IMMIGRATION COMPLIANCE LIABILITY IN THE TRUMP ERA

STRATEGIES TO IDENTIFY AND MITIGATE RISK

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WITH YOU TODAY

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AGENDA

• Business Immigration Risk Basics
• Executive Orders and Intent
  • The Travel Ban
  • Buy American, Hire American: Policy and Impact
• Immigration Litigation Strategies
• Worksite Enforcement
• What’s Happening on the Hill?
<table>
<thead>
<tr>
<th>Visa Type</th>
<th>Function</th>
<th>Duration of Stay</th>
<th>Limitations</th>
<th>Risks</th>
<th>Mitigation</th>
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</thead>
<tbody>
<tr>
<td>B-1/Visa Waiver</td>
<td>Short business trips</td>
<td>Up to 6 months/90 days</td>
<td>Cannot be used for U.S. employment, even briefly</td>
<td>Entry denial, co. reputation, loss of business</td>
<td>Payment/reimbursement tied to central travel agency, business visa technology, communicate rules broadly</td>
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<tr>
<td>H-1B</td>
<td>Positions requiring bachelor’s degree or equivalent</td>
<td>Up to six years, longer if in green card process</td>
<td>Annual quota, required wage, location specific</td>
<td>Unavailable, roving employees, DOL audits, monetary fines, debarment, site visits, RFE &amp; denials</td>
<td>Monitor &amp; report changes to immigration counsel, internal audits, workforce planning, site visit preparation, ensure degree requirement defensible, employer-employee relationship clear</td>
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<tr>
<td>L-1</td>
<td>Assignments from foreign affiliates</td>
<td>7 years for managers, 5 years for “specialized knowledge” employees</td>
<td>Time, scrutiny at USCIS, consulates in India</td>
<td>Corporate reorganizations, site visits, RFE’s &amp; denials</td>
<td>Screen candidates carefully, say “no” to marginally qualify candidates, examine org charts, identify advanced or distinguishing skills, site visit preparation</td>
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<tr>
<td>F-1</td>
<td>Training for STEM graduates</td>
<td>2 years (after completing initial year)</td>
<td>E-Verify, training plan, evaluations, reporting</td>
<td>Loss of status, loss of employee</td>
<td>Know who they are and who is signing and complying on behalf of company</td>
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<tr>
<td>PERM</td>
<td>Labor market test in support of green card application</td>
<td>n/a</td>
<td>No qualified U.S. worker, recruitment in good faith</td>
<td>Loss of employee if U.S. workers available, fast-track pressure from employees</td>
<td>Limit sponsorship to positions with lean labor pool or where jobs require distinguishing education, skills, experience, ensure credibility of requirements</td>
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</tbody>
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EXECUTIVE ORDERS AND INTENT:

- The Travel Ban
- Buy American, Hire American: Policy and Impact
The Travel Ban – Where Things Stand

• First and second travel bans rescinded/expired
• Third ban - a “proclamation” - issued on September 24, 2017
• December 2017 SCOTUS permits administration to implement Ban while lower courts hear appeals
  • No longer a “bona fide relationship” exception
• SCOTUS to hear *Trump v. Hawaii* in April, decision likely in June
• Business risks
  • Employees delayed/stranded abroad
  • Heightened scrutiny at ports-of-entry
  • Communicate risks to stakeholders before finalizing travel
  • Non-banned travelers still face risks
Buy American Hire American (BAHA) – Policy

• U.S. worker protection, higher wages and employment rates
• H-1B program changes
  • Ensure “most skilled or highest paid” get visas
  • Changes to H-1B allocation system
• U.S. consular officer consideration of U.S. worker protections in adjudicating H-1B visa applications
• Tougher enforcement of immigration program violations and abuse
BAHA Impact:
Roll Back of Prior Initiatives

- H-1B program changes
- H-4 employment authorization
- End of deference
- STEM OPT
- NAFTA negotiation
- DACA
- Parole for international entrepreneurs
- Temporary Protected Status (TPS) designations
- Adjustment of status interviews
- Enhanced enforcement
BAHA Impact: Computer Programmers, Entry-level Wages

• March 2017 USCIS memo: computer programmer positions no longer presumed eligible for H-1B program
  • Narrow interpretation of DOL Occupational Outlook Handbook (OOH) and Bachelor’s degree as standard requirement of employer or industry
  • Is offered position complex, unique or specialized thus requiring degree?
  • Do entry-level, “Level I” wages qualify for H-1B program”
    • An entry-level wage “will likely contradict a claim that the proffered position is particularly complex, specialized or unique compared to other positions within the same occupation.”
    • College recruiting, developmental assignments, junior staff with needed skills
  • Marked increase in H-1B requests for evidence (RFEs) in a wide range of industries and professional occupations, beyond computer programming and other IT positions
BAHA Impact: RFE Trends

• **Level I wage scrutiny**
  - Position appears too complex for entry-level wage
  - Entry-level wage suggests position does not require specialized degree

• **Position not an H-1B-eligible “specialty occupation”**
  - OOH does not definitively require bachelor’s degree – occupation “usually,” “typically,” or “generally” requires bachelor’s degree
  - OOH does not require degree in a *single* specific field, but lists several possible degrees that could qualify individual to perform occupation

• **Some help from the courts**
Requests for Evidence (number of RFEs issued by USCIS between Jan. 1 and Aug. 31 each year in response to H-1B petitions)

Visa Petitions Receipted (total H-1B visa petitions receipted each year between Jan. 1 and Aug. 31)
BAHA Impact: The End of Deference

• New guidance rescinds longstanding deference policy issued in 2004 and reaffirmed in 2015 for L-1B petitions

• USCIS officers no longer bound by previous petition approvals when reviewing nonimmigrant extension requests, including H-1B extensions

• Officers authorized to re-adjudicate eligibility extension on same facts

• More requests for evidence in H-1B and other nonimmigrant extension cases

• Longer processing times, compounding already-lengthy extension delays
  • Work authorization disruptions
  • Impact on driver’s license renewals

• Increase in extension denials
IMMIGRATION LITIGATION STRATEGIES
Litigating Denials

• Appeals to USCIS Administrative Appeals Office
  • Advantages
    • Provides relatively cost-efficient method to obtain agency-level review of Service Center's misapplication of applicable law or the substantial evidence rule
  • Disadvantages
    • AAO upholds ~94% of H-1B denials
    • Unfavorable decisions can have far-reaching negative consequences, including designation as an adopted or precedent decision
    • Processing times are at least 6-8 months
    • Employer’s future petition for employee may be held in abeyance while appeal is pending
    • AAO appeals usually result in negative decision after a long wait, so we rarely recommend them in circumstances such as these
    • For companies without resources to litigate, we typically suggest a motion to reopen/reconsider, if the particular case facts allow
Federal Court Litigation

• When challenging an agency attempt to change policy informally through a pattern of adjudication, federal court litigation is almost always necessary.

• The H-1B RFEs and denials that we have reviewed present clear examples of USCIS violations of the Administrative Procedure Act, the INA, and the implementing regulations.

• Because many of the H-1B denials are based on USCIS misinterpretation of DOL regulations, it is unlikely that a federal court would apply Chevron deference to the H-1B denial decision.

• DOJ's Office of Immigration Litigation represents USCIS when it is sued in federal court.

• DOJ/OIL lawyers are forced by their caseload to be practical and often look for settlement options when presented with a strong challenge to a poorly supported agency decision.
Federal Court Litigation Strategy

• File detailed complaint with robust discussion of USCIS’s:
  
  i. misapplication of the law,
  
  ii. failure to adhere to the substantial evidence rule, and
  
  iii. ineligibility for federal court deference to the agency determination under the Chevron decision

• **Option 1:** If looking to "keep the trains running," negotiate with DOJ/OIL to see if it will entertain USCIS's expedited review of a motion to reopen-reconsider, after which the litigation could be settled or pursued further

• **Option 2:** If looking to stop USCIS's unlawful behavior, then wait for DOJ to answer (60 days after service of the complaint/summons), and file cross-motions for summary judgment. There is no discovery in an APA case
Business Litigation Strategies

• Important to share information about visa adjudication trends

• Federal court litigation rarely worth the cost for most companies, but often worth the cost for industry groups or the business community generally

• Some business organizations are interested in funding litigation of key cases to benefit the larger business community

• Take away: sharing denials of visa petitions that, if reversed in federal court, would broadly benefit many businesses
WORKSITE ENFORCEMENT
Worksite Enforcement Measures

• April 2017 directives to increase worksite audits and investigations
  • DOL Wage and Hour Audits expected to increase
  • USCIS Fraud Detection and National Security (FDNS) worksite inspections to increase, broaden to other case types (e.g., L-1 visas)
  • ICE I-9 inspections to increase fourfold
  • Justice Department (IER) to increase investigations of immigration-related discrimination claims
  • Agencies actively encouraging members of public to report suspected H-1B abuse and discrimination against U.S. workers
  • Information-sharing and investigation/enforcement collaboration to increase among DHS, DOL, DOS and DOJ

• October 2017 ICE Acting Director announcement of stepped up workplace enforcement since Trump administration took office
  • Instructed the agency to increase worksite enforcement by four to five times current levels
  • Just weeks after ICE announced imposition of $95 million penalty against Asplundh Tree Company, the largest penalty ever imposed in a worksite case
Trends and Issues

• Larger Scale I-9 Audits: Recent ICE action with large convenience store chain

• Special Rules for Government Contractors: disclosure of noncompliance, and E-Verify

• Scrutiny of Underlying Compliance of Electronic I-9 Systems

• Recent increases in civil fines for I-9 noncompliance: substantive nontechnical paperwork errors now $220 to $2191 for 1st offense

• Protocols for response to unannounced agency site visits

• Special considerations for immigration site visits in California (AB 450)
Develop a Comprehensive Compliance Program

- Ensure I-9 and employment verification compliance is important and integral part of corporate compliance program
- Written I-9 and employment verification policies and procedures
- Internal I-9 training and compliance program
- Establish responsibility for I-9 compliance within the organization
- Establish an I-9 review and audit process for completed I-9 forms
- Establish procedures for resolving potential constructive knowledge issues and allegations regarding employment eligibility
- Don’t forget state law requirements
- Consider adopting an electronic I-9 program
- Integrate immigration compliance into company’s overall corporate compliance structure
IMMIGRATION POLICY PROPOSALS
Policy Objectives of Trump Administration

• As expressed in BAHA Executive Order:
  • The immigration agencies shall “ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”

• As expressed in “Four Pillars for Immigration Reform” in connection with DACA relief legislation:
  • “. . . promoting nuclear family migration by allowing immigration sponsorships of spouses and minor children only. More than 70 percent of immigrants who receive green cards every year do so based on their family relationships, not their skills.”

• In previous legislative proposals: (i) mandatory use of E-Verify; (ii) choosing employment-based visa beneficiaries through use of point system as opposed to employer sponsorship.
Legislative and Regulatory Vehicles

• **Legislation:** (i) Grassley-Durbin H-1B visa reform legislation; (ii) RAISE Act (point system); (iii) Legal Workforce Act (mandatory E-Verify; enhanced criminal penalties for I-9 noncompliance) – passed House Judiciary Committee.

• **Regulation:** (i) revisions to H-1B definition of “specialty occupation to increase focus on obtaining the best and the brightest foreign nationals” (forthcoming October 2018); (ii) removing H-4 dependent spouses from eligibility for employment authorization (forthcoming February 2018); (iii) reduction of STEM/OPT benefits (forthcoming).

• **Sub-regulatory:** (i) ending DACA; (ii) non-renewal of TPS for Haitians and Salvadorans; (iii) Computer Programmer Memo (H-1B)
Key Considerations from Today’s Presentation

• **International Business Travel**
  • How are you tracking it?
  • How are you paying for it?
  • Do you have systems in place to ensure work isn’t being performed using a visitor visa?

• **H-1B program**
  • Do you know who all your H-1B workers are?
  • Do you track their location and other changes to their jobs?
  • Are H-1B wages commensurate with US worker wages?
  • Are you using Level 1 wages?
  • Are you internal job requisitions consistent with the H-1B program?
  • What is your RFE/denial experience?

• **PERM/US Residency Green Card Sponsorship**
  • Who is setting minimum requirements for PERM cases?

• **I-9 Program**
  • Are you using an electronic system?
  • Do you have rules in place to ensure compliance?
  • Are you prepared for an unannounced worksite visit?
THANK YOU

QUESTIONS?