

The Race for Talent:

Is immigration a more viable option in the Biden era?

CLE Seminar for In-House Counsel Webinar Series
2021

Hiring Foreign Talent in the US: H-1B

- Professional workers: "Specialty occupation"
- DOL controls wages and working conditions that may be offered
- Lottery selection annual for **new** H-1Bs
- H-1Bs may transfer
- Exceptions to "cap"



Hiring Foreign Talent in the US: Other Alternatives

- Consider H-1B “cap” exemptions
- Consider green card option
- TN under the USMCA
- E-3 for Australians
- H-1B1 for Singaporeans and Chileans
- O-1 for extraordinary ability
- L-1 for intracompany transfers
- E-1/E-2 if employer is foreign owned



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Hiring Foreign Talent in the US: Non-degree Jobs

- Temporary visa options limited to seasonal
 - H-2A – agricultural
 - H-2B – non-agricultural
- Could qualify for O-1
- Can sponsor for green card



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Hiring /Transferring Foreign Talent from Abroad

- “Muslim” travel ban
 - Restricted travel from Muslim-majority countries and immigrant/diversity visas for nationals of African countries.
 - Revoked by Biden administration on January 20, 2021.
- Labor market (work visa) bans
 - Restricted travel for most work visa and immigrant visa applicants.
 - Ended on March 31, 2021.



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Ongoing Travel Bans

- COVID-19 related travel bans
 - Restricts travel to the United States if present in the prior 14 days in United Kingdom, Schengen Area, Ireland, Brazil, China, Iran, South Africa (added on January 30, 2021) and India (added May 4, 2021).
 - These will remain in effect (with potential modifications) for the foreseeable future.
 - There are some exemptions available but, as will be discussed, the criteria are strictly (though inconsistently) interpreted and, because consulates are generally closed or operating at a severely reduced capacity, such waivers either take a long time or are simply not practically available.
 - One workaround is to quarantine for two weeks in a third country (e.g., Bahamas or Croatia) before entering the United States.

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Consular Operations

- Because of the pandemic, US Consulates are operating at a significantly reduced capacity. If a visa stamp is required:
 - Appointments are difficult to obtain – often only available for “emergencies”
 - What is an “emergency” is determined by each individual consulate.
 - Consulates in India and China are practically shut down.
 - Wait times at other consulates are months long.
 - Although the DOS announced the resumption of services for nonimmigrant visas, this has remained a considerable challenge, with 76 percent of consulates partially or fully closed as of April 8, 2021, affecting 71 percent of visa applicants.



Consular Operations and NIEs

- National Interest Exemptions:
 - Even if a visa stamp is not required, a person traveling from one of the noted areas must obtain a National Interest Exemption from the Consulate in order to travel to the US (if not expressly exempted).
 - Must make NIE application abroad-cannot make from the US.
 - Reduced personnel at the Consulates means it takes longer to get responses from the Consulate.
 - Responsiveness of consulates varies greatly.
 - NIE criteria inconsistently interpreted (Bern v. Berlin/Frankfurt).
 - Some US Customs and Border Protection offices at US airports were granting waivers with a quick 3-5 day turnaround. Miami/Tampa is still entertaining NIE requests, but requires first trying with the US Consulate. Atlanta Hartsfield recently announced the suspension of processing NIEs.

Consular Issues – NIE Criteria

- Persons from the noted countries whose entry serves “the vital support of critical infrastructure sectors as defined by the DOS or critical infrastructure linked supply chain” may qualify for a National Interest Exception. NIE applicants must provide evidence that their entry into the U.S. is systemically relevant and that they provide a vital contribution to one of 16 critical infrastructure sectors or related supply chains.

US Critical Infrastructure Sectors - NIE for Travel, Visa



NIE Criteria – Critical Infrastructures

- Chemical
- Commercial Facilities
- Communications
- Critical Manufacturing
- Dams
- Defense Industrial Base
- Emergency Services
- Energy
- Financial
- Food and Agriculture
- Government Facilities
- Healthcare and Public Health
- Information Technology
- Nuclear Reactors, Materials & Waste
- Transportation Systems
- Water

Changes Under Biden Administration in First 100 Days

- Already addressing some bureaucratic barriers to legal immigration:
 - Freezing pending regulatory changes made at the end of the Trump Administration.
 - Withdrew unpublished rules and postponed the effective dates of published rules with reopened comment periods.
 - Ended the “public charge” rule
 - Withdrawal of “no deference” memo
 - Ended the “extreme vetting” policy on all visa applicants.
 - Requested increased budget to address certain backlogs at USCIS and increase USCIS’s processing capacity.
 - Ended the “Buy American Hire American” policies.
 - Lifted Muslim/African Travel ban



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Is help on the way from Congress?

- U.S. Citizenship Act – Pres. Biden’s comprehensive proposal
- Dream and Promise Act
- Farm Workers Modernization Act
- Other potential stand-alone bills?



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Immigration Compliance for All Employers

- I-9 accommodations for Covid
 - Document copies
 - Unavailable documents (driver's licenses in some states)
- E-Verify accommodations
- Bringing remote workers back – start verification now!



Special Compliance Rules for H-1B

- Remote work pitfalls
 - Posting required?
 - Tracking moves?
 - 30/60-day rule
- Filing amendments
 - Wage considerations
- Requesting forgiveness: *nunc pro tunc* filings



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Worksite Enforcement in the Biden Administration

- Ended "no-match letters"
- Some indications that investigation focus is changing
- Gearing up for more robust electronic I-9 enforcement and perhaps guidance
- Will focus of Dept. of Justice (IER) change?
- Will organized labor focus tilt agencies' direction?
- Will mandatory E-Verify be a trade-off for immigration reform?



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