Legal Immigration Reform by Another Name:

The Trump Administration's Policy and Administrative Changes Affecting Visas for Foreign Workers

By Cristobal Ramón

Over the last year, the Trump administration has called for significant reforms of the legal immigration system. In addition to calling for the end of the Diversity Immigrant Visa program (also known as the green card lottery) and ending "chain migration" (also known as family-based migration) the administration has supported legislation that would limit legal migration, such as the RAISE Act, which would establish a points-based system like that of Canada or Australia, and would promote the migration of high-skilled immigrants while limiting low-skilled and family-based immigration. While these positions have received the most public attention, the administration has also adopted or proposed more behind-the-scenes policy changes at U.S. Citizenship and Immigration Services (USCIS) that will impact the issuance of visas and green cards in the legal immigration system.

These policies largely stem from the April 2017 "Buy American and Hire American" Executive Order, which follows through on President Trump's campaign promise to stop foreign workers from taking American jobs by tasking federal agencies to develop policies

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that fight "fraud and abuse" in the legal immigration system. Given that implementation of immigration laws falls primarily under the purview of the Department of Homeland Security, the administration can enact many of these changes without congressional approval, making them a potent way to affect the number of foreign individuals who can travel to or work in the United States.

A review of news reports and USCIS regulations[a] in the administration's [Spring 2017](#) and [Fall 2017](#) Unified Agenda and Regulatory Plan at the Office of Management and Budget found that the largest group of these policies and administrative procedures focus on the H-1B high-skilled visa category, which the administration has criticized for purportedly allowing foreign workers to steal American jobs, especially in STEM fields (See Figure 1). In addition to creating an electronic application system for these visas that limits the number of applications in the annual so-called H-1B visa lottery, USCIS is also considering a systematic overhaul of how it reviews and approves these visas.

In terms of administrative procedural changes, USCIS has mandated in-person interviews for individuals applying for a green card based on employment sponsorship, a step that was formerly discretionary and regularly waived under previous administrations. The Trump administration is also reportedly considering other policy changes, including cutting work opportunities for the J-1 exchange visitor visa, a summer work-travel program that allows foreign students to work in the United States as summer employees in certain hospitality and healthcare industries. While the effects of these policies have not completely manifested themselves in the legal immigration system, they would likely reduce the number of individuals eligible to live and work in the United States by making it more difficult and expensive for employers to sponsor foreign workers.

Figure 1: Overview of Trump Administration Enacted and Proposed Policies and Administrative Actions for Changes in Legal Immigration System

Enacted Policies and Aministrative Actions		
Policy/Administrative Action	**Immigration Benefit**	**Description**
Increase Use of Requests for Evidence (RFEs) for H-1B visas	H-1B High Skilled Visa	Administrative measure that requires employers with H-1B worker petitions to show additional proof of their need and eligibility for these workers
Burden of Proof for Nonimmigrant Worker Extension Petitions	Primarily H-1B High Skilled and H-2B Temporary Non-Agricultural Visas	USCIS employees can review extensions of H-1B and H-2B visa applications as if they were new, without regard to the decision on the previous application
Expansion of In-Person Interviews for Green Card Holders	Green Cards	USCIS will require individuals seeking green cards based on their employment status to participate in interviews with USCIS employees

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[a] BPC also reviewed proposed Department of Labor rules related to labor certifications for immigration visas but did not locate any existing policies.

Proposed Policies and Administrative Actions

Policy/Administrative Action	Immigration Benefit	Description
Strengthening the H-1B Nonimmigrant Visa Classification Program	H-1B High Skilled Visa	Proposed policy that would strengthen standards in the H-1B visa review process to award the visas to the "best and the brightest foreign nationals" and protect American workers
Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to Numerical Limitations	H-1B High Skilled Visa	Proposed rule creates an electronic registration program for H-1B petitions that limits the number of application slots for the program
Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization	H-1B High Skilled Visa	Proposed policy that eliminates Obama-era program that allows spouses of certain H-1B holders to apply for work visas
EB-5 Immigrant Investor Program Modernization	EB-5 Investor Visa	Proposed Obama-era policy that changes investment levels for individuals petitioning as investors and types of investments that qualify for reduced amounts
Practical Training Reform	F-1 Student and M-1 Vocational Student Visas	Proposed rule that would establish greater oversight and requirements for the F-1 and M 1 Optional Training Programs that allow students to work for specific periods of time after their studies
Inadmissibility and Deportability on Public Charge Grounds	Green Cards	Proposed Clinton-era rule that establishes a definition for "public charge" for determining inadmissibility, deportability, or ineligibility for adjustment of visa status

Proposed Policies and Administrative Actions Under Consideration

Policy/Administrative Action	Immigration Benefit	Description
Eliminating or altering J-1 summer work-travel program	J-1 Visitor Exchange Visa	Policy that would reportedly eliminate or alter programs that allow foreign students to work in the U.S. during the summer in certain hospitality and child care professions

Taking Aim at H-1Bs

Increased scrutiny of H-1B filings has created headaches for many employers and may lead to reduced usage of the program. A September 2017 Reuters article reviewed USCIS data from January 1 to August 31, 2017, and found that the agency issued 85,000 "requests for evidence" (RFEs), which are challenges to an employer's H-1B worker petitions, requiring them to show additional proof of their need and eligibility for these workers. This figure represents a 45 percent increase over the same period in 2016 and exceeds the Obama administration's RFE issuance rate for every year except 2009. The data also shows that USCIS's requests often focused on entry-level technology positions, including software developers and computer systems analysts, jobs that U.S. employers are often accused of outsourcing to foreign workers. Aside from slowing down the H-1B visa issuance process, the increase in these requests increases the costs to employers, which may deter them from seeking out these foreign workers, a key goal of this administration.

The Trump administration's Fall 2017 Unified Agenda includes a series of proposed USCIS regulations targeting the H-1B program. One proposed rule would overhaul the standards for reviewing and granting H-1B petitions, including revising the category's definition of specialty occupations to narrow it to individuals considered to be "the best and the brightest" in their field, a term not found in the statute. The rule would also update the definition of employment and employer-employee relationship to limit outsourcing, and would implement new standards that would require employers to pay "appropriate wages" to H-1B recipients. The agency asserts in its notice that these policies would ensure that the program protects U.S. workers by granting these visas to foreign workers in jobs that meet the "statutory definition of specialty occupation." Combined, these changes could significantly affect the employers that tend to hire the most H-1B workers: information technology services firms.

USCIS is also considering creating an electronic registration program for employers seeking to file a request for an H-1B visa, a rule first proposed under the Obama administration in 2011. Each year, because there are many more petitions for H-1B workers filed than visas available, USCIS has created a lottery system to select from the applications filed those that will be considered for visas. As stated in the proposed rule, the registry would limit the number of application slots to streamline the process. It would create a priority system for evaluating which applications will be adjudicated to ensure that only the most skilled or highest-paid individuals receive these visas. Another H-1B policy that has received significant attention is the agency's proposed rule to rescind Obama-era programs that authorized a work permit for certain spouses of H-1B visa holders to assist them with integrating into local job markets. While USCIS has not implemented these changes yet, their stated intent—narrowing the criteria and process for issuing H-1B visas—indicates the administration's desire to limit the number foreign workers employed in the United States.

Policies for Other Visa Categories

Aside from H-1B visa policies, the administration has also adopted or proposed policies for other visa categories. In October 2017, USCIS unveiled new policy guidance that affected petitions filed to extend the status of already-approved foreign workers in categories including H-1B and H-2B workers. Prior to this policy, USCIS employees could rely on the findings from the initial employer petition as the basis for approving extension requests as long as the employer, worker, and conditions for employment

remained the same. Under the new policy, USCIS employees can treat the extension petition as if it were a new initial filing even if the employer, worker, and conditions remain unchanged from the first filing. This could mean that different adjudicators would reach different decisions about the eligibility of a worker from the same information, creating greater uncertainty for sponsoring employers. As with the increase in RFE challenges for H-1B visas, this new policy could deter the hiring of foreign workers by increasing the work and resources employers need to process their visa requests for these two categories.

Other proposed regulatory changes would cover programs that allow foreign students to work in the United States. In a proposed rule in the Fall 2017 Unified Agenda, ICE would adopt new requirements and exert greater oversight of the F-1 Student Visa and M-1 Vocational Student Visa's Optional Training Programs, which allow foreign students to work in the United States after their studies, purportedly to protect American workers from competition from these individuals through these programs. Reports also indicate that the administration may cut or alter five work categories in the J-1 summer work-travel program that allows foreign students to work as summer employees in hospitality, child care, and federal parks. Aside from eliminating these categories, the administration may require employers to show first that they could not locate Americans for these jobs, a step that highlights the administration's efforts to target temporary visas that allow foreign employment without domestic recruitment requirements.

Policies Focusing on Permanent Immigrants

The administration also has adopted or proposed measures focused on green card applicants. Under an August 2017 policy, which came into effect on October 1, 2017, USCIS will require in-person interviews for individuals applying for a green card based on employment sponsorship, as well as family members seeking a green card to join refugees and asylees residing in the United States. Under prior USCIS policy, USCIS allowed for discretion on whether to require these interviews. According to USCIS, this new policy complies with the visa interview policies in the administration's January 2017 Executive Order suspending entry for individuals from six countries. This policy could likely delay the issuance of green cards for these individuals, especially for family members of refugees who already face new restrictions for settling in the United States. USCIS is reportedly planning on requiring interviews for other petitions and application types in the future.

The Trump administration also has pushed proposed Obama-era rules that reform the EB-5 Immigrant Investor Visa, which allows individuals to apply for a green card after investing in the United States. Under the rule, which the Obama administration proposed on January 13, 2017, USCIS would tighten the definition of targeted employment areas (TEA)—urban or rural areas with high levels of unemployment where the investment requirements are lower for EB-5 investors. The rule would also raise the minimum investment amount for most EB-5 filings from $1 million to $1.8 million and the TEA investment threshold from $500,000 to $1.35 million. These changes were aimed at tightening program requirements that have been the subject of various legislative efforts over the last several years. As this rule shows, both administrations had some shared policy priorities in reforming the legal immigration system even if their views about the role of immigrants in the American labor market diverged significantly.

Finally, the Trump administration's 2017 Unified Agenda has resurrected a Clinton-era proposed rule from 1999 that would define the term "public charge" for determining inadmissibility, deportability, and eligibility to adjust status for immigrants.

Under current immigration law, DHS can deem an immigrant inadmissible, deportable, or ineligible to adjust their legal status if they are likely to become a public charge. While the law establishes a range of conditions that would relegate an individual to public charge status, it does not provide a concrete test. As result, the rule would establish the definition of "public charge" as the following:

> "An individual who is ''primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense."

The rule also establishes conditions that would lead individuals to fall under the public charge definition. Advocates fear that the Trump administration will implement more restrictive interpretations of what might make someone "likely" to become a public charge.

Conclusion

The scope and range of these policy proposals show that the Trump administration is willing to use its administrative and regulatory authority to pursue its policy priorities in the legal immigration system, namely reducing the number of permanent and temporary visas that allow foreign nationals to work in the United States and increase screening and vetting of proposed immigrants consistent with its early Executive Orders. While the majority of these changes have not yet been implemented, visa data suggests that the administration's rhetoric may have already started impacting issuance. In fiscal year 2017, for instance, the State Department issued 24 percent fewer non-immigrant visas in September 2017 than the monthly average through the previous six months. A January 2018 Reuters report that reviewed USCIS data also found that the number of approvals for family-based visas dropped to the lowest number in over a decade, with the agency approving 540,800 applications in FY2017. This data suggests that the administration's reliance on agency policy guidelines and administrative procedures may serve as its primary tool for limiting the number of foreign workers in the near future even as the administration and some members of Congress attempt to incorporate longer-term statutory changes to make these goals a permanent component of the legal immigration system.

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