

Client Alert

Business Litigation Practice Group

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New Obama Administration Employment-based Visa Rule and Trump's Plan to Target Visa Abuse Create Uncertainty For Employers

President-elect Trump made enforcement of immigration laws a centerpiece of his campaign. On November 21, 2016, Mr. Trump stated that he will make investigation of abuses in “visa programs that undercut the American worker” a priority for his first 100 days in office. That priority is likely to clash with a new rule published by the Department of Homeland Security that will take effect on January 17, 2017—just three days before the end of the Obama administration—and change conditions applicable to certain employment-based visas. 81 FR 82398 Among other things, the Obama administration’s new rule will relax certain employment restrictions on individuals with visas for highly-skilled individuals, such as the H-1B visas, making it possible for those visa holders to change jobs and extend their authorized period of admission in the United States, and for their family members to obtain work authorization.

Although Mr. Trump’s statement did not specify what “visa abuses” his administration will target, H-1B visas for specialty workers have long been the subject of political charges that they benefit non-immigrant aliens to the detriment of American workers. Investigations of visa abuses could focus on both the issuance of the visas and whether employers and employees comply with the terms of the visas once issued.

Under current rules, H-1B visas are issued for specialty workers based on an employer’s application to the Department of Labor that includes a certification that the visa holder will be paid at the prevailing rate for individuals with similar experience. Certain employers must also have taken steps to recruit American workers for the job, offer the job to any American worker who applied and is equally or better qualified for the job, and certify that “the employer did not and will not displace a United States worker.” Greater availability of H-1B visas has been favored in a number of business sectors, including high-tech businesses which have advocated raising the total number of such visas issued annually because of unmet needs for specialty workers.

Under the rule published by the Department of Homeland Security on November 18, 2016, some restrictions on the issuance of employment-based visas will be relaxed to enhance the portability of the visas, such as the time limits on visas and the requirements that the worker remain with the sponsoring employer. Some of the changes will affect areas that might

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otherwise be subject to investigation by the incoming administration, including whether the visa recipient remains employed by the company that provided the certification in the position specified in the employer's certification and whether that employee is being compensated at the same level as an American worker would be.

The conflicting approaches of the Obama and the Trump administrations to employment-based visas could result in significant uncertainty in early 2017, particularly if the Trump administration takes steps to challenge so-called "midnight rules" that go into effect days before they take office. Once the new Department of Homeland Security rule takes effect, the following are possibilities for employers of non-immigrant aliens with employment-based visas:

- Greater mobility of non-immigrant employees in the workforce;
- Greater flexibility in the deployment of employees with such visas;
- Requests from alien employees for assistance in adjusting their immigration status; and
- Some flexibility in time limits and extensions of employment-based visas.

There may be efforts to roll back this and other rules issued in the waning days of the Obama administration. Regardless of the outcome of challenges to the new rule, once the Trump administration takes over, employers can expect:

- Inquiries regarding the status of employees working on employment-based visas (e.g., expiration date, compliance with certification, compensation rates, etc.);
- Scrutiny of the skill level of jobs held by H-1B visa holders and compensation paid to H-1B visa holders; and
- Requests for information regarding the lack of available American workers to fill the position held by a visa holder.

There are other individuals who work in the United States pursuant to employment-based visas that authorize them to work under prescribed conditions (e.g., for an agricultural season, in an underserved area, or for a finite period in a specific industry), but without options to become lawful permanent residents or citizens. Businesses that employ such workers could also be subject to investigation under the new administration because many of these visas require an employer certification that hiring a non-immigrant alien will not undercut American workers.

Department of Labor certifications are required for certain skilled workers and professionals (such as registered nurses), and for non-seasonal unskilled workers for which qualified workers are not available in the United States, to obtain visas that authorize them to enter the United States and work here. Such visas may also require a determination by the Secretary of Labor that there are not American workers who are able, willing, qualified and available at the time of the visa application and at the place where the alien is to work, *and* that the alien's employment will not adversely affect the wages and working conditions of American workers employed in similar positions.

Investigations of compliance with labor certifications are conducted by the Department of Labor. Penalties for violations in visa programs may range from monetary penalties to debarment of employers by the Department of Labor.

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