

President Biden's Immigration Plan Legalizes Millions of Undocumented Workers

Proposal calls for clearing green card backlogs, higher wages for H-1B holders

By Roy Maurer
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Newly sworn-in President Joe Biden unveiled legislation Jan. 20 that would create a pathway to citizenship for the roughly 10 million to 12 million undocumented immigrants living in the United States, offering expedited green card eligibility to "Dreamers"—undocumented immigrants brought into the country as children—as well as to those under temporary protected status and farmworkers.

The U.S. Citizenship Act of 2021 would also attempt to clear the employment-based visa backlog, eliminate per-country visa caps for green cards, codify work authorization for the spouses of H-1B visa holders, incentivize higher wages for H-1B workers so as not to displace U.S. workers and encourage ways to improve the employment verification process.

The expansive proposal, which would need to be approved by Congress, is the most sweeping immigration reform package introduced since 2013. If it passes, it would usher in the biggest changes for immigrants since 1986, when President Ronald Reagan signed legislation granting legal status to 3 million people who were in the country without documentation.

Under Biden's plan, undocumented immigrants living in the U.S. as of Jan. 1, 2021, would have a five-year path to permanent residence if they pass background checks, pay taxes and fulfill other requirements. From there, it's a three-year path to naturalization if they pursue citizenship. The Department of Homeland Security may waive the presence requirement for those deported during the years of the Trump administration if they were physically present for at least three years prior to removal.

For some immigrants without legal status, the road to legalization would be quicker, including for the approximately 1.3 million "Dreamers," of which about 650,000 are part of the Deferred Action for Childhood Arrivals (DACA) program.

"This proposal could offer a long-awaited solution for these individuals who have been stuck in limbo while the DACA program has been challenged by opponents (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/supreme-court-ruling-daca-means-for-employers.aspx) and have been without a status that would allow them to live and work indefinitely in the U.S.," said Diane Hernandez, an attorney in the Denver office of law firm Hall Estill. "Currently, only some 'Dreamers' are eligible for green cards, and typically they must have entered the DACA program before reaching 18.5 years of age to be considered for such benefits. For the proposal to be truly equitable, it should include a way for all 'Dreamers,' regardless of age when entering the program, to apply for a green card."

The Society for Human Resource Management (SHRM), the U.S. Chamber of Commerce and other business groups have voiced support for some of the measures in the Biden plan, including putting DACA recipients and "Dreamers" on a path to citizenship, reforming the country's visa system and easing pandemic-related travel restrictions.

"As workplaces evolve, securing the country's global talent pipeline so workers educated and trained in the U.S. can contribute their talents to the American economy is more important than ever," said Emily M. Dickens, SHRM's chief of staff, head of government affairs and corporate secretary. "We look forward to working with the Biden administration and new Congress to shape policy solutions that provide critical, work-authorized talent; protect American workers; and modernize workplace immigration."

Bill Breakdown

The legislation contains several measures important to employers, including:

- Clearing employment-based visa backlogs by recapturing unused visas and eliminating per-country visa caps (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/house-votes-remove-green-card-caps.aspx). "It is the intent of Congress that unused employment visas are reallocated to other categories so the total number of authorized visas in any year is actually issued," said Susan Cohen, an attorney with Mintz in Boston. "That has not happened over the years, and we have lost a number of unused visas due to lack of oversight. The bill would seek to recapture those visas to help clear up the backlog." It is not yet known how far back the recapturing mechanism may go. The Biden administration may also exempt spouses and dependent children from the green card quotas to open up available numbers. Currently, about 40 percent of the employment-based green cards go to the primary beneficiaries' spouse and children.
- Making staying in the U.S. easier for graduates of U.S. universities who have earned advanced science, technology, engineering and math degrees. This is another group that could be exempted from the employment-based visa quotas.
- Improving access to green cards for workers in lower-wage sectors.
- Codifying work authorization for spouses of H-1B visa holders (those with H-4 visas). This group was awarded work authorization by regulation under the Obama administration, but that benefit was scheduled for the chopping block (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/trump-dhs-h4-rescind-work-permits-spouses-h1b.aspx) during the Trump years.
- Creating a pilot program to stimulate regional economic development (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/state-sponsored-visas-skills-based-immigration.aspx). "This can stimulate depressed areas and incentivize revitalization through a legal immigration structure," Cohen said.
- Establishing a commission to make recommendations for improving the employment verification process.
- Increasing penalties for employers of seasonal foreign workers who violate labor laws. "Given his labor agenda, there is reason to believe that President Biden's Department of Labor will be tough on wages for foreign nationals and that he will continue that agency's scrutiny of worker rights," said Rebecca Bernhard, a partner in the Minneapolis office of law firm Dorsey and Whitney.
- Seeking higher wages for guest workers to prevent unfair competition with U.S. workers, which is similar to what the Trump administration has been promoting with several final rules in its last weeks. "That's the big question right now—what will Biden do with Trump's recent H-1B rules?" Cohen asked. "I think the new president will be hard-pressed to support the Trump rule eliminating the lottery in favor of wage-based selection (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/uscis-replaces-h1b-lottery-with-salary-based-selection.aspx), and I'd be surprised if the Biden administration defended the recently reissued H-1B regulations (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/dol-increases-h-1b-wage-minimums-again.aspx)."

The White House announced Jan. 20 that the recently issued rules will be frozen and will undergo a 60-day review. "They probably won't survive scrutiny, but that does not mean that new, perhaps more-tailored rules will not be issued in a similar vein," Cohen said.

Partisan Divide

The fate of Biden's plan is uncertain. The president has already cautioned that his administration and Congress may not be able to pass a large-scale immigration overhaul in the first 100 days of his term.

Sen. Chuck Schumer, D-N.Y., who became the Senate majority leader Jan. 20, vowed to act quickly on the proposal, but the measure would need at least 10 Republicans to join all 50 Democrats to overcome a filibuster in the Senate.

"There are many issues I think we can work cooperatively with President Biden, but a blanket amnesty for people who are here unlawfully isn't going to be one of them," said Sen. Marco Rubio, R-Fla.

Andrew Arthur, a resident fellow in law and policy for the Center for Immigration Studies, a Washington, D.C.-based think tank, said, "A further economic downturn could imperil the prospects for the bill. The unemployment rate in Dec. 2020 was 6.7 percent, and more than 56 million working-age Americans were not in the labor force. Tens of thousands of businesses have closed permanently as a result of the pandemic. Popular support for legalizing millions of people unlawfully present and allowing them compete with those currently in the legal workforce may not be that strong and would likely fall if the economy does not reverse itself or if it gets worse."

Executive Actions

On his first evening in office, Biden signed immigration-related executive orders, which require no congressional action, to reinstate the DACA program and end travel restrictions on 13 countries (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/trump-expanded-travel-ban-6-new-countries.aspx) that were deemed to have failed to meet U.S. security and information-sharing standards. The measure directs the State Department to resume visa processing for the affected countries: Eritrea, Iran, Kyrgyzstan, Libya, Myanmar, Nigeria, North Korea, Somalia, Sudan, Syria, Tanzania, Venezuela and Yemen. The travel restrictions first went into effect in January 2017 and became one of Trump's signature immigration policies.

Biden also announced that Trump's COVID-19-related public health bans for Brazil, the European Schengen countries, Ireland and the United Kingdom will stay in place. The outgoing president had lifted the bans starting Jan. 26. The restrictions affect foreign nationals who were physically present in one of these countries within 14 days of travel to the United States.

In addition, the new administration will review the temporary protected status programs for various countries (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/court-allows-phaseout-tps-immigrants.aspx) to see which programs ended by the Trump administration could be reinstated.

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