



US Immigration: a new era of protectionism and enforcement

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In the US, as elsewhere, the recession of 2008-2009 has fuelled the long-standing debate on business immigration: should immigration policies restrict the hiring of foreign personnel in response to rising local unemployment, or do protectionist immigration policies impede economic recovery and growth by inhibiting access to foreign skills and talent that can yield innovation and competitiveness?

The Obama administration, a stated champion of comprehensive immigration reform, has been too occupied with a packed political agenda to take on the reform initiative and the opposition that it is likely to generate. It has, however, considerably stepped up enforcement of employer worksite compliance obligations with unannounced visits to sites of companies who petition for foreign talent, and implemented new documentation requirements and procedures for travellers to the US.

In summary, whatever the merits of the debate, the year has definitely witnessed a downturn in cross-border movement,

as well as an elevation in the need for employer compliance.

The first sign that immigration protectionism might serve as the favoured response to rising unemployment was the Employ American Workers Act (EAWA), which appeared in a short but nonetheless important provision of the American Recovery and Reinvestment Act of 2009 signed into law by President Obama on 19 February 2009. Sponsored by Senators Charles Grassley (R-RI) and Bernie Sanders (I-VT), EAWA was passed with little or no debate in Congress.

The legislation classified institutions that had received funds from the Troubled Assets Relief Program (TARP) or who had received credit from the Federal Reserve System under Section 13 of the Federal Reserve Act as "H-1B dependent employers". This classification restricted the funds' recipient from hiring a new foreign worker in H-1B classification, unless the employer could demonstrate that it had not displaced a US worker 90 days before and after filing of an H-1B Labor Condition Application. Since most recipients of funds under TARP and Section 13 of the Federal Reserve Act had undergone layoffs, these institutions were effectively barred from hiring new H-1B employees.

SHOCKWAVES

The legislation sent shockwaves through the financial services sector, which has historically utilised foreign talent to compete in a global economy. Foreign students who had been attracted to and educated by US universities would also be deprived of opportunities to utilise skills in high demand. The legislation has served to alienate skilled foreign workers and foreign students in the US, and encouraged them to find employment and educational opportunities elsewhere.

Shortly after EAWA's passage, anti-immigrant forces in Congress sought to take advantage of the momentum that EAWA provided. On 28 April 2009 Senators Richard Durbin (D-IL) and Charles Grassley (R-RI) introduced a new bill, the H-1B and L-1 Visa Reform Act, that seeks to impose new obligations and requirements on employers of H-1B and L-1 workers. For the H-1B programme, employers would be required to take steps to recruit qualified US workers for which H-1B workers are sought and would be prohibited from displacing US workers in the period 180 days before and after the filing of an H-1B petition.

It has the effect of making all employers of H-1B workers subject to similar regulations that presently apply only to H-1B dependent employers or willful violators. The bill would also impose significant changes to the wage requirements for H-1B workers. For the L-1 visa, the bill would place limits on L-1 workers at secondary sites as well as impose new wage requirements on employers similar to those proposed in the H-1B context. Finally, the bill would significantly expand the government ability to investigate, audit and impose penalties on employers for violations.

Stepped-up enforcement of employer worksite obligations and audits of employer practices would not be new. The Department of Homeland Security (DHS) has already increased its investigations of US employers as part of a broad initiative to uncover fraud in the filing of employment-based immigration petitions, and to enforce compliance with Form I-9 employment verification requirements.

The Fraud Detection and National Security (FDNS) unit of US Citizenship and Immigration Services (USCIS) has deployed officers and contract investigators to make



on-site visits to employers for the purpose of verifying information in immigration petitions previously filed by the employer on behalf of foreign national employees. The initiative is funded, in part, by the \$500 "fraud fee" USCIS collects with the filing of an H-1B or L-1 petition. Typically FDNS site visits are unannounced, and questions range from details pertaining to a specific immigration petition (such as an H-1B or L-1 petition) to the company's immigration programme generally. The FDNS investigator may ask to speak with both the company representative identified as the signatory on the petition, as well as the foreign national beneficiary, to verify the information in the petition. The investigator may also ask to see related company records, such as payroll records, to verify information in the petition.

While the FDNS focuses on investigating immigration benefit programmes, US Immigration and Customs Enforcement (ICE) announced in July 2009 that it would increase its audits of companies to ensure compliance with employment verification laws and regulations. ICE investigations typically commence with a Notice of Investigation (NOI) sent to the employer, requesting access to documentation related to the employer's Forms I-9. Most NOIs provide the employer with three days to present the documentation requested.

Although ICE's focus has been on the criminal prosecution of employers who knowingly hire unauthorised workers, employers found to have committed errors on the forms are subject to civil penalties.

E-VERIFY

On 8 July 2009 the Obama Administration also announced its support for E-Verify, an online system to verify the work authorisation for each new employee. Employers check basic Form I-9 information and social security numbers against records in the Social Security Administration (SSA) and DHS databases. Employers must accept reporting obligations in addition to maintaining Forms I-9 and must agree to take certain steps, including possibly terminating an employee or documenting the reasons for continued employment, if the employer cannot confirm the employee's work authorisation through E-Verify.

Specifically, the announcement gave support to the Federal Acquisitions Regulatory Council final rule requiring federal contractors and subcontractors to verify the work authorisation of employees utilising the E-Verify system. If a federal contract contains the E-Verify clause, the regulations require that the contractors and subcontractors utilise E-Verify to verify the work authorisation of new employees as well as all existing employees who are "assigned to the contract". An employee is considered "assigned to the contract" if he/she was hired after 6 November 1986, and directly performs work in the US under a contract containing the E-Verify clause. Employees who normally perform support work and do not perform any of the substantial duties under the contract need not be processed through E-Verify.

TRAVEL

The enhanced enforcement of immigration laws by employers has been accompanied by new travel documentation requirements. On 12 January 2009, all foreign nationals travelling to the US under the Visa Waiver Program (VWP) are required to obtain authorisation from the Electronic Screening System for Travel Authorisation (ESTA) prior to travelling to the United States. VWP travellers who fail to obtain the requisite ESTA approval may be denied permission to board an air or sea carrier and/or denied admission to the US.

Furthermore, commencing 1 June 2009, all travellers entering the US at land and sea ports will be required to present an approved travel document establishing identity and citizenship. This change primarily affects citizens of the US, Canada and Bermuda who currently may be admitted at US land and sea ports by presenting a government-issued photo identity document and a second document establishing citizenship.

Finally, in June 2009, DHS implemented a new pilot programme to collect fingerprints and biographic information from foreign nationals who departed the US from Detroit Metropolitan Wayne County Airport and Hartsfield-Jackson Atlanta International Airport. This pilot programme is a part of the US-VISIT electronic check-in system for most arriving passengers. Implementation of the departure procedures is expected to be carried out at all US ports of embarkation in 2010.

Comprehensive immigration reform remains on the political agenda of the Obama administration. If enacted, such reform would certainly provide a measure of relief to undocumented immigrants. However, it remains to be seen if reform will actually incorporate the recent elevation in immigration protectionist sentiments for employment-based immigrants, or if a less restrictive policy will be seen as a catalyst to economic recovery. Whichever way the pendulum swings, US employers should continue to expect the administration's heightened enforcement of worksite compliance obligations.



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