



Trump Will Have Means to Limit Legal Immigration

The future of guest worker visa programs is uncertain

Roy Maurer

November 22, 2016

President-elect Donald Trump's campaign for the White House was dominated by the debate over illegal immigration, but he also promised voters to reduce legal immigration to "within historic norms," overhaul the U.S. immigration system and protect U.S. workers from displacement from temporary guest workers.

The Trump transition team released a video Nov. 21 on YouTube announcing some of his planned executive actions, including directing the U.S. Department of Labor "to investigate all abuses of visa programs that undercut the American worker." And a key tenet of Trump's Aug. 31 address on immigration was a call to create a commission to study immigration levels and periodically revise visa caps.

However, any changes to the immigration system that require legislation will depend on whether Trump can work with Republicans and Democrats and whether the parties can reconcile their policy differences. "While Trump may benefit from a united Republican Congress on some issues, the Republican majorities in the House and Senate are slim, and that means most legislation will require bipartisan support and a willingness of Congressional leaders to work together to pass any legislation, especially on immigration," said Rebecca Peters, director of government affairs at the Council for Global Immigration (CGI), a nonprofit trade association committed to advancing the employment-based immigration of high-skilled professionals and an affiliate of the Society for Human Resource Management.

Issues of national security or protecting, educating and training American workers could garner bipartisan support and possibly move in pieces, she explained. "Other more divisive items may have to ride on must-move legislation or possibly through less-used mechanisms that require a simple majority in the Senate to pass."

Peters said CGI will be tracking the legislation Trump plans to introduce next year, outlined in his first 100-days plan—the End Illegal Immigration Act. While the bill, if introduced, is likely to be focused on border security, it is unknown whether it will include provisions addressing recruitment requirements for employers, a pause on issuing green cards to workers abroad or a mandate that employers hire from the domestic pool of unemployed workers first. It remains uncertain if Congress would include such provisions early next year.

"We remain hopeful a new administration and Congress will understand the economic benefit of high-skilled immigration especially where employers experience skills gaps," Peters said.

Alex Nowrasteh, an immigration policy analyst at the Cato Institute, a libertarian think tank in Washington, D.C., did the math on one of Trump's proposals to stop issuing employment-based green cards to workers who are not already living in the United States. The U.S. issued 151,596 employment-based green cards in 2014; 86 percent went to workers already in the United States on other visas and 14 percent went to workers abroad. The government issued 645,560 family-based green cards in 2014, which also allow recipients to work in the United States. Sixty-one percent of these visas went to immigrants who were not in the country. "Depending on how you dice it, this provision could cut between about 140,000 and 540,000 green cards annually," Nowrasteh said.

Trump also asserted during the campaign that the selection process for visas is "archaic" and that visa applicants should be judged by their "merit, skills and proficiency," an idea resembling the points-based immigration systems used in Australia, Canada and the United Kingdom.

"He clearly wants to give preference to people based on their supposed effect on the labor market," said Muzaffar Chishti, director of the Migration Policy Institute's office at New York University School of Law. "He is in effect saying that we should cut back on visas to lesser-skilled workers and those selected on the basis of family unification in favor of visas to higher-skilled, more-educated workers, with a heavier emphasis on employment-based selections," Chishti explained.

Trump's immigration plans also included possible actions to:

- Renegotiate or withdraw from key trade agreements like the North American Free Trade Agreement. "If he took such an action, this could affect the TN [visa] classification, a treaty-based classification that allows certain professionals from Canada and Mexico to work in the U.S. temporarily," Peters said.
- Suspend immigration from regions where vetting cannot adequately occur. "This could impact business travelers, executives, managers and other professionals coming to work in America from overseas, but we must recognize at this time there is no specific list of countries that would be impacted as policy decisions have yet to be made," Peters said.

"It's also possible that the new administration will not find a need to make many changes once they get a deeper understanding of how much vetting is already conducted in business immigration cases," said Julie Pearl, CEO and managing attorney of the Pearl Law Group, based in the San Francisco Bay area.

President-elect Trump could work to modify or revoke regulations stemming from President Barack Obama's executive actions on immigration, including rules allowing certain H-4 dependent spouses to file for employment authorization; improving job portability for certain visa holders; and allowing F-1 students with science, technology, engineering or mathematics degrees to apply for a 24-month extension of their post-completion optional practical training. However, as notice-and-comment rulemaking has completed on these regulations, he likely would need to commence full rulemaking to reverse them—a process that would take some time.

In addition, the expected proposal from the Department of Labor modernizing the labor certification system for employment-based green cards—currently at the White House—could be nixed before publication.

The Future of the H-1B

Trump mostly criticized the H-1B visa program for professional foreign workers, and advocated for boosting the prevailing wage to attain the visa in order to dissuade its use.

H-1B workers have an average salary of \$75,000, Nowrasteh explained. "If the minimum salary for H-1B visas was bumped up to \$100,000 then the number of H-1Bs hired by private firms would decrease. The H-1B system is also the feeder to the employment-based green card so any change here could disrupt future flows there even if no other changes are made."

Anton F. Mertens, a partner in the Atlanta office of Burr & Forman, expects more restrictions and extensive vetting for those applying for an H-1B and a limit to the number of visas issued. However, "Trump is a businessman, so most believe he will see the benefit of continuing the program for the sake of the economy," he said.

"What remains to be seen until the Congress convenes is whether populist and anti-trade Republicans will compromise with pro-growth, pro-business Republicans on H-1B reforms that [modify]—but do not end—the H-1B visa as a vehicle for helping American companies win the global war for talent," said Bill Stock, founding partner of Klasko Immigration Law Partners in the Philadelphia area and president of the American Immigration Lawyers Association.