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IMMIGRATION UNDER THE NEW ADMINISTRATION: HOW TECH CAN PREPARE FOR THE CHALLENGES AHEAD

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Today's Discussion

- Trump Administration Actions Impacting Business Immigration
  - Executive Orders and Policy Directives
- How the Orders and Announcements Are Affecting Business Immigration
  - H-1Bs and other visa categories
  - Draft Executive Order on "foreign worker visa programs" and overall impact on business immigration
  - Increasing restrictions on H-1Bs, and potential changes to other visa categories including L visas and E visas
  - Site Visits
  - Antidiscrimination
- Current Travel Environment
  - What are travelers experiencing at US ports of entry?
  - What can/cannot be anticipated? What situations should be avoided?
  - Traveling with electronic devices
- Visa Issuance
  - "Extreme vetting" and impact on visa issuance at US consular posts internationally
- Worksite Compliance

Current Immigration Trends

- Important to distinguish between politics and policy
  - The president has signed three Executive Orders (EOs) dealing with immigration
  - One proposed EO specifically addressing skilled immigration has yet to be signed and was leaked in January; no action on it since
  - No immigration law or regulation has been overruled or rescinded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
- Focus ostensibly on national security and need to protect US workers
  - This is not new policy; agency agendas have always been about national security and protecting U.S. workers
  - Significance is in the rhetoric and the implicit messages being sent
  - The Department of Homeland Security (DHS) hiring individuals with ties to organizations that have restrictionist views on immigration
  - Attorney General Jeff Sessions historically anti-immigration; strong influence on policy
- Administration recognizing the limits on what it can do unilaterally
  - Making rhetorical and symbolic gestures to political base
  - Empowering a bureaucracy that has strong anti-immigrant currents within its workforce

EXECUTIVE ORDER OF MARCH 6, 2017

PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES

March 6 EO

- "Protecting the Nation from Terrorist Attack by Foreign Nationals"
- Revoked January 27 EO; new Executive Order seeks to cure defects in prior order that led to litigation
- 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)
  - Iraq removed from original list
- Dual Nationals (i.e., Nationals of an affected country and a nonaffected 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 (e.g., Forms I-140, I-129, EAD, AP) – Not Affected
- Execution of travel ban enjoined by federal courts
- Refugee Program suspended for 120 days
- Visa Interview Waiver Program restricted; remains in force

SIGNIFICANT POLICY CHANGES IMPACTING WORK VISA CATEGORIES

Draft EO #4: Foreign Worker Visa Programs

- Draft EO, "Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs," was circulated in late January
- Sets the tone and lays the groundwork for future policy and regulatory and legislative action with respect to business immigration
  - DHS to submit a report within 90 days to "review all regulations that allow foreign nationals to work in the United States, determine which of those regulations violate the immigration laws or are otherwise not in the national interest and should be rescinded, and propose for notice and comment a rule to rescind or modify such regulations"
  - DHS, State Department, Department of Labor (DOL) to propose regulations or make policy changes "to restore the integrity of employment-based nonimmigrant worker programs and better protect U.S. and foreign workers affected by these programs"
- Key impact may be in the message it sends to the field
  - Higher scrutiny of petitions; increased use of RFE and NOID

Draft EO #4: Foreign Worker Visa Programs

- Draft EO presumes, without citing evidence, that foreign workers are negatively affecting U.S labor market
  - DHS to review not only H-1B, but L, E, STEM OPT and spousal EAD rules (specifically H-4 EAD)
  - Expanded site visits, including L visas
  - Entrepreneur Parole Rule a likely target

Draft EO #4: L-1 and E Visas

- L-1 and E visas are targeted for "study"
  - L-1A for managers and executives and L-1B for individuals with specialized company knowledge have seen increasingly challenging adjudications in recent years. Likely to get worse.
- State Department officers at consular posts have historically been more generous in granting Ls under a company's blanket
  - "Functional managers" and specialized knowledge employees generally have an easier time qualifying for Ls at consular posts.
  - We may see some increased restrictiveness here.
- E visas
  - Companies already registered as an E company can still expect consular officers to be generally friendly and fair toward applicants.
  - E visas should not be used for lower-level trainees or individuals in the early stages of their careers.

Draft EO #4: "Green Cards"/Lawful Permanent Residence

- Draft EO #4 calls for
  - Creation of a commission to provide recommended changes to "move toward a merit-based" immigration system
  - Possible move away from prioritizing family-based reunification
  - Potential points system
- Employment-based immigration currently counts for only about 10% of total yearly immigration; an increase in employment-based immigrant visas might be positive
- So far not much change in "PERM" labor market test for green card cases
  - DOL may become tougher as per administration request
- Green cards for managers will continue to be challenging
  - Definition of manager is very traditional; requires professional or supervisory-level subordinates
  - "Functional manager" almost impossible

EO: "Buy American, Hire American"

- Signed on April 18
- Calls on the Secretary of State, Attorney General, Labor Secretary, and DHS Secretary to propose new rules and issue new guidance to protect interests of the U.S. workers in administration of the U.S. immigration system, specifically mentioning fraud/abuse prevention
- Section 5(b) calls upon the cabinet agencies to suggest reforms to the H-1B program such that visas are awarded to the most-skilled or highest-paid petition beneficiaries
  - What exactly is intended by "most-skilled" or "highest-paid" remains to be seen
- Other actions that can be taken administratively
  - Adjust wage scale
  - Increase H-1B fees
  - Additional penalties for fraud and abuse

Suspension of H-1B Premium Processing

- USCIS suspended premium processing for all H-1B visa applications, including new applications, transfers, and extensions, for a period of six months beginning on April 3
  - Premium processing is a program under which a petition can be adjudicated within 15 calendar days for an additional fee; most employers use premium processing because regular (nonpremium) processing of H-1B visas can take 8 to 11 months
- Timed to impact H-1B "lottery" as well as all other H-1B filings
- Rationale for suspension of premium processing was to reduce backlogs
- Impacts all H-1B petitions filed on or after April 3
  - May be difficult for certain H-1B holders in the extension process to renew drivers licenses
  - May make travel difficult if new visa is needed to return
  - H-1B portability now a bit riskier

USCIS Memorandum on H-1B Computer Programmers

- USCIS memorandum that rescinds an old guidance memo regarding computer programmers with immediate effect
  - Old memo failed to recognize that an entry-level computer programmer position might require only a two-year (associate's) degree and that such a position would not constitute a "specialty occupation"
  - Restates that petitioners have burden of proof to demonstrate that an offered position is a specialty occupation
- Significant footnote
  - Use of a level one prevailing wage "will likely contradict a claim that a proffered position is particularly complex, specialized or unique compared to other positions within the same occupation"
- Signals a new era of restrictive decisionmaking in H-1B adjudications
  - USCIS likely to issue more RFEs to prove "specialty occupation," particularly for IT-related positions
  - USCIS attempting to eliminate use of level-one wages

April 4 Coordinated Announcements (USCIS)

- USCIS announced, on April 4, a more targeted approach to H-1B site visits:
  - H-1B–dependent employers (generally, employers with 51 or more employees with at least 15% of their workforce composed of H-1B beneficiaries)
  - Employers filing petitions for employees who will be assigned to work at the worksites of different companies
  - Employers whose business information cannot be verified through commercially available data (including, primarily, the Validation Instrument for Business Enterprises (VIBE) tool, which is based on a Dun & Bradstreet database
  - Random site visits will continue to occur
- All employers should have a protocol in place to deal with H-1B site visits
- Employers who use outsourcing firms should reach an agreement with such firms as to how to handle a site visit during which USCIS wants to question an H-1B employee of an outsourcing firm

FDNS Site Visits

- Will ask to speak with the human resources manager or the company official who signed the H-1B or L-1 petition
- Purpose is to verify:
  - existence of the employer
  - validity of the information the employer provided in the H-1B or L-1 petition
  - whether the foreign national is working in compliance with the terms of the H-1B or L-1 approval
- May ask for pay stubs or W-2 Forms and may ask questions regarding the rate of pay, title, and job duties to compare that information with the information reflected in the H-1B or L-1 petition and supporting letter
- FDNS may ask to take photographs of the facility to verify its existence, and interview the beneficiary and supervisors or other personnel to confirm the details of the beneficiary's physical work area, hours, salary, and duties
- In most situations, there is no advance notice of a site visit
- Site visits typically take less than one hour and often take significantly less time

April 4 Coordinated Announcements (DOJ)

- Office of Special Counsel for Immigration-Related Unfair Employment Practices of the Department of Justice (DOJ) is now known as the Immigrant and Employee Rights Section (IER)
- DOJ/IER issued an unprecedented announcement on April 3 warning employers not to discriminate against U.S. workers in hiring H-1B workers
- Acting Assistant Attorney General Tom Wheeler of the Civil Rights Division: "U.S. workers should not be placed in a disfavored status, and the department is wholeheartedly committed to investigating and vigorously prosecuting these claims"
- While the former OSC has previously investigated and prosecuted such claims, the announcement, which acknowledged that it was timed to coincide with the opening of H-1B cap filing, signals a shift in the focus of that office and encourages U.S. workers who believe they have been the victims of discrimination to come forward and file claims

April 4 Coordinated Announcements (DOL)

- Increase in DOL LCA audits and investigations
- Seeking legislation to expand investigative authority, which is currently complaint driven

Other Visas

- Recent Administrative Appeals Office Decision from DHS, Matter of I Corp., and associated guidance memorandum, state that USCIS cannot grant any employment-based visa where the offered salary, whether paid in the US or abroad, is lower than minimum required wage under state or federal law, whichever is higher
- TN (NAFTA visas)
  - Schedule of NAFTA occupations is in need of updating; it is unclear whether changes to NAFTA would be beneficial for TN occupations or create additional restrictions in this category
  - For some years, TN adjudication at the U.S.-Canadian border have become more restrictive, requiring a direct match of the applicant's educational background and proposed occupation to those specified in the NAFTA agreement; this will certainly continue or worsen

VISA ISSUANCE AND ADJUDICATION AT CONSULAR POSTS ABROAD

"Extreme Vetting"

- Along with the March 6 EO, President Trump issued a memorandum calling for "extreme vetting"
- Directed State Department and DHS to implement enhanced screening and vetting protocols and procedures for granting visas, admitting foreign nationals into the United States and granting immigration benefits
- Cable to all consular posts worldwide reminding consular staff that
  - "all visa decisions are national security decisions"
  - consular officers should not hesitate to refuse any case presenting security concerns
  - number of visa appointments should be reduced
  - greater discretion in ordering additional security checks beyond regular background checks
- Additional screening may include addresses and travel history over last 15 years, names of certain relatives, all phone numbers, e-mail addresses, and social media identifiers
- May be expanded to include ideological questions
- Will likely cause delays in visa issuance worldwide
- We are already seeing increase in "administrative processing" and delays in obtaining appointments abroad

THE CURRENT TRAVEL ENVIRONMENT

ISSUES AT ENTRY, ANTICIPATING PROBLEMS, AND TRAVELING WITH ELECTRONIC DEVICES

Current Travel Environment

- Heightened scrutiny, CBP exercising its discretion broadly
  - Reports of racial and religious profiling occurring at ports of entry
  - Reports of CBP canceling Global Entry status and ESTA approval for certain individuals, particularly those of Muslim heritage or with Muslim-sounding names
- CBP becoming extremely strict about business activities for which they believe work visas are required
  - Turning travelers back who attempt to enter as visitors for activities that CBP may consider "work," or activities that may be in a "gray" area
  - Previously CBP may have admitted the traveler with a warning that the traveler must have the correct visa for the next entry
- CBP may choose between removing a traveler who does not have the appropriate documents for entry and "allowing the traveler to withdraw request for admission"
  - Removal is a deportation and results in a ban on return
  - Withdrawal of request for admission allows for reentry with the appropriate paperwork

Understanding When a Visitor Visa Is Not Sufficient

- Any productive employment performed in the United States that could be undertaken by a U.S. worker is considered "work" and generally requires a work visa
  - This is true even if the work is only for one day
  - Source of compensation is not determinative
- B-1 or ESTA for business is generally for business meetings, observation of business operations, conferences, and the like
- There are narrow exceptions for short-term professional assignments where compensation will continue to be paid abroad (B-1 in lieu of H-1B increasingly disfavored)
- B-1 in lieu of H-3 for trainees still possible, but hands-on employment is limited
  - J-1 is appropriate for hands-on learning for interns and trainees
- Be conservative in the current environment

Foreign National Travel to the United States

- 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
- Be sure to have valid passport, visa stamp, Form I-797, and letter confirming employment
- Secondary inspection if foreign national of one of the 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 (United Kingdom has similar ban)
- Dual nationals should be prepared to travel into the United States on passport from the non-restricted country
  - Holders of multiple passports should present the passport that invites the least scrutiny
- Good idea to have "pocket letter" if concerned that CBP may view activities as "work"
- Travelers should have appropriate contact information in their carry-ons in case of delays or detention
- Expect that social media accounts will be reviewed and scrutinized

Green Card Holders and U.S. Citizens

- Lawful permanent residents should ensure that their passports and green cards are valid; any lengthy absence abroad warrants a "reentry permit" to facilitate return to the United States
- Lawful permanent residents should carry their green cards with them
- U.S. citizens should be aware that CBP may ask them for certain personal information
  - U.S. citizens are not required to provide ID except to CBP during the normal customs and immigration inspection
  - U.S. citizens do not have to answer questions about political or religious affiliation at entry

Traveling with Electronic Devices

- CBP may request passwords to cell phones, laptops, and other devices from any traveler, including U.S. citizens.
- Fourth Amendment rights during CBP inspection are limited.
- U.S. citizens who refuse to provide passwords at entry may be delayed; foreign nationals who refuse may be turned around.
- To the extent possible, travel with a clean device or no device.
- If passwords are provided, change them immediately after entry.

TRIP Complaints

- TRIP = Traveler Redress Inquiry Program
- Any unduly harsh or inappropriate comments and/or treatment at entry may be brought to the attention of the port director for that port of entry and/or reported via the CBP's TRIP system
- https://www.dhs.gov/dhs-trip

The Takeaways . . .

- The environment around travel and immigration to the United States has become highly restrictive in a very short period.
  - Applicants should expect to be questioned closely about all aspects of their visa applications.
- Applicants may be required to provide detailed information about their addresses and travel history over last 15 years, names of certain relatives, all phone numbers, e-mail addresses, and social media identifiers used in the last 5 years.
- Applicants should be prepared for the possibility of extra background and security checks, commonly known as "administrative processing." These can add days or weeks to the process.
- New processes and limits on visa interviews will likely lead to longer waits for interview appointments and longer waits for passports with visas to be returned after the interviews.
- Business visits to the United States should be approached more carefully and deliberately.
- Applications and petitions for work visas must be well prepared and eligibility for the category should be extremely well documented to avoid RFEs and denials.
- Companies that are eligible should explore blanket L and E visa registration for the transfer of key employees.
  - New hires of foreign nationals, such as foreign students which H-1B status, will be increasingly challenging.

The Takeaways . . .

- Increased scrutiny of H-1B and other work visa petitions
- Increased scrutiny at port-of-entry inspection
- Increased frequency of FDNS site visits and State Department antifraud investigations
- Increased scrutiny of H-1B petitions suing level one wages
- Increased petition adjudication times
- Increase in investigative activity
  - Worksite
  - Wage and hour
  - Visa applicant vetting
  - Port-of-entry inspection
- Increase in RFE and NOID activity, even on previously approved cases
- Need for continual adjustment and adaptation to changing adjudicatory environment at all relevant agencies

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APPENDIX

Business Visitor Limitations

- Permissible business visitor activities include:
  - engaging in commercial transactions that do not involve gainful employment in the United States;
  - negotiating contracts, typically for products or services manufactured or delivered abroad;
  - consulting with business associates;
  - litigating;
  - short-term training not involving productive labor or compensation;
  - participating in scientific, educational, professional or business conventions, conferences, or seminars; or
  - undertaking independent research.

Business Visitor Limitations

- Situations that may suggest "work" include:
  - an individual U.S. office or workstation;
  - the presence in the United States of individuals whom the person directly supervises or manages;
  - engaging in activities directly related to generating revenue for or otherwise directly benefiting a U.S. entity;
  - visiting clients on a billable basis;
  - receiving any wages or salary from a U.S. source; or
  - a pending or approved work visa petition (e.g., H-1B, E, L-1).

Asking About Immigration Upfront

- Ask the safe questions, and only the safe questions, preferably on an application
- The following language is acceptable if asked of all applicants:
  - Are you legally authorized to work in the United States? __ Yes __ No; and
  - Will you now or in the future require the company's sponsorship for an immigration-related employment benefit (e.g., H-1B, TN) ? __ Yes __ No
- Hiring decisions based on an applicant's need for immigration sponsorship are not considered discriminatory, provided that the policy is not applied in an inherently discriminatory manner (e.g., sponsorship only of certain nationalities)

Contingent Offer of Employment – General

- Make all offers of employment contingent upon the applicant's ability to satisfy the employment eligibility verification requirements.
- Sample Policy:
  - All offers of employment with [INSERT COMPANY] are contingent upon the employment applicant's ability to provide, within three business days of hire, evidence of identity and employment authorization acceptable for Form I-9 purposes under federal law. Therefore, all offers of employment, regardless of the applicant's nationality, should contain the following language:
    - This offer of employment is contingent upon your ability to provide acceptable original evidence of identity and work authorization within three business days of hire, in conformance with Form I-9 requirements.

Contingent Offer of Employment – Visa

- Offers that involve nonimmigrant visa sponsorship should be made contingent upon successfully obtaining the required employment authorization.
- Sample Policy:
  - Where [INSERT COMPANY] determines that it will seek nonimmigrant work authorization on behalf of an employment candidate, the offer of employment must be contingent upon the company's ability to obtain the temporary work visa allowing for the employment. Therefore, any written offer provided to an employment candidate for whom [INSERT COMPANY] will pursue nonimmigrant employment authorization should contain the following language:
    - This offer of employment is contingent upon [INSERT COMPANY]'s ability, after efforts that [INSERT COMPANY] deems to be reasonable, to secure appropriate work authorization on your behalf. [INSERT COMPANY] cannot and does not make any promises or representations as to the outcome of such efforts. [INSERT COMPANY]'s decision to undertake any such efforts may be modified or revoked at any time in [INSERT COMPANY]'s unilateral discretion.

Sponsored Employment Remains At-Will

- Offers that involve nonimmigrant visa sponsorship should not be inadvertently modified as a result of language included in an employer's immigration petition
- Sample Policy:
  - Where [INSERT COMPANY] determines that it will seek nonimmigrant work authorization on behalf of an employment candidate, no documents prepared in connection with the preparation or filing of a petition or application for an immigration benefit shall modify the underlying nature of the employment relationship. In particular, nothing in a document created in the preparation or filing of a petition or application for an immigration benefit shall alter the at-will nature of the employee's employment, nor may it be relied upon by the employee as a contract or modification of the at-will nature of the employment.
- Useful to include similar language in petition letters of support