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Immigration After the US Presidential Election and Brexit

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Topics of Discussion:

- Introduction
- Biden Administration Immigration Changes
- H-1B Updates
- Post-Brexit UK Immigration

Introduction

- US Immigration
 - Over the past four years, the Trump Administration implemented over 400 immigration-related changes, radically altering the current immigration system.
 - These changes were undertaken through executive action, policy memoranda and regulation.
 - The Biden transition team has already prioritized and announced several major policy reversals.
 - What can be done through executive action? What must be accomplished through regulatory action? How soon will new policies be implemented and how will they impact business immigration?
- Brexit
 - The Post-Brexit UK Immigration rules will take effect on January 1, 2021
 - How will EU nationals working in the UK be affected by these changes? What will happen to UK nationals working within the EU?

Biden Administration Immigration Changes

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Immediate Changes Announced by the Biden Team

- Rescind the travel ban imposing various restrictions on nationals of Burma, Eritrea, Iran, Kyrgystan, Libya, Nigeria, North Korea, Somalia, Sudan, Syria, Tanzania, commonly known as the “Muslim Ban”
- Restore DACA
- Roll back agreements with Central American countries to send rejected asylum seekers there; end “Remain in Mexico” policy under which thousands of asylum applicants were forced to remain in Mexico waiting for asylum hearings
- Increase refugee admissions to 125,000
- Temporary moratorium on deportations in order to re-institute prioritization of deportation of violent criminals

What do we expect to happen to US business immigration?

- Key employment-based changes over the past four years include the following:
 - “Buy American/Hire American” Executive Order
 - Public charge rule
 - Adjustment of status interviews
 - No deference to prior approvals
 - Redefinition of specialty occupation and focus on degree relevancy
 - Increasing requests for additional evidence and notices of intent to deny in all types of petitions for immigration benefits
 - Scrutiny of H-1B workers placed at third party work sites
- We expect many policies to be reversed, including the “no deference” policy
- Changing the “culture of no way” within the agency will take time
- Most significant changes will require legislation
- CIR is unlikely though small-scale compromises involving Dreamers, H-1B standards, and H-2B numbers may be possible

Reversal of COVID-related Proclamations?

- COVID-19-related travel bans (PP's 9984/China; 9992/Iran; 9993/Schengen; 9996/UK/Ireland; 10041/Brazil)
 - No specific announcement of reversal as yet; perhaps a testing approach for all international travel in lieu of country-specific bans
- Proclamation 10014: Ban on Issuance of Certain Immigrant Visas (Green Cards) Abroad
- Proclamation 10052: Entry/Visa Ban for Certain Nonimmigrant Visa Applicants
 - Ban on issuance of new H's, new L's and certain J's
 - Enjoined for companies that are members of certain plaintiffs including the US Chamber of Commerce, the National Association of Manufacturers, the National Retailers Association
- PP's 10014 and 10052 set to expire on December 31, 2020; could be extended beyond that date
- No signal from Biden Team yet regarding rescission of these bans
- Looking for better staffing and capacity, better customer service at US consular posts abroad after January 20, 2021

Three new regulations aimed at shrinking the H-1B program, issued within past six weeks

- DOL Interim Final Rule (“IFR”), ***Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States***
- DHS IFR, ***Strengthening the H-1B Nonimmigrant Visa Classification Program***
- Office of Information and Regulatory Affairs, which typically would review agency regulations, waived its right to review the DOL and DHS IFR’s rules prior to publication.
- DHS Notice of Proposed Rulemaking (“NPRM”), ***Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions (Proposal to Alter H-1B Lottery)***

DOL Prevailing Wage IFR

- Effective upon announcement, October 8, 2020; Comment period ended on November 9.
- Introduced new formula for computing prevailing wage levels for PERMs and Labor Condition Attestations, resulting in substantially higher prevailing wage levels for all occupations in the Occupational Employment Statistics wage database
- Entry level wage went from 17th percentile of all wages for a particular occupation in a specific geographic area to the 45th percent; similar dramatic upward shift in other three levels
- Rule is the subject of three separate lawsuits alleging that its' implementation violated the Administrative Procedures Act.
- Decision expected imminently in one case, Purdue University v. DOL.
- Biden administration DOL is likely to focus on US worker protection and to favor wage protection measures too

Immigration and Discrimination Enforcement at ICE and DOJ

- Return to more traditional enforcement activities
 - I-9 Desk Audits
 - De-politicization of ICE enforcement activities
- DOJ Immigrant and Employee Rights
 - Largely run by career staff so little change expected
 - Possible shift in emphasis away from BAHA theories of employer liability and return to traditional enforcement themes
 - Protection of U.S. workers likely to remain an enforcement area, but will be complaint-driven

H-1B Updates

USCIS Interim Final Rule: *Strengthening the H-1B Nonimmigrant Visa Classification Program*

- Published October 8, 2020; Not Effective Until December 7, 2020
- 60-Day Public Comment Period; Content of Rule May Change
- Rule Subject to Multiple Legal Challenges; Injunctions May be Issued
- Introduces a Number of Provisions Intended to Make H-1B Petitions More Difficult to Approve and Discourage the Filing of Such Petitions
- New Standards Will Apply to All H-1B Petitions Filed on or After December 7, 2020, Even if Seeking an Extension of a Previously Approved H-1B Petition
- USCIS Estimates that One Third of All H-1B Petitions Will be Denied Under the New Standards
- Codifies Hostile Stance of USCIS Towards H-1B Petitions and Provides USCIS Officers With Tools to Issue Denials

“Specialty Occupation” Standards

- “Direct Relationship” Required Between Degree in Specific Specialty and Duties of H-1B Position
- H-1B Petitioners Must Establish Connection Between Degree Course Work and Duties of Position
- Positions for Which a “General” Degree or Degrees in a Wide Variety of Fields (e.g. “Any Quantitative Field”) Are Acceptable Are Not Specialty Occupations; Business Administration Specifically Mentioned
- Degree in a Specific Field Must *Always* be Required for the H-1B Position; Normally, Commonly, Usually Not Enough: Language in *OOH* Will be Crucial

New Employer/Employee Relationship Standards

- Previous “Hire/Fire, Pay, Supervise or Otherwise Control” Test Abandoned
- Replaced With More Expansive Set of Criteria, Including Provision of Tools, Claiming of Beneficiary as an Employee for Tax Purposes, Evaluation of Beneficiary’s Performance, Use of Proprietary Employer Information by Beneficiary, Provision by Beneficiary of End Product Tied to the Employer’s Business, As Well as the Traditional Control Factors
- “Corroborating Evidence” Required: Obvious Purpose is to Increase the Amount of Evidence that Petitioners Must Provide to Establish Employer/Employee Relationships and Provide Further Avenues for Denials of H-1B Petitions

Third-Party H-1B Placements

- Maximum H-1B Petition Validity of One Year for H-1B Petitions for Workers Working at Third Parties
- Petition Validity Period Shorter Than One Year May be Granted
- Petition Filing Costs Will Significantly Increase for Third-Party Placements; USCIS Recognizes This, but Believes Increased Cost is Justified
- Obvious Purpose is to Discourage H-1B Petitions for Third-Party Placements; The Target is the IT Consulting Industry

H-1B Site Visits

- IFR Codifies Existing FDNS H-1B Site Visit Program
- Formally Allows USCIS Officers to Visit H-1B Petitioners' HQ, Beneficiary's Work Location (Including Home Offices), and Third Party Work Locations
- Also Allows Interviews with Petitioner's "Officials" and "Any Other Individuals", As Well as Broad Review of Petitioner's "Records"
- Failure or Refusal to Cooperate in Site Visit May Lead to Denial or Revocation of "Any" H-1B Petition for H-1B Workers at the Location of the Visit

What is in Store for the 10/8/2022 H-1B IFR?

- Legal Challenges Could Result in IFR Being Enjoined
- Apparent Dissatisfaction With IFR in Biden Camp
- Rescission of IFR by the Biden administration will be complicated
- IFR Will be in Effect on 12/7/2020; All H-1B Petitions Filed on or After that Date Must Take Account of its Provisions

Proposal to Alter H-1B Lottery

- Notice of Proposed Rulemaking (NPR) Issued November 2, 2020
- Rule Not Effective Yet; NPR Comment Periods on Rule Open Until December 2, 2020, and January 4, 2021
- NPR Seeks to Replace Current Random H-1B Cap Selection Process with Wage-Level-Based Selection Process
- Under New System, USCIS Would Rank H-1B Cap Registration Applications According to the OES Wage Level of the Promised Wage, and Would Choose Applications Indicating a Level IV Wage First
- All Other Registration Applications Would be Ranked and Selected in a Descending Order According to OES Wage Level, With Applications Indicating a Level I Wage Chosen Last, Thus Making it All but Impossible to Seek H-1B Status for Entry-Level Professional Positions
- Substantively on very shaky legal ground
- Unclear How Biden Administration Will React; Campaign Platform Mentions a “Wage-Based Allocation System” for Temporary Foreign Workers

Post-Brexit UK Immigration

Brexit

- Free movement will end on **31 December 2020**.
- EEA and Swiss nationals (and their family members) who lawfully enter the UK before 31 December 2020 will be able to remain in the UK indefinitely. They will be required to make an application under the EU Settlement Scheme **before 30 June 2021**.
- Irish nationals will continue to have free movement.
- Employers will not be required to retrospectively check the immigration status of any EU, EEA or Swiss employees or their family members who start work before 1 January 2021.

Post-Brexit UK Immigration System

- New Points-Based System from 1 January 2020 for both EEA and non-EEA nationals who wish to come to the UK for the purpose of working in a skilled job they have been offered.
- Due to launch from 1 December 2020 and replace the current Tier 2 system.
- Two stage application process:
 1. The employer must issue a Certificate of Sponsorship to the employee for a skilled role.
 2. The employee must apply for entry clearance (i.e. a visa) to enter the UK, or further leave to remain (i.e. an extension granted in the UK).
- The employer must be an approved sponsor and hold a sponsorship licence.
- The employee can be accompanied by his or her spouse or unmarried partner (if they have lived together for two years previously) and children aged 17 years old or less.

Skilled Worker Route

- Applicants must be awarded **70 points** in total to be eligible to apply under the Skilled Worker Route through:
 - Sponsorship (**20 points**);
 - Having a job at the appropriate skill level: RQF level 3 (**20 points**);
 - Meeting the English language requirement (**10 points**); and
 - Meeting the minimum salary requirement: higher of the going rate for their occupation code and the general salary threshold of £25,600 (**20 points**).

A reduction in the minimum salary requirement can be obtained if the job offer is in a shortage occupation, the applicant has a PhD in a related field or in a STEM subject, or the applicant is a 'new entrant'.

Intra-Company Transfer Route

- An existing employee of an overseas office who needs to be transferred to the UK branch for training purposes or to fill a vacancy either on a long-term basis or for frequent short visits.
 - Individuals who have worked for the overseas entity for at least 12 months prior to the date of the application (unless the salary is above £73,900)
 - Appropriate skill level: RQF level 6
 - Minimum salary requirement: £41,500
 - No English language requirement

Business Travel

- Non-visa national visitors (including EEA nationals) are permitted entry at the border for up-to 6 months. Visa nationals must obtain a visitor visa prior to travel.
- Permitted activities includes business meetings, talks and speeches, negotiate and sign deals and contracts etc.
- Work is prohibited.

British nationals travelling to Europe

- 90 days in any 180-day period without a visa for tourism and business visitor activities.
- Must have 6 months remaining on passport when travelling.

Post Brexit EU Immigration Schemes for UK Nationals

- Brexit Transition Period will end on December 31, 2020
- Freedom of Movement will end for UK citizens, except Into Ireland
- Current UK Nationals working in the EU may have ability to process Article 50 Permit or Frontier Worker Permit
- New UK hires in the EU may be subject to immigration schemes for non-EU citizens
- This is very much country dependent, and not all 26 EU member states have provided guidance to date
- Case Study: Switzerland

Implications of Global Remote Work

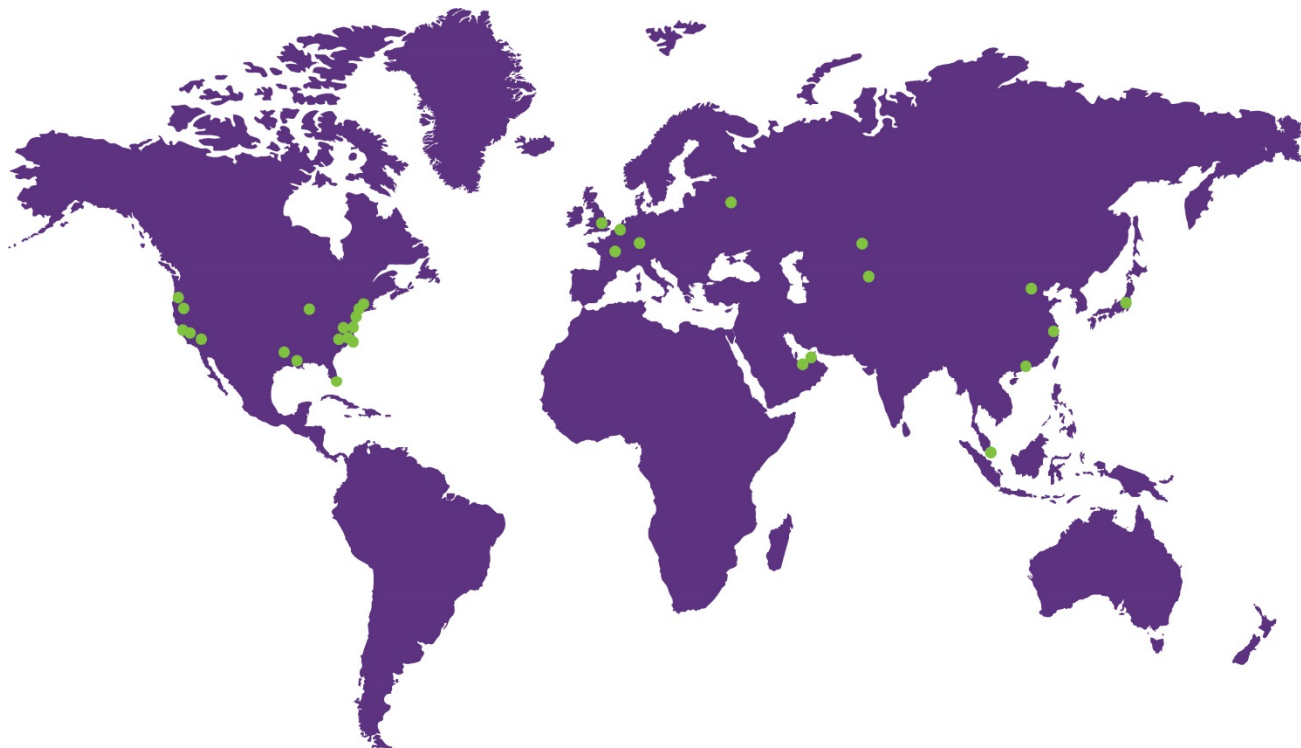
- Common Scenarios during Pandemic and beyond:
 1. My US citizen employee has asked to travel to Brazil with his Brazil citizen spouse to work there for 3-6 months. We do not have a corporate presence in Brazil.
 2. My H1B employee, Indian National, was in India in March /April of this year and has not been able to return to the United States. He/she would like to continue to work remotely at this time. We do not have a corporate presence in India.
- Considerations:
 - Immigration compliance
 - Local Employment Laws
 - Individual Tax Liability
 - Corporate Permanent Establishment (PE) Risk/Exposure

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