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Impact Of 'Buy American And Hire American' On H-1B

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Law360, New York (April 21, 2017, 5:04 PM EDT) -- On April 18, 2017, President Donald Trump signed an executive order addressing two aspects of the administration's policy: protection of U.S. jobs, and preferences for U.S.-manufactured products and goods.

Hire American

With regard to U.S. jobs, the EO directs the U.S. Departments of Labor, Justice, Homeland Security and State to review employment-based foreign worker programs to ensure that the integrity of these programs is restored and that U.S. workers are provided with adequate protections from lower-cost foreign labor. The EO calls for increased scrutiny and reform of existing nonimmigrant worker programs, in particular the H-1B program.

The EO directs the interagency group to do the following:

Propose New Rules and Guidance to Supersede Prior Rules and Guidance. The EO requires the interagency group to propose new rules and guidance, as soon as practicable. The EO focuses on prevention of fraud and abuse to protect the interests of U.S. workers affected by the administration of the immigration system. While the EO states these agency actions must be consistent with applicable law, the express reference to "supersede or revise" previous rules and guidance aligns with prior announcements that companies have abused the visa system and disadvantaged American workers.

Review and Reform of H-1B Visa Program. The EO singles out the H-1B program, requiring the interagency group to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." Based on the remarks made by the president during the signing of the EO and, previously, at the White House press briefing on April 17, 2017, the reforms are designed to attain the following:

- Merit-Based Versus Random, Allocation of Annual Visas. H-1B visas are currently awarded by random lottery. The agencies are directed to consider ways to allocate H-1B visas based on

merit and to ensure that the beneficiaries of these visas are the best and the brightest, consistent with the intent of the "specialty occupation" visa category.

- Heightened Wage and Skill Levels to Avoid Undercutting U.S. Jobs and Wages. The president stated that reform is needed to restore a "level playing field" in the jobs market, which he indicated "has not happened for decades." In the White House press briefing the day before the EO's signing, a senior administration official stated that 80 percent of H-1B workers are paid less than the median wage in their fields. The official was quoted as saying, "If you change that current system that awards visas randomly without regard for skill or wage to a skills-based awarding, it makes it extremely difficult to use the visa to replace or undercut American workers because you're not bringing in workers at beneath the market wage."

Buy American

Scope. The EO heralds a new emphasis on domestic sourcing, including all statutes, regulations, rules and executive orders relating to federal procurement or federal grants, that require or provide a preference for goods, products or materials produced in the United States, which the EO collectively refers to as "Buy American laws." The EO does not expressly address services.

The focus on existing laws indicates that compliance and enforcement rather than changes in law are to be expected in the near term. The EO is directed at agencies, but the emphasis on compliance and enforcement means contractors will need to be attuned to the heightened emphasis by agencies, and likely the enforcement community, on domestic source restrictions.

Guidance for EO. The EO directs creation of an interagency group, led by the Secretary of Commerce and the Director of the Office of Management and Budget and including the Federal Acquisition Regulatory Council (among others) to issue guidance to agencies for complying with the EO within 60 days.

Assessment of Compliance. The EO requires the interagency group to assess the monitoring, enforcement, implementation and compliance with regard to Buy American laws, assess the use of waivers based on type and impact on domestic jobs and manufacturing, and develop policies for federally funded projects to maximize the use of U.S.-manufactured products and materials. During this same window, the Secretary of Commerce and the USTR will assess how Buy American laws impact "all" U.S. free trade agreements and the World Trade Organization Agreement on Government Procurement on the operation of Buy American laws, including impacts on domestic procurement preferences.

This emphasis on domestic sourcing may lead to a tightening of the various exceptions and waivers under such laws for products produced overseas and acquired or used in federal contracts or federally funded projects.

Treatment of Waivers. Section 3 of the EO calls for "scrupulous[]" enforcement and compliance with Buy American laws and minimization of the use of waivers, "consistent with applicable law." This language raises the prospect of greater risk for contractors in terms of potential actions under the civil False Claims Act, among other enforcement approaches.

Section 4 of the EO provides that to "the extent permitted by law," public interest waivers should be

construed to “ensure maximum utilization” of goods, products and materials manufactured in the U.S. The EO also requires consideration of the effect of dumped steel, iron or manufactured goods, or the use of “injuriously subsidized steel, iron or manufactured goods when granting public interest waivers." Sec. 4(c).

Based on the EO, significant changes may be forthcoming in the treatment of foreign goods in federal contracts and federally funded projects. Conceivably, the assessments required by the EO may lead to revised regulations or new legislation to bolster domestic source restrictions.

Analysis

While the executive order has no immediate effect on the processing of H-1B petitions, it does set forth a clear picture of the administration’s views on the H-1B visa program in the following areas:

- Allocation of H-1B Visas. The administration will move away from the current random lottery to a process, whereby H-1B visa numbers will be allocated based on skill and wage levels, with particular emphasis on rewarding those who have attained U.S. master’s degrees.

- Skill Level. The EO evinces an administration policy that H-1B visas should be reserved for high-skilled occupations. This is further supported by guidance issued by USCIS to its adjudication corps on March 31, 2017, described further below.

- Wage Level. At an April 17, 2017, White House press briefing, a senior administration official stated that 80 percent of H-1B employees are paid less than the median prevailing wage rate for their occupations, and that only 5 percent of H-1B visa holders are paid at the highest level of the prevailing wage table. Consulting companies, in particular, can expect to see increased scrutiny of wage-setting practices in light of these figures. Indian IT companies were singled out during the White House press briefing on the new executive order.

- Placement of H-1B Visa Holders at Third-Party Worksites. During the White House press briefing, a senior administration official made reference to coverage by CBS’s “60 Minutes” of allegations of displacement by Disney and other U.S. companies of U.S. workers by foreign contractors holding H-1B visas. The laid-off U.S. workers told “60 Minutes” that they were required to train their replacements as a condition of their severance. While this practice does not violate the law or regulations, it will certainly be a focus under the EO, and H-1B employers should review their third-party placement practices to avoid the displacement of U.S. workers.

The EO’s directives and establishment of an interagency initiative comes on the heels of a number of recent announcements by several of these departments, including DHS, the Department of Labor, and the Department of Justice about their intended oversight of fraud and abuse in the U.S. visa programs, including the H-1B program. These included the following announcements:

- On March 3, 2017, exactly one month before the FY 2018 H-1B filings period opened, United States Citizenship and Immigration Services, which is a division of DHS, announced that it would temporarily suspend premium processing for all H-1B petitions, effective on April 3, 2017, the day the FY 2018 H-1B filings period opened. Premium processing is a service offered by USCIS whereby petitioners may request expedited processing of certain immigrant and nonimmigrant petitions for an additional fee. The agency stated that the suspension of premium processing would help USCIS "reduce overall H-1B processing times" by allowing the agency to allocate resources to process long-pending petitions. The suspension has the additional effect of allowing USCIS to increase its scrutiny of H-1B petitions by providing it with the time needed to focus its review on certain key factors, described in the announcements below.

- On March 31, 2017, one business day before the FY 2018 H-1B filings period opened, USCIS issued a policy memorandum titled "Rescission of the December 22, 2000 'Guidance memo on H1B computer related positions,'" PM-602-0142, March 31, 2017, (the "policy memorandum") that reversed a previously issued policy memorandum classifying all computer programming positions, including entry-level positions, as specialty occupations suitable for H-1B classification. (See "Guidance memo on H1b computer related positions" (dated Dec. 22, 2000) from Terry Way.) The policy memorandum places the burden on employers to prove that computer programmer positions qualify for H-1B specialty occupation classification. The agency based its policy reversal largely on the fact that entry-level programmer positions do not consistently require attainment of a bachelor's degree or equivalent, which is a prerequisite for H-1B classification as a "specialty occupation." In providing its rationale for the policy change, the agency emphasized the rigor it intends to apply in determining if the positions listed on H-1B petitions qualify. Specifically, USCIS emphasized three points:
    - If a bachelor's degree in a relevant specialty field is not the standard minimum for entry into the occupation, USCIS will not consider the occupation generally to meet H-1B standards.
    - When an occupation does not generally qualify for H-1B classification, the employer must provide evidence to distinguish how its particular position meets the criteria for classification as a specialty occupation.
    - If the wage level for the H-1B position is entry-level, USCIS may consider the position not to qualify as an H-1B specialty occupation.

- On April 3, 2017, USCIS similarly announced that the agency is launching multiple additional measures to combat fraud and abuse in the H-1B program. In the news release titled, "Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse," USCIS set out five examples of fraud and abuse indicators:
    - The H-1B worker is not or will not be paid the wage certified on the Labor Condition Application (LCA).
    - There is a wage disparity between H-1B workers and other workers performing the same or similar duties, which may work to the detriment of U.S. workers.
    - The H-1B worker is not performing the duties specified in the H-1B petition, including when the duties are at a higher level than those in the position description.
    - The H-1B worker has less experience than U.S. workers in similar positions in the same company.

- The H-1B worker is not working in the intended location as certified on the LCA.

- On April 3, 2017, DHS issued a news release titled "Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse Agency Creates Avenue for American Workers to Report Abuse." The announcement, which referenced the same-day announcement by USCIS, confirmed that USCIS will focus its scrutiny of H-1B petitions on cases involving the following fact patterns:
  - Where USCIS cannot validate the employer's basic business information through commercially available data.
  - Cases involving H-1B dependent employers (those which have a high ration of H-1B workers as compared to U.S. workers).
  - Employer petitioning for H-1B workers who work off-site at another company's office location.

- On April 3, 2017, the Department of Justice issued a news release titled "Justice Department Cautions Employers Seeking H-1B Visas Not to Discriminate Against U.S. Workers." The announcement confirms that the anti-discrimination provision of the INA generally prohibits employers from discriminating against U.S. workers because of their citizenship or national origin in hiring, firing, and recruiting. "Employers violate the INA if they have a discriminatory hiring preference that favors H-1B visa holders over U.S. workers." The Department further confirmed that it "is wholeheartedly committed to investigating and vigorously prosecuting these claims."

- On April 7, 2017, the Department of Labor issued a news release titled "US Department of Labor Announces Plans to Protect American Workers from H-1B Program Discrimination." The announcement confirmed that the department will "protect American workers against discrimination" by prioritizing the following:
  - "Rigorously" using its existing authority to initiate investigations of H-1B program violators, citing "greater coordination with other federal agencies, including the departments of Homeland Security and Justice for additional investigation and, if necessary, prosecution."
  - Considering changes to the Labor Condition Application (LCA) for future H-1B application cycles. The LCA, which is processed by the Department of Labor, is a prerequisite to submission of all H-1B petitions, and requires employers to confirm basic factors of the proposed H-1B employment, including worksite location, salary, occupational classification, and treatment of H-1B workers.
  - Continuing to engage stakeholders on how the H-1B program could be improve to provide greater protection for U.S. workers through the department's existing authority, as well as though legislative change.

Conclusion

The Trump administration is focused on protecting jobs for U.S. workers by ensuring that use of the H-1B program is limited to recruitment of the best and the brightest to fill vacancies for highly skilled occupations. Moreover, the administration plans to use all of its authority to ensure that the wages paid to H-1B employees do not have an adverse impact on U.S. workers and that U.S. workers are not displaced by H-1B visa holders. As a result, the "feeding frenzy" that characterizes the H-1B cap season may well become a thing of the past.

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