



## U.S. Business Immigration Policy in the Trump Administration



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By Christian Dallman and Kevin Aiston

Although the law and regulations governing U.S. employment-based immigration have remained essentially unchanged, the first year of the new Administration of President Donald J. Trump has been marked by an increased focus on enforcement and protection of the U.S. labor market. Since President Trump's inauguration in January 2017, the principal agencies responsible for administering the U.S. immigration system have taken a series of coordinated actions to promote the new Administration's immigration enforcement priorities.

This article will examine the new Administration's employment-based immigration priorities, review recent U.S. immigration enforcement and compliance initiatives from an employer perspective, and discuss the implications of today's more restrictive environment on companies seeking to employ foreign professional local hires and international assignees in the U.S.

### America First - The Trump Administration's Immigration Policy

During his candidacy and the first year of his presidency, President Trump has articulated a guiding policy of "America First," with a stated focus on prioritizing the interests of American workers, the American economy, and American interests generally, and he has applied this guiding policy to a wide range of issues, including immigration, trade, energy, the budget, and foreign policy.

In the employment-based immigration sphere, President Trump's "America First" policy has been advanced through a combination of increased scrutiny on applications for immigration benefits, new or revised policy guidance issued with the stated goal of protecting American workers, heightened enforcement of existing regulations, and increased compliance initiatives.

### Overview of the Trump Administration's Immigration Priorities

The Trump Administration's primary immigration priorities are three-fold:

- First, the new Administration seeks to secure the border using all mechanisms available, including constructing a physical wall along the U.S.-Mexico border and significantly increasing the number of Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) officers.
- Second, the Administration seeks to strictly enforce our existing immigration laws. While this goal may sound self-evident, the Administration views this as a change in policy from prior Administrations, which, in the current Administration's view, did not adequately enforce existing immigration laws.
- Third, the new Administration seeks to protect U.S. workers and their jobs against the perceived threat of unfair competition from foreign workers.

For more information,  
please contact:



Michael F. Turansick  
mturansick@fragomen.com  
+1 312 499 2804



Kevin C. Aiston  
kaiston@fragomen.com  
+1 312 499 2812

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Together, these priorities can be summarized as AMERICA FIRST, in terms of:

- protecting the jobs, wages, and overall economic security of U.S. workers, and
- protecting the security of the American public from possible terrorism and crime.

In particular, the Administration has focused on certain key priorities to help promote the economic security of U.S. workers, including examining ways to:

- Ensure that jobs are offered to Americans first;
- Increase wage requirements for foreign workers; and
- Ensure that U.S. workers are not displaced by foreign workers.

On August 2, 2017, a Whitehouse.gov blog post promoted President Trump's support for a legislative proposal, the Reforming American Immigration for a Strong Economy (RAISE) Act, which would largely replace the current employer-sponsored immigration preference system with a points-based/merit-based system. The Administration's support of the RAISE Act is direct evidence of its plan to restructure the immigration system to favor high-skilled workers. Specifically, the blog noted:

"The [proposed] RAISE Act puts American workers first by prioritizing immigrants based on the skills they bring to our Nation, safeguarding the jobs of our citizens. It replaces the current permanent employment-visa framework with a skills based system that rewards applicants based on their individual merits. This reform to our immigration system will reward education, entrepreneurial initiative, and previous achievement."

"President Trump is following through on his promise to reform our immigration system, keeping the interests of the American people at the forefront of his resolutions for our nation."

In keeping with this philosophy, the White House submitted its "Immigration Principles and Priorities" plan to Congress on October 8, 2017, which contained 70 enforcement priorities related to Border Security, Interior Enforcement, and a Merit-based Immigration System.

Some of the listed priorities relevant to employment-based immigration in the paper include:

- Adopting the RAISE Act;
- Requiring all employers to use E-Verify and increasing penalties for failure to comply with E-Verify, including debarment of noncompliant federal contractors;
- Broadening antidiscrimination laws to penalize employers who displace U.S. workers with nonimmigrants;
- Preempting state and local laws relating to the employment of unauthorized individuals;
- Eliminating the Diversity Visa program; and
- Increasing the penalties for visa overstays, including making even technical overstays a misdemeanor offense.

At the time of the plan's release, a Senior White House official was quoted in politico.com as stating that the proposed reforms "live up to the president's campaign commitment to have an immigration system that puts the needs of hardworking Americans first."

## **President Trump's "Buy American Hire American" Executive Order**

On April 18, 2017, President Trump issued the "Buy American Hire American" Executive Order (hereinafter "EO"), which is perhaps the most significant manifestation to date of the President's "America First" immigration policy as it relates to employment-based immigration. The EO included both federal government procurement and immigration-related mandates, promoting America First priorities in both contexts.

The stated purpose of the "Hire American" provisions of the EO is "to create higher wages and employment rates for workers in the United States, and to protect their economic interests." The EO seeks to achieve this purpose by initiating a wide-ranging interagency review of the U.S. immigration system and instructing the relevant agencies "to propose new rules and issue new guidance, to supersede or revise previous rules and guidance if

appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.”

The EO focused in particular on the H-1B temporary worker visa category, which is used by U.S. employers for professional positions that generally require at least a bachelor’s degree in a specialty field. The EO mandates that the Attorney General and the Secretaries of State, Labor, and Homeland Security “suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”

At the time of the release of the EO, an Administration official elaborated on the EO’s H-1B provision, stating that the Administration would be looking at ways to administratively increase H-1B minimum wage requirements and filing fees. In addition, the same Administration official added that the Administration would examine ways to replace the current, random H-1B cap lottery system – which is used to determine which H-1B cases will be processed in years when the annual numerical limits on this visa category are reached – with an allocation system that would prioritize high wage earners and advanced degree holders.

## **Agency Implementation of Trump’s “Buy American Hire American” Executive Order**

Although the EO has not yet resulted in any changes in the substantive laws governing the H-1B or other work visa categories, employers are already seeing the practical effects of the policies behind the EO. First, U.S. Citizenship and Immigration Services (USCIS) “Requests for Evidence” (or “RFEs”) – which are generally issued when the government is not satisfied that the immigration petition or application, as filed, is sufficient to merit approval – have increased dramatically this year, particularly for H-1B visa cases. According to USCIS data reviewed by Reuters news service, between January and August 2017, H-1B RFEs increased by approximately 45% compared with the same period in 2016, without a significant increase in the number of H-1B petitions filed. Also, anecdotal reports suggest that the rate of RFEs continues to increase, with some immigration practitioners reporting roughly a doubling in the number of H-1B RFEs received this year over last year.

Interestingly, a large percentage of the RFEs issued after the promulgation of the EO have focused on whether the wage being offered for the position is appropriate. Historically, this issue has been the province of the enforcement division of U.S. Department of Labor (DOL), and heretofore has generally not been an issue that USCIS has considered when deciding whether to approve H-1B petitions. USCIS push-back has been most noticeable in cases in which the employer has assigned an “entry-level” wage to the case. This new adjudication issue for H-1B petitions represents a significant development, and it appears to demonstrate an agency preference to grant H-1B visas to only the most highly compensated foreign workers.

- o **Employer Implications:** Employers need to be aware that the salary offered to an H-1B worker is no longer just a potential issue in the event of a subsequent audit by the DOL but can now impact the threshold approvability of the H-1B case and the foreign national’s ability to commence employment with the employer. Employers should expect, and be prepared for, challenges to H-1B filings involving offered salaries at the lower end of the occupation’s normal salary spectrum, with the potential for denials no longer an exceptional outcome, as was generally the case before.

## **Coordinated Enforcement Efforts by Immigration Agencies**

As a further manifestation of the Administration’s “America First” policy, there have been a number of coordinated interagency actions to enhance compliance in the U.S. immigration system and increase penalties for those who abuse the system. Several of these employment-based immigration compliance initiatives, with associated employer implications, are summarized below.

In the first week in April – which was also the beginning of the Fiscal Year 2018 H-1B Cap filing period – the U.S. Department of Homeland Security (DHS), DOL, and the U.S. Department of Justice (DOJ) unveiled coordinated initiatives to increase scrutiny of the H-1B visa program and enhance employment-based immigration enforcement.

Specifically:

» DHS announced that, going forward, it would focus its site visit program on: employers with a high percentage of H-1B workers; cases involving off-site employment of H-1B workers at client sites; and petitioning employers whose basic business information cannot be readily verified through available data. In so doing, DHS signaled that it intends to focus its site-visit resources in areas perceived most likely to be a source of fraud or abuse.

- o **Employer Implications:** Employers should anticipate an increase in DHS site visits generally, with possible expansion to other work visa categories, and employers who place H-1B workers at client sites or whose workforce is heavily weighted toward H-1B workers should expect a significant increase in the number of site visits. To avoid possible H-1B petition revocations, employers need to exercise due diligence in making sure that all H-1B petitions on file with the government are fully consistent with the foreign national's actual employment details, and employers in particular need to place renewed emphasis on filing amended H-1B petitions in advance of any material changes in employment, such as changes to work site location, to ensure that the petition on file with the government accurately reflects the current terms of employment.

» In the same April 2017 announcement, DHS alerted the public that it had created a special email address (ReportH1BAbuse@uscis.dhs.gov) "dedicated to receiving information about suspected H-1B fraud or abuse."

- o **Employer Implications:** Employers must anticipate that DHS, and its companion federal agencies, will rigorously investigate alleged H-1B program violations. Accordingly, employers should regularly audit their H-1B programs to ensure they are in compliance with all applicable regulations, including the requirement to pay all H-1B employees the required wage for the occupation.

» DOL subsequently issued a statement signaling that it would increase audits and investigations of H-1B employers to ensure that they are complying with the

wage and other labor-related obligations associated with the H-1B category. DOL indicated that it plans to work more closely with the Departments of Homeland Security and Justice on enforcement of program rules.

- o **Employer Implications:** Employers need to be prepared for an increase in DOL audits. Employers should prepare for the possibility of an audit by reviewing their H-1B "Public Access Files" to make sure that those files are complete and compliant with DOL regulations, and employers, working closely with their immigration counsel, need to make sure that the methodology of their H-1B prevailing and actual wage determinations is sound and defensible.

» DOJ also warned H-1B employers that discriminating against U.S. workers due to their citizenship or national origin violates the anti-discrimination provisions of the Immigration and National Act (INA). This guidance was later followed by a DOJ announcement in September 2017 of its first lawsuit under this initiative. In the announcement, U.S. Attorney General Jeff Sessions stated, "In the spirit of President Trump's Executive Order on Buy American and Hire American, the Department of Justice will not tolerate employers who discriminate against U.S. workers because of a desire to hire temporary foreign visa holders."

- o **Employer Implications:** Employers must exercise extreme caution before taking personnel actions that could be interpreted as favoring foreign workers over U.S. workers. DOJ has made it clear that an employer may be subject to prosecution under the anti-discrimination provisions of the INA if its practices show a discernable preference for hiring foreign workers over U.S. workers or if personnel data demonstrates that it has displaced U.S. workers in favor of foreign workers.

## Subsequent Agency Initiatives

These coordinated April 2017 agency announcements have been followed by a series of other agency initiatives aimed at combatting and/or exposing perceived fraud or abuses in the employment-based immigration system.

For example:

» In July 2017, DHS issued lengthy reports on H-1B petition approvals for Fiscal Years 2015 and 2016, listing H-1B petitioners by name, number of approved petitions, employers' average H-1B salary, and degree levels of beneficiaries. DHS released similar data for Individual L-1 Approval Notices in October 2017.

o **Employer Implications:** Employers of temporary work visa holders should be aware that the media and general public now have easy access to key data regarding their H-1B and L-1 programs and that the data could be used to analyze their hiring practices.

» In August 2017, DOL released proposed new editions of the H-1B Labor Condition Application (LCA) form which would make more details of H-1B employment available to the public. Some of the proposed changes include: (i) Disclosure of third-party worksites and organizations; (ii) Specification of the number of workers at each location listed in the LCA; and (iii) Specification by H-1B dependent employers of the specific basis for a dependency exemption as well as information about exempt employees. The Agency accepted comments on proposed LCA revisions through October 2, 2017, and a new edition of the LCA may be released at any time.

o **Employer Implications:** If the changes to the form are implemented, employers who place H-1B workers at third-party worksites, as well as employers who utilize another employer's H-1B workers at their worksites, should anticipate that the information will be available to the media and the general public.

» DOS updated its Foreign Affair Manual (FAM) in August 2017 to require consular officers to consider the spirit of President Trump's "Buy American Hire American" EO when adjudicating employment-based immigrant visas and H, L, E, O, and P temporary work visas. In addition, the FAM provision relating to H-1B visas was revised to emphasize the role of the consular officer in reporting labor violations to the DOL.

o **Employer Implications:** Employers should expect that employees may face more challenges when applying for temporary work visas at U.S. consulates around the world. Historically, once USCIS has approved an employment-based petition, absent fraud or security concerns, the consular officer would generally defer to the USCIS's pre-determination and not re-adjudicate the foreign national's eligibility for the visa classification. Under this new directive in the FAM, it is possible that this may no longer be the case. For example, a consular officer who believes that the planned employment in the U.S. of an "entry-level" wage visa applicant would undercut the wages of U.S. workers could in theory deny the prospective foreign worker's visa application, citing the EO.

» In an effort to implement "robust screening and vetting procedures" in the employment-based permanent resident (green card) application process, USCIS began phasing in a requirement in October 2017 that all employment-based adjustment of status green card applicants attend a personal interview prior to final adjudication of the application. During the interview, a USCIS officer will review the applicant's eligibility for permanent residence, with a particular focus on verifying that the job on which the application is based is bona fide and that the applicant intends to take up the offered position.

o **Employer Implications:** This new personal interview requirement will likely result in lengthier processing times, increased cost, and more uncertainty regarding the ultimate outcome of employment-based green card cases. Employers should expect an increase in documentary requests at the final stages of the green card process, and it may be prudent for employers to have legal counsel accompany sponsored employees to the employee's employment-based adjustment of status interview.

» In October 2017, USCIS announced that USCIS officers are no longer required to give deference to previous USCIS petition approvals when reviewing H-1B, L-1, or other nonimmigrant work visa status extension requests. Instead, USCIS officers are now

authorized to re-adjudicate the beneficiary's eligibility for a nonimmigrant classification de novo each time an extension of stay is requested, even if there has been no change in circumstances.

- o **Employer Implications:** This new policy means that adjudicators are not required to give any evidentiary weight to a prior approval, and they may potentially come to a contrary conclusion from the previous adjudication, thereby increasing the uncertainty associated with a foreign national employee's ability to extend his or her U.S. work authorization. In light of this change in policy, employers should be prepared to submit extensive documentation in support of extension requests and to meet the higher levels of scrutiny adjudicators are now applying to immigration benefits requests. Employers should be prepared for longer processing times for extension applications, additional cost, and a possible increase in RFE and denial rates.

## Conclusion

The increased focus on immigration enforcement in the new Administration makes it critical that employers ensure that they are fully compliant with applicable immigration laws and regulations. Employers would be well-advised to undertake self-audits of their immigration programs, including reviewing H-1B Labor Condition Application (LCA) Public Access Files and Form I-9 Employment Verification records. Employers need to devote the necessary resources to ensuring that immigration filings are accurate and up-to-date and reflect the actual circumstances of the foreign national's current employment. Employers may wish to consider retaining competent immigration counsel where appropriate to assist in evaluating the employer's immigration compliance and to develop a remediation plan to address any deficiencies.

Despite the absence of any statutory or regulatory changes to employment-based immigration, the foregoing analysis demonstrates that the executive branch has ample tools at its disposal to achieve many of its stated goals. As such, regardless of whether immigration reform is enacted under the Trump Administration, employers will likely face an increased enforcement environment that is most likely to become even more aggressive in the foreseeable future.