

Appendix A

Provisions of the Law and Numerical Limitations on Immigrant Visas

Some form of numerical limitation has been imposed on immigration into the United States since 1921, although certain classes of immigrants have traditionally been able to obtain visas outside those limitations. The Immigration Act of 1990 (Pub. L. 101-649) modified this concept by establishing an overall limit within which immediate relatives (IR's) and certain special immigrants would continue exempt from the requirement of an available visa number, but the IR total would be deducted from the overall ceiling for the calculation of the family-sponsored preference ceiling during the following year. Outlined below are the basic elements of the system applicable at present; unless otherwise stated, the section of law cited refers to the Immigration and Nationality Act (INA), as amended.

I. Classes not subject to the numerical limitations

A. Immediate Relatives

- (1) Spouse and children of U.S. citizens and parents of citizens at least 21 years of age (Sec. 201(b)(2)(A)(i)).
- (2) Certain surviving spouses of deceased U.S. citizens, and their children (Sec. 201(b)(2)(A)(i)).

B. Special Immigrants

- (1) Returning residents (Secs. 101(a)(27)(A) and 201(b)(1)(A)).
- (2) Certain former U.S. citizens (Secs. 101(a)(27)(B) and 201(b)(1)(A)).

C. Others

- (1) Child born abroad subsequent to issuance of immediate relative visa to parent (Secs. 211(a) and 201(b)(2)(A)(ii)).
- (2) Child born to a lawful permanent resident temporarily abroad (Secs. 211(a) and 201(b)(2)(B)).
- (3) Vietnam Amerasians, a category created by Sec. 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in Sec. 101(e) of Pub. L. 100-202, as amended) for Vietnam Amerasians and their immediate family members. Initially time-limited to March 1990, the provision was made permanent by Pub. L. 101-513.

II. Numerically limited classes

A. Numerical Limits under Secs. 201, 202, and 203

As a selective mechanism to enable distribution of the numbers to the immigrants desired, a preference system commingling certain classes of relatives and needed workers has long existed. The Immigration Act of 1990 divided such preference classes into two broad categories: family-sponsored immigrants and employment-based immigrants, with a separate numerical limitation for each category.

(1) Worldwide Limits

(a) Family-Sponsored Preference Limitation:

The overall ceiling for relatives is 480,000, from which the previous year's total of immediate relatives and other family classes which are exempt from the numerical ceiling (see I.A. and I.C.(1) and (2) above) are deducted to determine the level of family-based preference immigration. Beginning with FY-1999, aliens described in Sec. 201(c)(4) who were paroled into the United States under Sec. 212(d)(5) in the second preceding fiscal year are also deducted from the overall ceiling. Although the difference could be greater or less than 226,000, that figure is established as a minimum for the family-sponsored preference immigrant limitation.

Specifically, if such family-related numerically-exempt immigrants and parolees are fewer than 254,000, the family-sponsored preferences will be entitled to more than 226,000 in the following fiscal year. On the other hand, if such family-related numerically-exempt immigrants and parolees exceed 254,000, the family-sponsored preferences are still provided at least 226,000 numbers by virtue of the minimum annual limit assured by Sec. 201(c).

(b) **Employment-Based Preference Limitation:**

The overall ceiling for this category is 140,000. The term "employment-based" is broadly interpreted to encompass most non-family immigration, whether or not the immigrant is actually destined to employment in the United States.

(c) **Carry-Over of Unused Numbers:**

Certain preference immigrant numbers which are unused during a fiscal year are added to the worldwide levels of family-sponsored and employment-based preference immigrants for the following fiscal year (Sec. 201(c) and Sec. 201(d)). Unused **family** numbers from the previous fiscal year are added to the **employment** preference limit and vice versa.

See Appendix D regarding the recapture of employment-based preference numbers unused in Fiscal Years 1999 and 2000, under the terms of the American Competitiveness in the Twenty-First Century Act (Title I of Pub. L. 106–313 enacted October 17, 2000).

(2) **Per-Country Limits**

In addition to the overall limits, the INA contains a per-country ceiling to preclude preemption of the annual numbers by one or more foreign states of heavy emigration. Under the formula in Sec. 202(a), the per-country limit is 7% of the combined visa total available to family-sponsored and employment-based preference immigrants, i.e., at least 25,620. The dependent area limit is set at 2%, or a minimum of 7,320.

Sec. 202(a)(5)(A) (which was added by Sec. 104 of Pub. L. 106–313) provides that if the total of employment-based visa numbers available for a calendar quarter is greater than the number of qualified applicants who may otherwise be issued such visa numbers, the per-country limitation on employment-based visa numbers will be lifted for the remainder of that quarter.

For the permanent diversity classification which became effective in FY–1995, there is a separate 7% per-country visa limit. (See II.B.(3) below.)

B. Preference classes as set forth in Sec. 203

Class limitations are expressed in absolute numbers for the family-sponsored immigrants and in percentages of the annual limitation for the employment-based category specified in Sec. 201.

(1) **Family-sponsored:**

(a) **First preference:** Unmarried sons and/or daughters (i.e., offspring aged 21 or older) of U.S. citizens: not more than 23,400, plus any numbers unused by the fourth preference (Sec. 203(a)(1)).

(b) **Second preference:** (A) Spouses and children of lawful permanent residents, and (B) unmarried sons and/or daughters of lawful permanent residents: not more than 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any numbers not required for the first preference; of which 77% are designated for sub-category (A) (Sec. 203(a)(2)).

Sec. 202(a)(4)(A) provides that of the visa numbers made available for sub-category (A), 75% are to be issued without regard to the per-country limit, i.e., to applicants with the earliest priority date regardless of their country of chargeability.

(c) **Third preference:** Married sons and daughters of U.S. citizens: not more than 23,400, plus any numbers not required by the first and second preferences (Sec. 203(a)(3)).

(d) **Fourth preference:** Siblings of U.S. citizens who are at least 21 years of age: not more than 65,000, plus any numbers not required by the first three classes (Sec. 203(a)(4)).

(2) **Employment-based:**

(a) **First preference:** Priority workers (persons with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers): not more than 28.6% of the employment-based total, plus any visa numbers not required by the fourth and fifth preferences (Sec. 203(b)(1)).

(b) **Second preference:** Members of the professions with advanced degrees and persons of exceptional ability: not more than 28.6%, plus any numbers unused by the first preference (Sec. 203(b)(2)).

(c) **Third preference:** Skilled workers, professionals (without advanced degrees), and other (i.e., unskilled) workers: not more than 28.6%, plus any numbers unused by the first two preferences, of which not more than 10,000 numbers are available for unskilled workers (Sec. 203(b)(3)).

(d) **Fourth preference:** Special immigrants (other than returning residents and certain former U.S. citizens – see I.B. above): not more than 7.1%, of which not more than 5,000 numbers may be allocated for certain religious workers. There is no "fall-down" of numbers from higher classes into

this class; the limit is absolute. The class includes certain international broadcasters, ministers of religion, certain employees/retirees of the U.S. Government abroad, Panama Canal and/or Zone employees, certain doctors, certain international organizations-related and NATO-6 related aliens, aliens dependent on a juvenile court, and certain members of the U.S. Armed Forces recruited abroad. There is also a time-limited inclusion of certain religious workers other than ministers. (Secs. 101(a)(27)(C) through (M) and Sec. 203(b)(4).)

Under the terms of the Armed Forces Immigration Adjustment Act of 1991 (Pub. L. 102-110 enacted October 1, 1991), immigrant visas made available to the special immigrant class for certain Armed Forces members under Sec. 101(a)(27)(K) are not counted against the numerical limitation in the year involved. In the succeeding fiscal year, the Employment Preference limits for the First, Second, and Third Preferences are each reduced by one-third the number of such visas made available, and the per-country level under Sec. 202(a) is reduced by the number of such visas made available to natives of a foreign state. (Sec. 203(b)(6).)

- (e) **Fifth preference:** Employment creators, i.e., aliens whose investments will create employment for at least 10 U.S. citizens and/or lawful permanent residents: not more than 7.1%, of which not less than 3,000 are reserved for investors in a targeted rural or high-unemployment area; there is no "fall-down" of numbers from the higher classes (Sec. 203(b)(5)). Sec. 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Pub. L. 102-395 enacted October 6, 1992), as amended by Sec. 116 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (Pub. L. 105-119 enacted November 26, 1997) and Sec. 402 of the Visa Waiver Permanent Program Act (Pub. L. 106-396 enacted October 30, 2000), modifies INA 203(b)(5) by creating a 10-year pilot program that sets aside up to 3,000 immigrant visas annually for aliens investing in certain qualifying regional centers in the United States.

(3) Diversity immigrants:

This classification became effective as of FY-1995. It is designed to provide immigration opportunities for aliens from foreign states from which immigration levels are low relative to the level from other countries. Applicants for each year's visas are selected at random from the entrants in an annual visa lottery (Sec. 203(c) and Sec. 204(a)(1)(G)). The annual limitation is 55,000. The Nicaraguan Adjustment and Central American Relief Act (NACARA) of 1997 (Pub. L. 105-100 enacted November 19, 1997) provides that, beginning with Fiscal Year 1999, and for as long as necessary, the 55,000 diversity visa numbers available for a fiscal year will be reduced by up to 5,000 annually to offset adjustments under the NACARA program.

III. Related Provisions

- A. The applicability of the labor certification requirement (Sec. 212(a)(5)(A)) for immigrants is explicitly restricted to aliens in the employment-based second and third preferences. The Attorney General is authorized to waive the job offer requirement in certain second preference cases, however; the labor certification is also waived, by regulation, in those cases as a matter of practicality.
- B. A spouse or child accompanying or following to join a preference immigrant (whether family-sponsored or employment-based) is entitled to the same classification and priority date as the principal alien if not otherwise entitled to an immigrant classification and the immediate issuance of a visa. The spouse or child of a diversity immigrant is entitled to a similar derivative visa status during the year for which the principal is selected in the visa lottery. (Sec. 203(d).)
- C. The Marriage Fraud Amendments of 1986 (Pub. L. 89-639, November 10, 1986) established a conditional immigration status for aliens whose entitlement to an immigrant classification derived from a marriage entered into less than 2 years prior to admission. This provision affects not only the spouse of such marriage but also any sons or daughters. The conditionality may be removed only by approval of a petition filed during the 90-day period prior to the second anniversary of acquiring conditional status. (Sec. 216.)
- D. An alien may adjust status from nonimmigrant to lawful permanent resident, subject to certain conditions, through the Immigration and Naturalization Service (INS). Unless the adjustment is in a numerically-exempt category, it is charged against all appropriate limitations. (Sec. 245.)