

## Overview of President Biden's Immigration Reform Legislation in Regards to Higher Education and Immigrant and International Students

February 25, 2021

### I. INTRODUCTION

On day one of his presidency, the Biden administration announced its plans to send an immigration reform bill to Congress for consideration, the U.S. Citizenship Act of 2021. There will likely be other immigration efforts and vehicles of reform in addition to this bill in the coming weeks.<sup>1</sup> The administration initially released a fact sheet summarizing the bill's content.<sup>2</sup> On February 18, 2021, the bill was introduced in the Senate by Senator Robert Menendez (D-NJ) and in the House by Representative Linda Sánchez (D-CA).<sup>3</sup>

The proposed legislation would have a broad positive impact for immigrant and international students, alumni, staff, faculty, and their families and for higher education. Highlights include increased paths to legal status and citizenship for upwards of eleven million undocumented people, including an expedited route for DACA recipients and other Dreamers; expansion of dual intent; a broadened visa system; and increased paths to permanent residence would allow future and current international students and scholars to more easily remain in the country and build careers here. Other countries with similar opportunities for permanent status after graduation have seen increased enrollment and retention. Measures that facilitate family unity and stability bolster student and alumni success and support staff and faculty hiring and retention. Relevant to higher education, the bill incorporates the Dream Act, the American Promise Act (for Temporary Protected Status (TPS)/Deferred Enforced Departure (DED) holders), and the NO BAN Act.

The legislation also contains provisions that raise concerns for their potential impact on international students and recent alumni, including the provision to replace the H-1B lottery with a system that prioritizes higher wage levels and that the additional green cards are limited to STEM PhDs only. The legislation extends access for the Affordable Care Act for DACA recipients but not for other lawful prospective immigrants (LPIs). Lawful permanent residents (LPRs) are already eligible for ACA access under existing law.

The following represents an overview of this document:

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<sup>1</sup> This is a living document and will be updated with information relevant to students, faculty, and staff as the bill and analysis evolve. For a living directory of all immigration changes in the first 100 days of the Biden presidency, see Am. Immigr. Laws. Assoc., AILA Doc. No. 21011407, Featured Issue: First 100 Days of the Biden Administration (Jan. 26, 2021), <https://www.aila.org/advo-media/issues/all/first-100-days>.

<sup>2</sup> *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, Biden-Harris Transition (Jan. 20, 2021), <https://www.aila.org/File/Related/21011407b.pdf>.

<sup>3</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. (2021); U.S. Citizenship Act of 2021, H.R.1177, 117th Cong. (2021). Bill text is identical. Text is available for the Senate version at <https://www.menendez.senate.gov/imo/media/doc/USCitizenshipAct2021BillText.pdf>, and the House version at <https://lindasanchez.house.gov/sites/lindasanchez.house.gov/files/2021.02.18%20US%20Citizenship%20Act%20Bill%20Text%20-%20SIGNED.pdf>.

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## II. IMPACT FOR IMMIGRANTS IN HIGHER EDUCATION

Though the majority of immigration policy included in this and future bills will likely affect immigrants in higher education in some way, the following includes those changes with a clear and wide impact on this population.

### 1. *Pathway to citizenship for undocumented immigrants and expedited pathway to citizenship for DACA recipients, Dreamers, TPS holders, and others*

Creates a pathway to citizenship for undocumented immigrants granting an immediate “lawful prospective immigrant” (LPI) status to qualifying undocumented immigrants who arrived before January 1, 2021, a temporary status renewable every six years. Lawful prospective immigrants would be considered lawfully present in the United States for most immigration purposes. They would have permission to work and enlist in the military, receive Social Security numbers, and be allowed limited travel outside the United States.<sup>4</sup>

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<sup>4</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 1101(a) (2021).

- a. Undocumented immigrants: An eight-year path to citizenship for eligible noncitizens who pass criminal and national security checks. This includes a minimum of five years as a lawful prospective immigrant followed by three years with a green card, after which they must pass additional background checks, be up to date on their federal income taxes, and demonstrate proficiency in English and U.S. civics to then apply for citizenship.<sup>5</sup>
- b. Temporary Protected Status (TPS) and Deferred Enforced Departure (DED) holders: Incorporates the American Promise Act, providing immediate eligibility to apply for green cards for those who had or were otherwise eligible for TPS or DED by January 1, 2017, and have been continuously present since that date, including the spouses and children of those who qualify.<sup>6</sup> After three years, they may apply for citizenship in the same manner as above.
- c. Deferred Action for Childhood Arrivals (DACA) recipients and “Dreamers”: Incorporates the Dream Act, providing immediate eligibility to apply for green cards, including the spouses and children of those who qualify. After three years, they may apply for citizenship in the same manner as above. Covers all eligible noncitizens who have Deferred Action for Childhood Arrivals (DACA) or who (a) arrived under the age of 18; (b) meet certain high school educational requirements; and (c) have postsecondary education, meet certain military requirements, or demonstrate at least three combined years of earned income and postsecondary education.<sup>7</sup>

**Impact:** Under current law, most green card holders must wait a minimum of five years to naturalize after receiving their green card, but certain people can do so after only three years. This bill allows those who have been “lawfully present” and eligible to work for at least three years prior to receiving a green card (which would include lawful prospective immigrants, DACA holders, and TPS holders) to also naturalize in three years rather than five.<sup>8</sup> In 2018, over 450,000 undocumented students were estimated to be enrolled in postsecondary education, 216,000 of which were DACA recipients or are eligible for DACA.<sup>9</sup> An estimated 98,000 undocumented students graduate from U.S. high schools annually.<sup>10</sup> Many more students, faculty, and staff who already have citizenship or legal status have undocumented family members who would be included in this path to citizenship. Family stability has a marked impact on student success.

## 2. *Pathways to green cards for PhD STEM international students*

Adds doctoral STEM graduates from U.S. universities to the list of noncitizens that are not subject to numerical limitations on visas.<sup>11</sup>

<sup>5</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 1102(a), § 1206 (2021).

<sup>6</sup> American Dream and Promise Act of 2019, H.R.6, 116th Cong. (2019); U.S. Citizenship Act of 2021, S.348, 117th Cong. § 1104(a) (2021).

<sup>7</sup> Dream Act of 2019, S.874, 116th Cong. (2019); U.S. Citizenship Act of 2021, S.348, 117th Cong. § 1103(a) (2021).

<sup>8</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 1206 (2021).

<sup>9</sup> Miriam Feldblum et al., Undocumented Students in Higher Education: How Many Students are in U.S. Colleges and Universities, and Who Are They? (2020), available at <https://www.presidentsalliance.org/report-undocumented-students-in-higher-education-how-many-students-are-in-u-s-colleges-and-universities-and-who-are-they/>.

<sup>10</sup> Jie Zong & Jeanne Batalova, How Many Unauthorized Immigrants Graduate from U.S. High Schools Annually, Migr. Pol’y Inst. (2016), <https://www.presidentsalliance.org/migration-policy-institute-fact-sheet-on-number-of-dreamers-graduating-from-high-school/>.

<sup>11</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3401(a) (2021).

**Impact:** Under the status quo, there is no easy pathway to an employment visa from an F-1 student visa for international graduates with U.S. degrees, leaving many postgraduate plans up in the air. If prospective international students know that they are welcome and have greater opportunities to stay in the United States to work after graduation, they are more likely to pursue their studies in the United States.

### 3. *Expands dual intent to international students*

Clarifies dual intent for postsecondary students. To enter the United States as a nonimmigrant under current law, international students must show that they intend to enter the United States “temporarily and solely for the purpose of pursuing such a course of study.” By assuming all F-1 students will be “non-immigrants,” current law does not permit individuals who are being screened for a student visa or when entering the United States to communicate an interest in transferring to another legal status or staying in the United States to build their career after the completion of their degree. This bill removes that phrase and clarifies that full time international students do not have to show that they have “no intention of abandoning” their residency in a foreign country to enter as nonimmigrants.<sup>12</sup> Dual intent is an immigration law concept that allows a person to enter the United States with “nonimmigrant intent” (“I intend to leave the United States when my visa term is up”) while also maintaining the possibility of staying (“While in the United States, I also want to try to qualify for a more permanent status”). This bill opens up dual intent for full time international students pursuing a U.S. degree. Additionally, the bill enables international students (F visas) to apply for green cards without losing their ability to continue extending F status.

**Impact:** One of the reasons it is difficult for international graduates with U.S. degrees to stay in the United States after graduation is their inability to enter the United States with dual intent as international students. By removing this language, the bill opens the way for dual intent and allows international students to enter for study in the United States with intention to work here after graduation, making it easier down the line to apply for permanent residency. This change also removes the primary legal barrier that refugee students seeking to pursue their studies in the United States have faced in applying for a F-1 student visa as they usually can not demonstrate a residence in a foreign country to which they were planning to return.

### 4. *Permission for DACA recipients to work for Congress*

Federal appropriations law bars most noncitizens from being employed by the U.S. House or Senate, and this bill adds DACA recipients with work authorization to the short list of noncitizens who can work in congressional offices.<sup>13</sup>

**Impact:** Beyond increased job opportunities for DACA recipients, the opportunity to work on Capitol Hill is a major boon to DACA recipients who desire careers in public service.

### 5. *Expanded in-state postsecondary benefits*

- a. **Undocumented immigrants:** Repeals the federal law that mandates that if states allow undocumented immigrants to receive postsecondary education benefits like in-state tuition based on their residence in the state, the state must offer these benefits to all U.S. citizens regardless of state residency.<sup>14</sup>

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<sup>12</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3408(a) (2021).

<sup>13</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 1103(b) (2021).

<sup>14</sup> 8 U.S.C. § 1623; U.S. Citizenship Act of 2021, S.348, 117th Cong. § 1103(c) (2021).

- b. Refugees, asylees, and special immigrants: Requires states to provide in-state tuition to nonimmigrants who are refugees, asylees, and “special immigrants” (a catch-all category that includes groups like foreign employees of the U.S. government, juvenile dependents of the court, and foreign individuals allied to the U.S. military) until they can become state residents themselves.<sup>15</sup>

**Impact:** While some states have extended residency anyway or found workarounds for their immigrant residents (previous attendance at a state school or high school attendance in the state, for example), repealing this law will likely increase the number of states who extend in-state benefits to undocumented residents in their state and allow more immigrant residents to afford a college degree.<sup>16</sup> People who attend college and attain a professional job can increase their earnings and tax contributions as well as attract employers to a state who seek well-educated workers.

#### 6. *End of per-country caps for employment-based visas*

Per-country visa caps are eliminated for employment-based visas.<sup>17</sup> Currently, no country can receive more than seven percent of the total number of a year’s employment visas, creating a large backlog of applications year to year.

**Impact:** Faculty, staff, and recently graduated students from countries with a high number of applicants for employment-based visas (such as China, India, and the Philippines) will especially benefit from the elimination of country-based caps, as the waitlist for these countries is currently years long.<sup>18</sup>

#### 7. *Facilitation of family unification*

- a. Per-country visa caps are increased, but not eliminated, for family-based visas. Like employment-based visas, under current law, no country can receive more than seven percent of the total of a year’s family-sponsored visas (this does not apply to uncapped categories, like immediate family members of U.S. citizens).<sup>19</sup>
- b. Unused visas are recaptured to help reduce the visa backlog.<sup>20</sup>
- c. The “three- and ten-year bars” are eliminated, which currently bar many deported people from applying to legally re-enter the United States due to their previous time in the country without status.<sup>21</sup>
- d. Temporary visas for family members awaiting green cards. Immigrants with approved family-sponsorship petitions may come to the United States on a V visa while they wait for an available green card.<sup>22</sup>

**Impact:** Families of students, as well as faculty, staff, and recently graduated students from countries with a high number of applicants for family-sponsored visas (such as Mexico, India,

<sup>15</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3509 (2021).

<sup>16</sup> *Basic Facts About In-State Tuition for Undocumented Immigrant Students*, Nat’l Immigr. Law Ctr. (last updated Apr. 11, 2020), <https://www.nilc.org/issues/education/basic-facts-instate/>.

<sup>17</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3403 (2021).

<sup>18</sup> Julia Gelatt, *Explainer: How the U.S. Legal Immigration System Works*, Migration Pol’y Inst. (2019), <https://www.migrationpolicy.org/content/explainer-how-us-legal-immigration-system-works>.

<sup>19</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3103 (2021).

<sup>20</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3101 (2021).

<sup>21</sup> Ilona Bray, *Understanding the Three and Ten-Year Bars for Unlawful Presence*, AllLaw, <https://www.alllaw.com/articles/nolo/us-immigration/three-ten-year-time-bars-unlawful-presence.html> (last visited Jan. 27, 2021); U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3104(a) (2021)

<sup>22</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 1201(a) (2021).

and the Philippines) will especially benefit from the elimination of country-based caps, for the waitlist for these countries is also years long for non-immediate family members.<sup>23</sup> Many immigrants in higher education have family members separated across borders due to the current bars to reentry and green card backlogs. Family stability and unity have a significant impact on student success. The ability to more easily sponsor family without long periods apart will also make faculty and research positions more feasible for international applicants.

8. *Opens the possibility for wages to be a priority in visa provision for high-skilled non-immigrant workers*

Incentivizes a higher wage scale for high-skilled non-immigrant workers by clearing the way for regulations establishing procedures that prioritize visas based on the wage offered by employers.<sup>24</sup>

**Impact:** We are monitoring this provision, particularly as it relates to the ability of international students and alumni to be able to obtain employment. While we are very supportive of making sure that H-1B workers receive fair, competitive wages, this particular approach would have an unintended and adverse impact on those at the beginning of their careers and, most notably, international students. This could further jeopardize two key national interest strategies: (1) U.S. colleges and universities would be hampered in competing for international students to attend our institutions, as they instead opt to study in other countries with friendlier policies allowing them to apply their education with temporary work experience upon graduation; and (2) this would cut off the pipeline of foreign talent our nation depends on at the knees as fewer students enroll in our institutions. The policy of prioritizing those who pay the highest wages is short-sighted and inequitable for those just beginning their careers. Given that every eight international students present in the United States create three jobs, we risk losing this resource as students choose other non-U.S. opportunities if they cannot compete for H-1B (and, ultimately, green card) opportunities.<sup>25</sup> As an alternative, we would recommend exploring the existing authority at the U.S. Department of Labor to investigate employers who do not engage in a meaningful recruitment process in the U.S. labor market.

9. *Provides dependents of H-1B visa holders work authorizations and prevents “aging out”*

Statutorily provides work permits for dependents of H-1B visa holders and prevents dependent children from “aging out” while waiting for a visa petition.<sup>26</sup>

**Impact:** H-1B visa holders, including international graduates of U.S. higher education institutions and scholars, will be more likely to want to remain in the United States if their spouses and dependents can also work and support themselves. This would also prevent any future administration from issuing a regulation to revoke work authorization for H-1B dependents (which is currently permitted through a regulation). H-4 visa holders (children of H-1B visa holders) who were granted their visa status before they turned 18 will continue to be eligible to maintain their visa status even after they turn 21 in recognition of the substantial immigration backlogs that often lead to this “aging out” issue. For more information, see [\*New Bill Has Many Good But Two Bad Measures For Employment Immigrants\*](#).

<sup>23</sup> Gellat, *Explainer*, 2019.

<sup>24</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3407 (2021).

<sup>25</sup> Press Release, Rebecca Morgan, New NAFSA Data Show First Ever Drop in International Student Economic Value to the U.S., NAFSA Association of International Educators (Nov. 16, 2020), <https://www.nafsa.org/about/about-nafsa/new-nafsa-data-show-first-ever-drop-international-student-economic-value-us>.

<sup>26</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3409(a)(b) (2021).

#### 10. *Prevents loss of status due to lengthy adjudications*

If the wait time for the adjudication of an application for immigrant status surpasses one year, a person's current nonimmigrant visa and work authorization can be extended in one-year increments until the Department of Labor or U.S. Citizenship and Immigration Services (USCIS) decides which filings are required for green card status.<sup>27</sup>

**Impact:** Due to extensive adjudication backlogs, those on temporary nonimmigrant visas, particularly academic and employment visas, risk falling out of status in a race against the clock to receive a green card decision before their own nonimmigrant visa expires. This bill would help to stabilize the transition from temporary to permanent status, aiding international graduates, faculty, staff, and families to experience a smoother transition to a green card. This increased stability also helps recruit international students and faculty to American colleges and universities, as building a career here will depend on fewer unknown variables.

#### 11. *Increased flexibility for green card allocation*

The U.S. Department of Homeland Security (DHS) gains the preliminary authority to adjust the number of green cards available up or down based on the need in the national or regional economy rather than a static, predetermined limit.<sup>28</sup>

**Impact:** Requests for green cards very often exceed the number available, so it is likely that an increase in flexibility would result in an increased number of green cards available.<sup>29</sup> This change is in the form of a pilot program and the suggestion to "create a procedure," however, so it may not have a large impact to start. Aside from the benefit to newly graduated students, higher education institutions would be able to take advantage of this flexibility for their staff and faculty. The increased benefit and stability also extends to family members of students, staff, and faculty.

#### 12. *Incorporates the NO BAN Act to prevent future immigration bans*

Incorporates the NO BAN Act, which expands nondiscrimination law to prohibit the use of the President's authority to ban immigrants based on their religion and substantially limits the authority of future administrations to issue future immigration bans (similar to the Travel and African bans).<sup>30</sup>

**Impact:** Future presidents will not be able to issue bans similar to the previous administration's Travel and African bans, which will ensure that international students, scholars, and family members will be able to continue to come to the United States and contribute to higher education campuses.

#### 13. *Programs to promote immigrant integration at state and local levels*

Over \$200 million in new funding for state and local governments, private and community-based organizations, educational institutions, and nonprofits to expand integration and inclusion programs, an Integrated Education and Training workforce program, English language instruction, and citizenship application assistance.<sup>31</sup>

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<sup>27</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3410 (2021).

<sup>28</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3405-06 (2021).

<sup>29</sup> *Id.*

<sup>30</sup> National Origin-Based Antidiscrimination for Nonimmigrants Act (NO BAN) Act, H.R.2214, 116th Cong. (2019); U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3202 (2021).

<sup>31</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3502-3506 (2021).

**Impact:** English and citizenship educational programming at educational institutions and associated nonprofits would receive additional funding. Immigrant students, faculty, and staff receive increased access to such programming.

#### 14. *Elimination of the word “alien”*

An update of governmental terminology, going from “alien” to “noncitizen” and “alienage” to “noncitizenship” across immigration laws to “recognize America as a nation of immigrants.”<sup>32</sup> Specifically, the text directs that “with respect to a person who is not a citizen or national of the United States, any reference in Federal law, Federal regulation, or any written instrument issued by the executive branch of the Government to an alien shall be deemed to refer to a noncitizen.”<sup>33</sup>

**Impact:** In light of the historical use of inflammatory rhetoric used to mark immigrants as “other,” both in the eyes of society and the law, this change serves as an important step toward eliminating dehumanizing language that affects the morale of immigrants everywhere as well as the mindset of policymakers themselves.

#### 15. *Pilot program for regional economic development visas*

Permits the Secretary of DHS to establish a five-year pilot program that would admit upwards of 10,000 additional immigrants whose employment would be essential to economic development in local communities.<sup>34</sup>

**Impact:** This five-year pilot program could provide additional opportunities for immigrants, foreign trained professionals, and international students, researchers, and alumni to obtain immigrant visas and a path to permanent status.

#### 16. *Exempts certain high school students from the language and civics naturalization test*

Directs the DHS Secretary to exempt immigrant students who attend and graduate from high school in the United States from the English language and civics/history naturalization test.<sup>35</sup>

**Impact:** This provision essentially recognizes that Dreamers and similarly situated students likely already meet English language and civics/history knowledge requirements due to their long-term residency in the country; and the provision will reduce the barriers to naturalization for Dreamers.

#### 17. *Anti-discrimination provision based on national origin or citizenship status*

Establishes a federal anti-discrimination provision for individuals on the basis of national origin or citizenship status in the employment context (including hiring, employment eligibility verification, and termination).<sup>36</sup>

**Impact:** This provision would provide additional protections in the employment context for noncitizens, including DACA recipients, TPS holders, international students, H-1B visa holders, and H-4 dependents.

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<sup>32</sup> *Fact Sheet*, 2021.

<sup>33</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3(c) (2021).

<sup>34</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3406 (2021).

<sup>35</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 3511(a) (2021).

<sup>36</sup> U.S. Citizenship Act of 2021, S.348, 117th Cong. § 5105 (2021).