



K&L GATES

2016 Election Guide

A Guide to Trump-era
Changes in Business
Immigration

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For additional information regarding the business immigration effects of the recent elections, please contact Brian Graham at 512.482.6828 or any member of the Labor, Employment and Workplace Safety team.

2016 Election Guide: A Guide to Trump-era Changes in Business Immigration

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Introduction

This resource seeks to provide employers and foreign nationals working in the United States with meaningful information on expected changes to U.S. business immigration laws and policy under the upcoming Trump administration. Although specifics remain uncertain, we will focus squarely on what is known through policy statements, recent Republican immigration bills (particularly S. 2266, the “H-1B and L-1 Reform Act of 2015”), and post-election comments from the President-elect. We also take into account the inherent delays associated with new legislation, treaty negotiations, regulatory drafting and approval, and similar procedural factors. This resource is presented in Q&A format, starting with general business immigration questions and followed by specific nonimmigrant categories and then employment-based green cards.

Will my legal workers have to leave?

It depends on whether the workers are authorized to work under statute, or under other forms of authorization such as treaties or executive order. Statutory immigration programs like the H-1B, L-1, and O-1 are the most stable and are very likely to remain in place unless Congress passes new legislation. Workers with these statutory visas are not in imminent danger of losing their status. It is possible that H-1B and L-1 reform legislation could be enacted as early as the first quarter of 2017.

Employment authorization based on the Deferred Action for Childhood Arrivals (“DACA”) program is the least stable. The DACA program was created by executive order, which can be changed immediately by the incoming President. President-elect Trump has repeatedly stated, as part of his immigration policy, that he will revoke the executive order which created the DACA program, although no specific timetable was given. It is also unclear at this time whether ending DACA would lead to automatic revocation of existing grants of work authorization. More clarity on this important issue is expected in early 2017.

Both the E-1/E-2 and TN visa categories are treaty-based, which places their stability somewhere between executive orders and statutes. Under the termination and withdrawal provisions of the Trade Act of 1974, our trade-based treaties contain provisions that allow the United States to withdraw after notice. In the North American Free Trade Agreement (“NAFTA”), withdrawal power is covered by Article 2205, authorizing withdrawal after six months’ notice. Termination of NAFTA would end the TN visa program, which arises from Appendix 1301.d.3 of NAFTA. It would also terminate the E-1 and E-2 programs for Mexican and Canadian nationals, since that authority also arises out of NAFTA. As explained further below, the Trump administration intends to renegotiate NAFTA, not necessarily terminate it. The TN, E-1, and E-2 visa categories would therefore only be in

jeopardy if negotiation attempts failed and the United States exercised its right to withdraw under Article 2205.

What changes are coming for the H-1B program?

Trump's immigration policy statements on the H-1B program largely coincide with Senate Bill 2266, the "H-1B and L-1 Visa Reform Act of 2015" ("S. 2266"). With Republican majorities in both the House and Senate, we will likely see passage of this bill or very similar legislation at some point in 2017. Although no change to the H-1B cap is anticipated, other statutory modifications to the H-1B program could have the effect of reducing demand, restricting access to H-1Bs by offshore outsourcing companies, and giving priority to higher-wage workers in STEM (science, technology, engineering, and math) occupations. We expect to see the following five key changes to the H-1B program:

- Consistent with the stated policy goal of protecting U.S. worker wages, the prevailing wage rate requirement for H-1B visas is very likely to be strengthened. S. 2266 would raise the minimum acceptable wage to Level 2, which would prevent employers from relying on trainee and intern wages ("Level 1" wages under the Department Of Labor's 4-level wage classification system) for H-1B workers.
- We are likely to see a recruitment requirement for H-1B petitions, consistent with the policy goal of putting U.S. workers first. S. 2266 includes recruitment requirements and creates a job bank that will be cross-referenced with H-1B petitions. Both of these changes seem likely to end up in an H-1B reform bill.
- The H-1B requirements could also evolve to give more priority to workers in STEM occupations, which generally rely on higher wages. S. 2266 requires a degree for specialty occupations (eliminating degree equivalency based on work experience) and gives priority consideration to H-1B petitions for STEM occupations when H-1B demand exceeds supply.
- Also expected are tougher restrictions against use of the H-1B visa by offshore outsourcing companies, in keeping with S. 2266. These companies—some of which are the leading users of the H-1B visa—were the target of earlier H-1B and L-1 reform initiatives, as well as several provisions of S. 2266. Offshore outsourcing companies have been widely criticized for allowing employers to replace U.S. workers with H-1B workers earning lower wages (in some cases, with the U.S. workers training their replacements). This practice is very likely to be addressed in H-1B reform. S. 2266 includes a penalty provision against employers who replace a U.S. worker with an H-1B worker. In addition, S. 2266 requires all H-1B dependent employers (generally, employers where H-1Bs constitute more than 15% of the workforce) to follow restrictions on recruitment of H-1B workers and prohibits third-party placement of H-1B workers.
- Another anticipated change to the H-1B visa is one that many employers will welcome: replacing the random H-1B lottery with a priority system. Currently, the 85,000 new H-1Bs available each fiscal year are allocated on a random basis. More than 200,000 petitions are

typically filed for these 85,000 slots, making hiring decisions problematic. This lottery system has recently become the subject matter of a class action lawsuit, *Tenrec, Inc. et al v. U.S. Citizenship and Immigration Services* (Case 3:16-cv-00995-SI, D. Or.) If the new administration adopts legislation like S. 2266, it could scrap the random lottery and replace it with a priority system based on various factors including the prevailing wage rate, STEM occupations, and the education level. For the many STEM employers who hire top graduates from U.S. colleges and universities and pay top wages, this change would increase predictability when hiring persons that would need an H-1B visa to continue working.

What changes can we expect for the L-1 visa?

The L-1 visa for international intracompany executives, managers, and professionals is very likely to be revised to conform to President-elect Trump's "hire Americans first" policy initiative. The Republican majority in Congress could enact S. 2266 or very similar legislation. Important changes could include:

- We are very likely to see a prevailing wage requirement for L-1 applications. There is currently no prevailing wage rate requirement for intracompany transfers. Reform here is highly likely given the President-elect's prior policy statements and the emphasis on restricting offshore outsourcing companies. Prevailing wage requirements are featured in S. 2266, which is a strong indicator that they will be found in future L-1 reform legislation.
- It is probable that L-1 reform would include other restrictions against offshore outsourcing very similar to those described for the H-1B above. We anticipate changes requiring L-1 petitioners to demonstrate that the position cannot be filled with a U.S. worker.

Will the E-1/E-2 treaty visa category be impacted?

The E-1/E-2 treaty trader and treaty investor categories are based on international treaties of trade and commerce (unlike most other immigration visas, which are statute-based). In most cases, the relevant international treaties can be terminated after six months upon notice. This raises a particular concern for E-1/E-2 visas for Mexicans and Canadians, which are based on NAFTA. The President-elect has strongly signaled his intent to renegotiate the terms of NAFTA and to exercise termination rights if negotiations are unsuccessful. If NAFTA were allowed to expire, it would eliminate E-1/E-2 visas for Canadian and Mexican individuals and companies until new treaties are in place. Persons and companies relying on these visas would do well to prepare for this contingency by developing alternative immigration strategies where possible.

If NAFTA is terminated, what will happen to the TN visa category?

The TN visa, available only to Mexican and Canadian citizens, is based on NAFTA Appendix 1603.d.1. Accordingly, if NAFTA were terminated, which would generally require six months' notice, the TN category would be eliminated. At this stage the administration appears to favor renegotiation rather than termination of NAFTA, but the success of those negotiations will determine the continued viability of the TN visa classification.

Are there any changes expected to the business visitor (B-1) visa?

Although policy initiatives do not specifically suggest a change to the B-1 business visitor visa, if S. 2266 or similar legislation is enacted, the B-1 visa could be impacted. S. 2266 includes a provision which eliminates the so-called “B in lieu of H” rule, which allows certain foreign-paid businesspersons to enter the United States on a temporary basis if their work would otherwise qualify as a specialty occupation under the H-1B rules. The B in lieu of H rule has been considered a potential source of fraud and abuse, and has been especially criticized by Senator Charles Grassley, the Chair of the Senate Judiciary Committee and chief architect of S. 2266. Elimination of the B in lieu of H rule may be coming as part of an H-1B and L-1 visa reform package.

How will employment verification rules (Form I-9 and E-Verify) change?

Although it is too early to assess the likelihood of changes to the employment verification process, the incoming administration’s immigration policy includes expanded use of E-Verify. Past legislative initiatives by House and Senate Republicans suggest strong support for mandatory or at the very least expanded E-Verify. In addition, President-elect Trump has called for creation of an immigration reform commission to examine ways to further curtail unlawful immigration. This suggests there could be additional changes to employment verification in the coming years.

What changes are expected for employment-based immigrant visas (“green cards”)?

No near-term changes are anticipated for employment-based green cards. The administration’s immigration focus is directed first and foremost at preventing illegal immigration and fraud. Once an immigration reform commission is established, it may consider changes to the employment-based immigration system in keeping with the Trump administration’s stated policy objectives of protecting U.S. workers and encouraging retention of highly skilled foreign workers. What this might look like is unclear. The current employment-based green card rules are little changed since 1990, predating the digital economy and the rapid increase in STEM occupations.

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