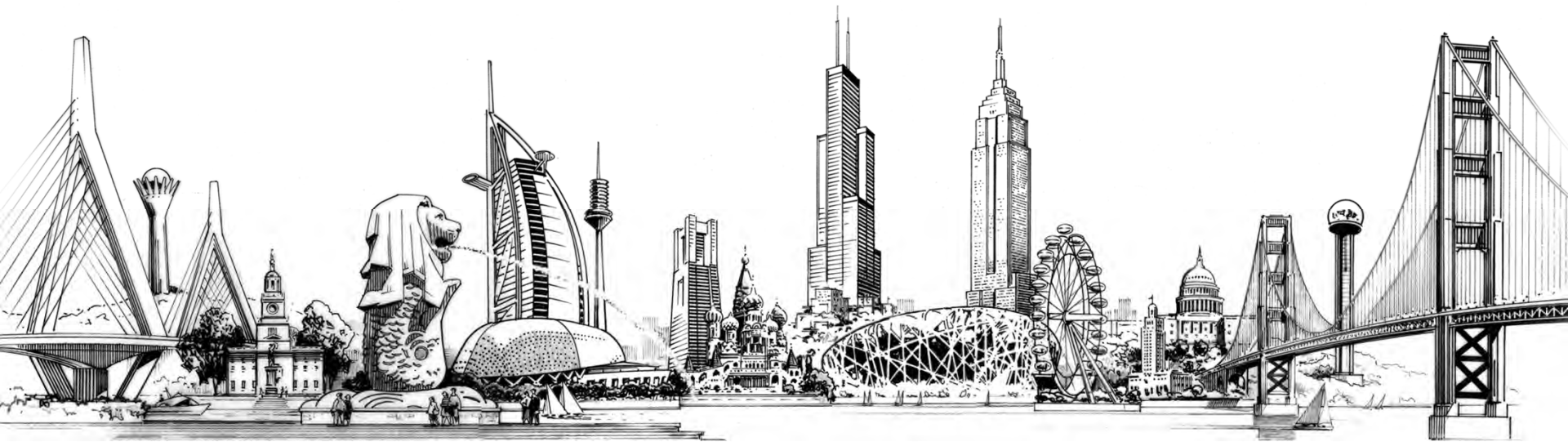


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# **IMMIGRATION DOING BUSINESS IN THE GOLDEN STATE**

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# Immigration and the Trump Administration

Our Three Topics for Today:

- The Three Published Executive Orders on Immigration
- The Leaked Executive Order on Business Immigration
- New Agency Activism (USCBP, USCIS, DOL) and How to Deal with It

# What Has and Has Not Happened?

- The President Has Signed Three Executive Orders Dealing With Immigration
- One Proposed Executive Order Specifically Addressing Skilled Immigration Has Yet to Be Signed and Was Leaked in January; No Action on It Since Then
- No Immigration Law or Regulation Has Been Overruled or Rescinded.
- No Action Has Been Taken to Limit or Restrict Business/Skilled Immigration
- All of the Immigration Agencies Have Taken Steps to Signal a New Activism, Probably Arising From the New Administration

# What Has Happened – The Trump Executive Orders on Immigration

- Executive Order #1 – Public Safety in the Interior of the United States (1.25.2017)
  - Prevents “Sanctuary Cities” from Receiving Federal Grants, Prioritizes Removal of Criminal Aliens
- Executive Order #2 – Border Security and Immigration Enforcement Improvements (1.25.2017)
  - Authorizes Construction of Border Wall, Hiring of More Border Patrol Officers, and Detention of Aliens in Removal Proceedings

# Executive Order #3 – Protecting the Nation from Terrorist Attacks (Reissued 3.6.2017) – Travel Ban

- “Protecting the Nation from Terrorist Attack by Foreign Nationals”
- 90-Day Admission Ban for Nationals of, or “Persons From” Iran, Libya, Somalia, Sudan, Syria, and Yemen Who Are Not US Citizens or Permanent Residents (“Persons From” Not Defined)
- Admission Ban Will Be in Place for 90 Days
- Dual Nationals (i.e., Nationals of an Affected Country and a Non-affected Country—e.g., Iran/Canada) are Not Subject to the Admission Ban
- US Citizens with Dual Nationality – Not Affected
- Persons with Valid Visas on January 27, 2017 – Not Affected
- Applications for Other Immigration Benefits (Forms I-140, I-129, EAD, AP, etc.) – Not Affected
- Viewed as Anti-Muslim Ban: Enforcement of Ban Has Been Enjoined by Federal Judges

# Executive Order #3 – Visa Interview Waiver Process

- The Visa Interview Waiver Program (Drop Box) Has Been Terminated
- All Visa Applicants at US Consulates, Regardless of Citizenship, Will Have to Undergo a Personal Interview, Even if Reapplying for a Visa
- Visa Wait Times Are Expected to Increase
- This is NOT a Termination of the Visa Waiver Program
- Implementation at Consulates Unclear

# International Travel After Executive Order #3

- No Need to Postpone or Avoid International Travel if not Foreign National of One of the Six Countries
- Be Ready for Delays in Visa Applications and on Arrival in United States – Secondary Inspection
- Make Sure to Have Valid Passport, Visa Stamp, Form I-797, Letter Confirming Employment
- Secondary Inspection if Foreign National of One of Six Countries or Have Visited These Countries
- Prohibition on Laptops/iPads/Tablets if Traveling to United States from Casablanca, Istanbul, Cairo, Amman, Jeddah, Riyadh, Kuwait, Doha, Abu Dhabi, Dubai (UK has Similar Ban)

# Proposed Executive Order #4 – Protecting American Jobs and Workers (1.23.2017) – Not Yet Signed

- “Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs”
- The Only Executive Order Squarely Addressing Business/Skilled Immigration = Best Insight into Trump Administration’s Thinking on Subject
- Order Not Signed – Why Not?
- Most Provisions Consist of Requirements That Certain Historically Problematic Subjects Be Studied and Recommendations Provided; No Immediate Prohibitions
- Dual Overall Purpose to “Prioritize Interests of American Workers,” but Also to Attract “Best and Brightest”



# Proposed Executive Order #4 – Review of All Regulations that Allow Foreign Nationals to “Work” in United States

- Requires Study within 90 Days of Regulations That Allow Foreign Nationals to “Work” in The United States and Determination of Which Regulations Violate Immigration Laws
- Preamble to Rule Suggests “Work Permits” Are Being Targeted
- H-4, L-2, E-1, E-2 EADs May Be Scrutinized – (Administration’s Position on H-4 EADs May Be Announced Soon as Part of Ongoing Litigation)
- Not an Attack on Skilled Immigration; More of an Attack on Collateral Employment

# Proposed Executive Order #4 – Review of Parole Programs

- Requires Publication of Regulation to Limit or Terminate Parole Programs That Do Not Comport with US Immigration Law
- Obama Entrepreneur Parole Regulation Obvious Target
- No Indication That Adjustment-Based Parole Programs Are Targets

# Proposed Executive Order #4 – Restore “Integrity” of Employment-Based Nonimmigrant Programs

- Requires Publication of Regulation to Restore “Integrity” of Employment-Based Nonimmigrant Programs
- Purpose to Protect US and Foreign Workers: Undercutting of Wages, Exploitation
- H-1B an Obvious Target – Higher Prevailing Wage Requirements? Greater US Worker Protections?
- L-1 Also a Target – Prevailing Wage?
- No Indication H-1B Numbers Will Be Reduced

# Proposed Executive Order #4 – Making Process for Allocating H-1B Visas More Efficient

- Requires Department of Homeland Security (DHS) to Consider Ways to Make Process for Allocating H-1B Visas More “Efficient”
- Purpose Is to Ensure That H-1B Beneficiaries Are the “Best and Brightest”
- Potential for Introducing a More Rational System That Benefits Graduates of US Schools and Other Highly Qualified Individuals
- No Indication That H-1B Numbers Will Be Reduced

# Proposed Executive Order #4 – Move to a “Merit-Based” Immigration System

- DHS Must, Within a Year, Establish a Commission to Provide Recommended Changes to Immigration Laws to “Move Toward a Merit-Based System”
- A Move Away From Prioritizing Family Reunification? Skills Over Family Relationships? “Points” System?
- Employment-Based (EB) Immigration Currently Accounts for Only About 10% of Total Yearly Immigration, and an Increase in the Number of EB Immigrant Visas and Percentage of Total Immigrants Would Be Very Welcome

# Proposed Executive Order #4 – Immigrant Visa Availability

- Requires DHS to Reform Manner in Which Immigrant Visa Availability Is Calculated and Propose a Regulation on Manner in Which Adjustment of Status Applications Are Filed
- Possible Overhaul of an Inefficient and Antiquated System; No Indication That EB Immigrant Visas Will Be Reduced; May Reduce Long Waiting Periods
- May Allow Filing of Adjustments of Status Applications Without Immigrant Visa Availability

# Proposed Executive Order #4 – Review of Practical Training Programs

- Requires Regulation to “Reform” Optional Practical Training (OPT) and Curricular Practical Training (CPT) Programs to Prevent “Disadvantaging” US Students and “Protect” US and Foreign Workers
- Aim to Restore “Integrity” of Practical Training Programs
- Principal Target May Be Schools That Abuse OPT Programs; No Indication That STEM OPT Grants or STEM OPT Extensions Will Be Discontinued

# Proposed Executive Order #4 – L-1 Site Visits

- Mandates DHS to Start Performing Site Visits at L-1 Worksites and Third-Party Sites Within 180 Days
- Also Requires Plan to Expand Site Visit Program to All Visa Categories Within Two Years
- Not a New Development; L-1 Site Visits Have Been Occurring for Some Time
- Reflects Concern Over Abuse of L-1 Category Through Third-Party Placements
- No Indication How L-1 Site Visits Will Be Funded



# Proposed Executive Order #4 – Regulation of B Visitor Activities

- Requires Issuance of a Regulation That Specifies Permissible Activities for Business Visitors (B-1) and Tourists (B-2)
- Should Provide Clarity on What B-1 Visitors May and May Not Do
- Arguably a Welcome Development Since Guidance on the Subject is Currently Inadequate
- Will Allow Companies to Establish More Concrete B-1 Compliance Programs

# Proposed Executive Order #4 – Expansion of E-Verify

- Requires DHS to Submit a Report Within 180 Days on Options to Expand and Incentivize the E-Verify Employment Eligibility Verification Program
- Many Companies Are Already E-Verify Users
- Not a Surprising Development: Obama Administration Had Championed Expanded Use of E-Verify
- Likely That E-Verify Will Become Mandatory for All Employers Through Legislation
- Companies That Are Not E-Verify Users Should Become Familiar with Program

# The NAFTA

Not Mentioned in an Executive Order, but:

- Repeated Promise to “Renegotiate” Treaty During Campaign
- Criticism of Tariffs, Trade Deficit, Not Movement of People
- TN Category Unlikely to Be Eliminated
- “Nuclear” Option – Bilateral Instead of Trilateral Treaty

# New Agency Activism: USCBP

- USCBP Agency Responsible for Admissions to the United States
- Very Aggressive Enforcement of Executive Order of January 27
- Requests to Access Laptops, Be Given Passwords to Social Media Accounts Upon Entry
  - USCBP Has Plenary Right to Ask You Whatever It Wants as Part of Admission Process – No Probable Cause Required
  - No Fourth Amendment Right Upon Entry
  - US Citizens Will Not Be Denied Entry if Fail to Comply, but May Be Penalized and Have Items Seized
  - Non-US Citizens May Be Denied Entry
  - If Not Comfortable Giving Access to USCBP, Do Not Carry Device
- If Employee Is Detained Upon Entry, Make Sure He or She Has Contact Information for Someone Who Can Assist
- No Attorney Representation at Entry, but May Attend Deferred Inspection
- Foreign National Employees with Valid Visas Should Avoid Signing Any Documents Presented by USCBP; Signing May Result in Removal

# New Agency Activism: USCIS

- Responsible for Adjudicating Petitions and Applications for Immigration Benefits
- Higher Bar for Petitions Based on Accomplishments of Beneficiary – Extraordinary Ability, Outstanding Researchers and Professors, Schedule A, Group II Exceptional Ability Immigrant Petitions, O-1 Nonimmigrant Petitions
- 2000 Memo on H-1B Computer-Related Positions Withdrawn: Fewer Positions Will Now Qualify for H-1B Status
- Routine Petitions Given Closer Scrutiny – Relevance of Electrical Engineering Degree to Computer Engineer Position Questioned
- L-1B Adjudications as Hard as Ever
- Suspension of H-1B Premium Processing?
- Email Address Created to Enable Americans and Foreign Workers to Complain of Abuse

# USCIS Site Visits

- USCIS Site Visits Announcement on April 3, 2017
- “More Targeted Approach” to Site Visits Will Now Focus on H-1B Petitions Filed By:
  - Employers Whose Business Information Cannot Be Verified Through VIBE
  - H-1B Dependent Employers
  - Employers Sending Workers to Work at Third-Party Companies/Sites
- L-1, J-1 Site Visits Possible in Future
- Site Visits Are Not Raids but Fact-Checking Exercises
- Make Sure Information Contained in Petitions Is Accurate and Up to Date
- Develop a Site Visit Protocol
- Biggest Issue Is Employee Morale: Make Sure Your Employee Is Accompanied at All Times During the Site Visit

# New Agency Activism: DOS

- Responsible for Issuing Visas at Consulates Overseas
- Delays in Visa Applications and Denials Have Spiked Sharply
- Aggressive Issuance of 221(g) “Administrative Processing” Notices
- DOS Cables Sent to Consulates to Implement More Rigorous Screening Procedures
- Be Prepared for the Possibilities of a Delay or a Denial; Make Plans to Allow Employee to Work Remotely if Necessary
- Very Little Can Be Done to Preempt Delays
- Very That Little Attorneys Can Do to Minimize Delays

# New Agency Activism: DOL

- Responsible for Processing PERM and LCA Applications
- Traditionally, the Most Hostile Agency
- PERM Modernization Regulation (Would Have Introduced a Number of Employer-Friendly Provisions) Withdrawn Without Explanation on December 16, 2016
- Aggressive Rule Demanding Quantification of Section H-14 Requirements Introduced Then Withdrawn
- New and More Oppressive Audit Requirements, Multiple Audits Issued
- Too Early to Tell if Overall Audit Rate Has Increased



# Biography



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James Vázquez-Azpiri, co-leader of the firm's global immigration practice, is part of Morgan Lewis's cross-practice global workforce team. The group provides integrated cross-border advice, counseling, and strategic planning across the spectrum of labor, employment, benefits, and immigration issues.

James counsels corporate clients on hiring and retaining foreign employees in his business immigration law practice. He advises businesses on labor certifications, specialty occupation petitions, and intracompany transfers. Clients rely on James for guidance through immigration law compliance during mergers, acquisitions, and corporate restructurings. He helps clients think and work proactively by providing them with traditional compliance policy reviews and audits, case management and litigation technology, and international executive travel and foreign resident worker visa processing.

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Christina M. Gonzaga focuses her practice on business immigration law. She represents clients in multinational organizations and Fortune 500 companies, as well as individual clients, in all aspects of immigration law, including employment-based immigrant and nonimmigrant visa matters. Christina has experience advising companies on developing compliant immigration programs to suit business needs. In addition, Christina provides pro bono legal representation in immigration cases including asylum and deportation and challenging family-based matters. Christina began her legal career with an international immigration law firm.

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