

CLINE WILLIAMS

Business and Employment Based Immigration Changes under the Biden Administration: What Can Employers Expect?

The Biden Administration has already made many large scale changes in the area of immigration. Starting as early as inauguration day, President Biden has rescinded the Muslim ban, confirmed that the Deferred Action for Childhood Arrivals (DACA) program will remain in place, suspended enrollment in the Migrant Protection Protocols that keeps asylum seekers waiting in Mexico, and attempted to pause deportations for 100 days. While these are certainly substantive changes to U.S. immigration policy, many U.S. employers specifically question what changes will be made in the business and employment based immigration arena? Will the Trump Administration's policies related to hiring foreign workers be undone? The short answer lies with hopeful anticipation that the process of sponsoring a foreign national employee will become easier for employers, or at least not met with the same level of resistance it has in the past.

H-1B Visa Opportunities for Specialty Occupations

Perhaps the area of business/employment based immigration that is most ripe for a reversal of Trump Administration policies is the H-1B. The H-1B is a non-immigrant, temporary visa used by employers to hire highly skilled professional workers in specialty occupations. There are only 65,000 H-1Bs available every fiscal year and an additional 20,000 for foreign national employees who have received Master's degrees from U.S. institutions. This statutory based quota of visas is known as the H-1B Cap. For-profit private corporations seeking to hire H-1B sponsored employees are referred to as cap-subject employers.

The 85,000 H-1Bs are allocated by a random lottery system conducted by U.S. Citizenship and Immigration Services (USCIS). All of the cap subject H-1Bs for the FY 2021 have been allocated. There were 275,000 visa petitions filed by cap subject employers seeking to sponsor foreign nationals in the FY 2021.

Allocation of H-1Bs for FY 2022 Remains a Random Selection

On January 8, 2021, USCIS published a "final rule" to end the H-1B Lottery. The rule was scheduled to go into effect in 60 days, which, if President Trump had been reelected, would have made it possible to use the new system to select H-1B petitions filed by April 1, 2021. The regulation sought to eliminate the random selection lottery and select H-1B petitions based on a wage prioritization scheme, starting with the highest salary level and working down. This wage prioritization and H-1B lottery elimination were the Trump Administration's final efforts to increase the difficulty involved in hiring highly skilled foreign national workers.

The Biden Administration directed all agencies to consider publishing a 60-day delay for any rules not yet in effect. On February 4, USCIS issued a statement that it would delay implementing the effective date for final rule from March 9, 2021 to December 31, 2021. For the upcoming H-1B cap season, USCIS will apply the current regulations (random selection) to any registration period that takes place prior to December 31, 2021.

Act Now! It's H-1B Season (FY 2022)

With a delay of the wage prioritization change to H-1B selection, employers are again encouraged to register for the H-1B Cap Lottery. The quota of H-1Bs for FY 2022 won't actually be available until October 1, 2021, but H-1B season opens on March 9, 2021. Starting then, employers will be able to register with USCIS and be eligible for the H-1B random selection process. If selected, employers will be able to file the H-1B Petition on April 1, 2021, indicating an employment start date of October 1, 2021.

The H-1B regulations are complex and constantly changing. Employers need to, among other considerations, ensure that the position they seek to sponsor is indeed an H-1B eligible specialty occupation. It is recommended that employers consult a qualified immigration attorney when considering sponsoring an employee for an H-1B.

Potential Changes to H-1Bs under the Biden Administration

The H-1B will likely remain front and center in the Biden Administration's proposed business/employment immigration reform. Such reform measures include the potential elimination of the H-1B cap or, in the alternative, an increase in the quota of H-1Bs. There is hope that USCIS and the U.S. Department of Labor will understand employers' need for highly skilled foreign labor and the limited number of visas available to them. Additionally, the H-1B policy changes should consider the realities of the U.S. labor market and post-pandemic economic considerations. H-1B reform will require bipartisan support from Congressional leaders and will take time to implement.

For More Information

To listen to a recent podcast between attorneys [Daniel Oldenburg](#) and [Tara Stingley](#) discussing these issues, please [CLICK HERE](#).

For more information on these issues, please reach out to [Daniel Oldenburg](#) or another member of Cline Williams' [Labor and Employment Law Section](#).

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