

The Impact of the U.S. Presidential Election on Business Immigration Issues

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In an electoral cycle made infamous by a historic level of emotion and division, perhaps no issue sparks as visceral a reaction as immigration. It raises concerns that go to our core values as Americans: How do we remain competitive in a global economy, yet provide opportunity and protect the wages of U.S. workers? How do we maintain national security without prejudicing civil rights and the efficient flow of goods and people across our borders? How do we support the historic American values of inclusion and welcoming “the tired, the poor, the huddled masses yearning to breathe free,” without disadvantaging those already struggling to achieve the American dream? How do we define ourselves as a nation? How do we retain our identity?

The results of the election took even the outlier pundits by surprise. On November 9, 2016 the country, and the world, woke up to a President Elect Donald J. Trump, who will be governing a Republican-controlled Senate, a Republican-controlled House, and will be charged with the responsibility of filling at least one Supreme Court vacancy during his tenure, most likely with a conservative Justice.

President Elect Trump made a very restrictive immigration policy a central tenet of his campaign, a message that appeared to resonate with a significant portion of the electorate. His promise of change, of offering employment opportunities to a sector of American society which feels disenfranchised, may well have led to his victory.

Regardless of how one feels about the results of the elections, business leaders must now turn their attention to where we are as a nation, where we are going, and attempt to structure business decisions accordingly.

How We Got Here

In a rare point of bipartisan consensus, Republicans and Democrats have long agreed that the U.S. immigration system is broken. But that is where the agreement ended. Due to Congressional gridlock, the presidential use of executive actions to push some kind of change in immigration laws has been attractive and arguably necessary. Both the Bush and the Obama administrations used their executive powers to take unilateral action to shape immigration policy where Congress refused to act.

President George W. Bush used his authority to expand E-Verify, requiring that U.S. employers use the Internet-based system to verify the identity and work authorization of individuals working under federal contracts.

President Obama used his authority to support prosecutorial discretion, directing that enforcement efforts be focused on immigrants with criminal records. He also provided temporary protection from deportation for undocumented individuals brought to the United States as children, through a program known as DACA (Deferred Action for Childhood Arrivals). Notwithstanding these directives, it should be noted that more people, more than 2.8 million, were removed from the United States during the Obama administration than during any other.

Recognizing the significant employment and economic contributions of foreign-born entrepreneurs, President Obama also used his executive authority to direct the Department of Homeland Security (DHS) to expand immigration options for foreign entrepreneurs, researchers, inventors and founders.

To prevent students educated in the United States in STEM fields from leaving to contribute their skills abroad, President Obama directed the promulgation of regulations to expand Optional Practical Training for foreign students graduating from U.S. universities in a STEM field, while adding provisions to safeguard the wages and working conditions of similarly-situated U.S. workers.

The above change is also beneficial for employers who must otherwise roll the dice to retain employees through the H-1B lottery process, where annually demand for visas continues to exceed supply. In Fiscal Year 2017, U.S. employers filed 236,000 petitions for the roughly 85,000 visas allowed annually by statute. The time, cost and uncertainty involved in the current system makes it impossible for employers to plan their available workforce and align it to project needs.

Competing Interests

Despite the above actions, most employers and practitioners will tell you that our immigration system remains a block to many business initiatives. A lack of predictability, consistency, and frankly, competence in adjudications, continues to vitiate progress. It results in a loss of time, money, and competitive advantage in time-sensitive projects in a globally competitive economy.

On the other hand, any ease in the burden of hiring foreign nationals for positions in the U.S. raises concerns about the impact on opportunities and wages of U.S. workers, a point emphasized by the recent presidential campaign. Let's speak candidly. Do some U.S. employers – and foreign national employees – commit fraud? Yes. Highly-publicized cases have triggered understandable outrage among U.S. workers. As with any law, there will be violators. The question is how best to address the violators. The solution is to enact minimally obstructive laws and procedures to ensure the highest degree of compliance without hamstringing employers. Fair and competent enforcement of employment practices and competence and consistency in the admissions process is also critical to an effective immigration system. Quite frankly, these are factors which are lacking in some sectors of our current immigration system.

President Elect Trump's Plan

In his first 100 days in office, President Elect Trump has promised a number of actions as part of his "Contract with the American Worker."

Some of the highlights with respect to business immigration:

All Executive Actions enacted by President Obama will be reversed.

- **Promotion of lawful employment-based immigration.** The reversal of efforts to encourage investment and entrepreneurship in the United States is a step backwards with regard to an employer's ability to compete in the global economy.
- **Compassion for the undocumented.** How we as a nation choose to treat the undocumented will have a significant impact on the U.S. economy. It would be short-sighted for the business community to concern itself only with issues of legal immigration. Companies which employ only documented workers may believe that what happens to the undocumented population is irrelevant to their business. Not so. Each sector of the economy plays a role in its overall health; an impact on one sector will necessarily impact the next, and the next.

For every new federal regulation, two existing regulations must be eliminated. There is no reference as to the substance of the regulations chosen for elimination in such a swap.

Renegotiate or withdraw from The North American Free Trade Agreement (NAFTA). NAFTA includes a provision for work authorization for certain professional positions for Mexican, American, and Canadian nationals in the respective countries. For those who cannot obtain an H-1B, in some cases the TN visa has been the only alternative.

Initiate a process of "extreme vetting" of foreign nationals entering the United States. It is unclear what "extreme vetting" would entail, what this would mean to the efficient flow of both business and tourism travel to the United States, and who would get caught up in the net of suspicion.

Suspend immigration from “terror-prone regions where vetting cannot safely occur.” What constitutes a “terror-prone” region is not defined. However, if we look at past practices in which men from predominantly Muslim countries were required to register under the NSEERS program post September 11, 2001; and President Elect Trump’s recent suggestion to temporarily ban Muslims from the U.S., it is not unreasonable for an employer to anticipate that hires of nationals from any predominantly Muslim country will be increasingly difficult.

Fund the construction of a wall on our southern border, and somehow require Mexico to reimburse the cost. From a business perspective, this raises the critical question of whether the wall, and/or whatever measures are taken to “force” Mexico to pay for it, will result in a stagnation of the efficient flow of goods and services across the southern border region. As an example of the potential impact, one can consider the San Diego-Baja California, Mexico region which constitutes a significant economic sector. The San Ysidro Port of Entry, located on the southwestern border between San Diego, California and Tijuana, Mexico, is the busiest land border port of entry in the Western Hemisphere. Increasing border wait times by even a couple minutes per traveler can have a major impact on business operations. The impact of cutting off cross-border trade and travel with Mexico altogether is incomprehensible.

Enhance penalties for overstaying one’s visa status. There are no details available with regard to how and in what circumstances this would be implemented. In practice, overstays of visa status can occur not just as a result of an intention to circumvent immigration laws. They can also occur through innocent oversight and/or government error in the admission process – for individuals in all visa statuses.

Vague mention of “ensuring jobs are open to Americans first.” This seems to indicate a labor certification-type test of the labor market would be required for most or all visa classifications before a position could be made available to a foreign national. Currently, positions such as those for intracompany transfers, some of the already highly-regulated H-1B petitions, professional positions under NAFTA, and positions requiring “extraordinary ability” (accomplished researched scientists, talented musicians, Nobel Prize laureates, etc.) are exempt from this requirement. The expense, time and administrative burden of requiring labor certification in all classifications would likely serve the desired result of creating a great disincentive to U.S. employers from hiring foreign nationals. The question is what impact this will have in a company’s ability to compete in a global economy.

Analysis

Interestingly, the above actions will require either Presidential Executive Action, or Congressional action and the promulgation of regulations, which must go through the process pursuant to the Administrative Procedures Act. Yet, the plans outlined above abhor federal regulation. It bears noting that immigration law is primarily federal, with the exception of some state and local ordinances.

Also notably absent from the above is a focus on worksite enforcement of immigration laws. To the contrary, there is a clear disdain for additional regulation. In the last two Presidential Administrations and concurrent Congresses, a focus on worksite enforcement (code for oversight and penalties applied to employers) has been the *quid pro quo* for any immigration-related legislative change. Despite presidential directives, to obtain Congressional support worksite enforcement is likely to be a necessary element of reform, both for the prevention of fraud and the protection of the U.S. workforce.

Regulation in and of itself is not evil. Immigration laws must be established rationally, with an understanding of the competing interests at stake. Regulation must be fair, and competently enforced. If our laws make it too difficult to do business in the U.S., companies will take their business elsewhere. This results in certain loss of employment opportunities for everyone in the United States, as well as the loss of economic benefits successful companies contribute to our community, both locally and nationally.

Conclusion

It is this author’s experience over more than 19 years of practice in the field that the vast majority of employers go through the lawful immigration process because they truly have a need; they wouldn’t go

through the cost and administrative headache of hiring a foreign worker otherwise. The legitimate, law-abiding employers and foreign nationals should not pay for those who commit fraud. The baby should not be thrown out with the bathwater.

What the election has shown us is how many U.S. workers feel disenfranchised, left behind in the global economy. It has also shown how such concerns can quickly turn to a fear and blame of "the other." From a historical standpoint, this is not a new psychological phenomenon. This fact cannot and should not be ignored.

The issues we must address encompass not only business and legal immigration. The undocumented and how they are treated will play a vital role in the overall U.S. economy. Establishing law and policy is just the beginning. Applying the laws and policies consistently, fairly, with humanitarian compassion, and with an understanding of business reality is a much larger issue.

As a nation, we have been through a civil war of sorts. It is time for reconstruction. We need to discuss immigration issues professionally, respectfully, and constructively. We must learn how to listen to one another again. As part of this process it is critical for each of us as individuals, and the business community as a whole, to take a leadership role in that conversation.