
Insight on Immigration Updates

By James E. Morrison, Michael P. Nowlan / Feb 26, 2018

H-1B Filing Season to Begin April 2, 2018 - Lottery is Anticipated

Employers are reminded to identify new candidates who will require new H-1B sponsorship as soon as possible to ensure that these applications are accepted for processing. April 2, 2018 is the first date that an employer is able to file and have an H-1B petition received on behalf of a foreign national who has not possessed H-1B status before. Employees with approved H-1B petitions will be able to begin work in that status on October 1, 2018. This year all new H-1B applications must be received by USCIS between April 2nd and April 6th.

The H-1B is a frequently used temporary work visa for professional positions. Generally, there are only 65,000 H-1B visas available per fiscal year. There are an additional 20,000 H-1B visas available for candidates with a Master's Degree or higher from a US university. If USCIS receives more than enough petitions in the first five days of processing, there will be computer generated random selection process to choose which H-1B petitions will be accepted for processing. In 2017, USCIS received over 236,000 applications in the first five days of processing and a lottery was held to select the 65,000 H-1B visas and the additional 20,000 H-1B Master's Degree visas. It is anticipated that a lottery will occur in 2018 as well.

While there have been numerous reports regarding proposed new H-1B regulations and changes President Trump's administration and Congress would like to implement, there have not been any changes to the H-1B program at this time. Significant changes to the H-1B program would take a new law or regulations, and we believe neither of these is likely before October 1, 2018.

Foreign nationals who work for a non-profit research organization, an institution of higher education, or work furthering the purposes of either of these, or who have used a cap subject H-1B in the past six years, are exempt from the H-1B quota. For more information on H-1Bs, [see the Clark Hill website](#).

DHS Must Follow the International Entrepreneur Work Rule

The International Entrepreneur Rule (IER), with an effective date of July 17, 2017, permits foreign entrepreneurs to travel to or stay in the United States to grow new businesses. Less than a week before the IER was scheduled to take effect, the Department of Homeland Security (DHS) published a [Federal Register notice](#) announcing that its implementation would be significantly delayed and suggesting that it ultimately intends to rescind the IER.

The IER was promulgated to provide a path for international entrepreneurs to obtain permission to be "paroled" into the US and receive temporary work authorization for a startup business. Unable to otherwise travel to or work in the U.S. due to ineligibility for existing visa categories or numerical caps, these prospective entrepreneurs are being forced to move their businesses and accompanying jobs elsewhere.

The American Immigration Council filed a lawsuit against DHS, *National Venture Capital Association v. Duke*, alleging that DHS failed to comply with the existing regulation processes and seeking to compel DHS to implement the IER and to begin accepting and adjudicating parole applications from international entrepreneurs. On December 1, 2017, the court granted summary judgment for the Plaintiffs and vacated the postponement rule and refused to consider any further delay of the IER's implementation.

On December 14, 2017, USCIS [announced](#) that it will begin accepting applications pursuant to the IER. However, "[w]hile DHS implements the IER, DHS will proceed with issuing a notice of proposed rulemaking (NPRM) seeking to remove the Jan[uary] 17, 2017, IER. DHS is in the final stages of drafting the NPRM." *Id.* For more on this category [see the Clark Hill website](#).

The Department of State (DOS) Reports Technical Issues with Visa Processing System

As of December 6, 2017, DOS acknowledged worldwide visa processing delays and confirmed that the Bureau of Consular Affairs is in the process of resolving these technical problems with the visa processing system. Although processing has not been fully restored, they noted that some progress has already been made.

While this is a worldwide issue, the problem only delays visa issuances for about 15-20 percent of applicants who have been approved for visas. According to the American Immigration Lawyers Association (AILA), the majority of approved visas are being issued without technical errors. AILA further reports, while the Consular Electronic Application Center (CEAC) system will show these cases as being in "Administrative Processing," this simply means that the cases are pending and does not denote that any further review is required.

Federal Government Plans to Increase Immigration Enforcement at Job Sites in 2018

Robert Hammer, Assistant Special Agent in charge of DHS Investigations (HSI), reports "the Federal government plans to increase job site immigration enforcement actions across Tennessee in 2018." Workplace immigration investigations will likely focus on "critical infrastructure," such as airports, defense contractors, food distribution, and other businesses that have an impact on the general safety and welfare of the community, he added. Hammer indicates that Thomas D. Homan, Acting Director of US Immigration and Customs Enforcement (ICE), gave the order to increase the focus on work site enforcement in Tennessee. The emphasis on critical infrastructure comes because the agency has to set priorities, Hammer said.

Immigration-Related Law in California Imposes New Responsibilities on All Employers

California's Assembly Bill 450 imposes new duties on California employers with respect to worksite enforcement actions, and requires them to navigate the intersection of state and federal laws, employees' rights and employers' employment eligibility verification responsibilities. Effective January 2018, California employers should be aware of the new law's immigration-related requirements:

- Both public and private employers are implicated;
- Employers (or their agent) cannot provide voluntary consent to an immigration enforcement agent to enter any nonpublic areas of a place of labor unless they provide a judicial warrant;
- Employers (or their agents) cannot provide voluntary consent to an immigration enforcement agent to access, review, or obtain an employer's employee records without a subpoena or judicial warrant. **Note, however, there is a carve out in the law for the Form I-9 when ICE agents present a Notice of Inspection (NOI).** It is important to note that an administrative agency such as ICE can issue subpoenas, meaning subpoenas are not always issued by a court;
- Employers must provide notice (within 72 hours) to employees and if applicable their union representative, of any Form I-9 inspection by ICE as well as any other inspections of employment records conducted by an immigration agency;
- Following up on the above notice requirement to employees and their union representative, the new law has additional disclosure requirements which must be followed by an employer when requested by an affected employee. Namely, an employer must, upon request, provide (1) the name of the immigration agency conducting the inspection; (2) the date the employer received notice of the inspection; (3) the nature of the inspection to the extent known; and (4) a copy of the NOI. California has released a [template Notice of Inspection Form](#), which complies with Labor Code 90.2(a) (1).
- It limits re-verifications of employees employment authorization unless specified by federal immigration law; and
- Allows for civil penalties for non-compliance ranging from \$2,000 to \$10,000.

The new requirements will be mostly exemplified by an increase in Fraud Detection and National Security (FDNS) site visits. The new law is intended to limit certain attempts to gain information about employees that fall outside current permissible federal inspections, but at the same time, the current enforcement environment in all states is active and focused on penalizing employers for failure to comply with the requirement to hire and maintain a legal workforce. Because the new workplace requirements specific to California overlap with similar (and potentially conflicting) federal requirements, employers should not handle worksite enforcement investigations without the assistance of legal counsel.

We encourage all employers in California to devise a plan to address worksite enforcement actions by ICE agents. For help creating a plan in compliance with the new immigration law, please reach out to either Michael Nowlan or James Morrison.