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Possible Changes to U.S. Business Immigration Law and Policy Under the New Administration

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This article covers proposed legislation, sub-regulatory changes, and—from a practical standpoint—the process/timing for implementing changes under the new administration. Please note that while legislative immigration reform does take time to implement, sub-regulatory changes can be implemented immediately without a formal rule-making process. Moreover, existing regulations need only go through the Administrative Procedure Act (APA) rulemaking process to be modified or rescinded. To help clarify current law and policies from a corporate immigrant standpoint, below we have outlined the following:

1. How Immigration Law, Policy and Treaties Can Be Changed
2. Summary of the Executive Order on Work Visa Programs
3. Trump Administration's 10-Point Immigration Plan
4. Summary of Proposed Immigration Legislation
5. Worksite Enforcement and Government Audits
6. Practical Recommendations

How Immigration Law, Policy and Treaties Can Be Changed

There are four main ways in which immigration law can be changed:

Sub-Regulatory Changes. This category includes changes to the United States Citizenship and Immigration Services (USCIS) / Department of Labor (DOL) Policy Memos and FAQs, agency adjudication policies, and presidential or agency executive orders. Sub-regulatory changes also include administrative processing decisions based on National Security Agency and U.S. Department of Homeland Security Immigration and

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Customs Enforcement (ICE) enforcement policy. Statutory authority is required for any changes to be applied retroactively.

Existing Regulations. Final or proposed rules that have already been published in the *Federal Register* typically require APA notice-and-comment rulemaking if they are to be modified or rescinded. Statutory authority is required to apply any changes retroactively, which is rare. However, under the Congressional Review Act (CRA), Congress can rescind a major regulation if it was issued within the last 60 legislative days. Only a simple majority is required in the Senate for a rescission. One regulatory change that could be affected under the CRA is a new [USCIS rule](#) that amends certain regulations relating to employment-based immigrant and nonimmigrant visa programs. This final rule was published on November 22, 2016, and has a January 17, 2017 effective date.¹

Statutes. Statutes require legislative action to amend. Retroactive changes are possible but are very rare as they are subject to constitutional limitations.

Treaties. Any amendments to the North American Free Trade Agreement (NAFTA) require providing six months' notice to Canada and Mexico.

Summary of the Executive Order on Work Visa Programs

On January 23, 2017, a draft executive order entitled "*Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs*," (the "Order") was leaked. Although this Order has not been issued yet, due to its publicity, we have highlighted key points below:

- **Business Travel (B-1) Reforms:** The Order instructs the Secretary of Homeland Security to propose a regulation clarifying the activities that are permitted under the B-1 business visitor visa. This could potentially result in the elimination of the "B-1 in lieu of H-1B" visa in addition to a strict application of the business visitor category.
- **Adjustment of Status:** Within 30 days of the Order, the Secretary of State and the Secretary of Homeland Security must propose a regulation that would reform the adjustment of status (a/k/a greencard) process and reduce inefficiencies.
- **OPT/Practical Training Reforms:** The Secretary of Homeland Security is instructed to propose a regulation to reform the practical training program "*to prevent the disadvantaging of U.S. students in the workforce, better protect U.S. and foreign workers affected by such programs, restore the integrity of student visa programs, ensure compliance, and improve monitoring of foreign students.*" This could result in significant changes to OPT, CPT and STEM OPT programs.
- **E-2 Reforms:** The Order instructs the Secretary of State and Secretary of Homeland Security to propose regulations reforming the current regulations to conform to the requirements of immigration law within 30 days of the Order.
- **Review of Regulations that Allow Foreign Nationals to Work:** This section of the Order requests that the Secretary of Homeland Security "*review all regulations that allow foreign nationals to work in the United States and determine which of those regulations violate immigration laws or are not in the national interest and should be rescinded, and propose a rule rescinding or modifying such regulations*" within 90 days of the Order.

¹ For more information about this rule, see Michelle White, [New USCIS Rule Amending Several Employment-Based and Nonimmigrant Visa Programs Will Take Effect on January 17, 2017](#), Littler ASAP (Jan. 12, 2017).

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- **H-1B Allocation Reforms:** The Order also instructs the Secretary of Homeland Security to “*make the process of H-1B allocation more efficient and ensure the beneficiaries of the program are the best and brightest*” within 90 days.
- **E-Verify Expansion:** The Secretary of Homeland Security will have 90 days to submit to the president a list of options to incentivize and expand E-Verify participation. This includes conditioning certain immigration-related benefits on E-Verify.
- **Site Visits for L-1s:** Instructs the Secretary of Homeland Security to start performing site visits for third-party worksites for L-1B individuals with specialized knowledge. Currently, site visits are only conducted for L-1A multinational managers or executives. In addition, new wage requirements could be implemented.
- **Department of Labor Nonimmigrant Visa Investigations and Reports:** Within 9 months, the Secretary of Labor is instructed to investigate injuries to U.S. workers caused by the employment of foreign nationals admitted under nonimmigrants visas.

The Trump Administration’s 10-Point Immigration Plan

Below we have included the relevant points from the 10-Point Immigration Plan that are related to business immigration:

- Suspend visa issuance in countries where security screening is not deemed adequate.
- Fully implement biometric entry-exit system.
- Mandate the use of E-Verify.
- Reform legal immigration to keep it within “historical norms,” and admit foreign nationals most likely to be economically self-sufficient.

Summary of Proposed Immigration Legislation

The following are recently introduced bills that, if passed, will impact immigration law.

Protect and Grow American Jobs Act (H.B. 170)

This legislation aims to limit how employers petition for H-1B visas. The bill proposes to amend the H-1B program by requiring H-1B-dependent employers (companies with over 50 employees that have 15% or more of their U.S. workforce on H-1B visas) to pay sufficiently high wages to ensure the protection of the U.S. workforce. It would **raise the annual salary requirement** for H-1B dependent employers **from \$60,000 to \$100,000 and eliminate the master’s degree exemption.**

High-Skilled Integrity and Fairness Act (H.B. 670)

This Democratic-sponsored proposal aims to **prioritize allocation of H-1B visas based on a market-based system of allocation and to eliminate the “per country” cap for employment-based visas.**

The legislation would also:

- Re-set the current dependent wage exemption level of \$60,000.

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- Increase prevailing wage requirements by replacing the current 4-level wage calculation with a new 3-level wage formula.
- Eliminate the master's degree exemption.
- Require employers to make attestations regarding recruitment and non-displacement of U.S. workers unless they compensate their H-1B workers above the required wage level.
- Set aside 20% of the annual allocation of H-1B visas for small and start-up employers.

Reforming American Immigration for Strong Employment (RAISE) Act (S. 354)

This bill is projected to reduce legal immigration by 41% in its first year and up to 50% by its tenth year. The bill's sponsors aim to raise American workers' wages by reducing overall immigration by half and **rebalancing the system toward employment-based visas and immediate family household members.**

The RAISE Act would:

- Eliminate the 50,000 visas allocated for the Diversity Visa (DV) Lottery for people from countries with historically low rates of immigration to the United States.
- Retain immigration preferences for the spouses and minor children of U.S. citizens and green card holders, and eliminate preferences for the extended and adult family members of U.S. residents.
- Create a renewable temporary visa for parents in need of caretaking.
- Limit the numbers of refugees offered permanent residence to 50,000 per year.

H-1B and L-1 Visa Reform Act (S. 180)

This bill was introduced as part of a long-time effort to revamp the H-1B program. The bill's bi-partisan sponsors intend to create a **preference-based visa allocation system to replace the current lottery-based system.** The proposed structure would task USCIS with prioritizing foreign applicants with advanced degrees from U.S. universities, those paid at the highest wage level, and applicants with valuable STEM-related skills.

The legislation would also:

- Require all employers who want to hire H-1B workers to make a good-faith effort to hire U.S. workers.
- Prohibit any employer from replacing a U.S. worker with an L-1 worker.
- Enhance the authority of the Department of Labor to review and investigate employer H-1B programs.
- Reduce the period of authorized admission for an H-1B immigrant from six to three years, with a three-year extension available for aliens with extraordinary ability, advanced degrees, or professors.

Worksite Enforcement and Government Audits

With the Administration's focus on immigration, we expect that worksite enforcement and government audits will increase. This could include the following types of investigations and audits:

- **USCIS:** Increased fraud detection site visits for H-1Bs and L-1s.
- **Department of Labor:** Public Access File (PAF) audits.
- **OFCCP:** Labor Condition Application (LCA) and nondiscrimination audits.

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- **ICE:** Increase in worksite raids and I-9 audits.
- **E-Verify Audits:** E-Verify does not have penalties associated with noncompliance, but the USCIS can and does report “unusual activity” to other government agencies such as the OFCCP.

Practical Tips

Federal Agency/Program	Recommendations
USCIS Fraud Unit Visits	Prepare a protocol for receptionists to follow if an FDNS (Fraud Detection and National Security Directorate) officer arrives. Prepare employees and managers for possible site visits. Audit I-129s to ensure duties, wages and work locations match the I-129.
Department of Labor	For worksite enforcement and government audits, confirm worksite location information is up-to-date. Public access files and posting notice documentation must be maintained.
OFCCP	Ensure actual wage and prevailing wage information is accurate.
ICE	Ensure I-9 Compliance is up-to-date and conduct regular audits and trainings.
E-Verify	Review E-Verify monitoring and conduct random audits of compliance.

We are monitoring these developments closely and will provide additional updates as needed.

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