

President Trump Expected to Sign Executive Order Affecting High-Skilled Workers and Foreign Students

January 31, 2017

President Trump is expected to sign an Executive Order concerning high-skilled workers and foreign students in the upcoming days.

Unlike the Executive Order signed last Friday that imposed an immediate travel ban on nationals from seven countries of concern, this Executive Order does not immediately suspend or terminate any individual's work authorization or visa status. Instead, it is expected that the Executive Order will put in motion changes to the student and work visa categories that will unfold over the weeks and months ahead.

Overview of Executive Order

The final text of the Executive Order is not yet available, but according to early versions of the Executive Order reviewed by BAL attorneys and conversations with government contacts, we expect the Executive Order to include:

- A directive that the Secretary of Homeland Security review all regulations that allow foreign nationals to work in the U.S. with an eye toward rescinding those that are deemed to violate immigration laws or are otherwise not in the national interest;
- An assessment of the process for H-1B visa allocation, seeking ways to make it more efficient and to ensure that beneficiaries of the program are “the best and the brightest.” We understand this language to mean that the administration will pursue changes to the H-1B lottery to prioritize applications for those who are paid higher wages and have more education;
- A directive that the Department of Homeland Security (DHS) work with the Departments of State and Labor to make changes (regulatory, policy and procedural) to “restore the integrity of employment based visa programs to better protect U.S. and foreign workers” affected by those programs. Few details are given, but “policy and process” changes could lead to case processing challenges and potentially new obligations related to recruiting, worker displacement and prevailing wages;
- A change to the Visa Bulletin that could result in a return to the single Visa Bulletin model and a retrogression of priority dates;
- A requirement that, within 180 days, U.S. Citizenship and Immigration Services (USCIS) expand the L-1 site visit program to include all places where L-1 visa holders work, including third-party worksites, and a plan to further expand the site-visit program to cover all visa categories within two years;
- A requirement that the Secretary of Labor initiate an investigation of the extent to which American workers have been harmed by the employment of foreign workers or by the recipient of services performed by foreign workers;
- A directive that DHS incentivize E-Verify use, which means that companies seeking to sponsor foreign workers will be required to participate in the E-Verify program; and
- Clarification of permissible activities on a B-1/B-2 short-term business visa.

BAL Analysis

- Case Processing: Immediately upon issuance of the Executive Order, companies should prepare for case processing challenges, including an uptick in Requests for Evidence and Notices of Intent to Deny. Adjudicators will read the goal of the Executive Order (to protect U.S. workers) and will immediately apply stricter adjudication standards than in the past.
- H-1B Lottery: The Executive Order proposes no immediate changes to the FY18 (April 1, 2017) lottery process, but does signal a long-term effort to revise how H-1B visas are allocated. BAL will closely monitor developments in the agency and will update if there is any indication the FY18 filing process will be different than in years past.
- Green Card Priority Dates: Companies should prepare for a retrogression in Visa Bulletin priority dates. Companies should identify employees who are currently eligible to file an application to adjustment of status (i.e., green card) in February and should make every effort to timely file those applications.
- F-1 OPT and H-4 EADs: It is expected that the administration will target the F-1 Optional Practical Training (extension) and H-4 Spousal Work Authorization regulations put in place by President Obama. It is not known whether the government will seek to rescind the regulations in their entirety or whether government officials will instead modify the regulations by imposing additional U.S. worker protections. Companies should begin evaluating alternative legal strategies for employees and family members who may be impacted by changes to these regulations.
- L-1 Site Visits: Additional L-1 site visits will begin in the months ahead. If a company has not filed an amendment to reflect a change in worksite for the L-1 beneficiary, there is an increased risk that the site visit will result in a Notice of Intent to Deny by USCIS.
- Security Screening: Employees from the countries of interest designated in the January 27th Executive Order on visa security and terrorist travel should expect delays and scrutiny in connection with any petitions filed on their behalves.
- B-1 Travelers: Individuals traveling pursuant to a B-1 in lieu of H-1B visa, or those who will engage in activities that are not clearly permissible under existing B-1 guidance, should expect additional scrutiny at ports-of-entry.
- DOL Investigations: President Trump previously announced that, in his first 100 days, he would instruct the Department of Labor (DOL) to investigate all abuses of work visa categories. Though no additional detail is provided in the Executive Order, companies should anticipate an increase in the number of Wage and Hour investigations by DOL.

Conclusion

The final text of any Executive Order will not become available until after the President signs the document. The information provided above is advisory in nature and will be updated once BAL reviews the final text of the Executive Order.