



**Special Immigration Alert:
Trump Administration's April 18, 2017 Executive Order on the H-1B Process**

On Tuesday, April 18, 2017, the Trump Administration signed another Executive Order ("EO") titled, "[Buy American and Hire American](#)," which includes the following small proviso on the current H-1B visa program:

In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.

In reading between the lines of this very general EO, the Trump Administration is directing the U.S. Departments of Labor, Justice, State, and Homeland Security to look into ways to reform the current H-1B process used by companies in all industries—but, in particular, the hi-tech industry—to prevent fraud and abuse. Nothing in this EO's wording changes or limits the current H-1B visa program. Even if the Administration were to implement future EOs affecting the current H-1B process, such action would be met with industry opposition and legal action since much of the current H-1B program is statutory or defined by regulations. Only Congress can change the laws, and any regulatory change cannot occur until after a proposed new regulation issues and survives the notice and comment period required by the Administrative Procedure Act.

There is no doubt that the current H-1B visa program, which has been in place since 1990, has its weaknesses. These weaknesses include the arbitrariness and unfairness of the annual cap lottery; the potential of "bad apple" employers to not follow the rules while using the process to hire lower-paid employees; the inability to differentiate between employers that try to hire the best minds compared to those that recruit lower-paid, entry-level professional workers; and use of the program by some employers to outsource their IT work overseas while having their U.S. counterparts train their foreign replacements before being terminated. These issues are then compounded by the xenophobic view that H-1B visa workers are all taking U.S. jobs or that H-1B workers are being paid less than their U.S. counterparts. The real facts show that there are only 85,000 new cap-based H-1Bs issued every year and that the H-1B regulations require payment of wages commensurate with the local workforce. But the system can be abused by unscrupulous employers, and that abuse has generated a significant amount of bad press.

The question is, “What does the EO mean going forward?” For the immediate future, this EO promises to generate nothing more than additional scrutiny of the H-1B program and more press coverage of possible abuses. As we indicated, the Trump Administration lacks the legal authority to unilaterally change the H-1B program, but it still can direct federal agencies to carefully review operations impacted by the H-1B program to prevent abuse and fraud as well as preclude these agencies from relying upon H-1B workers. There also may be increased policing through random onsite inspections to confirm that companies are adhering to the H-1B program; higher filing fees to pay for such onsite inspections; increased investigation of potential high-risk employment violators that do not follow H-1B regulatory requirements and fail to pay the required wages; and implementation of another type of system in lieu of the current lottery in choosing H-1B cases for each fiscal year.

In this regard, the added scrutiny of the H-1B program actually may work to the advantage of employers that follow all legal requirements and sponsor only the “best and the brightest” for H-1Bs. Already, the U.S. Citizenship and Immigration Services has announced that it will not consider entry-level computer programmers as eligible for the H-1B program. The suspicion is that this directive was designed to reduce the number of H-1B visas issued to foreign consulting companies that consume a disproportionate number of the H-1B quota (estimated at nearly half of the allotted H-1B numbers every year) and that have been responsible for much of the outsourcing that has cost American jobs. By decreasing the number of H-1Bs issued to these companies, the expectation is that there will be more H-1Bs available to those employers that seek to utilize the visas to recruit foreign talent who will occupy truly hard-to-fill positions.

This EO is another step in the Trump Administration’s efforts to place public focus on the H-1B program. We will keep you informed of future developments in this area.

If you have questions regarding this or any other immigration matter, please contact a member of Epstein Becker Green’s national Immigration Law Group.



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