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Citizenship by birth to be curtailed by incoming US President Trump, will impact 1 million Indians in green card queue

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MUMBAI: One of the top priorities of Donald Trump, the incoming President of the United States of America (USA) is to end automatic citizenship for children. The plan, posted on the official Trump-Vance campaign site, is to sign an executive order to this effect on Day 1 itself.

If one takes a closer look, automatic citizenship for children will not end just for children born to illegal immigrants. It goes much further. The draft executive order reads, "It will direct federal agencies to require that at least one parent be a US citizen or lawful permanent resident for their future children to become automatic US citizens."

Employment-Based Category	Principal applicant	Dependents (Estimated)	Total
1st Preference (EB-1) – those with extraordinary abilities	51,249	92,248	1,43,497
2nd Preference (EB-2) – those having an advanced degree	4,19,392	4.19,392	8,38,784
3rd Preference (EB-3) – skilled workers	1,38,581	1.38,581	2.77,162
Total	6,09,222	6,50,221	12,59,443

Source: NFAP's analysis of USCIS data

An annual limit for employment-based green cards pegged at 1.40 lakh plus any unused family-sponsored green cards that are passed on to this category, with a per-country limit of 7% has led to this backlog.

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While the draft of executive order states it is interpreting the 14th amendment to the US Constitution correctly, immigration advocates think otherwise and say the executive order if passed will be challenged in the courts. Rajiv S. Khanna, immigration attorney told TOI, "The Trump plan suggests no automatic citizenship for children born in the US. This is almost certainly a contravention of the 14th Amendment of the US Constitution. A Supreme Court judgement is available to counter Trump's misinterpretation. "

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Greg Siskind, immigration attorney added, "This will certainly be litigated as it violates the 14th Amendment. We will have to see if they go so far as to exclude children of people legally in the US,"

If passed it spells a huge set-back for the Indian diaspora. According to an analysis of the US Census (2022) done by Pew Research, US was home to about 4.8 Indian Americans, of whom 34% or 1.6 million were born in the US.

If this executive order is passed, going forward, children born to Indian couples, neither of whom is a US citizen or a green card holder (permanent resident) will not be eligible for automatic citizenship.

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Indians get the short end of the stick when it comes to allotment of green cards – many working in the US on H-1B visas are caught in a decades-long backlog. For instance, when it comes to employment linked green cards, the overall cap is set at 140,000 per year plus any unused family-sponsored green cards that can be passed on to this category. In addition to the annual caps, be it for employment or family based green cards, no country can

receive more than seven percent of the green cards. This adversely impacts Indians in the employment linked category.

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A study by David J. Bier, director, immigration studies at Cato Institute shows that the employment based green card backlog from India (EB-2 and EB-3 skilled category) has crossed one million in March 2023. If factors such as death and ageing out are considered (which will lead to these individuals dropping from the backlog statistics) the wait for a green card is 54 years, else it is a whopping 134 years. 4.14 lakh Indians waiting in this category will die before they receive a green card and more than a lakh children of Indian families will age out (turn 21) and their dependent visa will no longer be valid and they will drop off the green card queue.

Currently, those children who are not born in the US, and whose families are caught in the green card backlog have to self deport on turning 21 or have to opt for another visa – say an international student visa.

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Citizenship by birth at least gave the children of Indian couples waiting in queue for a green card a breather. If not they, at least their children were assured of stability on the immigration front.

Ashwin Sharma, immigration attorney said, “For the thousands of Indian nationals on H-1B visas already enduring the green card backlogs, Trump's proposal is illogical and staggeringly cruel. These skilled professionals often dedicate their prime years building lives and careers—to advance America's economy. One of the few consolations they have had during this ordeal is that their US-born children would have the security of US citizenship, sparing them from the relentless cycle of immigration issues. Trump's proposed executive order threatens to snatch away even this small solace from everyone who has played by the rules.”

Courts likely to uphold birth citizenship for children of those legally in USA:

The 14th Amendment of the US Constitution states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

TOI spoke to several immigration attorneys on Trump's proposed Steven A. Brown, Partner with Reddy, Neumann, Brown – an immigration law firm, explains: The question about 'subject to the jurisdiction thereof' became the important part of the US Supreme Court Case in the case of Wong Kim Ark. This individual was born in San Francisco, but at the time of his birth, his parents were Chinese Nationals. He travelled abroad and was denied entry as part of the Chinese Exclusion Act. He challenged the refusal to recognize his citizenship. The Supreme Court held that it allows [nearly] all children born to alien parents on US soil US citizenship (there are limited exceptions)."

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"I think what Trump plans to do is to try to rechallenge this using the 'subject to the jurisdiction thereof' clause of the 14th Amendment. My assumption is that his plan would be to potentially pass these laws or policies and let the courts play it out," adds Brown.

Ashwin Sharma, immigration attorney said, "The 14th Amendment guarantees citizenship to 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' For over a century, courts have consistently interpreted this clause to mean that all children born on U.S. soil are citizens, so long as their parents are within the bounds of US law. Documented migrants, like those on H-1B, L-1 (intra company transfers), and F-1 (international students) visas, clearly fall into this category. Therefore, I am quite certain this proposed executive order would not hold up in court and their children would be entitled to birthright citizenship."

Cyrus D. Mehta, immigration attorney also points out that the SC extended the 14th Amendment to an individual

who was born to parents of Chinese descent and during a time when Chinese nationals were subjected to the Chinese exclusion laws:

“If a child whose parents are in H-1B status is not issued a US birth certificate, they can seek review in federal court and should win. The Trump administration is capable of taking the case to the Supreme Court to test their theory, but even if the Supreme Court has Trump appointed justices it does not mean that they will abide by the policies of the Trump administration if they are in direct contradiction to the US Constitution,” added Mehta