H-1B Immigration Visas

Policy Brief   :::   Last Updated 10.23.2017

October 23, 2017 Update

On October 23, the Trump Administration issued a new [policy memo](#) regarding the H-1B and L-1B visa renewal process. The new guidance requires that officers of the U.S. Citizenship and Immigration Services (USCIS) "apply the same level of scrutiny when reviewing nonimmigrant visa extension requests even where the petitioner, beneficiary and underlying facts are unchanged from a previously approved petition."[1]

The policy specifically rescinds previous guidance from 2004 and 2015 which gave deference to the prior eligibility of the visa holder's initial application. Essentially, visa holders who would like to renew will need to go through the same process they did when they first applied, even if their eligibility status has not changed.

This policy is effective immediately.

April 18, 2017 Update

On April 18, President Trump issued an executive order requesting review of the H-1B program, "as soon as practicable" ([summarized below](#)). We will continue to monitor any proposals for reform from the government and update this brief accordingly. As our Executive Director [has said](#), we think sensible reform could benefit our members and the entire tech industry.

Overview

True H-1B visa reform requires an act of Congress, although the Trump Administration can make minor tweaks via executive order, as President Obama did in 2014. A draft H-1B order leaked in late January ([see below](#)).

Note: In recent weeks, the Trump Administration has also suspended the accelerated H-1B visa application process in which applicants could pay a higher fee to have applications processed in six

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[1] USCIS release [October 23,2017](#)

weeks instead of several months. In addition, USCIS released [new guidance](#) the first week of April removing the presumption that computer programmers are eligible for H-1B visas, which may have affected applications for the lottery for 2018 fiscal year that opened April 3. As summarized by [Axios](#):

> Companies applying for H-1B visas for computer programming positions will have to submit additional evidence showing that the jobs are complex or specialized and require professional degrees. Entry-level wages attached to these visa applications will also get more scrutiny. The change appears to target outsourcing companies, who typically employ lower-paid, lower-level computer workers.

USCIS claims that this was not a policy change. As [Engadget suggests](#), it may not be. So far we are not aware of any companies being adversely affected or filing suit over adverse impacts without sufficient advance notice. **Please let us know if you have been adversely affected**.

There are a number of [congressional bills in motion](#). The bulk of the proposed legislation attempts to: (1) reign in use of H-1B visas by outsourcing firms operating in the US; (2) change the way that such visas are awarded to companies; and (3) change how visas are allocated by country. The White House has not yet offered any guidance or support to any of the proposed legislation, which decreases the chances of success substantially.

Tech:NYC Member Action

→ Immigration lawyers are [looking for reports](#) of employees being hassled at the border. Please email julie@technyc.org or taline@technyc.org with any reports of such administrative delays.

Congressional Bills

None of these bills has received any White House guidance and are therefore stalled.

Lofgren (D-CA) Bill

On January 24th, 2017, Rep. Zoe Lofgren [introduced a bill](#) that addresses the main criticism of the current program: that it primarily benefits outsourcing firms. Under Lofgren's bill, instead of a lottery, H-1B visas would be granted based on how much each employer would be willing to pay for specific roles, across varying jobs and skill levels. It would also set aside 20% of allocated H-1B visas each year for startups (companies with 50 or fewer workers). And it would remove per-country restrictions (e.g., removing the huge backlog of visas for Indian and Chinese nationals).

Lofgren introduced the bill on her own and would need bipartisan support to get it passed.

Chaffetz (R-UT) Bill: Fairness for High Skilled Immigrants Act

Introduced January 10th, 2017, this bill would seek to remove the per-country caps and to allocate visas to companies on a first-come, first-served basis. This bill had wide, bipartisan support when it was first introduced in 2011.

Grassley (R-IA) / Durbin (D-IL) Bill: The H-1B and L-1 Visa Reform Act

On January 20th, 2017, Senators Chuck Grassley and Dick Durbin reintroduced their 2007 bill for revamping the program.

This bill would eliminate the lottery system and task USCIS with creating a "preference system" where foreign students educated in the US would get priority. It would also favor those with advanced degrees, those paid a "high wage," and those with valuable skills. It also seeks to weed out outsourcing firms.

Issa (R-CA) Bill: Protect and Grow American Jobs Act

Introduced Jan 4th, 2017, this bill was prompted by a number of companies (Disney, SoCal Edison, and others) coming under fire for abusing the H-1B Visa program to replace American workers with foreign workers from overseas. It would raise the salary requirement for the positions to $100,000/year (up from $60,000/year currently) and eliminate the Masters Degree exemption.

Introduced with support from fellow San Diego Congressman Scott Peters (D-CA).

Hatch Bill (R-UT):

Senator Hatch, the most outspoken Senate advocate for increasing the H-1B visa cap, is reportedly updating his 2015 "i-Squared" bill, which faced intense criticism two years ago.

The ideas Hatch reportedly floated for changes to his H-1B bill include capping the number of H-1B visas a single employer can apply for, holding multiple waves of H-1B lotteries instead of one per year, requiring additional attestations from employers that say they couldn't fill a job with an American worker, creating a 'shot clock' that would make a visa expire and go back into the lottery if

it's not used in a certain time period, and easing pressures of H-1Bs by changing the process to obtain green cards.

Executive Order on Buy American and Hire American, April 18th, 2017

Trump can't act unilaterally on the H-1B program; he needs Congress to cooperate. However, he can undo any minor tweaks that Obama made via his own Order and provide guidance on implementation, as he appears poised to do here.

On April 18, 2017, citing "widespread abuse" of the H-1B visa program and exemptions from "buy American laws," President Trump issued an executive order declaring that "[i]t shall be the policy of the executive branch to buy American and hire America."[2] Most of the provisions in the Order request various federal agencies to propose changes to "buy American" laws and regulations within specific timeframes (between 60 and 220 days). In this brief, we will focus on only the "hire American" provision of the Order.

Section 5(b) of the Order requires the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security to, "as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." That's the extent of the H-1B language in the Order.

So it remains to be seen what changes Trump and his staff would like to see to the H-1B program—perhaps the leaked order (below) offers some indication. If they want to make it more difficult for outsourcing firms to use H-1Bs to staff call centers in the U.S., while ensuring tech companies can continue to recruit high-level engineers, the changes could likely see widespread support.[3] However, if the Administration cracks down on H-1B visas across the board, the Administration may encounter substantial opposition from Congress and wide swaths of American industry.

In any case, the Administration is sending a clear message to U.S. companies not to fill openings with H-1B workers that Americans could fill.

The Previously-Leaked Executive Order from January 23rd

The Administration drafted (but did not issue) an executive order addressing the program in late January, which has been making the rounds.

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[2] It is not clear what he means by abuse—he has not expanded on this statement to date.
[3] Although half of H-1B visas go to tech companies, most H-1B visas aren't going to tech companies. Many go to outsourcing firms.

The draft Order calls for a report from the Secretary of Homeland Security within 90 days offering suggestions for how to make the program more efficient and how to better allocate H-1B visas.

According to the leaked order, it would:
1. Revoke permission for the spouses of H-1B visa holders to work, a permission granted by Obama via executive order.
2. Direct agencies to consider ways to alter the way the program works to "ensure that beneficiaries of the program are the best and the brightest." This would probably mean ensuring H-1B visas go to the "best and brightest" American tech companies, instead of the outsourcing companies.
3. Limit the issuance of L-1 visas, which permit companies to transfer foreign-born managers to oversee US-based operations.

Lending further color to President Trump's position, Attorney General Jeff Sessions has been critical of Silicon Valley companies using H-1B visas to hire foreign workers. He thinks that the so-called "STEM shortage" is a ploy by tech companies to hire foreign workers for lower pay than they'd have to pay their American counterparts. He calls it the "Silicon Valley STEM Hoax."

Impact on Members / Suggested Next Steps

Despite the executive branch's limited powers in curtailing immigration, there are other ways for the executive branch to effectively modify the visa program. For example, we have heard reports of CBP revoking or denying visas because of "administration processing" and for additional "security checks."

→ Immigration lawyers are exploring legal challenges to this kind of systematic delay. Having a collection of such instances from members would help immigration attorneys build their cases. Please email julie@technyc.org or taline@technyc.org with any reports of such administrative delays.

BACKGROUND

1. The current annual cap is 85,000 foreign nationals per year. H-1B visas are granted via a lottery. In 2016 demand was three times greater than the cap.
2. Although half of H-1B visas go to tech companies, most H-1B visas aren't going to Silicon Valley companies. Many go to outsourcing firms.

3. In 2013, New York State had [20,825 H-1B workers](#) (7.6% of all H-1B workers). [Mphasis Corporation](#) was the top petitioner at 897 workers. The top occupation in New York State that year was "systems analysis & programming" (5,078 workers).
4. The duration of stay is three years, extendable to six years.
5. University of California Davis researchers [say](#) H-1B workers across all professions generated 10% to 20% in annual productivity growth, adding $615 billion to the US economy between 1990 and 2010.
6. The regulations define a "specialty occupation" as requiring theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor including but not limited to biotechnology, chemistry, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, law, accounting, business specialties, theology, and the arts, and requiring the attainment of a bachelor's degree or its equivalent as a minimum (with the exception of fashion models, who must be "of distinguished merit and ability").
7. In the first week of March, 2017, the president of the National Association of Software and Services Companies, which represents Indian IT firms, met in Washington with lawmakers and Trump Administration officials to make the case for keeping the H-1B high-skilled visa program largely intact.

FURTHER READING

- [USCIS: Understanding H-1B Requirements](#)
- US immigration ban: Court dismisses case against H-1B lottery system, [Business Standard](#) (March 29)