



Building Walls in More Ways Than One

The Face of Business Immigration Under the Trump Administration

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There has been much discussion over the past few years about reforming our antiquated immigration system. Both Democrats and Republicans have introduced bills in an effort to develop comprehensive immigration reform, none of which have gained any traction largely because of heated political opposition to legalizing undocumented aliens.¹ While the majority in our country believe that comprehensive immigration reform is necessary, there remains a wide divide within our government and country on how to solve our immigration problems.

During the 2016 presidential campaign, there was significant focus on candidates' plans to deal with undocumented or "illegal immigration," including handling the estimated 11–12 million undocumented immigrants currently in the United

States without authorization² and curbing future unauthorized immigration.³ One topic drawing slightly less focus, however, is scaling back legal immigration for foreign nationals. This article discusses steps that the Trump administration has taken through executive orders and pending legislation to curb both

foreign temporary workers and foreign nationals seeking permanent resident status in the U.S.

"Buy American and Hire American" executive order and efforts to protect American workers

On April 18, 2017, President Trump signed an executive order titled "Buy American and Hire American."⁴ The "Hire American" portion of the order aims to create higher wages

FAST FACTS

The “Buy American and Hire American” executive order has triggered increased agency scrutiny.

Many bills have been introduced in an effort to develop comprehensive immigration reform, including the RAISE Act (S. 1720) and Immigration in the National Interest Act of 2017 (H.R. 3775).

Potential changes to NAFTA may impact cross-border employment.

and employment rates for U.S. workers through rigorous enforcement and administration of laws governing entry of foreign workers into the U.S.⁵ The order calls on the secretaries of State, Labor, and Homeland Security and the U.S. attorney general to promptly propose new rules and issue guidance to combat fraud and abuse in the U.S. immigration system.⁶ The order also contains a clause specifically addressing the H-1B program, and calls on the same departments to propose reforms to ensure that H-1Bs are awarded to the most-skilled or highest-paid applicants.⁷

Ensuring H-1Bs are awarded to the most-skilled or highest-paid applicants

Previously, when U.S. Citizenship and Immigration Services (USCIS) received more H-1B petitions than the number permitted under annual statutory caps, petitions were automatically subjected to a “lottery system,” whereby USCIS randomly selected enough petitions to meet the congressionally mandated cap for the annual allotment of new H-1Bs.⁸ The executive order would change the random lottery to a weighted system that would prioritize higher-skilled, higher-paid workers, with a claimed goal to make it more difficult to use H-1B holders to replace American workers.⁹ There are no proposals or guidance for how this weighted system would be applied to select petitions for the quota. However, such proposals are something to watch for as the departments of State, Justice, Homeland Security, and Labor follow the directive of the executive order to suggest reforms to ensure that H-1Bs are awarded to the most-skilled or highest-paid beneficiaries.

Combating fraud and abuse

The U.S. Justice Department released a statement on April 3, 2017, cautioning employers filing H-1B petitions not to discriminate against U.S. workers and advising it would not tolerate

misuse of the program; it also warned that it would investigate and prosecute claims of discrimination against U.S. workers.¹⁰ At the same time, USCIS announced measures to detect H-1B fraud and abuse, with the goal of protecting American workers by combatting fraud in employment-based immigration programs.¹¹ The USCIS initiative to combat fraud includes enhancing and increasing site visits, interviews, and investigations of petitioners using the H-1B program to help prosecute program violators and ensure American workers are not overlooked or replaced in the process of employing foreign-born workers.¹²

Following the signing of the Buy American and Hire American executive order, the Department of Labor announced efforts to step up monitoring and enforcement efforts of H-1B employers to protect American workers from discrimination.¹³ Additionally, on August 9, 2017, the Department of State updated its foreign affairs manual to advise consular officers to adjudicate certain classes of visas in the spirit of the executive order, focusing on protecting American workers.¹⁴ A citation relative to H-1B visas was also added to the manual, instructing consular officers who “uncover information indicating a violation of U.S. immigration or labor laws” to report the information to the Department of Labor for potential enforcement.¹⁵

Reforming American Immigration for a Strong Economy Act (RAISE Act)

Recently, the Reforming American Immigration for a Strong Economy Act (RAISE Act) and a companion bill, the Immigration in the National Interest Act of 2017, were introduced to amend the Immigration and Nationality Act.¹⁶ Each bill focuses on curbing legal immigration, which, if enacted, will be a major shift and dramatically redesign our current immigration system.

The RAISE Act was originally introduced in the Senate on February 13, 2017, by Sen. Tom Cotton (R-AR) and Sen. David Perdue (R-GA),¹⁷ and on August 2, 2017, Sen. Cotton introduced a revised version of the bill, S. 1720.¹⁸ The primary goals of the revised proposed RAISE Act are to (1) increase per capita growth in U.S. gross domestic product, (2) enhance the prospects for the economic success of immigrants who are issued points-based immigrant visas, (3) improve the country’s fiscal health, and (4) protect or increase wages of working Americans.¹⁹ Notably, similar ideas were introduced in 2007 in unsuccessful immigration legislation that was supported by President George W. Bush.²⁰

The proposed legislation furthers President Trump’s mission to protect U.S. workers, target the family reunification component of our immigration system, and propose a merit-based immigration system giving preference to admitting highly skilled and educated individuals, but neither the proposed RAISE Act nor the companion bill address stemming the flow of illegal immigration.²¹

The proposed RAISE Act has been met with considerable opposition from Democrats, some Republicans, and immigrant rights groups.²² The proposed act would significantly reduce legal immigration to the United States by sharply curtailing the ability of U.S. citizens and lawful permanent residents to bring family members to the country (i.e., chain migration).²³ As well, the proposed act reduces the number of persons obtaining lawful permanent resident status (Green Cards) by approximately half and imposes a permanent per-year cap on refugee admissions that is much lower than currently permitted under the law.²⁴ The proposed act also creates a merit-based system for selecting immigrants coming to the U.S. through employer sponsorship.²⁵ There are concerns that using a merit-based system will adversely affect employers who depend on low-skilled immigrant labor.

Changes to family-based immigration

Under current immigration laws, U.S. citizens 21 years old or older can sponsor spouses, parents, and minor children for U.S. lawful permanent residence status²⁶ with no limitation on the number of available immigrant visas.²⁷ Adult citizens can also petition for siblings and adult children, with a limited number of immigrant visas permitted annually.²⁸ Lawful permanent residents can sponsor minor children, spouses, and unmarried sons and daughters,²⁹ but given annual caps, there is typically a substantial wait for visas depending on an individual's nationality and visa category.³⁰

The proposed RAISE Act defines a child as an unmarried person under 18 years old as opposed to 21 years under the current system.³¹ The act would eliminate all family sponsorship categories except spouses and minor children

of U.S. citizens and permanent residents, dramatically lowering the capped family categories and thus reducing family reunification.³²

While the proposed RAISE Act would eliminate Green Cards for parents of U.S. citizens 21 years or older, it would create a new nonimmigrant category, the “W” visa,³³ for parents of U.S. citizens to temporarily enter the country for five years with the possibility of an extension. W nonimmigrants cannot work in the U.S. or accept federal, state, or local public benefits. The U.S. citizen son or daughter must be responsible for the financial support of the parent(s) and provide “satisfactory proof” that the U.S. citizen has arranged for health insurance coverage “at no cost to the alien,” regardless of his or her financial status, during their visit to the U.S.³⁴

Changes to the employment-based immigration system

While the substantial majority of immigrant visa reductions would affect those brought into the U.S. through family ties, the proposed RAISE Act would radically change our current process of employment-based immigration. The proposed act would dramatically reduce the number of employer-based immigrant visas allotted annually and institute a merit-based point system to determine who would get the limited number of immigrant visas.³⁵ This system favors applicants based on skills, education, English proficiency, age, and the proposed salary in the U.S. Visa applicants would earn points for:

- English language proficiency (maximum 12 points)
- Educational attainment (maximum 13 points)
- Age (maximum 10 points)
- Investment (maximum 12 points)
- Extraordinary achievement (maximum 25 points)
- Highly compensated job offers (maximum 13 points)
- Valid offer of admission for an eliminated visa category (2 points)

Eligible applicants would need 30 points to apply, and there is no guarantee that applicants will receive a Green Card.³⁶

Immigration in the National Interest Act of 2017

On September 14, 2017, Rep. Lamar Smith (R-TX) introduced the Immigration in the National Interest Act of 2017 (H.R. 3775), a House companion bill to the RAISE Act.³⁷ Although the two bills are nearly identical, one of the key differences is that the House bill requires at least 20 points to be eligible to submit an application under its points-based system instead of 30 points under the RAISE Act.³⁸ Correspondingly, there is a difference in point allocations under the House bill. For example, the House bill removes “extraordinary achievement” as a basis for accruing points and creates



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an immigrant visa category separate from the points-based system for investors in new commercial enterprises.³⁹

It also imposes a requisite for naturalization, which would prohibit an applicant from being naturalized if the sponsor who submitted an affidavit of support on the applicant's behalf failed to reimburse the federal government for all means-tested public benefits the applicant received during the five-year period immediately after the applicant became a lawful permanent resident.⁴⁰ Many of the remaining provisions of H.R. 3775 mirror the RAISE Act: the maximum admission of refugees, the family-based immigration system, prerequisites for naturalization, and elimination of the Diversity Visa Program.⁴¹

Potential changes to the North American Free Trade Agreement

The U.S. currently partners with Canada and Mexico in the North American Free Trade Agreement (NAFTA).⁴² Signed into law by President Clinton on December 8, 1993, NAFTA became effective on January 1, 1994, creating a trilateral trade bloc in North America and a framework for further regional cooperation.⁴³ NAFTA eliminated many tariffs and trade restrictions between its partners and produced a mechanism for reciprocal employment, and it also facilitated cross-border immigration between the U.S., Canada, and Mexico.⁴⁴ In particular, the TN (Trade NAFTA) visa category facilitates temporary entry of professionals and highly skilled and technical individuals who are citizens of a NAFTA country to perform services in the U.S.⁴⁵

President Trump has signaled his intent to renegotiate the terms and conditions of NAFTA.⁴⁶ While the agreement deals primarily with trade between the U.S., Canada, and Mexico, renegotiation could impact certain cross-border workers such as TN workers. It is still too early to predict the effect of a NAFTA renegotiation on U.S. businesses, but suffice it to say that businesses are looking closely at this issue.

Border changes

Concurrent with the proposed changes in immigration and the stated objectives of the Trump administration, we are

experiencing increased scrutiny of all applications for admission at U.S. ports of entry. For many years, attorneys have enjoyed a mutually beneficial working relationship with Customs and Border Protection (CBP) at Michigan ports of entry. Attorneys have been allowed to attend the border with clients to support them in the adjudication process, as specifically limited by CBP personnel. Many clients become anxious during the inspection process, and attorneys have been able to help explain and clarify to the inspecting officer complex questions such as corporate relationships, position duties, and related issues. However, as of October 1, 2017, under the CBP national policy, attorneys may no longer accompany clients to Michigan ports of entry to assist with adjudications.⁴⁷ Attorneys are not allowed on the premises at ports of entry, and there is speculation that in the future, they may not even be allowed to discuss cases with CBP by telephone. These changes are in sharp contrast to previous policies and procedures governing attorneys' communications with CBP.

The bottom line

Immigration is a hot-button issue in our nation. Nearly everyone has an opinion on it, but most of the dialogue involves undocumented aliens. The proposed changes to business and legal immigration are just as dramatic and are flying under the radar. The proposals, if enacted, will change the current immigration landscape. Only time will determine the outcome and impact of legislative and administrative attempts to further the Trump administration's goals for immigration reform. ■



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24. RAISE Act, S 1720[3]. This proposed section strikes 8 USC 207(a) and adds 8 USC 207(b) to cap the number of refugees at 50,000 per fiscal year.
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26. 8 USC 1151(b)(2)(A)(i). 8 USC 1101(b)(1) defines a child as an unmarried person being under 21.
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33. RAISE Act, S 1720(4)(d).
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36. *Id.* RAISE Act, S 1720(5)(c)(1) states that eligible applications will be placed in an eligible applicant pool, which will be sorted and given preference based on the total points accumulated.
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