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# NAVIGATING THE NEXT.

## Immigration Under the Biden Administration: The Evolving Business Immigration Landscape

Eleanor Pelta, Eric Bord, Shannon  
Donnelly, A. James Vazquez-Azpiri,  
Laura Garvin

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# Presenters



**Eleanor Pelta**  
Partner, Washington



**Shannon Donnelly**  
Partner, Washington



**James Vazquez-Azpiri**  
Partner, San Francisco



**Eric Bord**  
Partner, Washington



**Laura Garvin**  
Of Counsel, Miami

**Morgan Lewis**

# Topics for Discussion

- The Trump Administration's and the Biden Administration's Approaches to US Immigration
- The Current Status of US Travel Restrictions
- Changes Impacting H-1B Visa Classification
- Regulatory Freezes
- Proposed Legislation
- Public Charge Update
- February 2, 2021 Executive Orders
- Other Immigration Objectives of Biden Administration
- A Change in Culture at the Immigration Agencies?

# The Trump Administration's Approach to US Immigration

- Over the past four years, the Trump administration implemented over 1,000 immigration-related changes, radically altering the current immigration system
- These changes were undertaken through executive action, policy memoranda and regulations
- Opposition to immigration seen as key to the administration's success
- Anti-immigration figures selected for major executive positions (Stephen Miller)

# What Did the Trump Administration do 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 relevance
  - 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
- Development of a “culture of no” at the immigration agencies; USCIS almost ran out of money because of enforcement efforts

# The Biden Administration's Approach to US Immigration

- An explicitly pro-immigration administration
- The Biden administration immediately announced a series of immigration-related short-term and long-term measures favoring immigration
- Freeze on all published regulations not effective on January 20, 2021
- Withdrawal of all regulations not published by January 20, 2021
- Introduction of immigration legislation
- Appointment of new heads of immigration agencies: a change in culture?

# Current Status of US Travel Restrictions

- Muslim Travel Ban for nationals of Iran, Libya, Syria, Yemen, Somalia, Nigeria, Myanmar, Eritrea, Kyrgyzstan, Sudan, Tanzania and North Korea Abolished by executive order
- Biden Administration on January 25 Reinstated US Prohibition on Admission of persons physically present in certain countries (Brazil, China, Iran, Ireland, the UK and Schengen Nations and Adding South Africa)
- CDC order requiring negative COVID-19 test taken within 72 hours for all persons over 2 entering the US on or after January 26
- “National Emergency” on southern border revoked, but travel by land to Canada or Mexico limited to essential travel until at least February 21 (OK to Fly)
- Presidential Proclamation barring COVID-19 H-1B and L-1 visa issuance remains in place until March 31; no Biden announcement yet, but national interest exemptions remain available
- Prior visa decisions made by the previous administration have been mandated to be reviewed by the State Department

# Changes Impacting H-1B Visa Classification

- Trump *Buy American, Hire American* Executive order revoked on January 25
- Proposals to redefine specialty occupation and employer/employee relationship abandoned
- Policy Memo on H-1B computer related positions rescinded
- H-1B Cap Registration System will remain unchanged this year
- H-4 Spousal Employment Authorization will continue
- Less hostile adjudication of H-1B Petitions?



# H-1B Cap 2021

- 65,000 and 20,000 caps remain unchanged for 2022 fiscal year; demand will once again exceed supply
- Registration system used last year will be in place
- Registration applications filed online between March 9 and 25, 2021
- Master's lottery held first, regular lottery second
- Registrations selected will be invited to file H-1B Petitions; unselected registrations may still be selected later
- Earliest employment start date will be October 1, 2021
- Cap-Gap Relief for F-1 students will remain available

# H-1B Cap 2021

- DHS Final Rule sought to replace current random H-1B Cap Selection Process with wage-level-based selection process
- Under new system, USCIS Would Have Ranked 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, making it all but impossible to seek H-1B Status for entry-level professional positions, including those typically held by recent graduates
- Final Rule has been frozen until December 21, 2021
- New system may be in place next year; Biden Campaign platform mentioned a “Wage-Based Allocation System” for temporary foreign workers
- New OES Wage Levels will not be in place for H-1B Cap Filings, even if DOL Rule adopted

# What Will Happen to H-4 Spousal Employment Authorization?

- USCIS was scheduled to publish a regulation ending employment authorization for H-4 Spouses in December 2020; did not appear
- Concern with open market employment authorization for certain H-4 Spouses
- Biden administration will not end H-4 Spousal Authorization; may be included in new legislation
- Proposed Rule eliminating H-4 Spousal Employment Authorization withdrawn

# Three Immigration Regulations Subject to the Regulatory Freeze or Withdrawal

- Biden administration has requested that federal agencies freeze for 60 days (until March 21, 2021) all published rules and withdraw rules not published
- Freeze will allow review and reconsideration of rules
- DOL Final Rule Issued on January 13 to revise upwards OES wage levels used for H-1B and PERM prevailing wage; would have taken effect March 15, 2021, with new levels introduced on June 30, 2021
- DHS Final Rule Issued on January 8 to alter H-1B Cap Selection Process; would have taken effect on March 9, 2021. Has been formally paused until December 2021, though may be reviewed before then.
- DHS proposed regulation to redefine H-1B Employer/Employee Relationship was not published by January 20 and was thus withdrawn
- Federal agencies are anticipated to comply with freeze

# Biden Immigration Legislation

- On very first day in office, Biden administration announced plan to introduce United States Citizenship Act
- Legislation will include provisions to clear employment-based immigrant visa backlogs, recapture unused visas, reduce lengthy permanent residence waiting times and eliminate per-country immigrant visa quotas
- May be achieved by exempting spouses and children from 140,000 annual immigrant quota, as well as PH.D. STEM degree graduates
- Will allow green card quotas to be adjusted based on demand
- Fairness for High Skilled Immigrants Act not signed by Trump and will probably die
- Legislation would include H-4 Spousal Employment Authorization

# Biden Immigration Legislation

- Path to permanent residence for DACA and TPS Beneficiaries
- Undocumented Persons here on January 1, 2021 could apply for temporary legal status and permanent residence after five years
- Diversity Visa Quota increased from 55,000 to 80,000
- 3 and 10 Year Unlawful Presence Bars abolished
- Senate 50/50 with Democratic VP casting vote; however, there is still significant opposition to immigration

# Public Charge Update

- USCIS issued in February 2020 a Public Charge Rule that requires Form I-944 *Declaration of Self-Sufficiency* for adjustment of Status Applications and Personal Financial Information on Nonimmigrant Petitions
- On January 22, 2021, Ninth Circuit Court granted request by DHS to delay previously granted injunction on rule
- Public Charge Rule therefore remains effective and all filings must comply with it
- Dispute may go to US Supreme Court
- Biden administration has indicated it will repeal rule within First 100 Days; February 2, 2021, executive order requires review of rule

# February 2 Executive Orders

- Create task force to reunify families separated by USCBP; revokes Trump executive order allowing separation of children from parents
- Develop strategy to address irregular immigration across southern border and create humane asylum system
- Requires “Top to Bottom” Review of Trump immigration policies, regulations and guidance; rescinds requirement that family sponsors repay government if immigrants receive public benefits, and requires review of Public Charge Rule



# Other Immigration Objectives of Biden Administration

- Increase annual refugee admission ceiling to 125,000
- Preservation of DACA
- Stopped Emergencies Funding of Border Wall
- Establishment of Commission to Improve Employment Verification Process
- 4-Year, \$4 Billion investment plan for “Golden Triangle” countries

# A Change of Culture at the Immigration Agencies?

- Probably the most significant practical impact of the new administration
- Prioritizing service over enforcement
- Atmosphere within agencies has been damaging to the immigration process; restrictive views about immigration has trickled down and affected adjudication of petitions and applications
- Appointment of Alejandro Mayorkas as Head of DHS a good sign; just confirmed by Senate
- It will take time to place the relevant decision-makers and see effect on adjudications

# Looking Ahead: Other Labor & Employment webinars

- [Labor-Management Relations: A Look Ahead](#), February 23
  - Partners Philip A. Miscimarra and Harry Johnson, two former National Labor Relations Board Members having broad experience with Democratic and Republican Board majorities, will discuss how recent changes at the NLRB under the new Biden administration could impact businesses.
- [Employment Law in 2021: A Look Ahead](#), February 25
  - We will discuss the administration's executive orders so far, and look ahead to possible executive action, rulemaking, and legislative developments on top-of-mind employment issues

# THANK YOU

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