

# Immigration Changes and I-9 Updates Under the New Administration

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# BIOGRAPHIES



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## **Firm Profile**

Clark Hill PLC is one of the 200 largest law firms in the nation, with 12 offices around the US. The Immigration Practice Group handles client cases nationally, with offices in Detroit and Washington DC, and over 150 years of combined immigration law experience.

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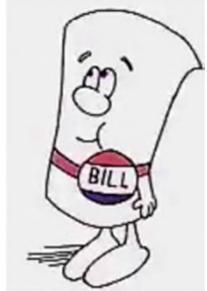
## DISCUSSION TOPICS

- What changes will take laws or regulations
- Executive updates
- Needed changes
- Possible visa changes – H-1B, L-1, and TN
- Visa delays, extreme vetting, and border searches
- Recent immigration/policy updates
- I-9 updates

Today's discussion is based on what has been stated by President Trump and his Administration. This is not a critique of these policies.

# HOW U.S. LAWS WORK

- Generally, the President can only enforce the laws
- Immigration law and policy rests solely with Congress (House and Senate)
- Once Congress passes a bill the President can sign it into law, or veto the entire bill
- 2/3 of Congress has to approve a law to override a veto
- Congress also controls the funding – the President only has a little discretionary spending
- Regulations are a U.S. government agency's interpretation of how a law will be implemented
- The agency proposes regulations internally, and then they go to the U.S. Office of Management and Budget (OMB) for edits and comments
- The regulations are released for notice and comment to the public
- Then the regulations go back to the agency to summarize the comments and address why they will or will not follow the suggestions and then back to OMB before being released
- Eliminating a final regulation is just as hard as making a new one – or a law change
- The courts interpret the laws - Congress can develop new laws, but they cannot violate the U.S. Constitution, as some level of due process is to be given to anyone in the U.S.



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# EXECUTIVE CHANGES

The President has executive powers in immigration, granted to him by Congress

- Executive Orders
- Discretionary Agency Directives and Guidance Documents – new heads of the agencies can withdraw or enact new policies
- Agency Rules and Regulations
  - Making and removing rules all take time
  - More litigation happens in this space
  - Congressional Review Act – Congress can enact legislation to immediately terminate a regulation
  - Congress gives the President powers to exclude certain persons - INA 212(f)

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# EXECUTIVE CHANGES

The following are believed by most immigration law observers as likely to change in President Trump's administration:

- DACA (740K approved) – policy shift?
- DAPA
- TPS
- Procedures for background checks
- Prosecutorial discretion
- “I will direct the Department of Labor to investigate all abuses of visa programs that undercut the American worker,” President-elect Trump said on Nov. 20th

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# EXECUTIVE CHANGES

- President Trump has signed five Executive Orders that directly or indirectly pertain to immigration
- January 27th: 90 day travel ban on individuals from: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen – revoked
- March 6th: reinstates a the temporary 90 day ban on individuals from Iran, Libya, Somalia, Sudan, Syria, and Yemen. Unlike the previous Order, this list does not include Iraq
- Practical effect of the ban:
  - USCIS: Immigration applications are continuing to be processed for individuals from these countries
  - DOS: Visas are still active so long as not revoked
  - The ban does not apply to: U.S. Legal Permanent Residents (green card holders) from one these countries or Dual nationals (citizens of one of the listed countries and another non-listed country)
  - Most people who need to enter the U.S. have entered and most will not travel again
- <http://www.clarkhill.com/alerts/update-to-march-6-2017-travel-ban-executive-order>

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## EXECUTIVE CHANGES

- On February 20th, Secretary of Homeland Security, John Kelly, issued two guidance memos to the Department of Homeland Security (DHS) implementing President Trump's Executive Orders on immigration. Some of the highlights of these DHS guidance memos:
  - Expanded deportation priorities
  - More immigration agents - 10,000 new ICE officers, 5,000 new Border Patrol Agents, and 500 new Air and Marine Agents
  - Stricter detention guidelines
  - Possibly deporting non-Mexicans to Mexico
  - Prosecuting parents of smuggled children
- <http://www.clarkhill.com/alerts/president-trump-s-immigration-enforcement-orders>

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## NEEDED CHANGES

- Our immigration laws and systems are generally regarded as broken
- Too many applicants, not enough visas for businesses or families, not enough controls or processes for monitoring persons who overstay their status in the U.S., and a slow process for deportation and appeals
- No significant changes in immigration law since 1996 – IIRAIRA and AEDPA
- Post 9/11 changes?
- 2007 was the last time a significant law was close to being passed
- The Republican controlled House and Senate (under President Obama) have stated that they want an enforcement first policy, before any new bills will be introduced to fix the problems addressed above
- Mid-term elections at the end of 2018, and it is possible Republican controlled Congress would want to pass a comprehensive law before the unpredictability of an election season occurs
- More funding for southern border enforcement and interior immigration law enforcement could occur

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## H-1B VISA BASICS

- U.S. employers frequently use/sponsor a worker under the H-1B Visa category to quickly hire foreign nationals
- A foreign national generally qualifies for H-1B status if he/she holds at least a U.S. Bachelor's Degree (or equivalent) relevant to the field in which he/she will be working, and the position normally requires at least a Bachelor's Degree as an entry-level requirement to perform the job
- Must not be “cheap immigrant labor” - must be paid the same amount the employer normally pays for that job, or the government's wage scale, whichever is higher
- Numerically limited visa – only 65,000 available per year, with an additional 20,000 available per year for those who have a U.S. Master's Degree or higher
- H-1B CAP was reached again within the first five business days April 3rd-7th
- Most employers have F-1 OPT students
  - One year of OPT
  - Up to two additional years of STEM OPT
  - If student has a U.S. Master's Degree, or higher, increases chances of being selected in the H-1B lottery

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# H-1B VISA & POSSIBLE LEGISLATIVE CHANGES

- Several bills have been introduced – common themes:
  - Advertisements/web posting likely before an H-1B can be filed
  - No increase in numbers – quota – but we could end up with a ranking system of who gets selected and preference
  - Dramatic wage increases
  - Non-displacement rules for all – and more investigative power and higher fines for non-compliance
- Litigation over H-4 EADs – shows a shift in policy and could result in changes

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# H-1B VISA & POSSIBLE LEGISLATIVE CHANGES

- USCIS eliminated a memo from 2000 regarding the computer programmer category-USCIS will continue to respond negatively to this category
- As part of President Trump's "American Workers First" policy, USCIS announced that they are launching multiple, additional measures to combat H-1B fraud and abuse
- USCIS has identified three new vehicles for enhanced H-1B fraud and abuse detection and prevention:
  - Creation of a new email address for individuals to report H-1B fraud and abuse – [ReportH1BAbuse@uscis.dhs.gov](mailto:ReportH1BAbuse@uscis.dhs.gov)
  - New "Extraordinary Circumstances" provision
  - Expansion of H-1B site visits to target specific employers and worksites:
    - Employers who are H-1B dependent
    - Employers who place H-1B workers at third party sites
- The U.S. Department of Labor (DOL) – more transparency and oversight to protect U.S. workers from H-1B discrimination
  - Initiating more investigations
  - Updating the Labor Condition Application (LCA) to provide greater transparency

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# L-1 VISA & POSSIBLE LEGISLATIVE CHANGES

- Available to foreign nationals moving from foreign operations to U.S. operations
- Foreign national must have worked 1 of the last 3 years for the foreign operation before coming to the US
- The U.S. and foreign company must have a parent/subsidiary/affiliate relationship
- Two types of L-1 Visas:
  - L-1A: for managers and executives
  - L-1B: for those foreign national's who possess specialized knowledge of the companies products, processes, etc.
- L-1 Changes (Durbin & Grassley draft bill of 2015)
  - L-1A: for managers and executives – L-1 site visits underway
  - No outplacement of workers without a waiver
  - More investigation power
  - Wage floors likely will be introduced – not required today
  - Non-displacement rules
  - More fines for non-compliance
  - Tougher standards for L-1B employees

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## TN VISA

- The TN Visa is a product of the NAFTA treaty between the U.S., Canada, and Mexico
- No NAFTA treaty – then no TN visa
- Renegotiation appears more likely – Senate has to approve treaties
- If renegotiated, it is unknown if the visa will be impacted
- President Trump must give six months' notice if the U.S. will not renegotiate the NAFTA treaty
- No discussion of visas in NAFTA that we have seen

# VISA DELAYS, EXTREME VETTING, & BORDER SEARCHES, OH MY!



- Visa delays: the Department of State (DOS) recently released four cables aimed at increasing visa scrutiny for certain applicants – all on hold
- Extreme vetting: vetting procedures to get a visa into the U.S. have always been very rigorous – extreme vetting involves additional background checks for visa applicants
  - Applicants could be asked to hand over their phones and contacts lists; provide social media handles and passwords; and/or provide 15 years of travel history, employment history, and addresses
  - Refusal to comply could lead to rejection - embassy and consulate staff have been advised to reject any applications that raise concerns according to one of the DOS cables – no court review
- Border Searches: US Customs and Border Patrol (CBP) issued a memo in early April regarding “Inspection of Electronic Devices”
  - As part of their authority to search all persons and baggage arriving in and departing from the U.S., CBP has the ability to search electronic devices, which may include copying the device
  - Individuals may decline to provide their passwords and social media handles; however, this will likely delay the detainment process - CBP has been keeping devices for up to five days
- What does this mean for employers? Could lead to extra time for the visa application process and international travel

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# HIGHLIGHTS OF RECENT IMMIGRATION REGULATIONS

New Employment Based Green Card and Related Regulations (effective January 17, 2017)  
Highlights:

- Employment Authorization Documents (EADs):
  - No more 90 day requirement for USCIS to review EAD applications, but can complain at 75 days if applying for an initial EAD
  - Just about everyone can apply 180 days before the EAD start date, including extensions, unless impracticable
  - 15 groups get work authorization for 180 days after their current EAD expires – does NOT include H-4s, L-2s, Spouses of Es, or J2s
  - F-1 STEM students also get 180 days of work authorization after their current EAD expires
- New grace period after employment ends for E, H-1B, H1-B1, L-1, O-1, and TNs – 60 days
- New H-1B whistleblowers provision provides protections to H-1B holders who face retaliatory action from their employer because they reported an LCA violation. H-1B holders will be allowed to extend their lapsed H-1B status or change to a different nonimmigrant status

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# HIGHLIGHTS OF RECENT IMMIGRATION REGULATIONS

- New Entrepreneur Regulation – takes effect July 2017
  - Entrepreneurs will be considered for parole (temporary permission to be in the U.S.) to startup businesses and work in the U.S.
  - Requires formation of a new-start up entity and the entity must establish potential for rapid growth and job creation through receipt of investments from US investor, government grants or awards, or through other means
  - <http://www.clarkhill.com/alerts/uscis-publishes-rule-for-international-entrepreneurs>
- New DOL PERM regulations – most likely dead for now
- Could we see a change in the discretion of the officers adjudicating the cases? Some say yes – we think it will be a little more tempered
- USCIS isn't under the direct control of the President – the agency is a fee driven agency
- Lots of areas where USCIS hasn't followed the agency's leadership's guidance – EB5s and L-1Bs

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# WHAT TO TELL EMPLOYEES

- Don't panic
- Our system of checks and balances ensures that no one branch controls
- Washington DC moves slowly - for both good ideas and bad ideas
- If additional background checks or vetting occurs for persons who are from certain countries, we will be notified
- To HR: don't fire employees solely because of these impending changes

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## I-9 BASICS

- I-9s are required for every employee hired since November 7, 1986
- Employee completes section 1 on or before first day of hire
- Employer has three business days, after the day of hire, to complete section 2 and examine original documents (four day rule)
- Employer, or its agent, reviews original documents and completes Section 2. Employee must be physically present when the documents are reviewed
- Employer may not accept expired documents
- Employer must not hire persons who lack valid work authorization – actual or constructive knowledge
- No I-9s needed for persons not physically on U.S. soil
- Remote I-9s are still a problem

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## I-9 AUDITS AND RAIDS

- We expect I-9 audits will rise and possibly the return of raids under the new Administration
- If your business will be audited, Immigration and Customs Enforcement (ICE) will notify you by letter or a phone call – once contacted, you have three business days to produce all I-9s
- If you receive a letter or a phone call from ICE, contact counsel immediately – do not attempt to alter or fix I-9s yourself – if your I-9s have mistakes, you will likely continue to make the same mistakes
- ICE warrant: ICE has the ability to issue a warrant for I-9s to be turned over immediately if there is probable cause to believe that evidence will be destroyed in the three business day time period
- Warrants are limited in scope - ICE needs probable cause to exceed the scope of the warrant
- Remember, be polite to ICE agents and never obstruct justice

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## I-9 BEST PRACTICES

- Company compliance policy and training
- Provide candidates with I-9 list of documents
- Be consistent when attaching, or not attaching, copies of work documents
- Online systems for creation and storage of I-9s
- Destroy old I-9s of ex-employees – three years after date of hire or one year after employment ends – whichever is longer
- Audit early and often
- E-Verify for new hires
- For internal audits, NEVER correct an I-9 without initialing and dating the change – without this there could be a charge of document fraud; different color pen preferred
- I-9 Central – <http://www.uscis.gov/I-9Central>

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## HR/ADVANTAGE – I-9 TRAINING

- The Clark Hill Labor and Employment Group recently launched a new suite of tools and resources tailored to HR professionals, called HR/Advantage
- Through HR/Advantage, Clark Hill offers an Internal I-9 Audit Package at a fixed rate of \$3500 (<http://www.clarkhill.com/pages/form-i-9-compliance-internal-audits>)
- Clark Hill also currently offers two Brown Bag sessions covering I-9 topics:
  - How-To: Completion and Storage of I-9 forms
  - How-To: Self-Auditing for I-9 Compliance
- For more information about these series, or to sign up, please contact your Clark Hill Labor & Employment attorney. If you are not currently working with a Clark Hill attorney, contact the Practice Group Director, Paul Boehms, at 313-965-8358 or [pboehms@clarkhill.com](mailto:pboehms@clarkhill.com)
- [www.hr-advantage.com](http://www.hr-advantage.com)

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# QUESTIONS?



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## POSSIBLE Q+A TOPICS

- Sanctuary Cities
- Border Wall
  - Interior enforcement
- Increased Criminal Penalties
  - Aggravated identity theft
  - Harboring
  - Smuggling
  - Unlawful re-entry
- Is everyone a priority?

# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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