Interactive Session

BUILDING A SUCCESSFUL IMMIGRATION PROGRAM

KEY PLANNING CONSIDERATIONS FOR ACTIVE BUSINESSES

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In recent years, particularly under the current administration, the Department of Homeland Security (DHS) has been aggressive in its enforcement efforts against companies and their employees that are perceived to be abusing the immigration process. There has been a significant increase in worksite visits by the Fraud Detection and National Security unit, I-9 audits are on the rise, and the rate of denials of certain visa categories has increased to unprecedented levels. It is, therefore, very important for employers to become familiar with the activities authorized under each visa category, the eligibility requirements which must be met by successful applicants, and ongoing compliance obligations that attach once a foreign worker has become an employee. This white paper will provide overview and discussion of these issues, covering topics including the most common visa types, complications with H-1B visa process, common compliance issues, and new U.S. Citizenship and Immigration Services (USCIS) policies on immigration.

Overview of Common U.S. Visa Options

Temporary Visa Options

1. Business Visitors

The business visitor (or B-1) visa or visa waiver option is designed to allow individuals from abroad to visit the U.S. to participate in permissible business activities. The Foreign Affairs Manual (FAM) addresses scenarios in which an employee may work in the U.S. in B-1 (or VWP Business Status). Under 9 FAM 41.31 N7, the Department of State offers the following guidance:

a. Aliens who desire to enter the U.S. for business and who are otherwise eligible for visa issuance, may be classifiable as nonimmigrant B-1 visitors . . . engaging in business contemplated for B-1 visa classification generally entails business activities other than the performance of skilled or unskilled labor. Thus, the issuance of a B-1 visa is not intended for the purpose of obtaining and engaging in employment while in the U.S.

b. It can be difficult to distinguish between appropriate B-1 business activities, and activities that constitute skilled or unskilled labor in the U.S. that are not appropriate on B status. The clearest legal definition comes from the decision of the Board of Immigration Appeals in Matter of Hira, affirmed by the Attorney General. Hira involved a tailor measuring customers in the U.S. for suits to be manufactured and shipped from outside the U.S. The decision stated that this was an appropriate B-1 activity, because the principal place of business and the actual place of accrual of profits, if any, was in the foreign country. Most [activities deemed] proper [for the] B-1 relate to the Hira ruling, in that they relate to activities that are incidental to work that will principally be performed outside of the U.S.

The Legacy INS provided a helpful definition of labor. In a Memorandum (Memo, Williams, Regional Director Western Region, WRINS 70/20 (2000)), the government raised the following three questions to help employers evaluate whether proposed business visitor activity would be permissible:

- Will the individual be compensated (i.e., beyond reimbursement for expenses per diem) from a U.S. source?
• Will the individual, even if uncompensated, perform services for which a U.S. worker would have to be hired or are the services inherently part of the U.S. labor market?

• Are the services primarily benefiting the U.S. entity as local work or hire (as contrasted with benefiting the alien him/herself or the foreign employer in furtherance of international trade)?

The government’s position is that “[a] ‘yes’ to any of the three above could disqualify the alien from B-1 or WB (VWP) admission.” While the 10-year old memorandum uses the words “could disqualify,” we should point out that in the current environment a positive answer to these questions clearly would disqualify the individual from B-1 or VWP status.

With regard to this source of funds concept, in Matter of Sriniasan, Case No. A23-192-575 (C.O. 1982), the government concluded that all profits from B-1 employment must accrue to the benefit of the foreign employer. In addition, it held that any B-1 worker’s services must be incidental to international trade and commerce.

Employers must be very cautious with this visa. Often when employers push the envelope, they can incur significant liability.

2. H-1B Visas

One of the most commonly used visas by U.S. employers is the H-1B. The H-1B visa is available to foreign national professionals coming temporarily to perform services in a specialty occupation for a U.S. employer. A specialty occupation is one that normally requires a bachelor’s degree in a field of specialized knowledge that directly relates to the occupation. A qualifying foreign national professional must possess at least a baccalaureate degree (or the equivalent) in a field qualifying him or her as a professional in the specialty occupation. The H-1B visa serves as a nice solution for employers who require professional workers. Like the B-1 visa, however, the H-1B visa has received a great deal of scrutiny in recent years, and there are a number of legislative initiatives in Congress which, if passed, will further restrict employers’ ability to use the H-1B visa.

Subject to Annual Quota

There is an annual limit on the number of H-1B visas set by Congress per fiscal year (October 1 to September 30). Currently, USCIS may approve no more than 65,000 H-1B visa petitions (along with 20,000 H-1B visas for graduates with advanced degrees—master’s degree or higher—from a U.S. institution). Of the 65,000 available visas, 6,800 are reserved for citizens of Chile and Singapore pursuant to the terms of the U.S.-Chile and U.S.-Singapore Free Trade Agreements. Like in past years, this year’s annual cap for H-1B visas was reached in the first week of April.

USCIS will accept new H-1B petitions subject to the annual quota for the upcoming fiscal year starting on April 1. Employers should identify current and future employees who may require new H-1B visas to work in the United States as soon as possible. Individuals currently holding F-1 student or J-1 trainee visas, individuals seeking to change to H-1B status from another visa status (such as L-1, TN, O-1, or E-3), and individuals outside of the United States commonly require a cap-subject H-1B petition to be filed on their behalf.
In recent years, USCIS will receive significantly more H-1B cap petitions than there are visas available. When that happens, USCIS conducts a random, computer-generated lottery to select the petitions that will ultimately be adjudicated. This year, USCIS announced that it would reverse its normal process and would conduct the regular H-1B cap lottery first, followed by the advanced degree lottery. USCIS stated that reversing the order of the lotteries would increase the total number of petitions selected for beneficiaries with a master's or higher degree from a U.S. institution by approximately 16 percent, or 5,340 workers.

Once USCIS selects a sufficient number of petitions to fill the H-1B visa quota, it returns all unselected petitions (with the government filing fees) to the employers who filed them. USCIS will not accept any additional H-1B cap petitions until filing for the next fiscal year begins.

Cap-Exempt Petitions

Some H-1B petitions are exempt from the annual fiscal year limitation. The following H-1B petitions are cap-exempt: (1) H-1B petitions that are filed to extend or amend H-1B employment for foreign workers who are already in H-1B status, and (2) petitions filed on behalf of new workers to be employed in H-1B status by institutions of higher education or related nonprofit entities, nonprofit research organizations, or government research organizations. So if a candidate is being interviewed for a position and they currently hold H-1B visa status (or previously held visa status and did not use up their entire six-year stay), they are not subject to the cap, as long as the H-1B petition was filed by a Cap-subject employer.

3. L-1 Visas

The intra-company transferee category is important to international companies operating in the United States. It permits the transfer of certain key employees of foreign parent, subsidiary, affiliate, or branch companies to the United States, provided specific conditions are met. The temporary status for these transfer employees is known as “L-1.” This status is available to a person who has worked for a foreign branch, parent, subsidiary, or affiliate company for at least one consecutive year during the three years preceding the application for the visa and admission to the U.S. During this one-year period, the employee must have worked in either an executive, managerial, or specialized knowledge capacity. In addition, the petitioning company must seek to transfer the employee to the United States to assume an executive, managerial, or specialized knowledge position.

Definition of Manager

The job must meet the following criteria for an employee to be classified as a manager:

- Management of the organization or a department, subdivision, function, or some component of it;
- Supervision and control over the work of other supervisory, professional or managerial employees, or management of an essential function of the organization, or of an essential function of a department or subdivision of the organization;
- Authority to execute or recommend personnel actions, if others are directly supervised, or if no other employees are directly supervised, function at a senior level within the organization's hierarchy, or with respect to the function managed;
• Exercise discretion over day-to-day operations of the activity or function.

The above criteria essentially result in two types of managers qualifying for L-1A status:

• People Managers. Management of at least two tiers of staff or of professionals is the characteristic that satisfies this requirement. Note that, under this definition, a first-line supervisor is not a manager merely by virtue of supervisory duties, unless the supervised employees are professionals. Because this manager derives eligibility from the supervision of others, the third criterion requires that he or she must have authority to execute or recommend personnel actions. Finally, he or she must exercise discretion over day-to-day operations of the function, activity or component for which he or she is responsible.

• Functional Manager. A person who manages a function or component but does not have qualifying staff management responsibilities must manage an "essential function." The term "essential function" generally means a function that is indispensable or important to achieve the organization's goals. Because the functional manager may lack authority to execute or recommend personnel actions, he or she must operate at a senior level within the organization or within the function managed. Like the people-managing manager, the functional manager must have discretion over the day-to-day operations of the function. Factors that may support this determination include having a high level of decision-making authority, providing coordination and guidance to other managers, having responsibility over assets or sales with a large dollar value, or reporting to a senior manager or executive.

Definition of Executive

To be classified as an executive, the employee must:

• Direct the management of the organization or a major component or function of the organization;

• Establish the goals and policies of the organization, component, or function;

• Exercise wide latitude in discretionary decision-making; and

• Receive only general supervision from higher-level executives, the Board or stockholders.

Definition of Specialized Knowledge

The third sub-classification in the L-1 category is that of employee with specialized knowledge, L-1B. “Specialized knowledge" professionals are employees possessing in depth or proprietary knowledge of a company’s products, services, management, or other interests. This knowledge is specialized because it is generally uncommon within the company or within the marketplace. Although not required by regulation or the definition of specialized knowledge, in recent years USCIS has held these visas to a very high standard, often seeking justification that the transferring employee possesses extraordinary knowledge and experience with tools, technologies or processes that are proprietary to the sponsoring company. See below for a discussion of recent rates for requests for evidence (RFEs) and denials.
H-1B and L-1 Visa Challenges

USCIS released new data confirming that both requests for evidence (RFEs) and denials are on the rise for many nonimmigrant visa categories. The rates for RFEs and denials, which had been gradually increasing for several years, jumped sharply in fiscal year (FY) 2018, which was when President Trump released his “Buy American and Hire American” executive order.

The following is a summary of the key findings extracted from the data:

H-1B Petitions

In the first quarter of FY 2019, the RFE rate jumped to 60 percent, compared to 45.6 percent in the first quarter of FY 2018. The rate of denials more than doubled between FY 2017 and FY 2018, and it more than tripled in FY 2018 compared to FY 2015. The approval rate, even after providing additional information via an RFE, has steadily dropped since FY 2015.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>H-1B Denial Rate</th>
<th>H-1B RFE Rate</th>
<th>H-1B Approved After RFE Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>4.3</td>
<td>22.3</td>
<td>83.2</td>
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<tr>
<td>2016</td>
<td>6.1</td>
<td>20.8</td>
<td>78.9</td>
</tr>
<tr>
<td>2017</td>
<td>7.4</td>
<td>21.4</td>
<td>73.6</td>
</tr>
<tr>
<td>2018</td>
<td>15.5</td>
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<td>62.3</td>
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<tr>
<td>2019 (Q1)*</td>
<td>24.6</td>
<td>60</td>
<td>61.5</td>
</tr>
</tbody>
</table>

*Data is only available for the first quarter of FY 2019.

L-1 Petitions

The increase in RFEs and denials has been more gradual for L-1 visas than it has for H-1B visas.

In the first quarter of FY 2019, the RFE rate jumped to 51.8 percent, compared to 46.1 percent in the first quarter of FY 2018.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>L-1 Denial Rate</th>
<th>L-1 RFE Rate</th>
<th>L-1B Approved After RFE Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>16.3</td>
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<tr>
<td>2019 (Q1)*</td>
<td>25.6</td>
<td>51.8</td>
<td>52.7</td>
</tr>
</tbody>
</table>

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While the report confirmed what many already knew—that USCIS continues to increase its scrutiny of nonimmigrant visa petitions—it is also a reminder that the majority of petitions are
ultimately approved. With that in mind, employers should provide detailed descriptions of the positions they are seeking to fill, as well as the qualifications of the sponsored employees who eventually fill them.

I-9 Policy & Procedures

The Trump administration’s focus on immigration compliance includes dramatically expanding the resources of the DHS’s Immigration and Customs Enforcement (ICE) agency. Specifically, it has authorized the hiring of 10,000 ICE agents across the United States. This increase in the number of ICE agents will have a direct impact on employers as it relates to I-9 compliance and ICE audits of Forms I-9.

As the number of ICE audits around the country continues to increase, now is the time for employers to perform I-9 checkups, review their I-9 processes, and eliminate potential liability before an ICE agent appears at the front door. Companies that take the I-9 requirements seriously are well ahead of the game. Ensuring that your company has a compliant I-9 program that encourages periodic internal review will go a long way in minimizing any potential penalties levied in the course of an ICE audit. Following the simple steps below may assist companies in tightening up their I-9 programs and processes.

1. Avoid a Fishing Expedition: Consider removing all I-9 records from personnel files and keeping them organized in a separate I-9 binder either at the work site or at a central corporate office. Should ICE visit the office requesting the I-9 records, the documents will be accessible and organized.

2. Appoint an I-9 Captain: Consider designating a lead human resources professional to oversee the I-9 process. Ensure that this person receives annual training on the I-9 requirements.

3. Watch for Timeliness: Failing to complete the Form I-9 in a timely basis is a substantive violation, which can lead to substantial fines. An employee must complete Section 1 on or before his or her first day of work, and the employer must complete Section 2 no later than the employee’s third day of employment. If a company has a seven-day operation, weekends count towards these days of employment.

4. Be There in Person: Make sure all I-9 documents are verified in person to ensure the documents appear legitimate and reasonably relate to the employee being verified. Do not accept faxed or scanned documents for I-9 purposes.

5. Never Ask for Specific Documents: Allow the employee to select the I-9 documents he or she wishes to present. Employers may want to avoid saying things like “please show me your green card” or “I need to see your Social Security card.” Instead, employers can allow the employee to choose from the list of acceptable documents.

6. Be Consistent: Companies may want to decide whether they will keep copies of supporting documents for I-9 purposes. What a company does for one, it should do for all—regardless of the employee’s citizenship status.

7. Create an I-9 Tickler System: If an employee indicates that he or she has work authorization that will expire, consider establishing an automated tickler system as a
reminder to re-verify his or her employment eligibility before it expires. An employer may also want to utilize an online I-9 system, if possible, to alleviate missed deadlines.

8. Do Not Over Document: Accepting and/or photocopying too many supporting documents may lead to a fine. If an employee provides too many documents, an employer may need to push back by showing him or her the list of acceptable documents and allowing him or her to choose which documents to use for I-9 purposes.

9. Perform an I-9 Checkup Now: Taking steps to ensure an effective, compliant I-9 program will not only alleviate unnecessary liability, but will also go a long way in establishing a good faith defense in the face of an ICE audit, which can further reduce civil fines. To conduct a checkup, an employer can ask its human resources team how they conduct the I-9 process and review their responses to tighten up the process where necessary. Next, the employer could perform an internal audit of its I-9s and clean up any technical violations. Finally, it can train its human resources team on I-9 issues and continue to review its processes on an annual basis.

Obligations and Concerns Once the Foreign National is an Employee

1. FDNS Worksite Visits

The Administrative Site Visit and Verification Program (ASVVP) is a key component of the DHS’s existing anti-fraud efforts. As of 2014, FDNS has conducted administrative site visits regarding approximately 15,000 H-1B petitions each year. The purpose of these site visits is to inspect and verify the accuracy of attestations made on petitions for immigration benefits and ensure employers and employees comply with the regulatory requirements of the immigration benefits received. Historically, inspections focused exclusively on H-1B workers, but in 2014, USCIS expanded the inspection program to include both L-1A and L-1B visa petitions.

Scope of Site Visit

Any company that has filed an H-1B or L-1 petition may be subjected to an unannounced site inspection at the work location listed on immigration forms. The FDNS officer will typically arrive at either the company’s principal place of business or the specified work location with no prior notice. The duration of a typical visit ranges from 15-60 minutes, during which time the FDNS officer will ask to speak with a company representative and the foreign worker. The officer will typically have a copy of the immigration petition and will ask questions to confirm veracity of the information presented in the petition. The officer may also take the opportunity to ask the foreign worker’s colleagues at the company if they are familiar with the existence of the particular foreign worker. The employer should be ready to answer questions relating to the following:

- Type of business, locations, number of employees, and recent layoffs;
- Company policies with respect to immigration matters, including repayment agreements, H-1B hiring policies, and green card sponsorship policies;
- Details about the specific H-1B or L-1 petition being investigated, including job title, job duties, work location, salary, work schedule, and dates of employment;
- Qualifications of the foreign worker, including education, work experience, and prior immigration history;
• Information about the number of petitions that the employer has previously filed; and

• Contact information for the employer’s immigration counsel.

The FDNS officer may also ask to review copies of the H-1B nonimmigrant’s most recent pay statement and Form W-2, as well as copies of the company’s tax returns, quarterly wage reports, and/or other company documentation to evidence that it is a bona fide business. After the visit, the officer may follow up via email with the company and foreign worker for further clarification regarding any remaining questions or issues incident to the visit.

FDNS officers are typically instructed to report that they verified that the inspected company is in compliance. Many of the inspectors are contract workers retained by USCIS and thus may lack expertise about how companies maintain records or may demonstrate employment terms. Employers are not obligated to submit to disruptive or unreasonable requests for access to company employees or company property, but they should always cooperate with USCIS requests and treat the visiting officers with courtesy. An employer can rightfully request that it have a reasonable period of time to produce documents and company supervisory personnel to provide the necessary information; officers are typically amenable to such requests and will usually leave a business card or letter with contact information and due date for follow-up from the employer and/or its immigration counsel.

Preparing for Unannounced Site Visits

It is important for businesses to be prepared for these site visits. In 2015, the Administrative Appeals Office (AAO), which adjudicates appeals from USCIS denials, affirmed the revocation of an approved H-1B petition in which a foreign national employee could not be found at the stated job location on the H-1B petition (Matter of Simeio Solutions LLC). Companies should have an action plan in place to prepare for such site visits, including internal trainings for immigration stakeholders, maintaining updated company contact lists, and immediately notifying immigration counsel regarding any change to the employment circumstances of foreign national workers.

To prepare for and respond to a site visit, employers should consider taking the following steps:

1. Designate in advance certain company representatives—for instance, in the Law Department and/or in Human Resources—to serve as leaders and subject matter experts in the area of immigration compliance. These experts can educate HR representatives, receptionists, and security guards at the company’s various work locations regarding the possibility of unannounced site visits and instruct them in proper protocol for hosting the visiting FDNS officers. A designated company representative should accompany the FDNS officer at all times during a site visit, including during times when the officer wishes to tour the premises and/or interview other employees at the company.

2. In the event of a site visit, the company representative (typically a receptionist) should request the name, title, agency, and contact information for the site investigator (i.e., a business card). The company representative should not speak with government agents or contractors without a witness present.

3. Employers should identify in advance which records will be shared with the government to confirm terms and conditions of employment, as well as where these pertinent records
will be stored, and by whom they will be maintained and distributed. The designated company representative should maintain complete copies of the relevant immigration petitions and supporting documents in a confidential file, and the representative should review this information prior to speaking with the FDNS officer. If the foreign worker does not already have a copy of the petition, the company should provide a copy to the worker as well, so that the foreign worker understands the nature of the job opportunity, terms and conditions of employment, and the education and prior work history as presented in the government record.

4. If the FDNS officer requests information that cannot be provided without further research, the employer should indicate as such to the officer and not try to “guess” the answer. The employer may offer to follow up with the officer at a later time to provide accurate information after such information is obtained.

5. Employers should conduct internal reviews of their immigration compliance programs and ensure that their records are up-to-date. In particular, employers should ensure that their foreign workers’ job titles, duties, work locations, and salaries are consistent with the government record. In some instances, USCIS may require official amendment for “material” changes to employment conditions, while in other instances, a simple memorandum may be added to the company immigration file in compliance with government requirements. Immigration counsel should be consulted regarding how these principles are applied in each individual fact situation.

2. Immigration Implications of Changes in Corporate Structure

In the context of mergers, acquisitions, and other corporate restructurings, during the due diligence process, employers often overlook the immigration-related considerations related to impacted foreign national workers. However, failure to complete a pre-close assessment of impacted foreign national workers, including assessments of work visa statuses and lawful permanent resident (e.g., green card) processes, can have serious negative consequences. Depending on the employee’s visa type and the nature of the corporate restructuring, some temporary work visas may not be eligible for transfer to the new employing entity.

In addition, existing green card processes may need to be assumed where the prior company left off, amended to account for the corporate change, or even restarted altogether. These situations can lead to surprises and hardships for both the company and the employee if, after closing, it is discovered that managers, executives, or other essential employees are no longer authorized to work and no longer have valid immigration status in the United States. For this reason, employers should include immigration assessments of any foreign national employees as a top priority in their due diligence checklists.

Nonimmigrant Work Visas

Nonimmigrant visas control an employee’s ability to remain in the United States and continue working for the petitioning company. Most nonimmigrant visas are company-specific, meaning that the employer is required to prepare a petition that specifically identifies the sponsored employee, as well as provide information about the offered job, such as the worksite location, title, salary, requirements, etc. When the structure or ownership of the petitioning company is changed, the sponsoring company may need to take additional compliance actions for employees to retain their nonimmigrant work status and work authorization and, in some cases, the company may not be able to continue sponsoring the employees.
A common concept in the context of mergers, acquisitions, and other corporate restructurings is that of a “successor in interest.” Successor in interest relationships are possible both in the context of stock acquisitions and asset purchases. In asset purchases, the succeeding company must be able to show that a distinct piece of the predecessor company was purchased, such as a distinct division or business unit, and that the piece of the business that was purchased was transferred as a whole to the successor company, with the exception of certain unrelated liabilities. The succeeding company may qualify as successor in interest if, as the result of a merger, acquisition, spin-off, or other similar corporate restructuring, it assumes the essential immigration-related rights and obligations attaching to former foreign national workers. The new employer must also be able to show that the job offered to an impacted foreign national worker must have been, and must continue to be, located within the transferred division or unit. Employers that can demonstrate successor in interest relationships may be able to continue sponsorship of most (but not all) nonimmigrant work visa types.

1. H-1B Visas for Specialty Occupation Workers

Immigration regulations provide that when a company changes its corporate structure as the result of an acquisition, merger, or other similar action, if the new employing entity qualifies as a successor in interest to the predecessor company, it is not required to file new labor condition applications (LCAs) and H-1B petitions on behalf of transferred H-1B nonimmigrants. This is permissible if the new employing entity expressly agrees to assume responsibilities arising from the labor certification applications originally filed by the predecessor company, and if it completes the appropriate documentation prior to the close date of the deal. This would permit transferred employees to continue employment without any interruption per the existing H-1B approval as long as there are no other material changes to the details of the employment (e.g., change in work location, substantial changes to duties performed, etc.).

Timing is important here. If the successor company fails to update the H-1B public access file documents prior to the close of the deal, it is required to file new H-1B amendment petitions with USCIS to update the U.S. government about the change in corporate structure.

2. L-1 Visas for Intracompany Transferees (Executives, Managers, and Specialized Knowledge Employees)

Following a corporate restructuring, immigration law allows an employee to continue to maintain L-1 status only if the successor company is part of a multinational group and maintains related company (e.g., a subsidiary, parent, affiliate, or branch office) outside the United States. The related company that is outside of the United States does not need to be the same company (or even in the same country where the L-1 visa employee originally gained the qualifying L-1 experience outside of the United States).

Where a corporate restructuring impacts L-1 visa holders, an amended L-1 visa petition must generally be filed with USCIS to alert the U.S. government of the change in corporate structure and reaffirm an ongoing “qualifying relationship.” If the succeeding company is not a multinational corporation and does not maintain a qualifying related company outside of the United States, it may not be possible to continue sponsorship of the L-1 visa, leaving certain executive, managerial, and essential employees without visa status and work authorization.
3. E-1 and E-2 Visas for Treaty Traders and Treaty Investor Employees

A key due diligence consideration for E-1 and E-2 visa holders is the nationality of the successor company’s ownership. E-1 and E-2 visa recipients include executives, managers, and essential skills employees who come to the United States under a treaty of commerce and navigation between the United States and the country of which the visa holder is a citizen or national. If the ultimate ownership of the succeeding company changes because of an acquisition, it can affect the individual’s ability to continue in E-1 or E-2 visa status. For example, if an E-2 visa holder is a French national working in the United States for a French-owned company and a U.S. company purchases the French-owned employing entity, the nationality of the successor company will change and will no longer be French, severing the ability to continue the E-1 or E-2 visa.

4. TN Visas for NAFTA Employees

If an employee’s job duties remain substantially the same, he or she should be able to maintain TN status with the new employer (and therefore continue employment). Succeeding employers should file TN amendment petitions within a reasonable period after the close of the sale.

5. F-1 Student Visas

An employee holding F-1 student status can contact the designated school official (DSO) at his or her school to provide an update about the change in the identity of the employing entity. The DSO can then advise if any new documentation is needed, such as an updated Form I-20 or I-983 training plan, in order to continue the employment.

Green Cards

Mergers, acquisitions, and other major changes in corporate structure, such as a stock or asset purchase, may have a fundamental impact on the permanent residence process for a company’s employees. The vast majority of employment-based green card cases require an offer of future permanent employment in the same or a substantially similar role. Until the final stages of the green card process, the offer of employment must be with the same petitioning employer. A successor employer should carefully evaluate whether it can continue the green card sponsorship or if it must restart the process entirely.

The key inquiry for assumption of green card sponsorship for existing employees is whether the company resulting from a corporate change qualifies as a successor in interest. Both agencies overseeing the green card process, the U.S. Department of Labor (DOL) and USCIS, have relaxed the definition of successor in interest over the years and recognized that when a company assumes all of the essential, immigration-related rights and obligations of an employee, the resulting successor company may continue permanent residence sponsorship. Employers should actively plan for and preserve the continued sponsorship of their foreign national workforces, including documenting precisely how the immigration rights and obligations of the employees were assumed. This includes appropriately documenting labor condition applications (LCAs) prior to close and filing any necessary nonimmigrant visa amendments, as discussed in part one of this series. Companies may also be required to prove their successor status with clear corporate and financial documentation at any stage during the green card process. If a resulting company cannot prove successor status, it may be required to restart the permanent residence sponsorship entirely.
Once a successor relationship is established, an employer must then analyze whether the job for which it is continuing sponsorship for a foreign national employee will remain the same or substantially similar post acquisition. This important analysis includes reviewing any material changes to the terms and conditions of the sponsored role, such as the job duties and geographic work location of the employee. If there are no material changes to the offered role, open green card processing can usually be assumed by the successor company. If the role will change substantially, a successor employer may need to restart the green card process.

Presuming there are no material changes to employment, the next step for a successor company is to determine the stage of the green card process. Most employment-based green card cases are broken down into three stages, and employers can take different actions depending on the stage of the green card process, as follows:

1. PERM Labor Certification (DOL)

If a predecessor company has started but not yet filed a PERM labor certification on behalf of an employee, the successor company will need to review whether it can rely on any of the pre-filing recruitment that supports the application. In the event that changes have occurred since recruitment, the successor company may need to restart recruitment activities before filing a PERM labor certification. If the PERM was filed and remains pending or is certified by the DOL, the resulting company can normally rely on it as a basis to continue green card sponsorship, provided the company can meet the definition of successor in interest and the offered role remains substantially the same.

2. Form I-140: Immigrant Petition for Alien Worker (USCIS)

For an employee with a certified PERM application, USCIS regulations require that a successor employer file a new or amended I-140 petition with updated corporate structure documentation to demonstrate that it qualifies as a successor in interest. In addition, a successor company must prove that the offered role remains the same or substantially similar to that on the underlying PERM labor certification and that the company has the ability to pay the offered wages.

3. Form I-485: Application to Register Permanent Residence or Adjust Status

An employee with a filed and pending I-485 adjustment of status application becomes “portable” after his or her application has been pending for 180 days or more. This means he or she can generally work for any employer in the same general occupation that supports his or her green card case. Once an employee reaches this stage, an employer’s requirements are normally limited to proving that the role is in fact in the same occupation that supports the underlying green card. If a company has established a successor relationship on the I-140 immigrant petition, as mentioned above, and demonstrated the employee’s role is the same or similar, the employer’s obligations are normally complete. An employee with an approved I-485 and a final green card can work for any employer and is no longer affected by changes in corporate structure.

In addition to this common three-stage green card process, employers of foreign nationals sponsored as EB-1 multinational managers or executives should note that this green card category is dependent upon the qualifying corporate relationship between a U.S. company and its foreign parent, subsidiary, affiliate, or branch office where the employee worked before transferring to the United States. Insofar as the corporate restructure affects the relationship
between the qualifying entities, the green card case can be affected as well. Ultimately, to preserve the green card case, successor companies will be required to prove that the qualifying relationship between the U.S. and foreign entities survived the corporate transaction. Other EB-1 green card cases, such as those based on extraordinary ability, do not require an offer of employment and may be unaffected by changes in corporate structure.

Ultimately, sponsoring employers undergoing mergers, acquisitions, or other corporate changes should analyze the effects on their employees’ permanent residence processes. Employers should also conduct a thorough pre-close due diligence process, including a complete successor in interest analysis of the resulting company, as well as role-based analyses for its entire foreign national population.

**Other Current Business Immigration Challenges**

1. **Extreme Vetting at U.S. Consulates**

In a diplomatic cable dated March 17, 2017, the U.S. Department of State issued orders to American consulates and embassies abroad instructing them to increase their vigilance in reviewing visa applications and to develop a “list of criteria identifying sets of post applicant populations warranting increased scrutiny” in order to safeguard national security. These additional protocols and procedures should focus on: (a) preventing the entry into the United States of foreign nationals who may aid, support, or commit violent, criminal, or terrorist acts; and (b) ensuring the proper collection of all information necessary to rigorously evaluate all grounds of inadmissibility or deportability, or grounds for the denial of other immigration benefits.”

Consular officers are instructed to increase their vigilance in screening of visa applicants for both “potential security and non-security related ineligibilities.” Officers are encouraged to deny visa applicants who may present security concerns or who may not abide by visa requirements. The additional screening criteria will be developed by interagency working groups to identify the “population sets” warranting additional scrutiny. These measures are part of “ongoing efforts to refine and improve visa applicant vetting” and may become increasingly stringent if permitted by the ongoing litigation over the president’s executive orders. In particular, applicants who “may have ties to ISIS or other terrorist organizations or [have] ever been present in an ISIS-controlled territory” are to be flagged for additional screening, and there is a “[m]andatory social media check for applicants present in a territory at the time it was controlled by ISIS.” After the social media review, the case is to be sent for a Security Advisory Opinion (SAO) by Department of State headquarters in Washington, D.C. Iraqi nationals, although excluded from the latest version of the presidential EO, are also singled out for additional screening.

All of this will result in delays in visa issuance, increases in extended “administrative processing,” and increases in visa denials. Note that consulates have been instructed to limit each consular officer to performing 120 visa interviews a day, which may further increase visa application backlogs in general.

Employers should plan for additional time when applying for visas and visa renewals for foreign national employees at consular posts abroad. Even individuals benefiting from the Visa Waiver Program (VWP), which permits entry to the U.S. without a visa for nationals of certain countries, may be put into secondary inspection or denied boarding onto U.S. flights or entry into the U.S. if they have visited countries where terrorists may have been deemed active. Recently there have been reports of travelers on the VWP being denied entry due to previous travel to
countries of concern. In 2016, VWP availability had already been tightened for individuals who had traveled to certain designated countries. Employers may want to limit international travel, if possible, of foreign national employees who already have temporary work visas and may be subject to the EO or the new consular screening guidance described above.

Visa denials may also increase for targeted individuals and more generally, as the new administration continues to emphasize increased vetting of visa applications. The litigation over the EO is expected to continue—possibly to the Supreme Court—and if the EO is upheld, even more visa scrutiny may be forthcoming.

2. New Policy—No Deference Given to Previously Approved Nonimmigrant Visa Petitions

Beginning in 2004, USCIS adhered to a policy of deferring to prior determinations when adjudicating petitions for extensions of nonimmigrant status. In its October 23, 2017 memorandum, USCIS announced that it was reversing course and would be reviewing each petition and its supporting evidence as if it were a new position. In the memorandum, USCIS reiterated that it is the petitioner’s responsibility to prove the eligibility of both the sponsored position and employee. USCIS said that this policy is more consistent with the agency’s current priorities, specifically those protecting the interests of U.S. workers.

When filing extension petitions for employees, employers will want to make clear that their sponsored positions and sponsored employees meet all relevant requirements for their visa category—even in cases in which there has been little change since the initial petition filing.

3. New Policy on Unlawful Presence for Students and Exchange Visitors

As of August 9, 2018, USCIS implemented a new policy changing the way the agency calculates the accrual of unlawful presence for students (F-1), exchange visitors (J-1), and vocational students (M-1) in nonimmigrant status, and their dependents, while in the United States. The new guidance, which was issued in furtherance of President Trump’s executive order, Enhancing Public Safety in the Interior of the United States, is intended to target and reduce the number of visa overstays currently in the country.

Unlawful presence is defined as presence in the United States after the expiration of the authorized period of stay. According to the new policy guidance, F, J, and M nonimmigrants and their dependents, admitted or otherwise authorized to be present in the United States, start accruing unlawful presence as outlined below.

F, J, or M Nonimmigrants Who Fail to Maintain Nonimmigrant Status Before August 9, 2018

An individual in F, J, or M nonimmigrant status who has failed to maintain his or her status before August 9, 2018, will start accruing unlawful presence based on that failure on August 9, 2018, unless he or she already started accruing unlawful presence on the earliest of the following:

- the day after the DHS denied the request for an immigration benefit, if DHS made a formal finding that the person had violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;
- the day after the person’s Form I-94 Arrival/Departure Record expired; or
• the day after an immigration judge, or in certain cases, the Board of Immigration Appeals (BIA), ordered the person excluded, deported, or removed (whether or not the decision was appealed).

F, J, or M Nonimmigrants Who Fail to Maintain Nonimmigrant Status on or After August 9, 2018

An F, J, and M nonimmigrant begins accruing unlawful presence due to a failure to maintain his or her status on or after August 9, 2018, on the earliest of any of the following:

• the day after the F, J, or M nonimmigrant no longer pursues the course of study or authorized activity, or the day after the person engages in an unauthorized activity;

• the day after completing the course of study or program (including any authorized practical training plus any authorized grace period);

• the day after the person’s Form I-94 Arrival/Departure Record expires; or

• the day after an immigration judge or, in certain cases, the BIA, orders the person excluded, deported, or removed (whether or not the decision is appealed).

Under the former policy, individuals who entered the United States for the duration of their studies and applicable training periods (Duration of Status or D/S) did not automatically begin to accrue unlawful presence if they overstayed or violated their nonimmigrant status. Instead, unlawful presence was triggered only upon a formal finding by USCIS that a nonimmigrant status violation had occurred or on an immigration judge’s ordering the person to be excluded, removed, or deported. The new policy provides a catchall date, whereby at the very least, unlawful presence will begin to accrue on August 9, 2018, for any F, J, or M nonimmigrant who overstays or violates status.

The accrual of unlawful presence is a significant issue because it may impact a person’s ability to apply for immigration benefits in the future. Individuals who have accrued more than 180 days of unlawful presence during a single stay and then depart the United States may be subject to a 3-year or 10-year bar to admission depending on how much unlawful presence they accrued before leaving the United States. Those who have accrued more than one year of unlawful presence based on their total number of entries into the United States, and who reenter or attempt to reenter without being admitted or paroled, may be deemed permanently inadmissible.

4. New Policy – Denial of Petitions Without First Issuing a Request for Evidence

As of September 11, 2018, adjudicators for USCIS now have the authority to deny any application or petition that is incomplete or lacks sufficient evidence without first issuing a request for evidence (RFE) or notice of intent to deny (NOID). The new guidelines are a reversal of the long-standing former policy, which required that an RFE be issued unless there is “no possibility” that the deficiency can be remedied. Depending on the vigor with which it is enforced, this policy shift may eliminate the opportunity for petitioners and applicants to correct simple errors, like missing documents, or to beef-up documentation in support of an applicant’s eligibility, before the case is denied.
USCIS provided the following examples of cases that may be denied after September 11, 2018:

- A waiver application that is submitted without enough supporting evidence; or
- A filing submitted without the required forms, such as an application for adjustment of status that is filed without the requisite affidavit of support.

Key Takeaway

According to USCIS, the new guidelines are not intended to penalize individuals for “innocent mistakes or misunderstandings” of the requirements but rather to discourage people from submitting “frivolous or substantially incomplete filings,” which it calls “placeholder” applications. The policy language suggests that adjudicators have some discretion to determine when to deny an application or issue an RFE, but it is not yet clear how often they will exercise that discretion or whether they will err on the side of denials.

Given the increased risks of an outright denial and the elevated adjudication standards currently employed by USCIS, every petition or application sent to USCIS should be checked and double checked to ensure accuracy, eligibility, and that sufficient documentation has been provided to support the immigration benefit requested. Employers may want to verify that all of their sponsored positions and sponsored employees meet the requirements for their visa categories.
Key Immigration Considerations During Mergers and Acquisitions, Part I: Work Visas

March 11, 2019

In the context of mergers, acquisitions, and other corporate restructurings, during the due diligence process, employers often overlook the immigration-related considerations related to impacted foreign national workers. However, failure to complete a pre-close assessment of impacted foreign national workers, including assessments of work visa statuses and lawful permanent resident (e.g., green card) processes, can have negative consequences. Depending on the employee’s visa type and the nature of the corporate restructuring, some temporary work visas may not be eligible for transfer to the new employing entity.

In addition, existing green card processes may need to be assumed where the prior company left off, amended to account for the corporate change, or even restarted altogether. These situations can lead to surprises and hardships for both the company and the employee if, after closing, it is discovered that managers, executives, or other essential employees are no longer authorized to work and no longer have valid immigration status in the United States. For this reason, employers may want to include immigration assessments of any foreign national employees as a top priority in their due diligence checklists.

Part one of this two-part series will outline common considerations related to temporary work visas. Part two will cover key considerations regarding green card processing.

Nonimmigrant Work Visas

Nonimmigrant visas control an employee’s ability to remain in the United States and continue working for the petitioning company. Most nonimmigrant visas are company-specific, meaning that the employer is required to prepare a petition that specifically identifies the sponsored employee, as well as provide information about the offered job, such as the worksite location, title, salary, requirements, etc. When the structure or ownership of the petitioning company is changed, the sponsoring company may need to take additional compliance actions for employees to retain their nonimmigrant work status and work authorization and, in some cases, the company may not be able to continue sponsoring the employees.

A common concept in the context of mergers, acquisitions, and other corporate restructurings is that of a “successor in interest.” Successor in interest relationships are possible both in the context of stock acquisitions and asset purchases. In asset purchases, the succeeding company must be able to show that a distinct piece of the predecessor company was purchased, such as a distinct division or business unit, and that the piece of the business that was purchased was transferred as a whole to the successor company, with the exception of certain unrelated liabilities. The succeeding company may qualify as successor in interest if, as the result of a merger, acquisition, spin-off, or other similar corporate restructuring, it assumes the essential immigration-related rights and obligations.
attaching to former foreign national workers. The new employer must also be able to show that the job offered to an impacted foreign national worker must have been, and must continue to be, located within the transferred division or unit. Employers that can demonstrate successor in interest relationships may be able to continue sponsorship of most (but not all) nonimmigrant work visa types.

1. H-1B Visas for Specialty Occupation Workers

Immigration regulations provide that when a company changes its corporate structure as the result of an acquisition, merger, or other similar action, if the new employing entity qualifies as a successor in interest to the predecessor company, it is not required to file new labor condition applications (LCAs) and H-1B petitions on behalf of transferred H-1B nonimmigrants. This is permissible if the new employing entity expressly agrees to assume the responsibilities arising from the labor certification applications originally filed by the predecessor company and if it completes the appropriate documentation prior to the close date of the deal. This would permit transferred employees to continue employment without any interruption per the existing H-1B approval as long as there are no other material changes to the details of the employment (e.g., change in work location, substantial changes to duties performed, etc.).

Timing is important here. If the successor company fails to update the H-1B public access file documents prior to the close of the deal, it is required to file new H-1B amendment petitions with U.S. Citizenship and Immigration Services (USCIS) to update the U.S. government about the change in corporate structure.

2. L-1 Visas for Intracompany Transferees (Executives, Managers, and Specialized Knowledge Employees)

Following a corporate restructuring, immigration law allows an employee to continue to maintain L-1 status only if the successor company is part of a multinational group and maintains a related company (e.g., a subsidiary, parent, affiliate, or branch office) outside the United States. The related company that is outside of the United States does not need to be the same company (or even in the same country where the L-1 visa employee originally gained the qualifying L-1 experience outside of the United States).

Where a corporate restructuring impacts L-1 visa holders, an amended L-1 visa petition must generally be filed with USCIS to alert the U.S. government of the change in corporate structure and reaffirm the ongoing "qualifying relationship."

If the succeeding company is not a multinational corporation and does not maintain a qualifying related company outside of the United States, it may not be possible to continue sponsorship of the L-1 visa, leaving certain executive, managerial, and essential employees without visa status and work authorization.

3. E-1 and E-2 Visas for Treaty Traders and Treaty Investor Employees

A key due diligence consideration for E-1 and E-2 visa holders is the nationality of the successor company's ownership. E-1 and E-2 visa recipients include executives, managers, and essential skills employees who come to the United States under a treaty of commerce and navigation between the United States and the country of which the visa holder is a citizen or national. If the ultimate ownership of the succeeding company changes because of an acquisition, it can affect the individual's ability to continue in E-1 or E-2 visa status.
For example, if an E-2 visa holder is a French national working in the United States for a French-owned company and a U.S. company purchases the French-owned employing entity, the nationality of the successor company will change and will no longer be French, severing the ability to continue the E-1 or E-2 visa.

4. TN Visas for NAFTA Employees

If an employee’s job duties remain substantially the same, he or she should be able to maintain TN status with the new employer (and therefore continue employment). Succeeding employers may want to file TN amendment petitions within a reasonable period after the close of the sale.

5. F-1 Student Visas

An employee holding F-1 student status can contact the designated school official (DSO) at his or her school to provide an update about the change in the identity of the employing entity. The DSO can then advise if any new documentation is needed, such as an updated Form I-20 or I-983 training plan, in order to continue the employment.

When a sponsoring employer undergoes a merger, acquisition, or other corporate change, it may want to take particular care to analyze the effect on its employees’ nonimmigrant work visa processes. Employers may want to consider conducting a thorough pre-close due diligence process, including a complete successor in interest and role-based analysis, for its entire foreign national population.
Key Immigration Considerations During Mergers and Acquisitions, Part II: Green Cards

March 13, 2019

Part one of this two-part series outlined common considerations related to temporary work visas employers may have during the due diligence process of a merger, acquisition, or other corporate restructuring. Part two will cover key considerations for employers during a pre-close assessment of impacted foreign national workers—this time, regarding green card processing.

Green Cards

Mergers, acquisitions, and other major changes in corporate structure, such as a stock or asset purchase, may have a fundamental impact on the permanent residence process for a company's employees. The vast majority of employment-based green card cases require an offer of future permanent employment in the same or a substantially similar role. Until the final stages of the green card process, the offer of employment must be with the same petitioning employer. A successor employer may want to carefully evaluate whether it can continue the green card sponsorship or if it must restart the process entirely.

The key inquiry for assumption of green card sponsorship for existing employees is whether the company resulting from a corporate change qualifies as a successor in interest. Both agencies overseeing the green card process, the U.S. Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS), have relaxed the definition of successor in interest over the years and recognized that when a company assumes all of the essential immigration-related rights and obligations of an employee, the resulting successor company may continue permanent residence sponsorship. Employers may want to actively plan for and preserve the continued sponsorship of their foreign national workforces, including appropriately documenting labor condition applications (LCAs) prior to close and filing any necessary nonimmigrant visa amendments, as discussed in part one of this series. Companies may also be required to prove their successor status with clear corporate and financial documentation at any stage during the green card process. If a resulting company cannot prove successor status, it may be required to restart the permanent residence sponsorship entirely.

Once a successor relationship is established, an employer must then analyze whether the job for which it is continuing sponsorship for a foreign national employee will remain the same or substantially similar post-acquisition. This important analysis includes reviewing any material changes to the terms and conditions of the sponsored role, such as the job duties and geographic work location of the employee. If there are no material changes to the offered role, open green card processing can usually be assumed by the successor company. If the role will change substantially, a successor employer may need to restart the green card process.
Presuming there are no material changes to employment, the next step for a successor company is to determine the stage of the green card process. Most employment-based green card cases are broken down into three stages, and employers can take different actions depending on the stage of the green card process, as follows:

1. PERM Labor Certification (DOL)

   - If a predecessor company has started but not yet filed a PERM labor certification on behalf of an employee, the successor company will need to review whether it can rely on any of the pre-filing recruitment that supports the application. In the event that changes have occurred since recruitment, the successor company may need to restart recruitment activities before filing a PERM labor certification.

   - If the PERM was filed and remains pending or is certified by the DOL, the resulting company can normally rely on it as a basis to continue green card sponsorship, provided the company can meet the definition of successor in interest and the offered role remains substantially the same.

2. Form I-140: Immigrant Petition for Alien Worker (USCIS)

   - For an employee with a certified PERM application, USCIS regulations require that a successor employer file a new or amended I-140 petition with updated corporate structure documentation to demonstrate that it qualifies as a successor in interest. In addition, a successor company must prove that the offered role remains the same or substantially similar to that on the underlying PERM labor certification and that the company has the ability to pay the offered wages.

3. Form I-485: Application to Register Permanent Residence or Adjust Status

   - An employee with a filed and pending I-485 adjustment of status application becomes “portable” after his or her application has been pending for 180 days or more. This means he or she can generally work for any employer in the same general occupation that supports his or her green card case. Once an employee reaches this stage, an employer’s requirements are normally limited to proving that the role is in fact in the same occupation that supports the underlying green card. If a company has established a successor relationship on the I-140 immigrant petition, as mentioned above, and demonstrated the employee’s role is the same or similar, the employee’s obligations are normally complete.

   - An employee with an approved I-485 and a final green card can work for any employer and is no longer affected by changes in corporate structure.

In addition to this common three-stage green card process, employers of foreign nationals sponsored as EB-1 multinational managers or executives may want to note that this green card category is dependent upon the qualifying corporate relationship between a U.S. company and its foreign parent, subsidiary, affiliate, or branch office where the employee worked before transferring to the United States. Insofar as the corporate restructure affects the relationship between the qualifying entities, the green card case can be affected as well. Ultimately, to preserve the green card case, successor companies will be required to prove that the qualifying relationship between the U.S. and foreign entities survived the corporate transaction. Other EB-1 green card cases, such as those based on extraordinary ability, do not require an offer of employment and may be unaffected by changes in corporate structure.
Ultimately, sponsoring employers undergoing mergers, acquisitions, or other corporate changes may want to analyze the effects on their employees' permanent residence processes. Employers may also want to conduct a thorough pre-close due diligence process, including a complete successor in interest analysis of the resulting company, as well as role-based analyses for its entire foreign national population.
US Citizenship and Immigration Services (USCIS) released new data confirming that both requests for evidence (RFEs) and denials are on the rise for many nonimmigrant visa categories. The rates for RFEs and denials, which had been gradually increasing for several years, jumped sharply in fiscal year (FY) 2018, which was when President Trump released his “Buy American and Hire American” executive order.

Key Findings

The following is a summary of the key findings extracted from the data:

H-1B Petitions

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>H-1B Initial Denial Rate</th>
<th>H-1B RFE Rate</th>
<th>H-1B Approved After RFE Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>4.3</td>
<td>22.3</td>
<td>83.2</td>
</tr>
<tr>
<td>2016</td>
<td>6.1</td>
<td>20.8</td>
<td>78.9</td>
</tr>
<tr>
<td>2017</td>
<td>7.4</td>
<td>21.4</td>
<td>73.6</td>
</tr>
<tr>
<td>2018</td>
<td>15.5</td>
<td>3.8</td>
<td>62.3</td>
</tr>
<tr>
<td>2019 (Q1)</td>
<td>24.6</td>
<td>6.0</td>
<td>61.5</td>
</tr>
</tbody>
</table>

In the first quarter of FY 2019, the RFE rate jumped to 60 percent, compared to 45.6 percent in the first quarter of FY 2018.

The rate of denials more than doubled between FY 2017 and FY 2018, and it more than tripled in FY 2018 compared to FY 2015.

The approval rate, even after providing additional information via an RFE, has steadily dropped since FY 2015.

L-1 Petitions

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>L-1 Initial Denial Rate</th>
<th>L-1 RFE Rate</th>
<th>L-1B Approved After RFE Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>16.3</td>
<td>34.3</td>
<td>53.5</td>
</tr>
<tr>
<td>2016</td>
<td>15.3</td>
<td>32.1</td>
<td>58.6</td>
</tr>
</tbody>
</table>
The increase in RFEs and denials has been more gradual for L-1 visas than it has for H-1B visas.

In the first quarter of FY 2019, the RFE rate jumped to 51.8 percent, compared to 46.1 percent in the first quarter of FY 2018.

### TN Visas

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>TN Initial Denial Rate</th>
<th>TN RFE Rate</th>
<th>TN Approved After RFE Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>4.9</td>
<td>17.3</td>
<td>76.8</td>
</tr>
<tr>
<td>2016</td>
<td>9.3</td>
<td>23.6</td>
<td>64.2</td>
</tr>
<tr>
<td>2017</td>
<td>8.4</td>
<td>22</td>
<td>64.7</td>
</tr>
<tr>
<td>2018</td>
<td>11.8</td>
<td>28.2</td>
<td>59.9</td>
</tr>
<tr>
<td>2019 (Q1)</td>
<td>11.6</td>
<td>27.9</td>
<td>59.8</td>
</tr>
</tbody>
</table>

The overall rate of TN denials increased from 4.9 percent in FY 2015 to 11.8 percent in FY 2018.

The TN RFE rate rose from 17.3 percent in FY 2015 to 28.2 percent in FY 2018.

While the rates for all categories in the first quarter of FY 2019 are consistent with the corresponding rates in FY 2018, they do show increased scrutiny when compared to the data for FY 2017.

**Moving Forward**

While the report confirmed what many already knew—that USCIS continues to increase its scrutiny of nonimmigrant visa petitions—it is also a reminder that the majority of petitions are ultimately approved. With that in mind, especially as H-1B cap season approaches, employers may want to provide detailed descriptions of the positions they are seeking to fill, as well as the qualifications of the sponsored employees who eventually fill them.

 Ogletree Deakins’ Immigration Practice Group will continue to monitor developments with respect to these changes and will post updates on the Immigration blog as additional information becomes available.
US. Citizenship and Immigration Services’ (USCIS) processing times continue to lag compared to previous years, according to data recently released by the agency. This is especially true for foreign nationals with pending green card applications whose average wait time has increased from six-and-a-half months in fiscal year (FY) 2015 (October 1 through September 30) to more than a year in the first quarter of FY2019. Wait times are not expected to improve anytime soon.

The chart below represents a sampling of processing times (in months) as represented in USCIS’s table of national average processing times for all USCIS offices for the forms most commonly associated with nonimmigrant visas and those used when pursuing permanent residency through employment.

<table>
<thead>
<tr>
<th>Form Type</th>
<th>FY2015</th>
<th>FY2016</th>
<th>FY2017</th>
<th>FY2018</th>
<th>FY2019: First Quarter</th>
</tr>
</thead>
<tbody>
<tr>
<td>I-129: Petition for a Nonimmigrant Worker (H-1B, L-1, TN, etc.)</td>
<td>2.3</td>
<td>5.5</td>
<td>4</td>
<td>3.4</td>
<td>5.4</td>
</tr>
<tr>
<td>I-131: Application for Travel Document – Advance Parole</td>
<td>2.3</td>
<td>2.3</td>
<td>3</td>
<td>3.9</td>
<td>3.8</td>
</tr>
<tr>
<td>I-140: Immigrant Petition for Alien Workers</td>
<td>5.1</td>
<td>5.7</td>
<td>6.9</td>
<td>7.8</td>
<td>6.1</td>
</tr>
<tr>
<td>I-485: Application to Register Permanent Residence or Adjust Status – Employment Based</td>
<td>6.5</td>
<td>6.8</td>
<td>8.1</td>
<td>11</td>
<td>12.2</td>
</tr>
<tr>
<td>I-539: Application to Extend/Change Nonimmigrant Status</td>
<td>3.3</td>
<td>3.5</td>
<td>3.3</td>
<td>4.5</td>
<td>4.3</td>
</tr>
<tr>
<td>I-765: Application for Employment Authorization</td>
<td>2.4</td>
<td>2.6</td>
<td>3.1</td>
<td>4.1</td>
<td>4.6</td>
</tr>
</tbody>
</table>

What Is Causing the Delays?
Processing backlogs are not a new problem for USCIS; they existed long before President Trump took office. But several of the Trump administration's newly implemented policy changes, those focused on the “extreme vetting” of visa applicants, are likely contributing to some of the steep jumps in processing times that began in FY 2017, after President Trump took office. Below are examples of Trump administration policy changes that are thought to have directly contributed to USCIS's increased wait times:

1. In August 2017, USCIS resurrected the requirement that all employment-based green card applicants (and their dependents) attend in-person interviews. Although this requirement was always in place, USCIS had routinely waived the interview requirement for decades, finding that employment-based green card candidates were not high security risks (especially given that they had already undergone in-depth vetting during the lengthy green card process). As a result, there are now more cases in line for interview appointments, and because USCIS cannot approve cases until completing interviews, total processing times have increased.

2. In October 2017, USCIS revoked a longstanding policy that allowed immigration officers to defer to prior determinations of visa eligibility, when adjudicating extensions of nonimmigrant status (H-1B, L-1, etc.). Petitioning employers must now anticipate that immigration officers will treat every request for an extension as if it were a new case, even if little (or nothing) has changed since the initial filing. As a result, immigration officers must spend more time reviewing each case before they can approve it.

USCIS also recently announced that beginning March 11, 2019, it will be implementing a revised Form I-539, the form used to apply for an extension or change of nonimmigrant status. In addition to the form change, USCIS will be requiring applicants and their dependents (regardless of age) to attend biometric appointments. We expect this new biometrics requirement to create additional processing delays for nonimmigrant visa applications (H-4, L-2, etc.). The biometrics requirement may also impact the approval of employment authorization documents filed in conjunction with Form I-59.

Key Takeaways

Processing delays are likely to persist as USCIS grapples with changing priorities and an increased workload. Employers and employees may want to plan ahead and be mindful of upcoming expiration dates. Employers may find it useful to file for immigration benefits as soon as permitted, which may mean preparing cases in advance (where possible). In some cases, processing can be expedited for a fee by filing a request for premium processing. However, the premium service is not available for all visa classifications and is subject to suspensions by USCIS.

More detailed information about processing times for each service center is available on the USCIS website. It is also worth noting that the processing times provided represent the average processing time across all USCIS offices, and may not reflect the processing time for any individual application.

Ogletree Deakins' Immigration Practice Group will continue to monitor developments with respect to this matter and will post updates on the Immigration blog as additional information becomes available.
Building a Successful Immigration Program: Key Planning Considerations for Active Businesses

Presenters
Brian Bumgardner (Raleigh)
Lee Depret-Bixio (Columbia)

Building a Successful Immigration Program

- The Basics: Overview of U.S. Immigration System and Visa Options
- Key Considerations in the Hiring Process
- Green Card Sponsorship
- Obligations and Concerns Once the Foreign National is an Employee
- Current Business Immigration Challenges
The Basics: Overview of U.S. Immigration System and Visa Options

- Preference for graduates with Master’s degree or higher from U.S. universities
- Preference for graduates in science, engineering, technology, and mathematics fields (STEM)
- Some countries have trade agreements that provide special visa types: Australia, Canada, Chile, Mexico, Singapore
- Company can choose to support visa sponsorship for only certain types of occupations
  - E.g., internal approval to sponsor for engineering roles, but not finance or administrative roles

Recruitment Process: How Do I Know if a Candidate Requires Visa Sponsorship?

- Department of Justice, Immigrant and Employee Rights Section (IER), has stated that the following questions are acceptable in the context of pre-employment inquiry:
  - Are you legally authorized to work in the U.S.?
    Yes ___  No ____
  - Will you now or in the future require sponsorship for employment visa status?
    Yes ___  No ____
During Recruitment Process: “Don’ts”

If candidate indicates that he/she is authorized to work and does not require employer sponsorship, then that is the end of the discussion.

- Do not ask more questions
- Do not ask for a copy of passport or I-9 documents
- Do not run E-Verify or ask candidate to complete I-9 BEFORE offer is extended and accepted

Temporary Work Visa Options

- **F-1 Student Visas**
  - Curricular Practical Training (CPT) work authorization
  - 12 months of work authorization after graduation
  - *Plus* another 24 months of work authorization for STEM graduates of U.S. universities only
- **H-1B** for professional workers in specialty occupations
- **Treaty** Related Classifications (TN, E-1, E-2, E-3, H-1B1)
- **L-1** Intracompany Transfers from a related company abroad
H-1B Visa Challenges

- Demand exceeds supply of “new” H-1B numbers every year
  - National selection rate: 40% annually
  - Odds of selection are higher with U.S. Master’s degree or higher in related field

- What happens if you miss the lottery?
  - If you have STEM degree, extend OPT and try for H-1B again next year
  - No STEM degree? Back-up options
    - TN, H-1B1, E-3, L-1

<table>
<thead>
<tr>
<th>Year</th>
<th>USCIS Lottery History</th>
<th>Selection Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>Lottery: USCIS received 124,000 petitions</td>
<td>68% Won</td>
</tr>
<tr>
<td>2014</td>
<td>Lottery: USCIS received 172,500 petitions</td>
<td>49% Won</td>
</tr>
<tr>
<td>2015</td>
<td>Lottery: USCIS received 233,000 petitions</td>
<td>36% Won</td>
</tr>
<tr>
<td>2016</td>
<td>Lottery: USCIS received 236,000 petitions</td>
<td>36% Won</td>
</tr>
<tr>
<td>2017</td>
<td>Lottery: USCIS received 199,000 petitions</td>
<td>43% Won</td>
</tr>
<tr>
<td>2018</td>
<td>Lottery: USCIS received 190,000 petitions</td>
<td>44% Won</td>
</tr>
</tbody>
</table>
Onboarding for F-1 and H-1B

- F-1 student graduates (completed degree) with EAD card in-hand: Can onboard at any time.
  - Additional compliance step within 10 days of start date: Form I-983 training plan for STEM OPT 2-year extension
- H-1B transfer: Candidate already holds H-1B with existing U.S. employer
  - Typical onboarding timeframe: 4-6 weeks from offer acceptance
  - Depends on candidate’s willingness to onboard – candidate can put in notice upon filing H-1B petition with USCIS (but s/he may want to wait for approval)

“Green Card” Sponsorship

- Key Considerations: Pros
  - Recruiting tool in a tight market
  - Retention tool for current employees
  - Way to build trust, increase employee engagement, and garner goodwill
“Green Card” Sponsorship

- Key Considerations: Cons
  - Cost
  - Cumbersome process
  - Delays
  - Uncertainty

I-9 Policy & Procedures

- Establish a policy that is consistent throughout the organization, e.g., copies or no copies
- Who is in charge of the I-9 process?
- Training, training, training!
- What is your tickler system for reverification if required?
- Where are I-9 documents held?
- E-Verify
- Are there any state immigration laws?
- Conduct periodic self-audits
- Retention policy
- What to do if you receive a subpoena for I-9s from ICE?
FDNS Worksite Visits

- **Worksite Inspections**
  - Fraud Detection & National Security Unit (FDNS) conducts worksite visits, funded by H-1B/L-1/H-2B filing fees
  - Usually no advance notice. Employer can require a subpoena or a warrant, but cooperation is recommended
  - Inspector’s goals:
    - Verify employer is legitimate; and
    - Verify foreign worker is properly employed under terms/conditions of H-1B, L-1, H-2B application (job title, duties, worksite location)
- Sanctions include revocation of H-1B petition, denial of pending petition, criminal charges

FDNS Visits – Guidance

- Designate a dedicated employee to serve as the point person to handle visits
- Instruct front desk personnel to immediately contact the company representative
- Ask to see a government issued ID and ask for a business card
- The agent should be accompanied at all times – do not allow unfettered access to the premises
- Agent will ask to speak to the employee to confirm:
  - Job title, duties, hours, salary, job site
Immigration Implications of Corporate Changes

- Mergers & Acquisitions
  - Conduct due diligence regarding foreign workers BEFORE closing the deal
  - Is the employing entity a “successor-in-interest”? 
  - Impact on foreign worker depends on visa status

Challenges

- Delays
  - Extreme vetting at Embassies and Consulates 
  - Administrative processing 
  - Processing times at the USCIS
- Increases in requests for evidence and denials
- Worksite enforcement on the rise
- Continued uncertainty
  - DACA
  - H4 EADs
Key Take-Aways

- No guarantees
- Make record-keeping a priority
  - H-1Bs, PERM, F-1 STEM OPT, I-9s
- Ensure compliance with work visas
  - Corporate changes
  - Monitor changes in the position, worksite location
- Expect expansion of worksite visits
  - FDNS visits
- Prepare for more worksite enforcement
  - Review I-9 procedures & policies

QUESTIONS?
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