TRUMP IMMIGRATION POLICY: HIGH-SKILLED IMMIGRATION

EXECUTIVE SUMMARY

An NFAP analysis of the Trump administration's policies finds that during the four years Donald Trump served as president, his administration did not enact or propose any measures to expand the entry of high-skilled foreign nationals or immigrants to the United States. The analysis finds if Donald Trump is elected president in November 2024, he should be expected to restrict legal immigration, including green cards and H-1B visas.

Table 1
Significant High-Skilled Immigration Actions by the Trump Administration

Following a series of memos to adjudicators, H-1B denial rates for initial employment rose to 29% in the second quarter of FY 2020, compared to 5% in FY 2015. Expensive and time-consuming Requests for Evidence also rose significantly. (2017-2020)
A USCIS memo rescinded guidance to provide deference to prior findings of facts on petitions, which resulted in increasing H-1B denials for continuing employment. (October 2017)
A "Buy American and Hire American" executive order directed federal workers to "rigorously enforce and administer the laws governing entry into the United States of workers from abroad." (April 2017)
Trump officials placed on the regulatory agenda a rule to impose new restrictions on Optional Practical Training for international students. The rule was not issued before Donald Trump left office. (2020)
The Trump administration proposed a rule that many companies and universities said would have made it almost impossible for many highly educated individuals to obtain H-1B status. A court blocked the rule, and the administration tried but failed to publish it in final form before leaving office. (2020-2021)
Donald Trump used his authority under section 212(f) of the Immigration and Nationality to issue a proclamation to prevent the entry of nearly all categories of immigrants, including employment-based. (April 2020). A second proclamation suspended the entry of H-1B, H-2B, L-1 and J-1 visa holders. (June 2020). The scope of these two proclamations was unprecedented.
In 2020, the Trump administration proposed a wage rule to inflate the salaries of H-1B visa holders and employment-based immigrants to price their services out of the U.S. labor market. A judge blocked it.
After a series of court decisions declared the Trump administration's actions on H-1B visas unlawful, USCIS agreed in May 2020 to a legal settlement that ended the agency's practices. New memos and directives to adjudicators following the settlement reduced H-1B denial rates to 2% by FY 2022.

Source: National Foundation for American Policy.

Among the findings in the research:

- In April 2020, Donald Trump used his authority under section 212(f) of the Immigration and Nationality to issue a proclamation to prevent the entry of nearly all categories of immigrants, including employment-based. No other president had used the 212(f) authority in this manner. In June 2020, a second proclamation suspended the entry of H-1B, L-1 and other temporary visa holders.

- The Trump administration adopted many policies to block employer access to high-skilled immigrants and visa holders. "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," according to a history of H-1B visa policy by NFAP's executive director.[1]

- H-1B visas are important because they represent generally the only practical way for a high-skilled foreign national, including an international student, to work long-term in the United States and have an opportunity to become an employment-based immigrant and a U.S. citizen. The Trump administration moved against high-skilled immigration from the beginning of Donald Trump's term. The "Buy American and Hire American" executive order was the first significant action. This was followed by a series of memos and directives to USCIS adjudicators, which were designed to make it much more difficult for employers to gain approval for H-1B petitions.

- The Trump administration carried out what judges later 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 court rulings and a legal settlement. H-1B petitions for "initial" employment are primarily for new employment, typically a case that would count against the H-1B annual limit.

- Trump officials, without any change in the law, increased the H-1B denial rate by significant margins by issuing memos and urging or directing USCIS adjudicators to interpret regulations in a highly restrictive manner. It is now known those policies were unlawful. Requests for Evidence raised costs for many employers.

- The Trump administration attempted to make its H-1B policies lawful through an interim final rule on H-1B visas issued in October 2020, but the rule was blocked for violating the Administrative Procedure Act. That regulation went even further than earlier administration policies and company and university personnel said the rule would have made employing H-1B visa holders nearly impossible.

- The Trump administration proposed a wage rule to inflate the salaries of H-1B visa holders and employment-based immigrants to price their services out of the U.S. labor market. Employers would have been required to pay $50,000 to $100,000 more than the market wage in many cases to hire high-skilled foreign nationals. A lawsuit led by businesses and universities succeeded in blocking the rule in December 2020.

[1] Stuart Anderson, "The Story of How Trump Officials Tried to End H-1B Visas," *Forbes*, February 1, 2024. The full article is reprinted in the Appendix.

- The Biden administration adhered to the legal settlement agreed upon with USCIS before Donald Trump left office. As a result, H-1B denial rates remained low. The Biden administration adopted several measures to facilitate the entry of high-skilled foreign nationals, including supporting legislative language in the CHIPS and Science Act that would have exempted most doctorate holders and master's degree recipients in STEM fields from employment-based green card quotas. The provision did not become law after Senator Charles Grassley (R-IA) blocked it from being included in the bill. Biden officials also made efforts to process a historically high number of employment-based green cards and released guidance that significantly increased approvals for O-1A visas and national interest waivers.

- Biden officials dropped Trump administration initiatives, such as an item on the regulatory agenda to put new restrictions on international students working on Optional Practical Training. It also made it easier for some high-skilled foreign nationals to be approved for visas and proposed expanding occupations eligible for the Department of Labor to exempt from time-consuming PERM requirements, a part of the employment-based green card process. A Biden administration proposed H-1B rule contained several positive provisions, but many employers and universities criticized aspects that mirrored Trump administration regulatory language restricting who could qualify for an H-1B specialty occupation.

The immigration policies the Trump administration enacted signal the types of policies one can expect should Donald Trump be elected president in November 2024. A Democratic administration would likely continue policies similar to those of the past four years.

H-1B Visa Restrictions During the Trump Administration

In a July 2024 podcast interview, Donald Trump said he favored providing green cards to all foreign graduates of U.S. universities. During his presidency, the Trump administration adopted policies that blocked many high-skilled immigrants and visa holders. "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," according to a history of H-1B visa policy during the Trump years by NFAP's executive director.[2] (See Appendix.)

Table 2
Denial Rate for H-1B Petitions for Initial (New) Employment

FISCAL YEAR	DENIAL RATE
FY 2023	3.5%
FY 2022	2.2%
FY 2021	4%
FY 2020	13%
FY 2019	*21%*
FY 2018	*24%*
FY 2017	13%
FY 2016	10%
FY 2015	6%
FY 2014	8%
FY 2013	7%
FY 2012	5%
FY 2011	7%
FY 2010	8%
FY 2009	15%

Source: USCIS, National Foundation for American Policy. Percentages before FY 2022 are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

H-1B visas are important because they generally represent the only practical way for a high-skilled foreign national, including an international student, to work long-term in the United States and have an opportunity to become an employment-based immigrant and a U.S. citizen. As a result, Trump officials focused many high-skilled immigration restrictions on making it more difficult to obtain H-1B status.

The Trump administration moved against high-skilled immigration from the beginning of Donald Trump's term. The "Buy American and Hire American" executive order was the first significant action. This was followed by a series of

[2] Stuart Anderson, "The Story of How Trump Officials Tried to End H-1B Visas," *Forbes*, February 1, 2024. The full article is reprinted in the Appendix.

memos and directives to USCIS adjudicators that made it much more difficult for employers to gain approval for H-1B petitions.

The Trump administration carried out what judges later determined to be unlawful policies for nearly four years. Those policies resulted in 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 court rulings and a legal settlement.[3] H-1B petitions for "initial" employment are primarily for new employment, typically a case that would count against the H-1B annual limit. Absent significant changes in government policies, high denial rates are unusual since employers would unlikely apply for H-1B petitions for individuals who do not qualify, given the time and expense.

Table 3
Denial Rate for H-1B Petitions for Initial (New) Employment: 4th Quarter FY 2019 vs. 4th Quarter FY 2020

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 Trump administration attempted to make its H-1B policies lawful through an interim final rule on H-1B visas issued in October 2020, but the rule was blocked for violating the Administrative Procedure Act. That regulation went even further than earlier administration policies and company and university personnel said the rule would have made it nearly impossible to employ H-1B visa holders.

Ten of the top 25 employers of new H-1B visa holders had denial rates ranging 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% and 4% in the fourth quarter of FY 2020.

The denial rate for H-1B petitions for "continuing" employment (primarily for existing employees) was 12% in FY 2018 and FY 2019—approximately four times as high as the 3% denial rate that prevailed between FY 2011 and FY 2015. An October 2017 memo that rescinded guidance to provide deference to prior findings of facts on petitions was blamed for much of the increase in denials for continuing employment during the Trump administration. Many

[3] A March 5, 2020, opinion in federal court was decided against USCIS and its interpretation of who qualifies for a specialty occupation after the agency denied an H-1B petition for a Quality Engineer position for InspectionXpert Corporation. A December 16, 2020, decision by a panel of judges in the U.S. Court of Appeals for the Ninth Circuit concluded that USCIS's restrictive interpretation of its regulation was arbitrary and capricious when denying an H-1B petition for a computer programmer, claiming the occupation did not meet the definition of a specialty occupation.

extensions of H-1B status were reviewed under a new standard with policies that judges later determined to be unlawful.

The fourth quarter of FY 2020 began on July 1, 2020. On June 17, 2020, USCIS was compelled to issue a new policy memo and withdraw a February 2018 memo on "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites" after losing a court case and then agreeing to a settlement with the business group ITServe Alliance. USCIS also rescinded the "Neufeld" memo, a January 2010 memo interpreted more aggressively during the Trump administration to deny H-1B petitions when companies engaged in work at customer sites.

Attorneys blamed the memos and their interpretation for much higher denial rates for H-1B petitions, particularly for information technology (IT) services companies, and higher costs due to Requests for Evidence. Data on H-1B denials in the fourth quarter of FY 2020 revealed the impact of the rescission of the two memos. During the first three quarters of FY 2020, 10 of the top 25 employers of new H-1B visa holders had denial rates that ranged from 23% to 58%, but their denial rates for H-1B petitions for initial employment dropped to between 1% to 4% in the fourth quarter of FY 2020.

For nearly four years, the Trump administration, without any change in the law, increased the H-1B denial rate significantly by issuing memos and urging or directing USCIS adjudicators to interpret regulations in a highly restrictive manner. It is now known that those policies were unlawful.

Trump DOL Wage Rule Would Have Priced Many High-Skilled Professionals Out of the Labor Market

A proposed Trump administration rule led an NFAP analysis to conclude: "The purpose of the new rule was to price H-1B visa holders and potential green card recipients out of the U.S. labor market by inflating the salaries employers are required to pay."[4]

On October 8, 2020, the U.S. Department of Labor published a rule that changed the way prevailing wage is determined for H-1B visa holders and employment-based immigrants.[5] NFAP research found the wages mandated under the new DOL rule do not reflect market wages or meet the definition of a prevailing wage. "The prevailing

[4] *An Analysis of the DOL Wage Rule*, NFAP Policy Brief, National Foundation for American Policy, October 2020. See also Stuart Anderson, "Trump H-1B Visa Wage Rule Gives Clue To Second-Term Immigration Policy," *Forbes*, August 19, 2024, from which parts of this section were adapted.

[5] "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," Department of Labor, Employment and Training Administration, 20 CFR Parts 655 and 656 [DOL Docket No. ETA–2020–0006], RIN 1205–AC00, *Federal Register*, October 8, 2020. https://www.federalregister.gov/documents/2020/10/08/2020-22132/strengthening-wage-protections-for-the-temporary-and-permanent-employment-of-certain-aliens-in-the.

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.

The new wage rule substantially increased the required minimum salary across all wage levels for H-1B visa holders and employment-based green cards. For all occupations and geographic locations, the new minimum salary employers would be required to pay when compared with the system in place before the new DOL wage rule was, on average, 39% to 45%.

The increases, particularly in common occupations, would have made hiring an H-1B visa holder or sponsoring a foreign national for permanent residence cost-prohibitive.

- Under the new rule, DOL mandated an employer pay a petroleum engineer 100% more than the prevailing wage at Level 1 only shortly before the DOL wage rule took effect. (DOL sets four wage levels.)

- Depending on the level, computer research scientists would have needed to be paid up to 49% more (up to $55,000 more annually) under the new DOL wage system.

- On average, employers would have been required to pay software developers at least 45% higher annual salaries under the new DOL wage rule.

- Annual salary increases of 200% were listed for common occupations. The required minimum annual salary (Level 1) for a computer and information systems manager in East Stroudsburg, Pennsylvania, increased 207% under the new wage rule. A hospital hiring a pediatrician in Wichita, Kansas, at Level 1 would pay 177% more a year.

- The new DOL wage system required employers to pay exactly $100 an hour, or $208,000 a year, for over 18,000 combinations of occupations and geographic labor markets, regardless of skill level and position.

- Although nearly 40% of all approved PERM labor certifications (needed for most employment-based green cards) are for software developers, NFAP found that all software developers must be paid $208,000 a year, regardless of skill level, in San Jose, San Francisco and many other U.S. cities, including Battle Creek, MI and Cape Coral-Fort Myers, FL and Reno, NV.

- Under the new DOL rule, an employer would need to pay a financial analyst in New York *more than three times the market wage* ($208,000 vs. the market wage of $66,428), according to a private wage survey.

- In the Los Angeles area, under the DOL wage rule, companies employing H-1B visa holders as software developers (system) would be required to pay 62% more than the market wage at Level 1.

NFAP concluded the DOL wage rule was designed to inflate the salaries of H-1B visa holders and employment-based immigrants to price their services out of the U.S. labor market.

A lawsuit filed by businesses and universities, led by the U.S. Chamber of Commerce, succeeded in blocking the rule because the economic data, the administration's long delay and other factors showed that "good cause" did not exist for Trump officials to bypass standard rulemaking procedures. "Defendants 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," wrote U.S. District Judge Jeffrey S. White in an order on December 1, 2020. "Accordingly, the Court concludes that Plaintiffs are entitled to judgment in their favor on their first two claims for relief, and the Court sets aside the Rules on the basis that they were promulgated in violation of [the law]."[6]

The decision in *U.S. Chamber of Commerce et al. v. DHS et al.* blocked the DHS and DOL rules the Trump administration proposed to restrict high-skilled immigration. During the November 23, 2000, hearing, attorney Paul Hughes said of the regulations: "We think this is an overt attempt to destroy the H-1B program." In declarations, company executives and university personnel said the DHS rule would cause data scientists, software engineers, medical personnel and others to leave the United States. Many international students would not qualify under the DHS rule or would be priced out of the labor market by the DOL regulation, argued attorneys and employers.[7]

Eliminating the Ability of H-1B Spouses To Work

In an April 4, 2018, letter to Sen. Charles Grassley (R-IA), USCIS Director Francis Cissna detailed proposals to prevent H-1B spouses from working in the United States: "With regard to regulations, our plans include proposing regulatory changes to remove H-4 dependent spouses from the class of aliens eligible for employment authorization, thereby reversing the 2015 final rule that granted such eligibility," according to the letter. "We announced this intention earlier this year in the semiannual regulatory agenda of the Department of Homeland Security. Such action would comport with the E.O. [executive order] requirement to 'propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system."[8]

The Trump administration did not finalize rules to eliminate the ability of approximately 100,000 H-1B spouses to work or the International Entrepreneur Rule. However, a lawsuit alleged that Trump officials had added new

[6] Stuart Anderson, "Trump Immigration Loss: Judge Declares H-1B Visa Rules Unlawful," *Forbes*, December 2, 2020.
[7] Ibid.
[8] Stuart Anderson, "USCIS Lays Out Far-Reaching Anti-Immigration Agenda," *Forbes*, Apr 26, 2018.

procedures designed to prevent spouses from working in the United States. After the new policies, USCIS took up to two years to process applications for the spouses of H-1B visa holders who needed work authorization. A legal settlement) in *Edakunni v. Mayorkas* ended the litigation that affected the spouses of H-1B and L-1 visa holders.[9]

In the letter to Grassley, Cissna stated, "We are also drafting a proposed rule to remove the International Entrepreneur Rule (IER), as announced in the regulatory agenda. Due to the court order which invalidated the IER delay rule, the International Entrepreneur Final Rule is currently in effect. We have not approved any parole requests under the International Entrepreneur Final Rule at this time." Cissna referred to a lawsuit USCIS lost for failing to accept applications under the rule.[10] Biden officials revived the rule. It has not yet attracted many applications.

Restrictions Against International Students

The Trump administration proposed several restrictions against international students, viewing them as a source of labor that Trump officials wanted to keep out of the United States. First, the Trump administration placed on the regulatory agenda a proposed to rule to restrict the ability of international students to work in the United States after graduation. Students and universities consider Optional Practical Training (OPT) crucial to gain experience as part of their education. Employers also see it as a valuable way to identify talent and potentially keep the students in the United States long enough—up to 36 months in STEM fields—to improve the chance of gaining H-1B status in the annual lottery. Canada and other countries already make working after graduation easier than the United States.

The Trump administration failed to issue a rule to restrict OPT, but published a proposed rule to limit study in the U.S. to fixed periods of admission. That would have replaced the long-standing policy of being admitted for "duration of status," so long as international students pursue a full course of study and make progress toward completing those studies. The rule, which was not finalized in the face of significant opposition, would have discouraged applications to U.S. universities. The requirements would have created uncertainty for students and imposed a significant administrative burden on USCIS by requiring the agency to renew hundreds of thousands of student applications.

The Trump administration enacted other policies to restrict international students. In 2018, USCIS changed its website on eligible employment for STEM OPT without providing notice and comment through the rulemaking process. The issue became more urgent after USCIS also enacted changes to the rules on unlawful presence. The website change would have prohibited students for working for companies on OPT at a customer's location. Following a lawsuit, The Trump administration eliminated that language from its website.[11]

---

[9] Stuart Anderson, "USCIS Settles Lawsuit That Should Help H-1B And L-1 Visa Spouses," *Forbes*, January 21, 2023.
[10] Ibid.
[11] Stuart Anderson," USCIS Changes Website, Backtracks On Foreign Student Rules," *Forbes*, August 20, 2018.

THE BIDEN ADMINISTRATION AND HIGH-SKILLED IMMIGRATION

The Biden administration adhered to the legal settlement agreed upon with USCIS before Donald Trump left office. As a result, H-1B denial rates remained low. The Biden administration took measures to encourage the entry of high-skilled foreign nationals, including supporting legislative language in the CHIPS and Science Act that would have exempted most doctorate holders and master's degree recipients in STEM fields from employment-based green card quotas. The provision did not become law after Senator Grassley blocked it from being included in the bill.

Biden officials dropped Trump administration initiatives, such as an item on the regulatory agenda to place new restrictions on international students working on Optional Practical Training. A proposed H-1B rule contained several positive provisions, but many employers and universities criticized aspects that mirrored Trump administration regulatory language restricting who could qualify for an H-1B specialty occupation. Positive actions the Biden administration took on high-skilled immigration included taking steps to issue an "unprecedented" number of employment-based green cards, increasing the validity of Employment Authorization Documents for up to five years, providing favorable guidance for O-1A visas and national interest waivers and making it easier for some employment-based green card applicants to stay if they have "compelling circumstances."[12] O-1A visa filings and requests for national interest waivers increased significantly after the new guidance.[13]

CONCLUSION: RED TAPE AND RESTRICTIONS UNDER TRUMP POLICIES

Attorneys questioned could not name any policies the Trump administration established or proposed to make it easier for high-skilled foreign nationals to work in or immigrate to the United States. "The Trump administration appears to have made a conscious decision to make it markedly more difficult for U.S. employers to employ a foreign national," said immigration attorney Vic Goel in 2018.[14] The immigration policies the Trump administration enacted signal the types of policies one can expect should Donald Trump be elected president in November 2024. These policies included a DOL wage rule designed to inflate the salaries of H-1B visa holders and employment-based immigrants and new restrictions on the ability of H-1B spouses and international students to work in the United States.

---

[12] See "Actions to Support H-1B Workers and Families," at https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/faqs-for-individuals-in-h-1b-nonimmigrant-status. A policy change also made it less likely consular officers would deny the student visas of individuals desiring to work in the United States after graduation.
[13] Stuart Anderson, "O-1A Visas, National Interest Waivers Rise After Immigration Guidance," *Forbes*, July 30, 2024.
[14] Stuart Anderson, "Attorneys: Trump Team Wraps Immigrants And Their Employers In Red Tape," *Forbes*, March 8, 2018.

APPENDIX

Below is a reprint of an article written by NFAP Executive Director Stuart Anderson in 2021.

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.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) nonprofit, nonpartisan public policy research organization based in Arlington, Virginia, focusing on trade, immigration and related issues. Advisory Board members include Columbia University economist Jagdish Bhagwati, Cornell Law School professor Stephen W. Yale-Loehr, Ohio University economist Richard Vedder and former INS Commissioner James Ziglar. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com. Twitter: **@NFAPResearch**

1550 Wilson Blvd., Suite 700, Arlington, VA 22209
Tel (703) 351- 5042 | Fax (703) 351-9292 | www.nfap.com