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Under the New Administration

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Q1 - 2017
Volume 34 Issue 1

Immigration Law and Practice Challenges and Opportunities Under the New Administration

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APPROVED

By Sherry Karabin

Uncertain Times

Fear, urgency, and longer wait times for work visas and citizenship requests—those are some of the new realities facing foreign nationals wishing to travel to, study in, visit, or permanently immigrate to the United States under President Donald Trump's administration, creating a political and legal climate that presents many challenges and opportunities for the attorneys and paralegals who specialize in immigration law.

David Jones, a partner in the Memphis office of the management-side labor and employment law firm Fisher Phillips, says the biggest challenge is the “general uncertainty of what could happen on a day-to-day basis.” “There have been some changes and a lot more are being discussed,” said Jones, who represents businesses in immigration-related employment matters. “There is talk of eliminating the work authorization for spouses of H-1B visa holders, as well as discussions about getting rid of student work authorizations.”

“...the biggest challenge is the ‘general uncertainty of what could happen on a day-to-day basis.’”

Jones explains that, currently, foreign students can obtain one year of work authorization after completing their studies, and STEM graduates at employers who use E-Verify can obtain an additional two years. This work authorization has been the subject of litigation as well as proposed elimination by administration officials such as Jeff Sessions. Prior to his nomination for attorney general, “Jeff Sessions also proposed changes to get rid of the Optional Practical Training work authorization for students” said Jones.

Employer Concerns

Jones says the potential changes make it difficult for employers to plan their hiring needs, especially those that rely heavily on

foreign workers to fill specialty occupations in fields such as engineering and IT. Each year, the non-immigrant visas that allow U.S. employers to temporarily employ foreign nationals to fill such jobs are granted based on a lottery. “Traditionally,” Jones said, “employers would have a 30 to 40 percent chance of receiving an H-1B visa.” “For fiscal year 2017-18 for which the U.S. Citizenship and Immigration Services just concluded the lottery, that number is closer to 32 percent,” he said. “Employers were hoping to increase the number of these visas, but under the new administration it’s likely they may be reduced.”

“The White House may also change the priorities used to determine who gets these visas,” said Jones, who explained, “For



Immigration Law

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example, foreign workers now have a better shot if they have a U.S. master’s degree.”

Sarah Flannery, head of the immigration practice group at Thompson Hine, which handles employment-based immigration matters, says her clients are also uneasy about the uncertainty of securing H-1B visas. “The demand has been greater than the supply over the past several years, but there are concerns that the number of available visas may shrink further and the way in which they will be allocated will change to favor highly paid and highly skilled employees,” said Flannery.

Flannery says others are concerned that H-4 spouses could lose their employment authorization. H-4 status is given to spouses of H-1B workers if the spouse does not have an independent sponsorship. For example, in the case of a married couple from India who are both computer developers with IT degrees, if the husband receives an offer to relocate to the U.S. to work for an American business, the business sponsors him for H-1B status, and his spouse may be granted H-4 status and accompany him to the U.S.

“H-4 status does not have automatic eligibility for work authorization,” Flannery said. “Thus the H-4 spouse can accompany her husband to the U.S., but she can work only if she finds an employer willing to sponsor her for H-1B status. The inability of the H-4 spouse to work can strain the

retention of the H-1B worker.”

In May 2015, certain H-4 spouses became eligible for work authorization. “This benefit was welcomed by H-1B workers, their spouses in H-4 status, and many businesses who expected this change to influence retention of foreign talent,” Flannery explained. “The change allows some H-4 spouses to work, specifically those married to H-1B workers being sponsored for green cards.” Once the H-1B worker gets to a certain step in the green card process, the spouse can then obtain work authorization that doesn’t require employer sponsorship. “She can then seek jobs and report that she comes to the employer authorized for work and doesn’t require sponsorship,” said Flannery. “If she then rebuilds her career in the U.S. that helps to keep the H-1B worker here as well.”

Flannery says revoking this work authorization could be achieved through executive action. “If the H-4 work authorization is removed, it will disrupt businesses currently employing the H-4 spouses, set back the H-4 spouses who were pleased to have work authorization and it could set back the retention of the H-1B workers of the H-4 spouses,” she said.

Employers are also concerned about possible immigration law changes that may result from the renegotiation or elimination of the North American Free Trade Agreement. Under NAFTA, a nonimmigrant

NAFTA Professional TN visa was created, which allows qualified Canadian and Mexican citizens to apply for temporary entry into the U.S. to work for employers in prearranged professional positions. Those who qualify include accountants, engineers, lawyers, pharmacists, scientists, and teachers. Flannery says if NAFTA is renegotiated or eliminated, employers could also lose this as an alternative to the H-1B visa.

Therefore, Flannery says it’s important for businesses that rely on foreign nationals to consider all their options. She says companies with offices outside the U.S. may be able to first employ foreign nationals at locations abroad and then use the L-1 visa to transfer them to the U.S. “This is a long-term strategy, though, because it requires at least one full year of employment outside the U.S. before the transfer,” said Flannery.

A Sense of Urgency

While neither of President Trump’s travel bans has taken effect, Flannery says the prospect of the changes is creating anxiety among foreign national employees. “Even employees who are citizens of Canada and the U.K., countries that have never been the subject of a travel ban, are expressing concerns about the administration’s new policies and the impact they will have on international travel,” she said. “What this is translating into is that employees are

putting pressure on employers to convert temporary work visas to green cards so they can live and work in the U.S. permanently,” Flannery explained.

Robert Casazza, a partner at the global immigration law firm Fragomen, Del Rey, Bernsen & Loewy, says that local officials from USCIS told him they are seeing an “onslaught of citizenship filings,” which may be contributing to the overall slowdown in the process. “The new administration is definitely doing more detailed vetting,” said Casazza, who represents companies and foreign national employees seeking to obtain visas and work authorizations.” “The administration has also directed the Department of State to increase scrutiny of visa applications and to limit the number of visa-related interviews that it does per day.” Casazza noted, “This, together with the fear created by the two proposed travel bans, has led us to receive a lot more calls from clients.”

Fragomen partner Isha Atassi also reports increased processing times for H-1B visas, green cards, and other work authorization requests for foreign nationals. “These applications are undergoing greater scrutiny at present,” she said, “as a result, I’m seeing an increased sense of anxiety on the part of my clients.”

“Anyone dealing with immigration issues should partner with a legal expert and

ensure a comprehensive review of all possible options and strategies pertaining to their case,” Atassi advised and noted that “in the past, it was easier for individuals to file applications for simple immigration benefits on their own.” “Now the applications are lengthier and more complex.”

Atassi says businesses also need to plan for longer delays when handling foreign national hires. “Prior to April 3, those seeking H-1B visas had the option of paying an additional fee for premium processing, which guaranteed a decision in 15 calendar days,” she said. “On April 3, the government suspended this option for up to a six-month time frame.”

Impact on Travel and Reentry

Over in Los Angeles, attorney Carl Shusterman says he’s encouraging many of his clients not to travel. “I represent people from the countries that are named in the travel ban,” said Shusterman, who runs the Law Offices of Carl Shusterman, where attorneys represent corporations and individuals around the world. “While the courts have struck down the travel bans thus far, I believe this issue will ultimately be decided by the U.S. Supreme Court, where President Trump has just appointed a new justice,” he explained, and “if one of my clients decides to travel and a ban takes effect, he or she may not be able to return.”

The former Immigration and Naturaliza-

tion Service trial attorney also says he’s witnessed many changes in the regulations governing immigration over the years, including those impacting the criteria used to determine eligibility for a National Interest Waiver for an immigrant visa petition. These waivers are granted when a foreign national’s work is determined to be in the “national interest” of the country. Shusterman explains that the waivers are available only to foreign nationals who have an advanced degree or the equivalent. The waivers eliminate the requirement that the person have a job offer that is certified by the U.S. Department of Labor. “Additionally, the U.S. employer is not required to advertise the job and show that they are unable to find a qualified U.S. worker,” he said. Shusterman notes that prior to leaving office, former President Barack Obama’s administration came out with a decision making it easier for foreign nationals to receive these waivers. “The administration eliminated the most restrictive aspects of the criteria for obtaining a national interest waiver,” said Shusterman.

He says President Obama also disbanded the National Security Entry-Exit Registration System begun by former President George W. Bush in 2002 as part of the war on terrorism. “The NSEERS program required non-citizens who did not have a green card to register and be fingerprinted,

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photographed, and interviewed,” said Shusterman. “This registry applied to males 16 or older from a Muslim majority country or North Korea.”

Consequences for Families

Shusterman is keeping an eye on the proposed bill known as the Reforming American Immigration for Strong Employment Act (RAISE Act) introduced by U.S. Senators Tom Cotton, R-Ark., and David Perdue, R-Ga., and which would limit the ability of U.S. citizens and permanent

residents to obtain green cards for family members. “The bill would eliminate most of the family-based categories,” he said. “For example, if you are a U.S. citizen you would no longer be allowed to apply for a sibling to get a green card.”

The RAISE Act would cap the number of refugees offered permanent residency at 50,000 per year and eliminate the diversity visa lottery that provides visas to those from countries with low rates of immigration. “President Trump is reportedly on board with this proposal,” said Shusterman.

Increased Enforcement

The attorneys also explain how increased enforcement might impact their clients. With increased government audits, Flannery at Thompson Hine says employers should revisit their internal processes to make sure they have all the necessary documentation for foreign nationals and are prepared to immediately respond to an audit.

Casazza at Fragomen says the Trump administration is also gearing up to increase worksite enforcement, transferring some USCIS adjudications officers to the



agency's Fraud Detection and National Security unit and hiring more U.S. Immigration and Customs Enforcement agents. "We are advising businesses and employees about how to handle searches and seizures, especially those involving electronic devices," he said, also noting that "some of our clients are asking their employees not to travel with company devices since customs agents may ask to search these devices."

Casazza says the recent crackdown under Trump's administration is shining a bright light on the importance of immigration law. "I see my job as helping people to fulfill the American Dream," he said. "Still, things are becoming more difficult. President Obama deported

more people than President Bush, and I would not be surprised to see Obama's record surpassed."

Shusterman has posted information on his firm's website about what individuals should do if they are arrested by ICE. "The Obama administration had a zero tolerance policy toward dangerous criminals who had committed serious offenses," said Schusterman. "However, the Trump administration has thrown away those priorities, and now anyone in violation of immigration law is at risk of being deported even if they have not committed a crime."

"My advice is that even if you don't have a record, if you are undocumented, you need to contact a lawyer," he said. "ICE has stepped up its enforcement, and if you wait to be arrested, there may be nothing left to do."

Challenges and Opportunities for Immigration Paralegals

The recent spotlight on immigration is also transforming the role of immigration paralegals, who, along with their attorney counterparts, are busier.

Flannery, who manages a team of two paralegals at Thompson Hine, says while the changes are creating challenges for those who advise clients in the immigration space, they are also increasing the volume of work for attorneys and paralegals. "I am not sure if this is a short-term or long-term increase, but for the moment at least there is more demand for our expertise," she said.

Fragomen Paralegal Immigration Specialist Tracey Curry says the work of an immigration paralegal has grown more complex over the last few years. "New and much longer forms have been rolled out," said Curry. "I would say the changes in the forms are not related to the new administration. However, the increased length, together with the immediacy of electronic filing, means that paralegals who work in immigration need to have good time management skills."

Curry also explains some of the challenges facing paralegals who want to specialize in immigration law. "A paralegal cannot learn about the field of immigration in paralegal classes or paralegal school," said Curry. "It's a very hands-on field that entails working closely with attorneys and clients." She says while some paralegals may be tempted to shy away from immigration law, there are career opportunities for those who choose this specialty. "In immigration, there are a higher number of paralegals to attorneys," she said. "While we don't give legal advice, we do a lot of research and fact gathering. The uncertain future is driving the demand for immigration from places where there had been little previously."

Fragomen Client Services Manager and Paralegal Cristina Park says it's both an exciting and challenging time to enter the field. "While some people may look at the paralegal role as filling out forms, paralegals have a much more client-centered role," said Park, who works closely with Atassi. "In my role at Fragomen, I manage a team of paralegals who are on the forefront with clients, fielding their initial questions and concerns." "I often hear concerns from employees and human resources officials about the recent atmosphere," she said.

"I would say paralegals who work in the immigration area are able to make a big difference in their clients' lives. It can be a very personally rewarding and satisfying field, where you can have a positive impact in a world that is constantly changing and creating conflicts." □

A native of New York City, Sherry Karabin has a Master's Degree in Broadcast Journalism from Northwestern University's Medill School of Journalism. She has spent many years as an on-camera cable television news reporter and as a writer for various legal publications. She is currently a regular contributor to the Akron Legal News in Ohio and is a freelance on-camera reporter for WJLP-TV in New Jersey.

