

THE FIRST 100+ DAYS OF THE TRUMP ADMINISTRATION – THE IMPACT ON U.S. IMMIGRATION: WHAT'S BEEN DONE, WHAT TO EXPECT AND HOW TO RESPOND

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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.



DISCUSSION TOPICS

- Changing the Law – Legislation Versus 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, Increased Worksite Enforcement
- Challenging Agency Decisions through Litigation

HOW U.S. LAWS/REGS WORK

- Generally, the President can only enforce the laws
- Immigration law and policy rests primarily with Congress (House and Senate)
- Once Congress passes a bill, the President can either sign it into law or veto it
- Congress also controls funding – the President has only limited discretionary spending authority
- 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
- Proposed regulations are released to the public for notice and comment
- Regulations then go back to the agency to summarize and respond to the comments, explaining why they will or will not follow the suggestions. The regulations then back to OMB before being published in the Federal Register.
- Eliminating a final regulation is nearly as difficult as promulgating a new one
- The courts interpret the laws - Congress can develop new laws cannot violate the U.S. Constitution, as some level of due process is to be given to anyone in the U.S. The courts are the final arbiters.



EXECUTIVE CHANGES

- The President traditionally has significant executive power over immigration, which is granted by Congress
 - Executive Orders
 - Discretionary Agency Directives and Guidance Documents – new heads of the agencies can withdraw prior policies and enact new policies
 - Agency Rules and Regulations



EXECUTIVE CHANGES

- The following areas are expected to be impacted during the Trump administration:
 - DACA (740,000 approved to date) – USCIS still accepting and adjudicating new applications and renewal applications, but the program could be eliminated suddenly and without advance notice
 - TPS – El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, Yemen. Haiti recently extended for only six months.
 - Procedures for background checks – “extreme vetting” – delays likely
 - Prosecutorial discretion – curtailed or eliminated altogether

EXECUTIVE CHANGES – TRAVEL

- January 27, 2017: 90-day travel ban on individuals from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen. Revoked following successful litigation and injunctions in multiple federal district courts, upheld by U.S. Court of Appeals.
- March 6, 2017: Revised 90-day ban reinstated on individuals from original countries minus Iraq. Ban immediately put on hold through multiple injunctions in various courts (Hawaii, Maryland, Washington). Injunction upheld in U.S. Court of Appeals for Fourth Circuit, petition for writ of certiorari pending at U.S. Supreme Court. Other cases ongoing.
- 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, and can seek reissuance if improperly revoked
 - Ban does not apply to U.S. Legal Permanent Residents (green card holders) 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>

EXECUTIVE CHANGES – ENFORCEMENT

- On February 20, 2017, 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>

NEEDED CHANGES

- There is broad agreement that our immigration laws and systems are 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
- 2007 was the last time a significant law was close to being passed
- The Republican-controlled House and Senate (under President Obama) emphasized an enforcement first policy, before any new bills introduced to fix 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 – unlikely to succeed
- More funding for southern border enforcement and interior immigration law enforcement could occur – funding for border wall not included in omnibus budget proposal

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
 - H-1B results in 2017?

EXECUTIVE CHANGES – H-1B

- On April 18, 2017 President Trump signed an Executive Order titled “Buy American, Hire American”
- Specifics of the Order:
 - Directs the Department of Homeland Security, Department of Justice, Department of State, and Department of Labor to review the current laws governing the H-1B program
 - Removal of the random lottery system for H-1Bs in favor of a merit-based system
 - Rigorous enforcement and administration of the laws governing entry into the United States from workers from abroad
- Order has no immediate impact on H-1B applications or approved petitions. Modification of the H-1B program would require a new law
- <http://www.clarkhill.com/alerts/buy-american-hire-american-executive-order>

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

MORE H-1B UPDATES

- 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
 - New "Extraordinary Circumstances" provision
 - Expansion of H-1B site visits to target specific employers and worksites:
 - o Employers who are H-1B dependent
 - o 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

L-1 VISA & POSSIBLE LEGISLATIVE CHANGES

- Available to foreign nationals moving from foreign operations to U.S. operations
- Foreign national must have worked one of the last three years for the foreign operation before coming to the U.S.
- 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)
 - 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

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
- On May 17, 2017 President Trump announced that his administration will renegotiate NAFTA with Mexico and Canada. Two-page letter announcing renegotiation plans triggered 90-day notice period but offered few details.
- Unclear what impact, if any, renegotiation will have on TN visa
- Senate must approve treaties

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 – recently went into effect
 - Applicants can 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 - .05%
 - Refusal to comply could lead to refusal of visa - 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: U.S. Customs and Border Protection (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

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
 - 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 allowed to extend their lapsed H-1B status or change to a different status

HIGHLIGHTS OF RECENT IMMIGRATION REGULATIONS

- New Entrepreneur Regulation – takes effect July 2017 – may be withdrawn
 - 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

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
- Delays particularly acute under the Trump Administration so far – many government positions unfilled (including at DHS, Dept. of State, Dept. of Justice), executive appointments not finalized, proposed legislation stalled
- If additional background checks or vetting occurs for persons who are from certain countries, we hope to be notified
- To HR: Don't fire employees solely because of these impending changes

I-9 BASICS

- I-9s are required for every employee hired since November 7, 1986
- Employee completes section 1 on or before 1st 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

I-9 AUDITS AND RAIDS

- We expect site visits and I-9 audits will rise under the Trump 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
- Site visit/raid pursuant to 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
- Ensure Public Access File complete and up to date
- Conduct self-audit with guidance from counsel to be prepared
- Recent example: \$276,000 fine against Alpine Staffing, Inc.



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>

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 | pboehms@clarkhill.com.
- www.hr-advantage.com

LITIGATION TO CHALLENGE ERRONEOUS AGENCY DECISIONS, UNREASONABLE DELAYS, OR UNFAVORABLE POLICY CHANGES

- Under Administrative Procedure Act (APA), can challenge agency action that is arbitrary, capricious, contrary to law, or not supported by substantial evidence
- Abrupt departure from prior decision-making or established policy, without adequate rationale and explanation, is arbitrary and capricious
- Need “final agency action” and exhaustion of administrative remedies before bringing suit in federal district court
- Mandamus lawsuit can be brought to challenge unreasonable agency delays – in adjudication of benefits applications, issuance of visas, or any other non-discretionary duty
- Mandamus not appropriate until delay has become “unreasonable” – review posted average processing times for particular application or agency action
- Litigation can be very effective in pressuring agency to engage on disputed issues and agree to settlement to avoid potentially unfavorable precedent

QUESTIONS?



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THANK YOU

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

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