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# What Does President Obama's Immigration Order Signal for Your Business in 2015?

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**President Obama's Executive Action  
Announced November 20, 2014**

# A New Pool of Over 5 Million Lawful Workers For the Next Three Years

- Temporary work permits
- Possibility of more complaints concerning FLSA (minimum wage) violations
- I-9 requirements apply
  - *Under guidelines published by US Citizenship and Immigration Services (USCIS) in 2012, an employer receiving updated documentation from an employee should review the previously completed Form I-9 and determine whether to complete a new Form or to simply re-verify the previously completed Form I-9.*
  - *Identity theft – Employers should adopt ICE best practices, for example, a system for identifying duplicate social security numbers.*

## ***How? Deferred Action for 5 Million Undocumented Immigrants for Three Years***

- Deferral of the removal of and work authorization for some **3.7 million** undocumented immigrants who have lived in the United States for more than *five years* and are *parents of US citizens or lawful permanent residents*.
- Expansion of the Deferred Action for Childhood Arrivals (DACA) program to include some **1.5 million** undocumented immigrants, who entered as children before January 1, 2010, regardless of how old they are today. Young people who had been in the country five years, came as children, and met certain education and public safety criteria previously qualified for DACA only if they were born after 1981 and entered the country before June 15, 2007.

# What Impact?

- USCIS will be receiving millions of applications within a short period of time.
- USCIS operations are wholly funded by the application fees the agency collects, however, hiring and training of new adjudicators typically lags months behind collection and availability of fees.
- Depending on the priority given to the DACA and DAPA applications, the new programs will almost certainly have the effect of creating additional backlogs in other applications and petitions that are processed by the agency.

# Easing Restrictions for High-Skilled Businesses and Workers

- In addition to deferring the removal of 5 million undocumented immigrants, the President outlined proposed changes to a number of employment-based immigration practices aimed at helping US businesses and foreign workers.
- In this regard, the President's announcement was followed by a memorandum from Department of Homeland Security Secretary Jeh Johnson directing USCIS and Immigration and Customs Enforcement (ICE) to take action on a number of issues of interest to high-skilled businesses and workers:

# *How?* Work Authorization for Spouses

- New rules give H-4 dependent spouses of H-1B skilled workers authorization to work once the H-1B spouse has an approved employment-based immigrant petition, the penultimate stage of the green card process.
- This will require USCIS to finalize a proposed rule published earlier this year for public comment. Dependent spouses of intracompany transferees (L-1 visas) and treaty investors and employees (E visas) are eligible for work authorization under current law.



## ***How?* Exemption from H-1B Cap for Nonprofit Research Organizations**

- A new definition of “affiliated with an institution of higher education” will allow for broader exemption from the annual cap on H-1B visas. This change is expected to benefit a relatively small number of nonprofit research organizations.
- Current law requires a showing that the petitioning employer is:
  - (i) connected or associated with an institution of higher education through shared ownership or control by the same board or federation;
  - (ii) operated by an institution of higher education;
  - or (iii) attached to an institution of higher education as a member, branch, cooperative or subsidiary.

## *How?* Ensuring Use of Employment-Based Visa Numbers

- USCIS to work with the State Department to ensure *prospectively* that employment-based visa numbers are used each fiscal year and that *any unused numbers are preserved* for use in subsequent years.
- Hundreds of thousands of employment-based numbers have gone unused in prior fiscal years because of the way in which the annual allotment of 140,000 employment-based visas is allocated by the State Department. Possible “recapture” of those unused visa numbers from prior fiscal years is likely to be raised by stakeholders in the **Presidential Memorandum** process described below.

## ***How?* Making Employment-Based Immigrant Visa Categories “Available”**

- USCIS to work with the State Department to improve the system for determining when immigrant visas are considered “available” to applicants during the fiscal year.
- This will allow for applications for immigrant visas and adjustment to permanent residence to be filed much earlier for those who have been waiting in the visa queue and will provide relief for dependent children who might otherwise age out while waiting in line under the current process.
- *If, as expected, the State Department makes the employment-based visa categories “current” it likely will do so only for a brief period.*
- Employers sponsoring their nonimmigrant employees for green cards will want to follow developments closely to ensure they are ready to assist employees with their applications for adjustment of status and those of family members.

## *How?* Expanded Green Card Portability

- Regulatory changes would allow workers with approved employment-based immigrant visa petitions (Form I-140) to move or change jobs even while they wait for a visa to become available (which can take years in some cases).
- Under current interpretation the worker's adjustment of status application must have been pending for six months or more before the worker may change jobs. Also, USCIS will provide guidance for the definition of "same or similar" job for purposes of expanding eligibility for a green card applicant to move to a new job or employer.
- This will help not only those in the green card process who wish to change employers, but also those employees who move to a different job with the same employer.

## ***How?* STEM Graduates Given Longer Practical Training Authorization**

- Post-graduate (OPT) work training authorization for US college graduates in science, technology, engineering and mathematics (STEM) can last up to 29 months—this would be extended.
- USCIS would approve extended OPT for STEM graduates who are pursuing non-STEM advanced degrees, such as an MBA.
- The Secretary has also directed establishment of stronger ties between OPT and the degree-granting institutions.
- Labor market protections, which could include a prevailing wage requirement, will be imposed in order to safeguard the interests of US workers in related fields.

# ***How?* Promoting Research and Development in the United States**

- Enhanced and expanded options designed to encourage foreign entrepreneurs to invest, create jobs and generate revenue in the United States, including a broader application of the “public interest” parole authority and “national interest” waiver of the labor market test and job offer requirements for green card status.

# ***How?* Bringing Greater Consistency to the L-1B Visa Program**

- Noting the “vague guidance and inconsistent interpretation of the term ‘specialized knowledge,’” which has created uncertainty for companies managing global workforces as they “choose where to establish new or expanded operations, research centers, or product lines, all of which stand to benefit the U.S. economy,” the Secretary has directed USCIS to issue a policy memorandum that provides clear, consolidated guidance on what constitutes specialized knowledge for L-1B visa eligibility.
- Definitive guidance on this issue is long overdue.

# Streamlining the Process

- On November 21, 2014, the President issued a **Presidential Memorandum** on “Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century” directing the immigration agencies to develop recommendations to improve the current visa system by March 20, 2015.
- The focus for streamlining includes:
  - Efficient processing of all immigrant (permanent) and non-immigrant (temporary) visas, with an emphasis on reducing costs, waste, and fraud;
  - Complete usage of all available immigrant visa numbers, consistent with demand; and
  - Development of a stronger technology infrastructure to improve the applicant’s experience, enable better oversight, and eliminate duplicative systems.



# **Current And Future Congressional Activity And Response To President Obama's Executive Action**

# Republican Response



- **House Speaker John Boehner:** *“This is a serious breach of our Constitution... It’s a serious threat to our system of government, and frankly, we have limited options and limited abilities to deal with it directly. But that’s why we’re continuing to talk to our members.”*
- **House Majority Leader Kevin McCarthy:** *“While House Republicans will still work to do everything we can to move the country forward, it is our obligation and responsibility to fight this brazen power grab that doesn’t solve the real problems.”*
- **Senate Majority Leader-elect Mitch McConnell:** *“If President Obama acts in defiance of the people and imposes his will on the country, Congress will act... We’re considering a variety of options. But make no mistake. When the newly elected representatives of the people take their seats, they will act.”*

# Republican Response Short Term



- Fiscal Year 2015 Funding Fight:
  - House of Representatives will vote on two separate pieces of legislation
  - One long-term funding bill:
    - Funding all of the government – other than the Department of Homeland Security (DHS) – through September 30, 2015
  - One short-term funding bill:
    - Funding DHS through sometime in early 2015 – likely first quarter
- Symbolic vote on legislation disapproving of President Obama's executive action on immigration (H.R. 5759 – Executive Amnesty Prevention Act)
- No government shutdown

# Republican Response Long Term



- Congressional hearings:
  - House Committee on Homeland Security hearing on “The Impact of Presidential Amnesty on Border Security” (12/2/14)
    - Chairman Michael McCaul (R-TX): *“This unprecedented executive power grab undermines the principle that the people—not just one man—should be the ultimate decision makers on our country's most important political matters.”*
  - House Committee on the Judiciary hearing on “President Obama’s Executive Overreach on Immigration” (12/2/14)
    - Chairman Bob Goodlatte (R-VA): *“By acting lawlessly and assuming legislative power, the Obama Administration is driving full speed ahead to a constitutional crisis, tilting the scales of our three-branch government in his favor and threatening to unravel our system of checks and balances.”*

# Republican Response Long Term (continued)



- Likely continued action through budget/appropriations process in coming fiscal years
- Senate GOP holding up Presidential nominees
- Litigation component?

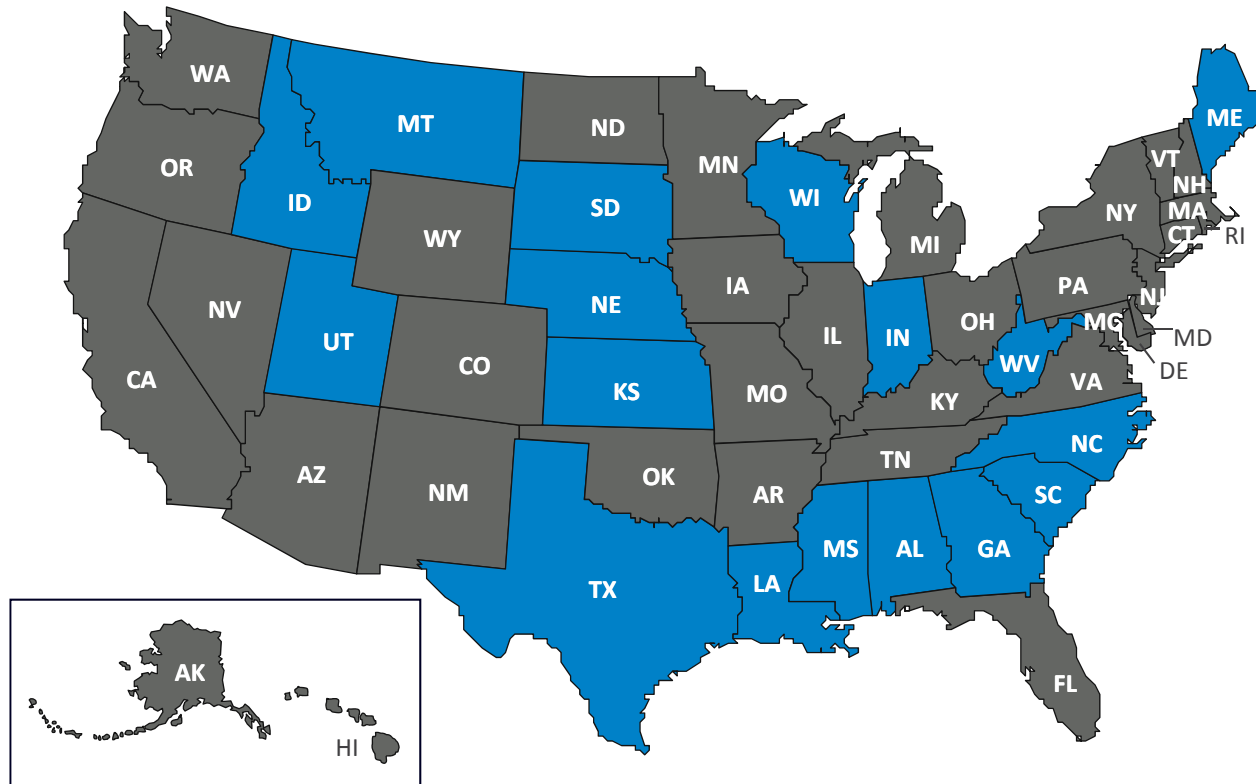
# Democratic Response



- Will continue to defend the President's executive action
- Given their minority status in both chambers of Congress, there is not much they can do legislatively
- Rather, House and Senate Democrats view this as a wedge issue and believe Republicans will tie themselves in knots
- 2016 implications?

# State Response

- 17 States have sued the U.S. over the President's Executive Order:
  - AL, GA, ID, IN, KS, LA, ME, MS, MT, NC, NE, SC, SD, TX, UT, WV and WI



# State Response

- Led by Texas Attorney General and Governor-elect Greg Abbott
- Suit claims:
  - Violation of the Take Care Clause of the U.S. Constitution
  - Agency directives implementing the order violate the Administrative Procedure Act's required notice and comment rulemaking process
  - Will exacerbate the humanitarian crisis along the southern border, which will affect increased state investment in law enforcement, health care, and education



**Questions?**

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