recruitment and non-displacement.

- Amends the definition of "**Exempt H-1B Nonimmigrant**" at INA §212(n)(3)(B) to deem exempt those who:

  - Receive annual wages (including bonuses) not less than the higher of 105% of the occupational mean wage for the geographic area of employment; or $100,000 (adjustable every three years, based on CPI).

  - Have attained a U.S. doctoral degree in a specialty related to the employment.

- Creates new INA §212(n)(2)(F)(ii) to require USCIS to share with DOL, information contained in H-1B petitions which indicates the employer is not in compliance with the H-1B requirements. DOL may initiate an investigation after receiving such information.

PREVAILING WAGES

Sec. 105: Strengthening the Prevailing Wage System

- Amends INA §212(p) to require the first level of wages to be no less than the mean of the lowest 50% of the wages surveyed.

- Permits the use of independent wage surveys that meet the following criteria: (1) published within the last two years; (2) the survey has not been duplicated since its initial publication; (3) survey data was collected within 2 years of the date of publication; (4) the survey reflects the area of employment; (5) the employer's job description adequately matches the survey job description; (6) the survey is across industries; (7) the wage is based on the arithmetic mean; and (8) the survey identifies a statistically valid methodology.

SHORTAGE OCCUPATIONS

Sec. 106: Schedule A Study

- Within one year of the date of enactment, requires the Secretary of Labor, in cooperation with OFLC, to submit to the Senate and House Judiciary Committees, the results of a study to determine whether the occupations listed in Schedule A should be modified or expanded and publish an NPRM if it is so determined.

TITLE II: EMPLOYMENT-BASED IMMIGRANT VISAS

IMMIGRANT VISA NUMBERS

Sec. 201: Elimination of Per Country Numerical Limitations

- Amends INA §202(a) to eliminate per-country limits for employment-based immigrants and to change the per-country limits for family-based immigrants from 7% for a single foreign state to 15%.

- Eliminates the offset in per country limits for the Chinese Student Protection Act.

- **Effective Date**: These provisions shall take effect as if enacted on October 1, 2017 and shall apply beginning with FY 2018.

RECAPTURE OF UNUSED VISAS AND ENSURING ALL VISAS ARE USED

Sec. 202: Ensuring the Issuance of All Preference Employment-Based Immigrant Visas

- Beginning in FY 2018, the number of EB-1, EB-2, EB-3 visas shall be increased by the greater of (I) the number of unused employment-based visas from FY 1992 to FY 2013; or (II) 200,000 [MINUS] the cumulative number of IVs issued for previous fiscal years pursuant to the increase. These visas may only be used for EB-1, EB-2, or EB-3.

- Amends INA §201(c)(1)(B)(ii) to increase the floor on family-based immigrant visas from 226,000 to 226,000 + the difference between the maximum number of employment-based visas which may be issued during the previous fiscal year and the number of visas issued during that year.

- Amends INA §203(g) to reinforce the requirement that all immigrant visas authorized by Congress be issued each year and to require DOS to publish a notice in the Federal Register no later than June 1 of each fiscal year regarding steps taken to comply.

- Amends INA §245(a) to state that an employment-based visa is "immediately available" if any employment-based visa number has not yet been issued for that fiscal year.

NO NUMERICAL LIMITATIONS

Sec. 203: Aliens Not Subject to Direct Numerical Limitation

- Amends INA §201(b)(1) to add to the list of aliens not subject to the direct numerical limitations:

    - Spouses and children of employment-based immigrants;
    - Aliens who have earned a U.S. master's degree or higher in a STEM field.

- Aliens with an approved EB-1 petition for extraordinary ability or outstanding professor/researcher.

- Changes percentage cap on EB-1 visas from 28.6% to 12% (intracompany transferees)
- Changes percentage cap on EB-2 visas from 28.6% to 36.9%
- Changes percentage cap on EB-3 visas from 28.6% to 36.9%

PORTABILITY

Sec. 204: Increased Portability

- Amends INA §204(j) to remove the 180-day temporal requirement and permit portability to a same or similar occupation for individuals with a pending adjustment of status application under INA §245(a) or an approved conditional resident application under the new INA §216B provisions with 3 annual reviews approved.

EARLY-FILING OF EMPLOYMENT-BASED ADJUSTMENT

Sec. 205: Adjustment of Status for Employment-Based Immigrants

- Adds new INA §245(n) to permit employment-based immigrants (and derivatives) with an approved I-140 to file an adjustment of status application regardless of whether an immigrant visa is immediately available.

- Requires a supplemental fee of $500 (principal only), which shall be deposited into the "Promoting American Ingenuity Account."

- Applications may not be approved until an immigrant visa becomes available.

CONDITIONAL IMMIGRANTS

Sec. 206: Employment-Based Conditional Immigrants

- Creates new INA §203(i), authorizing DHS/DOS to issue up to 35,000 conditional immigrant visas each FY to an alien who (i) has a university degree; (ii) has received an offer of employment from a U.S. employer that has complied with requirements set forth below; and (iii) will satisfy the requirements for EB-1, EB-2, or EB-3.

- Creates new INA §201(a)(4) [**worldwide level**] to account for up to 35,000 conditional employment-based immigrants, beginning in FY 2019.

- Amends INA §203(e) [**order of consideration**] to delegate to DHS, the authority to issue regulations setting forth the order in which numbers shall be made available to eligible aliens under INA §203(i).

- Nonimmigrants residing lawfully in the United States shall not be required to depart to obtain a conditional immigrant visa.

- Sets forth the following requirements for sponsoring employers, or employers seeking to hire a conditional employment-based immigrant:

    - Employers must file a petition and attest to DHS that:

        - The alien will not be paid less than a similarly situated U.S. worker; and
        - No U.S. worker has been or will be displaced by the conditional immigrant.
        - It has recruited for U.S. workers in the same or a similar occupation who possess a bachelor's or higher degree, including at least 3 types of targeted recruitment efforts, such as job fairs, on-campus recruiting, or job postings. (**Note**: Employer must be prepared to document recruitment efforts if audited)

    - Employers must "fully participate" in E-Verify.

    - Employer must pay a $10,000 fee, plus an additional administrative/processing fee.

    - H-1B dependent employers are excluded, as are employers who are debarred from any existing immigration program.

- Requires DHS to adjudicate petitions within 60 days of filing.

- Amends INA §212(a)(5)(A)(ii) to include among those who may demonstrate a lack of U.S. workers who are "equally qualified" (currently, those in the teaching profession and those of exceptional ability in the arts or sciences), conditional permanent residents under new INA §216B who earn at least $100,000 per year (adjustable every three years according to the Consumer Price Index).

- Conditional residents are required to renew their status annually by submitting proof of the following:

    - Ongoing employment in the occupation for which the alien was granted CR status by an employer that has complied with program requirements.
    - Payment of all social security and income taxes.
    - At first renewal, the filing of a labor certification or I-140 petition.
    - At second renewal, the filing of an I-140 petition, unless the LC is still pending.
    - At third and subsequent renewals, an approved I-140 petition.

- Conditional resident is not eligible for renewal if the LC or I-140 is denied by final agency action; or the approved I-140 was revoked for cause.

- Conditional immigrants may change employers without affecting legal status if the new employer complies with all requirements. Fee paid by new employer for each conditional immigrant shall be:

- $10,000 if the new employer hires the conditional immigrant within 1 year of obtaining conditional immigrant status;
- $5,000 if the new employer hires the conditional immigrant within the second year of conditional resident status;
- $2,500 if the new employer hires the conditional immigrant within the third year of conditional resident status;
- $0 if the new employer hires the employer after the conditional immigrant has held such status for 3 years.

- Conditional visa/status shall be terminated if:

  - Conditional immigrant fails to submit required proof when renewing conditional status; or submits proof but fails to qualify.
  - Conditional immigrant has been unemployed or employed in a different occupation for a cumulative 180 days while holding conditional status;
  - Conditional immigrant is employed by an employer who is not in compliance with program requirements;
  - Conditional immigrant does not apply to remove the conditions on residence within one year of an immigrant visa becoming available; or
  - Application to remove conditions is denied in a final agency action.

- Conditions on residence may be removed by applying when a visa becomes available under the preference category/country of chargeability that would otherwise apply to the conditional resident. Evidence required under the annual review process must be included if the annual review coincides with the submission of the application to remove conditions.

TITLE III: STUDENT VISAS

DUAL INTENT FOR STUDENTS

Sec. 301: Authorization of Dual Intent

- Amends INA §101(a)(15)(f)(i) to eliminate language requiring foreign students to have "no intention of abandoning" a residence in a foreign country.

TITLE IV: STEM EDUCATION AND WORKER TRAINING

CHANGES TO ACWIA FEES

Sec. 401: Funding for STEM Education and Worker Training

- Amends INA §214(c)(9)(B) to change the ACWIA fee structure as follows:

  - $2,000 per petition for employers with no more than 25 FTE employees in the U.S. Fees may escalate as follows:

        - $2,500 if the FY base allocation for the H-1B cap is 85,001 to 115,000
        - $3,000 if the FY base allocation for the H-1B cap is 115,001 to 145,000
        - $3,500 if the FY base allocation for the H-1B cap is 145,001 to 194,999
        - $4,000 if the FY base allocation for the H-1B cap is 195,000

    - $4,000 per petition for employers with more than 25 FTE employees in the U.S. Fees may escalate as follows:

        - $5,000 if the FY base allocation for the H-1B cap is 85,001 to 115,000
        - $6,000 if the FY base allocation for the H-1B cap is 115,001 to 145,000
        - $7,000 if the FY base allocation for the H-1B cap is 145,001 to 194,999
        - $8,000 if the FY base allocation for the H-1B cap is 195,000

- Fees are to be distributed as follows:

    - **Fees Collected from Employers with No More than 25 FTEs**: $750 goes to 286(s) account [H-1B Nonimmigrant Petitioner Account – training and scholarships]; remaining goes to 286(w) account [NEW—Promoting American Ingenuity Account].

    - **Fees Collected from Employers with More than 25 FTEs**: $1,500 goes to 286(s) account; $2,500 goes to 286(w) account.

PROMOTING AMERICAN INGENUITY

Sec. 402: Promoting American Ingenuity Account

- Adds new INA §286(w), Promoting American Ingenuity Account to enhance the economic competitiveness of the U.S. by:

    - Strengthening STEM academic achievement standards;
    - Ensuring schools have access to well-trained and effective STEM teachers;
    - Supporting efforts to strengthen the elementary and secondary STEM curriculum;
    - Helping colleges and universities produce more graduates in fields needed by U.S. employers, including STEM;
    - Improving availability of and access to STEM-related worker training programs;
    - Providing employment-based STEM education and training programs; and
    - Carrying out other DOE approved activities to improve STEM education and training.

- Secretary of Education may reserve up to 2% of funds collected for national research, development, demonstration, evaluation, and dissemination activities.

AMERICAN DREAM ACCOUNTS

- Secretary of Education shall allocate 5% of funds collected to award competitive grants to enable eligible entities to establish and administer "American Dream Accounts."

- American Dream Accounts shall be personal, online accounts for low-income students (up to 9th grade) that include a college savings account, monitor progress toward higher education, and provide opportunities, including mentoring, to gain financial literacy skills, learn about enrolling in college/university; and identify career interests.

- Priority for American Dream Accounts will be given to entities that demonstrate: (1) an intent to focus on STEM education and careers; (2) the ability to serve a large number of low-income students; or (3) state/local educational agencies that provide opportunities for students to participate in dual or concurrent enrollment programs or early college programs at no cost.

- "Eligible entity" may be a partnership of 2 or more of the following:

    - State educational agency
    - Local educational agency
    - Charter management organization
    - Institution of higher education
    - Nonprofit organization
    - Organization with demonstrated experience in educational savings or preparing low-income students for higher education

- Requires the Secretary of Education to submit annual reports to Congress evaluating the effectiveness of the grant program.

- Funds available in the college savings account portion of a student's American Dream Account shall not affect the student's eligibility for financial aid or considered in determining the amount of available aid.

- Requires DOE to promulgate regulations and issue an NPRM no later than 1 year from the date of enactment.

ALLOCATIONS TO STATES

- Funds not allocated to national activities or to the American Dream Accounts shall be proportionally allocated each FY to states that submit applications. States shall dedicate such funds 50/50 to activities described in INA §286(w)(2)(A)-(G).

- No state shall receive less than .5 percent of the total amount available to all states.

- If a state does not submit an application in a FY, that state's allocation shall be reallocated to other states.

- State Application Process: States desiring an allocation of funds must submit an application describing how the state plans to improve STEM education and training to

meet the needs of employers in the state. Applications will be approved if they meet the prescribed requirements, and after evaluating recommendations by peer reviewers.

- Funds received by state and local educational agencies shall be used to supplement, not supplant funds that would otherwise be made available from state and local resources.

NATIONAL EVALUATION

Sec. 403: National Evaluation

- DOE shall conduct an annual evaluation of the implementation and impact of the activities funded by the Promoting American Ingenuity Account. Reports shall be submitted to the President, and relevant Senate and House Committees, and shall be made publicly available.

Sec. 404: Rule of Construction

- Nothing in this title shall be construed to permit the DOE or other federal official to approve state content or academic achievement standards.

TITLE V: REFORMS AFFECTING IMMIGRANT AND NONIMMIGRANT VISAS

EMPLOYER PRE-CERTIFICATION

Sec. 501: Streamlining Petitions for Established Employers

- Adds new INA §214(c)(16) to require DHS to establish a pre-certification procedure for employers who file multiple nonimmigrant or immigrant petitions to enable such employers to:
    - Avoid repeatedly submitting documentation that is common to petitions; and
    - Establish through a single filing, criteria relating to the employer and the employment opportunity.

- Requires DHS to promulgate regulations to allow electronic filing and document storage with USCIS.

- INA §214(c)(16) is effective on the date of enactment, and shall apply to immigrant and nonimmigrant petitions filed 180 days after the date of enactment.