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## High Stakes for High-Skilled Immigrants: An Analysis of Changes Made to High-Skilled Immigration Policy in the First Year of the Trump Administration in Comparison to Changes Made During the First Year of Previous Presidential Administrations

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**HIGH STAKES FOR HIGH-SKILLED IMMIGRANTS: AN  
ANALYSIS OF CHANGES MADE TO HIGH-SKILLED  
IMMIGRATION POLICY IN THE FIRST YEAR OF THE TRUMP  
ADMINISTRATION IN COMPARISON TO CHANGES MADE  
DURING THE FIRST YEAR OF PREVIOUS PRESIDENTIAL  
ADMINISTRATIONS**

Kevin Miner<sup>†</sup> & Sarah K. Peterson<sup>††</sup>

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“Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies.”<sup>1</sup>

- *Groucho Marx*

## I. INTRODUCTION

Immigration policy in the United States is one of the most divisive issues facing our country.<sup>2</sup> Some groups, such as the Federation for American Immigration Reform and the Center for Immigration Studies, advocate for massive reductions in the number of immigrants in the United States, including both undocumented and legal immigrants.<sup>3</sup> Other groups, such as Compete America and the American Immigration Council, advocate for changes that will modernize immigration policy to allow employers in the U.S. to fill critical hiring needs, reunite families, and provide opportunities for those fleeing violence, natural disaster, and devastating poverty.<sup>4</sup>

Not surprisingly, each new presidential administration has listed immigration reform somewhere on its priority list.<sup>5</sup> And yet, despite

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1. Doug Sosnik, *Groucho Marx's Republican Party*, POLITICO MAG. (Mar. 17, 2014), <https://www.politico.com/magazine/story/2014/03/sosnik-memo-republican-party-future-104749> [<https://perma.cc/LWV7-9GJM>].

2. Faye Hipsman & Doris Meissner, *Immigration in the United States: New Economic, Social, Political Landscapes with Legislative Reform on the Horizon*, MIGRATION POL'Y INST. (Apr. 16, 2009), <https://www.migrationpolicy.org/article/immigration-united-states-new-economic-social-political-landscapes-legislative-reform> [<https://perma.cc/SS87-26QR>].

3. *Phase Down Mass Immigration*, FED'N FOR AM. IMMIGR. REFORM (Sept. 2016), <https://fairus.org/issue/legal-immigration/phase-down-mass-immigration> [<https://perma.cc/3S8J-5KYX>]; Jessica Vaughan, *What Part of 'Temporary' Do People Not Get?*, CTR. FOR IMMIGR. STUD. (Jan. 15, 2018), <https://cis.org/Oped/What-part-temporary-do-people-not-get> [<https://perma.cc/8GZS-YPQ2>].

4. COMPETE AMERICA, <https://competeamerica.org/about/> [<https://perma.cc/UB3F-Z9LJ>] (last visited June 20, 2018); *About the American Immigration Council*, AM. IMMIGRATION COUNCIL, <https://www.americanimmigrationcouncil.org/about/our-mission> [<https://perma.cc/YB35-JWX6>] (last visited June 20, 2018).

5. See, e.g., *White House Framework on Immigration Reform & Border Security*, WHITE HOUSE (Jan. 25, 2018), <https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/> [<https://perma.cc/4XL8-W5KZ>] (discussing the Trump administration's plan for immigration reform and border security); ROBERT NORTH ROBERTS ET AL., *PRESIDENTIAL CAMPAIGNS, SLOGANS, ISSUES, AND PLATFORMS* (Greenwood Press 2d ed. 2012); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*,

being a priority, we have not seen comprehensive changes to the underlying legal structure of the U.S. immigration system since the Immigration Act of 1990 (IMMACT 90).<sup>6</sup> High-skilled immigration saw some modifications through the American Competitiveness and Workforce Improvement Act (ACWIA),<sup>7</sup> passed in 1998, and the American Competitiveness in the Twenty-First Century Act (AC21),<sup>8</sup> passed in 2000. However, these statutes only made small adjustments to the existing structure for high-skilled immigration, including some that were only temporary.<sup>9</sup>

Yet, immigration policy in the U.S. is anything but stable. Instead, it has undergone major changes—through regulatory changes, the issuance of policy memoranda, and other guidance on adjudication policies. Sometimes, the changes are more accommodating to immigrants; other times, the changes are more restrictive.

This article examines these changes as they relate to high-skilled, employment-based immigration in the U.S. In particular, this article focuses on policy relating to H-1B nonimmigrant petitions for workers performing specialty occupations;<sup>10</sup> L-1 nonimmigrant petitions for intracompany

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68 FLA. L. REV. 101 (2016) (discussing the correlation between the President's role and immigration in the United States); Shan Carter et al., *On the Issues: Immigration*, N.Y. TIMES (May 23, 2012), <https://www.nytimes.com/elections/2008/president/issues/immigration.html> [<https://perma.cc/7EBY-KNY4>] (providing an assortment of articles highlighting the Obama administration's approach to immigration reform).

6. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended at 8 U.S.C. § 1101 (2012)); *The Immigration Act of 1990*, LAWS.COM, <https://immigration.laws.com/immigration-act-of-1990> [<https://perma.cc/3WMD-2CJE>] (last visited June 20, 2018) (“The Immigration Act of 1990 is considered to be one of the most considerable changes to United States immigration law since 1965.”).

7. American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105-277, 112 Stat. 2681-640 (1998) (codified at 29 U.S.C. § 3224a (2012) and 42 U.S.C. § 1869c (2012)).

8. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. 106-313, 114 Stat. 1251 (2000).

9. AC21, for example, increased the annual limit on H-1Bs from 65,000 to 195,000 for 2001–2003. After that date, however, the cap reverted back to 65,000. *Id.* at 1251.

10. *Infra* Part II.1.A, II.2.A. The H-1B nonimmigrant category is the most commonly used non-immigrant category for companies hiring high-skilled workers, and is one of the most controversial under the Trump administration.

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transfers for managers and workers with specialized knowledge;<sup>11</sup> and immigrants seeking permanent residence through the employment-based first, second, and third preference categories.<sup>12</sup>

This article continues with an analysis of how the Trump administration has affected high-skilled immigration policy far more in its first year than the prior two presidential administrations—despite not making any statutory or regulatory changes.<sup>13</sup> Instead, the administration has used a combination of sub-regulatory actions, such as the issuance of executive orders, rescission of long-standing policy memoranda of the United States Citizenship and Immigration Services (USCIS), and changes to adjudication policy.<sup>14</sup> While agency decision-makers seem to drive the directives, disclosure of the internal policy directives has not yet occurred. The combination of these factors has created a dramatic effect on the practical administration of high-skilled immigration policy.<sup>15</sup>

## II. STATUTORY AND REGULATORY GOVERNANCE OF HIGH-SKILLED IMMIGRATION POLICY

As with all areas of administrative law, high-skilled immigration policy is governed and modified in two ways—by statute and by regulation.<sup>16</sup> Practical changes are also made through sub-regulatory

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11. *Infra* Part II.1.B, II.2.B. The L-1 nonimmigrant category is a critical tool for international companies seeking to establish or grow operations in the United States, and restrictions to that category may directly affect the willingness of foreign-owned companies to invest in the United States. *Id.*

12. *Infra* Part II.1.C, II.2.C. The employment-based first, second, and third preference categories are the avenue through which most employment-based “green cards” are issued, and thus affect most high-skilled immigrants and their employers.

13. *Infra* Part III.

14. See generally Chad Blocker, *Draining the Pool: Visa Categories Related to the Entertainment Industry May Be Strongly Affected by Changes in U.S. Immigration Policy*, L.A. LAW, May 2017, at 34 (discussing some of the non-legislative ways the Trump administration has changed immigration policy).

15. See, e.g., B. Lindsay Lowell et al., *U.S. Immigration Policy: Admission of High Skilled Workers*, 16 GEO. IMMIGR. L. J. 619, 634–36 (2002) (identifying similar factors affecting administration of high-skilled immigration policy during the Bush administration).

16. Jennifer Chacon, *Who is Responsible for U.S. Immigration Policy?*, 14 INSIGHTS ON L. & SOC'Y 3 (Spring 2014), [https://www.americanbar.org/publications/insights\\_on\\_law\\_and\\_society/14/spring-2014/who-is-responsible-for-u-s-immigration-policy.html](https://www.americanbar.org/publications/insights_on_law_and_society/14/spring-2014/who-is-responsible-for-u-s-immigration-policy.html) [https://perma.cc/Q8LU-F2C6].

action, such as policy guidance memoranda and agency adjudication policies.<sup>17</sup> In high-skilled immigration law, statutory control is largely contained within the Immigration and Nationality Act (INA).<sup>18</sup> Regulatory control is primarily contained in Titles 8, 20, and 22 of the Code of Federal Regulations (CFR).<sup>19</sup>

A. *Statutes Affecting High-Skilled Immigration*

1. *Statutory Changes Affecting H-1B Nonimmigrants*

The H-1B program is governed primarily by sections 212(n) and 214 of the INA,<sup>20</sup> and has had the most statutory activity in the last twenty years. These statutory changes include the American Competitiveness and Workplace Improvement Act of 1998 (ACWIA),<sup>21</sup> AC21,<sup>22</sup> the H-1B Visa Reform Act of 2004,<sup>23</sup> and the 2009 Employ American Workers Act.<sup>24</sup>

In 1998, Congress passed ACWIA in response to an overwhelming demand for information technology specialists and other skilled workers as a result from the technology boom of the late 1990s.<sup>25</sup> ACWIA provided a temporary increase to the annual cap on H-1B petitions, raising the annual cap from 65,000 to 115,000 in 1999, 115,000 in 2000, and 107,500 in 2001.<sup>26</sup> The cap then

17. *Infra* Part III.

18. Immigration and Nationality Act, 8 U.S.C. § 1101–537 (2012).

19. Most notably, key regulatory provisions exist in the following: Temporary Employment of Foreign Workers in the United States, 20 C.F.R. § 655 (2017); Immigrant Petitions, 8 C.F.R. § 204 (2012); Labor Certification Process for Permanent Employment of Aliens in the United States, 20 C.F.R. § 656 (2004); Nonimmigrant Classes, 8 C.F.R. § 214 (2001); and Documentation of Nonimmigrants Under the Immigration and Nationality Act, 22 C.F.R. § 41 (2000).

20. Immigration and Nationality Act § 212(n), 8 U.S.C. § 1182 (2011); Immigration and Nationality Act § 214, 8 U.S.C. § 1184 (2011).

21. American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–641 (1998).

22. American Competitiveness and Workforce Improvement Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

23. Consolidated Appropriations Act of 2004, Pub. L. No. 108-447, 118 Stat. 3353 (2004).

24. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 305 (2009).

25. See Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1674–75 (2000).

26. *Id.* at 1676.

returned to 65,000 in 2002.<sup>27</sup> ACWIA also created a mandatory H-1B petitioner fee of \$500 that funded training and educating of U.S. workers.<sup>28</sup> Finally, ACWIA created the concept of “H-1B dependent” employers—those employers whose workforce included a significant proportion of H-1B workers.<sup>29</sup> ACWIA mandated that H-1B dependent employers comply with certain requirements, including attesting that: (1) the employer attempted to recruit “equally or better-qualified” U.S. workers to fill the position; and that (2) H-1B workers had not displaced and would not displace similarly employed U.S. workers.<sup>30</sup> Importantly, ACWIA also contained an exemption to these attestations for H-1B workers with either a master’s degree in a field related to their employment or paid an annual salary of at least \$60,000.<sup>31</sup> ACWIA did not provide any escalator clause to the salary threshold, meaning that as salaries have increased in the nearly twenty years since ACWIA was implemented, most H-1B workers employed by H-1B dependent companies have become exempt from the ACWIA recruitment and non-displacement attestations.<sup>32</sup>

In October 2000, President Clinton signed AC21 into law.<sup>33</sup> Again responding to the technology boom, AC21 set the H-1B cap for 2000 at 115,000, and increased the cap to 195,000 for 2001, 2002, and 2003.<sup>34</sup> The statute also contained a sunset provision, but provided that an H-1B worker would not count against the annual H-1B quota if he or she had held H-1B status in the preceding six years.<sup>35</sup> It also permitted individuals to hold H-1B status beyond the

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27. *Id.*

28. American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, § 414, 112 Stat. 2681-641, at 2681-651-52 (1998) (creating the “Nonimmigrant Petitioner Account”).

29. *Id.*

30. *Id.* (outlining the proportions and percentages of H-1B workers compared with the employer’s “full-time equivalent employees” to establish an employer as an “H-1B dependent employer”—such as an employer who employs twenty-five or fewer non-H-1B employees and has more than seven H-1B employees).

31. *Id.*

32. See Julia Preston, *Large Companies Game H-1B Visa Program, Costing the U.S. Jobs*, N.Y. TIMES (Nov. 10, 2015), <https://www.nytimes.com/2015/11/11/us/large-companies-game-h-1b-visa-program-leaving-smaller-ones-in-the-cold.html> [https://perma.cc/24GM-AZZ3].

33. American Competitiveness in the Twenty-First Century Act, Pub. L. No. 106-313, 114 Stat. 1251 (1998).

34. *Id.* § 102.

35. *Id.* § 103. Beginning in 2004, the cap reverted to 65,000 per year. *Id.*

normal maximum of six years if certain conditions were met regarding the employment-based permanent residence process.<sup>36</sup>

AC21 also created an exemption to the annual H-1B quota: H-1B workers who are employed by or have an offer of employment from institutions of higher education, nonprofit entities related to or affiliated with institutions of higher education, and nonprofit or government research organizations.<sup>37</sup> AC21 increased the \$500 ACWIA H-1B worker training fee to \$1,000,<sup>38</sup> but exempted from the fee requirement the institutions listed above.<sup>39</sup> Finally, AC21 created the concept of H-1B portability, which allows most H-1B workers to begin working for a new employer upon the filing of an H-1B petition.<sup>40</sup>

In December 2004, President George W. Bush signed into law the H-1B Visa Reform Act of 2004, which allocated an additional 20,000 H-1Bs annually for advanced degree graduates of U.S. colleges and universities.<sup>41</sup> The Act also increased the ACWIA fee to \$1,500 for most employers,<sup>42</sup> created a new mandatory \$500 anti-fraud fee for H-1B petitions,<sup>43</sup> and expanded the authority of the Department of Labor (DOL) to investigate alleged H-1B Labor Condition Application (LCA) violations.<sup>44</sup>

Finally, in February 2009, President Barack Obama signed into law the Employ American Workers Act, which mandated that employers receiving funds under the Troubled Asset Relief Program (TARP) comply with the ACWIA attestations for H-1B dependent employers, regardless of the size of its H-1B workforce.<sup>45</sup> Under the terms of the statute, once TARP funds were fully repaid, the

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36. *Id.* § 106.

37. *Id.* § 103.

38. Pub. L. No. 106-311, 114 Stat. 1247 (2000).

39. *Id.*

40. Pub. L. No. 106-313, § 105, 114 Stat. 1251.

41. L-1 Visa H-1B Visa Reform Act, Pub. L. No. 108-447, Sec. 4, Div. J, Tit. IV, § 425, 118 Stat. 3353, 3356 (2005).

42. *Id.* § 422.

43. *Id.* § 424.

44. *Id.* § 426 (“The Secretary of Labor may initiate an investigation of any employer that employs nonimmigrants . . . if the Secretary of Labor has reasonable cause to believe that the employer is not in compliance with this sub-section.”).

45. Employ American Workers Act, Pub. L. 111-5, Sec. 4, Div. A, Tit. XVI, § 1611, 123 Stat. 115, 305 (2009).

restrictions of the Employ American Workers Act no longer applied.<sup>46</sup>

Both immigration critics and advocates would likely agree that none of the changes truly fix the core problems of the program. Critics of the H-1B program may argue that the changes have not gone far enough to protect U.S. workers, while immigration advocates may argue that the changes have failed to increase or modernize quotas in a way that ensures that H-1B employers can access high-skilled talent.

## 2. *Statutory Changes Affecting L-1 Nonimmigrants*

Compared to the H-1B program, the L-1 has seen relatively little statutory change to its program in the past twenty years. In 2002, Public Law 107-125 was enacted, and reduced the required period of qualifying employment abroad from one year to six months if the employer had an approved blanket L petition.<sup>47</sup> While not directly affecting the L-1 status, Public Law 107-125 provided employment authorization to L-2 spouses of L-1 nonimmigrants.<sup>48</sup>

The only other major piece of legislation concerning the L-1 program was the L-1 Visa Reform Act of 2004.<sup>49</sup> As part of the same omnibus appropriation legislation as the H-1B Visa Reform Act, the statute prohibited placement of L-1 specialized knowledge workers at a third-party worksite if such workers were principally under the supervision and control of the third-party employer, or if the placement was essentially an arrangement to provide labor for hire.<sup>50</sup> The statute also added the same \$500 fraud prevention and detection fee to L-1 petitions.<sup>51</sup> Finally, the statute restored the period of qualifying employment abroad to one full year for employers with an approved blanket L petition.<sup>52</sup> The L-1 Visa Reform Act of 2004 did not change Public Law 107-125's provision regarding L-2 employment, and L-2 spouses remain able to apply for employment authorization from USCIS.

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46. *Id.*

47. Act of Jan. 16, 2002, Pub. L. No. 107-125, Sec. 2, 115 Stat. 2403 (2002).

48. Work Authorization for Spouses of Intracompany Transferees, Pub. L. No. 107-125, 115 Stat. 2403 (2002).

49. *See* L-1 Visa Reform (Intracompany Transferee) Act of 2004, Pub. L. No. 108-447, Sec. 4, Div. J, Tit. IV, §§ 401-417, 118 Stat. 3351-53 (2005).

50. *Id.* § 412.

51. *Id.* § 426.

52. *Id.* § 413.

The L-1 program is exceptionally important to large multinational companies with operations in the United States, and significant restrictions on that program may discourage foreign investment.<sup>53</sup> For now, the L-1 program has not received the kind of attention or scrutiny applied to the H-1B program, but it is certainly not immune to this kind of attack.

### 3. *Statutory Changes Affecting Employment-Based Green Cards*

The employment-based preference system for allocation of green cards appears in INA 203(b),<sup>54</sup> and sets forth criteria to allocate the annual quota of 140,000 employment-based green cards.<sup>55</sup> The only major statutory change relating to employment-based green cards in the last twenty years was the Legal Immigration Family Equity (LIFE) Act and LIFE Act Amendments of 2000.<sup>56</sup> The LIFE Act created a brief window during which foreign nationals who had entered the U.S. unlawfully, worked without authorization, or otherwise failed to maintain legal status could still adjust status to that of a lawful permanent resident.<sup>57</sup> This included employment-based green card applicants. To qualify for this relief, the individual was required to be the beneficiary of a labor certification application immigrant visa petition (either based upon family relationship or employment) filed on or before April 30, 2001.<sup>58</sup> In most cases, the individual was also required to pay an additional \$1,000 fee and complete Supplement A to Form I-485 to apply under Section 245(i) provisions with the individual's adjustment of status application.<sup>59</sup> In most cases, the individual was

53. See NAT'L FOUND. FOR AM. POLICY, THE REAL WORLD IMPACT OF PROPOSED HIGH-SKILLED IMMIGRATION RESTRICTIONS 4 (Aug. 2016), <http://nfap.com/wp-content/uploads/2016/08/Real-World-Impact-of-Proposed-High-Skilled-Immigration-Restrictions.NFAP-Policy-Brief.August-20161.pdf> [<https://perma.cc/SXY9-PBGX>] ("Not allowing companies to transfer their own employees where needed encourages employers to invest and operate more outside of the United States.")

54. Immigration and Nationality Act § 203(b), 8 U.S.C. 1153(b) (2012).

55. *Id.* § 1151(d).

56. Legal Immigration Family Equity (LIFE) Act, Pub. L. No. 106-553, 114 Stat. 2762A-142 (2000); LIFE Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-324 (2000).

57. Immigration and Nationality Act § 245(i), 8 U.S.C. 1255(i) (2012).

58. *Id.*

59. *I-485 Supplement A, Supplement A to Form I-485, Adjustment of Status Under Section 245(i)*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Dec. 13, 2017), <https://www.uscis.gov/i-485supa> [<https://perma.cc/FW7D-SXRQ>].

further required to show that he or she was physically present in the U.S. on December 21, 2000.<sup>60</sup>

The LIFE Act did not change the underlying employment-based green card process or the statutory annual quotas of employment-based green cards.<sup>61</sup> However, it did provide an opportunity for otherwise ineligible individuals to obtain a green card through the employment-based process.<sup>62</sup> In turn, labor certification applications surged as individuals attempted to take advantage of this brief window.<sup>63</sup> This contributed to a significant application-processing backlog at the DOL.<sup>64</sup> Some advocates for reducing immigration criticized the program, characterizing it as an amnesty program.<sup>65</sup>

*B. Major Regulations Affecting High-Skilled Immigration*

Since 2000, few statutory changes have affected high-skilled immigration. As a result, regulatory changes have taken on particular importance. A regulation cannot, of course, change an underlying statutory requirement. However, the way in which a regulation implements a statute can have significant practical impacts on a statutory requirement or benefit. Since 2000, this has certainly been the case with respect to regulations implementing various aspects of the INA.

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60. *Questions and Answers: Section 245(i) Provision of the LIFE Act*, U.S. DEP'T OF JUSTICE, (Mar. 23, 2001), [https://www.uscis.gov/sites/default/files/files/pressrelease/Section245ProvisionLIFEAct\\_032301.pdf](https://www.uscis.gov/sites/default/files/files/pressrelease/Section245ProvisionLIFEAct_032301.pdf) [https://perma.cc/SLV8-3GPB].

61. *Id.*

62. *Id.*

63. See U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR. STATISTICS, 2002 YEARBOOK OF IMMIGRATION STATISTICS 120 (2003) (showing a rise in individuals granted admission under the LIFE Act).

64. U.S. DEP'T OF LABOR, OFFICE OF INSPECTOR GEN., RESTORING SECTION 245(1) OF THE IMMIGRATION AND NATIONALITY ACT CREATED A FLOOD OF POOR QUALITY FOREIGN LABOR CERTIFICATION APPLICATIONS PREDOMINANTLY FOR ALIENS WITHOUT LEGAL WORK STATUS 1-2 (Sept. 2004), <https://www.oig.dol.gov/public/reports/oa/2004/06-04-004-03-321.pdf> [https://perma.cc/4AAC-4DN8].

65. *The Seven Amnesties Passed by Congress*, NUMBERSUSA EDUC. & RES. FOUND. (Aug. 26, 2009, 1:52 PM), <https://www.numbersusa.com/content/learn/illegal-immigration/seven-amnesties-passed-congress.html> [https://perma.cc/K9WY-HF5L].

1. *Regulations Affecting H-1B Petitions*

In December 2000, DOL issued interim final regulations implementing the H-1B components of ACWIA.<sup>66</sup> The regulations took effect in January 2001, except for the provisions on prevailing wages, which became effective immediately.<sup>67</sup> The regulation created an electronic “faxback” system for processing LCAs for H-1B petitions, in which the LCA was submitted via fax to the DOL and then the certified LCA was faxed back to the applicant.<sup>68</sup> In addition, the regulation prohibited “benching” of H-1B workers, meaning that even if the worker was not engaged in productive employment he or she still had to be paid the required wage.<sup>69</sup> The regulation also mandated a specific time period within which an H-1B worker had to be added to an employer’s payroll.<sup>70</sup> Additionally, it restricted payment by the H-1B worker of attorney’s fees for the H-1B petition,<sup>71</sup> and implemented posting requirements relating to the LCA at the worksite where the H-1B worker would perform services.<sup>72</sup> Finally, the regulation created a procedure for non-aggrieved parties to report H-1B LCA violations.<sup>73</sup>

In June 2004, the Department of State (DOS) announced that it would end the “visa reissuance” program in the U.S. for C, E, H, I, L, O, and P visas effective July 16, 2004.<sup>74</sup> Previously, this program allowed certain foreign nationals, including H-1Bs, to renew the visa stamp in their passport by mailing the passport to DOS within the U.S., rather than traveling abroad and submitting a visa application at a U.S. consulate.<sup>75</sup> DOS indicated the program was being

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66. DOL Temporary Employment in the United States of Nonimmigrants Under H-1B Visas, 65 Fed. Reg. 80,110 (Dec. 20, 2000).

67. *Id.*

68. *Id.* at 80,212.

69. *Id.* at 80,218.

70. *Id.*

71. *Id.* at 80,219.

72. *Id.* at 80,221.

73. *Id.* at 80,235.

74. Discontinuation of Reissuance of Certain Nonimmigrant Visas in the United States, 69 Fed. Reg. 120, 35,121 (June 23, 2004).

75. *Id.* (“22 CFR 41.111(b) authorizes the Deputy Assistant Secretary for Visa Services or another other person he or she designates to reissue nonimmigrant visas, in their discretion.”); Paul Siegel, *Visa Revalidation Process Terminated by the Department of State*, INT’L RISK MGMT. INST. (Aug. 2004), <https://www.irmi.com/articles/expert-commentary/visa-revalidation-process-terminated> [<https://perma.cc/UNU6-MKWU>].

terminated due to interview requirements and the Enhanced Border Security and Visa Entry Reform Act's requirement "that U.S. visas issued after October 26, 2004, include biometric identifiers."<sup>76</sup> Because of this new requirement, the DOS determined that "[i]t is not feasible for the Department to collect the biometric identifiers in the United States."<sup>77</sup>

In response to the H-1B Visa Reform Act of 2004, USCIS issued regulations explaining procedures for filing petitions seeking one of the new 20,000 H-1B visas reserved for individuals with an advanced degree from a U.S. college or university.<sup>78</sup> The regulations also created the "H-1B lottery" system, which is currently used when the number of H-1B petitions filed exceeds the annual quota.<sup>79</sup> The regulation states:

When necessary to ensure the fair and orderly allocation of numbers in a particular classification subject to numerical limits, USCIS may randomly select from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection as validated by the Office of Immigration Statistics.<sup>80</sup>

In December 2004, the DOL issued a regulation mandating the use of an electronic filing system for most LCAs, replacing the "faxback" and mail-in LCA adjudication process.<sup>81</sup> This regulation "requires electronic filing and processing of H-1B and H-1B1 [LCAs] except in limited circumstances where a physical disability or lack of Internet access prevents the employer from filing electronically."<sup>82</sup>

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76. Discontinuation of Reissuance of Certain Nonimmigrant Visas in the United States, 69 Fed. Reg. 120, 35,121 (June 23, 2004).

77. *Id.*

78. Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004, 70 Fed. Reg. 86, 23,775-83 (May 5, 2005) (to be codified at 8 C.F.R. pt. 214).

79. *Id.* at 23,783.

80. *Id.*

81. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 247, 77,336 (Dec. 27, 2004) (to be codified at 20 C.F.R. pts. 655-56).

82. Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, and Labor Attestation Requirements for Employers Using Nonimmigrants on H-1B1 Visas in Specialty Occupations; Filing Procedures, 70 Fed. Reg. 72,555, 72,557 (Dec. 5, 2005) (to be codified in 20 C.F.R. pt. 655).

As a result of this regulation, DOL created the iCert system, which is still used today for the filing, tracking, and adjudication of LCAs.<sup>83</sup>

In March 2008, USCIS issued a regulation that clarified the way H-1B petitions were counted against the H-1B quota.<sup>84</sup> The rule prohibited employers from filing more than one H-1B petition for the same worker in the same fiscal year.<sup>85</sup> It also clarified that in the event that a lottery was needed to allocate H-1B petitions, all petitions received during the first five days of the application period would be included in that lottery.<sup>86</sup> If a lottery was needed for petitions qualifying for the advanced degree exemption, the rule specified that those petitions would be held first, and that any petitions not selected would then be included in the general cap lottery that year.<sup>87</sup>

While not directly affecting the H-1B program, a 2008 regulation relating to Optional Practical Training for F-1 students affected many individuals who were attempting to obtain H-1B status but who were unable to do so because their petitions were not selected in the H-1B lottery. On April 8, 2008, the Department of Homeland Security (DHS) published what became known as the “STEM OPT” rule.<sup>88</sup> This rule extended the normal twelve months to seventeen months of Optional Practical Training available to F-1 students following graduation.<sup>89</sup> This extension was limited to students with a U.S. degree in science, technology, engineering, or mathematics who were working for an employer who participated in the E-Verify program.<sup>90</sup> In addition to providing continued work authorization, this rule also allowed many of those students to enter

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83. *iCERT Visa Portal System*, U.S. DEP'T OF LABOR, <https://icert.doleta.gov> [<https://perma.cc/TF53-PQLL>] (last updated Jan. 31, 2017).

84. *Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt from the Annual Numerical Limitation*, 73 Fed. Reg. 57, 15,394–95 (Mar. 24, 2008) (to be codified in 8 C.F.R. pt. 214).

85. *Id.* at 15,389.

86. *Id.* at 15,392.

87. *Id.*

88. *Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions*, 73 Fed. Reg. 18,944 (Apr. 8, 2008) (to be codified at 8 C.F.R. pts. 214 and 274a).

89. *Id.* at 18,944 (increasing the optional practical training from twelve months to twenty-nine).

90. *Id.*

H-1B petitions multiple times since they could remain working for multiple H-1B cycles.<sup>91</sup>

An additional non-H-1B regulation published in 2015 directly affected H-1B workers.<sup>92</sup> It provided an option for certain spouses of H-1B workers to obtain employment authorization.<sup>93</sup> On February 25, 2015, USCIS issued a rule extending eligibility for employment authorization to H-4 dependent spouses of H-1B nonimmigrants where the H-1B worker is either: (1) the beneficiary of an approved I-140 immigrant petition, or (2) has been granted H-1B status pursuant to sections 106(a) and (b) of the AC21.<sup>94</sup>

In March 2016, following litigation relating to the April 2008 STEM OPT rule, DHS issued a revised rule modifying the terms of the STEM OPT program.<sup>95</sup> Under the new rule, employers wishing to employ a student under STEM OPT are required to prepare a training plan describing the training, attest that the F-1 student will not replace a U.S. worker, and affirm that the student will receive wages consistent with the terms and conditions of a student's training opportunity and with U.S. workers in similar positions in the same geographic area of employment.<sup>96</sup> The regulation also extended the available period of STEM OPT from seventeen months to twenty-four months.<sup>97</sup>

In November 2016, DHS issued a final rule regarding a wide variety of areas affecting employment-based nonimmigrants and immigrants, including H-1B workers.<sup>98</sup> The rule codified many agency practices, including: procedures for H-1B portability;<sup>99</sup> qualifications for extension of stay in H-1B status beyond the normal six-year maximum;<sup>100</sup> and definitions of "related or affiliated

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91. *Id.*

92. Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) (to be codified at 8 C.F.R. pts. 214 and 274a).

93. *Id.* at 10,309.

94. *Id.* at 10,285.

95. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040 (Mar. 11, 2016) (to be codified at 8 C.F.R. pts. 214 and 274a).

96. *Id.* at 13,042.

97. Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2 (2016).

98. Immigrant Petitions, 8 C.F.R. § 204 (2012).

99. Temporary Employees, 8 C.F.R. § 214.2(h)(2)(i)(H) (2016).

100. *Id.*

nonprofit entity” for purposes of exemption from the H-1B quota.<sup>101</sup> It also created a sixty-day grace period where an H-1B worker would be viewed as maintaining H-1B status following termination of employment.<sup>102</sup>

## 2. *Regulations Affecting L-1 Nonimmigrants*

Unlike the H-1B category, no regulations have been implemented in the past twenty years that specifically focus on the L-1 nonimmigrant category. Certain regulations and notifications—such as the elimination of the domestic visa revalidation process in 2004 that required traveling abroad and attending a consular appointment for a new visa stamp—affected L-1 nonimmigrants in the same way as H-1B workers and other nonimmigrants.<sup>103</sup> L-1 nonimmigrants were also affected by the November 2016 regulation, described above, relating to employment-based nonimmigrants and immigrants.<sup>104</sup> The sixty-day grace period following conclusion of employment applies to L-1 workers in the same way it applies to H-1B workers. Therefore, those individuals are provided with a brief period to change to a different status or make arrangements to depart from the U.S. in the event of an unexpected termination of employment.<sup>105</sup>

The November 2016 regulation also provided USCIS with the authority to issue one year of employment authorization to individuals with “compelling circumstances.”<sup>106</sup> This relief is available for individuals with a valid E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status, but is particularly helpful for workers in L-1B status, as L-1 nonimmigrants are subject to a strict maximum period of stay in L-1A or L-1B status.<sup>107</sup> Under the regulation, an employment authorization document (EAD) can be issued, with compelling circumstances, to a beneficiary of an EB-1, EB-2, or EB-3

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101. *Id.*

102. Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.1(1)(2) (2016).

103. Discontinuation of Reissuance of Certain Nonimmigrant Visas in the United States, 69 Fed. Reg. 35,121 (June 23, 2004).

104. 8 C.F.R. § 214.1(1)(2).

105. *Id.*

106. Petitions for Employment-Based Immigrants, 8 C.F.R. § 204.5(p) (2016).

107. *See generally* Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,405 (Nov. 18, 2016).

I-140 immigrant petition who does not have an immigrant visa number immediately available to them due to the visa backlog.<sup>108</sup> Because an H-1B worker is able to extend his or her H-1B status beyond the normal six-year maximum, the compelling circumstance EAD is, therefore, rarely applicable to H-1B workers—even if a labor certification application or immigrant petition has been filed. By contrast, an L-1B specialized knowledge worker could meet the requirements of the compelling circumstances EAD, given the strict maximum limitation on the amount of time available in L-1 status.<sup>109</sup> However, there are few (if any) reports of successful compelling circumstances EAD applications.

### 3. *Regulations Affecting Employment-Based Green Cards*

The employment-based green card process is governed by section 204.5 of the INA.<sup>110</sup> This statute provides three primary categories for employment-based green cards—EB-1, EB-2, and EB-3. The EB-1 category consists of multinational managers,<sup>111</sup> outstanding researchers,<sup>112</sup> and individuals of extraordinary ability.<sup>113</sup> The EB-2 category consists of individuals of exceptional ability, as well as those performing a job that requires either a Bachelor's degree and at least five years of progressively more responsible experience or a Master's degree.<sup>114</sup> The EB-3 category consists of individuals performing a job requiring a Bachelor's degree and less than five years of experience, as well as skilled workers performing a job requiring at least two years of training.<sup>115</sup>

In the past twenty years, several regulations have been implemented that affect the employment-based green card process.<sup>116</sup> Most prominent among these are regulations affecting

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108. *Id.* at 82,424.

109. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77,326, 77,387 (Dec. 27, 2004) (to be codified at 20 C.F.R. pt. 656).

110. *See* 8 C.F.R. § 204.5 (2017).

111. *Id.* § 204.5(j). “Multinational managers” are individuals working in a managerial capacity abroad for the same or related company abroad for at least one year. *Id.* § 204.5(j) (2).

112. *Id.* § 204.5(i).

113. *Id.* § 204.5(h).

114. *Id.* § 204.5(k).

115. *Id.* § 204.5(l).

116. *Overview of INS History*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/>

the labor certification process—the process to prove there are no U.S. workers qualified for the vacant job.<sup>117</sup> There have also been minor regulations relating to USCIS processing of I-140 immigrant petitions and I-485 adjustment of status applications.<sup>118</sup>

In July 2002, a regulation was implemented that allowed an I-485 adjustment of status application to be filed concurrently with the underlying I-140 immigrant petition, if a visa number was available at the time of the application filing.<sup>119</sup> Green card applicants saw several positive impacts from this regulation. First, the regulation shortened processing times, as both applications could pass simultaneously. Prior to the 2002 regulation, employment-based green card applicants needed to wait for approval of the underlying I-140 immigrant petition.<sup>120</sup> Only then could the applicant file the I-485 adjustment of status application.<sup>121</sup>

Second, and perhaps more important, it allowed both the green card applicant and his or her family members to obtain employment authorization as part of the adjustment of status application process. Pursuant to 8 C.F.R. 274a.12(c)(9), an adjustment of status applicant is permitted to apply for an EAD while the adjustment of status application is pending.<sup>122</sup> For spouses of nonimmigrants in categories without work authorization (such as H-4 spouses prior to the 2015 H-4 EAD rule), this was a significant change and allowed them to seek employment, often after years of being unable to do so.

The most significant regulatory change to the employment-based green card process was the final rule issued in December 2004, creating the Program Electronic Review

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Our%20History/INS%20History/INSHistory.pdf [https://perma.cc/XST5-C8UG].

117. George N. Lester, *The Labor Certification Process*, IMMIGRATION DAILY, <https://www.ilw.com/articles/2004,0617-lester.shtm> [https://perma.cc/D5LV-3E3X] (last visited June 20, 2018).

118. *Overview of INS History*, *supra* note 116, at 10.

119. Allowing in Certain Circumstances for the Filing of Form I-140 Visa Petition Concurrently With a Form I-485, 67 Fed. Reg. 49,561 (July 31, 2002) (to be codified at 8 C.F.R. 204, 245, and 299).

120. *Id.* (“The current [INS] regulations provide that an alien worker who wants to apply for permanent resident by filing the appropriate Form I-485 . . . cannot do so until he or she obtains approval of the underlying [Form I-140] petition . . .”).

121. *Id.*

122. 8 C.F.R. § 274a.12(c)(9) (2004).

Management (PERM) labor certification process.<sup>123</sup> PERM completely restructured the process for applying to DOL for alien labor certification as required by INA § 212(a)(5). Under the PERM process, applications for labor certification are centrally filed with the Office of Foreign Labor Certification (OFLC), replacing the regional labor certification process and “Reduction in Recruitment” process that existed before.<sup>124</sup>

The PERM regulation sets forth a detailed process for employers to test the job market and determine whether a qualified, willing, and able U.S. worker can perform the position for which that labor certification is sought.<sup>125</sup> DOL created an electronic labor certification filing portal because most employers submit the application electronically.<sup>126</sup> The application is attestation-based and the regulation provides DOL with audit authority to conduct both random and targeted audits of filed applications.<sup>127</sup> The implementation of the PERM process has substantially reduced labor certification processing times, which often took years before the regulation was implemented.

In May 2006, USCIS published a notice in the Federal Register expanding the premium processing program to I-140 immigrant petitions in the EB-1, EB-2, and EB-3 categories, with the exception of EB-1(3) multinational manager petitions.<sup>128</sup> Under the premium processing program, petitioners can pay an additional fee of \$1,225, and in exchange, USCIS will adjudicate the underlying petition within fifteen calendar days.<sup>129</sup> Expanding the premium processing program to include I-140 immigrant petitions provided an option to obtain much shorter processing times and to gain access to the

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123. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77,326 (Dec. 27, 2004) (to be codified at 20 C.F.R. pt. 656).

124. *Id.* at 77,392.

125. *Id.* at 77,392–94.

126. *Permanent Labor Certification Details*, U.S. DEP’T OF LABOR (Jan. 15, 2009), [https://www.foreignlaborcert.doleta.gov/perm\\_detail.cfm](https://www.foreignlaborcert.doleta.gov/perm_detail.cfm) [https://perma.cc/XQ6F-5F6P].

127. 69 Fed. Reg. at 77,396.

128. Notice of Designation of Certain Employment-Based Petitions and Applications as Eligible for Premium Processing Service, 71 Fed. Reg. 29,662 (2006).

129. *How Do I Use the Premium Processing Service?*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Oct. 3, 2017), <https://www.uscis.gov/forms/how-do-i-use-premium-processing-service> [https://perma.cc/6HWF-ULGM].

ancillary benefits that come from an approved I-140, such as three-year extensions of H-1B status under AC21.<sup>130</sup>

In January 2016, DHS issued a final regulation expanding the list of initial evidence allowed for EB-1 outstanding professors and researchers to use in support of their petitions.<sup>131</sup> This expanded the options for petitioners to demonstrate that a beneficiary qualifies as an outstanding professor or researcher.<sup>132</sup>

Finally, the November 2016 final rule discussed above had a number of provisions directly affecting employment-based green card applicants.<sup>133</sup> Included was a provision clarifying that when an employment-based immigrant petition has been approved for at least 180 days, withdrawal of that I-140 immigrant petition by the employer will no longer result in an automatic revocation of the petition.<sup>134</sup> Instead, as long as the petition was not revoked for fraud or material misrepresentation, the invalidation or revocation of an LCA approval by DOL, or a material USCIS error, the petition will continue to be valid for: (1) purposes of retention of priority dates; (2) adjustment of status portability under INA § 204(j); and (3) extensions of status under AC21 §§ 104(c) and 106(a) and (b).<sup>135</sup>

The regulation also modified the effect of a timely filed EAD renewal application, particularly EADs obtained as part of a pending I-485 adjustment of status application.<sup>136</sup> Under the November 2016 rule, a timely filed EAD renewal application in a category that does not require adjudication of an underlying application, petition, or request will automatically extend the validity of the expiring EAD.<sup>137</sup> This change ensured that most employment-based adjustment of status applicants could maintain uninterrupted work authorization even when there are lengthy processing delays. Finally, the regulation largely codified existing agency practice regarding

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130. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

131. Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1 Immigrants, 81 Fed. Reg. 2068 (Jan. 15, 2016) (to be codified at 8 C.F.R. pts. 204, 214, 248, and 274a).

132. *See id.*

133. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245, and 274a).

134. *Id.*

135. *Id.* at 82,468.

136. *Id.*

137. *Id.* at 82,491.

adjustment of status portability under INA § 204(j) and provided a regulatory definition of what constitutes the same or a similar occupational classification.<sup>138</sup> The regulation created a new form, the I-485 Supplement J, intended to gather the information needed to process an adjustment of status portability request.<sup>139</sup>

As detailed above, the major changes seen in the past twenty years relating to high-skilled immigration were primarily made through legislation and regulation. In addition, DHS, DOS, and DOL have issued various policy memoranda, Frequently Asked Questions, and other guidance interpreting and explaining existing regulations and statutes.<sup>140</sup> In the first year of the Trump administration, however, there was a dramatic shift in this approach, where sub-regulatory actions were utilized to make substantial policy changes on an increasingly frequent basis.

### III. MODIFICATION OF HIGH-SKILLED IMMIGRATION THROUGH SUB-REGULATORY ACTION IN THE FIRST YEAR OF THE TRUMP ADMINISTRATION

During the first year of the Trump administration, no new statutes or regulations related to employment-based immigration were proposed or enacted. Nevertheless, the Trump administration has been far more active in its efforts to affect immigration than the prior two presidential administrations. This has been done exclusively through sub-regulatory action.

Sub-regulatory guidance relating to high-skilled immigration chiefly consists of official policy memoranda issued by USCIS,<sup>141</sup> Frequently Asked Questions issued by OFLC,<sup>142</sup> and the DOS Foreign Affairs Manual (FAM).<sup>143</sup> These sub-regulatory sources are intended to provide specific, practical answers and guidance relating

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138. *Id.* at 82,490.

139. *Id.* at 82,490.

140. *See, e.g., OFLC Frequently Asked Questions and Answers*, U.S. DEP'T OF LABOR, <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> [<https://perma.cc/UA6R-XDTB>] (last visited June 20, 2018).

141. *See generally Policy Memoranda*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/laws/policy-memoranda> [<https://perma.cc/S8JZ-G3KM>] (last visited June 20, 2018).

142. *OFLC Frequently Asked Questions and Answers*, *supra* note 140.

143. U.S. DEP'T OF ST., FOREIGN AFFAIRS MANUAL AND HANDBOOK, <https://fam.state.gov/FAM/FAM.aspx?ID=09FAM> [<https://perma.cc/FFH9-PYZX>] [hereinafter FOREIGN AFFAIRS MANUAL].

to the implementation of existing statutes and regulations.<sup>144</sup> Sub-regulatory guidance must remain consistent with current statutes and regulations, as they are not issued through the notice and comment provisions of the APA.<sup>145</sup> In addition to these forms of formal sub-regulatory guidance, as a practical matter, immigration practitioners also see varying adjudication trends, where USCIS, OFLC, or consular officers appear to change the way existing statutes and regulations are applied when adjudicating individual applications.<sup>146</sup>

High-skilled immigration policy is also affected by non-substantive changes. These changes include: the amount of time required by the agencies to process immigration petitions and applications and the frequency in which USCIS issues Requests for Evidence (RFEs), or OFLC issues audits in the context of processing labor certification applications under the PERM labor certification process. Finally, high-skilled immigration policy is affected by USCIS enforcement priorities and approaches, such as audits of LCA compliance relating to H-1B petitions and audits of Form I-9 compliance in the hiring process.<sup>147</sup>

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144. See *Policy Memoranda*, *supra* note 141 (“This page provides access to various policy and procedural memoranda which gives guidance to USCIS adjudicators in their work of processing applications and petitions for immigration benefits while still protecting national security.”).

145. See FOREIGN AFFAIRS MANUAL, *supra* note 143 (“The Foreign Affairs Manual (FAM) and associated Handbooks (FAHs) . . . convey codified information to Department staff and contractors so they can carry out their responsibilities in accordance with statutory, executive and Department mandates.”); *New Rules for the H-2B Visa Program Announced by the U.S. Department of Labor and Homeland Security*, U.S. DEP’T OF LABOR, <https://www.dol.gov/newsroom/releases/eta/eta20150772> [<https://perma.cc/2YTV-E9QB>] (last visited June 20, 2018) (“In response to recent court decisions that have created significant uncertainty around the H-2B temporary foreign nonagricultural worker program, the U.S. Departments of Labor and Homeland Security today announced an interim final rule to reinstate and make improvements to the program and a final rule to establish the prevailing wage methodology for that program.”).

146. See Gabriela Baca, *Visa Denied: Why Courts Should Review A Consular Officer’s Denial of A U.S.-Citizen Family Member’s Visa*, 64 AM. U.L. REV. 591, 596–97 (2015) (“Without any formal recourse, the U.S. citizen petitioner, the visa beneficiary, and the immigration lawyer are left wondering why the consular officer denied the application despite USCIS’s approval of the petition. . . . [O]nce a consular officer makes a visa decision, it is unlikely that a court or a reviewing officer will reverse the decision.”) (internal endnotes omitted).

147. See, e.g., Blocker, *supra* note 14, at 38 (explaining how changes to the immigrant visa program will affect the entertainment industry).

A. *The Travel Ban Executive Orders*

Then-candidate Donald Trump made numerous campaign promises, including banning Muslims from entering the U.S.<sup>148</sup> Shortly after taking office, attempting to implement a travel ban was one of the most visible steps taken by the Trump administration relating to immigration.

President Trump signed the first travel ban on a Friday afternoon, January 27, 2017.<sup>149</sup> The ban immediately went into effect, and blocked entry into the U.S. of nationals of seven Muslim-majority countries—Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen—for ninety days.<sup>150</sup> It also implemented an immediate 120-day ban on all refugees and indefinitely banned the admission of refugees from Syria.<sup>151</sup> The travel ban caused significant chaos at the nation's airports, as flights were already in route with people subject to the ban on board.<sup>152</sup> On February 3, 2017, a federal district court judge issued a nationwide injunction that prohibited enforcement of the travel ban, and on February 9, 2017, the Ninth Circuit Court of Appeals upheld the district court's order.<sup>153</sup>

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148. Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN POLITICS (Dec. 08, 2015), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html> [https://perma.cc/A35Y-RG2P] (citing to Trump campaign manager Corey Lewandowski who stated: "We want to be very fair but too many bad things are happening and the percentage of true hatred is too great. People that are looking to destroy our country must be reported and turned in by the good people who love our country and want America to be great again." (internal quotation marks omitted)).

149. Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13769, 82 Fed. Reg. 20 8977 (Jan. 27, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-02-01/pdf/2017-02281.pdf> [https://perma.cc/2RR7-FFTP].

150. *Id.* But see *2018 Index of Economic Freedom: Country Rankings*, HERITAGE (Feb. 22, 2018, 7:45 PM) <https://www.heritage.org/index/ranking> [https://perma.cc/6TKV-4C7Y] (noting that five of the seven listed countries are not ranked for economic freedom, one of the seven is listed as "Mostly Unfree," and the seventh country is listed as "Repressed." Also note that economic freedom has a direct correlation to "Rule of Law," "Government Integrity," and "Judicial Effectiveness").

151. *Id.*

152. Aaron Blake, *Trump's Travel is Causing Chaos—And Putting His Unflinching Nationalism to the Test*, WASH. POST (Jan. 29, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/president-trumps-travel-ban-is-causing-chaos-dont-expect-him-to-back-down/?utm\\_term=.b37a96e71b1d](https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/president-trumps-travel-ban-is-causing-chaos-dont-expect-him-to-back-down/?utm_term=.b37a96e71b1d) [http://perma.cc/L9KS-WTT9].

153. Dan Levine, *Challenge to Trump Travel Ban Moves Forward in Two Courts*, REUTERS (Feb. 13, 2017, 2:18 PM), <https://www.reuters.com/article/us-usa-trump->

Initially, the Trump administration stated that it would appeal to the U.S. Supreme Court.<sup>154</sup> Instead, on March 6, 2017, the Trump administration issued a revised travel ban.<sup>155</sup> The revised ban was more narrowly tailored and prohibited entry into the U.S. for ninety days nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, but exempted Iraqi nationals from the ban.<sup>156</sup> The ban included a refugee admission ban of 120 days.<sup>157</sup> It also included language that allowed exemptions for green card holders, dual citizens, and other specific visa holders.<sup>158</sup> Despite the narrow tailoring of the revised ban, on March 15, 2017, a U.S. district court judge issued a nationwide injunction banning enforcement of the revised ban, finding that it discriminated on the basis of religion in violation of the U.S. Constitution.<sup>159</sup> On June 26, 2017, the U.S. Supreme Court upheld the injunction, but also held that the ban could be enforced against anyone without a “bona fide relationship” with Americans or U.S. entities.<sup>160</sup>

Finally, on September 24, 2017, President Trump issued a third travel ban, this time banning entry of most nationals from Syria,

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immigration-court/challenge-to-trump-travel-ban-moves-forward-in-two-courts-idUSKBN15S2CB [https://perma.cc/DXY3-T3DE].

154. Richard Wolf & Alan Gomez, *Appeals Court Refuses to Reinstate Trump’s Travel Ban*, USA TODAY (Feb. 9, 2017, 8:30 PM), https://www.usatoday.com/story/news/politics/2017/02/09/appeals-court-trump-travel-ban-immigration-refugee-muslim-president/97644206/ [https://perma.cc/JED5-E2XD] (discussing President Trump’s indication that more appeals were coming after the Ninth Circuit’s ruling).

155. Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13780, 82 Fed. Reg. 45, 13,209 (Mar. 6, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-03-09/pdf/2017-04837.pdf [https://perma.cc/T5A3-X3F2].

156. *Id.*

157. *Id.*

158. *Id.* (stating the “suspension of entry” pursuant to this order does not apply to any lawful resident of the U.S., any foreign national who is admitted to the U.S. or who has documentation that permits travel to the U.S., any dual national of a country designated in the order, any foreign national traveling on a diplomatic visa, or any foreign national who has been granted asylum).

159. Alexander Burns, *2 Federal Judges Rule Against Trump’s Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html [https://perma.cc/6F6B-D7FP].

160. Ariane de Vogue, *Supreme Court Allows Parts of Travel Ban to Take Effect*, CNN (June 27, 2017, 3:11 AM) http://www.cnn.com/2017/06/26/politics/travel-ban-supreme-court/index.html [https://perma.cc/5VWU-HJYF] (“Examples of formal relationships include students accepted to US universities and an employee who has accepted a job with a company in the US.”).

Libya, Iran, Yemen, Somalia, Chad, and North Korea.<sup>161</sup> The ban also restricted travel by certain Venezuelan government officials and their families.<sup>162</sup> Like the March 6 revised travel ban, the third travel ban contained a number of exemptions for dual nationals, green card holders, and nationals from the countries subject to the ban who already had U.S. visa stamps or were already in the U.S.<sup>163</sup> While initially enjoined on a nationwide basis on October 17, 2017,<sup>164</sup> the U.S. Supreme Court ruled on December 4, 2017 that the ban could go fully into effect.<sup>165</sup>

While the travel bans were not directly targeted at employment-based nonimmigrants or green card holders, they nevertheless affected those travelers. In particular, the January 27 travel ban provided no exemptions for affected foreign nationals who had H-1B, L-1, or other employment-based visas, nor did it specifically exempt green card holders.<sup>166</sup> As a result, employment-based nonimmigrants and immigrants were affected by the January 27 travel ban just like any other travelers.<sup>167</sup>

The September 24 travel ban contained a number of exemptions for most individuals who already had an H-1B, L-1, other

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161. Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

162. *Id.* at Sec. 2(e) (citing Venezuela's "inadequacies" in "fail[ing] to share public-safety and terrorism-related information" as the reason for restricting travel by Venezuelan government officials).

163. *Id.*

164. *Practice Alert: DHS and DOS Implementation of Presidential Proclamation and Executive Orders Imposing Restrictions on Travel and Refugees*, AM. IMMIGR. LAW. ASS'N (2017), at 3-4, <http://www.aila.org/File/DownloadEmbeddedFile/70538> [<https://perma.cc/K8HJ-4MW5>].

165. See Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html> [<https://perma.cc/YV4B-WNMZ>].

166. See Dan Merica, *How Trump's Travel Ban Affects Green Card Holders and Dual Citizens*, CNN (Jan. 29, 2017), <https://www.cnn.com/2017/01/29/politics/donald-trump-travel-ban-green-card-dual-citizens/index.html> [<https://perma.cc/SP7U-35FK>].

167. See *id.* But see Noah Bierman, *Trump Administration Further Clarifies Travel Ban, Exempting Green Card Holders*, L.A. TIMES (Feb. 1, 2017, 12:45 PM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-administration-further-clarifies-1485979330-htmlstory.html> [<http://perma.cc/P42N-X5Q6>].

work-authorized visa, and green card holders.<sup>168</sup> However, employers were unable to hire nationals of countries subject to the ban who did not already have a U.S. visa stamp.<sup>169</sup> For instance, if a hospital in the U.S. wished to hire a renowned Iranian doctor who did not hold a U.S. visa stamp, they were unable to do so regardless of that doctor's qualifications. The September 24 travel ban also prevented that doctor from traveling to the U.S. regardless of the job offer.<sup>170</sup> Moreover, because the September 24 travel ban has no expiration date, there is no way for employers to predict when such hires might be possible in the future.

*B. The "Buy American, Hire American" Executive Order*

On April 18, 2017, President Trump signed the "Buy American, Hire American" Executive Order (BAHA), "which seeks to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering our immigration laws."<sup>171</sup> It also directs DHS, in coordination with other agencies, to advance policies to help ensure H-1B visas are awarded to the most-skilled or highest-paid beneficiaries.<sup>172</sup> As an Executive Order, BAHA cannot modify existing statutes or regulations. However, it does clearly direct the agencies involved with administering immigration programs to approach such administration from the standpoint of enforcement, rather than providing a service to regulated parties.<sup>173</sup> A number of agency memoranda have been issued or repealed since the issuance of BAHA.

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168. Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

169. *See id.*

170. *Id.*

171. Buy American and Hire American, Exec. Order No. 13788, 82 Fed. Reg. 18,837 (Apr. 18, 2017).

172. *Buy American, Hire American: Putting American Workers First*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Jan. 3, 2018), <https://www.uscis.gov/laws/buy-american-hire-american-putting-american-workers-first> [<https://perma.cc/J899-YPHE>].

173. *Id.* Indeed, in February 2018, USCIS revised its mission statement to remove the reference to petitioners or applicants as "customers." Richard Gonzales, *America No Longer A "Nation of Immigrants," USCIS Says*, NPR (Feb. 22, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says> [<http://perma.cc/CUE2-GCFS>].

C. *Rescission of the Computer Programmer Specialty Occupation Policy Memorandum*

On March 31, 2017, USCIS issued a policy memorandum that superseded a December 2000 policy memorandum on H-1B petitions for computer-related positions.<sup>174</sup> The March 2017 policy memorandum contained two key assertions. First, it indicated that the occupation of “computer programmer” might not be a specialty occupation eligible for H-1B classification because it might not require a bachelor’s degree as a normal requirement for entry into the occupation.<sup>175</sup> It also explained that USCIS adjudicators should consider whether H-1B petitions using an LCA indicating a Level 1 prevailing wage should be reviewed with additional scrutiny to determine whether the role is in fact a specialty occupation.<sup>176</sup> The timing of this memorandum is important. It was issued the business day before the filing period began for H-1B petitions subject to the 2018 H-1B quota.<sup>177</sup> This timing was likely a political message. More importantly, it foreshadowed the H-1B “Level 1” RFE trend described below.

D. *Dramatic Spike in H-1B Requests for Evidence*

In addition to sub-regulatory actions consisting of formal policy memoranda, it is also possible for agencies to substantially affect policy simply through changes to adjudication practices. Beginning in the summer of 2017, many attorneys representing employers who filed H-1B petitions began to report significant new adjudication issues relating to those petitions,<sup>178</sup> even though there was no change

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174. *PM-602-0142, Rescission of the December 22, 2000 “Guidance Memo on H1B Computer Related Positions,”* U.S. CITIZENSHIP & IMMIGRATION SERVS. (Mar. 31, 2017), <https://www.uscis.gov/sites/default/files/files/natedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf> [<https://perma.cc/3XYM-KTCA>].

175. *Id.* at 2–3.

176. *Id.*

177. *H-1B Fiscal Year (FY) 2018 Cap Season*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Oct. 3, 2017), [http://www.uscis.gov/h-1b\\_count](http://www.uscis.gov/h-1b_count) [<https://perma.cc/EU89-SYFP>].

178. See Yeganeh Torbati, *Trump Administration Red Tape Tangles Up Visas for Skilled Foreigners, Data Shows*, REUTERS (Sept. 20, 2017), <https://www.reuters.com/article/us-usa-immigration-employment-insight/trump-administration-red-tape-tangles-up-visas-for-skilled-foreigners-data-showsidUSKCN1BV0G8> [<http://perma.cc/A3Ar-FSYC>].

to the governing regulations or statutes. According to a November 2017 article in the Wall Street Journal:

[T]he administration is more closely scrutinizing applications for the high-skilled visa program known as H-1B, sending back more than one in four applications between January and August via ‘requests for further evidence,’ according to data from U.S. Citizenship and Immigration Services, known as USCIS, which administers the program. A year earlier, fewer than one in five were sent back.<sup>179</sup>

USCIS now questions the prevailing wage classification and level selected on the underlying LCA, and whether the position requires a bachelor’s degree.<sup>180</sup> For example, the authors of this article received RFEs questioning whether a physician starting a job after medical school should be classified for prevailing wage purposes with other physicians starting in their first professional role. Similarly, the authors received other RFEs questioning whether quantitative financial analysts developing algorithms to predict stock market movement are positions that require a degree. There has been extensive discussion of this issue among employer groups and immigration lawyers, such as the Society for Human Resource Management,<sup>181</sup> the Council for Global Immigration,<sup>182</sup> and the American Immigration Lawyers Association.<sup>183</sup>

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179. Laura Meckler, *Trump Administration Tightens Scrutiny of Skilled Worker Visa Applicants*, WALL ST. J. (Nov. 19, 2017), <https://www.wsj.com/articles/trump-administration-tightens-scrutiny-of-skilled-worker-visa-applicants-1511114338> [https://perma.cc/9HYB-PKFC].

180. Cole Heyer, *Emerging Trends for H-1B Petitions*, SOC’Y FOR HUM. RESOURCE MGMT. (Aug. 28, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/emerging-trends-h1b-petitions.aspx> [https://perma.cc/5UR8-CUFH].

181. *See id.* (discussing USCIS’s challenge to level one wages and computer programmer occupational classification).

182. *See Emerging Trends for H-1B Petitions*, COUNCIL FOR GLOB. IMMIGR. (Aug. 28, 2017), <https://www.cgi.org/us-immigration/news-and-alerts/Pages/Emerging-Trends-for-H1B-Petitions-08282017.aspx> [https://perma.cc/6JVE-BZS5] (showing a cross-posting article from the Council for Global Immigration, an affiliate of the Society for Human Resource Management).

183. *See Responding to H-1B Labor Condition Application*, in FIELD OPERATIONS HANDBOOK, AM. IMMIGR. LAWYERS ASS’N., (Sept. 27, 2016), <http://www.aila.org/File/DownloadEmbeddedFile/74591> [https://perma.cc/XQ7F-ERWC].

The extent to which these RFEs result in denials is currently unknown.<sup>184</sup> Immigration attorneys report that many cases are approved after the response is submitted, but some cases are denied.<sup>185</sup> Regardless of the outcome, however, this change adds substantial time, expense, and uncertainty to the H-1B process. This discourages immigration without making any formal policy change.

*E. Policy Memorandum Requiring In-Person Interviews for All Employment-Based Green Card Applicants*

On August 28, 2017, USCIS announced it would restore an old process, requiring employment-based adjustment of status applicants to attend an in-person interview at a local USCIS office before their application could be approved.<sup>186</sup> The practical effect of this requirement is likely to be a significant delay in the adjudication of employment-based green card applications. Local USCIS offices were not given additional funding to hire more adjudicators, and many local offices already have significant backlogs in scheduling family-based adjustment of status applications.<sup>187</sup> The Trump administration publicly endorsed the RAISE Act, which would vastly reduce legal immigration.<sup>188</sup> Delaying the adjudication process for those already seeking a green card achieves largely the same result as reducing overall green card quotas, and implements through

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184. See USCIS *H-1B Adjudications and RFEs Questioning Level 1 Wage Selection*, NAT'L ASSOC. OF FOREIGN STUDENT ADVISERS 2 (Oct. 19, 2017), [https://www.nafsa.org/\\_/file/\\_/amresource/rfeh1b2017.pdf](https://www.nafsa.org/_/file/_/amresource/rfeh1b2017.pdf) [<https://perma.cc/2HQL-XBPA>] (“There is little data regarding the success or failure of responses to these RFEs to date.”).

185. See Ana Campoy, *Trump is Quietly Swamping Visa Applicants in Extra Paperwork*, QUARTZ (Jan. 11, 2018), <https://qz.com/1176576/h1b-visa-under-trump-is-already-harder-to-get/> [<https://perma.cc/G3T8-UEDA>] (“USCIS approved more than 90% of the H1B applications it processed in fiscal 2017, but that rate dipped below 85% in the first two months of fiscal 2018.”)

186. *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Aug. 28, 2017), <https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants> [<https://perma.cc/ZBB5-8759>].

187. See Laura D. Francis, *Immigration Agency's Green Card Goals Unrealistic, Watchdog Says*, BLOOMBERG BNA (Mar. 14, 2018), <https://www.bna.com/immigration-agencys-green-n57982089845/> [<https://perma.cc/K8KR-42AK>].

188. See PRESIDENT DONALD J. TRUMP BACKS RAISE ACT, WHITE HOUSE, (Aug. 2, 2017) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/> [<https://perma.cc/R5UM-B36Y>].

agency action what has not gained traction through the constitutionally mandated legislative process.

*F. USCIS Adjudication Delays for Employment-Based Immigration Filings*

There have also been significant slowdowns in adjudication of employment-based petitions, due to explicit agency policy decisions and general unexplained slowdowns. On March 3, 2017, USCIS announced it would suspend premium processing for all H-1B petitions for up to six months.<sup>189</sup> This included: H-1B petitions filed subject to the 2018 quota; H-1B change-of-employer petitions; H-1B extensions; and H-1B change-of-status petitions for individuals not subject to the H-1B quota, including physicians who received a waiver of their two-year foreign residence requirement by agreeing to provide medical care in an underserved area for three years.<sup>190</sup> USCIS explained it suspended premium processing to catch up on long-pending extension petitions filed previously,<sup>191</sup> but the practical effect was a tremendous interruption in cases in which prompt adjudication was necessary. This included, for instance, physicians who needed an H-1B change of status to begin providing medical care in rural or other underserved areas of the U.S., engineers and other skilled professionals who needed an H-1B approval to travel abroad for business, and even individuals in H-1B status who were unable to renew their driver's licenses because their particular state's DMV required an H-1B approval notice rather than evidence of a timely filed extension request.<sup>192</sup> The practical effect was therefore significant, placing hardship on applicants having to wait for months and months of processing.

Even without a specific policy announcement, much slower processing times became the norm at USCIS during the first year of the Trump administration. Employment authorization applications, which until January 2017 had a regulatory requirement for

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189. *USCIS Will Temporarily Suspend Premium Processing for All H-1B Petitions*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Mar. 3, 2017), <https://www.uscis.gov/archive/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions> [<https://perma.cc/N9XY-RBPE>].

190. *Conrad 30 Waiver Program*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (May 5, 2014), <https://www.uscis.gov/working-united-states/students-and-exchange-visitors/conrad-30-waiver-program> [<https://perma.cc/UM67-XXTQ>].

191. *Id.*

192. *Id.*

processing within ninety days, currently take nearly five months.<sup>193</sup> EB-1 multinational manager immigrant petitions take in excess of fifteen months.<sup>194</sup> Adjustment of status applications—even without factoring in interview delays—take well over a year.<sup>195</sup> While slow processing times have always been a complaint of immigration attorneys and employers, the exceptionally widespread nature of those delays across multiple kinds of applications is particularly pronounced.

*G. The Administration's Response to Litigation Regarding the H-4 EAD Rule*

As discussed earlier, USCIS issued a final regulation extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants.<sup>196</sup> Following the implementation of that rule, Save Jobs USA filed a lawsuit in April 2015, asserting:

DHS . . . exceeded its authority under the Immigration and Nationality Act (INA) by granting the work permits and that it acted “arbitrarily and capriciously” when it concluded that the rule would have only “minimal labor market impacts” on unemployed and underemployed Americans. Save Jobs USA also claimed that the Department of Labor failed to certify pursuant to law that the new visa rule will not “adversely affect wages and working conditions” of similarly employed American workers.<sup>197</sup>

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193. *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGRATION SERVS. <https://egov.uscis.gov/processing-times/#mainContent> (select “I-765 Application for Employment Authorization” from the dropdown “Form”; then select “Nebraska Service Center” from the dropdown “Field Office or Service Center”; then select “Get processing time”) (last visited June 20, 2018).

194. *Id.* (select “I-140 Immigrant Petition for Alien Worker” from the dropdown “Form”; then select “Nebraska Service Center” from the dropdown “Field Office or Service Center”; then select “Get processing time”) (last visited June 20, 2018).

195. *Id.* (select “I-485 Application to Register Permanent Residence or Adjust Status” from the dropdown “Form”; then select “Nebraska Service Center” from the dropdown “Field Office or Service Center”; then select “Get processing time”) (last visited June 20, 2018).

196. *Supra* Part II.2.A.

197. *See Save Jobs USA v. U.S. Department of Homeland Security*, IMMIGR. REFORM L. INST. (Jan. 1, 2016), <http://www.irli.org/single-post/2016/01/01/Save-Jobs-USA-v-US-Department-of-Homeland-Security> [<https://perma.cc/7CAZ-L49A>].

The lawsuit was filed during the Obama administration and was defended by the Department of Justice, which asked for the court to invalidate the regulation.<sup>198</sup> On April 3, 2017, the Department of Justice under the Trump administration filed a motion asking for a six-month stay in the litigation so it could evaluate whether to continue to defend the validity of the rule and to potentially engage in further rulemaking on the issue.<sup>199</sup> The stay was granted, and on September 27, 2017, the administration asked for another stay of the litigation to December 31, 2017.<sup>200</sup> On February 22, 2018, the DHS motion to hold the case in abeyance for 90 days was granted, and DHS announced that it expects to publish a proposed rule regarding H-4 EADs in June 2018.<sup>201</sup>

As part of its Unified Regulatory Agenda published on December 14, 2017, DHS indicated it intends to proceed with rulemaking relating to the H-4 EAD program.<sup>202</sup> Most observers believe this will be a regulation to terminate the H-4 EAD program.<sup>203</sup> As of this writing, the details of such a regulation rescinding the H-4 EAD rule are not yet known, nor is it known how it would affect individuals currently holding a valid H-4 EAD. Ultimately, however, the end result will likely be that a significant number of H-4 spouses who have received work authorization and have commenced employment will see their employment authorization terminate and will be forced to stop working.<sup>204</sup> This

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198. See *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F.Supp.3d 108, 108 (D.D.C. 2015).

199. See *H4 Visa EAD 2018 News – Lawsuit Status, Trump Administration Impact*, REDBUS2US.COM, <https://redbus2us.com/h4-visa-ead-2017-news-lawsuit-status-trump-administration-impact/> [<https://perma.cc/AX83-9V9B>] (last visited June 20, 2018).

200. See *id.*

201. Greenspoon Marder LLP, *Federal Appeals Court Grants Abeyance in H-4 EAD Lawsuit, but Program Still in Jeopardy as DHS Will Publish Rule to Eliminate the Program in June 2018*, LEXOLOGY (Mar. 7, 2018), <https://www.lexology.com/library/detail.aspx?g=afcda1ee-6032-4775-9e41-64aba09004f2> [<https://perma.cc/N93X-2JHD>].

202. *Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization*, OFFICE OF INFO. AND REG. AFF. (2017), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AC15> [<https://perma.cc/T4GR-99W2>].

203. Dimo R. Michailov, *USCIS Starts Rulemaking Process to Take Away H-4 EAD Work Authorization*, CAP. IMMIGR. L. GROUP PLLC (Dec. 15, 2017), <https://www.cilawgroup.com/news/2017/12/15/uscis-starts-rulemaking-process-take-away-h-4-ead-work-authorization/> [<https://perma.cc/2NHZ-WU3P>].

204. *Id.*

will cause disruption not only to the H-4 spouse and his or her family, who may be relying on the income earned by the H-4 spouse, but also to employers forced to terminate the employment of these individuals and seek another qualified worker to fill the vacancy.

*H. The Entrepreneur Rule Delay and Planned Revocation*

Another significant rule affecting employment-based nonimmigrants, finalized during the Obama administration, was blocked from going into effect altogether by the Trump administration. On January 17, 2017, USCIS issued a final rule, allowing certain foreign national entrepreneurs to be paroled into the U.S. and provided with work authorization so that they could start and grow a business in the U.S.<sup>205</sup> A parole is not technically a nonimmigrant status, but rather authorization issued under the authority of the DHS Secretary to admit a foreign national to the U.S. to engage in specified activities.<sup>206</sup> To qualify for admission under the “entrepreneur parole” rule, an applicant had to “demonstrate through evidence of substantial and demonstrated potential for rapid business growth and job creation that they would provide a significant public benefit to the United States.”<sup>207</sup> The entrepreneur parole rule was praised by many in the technology industry, particularly in areas like Silicon Valley.<sup>208</sup> The finalized rule provided options for individuals who could make a significant contribution to the economy but did not meet the requirements for a traditional nonimmigrant visa.

However, on July 11, 2017, DHS under the new Trump administration issued a notice delaying the effective date of the entrepreneur rule.<sup>209</sup> A lawsuit was filed on September 19, 2017, challenging this delay,<sup>210</sup> and a federal court issued a preliminary

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205. See International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. 31,887 (Jan. 17, 2017) (to be codified at 8 C.F.R. pts. 103, 212, and 274a).

206. See *id.*

207. The rule sets specific detailed requirements, including the threshold of investment required. *Id.*

208. See Jennifer Elias, *Obama Administration Proposing ‘Startup Visa,’* SILICON VALLEY BUS. J. (Aug. 26, 2016), <https://www.bizjournals.com/sanjose/news/2016/08/26/obama-administration-proposing-startup-visa.html> [<https://perma.cc/NZ-H6-KBPE>].

209. 82 Fed. Reg. at 31,887.

210. Complaint, National Venture Capital Ass. v. Duke, No. 17–1912, 2017 WL 5990122 (D.D.C. Dec. 1, 2017).

injunction on December 1, 2017, directing DHS to proceed with implementation of the entrepreneur parole program.<sup>211</sup> USCIS announced on December 14, 2017, that it would begin accepting applications under the program in light of the court's ruling while litigation and regulatory efforts to repeal the rule are ongoing.<sup>212</sup> There have been no reports from USCIS regarding processing of applications under the rule, and it is unknown whether applications have been filed and are pending.

*I. Elimination of the "30/60 Day Rule"*

FAM governs day-to-day policy and procedure questions for consular officers processing nonimmigrant and immigrant visa applications at U.S. consulates abroad.<sup>213</sup> FAM is available to the public, and provides guidance to consular officers' procedures, definitions, and factors to consider in processing visa applications.<sup>214</sup> The nonimmigrant visa application process is governed by Volume 9, Chapter 400 of FAM.<sup>215</sup>

For many years, 9 FAM 302.9-4(B)(3)(g) instructed officers to utilize the "30/60-Day Rule" when assessing situations in which a nonimmigrant visa applicant previously entered the U.S. in a particular visa status, and then shortly thereafter sought to change status to a different category or proceeded with an application for a green card. In particular, 9 FAM 302.9-4(B)(3)(g) stated:

You should apply the 30/60-day rule if an alien states on his or her application for a nonimmigrant visa, or informs an immigration officer at the port of entry (POE), that the purpose of his or her visit is consistent with that nonimmigrant status and then violates such status by:

- (a) Actively seeking unauthorized employment and, subsequently, becomes engaged in such employment;
- (b) Enrolling in a full course of academic study without the benefit of the appropriate change of status;
- (c) Marrying and taking up permanent residence; or

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211. *USCIS to Begin Accepting Applications under the International Entrepreneur Rule*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Dec. 14, 2017), <https://www.uscis.gov/news/news-releases/uscis-begin-accepting-applications-under-international-entrepreneur-rule> [<https://perma.cc/PF7E-K8WS>].

212. *Id.*

213. FOREIGN AFFAIRS MANUAL, *supra* note 143.

214. *Id.*

215. *Id.*

(d) Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.

(g)(3) Inconsistent Conduct Within 30 Days of Entry:

If an alien violates his or her nonimmigrant status in a manner described in 9 FAM 302.9-4(B)(3) paragraph g(2) within 30 days of entry, you may presume that the applicant's representations about engaging in status-compliant activity were misrepresentations of his or her intention in seeking a visa or entry. For a finding of inadmissibility for inconsistent conduct within 30 days of entry, you must request an AO from CA/VO/L/A.

(g)(4) After 30 Days But Within 60 Days:

If an alien violates his or her nonimmigrant status more than 30 days but less than 60 days after entry into the United States, no presumption of misrepresentation arises. However, if the facts in the case give you reasonable belief that the alien misrepresented his or her intent, then you must give the alien the opportunity to present countervailing evidence. If you do not find such evidence to be persuasive, you must request an AO from CA/VO/L/A. (See 9 FAM 302.9-4(C)(2)).

(g)(5) After 60 Days: If an alien violates his or her nonimmigrant status more than 60 days after admission into the United States, the Department does not consider such conduct alone to constitute a basis for an INA 212(a)(6)(C)(i) inadmissibility.<sup>216</sup>

Under this guidance, a decision by an individual to seek a different nonimmigrant status or to apply for a green card was not presumed to be misrepresentation, unless that decision was made within thirty days after entry into the U.S.<sup>217</sup> For example, if someone entered the U.S. on a B-1/B-2 visitor visa to visit his or her American citizen boyfriend or girlfriend, and made the decision after thirty days to marry and apply for a green card, there would be no presumption of misrepresentation about the entry as a visitor.

However, on September 1, 2017, the DOS updated FAM. The update deleted the "30/60-Day Rule," and new sections regarding status violations (or "inconsistent conduct") within and after ninety

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216. *Id.* at 9 F.A.M. 302.9-4(B)(3)(g) (Dec. 20, 2016) (emphasis omitted).

217. *Id.*

days of entry were added.<sup>218</sup> In particular, 9 FAM 302.9-4(B)(3)(g) now states:

(2) Inconsistent Conduct Within 90 Days of Entry:

- (a) However, if an alien violates or engages in conduct inconsistent with his or her nonimmigrant status within 90 days of entry, as described in subparagraph (2)(b) below, you may presume that the applicant's representations about engaging in only status-compliant activity were willful misrepresentations of his or her intention in seeking a visa or entry. To make a finding of inadmissibility for misrepresentation based on conduct inconsistent with status within 90 days of entry, you must request an AO from CA/VO/L/A. As with other grounds that do not require a formal AO, the AO may be informal. See 9 FAM 304.3-2.
- (b) For purposes of applying the 90-day rule, conduct that violates or is otherwise inconsistent with an alien's nonimmigrant status includes, but is not limited to:
  - (i) Engaging in unauthorized employment;
  - (ii) Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g. B status);
  - (iii) A nonimmigrant in B or F status, or any other status prohibiting immigrant intent, marrying a United States citizen or lawful permanent resident and taking up residence in the United States; or
  - (iv) Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.

(g)(3) After 90 Days: If an alien violates or engages in conduct inconsistent with his or her nonimmigrant status more than 90 days after entry into the United States, no presumption of willful misrepresentation arises. However, if the facts in the case give you reasonable belief that the alien misrepresented his or her purpose of travel at the time of the visa application or application for admission, you must request an AO from CA/VO/L/A. (See 9 FAM 302.9-4(C)(2)).<sup>219</sup>

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218. *Id.* at 9 F.A.M. 302.9-4(B)(3)(g) (updated Oct. 17, 2017).

219. *Id.* (emphasis omitted).

This revision substantially broadens the circumstances in which consular officers are instructed to “presume” that visa applicants engaged in willful misrepresentation, which is a serious violation under immigration rules.<sup>220</sup> INA § 212(a)(6) makes misrepresentation in the immigration process a permanent bar to admission to the U.S.:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act, is inadmissible.<sup>221</sup>

Under this revision, for example, a foreign national entering the U.S. in O-1 extraordinary ability nonimmigrant status who files a green card application within ninety days of entering the U.S. could be “presumed” to have misrepresented his/her intent when entering on the O-1 visa.<sup>222</sup> This is because the O-1 is a “status prohibiting immigrant intent.”<sup>223</sup> This revision is also problematic when an O-1 worker, whose employment requires regular travel, decides to proceed with the permanent residence process. This revision, combined with the delays in processing times described above, could result in the individual being unable to travel for more than six to eight months after filing for permanent resident status, which may negatively affect his/her employment. The individual would be unable to file a green card application for ninety days after entering on the O-1,<sup>224</sup> and even after filing would need to wait three to four months for an advance parole travel document to be issued.<sup>225</sup> This would present a significant interruption in the ability to travel without any clear benefit to the immigration process or need for such an interruption.

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220. *See id.*

221. Immigration and Nationality Act § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i) (2017).

222. *See id.*; FOREIGN AFFAIRS MANUAL, *supra* note 143, at 9 F.A.M. 302.9-4(B)(3)(g)(2).

223. *See id.* at 9 F.A.M. 302.9-4(B)(3)(g)(b)(iii).

224. *See id.* at 9 F.A.M. 302.9-4(B)(3)(g)(2).

225. Benjamin Lau & David Rugendorf, *International Travel Alert: Change in Policy Regarding Advance Parole Travel Document Applications*, MSK BLOG (Aug. 23, 2017), <https://blogmsk.com/2017/08/23/international-travel-alert-change-in-policy-regarding-advance-parole-travel-document-applications/> [https://perma.cc/GZD6-A97H].

*J. Advance Parole Travel Document Application Denials*

Another change in adjudication policy implemented in the first year of the Trump administration relates to advance parole travel documents. As part of a pending I-485 adjustment of status application, an adjustment applicant can submit Form I-131 to apply for advance parole travel authorization, which is a travel document issued by USCIS for re-entry to the U.S. after travel abroad.<sup>226</sup> Adjustment of status applicants who hold any nonimmigrant status other than H-1B, H-4, L-1, or L-2 must obtain an advance parole before departing the U.S., as the departure is otherwise viewed by USCIS as an abandonment of the adjustment of status application.<sup>227</sup> While an advance parole is not required for H-1B, H-4, L-1, and L-2 nonimmigrants, it is still highly beneficial as it allows individuals holding such status—who do not have an unexpired H or L visa stamp—to travel abroad and return to the U.S. without a visa stamp at a U.S. consulate abroad. The advance parole document is typically valid for one or two years, and can be renewed for as long as the adjustment of status application is pending.<sup>228</sup>

For many years, USCIS required an advance parole applicant to be physically present in the U.S. at the time the advance parole application was submitted.<sup>229</sup> Once the application was submitted, however, applicants were free to travel abroad as long as they had H or L status, or alternatively, had an unexpired advance parole document and were simply filing the new application to renew the existing document.<sup>230</sup> Nonetheless, in the summer of 2017, applicants began to receive denials of their advance parole applications if they had traveled abroad while the application was pending.<sup>231</sup> These denials were issued even when the applicant had

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226. *Advance Parole*, U.S. CUSTOMS & BORDER PROTECTION (July 28, 2015), <https://www.cbp.gov/travel/us-citizens/advance-parole> [<https://perma.cc/R8N2-VBMP>].

227. *Id.*; *Issuance of Advance Parole Employment Authorization Document, PM-602-0023*, U.S. CITIZENSHIP & IMMIGRATION SERVS., at 2 (Dec. 21, 2010), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/April/issuance-advance-parole.pdf> [<https://perma.cc/2ME2-ZN5T>].

228. *Id.* at 7.

229. Lau & Rugendorf, *supra* note 225.

230. *Id.*

231. *USCIS Denying Advance Parole Applications Based on Overseas Travel*, MURTHY L. FIRM (Aug. 10, 2017), <https://www.murthy.com/2017/08/10/uscis-denying->

underlying H or L status or had a valid and unexpired advance parole while traveling abroad.<sup>232</sup>

USCIS Service Center Operations ultimately confirmed that it now requires that traveling while an advance parole application is pending is viewed as an abandonment of the application.<sup>233</sup> USCIS has taken this position despite the fact that neither the I-131 nor the instructions have changed, and the longstanding practice of USCIS was to require only that the applicant be present in the U.S. at the time the application was submitted.<sup>234</sup>

This change in adjudication policy directly affects employment-based nonimmigrants, as it creates lengthy blackout periods preventing travel abroad, including travel required by their employment in the U.S.<sup>235</sup> This has become especially problematic because of the slowing processing times noted earlier in this article. As of this writing, many advance parole applications are taking in excess of four months to be processed,<sup>236</sup> meaning that travel disruptions can be quite substantial.

*K. Rescission of the Deference Policy Memorandum for Extension of Stay Petitions*

On October 23, 2017, USCIS issued a policy memorandum rescinding prior guidance that instructed USCIS officers to defer to prior determinations of eligibility in the adjudication of petitions for

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advance-parole-applications-based-on-overseas-travel/ [https://perma.cc/AXX3-H2QE].

232. *Id.*

233. *USCIS Will Deny Pending Advance Parole Applications When Green Card Applicants Travel Internationally*, SEYFARTH SHAW, LLP (Aug. 30, 2017), <https://www.lexology.com/library/detail.aspx?g=f4b45f50-7c06-4e49-9b54-48554a0b960a> [https://perma.cc/WK7B-G7HA].

234. See David Jones, *International Travel Advisory for Foreign National Employees*, THE BUSINESS JOURNALS (Oct. 27, 2017), <https://www.bizjournals.com/bizjournals/how-to/growth-strategies/2017/10/international-travel-advisory-for-foreign-national.html> [https://perma.cc/F4EH-ZWXXV].

235. See, e.g., Lau & Rugendorf, *supra* note 225.

236. *Check Case Processing Times*, *supra* note 193 (select “I-131 Application for Travel Document” from the dropdown “Form”; then select “Nebraska Service Center” from the dropdown “Field Office or Service Center”; then select “Get processing time”) (last visited June 20, 2018).

extension of nonimmigrant status.<sup>237</sup> In particular, a 2004 USCIS guidance memo stated:

In matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference. A case where a prior approval of the petition need not be given deference includes where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility.<sup>238</sup>

The "deference" memorandum provided stability to the extension process, while ensuring that an extension petition was evaluated on its merits. The rescission of that memorandum eliminates this stability on the basis that "the memorandum unduly limited adjudicators' inherent fact-finding authority in certain cases."<sup>239</sup>

It is too early to know the practical result of the rescission of the deference memorandum. In many cases, even prior to this change and the start of the Trump administration, employers would see RFEs even on routine extension of stay petitions where there had been no change in the underlying job duties.<sup>240</sup> It is therefore not clear that USCIS adjudicators were following the 2004 deference memorandum even before its rescission.<sup>241</sup> Nevertheless, by formally

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237. *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrants*, PM-602-0151, U.S. CITIZENSHIP & IMMIGRATION SERVS., at 1–2 (Oct. 23, 2017), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf> [<https://perma.cc/9Y4Z-NJF8>].

238. *Id.* at 2 n.1.

239. *Id.* at 3.

240. See Austin T. Fragomen et al., *Immigration Law & Business* § 6:22 (2d ed. 2017) (detailing what a "request for evidence" is and how it is used in adjudications); see also Elizabeth K. Ottman, *It's Time to Open Up the L-1B: How the Emergence of Open Source Technology Will Impact the L-1B Visa Program*, 66 CATH. U. L. REV. 907 (2017).

241. *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Apr. 23, 2004), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_)

rescinding the deference memorandum and instructing adjudicators that they “may, of course, reach the same conclusion as in a prior decision, they are not compelled to do so as a default starting point.”<sup>242</sup> It will likely become increasingly difficult to maintain work-authorized nonimmigrant status, even for those individuals who have no change whatsoever in their role, or qualifications for a given nonimmigrant category. As discussed below, the sub-regulatory changes utilized by the Trump administration to modify immigration policy contrast significantly with prior administrations.

#### IV. HOW THE TRUMP ADMINISTRATION’S APPROACH TO HIGH-SKILLED IMMIGRATION POLICY COMPARES TO THE APPROACH OF PRIOR ADMINISTRATIONS IN THEIR FIRST YEARS

Historically, incoming presidents have issued executive orders and other policy changes when taking office, ordinarily to expand existing regulations and policies.<sup>243</sup> As such, the scope, impact, and depth of these changes are certainly worth further exploration. As explained in more detail below, the extent of changes implemented during the first year of prior administrations is virtually nothing in comparison to those of the Trump administration.

##### A. *The Obama Administration’s First Year: 2009–2010*

On the campaign trail and after he took office, President Barack Obama reiterated his strong commitment to an immigration bill in the first year.<sup>244</sup> In June 2009, President Obama tasked DHS Secretary Janet Napolitano “to begin putting together a

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Memoranda/Archives%201998-2008/2004/readjud\_042304.pdf  
[<https://perma.cc/PQW4-GZSP>].

242. *Id.*

243. See John C. Duncan Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333 (2010) (explaining the history behind the use of executive orders and their prevalence as a tool to the executive); see also *Executive Orders: Washington – Trump*, THE AM. PRESIDENCY PROJECT, (last updated Feb. 20, 2018) <http://www.presidency.ucsb.edu/data/orders.php> [<https://perma.cc/VNT6-YK9N>] (providing a detailed comparison of the total number of executive orders issued by each administration in history).

244. Julia Preston, *Obama to Push Immigration Bill as One Priority*, N.Y. TIMES (Apr. 8, 2009), <http://www.nytimes.com/2009/04/09/us/politics/09immig.html> [<https://perma.cc/B7F4-6DTU>].

comprehensive immigration reform framework.”<sup>245</sup> Yet, by the end of his first year in office, President Obama was unable to produce meaningful immigration legislation.<sup>246</sup> He was, however, able to affect change in other ways.

1. *Statutory Changes Affecting High-Skilled Immigration*

There was one statutory change relating to immigration during the first year of the Obama administration. On February 17, 2009, President Obama signed into law the Employ American Workers Act (EAWA),<sup>247</sup> which prevented U.S. companies from displacing U.S. workers when hiring H-1B specialty occupation workers if the company received funds through the Troubled Asset Relief Program (TARP),<sup>248</sup> or under section 13 of the Federal Reserve Act (collectively referred to “covered funding”).<sup>249</sup>

The only significant regulatory activity implemented in the first year of the Obama administration (relating to high-skilled immigration) included processing changes from the DOL.<sup>250</sup> On April 15, 2009, DOL published a notice in the Federal Register announcing the rollout of the iCERT system.<sup>251</sup> The notice announced that, effective May 15, 2009, all LCAs would need to be

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245. Lukas Pleva, *Updates: No Big Push in First Year*, POLITIFACT (Aug. 13, 2010, 4:39 PM), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/525/introduce-comprehensive-immigration-bill-first-yea/> [<https://perma.cc/K84F-B3RX>].

246. *Id.* (“[W]ell into his second year, no comprehensive immigration reform measure supported by Obama has been introduced in Congress.”).

247. Employ American Workers Act, Pub. L. No. 111-5, Div. A, Title XVI, § 1611, 123 Stat. 115, 305 (2009); see *Employ American Workers Act (EAWA) and H-1B Petitions*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Feb. 4, 2010), <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/employ-american-workers-act-eawa-and-h-1b-petitions> [<https://perma.cc/4B7V-QVYE>].

248. Troubled Asset Relief Program, Pub. L. No. 110-343, Div. A, Title I, 3765 Stat. 122 (codified at 12 U.S.C.A. § 5211 (2008)).

249. Federal Reserve Act § 13, 12 U.S.C. 347(d) (1978).

250. Tom McCarthy, *The Evolution of Immigration Reform Under Obama – A Timeline*, THE GUARDIAN (Nov. 20, 2014), <https://www.theguardian.com/us-news/2014/nov/20/immigration-reform-under-obama-timeline> [<https://perma.cc/FT6C-7MBB>].

251. Announcing the New iCERT Portal System for Temporary and Permanent Labor Certificates, 74 Fed. Reg. 17,545 (Apr. 15, 2009).

submitted through the online iCERT portal.<sup>252</sup> The Federal Register notice also announced that PERM LCAs would be filed through the iCERT portal beginning October 1, 2009,<sup>253</sup> although to date DOL has not moved the PERM filing system to iCERT. The move to iCERT improved what was previously a more cumbersome system, and was generally viewed as an improvement to the LCA filing process. It did not substantively change anything with respect to the information needed on the LCA form.

The second change was the December 4, 2009 Federal Register notice that, beginning January 1, 2010, all prevailing wage determinations would be requested through the National Prevailing Wage Center on ETA Form 9141.<sup>254</sup> This helped centralize and standardize the prevailing wage determination process, which had previously been handled by the State Workforce Agency (SWA) in the state of employment.<sup>255</sup>

2. *Agency Policy Memoranda and Other Sub-Regulatory Changes Affecting High-Skilled Immigration*

Policy memoranda issued by agencies during the first year of the Obama administration were primarily procedural clarifications and changes intended to improve application processing, in sharp contrast to the first year of the Trump administration.

On February 24, 2009, USCIS announced that it would expand the premium processing program to allow for premium processing of I-140 immigrant petitions where the beneficiary of the petition needed an approved I-140 for an extension of stay in H-1B status beyond the normal six year maximum.<sup>256</sup> This policy change provided H-1B workers, who were otherwise unable to extend their H-1B status, with the ability to expedite processing of the I-140, and thus seek an H-1B extension as soon as the underlying I-140 was approved under the premium processing program.

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252. *Id.*; *iCERT Visa Portal System*, U. S. DEPT. OF LABOR (Mar. 10, 2009), <https://icert.doleta.gov/> [<https://perma.cc/GD8Q-CZSE>].

253. *Id.*

254. *Prevailing Wage Determinations*, 74 Fed. Reg. 63,796 (Dec. 4, 2009).

255. *Id.*

256. *Premium Process Service Expanded for Certain Form I-140 Petitions*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Feb. 24, 2009), <https://www.uscis.gov/archive/archive-news/premium-processing-service-expanded-certain-form-i-140-petitions> [<https://perma.cc/RJB2-UJB5>].

As noted above, in February 2009, President Obama signed EAWA into law, which prevented U.S. companies from displacing U.S. workers when hiring H-1B specialty occupation workers if the company received funds through TARP. On March 20, 2009, USCIS published guidance on its website regarding implementation of the TARP/EAWA requirements.<sup>257</sup> The implementation guidance tracked the language of the statute and clarified the definition of the term “hire” under the statute.<sup>258</sup> The guidance clarified that the additional requirements under EAWA did not apply to a petition to extend the H-1B status of a current employee with the same employer, nor did the requirements apply to a petition seeking to change the status of a current U.S. work-authorized employee to H-1B status with the same employer.<sup>259</sup> It is important to note that USCIS could have, but did not, take a more expansive definition of the term “hire” in the statute, which would have significantly broadened the number of petitions affected by the EAWA requirements.

On May 20, 2009, USCIS issued a policy memorandum clarifying the adjudication policy for H-1Bs for healthcare occupations requiring a license.<sup>260</sup> It is normally necessary to show that an H-1B beneficiary meets all of the position requirements as of the date the petition is filed, including any licensing requirements.<sup>261</sup> However, certain states will not issue a license to healthcare workers unless the individual has a social security number or evidence of employment authorization, creating a “catch twenty-two” for H-1B workers.<sup>262</sup> Under the 2009 policy memorandum, USCIS

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257. *Employ American Workers Act (EAWA) and H-1B Petitions*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Feb. 4, 2010), <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/employ-american-workers-act-eawa-and-h-1b-petitions> [<https://perma.cc/G5WZ-6TLR>].

258. *Id.*

259. *Id.*

260. Memorandum from Barbara Q. Velarde, Chief, Service Center Operations, to Serv. Ctr. Dirs., *Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (May 20, 2009), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/health\\_care\\_occupations\\_20may09.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/health_care_occupations_20may09.pdf) [<https://perma.cc/KMF9-T287>].

261. *Id.*

262. Memorandum from Thomas E. Cook, Acting Ass’t Comm’r, Office of Adjudications, to Serv. Ctr. Dirs., et al., *Traveling After Filing a Request for a Change of Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Nov. 20, 2001),

implemented a new policy where the H-1B petition would be approved for one year if the H-1B petitioner could show that the reason the H-1B worker did not have a license was because of such a state law requirement.<sup>263</sup> An extension of stay petition could then be filed on behalf of the H-1B worker after he or she obtained the license.<sup>264</sup>

On August 6, 2009, USCIS issued a policy memorandum providing a new and more generous standard for determining whether a “successor in interest” relationship existed following a merger, acquisition, or corporate reorganization.<sup>265</sup> Additionally, the memorandum provided that the new entity in a successor in interest relationship was not required to repeat the PERM labor certification process.<sup>266</sup> Under the policy memorandum, a successor in interest scenario could exist “even in situations where a successor does not wholly assume a predecessor entity’s rights, duties and obligations.”<sup>267</sup> USCIS’s new, broader standard allowed more corporate changes and transactions to qualify under the successor in interest provisions.

On November 5, 2009, as a result of problems with the DOL processing of LCAs, USCIS issued a policy memorandum confirming that it would temporarily accept H-1B petitions without an approved LCA if the petitioner provided evidence that the LCA filing had been pending with the DOL for at least seven days.<sup>268</sup> This exception to the normal requirement of including a certified LCA with H-1B filings provided petitioners with relief in situations where filing by a

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<https://www.uscis.gov/sites/default/files/files/pressrelease/Travpub.pdf> [https://perma.cc/2VQP-SCZ3].

263. See Memorandum from Barbara Q. Velarde, *supra* note 260.

264. *Id.*

265. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, to Field Leadership, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions*, U.S. CITIZEN & IMMIGR. SERVS. (Aug. 6, 2009), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/2009%20Memos%20By%20Month/August%202009/Successor-in-Interest-8-6-09.pdf> [https://perma.cc/7ASL-WJMT].

266. *Id.* at 10.

267. *Id.* at 3.

268. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations to Serv. Ctr. Dir., *Temporary Acceptance of H-1B Petitions Without Department of Labor (DOL)-Certified Labor Condition Applications (LCAs)*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Nov. 5, 2009), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2009/h-ib-petitions-temporary-acceptance.pdf> [https://perma.cc/6UYK-APAW].

particular date was important, such as H-1B extension of stay petitions and change of employer petitions.<sup>269</sup>

Finally, on January 8, 2010, USCIS issued an extensive policy memorandum providing guidance on adjudication of H-1B petitions of on-site H-1B workers at third-party worksites.<sup>270</sup> The memorandum instructed adjudicators to evaluate the validity of the employer-employee relationship between the H-1B petitioner and the requested H-1B worker, particularly the H-1B petitioner's right of control over the worker at a third-party worksite.<sup>271</sup> The memorandum specifically addressed the "job-shop" scenario, in which an H-1B employer provided a worker to another employer in essentially a labor-for-hire or staffing arrangement.<sup>272</sup> The memorandum explained that because "job-shop" scenarios did not provide the required right of control between the H-1B petitioner and the H-1B worker, adjudicators should not approve such H-1B petitions.<sup>273</sup> After this memorandum, obtaining approval of H-1B petitions became substantially harder for IT consulting companies whose labor-for-hire business model could not demonstrate the required right of control.<sup>274</sup>

In contrast to the changes made during the first year of the Trump administration, the sub-regulatory changes implemented during the first year of the Obama administration generally made processing more efficient, while also working to attempt to eliminate perceived abuses of immigration programs. These actions did so within the scope of existing regulations, and even the "job shop" memorandum made clear that certain business arrangements

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269. *Id.* at 4. This exception to the requirement was effective from November 5, 2009, to March 4, 2010. *Id.* Interestingly, USCIS determined that it had authority to make this exception based upon a similar exception that INS made seventeen years earlier in 1992. *Id.* at 2.

270. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations to Serv. Ctr. Dir., *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Jan. 8, 2010), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20EmployerEmployee%20Memo010810.pdf> [<https://perma.cc/S8MG-R6QC>].

271. *Id.* at 3–4.

272. *Id.* at 6–7.

273. *Id.*

274. See *IT Consulting Firms Lose Neufeld Memo Lawsuit*, LAB. IMMIGR. LAW (Sept. 14, 2010), <http://www.laborimmigration.com/index.php?s=neufeld&sbutt=Go> [<https://perma.cc/ZD2W-MF57>] (describing the impact of the January 2010 Neufeld Memorandum on IT consulting companies).

involving the placement of H-1B workers at a third-party worksite were perfectly acceptable.<sup>275</sup> This is in sharp contrast to the broad changes made during the first year of the Trump administration, which generally did not provide exceptions and instead made sweeping, mandatory changes affecting all petitions.

*B. The George W. Bush Administration's First Year: 2001-2002*

When he was still a candidate for President, then Governor George W. Bush proposed “a comprehensive reform of the Immigration and Naturalization Service to help change its character and to make America more welcoming to new immigrants.”<sup>276</sup> He also believed that “immigration is not a problem to be solved, but the sign of a successful nation.”<sup>277</sup> Then Governor Bush went further, stating that he knew “first-hand the benefits legal immigrants bring to America,” and that he believed “more should be done to welcome legal immigrants.”<sup>278</sup> While President Bush was unable to meet his immigration reform goals, INS sent several internal field memoranda that liberalized existing immigration laws and policies.<sup>279</sup>

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275. See Memorandum from Donald Neufeld, *supra* note 265, at 4–5.

276. *George W. Bush 2000 On the Issues: Immigration*, 4PRESIDENT.ORG, <http://www.4president.org/issues/bush2000/bush2000immigration.htm> [<https://perma.cc/C3DT-9GRK>].

277. *Id.*

278. *Id.*

279. See, e.g., Memorandum from Michael A. Pearson, Exec. Assoc. Comm’r, Office of Field Operations, Immigration & Naturalization Serv. to Serv. Ctr. Dir. et al., *Initial Guidance for Processing H-1B Petitions as Affected by the “American Competitiveness in the Twenty-First Century Act” (Public Law 106-313) and Related Legislation (Public 106-311) and (Public Law 106-396)*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (June 19, 2001), <https://www.uscis.gov/sites/default/files/files/pressrelease/ac21guide.pdf> [<https://perma.cc/YEW8-59TU>] (temporarily increasing visa allotments and extending certain H-1B benefits); Memorandum from Michael D. Cronin, Acting Exec. Assoc. Comm’r, Office of Programs, Immigration & Naturalization Serv. to Reg’l Dir. et al., *Adjustment of Status Under Section 245(i), As Amended by Legal Immigration Family Equity Act Amendments of 2000*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Jan. 26, 2001), <https://www.uscis.gov/sites/default/files/files/pressrelease/245i.pdf> [<https://perma.cc/6PWD-LCF4>] (extending the “sunset date” for “aliens with current priority dates” from January 14, 1998, to April 30, 2001).

1. *Statutory Changes and Regulations Affecting High-Skilled Immigration*

There were no statutory changes implemented during the first year of President Bush's administration relating to high-skilled immigration. A change in 2002 abolished the INS and created the DHS, a cabinet-level department responsible for immigration processing, enforcement, border security, and other matters.<sup>280</sup> In addition, the USA PATRIOT Act was implemented, creating additional grounds of inadmissibility to the U.S. based upon terrorist activity.<sup>281</sup> This was not, however, targeted toward high-skilled immigration. On December 5, 2001, DOL published a final rule creating a system for electronic filing of LCAs.<sup>282</sup> This system replaced the unreliable and problem-prone "faxback" system that had been used for these applications.<sup>283</sup>

2. *Agency Policy Memoranda and Other Sub-Regulatory Changes Affecting High-Skilled Immigration*

President Bush took office shortly after the enactment of AC21, which was signed into law in October 2000.<sup>284</sup> While no regulations were promulgated regarding AC21 during President Bush's first year in office, INS did issue policy memoranda implementing provisions of the statute. On January 29, 2001, just nine days after President Bush took office, INS issued a memorandum to officers at the ports-of-entry regarding travel after an H-1B worker exercised H-1B portability.<sup>285</sup> Under the memo, H-1B workers who had changed jobs under H-1B portability could travel abroad and be readmitted while their H-1B change of employer petition was pending if they presented their passport with a valid visa stamp, the original I-797 approval notice from their prior employer, and the receipt notice

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280. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

281. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

282. 20 C.F.R. § 655.0 (2010).

283. *Id.*

284. *Supra* note 33 and accompanying text.

285. Memorandum from Michael A. Pearson, Exec. Assoc. Comm'r, to Regional Directors, *Interim Guidance for Processing H-1B Applicants*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Jan. 29, 2001), <http://www.nafsa.org/uploadedFiles/AC21memo20010129.pdf> [<https://perma.cc/8SNN-XP4L>].

evidencing the pending H-1B change of employer petition.<sup>286</sup> This guidance remains in effect today, and was cited in 2015 in a new policy memorandum regarding travel with an H-1B petition filed to reflect a location change.<sup>287</sup> Further guidance on AC21 was issued in a June 19, 2001, INS memorandum, covering issues such as H-1B quota exemptions, post-sixth year extensions of H-1B status, and H-1B portability.<sup>288</sup>

INS also issued a number of “opinion letters” related to high-skilled immigration during President Bush’s first year in office. While not policy memoranda, these letters reflected the agency’s approach to specific issues. These included a March 22, 2001, opinion letter advising that an amended H-1B petition was not required in a corporate acquisition or reorganization as long as a substantial portion of a division is being acquired.<sup>289</sup>

An October 1, 2001, memorandum provided relief to certain physicians, as INS announced that it would accept I-485 adjustment of status applications from physicians with approved national interest waivers who were fulfilling the INA § 214(l) three-year service requirement.<sup>290</sup> This allowed those physicians to gain the benefits of a pending adjustment of status application, including obtaining an EAD and advance parole for themselves and their immediate family members, rather than having to wait until the three-year service requirement was fulfilled.<sup>291</sup>

DOL was active with process improvement initiatives during the first year of the Bush administration. On November 13, 2001, DOL issued guidance on the process through which employers could

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286. *Id.*

287. *PM-602-0120, USCIS Final Guidance on When to File an Amended or New H-1B Petition After Matter of Simeio Solutions, LLC*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (July 21, 2015), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/20150721\\_Simeio\\_Solutions\\_Transition\\_Guidance\\_Memo\\_Format\\_7\\_21\\_15.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/20150721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf) [<https://perma.cc/8BXC-2QNF>].

288. Memorandum from Michael A. Peterson, *supra* note 279.

289. Letter from Efen Hernandez III, Dir., INS Business & Trade Services, to Steven M. Ladik (Mar. 22, 2001), *reprinted in* 78 Interpreter Releases 621 (Apr. 2, 2001).

290. Memorandum from William R. Yates, Deputy Exec. Assoc. Comm’r. to Reg’l Dir., *National Interest Waivers for Second Preference Employment-Based Immigrant Physicians Serving in Medically Underserved Areas or at Veterans Affairs Facilities*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Oct. 1, 2001), <https://www.hsdl.org/?view&did=19700> [<https://perma.cc/YAE4-TA2T>].

291. *Id.*

convert a pending “traditional” labor certificate application to a faster process called Reduction-in-Recruitment.<sup>292</sup> At that time, LCAs were processed by the SWA in the state where the employment would be located, and some states had processing backlogs of years.<sup>293</sup> The Reduction-in-Recruitment process allowed the employer to provide evidence with the labor certification filing of the real-world recruitment it had already performed, and if satisfied with these efforts, the SWA could waive the normal additional recruitment steps that were part of the traditional labor certification process.<sup>294</sup> In states with substantial backlogs, this allowed the process to speed up significantly.

While much of the policy memoranda issued during the first year of the Bush administration was helpful to business, this was not always the case. On June 18, 2001, for instance, INS issued a policy memorandum stating that if an individual traveled outside the U.S. after a change of status request was filed but before it was adjudicated, he or she was considered to have abandoned the change of status request.<sup>295</sup> For applications that took months to process, this provided major restrictions on the ability of individuals with a pending change of status application to travel abroad. This restriction continues today, although with premium processing available to many employment-based change of status applications, the duration of the travel restriction can be substantially reduced.

Another policy memorandum issued during the first year of the Bush administration related to applications for TN status under

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292. Labor Certification Process for Permanent Employment of Aliens in the United States, 20 C.F.R. § 656 (2001); *see also* Letter from Emily Stover DeRocco, Assistant Sec’y, to State Workforce Agencies, *Foreign Labor Certification*, U.S. DEP’T OF LABOR, (Nov. 13, 2001), [https://workforcesecurity.doleta.gov/dmstree/gal/gal2k2/gal\\_02-02.htm](https://workforcesecurity.doleta.gov/dmstree/gal/gal2k2/gal_02-02.htm) [<https://perma.cc/TAL2-BW2>].

293. Doris Meissner, et al., *Backlogs in Immigration Policy Persist*, MIGRATION POL’Y INST. 10 (June 2005), [https://www.migrationpolicy.org/sites/default/files/publications/Jernegan\\_Fact\\_Sheet\\_June\\_2005.pdf](https://www.migrationpolicy.org/sites/default/files/publications/Jernegan_Fact_Sheet_June_2005.pdf) [<https://perma.cc/EUD4-8QHA>].

294. *See Regulations Allow Labor Certifications to Process Faster*, Reeves Miller Zhang & Diza, <https://www.rreeves.com/immigration-news/regulations-allow-labor-certifications-to-process-faster/> [<https://perma.cc/9UHB-949T>] (last visited June 20, 2018).

295. Memorandum from Thomas Cook, Acting Assistant Comm’r, Office of Programs, to Serv. Ctr. Dir. et al., *Travel After Filing a Request for a Change of Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (June 18, 2001), <https://www.uscis.gov/sites/default/files/files/pressrelease/Travpub.pdf> [<https://perma.cc/5PTY-7BAU>].

NAFTA. On May 25, 2001, INS issued a memorandum stating that applicants who were denied admission under NAFTA could, at the discretion of the officer at the port-of-entry, be placed in expedited removal.<sup>296</sup> This was a highly concerning policy announcement, as the expedited removal process triggers a five-year bar to entering the U.S.<sup>297</sup> The memorandum therefore added a new element of risk to the TN application process, as applicants whose TN applications were not approved could be placed into expedited removal and barred from future entries into the U.S. for an extended period of time.

Finally, immigration policy generally—including policy related to high-skilled immigration—was directly affected by the September 11, 2001, terrorist attacks. Following these attacks, a number of new security measures were implemented. The one with the greatest effect on high-skilled immigrants was the National Security Entry-Exit Registration System (NSEERS) special registration program.<sup>298</sup> Although the rule did not specifically target workers on H-1B, O-1, L-1, and other employment-based visas, they were not excluded from the rule either.

Implemented in August 2002, the NSEERS program required individuals from designated countries, as well as those deemed “heightened national security or law enforcement risks,” to undergo a specialized entry process at U.S. ports-of-entry, including having fingerprints and a photograph taken.<sup>299</sup> Covered individuals were also required to “check-in” with immigration officials thirty days after

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296. Memorandum from Michael A. Pearson, Exec. Assoc. Comm’r, Office of Field Operations, to Reg’l Dir., *Public Law 106-378, Adjustment of Status for Certain Syrian Nationals*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (May 25, 2001), [https://www.uscis.gov/sites/default/files/files/pressrelease/106\\_378.pdf](https://www.uscis.gov/sites/default/files/files/pressrelease/106_378.pdf) [<https://perma.cc/NF49-H3KC>]; see Greg Boos & Robert Pauw, *Reasserting the Right to Representation in Immigration Matters Arising at Ports of Entry*, 5 (2004), <https://www.soundimmigration.com/wp-content/uploads/2017/02/reasserting-the-right-to-representation-in-immigration-matters-arising-at-ports-of-entry.pdf> [<https://perma.cc/L264-A2UV>].

297. Immigration and Nationality Act, 8 U.S.C. § 1182, § 212(a)(9)(i).

298. See 8 C.F.R. § 264.1 (2017); Muzaffar Chishti & Claire Bergeron, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*, MIGRATION POL’Y INST. (May 17, 2011), <https://www.migrationpolicy.org/article/dhs-announces-end-controversial-post-911-immigrant-registration-and-tracking-program> [<https://perma.cc/6MTE-8UEL>].

299. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002).

being admitted to the U.S., and again at the end of one year.<sup>300</sup> Certain individuals from the designated countries who were already in the U.S. were required to present themselves to immigration officials, in person, for “special registration” and questioning.<sup>301</sup> In addition, individuals covered by NSEERS could only depart from the U.S. through designated airports.<sup>302</sup> Willful failure to register with NSEERS and willful failure to notify the Department of Justice of a change in address were not only immigration violations, but were also made misdemeanor criminal offenses.<sup>303</sup>

Of note, the twenty-five countries whose citizens were designated for participation in NSEERS were, with the exception of North Korea, countries where the majority of the population were Muslim: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.<sup>304</sup> Only men age sixteen and older from these countries were subject to the NSEERS requirements.<sup>305</sup> NSEERS continued until April 2011,<sup>306</sup> although in December 2003 the “check-in” requirements for covered individuals in the U.S. were eliminated,<sup>307</sup> largely making the program one that resulted in additional scrutiny of covered individuals at the ports-of-

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300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *See* Notice of Requirements for Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002) (applying to “nationals or citizens of Iran, Iraq, Libya, Sudan, or Syria”), 67 Fed. Reg. 70,526 (Nov. 22, 2002) (applying to “national[s] or citizen[s] of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen”), 67 Fed. Reg. 77,642 (Dec. 18, 2002) (applying to “national[s] or citizen[s] of Pakistan or Saudi Arabia”), 68 Fed. Reg. 2,363 (Jan. 16, 2003) (applying to “national[s] or citizen[s] of Bangladesh, Egypt, Indonesia, Jordan or Kuwait”).

305. 67 Fed. Reg. at 67,766.

306. Removing Designated Countries from the National Security Entry-Exit Registration System (NSEERS), 76 Fed. Reg. 23,830 (Apr. 28, 2011).

307. Interim Rule Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578 (Dec. 2, 2003) (“Instead of requiring all aliens subject to NSEERS to appear for 30-day and/or annual re-registration interviews, the DHS will utilize a more tailored system in which it will notify individual aliens of future registration requirements.”).

entry. Those individuals were subject to additional questioning and scrutiny when traveling into the United States, but there were no widespread reports of individuals not being admitted simply because of special registration.

## V. CONCLUSION

The approach taken to employment-based immigration during the first year of the Trump administration is a dramatic departure from past administrations. It is clear that the Trump administration is using the sub-regulatory process to implement restrictions on high-skilled immigration and to discourage employers from utilizing the employment-based immigration system. This is being done in furtherance of the “Buy American, Hire American” executive order, presumably under the auspices of protecting American jobs.<sup>308</sup> The suspension of premium processing for H-1Bs, the significant spike in H-1B RFEs, the implementation of an interview requirement, and the elimination of the deference memo are all steps that add delays and uncertainty to the high-skilled immigration process. Moreover, unlike prior administrations that used the sub-regulatory process to provide clarification and process refinements, the Trump administration’s use of policy memoranda, adjudication changes, and other sub-regulatory changes make substantial policy changes without the notice and comment protections of the APA.

These changes add uncertainty to an already uncertain process. The great unanswered question is how employers will respond if the

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308. Buy American, Hire American, Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017). In comparing historical changes to the high-skilled employment-based immigration process, one item that is evident is the degree to which H-1B usage tracks overall employment rates. Contrary to the theory that H-1Bs are used by employers as a “cheap” source of labor, the data shows that H-1B usage trends up and down with overall employment rates. When unemployment levels are high, employers file fewer H-1B petitions. When unemployment levels are low, employers tend to file more H-1B petitions. H-1B usage follows general overall employment trends and H-1B workers are simply a component of overall employer hiring. For example, during the great recession, from December 2007 to June 2009, H-1B usage rates were dramatically down, in direct correlation to U.S. unemployment rates. Kumar, *H1B Visa Cap Reach Dates History 2000 to 2018—Graph—USCIS Data*, REDBUS2US (June 19, 2017), <https://redbus2us.com/h1b-visa-cap-reach-dates-history-graphs-uscis-data/> [https://perma.cc/W6WH-UXZC]; see also *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STAT. (Feb. 15, 2018, 1:04 PM), <https://data.bls.gov/timeseries/LNS14000000> [https://perma.cc/8VWL-3VRU].

employment-based immigration process becomes too unwieldy, costly, or time-consuming. Immigration opponents argue that there are ample qualified U.S. workers that would be hired if employment-based immigration was restricted.<sup>309</sup> Others argue that in a global economy, employers will take work where the talent is available, including moving major projects to India, China, or other countries that are sources of high-skilled talent.<sup>310</sup> Until now, this debate was more theoretical than practical. With the changes imposed during the first year of the Trump administration, we may soon learn the answer to this question. If immigration opponents are wrong and innovation goes abroad, there will be serious consequences for the U.S. in the coming decades.

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309. Colleen Curry, *Not Everyone is Happy About the Influx of Foreign Workers That Could Soon Hit Silicon Valley*, VICE (Mar. 17, 2015, 9:05 AM), <https://news.vice.com/article/not-everyone-is-happy-about-the-influx-of-foreign-workers-that-could-soon-hit-silicon-valley> [<https://perma.cc/JJ95-HQAH>].

310. Layna Mosley & David A. Singer, *If Trump Restricts Skilled Immigrants, the U.S. Could Lose Jobs to Other Countries*, WASH. POST (Mar. 22, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/22/why-trump-ps-potential-restrictions-on-highly-skilled-immigration-could-shift-jobs-overseas/utm\\_term=.08b14074915e](https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/22/why-trump-ps-potential-restrictions-on-highly-skilled-immigration-could-shift-jobs-overseas/utm_term=.08b14074915e) [<https://perma.cc/3TYY-9ZG9>].

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