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## Trump's Next Immigration Moves May Rock Businesses

By **Kevin Penton**

Law360, New York (February 13, 2017, 5:38 PM EST) -- President Donald Trump has already garnered plenty of attention with his immigration-related policies, but businesses may need to brace for even more changes if he moves forward with a recently leaked draft executive order that includes a call for revising H-1B and other work visas and legal immigration, experts said.

The draft executive order, which first surfaced in January in the wake of the highly publicized travel ban, would seek to terminate parole programs, expand site visits by immigration authorities and publicize the "devastating impacts" that the employment of foreign-born individuals has had on the wages and jobs of U.S. workers.

It would call for revisions to H-1B visas so that recipients are the "best and the brightest," a clarification of what work those entering the country on business visas could perform, a new procedure for processing H-2A agricultural visas, a reform of J-1 visas for summer work travel, and new regulations for governing the E-2 treaty investor category for foreign entrepreneurs, according to the order.

The document would also order the secretary of the U.S. Department of Homeland Security to set up an advisory committee or commission that would recommend changes to the nation's immigration laws so that merit is a more prominent factor in admissions, according to the order.

"Almost everything is on the table," said Susan J. Cohen, chair of the immigration practice at Mintz Levin Cohn Ferris Glovsky & Popeo PC.

There is concern that the draft executive order's tone and language, which includes a call for protecting the "civil rights of American workers and current lawful residents," could give more license to examiners of applications of visas such as H-1Bs or L-1s to interpret relevant laws less objectively and to inject their own biases, said Cyrus Mehta of Cyrus Mehta & Partners PLLC.

"It's already hard to get a visa approved for somebody who's setting up here as an entrepreneur," Mehta said. "I believe it's going to become even harder based on this executive order. Things have been tough, but they could get more difficult."

The order appears to target the H-1B, L-1 and B-1 visas in particular, with the appearance that the administration is considering restrictions on the visa categories, along with increased enforcement efforts, calling out L-1 visas specifically, according to Chad Blocker of Fragomen, Del Rey, Bernsen & Loewy LLP.

"I'm hoping that given that President Trump is a businessman, he would be able to understand that some of these restrictions would hurt American competitiveness and its global standing," said Mehta, who expects significant pushback should the draft executive order be signed and the administration seek to implement some of its provisions. "It won't just be the tech industry, I can see the entire business community pushing back."

Unlike the Jan. 27 executive order that immediately put into place a travel ban relating to seven predominantly Muslim countries, many of the provisions in the proposed executive order — which

the Trump administration has not indicated how close it may be to acting on — could not be pushed through overnight, but would need to follow a formal, orderly rulemaking process that would allow stakeholders to weigh in and attempt to steer the conversation, Blocker said.

The draft appears to be in its early stages, as it is clear that the administration could more clearly state its policy objectives and flesh out some of its ideas, said attorney John Miano, a fellow with the Center for Immigration Studies. For example, the order could also make calls for matters such as increased enforcement of nondiscrimination regulations protecting workers who are laid off and replaced with foreign-born employees, the elimination of the ability for H-1B visas to be renewed, or a shortening of the visas' terms, he said.

"The draft executive order is just scratching the surface," Miano said.

Should critics of the proposals sue the administration over the legality of what would be proposed and actually find a judge that agreed with them, Trump could then move to stop the issuance of the visas while the matter is under appeal, a prospect that could hold up new visas for years, he said.

"People who would sue over that would be taking a very large risk," said Miano, who believes that critics of the travel ban are using their challenge to that executive order as a warm up to the battle over work visas and legal immigration. "They're not earning themselves any friends in the Trump administration."

While the draft executive order certainly covers a lot of ground on all the different visa programs it is looking to target, said A. James Vazquez-Azpiri of Morgan Lewis & Bockius LLP, he believes that many of the provisions, on their own, do not appear to be well thought out and "even border on the nonsensical," such as the part that refers to protecting the civil rights of U.S. workers.

"I've never seen that claim made, even by the most extreme of the restrictionists," Vazquez-Azpiri said.

While the draft executive order is mostly silent on the question of fees for the different programs, Vazquez-Azpiri said the levies could only go up, particularly as the administration considers costly measures such as site visits within two years for all work-based visa programs.

Vazquez-Azpiri said he is to a very small degree encouraged by some of the draft executive order's provisions, such as calls for overhauling the messy lottery system currently used for allocating H-1B visas and the current system of calculating immigrant visa availability, which can impose particularly long waits on Indian and Chinese nationals, he said.

Cohen said he believes that clarifications to the type of work that can be performed under B-1 nonimmigrant business visas and to how the J-1 summer program is operated would be potentially beneficial.

If such provisions were based on sound research and data and effectively implemented, the changes could bring positive change for prospective visa applicants and the companies looking to bring them in, Vazquez-Azpiri said. But some experts questioned whether the Trump administration would be up to the challenge.

"I don't hold out much hope on that," Cohen said.

While Trump may be looking to appease his base and deliver on campaign promises to act tough toward what he perceives to be the taking of jobs from Americans by those born abroad, the draft executive order's characterizations of the supposed negative impact that work visa holders and immigrants have on the U.S. economy do not correspond with numerous studies that report the opposite, Mehta said.

Foreign-born workers may bring skills to a company that are complementary to those of U.S. workers, they may allow a company to create additional capital and jobs, or they may initiate a business on their own and create jobs themselves, Mehta said.

"It's not a zero-sum game," Mehta said.

--Editing by Katherine Rautenberg and Kelly Duncan.

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