Anticipating Changes to the H-1B Program

May 11, 2017

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The H-1B program – Points of Impact

- Executive Orders and Presidential Memoranda
- Regulatory Activity
- Compliance and Enforcement
- Proposed Legislation
- Other Agency Action

Executive Orders and Presidential Memoranda
Buy American and Hire American Executive Order, April 18, 2017

- Directs DOL, DHS, DOJ and DOS to propose changes to H-1B and other employment-based immigration regulations and policy
- Seeks agency recommendations on H-1B cap allocation to prioritize advanced-degree holders and high-wage earners
- Seeks increases in wage minimums
- Orders tougher enforcement of H-1B program violations and abuse
- Most changes contemplated by the EO require legislation or regulation, though Trump Administration believes some restrictions could be effected through policy guidance
- Administration officials indicate they are seeking an increase in H-1B filing fees, across-the-board administrative and legislative reforms for employment-based immigration programs

How NC State responded/will respond to the:

- “Hire American” Executive Order on April 18: Uneasiness.
  - Campus Advice: none yet, since we are waiting on several federal agencies to “suggest reforms” regarding the H-1B program
  - Impact: maybe unrelated, BUT since January 2017 we have already seen -
    • Increase in RFEs from USCIS – 5 between February 6 and May 5 (3 month span)
    • Increase in RFIs from DOL on 9141 applications – 3 since January
    • First DOL PERM audit request in April in over 4 years (last one was January 2013)
  - Future potential impact:
    • Tougher enforcement: not sure what that will mean; we are not a willful violator or abuser of the H-1B program
    • Proposed H-1B required minimum wage increases: we are not overly worried yet, but are keeping a close eye on developments related to this issue; anything requiring an increase in notoriously low “postdoc” wages would significantly raise alarm bells
Protecting the Nation from Foreign Terrorist Entry into the United States, Executive Order, March 6, 2017

- 90-day entry ban on nationals of Iran, Libya, Somalia, Sudan, Syria and Yemen, with exemptions for U.S. LPRs, valid U.S. visa holders, holders of advance parole, dual nationals with an unrestricted passport and valid U.S. visa, asylees, refugees in U.S. or with officially scheduled travel to U.S.
- Waivers of 90-day entry ban available to Canadian landed immigrants, FNs previously admitted for work or study and seeking reentry to resume those activities, persons with significant U.S. contacts, among others
- 120-day suspension of all refugees

- Nationwide preliminary injunction against entry and refugee bans in *State of Hawaii v. Trump*, now on appeal to 9th Circuit
- Nationwide preliminary injunction against entry ban in *IRAP v. Trump*, now on appeal to 4th Circuit
- Nationals of restricted countries may enter the United States, though will be subject to extreme vetting during visa application process, per Presidential Memorandum (see below)

Polling Question

Are you advising students and faculty from one of the 6 countries to avoid international travel until all litigation is settled?

A. Yes
B. No
Memorandum for the Secretary of State, the Attorney General, & the Secretary of Homeland Security, March 6, 2017

• “Extreme vetting” memorandum
• Directs DHS, DOS and DOJ to implement more stringent vetting of applicants and petitions for immigration benefits
• Currently in effect
• Enhanced security screening may delay processing at USCIS and at U.S. consulates

How NC State responded to the:

• 2nd “Travel Ban” EO on March 6 that was to have taken effect on March 16: Frustration.
  • Campus Advice – continue to recommend that potentially affected people not travel abroad, still too much uncertainty; we were better able to communicate with potentially affected employees and students ahead of time, since we had a 10 day notice period
  • Visa processing and Cybersecurity: we are in the process of developing communications for campus related to both ‘increased scrutiny’ during the visa application process, and also to a new FAQ that our Office of General Counsel recently created regarding searches of personal electronic devices by CBP Officers (main gist: comply with CBP requests)
Enforcing the Regulatory Reform Agenda, Executive Order, February 24, 2017

- Orders regulatory review process at federal agencies
- Orders agencies to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary or ineffective; impose costs that exceed benefits; create serious inconsistencies or otherwise interfere with regulatory reform initiatives and policies; or derive from executive orders that have been rescinded or modified

Currently in effect
- Though not specific to immigration, is expected to lead to broad regulatory reform agenda at USCIS, DOL and DOS

Protecting the Nation from Foreign Terrorist Entry into the United States Executive Order, January 27, 2017

- 90-day entry ban on nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen, with exemption for U.S. LPRs, dual nationals with non-restricted passport and valid U.S. visa
- 120-day suspension of U.S. refugee program
- Indefinite suspension of refugees from Syria
- 30-day review of foreign countries’ cooperation with U.S. national security efforts

- Withdrawn and replaced by March 6, 2017 executive order
How NC State responded to the:

• 1st “Travel Ban” EO on Friday, January 27, 2017: PANIC!!
  • Massive internal communication that weekend between Office of International Services (OIS), IE (International Employment), Associate Vice Chancellor for HR, General Counsel, Provost, Chancellor and others
    • Message sent by the Chancellor to the NC State Community on Sunday, January 29
  • OIS and IE scrambled to ascertain approximately how many affected students, faculty and staff we had (around 170), and then determine where everyone was physically located; very few people directly affected based on the timing
  • Multiple communications to campus based on ever-changing information from the Government; town hall meetings with students and faculty from the 7 countries –
    • Student concerns: revocation, deportation and even concentration camps within the U.S.
    • Campus Advice – we recommended that potentially affected people not travel abroad due to too much uncertainty regarding the TRO

Border Security and Immigration Enforcement Improvements Executive Order, January 25, 2017

• Provisions with impact on employers of foreign nationals include:
  • Increase in Fraud Detection and National Security site visit program
  • Review of agency fraud detection measures and vulnerabilities in benefits adjudication processes
  • Increase in ICE and CBP enforcement

• Executive order is currently in effect
• Employers report more intensive FDNS site visits
How NC State responded/will respond to the:

• Immigration Enforcement Improvements EO: Anxiety.
  • FDNS site visits: we had only 2 in 2015, then 8 in 2016, and 3 already in January 2017 – with no adverse findings, ever – so we are not currently too worried by the new “focus” on H-1B dependent employers (not us) or employers placing employees at a third-party worksite
    • We have a few situations where H-1B employees work at another location in addition to (or instead of) campus, but those are rare and usually the other worksite is directly owned/operated by, or clearly affiliated with, NC State – and our LCA Public Access Files and I-129 petitions list all locations
    • Intensity of the 3 visits in January were the same as during previous visits, but they occurred on the exact same day that this EO was issued, and we haven’t had once since

Draft Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs, January 23, 2017

• Sought review and revision of U.S. employment-based immigration program rules
• Sought studies of the impact of employment-based immigration programs on U.S. jobs and wages
• Would have ordered proposed regulations to limit the use of the B-1 business visitor program, F-1 OPT and CPT programs, H-1B and L-1 programs and parole
• Would have ordered increased FDNS site inspection and expansion of program to other visa categories
• Would have sought proposals on ways to increase E-Verify usage

• Draft executive order never issued
• Certain provisions have been included in other executive orders and administration policy memoranda
NAFTA Renegotiation/Withdrawal

- Administration has indicated its intention to renegotiate NAFTA, after earlier indications it would initiate withdrawal
- Federal law requires the president to give Congress 90 days notice of his intent to revise a trade agreement
- NAFTA requires 6 months’ withdrawal notice
- Negotiations expected to begin by late 2017
- Impact on NAFTA immigration provisions not yet known
- Trump Administration has not indicated its intentions for the TN, NAFTA L-1 or B-1 provisions

How NC State will respond to:

- NAFTA renegotiation/withdrawal: Apprehension.
  - We will carefully follow developments to assess any potential impact to current or future employees in TN status
  - We don’t have any NAFTA L-1s or NAFTA B-1s (that I know of – but that is a totally different discussion for another day!)
  - We have experienced several “glitches” in TN processing in the last year or two:
    - A Digital Librarian is apparently not a Librarian but a Computer Programmer to CBP
    - Scanned signature (which was recommended against) on the TN sponsorship letter was not accepted by CBP so employee was denied admission until the inked signature arrived
    - We will be curious to see if any changes are made to the list of TN occupations (and whether any comments or suggestions are solicited – not holding my breath!)
Polling Question

How are campuses reacting to the potential withdrawal from NAFTA?

A. No concerns or action at this time
B. Collecting a list of TN visa holders and contemplating alternatives
C. Hiring fewer TNs
D. Filing more petitions with USCIS rather than border applications
E. Some combination of the above

Regulatory Activity and Related Action
H-4 Employment Authorization Regulation

- Dismissal of *Save Jobs USA v. DOJ*, a federal challenge to the H-4 EAD regulation, is on appeal in federal court
- Trump Administration has asked the court to hold proceedings in abeyance for six months while it considers rulemaking
- H-4 EAD program remains in place
- DC Circuit has not yet ruled on Administration’s motion to hold proceedings in abeyance
- Future rulemaking could restrict or eliminate H-4 EAD program

How NC State will respond to:

- Reconsideration of H-4 employment authorization: *Irritation*.
  - We have no clear count of how many such cards are being used for employment here
    - If the authorization is terminated or revoked, we would send a communication to campus regarding these changes
      - Hopefully hiring units or other sponsored employees would contact us if they had knowledge of an employee (or spouse) working pursuant to that status
    - We would also make an attempt to run a query in either (or both) our HR system or our electronic I-9 system to see if one or both could help us capture the H-4 EAD information
      - HR system currently not sophisticated enough to capture/report H-4 EAD employment
      - I-9 system: has copies of all attached EAD cards, but no way to search by the (H-4) employment code on the face of the copy of the card
STEM OPT Regulation

- *Washington Alliance of Technology Workers v. Trump* (WashTech II), a second federal challenge to STEM OPT regulation was dismissed on April 19, 2017 for failure to state a claim for which relief could be granted
- STEM OPT program remains in place
- Lawsuit dismissal does not rule out regulatory restriction or elimination of the STEM OPT program in the future

How NC State will respond to:

- Possibility of termination of STEM OPT employment: Shock!
  - We pray that STEM OPT is not eliminated!
    - Since implementation of the new STEM OPT program, we have processed 40 I-983 STEM OPT Training Plans (which may or may not be a completely accurate number...)
    - If the program is terminated, we would need to send an immediate communication to campus and affected employees to assess impact to the students and the hiring units/projects
      - Special concern: what if employment cards are revoked or invalidated earlier than the requested or actual end date on the card or application?
    - New process since May 2016 is NOT ideal and has been somewhat difficult and cumbersome to administer and monitor, but it is still an important employment option for both the students and their employers (including the university as the employer)
Compliance and Enforcement

DOL LCA Enforcement

- April 4, 2017 announcement indicates DOL will provide “greater transparency and oversight” of the H-1B program to protect U.S. workers from discrimination
- DOL will:
  - Rigorously use all existing authority to initiate investigations of H-1B program violators
  - Consider changes to LCA for future application cycles
  - Seek stakeholder feedback on protections for U.S. workers through existing rules or legislative changes
- Coordinated agency announcements signal Trump Administration’s intention to expand government agency authority to initiate investigations against employers of foreign workers
How NC State will respond to:

• Future LCA/H-1B enforcement by DOL: **Dread.**
  • LCAs: if DOL increases audits and investigations, we will simply continue our current practice of creating, maintaining and updating a separate Public Access File (PAF) for each petition we file
    • Some institutions might use ‘master files’ for documentation common to all files
    • We already conduct an annual update/review to make sure nothing was missed regarding any employment (and salary) changes during the previous year
    • We get automatic email notifications from our HR system if there is any approved change in salary, FTE, job title, location or termination for any of our H-1B employees; this contemporaneous system notification has helped us stay current with LCA (and other) immigration changes or updates
    • But…still not sure how picky or rigid or difficult DOL investigators might be

USCIS Fraud Detection and National Security Unit

• FDNS Unit will focus site visits on H-1B dependent employers, employers who place H-1B workers at third party sites and employers whose businesses cannot be verified through publicly available information
• Inspectors will focus on H-1B dependent employer recruitment and non-displacement obligations, or their eligibility for an extension from those obligations
• Inspectors will review supervision of H-1B workers placed at third-party sites
• USCIS encourages the public to report H-1B abuse to a dedicated email address

• **Be Prepared!**
How NC State will respond to the:

- **FDNS site visits:** Nervousness.
  - As already mentioned, we saw a big jump in visits from 2015 (only 2) to 2016 (8), and 3 already in January 2017
    - We have a few situations where H-1B employees work at another location, but it is disclosed as required on USCIS and DOL forms
    - Never had any adverse findings by USCIS regarding our H-1B program, nor any complaints to DOL or USCIS that I am aware of
  - Possible recruitment expansion: this would be extremely problematic for us, as the increases in cost and timeline could mean that faculty will be less willing/able to sponsor students, postdocs and employees for H-1B status

DOJ Anti-Discrimination Enforcement

- April 3, 2017 warning to H-1B employers that displacement of U.S. workers by foreign nationals on temporary visas may be citizenship status discrimination
- Warning is an indication that DOJ will continue to scrutinize employers who hire foreign professionals and intensify its investigation of claims of discrimination brought by U.S. workers
- Be Prepared!
How NC State will respond to the:

• DOJ Anti-discrimination enforcement warning: Calm.
  • Not aware of any displacement of U.S. workers by foreign nationals on our campus – but then colleges and universities are very different professional environments than industry
  • Never had a DOJ investigation into these types of claims that I am aware of
  • We review this anti-discrimination content in our I-9 trainings, and our Office of Institutional Equity and Diversity (OIED) also monitors and provides training to avoid this type of discriminatory behavior

Proposed Legislation
H.R. 392

- H.R.392, the Fairness for High-Skilled Immigrants Act of 2017
- Representative Jason Chaffetz (R-UT)

- The bill aims to amend the Immigration and Nationality Act to eliminate the per-country numerical limitation for employment-based immigrants and to increase the per-country numerical limitation for family-sponsored immigrants.

How NC State will respond to the:

- Bill to eliminate employment immigration backlogs: Suspicion.
  - Not sure what to think about this proposal – can see both sides
    - Indian and Chinese employees will love it, but....
    - What about the 140,000 annual limit on employment-based green cards?
      - If there is no corresponding increase in the annual limit, it means that the other categories would be immediately and drastically impacted by the sheer volume of cases filed by and on behalf of Indian and Chinese workers
      - Would this idea be phased in, given the current huge volume of backlogged cases?
      - We would love to see spouses and children excluded from the 140,000 limit
S.180

• S. 180, H-1B and L-1 Visa Reform Act
• Senators Charles Grassley (R-IA) and Richard Durbin (D-IL)

• Introduced on January 19, 2017; previously introduced in 2015 (S.2266).
• The bill seeks to:
  • create a new H-1B allocation system;
  • impose significant new obligations and limitations on H-1B and L-1 employers;
  • toughen eligibility criteria for H-1B and L-1 visas;
  • limit certain uses of the B-1 business visitor visa;
  • grant broader enforcement powers to the Departments of Homeland Security and Labor.

How NC State will respond to the:

• H-1B (and L-1) Visa Reform Act: Resentment.
  • Punishing all employers for the bad actions of a few
    • New obligations and limitations on employers: current pages and pages of DOL and USCIS regulations aren’t enough?
    • Toughen eligibility criteria: how and why? We don’t need green-card type scrutiny for temporary workers – they are different classifications (with different criteria) for good reasons; only approximately 1/3 of our H-1Bs get sponsored for a green card
    • B-1 business visitor limitations: seems like this could potentially hinder trade in a global business environment
      • Possible retaliation/reciprocity treatment by our neighbors and allies towards U.S. business visitors going abroad?
S.179

- S.179, Accountability Through Electronic Verification Act
- Senator Charles Grassley (R-IA) and co-sponsors
- The bill proposes to:
  - permanently reauthorize E-Verify;
  - mandate the use of E-Verify by all employers.

How NC State will respond to the:

- E-Verify Act: Relief.
  - NC State has been using E-Verify for all new employees since January 1, 2007 because of state law
  - Based on FAR contract clause requirement, we E-Verified our entire active workforce in 2009/2010 (took us 7 long, painful months; approximately 12,000 employees hired between 11/6/1986 and 12/31/2006 – who were stilled employed - had to be run through the system)
    - Our entire workforce has now been put through the system, so any future requirement for us to “E-Verify” certain employees has already been done
  - We have been expecting proposed legislation like this – it is clear that Congress loves E-Verify, so we don’t expect to see it go away and do expect it to eventually become mandatory for all employers in the U.S.
H.R.1129, Student Visa Security Improvement Act
Representative Gus Bilirakis (R-FL)

- Introduced on February 16, 2017.
- The bill seeks to amend the Homeland Security Act of 2002 to direct the Department of Homeland Security to:
  - require DHS employees to review the applications, conduct in-person interviews where appropriate, and conduct on-site reviews of applications and supporting documentation with respect to student and exchange program visa applicants prior to final visa adjudication, with emphasis on determining whether an applicant is inadmissible for terrorist-related activities;
  - require an institution or exchange visitor program participating in the Student and Exchange Visitor Program (SEVP) to ensure that each covered student or exchange visitor is an active program participant, is observed, and is reported to DHS if he or she transfers institutions or academic majors;
  - provide Student and Exchange Visitor Information System (SEVIS) access to appropriate employees of a SEVIS program sponsor under specified circumstances; and
  - require a SEVIS upgrade to add data fields that include verification that students are meeting minimum academic standards.

How NC State will respond to the:

Student Visa Security Improvement Act: Alarm!

- If passed with current (or similar) language, this bill would be very unpleasant for Higher Ed
  - Mandate to have at least 2 authorized SEVIS users at each participating institution or exchange visitor sponsor, AND require 1 additional user for every 200 enrolled students or visitors (unfunded mandate – very costly at larger institutions!)
  - Even worse: institution or program sponsor would be required to “observe” an enrolled student or visitor every 30 days (or 60 days when not enrolled in a program) – with a minimum requirement of each student or visitor being ‘observed’ at least once every 60 days
    - ‘Observed:’ “positively identified by physical or electronic means”
    - Only by DSOs/ROs? What about other university/college employees?
    - What about during OPT or STEM OPT employment – still required then?
    - What about student/visitors on study abroad programs or researching abroad?
  - Contains other unclear, redundant and confusing language – overall, just “gross!”*
    - *Direct quote from colleague (deliberate PG version)
Polling Question

Are your campuses actively involved in liaising with government agencies and/or Congress to ensure future legislation or regulations don’t adversely impact Higher Ed?

A. Yes  
B. No

Other Agency Action
Premium Processing

• Suspension of Premium Processing for all H-1B petitions for at least 6 months beginning April

• Major impact has been
  ➢ Delays in bringing employees to US from abroad in short notice
  ➢ No predictability in processing time
  ➢ Loss of work authorization for H-1B extensions where 240-day limit is exceeded

How NC State responded to the:

• Suspension of Premium Processing (PP) for H-1B petitions: WHAT?!?!?
  • Campus Advice: immediately send IE all H-1B petitions for spring, summer and early fall hires by March 10 (hard deadline was March 17) to guarantee PP filing before suspension took effect
    • Huge surge in petitions: we received 25 in March, 14 alone during the week of March 6-10 (new record for us)
    • Annoyance that “we” (universities) now had to scramble – unexpectedly - to prepare cases in March, just like our fellow cap subject H-1B employers have to do every year
    • CUPA-HR signed on to letter by the Association of American Universities (AAU) and the Association of Public and Land-grant Universities (APLU) in mid-March to highlight the unique impact of the PP suspension on universities; no discernable reaction from USCIS
  • 240 day extension scenarios: fortunately the few cases that we had where this limit was looming were addressed with PP before the PP suspension took place; we have created new ways to monitor this more carefully than before
How NC State responded to the:

• Suspension of Premium Processing (PP) for H-1B petitions
  • We have seen an improvement in USCIS “regular” processing times; just last week we received approval on a petition filed in November – less than 6 months! (Sad that this is good news.)
  • Fall-out: we have had a few situations where a job offer (and therefore H-1B status) was rescinded completely; offer was revised to reflect the new end date corresponding to the upcoming STEM OPT expiration date; or the person will leave and go abroad and pray that regular H-1B processing time will keep getting shorter (leading to a gap in employment – hiring unit not happy!)
  • USCIS Expedite requests: we have not made any such requests for any H-1Bs
    • Even the few scenarios mentioned above do not fit the USCIS criteria
    • If we DID have a situation where we thought we meet the criteria, we would try it

Computer Programmers

• New USCIS Guidance Restricts H-1B Eligibility for Computer Programmers
  • Policy memo issued by USCIS on March 31, 2017
    ➢ Clarifies that DOL guidance does not support previous USCIS memo that computer programming jobs generally require a bachelor’s degree in specific field(s) and thus are generally H-1B-eligible
    ➢ Entry-level programming jobs do not typically require a related bachelor’s degree and are not H-1B-eligible absent evidence the job is unusually complex
How NC State will respond to:

- New USCIS guidance on H-1B eligibility for Computer Programmers: Dismay.
  - Not actually a big concern here, since the majority of our IT H-1B employees are hired into higher level/different positions – ones that are not focused primarily or solely on programming
    - We don’t have many H-1B IT employees – only 7 right now
  - But...why the change now from DOL and USCIS? Does DOL solicit input from employers – or better yet, from the universities and colleges granting these programming/IT degrees – about what knowledge and training is truly required (and acquired) for certain positions?

Q & A

Don't forget to submit your questions to our presenters.

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Thank you for joining us today!
Thank You!

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