

Biden has begun dismantling Trump's immigration rules. How long will H-1B holders need to wait to see results?

Synopsis

Biden's administration has already withdrawn the regulation that was not yet published: the USCIS regulation that redefined employer-employee relationship to a far stricter level than we have ever had before, and required end-clients to be actively involved in the H-1B process.



Most stakeholders are well aware that changes in US immigration processes are inevitable and already in the works. How long do we have to wait? This is a question shrouded in much confusion – – and rightly so as I will explain.

To start with the bottom line, some of the changes can be affected within a day (executive orders, policies, and procedures), some can take four or five months (regulations), and some will take many months (statutes).

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Executive Orders, Policies and Procedures

Changing executive orders and policies can be especially easy and quick because the changes do not require any approvals or procedures beyond the consent of the top decision-maker charged with the subject matter administration. For instance, President Biden nullified Trump's Muslim ban with the stroke of a pen on his first day in office, January 20th, 2021.

Changing procedures can be equally uncomplicated, but only if the infrastructure to execute the changed procedures is already in place. If the changed procedures require investment in training or materials, the changes could take a few weeks to a few months to implement.

Currently we have only one executive order that is particularly cumbersome for immigration – – the visa ban that was instituted and extended to March 31, 2021 by Trump. In my opinion this executive order has not been overturned because this requires some consideration. The Trump administration had used unemployment as an excuse to ban foreign workers, artfully avoiding the central issue: is there high unemployment in specific professions? Dockworkers and neurosurgeons are different categories of professions and overall unemployment rate in no way reflects specific vacancies in each profession. In fact, many authors and I have pointed out that there is relatively little attrition in most professional categories. A recent study published in the Harvard Business Review (January 22, 2021) found that just one of Trump's executive orders (H-1B visa banning) cost the US economy \$100 billion and had a significant long term deleterious impact. Ill considered changes bring untoward consequences.

Regulations

Broadly, changing a regulation depends upon whether it has been formally published as a final rule.

Mr. Biden's administration has already withdrawn the regulation that was not yet published: the USCIS regulation that redefined employer-employee relationship to a far stricter level than we have ever had before, and required end-clients to be actively involved in the H-1B process. Concomitant with the withdrawal of that regulation, the US Department of Labor withdrew its policies that implemented some of those changes.

The regulations that have already been published would need to be withdrawn through the same process it takes to promulgate the regulation. This process can take a few weeks, and then the publication and finalization can take three to four months.

We have to consider the fate of the most urgent surviving regulation: The H-1B lottery rule that requires only the highest paid workers to be selected in the lottery. Note that this highest paid selection does not apply to H-1B amendments, extensions, or transfers. Currently, this regulation is frozen till March 21, 2021 (or perhaps longer), but this could still impinge into the lottery this year.

I believe that the change in regulations, including the lottery regulation, is much more likely to come rapidly through an order of the court in a lawsuit than through the regulatory process. The stakeholders will have to sue the government. Note that the courts have a history of prohibiting the government from just walking away from a regulation by conceding a lawsuit. There will have to be justification for the court to rule in our favor, and I think, we have that.

Statutes

Changing the statutes is the most cumbersome, unpredictable, and lengthy process because it must go through several committees in both chambers of Congress and then be debated and changed several times. In addition, Congress is likely to hold hearings to ascertain basic facts and get opinions of the stakeholders. Unless firmly managed, this process could drag on for six months or more.

Notwithstanding the potential for delays and deadlocks, the good news is that this is the first time I see a real hope for a comprehensive change in immigration laws since 2013. The Democrats have the White House and a majority (albeit, a slim one) in both chambers of Congress. Also, there is a definite bipartisan acknowledgment that our immigration laws need to be fixed. That bodes well for reform.

Although much remains uncertain about the time and content of change, it is certain that change is coming.

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