

IMMIGRATION LAW

Expert Analysis

Business Immigration Under Trump: Upcoming Changes and How to Prepare

During the presidential campaign, Donald Trump promised voters that immigration, together with jobs and health care, would be at the top of his agenda. More recently, President-elect Trump has stated that his immigration plan will focus on increased enforcement and protecting U.S. workers. The extent to which these two initiatives impact business immigration will depend on how the Trump administration reconciles its desire to attract and retain the best and brightest foreign talent with its pledge to protect the interests of middle and working class Americans. As a result, employers who hire foreign workers will need to adapt quickly in order to remain compliant and meet business objectives.

Protecting U.S. Workers

Trump has asserted plans to “establish new immigration controls to boost wages and to ensure that open jobs are offered to American workers first” while simultaneously voicing support for immigration programs that attract and retain highly skilled workers in shortage occupations (such as advanced degree engineer and science professionals).

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However, provisions that are deemed to negatively impact U.S. worker wages or job prospects will be at risk of rescission, such as the March 2016 Department of Homeland Security rule (81 Fed. Reg. 13039) allowing STEM students to apply for an additional two years of work authorization, which extends the one year of work authorization granted to most foreign students.

Notably, Trump stated in his transition video of Nov. 21, 2016, that he will direct the Department of Labor (DOL) to “investigate all abuses of visa programs that undercut the American worker.” The DOL is charged with conducting audits (known as labor condition application (LCA) audits) of prevailing wage requirements and claims of abuse associated with H-1B visas—a numerically limited specialty occupation visa that permits U.S. employers to hire foreign workers with a related bachelor’s degree or equivalent into a job requiring that degree.

The H-1B visa program is used by U.S. employers to hire highly skilled workers, and high-tech companies in Silicon Valley have repeatedly stated that more H-1B visas are needed in order to fill shortage engineering positions. In contrast, the same H-1B visa program has been widely criticized for suppressing U.S. wages and taking jobs away from U.S. workers, especially in instances where the H-1B employees are working at a client site (and not in the H-1B

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employer’s office). In particular, allegations of abuse have recently surfaced in the media (Preston, Julia, “Laid-Off Americans, Required to Zip Lips on Way Out, Grow Bolder,” *New York Times*, June 11, 2016) where U.S. workers at a number of U.S. companies have claimed that they were laid off and forced to train foreign “H-1B” replacements.

In response, Trump has stated that he has spent time with the laid off American workers and “won’t let this happen anymore.” Thus, it is likely that the Trump administration will introduce a labor

market test or non-displacement attestation, increase salary requirements and direct investigations on staff augmentation arrangements (as distinguished from industrial equipment installation projects and global arrangements for turn key software solution projects). Here, it is important for client companies that have entered into consulting arrangements for its IT workers to ensure that H-1B visa holders working on-site with the client company are under the control and supervision of the consulting company and not co-employees of the client company.

An audit or investigation that alleges co-employment would be problematic as the wage requirement (set at the higher of the prevailing wage or actual wage) would be determined by the client company's actual wage (as opposed to the actual wage for the H-1B employer) for the occupation (or an allegation of visa fraud). Overall, employers should expect an increase in DOL audits and investigations, with a particular focus on consulting companies and their clients.

We also expect an increase in FDNS (Fraud Detection and National Security) site visits, where an FDNS officer visits an employer to ensure that employee wage and working conditions are consistent with USCIS (U.S. Citizenship and Immigration Service) filings. Also, Trump's directive to investigate visa abuses will likely lead to a review of the J-1 exchange visitor's summer work study and au pair categories. These programs have been the subject of abuse claims and viewed as taking low skilled jobs away from U.S. workers in child care and seasonal industries.

Trump has stated that he will renegotiate the North American Free Trade Agreement (NAFTA)—(he may exercise a unilateral revocation provision with six

months notice), which currently affords Canadians and Mexicans occupation-specific work authorization pursuant to the TN visa category, along with other important mobility provisions for business visitors and intracompany transferees. NAFTA mobility provisions and those of other free trade agreements are at risk, including Australia (E-3), Chile (H-1B1) and Singapore (H-1B1), so employers should plan accordingly.

In addition, Trump has announced an immediate hiring freeze for federal employees (including replacements).

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Business immigration filings require timely adjudication by multiple government agencies, including USCIS, the Department of State (DOS) and DOL. As a result, employers should expect significant adjudication delays for petitions and visas.

Increased Enforcement

Trump has stated that his 100-day plan will include "extreme vetting" in order to "keep out" those who do not share American values. This means that citizens of certain countries (or those who have travelled to certain countries) will be subject to enhanced security clearances before obtaining a U.S. visa that are above and beyond the additional clearances in place today. Currently,

persons from designated countries deemed to be a security risk undergo "administrative processing," a process whereby a U.S. Embassy or Consulate requests a specific security clearance from the DOS that usually takes one to eight weeks to complete but can take considerably longer.

Trump's plan includes additional checks to "screen out" those who have "hostile attitudes toward our country or its principles," presumably by examining social media activity. This would undoubtedly result in extensive travel delays, even for turn-key employees and senior-level executives.

Extreme vetting signifies the re-introduction of a registration requirement upon entering the United States for non-U.S. citizens from countries with active groups on the terrorist list, similar to the NSEERS (National Security Entry-Exit Registration System) requirement that occurred after Sept. 11. NSEERS, which requires travel through designated airports, fingerprints, photographs, interviews, and local check-ins with Immigration and Customs Enforcement (ICE), was indefinitely suspended in 2011 but could be reinstated quickly if the Obama administration does not succeed with its current effort to dismantle it. We also expect additional scrutiny in green card applications consistent with vetting for negative or hateful attitudes toward American values.

Enforcement will also include an increased focus on employment verification compliance. Presently, U.S. employers are required to verify that all new hires have proper work authorization through the completion of a Form I-9, (as mandated by the Immigration Reform and Control Act of 1986, Public Law 99-603). An increase in ICE agents will improve

enforcement with more I-9 audits and ICE raids, which inspect whether an employer has properly completed Form I-9 for employees and impose penalties and fines as applicable.

Also, E-verify, which began as a voluntary program with the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA, Public Law 104-208), will likely be mandatory for all employers, as Trump indicated during his campaign. E-verify is an Internet-based system that allows employers to electronically validate new hires' work authorization by comparing their I-9 data with information contained in the Department of Homeland Security (DHS), Social Security Administration (SSA) and Department of State databases. In 2009, the Federal Acquisition Regulation (48 C.F.R., Subpart 22.18) required federal contractors to use E-verify to validate the employment eligibility of employees working under federal contracts.

Trump is also expected to secure the southern border of the United States (the "wall") in order to curtail the entry of undocumented immigrants. These combined efforts will have a chilling effect on the employment of unauthorized workers, which is likely to result in a shortage of workers in agriculture and low skill industries, among others.

Another important campaign pledge was to revoke President Barack Obama's executive order establishing DACA (Deferred Action for Childhood Arrivals), which covers approximately 750,000 "DREAMers" (individuals who meet the general requirements of the Development, Relief, and Education for Alien Minors (DREAM) Act) who have entered the U.S. work force across multiple industries. Fortunately, Trump

has recently announced a possible modification or outright abandonment of this promise in stating that the beneficiaries are meritorious. Notably, Senators Dick Durbin (D-Ill.) and Lindsey Graham (R-S.C.) recently announced that they are working on a bipartisan bill to give Dreamers legal status before Trump takes office.

There is also expanded DACA and DAPA (Deferred Action for Parents of American and Lawful Permanent Residents), which Trump is expected to eliminate and will impact approximately four million undocumented immigrants. A recent 4-4 decision by the Supreme Court effectively let stand a decision of the U.S. Court of Appeals for the Seventh Circuit nullifying President Obama's executive order establishing these programs. (*United States v. Texas*, 579 U.S. __ (2016)).

Taking Effect

The timing and difficulty of change depend on whether the existing provision is based on policy guidance, executive order, regulation or statute. The provisions that are easiest and quickest to change are policy memos and executive orders, which serve as the foundation for DACA, administrative processing decisions based on national security, and ICE enforcement policy. However, such changes are subject to a legal challenge where Trump would need to show that the change is not arbitrary or capricious in order to succeed.

Provisions that are regulatory (the vast majority, including STEM and H-4 work authorization) are more difficult to change and will take longer (at least six months or more) as changing these requires compliance with the APA (Administrative Procedures Act), unless the Congressional Review Act (Contract

with America Advancement Act of 1996, Public Law 104-121) applies. The Congressional Review Act gives Congress the ability to disapprove of any regulations published within the preceding 60 congressional "session days" (which works out to approximately six months). This means that Congress could potentially revoke regulations published in mid to late 2016 without the need to follow the APA rulemaking process to rescind.

Provisions that are statutory will be the most difficult and take the longest to change as these require congressional action, such as H-1B wage reforms and labor market tests, dependent company restrictions and wage requirements for L-1 visas.

What Can Employers Do Now?

Given the likelihood of increased enforcement, it is important for employers to audit I-9 employment eligibility forms and LCA public inspection files. In addition, employers should perform a census of their foreign worker population in order to determine which employees may be affected by a change in law or policy and to ensure compliance with any new requirements.

Employers should also consider the potential impact on their own immigration policies, compliance programs and personnel actions, including consulting arrangements. Finally, employers should remain engaged with immigration counsel and stay abreast of changes before and after Jan. 20, 2017, as 2017 promises to be an eventful year for employers who hire foreign workers.