

How AI Executive Order Aims To Compete For Foreign Talent

By **Eric Bord** (December 11, 2023, 4:52 PM EST)

The rapid advancement of artificial intelligence is revolutionizing industries and permeating many aspects of modern life.

To harness the immense potential of AI while mitigating its risks, the Biden administration issued an executive order on Oct. 30, titled "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence."^[1] This comprehensive directive outlines a strategic approach to AI development and utilization, encompassing aspects such as safety, security, equity and international collaboration.



Eric Bord

Recognizing the critical role of human ingenuity and capital in the AI ecosystem — and the global competition for the talent required to develop AI and related STEM-based technologies — the executive order includes several immigration-related provisions that seek to reduce current barriers to timely and predictable immigration for AI and other science, technology, engineering and math professionals from around the world.

The ambition of the executive order remains constrained, however, by outdated laws and a dysfunctional political process that stand as impediments to the more meaningful legislative changes required to secure and sustain a coherent, modern and internationally competitive immigration infrastructure.

Updating Existing Nonimmigrant and Immigrant Programs

Notwithstanding the limitations imposed by the Immigration and Nationality Act, the executive branch retains significant authority to interpret and apply the authority granted to it by Congress.

The executive order identifies several areas where the U.S. Department of Homeland Security and the U.S. Department of Labor are instructed to exercise that authority to clarify, modernize and enhance nonimmigrant and immigrant opportunities in the areas of AI and other critical and emerging technologies.

Expanded EB-2 Eligibility

Elements of the executive order, if fully implemented, could make EB-2 national interest waiver and EB-2 Schedule A, Group 1, permanent resident strategies much more accessible and feasible for highly skilled technology professionals.

Most employer-sponsored permanent resident programs require employers to obtain a DOL certification that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment, and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

This labor certification requirement currently takes upwards of two years to complete and is a burdensome, costly element of many green card processes.

The EB-2 national interest waiver waives the labor certification requirement. EB-2 Schedule A, Group 1, avenues to permanent residence do not require employers to conduct a labor market test as part of the labor certification process.

Consequently, both offer a faster, potentially more predictable and often less costly alternative to labor certification that is significantly more attractive to potential AI and STEM technology experts seeking permanent residence.

National Interest Waiver

Though not explicitly referenced in the executive order, one of its more significant and immediate impacts may be enhancing the availability of the EB-2 national interest waiver as a vehicle for AI and other critical and emerging technology professionals to qualify for permanent resident status.

In accordance with the 2016 U.S. Citizenship and Immigration Services' Administrative Appeals Office decision in *Matter of Dhanasar*, USCIS may grant a national interest waiver to a petitioner that demonstrates: (1) the foreign national's proposed endeavor has both substantial merit and national importance, (2) the foreign national is well positioned to advance the proposed endeavor, and (3) on balance, it would be beneficial to the U.S. to waive the job offer and labor certification requirements.

The broad language of the executive order is a clear statement by the executive branch that it is in the national interest of the U.S. to attract individuals with science or technology expertise who are seeking to conduct research or work on AI and other critical technologies, and to provide immigration processes that are streamlined, timely, modern and expeditious.

This language directly addresses the first and third prongs of the *Dhanasar* test. If the foreign national possesses an advanced degree or an equivalent, and can otherwise satisfy the second prong of *Dhanasar*, then a petition requesting a national interest waiver from a bona fide employer should be approvable.

Schedule A Modernization

A similarly impactful element of the executive order requires that the DOL consider updating the current list of EB-2 Schedule A occupations.

A Schedule A occupation is one for which the DOL has predetermined there is an insufficient number of ready, willing, able and qualified U.S. workers. As a consequence, no labor market test is required to obtain labor certification for such occupations. The current list of qualifying occupations is woefully outdated, and includes only physical therapists and professional nurses.

In an effort to expand the use of Schedule A, the executive order requires the secretary of labor to publish a request for information to solicit public input on expanding the Schedule A list of occupations by Dec. 14, to include a range of AI and STEM-related occupations, "as well as additional occupations across the economy, for which there is an insufficient number of ready, willing, able, and qualified U.S. workers."

Expanding the list of Schedule A shortage occupations would be a long-overdue modernization of a program that has not been updated in decades. If the DOL were to use this as an opportunity to create a new, dynamic and evergreen mechanism for designating Schedule A occupations based on up-to-date labor market data, it would represent a major advancement toward ensuring that the country's employment-based immigration programs have the agility and adaptability to reflect its current and evolving needs and priorities.

Employers and industry associations that are interested in providing input should use the request-for-information process as an opportunity to contribute to the agency's deliberations.

Unfortunately, neither the national interest waiver nor the expansion of Schedule A can address what may be the greatest obstacle to making the U.S. immigration system more attractive to highly skilled workers in the countries from which there is currently the greatest demand: India and China.

Until Congress addresses the current country-based backlogs — which make the green card process a 10- to 20-year odyssey — the U.S. may remain at a comparative disadvantage in recruiting AI and STEM-based expertise.

Nonimmigrant Visa Programs and Enhanced Adjustment of Status Processes

The executive order also calls on the secretary of homeland security to "review and initiate any policy changes the Secretary determines necessary and appropriate to clarify and modernize immigration pathways for experts in AI and other critical and emerging technologies" by April 27, 2024.

It also calls on DHS to "continue its rulemaking process to modernize the H-1B program and enhance its integrity and usage, including by experts in AI and other critical and emerging technologies, and consider initiating a rulemaking to enhance the process for noncitizens."

This is in many ways a reflection and continuation of the administration's ongoing efforts to attract global STEM talent as part of an effort to enhance technological competitiveness.[2]

Within the past two years, the administration expanded the F-1 student visa fields of study included in the STEM Optional Practical Training program, updated its policy manual related to O-1A extraordinary ability — and by extension EB-1 extraordinary ability — petitions, and published a notice of proposed rulemaking to modernize the H-1B rules.[3]

The executive order suggests the possibility of additional rulemaking "that would enhance the process for noncitizens, including experts in AI and other critical and emerging technologies and their spouses, dependents, and children, to adjust their status to lawful permanent resident."

Perhaps this somewhat cryptic language foreshadows a mechanism whereby the I-485 dates for filing in the U.S. Department of State's visa bulletin might be accelerated for certain qualifying employment-based applicants.

Streamlined Visa Processing for AI Experts

Recognizing the critical role of immigrants in driving innovation and economic growth, the order requires the secretary of state and the secretary of homeland security to "streamline processing times of visa petitions and applications, including by ensuring timely availability of visa appointments, for noncitizens who seek to travel to the U.S. to work on, study, or conduct research in AI or other critical and emerging technologies."

The two agencies have until Jan. 28 to take the required appropriate steps.

It remains to be seen what measures the agencies propose, particularly with respect to the timing of visa appointments and the issuance of visas. While the availability of visa appointments at U.S. consulates has recovered considerably from the near shutdown of visa processing during and following the COVID-19 pandemic, there are posts with active business visa sections where it still takes a month or longer to schedule an H-1B visa appointment.

In addition, many AI visa applicants, given the technical areas of their expertise, face additional delays for administrative processing on national security, export control or technology transfer grounds, which currently can add weeks and sometimes months to the visa adjudication process.

Applicants who process as third-country nationals experience a greater likelihood of administrative processing delays. Proposals and programs that address these delays and that reduce the current uncertainty in visa processing will be welcome.

These might include, among other changes:

- Increased use of interview waivers;
- Reduced barriers to third-country national processing;
- Improvements in the user-unfriendly online DS-160 U.S. nonimmigrant visa application platforms;
- Improved coordination between USCIS and the State Department with respect to the Petition Information Management Service database;
- Improvements in immigrant visa processing by the National Visa Center; and
- Greater efficiency, transparency and exercise of discretion in administrative processing.

Modernizing the J-1 Program

In 1972, the State Department published the first J-1 skills list, which identified specific occupations and fields of knowledge deemed essential for the development of foreign nationals' home countries. This list was intended to guide consular officers in determining whether a J-1 visa applicant's proposed training was relevant and clearly required for their professional development and for the benefit of their home country.

Since then, however, the determination as to what occupations and fields of knowledge are deemed essential has been made not by U.S. consular officials, but rather by the governments of home countries.

While there may have been a legitimate U.S. national interest in avoiding a so-called brain drain from countries like China, India and South Korea in the 1970s, there is no such concern today. Yet the current J-1 rules impose a two-year foreign residence requirement on J-1 researchers, engineers, scientists, technologists, and others from these and other technologically advanced and competitive economies.

The executive order calls on the State Department, by Feb. 27, 2024, to:

- (i) consider initiating a rulemaking to establish new criteria to designate countries and skills on the Department of State's Exchange Visitor Skills List as it relates to the 2-year foreign residence requirement for certain J-1 nonimmigrants, including those skills that are critical to the U.S.;
- (ii) consider publishing updates to the 2009 Revised Exchange Visitor Skills List.

A modernized J-1 skills list that no longer includes AI, STEM and similar fields for China, India, and other technologically advanced and competitive economies would be a more rational list that creates additional and less restrictive opportunities for U.S. academic-, research- and private-sector enterprises to expand their use of J-1 programs for researchers, scholars, and AI and STEM professionals who are interested in sharing and developing their expertise in the U.S. as exchange visitors.

Domestic Visa Renewal

Domestic visa renewal — the reissuance of some visas by the State Department in the U.S. rather than at consulates abroad — was discontinued in 2004. As a consequence, all visa renewals, which by definition are for individuals who have already been vetted by the government and who in most instances have spent months or years in the U.S., must take place at U.S. consular posts abroad.

The time and cost of travel for visa renewal, combined with the processing time, presents a burden for applicants and their employers.

The executive order recognizes the desirability and potential benefits of domestic visa renewal in some instances, and calls on the State Department to explore its implementation for highly skilled talent in AI and critical and emerging technologies, as well as for J-1 research and F-1 STEM programs.

In fact, the State Department already has a plan to pilot a domestic visa renewal program for low-risk applicants that is expected to launch in 2024. The executive order may provide additional impetus for that effort.

Promoting the U.S. as an AI Destination

The executive order recognizes the importance of attracting and retaining AI talent from around the world. To achieve this objective, the order directs relevant agencies to engage in an international campaign to promote the U.S. as an attractive destination for individuals with science or technology expertise seeking to study, research, or work on AI and other critical technologies.

This campaign could highlight the United States' robust research infrastructure, strong entrepreneurial

ecosystem and diverse culture, all of which could contribute to a thriving AI environment.

Conclusion

The Biden administration's executive order on AI demonstrates a clear commitment to fostering a robust and globally competitive AI industry in the U.S. The immigration provisions within the order represent a strategic approach to addressing the global competition for talent by seeking to attract and retain AI and STEM talent from around the world.

By streamlining visa processing, enhancing educational and exchange programs, promoting the U.S. as an AI destination, and improving current visa programs and pathways to permanent residency, the Biden administration aims to cultivate a diverse and skilled AI workforce that will drive innovation and contribute to the nation's economic competitiveness. The effective implementation of these measures will be crucial in ensuring that the U.S. remains at the forefront of AI development and utilization.

Eric S. Bord is a partner and head of the immigration compliance and risk management practice at Morgan Lewis & Bockius LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>.

[2] <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/21/fact-sheet-biden-harris-administration-actions-to-attract-stem-talent-and-strengthen-our-economy-and-competitiveness/>.

[3] Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers. 88 FR 72870 (Oct. 23, 2023).