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The Employment Immigration Landscape Is Already Changing

By **Eleanor Pelta** (February 19, 2021, 5:40 PM EST)

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Beginning on day one of his administration, President Joe Biden took swift action to reverse a number of Trump administration immigration policies.

That Biden issued numerous executive orders relating to immigration on his first day in office — including a rescission of the travel ban impacting nationals of predominantly Muslim countries and a directive that U.S. Citizenship and Immigration Services safeguard the Deferred Action for Childhood Arrivals program — was intentionally symbolic.

The orders signaled a dramatic shift, from the prior administration's vision of an America that had to be protected from immigration, to a clear message that immigrants and immigration are an integral part of the American identity.

In all, thus far, the Biden administration has issued eight executive orders, four memoranda and three proclamations that concern or impact immigration, among other actions.

In addition, on day one, the Biden administration sent to Congress a sweeping immigration legislative proposal, currently titled the U.S. Citizenship Act of 2021. While several of these pronouncements relate to humanitarian categories of immigration, including asylum, processing of refugees and reunification of separated families, and many are clearly meant to reset agency culture with respect to immigration in general, a number of the new administration's immigration-related actions will have a substantial impact on U.S. businesses that employ foreign nationals.

The Impact of the U.S. Citizenship Act of 2021 on Business Immigration

The U.S. Citizenship Act of 2021 was formally introduced in Congress on Feb. 18. The proposal is wide-ranging and comprehensive in scope, touching all aspects of immigration from reform to asylum and refugee processing, to improvements of the immigration court system.

As a preliminary matter, the proposal contains a significant provision that is meant to reframe how the agencies that deal with immigration — and the American public in general — regard foreign nationals living in the U.S.

The USCA strikes the term "alien" from the immigration laws and replaces it with the term "noncitizen."

This is a welcome change in the view of immigrant rights groups that have long argued that the terms "alien" and "alienage" have a dehumanizing effect on foreign nationals residing in the U.S., regardless of status.

The proposal to use the term noncitizen instead of alien is in line with an internal change within USCIS following guidance from the Biden administration, mandating the use of the term noncitizen in lieu of alien to encourage inclusivity in communications about immigration. The USCA also provides for legalization and a path to citizenship for certain undocumented noncitizens present in the U.S. since January 1, "Dreamers" — DACA recipients — and those who hold temporary protected status.

While regularizing the status of millions of people, these programs will also award and/or continue employment authorization for millions, allowing employers access to a large lawful workforce. In addition, the USCA increases the number of immigrant visas for so-called other workers — those in jobs requiring less than a bachelor's degree or two years of experience, and creates a pilot program to admit immigrants whose employment is essential to their communities.

With respect to higher-skilled immigration, the proposal contains a trove of beneficial changes, including a program that would allow foreign nationals with doctorate degrees in STEM fields to obtain green cards without numerical limitations, an increase in the annual allotment of employment-based visas, several provisions that would reduce severe green card backlogs for employment-based green card applicants, employment authorization for spouses of H-1B workers and a provision that prevents certain children of H-1B workers from aging out during the green card process.

There are also provisions that allow extensions of stay during the green card process for foreign nationals in F, L and O visa status, thereby expanding the benefits of the American Competitiveness in the 21st Century Act beyond the H-1B to other visa classifications.

Not all changes contained in the USCA will be seen as salutary by employers. One proposed provision would codify the USCIS proposal, currently paused — as discussed below — allowing the selection of H-1B's to be based on wage levels.

If this becomes law it will effectively leave a number of U.S. employers out in the cold in terms of accessing key foreign talent, including certain small and emerging businesses, nonprofits that are not H-1B cap exempt, schools in need of teachers, and other employers of needed professionals at mid and lower wage ranges.

Another provision vastly expands the bases for a claim of unfair immigration-related employment discrimination, which will be beneficial for foreign workers but may create minefields for U.S. employers seeking to be in compliance with these provisions.

It is unlikely that USCA will be passed as-is. The Biden administration has signaled that it is willing to consider piecemeal legislation that will achieve some of the changes and reforms contained in its proposal.

But the proposed legislation is a significant blueprint for immigration reform, and employers would be well-advised to become conversant with its provisions, as we may see some of them moved forward in other legislative proposals in the next four years.

The End of Trump's "Buy American and Hire American" Order

On Jan. 25, Biden signed the "Executive Order on Ensuring that the Future is Made in All of America by All of America's Workers."

The provisions of this executive order are primarily concerned with ensuring that Federal government agencies purchase and use, to the extent possible, goods and services that are "from sources that will help American businesses compete in strategic industries and help American workers thrive."

Significantly, however, Section 14 of this executive order revokes former President Donald Trump's Executive Order 13788 of April 18, 2017, known as the "Buy American and Hire American" order.

Although it was an executive order without the force of law or regulation, the Buy American and Hire American order was arguably the most influential Trump administration policy with respect to employment-based or business immigration.

Resting on the dual premises that immigrants generally supplant U.S. workers and that there was an undue prevalence of fraud in employment-based immigration applications, without advancing any data in support of these claims, the order called on all agencies involved in the immigration process to rigorously enforce U.S. immigration laws with the end goal of protecting the jobs and interests of U.S. workers, and rooting out perceived fraud in the immigration system.

The Buy American Hire American order thereby radically altered the fundamental mission of the various agencies involved in immigration: the fair administration of U.S. immigration laws, and the protection and promotion of national security.

Instead, the order had the intended effect of throwing up numerous barriers to lawful employment-based immigration, drastically increasing both requests for evidence in, and denials of, employment-sponsored visa petitions, allowing adjudicators broad discretion to deny immigration benefits to otherwise eligible applicants and inserting de facto labor market tests into visa adjudications that did not require such tests as a matter of law.

Moreover, the last few years have witnessed a slow-walking of the processing of applications for employment authorization of all types, including employment authorization document's accorded to spouses of certain nonimmigrant visa holders, causing serious work interruptions for the U.S. businesses that employ them.

The Buy American and Hire American order was also the root and base premise of the Trump administration's last-minute regulations in 2020 relating to H-1B visas and employment-based green cards, including:

- U.S. Department of Labor rule raising prevailing wages;

- USCIS rule that would have changed the H-1B lottery into a tiered system that prioritized the highest paid workers; and

- USCIS' rule on "Strengthening the H-1B Nonimmigrant Visa Classification Program" — this would have changed the definition of specialty occupation, and altered the analysis of whether an employer-employee relationship exists between the petitioner and beneficiary in an H-1B application.

These rules have now either been withdrawn or paused.

The rescission of Buy American and Hire American signals that while the impact of immigration on the U.S. labor market remains an important consideration, it should no longer be the sole driving force behind regulatory action and decision making by the various agencies involved in immigration adjudications.

The reference in the title of the Biden administration executive order to "All of America's Workers" signals a nuanced recognition that America's workers include not only U.S. citizens but also foreign-born workers.

It's possible that this message — that all of America's workers make significant contributions to our economy as a whole — will begin to trickle down, creating a culture within the agencies involved in immigration processing that is more supportive and understanding of employers as customers or users of immigration services.

Travel Bans

Revocation of the So-Called Muslim Ban

The first immigration-related executive order signed by Biden revoked the Trump administration's travel and immigration restrictions on a group of 13 countries, most of which are African or predominantly Muslim, asserting that the restrictions constituted a "stain on our national conscience ... inconsistent with our long history of welcoming people of all faiths and no faith at all."

The so-called Muslim ban impacted nationals of the following countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, Yemen, Nigeria, Myanmar, Eritrea, Kyrgyzstan, Sudan and Tanzania.

Biden's executive order also instructed the U.S. Department of State to prepare a proposal for reconsideration of visa applications that had been previously denied under the ban, and a plan to ensure that visa applicants who wish to reapply are not prejudiced by a prior visa denial under the ban.

While the rescission of the travel ban on individuals from several Muslim-majority countries is largely viewed as a humanitarian and civil rights victory, it is also a plus for employers, particularly multinational companies that faced challenges in transferring employees from affected countries over the past four years.

To the extent that such employees may have encountered visa denials based upon the travel ban, employers may wish to request review of such denials at the relevant consular post, as soon as the Department of State announces a process for such review.

COVID-19-Related Travel Restrictions

The Biden administration has decided to continue the country-specific COVID-19-related travel restrictions put in place by the Trump administration. By a proclamation that took effect on Jan. 26, Biden continued the suspension of entry of certain individuals traveling from the Schengen Area, the United Kingdom, Ireland, and Brazil, and added a restriction on travel from South Africa, starting Jan. 30.

For U.S. employers, this means that travel of foreign national employees and business visitors who were or are physically present in affected countries remains severely restricted.

As before, employers in need of essential personnel who would be traveling from one of the impacted countries are compelled to undergo the burdensome and unpredictable process of applying for national interest exceptions for such personnel, hoping for a favorable exercise of discretion from a U.S. consular officer or from U.S. Customs and Border Protection at a port of entry.

It is not yet clear whether the Department of State and Customs and Border Protection, the two agencies charged with reviewing national interest exception requests, will use the national interest criteria that developed around the Trump administration's country-specific bans to adjudicate requests made under the Biden proclamation.

Interestingly, the Biden administration has not yet issued a statement regarding its intentions with respect to the other Trump administration travel restriction that has plagued employers since June of 2020 – Proclamation 10052 — which suspended the entry of certain nonimmigrant or temporary visa holders, including certain H-1B, L-1 and J visa holders who were not in the U.S. as of June 24, 2020.

Set to expire on Dec. 31, 2020, Trump extended the proclamation until March 31. Among other challenges, Proclamation 10052 essentially halted the ability of many multinational companies to transfer managerial and specialized knowledge staff to the U.S. under blanket L programs, routinely used to rotate key employees internationally.

As yet, it is unknown whether the new administration will rescind this proclamation, allow it to expire or extend it. In the interim, as with the country-specific COVID-19 travel restrictions, most employers must request emergency visa appointments from U.S. consulates and rely upon national interest exceptions to facilitate travel of employees abroad impacted by the proclamation.

Retention of DACA

DACA is the Obama-era program that afforded a temporary stay and employment authorization to certain foreign nationals who arrived in the U.S. as children. Biden's Inauguration Day executive order exhorting USCIS to preserve and fortify DACA is also good news for U.S. employers.

According to a March 2020 report from the Center for American Progress, there are over 600,000 DACA recipients in the U.S.. Virtually all DACA recipients currently work.

Early on in his presidency, Trump announced his intention to rescind DACA, and the program has been under threat over the past four years. However, primarily as a result of a number of lawsuits, DACA has remained in place.

At one point, when DACA was set to expire, FWD.us, an organization that advocated for the continuation of the program estimated that if DACA were to end, 1,700 job per day would be lost as a result over the course of several months. Numerous businesses across the U.S. employ DACA recipients.

The Biden Administration's commitment to the program — as demonstrated not only by the day-one executive order but also by the provisions in the administration's proposed legislation to allow DACA recipients to apply for lawful permanent residence — means that employers of DACA recipients will avoid the work interruptions and loss of key employees that would have occurred as a result of the

cessation of the program.

Top-to-Bottom Regulatory Review

In an executive order signed on Feb. 2 titled "Restoring Faith in Our Legal Immigration System and Strengthening Integration and Inclusion Efforts for New Americans," Biden mandated a comprehensive review of all regulations, policies and guidance that have created barriers to legal immigration.

Specifically mentioned in this executive order is the Trump administration's so-called public charge rule. This rule, promulgated in 2019 and subject to multiple lawsuits, redefined the public charge inadmissibility ground, shifting the focus from an analysis of whether an immigrant would be likely to require public benefits in the future, to a current wealth test, and imposed highly burdensome and invasive paperwork requirements on all immigrants, including those sponsored by employers.

Should U.S. Citizenship and Immigration Services determine, after review, that it will rescind the public charge regulation, employment-sponsored immigrants should be able to demonstrate future self-sufficiency as they did prior to its implementation, using simpler and more easily accessible documentation such as employer offer letters and wage statements.

Regulatory Freeze and Recent Agency Action

On Jan. 20, White House Chief of Staff Ron Klain issued a memorandum regarding review of pending regulatory actions that directed, in part, that (1) all rules pending at the Office of the Federal Register that had not been published be immediately withdrawn and (2) agencies must consider postponing the effective dates for regulations that had been published but not yet taken effect, for 60 days from the date of the memorandum.

As a result, a USCIS proposed regulation that would have redefined the meaning of employer/employee in the H-1B Specialty Occupation category, and created new obligations for H-1B petitioners and organizations at which H-1B beneficiaries are working, was withdrawn.

The part of the rule that would have changed the definition of "specialty occupation" for H-1B petitions was never finalized or reintroduced by USCIS.

On Jan. 21, the U.S. Department of Labor withdrew a companion guidance memorandum regarding a new labor condition application requirement for such H-1B petitioners.

The amended DOL rule raising prevailing wages, reintroduced as an interim final regulation on Jan. 14, has been paused until May 14. The impact of this delay on employers is uncertain, as the new system for computing prevailing wages for H-1B's and PERM — program electronic review management — labor certifications would not have become effective until July 1 in any event under the provisions of the rule.

On Feb. 4, USCIS announced a delay until Dec. 31 of the H-1B wage-selection final rule, discussed above, under which the registration or lottery system for cap-subject H-1B petitions would have prioritized petitions that offer the highest Department of Labor Occupational Employment Statistics-level wage. Therefore, there will be no anticipated changes to the upcoming fiscal year 2022 H-1B lottery process.

In delaying the rule, USCIS stated that the delay was necessary in order to allot "adequate time to complete system development, thoroughly test the modifications, train staff, and conduct public

outreach needed to ensure an effective and orderly implementation" of the rule.

However, USCIS also stated that during the delay, U.S. Department of Homeland Security leadership will also evaluate the Jan. 8th rule and its associated policies, indicating that the agency may change or withdraw the rule if it concludes that the rule does not conform to statute, regulation or DHS priorities.

However, in light of the fact, discussed above, that the Biden administration included in the USCA a provision that would codify an H-1B lottery wage prioritization signals that the Biden administration may well retain this rule. For now, however, the fiscal year 2022 H-1B lottery will proceed as last year's lottery did, with the selection of the lottery winners made randomly for both regular and advance degree cap registrations.

Finally, on Feb. 4, USCIS issued a succinct memorandum rescinding a 2017 guidance memorandum that categorically indicated "computer programmer" was not a specialty occupation.

The 2017 memorandum was withdrawn in light of the U.S. Court of Appeals for the Ninth Circuit's decision in Innova Solutions v. Baran, holding that USCIS' denial of an H-1B petition for a computer programmer was arbitrary and capricious given DOL sources indicating that most computer programmers possess baccalaureate degrees.[1]

This memorandum is significant for a number of reasons. As a preliminary matter, the 2017 memorandum on computer programmers was one of the first indications that the Trump administration was intending to restrict eligibility for the H-1B classification — not only for computer programmers but across the board. This was made clear in a number of footnotes to that memorandum.

For example, in one footnote, USCIS stated that it did not view the Occupational Outlook Handbook — the government's premier source of information regarding the educational and experience requirements for thousands of occupations — as determinative of whether a position constituted a specialty occupation.

In another footnote, USCIS indicated that a labor condition application showing an entry-level wage for a particular occupation could signal that the position would be too junior to constitute a specialty occupation for H-1B purposes. Both of these observations became standard bases for requests for evidence and denials of H-1B petitions over the past four years.

The withdrawal of the 2017 guidance is welcome in that it also presumably nullifies these interpretive embellishments, and, in combination with the withdrawal of the DHS proposed rule that would have redefined and restricted "specialty occupation," may signal a more reasonable and welcoming adjudicatory environment for H-1B petitions in the future.

Moreover, the withdrawal of the 2017 computer-programmer memorandum is significant because it indicates that USCIS is intending to follow court decisions and established policy precedent in H-1B decision making, thus heralding an agency whose decision making will be more predictable and reliable for employers and employees.

Biden's actions on day one and in the ensuing weeks have solidified the administration's intentions to mark a path that is starkly distinct from that of the Trump administration, not only with respect to both humanitarian and business immigration, but also with respect to processing of immigration benefits overall and the operation of the agencies that are involved in immigration decision making.

Employers of key foreign nationals on visas or involved in an immigration process have reason to be hopeful that the initial actions of the Biden administration are ushering in a period of predictability and efficiency that will support the operational stability of their U.S. businesses.

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[1] Innova Sols. Inc. v. Baran, 983 F.3d 428 (9th Cir. 2020).