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Tougher USCIS Adjudications Don't Protect American Jobs

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Overview

The Trump administration has claimed from its inception that legal immigration should focus on attracting the "best and the brightest" from around the world.[1] But while our nation's immigration laws themselves remain unchanged, sub-regulatory changes in the ways in which employment-based visa petitions are analyzed and processed constitute a real change in policy that does not support this stated goal. The paradoxical result is that employers who cannot find the talent they need among the U.S. workforce are increasingly considering expanding facilities abroad where they will have access to the skills they require. This, in turn, will have a negative impact on the creation of jobs for U.S. workers within our borders.

Buy American, Hire American

On April 18, 2017, President Donald J. Trump issued an executive order entitled "Buy American, Hire American" (BAHA)[2] which was a statement of the administration's intent to protect the economic interests of American workers in the management of employment-based immigration. The order directed the Department of Homeland Security (DHS), Department of State (DOS), and Department of Labor (DOL) to focus on increasing H-1B wage minimums and

The "Buy American, Hire American" philosophy has resulted in precipitous changes in how USCIS adjudicates employment-based visa petitions.

on altering other aspects of the H-1B program in an effort to promote the hiring of U.S. workers over foreign workers. The precipitous changes in how U.S. Citizenship and Immigration Services (USCIS) has been adjudicating employment-based visa petitions, including changes both in the substance of the agency's interpretation of relevant law and in the procedures it uses in processing cases, are how the "BAHA" philosophy has been effectuated.

The result has been a significant increase in requests for evidence (RFEs) and in denials of many employment-based petitions for both temporary and permanent foreign workers. The changes are not limited to how USCIS processes H-1B petitions; rather, the impact extends to other types of work visa categories as well. For example, in the last quarter of FY 2017, close to 70% of H-1B petitions received an RFE, nearly equaling the number of RFEs issued in the first three quarters combined. Nearly 20% of H-1B petitions were denied in FY 2017. Nearly 30% of L-1B specialized knowledge filings were denied by USCIS in the first half of FY 2018, compared to a 24% denial rate in FY 2016.[3]

New Policy on Computer Programmer Positions

An early hint of changes to come was found in a policy memorandum dated March 31, 2017, in which USCIS takes the position that the occupation of computer programmer is no longer presumed to be an H-1B "specialty occupation."[4] The new guidance rescinds a legacy memorandum that had deemed the position of computer programmer to qualify as an H-1B specialty occupation.[5] Citing the DOL's *Occupational Outlook Handbook* (OOH), USCIS concludes that because an associate's degree could qualify an individual to perform the work of a programmer, entry-level computer programmer positions will not generally rise to the level of a specialty occupation.[6]

A "specialty occupation" is defined in the Immigration and Nationality Act (INA) as an occupation that requires: (1) theoretical and practical application of a body of highly specialized knowledge; and (2) attainment of a bachelor's or higher degree in the specific specialty (*or its equivalent*) as a minimum for entry into the occupation in the United States.[7] In recent years, USCIS adjudicators have increasingly challenged whether offered H-1B positions require a bachelor's degree. Adjudicators frequently ask employers to demonstrate that a bachelor's degree is a standard requirement of the employer or the particular industry, or that the position is complex, unique, or specialized. The new guidance formalizes these longstanding trends. Moreover, recent denials of H-1B petitions for computer-related positions in particular (but not limited to such positions) have been predicated on an analysis of the law suggesting that even where the job requires a bachelor's degree, the degree must be in a very specific field.

As an example, USCIS denied an H-1B petition for an IT software engineer, for which the employer required a minimum of a bachelor's degree or equivalent in computer science, computer engineering, mathematics, or a related field. The foreign national in question possessed a master of technology degree in computer engineering and a bachelor of engineering degree with a major in computer science. USCIS denied the petition on the ground that the petitioner failed to establish how the particular position qualified as a specialty occupation since the petitioner did not require a bachelor's degree in a particular specialty. Moreover, USCIS questioned in particular the fact that the employer would accept a bachelor's degree in mathematics, since that is "a broad field of study that encompasses many occupation[s]" including "elementary and high school teachers."[8]

The stricter adjudication of H-1B petitions is not limited to positions in the technology sector, but has spread to other industries, thereby disrupting long-standing adjudication policies upon which employers have come to rely. For example, USCIS denied an H-1B petition for the position of Operations Research Analyst at a major financial services institution, where the duties would include developing sophisticated valuation models of derivative products, developing statistical models to analyze market risk factors, applying machine learning approaches to enhance various product control processes, performing pricing analyses, and more. Because the DOL's OOH states that some operations research analysts have degrees not in operations research but in other technical or quantitative fields such as engineering, computer science, analytics, or mathematics,[9] USCIS concluded that the position is not a specialty occupation, since "it is not evident that an individual must have at least a bachelor's degree in a specific field of study to qualify for the proferred position."[10]

Focus on Wages

In the same guidance providing that the occupation of computer programmer is no longer presumed to be a "specialty occupation," USCIS instructed adjudicators to consider wages when determining whether an offered position

More than ever before, employers are being required to provide voluminous, detailed wage-related and other evidence to explain how a job qualifies as a specialty occupation.

qualifies as an H-1B specialty occupation.[11] As a result, employers started seeing a surge in RFEs in cases involving entry-level professional positions and wages that fall into Level I of the DOL's four-level occupational wage data. RFEs have been issued even in cases where the offered salary listed on the H-1B petition far

exceeds DOL Level I, but where the prevailing wage is nevertheless based upon DOL's Level I by virtue of the calculation method mandated by DOL's instructions on determining prevailing wages.

The wage-related RFEs—which have not been limited to computer programmer or IT-related positions—typically claim that the job duties appear too complex for a wage at DOL Level I, that the Level I wage suggests the position does not qualify as a H-1B specialty occupation, or both.

It is worth noting that the legislative history of the H-1B provisions of the Immigration Act of 1990 recognizes that "certain *entry-level* workers with highly specialized knowledge are needed in the United States. . . ."[12] This makes clear that Congress contemplated that the H-1B category could, in fact, be appropriate for entry-level workers. Therefore, the fact that a position is entry-level is not necessarily inconsistent with a claim that a job qualifies as a specialty occupation. Nonetheless, employers are now being required to provide voluminous, detailed information—including expert opinions, industry data, and other evidence—to demonstrate that Level I is the appropriate wage for the position, and to explain in greater detail than ever before how the job qualifies as a specialty occupation.

Rescission of Deference Policy

In October 2017, USCIS rescinded a longstanding policy that required adjudicators to give deference to the agency's previous determinations of eligibility when reviewing an application for a nonimmigrant extension of status.[13] USCIS

Adjudicators no longer have to give deference to previous agency determinations of eligibility when reviewing applications for extension of status.

now takes the position that adjudicators are no longer bound by past petition approvals when reviewing an H-1B, L-1, or other nonimmigrant extension request. Officers have been given broader authority to re-adjudicate a foreign

beneficiary's eligibility for a nonimmigrant classification each time an extension request is filed—even in cases where there has been no change in facts since the initial petition was approved.

Under prior policy, officers were required to give deference to past approvals unless there was a substantial change in circumstances that affected the beneficiary's eligibility for the nonimmigrant classification, the agency made a material error in the previous approval, or new information adversely affected a beneficiary's eligibility for the nonimmigrant status. That guidance, in place since 2004, has now been rescinded.

New Policy on Third-Party Placements

In a policy memorandum released in February 2018, USCIS announced that it would require employers of H-1B workers to disclose detailed information about vendor and end-client relationships when petitioning for employees who will be placed at third-party sites.[14] Though USCIS has long asked H-1B petitioners to provide information about third-party assignments, the new guidelines indicate that the agency means to scrutinize relationships among petitioners, subcontractors, and end-clients even more closely than in the past and will seek direct confirmation of H-1B assignments from end-clients in initial petitions and extensions. More broadly, the new policy gives USCIS the ability to scrutinize an organization's practices and patterns of engagement with subcontractors and customers.

The 2018 guidelines require petitioners to document that there are specific H-1B-qualifying assignments for the entire period of an H-1B worker's employment. USCIS adjudicators require corroborating evidence that the work performed by the H-1B employee at a third-party worksite will be in a specialty occupation, and will examine the end-client's requirements to make that determination. The agency also now frequently requests detailed itineraries, reversing its longstanding policy of requiring itineraries only where the beneficiary's work location will change.

USCIS also uses contracts and related documentation to determine whether the petitioner will maintain an employer-employee relationship with the H-1B worker throughout the period of employment.

Site Visits and Information Sharing

USCIS announced on April 3, 2017, that it was implementing new measures to combat perceived fraud in the H-1B program.[15] Although all H-1B employers have long been (and will continue to be) subject to random and announced site visits, the agency's Fraud Detection and National Security (FDNS) unit started focusing its site visit program specifically on H-1B-dependent employers, employers who place H-1B workers at third-party worksites, and employers whose businesses cannot be verified through commercially available information (such as VIBE). FDNS site visits have also expanded to employers of workers holding L-1 intracompany transferee visa status. The DOL also announced in April 2017 its intention to increase site visits, couching it as an effort to protect American workers from being discriminated against in favor of foreign workers on H-1B visas.[16] Meanwhile, employers are sometimes experiencing multiple site visits by multiple agencies.

In October 2017, DHS's Office of Inspector General issued a report recommending steps USCIS should take to improve the H-1B site visit program.[17] Among other things, it recommended more site visits, improved efforts to prevent recurring violations by employers, and better interagency data sharing. USCIS confirmed that it intends to implement the recommendations, including measures to share site visit information with DOJ, DOL, and DOS. USCIS will allow DOL to access information on petitioners under investigation or identified as having committed fraud.

To this end, USCIS executed a memorandum of understanding with DOL in January 2017 to share access to agency systems containing certain labor condition application and employment-based petition information. Both agencies are evaluating statutory authorities that would allow for USCIS to systematically share site visit information with DOL. USCIS will also allow DOS access to USCIS site visit information through the FDNS Data System, to inform DOS's adjudication of visa applications. Both agencies are working to create mechanisms by which DOS can share with USCIS derogatory information DOS uncovers while adjudicating a visa. Finally, USCIS will establish a memorandum of understanding to share site visit information with DOJ that may aid in prosecuting H-1B employers who intentionally discriminate against U.S. workers.

Denying Petitions Without RFE or NOID

Pursuant to guidance issued on July 13, 2018, and effective as of September 11, 2018, USCIS adjudicators now have broad authority to deny a case without an RFE or notice of intent to deny (NOID) when they determine a lack of sufficient "initial evidence."[18] The guidance applies to applications, petitions, and requests received by USCIS after September 11, and effectively rescinds the previous policy that restricted an adjudicator's ability to deny a case without first giving the petitioner or applicant an opportunity to provide more evidence to prove the case.

The July 2018 guidance memo did not clarify what was meant by "initial evidence." On September 11, 2018, USCIS posted required initial evidence checklists for certain forms, including Forms I-129, I-129S, I-140, I-485, I-130, I-765, I-131, and N-400, among others. USCIS has said that the checklists are to be used for "informational purposes only," and overall, the checklists are quite general.[19] However, the checklists issued by USCIS do not substitute for the statute, regulation, or form instructions as authority for what is considered required initial evidence.

Issuing NTAs After Benefits Denial

The new RFE/NOID guidelines came out as USCIS also takes on new and expanded enforcement priorities that could increase the negative consequences of a petition or application denial. Pursuant to a policy memorandum dated June 28, 2018, the agency will start issuing a notice to appear (NTA) in immigration court—thereby initiating removal proceedings—to foreign nationals whose application for an immigration benefit (such as an extension of a nonimmigrant stay or an application for adjustment of status) is denied and whose underlying status has expired.[20]

The memorandum gave local USCIS offices until July 28, 2018, to develop procedures for the referral of cases, but implementation was further postponed until October 2, 2018, when the agency began phasing in the new NTA policy. Initially, USCIS will apply the policy to Form I-485 permanent residence applicants and to Form I-539 applicants to extend or change nonimmigrant status. Employment-based petitions for temporary workers—including H-1B, L-1, E, and O petitions—were not immediately subject to the enforcement policy, but will be added at a later date.

Here it is worth noting that since October 1, 2017, USCIS has required applicants for employment-based adjustment of status to permanent residence (and any family members) to attend a personal interview before their green card case can be processed to completion. The interview requirement is part of the agency's compliance with President Trump's executive order of March 6, 2017, on protection of the United States from terrorist activities.[21] That order directs federal agencies to implement uniform screening and vetting standards for all immigration programs. The interview requirement applies to all employment-based adjustment applications filed on or after March 6, 2017, and has contributed to lengthening processing times for adjustments. Previously, most employment-based adjustment applicants benefited from a blanket waiver of the interview requirement—unless USCIS identified an issue that could affect the applicant's eligibility to adjust status, such as an arrest or conviction—recognizing that employment-based applicants posed few security risks.

The new NTA requirement, depending upon how it is ultimately implemented, poses special risks for persons appearing at an immigration office (including employment-based adjustment applicants) if their application is denied. So far, indications are that NTAs will not be issued immediately upon denial of an immigration benefit. USCIS has stated that it will await the expiration of the filing deadline for an appeal or motion to reopen, generally thirty-three days from the date of USCIS's denial decision, to issue an NTA. USCIS does, however, reserve the right to issue an NTA prior to the appeal or motion expiration deadline.[22]

Immigration Creates Jobs for U.S. Workers

All of the new policies outlined above are part of a plan to restrict legal immigration, even without any legislation from Congress changing the underlying statutory provisions. To the extent that the administration's "BAHA" philosophy restricts the legal immigration of skilled workers, however, it may actually hurt the U.S. economy more than it helps.

It is no secret that, as in many developed countries, falling birthrates in the United States are creating challenges for the economy, especially with an aging population of Baby Boomers entering retirement. Indeed, in the United States, the birthrate would be below population replacement levels if not for immigration.[23] It is also true that the growing number of jobs in the so-called STEM

fields—science, technology, engineering, and mathematics—cannot all be filled by the relatively small numbers of American students who choose to pursue advanced post-secondary training in those fields.

Degrees awarded by U.S. colleges and universities in science and engineering, for example, account for approximately one-third of all bachelor's degrees awarded in the United States,[24] of which only about 4% are earned by non-U.S. citizens.[25] At the graduate level, however, a full 40% of U.S. master's degrees in computer science and engineering are earned by foreign students, and within engineering, foreign students earn more than half of the master's degrees in electrical and chemical engineering.[26] At the doctoral level, foreign students earn half or more of U.S. Ph.D. degrees in engineering and computer science.[27] The federal government's own data suggests that by the year 2020, there will be more than 1.4 million software development jobs in the United States but only 400,000 U.S. college graduates with the skills to fill them.[28]

Recent research shows that two-thirds of economic growth in the United States since 2011 is directly attributable to immigration.[29] More than a quarter of all new businesses in the United States are founded by immigrants,[30] while more than 40% of Fortune 500 companies were founded by immigrants or their

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children.[31] In addition, more than half of startups valued at more than $1 billion were founded by immigrants,[32] and these startups have created an average of 760 jobs each.[33] A 2016 study of the eighty-seven billion-dollar startups in the United States showed that almost half of the immigrant founders of such companies first came to the United States as international students.[34] Research also indicates that,

at worst, the presence of immigrants in the work force does nothing to depress labor force participation by native-born workers.[35] At best, immigrants create jobs—approximately 1.2 jobs for local workers for each immigrant, according to one study—and most of those jobs go to native-born workers.[36]

What this all means is that without immigration, companies cannot expand. Without such expansion, there are fewer jobs for U.S. workers. Without immigration, many U.S. companies find ways to outsource the work abroad—and not just to countries with lower labor costs. For example, Microsoft announced in July 2018 that restrictive U.S. immigration policies were forcing it to consider moving jobs from the United States to other countries.[37] Three months later, the company announced its intention to invest more than $570 million in Canada, where it expected to hire more than 500 full-time employees.[38] Our firm has regular discussions with companies considering locating plants in other countries because of increasingly restrictive immigration policies in the United States.

Not surprisingly, Canada is trying to make it easier for international students to remain in Canada after they finish their studies.[39] This is in contrast to the United States, where the federal government has made life harder for foreign students by, among other things, radically revising how it calculates the accrual of unlawful presence for students and exchange visitors who fail to maintain their nonimmigrant status[40] and making plans to restrict foreign students' access to practical training upon completion of their studies.[41] This is in an environment where H-1B work visas—even when they are not subject to overly restrictive interpretations—are in short supply[42] and doled out to employers via lottery.[43]

Protecting Americans, hiring Americans, buying American—this may all sound good on paper. But doing so at the expense of the legal immigration the American economy needs is short-sighted and counterproductive.

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NOTES

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3. Nat'l Found. for Am. Policy [NFAP], NFAP Policy Brief, H-1B Denials and Requests for Evidence Increase Under the Trump Administration (July 2018), https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf.
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5. U.S. Dep't of Homeland Sec., USCIS Policy Memo., Guidance Memo on H-1B Computer Related Positions (Dec. 22, 2000).
6. 2017 Policy Memo, *supra* note 4.
7. INA § 214(i)(1), 8 U.S.C. § 1184(i)(1) (emphasis added).
8. USCIS Denial of H-1B Petition (Sept. 6, 2018) (on file with the authors).
9. Bureau of Labor Statistics, Occupational Outlook Handbook, Operations Research Analyst (U.S. Dep't of Labor Apr. 4, 2018), www.bls.gov/ooh/math/operations-research-analysts.htm.
10. USCIS Denial of H-1B Petition (Aug. 30, 2018) (on file with the authors).
11. *See* 2017 Policy Memo, *supra* note 4.
12. *See* H.R. Conf. Rep. 101-955 at 67, *reprinted in* 1990 U.S.C.C.A.N. 6710, 6747 (Oct. 26, 1990) (emphasis added).
13. *See* USCIS Policy Memo. PM-602-0151, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status (Oct. 23, 2017), www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf, *superseding and rescinding* USCIS Interoffice Memo. HQOPRD 72/11.3, The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity (Apr. 23, 2004), and section VII of USCIS Policy Memo. PM-603-0111, L-1B Adjudications Policy (Aug. 17, 2015), relating to re-adjudication of L-1B status, which articulated a "default policy of deference."
14. *See* USCIS Policy Memo. PM-602-0157, Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites (Feb. 22, 2018), www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf. Note that the PDF of the actual memorandum does

not include a date, but USCIS posted the memo on its website on February 22, 2018, and stated that the "Release Date" was "Feb. 22, 2018."

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25. *Id.*, App. Table 2-18 (earned bachelor's degrees, by citizenship, field, race and ethnicity: 2000–13).

26. *Id.*, App. Table 2-29 (earned master's degrees, by citizenship, field, race, and ethnicity: 2000–13).
27. *Id.*, App. Table 2-33 (earned doctoral degrees, by citizenship, field, race, and ethnicity: 2000–13).
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39. *See, e.g.*, Canadian Bur. for Int'l Educ., Retaining International Students in Canada Post-Graduation: Understanding the Motivations and Drivers of the Decision to Stay (June 2018), https://cbie.ca/wp-content/uploads/2018/06/Intl-students-post-graduation-RiB-8-EN-1.pdf; *see also* Kerrie Kennedy, *Canada: Provinces Adopt 'Study & Stay' Program*, PIE News (May 12, 2018), https://thepienews.com/news/canada-provinces-adopt-program-keep-intl-students/; Eman Katem, *Canada Considers International Student Migration Important for Growth in the Atlantic Provinces*, Canada Study News (July 10, 2018), www.canadastudynews.com/2018/07/10/canada-considers-international-student-immigration-key-for-growth-of-atlantic-provinces/.
40. *See* USCIS Policy Memo. PM-602-1060.1, Accrual of Unlawful Presence and F, J, and M Nonimmigrants (Aug. 9, 2018), www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf.
41. *Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions*, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, https://reginfo.gov/public/do/eAgendaMain (last visited Oct. 9, 2018) (setting out the Trump administration's intent to issue a notice of proposed rulemaking to comprehensively revise practical training rules for F and M foreign students, *see* https://reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1653-AA76).
42. *See* INA § 214(g), 8 U.S.C. § 1184(g) (setting annual cap of 65,000 on the total number of foreign nationals who may be issued H-1B visas or otherwise provided H-1B status during any fiscal year). Overall H-1B numbers are reduced by the U.S.-Chile and U.S.-Singapore Free Trade Agreements, which set aside 6800 H-1B numbers for professionals from those two countries each fiscal year. *See* United States-Chile Free Trade Agreement Implementation Act, H.R. 2738, Pub. L. No. 108-77, 117 Stat. 909 (Sept. 3, 2003); United States-Singapore Free Trade Agreement Implementation Act, H.R. 2739, Pub. L. No. 108-78, 117 Stat. 948 (Sept. 3, 2003). Legislation enacted in 2004 created an exemption from the cap for 20,000 advanced degree graduates of U.S. universities, effectively raising the cap to 85,000. *See* div. J, tit. IV of Consolidated Appropriations Act, 2005 (H.R. 4818), Pub. L. No. 108-447, 118 Stat. 2809 (Dec. 8, 2004). Several other types of H-1B cases are exempt from the annual cap, including (1) petitions for employment at organizations including

institutions of higher education or a related or affiliated nonprofit entity, nonprofit research organizations, and governmental research organizations; (2) petitions for an individual who has already been counted against the cap during the previous six years, unless the beneficiary would be eligible for a full six years of authorized admission at the time the petition is filed; and (3) petitions for J-1 nonimmigrants who are changing status to H-1B and who obtained waivers through the Conrad 30 Program or other federal government programs. In additions, petitions seeking an extension or amendment of an H-1B worker's authorized period of stay are also exempt from the cap.

43. *See* 73 Fed. Reg. 15,389 (Mar. 24, 2008).