

Immigration Compliance during COVID-19 and What to Expect under the Biden Administration

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Outline

- I-9 Verification
- Temporary foreign national workers on H-1B, H-1B1, and E3
- DOL's Permanent Labor Certification Process (PERM)
- DOL Wage and Hour Investigations
- USCIS Fraud Detection and National Security Directorate (FDNS) Enforcement
- Review of Current Status of Presidential Executive Orders
- H-1B program under Biden
- Anticipated changes at USCIS/Consulates
- Chances for Broad and Comprehensive Immigration Reform

I-9 Verification during COVID-19

- ICE provides flexibility
 - DHS will exercise prosecutorial discretion to defer the physical presence requirements associated with the Employment Eligibility Verification (Form I-9) under the INA.
 - Only applies to employers and workplaces that are operating remotely.
 - No exception if there are employees physically present at a location.
 - Flexibility extended through January 31, 2021
- Use of “Agents” as authorized representatives
- Form I-797 Approval Notice dated between December 1, 2019 and August 20, 2020 as acceptable List C document in lieu of EAD
 - Flexibility extended through February 1, 2021
- Common Challenges and Best Practices

Temporary Foreign National Workers

- Changes in work conditions
 - H-1B, H-1B1, E3
 - Work from home
 - Full-time or Part-time
 - Obligation to continue to pay the offered wage
- LCA
 - Same geographic area or within normal commuting distance
 - Short-term placement
- Posting requirements
 - In compliance if done within 30 days after work at the new site begins
 - Electronic notification

PERM

- E-Certification adopted permanently
 - Wet signature still required from the foreign worker, preparer (if applicable) and employer
 - Mail still possible in certain circumstances
- Notice of Filing Options
 - Physical office - no exception
- Recruitments
 - “Future Job”
 - Is telecommuting available?
 - Is travel required?
- Common challenges and best practices

Wage and Hour Investigations

- Current enforcement during COVID-19
- Documenting changes in work conditions
 - Requiring the employee to work from home, outside the MSA
 - Terminations, reductions in salary/hours
 - Temporary layoffs
- Retain documents
 - State and local orders
- Violation of LCA attestation

FDNS Enforcement

- USCIS Site Visit and Verification Program
 - Who are subject
 - FDNS “visits” during COVID-19
 - Email, phone call, physical visits, home visits
- Compliance Review: What to Expect
 - Verify the information, including supporting documents, submitted with the petition;
 - Verify that the petitioning organization exists;
 - Review public records and information on the petitioning organization;
 - Conduct unannounced site visits to where the beneficiary works;
 - Take photographs;
 - Review documents;
 - Interview personnel to confirm the beneficiary’s work location, physical workspace, hours, salary and duties; and
 - Speak with the beneficiary.
- How to Prepare and Best Practices

Review of Current Status of Presidential Executive Orders

- Over 900 Executive Orders on Immigration under Trump Administration
- Began in first 4 days of administration with the “Muslim” travel ban
- Most Executive Orders directed review of existing practices and implemented policy changes—bypassed legislative changes

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Executive Orders on Travel:

- Regional COVID ban – (Schengen countries, UK, Ireland, China, Brazil and Iran), continued until terminated by the President
- Labor Market Entry Ban – (suspension of H-1B, L-1 and J-1 visa issuance for certain individuals) extended through March 31, 2021

Exceptions – NIEs and legal challenges to the Labor Market Entry Ban

Biden likely to take Executive Action immediately to undo Prior Executive Orders under Trump

Challenges – Other priorities may take precedence, with COVID being primary focus and competing stakeholders

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H-1B Program Under Biden

Impact of Buy American, Hire American Executive Order and No Deference Memo-October 2017, led to highest rate of RFEs and NOIDS/NOIR in history of program.

Proposed Rules targeting H-1B and PERMs:

- DOL Wage Rule (IFR) – material increase in prevailing wages for H-1Bs and PERM based green cards
- Strengthening H-1B rule (IFR) – requires almost exact match between position and degree
- H-1B Cap Registration Rule – would replace current lottery process with an allocation of H-1B Cap numbers based on highest wage levels.
- Future of H-4/EAD program looks promising

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Anticipated Changes at USCIS/Consulates

- Will Agencies shift to a more fair and reasonable approach to adjudications?
- Greatest number of RFES and denials for experienced business immigration attorneys issued in the past 4 years compared to the last 40 years
- Anticipate Changes Under Biden:
 - Alejandro Mayorkas nominated as DHS Director-pro Employer/family unity
 - Biden-Harris has established an immigration “transition team” of experts
 - Potential withdrawal of the End of Discretion Memo and mandatory interviews for employment based adjustment cases
 - How to handle tremendous backlogs at regional service centers?
 - Resumption of visa processing at US Consulates in light of COVID unclear

Chances for Broad Comprehensive Immigration Reform

- History has been a series of amendments and add-ons to the existing Immigration and Nationality Act of 1952
- Points system considered
- S.386s passage in the Senate-likely to be taken up in the new year
- Greater authority for states/regions/cities to earmark start up green cards
- Biden support for green cards for graduating PhD students in the US and exemption from H cap.
- The overall direction of immigration enforcement and discretion-change back in mission statement of the DHS?
- Difficulty passing comprehensive immigration reform with divided Congress

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