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Client Alert

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Want to Hire and Keep Foreign Talent? Expect Big Changes in 2018.

While it remains unclear exactly how the Trump Administration will change business immigration rules, the Department of Homeland Security's 2018 regulatory plan contains important clues. Based on new regulations that are working their way through the formal rulemaking process, US businesses may find it significantly harder to recruit and retain foreign workers in the F-1 and H-1B categories. Here's a sneak peek at the regulatory pipeline:

That new STEM grad you hired may only be able to work for a year.

Foreign students have always been able to work legally for a year after graduation under a program called Optional Practical Training. With this foot in the door at a US company, many are then sponsored for H-1B status by their employers, giving them another six years to work, and those who prove themselves valuable may be sponsored for permanent residence (a "green card"). Graduates who are not successful in finding employers to file H-1B petitions for them must go back to their home countries after their OPT work permits expire.

Because the annual limit on H-1Bs has remained essentially static since Congress set the cap in 1990, but US demand for foreign talent has steadily risen, fewer than half of the petitions employers now file are even reviewed by US Citizenship and Immigration Services. The rest are rejected in the annual lottery, conducted the first week of April each year, and returned to the companies that filed them, along with their filing fee checks.

In 2015, to mitigate this discrepancy between supply and demand, DHS began allowing certain graduates – those in STEM fields whose employers use E-Verify – to renew their work permits for a total of three years. As the employee gains more tenure and presumably more value at the company, employers have the benefit of trying their chances in three annual H-1B lotteries instead of just one.

It is this "STEM OPT Extension" that DHS is expected to end with the "Practical Training Reform" rule. Since the two-year extension was a creature of regulation, not legislation, it can be eliminated the same way, with no involvement by Congress. Release of a detailed rule is expected in October 2018. If the rule ultimately becomes final, we can anticipate it will roll the clock back to 2014, when foreign students who graduated from US colleges and universities, regardless of their academic fields, had only one year of work authorization, and the employers who hired them had only one shot at an H-1B to keep them here.

With no increase in the annual H-1B allotment in sight, this hard stop on work eligibility is an obvious deterrent to hiring and investing in foreign graduates – and 100 percent consistent with the Trump Administration's "Hire American / Buy American" executive order.

You may not be able to file <u>any</u> H-1B petitions.

DHS will publish a proposed rule in February that will radically change the annual H-1B lottery. Currently, the process is egalitarian and non-exclusive. Although less than 50 percent of petitions are selected for processing each year, any employer may file a petition for any H-1B beneficiary, and each petition has an equal chance of being selected in the lottery. That may not be the case under the new system.

We do not know exactly what the new rule will say. However, under a similar proposed rule that DHS published in March 2011 and never finalized, employers would have been required to preregister for the privilege of filing H-1B petitions and provide certain information, including the name of the worker they wished to sponsor. If USCIS expected the H-1B cap to be met on the first day of filing that year (which is now the norm), then a number of preregistered employers sufficient to meet that cap would be randomly selected and notified that they had 60 days in which to file for the worker they listed (and only that worker). A certain number of additional preregistered employers would be put on a waiting list, in case petitions filed by the pre-selected employers turned out not to be sufficient to meet the cap after all. The rule to be proposed next month will likely adopt a very similar 2011 preregistration requirement, and go even farther.

You may not be able to file H-1B petitions for entry-level professionals.

Because the "Hire American" Executive Order mandates awarding H-1B visas only to "the most-skilled or highest-paid," DHS could execute that mandate on the front end by requiring employers who preregister to provide additional information about the job, the salary, and/or the sponsored worker, and accept the registrations of only those employers that meet a pre-set priority system.

What such a priority system will entail remains to be seen. However, in thousands of Requests for Evidence USCIS sent employers in 2017, the agency gave strong clues as to its priorities under "Hire American." These RFEs challenged, with virtually no support in law or regulation, whether jobs that paid an entry-level wage could ever be categorized as H-1B "specialty occupations." Of course, every job – from the lowest to the highest-skilled – has an entry level, so wage alone can never be the sole or final criterion for determining H-1B eligibility.

Under current law – not to mention decades of USCIS case decisions and guidance memoranda – if the duties cannot be performed without a specifically related bachelor's degree or equivalent experience, then the job qualifies as a "specialty occupation." Regulations provide several ways to prove this is the case – industry standards, the employer's normal requirements, the specialized and complex nature of the job, etc. – but none of those ways involve salary. Salary is a separate analysis, based on the requirements for that particular job. Higher-level jobs that demand greater qualifications require a correspondingly higher salary, perhaps Level 3 or 4 on the Department of Labor's 4-tiered wage ladder for the occupation in that area. But even jobs that pay a Level 1 wage are H-1B jobs if they meet the "specialty occupation" criteria.

Under "Hire American," USCIS seems to have turned this long-standing analysis on its head. Now, salary appears to be the primary consideration, and employers must overcome the unprecedented presumption that "Level 1 jobs" are not eligible for H-1Bs. Employers have even received similar challenges to jobs that paid a Level 2 wage. It is reasonable to anticipate that the Administration will build similar criteria into its proposed changes to the H-1B lottery system, including how employers and/or petitions are selected to meet the annual allotment.

You may not be able to file H-1B petitions for mid-stream professionals.

Although the rule is not expected until October 2018, DHS has also proposed fundamental changes to the regulatory definitions of several key terms in the H-1B context, including "specialty occupation" (what makes a job an H-1B job), "employment," and "employer-employee relationship" (who directly controls the

work of an H-1B worker). The Administration's explicit goals for this initiative are to disqualify all but "the best and brightest foreign nationals," to "better protect US workers and wages," and to ensure "appropriate wages" for H-1B workers.

Targeting these foundational H-1B concepts for re-regulation cannot help but result in sweeping change to H-1B eligibility, in terms of both the types of jobs and the types of employees that will qualify. Taken together, this set of targets are likely to codify the Level 1 (and possibly even Level 2) wage prohibitions discussed above, severely constrain the ways in which an employer may prove that its job qualifies, and limit or even eliminate the use of the H-1B in third-party placements, for contracted resources, and/or by staffing agencies.

Your employee may not be as eager to stay in the United States any more.

Even if an employer is successful in scaling the mounting barriers to H-1B approval implied by DHS's regulatory agenda, some H-1B workers themselves may no longer be willing to do the same. Under additional proposed rules, the government will decimate several key, hard-won improvements to the quality of life that H-1B workers and their families enjoy in the United States.

Spouses will likely lose employment authorization. As early as next month, DHS is expected to propose a rule that will eliminate work permits for the spouses of H-1B workers. Until 2015, H-4 spouses could not legally work at all until their H-1B spouses were in the final stages of employer-sponsored green card processes. Since Indian and Chinese nationals – who have the highest demand by far on limited H-1B and green card numbers – routinely wait upwards of 10 years to get to those final stages, these spouses, who are often highly educated and skilled themselves, were unable to further their careers, keep up their professional credentials, or work outside the home for decades. By the same token, these households, which were often increasing in size with the birth of children here, were forced to live on a single earner's income – a difficult task even for US citizens, particularly in expensive metropolitan areas. Meanwhile, the spouses of other nationality groups who were not subject to such long wait lists already had their work permits or even their green cards.

After multiple proposals beginning in 2011, the Obama Administration succeeded in leveling this playing field, in 2015, by allowing H-4 spouses to apply for work permits at approximately the same time in the green card process as their luckier counterparts. In contrast to other sections of its regulatory agenda, DHS makes no explicit claims that this rule will "protect US workers." Instead, the agency cites cost savings for USCIS in reducing the number of work permit applications it must process, while acknowledging that employers of currently authorized H-4 workers will incur costs in labor turnover. H-4 spouses who have finally been able to return to the workforce – but only a couple of years ago – may find it exceedingly frustrating to be relegated once more to the ranks of the unemployed.

Employees may have to extend status every year. Another possible change that will increase frustration and stress in H-1B/H-4 households is the potential end, widely reported in the press, of the so-called "AC21" extensions. Known by the acronym for the law that created the provisions – the American Competitiveness in the 21st Century Act – these extensions enable H-1B workers to keep their jobs past the normal six-year limit while green card processes are underway. Like the H-4 work permit, they are Obama-era changes intended to ameliorate the sharp chronological discrepancies between the green card journeys of Indian and Chinese nationals, and those of most other nationalities who are sponsored by employers.

Although the Administration has denied it and the issue is not included in the regulatory agenda DHS released in Fall 2017, multiple media outlets have reported that USCIS is looking at whether existing statutory language allows sufficient discretion to deny these extensions and/or whether rewriting AC21's governing regulations could reinterpret the language of the law to allow denial. AC21 provides one-year extensions at an earlier stage of the green card process and three-year extensions at a later stage. The latter appear to be at more risk because that section uses permissive language, "may grant," while the

section discussing one-year extensions employs mandatory terms such as “shall extend” and “limit shall not apply.” It may be that employers and H-1B workers will not know whether DHS has decided to force the issue until either DHS releases a proposed rule to revise the provisions or the denials begin arriving in the mail.

Even if the one-year extensions survive for a while, the loss of the three-year AC21 extensions would be a major blow to H-1B employees who are caught in the long green-card backlogs. Currently, reaching that landmark finally allows them to relax and not worry so much about annual extensions – always an ordeal, and increasingly so now. It also facilitates travel back home – to get married, tend to aging parents, be present for family milestones, or introduce a new baby to its grandparents – since a three-year extension approval by USCIS means a three-year visa issued by a US consular post the next time they travel. Visa applications abroad are also often fraught with difficulty, risk and uncertainty, especially for high-tech and scientific workers, who are subject to export controls in addition to the security alerts that often unexpectedly delay their return to the United States.

For many of the same reasons, a forced return to annual extensions is also a powerful disincentive for employers to sponsor H-1B workers in the first place and, especially, to sponsor Indian and Chinese nationals for permanent residence. Out-of-pocket legal and filing costs that are tripled or quadrupled over the many years it will take to get a green card for these workers may be a budget buster for some employers, especially for smaller companies.

Hunton & Williams LLP’s Immigration Practice will continue to monitor and report on these and other changes to law, regulation, policy and practice that may affect US businesses and their employees in 2018 and beyond. If you need specific advice on a particular situation, please contact one of our lawyers directly.

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