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WHITE PAPER:

HIGH-SKILLED IMMIGRATION POLICY UNDER PRESIDENT TRUMP



INTRODUCTION

Donald Trump's surprise victory in the presidential election has upended the political and policy landscape for immigration. It will still fall to Congress to make substantial changes to the immigration system, but the Trump administration will have authority to reshape the lives of hundreds of thousands of unlawful immigrants and influence the ability of US companies to access and retain highly-skilled foreign workers. This paper explores how the Trump administration will approach the issue of immigration and analyzes how administrative reforms will impact US companies.

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PRESIDENTIAL APPOINTEES



With the presidential inauguration only nine weeks away, President-elect Trump is busy selecting the political appointees who will serve in his administration. Personnel is policy, and dozens of political appointees, across four different cabinet-level agencies, will influence the direction of the Trump administration on immigration policy. DHS has assumed primary responsibility for immigration policy, particularly with respect to legal immigration, since its creation in 2002. The Director of US Citizenship and Immigration Services (USCIS) and the Director of Immigration and Customs Enforcement (ICE), within DHS, are also Senate-confirmed positions and will play important roles in developing and prioritizing new immigration policies.

PRESIDENTIAL APPOINTEES

The Department of Justice and the Department of State will also play key roles in developing and implementing new immigration policies. Each department has a unique role in the immigration system, and it is common for there to be competing views within an administration. For example, a change in immigration enforcement priorities by the Department of Homeland Security could affect resource demands at the Department of Justice or it could negatively affect foreign relations discussions.

DEPARTMENT OF JUSTICE	DEPARTMENT OF HOMELAND SECURITY	DEPARTMENT OF STATE
330 APPOINTEES	161 APPOINTEES	401 APPOINTEES
Board of Immigration Appeals (BIA) (appellate body)	Immigration Policy	Visa Adjudication
Executive Office of Immigration Review (EOIR) (immigration courts)	Benefits Adjudication (work visas, family immigration, refugee and asylum programs)	Visa Security Screening Overseas
Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)	E-Verify and I-9 Worksite Enforcement	Visa Bulletin (green card allocation system)
Civil and Criminal Enforcement (US attorney offices)	Deportation Prosecution (before DOJ judges)	Foreign Policy
Office of Immigration Litigation (OIL) District/Appellate Litigation	Immigration and Nationality Act Enforcement (i.e. whom to deport)	Consular Office Staffing

MIDNIGHT REGULATIONS



Regulations published during the final three months of an administration are referred to as “midnight regulations,” and it is common for outgoing administrations to publish regulations to advance their policies or make it more difficult or time consuming for the incoming administration to reverse the policies. Today, the Obama administration is discussing which regulations should be issued before January 20, 2017 and, due to limited capacity at the Office of Information and Regulatory Affairs, difficult choices must be made within weeks.

OBAMA’S MIDNIGHT REGULATIONS

A little-known statute called the Congressional Review Act (CRA) could become relevant in the months ahead. That statute states that the US Congress can rescind a major regulation (impact of over \$100 million) if it was issued within the last 60 legislative days, and only a simple majority in the US Senate is required for rescission. The CRA has only been used successfully by Congress on one occasion, but the dynamics in 2017 of a Republican-controlled Senate, House of Representatives, and White House could mean that Congress will closely scrutinize midnight regulations issued by the Obama administration.

MIDNIGHT REGULATIONS

RESCINDING OBAMA'S EXECUTIVE ACTIONS

A centerpiece of Donald Trump's campaign was his promise to rescind Obama's executive actions on immigration reform. Obama's most impactful policy proposal – to grant Deferred Action to approximately four million unlawful immigrant parents of US citizens and green card holders – was enjoined by a federal court and never took effect. But the Obama administration did successfully implement many other policy memoranda and regulations that, if fully implemented, would afford some form of lawful status or work authorization to approximately 1 million individuals.

The Trump administration will seek to modify or rescind many of these policies, though it is difficult to forecast the scope and timeline of those changes. Given the huge number and broad range of individuals who would have benefitted from Obama's executive actions (combined with Trump's proposals for heavy-handed enforcement against unlawful immigrants), there is a high degree of anxiety within the immigration community.

OBAMA EXECUTIVE ACTIONS

FAMILY IMMIGRATION	BUSINESS IMMIGRATION	ENFORCEMENT	PROTECTIONS
DACA DAPA Cuban Reunification Haitian Reunification Filipino Veterans Extreme Hardship Standard Provisional Waivers	H-4 Spousal Work Authorization STEM OPT Extension AC21 Regulation L-1 Policy Guidance Visa Bulletin Entrepreneur Regulation	Secure Communities Priority Enforcement Program Prosecutorial Discretion 287(g)	Refugee numbers (70k to 110k) Terrorism grounds of inadmissibility

MIDNIGHT REGULATIONS

TIMEFRAMES FOR TRUMP'S ACTIONS

Generally, a new administration that seeks to withdraw a policy must follow the same legal procedures that the prior administration used to implement the policy. This means the Trump administration could issue a policy memo to withdraw a policy memorandum, but would need to go through the rulemaking process to withdraw a regulation. There are several variables that can affect the timeframe for policy making, not least of which is the time it takes for any administration to settle on the specifics of a policy.



CAMPAIGN PROMISES AND PRIORITIES



During the campaign, Trump issued a 10-point plan for overhauling the immigration system. The plan focused on building a wall along the US-Mexican border and other enforcement measures, but Trump also called for a reduction of legal immigration and new “immigration controls to boost wages and to ensure that open jobs are offered to American workers first.” Based on his stump speeches and the positions he took during the primary and general election debates, Trump is expected to focus on the following priorities:

CAMPAIGN PROMISES AND PRIORITIES

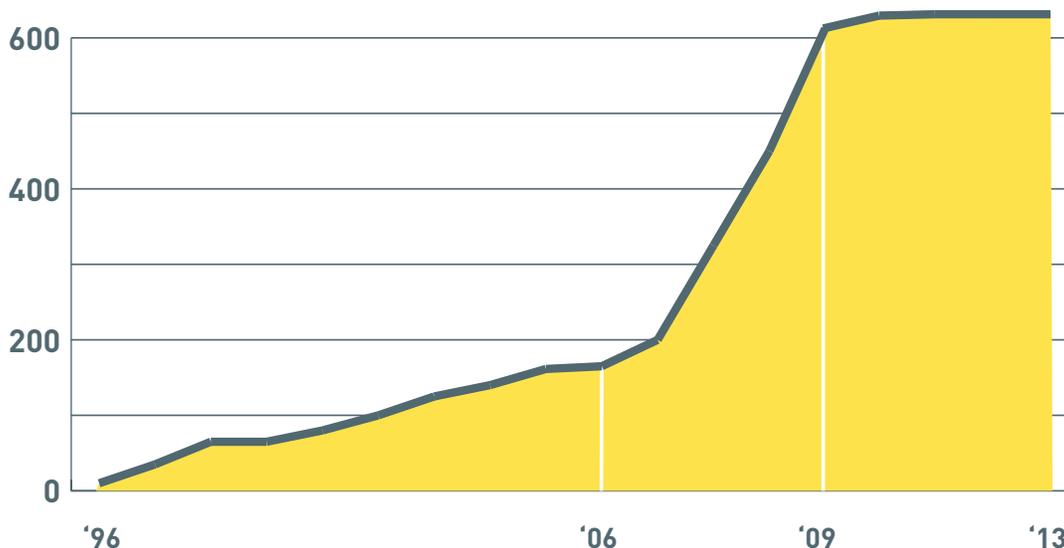
BORDER WALL

A priority of the Trump administration will be to show progress on his commitment to build an “impenetrable” wall. Experts disagree on how much it would cost to complete the wall (approximately 670 miles exist today along a 2,000-plus mile border), but there is little doubt that the cost far exceeds current appropriations from Congress. Trump has stated that he will use his authority to tax remittances to Mexico to pay for the wall, but pursuing that option will take many months and will face many obstacles. We should expect that he will look for quick progress (shifting existing appropriations or sending the National Guard to the border), followed by a request to Congress for additional appropriations.



BORDER FENCING

Miles of border fence over time



CAMPAIGN PROMISES AND PRIORITIES

EXTREME VETTING

Donald Trump has stated that he will impose “extreme vetting” on travelers from certain regions of the world. This could take many forms, including a resurrection of the post-9/11 “special registration” program that required additional screening and exit requirements for travelers from certain countries. Civil liberties groups are concerned about religion-based screening, and business groups are concerned about the potential for travel disruption and a decrease in tourism and student enrollment in the US. Based on Trump’s campaign promises, we should expect some increase in security vetting for individuals who are either from or have traveled to certain countries or regions.

A Return of the National Security Entry-Exit Registration System (NSEERS)?

One year after 9/11, the federal government implemented a port-of-entry registration system for nationals of 25 countries. Travelers were subjected to additional security screening at the airport, both on arrival and on departure. Approximately 290,000 travelers were registered. The program was suspended after two years, as the federal government shifted its focus to US-VISIT (fingerprint and facial recognition screening of almost all travelers) and security screening of travelers prior to departure to the US.

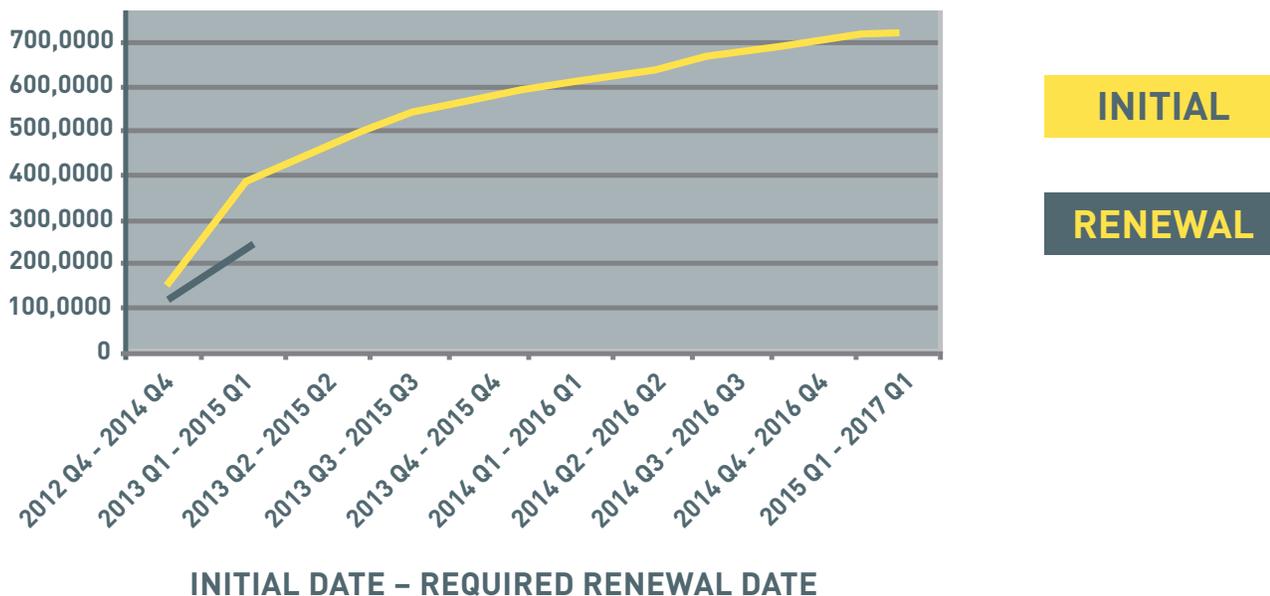
CAMPAIGN PROMISES AND PRIORITIES

DACA (DREAMERS)

President Obama's first major executive action remains his most significant: granting Deferred Action to approximately 700,000 individuals who came to the US unlawfully before the age of 16 ("Deferred Action for Childhood Arrivals" or DACA). The first DACA program, implemented in 2012, was never successfully challenged in court and was not part of the *Texas vs. US* legal proceeding. Nevertheless, there is a significant possibility that the Trump administration will seek to end or phase out the DACA program. Even if Trump elects to phase out DACA and not renew Employment Authorization Document (EADs) issued to DACA recipients, approximately 50,000 individuals would lose status each month. This could mean that companies will be required to terminate the employment of DACA beneficiaries at the time their employment authorization is rescinded or expires.

There is no precedent for the creation or termination of a program that is of the scale of DACA, so the government will be in uncharted territory. Students and universities around the country are already rallying to the defense of DACA beneficiaries and we expect that any change to the DACA program will result in unprecedented public protests in person and through social media. Absent further action by the Obama administration, Trump would be able to rescind or modify DACA via policy guidance.

CUMULATIVE INITIAL AND DACA APPLICATIONS ACCEPTED



CAMPAIGN PROMISES AND PRIORITIES

SANCTUARY CITIES

A sanctuary city is not a defined term, but it generally refers to any city or jurisdiction that violates federal law by refusing to share information with federal authorities. Sanctuary cities have been around for decades, and the federal government has authority to withhold federal funding as a means of forcing cooperation. Post-election, many jurisdictions – including Chicago, New York City, Portland, San Francisco and Seattle – have already announced that they will not cooperate with federal law enforcement actions against unlawful immigrants. We expect that the Trump administration will adopt a more aggressive position against sanctuary cities and will leverage all of the federal government’s legal tools to punish those jurisdictions. But politicians in sanctuary jurisdictions often have the strong support of the people who elected them, which could set up a volatile conflict between federal officials and state and local jurisdictions.



E-VERIFY

Trump’s 10-point plan calls for the US to “turn off the jobs and benefit magnet” for undocumented workers, which presumably means that his administration will seek to expand the use of E-Verify. The federal program is voluntary for most employers, though many states now impose E-Verify obligations on some or all employers. The Bush administration sought to expand use of the program by requiring federal contractors to use the system and by tying certain immigration benefits (e.g. STEM OPT) to use of the program. Due to statutory restrictions, Trump would need to pursue a similar approach as there is no simple way for the new administration to impose mandatory E-Verify on all employers in the US.

Employer participation has grown exponentially in the last ten years. In 2005, only 5,300 companies participated in E-Verify. Today, over 650,000 companies participate in E-Verify and a large percentage of new hires are now run through the electronic system.

HIGH-SKILLED BUSINESS IMMIGRATION



DEPARTMENT OF LABOR INVESTIGATIONS

Trump has released a short video in which he lays out the administrative actions that he will take during his first 100 days in office. His only reference to immigration is a statement that he will “direct the Department of Labor to investigate all abuses of visa programs that undercut the American worker.” On the campaign trail, Trump focused extensively on the alleged abuse of the H-1B category by Indian outsourcing companies to displace US workers. For example, he invited laid off Disney workers to speak at campaign events where they alleged that they were displaced by H-1B workers from Cognizant and HCL. It is an open question as to whether Trump will prioritize DOL enforcement resources towards the investigation of companies that are H-1B dependent (i.e. more than 15 percent of US workforce is in H-1B status) and are engaged in offshore IT work.

Under the law, the Department of Labor (DOL) can initiate an H-1B investigation if (i) DOL receives a complaint from an aggrieved person or organization; (ii) DOL receives specific credible information from a reliable source (other than a complainant); (iii) the Secretary of Labor has found that an employer has, within the previous five year years, committed a willful failure of its H-1B obligations; or (iv) the Secretary of Labor personally certifies that he or she has reasonable cause to believe that the employer is not in compliance. The penalties for violating the H-1B regulatory obligations are substantial and can include civil monetary penalties of up to \$35,000 per violation and debarment from the immigration program for up to two years. For many companies, debarment would seriously compromise their ability to do business in the US.

HIGH-SKILLED BUSINESS IMMIGRATION

F-1 OPTIONAL PRACTICAL TRAINING (OPT)

Both the Bush and Obama administrations expanded opportunities for foreign graduates of US universities to transition to the US workforce. In 2008, the Bush administration expanded post-graduate Optional Practical Training by allowing graduates with degrees in science, technology, engineering, and mathematics (STEM) fields to obtain an additional 17 months of work authorization. The Obama administration extended the STEM OPT program from 17 to 24 months of work authorization and made other enhancements to the program.

The regulations have survived judicial review, but it is notable that groups that have supported Donald Trump have challenged the regulations at every stage of their implementation. Those groups have also advocated for tighter restrictions on the existing STEM OPT program, including higher wage obligations.

STEM OPT is a program with broad political support (“staple a green card to a US diploma”), but it has also become the target of groups that believe foreign graduates of US universities steal jobs from US workers. Any changes to the program could negatively affect the hundreds of thousands of individuals working today pursuant to the STEM OPT program. Modifications to STEM OPT would likely need to be made via a new regulation.

H-4 SPOUSAL WORK AUTHORIZATION

One of the first business-related executive actions put in place by the Obama administration was a regulation that extended work authorization (Employment Authorization Documents (EADs)) to spouses of certain H-1B workers. The same groups that challenged the OPT regulation also challenged the H-4 EAD rule, also unsuccessfully. Should opponents of the STEM OPT regulation and H-4 EAD regulation have a strong voice in the Trump administration, we may see an effort to rescind or modify the H-4 EAD rule. USCIS had estimated that over 170,000 EADs would have been issued under the regulation, though actual numbers have fallen short of that number. Any changes to the H-4 EAD regulation would likely need to be made via a new regulation.

HIGH-SKILLED BUSINESS IMMIGRATION

H-1B PROFESSIONAL WORKERS

Trump has made several contradictory remarks regarding the H-1B category. In response to questions about terminating the H-1B program, he responded that the US needs to retain highly-skilled workers. At other times, however, he has stated that the program is abused and should be curtailed. His comments about the H-1B program clearly signal his concerns about H-1B wage protections and use of the program to displace US workers. This should be somewhat worrisome to H-1B dependent employers who are involved in outsourcing services. Indeed, on the campaign trail Trump often invited US workers who had allegedly been displaced by Indian outsourcing companies to speak at his rallies.

Trump on H-1Bs: Conflicting Positions, or Nuanced Policy?

"I am all in favor of keeping these talented people here so they can go to work in Silicon Valley."

"The H-1B program is neither high-skilled nor immigration: these are temporary foreign workers, imported from abroad, for the explicit purpose of substituting for American workers at lower pay."

"Raising the prevailing wage paid to H-1Bs will force companies to give these coveted entry-level jobs to the existing domestic pool of unemployed native and immigrant workers in the US, instead of flying in cheaper workers from overseas."

"So, we do need highly skilled...They'll go to Harvard, they'll go to Stanford, they'll go to Wharton, as soon as they're finished they'll get shoved out....they're not able to stay here. For that purpose, we absolutely have to be able to keep the brain power in this country."

HIGH-SKILLED BUSINESS IMMIGRATION

It is difficult to predict how Trump will navigate the H-1B issue, but we do know that opponents of the category have advocated for the following policy changes before Congress and are likely to push the new administration to implement some of the changes through administrative reform:

- Prioritize H-1B visa allocation based on salary or education levels;
- Elevate prevailing wage levels;
- Prohibit primary or secondary displacement of US workers; and
- Require employers to recruit US workers before sponsoring an H-1B visa holder.

Whether any of these can be accomplished in the absence of legislation remains to be seen. With over 20,000 different employers utilizing the visa category, any effort to restrict the category will be scrutinized and parties will pursue litigation if the government oversteps its legal authority.

L-1 INTRACOMPANY TRANSFEREES

Though the L-1 category remained out of the spotlight during the campaign, opponents of highly-skilled immigration have been advocating for years for new restrictions on the visa category. The most likely scenario is that the government will seek to apply the *Matter of Simeio* decision to L-1B filings, which means that employers will be required to file an L-1 amendment any time an employee changes geographic locations. This would result in new costs and operational burdens for many companies, particularly those in the professional services industries. It is also expected that the government may revisit the recent policy guidance interpreting “specialized knowledge” for L-1B petitions, which could result in further narrowing of eligibility for the visa category. Those two changes, both of which could be made through policy guidance, would dramatically alter the L-1B landscape for employers.

HIGH-SKILLED BUSINESS IMMIGRATION

TN (TRADE NAFTA) VISAS

The North American Free Trade Agreement (NAFTA) included a visa category (TN) for professionals from Canada and Mexico. That visa category was later codified into regulations, but its underlying authority remains the treaty agreement between the countries. Trump stated during his campaign that he would seek to renegotiate the terms of the treaty and, if the other countries did not agree to do the same, he would unilaterally withdraw from the treaty. Under the terms of NAFTA, any party may withdraw by providing six months' notice.

There is no precedent for the US withdrawing from a treaty like NAFTA, so it is difficult to predict what would happen to TN visa holders in the US in the event of withdrawal. Under the worst-case scenario, those individuals would lose their status and work authorization. The immigration issues are likely to be secondary to the significant trade implications that would result from unilateral withdrawal from NAFTA. In light of the significant trade implications, it appears likely that there will be no significant changes to the TN category in the next few months.

ENFORCEMENT TRENDS

Employers who utilize high-skilled visa categories already face a high level of scrutiny by adjudicators and consular officers. Over the past few years, however, the number of civil and criminal investigations into alleged abuse of immigration benefits has significantly increased (e.g. B-1, H-1B or L-1B visa categories). The new administration will likely continue this trend and, assuming Senator Jeff Sessions (R-AL) is confirmed as Attorney General, the Department of Justice will prioritize enforcement of US immigration laws. In practical terms, this means that federal prosecutors across the country will feel empowered to aggressively pursue civil and criminal investigations against employers of high-skilled immigrants.

HIGH-SKILLED BUSINESS IMMIGRATION

It is more difficult to predict how the new administration will handle the enforcement of section 274B of the Immigration and Nationality Act, which prohibits discrimination based on nationality or citizenship. One possible scenario is that the new administration will direct the Justice Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to increase its enforcement against employers that favor H-1B workers over US workers (i.e. H-1B dependent employers).

Within USCIS, the Fraud Detection and National Security Directorate (FDNS) will play a more prominent role within the agency, which means employers should expect the expansion of the administrative site visit program to additional visa categories. Employers should also expect an uptick in collaboration between ICE and USCIS when FDNS site visit inspectors find evidence of fraud or misrepresentation.

ADJUDICATION STANDARDS

US Citizenship and Immigration Services (USCIS) adjudicators and Department of State (DOS) consular officers are influenced by the rhetoric and policy proposals of their leadership. If the Trump administration seeks to impose restrictive policy proposals on highly-skilled visa categories, companies should expect adjudicators and consular officers to closely scrutinize applications and to increase Requests for Evidence ("RFEs") and denials. The rapid increase in L-1B denials after the 2009 economic downturn is a recent example of how susceptible a visa category is to "policy through adjudication." For employers, this scenario can be dangerous as it can be difficult to identify and address "informal" communications and adjudication trends.

CONCLUSION

Donald Trump was an unpredictable candidate, and his immigration agenda is both very specific (e.g. “build a wall”) and very vague (“immigration controls to boost wages”). In the next few weeks and months, the answers to the questions below will determine the 2017 landscape for companies that utilize high-skilled visa categories:

Who will Trump select as political appointees in the relevant agencies?

Will Trump focus on executive actions that target unlawful immigration, or will he try to simultaneously reform the legal immigration system?

Will Trump’s enforcement efforts in the high-skilled immigration arena target Indian out-sourcing companies, or will his administration cast a wider net to discourage use of the visa system by US employers?

One thing is certain: it will be period of uncertainty both for companies and for foreign high-skilled workers. BAL will continue to work with clients and coalitions to advocate for sensible immigration policies that deter abuse while improving access to talented foreign workers. Clients are encouraged to consult with the BAL immigration professionals they work with to discuss steps that they should take to understand and mitigate against possible policy changes.



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