



Ep. 43: The Biden Immigration Bill: What It Means for Business

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Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host Jose Garriga.

The Biden administration, on February 18, introduced an ambitious immigration bill in Congress, the U.S. Citizenship Act of 2021, that addresses a wide range of issues and regulations related to immigrant and nonimmigrant visas, among other topics.

We have with us today Akin Gump public law and policy partner Ed Pagano, who returns to the show, senior policy advisor Casey Higgins and international trade counsel Maka Hutson. They'll be discussing the Biden bill, what it comprises and what it means for business.

Welcome to the podcast.

Ed, Casey, Maka, welcome to the show. In Ed's case, welcome back.

Immigration is a topic of perennial interest in the U.S. and always something of a political football. So, to start this, as I noted, it's an ambitious bill. Ed, could you break out the biggest components of this bill for listeners?

Ed Pagano:

Sure. I think you've correctly identified the bill. It really is ambitious. It is a comprehensive immigration reform proposal that would allow for a pathway to citizenship for more than 10 million undocumented Americans, provides visa relief and visa expansions in the business community, and a host of other provisions that I think many of the advocates in the immigration community have wanted for years. And I guess that's what the, to me, even bigger than the individual pieces of the legislation is that this is President Biden's first bill; he's proposed it on the first day in office. He's bearing a much different signal than President Trump on immigration, wants to be friendly to new immigrants, to Americans that may want to be, go through citizenship in the U.S., and it's a total different turning the page from the last four years, opening up the immigration system for businesses and welcoming new citizens and new visitors to the United States.

Jose Garriga: Thank you Ed. We mentioned it's a comprehensive bill. It's not a series of discrete bills. So, Casey, if you would, why do you think that the Democrats did, in fact, propose it as a comprehensive? And do you agree with this approach?

Casey Higgins: Thanks, Jose. I think the comprehensive nature of the bill is indicative of the fact that Democrats believe that there are a plethora of priorities that need to be addressed urgently by Congress that relate to our immigration system. And as those of us that work in this space know, it has been decades since there's been an overhaul of a lot of different aspects of the immigration system. And it shows for advocates that this is full of their priorities, and you can't necessarily just nail down one because their priorities are broad. I think you will see there's ultimately a need to be broken down a little bit to ensure that you can try to get some pieces moved through Congress.

But, overall, I think what the Biden administration and Democrats in Congress were seeking to do is lay down a marker for, in an ideal world, where they would be, what they would want to see done to our immigration system. That will continue to evolve as they begin to have conversations in Congress and decide what can and can't be passed. So, I think it's correct in that there are a lot of different things that need to be reformed within our immigration system. In terms of process, we'll see, as they move forward, whether it stays in this form or if it breaks down into pieces. And I think it's more likely to break down into pieces.

Jose Garriga: Thank you. So, we've talked about a little bit about just in the introduction about this is something that has, and you have mentioned, that this is something that has a fairly strong business component in terms of the visas and other provisions. So, Maka, if you would, for business listeners, what are the big-ticket issues? What are some of the bright spots for the business community? And are there areas of potential concern for business listeners?

Maka Hutson: Yes. Thank you, Jose, for having me on this podcast. There are definitely several provisions that will be very interesting to the business community. The most important issue in the last few years that has gained quite a bit of traction in Congress is this issue of very long waits for green cards for employment-based immigrants. If a U.S. company sponsors somebody for a green card, and that foreign national happens to be from India or China, the two most-populated countries and countries that contribute the highest number of skilled immigrants to the United States, sometimes they wait for decades to get their green card. And, so, that is the main issue that this bill attempts to resolve.

There's several ways that the bill does that. There is a modest, outright increase in the number of employment-based green cards, from 140,000 per year, the limit that was set 30 years ago, to 170,000, but most of it goes to unskilled workers category. The category of workers who don't have a bachelor's degree, but have experience that is relevant to their position. The bill also recaptures unused employment-based immigrant visas. So, for the last 30 years or so, not all of the green cards have been distributed for various reasons, processing reasons. So, the bill calls on the Department of Homeland Security to look back and recapture, which is a pretty significant number of green cards.

The bill also exempts spouses and children of employment-based immigrants from the numerical limitation, which is very important because, currently, they're counted against the 140,000 limit. And, so, that means that a lot fewer than 140,000 employees themselves end up getting sponsored.

It also does things like exempting from those numerical limits non-citizens who have earned a PhD in a STEM degree, a science, technology, math or engineering degree. So, in other words, if you get a PhD in one of those fields where we really need high-skilled workers, you get to jump to the front of the line, the green card line.

And it also eliminates numerical limitations on applicants who have been waiting for their green cards for 10 years, essentially capping the wait to 10 years. So, that brings quite a bit of predictability to the process and says that even if you're from India or China, the two countries experiencing the longest backlogs, you won't be waiting longer than 10 years.

Finally, it does something that hasn't really been done before in U.S. immigration. Our immigration system is a federal system, a purely federally regulated system, but the bill proposes a five-year pilot program where states and local jurisdictions would get to decide if they need supplemental labor. And they would be eligible to apply for a certain number of employment-based immigrants up to 10,000 per year. And, so, if that pilot program does come through and is successful, that may become part of our immigration system going forward.

Very quickly, there are a couple of provisions that may not be welcomed by the business community. One is the ability of a future Secretary of Homeland Security to temporarily reduce the number of green cards that are available due to high unemployment. But the bill doesn't really define what that is. And, so, I would imagine that there will be some concern in Congress and in the business community that a future administration, perhaps a less friendly administration to business immigration, would want to reduce the number of green cards issued, citing unemployment numbers.

It also does something that might restrict some of the H-1B visa availability to entry-level applicants. For example, there's a proposal in the bill that the Secretary of Homeland Security could restructure the H-1B lottery and award the H-1B visas to higher-paid applicants first. Again, that's something that's been proposed in the past and could very well happen. Seeing that language in the bill makes me think that the Biden administration is approving of this type of lottery. I'll stop here, and then I'll be happy to address any other questions.

Jose Garriga:

Great. Thank you, Maka. A reminder, listeners, we're here today with Aiken Gump, public law and policy partner Ed Pagano, senior policy advisor Casey Higgins, and international trade counsel Maka Hutson discussing the Biden immigration bill currently before Congress.

So you mentioned H-1B visas, Maka, and I'll stay with you to discuss this. The Biden bill does contain benefits for H-1B visa holders and their dependents. You mentioned the wage-based priority or preference system for selecting H-1B employees. What would the benefits be for that, and separately, is that something that the business community would welcome?

Maka Hutson:

Generally, no. I don't think the business community would welcome this, Jose. The reason is a lot of H-1B employees begin their life with U.S. companies in entry-level positions. It is very typical for U.S. companies to hire entry-level employees after they've graduated from U.S. universities, typically, and after they've used their optional practical training, a work permit that is given to them for one or three years, depending on their major. Oftentimes, those entry-level employees with lower experience levels begin on the H-1B visa with the company. And then the company sponsors them for a green card

as they continue on with their employment and move up the ladder. So, as they become higher paid, they transition to a green card, typically.

Now, that's not necessarily the case for everybody. We've certainly worked on a lot of H-1B petitions for highly paid executives at companies, but it's very typical to sponsor an H-1B employee who is in an entry-level position. If the H-1B lottery is restructured in such a way that higher-paid employees are given priority, entry-level employees may very well not qualify for an H-1B visa at all. And, so, that would force employers to either raise their wages, sometimes raise their wages over the wages of similarly situated American workers, which would really defeat the goals of the bill, or they would just not be able to hire employees when the wage is higher than what they're able to pay. It would also disadvantage startups, small businesses, nonprofit organizations. So, there's quite a bit of concern around that particular provision.

Jose Garriga: Okay, that's very interesting. Thank you. Ed, let me turn to you. I think you're very familiar with Democratic priorities on the Hill and in the White House. To what extent does this bill reflect those priorities? This is something that Casey alluded to, but to what extent does it open or close the door for bipartisan action as a function of reflecting these Democratic priorities?

Ed Pagano: Thanks, Jose. The bill is an exact and very ambitious statement. It includes authorization putting into law, into statute for the DACA program, for Dreamers, large increases in visas, changes in asylum. So, it really is a reflection of the Democratic priorities. And I think for Democrats, this is the beginning and not the end of immigration reform and the negotiations. I see this as the Democratic opening bid. I think for immigration reform to be successful and to be enacted into law, it must be bipartisan in the House and in the Senate. Immigration cuts across party lines, to a degree. But I think certainly for 60 votes in the Senate, you're going to have to be bipartisan. And then for the House, it must again be bipartisan.

So, this is the beginning of the debate and I think, well, I'm very encouraged, and Casey certainly knows very well that the Republicans that I think want to move forward on immigration reform, it may not be in a comprehensive bill. It may be more of a piecemeal fashion. I think the Dream Act [*American Dream and Promise Act*] will be the first bill to move forward in the House and in the Senate. But after that, it'd be more encouraged with other pieces of bipartisan legislation.

Jose Garriga: Thank you, Ed. Casey, to what extent do you think Congress is—and this is following up on Ed's point—to what extent do you think Congress is going to move to pass this bill? Or do you think they're going to take another approach entirely?

Casey Higgins: Yeah, I think Ed made some excellent points. And I think while you might see this, how this bill attempts to be moved in the House, I think that in order to get the 60 votes that you need in the Senate to actually enact legislation, you're going to need Republicans to come along with it. And too often, what we've seen in the past is that a comprehensive piece of legislation collapses under its own weight to give everyone a reason to vote no, instead of giving everyone a reason to vote yes at the end of the day. And I think there is interest in pursuing a new approach to make sure that there are actually some pieces of legislation that can get passed this Congress. So, as Ed said, I think you might see the comprehensive bill move in the House, but I think they're also intending to move quickly the Dream and Promise Act, addressing Dreamers, as well as a bill that reforms the agricultural guest worker program.

I think those are two pieces that could have bipartisan support. I think you'll see the Senate focus on Dream, potentially agricultural guest workers as well, to try to move forward. I also think that there is potential for bipartisanship surrounding a bill that was introduced last Congress in light of the COVID-19 pandemic that would provide green cards to doctors and nurses who have been on the front lines of fighting this pandemic over the last year. So, I think there's a lot of hope that we can find some common ground between Republicans and Democrats and move forward. But I do think in order for those bills to be successful, you're going to need to break them up into smaller pieces and, ultimately, allow different vote coalitions to come together, to get to that 60 votes that you need for Senate passage.

Ed Pagano:

I would just add, I agree with Casey 100 percent that I think, different from the past, there was an attempt to pass comprehensive immigration reform in 2013. I was working with President Obama. In the Senate, we passed a bipartisan bill, but were not able to move the House bill. And I think, in that kind of failure and also in the dark days of the Trump administration, the anti-immigration policy certainly from my perspective, that there's a kind of reawakening for Democrats that comprehensive may be too much and may be too hard, and let's make progress as we can. And all the bills that Casey has mentioned and Maka has mentioned are bipartisan bills. The Dream Act, The agriculture workers program, the COVID relief bill that Sens. [Dick] Durbin [D-Ill.] and [Todd] Young [R-Ind.] have introduced for doctors and nurses, those are all bipartisan, and I think there's a real awareness that we have to move them separately than a comprehensive bill.

Jose Garriga:

Thank you. So, just to close, what takeaways could each of you offer listeners on the humanitarian or the business aspects of the Biden bill? Maka, I'll start with you.

Maka Hutson:

Yes, Jose. So, I completely agree with everything that Ed and Casey were saying. And, so, from a business immigration standpoint, my concern is will the business immigration provisions that I just described a little while ago find a home in these individual bills that are being proposed and debated, right? If we are looking at the Dream Act potentially being the first bill, and the agricultural workers being able to regularize their status, will the H-1B provisions or the increase in the number of green cards or the exemption of dependents that I just outlined find a home in one of those bills sort of being attached to them, or will there be enough of a political will or legislative appetite to pass a separate business immigration reform bill?

There was quite a bit of debate last year around Fairness for High-Skilled Immigrants Act, which was a bill that was proposed both in the Senate and the House, actually passed the House, but then there were some amendments made in the Senate, and the two chambers were ultimately not able to reconcile the two versions, and the bill died at the end of the previous Congress. So, it's possible that a similar bill will arise, as Casey and Ed mentioned. It may take the form of prioritizing doctors and nurses who fight the pandemic on the front lines. It's possible that we'll see an increase in the number of green cards primarily allotted to medical professionals or a recapture of those unused immigrant visas from the past 30 years that, again, primarily will be geared toward awarding them to physicians and nurses.

But I don't know about the broader provisions. It would have to be either a separate bill that will include more than just the recapture of green cards for doctors and nurses, or it could potentially be that some of the provisions could get attached to the other bills that will be moving through Congress independently. So we'll have to look and see. I think the business community has been waiting for a business immigration bill for a long time,

potentially close to 30 years. And, so, my hope is that we'll see a change, especially since some of the green card waits are really untenable, and everybody pretty much agrees. I think it's a bipartisan agreement, that the system, the way it works really doesn't work that efficiently. So, we definitely need to reform it.

Jose Garriga: Thank you, Maka. Casey, what do you think? What takeaways would you offer listeners on either the humanitarian or the business aspects of this Biden bill?

Casey Higgins: I think Maka makes some wonderful points. The additional point I would make is, at the moment, it doesn't seem that business interests are the first priority of Democrats, as indicated by the unveiling of this bill, or, frankly, by Republicans. But I do think that while Republicans may still want to be focused on border security, and Democrats may be focused on Dreamers and other legalization issues as paramount, I think that where you can find a lot of mutual agreement is with those business provisions. And I think it would do both sides a lot of good to focus on those and see how those can be crafted into a compromise.

For example, there is a lot of support behind the agricultural guest worker program and being able to reform it. And there is a lot of support behind our doctors and nurses and making sure that with the national nursing shortage that we've had for years and with needing doctors in rural areas and things like that amidst a pandemic, that there's a lot of support there. So, I think both sides, while they may have some competing constituencies on the details of how to execute on some of those reforms. I think both sides would be well suited to bring those into these debates and see if those are issues that can help forge compromise.

Jose Garriga: Thank you, Casey. Ed, I'll give you the final word. What takeaways would you offer listeners on this bill?

Ed Pagano: I would say that now is the time for reasonable and measured and bipartisan immigration reform. We've had very ambitious proposals in the past that have fallen short. We've had, for the last four years, an administration that has not been friendly to immigrants. And now we're turning the page, and I think President Biden wants to make progress. I think the business community wants to make progress. I think the advocates in the immigration community want to make progress. And my sense is that, in the next year, we're going to have some real movement on several of these bipartisan bills.

Jose Garriga: Terrific, thank you. Listeners, you've been listening to Akin Gump public law and policy partner Ed Pagano, senior policy advisor Casey Higgins and international trade counsel Maka Hutson. Thank you all for appearing on the show today and sharing your thoughts on this landmark bill. I'm sure that listeners in the business communities and in just generally in immigration circles will be very interested in hearing what you all have to say.

And thank you, listeners, as always for your time and attention. Please make sure to subscribe to OnAir with Akin Gump at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube and Spotify.

To learn more about Akin Gump and the firm's work in, and thinking on, immigration and policy matters, search those terms on the Experience or Insights & News sections on akingump.com and take a moment to read Ed's, Casey's and Maka's bios on the site as well.

Until next time.

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