

Don't Write Off Trump's Green Card Proposal, Attys Say

By **Nicole Narea**

Law360 (May 17, 2019, 9:29 PM EDT) -- Attorneys have expressed cautious optimism about President Donald Trump's proposal to create a points-based green card system that would prioritize highly skilled workers, but they also said it should not come at the expense of family-based immigration.

In a Rose Garden address at the White House on Thursday, Trump said the current legal immigration system, which values immigrants' family ties to the U.S., does not delineate a "clear path for top talent."

Under his plan, existing green card categories would be replaced with a new visa, dubbed the "Build America" visa. Candidates would be evaluated through a points-based system that would prioritize younger workers, higher-wage workers, valuable skills, offers of employment, advanced education and plans to create jobs.

While attorneys said a points-based system could be viable depending on how it is implemented, they said it should not undercut family-based immigration, which remains a critical pillar of American immigration law.

"The proposed trade off between employment- and family-based immigrants reflects a policy decision by the Trump administration," said Andrew Greenfield, a partner at Fragomen, Del Rey, Bernsen & Loewy LLP. "It does not have to be the case that increasing the number of employment-based immigrants requires a reduction in family-based immigrants."

Threatening Family-Based Immigration

Trump has long aimed to eliminate what he refers to as "chain migration," under which citizens or green card holders can sponsor their family members for immigration benefits. While he has not laid out a specific plan to do so, he hinted Thursday that his plan would emphasize "merit" over family ties.

Paul Virtue, a partner at Mayer Brown LLP, predicted that Trump's proposal could bear similarities to the Reforming American Immigration for Strong Employment Act, which was introduced in 2017 by Republican Sens. Tom Cotton of Arkansas and David Perdue of Georgia. The bill earned Trump's seal of approval, pairing major cuts to family-based immigration with a points-based immigration system based on employer sponsorship.

But David Bier, a policy analyst at the libertarian Cato Institute, said there is good reason to maintain a family-based immigration system.

“The reason why we have a family-sponsored system is in part because we feel that U.S. citizens should be able to live and be with their family members,” he said. “It’s a matter of liberty, not so much about their economic contributions.”

Can a Points-Based System Work?

Elizabeth Espín Stern, who leads Mayer Brown LLP’s global mobility and migration practice, said Trump’s shift to a points-based system has long been anticipated. She noted that a recent overhaul of the H-1B skilled worker visa lottery, in which advanced degree holders from U.S. universities now have better odds, foreshadowed that the administration would continue to emphasize skilled workers.

She said there are some promising aspects of a points-based system that could relieve pressure on capped visa categories where demand consistently outstrips supply.

“A move to a points-based system is not necessarily something that should be completely written off,” she said. “There could be some positive aspects of a merit-based component to our visa systems, particularly when we have gotten so stuck in [visa] quotas.”

Stern said, however, that Trump seems to want to raise the bar for what constitutes a skilled worker, which could reduce the overall number of skilled workers admitted to the U.S. She said U.S. Citizenship and Immigration Services, following Trump’s lead, might start raising its own standards for who qualifies as a skilled worker in relation to H-1B petitions by changing the way it defines a “specialty occupation,” which demands specialized degrees or skills.

Greenfield said that while a points-based system seems reasonable, it problematically “wrests from American employers the control they currently have to sponsor foreign nationals who are specifically matched with jobs available in the employers’ workforces.”

He said under the current system, employers must define particular positions needed to enhance their businesses, show that U.S. workers cannot fill the jobs and that a foreign national they seek to sponsor meets their specific requirements.

“It guarantees that sponsoring employers are getting what they want and need if Americans are not available,” he said.

Bier said that to ensure that employers continue to get the kinds of workers they need, a points-based system should prioritize an immigrant with a job offer from a U.S. employer above, for example, one with a particular degree or attractive skillset with no offer in hand.

Bier said a points-based system also should not undercut low-skilled immigration. While high-skilled immigration provides more economic benefits overall — with workers producing value of \$100,000 per year or more — he said low-skilled workers still provide critical services.

He said Trump’s plan is notably missing reforms to low-skilled immigration, including worker programs that allow for year-round — rather than temporary — employment.

Greenfield said the proposal could therefore result in shortages of low-skilled workers.

“Given the criteria the president laid out in his announcement, it may become harder under the proposed scheme for non-professionals to obtain green cards, which may itself lead to labor shortages for lower-skilled jobs that Americans are less likely to seek or hold,” he said.

--Editing by Kelly Duncan and Emily Kokoll.