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

# COMPREHENSIVE IMMIGRATION REFORM BILL WILL RADICALLY ALTER IMMIGRATION LAW

*Posted on May 27, 2007 by Cyrus Mehta*

**by**
**Cyrus D. Mehta* and Poorvi Chothani****

America is a nation of immigrants and its history of admitting newcomers goes all the way back since its inception. Millions upon millions of people have been attracted to this country because it provides opportunities to anyone who works hard, regardless of race, religion or national origin. In turn, generations of immigrants have contributed to the nation's prosperity and diversity.

The United States Senate, at the time of going to press, is debating a Comprehensive Immigration Reform (CIR) measure, which will radically alter and transform the US immigration system. American immigration policy, in recent times, has been woven around primarily family unity, and secondarily around the skills of newcomers. The new proposal will de-emphasize family unification and place more weight on the skills of potential entrants.

As background, the US Immigration and Nationality Act (the INA), enacted in 1952, consolidated a number of prior immigration laws, and with its various amendments, governs present day immigration. In 1965, all racial and national origin quotas were eliminated by the US Congress. Employment and family categories were created, which applied equally to people of all countries. In 1986, Congress passed a legalization measure granting amnesty to undocumented immigrants and also for the first time enacted sanctions against employers who hired illegal immigrants. A decade later, in 1996, Congress passed a restrictive bill, which penalized overstayers and retrospectively made immigrants deportable for minor crimes committed in the past. After September 11, 2001, the INA was amended to enhance national security and place all immigration functions within the new Department of Homeland

Security.

Unfortunately, the present immigration system has not been able to cope with present-day economic realities, resulting in an accumulation of about 12 million plus undocumented people in the US. The 1986 amnesty only legalized the undocumented immigrants already in the country, but failed to allow new entrants with jobs or family ties to easily seek legal status. There are very few pathways to temporary and permanent residency under the current system. Those waiting in line to legally immigrate to the United States have to wait for several years under the family and employment-based quotas. The limited number of H-1B visas, only 65,000 since 2003, has further exacerbated the situation. Foreign students graduating out of US universities are unable to obtain an H-1B visa if they secure a job offer in the US. The H-1B visas are often used as a bridge while one is being sponsored for permanent residence.

While most recognize that the current system has broken down and is urgently in need of reform to accommodate more pathways to temporary and permanent residence, there also exists a contrary viewpoint, not shared by the authors, that immigrants are not good for America as they take away jobs and could in the long term undermine the cultural and social fabric of the country. Their proposal is to not just shut the border, but to slowly ensure that the 12 million plus undocumented people should not be rewarded for breaking the law, and should instead be deported from the country.

**Comprehensive Immigration Reform**

The impetus for CIR started shortly before September 11, 2001, but it was put on the backburner after the terrorist attacks. Momentum again built up in late 2005, when the House passed a measure, HR 4437, which would criminalize all forms of illegal status in the United States. This led to a number of spontaneous protests from immigrant organizations and immigrants themselves.

In 2006, when the protestors marched peacefully all across the country, Congress was unable to enact a bill that would comprehensively reform the system, given that the two opposing view points could not reconcile their positions. CIR involves both enforcement measures, such as securing the border with Mexico, along with creating more options for people to reside temporarily and permanently in the United States. CIR recognizes that tougher enforcement will not resolve the problem, as illegal immigration is caused not because foreign nationals do not obey the law but due to severe limitations in

quickly obtaining legal residence in the country.

CIR negotiations were again revived this year, and since May 15, 2007, the United States Senate has begun grappling with a new measure, which has been nicknamed the “Grand Bargain.” Senators from both the Democratic and Republican parties, with opposing views on immigration, along with President Bush, have managed to negotiate a compromise. President Bush badly wants an immigration bill that will secure his domestic legacy after his foreign policy debacle in Iraq.

**Legalization for 12 Million Undocumented Immigrants**

The new measure, now known as S. 1348 in the Senate, which continues to be vigorously debated, will allow anyone who has been unlawfully present on or before January 1, 2007 to legalize his or her status through a Z visa after paying a fine of $5,000. There are thought to be over 12 million and up to 20 million undocumented immigrants who might be able to take advantage of this very generous measure. Upon obtaining the Z visa, it would take about 8 to 13 years for an individual to become a permanent resident. Heads of household would have to return to their home countries first. Before the Z visa program is implemented, undocumented immigrants could come forward right away to claim a probationary card that would let them live and work legally in the US.

The proposed measure would also allow for a future flow of temporary workers to the United States, via a Y visa, that was cut from 400,000 to 200,000 through an amendment that passed the Senate on May 23. The Y visa, which applies to unskilled workers, mainly in the farm, restaurant, hotel and food processing industries, would have to wait until the so-called “triggers” that have been activated, which include securing the border with more patrols, building more fencing and implementing an employer verification program that will electronically check the status of all new hires. The new bill will also toughen penalties against illegal crossers and overstayers. Y workers would have to return home after work stints of two years, with little opportunity to gain permanent legal status or ever become the US citizens. A Y worker who fails to timely depart is permanently barred from any future immigration benefit. However, a special category of 10,000 exceptional Y-3 workers would be able to obtain permanent residence under the ‘points system’.

The temporary Y visa proposal has been criticized as it would not provide the individual with an opportunity to apply for permanent residence. The families

of a Y visa holder will also not get an opportunity to stay with him or her in the US, except for very limited stays.

The "Grand Bargain" not just addresses the problems pertaining to undocumented and unskilled immigration, but also seeks to comprehensively reform the system for legal immigrants, and these proposals too have alarmed many.

**Employment Based Immigration**

***Existing Law***

Under existing law, foreign nationals who are skilled or educated and who have job offers have the possibility of immigrating to the United States. Employment based immigration is divided into three preference categories: (a) Employment-based first preference - priority workers comprising persons with extraordinary abilities, outstanding professors and researchers and certain multi-national executives and managers; (b) Employment-based second preference – members of the professions with advanced degrees or the equivalent or persons of exceptional ability in the sciences, arts or business; and (c) Employment-based third preference – professionals, skilled workers (jobs requiring two years or more training or experience) or unskilled workers (jobs requiring less than two years training or experience). The numbers in these categories have been grossly inadequate, further hamstrung by "per country" limits, and have resulted in long waiting periods. In the second and third preferences, apart from a few exceptions, the employer has to first test the US labor market through a process known as "labor certification."

***Expected Changes***

The proposed amendments eliminate the employment preference categories 1, 2 and 3 and replace them with a points system, similar to the systems prevalent in Canada, Australia and the United Kingdom. The new system would eliminate the need of an employer's actual sponsorship. The labor certification process is also slated to be abolished. Points will be assigned based on merits. Employment in the US, particularly in specialty or high demand occupations, will fetch the maximum points. Employment in science, technology, engineering and mathematics (STEM) fields will also fetch points. Points will also be assigned to education, with persons holding advanced graduate degrees, fetching the highest points. Moreover, those who are native English speakers or

who gain a Test of English as a Foreign Language (TOEFL) score of 75 or above will also get high points. Applicants with extended family members, such as adult children or siblings, will not get as many points as those who meet the employment and education criteria.

The points system will radically change the existing system, which is tethered to an employer that sponsors a foreign national after an unsuccessful test of the US labor market. Individuals would be able to apply for a green card on their own, although US-based employment would fetch them high points.

**Family Based Immigration**

The Immigration and Nationality Act allows for the immigration of foreign nationals to the United States based on relationship to a U.S. citizen or legal permanent resident. Family-based immigration falls under the following two categories:-

***Existing Law***

Immediate Relatives of U.S. Citizens (IR), which applies to the spouse, widow(er) and unmarried child (under 21) of a U.S. citizen, and the parent of a U.S. citizen who is 21 or older. Petitions filed by US citizens under this category are at present not subject to any cap at all.

Other family members are subject to caps depending on their relationship to the sponsoring relative. Family First Preference (F1), covering unmarried sons and daughters of U.S. citizens, is subject to an annual cap of 23,400. The Family Second Preference (F2), which applies to spouses, minor children, and unmarried sons and daughters (over age 21) of lawful permanent residents, is subject to an annual cap of 114,200 visas. More than 75% percent of all visas available for this category are issued to the spouses and minor children; the remainder will be allocated to unmarried sons and daughters. Under the Family Third Preference (F3), which applies to married sons and daughters of U.S. citizens, and their spouses and minor children, 23,400 are granted immigrant visas. Finally, under the Family Fourth Preference (F4), 65,000 visas are granted to brothers and sisters of United States citizens, and their spouses and minor children, provided the U.S. citizen sponsor is 21 years of age.

***Expected Changes***

The new bill would immediately abolish the family-based first, second (2B),

third and fourth preferences. It would also abolish the immediate relative category for parents of US citizens. Spouses and minor children of US citizens will continue to remain immediate relatives. A proposed amendment seeks to include the spouses and minor children of Lawful Permanent Residents (Green Card Holders) in the immediate relative category. However, filings under the soon to be eliminated family preferences prior to May 1, 2005 will get processed under the old system. The rest of the family-based beneficiaries will have to re-apply under the new points system even if they were beneficiaries of I-130 petitions post May 1, 2005. These proposed changes designate as many as 440,000 visas a year to reduce the backlog of 4 million foreign nationals with family ties to the United States who have been waiting in the bureaucratic pipeline as long as 22 years, with the goal of eliminating the backlog in 8 years. Further, the proposed amendments will now require even those who would have been sponsored through a family member to apply under the new points system, which gives less emphasis to family relationships. After the pre-May 1, 2005 backlog is cleared, merit-based immigration would gain importance.

As noted, the new system will also abolish the immediate relative category for parents of US citizens who are not currently subject to a quota, and will create a new preference category for them with a ceiling of 40,000. On the other hand, a special non-immigrant parent visa will be created for parents of US citizens and Y visa holders, which would require the parent to post a bond of US$ 1,000, remain in the US for a maximum period of 30 days, and prohibit any adjustment or change of status. The proposal has tough penalties on both the parent and the US citizen sponsor if the parent overstays this visa.

**Changes Affecting the H-1B and L-1 Category**

Beneficiaries of H-1B and L-1 petitions are entitled to maintain a “dual intent,” permitting them to work temporarily in the Unite States while allowing them to initiate procedures to permanently reside there. ”Dual intent” will be eliminated under the new provision. In addition, the Department of Labor and the Department of Homeland Security are granted sweeping powers to scrutinize the H-1B and the L-1 category respectively.

The H-1B visa number will be increased to 115,000 annually from the earlier annual cap of 65,000, with the possibility of providing for additional H-1B visas to a cap of 180,000. However, the proposed changes require that employers attest to non-displacement of US workers and good faith recruitment

requirements that were earlier limited to H-1B dependant employers. Additionally, an employer that employs 50 or more persons is limited to employing only 50% of its employees on H-1B visas. Employers are also restricted from advertising exclusively for H-1B workers.

A May 24 amendment would increase the H-1B fees to US$ 5,000 per petition from the existing US$ 1,500.

The L-1 visa system is also likely to be changed significantly introducing stringent restrictions on new companies that sponsor individuals on L-1 visas for new employment or petitioning for extensions.

**New Student Visa Proposal**

The scope of the F-1 visa, available to students, is modified to increase the period of post curricular Optional Practical Training from 12 months to 24 months. A new visa category (F-4) for students pursuing advanced degrees in STEM fields could be introduced. Certain categories of students will be granted "dual intent" too.

**Conclusion**

The Grand Bargain is a delicate compromise, which is attracting criticism from both supporters of broader immigration options and from the restrictionists. The latter are appalled by the fact that over 12 million undocumented people will get legalized, but also do not realize that there it is virtually impossible to deport so many people. The pro-immigration advocates are alarmed that the family immigration system, the bedrock of US immigration policy, is being dismantled and that future temporary workers under the Y visas will be treated as "guest workers" and will not be provided with a pathway to permanent residence and eventual citizenship. The measure also does not provide any due process relief to immigrants who have been given the raw end of the stick since the passage of the 1996 Act. On the other hand, this may be the only chance in a long time to reform a broken immigration system. Only time will tell whether the proposed cure will be worse than the sickness!

---

*** Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, practices immigration law in New York City and is the managing member of Cyrus D. Mehta & Associates, P.L.L.C. He is the Past Chair of the Board of Trustees of the American Immigration Law Foundation and**

**recipient of the 1997 Joseph Minsky Young Lawyers Award. He is also Secretary of the Association of the Bar of the City of New York and former Chair of the Committee on Immigration and Nationality Law of the same Association.**

** Poorvi Chothani, of LawQuest, is the Correspondent Attorney in Mumbai, India for Cyrus D. Mehta and Associates, PLLC that practices US Immigration and Nationality Law in New York. She is licensed to practice Indian Law, New York State Law and US Federal Law and is a member of the American Immigration Lawyer's Association (AILA), Poorvi Chothani practices Indian and US Immigration and Nationality Law in Mumbai, and can be reached at info@lawquestinternational.com.