2021 Digest of NFAP Forbes Articles on Trade and Immigration

Below are links to Forbes articles that have appeared in 2021 divided by topic. The articles are also pasted below in full and can be found by searching for the title.

H-1B Visas and High-Skilled Immigration

The Story Of How Trump Officials Tried To End H-1B Visas

USCIS Taking Two Years To Process Many Applications For H-1B Spouses

Trump's H-1B Visa Wage Rule Is Dead: What's Next?

Over 1 Million Job Vacancy Postings In Computer Occupations In U.S.

2021 Might Be A Decisive Year For H-1B Visas

U.S. Chamber Of Commerce Lawsuit Looks To Slay H-1B Visa Rules Again

Trump DOL Wage Rule Remains Threat To H-1B Visas And Immigrants

Plaintiffs Dispute USCIS Reasons For Long Delays For H-1B Spouses

DOL Delays Trump Wage Rule Poised Against Immigrants And H-1B Visas

Immigration Bill Shows Need To End Employment-Based Immigrant Backlog

New Bill Has Many Good But Two Bad Measures For Employment Immigrants

H-1B Visa Ban Not Sustainable Amid Low Computer Unemployment Rate

Ending Unlawful Trump H-1B Visa Policies Caused Denials To Plummet

Trump Ignores Jobs Data To Extend H-1B Visa And Immigration Bans

The Outlook On H-1B Visas And International Students In 2021

DOL H-1B Visa Wage Rule: Donald Trump's Bad Parting Gift To Immigrants

DHS And DOL Team Up On H-1B Visas Against IT Services Companies

The Biden Administration And What Happens To Trump's H-1B Visa Rules

International Students

Research: More International Students, More U.S. Student STEM Degrees

Rule To End The H-1B Visa Lottery Would Harm International Students

U.S. Businesses And Universities Defend STEM OPT In Court

What International Students And U.S. Universities Need To Know

AI Commission: Immigrants Key To America's Tech Competitiveness

Trump And Miller Left Biden With Unfinished Immigration Business

Asylum, Refugees and the Border

Asylum Expert: Respecting Human Rights Also Controls The Border

Joe Biden's New Policies For Asylum, DACA And Legal Immigration

Illegal Immigration In America Has Continued To Decline

Immigration – General

Evidence Mounts That Reducing Immigration Harms America's Economy

The State Department Can Act To Reduce Visa Delays

New Research Makes Case For Increasing Immigration

Lawsuit Challenges Biden Administration Covid-19 Visa Policies

Businesses Lend Support To The Case For Dreamers

Attorneys Question Logic Of Policy Blocking Business Visas In Europe

Pardons May Have Revealed Insincerity Of Trump Immigration Policies

Unlike Trump, Bush Paints A Kind Picture Of Immigrants

International Travel Nightmares Pause For Supersonic Dreams

Thomas Sowell: Common For Poor Immigrants To Make New Country Richer

America's First Employment-Based Immigrant: Friedrich Von Steuben

Trade

Trump's Tariffs Were Much More Damaging Than Thought

IMF Tells Biden To Dump Trump's Tariffs

Forbes

July 7, 2021

IMF Tells Biden To Dump Trump's Tariffs

By STUART ANDERSON

For the good of the U.S. and world economy, the International Monetary Fund (IMF) has advised the Biden administration to end the tariffs imposed by Donald Trump and his administration. The Biden administration has disappointed economists and trade analysts by continuing policies that objective measures show harm U.S. consumers and companies.

The "Concluding Statement of the 2021 Article IV Mission," which was issued on July 1, 2021, following the end of an official IMF staff visit, takes aim at U.S. trade policies.

"The [Biden] administration has underscored the need for a 'worker-centric' trade agenda that ensures that global trade benefits Americans as workers and wage-earners, not just as consumers," notes the IMF in a section titled Gaining from Trade. "In pursuing these objectives, a removal of the obstacles to free trade would help support U.S. workers and create more and better U.S. jobs (particularly in light of the domestic efforts that are being proposed to increase productivity, labor supply, and the competitiveness of U.S. producers).

"*It is of significant concern, therefore, that many of the trade distortions introduced over the past four years remain in place.* In particular, tariffs have been kept on imported steel and aluminum, washing machines, solar panels, as well as a range of goods imported from China. The administration has also committed to prioritizing U.S. producers in public procurement, strengthening 'Buy American' requirements put in place by the previous administration. These policies should be reconsidered. Trade restrictions and tariff increases should be rolled back and 'Buy American' provisions should be tightly circumscribed and made consistent with the U.S. international obligations. Doing so would underscore the U.S. traditional commitment to an open, stable, and transparent international trade regime." (Emphasis added.)

The Biden administration has maintained Donald Trump trade policies even though economic research has shown Trump's tariffs—the core of his trade policies—were even more damaging than initially believed.

Research by Mary Amiti, an economist at the Federal Reserve Bank of New York, and Sang Hoon Kong and David Weinstein, both economists at Columbia University, used movements in stock prices to measure the response to policy announcements on tariffs and the escalation of the U.S.-China trade war initiated by the Trump administration.

The economists found a long-term decline in U.S. consumer well-being (or "welfare") of 7.8%: "Our results show that the trade-war announcements caused large declines in U.S. stock prices, expected TFP [Total Factor Productivity], and expected inflation largely by moving macro variables, but also by causing declines in the returns of firms trading with China. We find that markets expect the trade war to lower U.S. welfare by 7.8 percentage points." Total Factor Productivity (TFP) "is the portion of output not explained by the amount of inputs used in production," as defined by the Harvard Business School.

"The results suggest that markets interpreted the impact of the tariffs as much more negative than what economists initially estimated," said David Weinstein in an interview. "Part of the reason stems from the fact that the U.S. tariffs rose significantly in 2019, and the earlier studies didn't include these higher rates. Moreover, the new analysis suggests that the tariffs' impact on productivity is likely to be a factor holding down U.S. growth rates. The tariffs protect the least efficient firms and reduced their incentives to innovate while hurting the most successful U.S. firms, reducing their ability to innovate."

The decline in stock market value caused by trade war announcements "amounted to a $3.3 trillion loss of firm value (equivalent to 16% of U.S. GDP [Gross Domestic Product] in 2019)."

The Congressional Budget Office has calculated the tariffs imposed by the Trump administration cost the average U.S. household more than $1,200 a year.

A letter (June 30, 2021) from Republican senators urged President Biden to end the Trump tariffs. "For more than three years, we have highlighted the harm to U.S. businesses from tariffs and the trade war. While campaigning, you acknowledged this harm when you stated 'American farmers, manufacturers and consumers' were 'losing and paying more,'" wrote Sen. Ron Johnson (R-WI), Sen. Chuck Grassley (R-IA), Sen. Deb Fischer (R-NE), Sen. Mike Lee (R-UT), Sen. Joni Ernst (R-IA), Sen. Thom Tillis (R-NC) and Sen. Pat Toomey (R-PA).

The IMF also criticized what has become a common protectionist trade tactic—blaming other countries for currency manipulation (whether or not it exists). "Treating currency undervaluation as a subsidy to be countervailed raises concerns both in the finance and trade spheres and risks increased trade tensions and retaliation (with other countries replicating a similar approach, perhaps using their own standards and methodologies). Currency-related trade responses should be avoided," according to the IMF.

The IMF argues that U.S. trade agreements should not include "enforceable provisions on currency policy" and that "the U.S. should work constructively with its trading partners to better address the underlying macro-structural distortions that are affecting external positions."

"The IMF's advice is excellent: To strengthen our recovery, the U.S. should untangle the trade barriers raised in recent years and avoid raising new ones, especially in the highly problematic area of currency," said John Murphy, senior vice president for international policy at the U.S. Chamber of Commerce, in an interview. "Amid today's materials shortages and port backups, we need to cut costs and red tape, not create more."

The IMF also criticized subsidies. “Finally, there is a clear need to address longstanding global trade and investment distortions in areas such as tariffs, farm subsidies, industrial subsidies, and services trade,” notes the IMF. It recommends that the United States work through the World Trade Organization “to strengthen the rules-based multilateral trading system and address these longstanding global trade and investment distortions.”

After almost 6 months in office, many analysts believe the “Trump tariffs” have turned into the “Biden tariffs.” But there is still time for the Biden administration to act and remove the tariffs and change other trade policies. “The IMF says the United States should roll back tariffs and limit ‘Buy American’ overreach,” said Bryan Riley, director of the National Taxpayers Union’s Free Trade Initiative, in an interview. “If the Biden administration listens, U.S. economic growth coming out of the pandemic will be turbocharged.”

Forbes

July 1, 2021

Trump's H-1B Visa Wage Rule Is Dead: What's Next?

By STUART ANDERSON

A federal judge has ended the Trump administration's controversial rule that would have significantly increased the required minimum salary for H-1B visa holders and employment-based immigrants. Even though the rule is dead, it does not mean efforts to mandate higher salaries for foreign-born professionals are over.

"A federal judge has vacated a Department of Labor (DOL) rule that would have amended wage obligations for certain temporary visa classifications and permanent labor certifications (PERM)," reports Berry Appleman and Leiden in a recent client alert. "The DOL rule was set to take effect on Nov. 14, 2022, but Judge Jeffrey S. White accepted the DOL's motion to remand the rule back to the agency. DOL did not oppose vacating the rule . . . In its motion, DOL stated that until the agency conducts further review, it "cannot say for certain the extent to which the Final Rule may need to be revised, but the concerns raised to this point suggest that there may need to be significant changes to the rulemaking going forward."

Under the Department of Labor (DOL) rule, published in the final days of the Trump administration, employers would have paid "23% to 41% higher salaries than under the current system across a range of occupations if they want to employ high-skilled foreign nationals in America," according to a National Foundation for American Policy (NFAP) analysis.

There is no evidence H-1B visa holders and employment-based immigrants as a group are underpaid relative to native-born professionals. Numerous economic studies have found high-skilled foreign nationals, on balance, earn more than their native-born counterparts. According to Andrew Chamberlain, the chief economist at Glassdoor, "Across the 10 cities and roughly 100 jobs we examined, salaries for foreign H-1B workers are about 2.8% higher than comparable U.S. salaries on Glassdoor." Research by Utah State University economist Omid Bagheri found a more significant wage premium for high-skilled foreign nationals.

After the Trump administration published the wage rule as "interim final" in October 2020, three courts blocked it. On January 14, 2021, the Department of Labor published a final rule that made few changes from the original and carried the same goal—to price H-1B visa holders and employment-based immigrants out of the U.S. labor market. "The revisions to the rule don't

change the fact that it still fails to do what the law requires—to reflect the actual, prevailing wage for workers in that geographical area doing similar work," said Kevin Miner, a partner at Fragomen.

The Biden administration delayed the DOL rule until November 14, 2022. The U.S. Chamber of Commerce and allied business groups and education organizations filed an amended complaint that continued its lawsuit to end the Department of Labor wage regulation. The Biden administration, as noted, did not oppose vacating the rule. The Department of Labor will need to go through a new rulemaking process (i.e., issue a new regulation) to change the current process on prevailing wage for high-skilled foreign nationals.

What's Next?: In April 2021, the Department of Labor requested information from the public on data sources for calculating the prevailing wage for H-1B visa holders and employment-based immigrants. DOL may use the information it received from the public if it decides to make changes to the required minimum wage for foreign-born professionals.

Some critics allege that foreign workers are underpaid unless they are paid the median wage for everyone in that occupation in an area. However, that makes little sense, economists note, since experience makes a difference and it is reasonable to expect employers would not pay new entrants to the U.S. labor market, such as recent international students, as much as the average workers in an occupation, which would include workers with many years of experience.

Employers and immigration attorneys believe, contrary to the premise of the Trump administration's DOL regulation, that the current DOL prevailing wage system often inflates the required wage for H-1B professionals and applicants for employment-based green cards.

"Most of the litigation [against the rule] focused on the inaccuracy of entry-level wages, but the Department of Labor should take a hard look at the mechanism by which wages are assigned to more experienced workers," said William Stock of Klasko Immigration Law Partners in an interview. "Under the current prevailing wage guidance used by DOL, a 'Level IV' wage is assigned to any position requiring the top of a range of experience set by the occupation's 'job zone,' which is only 2 to 4 years of experience for most professional occupations.

"Under the Department of Labor's current methodology, a job requiring 4 years of experience and a job requiring 10 years of experience in the same profession both have the same prevailing wage, currently set at the 67th percentile of all wages in that profession. A more realistic wage leveling system would set the median wage at the median experience of workers in those professional occupations, not the artificially low 4 years set by DOL statisticians in assigning an occupation to a 'job zone' that requires 2 to 4 years of experience to enter it."

Stock said the other area to make improvements is for first-level supervisors of professional workers. "The Standard Occupational Classification's 'Classification Principles and Coding Guidelines' states that first-level supervisors of professionals such as engineers, physicians and accountants are classified within those occupations, and not within the managerial occupations (such as Computer and Information Systems Managers)," according to Stock. "DOL should

incorporate this classification principle into its wage methodology to avoid setting artificially high wages for first-level supervisors of workers in those professional occupations."

Immigration attorney Cyrus Mehta identifies different problems. "If the Biden administration wants to develop a fair way to determine prevailing wages, the prevailing wage ought not to be based on surveys factoring wages paid by *all* employers in the industry," said Mehta in an interview. "For instance, nonprofits find it very difficult to hire foreign national lawyers on H-1B visas or sponsor them for green cards as they have to rely on wage surveys that include what the largest law firms also pay entry-level lawyers, which can cross $200,000.

"The government should also not assume that all lawyers wish to only work for firms that pay the highest wages. Some lawyers desire to work for nonprofits or smaller firms as lifestyle choices or because they find the work truly challenging or are altruistic. Similarly, startups are also affected by formalistic prevailing wage surveys. Startups may not be able to pay the same salaries as Fortune 100 companies, and may instead offer stock options rather than high salaries at the nascent stage. Disregarding other forms of compensation, as well as the choices that employers and employees make in a free market system, is likely to deprive employers of talented foreign national professionals who may ultimately succeed and enable their employers to succeed."

On June 29, 2021, the Department of Labor announced: "The Department has twice delayed the effective date of the Final Rule. In light of these delays and now the June 23, 2021 order vacating the Final Rule, the operative version of the regulations . . . continues to be the version in place on October 7, 2020, prior to the publication of the IFR [interim final rule]."

While the Trump administration rule was designed to inflate the salaries of H-1B visa holders and employment-based immigrants, the regulation in place on October 7, 2020, was (and is) not perfect, as noted by William Stock and Cyrus Mehta. "DOL determines the prevailing wage by gathering data from the government's Occupational Employment Statistics (OES) wage survey and using a mathematical formula to create four levels of wages for each occupation. . . . The underlying data is based on broad pay band information [and] 'education-, experience-, or supervision-based wage differentials are addressed poorly in the current system,'" according to a National Foundation for American Policy analysis.

A federal judge's decision to vacate a Trump administration Department of Labor rule on prevailing wage closes a chapter on salaries for foreign-born professionals. It is unlikely to be the end of the story.

Forbes

June 28, 2021

U.S. Businesses And Universities Defend STEM OPT In Court

By STUART ANDERSON

The legal threat to Optional Practical Training (OPT) in STEM (science, technology, engineering and math) fields has returned. U.S. businesses and universities wasted no time defending the ability of international students to work up to 36 months in a STEM specialty on OPT, viewing it as vital to attracting students and retaining talent in America. Still, startups, larger technology companies and U.S. educators cannot be happy at another threat facing international education in the United States.

In an order on November 30, 2020, U.S. District Judge Reggie B. Walton ruled against WashTech (Washington Association of Technology Workers) in its lawsuit that sought to declare Optional Practical Training and STEM OPT (the regulation issued in 2016) unlawful. WashTech has appealed the final judgment to the U.S. Court of Appeals for the District of Columbia.

In an opinion, issued January 28, 2021, Judge Walton wrote, "Not only does DHS [Department of Homeland Security] enjoy broad, delegated authority to enforce the INA [Immigration and Nationality Act] and issue rules governing nonimmigrants, but 'DHS's interpretation of F-1—inasmuch as it permits employment for training purposes without requiring ongoing school enrollment—is 'longstanding' and entitled to deference.' 'Since at least 1947, [the Immigration and Naturalization Service ('INS')] and DHS have interpreted the immigration laws to allow foreign students to engage in employment for practical training purposes.'"

Judge Walton referred to an earlier court opinion and continued: "This longstanding interpretation by DHS is further bolstered by the fact that 'Congress has repeatedly and substantially amended the relevant statutes without disturbing [DHS's] interpretation' permitting post-graduation practical training. [Washtech II, 156 F. Supp. 3d at 143.] 'Since 1952, Congress has amended the provisions governing nonimmigrant students on several occasions.' . . . And, '[d]uring that time, Congress has also imposed various labor protections for domestic workers[,]' yet 'Congress has never repudiated INS['s] or DHS's interpretation permitting foreign students to engage in post-completion practical training.'"

"Accordingly," wrote Judge Walton, "this Court agrees with the Court's conclusion in Washtech II that '[b]y leaving the agency's interpretation of F-1 undisturbed for almost [seventy] years,

notwithstanding these significant overhauls, Congress has strongly signaled that it finds DHS's interpretation to be reasonable.' . . . WashTech's arguments to the contrary are not convincing.

"For the foregoing reasons, the Court concludes that WashTech has Article III standing to bring this action, and that DHS did not exceed its statutory authority in issuing the 2016 OPT Program Rule. Accordingly, the Court denies WashTech's motion for summary judgment, grants the Government's and the Intervenors' motions for summary judgment, and denies WashTech's motion to strike."

In 2019, three trade associations—the National Association of Manufacturers (NAM), the U.S. Chamber of Commerce and the Information Technology Industry Council—intervened in the case "to protect the rights of international students," according to an interview with Paul Hughes of McDermott Will & Emery, who represented the associations. They are the "Intervenors" referred to in the judge's opinion.

On June 11, 2021, in response to WashTech's appeal, NAM and other intervenors-appellees filed a brief that defended Judge Walton's opinion and detailed why they believed WashTech's arguments are incorrect. "WashTech would have this Court hold that every presidential administration since Harry Truman's has acted unlawfully by authorizing foreign students to engage in term-limited practical training after the completion of their classroom studies," wrote the trade associations. "If that sounds implausible, it should: DHS has ample authority to authorize noncitizen employment, it has used that authority reasonably here, and OPT is not precluded by the statutory definition of F-1 status. The program should be upheld."

The trade associations note that WashTech prevailing in court would overturn far more than U.S. policy toward international students. "WashTech is also wrong in arguing that DHS lacks the power to authorize *any* noncitizens to work, beyond those already granted employment authorization by statute," write the trade associations. "To the contrary, DHS is empowered both generally to make regulations and specifically to set the terms and conditions of nonimmigrants' admission, and Congress has enacted into law a reference to noncitizens "authorized to be so employed . . . by the [Secretary of Homeland Security]" (8 U.S.C. § 1324a(h)(3))—a provision that squarely confirms the authority of DHS to grant work authorization to classes of noncitizens."

"In sum, the OPT program easily satisfies the requirement that regulations be 'reasonably related to the purposes of the enabling legislation' in addition to being entirely consistent with the INA and supported by over seven decades of executive practice and congressional ratification," according to the trade associations. "WashTech has presented no basis for striking it down."

On June 18, 2021, FWD.us, 47 companies and 12 industry associations filed an amici curiae brief to support the defendants-appellees [DHS et al.] and intervenors. The signatories among the companies and organizations included Amazon, Apple, Box, Inc., Business Roundtable, Compete America, Facebook, Google, Intel Corporation, Microsoft, National Immigration Forum, National Venture Capital Association, Netflix, PayPal, the Semiconductor Industry Association, Texas Instruments and others.

"The OPT and STEM OPT programs help address the STEM labor scarcity by creating a recruiting opportunity and a crucial pipeline of talent to fill companies' needs across industries," according to the company and associations' brief. "They provide an attractive prospect for foreign-born students who wish to gain additional, practical knowledge in their fields of study in the United States following conferral of their degrees, enhancing the United States' ability to vie for those students with competitor countries. It creates opportunities for highly skilled foreign-born students to work for U.S. companies in the short term, augmenting their scholastic education with a practical one."

The brief cited National Foundation for American Policy research on the large number of unfilled positions in computer occupations and economist Madeline Zavodny's recent research that showed enrolling more international students increases the number of U.S. students awarded degrees in science and technology majors at the average American university. An earlier study by Zavodny concluded, "There is no evidence that foreign students participating in the OPT program reduce job opportunities for U.S. workers."

On June 21, 2021, the Presidents' Alliance on Higher Education and Immigration and 151 colleges and universities filed an amicus curiae brief. The university signatories to the brief included Boston University, Carnegie Mellon, Dartmouth, Georgetown, Harvard, MIT, NYU, Princeton, UC-Berkeley, Yale and others.

The brief cited the educational benefits of OPT and STEM OPT. "This marriage of theory and practice sets U.S. graduates apart and equips them to tackle the greatest challenges of our time with creativity and common sense," according to the brief.

"As emphasized by higher education leaders across New Jersey, including Princeton University's President Christopher Eisgruber, OPT 'allows students to supplement their education with valuable experiential learning and on-the-job-training as they start their careers,'" the brief continued. "The Vice Dean for Faculty and Graduate Affairs at Georgetown University put it this way: 'Even our best students can only learn so much from the classroom; they must then test and further these lessons in the real world. The opportunity to undertake internships, employment, or research is critical to their development as future leaders in a more globalized world community for generations forward.'"

The brief cited research by NAFSA: Association of International Educators on the $38.7 billion contribution of international students to the U.S. economy during the 2019-2020 academic year, supporting approximately 415,000 jobs in America. It also discussed research by Business Roundtable that modeled a 60% decline in OPT and found such a drop in Optional Practical Training would lead to 255,000 fewer jobs held by native-born workers.

WashTech does not appear to have the facts on its side, but its persistence maintains a focus on OPT and STEM OPT that may cast doubt whether these programs will continue. From the perspective of those who support WashTech's viewpoint, discouraging international students from attending U.S. universities by raising doubts about OPT's future existence may be a victory in itself. That is not good news for those who support the increased entry of international students to America.

Forbes

June 15, 2021

Thomas Sowell: Common For Poor Immigrants To Make New Country Richer

By STUART ANDERSON

A new book by *Wall Street Journal* columnist Jason Riley is a reminder of Thomas Sowell's important writings on the movement of people. Immigration continues to be hotly debated, and Sowell provided insights on how education, culture and government actions influence migration around the world.

In *Maverick: A Biography of Thomas Sowell*, Jason Riley describes Sowell's intellectual journey and diverse writings, including his research on migration. "[I]t it wasn't until he [Sowell] read Nathan Glazer and Daniel Patrick Moynihan's classic 1963 study of racial and ethnic minorities in New York City, *Beyond the Melting Pot*, that Sowell would become interested in conducting his own comparative analyses of different cultures," writes Riley. "It was really the first book I read about different ethnic groups," according to Sowell, who Riley interviewed extensively for the book. "There were many different patterns. And more than anything else, each group had its own pattern."

In *Migrations and Cultures: A World View*, published in 1996, Sowell makes several observations about immigration important to the historical record and that remain relevant today.

Italian Immigrants: Analysts have noted Italians in the early part of the 20th century were treated similarly to Mexicans in the second half of the 20th century and later. That makes Sowell's observations about Italian immigrants of interest beyond the history. "Italian emigration also illustrates the different roles that the emigration process can play in the lives of individuals and families," writes Sowell. "Sojourners and remittances from sojourners have played a key role in the survival of desperately poor families in Italy. Men living in crowded and squalid conditions abroad, skimping on their personal expenses even to the detriment of their health, were often objects of pity or contempt, when in fact they were heroic in their quiet tenacity and self-sacrifice for their loved ones back home."

Chinese Immigrants as Entrepreneurs: Sowell calls overseas Chinese "middlemen," meaning many became traders and owned retail operations. They evaluated the local market conditions and became entrepreneurs. "This small Chinese majority played a disproportionately large role in the economics of Indochina," according to Sowell. "They owned approximately 70% of the retail

trade in Vietnam and Cambodia. In South Vietnam in 1974, the Chinese owned 60% of all capital invested in paper manufacturing and in fisheries, and 80% of all capital invested in the manufacturing of textiles, iron and steel, and chemical and allied products."

Japanese Immigrants Were Mistreated in Both the U.S. and Canada: In the United States, Japanese immigrants at first were welcomed as replacements for Chinese workers. But the Japanese became resented when they transitioned from laborers to farmers and small businessmen. White farmers pushed for the Alien Land Laws, making it unlawful for "aliens ineligible for citizenship" to own land in California, he notes. Sowell decried the internment of Japanese Americans, and wrote, "The economic impact was as devastating as the social trauma. Businesses built up over many years had to be liquidated in a matter of weeks, at ruinous losses."

Few Americans may realize people of Japanese descent were also mistreated in Canada during World War II. "More than a thousand Japanese-owned fishing vessels were impounded," according to Sowell. "Japanese-language newspapers were closed. Then Japanese employees began to be fired, and political pressure groups in British Columbia began to demand that the Japanese be interned. . . . The political pressure from British Columbia caused [Canada's] central government to give in to their demands."

Indian Immigrants as Professionals and Entrepreneurs: "The economic role of the Indians in Uganda can perhaps best be appreciated by considering what happened after they left. The economy collapsed," notes Sowell, describing the impact of Idi Amin, the country's dictator, expelling 50,000 Asians from Uganda in 1972. "The Asian shops were often simply turned over to Amin's favorites, who sold everything and then closed them down."

Jean Raspail, the author of the racist tract *The Camp of the Saints*, made the inaccurate prediction that poor, uneducated Indian immigrants would overwhelm wealthier countries. In fact, as Sowell, points out, the Indians immigrating to the United States are overwhelmingly doctors and technology professionals. The income and education levels of Indian immigrants are much higher than the native-born U.S. population.

Donald Trump once asked why more people from Norway didn't immigrate to the United States. If he had read Sowell's writings, Trump would have learned that poor people from Norway once immigrated to America, but it was during the 1800s. Trump also would have discovered that people generally immigrate to countries where they can earn more money and enjoy a higher standard of living. Sowell has long understood that economic calculation has motivated immigrants for centuries, even if governments around the world have failed to learn and address this motivation.

That does not mean Thomas Sowell has favored open borders. "Tom isn't saying people aren't able to assimilate, as people have adapted for centuries," Riley told me. However, he points out Sowell has expressed concern that liberal elites are not encouraging immigrants to assimilate. Still, Riley notes, objective indicators on learning English and educational attainment provide evidence immigrants are assimilating in America.

“I liked his international comparisons,” said Riley. “Chinese immigrants in Southeast Asia, Jews in Eastern Europe, the Japanese in Canada and the United States, these were hated groups. They were minorities and impoverished, but they had human capital and not only rose from poverty but surpassed the majority in terms of income. Tom took away from that the importance of human capital, culture, attitudes and behavior as far more important than whether you’re discriminated against or even hated by the majority.”

Riley points to a passage in *Migrations and Cultures: A World View* that encapsulates much of what Thomas Sowell learned in his research: “Nothing is more common than to have poverty-stricken immigrants become more prosperous in a new country and to make that country more prosperous as well.”

Forbes

June 10, 2021

U.S.-Born Computer Professionals Earn Far More Than Other U.S. Workers

By STUART ANDERSON

Native-born information technology (IT) professionals and people with computer-related majors chose their careers well. New research shows native-born Americans working in computer fields earn much higher salaries than workers in other fields.

"U.S. natives who work in a computer-related occupations or have a college degree in a computer-related major earn substantially more than other professional workers or college graduates with other majors, including other science, technology, engineering and math (STEM) majors," according to a new study from the National Foundation for American Policy (NFAP) by economist Madeline Zavodny.

The analysis used data from the Current Population Survey, American Community Survey, and National Survey of College Graduates and showed a significant premium for information technology professionals or computer and information systems-related (CIS) majors that has remained stable or risen over time.

"Despite oft-voiced concerns that U.S. IT workers and computer-related majors are disadvantaged by having to compete with foreign-born workers, either via offshoring or immigration, the evidence clearly indicates that IT professionals and computer-related majors have relatively high earnings," concluded Zavodny, an economics professor at the University of North Florida and formerly an economist at the Federal Reserve Bank of Atlanta. "IT professionals earn more than other professionals across all education groups examined here, and they earn more, on average, than other professionals who have similar demographics characteristics, live in the same state, and work in the same industry. Workers who have a bachelor's in a computer-related field earn more than their counterparts with a degree in another STEM field or in a non-STEM field. The same is true for recent bachelor's or master's degree recipients."

Other findings from the research include:

· "Median earnings of IT professionals were 40% higher than median earnings of other professionals, according to data on U.S.-born workers from the Current Population Survey for

the period 2002 to 2020. There is a sizable earnings premium for all education groups examined here, including workers who have at least a bachelor's degree. The premium would be even larger if computer and information systems managers were classified with IT professionals instead of other professionals.

· "IT professionals earn significantly more than other professionals even when controlling for differences in observable demographic characteristics, state of residence, and broad industry. The earnings gap between IT professionals and other professionals as a whole remained fairly stable over the period 2002 to 2020 but rose among college graduates who work full-time, year-round in salaried jobs.

· "Median earnings of college graduates with a computer-related major are 35% higher than other STEM majors and fully 83% higher than non-STEM majors, according to data on U.S.-born college graduates from the American Community Survey for the period 2009 to 2019. The earning gap narrows but remains statistically significant when controlling for differences in observable demographic characteristics, state of residence and broad industry.

· "The earnings gap between college graduates with a major in computer and information systems or another computer-related field and other STEM majors has increased over time. The gap between computer and information systems-related (CIS) majors and non-STEM majors has remained stable over time at very high levels.

· "Median earnings of recent bachelor's degree recipients with a computer-related major are about 15% to 40% higher than other STEM majors, depending on the year, according to an analysis of data on recent U.S.-born bachelor's and master's degree recipients from the National Survey of College Graduates in 2010, 2013, 2015, and 2017. The gap is substantially larger in 2017 than in the other years. Recent bachelor's degree recipients with computer-related majors continue to earn significantly more than other STEM majors when controlling for differences in observable demographic characteristics and region of residence.

· "Median earnings of recent master's degree recipients with a computer-related major are about 10% to 40% higher than other STEM majors, depending on the year. Like with bachelor's degree recipients, the gap is larger in 2017 than in the other years and remains sizable when controlling for differences in observable demographic characteristics and region of residence."

The report adds to a growing body of research about foreign and native-born workers in technology fields. "The stable-to-increasing earnings premium among U.S.-born IT professionals and computer-related majors during a period that critics characterize as high levels of immigration is consistent with a large literature that concludes that highly educated immigrants have not harmed U.S.-born workers," writes Zavodny. "Indeed, studies show that highly educated U.S. natives may even see their earnings increase as a result of highly skilled immigration since it can boost firms' productivity, spur additional innovation, prompt more U.S. natives to move into communications-intensive jobs that are their comparative advantage, and slow offshoring by U.S. firms, among other benefits.

“The substantial earnings premium for IT professionals and computer-related majors is consistent with persistently strong demand for workers with these technical skills. Even during a period of temporary and permanent immigration into the U.S. of skilled foreign-born workers and offshoring of technical jobs outside of the U.S., U.S.-born IT professionals and computer and information systems majors continued to earn, on average, substantially more than other professional workers and other majors.”

The report is good news and a signal to policymakers that native-born information technology professionals do not need protection from H-1B visa holders and employment-based immigrants. Other research shows attempts to enact such restrictions harms the U.S. economy and native-born workers by slowing innovation and pushing more jobs outside the United States.

Forbes

June 7, 2021

International Travel Nightmares Pause For Supersonic Dreams

By STUART ANDERSON

Will reducing the time for overseas flights boost international travel? It is too early to say, as airplanes projected to travel at supersonic speeds are still in production. However, after a dismal year for international travel, people in the travel industry can dream.

“For decades, the trend for international travel to the U.S. has been increased time and hassle—increased flight delays and cancellations, increased wait times for Customs, increased wait times to get a visa,” said Erik Hansen, vice president for government relations at the U.S. Travel Association, in an interview. “Research has consistently shown that increased wait times and hassle discourage international travel and often put the US at a competitive disadvantage. Boom is a technology that would disrupt this trend and make international travel to the U.S. more efficient. It would undoubtedly increase demand for travel to the United States.”

Table 1: Projected Flight Times on Supersonic Airliner

Route	Projected Flight Time on Overture	Current Flight Time
NY to London	3:30h	6:30h
LA to Sydney	8:30h	14:30h
LA to Seoul	6:45h	12:45h
Tokyo to Seattle	4:30h	8:30h
Paris to Montreal	3:45h	7:15h
SF to Tokyo	6h	10:15h
Madrid to Boston	3:30h	7:30h

Source: Boom Supersonic.

Boom Supersonic received increased visibility with the news that United Airlines had ordered planes. "United Airlines said it was ordering 15 jets that can travel faster than the speed of sound from Boom Supersonic, a start-up in Denver," reported the *New York Times*. "The airline said it had an option to increase its order by up to 35 planes."

According to Boom, on its new planes, a flight from New York to London would take only 3 hours and 30 minutes, compared to the current 6 hours and 30 minutes. A Los Angeles to Seoul flight could be completed in 6 hours and 45 minutes rather than the current 12 hours and 45 minutes. And for people outside the United States, a flight from Tokyo to Seattle would take 4 hours and 30 minutes (instead of 8 hours and 30 minutes) and a Madrid to Boston flight would be 3 hours and 30 minutes (instead of 7 hours and 30 minutes).

The Concorde flew at supersonic speeds across the Atlantic but stopped flying in 2003. Noise complaints limited the number of flights. "Boom's planes will not be as noisy as the Concorde because their engines will create a sonic boom only when flying over water 'when there's no one to hear it,' said Boom's chief executive, Blake Scholl," reported the *New York Times*.

The new supersonic airliner (called Overture) is not expected to fly passengers until 2029. Still, even the news of the airplanes cheered a travel industry rocked by the coronavirus pandemic.

Statistics reveal a steep decline in international travel over the past year. "Between the second quarter and end of 2020, international inbound travel [to the U.S.] fell by 91% and overseas visitation was down a staggering 96% compared to the same period in 2019," according to the U.S Travel Association. "The pandemic caused U.S. travel exports to plummet by 64% to just $83 billion—a loss of $150 billion."

That means the most immediate concern for the industry is reopening international travel. "President Biden and the State Department should come to the table with U.K. leaders and align our countries on a transparent, risk-based roadmap to reopening safe travel," argues Stewart Verdery, a former assistant secretary for Homeland Security and CEO of Monument Advocacy representing the Travel Management Coalition. "We can swiftly revitalize our economies and connectivity—but only if both governments return to a reasonable risk analysis befitting our special relationship."

Regular flights of supersonic passenger airliners are years in the future but hold great promise for making life easier for people who need to conduct business or want to see the world. In the meantime, governments will need to align their policies with global improvements in health and safety.

Forbes

June 2, 2021

2021 Might Be A Decisive Year For H-1B Visas

By STUART ANDERSON

The Trump administration was hostile to high-skilled immigration, but the Biden administration may enact the most enduring policy changes to H-1B visas. And the changes might not be positive for employers. A series of decisions loom on regulations that would affect who can receive H-1B petitions, how much employers must pay H-1B professionals and much more.

The Big Picture: "H-1B visas are important because they generally represent the only practical way for high-skilled foreign nationals, including international students, to work long-term in the United States and have the chance to become employment-based immigrants and U.S. citizens," as discussed in a recent *Forbes* article. "In short, without H-1B visas, nearly everyone from the founders of billion-dollar companies to the people responsible for the vaccines and medical care saving American lives would never have been in the United States."

The number of H-1B visas is small for a country the size of the United States. The 85,000 annual H-1B limit—the 65,000 regular cap and the 20,000-exemption for H-1B visa holders with a master's degree or higher from a U.S. university—comes to 0.05% of the U.S. labor force. Companies are allowed to file for only 85,000 new H-1B petitions in a year, and about two-thirds, or 56,000 a year, are in computer occupations.

The U.S. job market is strong for individuals who work in computer occupations. The unemployment rate in math and computer occupations was 2.5% in April 2021, below the 3%, lower than in January 2020 before the pandemic began.

Today, there are well over 1 million active job vacancy postings in computer occupations, according to a National Foundation for American Policy (NFAP) analysis of Emsi Job Posting Analytics. "There is not a fixed number of jobs, and people with high skills often create more jobs for people with complementary skills," notes the NFAP analysis. "Still, even if one adopts a zero-sum approach, there are nearly 20 times more job vacancy postings in computer occupations than new H-1B petitions typically used by companies in computer occupations each year. There are also likely many more openings than publicly posted positions."

With regional Covid-19 bans still in place and many U.S. consulates either not operating or working in a limited capacity, visa backlogs, including for H-1B and L-1 visa, will continue to mount until the State Department commits to new policies. Jeffrey Gorsky, former Chief of the Legal Advisory Opinion section of the Visa Office in the U.S. Department of State, believes the State Department could become more creative with biometric intake, give visa processing a higher priority and conduct more interviews via video. He believes interviews via Zoom would meet the statutory definition of in-person interviews.

Due to Trump administration policies that U.S. courts found unlawful, H-1B denial rates reached 24% for initial employment and 12% for continuing employment in FY 2018 (compared to 6% and 3% in FY 2015). After USCIS agreed to a settlement with the ITServe Alliance that overturned years of restrictive policies, H-1B denial rates returned to pre-Trump levels (after costing companies millions of dollars). The Biden administration may remove some restrictions on H-1B visa holders that prevent them from starting businesses, according to the *New York Times*.

Still, the H-1B annual limit is low. Employers filed 308,000 H-1B registrations for cap selection for FY 2022, according to USCIS. That means over 72% of H-1B registrations for high-skilled foreign nationals were rejected even before an adjudicator evaluated the application.

The economic literature shows loosening restrictions on H-1B visas would benefit the U.S economy and American workers. A study by economists Giovanni Peri, Kevin Shih, Chad Sparber and Angie Marek Zeitlin found, "The number of jobs for U.S.-born workers in computer-related industries would have grown at least 55% faster between 2005-2006 and 2009-2010, if not for the denial of so many applications in the recent H-1B visa lotteries."

Britta Glennon, an assistant professor at the Wharton School of Business at the University of Pennsylvania, found in her research that H-1B restrictions push technology-related jobs out of the United States: "[A]ny policies that are motivated by concerns about the loss of native jobs should consider that policies aimed at reducing immigration have the unintended consequence of encouraging firms to offshore jobs abroad."

Some policymakers argue America needs even more restrictive laws and rules to block the hiring of foreign-born scientists and engineers. As discussed below, the Biden administration will soon decide on a series of restrictions that could produce significant changes in H-1B visa policy.

Rule Would Make it Less Likely International Students Will Get H-1B Petitions: Before Donald Trump left office, his administration finalized a regulation that would end the H-1B lottery and replace it with a system that awards H-1B petitions by highest to lowest salary level. Many attorneys consider the regulation to be unlawful, and there are pending lawsuits against the rule. Instead of taking steps to rescind the rule, the Biden administration only delayed the regulation until next year's H-1B cap selection.

In addition to questions of legality, the rule finalized by the Trump administration would fulfill a long-standing goal of Trump White House adviser Stephen Miller and his allies to make it more

difficult for international students to obtain an H-1B petition, which would discourage many students from coming to America in the first place.

International students are disadvantaged under the rule because choosing H-1B petitions by salary level favors individuals with the most experience in the labor market over those with the least experience. "The National Foundation for American Policy found that an international student may be 54% more likely to get an H-1B petition under the current H-1B lottery system than under the Trump administration's regulation that would end the H-1B lottery," according to an NFAP analysis of actual cases of recent international students and filings for H-1B petitions. "The data demonstrate the new regulation would have a significant negative effect on the ability of international students to gain an H-1B petition."

"The law firm Curran, Berger & Kludt provided NFAP with 170 cases of F-1 students with applications for H-1B cap selection for FY 2018, FY 2019, FY 2020 and FY 2021," according to NFAP. "Under the current system that randomly selects H-1B petitions, 60% of the F-1 students were chosen through the H-1B lottery. However, the law firm provided information on the pay levels (Level 1 through 4) for the students' H-1B applications, and NFAP found if the new regulation had been in effect, only 39% of the students' H-1B petitions would have been selected." Education organizations had warned the Trump administration's rule would harm international students and make studying in America less attractive.

Rule to Force Employers to Pay H-1B Visa Holders and Employment-Based Green Card Applicants Well Above Market Wages: Under a Department of Labor (DOL) rule, published in the final days of the Trump administration, "employers must pay 23% to 41% higher salaries than under the current system across a range of occupations if they want to employ high-skilled foreign nationals in America," according to a National Foundation for American Policy (NFAP) analysis.

The rule would apply to H-1B visa holders and employment-based immigrants and could have a devastating impact on both. H-1B visa holders waiting in the green cards backlog might be forced to leave the country if an employer could not extend their H-1B status at the new, much higher required salary level.

There is no evidence H-1B visa holders and employment-based immigrants as a group are underpaid relative to native-born professionals. Numerous economic studies have found high-skilled foreign nationals, on balance, earn more than their native-born counterparts. For example, Andrew Chamberlain, the chief economist at Glassdoor, found, "Across the 10 cities and roughly 100 jobs we examined, salaries for foreign H-1B workers are about 2.8% higher than comparable U.S. salaries on Glassdoor." A recent study by Utah State University economist Omid Bagheri finds a larger wage premium for high-skilled foreign nationals.

The Biden administration published a notice of an agency action to delay the DOL rule until November 14, 2022. At the same time, the administration requested information from the public on data sources for calculating the prevailing wage.

Three courts blocked the rule when it was published as "interim final" in October 2020. On January 14, 2021, the Trump administration published a final rule that was only slightly modified from the original and carried the same aim—to price H-1B visa holders and employment-based immigrants out of the U.S. labor market. "The revisions to the rule don't change the fact that it still fails to do what the law requires—to reflect the actual, prevailing wage for workers in that geographical area doing similar work," said Kevin Miner, a partner at Fragomen.

The U.S. Chamber of Commerce and allied business groups and education organizations filed an amended complaint that argues the regulation to end the H-1B lottery is unlawful and continued its lawsuit to end the Department of Labor wage regulation.

New Regulation on Work at Third-Party Sites: "USCIS is still aiming to have a regulation in place by FY23 cap season to restrict use of the H-1B category by outsourcing companies by changing the 'employer-employee relationship' definition," according to Berry Appleman & Leiden. Peter Bendor-Samuel, founder and CEO of Everest Group, argues access to talent is key for competitiveness as information technology services companies attempt to build digital platforms for U.S. companies. "Almost every major U.S. firm is building some form of digital platform so it can enhance its competitive position both domestically and internationally," he said. "This is probably the most important thing these firms are doing and success will define both company and global success as we move into the future."

The mistaken premise of nearly all restrictions on high-skilled immigration is that foreign-born scientists and engineers offer no value to America or U.S. companies except for a willingness to work for less money. Some policymakers believe that people born in other countries possess inferior abilities to people born in the United States—hence the belief companies must pay them lower salaries—and incorrectly assume that only a fixed number of jobs exist in the U.S. economy. The Biden administration has an opportunity to adopt a more forward-looking policy.

Forbes

May 24, 2021

Unlike Trump, Bush Paints A Kind Picture Of Immigrants

By STUART ANDERSON

Former President George W. Bush tells the stories of dozens of immigrants and includes a painting of each one in a new book that should be on people's shelves for its beauty and storytelling. While his talent for painting is notable, it is the heart the former president displays for his subjects that stands out in the book *Out of Many, One: Portraits of America's Immigrants*. Through his portraits and stories, Bush tells the reader that America is not for only one type of person but should be open, as Ronald Reagan once said, to "anyone with the will and the heart to get here."

Among those with "the will and the heart to get here" highlighted in the book is Paula Rendon, an immigrant from Mexico who came to work for the Bush family. "I didn't realize at the time what a life-changing moment it would be for me, Paula, or our families," writes Bush, describing the rainy night a small woman with a suitcase came to his family's house when he was 13 years old in 1959. "Over the next six decades, Paula became an integral part of our family. She was like a second mother to my siblings and me. The first immigrant I really knew showed me how hardworking, family-oriented newcomers add to the cultural fabric, economic strength and patriotic spirit of America."

The book includes portraits—both painted and written—of nearly four dozen immigrants from 35 different countries. Among them are many famous immigrants, including former secretaries of state Madeline Albright and Henry Kissinger, basketball star Dirk Nowitzki, golfer Annika Sörenstam, movie star and former governor Arnold Schwarzenegger and former head of PepsiCo Indra Nooyi. (Note: I worked in the Bush administration as head of policy and counselor to the Commissioner of the Immigration and Naturalization Service.)

The book's charm is mixing in the famous with those who have lived extraordinary lives but might be unknown to most Americans. Bush describes the harrowing journey of Bob Fu, a Christian minister who escaped arrest in China and was accepted as a refugee to America "only three days before Hong Kong was returned to China."

Thear Suzuki was born in Phnom Penh, Cambodia. "Thear's family of seven managed to survive the genocide, which took place on sites across Cambodia now known as the Killing Fields,"

writes Bush. “They worked in forced labor camps and lived in the jungle for years before escaping to a Thailand refugee camp in 1979.”

At 14, Alfredo Duarte crossed the Rio Grande into America to support his family. “There was a moment I thought we were all going to die, but we finally made it to the other side of the river, where we ducked and crawled,” said Duarte. He worked many jobs and sent money back to his parents. In 1985, he became a lawful permanent resident and partnered with his brother-in-law to start Taxco Produce, a food distributor that employs 120 people in the United States.

While the book is not political, it is difficult not to compare the vision of humanity and compassion George W. Bush expresses for his subjects with the animosity Donald Trump’s has often exhibited toward immigrants.

While Bush praises the heroism of refugees, Trump gave speeches during the 2020 campaign that boasted of cuts to refugee admissions and warned an entire state could get turned into a refugee camp. Bush writes about the family values and work ethic of Mexican immigrants, while Trump said many Mexicans were rapists who would commit crimes against Americans.

These are the two most recent Republican presidents, yet their views of their fellow human beings, fellow Americans, are so different.

“It depends on where you start your philosophy from,” said Bush in remarks at an event presented by the George W. Bush Institute, the National Immigration Forum and the Ethics & Religious Liberty Commission of the Southern Baptist Convention. “I started mine from ‘all life is precious’ and ‘we’re all God’s children’ . . . If that’s how you view immigration, then you don’t view people with a hostile eye. You view them with a loving eye. . . . A loving eye means treating people with respect.”

In his essay on Paula Rendon, the woman who helped raise him, Bush concludes: “Sadly, Paula died in February 2020 at the age of 97, shortly after I finished painting her. Four generations of Mexican-American family members attended her funeral. On that day, Elysia Ramirez, one of her 36 great-great-grandchildren, gave a touching eulogy.”

“We learned a lot from Paula,” writes Bush. “She taught us what it means to work hard. She taught us what it means to sacrifice for family. And she taught us to be grateful to immigrants, who keep the American dream alive by realizing it and passing it along to new generations of diligent, determined United States citizens.”

Forbes

May 20, 2021

Trump's Tariffs Were Much More Damaging Than Thought

By STUART ANDERSON

Donald Trump's tariffs and the trade war his administration launched against China turned out to be far more damaging than many believed. That is the conclusion of research finding companies, consumers and the U.S. economy paid a heavy price for the Trump administration's protectionist trade policies.

In new research, Mary Amiti, an economist at the Federal Reserve Bank of New York, and Sang Hoon Kong and David Weinstein, both economists at Columbia University, used movements in stock prices to measure the response to policy announcements on tariffs and the escalation of the U.S.-China trade war initiated by the Trump administration. "Stock prices are well suited for this purpose because firm market value equals the expected present value of future firm profits," according to Amiti, Kong and Weinstein. "Therefore, movements in stock prices tell us about changes in the expected future value of firm-specific capital (both tangible and intangible)."

Table 1: Stock Returns on U.S.-China Trade War Announcements

Event Date	Stock Market Return	Event Description
Jan. 22, 2018	0.75%	U.S. imposes tariffs on solar panels and washing machines
Feb. 28, 2018	-1.07%	U.S. will impose steel and aluminum tariffs
March 22, 2018	-2.57%	Trade war escalates as China says it will impose tariffs on 128 U.S. exports
May 29, 2018	-1.00%	White House to impose 25% tariff on $50B worth of Chinese goods
June 15, 2018	-0.10%	China announces retaliation against U.S. tariffs on $50B of imports
June 19, 2018	-0.41%	U.S. announces imposition of tariffs on $200B of Chinese goods
Aug. 2, 2018	-0.59%	China announces tariffs on $60B of U.S. goods
May 6, 2019	-0.41%	U.S. to raise tariffs on $200B of Chinese goods up to 25%
May 13, 2019	-2.58%	China to raise tariffs on $60B of U.S. goods starting June 1
Aug. 1, 2019	-1.00%	U.S. will impose a 10% tariff on another $300B of Chinese goods
Aug. 23, 2019	-2.64%	China retaliates with higher tariffs on soy and autos
Total	-10.43%	ALL

Source: Mary Amiti, Sang Hoon Kong and David Weinstein, "Trade Protection, Stock Market Returns and Welfare," NBER. Note: This table shows market returns in sample of firms on and around trade-war events.

"The results suggest that markets interpreted the impact of the tariffs as much more negative than what economists initially estimated," said David Weinstein in an interview. "Part of the reason stems from the fact that the U.S. tariffs rose significantly in 2019, and the earlier studies didn't include these higher rates. Moreover, the new analysis suggests that the tariffs' impact on productivity is likely to be a factor holding down U.S. growth rates. The tariffs protect the least efficient firms and reduced their incentives to innovate while hurting the most successful U.S. firms, reducing their ability to innovate."

"We consider three ways in which firms are exposed to China: importing, exporting, and foreign sales (either through exporting or subsidiaries)," note the economists. "It is important to capture indirect imports that are ultimately purchased by U.S. firms because many firms do not import directly from China but instead obtain Chinese inputs through their subsidiaries or the U.S. subsidiaries of foreign firms. For example, Apple Computer's exposure to China can arise through direct imports, imports obtained by its subsidiary (Beats Electronics), or from the purchase of iPhones from the U.S. subsidiary of Foxconn."

Among the key findings of the research:

- The economists found a long-term decline in U.S. consumer well-being (or "welfare") of 7.8%: "Our results show that the trade-war announcements caused large declines in U.S. stock prices, expected TFP [Total Factor Productivity], and expected inflation largely by moving macro variables, but also by causing declines in the returns of firms trading with China. We find that markets expect the trade war to lower U.S. welfare by 7.8 percentage points." Total Factor Productivity (TFP) "is the portion of output not explained by the amount of inputs used in production," as defined by the Harvard Business School.

- The decline in stock market value caused by trade war announcements "amounted to a $3.3 trillion loss of firm value (equivalent to 16% of U.S. GDP [Gross Domestic Product] in 2019)." That is larger than the $1.7 trillion estimate in the loss of firm value in an earlier paper from the economists.

The economists identified "11 trade-war announcement dates, comprising six U.S. tariff events and five China retaliation events." The Trump administration announced tariffs on solar panels and washing machines on January 22, 2018, which were imposed on imports from China and other countries. On February 28, 2018, the administration announced it would imposed tariffs on steel and aluminum, which also affected China and other countries. "All of the subsequent U.S. tariff events only apply to China," as discussed in the study, including the announcement on May 29, 2018, of a 25% tariff on $50 billion of Chinese imports, the announced U.S. decision to raise tariffs on $200 billion of Chinese goods up to 25% and others.

"The data reveal that there were large and persistent movements in stock prices and inflationary expectations following these trade-war announcements," according to Amiti, Kong and Weinstein. "We see that the stock market fell on all of the event dates except one U.S. event date and one China event date, with a total drop of 10.4% over all of the events, and 12.9% over the three-day windows (beginning the day before the announcement and extending one day after). These drops in the market imply substantial drops in expected profitability for U.S. firms—a factor that . . . suggests will drive decreases in the expected wage.

"We explore the persistence of these stock-market movements . . . The data reveal that in the five trading days before our events, stock-price movements were quite small. Indeed, there is little evidence of anything out of the ordinary happening in the market before the announcements. However, on the announcement days . . . we see that there was a large decline of over 10%. Moreover, it is also quite striking how persistent this decline is. Even if we track the market five trading days later (approximately one week of calendar days), we see that the market did not recover. Thus, there is little evidence that markets overreacted and bounced back from their initial negative assessment of the trade war on expected returns."

Amiti, Kong and Weinstein used a sample of 2,859 companies across sectors that are publicly traded on the U.S. stock market and present fascinating data that show more than half of publicly traded companies in the sample were connected to the Chinese economy and affected by the trade war: "We see that only 10% of the firms in our sample import directly from China, and only 2% export directly to China. However, if we take subsidiaries into account, these numbers

rise to 24% and 4%, respectively. When we add imports by all firms in the supply chain, we see that 29% of all listed firms in the U.S. import directly or indirectly from China. . . . we construct a variable, 'Firm Exposed to China' if any firm in the firm's network exported to or imported from China or if the firm had positive revenues from China (possibly from affiliate sales). We see that 53% of all firms were exposed to China through one or more of these channels."

Because the courts and Congress have ceded authority over trade to presidents, Donald Trump had a free hand to conduct trade policy during his presidency. With that free hand, the evidence shows he inflicted significant damage.

Most of Donald Trump's political appeal rested on being a businessman (as portrayed on *The Apprentice*) and his perceived stewardship of the U.S. economy. The latest research illustrates the negative impact of his trade policy, leading one to conclude that to the extent a president manages the economy, Donald Trump managed it poorly.

Forbes

May 10, 2021

Rule To End The H-1B Visa Lottery Would Harm International Students

By STUART ANDERSON

A Trump administration regulation that would end the H-1B lottery would make it more difficult for international students to obtain an H-1B petition and work in the United States, as confirmed by new research. While implementation of the Trump rule has been delayed, observers believe the Biden administration may favor the rule. The battle over the regulation could determine whether U.S. universities will recover from the students lost during the Trump years and as a result of Covid-19. "In calendar year 2020, U.S. schools saw a 72% decrease in new international student enrollment when compared to calendar year 2019," according to Immigration and Customs Enforcement (ICE).

The Trump administration rule, published a few weeks before Donald Trump left office, would replace the H-1B lottery, which distributes H-1B petitions by random selection when U.S. Citizenship and Immigration Services (USCIS) receives more H-1B registrations than the 85,000-annual limit allows. In its place, the new rule would direct USCIS to select H-1B petitions from highest to lowest salary level under the Department of Labor's wage system, starting with individuals paid at Level 4 wages, typically the most experienced workers, and then selecting applicants at Level 3, Level 2 and Level 1 (entry level).

International students are disadvantaged under the rule because choosing H-1B petitions by salary level favors individuals with the most experience in the labor market over those with the least experience.

"The National Foundation for American Policy (NFAP) found that an international student may be 54% more likely to get an H-1B petition under the current H-1B lottery system than under the Trump administration's regulation that would end the H-1B lottery," according to an NFAP analysis of actual cases of recent international students and filings for H-1B petitions. "The data demonstrate the new regulation would have a significant negative effect on the ability of international students to gain an H-1B petition."

"The law firm Curran, Berger & Kludt provided NFAP with 170 cases of F-1 students with applications for H-1B cap selection for FY 2018, FY 2019, FY 2020 and FY 2021," according to NFAP. "Under the current system that randomly selects H-1B petitions, 60% of the F-1 students

were chosen through the H-1B lottery. However, the law firm provided information on the pay levels (Level 1 through 4) for the students' H-1B applications, and NFAP found if the new regulation had been in effect, only 39% of the students' H-1B petitions would have been selected."

When the Department of Homeland Security (DHS) published the rule, it concluded that under the new regulation, *no applicants for H-1B petitions paid Level 1 wages would be selected under the new system and only about half of the people paid at Level 2 wages would get H-1B petitions*. Meanwhile, everyone paid at Level 3 and Level 4 would get an H-1B petition. Once the rule is in effect, DHS notes that employers may decide to raise some salaries (beyond market wages) to improve the odds of selection, which means even fewer individuals paid at Level 2 would be likely to get an H-1B petition.

It is natural that international students, who have little experience in the labor market, would be paid at Level 1 or Level 2. "Among the firm's cases for the four cap years examined (FY 2018 to FY 2021), 53% of international students were paid at level 1 and 37% were paid at Level 2 (i.e., 90% combined)," according to the NFAP analysis. "As noted, DHS states in the rule that under its simulation no one at Level 1 would receive an H-1B petition and only about half the individuals paid at Level 2 wages would be selected for an H-1B petition."

NFAP found a remarkable aspect of the rule that illustrates its impact was not well studied. There are 11 occupations, including physicians, internists, pediatricians, dentists and computer and information systems managers, "for which the individuals paid Level 1 salaries would be unable to obtain an H-1B petition under the rule even though their Level 1 salaries are actually higher than the median salary for Level 3 for all occupations ($109,886)."

The Biden administration has pledged to "follow the science," and, ironically, under the rule, it will be very difficult for microbiologists and medical scientists to gain H-1B petitions if the rule goes into effect. NFAP found, "More than half of the of the labor condition applications for those occupations in FY 2019 were for Level 1, and close to 90% were paid at Level 1 or Level 2."

The U.S. Chamber of Commerce and allied business groups and education organizations have filed an amended complaint that argues the regulation to end the H-1B lottery is unlawful. "Many international students are taking a leap of faith in many cases to leave their homes and their families, and come to study or work in the United States with the hope of being able to get continued immigration status to follow their career plans," said Dan Berger of Curran, Berger & Kludt in an interview.

The rule was the culmination of a series of Trump administration actions designed to discourage international students from coming to America and working in the United States after they arrived. It encompassed the same zero-sum view of economics and the labor market that drove most of the Trump administration's immigration measures. It is up to the Biden administration to decide if it wants to continue this part of the Donald Trump-Stephen Miller immigration agenda against international students.

Education organizations warned at the time that the Trump administration's rule would hurt international students and make studying in America less attractive. The latest research proves they were correct.

Forbes

May 5, 2021

Biden Continues Trump's Misguided Trade Policies

By STUART ANDERSON

When it comes to U.S. trade policy, so far, Joe Biden has continued Trump administration policies that economists and other analysts found to be harmful and misguided. Biden's rhetoric is less confrontational toward other countries and foreign leaders, but the unwelcome news for companies and consumers is the new president's substance on trade has remained "America First."

"On trade, Biden has voluntarily extended key Trump protectionist policies, including tariffs on metal imports and an effort to undermine the World Trade Organization's appellate process," writes Zack Beauchamp for *Vox*. "He even added to some of them, signing an executive order tightening "Buy American" rules for the federal government and proposing tax incentives for ordinary citizens to purchase American-made electric cars."

Beauchamp quotes Tufts University professor Daniel Drezner: "It's totally America First. I don't think they're more protectionist than Trump per se. But they're not less either."

When one examines Donald Trump's trade record, it's unclear why the Biden administration finds the policies appealing. (A new video from the National Foundation for American Policy details the shortcomings of an "America First" trade policy.)

First, Trump's trade policies were harmful to consumers. As economists know, tariffs are another word for taxes. The Congressional Budget Office has calculated the Trump tariffs cost the average U.S. household more than $1,200 a year. Since Biden has continued the tariffs, at some point, they will be called the "Biden tariffs," and the cost to U.S. households will be similar.

Second, Trump's policies, particularly the tariffs on steel and aluminum, cost jobs in manufacturing. "Tariffs on steel may have led to an increase of roughly 1,000 jobs in steel production," according to economists Lydia Cox of Harvard and Kadee Russ of the University of California, Davis. "However, increased costs of inputs facing U.S. firms relative to foreign rivals due to the Section 232 tariffs on steel and aluminum likely have resulted in 75,000 fewer manufacturing jobs in firms where steel or aluminum are an input into production."

Some estimates of job losses in manufacturing are higher. In 2019, the *St. Louis Post-Dispatch* reported on the layoffs that the steel tariffs caused at Mid-Continent Nail in Poplar Bluff, Missouri: "The plant, the largest U.S. nail manufacturer, was hit hard by President Donald Trump's steel tariffs . . . Its sales fell by 60%, it's been losing money, and employment fell from more than 500 last June to fewer than 300 now."

The irony is that two years after the Trump administration levied the tariffs, the U.S. primary metals industry employed only about 2,500 more people than when the tariffs were announced, according to the Bureau of Labor Statistics, as noted by Shawn Donnan of Bloomberg. In March 2018, 376,000 people were employed in primary metals, a number that increased to only 378,500 by March 2020.

Third, the tariffs on China hurt U.S. farmers—leading to more than $28 billion in government aid from taxpayers—and harmed the stock value of many companies. "We find that U.S. and Chinese tariff announcements lowered U.S. aggregate equity prices in our sample of close to 3,000 listed firms by 6.0 percentage points: a $1.7 trillion reduction in market value for our sample of listed firms," according to research by Mary Amiti, an economist at the Federal Reserve Bank of New York, and Columbia University economists Sang Hoon Kong and David Weinstein. The study noted that 3.4 percentage points of the 6.0 percent decline in equity prices "can be attributed to the common effects" [effects that matter in general to companies] and "2.6 percentage points can be attributed to the differentially poor performance of firms importing from, exporting to, or selling in China."

The Trump administration's trade tactics harmed consumers and companies and failed to achieve their stated objectives with China or America's other trading partners.

"President Trump is the worst president on trade policy in at least 90 years," according to Bryan Riley, director of the National Taxpayers Union's Free Trade Initiative. It remains a mystery why the Biden administration wishes to continue policies that were unsuccessful and harm Americans.

Forbes

May 3, 2021

What International Students And U.S. Universities Need To Know

By STUART ANDERSON

The past two years have been challenging for everyone, especially U.S. universities and international students. While many people hope the Fall 2021 semester will bring a return to normalcy on college campuses, the world and Covid-19 may have other plans. To better understand the multitude of issues facing universities, employers and international students, I interviewed Kenneth Reade, director of international student and scholar services at University of Massachusetts Amherst, and Dan Berger, a partner at Curran, Berger & Kludt.

Stuart Anderson: How challenging is it for students to obtain visas today?

Kenneth Reade: In the university community, we face a "double-whammy" of pent-up demand for U.S. consular visa appointments: Not only this year's newly admitted class but most of the international students admitted in 2020 who were not able to make it to the United States last fall or this spring. International students are seeking appointments, and we wish we could provide more reassurance at this anxious moment.

One bit of breaking news illustrates the situation. The State Department on April 30th announced a presidential proclamation barring most people coming to the United States from India, which raised questions and sparked fear among Indian students already facing a fraught time with the Covid-19 situation there. Hours later, the State Department clarified that students would be exempt. It's very positive that the State Department is listening to the international education community. In this world of lighting social media communication, it would have alleviated more concerns if the clarification had been issued at the same time as the proclamation.

Dan Berger: It has been a busy time with lots of news. The new proclamation on India highlights the uncertainty. We do not know how the Covid-19 situation in India will affect U.S consular operations, or if the State Department will consider more interview waivers to keep cases moving. Everything is in flux. Just last week, the U.S. consulates in Russia cut back to emergency services, and there are hints that U.S. consulates in China may offer more appointments for students.

Despite this uncertainty, we are slowly seeing glimmers of hope. The State Department just issued updated guidance that students in all countries with Covid-19 travel bans (UK, Ireland, the Schengen area, Iran, Brazil and China) will be eligible for "national interest exemptions." But at the same time, most countries in the world are now under a travel advisory, meaning travel for a visa appointment is uncertain. We still do not have clear guidance about how the travel bans apply to the spouses and children of students or more generally for scholars and staff.

U.S. Citizenship and Immigration Service (USCIS) has also rolled out an online version of the student work authorization (OPT) application, which seems to be very gradually cutting processing times to help graduates start jobs on time. But the in-person biometrics requirements for changes of status (for example for those working in H-1B status who go back to school and prefer not to travel abroad during the pandemic) makes those applications move glacially slow.

Anderson: What is the current policy on international students and in-person and remote learning at U.S. universities?

Reade: The April 26 updated guidance from SEVP (Student and Exchange Visitor Program) confirming the extension of existing guidance for the entire 2021-22 academic year is very helpful because it has come early. Last year we did not get guidance until the last minute, making it extremely difficult to advise international students. We appreciate being able to continue Covid-19-related "flexibility," including being able to issue I-20 immigration documents electronically and letting currently enrolled F-1 students stay outside of the U.S. beyond five months while maintaining their underlying F-1 immigration status. The ability for individual campuses to classify themselves with SEVP as hybrid, fully remote, or fully in-person allows significant leeway depending on each school's operational capacities and local Covid-19 conditions.

The current guidance does not force a hard return to in-person classes for international students. But even as our campuses move back in that direction, I foresee increasing complications. Zoom isn't going away, and the line between in-person and online instruction is now perhaps irreversibly blurred. The resumption of standard F-1 regulations without temporary guidance exceptions will make advising F-1 students even more challenging in the future now that online instructional delivery is bound to continue in some form.

Berger: Yes, unfortunately, the Student and Exchange Visitor Program has offered essentially no updated guidance regarding student work programs, such as Optional Practical Training or Curricular Practical Training (CPT) for students currently stranded abroad. It does not make sense to require students to fly to the U.S. to file their OPT applications when the students are allowed to study remotely from their home country.

Anderson: What advice do you have for international students?

Reade: It's easier said than done, but international students, especially new admits who have yet to secure an F-1 visa, need to try to remain as patient and flexible as possible, and know that their institutions in the U.S. support them fully and sincerely empathize with their concerns.

They should try to avoid the temptation to be distracted by online and social media "advice," and instead rely on your U.S. institution's guidance. Also, grab any type of U.S. consular appointment that may be available just to get into the State Department's appointment booking system, even if the date is unrealistically far in the future (we've already had some new students offered consular appointment bookings for early 2022!).

The State Department is working on a plan to prioritize student visa processing for the fall. But we know it's hard for students who are planning their lives and their move to wait—especially because last summer many did not make it to America.

Anderson: What advice do you have for university administrators?

Berger: Continue to be active in supporting international students through advocacy, and, if necessary, court challenges. Such efforts are still needed even with a new administration. Stephen Yale-Loehr, a Cornell Law School professor, shares this goal in a recent article. Advocate for more guidance and a positive message for international students, for a path to long-term status for DACA (Deferred Action for Childhood Arrivals), TPS (Temporary Protected Status) and undocumented students, for the ability of refugees to attend U.S. colleges, and for increased consular services abroad so students can come to our campuses.

Reade: Listen to your senior international officers and include them in every aspect of fall campus planning, even if some of that planning is not necessarily "international" in nature. Remember that even though Covid-19 rates are declining in the United States and vaccinations are increasing, that is not the case in most of the world. Covid-19 conditions worldwide will continue to hamper U.S. consular operations, and fall international enrollment will continue to be negatively impacted as a result.

Anderson: Have you been pleased with Biden administration policies that affect international students?

Reade: I think it's fair to say that most, if not all, immigration practitioners are relieved by the positive tone of the Biden Administration's policies on immigration. I will say, however, that there is a remaining sense of exhaustion at trying to keep up with the updates to advise our international students. Similar to policy directives during the Trump Administration, Biden's new policies are equally challenging—albeit in a very different way— since absorbing the updates often leads to more questions.

Anderson: What else would you like to see the Biden administration do?

Berger: We would like to see more guidance based on back-and-forth communication, such as to:

1) Continue the very welcomed trend of setting visa policies at U.S. consulates abroad based on the public health situation there, and updating policies as the Covid-19 situation evolves, but keep open to ways to avoid in person services in countries where the pandemic is spiking.

2) Expand the "special student relief" granted recently to students from two countries in dire situations—Syria and Venezuela—to support all students during the pandemic (at least through the end of 2021).

3) Continue issuing clarifying FAQs (frequently asked questions) on the Student and Exchange Visitor Program guidance about the flexibility schools have to support international students abroad or taking online classes during the pandemic. Uncertainty can be difficult and discouraging for international students. More communication will help move beyond the fear that lingers from last year.

4) Revive high-level communication between the government and higher education by bringing back the Homeland Security Academic Advisory Council.

Reade: I would like to see progressive reform to student visa regulations be decoupled from the larger debate over "comprehensive immigration reform." Immigration has sadly become such a toxic political football that lumping international education regulatory reform together with all of the other critical but highly contentious immigration issues such as border security, asylum and refugees, DACA, etc., can be a recipe for policy stagnation.

Reforming international student policies should instead be presented for what they are: an undeniable national economic benefit crucial to competing for the world's most talented individuals. Over the years, whenever I have spoken with members of Congress and their staff about international education issues, there is near-unanimous support, regardless of one's side of the aisle. And it's because the issue is ultimately a local one.

The significant economic impact to the district and state that international students bring speaks for itself whether it be tuition revenue or the high-skilled jobs created by our international graduates through startups and other local business development. International education touches on so many areas that are often not linked together: the economy, national security, public diplomacy, education and the labor market, to name a few.

We have a golden opportunity to take international student policy to the next level with the Biden Administration. It needs to be driven steadily and confidently by facts and data about the value of international students, and with the aim of removing regulatory impediments for students. We need to continue to welcome the world's most talented young minds to this country for education, and reward them with an opportunity to contribute to American society and the economy.

Forbes

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America's First Employment-Based Immigrant: Friedrich Von Steuben

By STUART ANDERSON

When Americans think about the contributions of immigrants to the defense of the nation we should recall there was a time when it appeared unlikely America would even be a nation. Alexander Hamilton played an important role in America's early years and Thomas Paine galvanized public opinion with *Common Sense*, but Friedrich von Steuben played the most critical military role of any immigrant during America's fight for independence. In a way, he was America's first employment-based immigrant.

In 1777, Friedrich von Steuben, a former Prussian officer, met with Benjamin Franklin, the colonies' ambassador to France, and Franklin's chief agent in Paris, Silas Deane, and impressed them enough that they, in effect, recruited him to help the Continental Army. While Steuben had served admirably as a Prussian officer, by 1777, he was out of a job and agreed to travel to the colonies, present himself with Franklin's recommendations to the Continental Congress and, it was hoped, become a paid officer for General Washington.

Franklin and Deane's introduction to the Continental Congress overstated Steuben's background. Moreover, Steuben did not possess the money to travel to the colonies. Pierre-Augustin Caron de Beaumarchais, a French playwright and friend of Steuben, gave him a loan.

What Steuben lacked in wealth and status, he made up for with other qualities. Nearing the age of 50, Steuben had amassed experience from many of Europe's best military minds. "What set Steuben apart from his contemporaries was his schooling under Frederick the Great, Prince Henry and a dozen other general officers," writes Paul Lockhart, author of *The Drillmaster of Valley Forge*. "He had learned from the best soldiers in the world how to gather and assess intelligence, how to read and exploit terrain, how to plan marches, camps, battles and entire campaigns. He gleaned more from his 17 years in the Prussian military than most professional soldiers would in a lifetime. In the Seven Years' War alone, he built up a record of professional education that none of his comrades in the Continental Army—Horatio Gates, Charles Lee, the Baron Johann de Kalb and Lafayette included—could match."

In December 1777, when Baron Friedrich von Steuben arrived in America, a colonial victory over the strongest empire on the globe looked uncertain. "Since losing a series of battles and

being driven from New York the previous summer, Washington and his closest advisers had been uncharacteristically flummoxed by Gen. Sir William Howe, who led the 30,000 strong British expeditionary force in North America," writes Bob Drury and Tom Clavin, authors of *Valley Forge*. "Throughout the spring and summer of 1777, Howe had orchestrated a series of feints that forced Washington into exaggerated countermeasures. He had dispatched some companies of his exhausted Continentals from their camp in Morristown, New Jersey, through rainstorms in searing heat as far north as the Hudson Highlands and as far south as the lower Delaware River."

General George Washington, the commander-in-chief of the Continental Army, chose to winter his troops at Valley Forge. Although the army had achieved surprising victories at Trenton and Princeton, the British occupied Philadelphia and Washington had yet to decide how next to deploy the Continental Army. In fact, the larger problem remained the state of the Army itself.

Steuben found the Continental Army at Valley Forge in bad shape. "What [Steuben] discovered was nothing less than appalling," according to Thomas Fleming, author of Washington's Secret War: The Hidden History of Valley Forge. "He was confronting a wrecked army." How wrecked? "The baron found soldiers without uniforms, rusted muskets without bayonets, companies with men missing and unaccounted for," writes Erick Trickey for the Smithsonian. "Different officers used different military drill manuals, leading to chaos when their units tried to work together. If the army had to fight on short notice, von Steuben warned Washington, he might find himself commanding one-third of the men he thought he had. The army had to get into better shape before fighting resumed in the spring."

Steuben grasped the key problems the army needed to overcome if it was to have a chance to defeat the well-trained and more experienced British Army. "Without ever having seen them fight, Steuben intuited that the resiliency the Americans had exhibited to this point in the war was offset by their professional limitations," writes Drury and Clavin. "At less than three years old, the Continental Army lacked an institutional memory; its soldiers were no more adept at fighting a practiced, dedicated foe than its commissary officers were at feeding and clothing them. What few drills the army practiced were a mélange of the whims of individual state commanders whose influences, such as they were, ranged from bits of French, English and Prussian field guides to homegrown backwoods fighting techniques."

Steuben understood his role could decide the outcome of the war. "It was only the Americans' spirited tenacity that had prevented them from being completely swept away by polished British and Hessian soldiers at Brandywine and Germantown," according to Drury and Clavin. "Such hardiness had been responsible for the surprise victories in Boston and at Trenton and Princeton. But Steuben knew that the Continentals' tendency to expose the flanks of their long files of Indian style marching columns, for instance, or their inability to form swiftly into disciplined lines of fire, would ultimately lead to catastrophe."

Steuben decided he needed to instruct the troops in drilling to instill discipline and professionalism in both soldiers and officers. He chose to "train" the trainers, teaching a twenty-man squad that could then be used to instruct other troops. He started with the proper standing position and moved to "dressing their ranks" or proper alignment, then the marching step. "The

speed of the marching was entirely new to the soldiers . . . Finally, the men were taught how to face 90 degrees to the right, 90 degrees to the left, and to face to the rear, which must always be done by spinning 180 degrees clockwise on both heels," writes Lockhart.

Baron von Steuben demonstrated drilling himself and punctuated his instruction with entertaining profanity in French or German, translated to the troops. He oversaw the drilling and showed unique insight into the character of the American troops, notes Lockhart. He understood American soldiers where not like European soldiers who were mostly peasants and naturally deferential, ready to obey those with higher social rank. "The genius of this nation is not to be compared . . . with that of the Prussians, Austrians or French," Steuben wrote to a Prussian friend following the war. "You say to your soldier, 'Do this,' and he does it; but I am obliged to say, 'This is the reason why you ought to do that,' and *then* he does it."

George Washington recorded favorable first impressions of Steuben but it was the former Prussian officer's results that most gained Washington's confidence. "Washington had ordered the cessation of all drilling not overseen by Steuben or his subinspectors," according to Drury and Clavin. And this confidence in Steuben extended beyond drilling. "So meticulous was Steuben's process, so indefatigable his diligence, and so burgeoning his influence that Washington was soon issuing a series of general orders suitable for, and nearly indistinguishable from, the Prussian army's boot camp directives."

The change was remarkable. "They went from a ragtag collection of militias to a professional force," according to historian Larrie Ferreiro. "[It was] Steuben's ability to bring this army the kind of training and understanding of tactics that made them able to stand toe to toe with the British."

In addition to preparing the Continental Army to defeat the British army and win independence, Steuben made two other important contributions to America. First, he wrote the field guide for the army. "[That] spring the resulting *Regulations for the Order and Discipline of the Troops of the United States* would be circulated among general Smallwood's troops in Delaware as well as Continental regiments in New Jersey," writes Lockhart. "The work eventually constituted the United States Army's primary field guide for decades and its unique rationale—that European military methods could be integrated into a thoroughly independent-minded Army—may be Steuben's greatest gift to his adopted country."

Steuben also contributed as a leader on the battlefield. He undertook the defense of Virginia and was at Yorktown for the final victory over the British. "Steuben's division was still in the trenches two days later, on the nineteenth, the day designated for the surrender ceremony," according to Lockhart. "The Baron planted the American flag on one of the captured British redoubts with his own hands. A small satisfaction, perhaps, but satisfaction nonetheless. After he had done so much to make this day possible – both by training the victorious army and by holding Virginia until Lafayette could take his place – Steuben no doubt felt that he deserved the honor."

Steuben made two critical recommendations that became another contribution to his adopted country. First, he formulated plans for a small professional army that could be supplemented by

reserves. Such an army could act as a deterrent to European powers. “His notion of a small peacetime army, supplemented in times of war with a national militia, would . . . serve as the underlying foundation of the American military establishment for many decades to come,” writes Lockhart.

Second, he recommended a military academy and suggested a curriculum. “West Point, and indeed all of the American service academies are products of the Baron’s agile mind,” according to Lockhart. “Above all other contributions tower the concepts of discipline and professionalism in the army as a whole and in the officer corps in particular.”

“The Baron de Steuben’s is the classic ‘coming to America’ story writ large,” writes Paul Lockhart. “Like so many immigrants before and since, he cut himself loose from the Old World and journeyed to the new intending to reinvent himself. He did just that.” Friedrich von Steuben may have been America’s first employment-based immigrant, and, like many immigrants, his achievements benefited America.

Forbes

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The State Department Can Act To Reduce Visa Delays

By STUART ANDERSON

When it comes to interview appointments in most temporary visa categories, the United States has a "Do Not Enter" sign lofted high for all to see. That is the reality based on interviews with attorneys and companies and a National Foundation for American Policy review of the leading source countries for visas. Past efforts and flexibility in the law illustrate the steps that the State Department can take to improve visa processing.

Consulate closures and limited processing have caused significant delays for visa appointments, leading companies to fear much-needed employees may never arrive in America. Attorney William Stock of Klasko Immigration Law Partners recently shared a thread showing a client's interview in Paris for an O-1 visa has been bumped four times. Two other appointments scheduled for July, one for an L-1B visa (intracompany transferee), were canceled. The first new interview appointments in Paris appear to be in February 2022.

Table 1: Visa Appointment Wait Times

Issuing Office	Visitor Visa	Student/Exchange Visitor Visa	All Other Nonimmigrant Visas
Beijing	Emergency Appts. Only	Emergency Appts. Only	Emergency Appts. Only
Bogota	Emergency Appts. Only	Emergency Appts. Only	Emergency Appts. Only
Frankfurt	Emergency Appts. Only	Emergency Appts. Only	Emergency Appts. Only
London	Emergency Appts. Only	Emergency Appts. Only	Emergency Appts. Only
Manila	Emergency Appts. Only	9 Calendar Days	7 Calendar Days
Mexico City	Emergency Appts. Only	1 Calendar Day	Emergency Appts. Only
Mumbai	Emergency Appts. Only	Emergency Appts. Only	Emergency Appts. Only

New Delhi	70 Days	26 Calendar Days	29 Calendar Days
Paris	272 Calendar Days	20 Calendar Days	272 Calendar Days
Santo Domingo	Emergency Appts. Only	9 Calendar Days	14 Calendar Days
Sao Paulo	Emergency Appts. Only	Emergency Appts. Only	Emergency Appts. Only

Source: U.S. Department of State, National Foundation for American Policy.

The State Department's appointment wait time website page shows nearly all the major countries for U.S. visas are processing emergency appointments only. (See Table 1 for appointment wait times for temporary/nonimmigrant visas as of April 16, 2021.) That includes Beijing, Bogota, Frankfurt, London and Sao Paolo. "To get an expedited interview, you have to first make a regular appointment, and then you need to explain what are the factors, such as dire business need or family issues," said Dagmar Butte of Parker, Butte & Lane in an interview. "So far, I am seeing that mere inconvenience or business interruption without demonstrable and serious financial consequences won't do it."

"It is very hit or miss whether an emergency appointment will be granted," said Kevin Miner of the Fragomen law firm. "Especially after early March when the State Department issued new guidance on what qualifies for a National Interest Exception it has been particularly difficult. We were having quite a bit of success before that for executives and other senior business leaders, but that really closed down after the new guidance came out."

Mumbai, Chennai and the other consulates in India are shut down except for emergency appointments. However, in New Delhi, the State Department lists appointments are available for temporary visa interviews in 29 calendar days. Chennai conducts interviews for blanket L visas, and it's not clear that applicants can easily switch their cases to New Delhi.

"I think that with the exception of blanket L's, the consulates in India have been willing to process whoever can manage to get an appointment," said Miner. "The problem is that if you get a regular appointment, at least half the time they seem to then get canceled a few days before the appointment. It is only the emergency appointments that hold. Most consulates also take the position that you are supposed to be in the consular jurisdiction before requesting a National Interest Exception, so if you are in the U.S. and need a visa, you can't really get everything arranged in advance and then travel to India. Instead, you have to make the trip and hope it works out. This puts people in a very difficult spot, because if they leave the U.S., they might be gone unexpectedly for months if the emergency appointment isn't granted."

International students are eligible to get visas under the State Department guidelines, although the result depends on the country. "We are seeing F-1s starting to be granted," said Dan Berger of Curran, Berger & Kludt in an interview. "But with big countries, it is frustrating." He said appointments in China are made and then often canceled at the last minute.

A recent lawsuit challenged the State Department's policy of not issuing visas in places subject to regional visa bans connected to Covid-19. However, additional questions are emerging about U.S. visa policy.

It is unclear, for example, why China remains on the list of countries with Covid-19-related visa restrictions since there have been few reported cases of Covid-19 in China for many months. If per CDC guidelines everyone needs to show a "negative Covid-19 test result or documentation of recovery from Covid-19" before they can board a plane to the United States, why are there different policies from one visa category to another for the same country or the continuation of the country-based bans?

There are steps the State Department can take to return U.S. visa processing to a more normal footing. "State can adopt more flexible ways to interview, mandate more openness in rules and visa denials, and provide more effective means for administrative review of denials," said Jeffrey Gorsky, former Chief of the Legal Advisory Opinion section of the Visa Office in the U.S. Department of State, in an interview.

On January 19, 2012, President Barack Obama issued an executive order to relieve visa delays in China and Brazil. "State and DHS [Department of Homeland Security] are focused on making the travel process as efficient as possible for visitors and residents, while increasing the government's operational productivity," according to a joint DHS and State Department report issued 6 months after the executive order was issued. "State has increased visa processing capacity in high-demand markets through a combination of increased staffing, workload management and expansion of its facilities."

The report continued: "Increased staffing has been key to lower visa interview wait times. By the end of 2012, State will have created more than 50 new visa adjudicator positions in China and 60 in Brazil, including 43 hired under State's innovative Limited Non-career Appointment program. Between October 2011 and July 2012, State deployed, on temporary duty, 220 consular officers to Brazil (a 253% increase over the number of temporary officers sent the previous fiscal year) and 48 officers to China (a 60% increase). The additional staff enabled State to meet the 40% capacity increase target goal outlined in EO 13597 in Brazil in June 2012, and will enable State to meet that goal in China by December 2012.

"Visa processing capacity in high-demand countries, particularly Brazil and China, has grown to meet sharply-rising demand. Consular managers in China are finding greater efficiencies and have expanded their work hours to maximize interview window use. Managers throughout Brazil's four consular sections have responded to a nearly 50% year-on-year increase in demand by expanding operating hours, including occasional Saturdays and holidays. On January 20, 2012, State and DHS initiated a two-year Interview Waiver Pilot Program (IWPP) to streamline processing for low-risk visa applicants."

Although the fixes today would not be the same as in 2012, history shows where there is a will, there is a way. Gorsky notes the State Department could become more creative with biometric intake, give visa processing a higher priority and conduct more interviews via video. He believes interviews via Zoom would meet the statutory definition of in-person interviews.

The authority to waive interviews could be used more extensively. The law provides the Secretary of State latitude to waive interviews when he finds it is in "the national interest of the United States" or "necessary as a result of unusual or emergent circumstances." On March 11, 2021, the State Department announced it "has temporarily expanded the ability of consular officers to waive the in-person interview requirement for individuals applying for a nonimmigrant visa in the same classification. Previously, only those applicants whose nonimmigrant visa expired within 24 months were eligible for an interview waiver. The Secretary has temporarily extended the expiration period to 48 months."

"First impressions are important," according to the Obama administration's 2012 report on the executive order to improve visa processing. "A foreign visitor's first and primary encounters with the U.S. government are often with the Departments of State and Homeland Security, and these interactions shape visitors' opinions about the United States." If the Biden administration wants to achieve improved visa processing, it will need to change its current policies.

Forbes

April 12, 2021

Lawsuit Challenges Biden Administration Covid-19 Visa Policies

By STUART ANDERSON

A new lawsuit challenges the State Department's refusal to issue visas in countries the Biden administration maintains coronavirus-related restrictions on entering the United States. Beyond the legal issues, attorneys say the current policy is not advancing public health since anyone who obtains a visa must show a negative Covid-19 test result before flying to the United States and can quarantine. Moreover, people in some visa categories and individuals with previously issued valid visas are allowed to enter America, while individuals in other categories are refused visas.

"Defendants have unlawfully interpreted section 212(f) of the Immigration and Nationality Act authorizing the President to temporarily suspend the entry of classes of noncitizens to be *a grant of authority to suspend the processing of visas and create exceptions for issuance*," according to the complaint for declaratory and injunctive relief filed on April 7, 2021. (Emphasis added.) The American Immigration Lawyers Association (AILA) is a co-counsel with Jeff Joseph of Joseph and Hall PC, Charles Kuck of Kuck Baxter Immigration LLC, and Greg Siskind of Siskind Susser PC.

"This matter involves the unlawful suspension of visa processing for Plaintiffs simply because they temporarily may not enter the United States," according to the complaint. "Defendants have unlawfully relied on certain suspensions on entry that apply to individuals who were physically present in the Islamic Republic of Iran, the People's Republic of China, the Federative Republic of Brazil, South Africa, the Republic of Ireland, the United Kingdom, and the Schengen area of Europe ("designated countries") during the 14-days prior to seeking entry.

"These regional *entry* bans based on presence allow for entry after the individual has remained outside the designated countries for 14 days. However, Defendants have refused to issue visas to Plaintiffs which would allow them to quarantine in a third country for fourteen days prior to seeking entry.

"Due to Defendants' unlawful refusal to issue visas to individuals in these countries, the plaintiffs are subject to a total, inescapable ban on receiving their visas, or even having these visas adjudicated, unless they can meet certain, unlawful and narrowly proscribed exceptions to trigger visa processing. The law authorizes none of this agency action.

"Plaintiffs hereby call on this Court to strike DOS' [Department of State's] stubborn adherence to its unlawful 'no-visa' policy as *ultra vires* with regard to the suspensions of entry under PP10143 [presidential proclamation 10143] as arbitrary, capricious and not in accordance with law under the Administrative Procedure Act."

The plaintiffs argue the doctrine of consular non-reviewability does not apply in this case because the lawsuit is not challenging a consular officer's individual decision to deny a visa.

The plaintiffs include individuals who have applied for visas and employers prevented from obtaining visas for needed workers, including the Association of Cultural Exchange Programs, which joined the lawsuit on behalf of members that hire thousands of individuals on J-1 exchange visas. "Sponsoring organizations report losing 50% to 90% of their expected staff, and millions of dollars in revenue due to the Department of State's refusal to process J-1 visas in countries subject to regional entry restrictions," write the plaintiffs. Individuals in L-1, H-1B and other temporary visa categories are also affected.

The complaint correctly notes that on January 18, 2021, the Trump administration rescinded the proclamation restricting entry from the Schengen Area (almost all European countries), the United Kingdom, the Republic of Ireland, and Brazil, but the Biden administration "restored the restrictions on the *entry* of all immigrants and nonimmigrants who were physically present in the preceding 14-day period in the Schengen Area, the United Kingdom, the Republic of Ireland, and Brazil." (The Biden administration added South Africa to the ban on entry.)

"The Department of State, however, as recently as April 6, 2021 . . . [declared] '[t]hese proclamations, with certain exceptions, place restrictions on visa issuance and entry into to the United States for individuals physically present in China, Iran, Brazil, UK, Ireland, South Africa, and the 26 countries in the Schengen area.'" The plaintiffs argue, "This is a factual misstatement, and a continuation of the Defendants ignoring numerous courts explicitly stating that their policy of restricting visa issuance as unlawful. Nowhere in any of these Presidential Proclamations is any reference to visa issuance whatsoever."

The lawsuit notes by refusing to issue visas the State Department is creating enormous backlogs from which it will be difficult to recover. The State Department has disclosed a backlog of 473,000 immigrant visa cases pending at the National Visa Center, not including "cases already at embassies and consulates that have not yet been interviewed or applicants still gathering the necessary documents before they can be interviewed, and also, of course, petitions awaiting USCIS [U.S. Citizenship and Immigration Services] approval."

The plaintiffs argue the refusal to issue visas has created a virtual moratorium on immigration and temporary migration from many countries. Recall that President Biden has issued several statements proclaiming support for immigration to the United States.

"In fiscal year 2019, the five consulates in mainland China, excluding Hong Kong, issued a total of 1,157,656 nonimmigrant visas," according to data compiled by the plaintiffs. "For fiscal year 2020—for which half of the year was prior to the March 20th suspension on routine visa services—only 277,838 nonimmigrant visas were issued. This pattern held true for all countries

subject to the regional entry bans. Spain saw a reduction of nonimmigrant visa issuances from 40,807 in fiscal year 2019 to 15,301 in fiscal year 2020. Brazil saw a reduction from 548,201 nonimmigrant visas to 237,178.

"Issuance of immigrant visas similarly plummeted. In fiscal year 2019, the U.S. consulate in China issued 27,036 immigrant visas. In fiscal year 2020 that number fell to 11,820. Brazil's issuance fell from 3,506 to 1,617.

"Meanwhile, some countries that were not subject to travel restrictions actually saw their issuance numbers *rise*. In Turkey, for example, 3,018 immigrant visas were issued in fiscal year 2019. In fiscal year 2020, even with routine visa operations being shut down for months, 3,538 immigrant visas were issued."

In what may have been a response to the litigation, on April 8, 2021, the State Department announced: "The Secretary has determined that the travel of immigrants, [K-1] fiancé(e) visa holders, certain exchange visitors, and pilots and aircrew traveling to the United States for training or aircraft pickup, delivery, or maintenance is in the national interest for purposes of approving exceptions under the geographic COVID Presidential Proclamations (9984, 9992, and 10143). These proclamations restrict the entry of individuals physically present, within the 14-day period prior to their attempted entry into the United States, in the People's Republic of China, Islamic Republic of Iran, Schengen Area, United Kingdom, Republic of Ireland, Federative Republic of Brazil, or Republic of South Africa."

"It may very well redress the harms for our immigrant visa and K-1 plaintiffs, but we have others who will not benefit," said Jesse Bless, AILA's director of litigation, in an interview. "Our team will continue considering the implications of the guidance and, of course, we will look at the execution of DOS to process visas in line with this guidance."

The State Department acknowledges the ban on entry is "based on presence, not citizenship." In a briefing on March 1, 2021, Consular Affairs Acting Deputy Assistant Secretary for Visa Services Julie M. Stufft said, "So if there is capacities in other posts, the situation that you lay out is possible. We definitely advise people to check with other embassies and the consulates to find out if there is capacity in those places."

The plaintiffs assert the policy is illogical: "They are inviting people to travel through multiple countries during a pandemic to obtain a visa from a U.S. Consulate rather than having the individual remain-in-place and receive consular processing."

"We are trying to figure this out and really don't get it," said Tammy Fox-Isicoff of Rifkin & Fox-Isicoff in an interview, discussing the overall policy. "But it is life-altering for U.S. businesses and financially devastating for investors and the U.S. workers these investors employ. Upon issuance of a visa, the applicant could quarantine [outside the Schengen Area] or comply with whatever Covid-19 precautions are required. This is what the actual proclamation requires." Fox-Isicoff also takes exception to "new arbitrary, amorphous and mysterious national interest exceptions" the State Department has issued.

“The current visa policy cannot be justified as stopping Covid-19,” said Fox-Isicoff. “We allow people who obtained visitor visas years ago to come to the United States, but people like my client who have lived here on an L visa for years and left recently are lower on the chain than a visitor who comes to America for a vacation after not being here for years.”

If per CDC guidelines everyone needs to show a “negative Covid-19 test result or documentation of recovery from Covid-19” before they can board a plane to the United States, why are there different policies from one visa category to another or country-based bans?

“I try to see the logic but just can’t,” said Fox-Isicoff. “Simply put, it’s asinine.”

It has become difficult for many affected individuals and employers to understand how the Biden administration’s visa policies provide protection from Covid-19. The new lawsuit holds the potential to bring about more rational immigration policies.

Forbes

April 6, 2021

Research: More International Students, More U.S. Student STEM Degrees

By STUART ANDERSON

New research shows concerns that international students take spots from U.S. students are unfounded. The research also finds that having more international students at a university results in more U.S. students going into STEM (science, engineering, computer science and mathematics/statistics) fields. Both findings are significant and should encourage policies that welcome international students to America.

“Enrolling more international undergraduate students does not crowd out U.S. students at the average American university and leads to an increase in the number of bachelor’s degrees in STEM majors awarded to U.S. students,” according to a new study from the National Foundation for American Policy (NFAP) by economist Madeline Zavodny.

“Each additional 10 bachelor’s degrees—across all majors—awarded to international students by a college or university leads to an additional 15 bachelor’s degrees in STEM majors awarded to U.S. students,” concluded Zavodny, an economics professor at the University of North Florida and formerly an economist at the Federal Reserve Bank of Atlanta.

The study finds “a drop in international students will not mean more seats are available for U.S. students since, with limited exceptions, there is plenty of capacity at U.S. colleges and universities and international students are not taking away slots from American students.” (Universities usually don’t want to lower their admissions standards, which hurts their rankings.)

The study suggests, “Colleges and universities that attract more international students likely are devoting more resources to STEM areas, such as increasing the number of courses and adding fields offered within STEM, hiring more faculty, and providing new lab spaces and buildings. To the extent such changes are occurring, they appear to be attractive to U.S. students as well.”

“International students are considerably more likely to major in STEM fields than in most other areas of study, indicating U.S. students are taking more classes with international students rather than avoiding majors popular with international students,” according to Zavodny.

“The positive relationship is after controlling for school fixed effects and linear trends, so regardless of its cause the finding an increase in international students at a school leads to an increase in the number of bachelor’s degrees in STEM majors awarded to U.S. students is a robust relationship,” writes Zavodny.

The study used data from the U.S. Department of Education’s Integrated Postsecondary Education Data System (IPEDS) to analyze international and U.S. undergraduate students at 1,234 non-profit higher-education institutions from 1990 to 2018.

Other findings from the research include:

· “Within 1,234 colleges and universities over 1990-2018, the number of international undergraduate students has no significant effect—either positive or negative—on the number of U.S. students enrolled, on average. This null result holds overall, for men and women, and for non-Hispanic white and black students.

· “There is no effect of international students on the number of bachelor’s degrees awarded to black U.S. students, either in total or by sex. The number of bachelor’s degrees awarded to international students likewise has no significant effect on the total number of bachelor’s degrees awarded to U.S. students within those 1,234 colleges and universities over 1990-2018, on average. This null result holds overall, for men and women, and for black students.

· “The results indicate that the number of bachelor’s degrees awarded to white U.S. women increases less if a school increases the number of bachelor’s degrees awarded to international students. This does not mean that fewer white U.S. women earn bachelor’s degrees in total because of international students, but rather that the increase in the number of them earning their degree from a particular school is smaller as the number of bachelor’s degrees earned by international students increases at that school. In other words, the evidence is only that the increase in the number of white women graduating from a school is smaller when the increase in the number of international students graduate from that school is bigger, not that fewer white women in total are graduating from college. White women are the largest demographic group to attend and graduate from college in the U.S. Some colleges may be choosing to diversify away from this group as they enroll and graduate more international students.

· “The research indicates U.S. students, both men and women, shift into STEM majors from social sciences majors at schools that experience larger increases in the number of international students. This may be due to those schools devoting more resources to their STEM programs, making them more attractive to U.S. and international students alike.”

“The findings that international undergraduate students do not crowd out U.S. students and even prompt more of them to graduate with a STEM major have important economic implications,” writes Zavodny. “Students who graduate with a STEM major typically earn more than other graduates, especially early in their careers. The finding here that the presence of international students actually increases the number of U.S. students graduating with a STEM major is another reason to encourage international students to come to the United States.”

Before Covid-19, new international student enrollment declined largely because of the difficulty in working in the United States after graduation, particularly when compared to Canada. That was due, at least in part, because of U.S. immigration restrictions that include potentially decades-long waits for permanent residence and restrictive policies toward H-1B visas. International students from India at Canadian universities rose from 76,075 in 2016 to 172,625 in 2018, an increase of 127%. The number of Indians who became permanent residents in Canada more than doubled from 39,340 in 2016 to 85,585 in 2019, according to a National Foundation for American Policy analysis.

The Biden administration is considering two rules published in the final weeks of the Trump administration that could discourage international students from coming to America. One is a Department of Labor rule aimed at pricing international students out of the U.S. labor market. The other is a Department of Homeland Security regulation that makes it less likely for foreign students to be selected for an H-1B petition after graduation. “In calendar year 2020, U.S. schools saw a 72% decrease in new international student enrollment when compared to calendar year 2019,” according to the Department of Homeland Security.

“Many international students are potential STEM professionals and their presence prompts more U.S. college graduates to become potential STEM workers as well, two important benefits of U.S. universities admitting international students,” concludes Zavodny. “There is not a trade-off between U.S. students and international students. An increase in the number of international students should be viewed as good news for both U.S. students and U.S. schools.”

The fate of international students may be linked to U.S. policies. The latest research shows there are good reasons those policies should be welcoming.

Forbes

April 1, 2021

Evidence Mounts That Reducing Immigration Harms America's Economy

By STUART ANDERSON

Donald Trump's immigration policies were harmful to America's long-term economic future. That becomes clearer as one compares the Trump administration's actions to the projected increase in the number of immigrants under recently introduced immigration legislation. The U.S. Citizenship Act, developed by the Biden administration, would aid long-term economic growth by increasing the number of legal immigrants by 28%. In contrast, Trump administration policies would have cut legal immigration in half. The immigration policy path America chooses in the long-term will make a significant impact on economic growth and future labor force growth, of which immigrants are a vital part.

Economic growth or growth in Gross Domestic Product (GDP) is necessary for a country's inhabitants to improve their standard of living. "GDP growth [economic growth] is made up of growth in the workforce plus growth in labor productivity," according to Robert S. Kaplan, president and CEO of the Federal Reserve Bank of Dallas. "Unless slower workforce growth is offset by improved productivity growth, U.S. GDP growth will slow."

The Trump administration's immigration policies harmed long-term economic growth by reducing labor force growth and potential productivity growth through restrictive policies.

High-skilled foreign nationals are important to productivity growth. Yet the Trump administration increased the denial rates of H-1B petitions, causing many long-time H-1B visa holders to leave the United States. The administration also blocked the entry of H-1B visa holders and published regulations that employers believed would make it nearly impossible for many foreign-born scientists and engineers to work in the United States.

"When we aggregate at the national level, inflows of foreign STEM [science, technology, engineering and math] workers explain *between 30% and 50% of the aggregate productivity growth* that took place in the United States between 1990 and 2010," according to economists Giovanni Peri (UC, Davis), Kevin Shih (RPI) and Chad Sparber (Colgate University). Research by economist Britta Glennon found rather than saving jobs, H-1B restrictions "have the unintended consequence of encouraging firms to offshore jobs abroad."

While the Biden-supported U.S. Citizenship Act may have a difficult time becoming law, it serves as a marker for changes to legal immigration by increasing both family and employment-based immigration. The bill would have a positive impact on labor force growth by raising immigration by 28% a year after a transition period.

"Increasing legal immigration by 28% a year would increase the average annual labor force growth in the United States by 23% over current U.S. projections, which would help economic growth and address a slower-growing U.S. workforce," according to an analysis by the National Foundation for American Policy (NFAP). "The average annual labor force growth could be even more than 23% compared to a scenario of no immigration increases because the Bureau of Labor Statistics currently projects the U.S. labor force will grow by 800,000 a year, and that baseline growth may be lower after 2029 without the increase in immigration contained in the bill."

"In contrast," the analysis continues, "if the United States continued the Trump administration's policies that administratively reduced legal immigration by approximately 49%, average annual labor force growth would be approximately 59% lower than compared to a policy of no immigration reductions, according to an NFAP analysis. Under policies that reduced legal immigration by half, in 40 years the United States would have only about 6 million more people in the labor force than it has today. Admitting fewer immigrants results in lower economic growth because labor force growth is an important element of economic growth and immigrants play a major part in both current and future labor force growth."

A recent National Foundation for American Policy study by Madeline Zavodny, an economics professor at the University of North Florida, shows the positive impact of immigration.

"Analysis of U.S. Census Bureau data finds international migration was the only source of population growth in rural areas as a whole during most of the 2010s," writes Zavodny. "International migration is strongly related to employment growth in both rural and metro counties. Each additional international migrant is associated with an additional 1.2 jobs in rural counties over 2010 to 2018. The estimate for rural areas suggests that international migration adds to total employment well beyond the jobs filled by international migrants. International migrants may have a larger impact on employment because of the jobs they fill. International migrants may work in jobs that otherwise would go unfilled by local residents and thereby enable businesses to expand."

Due to declines in fertility, immigration keeps the United States from experiencing negative population growth, according to the U.S. Census Bureau.

New economic research finds that negative or falling population growth may yield harmful economic outcomes beyond slowing labor force growth. Fewer available minds may mean fewer solutions to our problems. What if the breakthrough advances in mRNA made by Katalin Karikó, an Hungarian-born immigrant to America, never happened or occurred years later because Karikó was never born? How would that have affected the development of vaccines and other potential solutions to medical problems?

In a recent paper, "The End of Economic Growth? Unintended Consequences of a Declining Population," Charles I. Jones, a professor of economics at the Stanford Graduate School of Business, writes, "What happens to economic growth if population growth is negative? We show below—first in models with exogenous [external] population growth and then later in a model with endogenous (internal) fertility—that negative population growth can be particularly harmful." He asks: "How do idea-based growth models behave when population declines?"

In sum, with fewer people, "knowledge and living standards stagnate." Jones writes, "If knowledge were to depreciate at a constant exogenous [external] rate, it is easy to show in the simple models at the start of this paper that this would lead to declining living standards in the presence of negative population growth, an even more dire outcome."

"We refer to this as the *Empty Planet* result," writes Jones. "Economic growth stagnates as the stock of knowledge and living standards settle down to constant values."

Immigration can prevent population decline in the United States and allow America to grow—if U.S. elected officials choose the right policies. "Among great powers, the coming population decline uniquely advantages the United States," according to Darrell Bricker and John Ibbitson, authors of the book *Empty Planet*, the title to which Charles Jones referred. "For centuries, America has welcomed new arrivals, first from across the Atlantic, then the Pacific as well, and today from across the Rio Grande. Millions have happily plunged into the melting pot—America's version of multiculturism—enriching both its economy and culture. Immigrants made the twentieth century the American century, and continued immigration will define the twenty-first as American as well.

"Unless. The suspicious, nativist, America First groundswell of recent years threatens to choke off the immigration tap that made America great by walling up the border between the United States and everywhere else. Under President Donald Trump, the federal government not only cracked down on illegal immigrants, it reduced legal admissions for skilled workers, a suicidal policy for the U.S. economy. If this change is permanent, if Americans out of senseless fear reject their immigrant tradition, turning their backs on the world, then the United States too will decline, in numbers and power and influence and wealth. This is the choice that every American must make: to support and open, inclusive, welcoming society, or to shut the door and wither in isolation." It is a significant choice.

Forbes

March 24, 2021

Asylum Expert: Respecting Human Rights Also Controls The Border

By STUART ANDERSON

The debate over U.S. border policy has centered on how harsh the policy should be. But what if the answer to reducing unlawful migration is better adherence to human rights? To better understand the issue, I interviewed one of America's leading experts on asylum, Dree Collopy, a partner at Benach Collopy LLP. Dree serves as chair of the American Immigration Lawyers Association's (AILA) National Asylum and Refugee Liaison Committee and is the author of the book *Asylum Primer*.

Stuart Anderson: Some have argued that people are coming across the border because of things Joe Biden has said. Is that why people are coming to the United States from Central America?

Dree Collopy: Quite simply, no. People are fleeing from endemic violence and instability in Central America in search of safety for themselves and their families. Nothing any U.S. president says is going to stop people from fleeing violence. Doing so is akin to telling someone to stay in a burning house. Rather than continuing Trump-era policies, such as mass expulsions of asylum seekers under Title 42, the Biden administration should stop sending these families and children back to danger and instead follow the law, which requires that all asylum seekers be provided a meaningful opportunity to seek protection from persecution.

Anderson: Can you explain the current ban from the Centers for Disease Control and Prevention (CDC)?

Collopy: In March of 2020, the Trump administration's Department of Health and Human Services' Centers for Disease Control and Prevention issued an order, in coordination with the Department of Homeland Security (DHS), barring all "nonessential" travelers at the southern and northern borders of the United States, with limited exceptions.

This "ban" is referred to as Title 42 because, for the first time in U.S. history, section 265 of Title 42 of the U.S. Code was used to justify this indefinite closure of the border. This statute allows the Surgeon General of the United States to restrict the entry of people into the United States to avert the spread of infectious disease. The Trump administration grasped on to this statute, using it as an excuse to unilaterally and summarily expel asylum seekers and other

noncitizens arriving at the U.S. border, without due process or access to the asylum system—and without even testing for Covid-19.

Of course, this sudden concern about the global public health crisis and its impact on the United States was merely a façade—a weaponization of public health to advance the Trump administration's anti-immigration views.

Perhaps the clearest example that invoking this statute was *not* based on concern for the health of Americans, but just another tool to close the U.S. borders to noncitizens is that the Trump administration never once closed the U.S. immigration courts due to public health concerns. It continued to require U.S. immigration judges, DHS counsel, respondents, counsel for respondents, witnesses, interpreters, and court staff to continue to appear in court, in person, in the middle of a pandemic, all to keep the deportation machine churning out as many removal orders as possible.

Unfortunately, the Biden administration has chosen to maintain the Title 42 restrictions imposed by the Trump administration, and although it has temporarily halted the expulsions of unaccompanied children, it continues to apply the policy to adults and families with children of all ages who arrive to seek protection in the United States. In sum, this unlawful CDC "ban" continues to result in rapid expulsions and refoulement of asylum seekers back to the hands of their persecutors and other dangers, with no due process of law and no adherence to U.S. international and domestic legal obligations toward asylum seekers.

Anderson: What would happen to the current situation if the administration revoked the CDC ban and let families, children and individuals apply for asylum at ports of entry?

Collopy: The United States would be following the law. Letting people apply for asylum at ports of entry is what is required under U.S. international and domestic legal obligations, including due process of law.

Providing an opportunity to apply for asylum does not mean that every applicant is granted asylum. It simply means that they get a chance to present their protection claim in the context of removal proceedings. If their case is not granted, they will be removed from the United States.

It is essential for the Biden administration to revoke the CDC ban as soon as possible, an important step toward rebuilding a U.S. asylum system that was systematically dismantled and destroyed by the Trump administration.

Anderson: Would allowing people to apply for asylum at ports of entry discourage much of the illegal entry by families or minors coming separately across the border and asking for asylum?

Collopy: Yes. Allowing people to apply for asylum at ports of entry would discourage illegal entries. An accurate analysis of the statistics shows that Title 42, the Migrant Protection Protocols (also known as Remain in Mexico), and other policies that expel and close the border to asylum seekers have led to repeat border crossers, artificially inflating the numbers of illegal entrants. If asylum seekers were processed at ports of entry as the law requires and could

meaningfully access the asylum system at those locations, they would not be forced to cross the border between ports of entry out of desperation for protection and survival.

Anderson: Has the U.S. caused more young people to become "unaccompanied minors" through its policies and has that created the need for large-scale facilities to house the minors?

Collopy: The Trump administration did, yes. They cancelled legal pathways for children to apply for protection from Central America, cut funding to the region—which further destabilized and added to the instability of the entire region—systematically dismantled our asylum system, and unilaterally implemented inhumane border policies, such as "zero tolerance" and family separation, which resulted in thousands of children being separated from their family members and processed as "unaccompanied minors." These actions most certainly created more unaccompanied minors and resulted in the need for large-scale facilities to house them.

Anderson: What do you make of Border Patrol agents releasing migrants without a court date and of contracts with hotels to house families? Will those released know how to proceed with their asylum claims or will authorities be able to contact them later? To some people it would seem hotel rooms for families are better than some alternatives but will authorities be able to oversee or account for those housed there?

Collopy: Asylum processing does not require mass detention in any type of facility, including hotels. Immigration detention is often inhumane, unjust, and even deadly, especially in the middle of the Covid-19 pandemic. Even before the pandemic, DHS consistently failed to follow its own health guidelines, resulting in serious negative impacts on detainees' health and well-being. Moreover, asylum seekers in immigration detention have no access to adequate medical and mental health care, family support, legal counsel, witnesses and evidence, and interpreters—all the tools they need to actively and meaningfully participate in their asylum cases.

Additionally, immigration detention is costly to American taxpayers. Alternatives to detention, such as community-based and community-driven case management programs, have proven very effective and at a fraction of the cost to taxpayers. For example, it costs the federal government $319 per day to detain an individual in a family detention facility, while organizations such as the Lutheran Immigration and Refugee Service spend just $14.05 per day to provide community-based support and a wide array of services to families.

Finally, immigration detention is completely unnecessary. Most asylum seekers have family or close friends in the United States who they can stay with while they pursue their applications for protection. For those who do not, there are community organizations available to provide a broad array of humanitarian support, including legal, housing, transportation, social and medical services. Perhaps most importantly, study after study has shown that asylum seekers appear for their hearing dates.

In fiscal year 2018, Department of Justice statistics show that 89% of all asylum applicants attended their court hearings through receipt of decisions on their applications. Between fiscal years 2013 and 2017, 92% of individuals who filed asylum claims attended their court hearings through receipt of their final decisions.

When individuals have access to legal representation, the rate of compliance with immigration court appearances jumps even higher. ["Out of 10,427 decisions in fiscal year 2018 for released asylum seekers, only 160 received removal orders because they missed a court hearing—resulting in a 98.5% court hearing compliance rate," according to data compiled by Syracuse University.] It has been well documented that when asylum seekers fail to appear in court, it is not due to a desire to abscond, but rather failure by immigration agencies to provide adequate, language-appropriate notice of the date, time, and location of hearings, and medical issues such as trauma or cognitive disabilities.

Asylum seekers should be processed and paroled into the community, where they can live safely with their loved ones and secure the legal and humanitarian services they need to actively and meaningfully participate in their asylum cases.

Anderson: What policies would you recommend the Biden administration adopt to address the current situation at the border in an orderly and humane manner?

Collopy: The Biden administration has inherited a dismantled and gutted immigration system and—to the extent that it even exists anymore—a completely dysfunctional asylum system that lacks the personnel, policies, procedures and training to properly administer our laws.

It will take time and significant effort to rebuild the entire U.S. asylum system. This is especially true when we are still in the midst of a global pandemic and need to take measures to ensure the health and safety of our frontline officers, DHS and Health and Human Services staff, local residents and individuals who arrive at our borders. But time is of the essence—with each day that passes, hundreds of bona fide refugees seeking protection are expelled from our borders and returned to persecution, torture, and other danger.

Rather than bowing to political pressure and giving credence to inaccurate media reporting about "surges" and "crises" at the border, the Biden administration needs to immediately put its plans into action to treat our fellow human beings humanely, address the root causes of migration, and create a safe and orderly process at the border.

This starts with immediately halting the use of Title 42 to expel asylum seekers at the border and resuming asylum processing in accordance with U.S. law. As the National Immigrant Justice Center notes, leading health experts and epidemiologists, including those with CDC experience, "overwhelmingly reject weaponizing public health to expel asylum seekers and have repeatedly condemned the use of Title 42 expulsions at the border." Resuming asylum processing must be done to comply with our legal obligations and it can be done safely.

Forbes

March 24, 2021

Plaintiffs Dispute USCIS Reasons For Long Delays For H-1B Spouses

By STUART ANDERSON

The American Immigration Lawyers Association (AILA) and Wasden Banias, LLP have filed a class action lawsuit to compel the Department of Homeland Security (DHS) to fix policies that have caused many spouses of H-1B and L-1 visa holders to lose their work authorization. Because of the policies, it takes U.S. Citizenship and Immigration Services (USCIS) two years to process many applications for spouses, making it mathematically impossible for the spouses to remain employed.

Divya Jayaraj came to America as an international student and returned as the spouse of an H-1B visa holder. As the spouse of an H-1B professional with an approved immigrant petition, Divya became eligible for an H-4 EAD (employment authorization document). She worked in health care as a quality assurance auditor in Massachusetts. "Concurrent with her spouse's extension, on August 25, 2020, she filed applications to extend her H-4 status on Form I-539 and EAD on Form I-765," according to the lawsuit. "The agency has not scheduled her for biometrics. Plaintiff Divya Jayaraj . . . has lost her job because of agency inaction."

The plaintiffs dispute whether new biometrics have been necessary for USCIS processing or if requiring new biometrics was contrived during the Trump administration as a way to prevent the spouses of H-1B visa holders from working.

"The agency sought to take away H-4 Plaintiffs' legal ability to work in the United States," according to the complaint. "The agency was unable to achieve this goal through regulation. When it became evident that the agency's attempt at legal recission of the H-4 EAD regulation were sputtering, the agency began the process of creating a new Form I-539 which would require recollecting biometrics. The agency knew and anticipated that this requirement would create delays in processing plaintiffs' status and EAD extensions. Prior to March 2019, H-4 status and EAD extensions were timely processed, all within 180 days. The new policy created delays over more than 180 days immediately.

"The agency created the requirement for new biometrics with the intent of damaging H-4 EAD applicants' ability to maintain employment authorization and their jobs. Further evidence of bad faith is the agency's factually and legally unsupportable justification for the new biometric

requirement. First, the Executive Order the requirement is allegedly based on cannot be reasonably read to require collection of new biometrics from people already in the United States.

"Second, the agency's claim that plaintiffs' biometrics stored in the IDENT system cannot be used to query the FBI's biometric system are factually incorrect. Third, the agency's claim that it lacks legal authority to share IDENT biometrics with the FBI is contradicted by statute, regulation and the agency's own publications. . . . This Court must find that the agency's delay is unreasonable and order the agency to adjudicate Plaintiffs' H-4 and H-4 EAD extensions. These delays are substantially unjustified."

The delays have stirred controversy and seem to be a creature of USCIS policies. "The delays that H-4 and L-2 nonimmigrants are facing needlessly place families in financial limbo," said AILA President Jennifer Minear. "DHS has the legal tools and authority to grant work authorization to impacted individuals whose financial security is hanging in the balance, and it should immediately begin to use those tools to provide solutions. DHS can and must revoke the unnecessary biometrics requirements for H-4 and L-2 nonimmigrants, provide automatic work authorization while DHS processes EAD renewal requests, and allow EAD applicants to file their renewal applications sooner than 180 days prior to EAD expiration to prevent gaps in work authorization."

The information U.S. Citizenship and Immigration Services has provided on biometrics as part of the lawsuit and what the agency has stated elsewhere differ in important aspects.

In one place, USCIS has said it doesn't have certain legal or technical authorities related to biometrics, but on its website, it appears to say the opposite.

In a declaration as part of the lawsuit, a USCIS official said:

"USCIS cannot submit fingerprints to the Federal Bureau of Investigation for purposes of receiving a criminal background check without performing the appropriate identity verification. Identity verification can either be accomplished through a one-to-one match with fingerprints previously collected at an ASC [Application Support Center], or by an exact match of the applicant's biographic information and USCIS assigned Alien-number.

"USCIS does not have the technical (information technology) capability to submit fingerprints collected by Department of State or U.S. Customs and Border Protection to the Federal Bureau of Investigation. Additionally, USCIS does not have the legal authority to use biometrics collected by a criminal justice agency or from a non-criminal justice agency when the biometrics were collected for a different purpose."

On its website, DHS (the parent agency of USCIS) states something different:

"The breadth and depth of OBIM's [Office of Biometric Identity Management] customer base began with a simple biometric identification service and has expanded to support complex data sharing programs that assist federal, state, and local agencies by providing a large pool of

matching partners for biometric queries and interoperability with other biometric repositories, such as the Federal Bureau of Investigation's Next Generation Identification system.

"A key strength of OBIM's services is that biometric matching is not limited to a single DHS Component or external mission partner but encompasses encounters across stakeholders. A single query of OBIM's biometric system can retrieve data for an individual tied to a Department of State visa application, a U.S. Customs and Border Protection log of an entry into the United States, and an immigration status change logged by U.S. Citizenship and Immigration Services."

USCIS declined requests to respond to questions on this topic.

"After having studied and compared the declaration against the agency website and the information provided in the federal register cited in our complaint either the declaration is true and everything else is false or the declaration is false and everything else is true," said Jesse Bless, AILA's director of federal litigation, in an interview. "I have not come up with a way to reconcile the statement and information. It's really incumbent on the agency to address the issue and Jon Wasden, to his credit, has provided the DOJ/USCIS with the opportunity. They have not responded."

What is the truth? This lawsuit may reveal the answer.

Forbes

March 23, 2021

U.S. Chamber Of Commerce Lawsuit Looks To Slay H-1B Visa Rules Again

By STUART ANDERSON

Businesses and universities successfully eliminated two major H-1B visa rules in court in December 2020, and an amended lawsuit asks a judge to kill one of those rules again. The amended lawsuit also takes aim at another Trump administration regulation that would end the H-1B lottery. The amended lawsuit could decide the fate of business immigration for the rest of this decade and beyond.

On October 8, 2020, the Trump administration published two rules directed against employers and high-skilled foreign nationals. Both were "interim final" rules, meaning they could go into effect without providing the public an opportunity to comment.

The Department of Labor (DOL) rule, which went into effect immediately, dramatically increased the required minimum wage (prevailing wage) employers must pay to employment-based immigrants and H-1B visa holders. According to declarations filed by company executives and university personnel, the Department of Homeland Security (DHS) rule would have made it impossible for many high-skilled foreign nationals to qualify for H-1B status due to new (arbitrary) definitions for specialty occupations, forcing data scientists, software engineers, medical personnel and others to leave the United States.

On December 1, 2020, in a significant victory for businesses and universities in *U.S. Chamber of Commerce v. DHS*, U.S. District Judge Jeffrey S. White, in a written order, vacated and set aside both rules. "Defendants [the Trump administration] failed to show there was good cause to dispense with the rational and thoughtful discourse that is provided by the APA's [Administrative Procedure Act] notice and comment requirements," he wrote. The opinion was binding nationwide and not limited to one geographic region or group of plaintiffs, said Paul Hughes of McDermott Will & Emery, the lead counsel for plaintiffs in the Chamber lawsuit. Hughes had described the regulation as "an overt attempt to destroy the H-1B program."

Paul Hughes argued at a court hearing that DHS and DOL failed in their rules to connect the H-1B visa category to the coronavirus-related economic problems. He cited a National Foundation for American Policy (NFAP) analysis that showed the U.S. unemployment rate for individuals in

computer occupations had not changed significantly from the 3% unemployment rate in January 2020 (before the pandemic spread in the United States).

Judge White wrote, "The statistics presented regarding pandemic-related unemployment still indicate that unemployment is concentrated in service occupations and that a large number of job vacancies remain in the areas most affected by Rules: computer operations which require high-skilled workers." During his oral argument and in a declaration, Hughes pointed to an analysis that identified hundreds of thousands of active job vacancy postings in computer occupations in the United States.

The judge found persuasive Paul Hughes's argument that the administration's lengthy delay in publishing the regulations belied claims the two regulations were issued to address an emergency.

On January 14, 2021, the Trump administration attempted to salvage the DOL regulation by publishing a final rule. The final rule was only slightly modified from the original and still aimed to price H-1B visa holders and employment-based immigrants out of the U.S. labor market. DHS did not revive its rule that narrowed the definition of a specialty occupation, which also placed new restrictions on H-1B visa holders working at customer locations.

On January 8, 2021, DHS published as a "final rule" a controversial regulation to end the H-1B visa lottery and replace it with a system that awards H-1B petitions by highest to lowest salary.

The Biden administration has delayed the effective date of the DOL wage rule and the DHS lottery rule. Both could go into effect in the future if not stopped by court action.

On March 19, 2021, the U.S. Chamber of Commerce and its allies filed an amended complaint for declaratory and injunctive relief with Judge White. "If these rules become operational, they will significantly limit the ability of many companies to meet their critical workforce needs," said Jon Baselice of the U.S. Chamber of Commerce in an interview. "The Chamber cannot sit idly by when these serious threats to the business community exist."

The goal of the lawsuit is to convince the judge to vacate and set aside both the DOL wage rule and the DHS lottery rule. Below is a look at the plaintiffs' arguments against both rules.

The DOL Wage Rule: Plaintiffs argue the DOL final rule conflicts with the statutory text. "Although the Immigration and Nationality Act (INA) provides that H-1B visas are to be made available to those with *bachelor*'s degrees and equivalent experience, DOL seeks to raise the standard, rendering H-1Bs available only to those individuals that are paid commensurate with skills equivalent to a *master*'s degree," according to the complaint.

"This is a naked attempt to substantially raise the eligibility criteria for H-1B visas," write the plaintiffs. "The DOL Rule is also substantively arbitrary and capricious: It significantly raises wages in an attempt to price out highly skilled foreign nationals, without sufficient justification; real-world data—presented to the agency in comments—demonstrates that the Rule's methodology is wildly inaccurate; and DOL failed to address material comments placed in the

record. Moreover, the Final DOL Rule must be vacated and remanded because it is premised on an incorrect legal interpretation."

"The Final DOL Rule has an enormous effect on the actual dollar wages H-1B, EB-2, and EB-3 employers are now required to pay," according to the complaint. "A new analysis by the National Foundation for American Policy compared the prevailing wages calculated on June 30, 2020, under the prior system with those now required under the Final DOL Rule, and the increases are staggering. For example, the required minimum salary for software developers—a common H-1B occupation—is about 30% higher under the Final DOL Rule than under the agency's prior practice; for computer science teachers, the new minimum is 41% higher at Level I. The same pattern is seen across many occupations frequently held by H-1B workers."

The complaint reprinted a table from the NFAP analysis:

Table 1: Average Increase in Required Minimum Salary Under the DOL Final Rule By Occupation

OCCUPATION	Level 1	Level 2	Level 3	Level 4
Biochemists and Biophysicists	+34.3%	+32.6%	+40.3%	+31.4%
Chemical Engineers	+24.5%	+23.5%	+27.1%	+25.1%
Computer Hardware Engineers	+26.8%	+25%	+27.3%	+25.4%
Computer and Information Research Scientists	+25.8%	+24.6%	+27.9%	+21%
Computer Network Architects	+26.5%	+24.5%	+26.8%	+25.6%
Computer Programmers	+27.7%	+25.5%	+28.3%	+26.1%
Computer Science Teachers	+41%	+35.2%	+39%	+31.4%
Computer Systems Analysts	+25.6%	+24.6%	+28.4%	+26.2%
Database Administrators	+29.2%	+26.3%	+25%	+27.3%
Electrical Engineers	+23.5%	+22.5%	+25%	+25.2%
Mechanical Engineers	+23.7%	+23.2%	+27%	+25.4%
Petroleum Engineers	+27.2%	+25.4%	+29%	+29%
Software Developers	+29.2%	+26.9%	+29.7%	+26.5%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the average increase in required minimum salary between the Department of Labor's system in place on June 30, 2020 and after the new wage under the DOL final rule. All geographic areas.

"Indeed, on average the Final DOL Rule will raise the required minimum salary for H-1B employees by about 25% across all the studied groups," noted the complaint and reprinted a second table from the NFAP study:

Table 2: Increases in Required Minimum Salary by Level Under DOL Final Rule

LEVEL	Average Increase in Required Minimum Salary Between Current DOL Wage System and DOL Final Rule
Level 1	24%
Level 2	23%
Level 3	27%
Level 4	25%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the average increase in required minimum salary between the Department of Labor's current wage system and after the new wage system in final rule. Estimates for the final rule involved NFAP extrapolation of percentiles using the DOL Online Wage Library (OWL) files released in June 2020 and October 2020, as well as the public use May 2019 Occupational Employment Statistics file released in March 2020.

The complaint continued: "As that [NFAP] analysis puts it, '[t]he significant increases in the mandated minimum salaries would lead a rational observer to conclude the purpose of the DOL wage rule is to price foreign nationals out of the U.S. labor market. The increases for common occupations in technical fields are large enough that complying with the rule would be difficult for any company.'"

"The Final DOL Rule's methodology demonstrably does *not* produce results that mirror actual wages paid to actual workers with a given set of qualifications," according to the plaintiffs. "To the contrary, as . . . [the] analysis by the National Foundation for American Policy explains, wage surveys conducted by private firms reveal *actual* prevailing wages that are in many instances far lower than the output of DOL's statistical methodology. That analysis obtained private wage survey data from Willis Towers Watson, a leading firm in the field. . . . The results are striking: The Final DOL Rule's methodology output a Level I wage that was within 10% of the observed Level I wage from the survey data for *only 18%* of the city-occupation combinations. DOL's current methodology, which has been in use since 2005 and will be used until this rule takes effect, did much better, scoring 53% on this metric."

A software developer (applications) in Atlanta had almost the same salary under DOL's current methodology and a private wage survey. However, the DOL final rule would raise the required wage by approximately 33%. The complaint stated that NFAP presented analysis of the differences between new DOL wages and private wage surveys in comments in response to the interim final rule "and the agency has failed to address the problem."

The DHS Lottery Rule: The plaintiffs' arguments were direct on the lottery rule. "The Lottery Rule conflicts with the INA for one central reason: It brazenly replaces the statutory command that H-1B petitions be prioritized for processing without regard to their substantive contents—that is, "in the order in which petitions are filed" (8 U.S.C. § 1184(g)(3))—with an undoubtedly substantive rule that awards scarce visas to higher-paid noncitizens over lower-paid ones," according to the complaint. "That blatant inconsistency with the statute dooms the Lottery Rule. Indeed, DHS *itself* concluded, in the course of instituting the new H-1B registration requirement just two years ago, that 'prioritization of [H-1B visa] selection on other factors, such as salary, would require statutory changes.'"

The plaintiffs make another argument against the lottery rule: "Separately, the Lottery Rule was promulgated by the Department of Homeland Security (DHS) under the authority of Chad Wolf, who was purporting to act as Acting Secretary of Homeland Security—but who in fact never lawfully occupied that post under the laws governing administrative succession, as numerous courts have now held. Wolf's lack of valid authority independently renders the Lottery Rule void."

The plaintiffs point out the DHS lottery rule is connected to the interim final DOL wage rule that Judge White set aside on December 1, 2020. "The two rules are, by design, inextricably linked," according to the plaintiffs' notice of filing an amended complaint. "The Lottery Rule cross-references 'DOL IFR'—its term for the original interim DOL Rule—no less than 36 times."

The Trump administration also included in the DOL final wage rule a controversial USCIS interpretation of an H-1B specialty occupation *after* a U.S. Court of Appeals for the 9th Circuit rejected that interpretation nearly a month earlier (on December 16, 2020). Plaintiffs noted this in their complaint. The complaint argues the "costs to the economy of restricting the employment of H-1B workers" are ignored in the DOL rule.

The lawsuit points out the DOL wage rule raises important reliance issues for companies, universities, longtime H-1B visa holders and applicants for employment-based green cards.

The U.S. Chamber of Commerce lawsuit attempts to stop two regulations that may represent the most significant parts of the Trump administration's immigration legacy for companies and universities. The judge's decision in the case could affect tens of thousands of employers and hundreds of thousands of lives.

Forbes

March 18, 2021

Over 1 Million Job Vacancy Postings In Computer Occupations In U.S.

By STUART ANDERSON

The number of job vacancy postings in computer occupations in America now exceeds one million. The national unemployment rate in computer occupations remains low. Still, a proclamation blocking the entry of H-1B visa holders remains in effect, and new immigration restrictions may be on the horizon.

“There are over 1 million unique active job vacancy postings in computer occupations in the United States as of March 7, 2021, up 11% from 12 months earlier, based on data from Emsi Job Posting Analytics,” according to an analysis by the National Foundation for American Policy (NFAP). “The unemployment rate in computer occupations is down to 2.3% in February 2021, below the level of 3.0% in January 2020 before the coronavirus pandemic started.”

Table 1: Active Job Vacancy Postings in Computer Occupations

OCCUPATIONS	ACTIVE JOB VACANCY POSTINGS (February 8 to March 7, 2021)	CHANGE FROM 12 MONTHS EARLIER (February 8 to March 7, 2020)
Software Developer and Software Quality Assurance Analyst and Tester	378,197	14%
Computer Occupations, All Other	194,130	15%
Computer Systems Analyst	101,737	6%
Network and Computer System Administrator	101,153	6%
Information Security Analyst	67,995	17%
Computer and Information Systems Manager	61,621	27%
Electrical Engineer	37,058	-5%
Computer Programmer	26,241	-14%
Computer and Information Research Scientist	21,767	21%
Database Administrator	17,213	-4%
Electronics Engineer (except computer)	15,118	6%
Computer Hardware Engineer	9,794	14%
Computer Network Architect	6,804	3%
TOTAL	**1,038,828**	**11%**

Source: Emsi Job Posting Analytics; National Foundation for American Policy. According to Emsi, "All job posting counts reflect unique postings that were active during the indicated time frame," February 8, 2020 to March 7, 2020 and February 8, 2021 to March 7, 2021.

"There is not a fixed number of jobs, and people with high skills often create more jobs for people with complementary skills," notes the NFAP analysis. "Still, even if one adopts a zero-sum approach, there are nearly 20 times more job vacancy postings in computer occupations than new H-1B petitions typically used by companies in computer occupations each year. There are also likely many more openings than publicly posted positions."

The computer occupations in the analysis track those eligible for H-1B petitions, according to the H-1B "characteristics report" for FY 2019, published by U.S. Citizenship and Immigration Services (USCIS), and Bureau of Labor Statistics data. Companies are allowed to file for only 85,000 new H-1B petitions in a year and about two-thirds, or 56,000 a year, are in computer occupations.

The statistics showing 1,038,828 active job vacancy postings in computer occupations are from March 7, 2021, and also measure the increase in postings from a year earlier. The period ending March 7, 2020, is a week before the declaration of a national emergency stopped most in-person commerce across America because of Covid-19. The data show 10 of the 13 occupational categories increased in active job vacancy postings from 12 months earlier. Postings for jobs as information security analysts rose by 17%, while active job vacancy postings for software developers and software quality assurance analysts and testers increased by 14%. Postings for computer and information research scientists increased by 21%.

"Computer jobs were already fast-growing before the pandemic, but it is still remarkable to see an 11% increase in job postings from the period just before the Covid-related recession hit," said Mark Regets, a labor economist and a senior fellow at the National Foundation for American Policy. "This is consistent with the low unemployment rates we see in computer occupations. Firms have needed a lot of IT (information technology) talent to reorganize their businesses during the pandemic, and many of the changes will be long-term."

The employment postings in computer occupations include 378,197 active job vacancy postings for software developers and software quality assurance analysts and testers, 101,737 for computer systems analysts, 101,153 for network and computer system administrators, 67,995 for information security analysts, and 37,058 for electrical engineers. "All job posting counts reflect unique postings that were active during the indicated time frame" (February 8 to March 7, 2021).

In March 2021, Emsi updated its categories and standard occupational classification (SOC) codes in computer occupations, and the National Foundation for American Policy adjusted its tracking of active job vacancy postings accordingly, notes the NFAP analysis. The current list provides active postings for jobs in common computer occupations that would normally require at least a bachelor's degree.

"H-1B visas are important because they generally represent the only practical way for high-skilled foreign nationals, including international students, to work long-term in the United States and have the chance to become employment-based immigrants and U.S. citizens," as discussed in a recent *Forbes* article. "In short, without H-1B visas nearly everyone from the founders of billion-dollar companies to the people responsible for the vaccines and medical care saving American lives would never have been in the United States."

A study by economists Giovanni Peri, Kevin Shih, Chad Sparber and Angie Marek Zeitlin looked at the last recession and found denying H-1B visas due to the low annual H-1B limits hurt job growth for native-born professionals. "The number of jobs for U.S.-born workers in computer-related industries would have grown at least 55% faster between 2005-2006 and 2009-2010, if not for the denial of so many applications in the recent H-1B visa lotteries," concluded the economists.

Britta Glennon, an assistant professor at the Wharton School of Business at the University of Pennsylvania, found in her research that new H-1B restrictions are likely to push technology-related jobs out of the U.S., concluding, "[A]ny policies that are motivated by concerns about the

loss of native jobs should consider that policies aimed at reducing immigration have the unintended consequence of encouraging firms to offshore jobs abroad."

Despite the importance of H-1B visas and the positive economic picture for individuals in computer occupations, both current and future restrictions loom for companies.

First, the Biden administration has yet to revoke a proclamation that the Trump administration issued on June 22, 2020, that suspended the entry of H-1B and other visa holders. The suspension on the entry of visa holders runs until March 31, 2021, and could be extended into the future. There was no case for implementing the proclamation in June 2020, particularly since the unemployment rate in computer occupations at the time was below pre-pandemic levels. The unemployment rate is even lower today and job vacancy postings in computer occupations have soared.

The nation's overall unemployment rate is projected to fall to 4.5% in 2021, and below 4% in 2022 and 2023, according to the Federal Reserve Board.

On March 17, 2021, Senators Michael Bennet (D-CO), Jeanne Shaheen (D-NH), Angus King (I-Maine), Cory Booker (D-NJ), and Bob Menendez (D-NJ) wrote a letter to President Biden and urged him to end the ban on the entry of many temporary visa holders. "Looking ahead to long-term economic recovery, the deficit of foreign workers to fill available American tech jobs will worsen through any further lack of access to foreign talent," they wrote. "Reports also suggest that many jobs in fields such as information technology that would have been filled by H-1B nonimmigrants have remained open or were moved permanently overseas. . . . Every day these visa bans remain in place undermines our collective vision for a new, more prosperous and welcoming nation." The senators urged timely processing of visas at U.S. consulates.

Second, in its final days, the Trump administration published a final Department of Labor (DOL) rule that courts had blocked as an initial "interim final" rule. The final version of the rule did not change much from the original and is still likely to price out of the U.S. labor market many employment-based immigrants and H-1B visa holders.

The DOL regulation would increase the required wages for employment-based immigrants and H-1B visa holders by 23% to 41% depending on the occupation, according to an NFAP analysis. Many studies and private wage surveys have concluded foreign-born scientists and engineers are paid the same or higher than comparable U.S. professionals. The Biden administration has delayed the effective date of the rule.

Third, the Trump administration published a final regulation to eliminate the H-1B lottery and replace it with a system that awards H-1B petitions from highest to lowest salary. International students and other young people with less experience in the labor market (and, therefore, lower salaries) will likely have great difficulty obtaining an H-1B petition if the rule goes into effect. The rule has been delayed.

Fourth, there may be new attempts to adopt the Trump administration's policies on information technology (IT) services companies. "The Department of Homeland Security (DHS) is working

on rulemaking to restrict the H-1B category, with a focus on the 'employer-employee relationship' definition," according to Berry Appleman and Leiden. "We expect DHS will go through the full notice-and-comment rulemaking process and will not attempt to fast-track changes."

Technology experts such as Peter Bendor-Samuel, founder and CEO of Everest Group, argue that access to talent is crucial for IT services companies to conduct work for U.S. companies attempting to build digital platforms. "Almost every major U.S. firm is building some form of digital platform so it can enhance its competitive position both domestically and internationally," he said. "This is probably the most important thing these firms are doing and success will define both company and global success as we move into the future." He criticized the Trump administration's approach to technology companies. "When the [Trump] administration restrict[ed] the ability to bring these scarce skills into the United States by restricting H-1B and L-1 visas, making the granting of these visas more difficult and less predictable, it directly affects these firms' ability to build and scale these digital platforms and negatively affects the competitiveness of U.S. companies."

The Biden administration said in an *Interim National Security Guidance*, released in March 2021, it would restore "our nation's historic strengths by ensuring our immigration policy incentivizes the world's best and brightest to study, work, and stay in America." Keeping the two Trump administration H-1B regulations and imposing new immigration restrictions would almost certainly make that difficult to do.

A reasonable conclusion to be drawn from an understanding of economics and the employment data over the past year is that foreign-born scientists and engineers are not preventing U.S. professionals from obtaining jobs in computer occupations, but rather are helping U.S. companies and America become more competitive.

Forbes

March 14, 2021

Attorneys Question Logic Of Policy Blocking Business Visas In Europe

By STUART ANDERSON

Gaining approval for a visa during the coronavirus pandemic has not been easy for businesses. At the beginning of March, the Biden administration made it more difficult. Attorneys and visa applicants are raising questions about whether the visa policy makes sense.

U.S. visa policy treats an international student on an F-1 visa and a treaty trader with a business in the United States on an E-1 visa differently, even though both would have to show a negative Covid-19 test result before flying to the United States. It makes sense to welcome international students to America under the health provisions, but why have the rules become stricter for people in other visa categories? Are there reasonable alternatives available to accommodate health concerns and legitimate travel?

According to the CDC (Centers for Disease Control and Prevention) guidelines, "All air passengers coming to the United States, including U.S. citizens, are required to have a negative Covid-19 test result or documentation of recovery from Covid-19 before boarding a flight to the United States." That makes the State Department's distinctions among the visa categories baffling.

If everyone needs to show a "negative Covid-19 test result or documentation of recovery from Covid-19" before they can board a plane to the United States, why are there different policies from one visa category to another?

"I try to see the logic but just can't," said Tammy Fox-Isicoff of Rifkin & Fox-Isicoff in an interview. "Simply put, it's asinine."

On March 11, 2020, the Trump administration issued presidential proclamation 9993, suspending and limiting the entry "of all aliens who were physically present within the Schengen Area during the 14-day period preceding their entry or attempted entry into the United States." The Schengen Area includes almost all European countries. A few days later, another proclamation extended similar restrictions to cover England, Scotland, Wales, Northern Ireland and the Republic of Ireland. Other proclamations covered China, Iran, South Africa and Brazil. There is

a separate ban on the entry into the U.S. of visa holders (H-1B, L and others) that continues until at least March 31, 2021, and contains national interest exceptions.

The Trump administration ended the bans on entry for the Schengen Area, the United Kingdom and Ireland, Brazil, and South Africa on January 26, 2021. The Biden administration reinstated the ban after the inauguration, meaning it stayed in effect continuously, with a plan to reevaluate the worldwide Covid-19 travel restrictions regularly based on public health guidance.

The Trump administration's travel proclamations included national interest exceptions (NIEs). After reinstating the ban, the Biden administration changed those national interest exceptions on March 2, 2021, which had the effect of disqualifying more individuals for visas.

Fox-Isicoff points to the case of her client. "Without notice, the Schengen consulates changed the amorphous and unknown criteria for the national interest exceptions to a Covid-19 ban," she said. "Now investors, intracompany managers, essential workers and those extending prior visas are being refused."

"Our client is on an E visa—he invested $300,000 and employs four U.S. workers. He was in the United States until a week ago on an L visa for intracompany transferees. The L visa expired and he went to Paris to get an E visa. The embassy found he qualified for the E visa but did not merit receiving one due to the tighter national interest exception criteria, so no visa was granted. This puts his $300,000 investment and the employment of four U.S. workers at risk. This is happening all over the Schengen Area."

"We are trying to figure this out and really don't get it," said Fox-Isicoff. "But it is life-altering for U.S. businesses and financially devastating for investors and the U.S. workers these investors employ. Upon issuance of a visa, the applicant could quarantine [outside the Schengen Area] or comply with whatever Covid-19 precautions are required. This is what the actual proclamation requires."

"The application of this new arbitrary, amorphous and mysterious national interest exceptions is arbitrary and capricious," she said. "There is no logical reason for this given that visitors from other visa categories are coming from these same countries."

"The current visa policy cannot be justified as stopping Covid-19," said Fox-Isicoff. "We allow people who obtained visitor visas years ago to come to the United States, but people like my client who have lived here on an L visa for years and left recently are lower on the chain than a visitor who comes to America for a vacation after not being here for years."

In response to questions, a State Department official told me on background:

"On March 2, 2021, the Secretary of State approved changes to the Department's National Interest Exceptions (NIE) policy with regard to the travel restrictions that apply to the Schengen Area, United Kingdom, and Ireland under the President's January 25, 2021 Presidential Proclamation. These changes add an exception for critical infrastructure travelers, maintain the

exceptions for students, academics, and journalists, and *remove the exception for certain business travelers and athletes*." (Emphasis added.)

"Effective immediately, travelers seeking to provide vital support for critical infrastructure in the United States may review information provided on travel.state.gov and contact the nearest embassy or consulate to see if they qualify under this most recent national interest determination. The following travelers subject to the travel restrictions covering those present in the Schengen Area, the United Kingdom, and Ireland within 14 days before attempted entry into the United States may qualify for NIEs if they are otherwise qualified for visas: travelers seeking to provide critical infrastructure support, academics, students, journalists, humanitarian travelers, travelers participating in public health response, and travelers whose travel is in the interest of U.S. national security.

"Technical experts and specialists, senior-level managers and executives, treaty-traders and investors, and professional athletes and their dependents no longer qualify for NIEs.

"The Secretary of State made this determination of travel in the national interest following discussions with the Principals Committee of the National Security Council. The Secretary's view, consistent with the administration, is that these measures, prioritizing health and safety as we work to reduce the prevalence of Covid-19, are in the United States' best long-term interests. The Secretary also believes that travel that will provide vital support for critical infrastructure continues to be in the national interest. The United States will look to reevaluate these restrictions as the science-based conditions allow."

Attorneys are receiving similar responses from consulates in London, Paris, Frankfurt and elsewhere across Europe.

International students have automatically qualified for national interest exceptions, a positive development considering the significant decline in international student enrollment in the past year. "Students coming from Brazil, China, Iran, and South Africa have to go to another country for 14 days, or ask for a case-by-case waiver from the local consulate," said Dan Berger of Curran, Berger & Kludt in an interview. "Some Brazilian student-athletes went to Mexico for 14 days, for example, to avoid the Brazil ban. Most students from China didn't get here for the spring and are taking classes remotely in the middle of the night."

"I'm not quite sure why some Ls and Es were taken off the blanket exemption for the UK/Ireland/Schengen ban," he said. "Definitely pleased to see F-1 visas prioritized. I agree that if there is testing for everyone, why have a visa ban? We hope the Biden administration will let the Trump H-1B ban expire later this month, but these country restrictions are concerning. Quite a few faculty and researchers were unable to reach the United States for this spring semester because of the H-1B and country bans. If there are specific public health concerns about documentation of testing in particular countries or false negatives, those need to be clearly explained to the public and coupled with a welcoming message so that international investors and business people do not get discouraged from trying to come here."

Litigation is being prepared to challenge the policies, according to attorney Greg Siskind.

“Our suit is challenging the legality of barring visas from being issued to people subject to these travel bans,” said Siskind. “The law allows the president to bar the entry of people, but visas are not covered in the statute. With these proclamations, they’re banning based on presence in a country and not based on nationality. So if someone wants to go to another country for 14 days and then enter the US, there shouldn’t be an issue. But the State Department is barring visas from being issued even if a person is willing to abide by the 14 days rule. We have sued and won on this issue in other cases, but our new suit will challenge this for all visa categories in all 35 affected countries. There will likely be other litigation challenging the way the administration has rolled out the national interest exemptions.”

The Trump administration did not attempt to find alternatives to outright bans of immigrants and temporary visa holders. The Biden administration withdrew the proclamation that suspended the entry of immigrants but has kept in place the proclamation that blocks many temporary visa holders. If health is the concern, in addition to proof of a negative test prior to boarding a U.S.-bound plane, individuals eligible for visas to invest, work and live in the U.S. would almost certainly be happy to quarantine upon arrival in America rather than being banned from the country.

“There are other options that would be consistent with public safety and less burdensome on international travel,” said Jeffrey Gorsky, senior counsel at Berry Appleman & Leiden and a former State Department attorney, in an interview. “But it looks like the current administration is placing a much higher priority on Covid than on immigration flexibility. At least I don’t sense that they have ulterior motives here, which the Trump restrictionists did in a number of their policies. There is hope things will change as soon as the virus comes more under control.”

Forbes

March 12, 2021

DOL Delays Trump Wage Rule Poised Against Immigrants And H-1B Visas

By STUART ANDERSON

The Department of Labor (DOL) announced it will delay a potentially devastating rule for employers that hire employment-based immigrants and H-1B visa holders, signaling the Biden administration may invite comments or new information before deciding on the regulation. Under the rule, published in the final days of the Trump administration, "employers must pay 23% to 41% higher salaries than under the current system across a range of occupations if they want to employ high-skilled foreign nationals in America," according to a National Foundation for American Policy (NFAP) analysis.

Table 1: Increases in Required Minimum Salary by Level Under DOL Final Rule

LEVEL	Average Increase in Required Minimum Salary Between Current DOL Wage System and DOL Final Rule
Level 1	24%
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Level 3	27%
Level 4	25%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the average increase in required minimum salary between the Department of Labor's current wage system and after the new wage system in final rule. Estimates for the final rule involved NFAP extrapolation of percentiles using the DOL Online Wage Library (OWL) files released in June 2020 and October 2020, as well as the public use May 2019 Occupational Employment Statistics file released in March 2020.

In October 2020, the Trump administration published a DOL rule to require higher prevailing wages for employment-based immigrants and H-1B visa holders as "interim final," meaning it went into effect immediately. Three courts blocked the rule.

To sponsor foreign nationals for employment-based green cards and H-1B petitions, employers typically must obtain a prevailing wage determination from the Department of Labor. Under the law, to gain the approval of an H-1B petition, an employer must pay "*at least*- (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for

the specific employment in question, or (II) the *prevailing wage level for the occupational classification in the area of employment*." (Emphasis added.) A prevailing wage determination also is needed for labor certification, part of the process required for many employment-based immigrants.

On January 14, 2021, the Trump administration published a final rule that was only slightly modified from the original and carried the same aim—to price H-1B visa holders and employment-based immigrants out of the U.S. labor market. "The revisions to the rule don't change the fact that it still fails to do what the law requires—to reflect the actual, prevailing wage for workers in that geographical area doing similar work," said Kevin Miner, a partner at Fragomen.

Table 2: Average Increase in Required Minimum Salary Under the DOL Final Rule By Occupation

OCCUPATION	Level 1	Level 2	Level 3	Level 4
Biochemists and Biophysicists	+34.3%	+32.6%	+40.3%	+31.4%
Chemical Engineers	+24.5%	+23.5%	+27.1%	+25.1%
Computer Hardware Engineers	+26.8%	+25%	+27.3%	+25.4%
Computer and Information Research Scientists	+25.8%	+24.6%	+27.9%	+21%
Computer Network Architects	+26.5%	+24.5%	+26.8%	+25.6%
Computer Programmers	+27.7%	+25.5%	+28.3%	+26.1%
Computer Science Teachers	+41%	+35.2%	+39%	+31.4%
Computer Systems Analysts	+25.6%	+24.6%	+28.4%	+26.2%
Database Administrators	+29.2%	+26.3%	+25%	+27.3%
Electrical Engineers	+23.5%	+22.5%	+25%	+25.2%
Mechanical Engineers	+23.7%	+23.2%	+27%	+25.4%
Petroleum Engineers	+27.2%	+25.4%	+29%	+29%
Software Developers	+29.2%	+26.9%	+29.7%	+26.5%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the average increase in required minimum salary between the Department of Labor's system in place on June 30, 2020 and after the new wage under the DOL final rule. All geographic areas.

The long-standing goal of Donald Trump's White House adviser Stephen Miller and other advocates of restrictive immigration policies is to make foreign nationals unaffordable so that employers would hire U.S. workers instead, even though the likeliest impact, say economists, is companies will hire more professionals in other countries. Moreover, the rule could slow or end the great movement of foreign-born talent to America that has resulted in world-class startup companies, medical breakthroughs and technological innovation. It is not surprising the nation's leading anti-immigration group, which has called for a "permanent pause" on immigration to America, praised the DOL rule.

Trump officials engineered inflated wages in the DOL rule by altering the formula used to calculate the required minimum wage for permanent residence and H-1B temporary visas. The rule has several deficiencies that make it susceptible to being overturned in ongoing litigation.

On February 1, 2021, the Biden administration published a proposed rule in the *Federal Register* seeking comment on delaying the DOL wage rule until May 14, 2021. The proposed rule noted this was "In accordance with the Presidential directive as expressed in the memorandum of January 20, 2021, from the Assistant to the President and Chief of Staff, entitled 'Regulatory Freeze Pending Review.'" It was necessary to go through the rulemaking process to delay the effective date of the rule.

In a rule published on March 12, 2021, provided in preview form on March 11, 2021, the Department of Labor announced it was delaying the effective date of the rule (until May 14, 2021) and considering other actions. The final rule already contains a phased implementation. "Of the 57 comments, 36 were reviewed and determined out of scope either because they were comments exclusively on the final rule and did not address the proposed delay, concerned another agency's rule, or were general statements," according to the rule. "The remaining 21 comments were reviewed and determined within the scope of the request for comments. Of these, 17 commenters supported the delay. Four commenters opposed the delay based on their overall support of the final rule."

"Many of the comments specifically addressed substantive concerns related to the Department's publication of the final rule and the methodology or computations contained therein," according to the rule delaying the effective date. "The Department acknowledges these public comments as well as concerns that have been raised by the commenters and in pending litigation challenging the Department's IFR [interim final rule], *see* 86 FR 3608, 3612 (discussing lawsuits and court orders setting aside the IFR), and, subsequently, the final rule published on January 14, 2021."

The DOL rule on delaying the effective date raises the possibility the agency will invite new information or formal comments before deciding on the regulation: "The Department has already begun its comprehensive review of this rulemaking and may need to take additional action as necessary to complete such a review. In particular, *the comments raised thus far suggest that it may be helpful for the Department to issue a request for information soliciting public input on other sources of information and/or methodologies that could be used to inform any new proposal(s)* to further amend ETA's [Employment and Training Administration's] regulations governing the prevailing wages for PERM, H–1B, H–1B1, and E–3 job opportunities as the comments raised thus far suggest that additional information and data may be useful in the Department's review." (Emphasis added.)

"In addition, in light of the complexity of this issue, the Department is considering whether to propose a further delay of the final rule's effective date and accompanying implementation periods that are currently scheduled to take effect on May 14, 2021, and July 1, 2021, respectively. Before further delaying the effective date and implementation periods, the Department will provide the public an opportunity to comment."

The Department of Labor wage rule and the Department of Homeland Security rule to award H-1B petitions based on highest salaries could be the most consequential legacies of the Trump administration's business immigration policies. The Biden administration will get an opportunity to decide whether to be on the side of Stephen Miller and the anti-immigration groups advocating for the DOL wage rule or the businesses, immigrants and universities who believe the rule threatens America's future.

Forbes

March 10, 2021

Illegal Immigration In America Has Continued To Decline

By STUART ANDERSON

In a report that could provide context to most immigration news stories, new research reveals that the number of unauthorized immigrants has continued to decline in the United States. The unauthorized immigrant population fell to 10,350,000 in 2019, a decline of 12% since 2010. The approximately 10.4 million unauthorized immigrants represent about 3% of the total U.S. population. A majority have lived in the U.S. for more than a decade.

While Donald Trump railed against illegal immigration from Mexico, it turns out demographics and economic conditions in Mexico had already addressed the issue. "The undocumented population from Mexico declined so much in the past decade that its share dropped to less than half of the total population," according to new research from Robert Warren, a demographer and senior visiting fellow at the Center for Migration Studies. "From 2010 to 2019, the undocumented population from Mexico declined by about 1.9 million, and the undocumented population from the rest of the world increased by about 500,000."

Table 1: Undocumented Immigrant Population in the United States

Year	Undocumented Population
2010	11,725,000
2011	11,315,000
2012	11,110,000
2013	11,010,000
2014	11,045,000
2015	11,045,000
2016	10,790,000
2017	10,640,000
2018	10,565,000
2019	10,350,000

Source: Center for Migration Studies. Note: Numbers rounded independently. Estimates as of July 1 in each year.

Among the key findings in Warren's report:

- "The undocumented population continued to decline in 2019, falling by 215,000 compared to 2018; this population has declined by 1.4 million, or 12%, since 2010."

- "Return migration of undocumented residents to Mexico was principally responsible for the decline of almost 1.9 million in the total undocumented population from 2010 to 2019."

- "The undocumented populations from Central America and Asia increased at the same rate from 2010 to 2016. After 2016, the population from Asia stopped growing, and the population from Central America increased by about 200,000."

- "Since 2010, the undocumented population from Mexico has fallen from 6.6 million to 4.8 million, or by 28%."

- "In 2019, 42 states and Washington, DC, had fewer undocumented residents from Mexico than they had in 2010. The states with increases in undocumented persons from Mexico had small undocumented populations." Between 2010 and 2019, the number of unauthorized immigrants from Mexico declined by 35% in California, 13% in Texas, 23% in Arizona, 41% in Illinois, 37% in Georgia and 27% in Florida.

However, news and politics are often dominated by the short-term, including what is happening at any moment on the U.S.-Mexico border.

Ali Noorani, president and CEO of the National Immigration Forum, believes a combination of people today are crossing the U.S.-Mexico border. "My sense is that we are talking about unaccompanied minors (UACs) presenting themselves for protection, families who were in Migrant Protection Protocols (MPP) in Mexico and are re-entering through the UNHCR (United Nations High Commissioner for Refugees) process, families with young children who Mexico will not take back (in particular those in south Texas) and the population of single adults by and large from Mexico who are entering, apprehended, expelled and who then try to enter again," he said in an interview.

"Nothing at the border right now is a surprise," said Noorani on Twitter. "Therefore, it should not escalate to a crisis. The Biden administration needs to put in place the infrastructure, logistics and processes to manage the border. A crisis is when Trump expelled thousands of migrant children back to Mexico, strong-armed/bribed unsafe countries to pretend to be safe countries, and forced thousands of families to wait in Mexico while eviscerating the immigration system."

The current situation at the border could affect bills to legalize Dreamers and others in the United States, although Robert Warren found no evidence that Congress considering legalization affects migrant decisions to come to America.

"An important finding is that the comprehensive immigration reform bill, S. 744, passed by the U.S. Senate in June 2013, did not cause an increase in undocumented immigration from Mexico," writes Warren. "Instead, return migration fell by about half during the period that the bill was under active consideration. The finding that proposed legalization programs do not increase undocumented migration provides support for legalization proposals forthcoming from the Biden administration."

A letter (February 2, 2021) from legal, religious and humanitarian organizations urged President Biden to stop using the authority invoked by the Trump administration to expel people at the border without due process. "We write to urge your administration to immediately end the misuse of Title 42 public health authority to illegally and inhumanely expel asylum seekers and migrants at the border," according to the letter from Human Rights First, America's Voice, American Immigration Lawyers Association, Anti-Defamation League, Kids in Need of Defense (KIND) and other groups.

"Since March 2020, the Department of Homeland Security (DHS) has blocked and turned away people at the southern border, including asylum seekers and children, without access to the U.S. asylum system or preliminary protection screenings, sending them to persecution, torture and other serious danger in violation of U.S. refugee and anti-trafficking laws and treaty obligations. The Trump administration, for instance, expelled prominent Nicaraguan dissidents who had attempted to seek asylum in the United States, returning them to Nicaragua where authorities had detained and beaten them for their political activism. Your administration continues to block and expel people, including families with children, under the same policy.

"These expulsions are being carried out under orders that Trump Administration officials pressured the Centers for Disease Control and Prevention (CDC) to issue despite objections by senior CDC medical experts. . . . During the presidential campaign, you committed to end inhumane Trump administration border policies, uphold U.S. laws and treaty obligations to protect refugees and immigrant children, and adopt COVID-19 measures based in science. For your actions to reflect those promises, your administration must end the misuse of Title 42 public health authority at the border, stop blocking and expelling people seeking U.S. humanitarian protections, ensure appropriate infrastructure and support for shelters and other border groups to assist asylum seekers, and allow these families, children and adults to pursue their requests while in safety, inside the United States."

In addition to addressing humanitarian concerns, the solution to preventing most future illegal entry is to make it possible for individuals to apply to work legally in the United States at the types of jobs many would otherwise fill as unauthorized immigrants.

Fernando Castillo picks "oranges and other crops for Elkhorn Packing, a company that provides labor through H-2A visas . . . He heard about the program through his job back in Tamaulipas, Mexico. It's a good way to make more money, he says."

"'Because here the salary is a bit more than over there, and to help the bosses,' he says," according to National Public Radio. "The bosses he's referring to are his parents. The 29-year-old sends money to them and his siblings. 'To buy food to buy whatever they need in Mexico.

Because in that country the salary is not enough to do certain stuff,' he says. 'And the American money over there gives people better benefits.'"

Contrast Fernando Castillo, who had a legal work visa and happily sends money to his family, with the fate of Yesenia Magali Melendrez from Guatemala.

"Yesenia Magali Melendrez Cardona told her father she wanted to follow in his footsteps," reported the *Los Angeles Times*. "He had made the trek from Guatemala to the U.S. 15 years earlier in search of a new life. In February, she left a job and her studies behind and headed north. Chiquimulilla, the town where she had spent her 23 years, had been ravaged by the pandemic. Unemployment was rising. The population was desperate. The streets were too dangerous to walk at night.

"On Tuesday, Yesenia found herself in a situation just as perilous as the one she had fled. A maroon Ford Expedition bore a suspected smuggler and 24 people racing toward what they hoped would be safety. Yesenia and her mother, Verlyn Cardona, were wedged in the back when it drove through a breach in the fence separating Mexico from California.

"It was broadsided in the Imperial County town of Holtville by a semi hauling two empty trailers. It came to a stop, windshield shattered, at the intersection of Highway 115 and Norrish Road.

"Seventeen passengers were ejected from the SUV. When Verlyn regained consciousness in the back of the crumpled vehicle, her daughter was sprawled across her legs. Dead."

Many potential asylum seekers from Central America would welcome the security and safety of a work visa.

"The best solution, as ever, is to reduce the incentive for people to come illegally by creating more ways to work legally in America," wrote the *Wall Street Journal* in a December 2018 editorial. "Most migrants come to work, and at the current moment there are plenty of unfilled jobs for them. A guest-worker program would let migrants move back and forth legally, ebbing and flowing based on employer needs, while reducing the ability of gangs and smuggler 'coyotes' to exploit vulnerable migrants."

Research from the National Foundation for American Policy found increasing the legal admission of farmworkers during the 1950s under the Bracero Program significantly reduced unlawful entry to America. Based on apprehensions at the border, illegal entry to the United States fell by 95% between 1953 and 1959, as farmworkers entered legally in larger numbers. Today, a greater ability to work in jobs in other sectors, particularly year-round, would be welcomed by migrants and employers.

Making it easier to work and apply for protection lawfully will save lives and address illegal immigration. The unauthorized immigrant population in the United States has declined by 12% since 2010. It's a statistic that should crawl across the screen whenever immigration is discussed on TV—or in Congress.

Forbes

March 3, 2021

Businesses Lend Support To The Case For Dreamers

By STUART ANDERSON

A group of major businesses has published a letter calling on Congress to support legalization for people brought to America as children. The letter adds momentum to the effort to pass legislation on Dreamers.

The movement to provide permanent residence to individuals who were children when their parents brought them to the United States is now 20 years old. In 2001, Sen. Richard Durbin (D-IL) and Sen. Orrin Hatch (R-UT) introduced the first Dream Act, which did not become law. The term Dreamers became synonymous with this group of young people. (Americans for Prosperity has a detailed timeline on the Dreamers debate.)

Following unsuccessful efforts to pass legislation in Congress, in 2012, President Barack Obama established the Deferred Action for Childhood Arrival (DACA) program. DACA protected qualified young people from deportation and granted them work authorization.

In September 2017, the Trump administration ended DACA. Following a lawsuit filed by the University of California, which gained wider support, the Supreme Court ruled in June 2020 that the Trump administration's process for ending DACA was unlawful. The Supreme Court concluded the Trump administration had the right to end DACA but that it did so without following proper procedures, particularly in light of the reliance interests of DACA recipients.

In 2021, with the Democrats controlling the House, Senate and the White House, a renewed push is on to enact legislation to protect Dreamers. There is urgency because a U.S. district judge in Texas may declare DACA to be unlawful. Supporters hope for a bipartisan legislative solution.

On March 3, 2021, the Coalition for the American Dream sent a letter to Senate Majority Leader Chuck Schumer (D-NY) and Minority Leader Mitch McConnell (R-KY) urging passage of the Dream Act of 2021 (S.264), introduced by Sen. Durbin and Sen. Lindsey Graham (R-SC). The letter, which was also published as an advertisement in the *New York Times*, was signed by more than 100 businesses, trade associations and policy organizations, including Apple, Microsoft, Facebook, Amazon, Google, Intel, Accenture, Square, the U.S. Chamber of Commerce, the

National Association of Manufacturers, FWD.us, NAFSA, the National Immigration Forum and others.

"This important legislation has our strong support and we ask that you and your colleagues consider and pass it in the immediate weeks ahead," according to the Coalition letter. "Poll after poll has shown that overwhelming majorities of Americans in both political parties support Dreamers. They are critical members of our workforce, industries, and communities, and they have abided by the laws and regulations of our country in order to qualify under the conditions set forth in the Dream Act. They are vital to our nation's strength, especially now when tens of thousands of them are currently working as essential front-line personnel fighting Covid-19."

The legislation has strong support among religious organizations, including evangelicals. "Evangelical leaders, like the majority of evangelical Christians throughout the country, believe that these members of our communities ought to be allowed to apply for permanent legal status," wrote the Evangelical Immigration Table on February 4, 2021. "We urge other members of Congress to follow the lead of Senators Graham and Durbin in forging bipartisan consensus and finally pass vital legislation to protect Dreamers."

The House of Representatives may vote this month on the American Dream and Promise Act, which passed the House in June 2019 by a vote of 237-187. The American Dream and Promise Act is broader than the Durbin-Graham Dream Act. The House bill includes potential lawful permanent residence status for individuals who have lived in the United States in Temporary Protected Status.

A recent National Foundation for American Policy analysis discussed the policy arguments in favor of providing a legislative solution for Dreamers:

"First, for moral reasons, U.S. law rarely holds children accountable for the actions of their parents. The bill defines someone eligible for the Dream Act in the bill as an individual who 'was younger than 18 years of age on the date on which the noncitizen [or alien] initially entered the United States.'

"Second, there were 643,560 active DACA (Deferred Action for Childhood Arrivals) recipients as of March 31, 2020, according to U.S. Citizenship and Immigration Services (USCIS). DACA provides work authorization and protects these individuals from deportation. From an economic perspective, it makes no sense to remove approximately 600,000 people from the U.S. labor force.

"Third, while public opinion should not necessarily guide policy, there is strong public support for providing a durable solution for people brought to America by their parents.

"Fourth, without legislation, individuals in DACA and others who came to the United States with their parents could be subject to deportation. DACA is an administrative vehicle, and a court may either strike it down as unlawful or a future presidential administration may decide not to continue the program. The primary criticism of President Obama creating DACA is that it was an

action by the president, not Congress. Members of Congress can address that criticism through a legislative solution."

Zion Dirgantara was 12 years old when his parents brought him to America. "I learned that I was without status when I tried to join the U.S. Army my junior year in high school, and also when I tried to apply for a driver's license," he said in an interview. "My life was limited. I felt alone and isolated, but I learned to accept my reality. My mom helped me understand this difficult situation. As an undocumented person, I know that I am not alone. This situation has taught me how to persevere and have patience in life, although at times I thought my life was not going anywhere, like a ship sailing to no end with no destination. But I am lucky enough to have people that supported and guided me throughout the years, and it gave me faith and hope for good things to come.

"DACA has allowed me to fulfill my lifelong dream to become a soldier. I am very grateful to have the chance and privilege to join and enlist with the U.S. Army through the MAVNI [Military Accessions Vital to the National Interest] program. DACA allowed me to finish college. DACA allowed me to get a job."

Legislation would help people like Zion Dirgantara to live without fear of deportation and have the chance to become American citizens.

The latest business support adds energy to what could be the best opportunity in 20 years to pass a legislative solution for Dreamers.

Forbes

March 3, 2021

AI Commission: Immigrants Key To America's Tech Competitiveness

By STUART ANDERSON

A bipartisan government commission on artificial intelligence (AI) recommends changing U.S. immigration laws to allow America to attract and retain talent to compete in AI and other cutting-edge technologies. The commission's report, which is likely to be influential, concludes that preventing Chinese nationals from studying or working in AI, as some anti-immigration and anti-China legislators have proposed, would benefit the Chinese Communist Party and hurt the United States.

This week, after two years of research, hearings and investigations, the National Security Commission on Artificial Intelligence released its Final Report. Eric Schmidt, former CEO and chairman of Google and cofounder of Schmidt Futures, chaired the commission. Robert Work, a former deputy secretary of defense, served as vice chair.

"As a bipartisan commission of 15 technologists, national security professionals, business executives, and academic leaders, the National Security Commission on Artificial Intelligence (NSCAI) is delivering an uncomfortable message: America is not prepared to defend or compete in the AI era," write Schmidt and Work in the report's opening. "This is the tough reality we must face. And it is this reality that demands comprehensive, whole-of-nation action. Our final report presents a strategy to defend against AI threats, responsibly employ AI for national security, and win the broader technology competition for the sake of our prosperity, security and welfare."

Improving U.S. immigration policy plays a significant role in the report's recommendations: "As a starting point, the strategy should build on the following pillars: 1) winning the AI talent competition; 2) promoting American AI innovation; 3) protecting U.S. AI advantages; and 4) leading a favorable international AI order."

"[T]he United States needs to win the international talent competition by improving both STEM [science, technology, engineering and math] education and our system for admitting and retaining highly skilled immigrants," write Schmidt and Work.

Currently, H-1B visa fees paid by employers have funded approximately 100,000 college scholarships for U.S. students in science and engineering, according to a National Foundation for American Policy (NFAP) analysis. However, the annual number of H-1B visas, typically the only practical way for a high-skilled foreign national to work long-term in the United States, has been exhausted every year since 2004.

In a summary of "Win the global talent competition," the report states: "The United States risks losing the global competition for scarce AI expertise if it does not cultivate more potential talent at home and recruit and retain more existing talent from abroad. The United States must move aggressively on both fronts. Congress should pass a National Defense Education Act II to address deficiencies across the American educational system—from K-12 and job reskilling to investing in thousands of undergraduate- and graduate-level fellowships in fields critical to the AI future. *At the same time, Congress should pursue a comprehensive immigration strategy for highly skilled immigrants to encourage more AI talent to study, work, and remain in the United States through new incentives and visa, green card, and job-portability reforms*." (Emphasis added.)

In a section titled "Strengthen AI talent through immigration," the report concludes: "Immigration reform is a national security imperative. Nations that can successfully attract and retain highly skilled individuals gain strategic and economic advantages over competitors. Human capital advantages are particularly significant in the field of AI, where demand for talent far exceeds supply. Highly skilled immigrants accelerate American innovation, improve entrepreneurship and create jobs."

While the Trump administration treated foreign-born professionals as a threat, enacting numerous obstacles and even bans on their entry into America, the report states, "The United States benefits far more from the immigration of highly skilled foreign workers than other countries." According to the report, "In 2013, the United States had 15 times as many immigrant inventors as there were American inventors living abroad. By contrast, Canada, Germany, and the U.K. all maintain a net negative inventor immigration rate. Compared with other U.S. advantages in the AI competition—such as financial resources or hardware capacity—this immigration advantage is harder for other countries to replicate."

The report identifies several problems with the current U.S. immigration system, including international students becoming more likely to study in other countries and the long waits for employment-based immigrants for green cards, which are in some ways connected. As this recent article explains: "Without a change in immigration law, it will be sometime in the year 2216—195 years from now—when the last person born in India waiting today in the employment-based immigrant backlog is expected to receive a green card."

Among the immigration policies the commission recommends:

- *"Expand and clarify job portability for highly skilled workers."* The concept is contained in the recently introduced U.S. Citizenship Act, which was developed by the Biden administration. The commission believes the current one-year extension for many H-1B visa holders waiting for employment-based green cards should be expanded to make it easier for

foreign-born scientists and engineers in H-1B, O-1 or other statuses to change jobs more easily and have more flexibility in the labor market.

- *"Recapture green cards lost to bureaucratic error."* This measure is also in the U.S. Citizenship Act.

- *"Grant green cards to students graduating with STEM PhDs from accredited American universities*." The U.S. Citizenship Act contains this measure. NFAP estimates it would result in about 10,000 green cards a year.

- *"Double the number of employment-based green cards."* The U.S. Citizenship Act potentially more than doubles the number of employment-based immigrant visas by no longer counting dependents toward the annual limit and allowing unused green cards to be used from the family preference categories—after providing family categories a higher annual limit unlikely to be fully used after five years.

- *"Create an entrepreneur visa."* The United States lacks a startup visa and it places America at a disadvantage compared to other nations in retaining or attracting foreign-born entrepreneurs.

- *"Create an emerging and disruptive technology visa."* The commission recommends the National Science Foundation "identify critical emerging technologies every three years. DHS would then allow students, researchers, entrepreneurs, and technologists in applicable fields to apply for emerging and disruptive technology visas. This would provide much-needed talent R&D [research and development] and strengthen our economy."

The Commission soundly rejected an approach favored by Sen. Tom Cotton (R-AR) to prevent Chinese-born researchers from studying in science and technology fields in the United States, arguing such a policy would be a huge benefit to the Chinese Communist Party.

"Immigration policy can also slow China's progress," according to the report. "China's government takes the threat of brain drain seriously, noting that the United States' ability to attract and retain China's talent is an obstacle to the Chinese Communist Party's (CCP) ambitions. Increasing China's brain drain will create a dilemma for the CCP—which will be forced to choose between losing even more human capital, further slowing their economic growth and threatening their advancement in AI, or denying Chinese nationals opportunities to study and work in the United States."

In a hearing, Eric Schmidt noted many promising researchers in AI in the United States were born in China. "We looked at the question of how important are Chinese researchers for the AI effort, in our report, and it turns out the Chinese researchers are the number one authors on the key papers," said Schmidt at a recent Congressional hearing. "If you were to get rid of all of them . . . you will, in fact, hurt America's AI leadership." In a report, Georgetown University's Center for Security and Emerging Technology also pointed out the importance of Chinese-born researchers in American AI.

If Sen. Chuck Schumer follows through on a bill directed at China to increase U.S. efforts in technology, as reported by Reuters, it is reasonable to expect amendments from Sen. Cotton or others to restrict international students from China. It appears Sen. Cotton's definition of "sensitive" fields includes anything in STEM an international student would be interested in studying in America, arguing the U.S. could "continue to permit Chinese nationals to study non-STEM subjects, such as the humanities."

The commission addresses technology transfer concerns but warns restrictions on immigration or international students are the wrong approach and would be counterproductive. "While immigration benefits the United States, policymakers must also bear in mind the threat of unwanted technology transfer," according to the report. "However, restricting immigration is far too blunt a tool to solve this problem. Restrictions harm U.S. innovation and economic growth and only help our competitors by enabling their human capital to grow. They also incentivize U.S. technology companies to move to where talent resides, whether right across our borders or overseas. Technology transfer will only get worse if significant components of the U.S. technology sector move their research and development to China or other countries that are more vulnerable than the United States to technology transfer efforts. A more effective strategic approach would pair actions to improve the United States' ability to attract top global talent with targeted efforts to combat technology transfer vectors."

Policy choices made today will reverberate in the coming years. "The leading indexes that measure progress in AI development generally place the United States ahead of China," according to the commission. "However, the gap is closing quickly. China stands a reasonable chance of overtaking the United States as the leading center of AI innovation in the coming decade."

America's leading thinkers on technology, innovation and national security have told policymakers in a final report on AI that making U.S. policies more open to high-skilled immigrants and international students is essential to the nation's future. Will Congress listen?

Forbes

March 2, 2021

H-1B Visa Ban Not Sustainable Amid Low Computer Unemployment Rate

By STUART ANDERSON

The unemployment rate in computer and mathematical occupations remains well below pre-pandemic levels, making the current immigration ban on the entry of H-1B visa holders unsustainable.

On June 22, 2020, Donald Trump used his authority under section 212(f) of the Immigration and Nationality Act to issue a proclamation suspending the entry of H-1B, L-1 and other temporary visa holders. This followed a similar proclamation on April 22, 2020, that blocked the entry of nearly all categories of immigrants, including employment-based. Before leaving office, Trump extended the ban on entry for both the April and June proclamations until March 31, 2021.

Table 1

Occupations	January 2020	January 2021
Computer and Mathematical Occupations	3.0%	2.4%

Source: Bureau of Labor Statistics.

Successful litigation in *NAM v. DHS* stopped the June 2020 proclamation for many employers. The judge's opinion cited National Foundation for American Policy research on the low unemployment rate in computer occupations. However, for employers that were not members of the trade associations that engaged in the successful litigation, the ban remains in place on the entry of H-1B, L-1, H-2B and certain J-1 visa holders. That includes university employers, public schools, nonprofit organizations and others unable to join business organizations. (Some national interest exemptions have been possible.)

Table 2

Occupations	January 2020	January 2021
Computer Occupations	3.0%	2.7%

Source: National Foundation for American Policy estimates using Bureau of Labor Statistics' Current Population Survey, January 2020 and January 2021. Not seasonally adjusted. Computer occupations include Computer and information research scientist, Computer and information systems manager, Computer hardware engineer, Computer network architect, Computer programmer, Computer support specialist, Computer systems analyst, Database administrator and architect, Information security analyst, Electrical and electronics engineer, Network and computer systems administrator, Software developer, Software quality assurance analyst and tester, Web and digital interface designer and Web developer.

On February 24, 2021, the Biden administration revoked the proclamation issued on April 22, 2020, thereby no longer blocking the entry of immigrants in the Diversity visa, employment and family categories.

The administration left in place the bans in the June 2020 proclamation, which blocks the entry of H-1B and other visa holders whose employers were not part of the order in *NAM v. DHS*. The justification for maintaining the suspension looks weak.

On October 1, 2020, when U.S. District Judge Jeffrey S. White ruled the president did not possess the power to issue the June 2020 proclamation, he referenced a June 2020 National Foundation for American Policy (NFAP) analysis. That analysis showed between January and May 2020 the U.S. unemployment rate in computer occupations had remained stable and actually declined (from 3.0% to 2.5%) in occupations that lined up with those of H-1B visa holders (based on DHS H-1B occupational data). That information was available at the time the June 2020 proclamation was issued.

In January 2021, in computer and mathematical occupations, the unemployment rate declined to 2.4%, compared to 3.0% in January 2020 (before the pandemic spread in the U.S.), according to the Bureau of Labor Statistics (BLS). In computer occupations, a somewhat narrower designation, the unemployment rate declined from 3.0% in January 2020 to 2.7% in January 2021, according to according to an analysis of the Bureau of Labor Statistics' (BLS) Current Population Survey by the National Foundation for American Policy.

Judge White also wrote, "The statistics regarding pandemic-related unemployment actually indicate that unemployment is concentrated in service occupations and that *a large number of job vacancies remain in the area most affected by the ban, computer operations which require high-skilled workers*." (Emphasis added.)

The statement on job vacancies referred to data presented by NFAP that showed, "During the 30-day period ending June 9, 2020, there were over 639,000 active job vacancy postings advertised online for jobs in common computer occupations, including those most common to H-1B visa holders, according to Emsi Job Posting Analytics. For example, there are over 260,000 active job vacancy postings advertised online for software developers (applications)."

What do the latest statistics show? Between June 9, 2020, and February 28, 2021, the number of active job vacancy postings advertised online for jobs in common computer occupations increased by 37% or 234,000 and now stands at over 873,000, according to an NFAP analysis of Emsi Job Posting Analytics. Instead of 260,000 active job vacancy postings advertised online for

software developers (applications), there were over 368,000, an increase of 108,000 or more than 40%.

In revoking the April 22, 2020 proclamation blocking the entry of immigrants, the Biden administration was likely influenced by the litigation in *Gomez v. Trump*, as evidenced by the language in its February 24, 2021 proclamation that mentions Diversity and other immigrants. The American Immigration Lawyers Association (AILA), the Justice Action Center (JAC) and Innovation Law Lab filed the lawsuit with pro bono support from Mayer Brown LLP.

"Prior to the rescission of PP10014 [the April 22, 2020 proclamation], Judge Mehta granted our request for emergency relief on behalf of our class of DV2020 [Diversity] winners who had visas issued or renewed in September pursuant to his original injunction," said Jesse Bless, AILA's director of litigation, in an interview. "The judge preserved the validity of DV2020 visas and those individuals will now have the opportunity to enter the U.S. The visas will be treated as if they were issued as of February 24, 2021."

Significant practical issues remain due to consular closings and backlogs for issuing immigrant and temporary (nonimmigrant) visas. In a March 1, 2021, briefing, the State Department asked for patience.

"They are acknowledging the problem but seem to be saying there is not much they can do about it at this time," said Jeffrey Gorsky, senior counsel at Berry Appleman & Leiden and a former State Department attorney, in an interview. "The NIV/IV [nonimmigrant/immigrant visa] distinction should not be an issue. Almost all posts have separate NIV and IV units that do not compete for space. With both operating significantly under capacity, there should not be an issue of prioritizing one over the other. They should be able to get immigrant visa processing back to normal—and they say they are not ready to do that—without draining resources from nonimmigrant visas."

"If the ban were to be extended beyond March 31, it would limit the ability of H-1B lottery beneficiaries to use the visa process, but there are exceptions that would limit the effectiveness of the ban," said Gorsky. "It would not apply to the plaintiff class [in *NAM v. DHS*], assuming that the injunction holds, and there are national interest exceptions. And it does not apply to people who were in the U.S. on the effective date of 10052 (June 24, 2020). But the consular shutdown would probably have a greater impact, as it would inhibit visa processing on all classes and will remain in effect, subject to local conditions, even if the ban expires at the end of March."

The business and legal community is sufficiently unclear of the Biden administration's posture on H-1B and other temporary visas that there is uncertainty as to whether Biden will continue Trump's June 2020 proclamation past March 31, 2021, despite there being no economic case for continuing it.

When running for president, Joe Biden said he would let the facts dictate his administration's policies. The economic facts show the Trump administration's ban on the entry of H-1B and other visa holders was faulty from the start, and the case for it has grown weaker with each passing month.

Forbes

March 1, 2021

Immigration Bill Shows Need To End Employment-Based Immigrant Backlog

By STUART ANDERSON

Without a change in immigration law, it will be sometime in the year 2216—195 years from now—when the last person born in India waiting today in the employment-based immigrant backlog is expected to receive a green card. Barring advances in human longevity, businesses and high-skilled foreign nationals must rely on Congress to solve this problem and enact reasonable policies to welcome highly skilled people who want to become Americans.

The Scope of the Problem: H-1B and L-1 (intracompany transferee) are temporary statuses, meaning if someone wishes to remain in the United States, they must obtain an employment-based immigrant visa (or green card) that grants permanent residence. However, there is far greater demand for high-skilled individuals than the limited number of employment-based green cards allotted by Congress.

Since 1990, when Congress set the annual limit on employment-based immigrants at 140,000 (and 65,000 H-1B temporary visas), changes in technology have accelerated the demand for high-skilled technical labor. Congress established the current employment-based limits before the internet became a part of daily life. It also predates the iPhone, the iPad, YouTube, e-commerce, Netflix, Google, cloud computing and thousands of innovative companies and technologies that have come into existence and fueled the demand for high-skilled labor.

U.S. businesses would still need more scientists and engineers to grow and innovate even if the number of Americans earning degrees in science and engineering had exploded—and it hasn't.

Between 1995 and 2015, full-time U.S. graduate students in electrical engineering *decreased by 17%*. The number of full-time U.S. graduate students in computer science increased by 45% from 1995 to 2015, while international graduate students increased by over 480%. (H-1B visa fees paid by employers have funded approximately 100,000 college scholarships for U.S. students in science and engineering.)

As of March 2020, the backlog in EB-1, EB-2 and EB-3—the employment-based first, second and third preferences—was 915,497, according to the Congressional Research Service (CRS).

Without Congressional action, notes CRS, the problem will grow worse: "The total backlog for all three categories would increase from an estimated 915,497 individuals currently to an estimated 2,195,795 individuals by FY 2030."

Let that number sink in: Within a decade, more than 2 million people will be waiting in line, most for many years or even decades, for employment-based green cards. And there are indications this underestimates the problem.

Table 1

Fiscal Year	Employment-Based 2nd Preference	Employment-Based 3rd Preference
2018	4,527	5,891
2017	3,328	6,468
2016	4,407	4,680

Source: U.S. Citizenship and Immigration Services, National Foundation for American Policy.

Table 1 shows that in FY 2018 only about 4,500 Indians obtained permanent residence in the employment-based second preference and fewer than 6,000 received green cards in the employment-based third preference. (The National Foundation for American Policy obtained the data via a Freedom of Information Act request.)

CRS estimates the annual demand for employment-based green cards in the three preference categories is 262,376 (including dependents). This is based on petitions U.S. Citizenship and Immigration Services (USCIS) approved in FY 2018. CRS explains the backlog grew because there is a "current limit of 120,120 green cards for the three employment-based immigration categories."

Another problem is that Congress established a per-country limit of 7% for each country that burdens mainly potential employment-based immigrants from India but also affects people born in China and the Philippines. The law, in effect, gives the same number of green cards for employment to India as it does Iceland.

In the employment-based second preference (EB-2): "Under current law, and owing to a limited number of green card issuances, the current backlog of 568,414 Indian nationals would require an estimated 195 years to disappear," according to CRS. David Bier of the Cato Institute predicts "about 186,038 Indian immigrants will die . . . before they receive green cards even if they could remain in line forever."

"By FY 2030, [the] estimated wait time would more than double," according to CRS. "Under S. 386, the estimated wait time for newly approved EB-2 petition holders would shrink to 17 years, and in FY 2030, the wait time would be 37 years, the same as for all other foreign nationals."

S. 386 was a bill in the last Congress sponsored by Sen. Mike Lee (R-UT) that would have eliminated the per-country limit for employment-based immigrants. Rep. Zoe Lofgren (D-CA)

wrote H.R. 1044 with Rep. Ken Buck (R-CO) and it passed the House in July 2019. The companion bill, S. 386, was blocked in the Senate for more than a year. It became a Christmas tree for extraneous immigration provisions. The Senate finally approved S. 386 near the end of the session but the House found the provisions to be objectionable and it did not become law. The bill would not have increased the number of employment-based green cards but would have reduced the wait times for those waiting the longest for permanent residence, particularly professionals from India.

Without any change in the law, CRS predicts: "Currently, new Indian beneficiaries entering the EB-3 [employment-based third preference] backlog can expect to wait 27 years before receiving a green card." (The wait time would be much longer in the EB-2 category.)

Scientists and engineers waiting for their green cards may see their children who have lived in the United States for years be forced to leave the country when they "age out" of their place on a mother or father's immigration application when reaching 21 years old. USCIS policies during the Trump administration caused many spouses of H-1B visa holders waiting for green cards to lose their work authorization due to long processing delays.

New Immigration Bill Would End the Employment-Based Backlog: The U.S. Citizenship Act, developed by the Biden administration, would eliminate the employment-based backlog within 10 years through various provisions, according to a National Foundation for American Policy (NFAP) analysis.

First, the bill would no longer count spouses and children toward the annual limit, which would approximately double the annual number of employment-based green cards. Second, the legislation increases the annual limit for family-sponsored immigrants and allows unused numbers from the family categories to be used by the employment categories. That means once the family backlog is eliminated, which NFAP predicts could happen within 5 or 6 years, backlog reduction in the employment-based categories would accelerate.

Third, the bill eliminates the per-country limit. Fourth, the legislation allows unused green cards from earlier years to be redirected to reduce family and employment backlogs.

The bill also contains a provision, which NFAP has recommended, to allow any individuals who wait at least 10 years with an approved immigrant petition to receive permanent residence without numerical limit. If Congress passed only this reform, it would help many people and bring certainty to otherwise interminable waits for many employment-based immigrants.

Related to the backlog, in its final days, the Trump administration published a final rule designed to price employment-based immigrants and H-1B visa holders out of the U.S. labor market. The regulation would boost required wages 23% to 41% depending on the occupation, according to an NFAP study. The regulation could block people waiting for green cards if the new required salary is too high for an employer to retain them in H-1B status. (Individuals can be extended in H-1B status while waiting for an employment-based green card.)

If the Biden administration keeps the rule, it would be a significant victory for former White House adviser Stephen Miller and opponents of immigration.

Numerous studies and private wage surveys show that there is no evidence high-skilled foreign nationals are paid less than comparable U.S. professionals. If employers were forced to pay high-skilled immigrants 41% more than comparable U.S. workers, one would expect critics would still claim the immigrants were paid less because that is typically the only argument put forward against high-skilled foreign nationals who work in America. Members of Congress are repeatedly told to believe the only value someone born in another country offers a U.S. business or the U.S. economy is a willingness to work for less money.

If we have learned one thing from the pandemic, it is how valuable immigrants are to America. Immigrants play key roles in the two companies responsible for the Covid-19 vaccines Americans are receiving to protect their lives. Moderna's leaders, two cofounders and critical scientific personnel are immigrants, as are the chief executive (and chief science officer) of Pfizer and a key scientist (Katalin Karikó) who made a crucial breakthrough on messenger RNA," as noted in a December 2020 article. Even the founders of Pfizer were immigrants.

"We have blown the opportunity to maximize the incredible high-skilled immigrants in this country," said Sen. Kevin Cramer (R-ND) at a recent hearing. "The backlog of green cards is immoral to me." Will this be the year moral outrage and economic sense lead to a solution for employment-based immigrants?

Forbes

February 19, 2021

New Bill Has Many Good But Two Bad Measures For Employment Immigrants

By STUART ANDERSON

The Biden administration unveiled its new immigration reform bill and it includes many good provisions for employment-based immigrants, but two that could prove harmful. Observers believe it is less likely the legislation will pass in its present form than that smaller parts of the bill could move independently and gain bipartisan support, making every section potentially critical. Below is a look at the good and the bad in the bill for companies and employment-based immigrants.

The Good: The bill includes several positive reforms for employment-based green cards (for permanent residence). It would raise the worldwide level of employment-based immigrants from 140,000 to 170,000 and add to the ceiling unused employment-based visas from fiscal years 1992 through 2020. (The number of unused visas could be over 220,000, as explained in this Cato Institute essay.)

International students with a Ph.D. in STEM (science, technology, engineering and math) fields from a U.S. university would get green cards without numerical limits, and F students would be considered "dual intent" when applying for visas.

The National Foundation for American Policy (NFAP) has estimated the wait times for employment-based immigrants from India can range from a decade to well over 100 years, depending on when they applied. Two measures will have the most impact on the long waits for employment-based green cards. First, eliminating the per-country limit will dramatically reduce the wait times for employment-based immigrants from India. It would also help people from China and the Philippines. It may allow America to retain talented people who otherwise might grow so frustrated they decide to leave the United States for Canada or return to their home country. The per-country limit puts, in effect, a green card cap of 7% annually on any one country, so Iceland and India have the same annual limit for employment-based green cards.

Second, the bill would exempt from the numerical limits the spouses and children of family and employer-sponsored immigrants. That should more than double the annual limit for employment-based immigration. Another provision would grant permanent residence to anyone who has

waited 10 years with an approved immigrant petition. The National Foundation for American Policy recommended such a reform last year.

Currently, people who reach their 6-year limit in H-1B status while waiting in the immigration backlog can have their H-1B status extended while they remain in the United States. The bill expands the provision to be used by more individuals in H-1B status, and also F-1 students, L-1 intracompany transferees and O-1 (individuals with extraordinary ability or achievement) visa holders. Attorney Cyrus Mehta believes that provision holds the potential for an international student to bypass H-1B status and go straight to a green card, if an employer sponsored him or her and the measure, of course, became law.

The bill makes an essential reform for many families by protecting children who turn 21 from "aging out" of a parent's immigration application due to long waits for green cards. The legislation makes statutory the current regulatory work authorization for the spouses of H-1B visa holders (H-4), providing more protection from a future administration hostile to the measure. It also expands the eligibility for work authorization in H-4 status to more spouses and to children, and includes automatic extensions to help cope with processing delays. It is currently taking up to two years to process H-4 employment authorization documents in the California Service Center.

The Bad: The bill includes two provisions that would be harmful to employers and employment-based immigrants. Unless one subscribes to the discredited "lump of labor" fallacy, the first one defies economic logic. The bill would allow the secretary of Homeland Security, in consultation with the secretary of Labor, to "establish, by regulation, a procedure for temporarily limiting" employment-based immigrants from entering the U.S. or adjusting status inside the United States "in geographic areas or labor market sectors that are experiencing high levels of unemployment."

The provision is ripe for abuse. The Trump administration issued proclamations to block the entry of employment-based immigrants and H-1B and L-1 visa holders although the unemployment rate in computer occupations during the coronavirus pandemic actually declined. The administration offered arguments that judges found specious and businesses viewed as devoid of facts, such as claiming high unemployment existed in computer occupations by citing the Information and Professional and Business Services sectors, even though only 10% of the workers in those sectors were in computer occupations. Still, the Trump administration succeeded in denying entry to at least tens of thousands of visa holders. This new provision would expand the authority, since it would apply to adjustment of status and not just "entry."

"This section of the bill would allow a future president who did not believe in immigration to direct the Department of Homeland Security and Department of Labor to bar employment-based immigration in large parts of the economy," said William Stock of Klasko Immigration Law Partners. "It would allow those agencies to ban immigration based on broad unemployment trends unrelated to labor market shortages in specific industries or for particular skill sets. For the past four years, we have seen that delegations of authority meant to allow for responses to emergencies, like the travel ban authority, can be misused to bar immigration broadly unless the statute provides strict guidelines as to how that authority should be exercised."

“Reducing labor supply is nearly always a dumb, counterproductive way to try to deal with unemployment,” said labor economist Mark Regets a NFAP senior fellow. “Kicking highly skilled workers out of jobs they already have is likely to disrupt the economy even if native replacements were readily available.”

The term “high levels of unemployment” is not defined in the bill, meaning that any future administration could claim, in its opinion, there is a “high level of unemployment” that warrants stopping all employment-based immigration to the United States. The term “temporarily” is also not defined, meaning a president could theoretically block all potential employment-based immigrants for 8 years.

The provision also contradicts the intent of section 3202 of the bill. That section aims to place new limits on the presidential use of section 212(f) of the Immigration and Nationality Act. Donald Trump used section 212(f) to block the entry of people from several majority-Muslim countries, H-1B visa holders, employment and family-based immigrants, Diversity visa lottery winners and others. It is reasonable to ask if it makes to close one loophole that permits presidents to override immigration laws passed by Congress while handing a future president broad new authority to limit immigration.

A second problematic measure would give statutory authority to a poorly conceived Trump regulation that would eliminate the H-1B lottery and replace it by awarding H-1B petitions from highest to lowest salary. The Trump regulation may get struck down in court (it is being delayed right now by the Biden administration) because the rule likely violates the statute, but this provision would help that or a similar regulation withstand a legal challenge. The provision would disadvantage international students or other young people who, because they have less experience in the labor market, command lower salaries. It would favor senior employees, regardless of talent or their expected contribution to the economy or society. It would also disadvantage startups, smaller companies and firms outside of the largest metro areas.

“The primary reason the new lottery rule is problematic is that it contradicts the current statutory directive for selecting H-1Bs by order of filing,” said Stock. “Section 3407 of the bill would provide a valid statutory basis for selecting H-1Bs by wage level, advantaging larger employers and employers in cities with higher average salaries.”

Other parts of the bill will gain more attention, including sections that provide a legislative solution to recipients of DACA (Deferred Action for Childhood Arrivals) and broad legalization for those in the country without legal status. On employment-based immigration, the bill contains many good provisions but a few that will cause immigrants and businesses heartburn.

Forbes

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Trump DOL Wage Rule Remains Threat To H-1B Visas And Immigrants

By STUART ANDERSON

The most devastating immigration regulation for the future of American innovation is the Department of Labor (DOL) rule left by Donald Trump and Stephen Miller to raise the required salaries for employment-based immigrants and H-1B visa holders. The Biden administration is proposing to delay the rule, but if it later decides to retain and defend the rule, it could be a significant victory for opponents of immigration.

After three courts blocked an "interim final" rule, on January 14, 2021, the Trump administration attempted to salvage the DOL regulation by publishing a final rule. The final rule was only slightly modified from the original and still aimed to price H-1B visa holders and employment-based immigrants out of the U.S. labor market. "The revisions to the rule don't change the fact that it still fails to do what the law requires—to reflect the actual, prevailing wage for workers in that geographical area doing similar work," said Kevin Miner, a partner at Fragomen.

Background on Stephen Miller's DOL Regulation: A long-standing goal of White House adviser Stephen Miller and other advocates of restrictive immigration policies is to compel employers to pay employment-based immigrants and H-1B visa holders salaries that are well above market wages.

The goal is to make foreign nationals unaffordable so that employers would hire U.S. workers instead, even though the likeliest impact, say economists, is companies will hire more professionals in other countries and the great movement of foreign-born talent to America that has led to world-class startup companies, medical breakthroughs and technological innovation will end or be slowed considerably. The nation's leading anti-immigration group, which has called for a "permanent pause" on immigration to America, has praised the DOL rule.

Trump officials engineered inflated wages in the DOL rule by altering the formula used to calculate the required minimum wage for permanent residence and H-1B temporary visas. To sponsor foreign nationals for employment-based green cards and H-1B petitions, employers usually must obtain a prevailing wage determination from the Department of Labor. DOL determines the prevailing wage from data provided by the federal government's Occupational Employment Statistics (OES) wage survey. A mathematical formula is used to create four levels

of wages for each occupation and location. The final rule achieves higher mandated wages by raising the current salaries for Level 1 ("entry level") up to the equivalent of the current Level 2 ("qualified") and moving up the other levels as well.

Pricing Employment-Based Immigrants and H-1B Visa Holders Out of the U.S. Labor Market: "The Department of Labor provided the public with no information on the new minimum salaries for H-1B visa holders and employment-based immigrants in specific occupations and geographic areas once the final rule takes effect," according to a new National Foundation for American Policy (NFAP) analysis that estimates the impact of the final rule. "NFAP found there will be significantly higher salaries required for employers under the Department of Labor's final rule compared to the current DOL wage system."

According to the NFAP analysis:

- "For all occupations and geographic locations, the new minimum salary that employers will be required to pay when compared with the current system is, on average, 24% higher for Level 1 positions, 23% higher for Level 2, 27% higher for Level 3 and 25% higher for Level 4.

- "Under the final rule, DOL mandates an employer pay a computer hardware engineer a 26.8% higher salary at Level 1 than under the existing DOL system. The average increase is similar at the other three levels.

- "For software developers, the average increase in the required minimum salary is 29.2% at Level 1, 26.9% at Level 2, and 29.7% at Level 3 and 26.5% at Level 4.

- "For electrical engineers, the average increase in the required minimum salary is 23.5% at Level 1, 22.5% at Level 2, 25% at Level 3 and 25.2% at Level 4.

- "The DOL final wage rule will make it much more difficult to employ individuals to educate more U.S. students in computer science. The average increase in the required minimum salary for computer science teachers, which includes primarily professors at universities and community colleges, would be 41% at Level 1. That could make it difficult or impossible for many educational institutions to employ an H-1B visa holder or employment-based immigrant to teach computer science to U.S. students."

The Final Rule's Arguments Make Little Sense Outside of the Trump Anti-Immigration Agenda: The Trump administration tried, often successfully, for the past four years to block the entry of refugees, asylum seekers, family-based and employment-based immigrants, including a four-year battle against H-1B visa holders and their employers. Only by appreciating this context can one understand the arguments made in the DOL rule.

To reverse-engineer the intended result of much higher required wages, the DOL final rule asserts the entry level salary for H-1B visa holders and employment-based immigrants should be based on individuals with a master's degree. However, immigration law states that a foreign national only needs a bachelor's degree for H-1B status. The Department of Labor claimed it used National Science Foundation (NSF) survey data to set its wages under the rule, but NSF

survey data show that 66% of individuals in computer occupations had a bachelor's degree as their highest degree. DOL's argument that entry level salaries should be based on individuals with a master's degree is perplexing.

"There is not a good reason that a starting wage should be set at a master's degree level for everyone even if a master's were the most common credential," according to labor economist Mark Regets, a NFAP senior fellow. "When it is not the most common credential, there is no justification at all."

Rule is Based on a Trump Executive Order that Biden Revoked and a Memo that USCIS Rescinded: There are strong arguments for why the Biden administration should rescind the rule. Among the reasons: The Trump administration cited in the DOL final rule Donald Trump's anti-immigration "Buy American and Hire American" executive order for the regulation's "justification," its "need" and the "Objectives of and Legal Basis for the Final Rule." However, on January 25, 2021, President Biden revoked Trump's "Buy American and Hire American" executive order. That means the authority that Trump's DOL cited no longer exists.

Trump's Department of Labor also cited in the final rule a computer programmer memo that the Biden administration withdrew on February 3, 2021. DOL cited the memo to justify setting entry level salaries based on individuals possessing a master's degree. But a "court overturned USCIS' denial of an H-1B nonimmigrant visa petition as arbitrary and capricious," according to a USCIS statement. In other words, the Trump administration included in its final rule published on January 14, 2021, a controversial USCIS interpretation of an H-1B specialty occupation *after* a U.S. Court of Appeals for the 9th Circuit rejected that interpretation in a decision nearly a month earlier (on December 16, 2020).

Approximately 80% of the full-time graduate students in key technology fields at U.S. universities are international students who only can work in America if immigration policies are not designed to block them. Forcing employers to pay 25% to 40% more for their services will drive many international students out of the country or lead them to study in other nations in the first place. H-1B visas represent the only practical way for most high-skilled foreign nationals to work long-term in America, become permanent residents and later U.S. citizens.

The Biden administration's immigration proposal for Congress includes more green cards for employment-based immigrants and eliminating the per-country limit. Such reforms are good ideas but make little sense if the Department of Labor rule goes into effect and prices out of the U.S. labor market those same employment-based immigrants.

Biden administration officials have said they would like to attract more international students to America, compete better with China and develop more products and services in the United States. Those goals will be more difficult to achieve if the Biden administration retains the Trump Department of Labor regulation on employment-based immigrants and H-1B visa holders.

Forbes

February 9, 2021

USCIS Taking Two Years To Process Many Applications For H-1B Spouses

By STUART ANDERSON

U.S. Citizenship and Immigration Services (USCIS) takes two years to process applications for many spouses of H-1B visa holders, a legacy of Trump administration policies that attorneys say were designed to prevent the spouses from working in the United States. A new lawsuit points out the current processing times make it "mathematically" impossible for the spouses to remain employed.

The Trump administration threatened to rescind a regulation finalized during the Obama administration that granted work authorization to the spouses of H-1B visa holders with approved immigrant petitions (i.e., long-pending employment-based green cards). H-1B spouses are usually in H-4 status, and the work authorization is called H-4 EAD (employment authorization document).

Before March 2019, USCIS would typically adjudicate an H-4 dependent petition and the H-4 EAD application at the same time as the H-1B petition from the same family. Premium processing of the H-1B petition would ensure adjudication within 15 days.

The wait times for H-4 EADS grew after USCIS changed its policies, including requiring H-4 spouses to supply biometrics. The plaintiffs in *Kolluri v. USCIS* charged the new policy to supply biometrics was to make it more difficult for the spouses of H-1B visa holders to retain their work authorization. "On March 30, 2019, the Agency's Senior Policy Council determined it would begin collecting biometrics for H-4 extension applications filed on Form I-539," according to the plaintiffs. "This change exploded Form I-539 processing times from an . . . average of 3.77 months."

Did requiring biometrics for H-4 EAD renewals serve a legitimate purpose? "Each of the H-4 plaintiffs have previously given biometrics in conjunction with an application for immigration benefits either at a consulate or in the United States," noted the plaintiffs. "The agency's insistence on obtaining *new* biometrics prior to adjudication of the H-4 extension is a pretext. The agency's bad faith insistence on biometrics for H-4 visa holders is telling, especially when 'DHS is not aware of any risk factors – such as fraud, criminal activity, or threats to public safety

or national security – associated with H–4 dependent spouses as a whole that would support imposing [additional burdens].'"

A new lawsuit argues that wait times for extensions for spouses of H-1B visas far exceed those of other applicants for extensions. "Presently, the agency processing times for H-4 visa extensions submitted on Form I-539 are 19-24.5 months (California), 8-10 months (Texas), 7-9.5 months (Nebraska)," according to the memorandum in support of the plaintiff's motion for a preliminary injunction. "Regardless of which service center adjudicates the petition, the applicant is mathematically guaranteed to lose immigration status and employment authorization."

The lawsuit, filed by Wasden Banias, LLC, is *Deepika Gona v. USCIS*. "Plaintiff is a highly skilled information technology professional who has been working to transform the Maryland Department of Human Services IT infrastructure," according to the lawsuit. "Her work is vital to the timely and efficient delivery of services to Maryland's most vulnerable residents. She is the spouse of an H-1B worker and is eligible for H-4 visa status and employment authorization ('EAD'). She applied for her H-4 and EAD to be extended on July 9, 2020. To date, she has been waiting for 214 days, or seven months for a decision. Her prior H-4 and EAD expired on December 30, 2020.

"However, USCIS is forcing her out of work and imperiling the well-being of those vulnerable residents. Despite record high manning levels and record low volume of work to perform, the agency will not adjudicate her requests for extension of her visa and employment authorization."

The case builds on the *Kolluri v. USCIS* lawsuit. In earlier cases, Jon Wasden of Wasden Banias said the court relied on the uncontroverted declaration of Jennifer Roller, the Section Chief at the Nebraska Service Center and person in charge of H-4 processing at that location. "The court accepted her testimony at face value and stated the agency has a 'rule of reason' and processes applications on a first-in-first-out (FIFO) basis," according to Wasden. "However, when she actually was called and cross-examined in another case, she admitted USCIS doesn't have a first-in-first-out system. The agency has a first-in first *assigned*, but *no one is monitoring or tracking when applications go 'out' or are final*. We were able to point out multiple plaintiffs in the *Kolluri* case and others where biometrics had been complete but no action had been taken for 5, 6 or 7 months. We confirmed Roller's testimony that the agency does not follow a FIFO [first-in-first-out] process." (Emphasis added.)

Wasden also gathered information that showed USCIS could adjudicate the cases of H-1B spouses if the agency wanted to since there is no line to skip. He found the agency disclosed it anticipated 231,000 I-539 applications to be filed in 2020 and that Ms. Roller testified her team adjudicating I-539s in Nebraska grew from 57 employees in 2018 to 132 employees in 2020. "Her team was one of four such teams in the United States. Doing the math, if her I-539 team worked on applications full time, it could process the nation's entire I-539 workload in about 6 months," he said.

"At the end of the day, the agency has the resources to adjudicate these cases immediately, but it has chosen not to," said Wasden. "The Trump administration elevated individuals in the agency

who were sympathetic to its anti-immigrant agenda. The administration failed to kill the H-4 EAD legally and used bureaucratic inertia to harm H-4s." He found the arguments for why USCIS started to implement the biometrics policy unpersuasive. (USCIS claimed it was done to verify identity for renewals of people who had lived in America for years and to avoid files being mixed up.) He said, "These are career bureaucrats and will continue to play games with H-4s for the foreseeable future until the courts finally see what is happening."

The spouses of H-1B visa holders cannot legally work without USCIS approving their extension applications. They have no choice but to stop working due to USCIS processing delays. The memorandum for the plaintiff asks: "The ultimate question for the court is whether it is reasonable for these people to lose their jobs because the government agency fails to do its job."

Forbes

February 9, 2021

Trump And Miller Left Biden With Unfinished Immigration Business

By STUART ANDERSON

Donald Trump, Stephen Miller and the rest of the Trump immigration squad left the Biden administration with a lot of unfinished business, only some of which has garnered newspaper headlines. The Biden administration has moved quickly on several high-profile issues, including protection for refugees and DACA (Deferred Action for Childhood Arrivals) recipients. However, the list of immigration issues that requires attention after four years is long. Below are some of the most significant issues.

Stephen Miller's Department of Labor Rule: Jyoti Bansal came to America on an H-1B visa. "I waited seven years for my employment-based green card [due to the per-country limit] and I wanted to leave my job and start a new company but couldn't," Bansal told me in an interview. "What is most frustrating about the green card process is you have no control over a major part of your life."

In the final days of Donald Trump's term, as part of a longstanding goal to price out of the U.S. labor market employment-based immigrants, international students and H-1B visa holders, White House adviser Stephen Miller and other members of the Trump immigration team pushed through a final rule on wages from the Department of Labor (DOL). The rule would significantly boost the required minimum or "prevailing" wage employers must pay employment-based immigrants and H-1B visa holders by 24% to 40% across a range of occupations, according to an analysis by the National Foundation for American Policy.

If the DOL rule had been in effect years ago, Jyoti Bansal likely would never have been able to come to America, nor would the many people who played critical roles in developing the Covid-19 vaccines and came to (or remained in) America on H-1B visas and employment-based green cards.

In 2007, Bansal received an employment authorization document (EAD) as part of the green card process. He later left his employer and started AppDynamics. The company, which monitors websites for clients such as HBO, has grown to employ over 2,000 people and was valued at $3.7 billion when Cisco acquired it in 2017.

The DOL final rule cites Donald Trump's anti-immigration "Buy American and Hire American" executive order for the regulation's "justification," its "need" and the "Objectives of and Legal Basis for the Final Rule." However, on January 25, 2021, President Biden revoked Trump's "Buy American and Hire American" executive order. In other words, the authority cited for the DOL final rule by Trump's Department of Labor no longer exists. The nation's leading anti-immigration group, which has called for a "permanent pause" on immigration to America, has praised the DOL rule. This should not be a difficult choice for the Biden administration on what to do with the rule.

An Agenda on International Students: It is too soon to expect a full agenda from the Biden administration on international students. Rescinding the DOL wage rule would help attract students, since the rule makes it far less likely international students could get a work visa or permanent residence in the United States. There are other pressing student issues.

First, processing delays in Optional Practical Training (OPT) have bedeviled international students, particularly at the Texas Service Center Lockbox. Without a receipt, students can lose their status. (Attorneys have reported some improvements.) The Biden administration disbanded a last-minute effort by the Trump administration to establish a new unit to go after international students working on OPT, which may facilitate more targeted enforcement against bad actors, rather than a generalized effort against all students working on OPT.

Second, the Trump administration's student policies left in place from 2020 may need to be adapted to the current situation. "After a concerted advocacy effort by the higher education community, the U.S. Department of Homeland Security (DHS) stated that international students should 'continue to abide' by emergency pandemic guidance that allows them to take all or some of their courses online," according to a letter from the Presidents' Alliance on Higher Education and Immigration to Immigration and Customs Enforcement (ICE). "We strongly support this guidance because without it, a large number of international students still in the United States during the pandemic would have had to take classes in person or leave–neither tenable as COVID cases rise and the pandemic is still prevalent.

"However, DHS has still not issued additional guidance that would allow *all* international students, including those who were not already enrolled during the initial COVID-19 outbreak in March 2020 but have since enrolled or who will enroll, to enter and remain in the United States. Current guidance stipulates that if a new international student's courses are online, they are prohibited from entering the United States or must depart the country. This policy is a substantial problem for programs with students living in different time zones."

Universities would like updates to the policy, including "explicitly allowing initial international students to enter the country, as well as permitting existing students to remain in the United States when enrolled in online-only courses (as opposed to currently only allowing students enrolled in hybrid courses to enter)."

A recent survey found that during Fall 2020, "new enrollment of international students physically in the United States declined by 72%," more than the 43% drop in foreign enrollment overall because students started online overseas.

If the Biden administration is looking for policy suggestions for a broader agenda on international students, NAFSA: Association of International Educators has put one together. The recommendations include a series of administrative and legislative actions to "establish a welcoming environment for international students and scholars."

The Spouses of H-1B Visa Holders and Long USCIS Processing Times for Work Authorization: The Trump administration was unsuccessful in its plans to rescind the Obama administration's rule on H-4 EAD (employment authorization document). A lawsuit (*Kolluri v. USCIS*) credibly alleges that USCIS put in place an unnecessary biometrics requirement to prevent the applicants, mostly women from India, from working in the United States. The California Service Center is taking up to two years to process an extension for work authorization. Another lawsuit charges current USCIS policies make it "mathematically" impossible for the spouses to continue working because extension applications cannot be processed in time.

Startup Visas and the International Entrepreneur Rule: The Biden administration's outline on immigration legislation did not include a startup visa that would allow foreign nationals to gain green cards after demonstrating they have started a business that creates a threshold number of jobs. Congress can add that to any proposal. In the meantime, the administration can revive the International Entrepreneur Rule.

A letter from a coalition that includes the National Venture Capital Association, FWD.us, the Ewing Marion Kauffman Foundation, the National Immigration Forum and others asks DHS Secretary Alejandro N. Majorkas "to implement the International Entrepreneur Rule . . . . originally put in place at the end of the Obama Administration, would work similar to a Startup Visa by allowing world-class foreign entrepreneurs to launch high-growth companies in the United States by utilizing the parole authority of DHS."

A new report from the Progressive Policy Institute finds implementing the International Entrepreneur Rule could lead to significant job creation. A study last year from the National Foundation for American Policy examined the international experience and concluded startup visas for foreign-born entrepreneurs can bring jobs and innovation to a country.

It may take years for the Biden administration to undo many of the immigration policies implemented over the last four years. Addressing some of the issues not making front-page news will improve the chances the effort will be successful.

Forbes

February 4, 2021

New Research Makes Case For Increasing Immigration

By STUART ANDERSON

A criticism of Joe Biden's new immigration plan is it will increase the number of immigrants admitted to the United States. However, new research suggests increasing immigration is a good thing and argues that allowing in more immigrants will help America deal with an aging workforce and better address problems with government entitlement programs.

"The U.S. population is aging, dramatically," note Ali Noorani and Danilo Zak in a new study for the National Immigration Forum. "Fertility rates are falling, life expectancy is rising, baby boomers are reaching retirement age, and net immigration levels are not high enough to keep pace. According to the U.S. Census, nearly one in every four Americans is projected to be 65 years or older by 2060. At that point, 94.7 million people over age 65 will be living in the country—close to twice the number today. At the same time, the overall population is growing at a slower rate than it has in almost a century, leaving unfilled openings in crucial industries such as health care, agriculture and information technology."

"Our analysis suggests that a sustained increase in net immigration levels based on the Old-Age Dependency Ratio (OADR), or the ratio of working-age adults to adults at retirement age, provides a natural solution to many of the problems that demographic deficit causes," according to Noorani and Zak. "Immigrants are well-positioned to fill critical shortages, whether in the labor market or the country's demographic composition.

"An ethic of welcome is more than a charitable act. It is a clear-eyed solution to a demographic challenge that could torpedo the nation's economy if left unaddressed. Only by intentionally recruiting and integrating immigrants will the U.S. be able to beat back socioeconomic malaise and continue to thrive well into the future."

Noorani and Zak estimate how many additional immigrants America would need to address the problems cited in the research: "This approach also offers a remedy to another problem befuddling policymakers: how to set immigration levels. It helps answer the question of whether levels should remain the same, decrease, or increase. While the policy debate typically centers on the merits of each additional immigrant and what kind of immigrant to allow in, most

immigration reform proposals have lacked an evidence-backed, forward-looking approach to setting overall immigration levels.

"Using publicly available census data and modern demographic concepts, we project that at least a 37% increase in net immigration levels over those projected for fiscal year 2020 (approximately 370,000 additional immigrants a year) will help prevent the U.S. from falling into demographic deficit and socioeconomic decline."

New research from the National Foundation for American Policy (NFAP) also makes the case that increasing immigration would benefit the United States and its citizens, particularly those living in rural communities. "Analysis of U.S. Census Bureau data finds international migration was the only source of population growth in rural areas as a whole during most of the 2010s," according to a study by Madeline Zavodny, an economics professor at the University of North Florida and a former economist at the Federal Reserve Bank of Atlanta. "International migration is strongly related to employment growth in both rural and metro counties. Each additional international migrant is associated with an additional 1.2 jobs in rural counties over 2010 to 2018."

"The estimate for rural areas suggests that international migration adds to total employment well beyond the jobs filled by international migrants," writes Zavodny. "International migrants may have a larger impact on employment because of the jobs they fill. International migrants may work in jobs that otherwise would go unfilled by local residents and thereby enable businesses to expand."

As discussed earlier, in reducing legal immigration by an estimated 49% since becoming president, in the long term, Donald Trump's immigration policies, if maintained, would have harmed U.S. labor force growth. An NFAP analysis showed: "Average annual labor force growth, a key component of the nation's economic growth, will be approximately 59% lower as a result of the administration's immigration policies, if the policies continue."

In a recent executive order, Joe Biden asked the Department of Homeland Security to review and likely eliminate the "public charge" rule, a health insurance proclamation and other policies Trump administration officials designed to reduce legal immigration.

President Biden's most important legacy for the future of the U.S. economy and population may be a welcoming immigration policy.

Forbes

February 1, 2021

The Story Of How Trump Officials Tried To End H-1B Visas

By STUART ANDERSON

Members of the Trump administration waged war behind the scenes against companies and foreign-born scientists and engineers. After four years, telling the story helps explain how Trump appointees turned U.S. Citizenship and Immigration Services (USCIS) into an organization opposed to the immigration of high-skilled foreign nationals on H-1B visas.

The story began before Donald Trump's election. A handful of senators in both parties became outspoken critics of H-1B visas. Sen. Charles Grassley (R-IA) regularly introduced a bill with Sen. Richard Durbin (D-IL) to impose sweeping restrictions on the employment of individuals on H-1B temporary visas. Sen. Jeff Sessions (R-AL) took the battle further, often publicly chastising major technology companies.

Two bills provided a blueprint for the types of changes to high-skilled immigration Trump officials sought to implement during their time in the executive branch. Sen. Sessions sponsored S. 2394, the American Jobs First Act of 2015, with Ted Cruz (R-TX). In 2013, Cruz sponsored a pro-immigration amendment in the Senate Judiciary Committee to increase the annual number of H-1B visas by 500%. In late 2015, Cruz turned around and supported an anti-H-1B visa bill, attempting to position himself for the anti-immigrant vote in the 2016 Republican presidential primary and a possible endorsement from Jeff Sessions.

The bill contained the outline of the Trump administration's action plan for H-1B visas. An analysis determined its purpose was to end the ability of high-skilled foreign nationals to work in the United States.

Research has concluded high-skilled foreign nationals on H-1B temporary visas contribute to America in many ways, including by increasing productivity, which is essential to improving the standard of living. "When we aggregate at the national level, inflows of foreign STEM [science, technology, engineering and math] workers explain *between 30% and 50% of the aggregate productivity growth* that took place in the United States between 1990 and 2010," according to economists Giovanni Peri (UC, Davis), Kevin Shih (RPI) and Chad Sparber (Colgate University). Research by economist Britta Glennon found rather than saving jobs, H-1B restrictions "have the unintended consequence of encouraging firms to offshore jobs abroad."

H-1B visas are important because they generally represent the only practical way for high-skilled foreign nationals, including international students, to work long-term in the United States and have the chance to become employment-based immigrants and U.S. citizens. In short, without H-1B visas nearly everyone from the founders of billion-dollar companies to the people responsible for the vaccines and medical care saving American lives would never have been in the United States.

Despite the economic consensus that international students and high-skilled immigrants are a boon to America, the Trump administration took the opposite stance and tried, among other things, to break the link between international students and their ability to work in the U.S. after graduation. In addition to restricting H-1B visas, administration officials pursued policies to make it less appealing to study in the United States.

The Cruz-Sessions bill would have required anyone with a bachelor's or master's degree – 90% of current H-1B visa holders – from working in America in H-1B status until they had first worked for 10 years outside of the United States. The bill eliminated Optional Practical Training (OPT) for international students, which allows students to work in the United States, usually after graduating. (A never-released Trump administration regulation would have eliminated or restricted OPT.) The bill would set a high minimum salary ($110,000 a year) for H-1B visa holders, foreshadowing the administration's October 2020 Department of Labor (DOL) wage rule. The bill also sought to make it easier for U.S. workers to file lawsuits against companies for discrimination, years before the Trump administration filed what the *Wall Street Journal* called a "dubious" lawsuit against Facebook for allegedly discriminating against U.S. workers.

The Cruz-Sessions bill reflected the views and likely drafting of Stephen Miller, a Sessions aide who went on to lead Donald Trump's immigration policy.

The Durbin-Grassley bill, S. 2266, also contained elements of Trump's future policies. During the Trump administration, some U.S. companies complained that 80% to 90% of their L-1 visa applications to transfer employees into the U.S. from India were denied. The Durbin-Grassley bill had a whole section that, in effect, restricted the category out of practical use for employers. The bill also prohibited placing an H-1B visa holder to work at a customer's site, which became a chief objective of USCIS policy under Trump. The Durbin-Grassley bill attempted to force employers to pay H-1B visa holders much higher salaries than U.S. workers, similar to the Trump DOL wage rule.

After Trump's election, the administration filled key immigration policy positions with people who had worked for Sessions, Grassley, anti-immigration organizations and others.

On April 18, 2017, when Trump issued the administration's first public directive against H-1B visas, the "Buy American and Hire American" executive order, Trump immigration officials had written a document designed to give themselves the authority to argue any new restrictions later proposed came from the president. The Foreign Affairs Manual soon included a directive to

consular officers to consider the executive order when deciding whether to grant a visa. Other restrictive measures also cited the order as a reason for new policies.

Behind the scenes, the Trump team took significant actions against employers and high-skilled foreign nationals even before the "Buy American and Hire American" executive order:

- The "Implementation of March 31, 2017 Memo, Rescission of the December 22, 2000 'Guidance memo on H-1B computer-related-positions'" instructed USCIS adjudicators, in practice, to deny H-1B petitions for many occupations because the Department of Labor Occupational Outlook Handbook states that not everyone hired in those occupations required a bachelor's degree. The document remained secret from the public until USCIS released it and others to the American Immigration Lawyers Association (AILA) after settling a Freedom of Information Act (FOIA) lawsuit.

- The USCIS document titled "H-1B RFE Standards," dated "revised March 23, 2017," contributed to a significant increase in expensive and time-consuming Requests for Evidence (RFEs).

- "H-1B AC21 Denial Standards," revised July 17, 2017, with March 23 crossed out, and other documents contained many redacted parts, masking what USCIS leadership instructed its adjudicators.

"What the documents do not say is more important than what they say," Jonathan Wasden, a partner with Wasden Banias LLC, said in an interview when the USCIS material became public in September 2019. "You see that the noncontroversial matters are all supported by citation to statute and regulation. However, their most controversial policies lack any such support. It appears that the agency made dramatic changes to H-1B policy without grounding those changes in any law. Attorneys have known this is happening in practice, but to see they don't even attempt to create a facade of statutory support is shocking."

In October 2017, the new USCIS director, L. Francis Cissna, issued a memo that increased the denials of H-1B petitions for continuing employment, which are usually extensions for existing employees at the same company or an H-1B visa holder changing to a new employer. Cissna's memo directed USCIS adjudicators to no longer give deference to prior agency determinations on applications, which meant adjudicating extensions of existing H-1B visa holders almost from scratch and under new, more restrictive standards.

Company executives and H-1B visa holders grew distraught as lives were upended when long-standing employees, often waiting years for their employment-based green cards, were denied H-1B petitions and forced to leave the country.

Cissna was an employee of the State Department and Department of Homeland Security who had been working on detail to Sen. Grassley on the Senate Judiciary Committee before joining the administration and being confirmed as USCIS director. He resigned in May 2019, reportedly due to an unwillingness to move as aggressively as other administration officials wanted on issues like asylum.

The impact of the many policy changes could be seen in September 2017. In that month, the percentage of completed H-1B cases with a Request for Evidence more than doubled from 17% in August to 38% in September 2017. By December 2017, the Request for Evidence rate increased to 56%. The following year, in November 2018, over 66% of H-1B petitions were at least temporarily rejected with a demand for additional evidence—nearly triple the rate of approximately 23% in November 2014.

Denials also increased. The percentage of H-1B petitions for initial employment (cases that typically count against the annual cap) increased to 24% in FY 2018 (which started October 1, 2017) and 21% in FY 2019. Between FY 2010 and FY 2015, the denial rates for H-1B petitions for initial employment were between 5% to 8%, much lower than during the Trump administration. While administration officials would claim they were attacking fraud, there is no evidence the policies reduced fraud and were clearly aimed at preventing approvals and the practical use of H-1B visas by employers. The policies were also the opposite of the deregulation that administration officials highlighted in other policy areas.

USCIS adjudicators also began approving some petitions for much less than the typical three years. In a classic example, USCIS granted one applicant *an H-1B approval valid for only a single day* – from February 1 to February 2, 2019. (See here.) USCIS published a February 2018 USCIS memo that changed the interpretation of an agency "itinerary" regulation. It resulted in approving cases for short periods unless an employer could provide contracts that detailed every place an individual might work.

Attorneys noticed the impact on their clients. Dagmar Butte of Parker, Butte & Lane said in an interview she experienced some bad adjudications during the Obama administration but considered those aberrations. "When I read the computer programmer memo and realized the aberration was now policy, contrary to any sane reading of statute or regulation, I was profoundly dispirited," she said. "As a lawyer, I am trained to argue the law—-win or lose— and realizing the law didn't matter when there was a policy objective to pursue was a terrible feeling."

With attorneys scrambling, employers perplexed and H-1B visa holders panicking, Trump officials could smile.

The Trump team could feel confident their approach would succeed through four or eight years of the Trump presidency. First, employment-based immigration had little history of litigation. Employers mostly adopted a grin and bear it attitude. Second, going to court took time and every day the policies remained the Trump team was winning. The victory in the Muslim travel ban case also may have convinced at least some Trump officials that federal judges would back them.

However, this was not a chess match with only one side allowed to make moves. Fed-up employers started filing lawsuits. The most significant group of employers proved to be the ITServe Alliance. This group of companies, many founded by Indian-born immigrants, held onto an old-fashioned American ideal—every citizen has the right to seek redress for perceived repressive or unlawful acts committed by government officials.

The stage was set for a showdown at a court hearing in *ITServe Alliance v. USCIS* on May 9, 2019. After reading the briefs and listening to arguments on both sides about H-1B visa holders, U.S. District Judge Rosemary M. Collyer turned to the Trump administration's attorney and said, "You don't want these people in this country."

Judge Collyer pointed to the significant "difference in outcome" for employers filing H-1B petitions during the Trump administration compared to previous years. Plaintiff's attorneys Jonathan Wasden and Bradley Banias pointed to data showing USCIS approved 94% of H-1B petitions for client ERP Analysts from FY 2012 to FY 2017, but only 19% in FY 2018 and FY 2019.

Plaintiffs argued the February 2018 memo that a contractor must have actual and exclusive "control" over the day-to-day activities of a contractor's employees at a third-party customer site was unlawful, as were other administration policies.

Judge Collyer appeared amused by the example of the H-1B petition that USCIS approved for only one day. She was less amused by the administration's argument in its court filing that a USCIS policy memo "only guides adjudicators in exercising their discretion" and does not require notice and comment as would a regulation. The judge asked the government attorney about one of the USCIS memos that contributed to the significant increase in H-1B denials. "If it's not changing things, why are the results so different?" she asked. The government's answer: "That's a fair question."

While attorneys and employers waited for the judge's decision, the administration continued to deny H-1B petitions, and new lawsuits moved forward. On March 31, 2020, in *Taylor Made Software v. Kenneth T. Cuccinelli*, U.S. District Judge Rudolph Contreras found USCIS was wrong to declare that since "many computer systems analysts have liberal arts degrees and gained experience elsewhere . . . the proffered position cannot be" a specialty occupation. Contreras cited the March 6, 2020, decision in *3Q Digital, Inc. v. USCIS*: "[The regulation] does not say that a degree must always be required, yet the agency appears to have substituted the word 'always' for the word 'normally.' This is a misinterpretation and misapplication of the law."

In *India House v. Kevin McAleenan* (March 26, 2020), U.S. District Judge Mary S. McElroy ruled that the USCIS Administrative Appeals Office (AAO) decision to uphold a denial of an H-1B petition for a restaurant manager with a B.S. in Hospitality Management was "arbitrary and capricious." In one instance, a court ruling favored USCIS on the definition of a specialty occupation. That worked against the Trump administration when, on December 16, 2020, a higher court in the Ninth Circuit "reversed the district court's grant of summary judgment for the U.S. Citizenship and Immigration Services, and remanded, concluding that USCIS's denial of an H-1B temporary worker visa was arbitrary and capricious."

On June 20, 2020, Trump used his authority under section 212(f) of the Immigration and Nationality Act to issue a proclamation suspending the entry of H-1B, L-1 and other temporary visa holders. This followed a similar proclamation on April 20, 2020, that stopped the entry of nearly all categories of immigrants, including employment-based.

Successful litigation in *NAM v. DHS* stopped the June 2020 action for many employers. (National Foundation for American Policy research on the low unemployment in computer occupations was cited in the judge's opinion.)

On October 8, 2020, the Trump administration attempted to solidify its anti-H-1B legacy by issuing two sweeping regulations. This was significant because the administration had relied primarily on memos, making the policies more vulnerable to legal challenges. It remains unclear why the Trump administration did not pursue regulations earlier.

The Department of Labor issued a rule designed to make it much more expensive to employ an H-1B visa holder. On the same day, the Department of Homeland Security (DHS) released a regulation to limit H-1B visas by introducing restrictive definitions of a specialty occupation and an employer-employee relationship, and limiting H-1B approvals to one year for work at customer locations. The DHS rule was a "greatest hits" of policies judges had previously declared to be illegal.

Both regulations were issued as "interim final." That meant the rules sought to bypass the normal process. The administration claimed a "good cause" exception to public notice and comment, due primarily to the unemployment impact of the coronavirus pandemic. The Trump administration did not have the facts on its side. The unemployment rate was low in computer occupations, and precedent decisions did not support the administration's claims of a mandate for emergency action. The only emergency appeared to be Donald Trump trailed Joe Biden in the polls and Trump appointees would no longer be in a position to make policy.

On December 1, 2020, an opinion striking down both rules dealt a significant blow to the Trump administration's efforts to restrict high-skilled immigration. The plaintiffs—businesses and universities led by the U.S. Chamber of Commerce—argued economic data, the administration's long delay in publishing the rules and other factors showed "good cause" did not exist for Trump officials to bypass standard rulemaking procedures. In an order, U.S. District Judge Jeffrey S. White agreed with the plaintiffs.

During the November 23rd hearing, held a week before Judge White's opinion, attorney Paul Hughes, speaking for the plaintiffs, said of the regulations: "We think this is an overt attempt to destroy the H-1B program." Company executives and university personnel said in declarations the DHS rule would cause scientists, software engineers, medical specialists and others to leave America. Attorneys and companies said international students would be unlikely to qualify under the DHS rule.

On January 14, 2021, the administration tried to salvage the DOL regulation by publishing a final rule. The rule was only slightly modified from the original and still aimed to price H-1B visa holders and employment-based immigrants out of the U.S. labor market. (See here.) In all, three courts had blocked the original rule.

The Biden administration reopened the DOL wage rule for comments and its fate remains uncertain. Litigation is expected if the rule goes into effect.

A Trump final rule published in January 2021 aimed to disadvantage international students when selecting H-1B petitions by eliminating the H-1B lottery and replacing it with wage-based selection criteria (highest to lowest salary). A Biden move to review regulations means the April 2021 H-1B lottery will likely occur without the change but litigation is still expected. In January 2021, the Biden administration revoked Trump's Buy American and Hire American executive order.

In a surprising series of moves, the Trump administration tried to resurrect part of the DHS rule but failed to get it published in the *Federal Register* before Inauguration Day on January 20, 2021, effectively killing the rule. The administration had released text of a revised rule online that focused on harming the operations of IT services companies, hospitals, health care staffing companies and professional services firms that employ H-1B visa holders.

The fatal blow to the core of the Trump administration's restrictive H-1B visa policies came in an opinion issued on March 10, 2020. Judge Rosemary M. Collyer invalidated the key USCIS memos and policies that caused H-1B denial rates to skyrocket, particularly for IT services companies. "A decision like this has been long overdue. We finally have the judicial system agreeing with the employers that USCIS has been out of bounds for a long time," said ITServe Alliance National President Amar Varada. (See here for an analysis of the decision.)

In May 2020, USCIS agreed to a settlement with the ITServe Alliance that overturned years of restrictive policies. The settlement followed the March 10, 2020, District Court opinion and on the same day that a May 20, 2020, an opinion in Georgia also found USCIS policies to be unlawful.

Data on H-1B denial rates in the fourth quarter of FY 2020 showed the significant impact of the settlement and court rulings. The fourth quarter of FY 2020 began on July 1, 2020. That was shortly after June 17, 2020, when, as part of the settlement with the ITServe Alliance, USCIS issued a new policy memo, withdrew a February 2018 memo on contracts and itineraries and rescinded the 2010 "Neufeld" memo, which the Trump administration interpreted to deny many H-1B petitions for work at customer locations.

"Losses in federal court cases that declared administration actions to be unlawful forced Trump officials to change restrictive immigration policies and resulted in dramatic improvements in H-1B denial rates for companies," according to an analysis by the National Foundation for American Policy (NFAP). "The denial rate for new H-1B petitions for initial employment was 1.5% in the fourth quarter of FY 2020, much lower than the denial rate of 21% through the first three quarters of FY 2020."

Individual company data show the significant impact of requiring the Trump administration to change its policies. "Ten of the top 25 employers of new H-1B visa holders had denial rates that ranged from 23% to 58% during the first three quarters of FY 2020, but their denial rates for H-1B petitions for initial employment dropped to between 1% to 4% in the fourth quarter of FY 2020," according to the NFAP analysis.

The drop in the denial rates in the fourth quarter of FY 2020 showed that unlawful policies caused the increase in H-1B denials during the Trump administration. Vic Goel, managing partner of Goel & Anderson, said, "Following the decision and settlement in the ITServe Alliance case that caused the rescission of the 2010 and 2018 memos, H-1B approval rates improved substantially."

On H-1B visas, the Trump administration came into office like a lion and exited like a lamb. The administration's policies inflicted much damage over the past four years, say companies and attorneys. While Donald Trump often said he wanted "merit-based" immigration, the war waged against companies, international students and H-1B visa holders during his administration showed the president and his appointed team had little interest in admitting even the most highly skilled foreign nationals to America.

Forbes

February 1, 2021

A New Plan For America's Trade Policy With China

By STUART ANDERSON

The Trump administration failed to change China's policies by imposing tariffs on imports. The time is ripe for a new U.S. trade policy with China. A new policy would do away with the Trump administration's unsuccessful unilateral and protectionist approach in favor of an approach that brings in our allies and uses and expands upon existing trade rules.

"Looking back at the China trade policy of the Trump administration, the biggest lesson is that unilateralism simply doesn't work, at least not against a major power like China," writes Henry Gao, a top trade expert and an Associate Professor of law at Singapore Management University, in a new study for the National Foundation for American Policy. "Despite the tumultuous two-and-half-year trade war and the Phase 1 deal hailed as an 'unprecedented' deal promising 'a more balanced trade relationship and a more level playing field for American workers and companies,' there has been little progress on the issues U.S. businesses and the Trump administration objected to in China's trade and economic policies."

Gao points out, "It is not only the U.S. government that needs a more viable approach. Many companies would like to see an alternative policy that addresses what they consider unfair or even sometimes predatory practices by the Chinese government but without resorting to protectionist trade and investment policies in the United States. Imposing tariffs on Chinese imports has been ineffective and has harmed U.S. consumers and companies."

A regional approach could have proved effective with China. However, one of the most significant mistakes of the Trump presidency was to withdraw from the Trans-Pacific Partnership Agreement (TPP), which could have provided a bloc of countries to support U.S. economic interests. Trump claimed that the TPP would have cost jobs and been a "disaster." There is no evidence that was true.

Without a regional approach, Gao notes, the only other option is multilateral, which would include enforcing rules in the World Trade Organization (WTO) through investigation and negotiating new rules. It is a good sign the Biden administration called for the swift selection of a new WTO director general.

"There are a number of China-specific rules that have long been overlooked," writes Gao. "Properly interpreted, these rules could be used to not only prevent the Chinese government from intervening in the market, but also ensure that such interventions would not be implemented through state-owned enterprises (SOEs). This can help address the market distortions caused by state intervention. The special rule on subsidies in Section 15(b) of China's WTO Accession Protocol, coupled with existing WTO rules on subsidies, provide a good defense against the problems created by China's unique economic model."

"The real problem is not the lack of rules to tackle China's state capitalism, but the lack of utilisation of existing rules," according to Gao. "WTO members—especially the major players—should start conducting well-coordinated countervailing investigations domestically and initiate "big, bold" cases at the WTO to challenge China's subsidies and state intervention in the market through state-owned enterprises. In view of the systemic importance of these issues, the cases are best brought by the United States together with its allies."

Gao favors engaging with China to achieve meaningful reforms at the World Trade Organization. He encourages the Biden administration to propose rules that are neutral on their face, rather than overtly aimed against China. He also believes it is important not to expect success by making a list of demands without allowing China to gain something as well. And the United States should understand China's economic goals and policies as way to evaluate where an agreement could be reached.

All of this is much different than the unsuccessful approach of the Trump administration. The Trump team crippled the use of the World Trade Organization as a way to settle disputes. Moreover, the Trump administration did not work with America's allies.

During an interview with Bob Davis and Lingling Wei of the *Wall Street Journal*, authors of the book *Superpower Showdown: How the Battle Between Trump and Xi Threatens a New Cold War*, Davis said, "From the start, the administration looked to take on China unilaterally. During a state visit in April 2018, French President Macron suggested teaming up. Trump waved him off and said, 'I've got this one.' I think a multilateral approach would be more effective. Beijing fears being isolated."

"Throughout the trade war, Beijing had tried to capitalize on Washington's alienation of its allies," said Lingling Wei. She notes many U.S. allies share the same concerns as Washington about China's trade and economic policies. "A coordinated approach could help Beijing realize that it's in its interest to make the changes."

The Biden team has yet to lift the tariffs the Trump administration imposed on imports from China. Those tariffs have been costly to American consumers and companies and have not achieved their objectives. A new approach to dealing with China is overdue.

Forbes

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Ending Unlawful Trump H-1B Visa Policies Caused Denials To Plummet

By STUART ANDERSON

The Trump administration lost in federal court and, after four years, companies and foreign-born scientists and engineers finally won. That is the surprising end to the Trump administration's efforts to increase denials for H-1B petitions. While policies remain that could bedevil companies, the latest available data show H-1B denial rates plummeted near the end of FY 2020 after the Trump administration was forced to abandon policies that caused the denials to skyrocket.

H-1B visas have become vital, as noted here, because they generally represent the only practical way for high-skilled foreign nationals, including international students, to work long-term in the United States and be given the opportunity to become employment-based immigrants and U.S. citizens. Immigrants and visa holders have driven much of America's technology engine over the past 30 years. The visas play a significant role in America's ability to innovate at a time when elected officials want companies to develop and produce more products and services in the United States, according to analysts.

None of this mattered to Trump administration officials, who preferred to prevent foreign-born individuals—no matter their skill level—from coming to America. Eventually, judges said the Trump administration had to stop its most damaging H-1B policies.

"Losses in federal court cases that declared administration actions to be unlawful forced Trump officials to change restrictive immigration policies and resulted in dramatic improvements in H-1B denial rates for companies," according to a new analysis by the National Foundation for American Policy (NFAP). The numbers tell the story.

Table 1

Denial Rate for H-1B Petitions for Initial (New) Employment for the 4th Quarter FY 2020 vs. 4th Quarter FY 2019

H-1B Denial Rate (Initial Employment) 4th Quarter FY 2019	15.0%
H-1B Denial Rate (Initial Employment) 4th Quarter FY 2020	1.5%

Source: USCIS, National Foundation for American Policy. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

"The denial rate for new H-1B petitions for initial employment was 1.5% in the fourth quarter of FY 2020, much lower than the denial rate of 21% through the first three quarters of FY 2020," according to the analysis. "The Trump administration managed to carry out what judges determined to be unlawful policies for nearly four years. Those policies resulted in high denial rates for H-1B petitions for initial employment of 24% in FY 2018, 21% in FY 2019 and 13% in FY 2020, compared to 6% in FY 2015. The FY 2020 denial rate would have been much higher without the recent court rulings."

H-1B petitions for "initial" employment are primarily for new employment, typically a case that would count against the H-1B annual limit, notes the analysis. The denial rate for H-1B petitions for initial employment was 1.5% in the fourth quarter of FY 2020, much lower than the 15% denial rate in the fourth quarter of FY 2019. Employers do not like to waste money, which means, given the expense of attorneys and government fees, one would expect denial rates to be low because companies only want to submit applications for people likely to qualify.

However, if the government changes policies in dramatic or unexpected ways, as happened under the Trump administration, high denial rates for H-1B petitions could occur. Between FY 2010 and FY 2015, the denial rates for H-1B petitions for initial employment were between 5% to 8%, much lower than during the Trump administration.

Individual company data show the significant impact of the Trump administration being required to change its policies. "Ten of the top 25 employers of new H-1B visa holders had denial rates that ranged from 23% to 58% during first three quarters of FY 2020, but their denial rates for H-1B petitions for initial employment dropped to between 1% to 4% in the fourth quarter of FY 2020," according to the NFAP analysis, which is based on data from the U.S. Citizenship and Immigration Services (USCIS) H-1B Employer Data Hub.

Table 2: Denial Rate for H-1B Petitions for Initial Employment for the First 3 Quarters FY 2020 vs. 4th Quarter FY 2020

Employer	First 3 Quarters of FY 2020 H-1B Denial Rate for Initial Employment	Fourth Quarter of FY 2020 H-1B Denial Rate for Initial Employment
Amazon	7%	1%
Infosys	58%	1%
TCS	15%	1%
Cognizant	48%	4%
Microsoft	3%	1%
Google	1%	1%
Capgemini	30%	1%
HCL America	34%	1%
IBM	12%	1%
Deloitte	23%	2%
Facebook	1%	0.2%
Accenture	28%	2%
Wipro	37%	1%
Tech Mahindra	30%	0.4%
Intel	5%	1%
Larsen & Toubro	26%	1%
Apple	4%	0.2%
Qualcomm	2%	1.5%
Ernst & Young	14%	2%
Oracle	5%	0.4%
PricewaterhouseCoopers	16%	3%
Cisco	10%	0.4%
Walmart	5%	1%
Goldman Sachs	4%	0%
Atos Syntel	39%	0%

Source: USCIS, National Foundation for American Policy. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

Interviews with attorneys confirmed that H-1B cases for their clients decided in the fourth quarter of FY 2020 had low denial rates. Dagmar Butte of Parker Butte and Lane said she observed both a much lower rate of denials and fewer Requests for Evidence (RFEs).

Note that the fourth quarter of FY 2020 began on July 1, 2020. It was on June 17, 2020, that USCIS was compelled to issue a new policy memo and withdraw a February 2018 memo that affected third-party placements. That happened after USCIS lost a court case and agreed to a settlement with the business group ITServe Alliance. USCIS also rescinded the "Neufeld" memo. Although the Neufeld memo was issued in January 2010, Trump officials used it much more than the Obama administration to deny H-1B petitions in situations where an H-1B visa holder would work at a customer's location.

"The memos and their interpretation were blamed for much higher denial rates for H-1B petitions, particularly for information technology (IT) services companies. Data on H-1B denials in the fourth quarter of FY 2020 revealed the impact of the rescission of the two memos," according to the NFAP analysis. "Another factor in the decline in the denial rate: In 2020, judges also more frequently ruled against restrictive interpretations of whether a position met the definition of an H-1B specialty occupation."

Vic Goel, managing partner of Goel & Anderson, said the lower denial rates could be seen in the fourth quarter of FY 2020 and have continued into the first quarter of FY 2021. "Following the decision and settlement in the ITServe Alliance case that caused the rescission of the 2010 and 2018 memos, H-1B approval rates improved substantially," he said.

Companies hope the Biden administration's policies on H-1B visas will resemble those of the Obama administration rather than the policies under Donald Trump that resulted in such a high number of denials of H-1B petitions.

Forbes

January 25, 2021

Pardons May Have Revealed Insincerity Of Trump Immigration Policies

By STUART ANDERSON

The flurry of pardons for significant perpetrators of fraud and drug crimes may have revealed that insincerity resided at the core of the Trump administration's immigration policies. Officials said the border wall and Trump's business immigration policies were designed to fight fraud and keep out drugs and bad people. However, to put it simply, the pardons show it is unlikely Donald Trump enacted restrictive immigration policies because he cared about stopping fraud.

On April 18, 2017, in one of his first major immigration policy directives, Trump issued the "Buy American and Hire American" executive order. A key part of the order was to protect the interests of U.S. workers "through the prevention of fraud or abuse." White House adviser Stephen Miller "told the Associated Press that USCIS [U.S. Citizenship and Immigration Services] was plagued by a 'huge amount of fraud.'"

After four years, the evidence indicates that "prevention of fraud" in the Trump administration turned out to be a way to prevent immigration.

"The Trump administration failed to show that employment-based immigration programs had statistically significant levels of fraud," said Dagmar Butte of Parker Butte and Lane in an interview. "From the data presently available it does not appear the levels are any higher than they were when the Bush administration created the Fraud Detection and National Security Directorate for employment-based immigration. The Trump changes in policy increased costs for employers who needed the talent and desperately wanted to follow the rules to get it. It also created anxiety and harmed the workers who wanted to earn a living and contribute to the U.S. economy."

"Trump administration policies didn't prevent fraud but discouraged employers and workers from participating in these immigration categories, given the barriers to entry and continued participation," she said. "That seems to have been the real purpose of these initiatives."

Butte, who is chair of the Freedom of Information Act (FOIA) Committee for the American Immigration Lawyers Association (AILA) and a member of its H-1B Taskforce, reviewed and analyzed documents uncovered by a FOIA request that revealed something crucial about Trump

immigration policies: The increase in denials were not due to fraud or fraud prevention but to policies aimed at restricting who USCIS could approve for immigration benefits, including H-1B visas.

As reported in September 2019, "New government documents reveal the increase in denials and Requests for Evidence for H-1B petitions are part of an effort by U.S. Citizenship and Immigration Services to achieve desired results — fewer high-skilled foreign nationals working in America. The American Immigration Lawyers Association made the documents public after settling a Freedom of Information Act lawsuit."

A previously secret document (before the FOIA release) showed a leading reason for the increase in the H-1B denial rate had nothing to do with combating fraud. It was a new, restrictive interpretation of immigration law that caused the significant increase in H-1B denials. The "Implementation of March 31, 2017 Memo, Rescission of the December 22, 2000 'Guidance memo on H-1B computer-related-positions'" told USCIS adjudicators, in effect, they could deny H-1B petitions for many occupations because the Department of Labor Occupational Outlook Handbook states that not everyone hired in those occupations required a bachelor's degree. Judges ruled that interpretation to be unlawful, but only after businesses experienced years of denials by USCIS adjudicators.

What about the pardons? The pardons do not reveal an administration or a president who cared about fraud. Before leaving office, Donald Trump granted clemency to "Philip Esformes, a former nursing home executive who orchestrated one of the biggest Medicare frauds in United States history," reported the *New York Times*. "Not far away, in Hialeah, Fla., Judith Negron, 49, who had been convicted in a separate scheme to siphon off hundreds of millions of dollars in fraudulent Medicare payments, was also at home for the holidays instead of in federal prison. Thanks to a commutation by Mr. Trump, she had been released after serving eight years of a 35-year sentence and was relieved of any remaining obligation to pay her share of $87 million in court-ordered restitution."

Other convicted or alleged perpetrators of fraud who received pardons from Trump included Stephen Bannon, a former member of the Trump administration accused of taking nearly $1 million for personal use from a charity to build a private border wall. "What gives the pardon power a bad name is using your last hours in office to help a political ally like Mr. Bannon who was charged with ripping off your own supporters," wrote the editorial page of *The Wall Street Journal*.

NBC News reported other individuals who received pardons from Donald Trump included:

- "Former U.S. Rep. Rick Renzi (R-AZ) . . . In 2013, he was sentenced to three years in prison for extortion, bribery, insurance fraud, money laundering and racketeering in a public corruption case."

- "Randall 'Duke' Cunningham: Another ex-member of Congress, the California Republican was sentenced to 8 years in prison for bribery and was released in 2013."

- “Eliyahu Weinstein . . . from Lakewood, New Jersey, has been pardoned whilst serving his eighth year of a 24-year sentence for a real estate investment fraud as well as money laundering charges.”

- “Shalom Weiss . . . Weiss was pardoned 18 years into an 835-year sentence — believed to be the longest-ever white-collar prison sentence — for his role in setting up an insurance fraud scheme.”

One of the rationales laid out by Donald Trump to keep out Mexicans and build a wall was to stop drugs from coming into the country. Border Patrol officials also argued in favor of building the wall as a way to stop drugs. “Jonathon Braun . . . imported marijuana worth approximately $1.76 billion, from 2008 to 2010, according to Customs and Border Protection documents, including 2,200 pounds in a single incident,” reported NBC. “He pleaded guilty in 2011 and served five years of a 10-year sentence for conspiracy to import marijuana and to commit money laundering. Trump commuted his sentence.”

“As recently as two and a half years ago, Mr. Braun was accused of throwing a man off a deck at an engagement party,” according to the *New York Times*. “Federal prosecutors said in a court proceeding that he threatened to beat a rabbi who borrowed money to renovate a preschool at his synagogue.”

An examination of the policies and the final flurry of pardons make it difficult to argue Donald Trump enacted restrictive immigration policies due to an abiding interest in preventing fraud.

Forbes

January 21, 2021

The Biden Administration And What Happens To Trump's H-1B Visa Rules

By STUART ANDERSON

During its four years, the Trump administration inflicted most of its immigration damage on businesses and high-skilled foreign nationals through memos, executive orders and proclamations. Near the end, Trump officials published two regulations to restrict H-1B visas and prepared a third rule for publication. Businesses, universities and H-1B professionals now wonder what the start of the Biden administration means for the fate of these three Trump-era H-1B rules.

One indication as to the fate of these rules came on Joe Biden's first day. A January 20, 2021, memorandum sent by White House Chief of Staff Ronald A. Klain asked executive departments and federal agencies to postpone rules for 60 days that "have been published in the *Federal Register* . . . but not taken effect." The memorandum adds: "For rules postponed in this manner, during the 60-day period . . . consider opening a 30-day comment period to allow interested parties to provide comments about issues of fact, law, and policy raised by those rules, and consider pending petitions for reconsideration involving such rules. As appropriate and consistent with applicable law, and where necessary to continue to review these questions of fact, law, and policy, consider further delaying, or publishing for notice and comment proposed rules further delaying, such rules beyond the 60-day period."

For rules not yet published, the memorandum states, "With respect to rules that have been sent to the OFR [Office of the *Federal Register*] but not published in the *Federal Register*, immediately withdraw them from the OFR for review and approval . . ."

DHS Rule to End the H-1B Lottery: On January 8, 2021, the Department of Homeland Security (DHS) published a "final rule" to end the H-1B visa lottery. The rule was scheduled to go into effect in 60 days, which, if Donald Trump had been reelected, would have made it possible to use the new system to select H-1B applications sent in by April 1, 2021.

As discussed here, the regulation authorizes U.S. Citizenship and Immigration Services (USCIS) to eliminate the H-1B lottery and instead grant petitions based on registrations starting with the highest salary level and working down. (A lottery is used when more applications or registrations for H-1B petitions are received than the statute allows to be issued annually.) Attorneys,

businesses and universities believe the rule would make it much more challenging to obtain new H-1B petitions for younger workers, particularly international students and information technology professionals. In the proposed rule, DHS predicted no individuals paid Level 1 wages would be selected for H-1B petitions, and about 25% of individuals who would receive Level 2 wages also would not be chosen. Once in effect, the system could cut out even more applicants at Level 2.

The rule will likely be challenged in court. The Trump administration received almost 1,500 comments in response to the proposed rule but chose not to change anything in the rule. Attorneys have questioned the legality of the regulation. "The statute mandates visas be issued in the order in which they are received," said Brad Banias of Wasden Banias in an interview. "While a lottery may be a fair interpretation of that mandate when 250,000 applications show up on the same day, the same cannot be said of prioritizing those applications based on wages."

What impact will the new administration have on the rule? "The incoming Biden administration has directed agencies to consider publishing a 60-day delay for any rules not in effect," said William Stock of Klasko Immigration Law Partners. "If DHS agrees to publish such a delay to March 21, it would likely keep the wage registration rule from affecting the FY 2022 (April 1, 2021) registration process."

H-1B cap selection is the most immediate concern for employers. "The FY 2022 cap selection process must begin no later than 14 calendar days prior to April 1 (March 18) under current regulations," said Stock. "Given the challenge of a lottery with two sets of rules, USCIS would have a basis to publish a further delay of the effective date for the rule until after this lottery runs to give themselves more time to make the necessary changes to the registration website. Such a delay would be similar to what happened when the initial electronic submission regulation was finalized in 2019. It took effect April 1, 2019, but was suspended for that first year because the technology was not yet in place."

DOL Wage Rule for H-1B Visa Holders and Employment-Based Immigrants: On January 14, 2021, the Department of Labor (DOL) published a final rule whose aim was to price H-1B visa holders and employment-based immigrants out of the U.S. labor market. (See here.) DOL had published the same rule as an interim final regulation in October 2020, but three courts blocked the rule on the grounds it violated the Administrative Procedure Act by claiming a "good cause" exception to allow the regulation to go into effect immediately without notice and comment. (Judges cited, among other things, a National Foundation for American Policy analysis that showed the unemployment rate for computer occupations had not increased during the pandemic.)

While the previous court opinions did not decide on the substantive changes to the wages required by the rule, the new rule carries the same defects as the earlier version, even if the wage effects are slightly less extreme, according to a preliminary analysis by the National Foundation for American Policy (NFAP). Compared to the regulation currently in effect, the new DOL rule would require employers to pay, on average, 34% higher salaries at the Level 1 wage for biochemists and biophysicists, 29% higher for software developers and database administrators, and 28% more for computer programmers. An employer in the San Jose, California, area would

pay an electrical engineer at Level 4 more than $41,000 above the market wage, as indicated by a private wage survey (Willis Towers Watson). At Level 1, an employer in San Jose would pay an electrical engineer more than $36,000 above the market wage, according to an NFAP estimate.

"The revisions to the rule don't change the fact that it still fails to do what the law requires—to reflect the actual, prevailing wage for workers in that geographical area doing similar work," said Kevin Miner, a partner at Fragomen, in an interview. "The fact that Level 1 wages are now tied to around the 35th percentile rather than the 45th percentile [from the earlier version of the DOL rule] doesn't change the fact that it is artificially inflating required wages. Prevailing wage data published by DOL should reflect the actual wages paid in the market. It should be math, not politics."

"Because the DOL wage rule has a phased-in process that leaves the current wages in place until July 1 in any event, even if DOL publishes a 60-day delay, it won't change when that rule really takes effect," said William Stock. "It is likely that current lawsuits which successfully rolled back the interim rule will be amended to challenge the final rule on substantive grounds."

DHS Rule on Specialty Occupation and Employer-Employee Relationship: In October 2020, the Trump administration published a far-reaching interim final regulation that would have made it difficult for H-1B applicants to qualify under a new definition of a specialty occupation. The rule also redefined an employer-employee relationship and imposed new requirements on placing visa holders at third-party customer sites. On December 1, 2020, a federal judge in the Northern District of California invalidated the regulation for violating the Administrative Procedure Act.

On January 15, 2021, the Department of Homeland Security (DHS) released the text of a final H-1B rule that focused on the "employer-employee relationship" aspect of the rule released in October. A Department of Labor memo accompanied the rule. The DHS rule and DOL memo combined would have forced the customers of information technology (IT) services companies to file H-1B petitions and labor condition applications on behalf of H-1B visa holders who perform work on a customer's site. The measures were of questionable legality for several reasons (see here), and would have required customers, which do not employ or set the pay of an H-1B professional, to take on new legal obligations. That is something the customers of IT services and other professional companies are unlikely to do, which the writers of the rule likely understood.

A strange thing happened to the rule—it was not published in time. "The Trump administration failed to publish the final regulation before January 20th," noted the law firm Berry Appleman and Leiden. "The Biden administration instructed agencies to withdraw rules that have not yet been published in the *Federal Register*. The Department of Labor guidance that would require an end-client to file an H-1B labor condition application on behalf of a vendor's H-1B employee has been withdrawn."

In sum, one rule disappeared through a regulatory black hole, while two other H-1B rules likely will have to be defeated in court in order to go away. If the two remaining H-1B regulations are ruled invalid by a court or otherwise rescinded, the Trump administration will have made little

permanent change to H-1B visa policy after the four years of tumultuous activity experienced by employers, attorneys and H-1B visa holders.

Forbes

January 19, 2021

Long Delays And ICE Investigative Unit For Students On OPT

By STUART ANDERSON

International students on Optional Practical Training (OPT) are worried about processing delays that threaten their ability to remain in the United States. The Trump administration's response? Establish a new unit designed to investigate students and employers. Those who follow international education say the administration's goal is to diminish public and Congressional support for OPT, which would be consistent with the Trump administration's approach to international students over the past four years.

Optional Practical Training allows international students to work for 12 months and 24 additional months in science, technology, engineering and math (STEM) fields. The ability to gain practical work experience following a course of studies attracts many international students to America and is considered a vital part of their education. Competitors for talent and students, such as Canada and Australia, already make it much easier than the United States for international students to work after graduation.

A recent survey found that during Fall 2020, "new enrollment of international students physically in the United States declined by 72%," more than the 43% drop in foreign enrollment overall because students started online overseas. The U.S. government's policy on international education has become even more critical.

International students sending money and applications to the Texas Service Center have faced delays of many weeks that threaten their ability to remain in the United States and work on OPT. As one education specialist explains, "After one year of OPT when filing for the additional two-year period for STEM, it is possible to continue to work with a receipt notice of a timely filed extension." The problem is the Texas Service Center's lockbox has turned into a black hole. A student who does not receive a receipt notice eventually will be unable to continue working. It can also affect first-time applicants for OPT, depending on the length of the delay. It also affects the ability to land an OPT position.

On a video produced by international students affected by the Texas lockbox delays, one student after another describes waits of 8, 10 or 11 weeks without receiving a receipt. "I lost my job offer," said one. The delays may cost a student her legal status, said another. "We don't know

how many more days we need to wait to even get a receipt, let alone getting our cases approved," said a student. "VOA interviewed more than 10 students in the same situation and had access to chat rooms where hundreds more described reports of receipt notice delays at a Dallas USCIS [U.S. Citizenship and Immigration Services] lockbox facility," reported Voice of America.

Did the Trump administration respond to these desperate pleas from students to ensure it did not further diminish America's reputation as a place to study? No, the pleas have been largely ignored. Instead, Trump officials promised new investigations, potential crackdowns and publishing information designed to weaken support for allowing international students to work in America after graduation.

"The Student and Exchange Visitor Program (SEVP) has determined that it must take bold action to ensure that the Optional Practical Training (OPT) programs operate in a manner that does not harm U.S. workers or foreign student employees, consistent with regulatory and statutory law," announced Immigration and Customs Enforcement (ICE), which oversees OPT, in a statement on January 13, 2021. "SEVP is announcing the development of a new unit—the OPT Employment Compliance Unit—that will be dedicated full-time to compliance matters involving wage, hours, and compensation within OPT, the OPT extension, and Curricular Practical Training (CPT). This unit will publish a public-facing report at least annually on its findings, which will include detailed information on duties, hours, and compensation of OPT workers in a standard formatting that will allow for comparisons against DOL data. The first report will be published on ICE.gov by July 31, 2021."

"This is potentially a big deal," said attorney Dan Berger in an interview. "The devil is in the details, but for decades OPT has been considered more as training connected to the degree than as work. This move goes down the path of regulating STEM OPT more like H-1B visas. STEM OPT is a prime motivator for international students to study here in STEM fields."

William Stock of Klasko Immigration Law Partners said this unit's work should not be taken lightly by companies or students. "Participation in OPT requires employers and students to make statements and commitments to a government agency on a form seeking a benefit under the immigration laws," he said. "As such, students and employers could both be punished for false statements with civil fines under Section 274C of the Immigration and Nationality Act or with criminal prosecution. In addition, false statements could serve as the predicate for removal proceedings against the student as a status violator."

Labor economist Mark Regets, a senior fellow at the National Foundation for American Policy, doubts ICE officials can make reasonable comparisons between U.S. workers, who typically take jobs that are open-ended, and international students on Optional Practical Training, who by regulation cannot work for more than 12 months unless they receive a STEM extension that will allow only an additional 24 months.

Research shows little evidence that international students on OPT are "taking jobs" from U.S. workers. A University of Maryland-Business Roundtable study concluded restricting OPT would cost jobs. "A total of 443,000 jobs would be lost in the economy by 2028, resulting in 255,000

fewer positions for native-born workers," concluded the study. "The modeled results echo myriad prior studies illustrating that employment in the United States is not a zero-sum game."

Madeline Zavodny, an economics professor at the University of North Florida, examined nearly a decade of OPT data. Zavodny concluded, "The results indicate that the OPT program does not reduce job opportunities for American workers in STEM fields." The study for the National Foundation for American Policy found, "There is no evidence that foreign students participating in the OPT program reduce job opportunities for U.S. workers. Instead, the evidence suggests that U.S. employers are more likely to turn to foreign student workers when U.S. workers are scarcer. . . . The OPT program is an important way for the U.S. to attract and retain foreign talent."

If the Biden administration feels it must keep the new unit, analysts and attorneys say it should focus its work on exposing bad actors and educating participants about the rules. It should ensure any reports released are done responsibly and not follow the path of the annual "overstay" reports by DHS, which have produced questionable findings and dubious policy recommendations.

"The Biden administration can utilize this unit and perhaps change it from an 'enforcement unit' to a 'fact-seeking commission' that can provide solutions on improving the technology available to enhance SEVIS to ensure the information provided by the student, employer and DSO's [Designated School Official] match to ensure compliance," said Kelli Duehning, a partner at Berry Appleman & Leiden and a former attorney at USCIS who worked closely with law enforcement and investigators. "Thus, the reports that are released are not just calling out which students or employers are not complying but a more general approach to determine the volume of violations and why those violations are occurring? Is it fraud or a lack of understanding of the program? Perhaps this unit could partner with employers and provide training on the OPT program to ensure employers understand its educational component and purpose. Including higher educational institutions on a commission to ensure the training plans include the necessary elements to ensure a positive OPT experience for the student."

Dan Berger agrees. "If this has to happen, I would say providing more guidance on best practices is always helpful," he said. "If there is a team overseeing students on STEM OPT, they could look for fraud, but also clarify safe harbors and best practices. For example, explain whether employers should keep a compliance file and what should be in it and provide outreach to startup companies and businesses that are part of a university incubator or accelerator. The oversight team could provide information on how best to comply, while also promoting STEM OPT as a benefit."

The Biden administration should understand the latest action from the Trump administration on international students. An attorney offered an explanation for why a few days before Donald Trump leaves office Trump political appointees established a new ICE investigative unit to go after students and employers: "These folks are like those guys that know they've already lost their security deposit, so they're just trying to see how much damage they can do before they leave town."

Forbes

January 18, 2021

DHS And DOL Team Up On H-1B Visas Against IT Services Companies

By STUART ANDERSON

The Trump administration released a midnight regulation and memo designed to end information technology (IT) and professional companies' ability to provide services with H-1B visa holders. The administration's actions would force the customers of IT services companies to file H-1B petitions and labor condition applications on behalf of H-1B visa holders if they perform work on a customer's site, even though the customer does not employ or set the pay of the H-1B professional. The far-reaching actions may be unlawful.

What Did DHS and DOL Do? On January 15, 2021, the Department of Homeland Security (DHS) released the text of a final H-1B rule. This is the same regulation a federal judge in the Northern District of California invalidated on December 1, 2020, except this version of the rule focuses only on the "employer-employee relationship."

The Trump administration understood it was on tenuous legal grounds and decided to narrow the rule, apparently believing this would have better chance in court and would inflict the most damage on IT services companies, the administration's favorite H-1B target over the past four years. U.S. Citizenship and Immigration Services (USCIS) policies under Trump increased the H-1B denial rates dramatically for companies, particularly among IT services companies. However, a judge ruled the policies to be unlawful. As a result, in June 2020, USCIS withdrew two memos and issued a new policy memo as part of a settlement with the business group ITServe Alliance. The DHS rule and DOL memo are attempts to give permanence to policies ruled unlawful.

The new DHS rule significantly changes the definition of an employer to allow DHS to require the *customers* of information technology and professional services companies to submit labor condition applications and H-1B petitions as if they were employers of the H-1B professionals, which they are not. These additional requirements would likely drive customers away from any IT services companies that send H-1B visa holders to a customer's location, since few customers want to (or can) take on legal obligations for individuals for whom they do not possess the ability to hire, fire or compensate. (The DHS rule goes into effect 180 days after publication.)

The Trump administration made a critical change to the current DHS regulation. The current regulation defining what an "employer means" reads: "(2) Has an employer-employee relationship with respect to employees under this part, *as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee*." That matches the Department of Labor's regulation and contains a reasonably clear, common-sense definition of an employer.

Now look at the new rule: DHS removed the phrase "as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." DHS added the phrase "the factors that USCIS may consider to determine if a valid employment relationship will exist or continue to exist include, but are not limited to…" and goes on to list 11 factors. DHS includes unclear phrases among the factors, such as "Where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision." Which type of supervision would mean USCIS considers a company to be an employer, which would require the company to file an H-1B petition? USCIS does not say.

None of this is by accident. Among the reasons the Trump administration lost the ITServe Alliance case is USCIS adjudicators kept denying H-1B petitions in contractor situations involving off-site work. The denials came when USCIS adjudicators asserted if the contractor that filed the H-1B petition did not always supervise (or control) the visa holder because the worker was off-site, the contractor was not the actual employer of the H-1B visa holder.

"DHS asserts that it is 'making clear' that all factors must be taken into consideration to the extent applicable and appropriate to the facts of the specific case," according to comments to the October 2020 interim final rule by the American Immigration Lawyers Association (AILA) and American Immigration Council (AIC). "Rather than providing clarity, DHS has created an impossibly complex rubric of factors that adjudicators 'may consider' to determine the existence of an employer-employee relationship."

AILA and AIC call out DHS for engaging in what amounts to a giant fib when DHS writes it "believes that this new regulation is not necessarily inconsistent with the DOL definition of '[e]mployed, employed by the employer, or employment relationship.'" In reality, the new DHS regulation removes the crucial defining phrase "as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control."

Why the DHS Rule and DOL Memo May Be Unlawful: Several aspects of the Department of Homeland Security rule and Department of Labor memo appear to violate the Administrative Procedure Act (APA).

The Department of Labor chose to issue a memo, rather than publish a new regulation, to make its significant change in policy. DOL claimed reinterpreting its regulation in a new memo was not only legal but "necessary" because USCIS (DHS) had reinterpreted its own regulations. A judge may wish to scrutinize that logic.

"With USCIS now interpreting its regulations as requiring H-1B workers' secondary but common-law employers to file nonimmigrant visa petitions, OFLC [*Office of Foreign Labor*

Certification] will interpret its own regulations as requiring those employers to file LCAs [labor condition applications] as well. . . . This interpretation is a necessary consequence of how the H-1B program functions across OFLC and USCIS. Since USCIS will now require secondary but common-law employers to file petitions, and since these employers will be unable to proceed to the petition stage without an approved LCA from OFLC, OFLC must begin both requiring LCAs from these employers and adjudicating them."

Attorney Cyrus Mehta believes both the DOL memo and the DHS rule could be legally vulnerable due to the Supreme Court's opinion in *Kisor v. Wilkie*. In a March 5, 2020, opinion, U.S. Magistrate Judge L. Patrick Auld ruled against USCIS in its interpretation of its rule (on the definition of specialty occupation) to deny an H-1B petition for a Quality Engineer position for InspectionXpert Corporation. Judge Auld wrote that for USCIS "to receive *Auer* deference, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views.' . . . '*And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties*.'" (Emphasis added.)

Bradley Banias, a partner with Wasden Banias, LLC who argued the case for the plaintiff InspectionXpert, said in an interview, "USCIS uses a convoluted, nearly indecipherable rationale to define the word 'degree' to mean 'not just a degree,' but a degree in a specific specialty."

The relevance to the DHS rule and DOL memo is clear. "While the need for a 'secondary employer' to file an H-1B petition was suggested in the preamble to the DHS rule, it is not stated in the actual rule, which essentially defines the employer but does not include any definition of 'secondary employer' and the need to file an H-1B petition," said Mehta in an interview. "DOL's interpretation of its rule can also be similarly challenged under *Kisor*. Agencies no longer have unbridled discretion to interpret their own regulations under *Auer v. Robbins*. If the new interpretation of the ambiguous rule has never been the authoritative position of the DHS and DOL, and it has taken stakeholders by unfair surprise, it should be held to be an unreasonable interpretation under *Kisor*."

There are also questions about the term "secondary employer." While the term has appeared in a DOL H-1B regulation issued in December 2000, it does not appear in the law passed by Congress on which the regulation is based. Lawrence Lorber, who specializes in labor law at Seyfarth Shaw LLP, said, "Calling someone a secondary employer is nonsense." If Apple contracts with a company to provide landscaping services on a property, is Apple an "employer" of the individual who cuts the lawn and trims the hedges?

AILA and AIC point out the relevant H-1B statute specifies an "importing employer," not multiple or secondary employers. "The question of importing any [foreign national] as a nonimmigrant under subparagraph (H) . . . of this title . . . in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer," according to the law.

DHS claimed in its rule a "good cause" exception to the requirement to allow for notice and comment from the public: "This final rule merely alters the definition of the employer-employee to provide additional clarity to participants in the H-1B program and better align the program with Congressional intent. This alternation will have a *de minimus* impact on the program as a whole and therefore it is unnecessary to engage in notice and comment and the good cause exception properly applies."

This statement appears to be another fib on the part of DHS. First, the final rule takes a clear definition of an employer-employee relationship that matches the one used by the Department of Labor and obscures it by replacing the definition with 11 factors that adjudicators will "consider"—and no company could be certain of the meaning of these factors. Second, it is inconceivable the "alteration will have a *de minimus* impact on the program as a whole." The definition of *de minimus* is "pertaining to minimal or trivial things; small, minor, or insignificant; negligible." IT services companies are prominent among the top 25 employers of H-1B visa holders, and the change in the regulation, experts believe, would have a potentially devastating impact on their ability to employ H-1B professionals.

"The regulation is also vulnerable because this is not a *de minimus* change at all," said Cyrus Mehta. "Through sleight of hand, both DHS and DOL have used the expanded definition, which they term innocuous, to deem client companies as employers and force them to file LCAs and H-1B petitions when they do not pay the wages or have no direct knowledge of the wages paid or other details required under the LCA. This would also interfere in contractual relations and force the vendor to divulge confidential data."

AILA and AIC wrote, "In their totality, these changes to the definition of the employer-employee relationship are unquestionably designed to completely prevent consulting and professional services firms from accessing the H-1B visa program."

William Stock of Klasko Immigration Law Partners called it "astounding chutzpah" for DHS to claim a "good cause" exception to the normal rulemaking process and to argue its rule won't be of any consequence. "It is likely the rule will be struck on both grounds," said Stock.

Stock also believes it is a "stretch" for DHS to argue that it can accept comments to its invalidly-promulgated interim rule from October 2020 and go directly to a final rule, particularly because when the rule was issued in October, Chad Wolf was serving as acting secretary of DHS. Several courts have ruled his appointment to be unlawful.

For the past four years, the Trump administration has attempted to make it as difficult as possible for companies, particularly IT services companies, to employ H-1B visa holders. Arguments about how such policies make U.S. companies less competitive and drive more work out of the United States fell on deaf ears.

It is unsurprising that just before Donald Trump's term finished, Trump political appointees would make a final attempt to cement in place policies that have exerted significant harm on high-skilled foreign nationals and businesses. It remains to be seen whether the Biden

administration would want to keep this set of anti-immigration policies and whether courts will allow to remain in place what appear to be legally dubious actions.

Forbes

January 13, 2021

DOL H-1B Visa Wage Rule: Donald Trump's Bad Parting Gift To Immigrants

By STUART ANDERSON

The Department of Labor (DOL) reissued a controversial rule designed to price H-1B visa holders and employment-based immigrants out of the U.S. labor market, setting up new legal battles and a decision by the Biden administration on whether to keep a rule that fulfills a key part of White House adviser Stephen Miller's anti-immigration agenda. The final rule makes only minimal substantive changes from the original rule and was drafted to avoid the violations of the Administrative Procedure Act (APA) that caused three judges to issue opinions blocking the regulation.

Under immigration law, employers must pay H-1B visa holders the higher of the prevailing wage or actual wage paid to similar U.S. workers. DOL determines the prevailing wage with data from the government's Occupational Employment Statistics (OES) wage survey and uses a mathematical formula to create four levels of wages for each occupation.

A formula is already problematic, since it is much less accurate than asking employers what they pay employees at different levels of experience. A formula can be manipulated to achieve a result, as analysts note, by artificially raising the required wage. That is what the Department of Labor has done in the two versions of its wage rule.

In October 2020, the Department of Labor issued an interim final regulation that raised the required wage employers must pay not just to H-1B visa holders but for employment-based immigrants who required labor certification. Three courts blocked the rule on grounds that it violated the Administrative Procedure Act by claiming a "good cause" exception to allow the regulation to go into effect immediately without notice and comment. Judges cited, among other things, a National Foundation for American Policy analysis that showed the unemployment rate for computer occupations had not increased during the pandemic.

The new rule does not go into effect for 60 days. It also phases in the latest higher salary requirements over several months. Trump officials hoped that would force employers and universities to argue that the regulation violates the statutory language or did not properly address comments, rather than the more straightforward violations of the Administrative Procedure Act contained in the original rule that were defeated in court.

The Fragomen law firm summarized the regulation's phase-in:

- **"Phase 1, Rule Effective Date through June 30, 2021:** LCAs [labor condition applications] filed and PWDs [prevailing wage determinations] issued during this timeframe are to remain subject to current wage levels, with Level I at the 17th percentile, Level II at the 34th percentile, Level III at the 50th percentile and Level IV at the 67th percentile.
- **"Phase 2, July 1, 2021 through June 30, 2022:** The new wage levels will take effect, however, they are to be adjusted downward as follows – Levels I and IV are to be set at the higher of either 90% of the wage value calculated at the 35th and 90th percentile or the mean of the lower one-third of the current OES wage distribution. Levels II and III are to be set using the wage calculations outlined in the Immigration and Nationality Act (INA), which rely on the amounts listed in Levels I and IV.
- **"Phase 3, July 1, 2022 and after:** The new wage levels are to take effect without any adjustments, with Level I at the 35th percentile, Level II at the 53rd percentile, Level III at the 72nd percentile and Level IV at the 90th percentile."

"The revisions to the rule don't change the fact that it still fails to do what the law requires—to reflect the actual, prevailing wage for workers in that geographical area doing similar work," said Kevin Miner, a partner at Fragomen, in an interview. "The fact that Level 1 wages are now tied to around the 35th percentile rather than the 45th percentile doesn't change the fact that it is artificially inflating required wages. Prevailing wage data published by DOL should reflect the actual wages paid in the market. It should be math, not politics. If Congress wants to make changes to the H-1B statute, it can do so. But DOL shouldn't be trying to do that through rulemaking."

The new rule has the same defects as the earlier version, even if the wage effects are slightly less extreme, according to a preliminary analysis by the National Foundation for American Policy. In effect, at the 35th percentile, the new rule would require employers to pay an entry level employee the same or more than 35% of the people working in the same occupation and geographic location, even if those individuals have much more experience.

One way of looking at the new rule is since the current Level 2 wage is at the 34th percentile, and the new Level 1 is at the 35th percentile, then what the new rule does is eliminate the entire Level 1 wage level and pushes everything else upwards. "That is one of the ways the rule violates the statute," said Miner.

The wages mandated under the DOL rule do not reflect market wages or meet the definition of a prevailing wage. "The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment," according to the Department of Labor.

Compared to the regulation in effect for years, the new DOL rule will require employers to pay, on average, 34% higher salaries at the Level 1 wage for biochemists and biophysicists, 29% higher for software developers and database administrators, and 28% more for computer

programmers, according to a National Foundation for American Policy (NFAP) estimate of the new rule's impact.

To examine how much above the market wage the new rule requires employers to pay, NFAP looked at private wage survey data. Under the new DOL mandated minimum salary, an employer in the San Jose, California area would pay an electrical engineer at Level 4 more than $41,000 above the market wage, as indicated by a private wage survey (Willis Towers Watson). At Level 1, an employer in San Jose would pay an electrical engineer more than $36,000 above the market wage, according to an NFAP estimate.

The Department of Labor wage rule is designed to make it as difficult as possible for employment-based immigrants and visa holders to enter or work in America. The DOL wage rule should be viewed the same as Trump administration's policies that ended nearly all refugee admissions, prevented individuals from applying for asylum, banned people from several Muslim-majority nations and stopped family immigrants from entering the United States.

H-1B visas are important because they generally represent the only practical way for high-skilled foreign nationals, including international students, to work long-term in the United States and have a chance to become employment-based immigrants and U.S. citizens. Analysts note the visas are a crucial part of America's ability to innovate at a time when elected officials want companies to develop and produce more products and services in the United States.

Pricing visa holders and immigrants out of the U.S. labor market will push more work to other nations and further discourage international students from coming to America. Economists recognize there is a global market for labor, which is ignored in the DOL rule: "[A]ny policies that are motivated by concerns about the loss of native jobs should consider that policies aimed at reducing immigration have the unintended consequence of encouraging firms to offshore jobs abroad," according to research by Britta Glennon, an assistant professor at the Wharton School of Business.

Litigation is expected from employers. The more critical issue is whether the Biden administration will implement the Trump administration's most recent assault on high-skilled immigration or move to rescind or substantially revise the regulation through the rulemaking process.

The DOL wage rule is Donald Trump and Stephen Miller's parting gift to immigrants, universities and high technology companies. The Biden administration must decide if it wants to carry out the Donald Trump-Stephen Miller agenda on immigration.

Forbes

January 8, 2021

DHS Publishes Final Rule To End H-1B Visa Lottery

By STUART ANDERSON

The Department of Homeland Security (DHS) has published its controversial regulation to end the H-1B visa lottery as a "final rule," leaving it to the Biden administration or a lawsuit to stop a significant change in U.S. immigration policy. The rule, published January 8, 2021, goes into effect in 60 days.

The regulation would authorize U.S. Citizenship and Immigration Services (USCIS) to end the H-1B lottery and instead grant petitions based on registrations starting with the highest salary level and working down. The Trump administration rejected all comments to the rule. Attorneys and businesses argue the regulation violates the statute and makes it difficult to obtain new H-1B petitions for younger workers, particularly international students and information technology professionals.

What Would the Rule Do and Who Would It Exclude?: In place of the H-1B lottery, USCIS would receive registrations before the start of a fiscal year (likely before April 1) and if more are received than the H-1B limit allows, the agency would award the petitions from highest to lowest salary. This process would be used for the 65,000 petitions under the annual limit and 20,000 petitions for individuals with an advanced degree from a U.S. university.

"USCIS will rank and select the petitions received on the basis of the highest Occupational Employment Statistics (OES) wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I," according to the regulation.

In the proposed rule, DHS predicted no individuals paid Level 1 wages would be selected for H-1B petitions, and about 25% of individuals who would receive Level 2 wages also would not be chosen. DHS asserted everyone at Level 3 and Level 4 would be selected but concedes a lot more individuals at Level 2 wages may be shut out of petitions if there are more registrations than in the past for H-1B visa holders at Level 3 and Level 4 wages.

Favoring Senior Professionals Over International Students: The rule would make it a U.S. priority to recruit primarily individuals who are already senior professionals, according to Bo Cooper of the Fragomen law firm and a former general counsel at USCIS, even though other nations focus on attracting young talent, particularly recent university graduates.

DHS said in its response to comments that universities and international students probably won't be affected by the new regulation, but representatives of students and schools don't believe that is true.

"The proposed rule is unsound policy, not supported by statute, and will serve only to further undermine the ability of our colleges and universities to recruit and retain international students," said Miriam Feldblum, executive director of the Presidents' Alliance on Higher Education and Immigration. "H-1B visas serve as a critical pathway for these students. The proposed rule will block these opportunities by imposing a system that grants H-1B petitions based on the highest salary first, locking out many new international graduates of U.S. colleges and universities. Our communities, economy, and country will lose, while other countries that facilitate policies for international students to stay and work will benefit."

Startup companies, public schools, younger information technology professionals and health professionals working in rural areas will also be disadvantaged under the rule, according to companies and attorneys.

USCIS Changed Nothing from the Proposed Rule: Despite receiving almost 1,500 comments in response to the proposed rule, DHS did not change anything in the final rule. "Following careful consideration of public comments received, including relevant data provided, DHS has declined to modify the regulatory text proposed in the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on November 2, 2020," according to DHS. "Therefore, DHS is publishing this final rule as proposed in the NPRM."

"Under the Administrative Procedure Act, an agency must meaningfully address comments raised by the public in response to the proposed rulemaking," said William Stock of Klasko Immigration Law Partners in an interview. "DHS needed to address a significant number of comments regarding whether the rule was lawfully promulgated, and did little more than repeat legal arguments that have been rejected by numerous federal courts about the lawfulness of the DHS secretary's appointment." Expected litigation may target the lawfulness of the appointment and other aspects of the regulation.

Questions About the Legality of the Rule: "The statute mandates visas be issued in the order in which they are received," said Brad Banias of Wasden Banias in an interview. "While a lottery may be a fair interpretation of that mandate when 250,000 applications show up on the same day, the same cannot be said of prioritizing those applications based on wages. A regulation is an interpretation of an ambiguous statutory provision. This interpretation is wholly unmoored from the statute and likely ultra vires (beyond one's legal authority). The statute provides interpretive jumping off point for this final rule. It will be interesting to see if the new administration even defends it."

In the proposed rule, DHS tried to make it seem unimportant that the Trump administration had earlier argued it "would require statutory changes" to prioritize H-1B selection based on salary: "DHS acknowledges that the preamble to the H-1B Registration Final Rule states that prioritization of registration selection on factors other than degree level, such as salary, would require statutory changes."

What Will the Biden Administration Do with the Rule?: "It is important to note that the 60-day delay of the rule only buys time to revoke the rule, which would have to be done by notice and comment or via a court decision striking it down," said William Stock. He cited the International Entrepreneur Rule, which the Trump administration refused to use, to argue the Biden administration could not simply indefinitely suspend the rule.

Geoff Forney of Wasden Banias agrees with Stock. "The delayed effective date, as required under the Administrative Procedure Act, is simply intended to provide the regulated public an opportunity to prepare for the rule," said Forney in an interview. "The new administration unfortunately cannot simply suspend the rule from coming into operation. Rather, the new administration must rescind the rule through notice and comment because courts have held that suspending a rule is itself a rule and putting a rule into effect requires notice and comment."

"I am less certain that you must withdraw the rule by notice and comment rather than deferring any decision on it," said Ira Kurzban, author of *Kurzban's Immigration Law Sourcebook*, in an interview. "Remember, the notice and comment issue arose from the International Entrepreneur Rule because an entrepreneur was harmed. The fact that someone may sue on some theory does not mean that they will win or that it would necessarily stop a new administration from putting it on hold." He argues the International Entrepreneur Rule was not just a simple pause but that the Trump administration "expressly put it off for 6 months and said it was going to end it."

Kurzban believes the most important issue is whether the Biden administration might want to keep the rule. A Biden policy document indicates support for issuing H-1B visas based on salary, though given how little attention had been given to the issue, it is not clear those putting together that document understood the negative implications for international students, health care professionals and others. Moreover, the Biden document mentions this in the context of legislation.

"Biden will work with Congress to first reform temporary visas to establish a wage-based allocation process and establish enforcement mechanisms to ensure they are aligned with the labor market and not used to undermine wages," according to the document. "Then, Biden will support expanding the number of high-skilled visas and eliminating the limits on employment-based visas by country, which create unacceptably long backlogs."

The incoming Biden team will need to decide what to do with a regulation of questionable legality that would eliminate the H-1B visa lottery. It is one more item to add to the Biden administration's growing immigration "to do" list.

Forbes

January 5, 2021

Joe Biden's New Policies For Asylum, DACA And Legal Immigration

By STUART ANDERSON

President-elect Joe Biden faces a series of decisions on how best to change immigration policies implemented during the Trump administration. Biden's actions will affect millions of lives.

Below is a review of significant immigration issues confronting the Biden administration on asylum, refugees and other topics. An earlier article addressed the challenges and the outlook on H-1B visas and international students.

DACA: Due to court rulings, Deferred Action for Childhood Arrivals (DACA), protecting more than 600,000 recipients from deportation, managed to outlast the Trump administration. Based on statements made at a December 2020 hearing, it appears U.S. District Judge Andrew Hanen may be inclined to stop DACA. That creates additional complications for Biden's efforts to maintain DACA. Administration attorneys must decide whether to continue the program in its current form or adopt a different administrative (or regulatory) approach.

Biden has promised to send a bill to Congress to provide a permanent solution for DACA recipients. The bill's fate may rest on the ability to attract Republican support. A key question: Will the legislation include additional immigration provisions and address other groups seeking lawful permanent residence?

Refugees: Biden promised to increase the annual refugee admissions cap to 125,000, compared to the Trump administration's level of 15,000 in FY 2021. While Biden can adjust the annual refugee ceiling after becoming president, it will take time to process more people and rebuild the refugee resettlement system after four years of policies aimed primarily at preventing refugees from coming to America.

Asylum: During a December 22, 2020, news conference, Joe Biden said rolling back Trump administration changes to the asylum process will take months, not days. "Given the Trump administration's relentless attack on asylum seekers and the U.S. asylum system, there are too many things to even list that need to be promptly addressed by the Biden administration to restore a system of due process and meaningful access to protection," said Dree Collopy, a partner at Benach Collopy, in an interview.

Collopy's top priorities include:

"First, restore protection for asylum seekers at the border by rescinding or terminating the November 2018 asylum ban, the July 2019 third country transit ban, the Migrant Protection Protocols, the Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador, and the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) procedures that block people from seeking relief.

"Second, halt unjust and inhumane border enforcement: suspend prosecutions of asylum seekers for illegal entry and reentry, halt the practice of turning back asylum-seekers, halt the use of expedited removal and reinstatement of removal procedures, and restore the long-established practice of releasing asylum-seekers from detention while their immigration court proceedings are pending.

"Third, terminate Trump bans, regulations and international agreements that have all but eviscerated asylum: in addition to those mentioned, undo or halt policies that have rewritten asylum law to exclude whole categories of people from protection (for example, victims of domestic violence and gang persecution), and halt regulations that attack the procedural aspects of asylum law by truncating due process and making it far more difficult for asylum seekers to meet deadlines and find legal counsel or obtain work authorization."

Collopy would also like to see a guarantee of legal counsel and an end to "inhumane detention," accomplishing this, in part, by "scaling up community-based release programs that are highly effective at ensuring appearance at court, far less costly than detention, and more humane."

TPS: A Biden campaign policy document called for reviewing Temporary Protected Status (TPS) "for vulnerable populations who cannot find safety in their countries ripped apart by violence or disaster." That could include protection for Venezuelans, which Biden mentioned during the presidential campaign, and halting Trump administration efforts to end TPS for Central Americans. "The incoming Biden administration is considering a plan to shield more than a million immigrants from Honduras and Guatemala from deportation after the countries were battered by hurricanes in November," according to Reuters. In 2020, the House passed a bill that would have granted TPS to many individuals from Hong Kong, but Ted Cruz blocked the legislation in the Senate.

The Wall: Biden promised to end construction on Trump's wall. Government estimates concluded doing so would save $2.6 billion, according to the *Washington Post*. Advocates will pressure the administration to remove parts of the wall that caused environmental damage.

Legal Immigration and Public Charge: Judging by the election, many Americans were satisfied enough with Donald Trump's handling of the economy to vote for him. However, by reducing legal immigration by an estimated 49% since becoming president, in the long term, Trump immigration policies, if maintained, would have devastated U.S. labor force growth. A National Foundation for American Policy (NFAP) analysis showed: "Average annual labor force growth, a key component of the nation's economic growth, will be approximately 59% lower as a result of the administration's immigration policies, if the policies continue." Eliminating the

"public charge" rule, a health insurance proclamation and other policies designed to hinder legal immigration could be among Joe Biden's most important legacies.

Donald Trump implemented nearly all of his immigration policies by executive orders, memorandums, proclamations and regulations. While passing legislation is preferable, Biden will likely use his pen to undo many Trump administration policies on refugees, asylum and legal immigration.

Forbes

January 4, 2021

The Outlook On H-1B Visas And International Students In 2021

By STUART ANDERSON

For the fifth consecutive year, we should not expect Donald Trump to visit the Statue of Liberty and celebrate America's tradition as a nation of immigrants. But after January 20, 2021, Donald Trump will no longer be president and Joe Biden is expected to view immigrants as a positive force and enact policies that reflect it.

Regulations, Proclamations and Executive Orders: The Trump administration implemented many policies by memos, executive orders and proclamations. Addressing those policies will be easier than undoing regulations.

A new regulation that is "final" and has gone into effect generally can only be undone via a new round of notice and comment to withdraw the rule or as part of a settlement in litigation.

Another category of regulations is those made final but with an effective date *after* Inauguration Day (January 20, 2021), when Joe Biden becomes president. "The new president normally does an executive order pushing the effective date of any rule not final on January 20 by 60 days," said William Stock of Klasko Immigration Partners in an interview. "That allows them to figure out which ones to let go into effect and which ones to withdraw. They can withdraw any rule from publication before its effective date. After its effective date, they need a new rule to change it." By January 20, 2021, we should know all immigration regulations in this category.

The Trump administration used 212(f) of the Immigration and Nationality Act to suspend the entry of nearly all categories of immigrants in an April 2020 proclamation and of H-1B, L-1 and other temporary visa holders in a June 2020 proclamation. Successful litigation stopped the June 2020 action for many employers, but difficulties experienced at U.S. consulates have limited the ruling's impact.

On December 31, 2020, Trump extended the two proclamations until March 31, 2021, even though the unemployment rate in computer occupations was 2.3% in November 2020, compared to 3.0% in January 2020. The Biden administration would not need to go through the regulatory process to rescind the proclamations. "Biden will only have to find that the suspension of entry applied to certain foreign nationals is no longer detrimental to the interests of the United States.

He should support his findings," said Jesse Bless, director of litigation at the American Immigration Lawyers Association, in an interview.

The Biden administration said it would end the ban on the entry of individuals from predominately Muslim countries. Other proclamations, including those connected to travel and coronavirus, are expected to be undone, even if not on day one.

"All the executive orders can be rescinded immediately without need for notice or comment," said Jeffrey Gorsky, senior counsel at Berry Appleman & Leiden and a former State Department attorney, in an interview. "Moreover, it is standard practice to rescind 212(f) travel bans—which are normally based on foreign policy concerns—without delay, notice or comment."

"I think the Biden administration's initial approach to immigration is going to be cleaning out the Augean stables, and it is hard to see how they can do much more than repair in the first year," said Gorsky. "The challenges are enormous—restoring asylum and refugee programs, dealing with the financial distress of U.S. Citizenship and Immigration Services (USCIS) and overcoming enormous backlogs in applications that are the result of both deliberate processing slowdowns and incompetent management." Gorsky adds to this moving all the agencies away from an "obsessive focus on enforcement." The backlogs and wait times for interviews and visas at consulates will be substantial.

H-1B and L-1 Visas: Joe Biden will not be a pro-immigration president if he enacts or continues anti-immigration policies on H-1B and L-1 visas. H-1B visas are generally the only way highly educated foreign nationals, including international students, can become employment-based immigrants and eventually American citizens. Research shows restricting H-1B visas pushes more jobs outside the United States, can prevent the next job-creating founder of a billion-dollar company from gaining a green card and deprives America of the significant contributions made by the children of immigrants: 75%—30 out of 40—of the finalists of the 2016 Intel Science Talent Search had parents who worked in America on H-1B visas.

If a Biden administration adds to or continues policies that saw H-1B denial rates nearly quadrupled during the Trump years, it will harm U.S. company competitiveness and deal another blow to U.S. universities seeking to regain international students. The ability to work after graduation is essential to attracting and retaining foreign students. Approximately 75% to 80% of full-time graduate students in key technology fields at U.S. universities are international students. With first-time freshman enrollment down 13% in Fall 2020 for all students, U.S. companies will face further hiring difficulties in the coming years.

Restrictions on H-1B and L-1 visas can inhibit economically important foreign direct investment "to acquire, establish, or expand U.S. businesses," which declined by a startling 37.7% between 2018 and 2019, according to the U.S. Department of Commerce.

In recent years, the Trump administration and some Democrats and Republicans in Congress have targeted information technology (IT) services companies. These companies provided essential services during the pandemic in keeping systems running for medical, energy and other

sectors of the U.S. economy. The evidence indicates those services will become more critical in the future.

"Some 84% of employers are set to rapidly digitalize working processes," reports *Axios* and the World Economic Forum. Experts like Everest Group CEO Peter Bendor-Samuel say it is information technology companies with specialized skills that generally must perform the digital transformations that make U.S. companies more competitive.

Many Trump officials and some in Congress may lack an understanding of how large IT companies currently operate, believing when such firms send H-1B professionals or native-born employees to customer locations it involves "leasing" employees to customers. Today, these companies are primarily working on projects that provide solutions in which IT professionals are gathering information on-site for a transition to a new contract or engaging in work that uses the IT company's proprietary products to provide services.

For cybersecurity reasons, U.S. companies receiving services often prefer to have tech professionals come on-site because it helps protect data, said one executive, which means making it more burdensome to send people on-site may make data less secure by making cybersecurity a secondary priority. More services would be delivered off-site, including outside the United States.

Immigration opponents on both the left and the right ignore the existence of a global market for labor. "Sahil Lavingia, founder of the 24-person e-commerce startup Gumroad, heard from hundreds of job seekers after tweeting that he would no longer consider geography when determining wages," reported the *Wall Street Journal*. "Mr. Lavingia said many of the tech workers he has heard from are based outside the U.S.—in India, Nigeria, Singapore and Eastern Europe."

"Biden's position on H-1B visas is mixed," said Jeffrey Gorsky. "He seems receptive to increasing numbers, but also may try to implement some aspects of the Trump agenda—e.g., trying to give priority based on wage levels. There are Democratic critics of H-1Bs who see it as a threat to U.S. labor, so there may be attempts at reform that are a mix of greater flexibility with more enforcement measures and restrictions."

The Biden administration will send an early signal on H-1B visas when it decides to keep or withdraw a series of U.S. Citizenship and Immigration Services (USCIS) memos, directives and regulations designed to prevent H-1B visa holders from working in the United States.

International Students: A recent survey found that during Fall 2020, "new enrollment of international students physically in the United States declined by 72%," greater than the 43% drop in foreign enrollment overall because students started online overseas. That heightens the risk to universities if Covid-19 will keep international students from entering the U.S. in the spring. It raises the stakes for the Biden administration to adopt policies sufficient to lure students in Fall 2021. "If there is no ability to come in the spring, the 'melt' could be significant," said Alan W. Cramb, president of Illinois Institute of Technology.

The Trump administration is leaving behind rules it invited comments on that limit the period of stay for international students and eliminate the H-1B lottery. The student rule relies on flawed DHS reports on student overstay rates. The regulation to end the lottery is likely unlawful and favors well-established professionals over international students and others entering the U.S. labor market. That approach makes little economic sense for a nation seeking to attract and retain cutting-edge talent.

"The one program that is likely to get strong support under Biden is students, so Optional Practical Training (OPT), including the Obama STEM (science, technology, engineering and math) extension, which was under constant threat during the Trump administration, is now safe," said Gorsky. OPT and STEM OPT are important, but many students hope to gain H-1B status to work in America long-term.

"Like others, international students need to see a change in rhetoric and policy to show they are welcome in the United States," said Jill Allen Murray, the deputy executive director of public policy at NAFSA: Association of International Educators, in an interview. "How the new administration re-starts visa processing and re-opens the country broadly to temporary visa holders will matter. We are asking international students to put their trust—in addition to a considerable investment of time and money—in the United States. At minimum, they need to know that if they are admitted to a U.S. higher education institution that they will be able to get a timely visa interview (or waiver or online interview) and have a transparent way to check on the processing time of that visa."

The Per-Country Bill: The Fairness for High-Skilled Immigrants Act (H.R. 1044), introduced by Rep. Zoe Lofgren (D-CA), passed the House by a vote of 365-65 but was subjected to long delays and a series of amendments before passing the Senate. The legislation aimed to address waits of potentially several decades for employment-based immigrants from India due to per-country limits. The legislation did not become law but made it farther than ever before, demonstrating a depth of support not seen for other immigration measures. That is a positive sign for advocates in 2021.

Sen. Rick Scott (R-FL) added two provisions that would have limited the number of H-1B visa holders and their family members from gaining permanent residence in a year and bar individuals affiliated with the China's Communist Party from adjustment of status. Scott included the provisions, which may have been designed to stop the bill, at the direction of the Trump administration. "Unfortunately, the last-minute additions made in the Senate early this month defeated the congressional intent behind the House-passed bill," said Lofgren. "The Senate additions would create more backlogs instead of clearing backlogs, which was the very point of the House bill."

Kamala Harris sponsored a companion to Lofgren's bill in the Senate and Biden's immigration policy document mentions eliminating the per-country limit for employment-based immigrants as a priority.

Fixing Processing of H-4 EADs: While work authorization for H-1B spouses survived four years of the Trump administration, Biden immigration officials will need to address processing

for H-4 EADs (employment authorization documents). A recent lawsuit exposed that because USCIS added an unnecessary biometrics requirement and adopted an erroneous interpretation of government regulations by prohibiting automatic extensions many H-1B spouses cannot renew their H-4 EADs.

Immigration advocates believe Biden's nominee to be secretary of Homeland Security, Alejandro Mayorkas, who served as director of USCIS during the Obama administration, bodes well for their cause. Other appointments will be important to Biden's immigration legacy: A director of USCIS willing to undo actions large and small designed to restrict legal immigration; a labor secretary who will shun the anti-immigration policies of the Trump administration on H-1B and other visa categories; and State Department officials who will reverse Trump policies at consulates designed to slow and prevent the entry of visa applicants.

Donald Trump will no longer be president, but his immigration policies will continue unless Joe Biden changes them to ones consistent with the traditions of a nation of immigrants.

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Trump Ignores Jobs Data To Extend H-1B Visa And Immigration Bans

By STUART ANDERSON

Donald Trump ignored the low unemployment rate in computer occupations and other economic data to continue proclamations banning the entry of H-1B visa holders and nearly all categories of immigrants. The extension (until March 31, 2021) of the proclamations issued in April and June 2020 shows the danger of the authority under section 212(f), which critics say has allowed the president to override significant parts of U.S. immigration law based on personal ideology.

On April 22, 2020, the Trump administration used 212(f) of the Immigration and Nationality Act to suspend the entry of almost all types of immigrants, including employment-based immigrants, in a proclamation. In *Gomez v. Trump,* litigation by the American Immigration Lawyers Association and its partners resulted in Judge Amit P. Mehta striking down the State Department's policy of not issuing or reserving visas for FY 2020 Diversity Lottery winners. However, the judge upheld the proclamation itself and suspending the entry of immigrants using section 212(f).

On June 22, 2020, the administration followed with a proclamation to prevent the entry of H-1B, L-1 and other temporary visa holders. A decision on October 1, 2020, halted the June 2020 action for many employers, but difficulties at U.S. consulates have limited the ruling's impact. The Trump administration appealed the decision. The appeal is scheduled to be heard on January 19, 2021.

In the October 1, 2020, opinion, U.S. District Judge Jeffrey S. White cited a June 2020 National Foundation for American Policy (NFAP) analysis that showed between January and May 2020 the U.S. unemployment rate in computer occupations had remained stable and actually declined in occupations that lined up with those of H-1B visa holders (based on government H-1B occupational data). That information, contained in plaintiffs' attorney Paul Hughes' declaration, was available at the time the administration issued the June 2020 proclamation. The NFAP analysis also found, "During the 30-day period ending June 9, 2020, there were over 639,000 active job vacancy postings advertised online for jobs in common computer occupations, including those most common to H-1B visa holders."

"The Presidential finding in the text of the Proclamation, such as it is, is not supported by any review or report proffered by Defendants," concluded Judge White. "Rather, although its stated purpose is to aid the domestic economy by providing job opportunities for United States citizens, the Proclamation completely disregards both economic reality and the preexisting statutory framework." He noted, "The statistics regarding pandemic-related unemployment actually indicate that unemployment is concentrated in service occupations and that large number of job vacancies remain in the area most affected by the ban, computer operations which require high-skilled workers."

The economic case against the proclamation has grown even stronger since the ruling on October 1, 2020. The unemployment rate for individuals in computer occupations was 2.3% in November 2020, compared to the 3.0% unemployment rate for computer occupations in January 2020 (before the pandemic spread in the U.S.), according to an analysis of the Bureau of Labor Statistics' (BLS) Current Population Survey by the National Foundation for American Policy. In a broader category, computer and mathematical occupations, the unemployment rate declined from 3.0% in January to 2.4% in November 2020, according to BLS.

As of November 17, 2020, there were 731,762 job vacancy postings advertised online in the previous 30-day period for jobs in the most common computer occupations that typically require at least a bachelor's degree, according to Emsi Job Posting Analytics. That represents a 17% increase for job vacancy postings in the most common computer occupations since May 2020, with 11 of 12 occupations displaying an increase in active job vacancy postings since May.

On December 1, 2020, Judge White cited National Foundation for American Policy analyses in his opinion vacating regulations to restrict H-1B visas issued by the Department of Labor and the Department of Homeland Security. Judges ruled against the Department of Labor in two other cases, also for violating the Administrative Procedure Act. In all three cases, judges decided that the unemployment rate and other data in the computer occupations most H-1B visa holders worked conflicted with the Trump administration's assertion that an economic emergency existed.

On the same day that the president claimed he must extend the two proclamations because of the employment picture, Donald Trump released a video in which he boasted about the strength of the economy and employment in the United States. "The proclamation's message about the economy is also contradictory for the president," noted CNN. "In a video posted to his Twitter account earlier Thursday, in which the resident touted the growth of the U.S. economy, he bragged about the unemployment rate and said the number is 'heading a lot lower' than the current 6.7%."

The national unemployment rate has dropped by more than 50% since the first proclamation was issued, falling from 14.7% in April to 6.7% in November 2020. For reference, the national unemployment rate between 2010 and 2014 was above 6.7% almost every month. That indicates how unprecedented it is to claim a need to block immigration due to the unemployment rate.

There is no evidence immigration increases the unemployment rate. A study by economist and University of North Florida Professor Madeline Zavodny for the National Foundation for

American Policy found, "On the contrary, the evidence points to the presence of H-1B visa holders being associated with lower unemployment rates and faster earnings growth among college graduates, including recent college graduates."

An earlier study by Zavodny concluded, "The results of the state-level analysis indicate that immigration does not increase U.S. natives' unemployment or reduce their labor force participation. Instead, having more immigrants reduces the unemployment rate and raises the labor force participation rate of U.S. natives within the same sex and education group." Zavodny explained: "Immigrants may boost consumer demand, start their own businesses, and reduce offshoring . . . of manual-labor intensive jobs in the U.S." She also points out immigrants tend to work in different sectors, in different parts of the country and even other labor markets within a state.

Indications are that eliminating the two proclamations, along with the travel ban on people from primarily Muslim countries, will be among the Biden administration's early actions on immigration. "Rescinding the proclamations need not go through notice and comment rulemaking," said Jesse Bless, director of litigation at the American Immigration Lawyers Association, in an interview. "Biden will only have to find that the suspension of entry applied to certain foreign nationals is no longer detrimental to the interests of the United States."

Economic facts should play a role in policymaking. Businesses, immigrants and their families almost certainly believe Donald Trump's decision to continue the administration's two proclamations despite the economic evidence is an example of fact-free policymaking.