

# Understanding Changes in US Immigration Policy





#### USCIS CHANGES MISSION STATEMENT

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#### **NEW MISSION STATEMENT**

U.S. Citizenship and Immigration Services administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.

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# Understanding Changes in US Immigration Policy

#### **OLD MISSION STATEMENT**

USCIS secures America's promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.

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# MISSION STATEMENT DRIVES THE FOCUS

- Old statement
  - Recognized and honored America as a Nation of Immigrants
  - Role of USCIS was to provide useful and accurate information to "customers"
  - Promote citizenship & understanding

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# MISSION STATEMENT DRIVES THE FOCUS

- New Statement
  - Safeguard integrity
  - Protection of American Citizens
  - Secure the Homeland



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# Understanding Changes in US Immigration Policy

# CHANGING STANDARDS FOR H-1B PETITIONS

- · Level 1 wages
  - Driven by the Buy American, Hire American E.O.
  - 2 Theories
    - · Level 1 wage did not match the job description
    - Level 1 wage for entry level position, therefore not a specialty occupation
  - AAO Decisions
  - Recognized DOL Guidance
  - All occupations have a level 1 wage

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#### **DEFERENCE MEMO**



- Prior decisions should be given deference pursuant to 2004 Policy Memo
  - Same facts, approve the petition unless:
    - Material Error
    - Substantial change in circumstances
    - New material that adversely affects eligibility
  - Required supervisory review and articulation of changed circumstances

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#### **DEFERENCE MEMO**



- · Deference Memo, October 23, 2017
  - Petitioner has burden of proof, all facts and eligibility must be demonstrated to satisfaction of examiner
  - Encourages RFEs and challenges to eligibility



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#### SPECIALTY OCCUPATION

- Focus on language that requires specific degree
- · Computer Systems Analyst
  - DOL Publications (Occupational Outlook Handbook) note most employers require degree in computer related field, some accept business degrees if computer background
  - USCIS Conclusion: Degree in Computer field is not required

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#### SPECIALTY OCCUPATION

- · Emerging occupations
  - QA Testers and Engineers
  - Business Intelligence Analysts
  - Database Architects
- Classified Computer Occupations, All others
  - Aggregation of emerging occupations
  - Not separately defined
  - USCIS Assertion: Because there is no separate category, not a specialty occupation

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#### WHAT IS THE LAW?

- Residential Finance v USCIS
  - Knowledge, not the title of the degree, is required by the statute
- Big Picture
  - Most petitions are still approved
  - RFE rate is almost double
  - Approval rate down only about 8%



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#### THIRD PARTY PLACEMENT

- Targets information technology consulting companies
- · Applies to all Third Party Placements
- Policy Memo, January 8, 2010
  - Increased scrutiny to third party placement petitions
  - Questions employer-employee relationship
- Additional Requirements imposed by memo released February 23, 2018

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#### **ENHANCED REQUIREMENTS**

- Evidence of the job duties requires more proof than the Petitioner's description.
- Requires Contracts with "End User" (client) and all intermediate contractors
  - Exacerbates requirement to show Petitioner control and employer relationship to beneficiary
- Will be approved only for period of documented actual work assignments

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#### ITINERARY REQUIREMENT

- · Regulation requires Itinerary
- · Itinerary must include
  - Dates of each service or engagement
  - Name and addresses of "ultimate employer"
  - Names, addresses (Including floor, suite and office) and telephone numbers of the locations where services will be performed.
  - Corroborating Evidence for all of the above

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# PROPOSED RESCISSION OF H-4 EAD REGULATION Impacts primarily Indian citizens caught in the backlog of immigrant visas 104,750 issued between 5/15/2015 and 6/29/2017 FY2015 26,858 FY2016 41,526 FY2017 36,366

#### REQUIREMENTS FOR H-4 EAD

- Principal Alien (H-1B) must have an approved immigrant visa petition (I-140)
- H-4 EAD available only to spouses (does not include children in H-4 status)
- Application filed on Form I-765. Can be filed simultaneously with extension of H-1B for principal and extension of H-4 status (Form I-539)
- · Can also be filed as stand-alone application
- EAD only valid for period of H-4 status

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### SAVE OUR JOBS V US DEPT. OF HOMELAND SECURITY

- Complaint and Motion for Preliminary Injunction to delay implementation of regulation filed on April 23, 2015
- Motion denied on May 24, 2015 and regulation implemented on May 26, 2015 as scheduled
  - Court held that there was no showing of irreparable harm
  - Court did not consider whether plaintiff was likely to succeed on the merits

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# CURRENT STATUS OF ADMINISTRATION EFFORTS

- Status Update filed March 1, 2018 with Federal Court
- Regulation must be reviewed by USCIS for economic analysis
- Proposed regulation is not expected until June, 2018
- Will require notice and comment period
- Final rule not expected until 2019

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#### POSSIBLE CHANGES TO THE OPT AND STEM OPT REGULATIONS

- · OPT STEM extension initiated in 2008
  - Requires STEM degree
  - Employer must enroll in E-Verify
  - Initially 17 months
- Lawsuit challenging the implementation of this STEM extension
- USCIS responded with new regulation, additional procedures and requirements
- Effective May 2016
- · Extended to 24 months

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# CONCERN WITH STEM EXTENSION

- STEM Regulation was published during Obama Administration
- Provides a benefit to foreign students
- Trump Administration has identified this regulation as subject to change on the regulatory agenda
- No formal proposals or statements beyond regulatory agenda published

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# DEVELOPMENTS IN NAFTA AND THE TN CLASSIFICATION

- NAFTA discussions are continuing in Mexico City
- President Trump & Prime Minister Trudeau discussed NAFTA on Monday



# DEVELOPMENTS IN NAFTA AND THE TN CLASSIFICATION • President has proposed tariffs on steel and aluminum imports • Current buzz is that he will tie tariffs to "a better deal" on NAFTA


# Understanding Changes in US Immigration Policy

#### **ECONOMISTS - TN APPLICATIONS**

- Policy Memo, November 20, 2017
- Economists are eligible for TN based upon occupations listed in the Appendix
- Policy Memo defines economists very narrowly
- Specifically excludes Financial Analysts, Market Research Analysts and Marketing Specialists as eligible
- Recognizes similarity of duties but application of title should be restrictive
- · No explanation or justification provided

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ADDITIONAL RESOURCES



#### EMPLOYER LAW REPORT

JANUARY 26, 2018

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# USCIS Administrative Appeals Office issues important non-precedent decisions on wage level determinations for H-1B petitions

Beginning in the summer of 2017, employers began to see an increase in Requests for Evidence (RFE) from USCIS on H-1B petitions alleging that the occupation was not a specialty occupation because the employer assigned a level 1 wage. Two recent decisions from the Administrative Appeals Office (AAO) indicate that this may no longer be an concern.

Some background to this issue is helpful. The H-1B visa is available for foreign nationals who will be preforming services in a specialty occupation. The specialty occupation is a field that requires a specific educational background as a minimum qualification to perform the duties of the position. The statute also imposes an obligation to pay the "prevailing wage" or the actual wage, whichever is higher, as a measure to protect U.S. workers against unfair competition from foreign workers willing (or coerced) to work for substandard wages. The employer may calculate the prevailing wage by using the data provided by the Bureau of Labor Statistics for occupations and locations nationwide. The Department of Labor has issued guidance on how to determine which of the four wage levels provided in the data should be selected, based upon the normal requirements for the occupation compared to the employer's requirements for the specific position.

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### EMPLOYER LAW REPORT

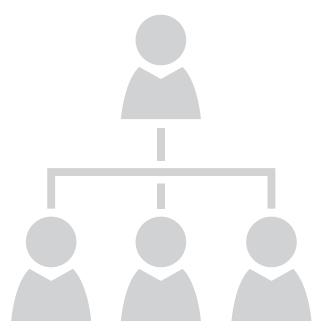
During the past several months, USCIS has issued several RFEs and some denials on H-1B petitions alleging that the position was not a specialty occupation because the employer selected a level 1 wage. The alleged justification for this assertion was President Trump's Buy American Hire American Executive Order, and his instructions that only the "best and brightest" foreign workers should be allowed in the United States. We have responded to many of these RFEs with legal arguments that followed the definition of specialty occupation and the Department of Labor Wage Determination Guidance. While all of our cases have been approved this far, USCIS has issued a number of denials across the country, providing a level of uncertainty and concern among employers and beneficiaries of H-1B petitions.

On January 25, 2018, the AAO issued two important non-precedent cases on the level 1 wage issue. The AAO is the appellate body within USCIS that has the responsibility to review decisions appealed by an employer who believes the decision does not properly follow the law and regulations. Many of the denials based upon the level 1 wage analysis were appealed to the AAO. The first two decisions on this issue clarify the policy of USCIS and clearly stated that "There is no inherent inconsistency between an entry-level position and a specialty occupation." While one case was approved and the other denied, both cases firmly stand for the proposition that the wage level does not define a specialty occupation. The Department of Labor guidelines are the proper source for determining the wage level and the USCIS's only role is to determine if the wage level assigned to the position is consistent with the employer's description of the position.

In *Matter of G-J-S-USA*, *Inc.*, the AAO affirmed the denial of the H-1B petition, but did so only because the Employer's statement of the requirements for the position are inconsistent with selected wage level. In the second case, Matter of B-C-, Inc., the AAO reversed the denial and ordered the H-1B to be issued. The position of a geotechnical engineer in training was clearly a specialty occupation, and required specialized training and education, but nevertheless was properly assigned a level 1 wage.

### EMPLOYER LAW REPORT

Together these two decisions provide a cogent analysis of the issues raised by the level 1 wage challenges to the H-1B classification. Employers no longer need be concerned that the wage level will determine whether or not a position is a specialty occupation meriting an H-1B visa. While the proper wage determination must still be assigned to the position, entry level positions in any occupation can be appropriate.



#### EMPLOYER LAW REPORT

**JANUARY 9, 2018** 

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# Administration disavows proposal to limit all H-1Bs to six years

On Dec. 30, 2017 McClatchy News reported that USCIS was considering an interpretation of a provision in the American Competitiveness in the Twenty First Century Act that would restrict H-1B visas from extensions beyond six years. This story provoked a fire storm of panic among Indian H-1B visa holders who have been waiting for an available immigrant visa while caught in backlogs often in excess of 10 years and longer. While many lawyers cautioned that the statute could only be interpreted to withhold three year extensions but not one year extensions (creating only a more pronounced processing backlog but not substantively impacting the right to remain and work in the United States), various other sources argued that the Administration could indeed eliminate a statutory provision provided by Congress.

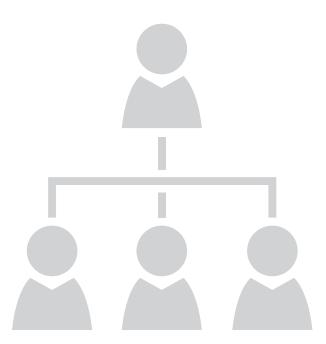
Today, McClatchy News reported that that the Administration is not considering such an interpretation. The article notes that the Administration is backing away from the proposal in light of the extreme pressure. But, according to the USCIS spokesman: "USCIS was never considering such a policy change and that 'any suggestion that USCIS changed its position because of pressure is absolutely false.' "

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## EMPLOYER LAW REPORT

The story published this morning eliminates the fear that the Administration will move to end the H-1B eligibility for tens of thousands of immigrants waiting for a green card. The Administration has announced that the Buy American Hire American Executive Order issued on April 18, 2017 provides a mandate to scale back the program. USCIS is examining H-1B regulations and policies, and we anticipate further announcements that will likely restrict the H-1B program in additional ways. We will have a better idea of the parameters being considered when the proposed new regulations are published.



#### EMPLOYER LAW REPORT

DECEMBER 6, 2017

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# SCOTUS allows travel ban 3.0 to take effect

The third time is the charm for the Trump Administration, for now. On Monday, Dec. 4, 2017 the U.S. Supreme Court issued an order allowing President Trump's third attempt at a travel ban to take full effect while the issue of its constitutionality is litigated in the circuit courts. This decision has the practical effect of lifting hard-fought blocks against the controversial ban.

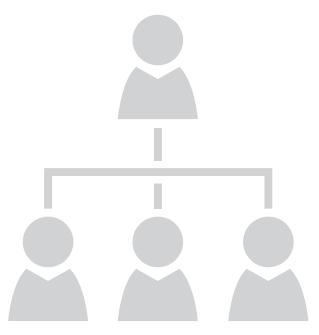
The travel ban has been a source of contention since its inception in January 2017, when the President signed an executive order calling for restriction on incoming travel for individuals of six Muslim-majority nations. The executive order was met with an instant legal battle and political protest, and on February 9, the U.S. Court of Appeals for the 9th Circuit upheld a suspension of the travel ban. The President's second attempt at the ban came on March 6 by way of executive order, was met with the same level of opposition, and was similarly blocked in the federal courts. President Trump issued his latest attempt through Presidential Proclamation on September 24. If successful, the Proclamation would allow the government to categorically restrict the entry of individuals from seven countries: Chad, Iran, Libya, North Korea, Somalia, Syria and Yemen. Edition 3.0 would also prevent the entry of Venezuelan officials and their immediate family members, while subjecting Venezuelan nationals, who hold visas, to additional screening. Unlike its predecessors, the most recent version of the ban has no self-imposed expiration date.

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## EMPLOYER LAW REPORT

Monday's 7-2 Supreme Court decision seems to have given fresh hope to the administration in its fight in the federal courts. While the merits of the case were not addressed and the issue remains undecided, the blocks have been removed and the travel ban is allowed to take full force and effect in the interim. In its brief order, the Supreme Court urged the lower court to "render its decision with appropriate dispatch." The Court gave no explanation for its decision, but did note that Justices Ginsburg and Sotomayor would have denied the administration's request to implement the ban.



#### **EMPLOYER LAW REPORT**

NOVEMBER 6, 2017

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# Scam alert: USCIS does not request I-9 forms by email

U.S. Citizenship and Immigration Services (USCIS) recently posted notice advising employers of a scam operation requesting I-9 forms. USCIS, as well as any other investigating government agency, will never request I-9 forms by email. There are reports of recent scam operations that appear to come from a government email address requesting I-9 forms for recently hired employees. Employers should delete any emails requesting emails or uploaded copies of I-9 forms. The full government warning states:

#### Scam Alert: USCIS Does Not Request Forms I-9 By Email

"USCIS has learned that employers have received scam emails requesting Form I-9 information be sent to the fraudulent email address news@uscis. gov. You should neither respond to these emails nor click the links in them. Employers are not required to submit Forms I-9 to USCIS."

Employers are required to prepare a Form I-9 on behalf of every new employee. The employee must prepare section one of the form on or before the first day of employment, and employers must review the supporting documents and complete section two by the third day of employment. Employers are required to retain the I-9 form, but do not file it with USCIS. Audits of I-9s are conducted by the Immigration and Customs Enforcement or the Department of Labor and are always accompanied by written notice from the agency.

We recently posted an explanation of the new Form I-9, which is required for all employees hired on or after Sept.18, 2017.

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# Robert H. Cohen

Rob's primary area of practice is immigration and nationality law. He has extensive experience in all aspects of business and family immigration procedures. Rob is past chair of the Board of Trustees for the American Immigration Council, has served as the Ohio Chapter chair of the American Immigration Lawyers Association, chair of the Nebraska Service Center Liaison Committee, and is currently chair of the USCIS Benefits Liaison Committee. He has been listed in *The Best Lawyers in America*<sup>®</sup>. in the areas of Immigration Law every year since 1997, and was most recently named *Best Lawyers* <sup>®</sup> 2015 Columbus, Ohio Immigration Law "Lawyer of the Year." In addition to his legal experience, he was also an instructor for the Legal Assistant program at Capital University from 1986-2015.

#### **Bar Admissions**

Ohio

U.S. Court of Appeals for the Sixth Circuit

U.S. District Court for the Northern District of Ohio

U.S. District Court for the Southern District of Ohio

#### **Presentations**

- "Traveling Travails," Porter Wright Employment Relations Seminar, Oct. 5, 2016
- "Cutting Edge Approaches for Business Immigration," American Immigration Lawyers Association, Sept. 23, 2016
- USCIS Open Forum, American Immigration Lawyers Association Annual Conference, June 20, 2016
- USCIS Open Forum, American Immigration Lawyers Association Spring Conference, April 7, 2016
- "Business in the 21st Century–Virtual Office Challenges in PERM," American Immigration Lawyers Association National Conference, June 17, 2015
- "Alternatives to H-1B," American Immigration Lawyers Association Midwest Regional Conference, March 9, 2015
- "Immigration: The Intersection of Politics and Policy," Ohio State University, Marion Campus's Learning Enrichment Institute, a four part lecture series, Oct. 9, 16, 30 and Nov. 13, 2014
- "PERM and BALCA Updates," American Immigration Lawyers Association Midwest Regional Conference, March 2014

#### **Partner**

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#### **SOCIAL MEDIA**

#### Blogs

employerlawreport.com

#### **EDUCATION**

University of Cincinnati College of Law, J.D., 1976

Miami University, A.B., 1973

#### **SERVICES**

#### **Immigration**

#### International Business & Trade

 Immigration and cross-border employment

#### PROFESSIONAL ASSOCIATIONS

- American Immigration Lawyers Association, Chair, USCIS Benefits/Headquarters Liaison Committee
- Columbus Bar Association
- Ohio State Bar Association

- "Challenging Business Denials in Federal Court," American Immigration Lawyers Conference, June 28, 2013
- "Recurrent Nonimmigrant Visa Issues," American Immigration Lawyers Association Midwest Regional Conference, March 15, 2013
- "Dealing with Difficult RFEs: EB-2 and EB-3," American Immigration Lawyers Association Annual Conference, June 16, 2012
- "Pre-Filing PERM Issues Cases & Practice Tips," American Immigration Lawyers Association Annual Conference, June 14, 2012
- "Service Center Updates/Visa Bulletin," American Immigration Lawyers Association Midwest Regional Conference, March 16, 2012
- "PERM Denials: Now What Do I Do?," American Immigration Lawyers Association Annual Conference, June 16, 2011
- "The Economic Effects on Immigrant Visa Petitions Rough Ride on Stormy Waters," American Immigration Lawyers Association Mid-Year Conference, Jan. 28, 2011
- "Health Care Workers: Temp and Perm," American Immigration Lawyers Association Midwest Regional Conference, April 9, 2010
- "E Visas: From Preparation to Practical Aspects in Filing," American Immigration Lawyers Association Midwest Regional Conference, April 9, 2010
- "Monumental Decisions Affecting Labor Certification Practice: BALCA Cases," American Immigration Lawyers Association Annual Conference, July 1, 2010
- "Fundamentals: You Want Me to File a PERM Application? OK, Here Is What You Need to Know...," American Immigration Lawyers Association Annual Conference, June 2009
- "Navigating the New ETA-9089: Has the Landscape Changed?," American Immigration Lawyers Association Annual Conference, June 2008

#### **Publications**

- "Trump's executive order: What's legal?" Columbus Bar Association, Feb. 16, 2017
- "Practice pointer, specialty occupation," written with Cyrus D. Mehta and Turid L. Owren, American Immigration Lawyers Association, September 2016
- "Virtual office, roving, and telecommuting challenges in the PERM labor certification process: Six things you need to know," *Immigration Practice Pointers, Tips for Handling Complex Cases*, 2015
- "Administrative appeals and federal court review for business immigration petitions," *American Immigration Lawyers Association Practice Pointers*, 2013-2014
- "When eat, pray and love doesn't work, respond, build and sue," written with Rita Sostrin and Angelica Grado-Wright, Immigration Practice Pointers, 2012-2013 edition

- "My PERM was denied, now what? A practical guide to next steps," written with Michelle Funk and Michael P. Nowlan, *Immigration Practice Pointers*, 2011-2012 edition
- "When changes in the job description require or permit a new PERM Application," American Immigration Lawyers Association, Midyear Conference Handbook, 2011
- "Determining substance over form: When does BALCA determine a mistake is a fatal error?" *Immigration Practice Pointers*, 2010-2011 edition
- "Identifying the Employer's Requirements for the Position Before
  Drafting an Approvable and Appropriate PERM Application," David
  Stanton Manual on Labor Certification, American Immigration
  Lawyers Association, 2008-2009
- "Labor Certification du Jour: 2007-08 PERM Developments," Immigration & Nationality Law Handbook 117, 2008-2009 edition

#### Honors | Awards

- Ohio Super Lawyers<sup>®</sup>, Immigration: Business
- The Best Lawyers in America®, Immigration Law
- Best Lawyers<sup>®</sup> Columbus, Ohio Immigration Law Lawyer of the Year, 2015
- American Immigration Lawyers Association, Jack Wasserman Memorial Award for Excellence in Litigation in the field of Immigration Law, June 2013
- American Lawyers Association, Presidential Award for outstanding leadership as Chair of the Nebraska Service Center Liaison Committee, June 2011
- Ohio Chapter of American Immigration Lawyers Association, Outstanding Contribution to the Practice of Immigration Law, November 2009
- American Immigration Lawyers Association, Presidential Award for distinguished service on the Chapter Litigation Guidelines and Chapter Affiliation Agreement Working Groups, June 2006

#### Community

- Community Refugee & Immigration Services, Board Member
- Columbus Jewish Historical Society, Board Member, 2010-2016

