On Tuesday, April 18, 2017, the Trump Administration signed an Executive Order (“EO”) titled, Buy American and Hire American. The EO directs the US Departments of Labor, Justice, State, and Homeland Security to look into ways to reform the current H-1B process used by companies, but in particular, the hi-tech industry, to prevent fraud and abuse. Nothing in this EO’s wording changes or limits the current H-1B visa program. Any future EO that tries to drastically change the current H-1B program will be met with industry opposition and legal action since much of the current H-1B program is statutory or defined by regulation. Only Congress can change the laws, and any regulatory changes must first require legal vetting through proper notice and commentary procedures required by the Administrative Procedure Act.

The current H-1B visa program has been in place since 1990. Since that time, some of the program’s weaknesses and vulnerabilities have reared its ugly head. Unfortunately many of these weaknesses have been exposed and manipulated by the ‘bad apple’ employers who refuse to follow the rules while using the process to hire only the lowest-paid employees. Other noted weaknesses of the program include the
arbitrariness and unfairness of the annual cap lottery; the inability to differentiate between employers that try to hire the best minds compared to those that recruit lower-paid, entry-level professionals; and the use by some employers to outsource their IT work overseas while having their U.S. counterparts train them only to terminate the U.S. workers thereafter.

There also is considerable xenophobia that H-1B visa workers are all taking US jobs or that H-1B workers are being paid lower than their US counterparts. The real facts show there are only 85,000 new cap-based H-1Bs issued every year and that the H-1B regulations require payment of wages commensurate with the local job force. Unfortunately the use of the H-1B program by a small number of unscrupulous employers continues to generate bad press resulting in the current Administration’s EO focus on the H-1B program.

So what does this EO mean going forward? For the immediate future, nothing more than further scrutiny and press for possible abuses. The Trump Administration lacks the legal authority to unilaterally change the H-1B program without Congressional legislation or proper promulgation of new regulations under the Administrative Procedure Act. But it still can implement directives to prevent abuse and fraud, including increased policing through random onsite inspections confirming companies are adhering to the H-1B program; increased filing fees to pay for such onsite inspections; increased investigation of potential high-risk employment violators that do not follow the H-1B regulatory requirements to pay the required wages; and implementing a fairer type of selection system, other than a random lottery, for choosing new H-1B cases for each fiscal year.

In this regard, the added scrutiny of the H-1B program actually may work to the advantage of the ‘good employers’ that follow the rules and try to hire the “best and the brightest.” Much of recent H-1B focus and bad press are attributable to the foreign consulting companies that consume nearly half of the allotted H-1B numbers each year and are part of the U.S. outsourcing controversy. By decreasing the number of H-1Bs issued to these companies, more H-1Bs will be available for employers that follow the rules and seek to fill truly hard-to-find positions.

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