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Immigration Alert

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How re-election of Donald Trump could impact US employment-based immigration

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Employers can take proactive steps to ensure compliance with anticipated changes in employment-based immigration.

What's the impact?

- Employers of foreign national workers can potentially expect greater investigative and enforcement action.
- Some populations of lawful workers risk potential loss of employment authorization—employers should consider alternative employment authorization options.
- Adaptability will be required by immigration counsel and employers alike.

President-elect Donald Trump has signaled that his second administration, like the first, will focus heavily on immigration. The full scope of Trump's plans remains to be seen, but we can anticipate the impact in several key areas.

Below, we provide an overview of what US employers can reasonably expect and, where possible, the proactive steps that employers can take.

Anticipate enhanced worksite enforcement

Employers in industries traditionally associated with a higher percentage of undocumented workers, including agriculture, construction, hospitality, food processing, and manufacturing, should anticipate an increased risk of worksite raids conducted by US Immigration and Customs Enforcement (ICE).

Regardless of industry, employers of foreign national workers can potentially expect greater investigative and enforcement action from the US Citizenship and Immigration Services (USCIS) and ICE. In particular, the USCIS Fraud Detection and National Security Directorate (FDNSD) will more aggressively leverage its Administrative Site Visit and Verification Program to ensure the accuracy of information provided on an immigration petition, including H-1B and L-1 petitions. We will also see increased inspections and worksite raids by ICE's Homeland Security Investigations, which are focused on employer compliance with the Form I-9, Employment Verification, requirements as necessitated by the Immigration Reform and Control Act (IRCA).

In anticipation of greater investigative and enforcement action, employers can take proactive steps such as:

- Review internal Form I-9, Employment Verification, and E-Verify policies and procedures and consider conducting an internal compliance audit.
- Review compliance with US Department of Labor (DOL) Labor Condition Application requirements if an employer of H-1B, H-1B1, and/or E-3 non-immigrant workers.
- Review recruiting, hiring, and employment procedures to identify practices the government may view as favoring the employment of foreign national workers over US workers (US citizens, lawful permanent residents, refugees, and asylees).
- Ensure the accuracy of evidence and information submitted with any employment-based visa petition.

Employers should work with immigration counsel to ensure internal procedures and policies are in place should an immigration raid or site visit occur and confirm overall immigration compliance.

Assess vulnerable employee populations

In addition to undocumented workers, the following populations of lawful workers risk potential loss of employment authorization:

- Holders of Temporary Protected Status (TPS), currently available to certain foreign nationals from Afghanistan, Burma (Myanmar), Cameroon, El Salvador, Ethiopia, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, Ukraine, Venezuela, and Yemen;

- Persons granted Deferred Action for Childhood Arrivals (DACA) status;
- Persons granted "parole" status and employment authorization, including those granted "parole in place" for certain noncitizen spouses and children of US citizens under President Biden's "Keeping Families Together" process; and
- Certain H-4 spouses with valid Employment Authorization Documents (EADs).

While the above list is by no means exhaustive, employers should consider alternative employment authorization options for vulnerable populations, such as H-1B visa sponsorship.

Anticipate stricter immigration petition/application adjudication standards

Employers can reasonably expect heightened scrutiny of employer-sponsored immigration petitions and applications and, as a result, the increased likelihood of denial of petitions and applications. Specifically, employers can expect the rescission of the "Deference Memo," originally established by USCIS in 2004, rescinded by the Trump administration during his first term as president, and subsequently reinstated by the Biden administration. Under the current Deference Memo, USCIS officers are instructed to give deference to a prior petition approval, where a subsequent extension petition involves no material change in facts or eligibility, thereby providing a level of certainty and efficiency during the renewal of an employee's work authorization.

In addition, employers should anticipate the rescission of Biden administration guidance that may be viewed as favorable to employment-based immigration, including guidance regarding the adjudication of National Interest Waiver (NIW), EB-1 extraordinary ability, and O-1 extraordinary ability petitions for foreign national workers and entrepreneurs with STEM degrees.

The above are just a couple of examples of possible stricter adjudication standards and policies, and employers should consider the immediate action of filing any eligible extension petition prior to the change in administration, using the USCIS Premium Processing service if eligible. In the longer term, employers can reasonably expect delays and challenges of employer-sponsored petitions and applications.

Anticipate new executive orders, rules, and regulations

Employers can anticipate the introduction of numerous executive orders and new employment-based immigration rules and regulations under the second Trump administration. The specifics of President-elect Trump's executive orders are unknown and will require additional resiliency and adaptability by immigration counsel and employers alike.

However, if the first Trump administration is a forebearer of things to come under a second administration, below are several actions taken during that term that could resurface:

HIGHER PREVAILING WAGES AND "SPECIALTY OCCUPATION" REQUIREMENTS

During the first Trump administration, both the DOL and US Department of Homeland Security (DHS) published new regulations that would have significantly changed the H-1B visa program and prevailing wage requirements. Specifically, the DOL Interim Final Rule (DOL IFR) would have resulted in significantly higher prevailing wages required for H-1B, H-1B1, and E-3 nonimmigrant visa sponsorship, as well as permanent residency (green card) sponsorship requiring a PERM Labor Certification. In many cases, the higher prevailing wages would have significantly exceeded competitive wages already paid by US employers. The DHS Interim Final Rule (DHS IFR) narrowed the definition of "specialty occupation," among other changes, and would have made H-1B sponsorship more difficult for certain occupations.

Both the DOL IFR and DHS IFR were ultimately blocked by the courts on procedural grounds but could resurface under the second Trump administration, and employers should anticipate the potential associated hiring disruptions for certain occupations.

TRAVEL BANS

Among the arguably more controversial actions of the first Trump administration was an executive order banning travel to the US by nationals of seven Muslim-majority countries that took effect immediately upon announcement, leaving employees stranded outside the US and resulting in employer disruption and uncertainty. A nation-wide injunction of the first travel ban was ultimately implemented, and subsequent travel bans implemented by the first Trump administration provided a brief notice period.

As part of an overall immigration compliance program, employers should maintain up-to-date Form I-9, Employment Verification, records for all employees and additional required documentation for all sponsored foreign national employees, and, in the event immediate action is needed because of a country-specific or visa-specific travel ban or similar action, be ready to identify affected foreign national employees and have an effective communication strategy in place.

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