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Climate change alert: A colder immigration front has come

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Since President Trump took office, there have been significant changes on the immigration front. In addition to the termination and curtailing of several humanitarian-based programs such as DACA and the Temporary Protected Status for certain countries, U.S. Citizenship and Immigration Services recently has taken a hard look at foreign students and exchange visitors, as well as some employment visa categories.

As of August 9, 2018, USCIS is changing its policy on how to calculate unlawful presence for students and exchange visitors imposing severe consequences for F-1, J-1 and M-1 visa holders who overstay after the completion of their study or program, or fail to pursue the course of study or program.

Students and exchange visitors who accrue more than 180 days unlawful presence may be subject to three-year or ten-year bars to admission, depending on the length of the unlawful presence period.

USCIS also changed recently the language on its website indicating that F-1 students in the STEM OPT program are not allowed to work at end-clients or customers "because ICE would lack authority to visit such sites."

This would prevent STEM employers from placing student trainees at third-party worksites, even though the employment relationship with the STEM employer is preserved.

The administration has also focused on measures severely affecting the employment-based immigration process.

The increased scrutiny on nonimmigrant petitions for skilled workers became obvious last year, when President Trump singled out the H-1B visa program in his executive order 13788 and directed federal agencies to suggest reforms to help ensure that H-1B visas were awarded to the "most-skilled and highest-paid beneficiaries."

In response, the USCIS issued a memorandum in the eve of the 2017 H-1B filing season changing some long-established policies and leaving no time for employers to adjust thus triggering an avalanche of requests for further evidence (RFE).

The first freeze in the 2017 H-1B filing season affected petitions for computer programmers and computer-related positions, as USCIS questioned the specialty occupation character of these positions, whether they necessarily require bachelor degree or equivalent in order to satisfy the H-1B requirement.

USCIS rescinded its prior guidance on this issue, pointing to the Department of Labor's Occupational Outlook Handbook (OOH) where it is indicated that entry-level computer programmers may be hired with merely an associate degree.

While the OOH was never intended to be used as legal authority and its primarily goal is to educate the public about occupational classifications and trends, H-1B employers had to respond to this type of challenges to the specialty occupation character of the position by compiling massive documentation of their standard requirements for the position, the standard requirements in the industry, and often paying for expert opinion.

H-1B adjudicators were also directed to consider the salary level in determining whether the petition met the requirement for specialty occupation.

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As a result, petitions with Level 1 prevailing wage for entry-level positions were challenged on the basis that the proffered position is not particularly complex, specialized, or unique to satisfy the requirement for specialty occupation.

This flawed reasoning meant that beneficiaries with just a bachelor's degree and no experience could not qualify for H-1B.

The USCIS' unfounded use of the salary level as some sort of test for "specialty occupation" caused H-1B employers to struggle for months responding to voluminous RFEs.

This H-1B filing season in 2018, the USCIS continued the trend — just three weeks before the filing deadline, the premium processing service for new H-1B was blocked, similar to last season.

Also, claiming that program violations are more likely to occur in third-party work situations, the USCIS imposed heightened evidentiary requirements for all H-1B petitions involving third-party worksites.

While employers who place workers at third-party worksites have been required even previously to document the employment relationship with the beneficiary, they must now be prepared to present contracts, work orders, itineraries, and letters from authorized company representatives attesting to the nature and the duration of the third-party project.

Further, when seeking an extension, they must be prepared to show evidence retroactively confirming the employment relationship for the previous approval period.

Other non-immigrant employment visa categories were also affected by the frigid climate change.

Last fall, USCIS issued a policy memorandum restricting the TN classification for economists to positions involving a narrow range of economic analysis duties.

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As a result, employers could no longer use the TN classification for other professions related to economics, such as financial analyst, market research analyst, and marketing specialist.

The freeze may also reach the employment authorization program for H-4 foreign spouses to H-1B workers whose green card case has progressed to a certain stage. In a rule expected to be published in June 2018, the administration is considering eliminating this program.

The reality is that most H-4 visa holders are women. While they may have attended college and nurtured career aspirations, these women would be more easily forced back into a domestic role, regardless of the record low unemployment rate.

On May 25, 2018, DHS proposed to terminate the program under the "International Entrepreneur Rule" that would allow for consideration of parole into the United States, on case-by-case basis, of certain inventors, researchers, and entrepreneurs who had established a U.S. start-up entity, and who have received substantial U.S. investor financing.

As DHS announced, such complex and highly-structured program would be best established by the legislative process.

Overall, apart from the symbolic gesture of marginalizing customer service in its mission statement, the USCIS has taken very real steps towards immigration climate change.

With increased backlog for processing applications for employment authorization documents (EAD) beyond the 90-days, restrictions on the interview waiver program for non-immigrant visa applicants at consulate offices, in-person interviews of all employment-based green card applicants, limited access to InfoPass appointments, and many other initiatives, the USCIS has imposed significant hurdles for employers seeking skilled and talented foreign workers.

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