



BURR ALERT

The First 100 Days on Planet Immigration

By Anna L. Scully

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The first months of President Trump's administration have been a whirlwind of activity, and certainly immigration has been the subject of several executive orders and much controversy. The natural question that arises from all this activity is, "what has actually changed?" On the immigration front, the simplest answer is: not as much as all the activity and media coverage might lead one to believe. So, this synopsis will attempt to address things that have changed, things that might change, and things that haven't actually changed at all.

Things that have changed

On January 25, President Trump signed two executive orders that arguably have had the most impact on U.S. immigration policy: "Enhancing Public Safety in the Interior of the United States," and "Border Security and Immigration Enforcement Improvement."

The first order, having to do with enhancing public safety, calls on federal agencies to step up interior enforcement activities that are designed to seek out and apprehend people who are not legally present in the United States. Our clients should take note of this order, because it has resulted in a marked increase in I-9 compliance audits, many of which have resulted in visits by federal officials to worksites to question and apprehend employees who are identified as illegally present during the I-9 review. Currently, it seems that Immigration and Customs Enforcement and Homeland Security Investigations, the two agencies primarily responsible for I-9 and worksite compliance investigations, are willing to honor standing policy to be lenient with employers who are obviously doing their best to comply with I-9 regulations, even when some employees are determined to be illegally present. To take advantage of this leniency, though, employers must pay rapt attention to their I-9 compliance policies and conduct internal audits of their compliance as soon as possible. Once an employer receives notice of an I-9 compliance audit, it is too late to take any meaningful steps to show good faith in complying.

The second order has resulted in a harsher approach to dealing with individuals who are detained in deportation proceedings. The Obama Administration developed several policies encouraging agency prosecutors and administrative law judges to de-prioritize the deportation of illegal aliens who do not have a significant criminal history, and to grant relief when possible to illegal aliens who have ties to the U.S. President Trump's order dismantles many of those policies and has resulted in a higher rate of deportation orders since its inception. Right or wrong, this change makes it much harder for those illegally present to seek relief such as asylum, deferred action, parole, and other humanitarian forms of immigration benefits.

Things that might change

President Trump also targeted some legal immigration programs for review and possible reform. For example, he signed an executive order titled "Buy American and Hire American" on April 18, 2017.

Many of us on Planet Immigration quaked in our boots a bit to see the H-1B visa program specifically mentioned. The H-1B visa program, which allows visas to be granted each year to 65,000 professionals holding a Bachelor's degree (and an additional 20,000 who hold a Master's degree), has been blamed for lay-offs in the technology sector, for driving down median salaries for professional jobs, and a host of other evils over the years.

However, this order does not immediately dismantle or overhaul the H-1B visa program (and really there is no legal way it could). Instead, it calls for the various agencies involved in the process of granting an H-1B visa (there are four of them) to review the current program rules and propose new ones that will prevent fraud and abuse and protect the interests of U.S. workers. Protecting the interests of U.S. workers invariably means allowing fewer visas and making them harder to get approved – right or wrong, employers who use the H-1B program as an option to hire key employees with special skills may find their chances of getting these visas approved diminished even further than before. New rules also may affect extensions of previously approved H-1B visas, but that remains to be seen.

The review and rule-making process necessary to change anything about the H-1B visa program is likely to take years, and even when new rules are finalized, it is possible they will be challenged in the court system. So, the only true take-away from this order is that there will be no reforms for the H-1B program that make it more accessible to employers.

There is another draft executive order out there, titled “Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs,” that received little attention because President Trump never signed it. The draft was leaked to the media in February, with very little indication of whether or when it actually would be signed. This order calls for an increase in federal investigations to ensure that employers and employees are complying with the terms of the work visas they are granted, specifically H visas, L visas, B visas, J visas, and the E visa program is even mentioned.

By way of explanation: to petition for a work visa, an employer is required to make a series of representations to Immigration authorities, and supporting documents are provided to convince authorities that the representations are “more likely than not” true. The representations usually concern why the employer needs a visa for a new employee, what the employee will be doing, what the employee will be paid, etc. Yet there are very few controls in place to check up on the employer and employee after the visa is approved to ensure that both parties are making good on all those representations. The most effective tool so far is a small group of federal officers who are authorized to visit employer sites, review personnel documents, and interview employees to test the truth of those representations. This group is called FDNS, and its efforts will increase if President Trump ever signs this order.

Employers always should be ready for these visits, signed order or not, and the best way to prepare is to keep the visa petition documents on file and periodically check to be sure all those representations are still true. For example, if Widgets ‘R Us represents that an H visa employee will be working in the engineering department for \$50,000 per year, an FDNS visit is not going to go well if it turns out that this employee was transferred to sales, his salary was decreased by \$5,000 as a result, and nobody bothered to get approval from Immigration before making this move. A bad FDNS visit can result in revocation of the employee's visa and a referral to other agencies, such as Department of Labor or Immigration and Customs Enforcement, who have authority to levy civil fines and criminal penalties for program violations and fraud.

Things that have not changed

Can this article be written without addressing the travel ban? Apparently not. Right or wrong, the travel ban was the greatest source of confusion and hysteria on Planet Immigration during the first 100 days of the Trump Administration. The executive order suspended immigration benefits for citizens of Iran, Iraq, Libya, Somalia, Syria, Sudan, and Yemen. It also altered the way visas are processed at U.S. Consulates abroad and suspended the Refugee admissions program.

The most important thing to know about the travel ban is that it isn't. The first executive order, signed in January, was suspended by several federal district courts, as was the second executive order signed in March (its legality is currently being examined by the Ninth Circuit Court of Appeals).

Some vestiges of the travel ban orders have been adopted in State Department and Homeland Security policy. For example, "extreme vetting" is now practiced by many U.S. Consulate abroad and involves additional background checks during the visa approval process, some of which require review of social media accounts.

There also was a brief scare in late April over the prospect that President Trump might dissolve the NAFTA trade agreement. NAFTA is significant on Planet Immigration because it makes a type of visa called the "Free Trade" or TN visa possible. Many employers use the TN visa to import professional workers in a number of fields from Canada and Mexico. If the TN visa were eliminated, many employers would be left with the over-taxed H-1B program, or the ever-scrutinized L visa program, to keep key employees who currently use the TN visa. At the moment, President Trump appears to be willing to renegotiate the terms of the NAFTA treaty rather than terminate it, so TN workers are currently safe. However, to prepare for the worst, employers may want to consider moving TN workers to other temporary visa programs or even sponsoring them for permanent residency.

Should the next 100 days prove to be as lively as the first, you can expect additional updates. Just be aware that, for all the rhetoric about immigration, actual change is not as sweeping as the rhetoric suggests, and any future change is going to take lots of time.

If you would like more information, please contact:

[Anna L. Scully](#) in Mobile at (251) 345-8205 or ascully@burr.com

or the Burr & Forman attorney with whom you regularly work.

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