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U.S. looking for ways to reduce legal immigration

By Andrew M. Wilson

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Immigration policy proposals under the current administration represent a continuing trend toward discouraging legal immigration to the United States. While current efforts to thwart illegal immigration dominate headlines, the opaque measures to reduce and frustrate legal immigration tend to fly under the radar.

I do not think it takes a master sleuth though to conclude that U.S. Citizenship and Immigration Services (USCIS) has been given a directive to reduce legal immigration. In order to achieve that directive, they have developed some creative strategies.

The Department of Homeland Security (DHS) recently released proposed regulations under consideration. One proposed change to the H-1B program (a visa that lets U.S. employers temporarily employ foreign workers in specialty occupations) is particularly striking. USCIS has plans to alter the definition of "specialty occupation" to, in their words, "increase focus on obtaining the best and brightest foreign nationals via the H-1B program". This would conflict with existing law and greatly reduce who may qualify for H-1B status.

USCIS has already informally started to reinterpret the meaning of "specialty occupation" and apply its own definition when adjudicating H-1Bs.

When reviewing this proposed change, it is important to know that regulations from 1991 defining specialty occupation have never been revised and remain controlling today. They have not changed, and nothing has happened over the past two years that grants USCIS the authority to ignore these regulations or unilaterally interpret them differently than how they were presented.

But that is exactly what USCIS is trying to do. They are reinterpreting established law and regulations to make qualifying for H-1Bs more challenging. USCIS makes a resolute effort to:

- Misapply statutory and regulatory criteria used to prove specialty occupation eligibility.
- Exclusively and improperly rely on the Department of Labor's Occupational Outlook Handbook (OOH) as the authoritative source for determining specialty occupation eligibility.

The proposed changes above become even more concerning when understood in the context of two policy updates released last year. Taken together they underscore the hyper-aggressive tack the DHS is taking with its adjudications through USCIS. One memo from last year clarifies that USCIS has the authority to deny filings without the need to send a Request for Further Evidence (RFE) or Notice of Intent to Deny (NOID). USCIS routinely (even more routinely lately with H-1B filings) sends an RFE if they feel additional information or documentation is needed.

Now, under this new policy, USCIS may deny cases without providing the petitioner the opportunity to address any specific concerns about the filing.

This is a scary scenario given the current statistics with H-1B adjudications. Consider that H-1B denial rates for new H-1B filings have risen from six per cent in fiscal year (FY) 2015 to 32 per cent in the first quarter of FY 2019. This was after an increase from six per cent in FY 2015 to 24 per cent in FY 2018.

H-1B extensions with the same employer and for the same position have also experienced unusual scrutiny. Interestingly, these filings for the same position and same employer as the previous H-1B approval(s) also a saw a denial rate that quadrupled from three per cent (FY 2015) to 12 per cent (FY 2018).

Although USCIS asserts that they are not adjudicating H-1B cases differently, the spread of denials is palpable and belies that assertion. The fact that H-1B denial rates from FY 2015 to FY 2018 for “new” and “continuing” H-1Bs both quadrupled is a curious coincidence. It almost feels like there a certain rate of denials USCIS is targeting for H-1B petitions.

Another memo released last year confirms the conscription of USCIS into the enforcement world — a role usually reserved for Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP). This new policy memo authorizes USCIS to place an individual into removal proceedings if denying the non-immigrant petition will result in the foreign national having no status. For example, if an H-1B extension is filed for an individual, and the current H-1B status expires, and then the H-1B extension is denied without an RFE or NOID, USCIS may then place that individual into removal proceedings.

While not being afforded the opportunity to address an issue with USCIS before it chooses to deny a filing is unsettling, the notion that the person will subsequently be placed into removal proceedings is absolutely frightening. Individuals who have been here for years could be placed into removal proceedings without any opportunity to respond to a request for clarifying info from USCIS. Without any warning, a non-immigrant extension filing such as an H-1B filing could lead to being placed into removal proceedings.

These proposed policy changes are ultra vires and provide USCIS unauthorized authority to make the law rather than apply the law. These proposed changes create a mechanism for USCIS to:

- Place a higher burden on U.S. employers when pursuing H-1B work authorization for a foreign national.
- Utilize that higher burden as a basis to deny H-1B petitions without requesting additional documentation.
- Place a foreign national into removal proceedings after the H-1B petition is denied

So why would USCIS deny applications without providing the employer the opportunity to respond to any questions about the filing? Why is USCIS pushing policies to discourage and frighten foreign nationals from working in the U.S.? The simple answer is the current administration’s agenda to reduce legal immigration.

No administration, however, should have the authority to circumvent Congress in an effort to change existing immigration statutes and regulations. While everyone understands that going through Congress to change existing immigration laws is a Sisyphean task, it is no excuse to exercise self- imposed “because I said so” authority to fulfill a directive to reduce legal immigration.

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