112TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
112–292

FAIRNESS FOR HIGH-SKILLED IMMIGRANTS ACT OF 2011

NOVEMBER 18, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 3012]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3012) to amend the Immigration and Nationality Act to eliminate the per-country numerical limitation for employment-based immigrants, to increase the per-country numerical limitation for family-sponsored immigrants, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fairness for High-Skilled Immigrants Act of 2011".

SEC. 2. NUMERICAL LIMITATION TO ANY SINGLE FOREIGN STATE.

(a) IN GENERAL.—Section 202(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1152(a)(2)) is amended—

(1) in the paragraph heading, by striking "AND EMPLOYMENT-BASED";

(2) by striking "(3), (4), and (5)," and inserting "(3) and (4),";

(3) by striking "subsections (a) and (b) of section 203" and inserting "section 203(a)";

(4) by striking "7" and inserting "15"; and

(5) by striking "such subsections" and inserting "such section".

(b) CONFORMING AMENDMENTS.—Section 202 of the Immigration and Nationality Act (8 U.S.C. 1152) is amended—

(1) in subsection (a)(3), by striking "both subsections (a) and (b) of section 203" and inserting "section 203(a)";

(2) by striking subsection (a)(5); and

(3) by amending subsection (e) to read as follows:

"(e) SPECIAL RULES FOR COUNTRIES AT CEILING.—If it is determined that the total number of immigrant visas made available under section 203(a) to natives of any single foreign state or dependent area will exceed the numerical limitation specified in subsection (a)(2) in any fiscal year, in determining the allotment of immigrant visa numbers to natives under section 203(a), visa numbers with respect to natives of that state or area shall be allocated (to the extent practicable and otherwise consistent with this section and section 203) in a manner so that, except as provided in subsection (a)(4), the proportion of the visa numbers made available under each of paragraphs (1) through (4) of section 203(a) is equal to the ratio of the total number of visas made available under the respective paragraph to the total number of visas made available under section 203(a).".

(c) COUNTRY-SPECIFIC OFFSET.—Section 2 of the Chinese Student Protection Act of 1992 (8 U.S.C. 1255 note) is amended—

(1) in subsection (a), by striking "subsection (e))" and inserting "subsection (d))"; and

(2) by striking subsection (d) and redesignating subsection (e) as subsection (d).

(d) EFFECTIVE DATE.—The amendments made by this section shall take effect as if enacted on September 30, 2011, and shall apply to fiscal years beginning with fiscal year 2012.

(e) TRANSITION RULES FOR EMPLOYMENT-BASED IMMIGRANTS.—

(1) IN GENERAL.—Subject to the succeeding paragraphs of this subsection and notwithstanding title II of the Immigration and Nationality Act (8 U.S.C. 1151 et seq.), the following rules shall apply:

(A) For fiscal year 2012, 15 percent of the immigrant visas made available under each of paragraphs (2) and (3) of section 203(b) of such Act (8 U.S.C. 1153(b)) shall be allotted to immigrants who are natives of a foreign state or dependent area that was not one of the two states with the largest aggregate numbers of natives obtaining immigrant visas during fiscal year 2010 under such paragraphs.

(B) For fiscal year 2013, 10 percent of the immigrant visas made available under each of such paragraphs shall be allotted to immigrants who are natives of a foreign state or dependent area that was not one of the two states with the largest aggregate numbers of natives obtaining immigrant visas during fiscal year 2011 under such paragraphs.

(C) For fiscal year 2014, 10 percent of the immigrant visas made available under each of such paragraphs shall be allotted to immigrants who are natives of a foreign state or dependent area that was not one of the two states with the largest aggregate numbers of natives obtaining immigrant visas during fiscal year 2012 under such paragraphs.

(2) PER-COUNTRY LEVELS.—

(A) RESERVED VISAS.—With respect to the visas reserved under each of subparagraphs (A) through (C) of paragraph (1), the number of such visas made available to natives of any single foreign state or dependent area in the appropriate fiscal year may not exceed 25 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas.

(B) UNRESERVED VISAS.—With respect to the immigrant visas made available under each of paragraphs (2) and (3) of section 203(b) of such Act (8 U.S.C. 1153(b)) and not reserved under paragraph (1), for each of fiscal years 2012, 2013, and 2014, not more than 85 percent shall be allotted to immigrants who are natives of any single foreign state.

(3) SPECIAL RULE TO PREVENT UNUSED VISAS.—If, with respect to fiscal year 2012, 2013, or 2014, the operation of paragraphs (1) and (2) of this subsection

would prevent the total number of immigrant visas made available under paragraph (2) or (3) of section 203(b) of such Act (8 U.S.C. 1153(b)) from being issued, such visas may be issued during the remainder of such fiscal year without regard to paragraphs (1) and (2) of this subsection.

(4) RULES FOR CHARGEABILITY.—Section 202(b) of such Act (8 U.S.C. 1152(b)) shall apply in determining the foreign state to which an alien is chargeable for purposes of this subsection.

Purpose and Summary

The bill eliminates the per-country numerical limitation for employment-based immigrant visas and increases the per-country numerical limitation for family-sponsored immigrant visas.

Background and Need for the Legislation

The Immigration and Nationality Act generally provides that the total number of family-sponsored and employment-based immigrant visas made available to natives of any single foreign country in a year cannot exceed 7% of the total number of such visas made available in that year.[1]

Since the annual numerical limits on the employment-based first preference category (aliens with extraordinary ability, outstanding professors and researchers and certain multinational executives and managers),[2] second preference category (members of the professions holding advanced degrees and aliens of exceptional ability)[3] and third preference category (skilled workers, professionals with bachelor's degrees and unskilled workers)[4] are 40,040 each, natives of each country are limited to no more than 2,803 green cards per year per category.

There are a number of modifications to this general rule. Among these are that if the total number of statutorily-available immigrant visas in each of the five employment-based preference categories in a calendar quarter exceed the total number of aliens who may be issued such visas in that quarter pursuant to the operation of the per-country cap, then the visas can be issued without regard to the per-country cap for the rest of that calendar quarter.[5] For this reason, natives of India received 31,118 employment-based immigrant visas in 2010 and natives of the People's Republic of China received 17,949, rather than the 9,800 that 7% of the 140,000 available employment-based immigrant visas would represent.[6]

Because of annual caps on employment-based immigrant visas, the population size of certain countries and the large number of natives of those countries for whom employers have petitioned for employment-based immigrant visas, the time it takes for visas to be become available to natives of those countries may be much longer than it takes for natives of other countries:

- For instance, in the employment-based second preference category, immigrant visas are now immediately available to applicants from most countries. However, for natives of

[1] *See* INA sec. 202(a)(2). In addition, the total number made available to natives of any single dependent area (a colony or other component or dependent area of a foreign state overseas from the foreign state) cannot exceed 2%. *See* INA sec. 202(c).
[2] *See* INA sec. 203(b)(1).
[3] *See* INA sec. 203(b)(2).
[4] *See* INA sec. 203(b)(3).
[5] *See* INA sec. 202(a)(5)(A).
[6] *See* U.S. Department of Homeland Security, *2010 Yearbook of Immigration Statistics* (2011)(table 10).

China and India, they are only available to aliens with priority dates of on or before November 1, 2007.

- In the employment-based third preference category, immigrant visas are now available to applicants from most countries with priority dates of on or before December 22, 2005, but for natives of China, they are only available to aliens with priority dates of on or before August 22, 2004, and for natives of India—July 22, 2002.[7]

These disparities are likely to increase in the future. Of the 108,250 aliens who had approved petitions for third preference green cards when the current State Department visa bulletin (November 2011) was calculated, 53,650 were from India.[8]

Similar per-country caps exist to the family-sponsored immigrant visa categories.[9] These are 1) unmarried sons and daughters of citizens,[10] 2) spouses and unmarried sons and daughters of permanent resident aliens,[11] 3) married sons and daughters of citizens,[12] and 4) siblings of citizens.[13] That is why natives of most countries who are siblings of U.S. citizens with priority dates of on or before June 15, 2000, have visas available, while siblings from Mexico only have visas available if they have priority dates of on or before April 22, 1996, and siblings from the Philippines only have visas available if they have priority dates of on or before August 22, 1988.[14]

It makes little sense for American employers who seek immigrant visas for skilled foreign workers to have to wait longer just because the workers are from India or China. Employers have already proven to the Labor Department through the labor certification process that they need these workers, that qualified Americans are not available and that American workers will not be harmed (or the process has been waived in the national interest).[15] As the high-skilled foreign worker advocacy organization Immigration Voice states, "the country of origin does not affect the immigrants' ability to contribute to the economy and the employer. Employment-based immigration is driven by U.S. employers seeking to fill positions for which they cannot find qualified, willing and able Americans."[16]

Consequently, the bill eliminates the employment-based immigrant visa per-country cap entirely by fiscal year 2015. It also raises the family-sponsored immigrant visa per-country cap from 7% to 15%.

Hearings

The Committee on the Judiciary held no hearings on H.R. 3012.

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[7] *See* U.S. Department of State, Bureau of Consular Affairs, *Visa Bulletin,* num. 38 vol. IX. (for Nov. 2011).

[8] Information provided by U.S. Department of State.

[9] *See* INA sec. 202(a)(2). However, the cap does not fully apply to the spouses and children of permanent residents. *See* INA sec. 202(a)(4).

[10] *See* INA sec. 203(a)(1).

[11] *See* INA sec. 203(a)(2).

[12] *See* INA sec. 203(a)(3).

[13] *See* INA sec. 203(a)(4).

[14] *See Visa Bulletin.*

[15] *See* INA secs. 202(b)(2)(B)(i), 212(a)(5).

[16] *See* Immigration Voice website.

Committee Consideration

On October 27, 2011, the Committee met in open session and ordered the bill H.R. 3012 favorably reported with an amendment by a voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call vote occurred during the Committee's consideration of H.R. 3012.

1. An amendment by Mr. King that would have removed the bill's increase in the family-sponsored immigrant visa per-country cap was defeated by a vote of 6 to 23.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa		X	
Mr. Pence			
Mr. Forbes			
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy			
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle	X		
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi			
Mr. Quigley		X	
Ms. Chu		X	
Mr. Deutch			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Sánchez		X	
(Vacant)			
Total	6	23	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3012, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 17, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3012, the "Fairness for High-Skilled Immigrants Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3012—Fairness for High-Skilled Immigrants Act.

CBO estimates that implementing H.R. 3012 would have no significant budgetary impact. Enacting the bill could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any effects would be insignificant for each year.

Under current law, the number of family-sponsored and employment-based immigrant visas available to natives of a foreign country in each year generally cannot exceed 7 percent of the total number of such visas made available in that year. H.R. 3012 would raise the per-country limitation from 7 percent to 15 percent of the total number of family-sponsored visas and would remove this limitation for employment-based visas.

The bill would not affect the existing caps on the total number of family-sponsored and employment-based visas that can be issued in each year. Those caps have been reached in recent years, and CBO expects that trend to continue; so we anticipate that the bill would not significantly affect the number of immigrants entering the United States. Thus, we estimate that the net effects on adjudication fees collected as offsetting receipts and spent by the Department of Homeland Security would not be significant in any year. CBO also estimates that enacting H.R. 3012 would have insignificant net effects on visa fees collected as revenues by the Department of State.

H.R. 3012 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3012 eliminates the per-country numerical limitation for employment-based immigrant visas and increases the per-country numerical limitation for family-sponsored immigrant visas.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3012 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Sec. 1. Short Title

Sec. 2. Numerical Limitation to any Single Foreign State

Subsection (a) eliminates the per-country cap for employment-based immigrant visas and raises the per-country cap for family-sponsored immigrant visas to 15%.

Subsection (b) makes conforming amendments.

Subsection (c) makes a conforming change to the Chinese Student Protection Act of 1992.

Subsection (d) provides that the amendments made by the bill will take place as if enacted on September 30, 2011, and shall apply beginning in fiscal year 2012.

Subsection (e) provides transition rules. Paragraph (1) provides a three-year transition period for employment-based second and third preference (EB–2 and EB–3) immigrant visas. During fiscal year 2012, 15% of EB–2 and EB–3 immigrant visas are reserved for natives of countries other than the top two countries in terms of visa receipts by natives in those categories in fiscal year 2010. During 2013 and 2014, 10% of EB–2 and EB–3 visas are reserved in each category for natives of countries other than the top two in terms of visa receipts by natives in those categories two years previously.

Paragraph (2) of subsection (e) sets out rules for the distribution of the reserved and unreserved visas set under paragraph (1):

- *Reserved Visas:* Natives of no single country can take more than 25% of the reserved visas.
- *Unreserved Visas:* Natives of no single country can take more than 85% of the unreserved visas, ensuring that the second-largest user of such visas can receive at least 15% of the unreserved visas.

Paragraph (3) of subsection (e) allows the State Department to issue visas notwithstanding the above transition rules if such rules would result in immigrant visas going unused.

Paragraph (4) of subsection (e) clarifies that the current chargeability rules in the Immigration and Nationality Act apply to visas issued during the transition period.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

IMMIGRATION AND NATIONALITY ACT

* * * * * * *

TITLE II—IMMIGRATION

CHAPTER 1—SELECTION SYSTEM

* * * * * * *

NUMERICAL LIMITATION TO ANY SINGLE FOREIGN STATE

SEC. 202. (a) PER COUNTRY LEVEL.—

(1) * * *

(2) PER COUNTRY LEVELS FOR FAMILY-SPONSORED [AND EMPLOYMENT-BASED] IMMIGRANTS.—Subject to paragraphs [(3), (4), and (5),] *(3) and (4),* the total number of immigrant visas made available to natives of any single foreign state or dependent area under [subsections (a) and (b) of section 203] *section*

203(a) in any fiscal year may not exceed [7] *15* percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under [such subsections] *such section* in that fiscal year.

(3) EXCEPTION IF ADDITIONAL VISAS AVAILABLE.—If because of the application of paragraph (2) with respect to one or more foreign states or dependent areas, the total number of visas available under [both subsections (a) and (b) of section 203] *section 203(a)* for a calendar quarter exceeds the number of qualified immigrants who otherwise may be issued such a visa, paragraph (2) shall not apply to visas made available to such states or areas during the remainder of such calendar quarter.

* * * * * * *

[(5) RULES FOR EMPLOYMENT-BASED IMMIGRANTS.—

[(A) EMPLOYMENT-BASED IMMIGRANTS NOT SUBJECT TO PER COUNTRY LIMITATION IF ADDITIONAL VISAS AVAILABLE.—If the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 203(b) for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.

[(B) LIMITING FALL ACROSS FOR CERTAIN COUNTRIES SUBJECT TO SUBSECTION (e).—In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 203(b) exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 203(b) consistent with subsection (e) (determined without regard to this paragraph), in applying subsection (e) all visas shall be deemed to have been required for the classes of aliens specified in section 203(b).]

* * * * * * *

[(e) SPECIAL RULES FOR COUNTRIES AT CEILING.—If it is determined that the total number of immigrant visas made available under subsections (a) and (b) of section 203 to natives of any single foreign state or dependent area will exceed the numerical limitation specified in subsection (a)(2) in any fiscal year, in determining the allotment of immigrant visa numbers to natives under subsections (a) and (b) of section 203, visa numbers with respect to natives of that state or area shall be allocated (to the extent practicable and otherwise consistent with this section and section 203) in a manner so that—

[(1) the ratio of the visa numbers made available under section 203(a) to the visa numbers made available under section 203(b) is equal to the ratio of the worldwide level of immigration under section 201(c) to such level under section 201(d);

[(2) except as provided in subsection (a)(4), the proportion of the visa numbers made available under each of paragraphs (1) through (4) of section 203(a) is equal to the ratio of the total number of visas made available under the respective paragraph to the total number of visas made available under section 203(a), and

[(3) except as provided in subsection (a)(5), the proportion of the visa numbers made available under each of paragraphs (1) through (5) of section 203(b) is equal to the ratio of the total number of visas made available under the respective paragraph to the total number of visas made available under section 203(b).

Nothing in this subsection shall be construed as limiting the number of visas that may be issued to natives of a foreign state or dependent area under section 203(a) or 203(b) if there is insufficient demand for visas for such natives under section 203(b) or 203(a), respectively, or as limiting the number of visas that may be issued under section 203(a)(2)(A) pursuant to subsection (a)(4)(A).]

(e) SPECIAL RULES FOR COUNTRIES AT CEILING.—If it is determined that the total number of immigrant visas made available under section 203(a) to natives of any single foreign state or dependent area will exceed the numerical limitation specified in subsection (a)(2) in any fiscal year, in determining the allotment of immigrant visa numbers to natives under section 203(a), visa numbers with respect to natives of that state or area shall be allocated (to the extent practicable and otherwise consistent with this section and section 203) in a manner so that, except as provided in subsection (a)(4), the proportion of the visa numbers made available under each of paragraphs (1) through (4) of section 203(a) is equal to the ratio of the total number of visas made available under the respective paragraph to the total number of visas made available under section 203(a).

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CHINESE STUDENT PROTECTION ACT OF 1992

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SEC. 2. ADJUSTMENT TO LAWFUL PERMANENT RESIDENT STATUS OF CERTAIN NATIONALS OF THE PEOPLE'S REPUBLIC OF CHINA.

(a) IN GENERAL.—Subject to subsection (c)(1), whenever an alien described in subsection (b) applies for adjustment of status under section 245 of the Immigration and Nationality Act during the application period (as defined in [subsection (e))] *subsection (d))* the following rules shall apply with respect to such adjustment:

(1) * * *

* * * * * * *

[(d) OFFSET IN PER COUNTRY NUMERICAL LEVEL.—

[(1) IN GENERAL.—The numerical level under section 202(a)(2) of the Immigration and Nationality Act applicable to natives of the People's Republic of China in each applicable fiscal year (as defined in paragraph (3)) shall be reduced by 1,000.

[(2) ALLOTMENT IF SECTION 202(e) APPLIES.—If section 202(e) of the Immigration and Nationality Act is applied to the People's Republic of China in an applicable fiscal year, in applying such section—

[(A) 300 immigrant visa numbers shall be deemed to have been previously issued to natives of that foreign state under section 203(b)(3)(A)(i) of such Act in that year, and

[(B) 700 immigrant visa numbers shall be deemed to have been previously issued to natives of that foreign state under section 203(b)(5) of such Act in that year.

[(3) APPLICABLE FISCAL YEAR.—

[(A) IN GENERAL.—In this subsection, the term "applicable fiscal year" means each fiscal year during the period—

[(i) beginning with the fiscal year in which the application period begins; and

[(ii) ending with the first fiscal year by the end of which the cumulative number of aliens counted for all fiscal years under subparagraph (B) equals or exceeds the total number of aliens whose status has been adjusted under section 245 of the Immigration and Nationality Act pursuant to subsection (a).

[(B) NUMBER COUNTED EACH YEAR.—The number counted under this subparagraph for a fiscal year (beginning during or after the application period) is 1,000, plus the number (if any) by which (i) the immigration level under section 202(a)(2) of the Immigration and Nationality Act for the People's Republic of China in the fiscal year (as reduced under this subsection), exceeds (ii) the number of aliens who were chargeable to such level in the year.]

[(e)] *(d)* APPLICATION PERIOD DEFINED.—In this section, the term "application period" means the 12-month period beginning July 1, 1993.

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