

02.03.2017

ANALYSIS

Decoding Trump's Immigration Orders

What to watch as the system prepares for mass deportations.

By JULIA PRESTON

The refugee program was not the only part of the immigration system that sustained shocks this week from three executive orders by President Donald Trump. While the White House scrambled to contain the widening furor over his ban on refugees and immigrants from seven Muslim-majority countries, the administration was laying the groundwork for a vast expansion of the nation's deportation system. How vast? Here's a close reading of Trump's orders:

New language to justify new powers, new priorities. The language of the immigration orders codified the grim warnings that galvanized Trump's followers during the campaign, about dangers posed by undocumented immigrants. Immigrants in the country illegally "present a significant threat to national security and public safety," says the order on "sanctuary cities." It says local governments that limit cooperation with immigration authorities "willfully violate federal law" – a claim those governments reject -- and have caused "immeasurable harm to the American people." An order on border security finds that illegal border crossers present "a clear and present danger," language traditionally evoked during times of war.

Trump swept away enforcement priorities set by the Obama administration, which focused on deporting new border-crossers and immigrants convicted of serious crimes. President Trump gave authorities wide new discretion to determine whom to deport, including immigrants charged with crimes but not convicted and people agents think might have been involved in "a chargeable criminal offense."

Under the orders, "the judgment of an immigration officer" is sufficient to have an immigrant

deported as a public safety risk. Although the president enjoys considerable legal sway to change immigration, the broad powers Trump is trying to give immigration agents seem likely to be challenged soon in the courts.

Bracing for a battle with police. With his threat to withdraw federal funding for cities the administration identifies as sanctuaries for undocumented immigrants, Trump is heading towards a confrontation with police chiefs in cities large and small.

To be sure, his crackdown was cheered by federal agents at Immigration and Customs Enforcement, or ICE, who have long resented the cool reception they received in some cities and the Obama administration's hands-off approach to those uncooperative jurisdictions. ICE officials pointed to their arrest in New York as recently as Jan. 25 of a Mexican, Luis Alejandro Villegas, who had served five years for armed robbery, been deported and returned illegally. After he had been arrested in December for driving under the influence, ICE officials said, New York police had released him without waiting for them to pick him up.

Trump's order was also endorsed by the National Sheriffs' Association, whose members run many county jails. In Texas, Gov. Greg Abbott, a Republican, moved faster and further than Trump, cancelling \$1.5 million in state funds for Austin, where Travis County Sheriff Sally Hernandez, a Democrat, said she would only honor ICE hold requests for immigrants with the most serious felonies.

Many city police chiefs were wary.

"We don't believe immigration enforcement should be forced on local police," said J. Thomas Manger, the chief of Montgomery County, Maryland who is president of the Major Cities Chiefs Association.

Chief Manger, whose county is growing fast with immigrants from many countries, said most police departments are willing to tell ICE agents if they are holding a foreigner and to advise when that person will be released.

But Trump's order revives a nationwide program called Secure Communities, which the Obama administration abandoned after it was crippled by court rulings and met fierce resistance in immigrant neighborhoods. Under that program, ICE agents could issue a hold request—known as a detainer--for any undocumented immigrant booked by police, no matter how minor the offense,

no matter whether there was a conviction. Through that program deportations steadily rose, reaching a peak of more than 409,000 in 2012, assuring Obama the record for the most deportations by an American president. Trump has ridiculed Obama's record and said he intends to far surpass it.

But at least two federal courts found it was unconstitutional for police to detain immigrants without warrants under the Secure Communities program. It is not clear how Trump administration officials plan to get around those rulings.

Chief Manger said city chiefs hoped to persuade the new president that closer cooperation with ICE would erode vital trust between immigrants and police.

In Lake County, Illinois, home to many Latino immigrants, Sheriff Mark Curran broke with his peers in the sheriffs' association. "Those of us who live in the real world where there are lots of Latinos in our counties would not go anywhere near something like that," he said.

More detentions, a boon for private prison companies. Trump's orders greatly expand immigration detention near the southwest border, requiring all foreigners arrested "on suspicion of violating Federal or State law" to be detained while they go through court. Currently Congress provides funds for about 34,000 immigration detention beds each night, a number that would have to grow dramatically.

The Department of Homeland Security never followed the lead of the Justice Department, which last year vowed to phase out private, for-profit prison contractors. Thomas Homan, the new acting director of ICE, said officials are rushing to sign contracts and locate facilities. Along the length of the border new detention centers will open their doors, something border communities haven't seen in years.

These days many border crossers are families from Central America and migrants from Haiti and Cuba, many seeking asylum. In immigration courts, already staggering under backlogs of more than 533,000 cases, asylum claims are often taking years to resolve. Congress can expect mounting costs for holding those migrants to the end of their cases.

At the same time, at two family detention centers already open in south Texas, ICE officials have rushed to release Central American migrants under a court order that requires them to free children in three weeks or less. That is another federal ruling Trump officials have yet to reckon

with.

And what about judges? At the overburdened immigration courts, officials and judges experienced whiplash after Trump's first days in office. His orders appeared to create a huge new demand for judges to hear immigration cases, especially for people in detention. The courts have long given priority to people who are detained.

But another Trump order imposed a federal hiring freeze, including at the immigration courts, which are part of the Justice Department.

Court officials said about 65 new judges have been approved by Attorney General Loretta Lynch, but they have not yet been hired because they were going through the painstaking security vetting for federal judges. Senator Jeff Sessions of Alabama, the Republican Trump has nominated to be his attorney general, would presumably have to find a way to exempt immigration judges from the freeze.

Sessions, a staunch conservative, could also decide he wants to take a second look at his predecessor's choices, slowing the process. It would be within his authority to start over with judges more to his ideological liking, although in the past there has been bipartisan consensus that the courts should not be politicized.

Court officials had calculated that with 330 judges, they could begin to reduce the backlogs. Today 305 judges are sitting. But with Trump's plans to ramp up deportations, officials said they are giving up hope the caseload will decline any time soon. ■■■

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Piotr Bilanicz (second from right) after his deportation hearing with social worker Kristin Anderson, law student Chris Helwig (left) and attorney Conor Gleason (second from left)
(Beth Fertig / WNYC)

Jan 17, 2017 · by **Beth Fertig**

In March of 2014, federal immigration agents arrested Piotr Bilanicz at the house he shares with his mother in Yonkers.

"Five o'clock in the morning, six police officers, like, surrounded [the house]," he recalled. "Two in the driveway, two come up to my room, two outside - waiting outside. And they just brought me down to Immigration."

A year earlier, in 2013, Bilanicz was convicted of possession of crack cocaine. It wasn't the first time. He's had a total of six arrests for possessing small amounts of crack cocaine and four for petty theft; the last arrest for possession was in 2014. But because he's a green card holder, Bilanicz was suddenly in danger of deportation, even though the 57-year-old had lived in New York ever since his family immigrated from Poland in 1964.

Bilanicz was shocked to find himself at risk of being sent back to a country he hasn't seen since he was five, and where he doesn't have any family. "I'm not a felon or nothing like that, never got caught with firearms, never assaulted anybody," he said.

But while President Barack Obama has said the nation's limited immigration resources should focus on removing "felons, not families," those priorities <http://www.vox.com/2014/11/21/7260285/obama-immigration-illegal> he laid out in the fall of 2014 also include immigrants convicted of misdemeanors. This wide net of convicted criminals, plus a shortage of judges, has contributed to massive backlogs throughout the nation's immigration courts.

Behind the Backlog

More than 525,000 immigration cases are currently pending

http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php , according to Syracuse University's Transactional Records Access Clearinghouse (TRAC). Nearly 70,000 of those are in New York City alone, making it home to the nation's third busiest immigration courtrooms after California and Texas. Not all respondents have criminal records. Many crossed the border illegally; others don't have proper documentation.

This is why experts say it's hard to imagine Donald Trump deporting more criminal immigrants than Obama. "I think this administration already takes a fairly broad view of who is a criminal," said Paul Wickham Schmidt, who was an immigration judge in Arlington, Virginia for 13 years.

Trump has claimed there are two to three million undocumented immigrants with criminal convictions. The government has said **that number is actually just below 2 million**

<http://fivethirtyeight.com/features/there-arent-2-to-3-million-undocumented-immigrants-with-criminal-records-for-trump-to-deport/> and includes non-citizens who are in the country legally (like Bilanicz), as well as undocumented immigrants.

The government has put **more resources** into immigration enforcement

<https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice> . But Schmidt said it hasn't done enough to help the court system meet the growing demand. There were fewer than 300 immigration judges for the whole country last year, and they were hearing more than 220,000 cases. Schmidt said even 100 additional judges would barely keep up with incoming cases, let alone the backlog.

"If you start doing the half million cases that are pending then you're going to fall behind on the incoming cases," he said.

The staffing of judges is run by the **Executive Office for Immigration Review**

<https://www.justice.gov/eoir> . Spokeswoman Kathryn Mattingly said the office "constantly monitors its

caseload nationwide and shifts resources to meet needs in the most efficient possible manner. This includes temporarily detailing judges and staff, and using video teleconferencing, when appropriate."

Judges have also complained that the government **fast-tracked unaccompanied minors and families** <<https://law.stanford.edu/2014/08/15/the-immigration-rocket-docket-understanding-the-due-process-implications/>> from Central America and Mexico who crossed the border in a "surge" a couple of years ago. These recent arrivals got priority over immigrants who had been waiting years for their hearings or trials, leading to bigger backlogs.

Immigration Court Backlog

■ NYC ■ Rest of NY State

70,000 cases

52,500

35,000

17,500

0

'00

'02

'04

'06

'08

'10

'12

'14

'16

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www.immigration.gov | [Access Clearinghouse](http://www.accessclearinghouse.org) | [Syracuse University](http://www.syr.edu)

Data by fiscal year, ending Sept. 30. NYC totals include immigration courts in the Federal Building and the Varick St. detention court. (Transactional Records Access Clearinghouse at Syracuse University/WNYC <http://trac.syr.edu/phptools/immigration/court_backlog/>)

The New York Courts

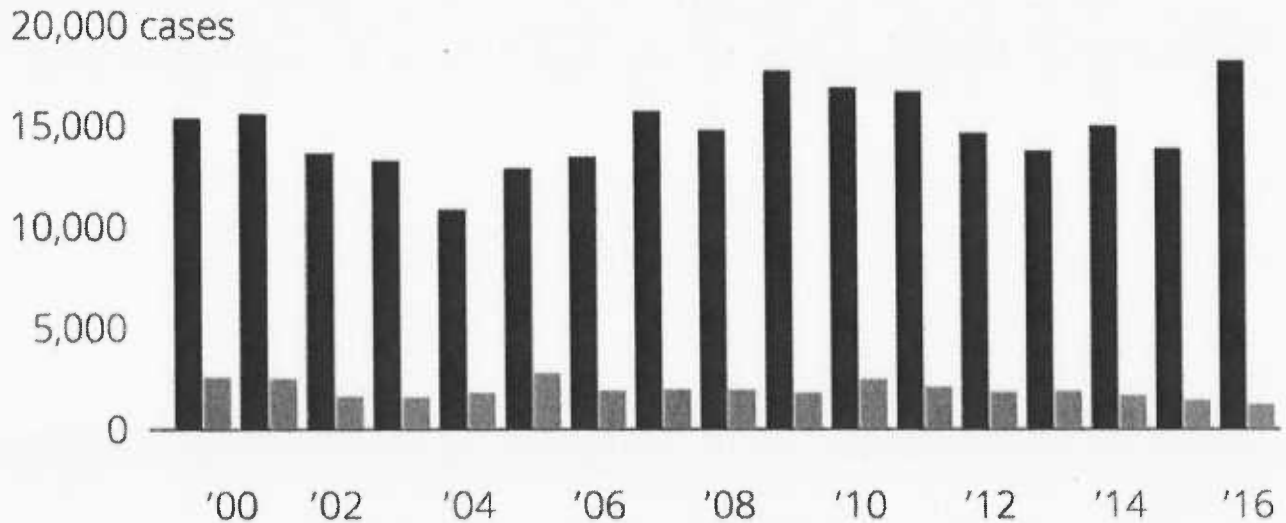
Here in New York, there are 28 immigration judges working in the Federal Building on Foley Square in Lower Manhattan. On the same day that Bilanicz had his deportation hearing, WNYC visited a courtroom where Judge Amiena Khan was hearing new cases.

More than 30 were scheduled between the morning and early afternoon. The immigrants were from Albania, Russia, India, China, and Latin America. Those without lawyers would ask for new dates. But the majority had lawyers and quickly addressed the government's charges. The judge then scheduled additional court dates, for status checks or individual hearings on the merit of their claims to remain in the country. Some planned to apply for asylum.

The whole process took about five minutes for each case, and Khan was scheduling future court appearances as late as August of 2018. This isn't so bad given, that Schmidt said *he* was scheduling hearings for 2021 before retiring last summer. But one lawyer in court that morning, Shihao Bao, agreed the system couldn't possibly handle more cases unless Trump wanted to "take away due process."

New Deportation Cases in New York State, by Charge Type

■ Immigration ■ Criminal



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Data: Transactional Records Access Clearinghouse (TRAC) at Syracuse University

Data by fiscal year, ending Sept. 30. Immigration cases include people who entered the U.S. illegally as well as immigrants whose visas expired. Terror or national security cases, which average 2.6 per year, are too few to be visible on this chart. (Transactional Records Access Clearinghouse at Syracuse University/WNYC <http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php>)

In the state of New York, the government filed 20,193 deportation cases in Fiscal Year 2016, according to TRAC. Most were charged with immigration violations, like entering the country illegally or overstaying a visa. Less than 7 percent, or 1,239, had criminal convictions of any type — a percentage that's been gradually dropping.

Making the Case

Bilanicz had his hearing on December 6th. His attorney, Conor Gleason, was asking for cancellation of removal/deportation, which is a form of judicial discretion. Gleason argued that Bilanicz's convictions were for misdemeanors connected to drug abuse, and that he's been sober since he completed a drug rehabilitation program in March of 2015.

"In my opinion, Piotr is the model classic example of what cancellation of removal is for in terms of the second chance," he explained.

He also argued that Bilanicz's deportation would cause him great harm, because he's been on disability since a heart attack in 2011 and has a pacemaker.

"I think it's one of the greatest examples of hardship that I've seen in any client I have had," he said of Bilanicz. "He sees the same doctors every 90 days. He needs to maintain the ability to see those doctors. To be deported to Poland, he won't have access to that type of medical help."

Gleason claimed deporting Bilanicz would also have a devastating effect on the man's 84 year-old mother, who's a naturalized American citizen. Bilanicz lives with her and takes care of her many medical needs.

The 9 a.m. hearing was held on the 12th floor of the Federal Building, in a small courtroom with dark pink carpeting, a Department of Justice seal and an American flag. Gleason told Judge Patricia Rohan that his client was "extremely repentant" for the crimes he'd committed and that "he is truly rehabilitated from his condition" of drug addiction. He brought a certificate of completion from a substance abuse program and 10 toxicology tests.

An attorney for the government, Adrienne Yasunaga, called those efforts toward rehabilitation "commendable," but "relatively recent." She also argued that Bilanicz "remains a danger to society" because of his criminal record.

But Judge Rohan ruled in favor of Bilanicz. As she cancelled the deportation order, she told him, "this is the only chance you get."

Afterwards, Bilanicz stood outside with his little defense team and celebrated by lighting a cigarette. "I feel great," he said.

His social worker had come along and so did a law school student who had straightened out his back taxes.

Bilanicz was very lucky. Unlike many people in immigration court, he had a free public defender. Gleason is with **Bronx Defenders** <<http://www.bronxdefenders.org/>> , which is a partner in the **New York Immigrant Family Unity Project** <<http://archive.vera.org/project/new-york-immigrant-family-unity-project>> . It's a city-funded program in which public lawyers represent immigrants facing deportation (though unlike Bilanicz, most are in detention centers).

Gleason said immigration cases are very tough, which is another reason why they take so long. He submitted 329 pages of evidence in Bilanicz's case, including 12 letters of support from family members with legal status in the U.S., medical records and research on the Polish healthcare system. "It's a lot of work and it takes a team," he said.

The final hearing took place two and a half years after Bilanicz was arrested by Immigration and Customs Enforcement agents. As he left the Federal Building, Bilanicz called his mother in Yonkers. It was still early, around 10 a.m.

"Everything's over, Mom," he told her.

Bilanicz said he was relieved and eager to move on with his life. In addition to gaining sobriety, he said his brush with deportation taught him *another* lesson. The rest of his family became naturalized American citizens after moving to New York in the 1960s. But Bilanicz never bothered to take the test.

"I should have become a citizen years ago," he said, with a hearty laugh.

He still can. In early January, the government declined to appeal the judge's decision to cancel the deportation order. Bilanicz can apply to become a citizen in 2019 and never again face the risk of deportation.

Queue

Needed: Justice for immigrants fighting deportation

BY JOJO ANNOBIL

NEW YORK DAILY NEWS Thursday, January 26, 2017, 5:00 AM



Everyone deserves representation (NEW YORK CITY COUNCIL/WILLIAM ALATRISTE)

These are uncertain times for immigrants in America, and the urgent need for free and affordable competent counsel in deportation proceedings has never been more critical. The U.S. government continues to aggressively deport tens of thousands of vulnerable, unaccompanied minor children and mothers with children fleeing extreme violence who do not have the benefit of a lawyer.

Moreover, every year, hundreds of U.S. citizens find themselves mistakenly in deportation proceedings. Green card holders who have no memory of living in another country face deportation based on minor crimes oftentimes committed decades ago.

Although the Supreme Court has recognized that deportation — being torn away from one's family and the life a person has built in America — is a severe penalty, there is currently no right to appointed counsel in deportation proceedings, and 63% of all immigrants are forced to represent themselves, with disastrous consequences.

Against this backdrop, the country is bracing for what may be an unprecedented era of enforcement against immigrants. President Trump and his appointees and advisers have talked about deporting millions of immigrants. Such a drastic enforcement measure will overwhelm the immigration bar, especially legal services providers and pro bono (volunteer) attorneys who represent immigrants in removal proceedings who cannot afford a lawyer.

Courts have often compared immigration law to the tax code as being one of the most complicated areas of federal law. Even experienced volunteer lawyers who are new to immigration law are only able to take on deportation cases after they go through extensive training and receive mentoring from experienced immigration attorneys.

Immigration judges and even attorneys for the Department of Homeland Security have acknowledged that when immigrants have good lawyers, the deportation proceedings move faster and more efficiently. Those who have no claims to relief or waiver of deportation are more likely to accept deportation quickly, and those who do have a basis to remain in the United States can present their case more effectively.

For immigrants who are detained, giving them lawyers can actually save taxpayers money by moving the case faster and reducing the expense of holding immigrants in jails.

The statistics are daunting. In 2015, unaccompanied minor children forced to represent themselves in immigration court nationwide lost 91% of their cases. But when they have competent counsel, they win 84% of their cases. The children who have arrived recently in the United States are fleeing unspeakable violence inflicted by multinational gangs.

Without counsel, they realistically have no chance of avoiding deportation.

Needed: Justice for immigrants fighting deportation - NY Daily News

Responding to the President's plan to increase immigration enforcement, Gov. Cuomo has proposed an emergency deportation defense fund to assist immigrants in deportation proceedings. The California Legislature and Los Angeles, San Francisco, Chicago, Connecticut and Washington, D.C., officials have also announced similar relief funds to protect their immigrant populations. These visionary leaders recognize the importance of counsel in removal proceedings.

The need for representation is great and will likely stretch beyond the resources that these states and cities can make available. Immigrants will need help from municipalities, foundations and private donors to ensure that they get a fair day in court. Innovative approaches are needed to meet a crisis that will only grow in the coming years.

For the past three years, Immigrant Justice Corps, a fellowship program dedicated to improving the quantity and quality of immigration representation, has been training the next generation of immigration lawyers. In two years, the program has impacted the lives of more than 15,000 immigrants residing in New York City, surrounding counties, New Jersey and Texas with 70 justice fellows (law graduates) and community fellows (college graduates). Additional funding could also assist modest-income earners who are ineligible for free legal services and immigrants who believe that paying for aid no matter how modest gets them better treatment.

In 2007, Judge Robert Katzmann (now chief judge) of the 2nd Circuit U.S. Court of Appeals first challenged the legal profession to meet the representation needs of poor immigrants; justice, he said, should not depend on whether an immigrant can afford a lawyer.

His clarion call rings out loud today. Immigration is America's past, present and future, and we should uphold the core principles of liberty and justice for all.

Annobil is executive director of the Immigrant Justice Corps.

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Immigration Legislation And Regulation To Watch In 2017

By Allissa Wickham

Law360, New York (January 2, 2017, 1:03 PM EST) -- Many aspects of President-elect Donald Trump's immigration policy plans are still unclear, but experts say changes to the H-1B and EB-5 visa programs could be on the docket, and Congress may end up wrestling with border security and enforcement measures. Here, Law360 runs down some of the top immigration policy issues that could make an appearance in 2017.

Border Security and Mandatory E-Verify

One of Trump's main campaign promises was building a wall along the southern border, although the president-elect has already begun walking back some of that rhetoric. Post-election he told 60 Minutes that the wall could include "some fencing," and later said some areas didn't need a wall, pointing to existing "vicious rivers."

Still, when it comes to immigration, it's "pretty apparent" that border security is one of the top priorities for the incoming Congress, according to Rebecca Peters, director of government affairs at the Council for Global Immigration, although she cautioned that the timing and contents of that bill are still up in the air.

"I think the question really becomes what could be included in a border bill, and I don't think we know that, yet," Peters said, adding that Congress may want some part of the bill to fund "whatever enhancements" Trump is seeking for the border.

Indeed, although Kansas Secretary of State Kris Kobach — who could still emerge as a pick to serve in the Trump administration — hinted in a Reuters article in November that advisers were examining how the U.S. government could start on the wall without Congress by shuffling around funds in the existing budget, lawmakers would eventually need to carve out funds to construct the pricey barrier.

On top of border security measures, mandatory E-Verify will likely be a topic that comes up in the next Congress, according to Peters. E-Verify, an online employment eligibility verification tool, is currently voluntary for most companies, and making it mandatory could have major consequences for industries like agriculture that often rely on unauthorized workers.

"In the past, bills have looked to phase this in from just an implementation standpoint," Peters said, speaking about the rollout for all companies. "They would need to do that, because there's over 6 to 7 million employers and only about 600,000 or so using E-Verify right now."

One particular bill to keep an eye on, according to Laura Reiff of Greenberg Traurig LLP, is the Legal Workforce Act, a previously floated measure that would require employers to use E-Verify.

"It may be introduced on its own because it's been stand-alone for so long, and then married up with a border bill," Reiff said. "And I anticipate these things coming out of the House."

Possible Relief for DREAMers

With Trump having said he will end President Barack Obama's executive actions on immigration, anxiety continues to swirl over what will happen to the Deferred Action for Childhood Arrivals program, a deferred deportation program for immigrants who entered the U.S. as children.

Those who qualify are also able to receive a renewable work permit, and over 741,500 people have benefited from the program. Trump recently indicated he may seek to "work something out" regarding young, undocumented immigrants often referred to as DREAMers, but attorneys will also want to keep an eye on relief efforts in Congress.

Specifically, the bipartisan BRIDGE Act in the Senate will be one to watch. The legislation, rolled out in early December, would provide provisional protected-presence and employment authorization to individuals eligible for DACA. Although the measure will need to be refiled when the new Congress convenes this year, Reiff said she expects the bill to be reintroduced with a House companion as soon as lawmakers are back in action.

Potential Changes for H-1B Visa Program

It's also possible that changes to visa programs for skilled guest workers and investors could be on the docket, thanks to both the Trump administration's priorities and regulatory efforts that are already underway.

For instance, although Trump has sent some mixed messages about his views on high-skill workers, he has clearly called for boosting the prevailing wage that is used to set the bar for H-1B employees. And changes could also be on the horizon for the L-1 visa program for managers or those with specialized knowledge, according to Chad Blocker of Fragomen, Del Rey, Bernsen & Loewy LLP.

"The idea of requiring L-1 visa petitions to meet prevailing wage requirements, that's something that's

been floating around for the last couple years," Blocker said. "So, it could be that we see something along those lines."

It's also possible that the Trump administration could seek to rescind some of the immigration regulations issued under Obama — which have included work authorization for H-4 visa holders and an expanded work period for some foreign graduates — but the chances of such a move is still unknown.

"If you start off with the premise that we're putting U.S. workers first, then any regulation that expands the universe of foreign nationals eligible to secure employment authorization and stay here is vulnerable," said Robert Groban of Epstein Becker & Green PC. "Then it becomes a question under the political process as to whose ox is gored, and how loudly and what political pressure, or other pressure, is brought on the administration to maintain the rule or somehow limit the impact."

Attorneys may want to keep an eye out on any movement on North American Free Trade Agreement renegotiations as well, as that could potentially affect TN visas for Canadians and Mexicans.

Updates Waiting in the Wings for EB-5 Visa Program

Updates may also be afoot for the EB-5 visa program, which gives green cards to immigrants who invest \$500,000 and create new jobs in the U.S. Most recently, U.S. Citizenship and Immigration Services asked the Office of Management and Budget to review a proposed rule-making to update the program's regulations.

The exact scope and details of the rule are still under wraps, but USCIS previously asked stakeholders for input on minimum investment amounts and regional center designation processes. And while it's unclear if the Trump administration will continue pursuing those rules, even if it doesn't move ahead with them, the EB-5 program could see some action in Congress, as EB-5's regional center program is due to expire in April.

"I think the opportunity for a more long-term, sustained EB-5 package is definitely on the horizon," Reiff said.

"Extreme Vetting," Refugee Issues and Sanctuary City Fights

Even though the U.S. Department of Homeland Security announced it's scrapping an 'obsolete' program once used to track men from countries with sizable Arab and Muslim populations, the waters are still murky as to whether Trump will seek to reinstall the program.

When recently asked by a reporter whether he was still considering a registry or a ban targeting Muslims,

Trump vaguely responded, "You've known my plans all along." The New York Times reported last year that Trump said he would "absolutely" force Muslims to register, although that point was overshadowed later in the campaign, when Trump turned his focus to "extreme vetting" of immigrants.

Exactly what this would entail is, again, rather murky, but Trump has called for an ideological screening test for immigrants, saying that people who "do not believe in our Constitution or who support bigotry and hatred will not be admitted for immigration into our country." The president-elect has also called for temporarily suspending immigration from parts of the globe that have "a history of exporting terrorism."

Meanwhile, the upcoming year could include **fights over immigrant sanctuary cities**, and the Trump administration could also move to lower refugee levels, as a plan recently **flashed by Kobach** called for halting the intake of all Syrian refugees.

"They'll probably reduce refugee admissions in total, and ... it's possible they could shut off Syrian refugee admissions entirely," Stephen Legomsky, a Washington University School of Law professor emeritus and a former USCIS chief counsel, said of the incoming administration.

--Additional reporting by Bonnie Eslinger, Kelly Knaub and Melissa Daniels. Editing by Edrienne Su.



IMMIGRATION LAW

Expert Analysis

Business Immigration Under Trump: Upcoming Changes and How to Prepare

During the presidential campaign, Donald Trump promised voters that immigration, together with jobs and health care, would be at the top of his agenda. More recently, President-elect Trump has stated that his immigration plan will focus on increased enforcement and protecting U.S. workers. The extent to which these two initiatives impact business immigration will depend on how the Trump administration reconciles its desire to attract and retain the best and brightest foreign talent with its pledge to protect the interests of middle and working class Americans. As a result, employers who hire foreign workers will need to adapt quickly in order to remain compliant and meet business objectives.

Protecting U.S. Workers

Trump has asserted plans to “establish new immigration controls to boost wages and to ensure that open jobs are offered to American workers first” while simultaneously voicing support for immigration programs that attract and retain highly skilled workers in shortage occupations (such as advanced degree engineer and science professionals).

JULIE MUNIZ is a partner at Fragomen, Del Rey, Bernsen & Loewy.

By
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However, provisions that are deemed to negatively impact U.S. worker wages or job prospects will be at risk of rescission, such as the March 2016 Department of Homeland Security rule (81 Fed. Reg. 13039) allowing STEM students to apply for an additional two years of work authorization, which extends the one year of work authorization granted to most foreign students.

Notably, Trump stated in his transition video of Nov. 21, 2016, that he will direct the Department of Labor (DOL) to “investigate all abuses of visa programs that undercut the American worker.” The DOL is charged with conducting audits (known as labor condition application (LCA) audits) of prevailing wage requirements and claims of abuse associated with H-1B visas—a numerically limited specialty occupation visa that permits U.S. employers to hire foreign workers with a related bachelor’s degree or equivalent into a job requiring that degree.

The H-1B visa program is used by U.S. employers to hire highly skilled workers, and high-tech companies in Silicon Valley have repeatedly stated that more H-1B visas are needed in order to fill shortage engineering positions. In contrast, the same H-1B visa program has been widely criticized for suppressing U.S. wages and taking jobs away from U.S. workers, especially in instances where the H-1B employees are working at a client site (and not in the H-1B

Employers who hire foreign workers will need to adapt quickly in order to remain compliant and meet business objectives.

employer’s office). In particular, allegations of abuse have recently surfaced in the media (Preston, Julia, “Laid-Off Americans, Required to Zip Lips on Way Out, Grow Bolder,” *New York Times*, June 11, 2016) where U.S. workers at a number of U.S. companies have claimed that they were laid off and forced to train foreign “H-1B” replacements.

In response, Trump has stated that he has spent time with the laid off American workers and “won’t let this happen anymore.” Thus, it is likely that the Trump administration will introduce a labor

market test or non-displacement attestation, increase salary requirements and direct investigations on staff augmentation arrangements (as distinguished from industrial equipment installation projects and global arrangements for turn key software solution projects). Here, it is important for client companies that have entered into consulting arrangements for its IT workers to ensure that H-1B visa holders working on-site with the client company are under the control and supervision of the consulting company and not co-employees of the client company.

An audit or investigation that alleges co-employment would be problematic as the wage requirement (set at the higher of the prevailing wage or actual wage) would be determined by the client company's actual wage (as opposed to the actual wage for the H-1B employer) for the occupation (or an allegation of visa fraud). Overall, employers should expect an increase in DOL audits and investigations, with a particular focus on consulting companies and their clients.

We also expect an increase in FDNS (Fraud Detection and National Security) site visits, where an FDNS officer visits an employer to ensure that employee wage and working conditions are consistent with USCIS (U.S. Citizenship and Immigration Service) filings. Also, Trump's directive to investigate visa abuses will likely lead to a review of the J-1 exchange visitor's summer work study and au pair categories. These programs have been the subject of abuse claims and viewed as taking low skilled jobs away from U.S. workers in child care and seasonal industries.

Trump has stated that he will renegotiate the North American Free Trade Agreement (NAFTA)—(he may exercise a unilateral revocation provision with six

months notice), which currently affords Canadians and Mexicans occupation-specific work authorization pursuant to the TN visa category, along with other important mobility provisions for business visitors and intracompany transferees. NAFTA mobility provisions and those of other free trade agreements are at risk, including Australia (E-3), Chile (H-1B1) and Singapore (H-1B1), so employers should plan accordingly.

In addition, Trump has announced an immediate hiring freeze for federal employees (including replacements).

Extreme vetting signifies the re-introduction of a registration requirement upon entering the United States for non-U.S. citizens from countries with active groups on the terrorist list, similar to the National Security Entry-Exit Registration System requirement that occurred after Sept. 11.

Business immigration filings require timely adjudication by multiple government agencies, including USCIS, the Department of State (DOS) and DOL. As a result, employers should expect significant adjudication delays for petitions and visas.

Increased Enforcement

Trump has stated that his 100-day plan will include "extreme vetting" in order to "keep out" those who do not share American values. This means that citizens of certain countries (or those who have travelled to certain countries) will be subject to enhanced security clearances before obtaining a U.S. visa that are above and beyond the additional clearances in place today. Currently,

persons from designated countries deemed to be a security risk undergo "administrative processing," a process whereby a U.S. Embassy or Consulate requests a specific security clearance from the DOS that usually takes one to eight weeks to complete but can take considerably longer.

Trump's plan includes additional checks to "screen out" those who have "hostile attitudes toward our country or its principles," presumably by examining social media activity. This would undoubtedly result in extensive travel delays, even for turn-key employees and senior-level executives.

Extreme vetting signifies the re-introduction of a registration requirement upon entering the United States for non-U.S. citizens from countries with active groups on the terrorist list, similar to the NSEERS (National Security Entry-Exit Registration System) requirement that occurred after Sept. 11. NSEERS, which requires travel through designated airports, fingerprints, photographs, interviews, and local check-ins with Immigration and Customs Enforcement (ICE), was indefinitely suspended in 2011 but could be reinstated quickly if the Obama administration does not succeed with its current effort to dismantle it. We also expect additional scrutiny in green card applications consistent with vetting for negative or hateful attitudes toward American values.

Enforcement will also include an increased focus on employment verification compliance. Presently, U.S. employers are required to verify that all new hires have proper work authorization through the completion of a Form I-9, (as mandated by the Immigration Reform and Control Act of 1986, Public Law 99-603). An increase in ICE agents will improve

enforcement with more I-9 audits and ICE raids, which inspect whether an employer has properly completed Form I-9 for employees and impose penalties and fines as applicable.

Also, E-verify, which began as a voluntary program with the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA, Public Law 104-208), will likely be mandatory for all employers, as Trump indicated during his campaign. E-verify is an Internet-based system that allows employers to electronically validate new hires' work authorization by comparing their I-9 data with information contained in the Department of Homeland Security (DHS), Social Security Administration (SSA) and Department of State databases. In 2009, the Federal Acquisition Regulation (48 C.F.R., Subpart 22.18) required federal contractors to use E-verify to validate the employment eligibility of employees working under federal contracts.

Trump is also expected to secure the southern border of the United States (the "wall") in order to curtail the entry of undocumented immigrants. These combined efforts will have a chilling effect on the employment of unauthorized workers, which is likely to result in a shortage of workers in agriculture and low skill industries, among others.

Another important campaign pledge was to revoke President Barack Obama's executive order establishing DACA (Deferred Action for Childhood Arrivals), which covers approximately 750,000 "DREAMers" (individuals who meet the general requirements of the Development, Relief, and Education for Alien Minors (DREAM) Act) who have entered the U.S. work force across multiple industries. Fortunately, Trump

has recently announced a possible modification or outright abandonment of this promise in stating that the beneficiaries are meritorious. Notably, Senators Dick Durbin (D-Ill.) and Lindsey Graham (R-S.C.) recently announced that they are working on a bipartisan bill to give Dreamers legal status before Trump takes office.

There is also expanded DACA and DAPA (Deferred Action for Parents of American and Lawful Permanent Residents), which Trump is expected to eliminate and will impact approximately four million undocumented immigrants. A recent 4-4 decision by the Supreme Court effectively let stand a decision of the U.S. Court of Appeals for the Seventh Circuit nullifying President Obama's executive order establishing these programs. (*United States v. Texas*, 579 U.S. __ (2016)).

Taking Effect

The timing and difficulty of change depend on whether the existing provision is based on policy guidance, executive order, regulation or statute. The provisions that are easiest and quickest to change are policy memos and executive orders, which serve as the foundation for DACA, administrative processing decisions based on national security, and ICE enforcement policy. However, such changes are subject to a legal challenge where Trump would need to show that the change is not arbitrary or capricious in order to succeed.

Provisions that are regulatory (the vast majority, including STEM and H-4 work authorization) are more difficult to change and will take longer (at least six months or more) as changing these requires compliance with the APA (Administrative Procedures Act), unless the Congressional Review Act (Contract

with America Advancement Act of 1996, Public Law 104-121) applies. The Congressional Review Act gives Congress the ability to disapprove of any regulations published within the preceding 60 congressional "session days" (which works out to approximately six months). This means that Congress could potentially revoke regulations published in mid to late 2016 without the need to follow the APA rulemaking process to rescind.

Provisions that are statutory will be the most difficult and take the longest to change as these require congressional action, such as H-1B wage reforms and labor market tests, dependent company restrictions and wage requirements for L-1 visas.

What Can Employers Do Now?

Given the likelihood of increased enforcement, it is important for employers to audit I-9 employment eligibility forms and LCA public inspection files. In addition, employers should perform a census of their foreign worker population in order to determine which employees may be affected by a change in law or policy and to ensure compliance with any new requirements.

Employers should also consider the potential impact on their own immigration policies, compliance programs and personnel actions, including consulting arrangements. Finally, employers should remain engaged with immigration counsel and stay abreast of changes before and after Jan. 20, 2017, as 2017 promises to be an eventful year for employers who hire foreign workers.

The New York Times

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U.S.

Trump's Immigration Order Expands the Definition of 'Criminal'

By JENNIFER MEDINA JAN. 26, 2017

After President Trump signed two sweeping executive orders on immigration on Wednesday, most of the attention was on his plans to build a wall along the border with Mexico and to hold back money from “sanctuary cities.” But the most immediate effect may come from language about deportation priorities that is tucked into the border wall order. It offers an expansive definition of who is considered a criminal — a category of people Mr. Trump has said he would target for deportation. Immigration agents will now have wider latitude to enforce federal laws and are being encouraged to deport broad swaths of unauthorized immigrants.

Here are some questions and answers about the changes:

Who is considered a priority for deportation?

Each presidential administration must decide who it considers a priority for deportation. Mr. Trump's order focuses on anyone who has been charged with a criminal offense, even if it has not led to a conviction. He also includes, according to language in the order, anyone who has "committed acts that constitute a chargeable criminal offense," meaning anyone the authorities believe has broken any type of law — regardless of whether that person has been charged with a crime.

Mr. Trump's order also includes anyone who has engaged in "fraud or willful misrepresentation in connection with any official matter or application before a governmental agency," a category that includes anyone who has used a false Social Security number to obtain a job, as many unauthorized immigrants do. Anyone who has received a final order to leave the country, but has not left, is also considered a priority.

Finally, he allows the targeting of anyone who "in the judgment of an immigration officer" poses a risk to either public safety or national security. That gives immigration officers the broad authority they have been pressing for, and no longer requires them to receive a review from a supervisor before targeting individuals.

Who is considered a criminal?

The order defines criminal loosely, and includes anyone who has crossed the border illegally — which is a criminal misdemeanor. Anyone who has abused any public benefits program is also considered a criminal under the order.

The Obama administration, which deported nearly 400,000 people per year during its first five years, initially included those convicted of minor offenses such as shoplifting. But it later changed its policy to target primarily those who had been convicted of serious crimes, were considered national security threats or were recent arrivals. By the end of President Barack Obama's time in office, around 90 percent of the country's 11 million undocumented immigrants were not considered a priority for deportation. According to the Migration Policy Institute, a nonpartisan think tank, roughly 820,000 undocumented immigrants currently have a criminal record.

Who could be affected by this?

It's impossible to know how many people will be considered priorities for deportation under the new criteria. Mr. Trump's executive order could affect any unauthorized immigrant who is not protected by Deferred Action for Childhood Arrivals, which the Obama administration put in place to give young people work permits and temporary relief from deportation. (Mr. Trump has not yet made clear whether he intends to keep that program.) Immigration lawyers have already raised concerns that people with no criminal history will be swept up by the large net the administration is casting.

Can the president carry out these changes?

The president has the authority to decide who should be deported. But it is unclear whether the administration will be able to — or even try to — carry out deportations as expansively as suggested in the executive order's language. First, in order to put the 15,000 additional immigration agents he wants in place around the country and along the border, Mr. Trump needs spending approval from Congress. Even then, additional detention centers would also be needed.

The most significant hurdle is the tremendous backlog in the immigration courts. Even if immigration officials initiated thousands of deportations immediately, court dates for those immigrants would be at least a year and a half away. Some immigration experts have suggested that Mr. Trump will try to push for expedited removals, which could speed the process, and give immigrants less time to find legal representation.

How does this compare with previous administrations?

Mr. Trump is opening the door to deporting far more unauthorized immigrants than previous administrations. "This is the largest expansion of any president in terms of who is a priority for removal," said Steve Yale-Loehr, a professor of immigration law at Cornell University. "Every administration has to prioritize who they will go after with their limited enforcement resources. This goes further than

any other president. To make it simple: If someone is here illegally they are targets for removal.”

A version of this article appears in print on January 28, 2017, on Page A9 of the New York edition with the headline: Order Expands the Authority to Deport.

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