

H-1B Visa Program Faces Heightened Scrutiny, Employers Beware

Article

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The H-1B visa program is in the crosshairs again. Over the past few weeks, The Department of Homeland Security (“DHS”), the Department of Labor (“DOL”) and – President Trump have all weighed in on whether to alter the H-1B landscape. Whether any of these moves result in changes to the H-1B program is yet to be seen, but employers would be wise to be prepared.

On March 31, 2017, the United States Citizenship and Immigration Services (“USCIS”) (an agency housed within DHS) issued a policy memorandum stating that computer programmers and workers who write and test code, are not always “specialty occupations,” a requirement for eligibility for an H-1B visa. The new guidance specifically questions whether a computer programmer position, offered at an entry-level wage, would qualify as a specialty occupation because bachelors’ degrees are not always required to enter the field.

A few days later, on April 3, USCIS announced measures aimed at making fraud-related workplace visits. Specifically, USCIS indicated that investigations would be focused on companies whose basic business information cannot be validated through commercially available sources, employers who are dependent on H-1B workers, and employers who place H-1B workers at client sites.

The next day the DOL, weighed in. It issued a press release stating that it would “rigorously” use its existing authority to initiate investigations of H-1B violators.

Finally, earlier this week, on April 18, President Trump signed a new Executive Order, “Buy American and Hire American.” In the “Hire American” portion of the Order, Trump announced he was directing the DOL, Department of Justice, DHS, and Department of State to review the current laws governing the H-1B program and suggest changes to prioritize the most skilled and highest paid positions. The President also indicated he was directing federal agencies to review all visa programs and take prompt action to crack down on fraud and abuse in order to protect U.S. workers. Many of the changes contemplated by the Executive Order would require legislative action or rulemaking and would take time to go through the necessary processes.

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While none of these announcements require anything new, they do suggest that employers of H-1B workers may face increased scrutiny. Consequently, as the government becomes more aggressive with enforcement and adds reporting requirements, employers should:

- Expect changes in the petition process and be ready to make modifications;
- Be ready for increased scrutiny, possibly in the form of site visits; thus, making strict and timely compliance with the rules and proper documentation policies essential;
- Be aware that some of the changes suggested in the recent actions outlined above could mean that some current H-1B jobs may no longer qualify for this classification.

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