



BUY AMERICAN AND HIRE AMERICAN AND THE H-1B LOTTERY

APRIL 2017

On April 18, President Trump signed the “Buy American and Hire American” [Executive Order](#). Federal agencies are already subject to laws and regulations which require them to give preference to American goods and raw materials in contracting and procurement. The purpose of the Order is to “maximize...the use of goods, products, and materials produced in the United States” and to “rigorously enforce and administer the laws governing entry into the United States of workers from abroad.”

The Order requires all agencies to submit findings regarding their enforcement of and compliance with “Buy American” laws, and to develop new policies for maximizing the use of American-manufactured products. Additionally, the Order requires agencies seeking a “public interest” waiver, allowing them to purchase non-American goods, to “take appropriate account” of trade practices the Administration deems unfair before seeking those waivers.

Significantly, the Order requires the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security to propose new rules and issue new guidance to “protect the interests of United States workers in the administration of our immigration system,” and to “suggest reforms” to the H-1B visa program for high-skilled workers.

What Employers Need to Know About this Executive Order

At this time, the Order does not make concrete changes to the H-1B visa program other than to direct a thorough review of the program by multiple federal agencies. While federal agencies will be required to submit certain findings regarding their “Buy America” compliance, the Order lacks any substantive provisions that take effect immediately. The Executive Branch retains considerable discretion in the enforcement of immigration law, but major changes to the Immigration and Nationality Act will require Congressional action. Nevertheless, this order is consistent with recent announcements by multiple federal agencies, including the Department of Justice, the Department of Labor, and the Department of Homeland Security, which have promised to vigorously root out fraud and misuse of the H-1B and other business visa programs. Prior statements by this administration and legislative proposals in Congress suggest that, in the long run, the program could be reformed to focus on awarding visas first and foremost to the highest-paid positions and to positions that are more difficult to fill with U.S. workers.



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USCIS announces significant drop in H-1B submissions for FY2018

In other related news, U.S. Citizenship and Immigration Services (USCIS) announced on April 17, 2017, that it received 199,000 cap- submissions for the fiscal year 2018 (FY2018) H-1B statutory cap in the first week of April. While this number represents a 15.7 percent decrease in the number of submissions received during the same lottery last year, it is still substantially higher than the overall quota of 85,000 H-1B visas, which includes 20,000 visas for applicants holding U.S. master's or advanced degrees (falling under the advanced degree exemption limit), and an additional 65,000 visas for those outside that category. The agency also confirmed completion of its randomized selection of submissions, and employers can expect to receive rejected, unselected filings in the coming weeks.

This is the first time in several years that the number of applications has decreased. While fluctuations do occur from year to year, this year's decrease could be a response to greater scrutiny of the H-1B program by the Trump administration. The past several years have seen increases in submissions, with over 236,000 submissions in 2016, nearly 233,000 in 2015, 172,500 in 2014, and 124,000 in 2013. Nevertheless, notwithstanding the decrease in H-1B submissions, demand still substantially outweighs supply and many applicants have less than a one in two chance of selection in the lottery. This year, the approximate odds of selection in the

lottery are 42.7 percent for those with U.S. master's degrees or higher and 32.7 percent for other applicants.

What Employers Need to Know About the H-1B Lottery and Alternatives to the H-1B

In light of suspension of premium processing for H-1B petitions, receipt notices or returned petitions may not be delivered by regular mail for several more weeks — typically late April or early-mid May. At that point in time, you will know whether an application you filed has been selected in the lottery.

Because employees whose applications are not selected may have looming expiration dates for their current visas/work authorization, employers should pre-emptively review “back up options” options for all employees sponsored in the H-1B lottery. Employers and employees should consider traditional alternatives to the H-1B visa and other creative, short-term solutions within the boundaries of the immigration laws. This should include consideration of the employee's eligibility for the following:

- Optional Practical Training (OPT) for recent graduates on F-1 visas
- Extension of OPT beyond the initial 12 months post-graduation for STEM (Science Technology Engineering or Math) degree holders. Note that an employer must be E-Verify-registered to sponsor an



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- employee for the STEM OPT extension.
- TN (Trade NAFTA) visas for Canadian or Mexican nationals in certain eligible professional roles
- Transfer of employees to overseas affiliate offices and later consideration for international transferee visas (L-1)
- Status based on extraordinary ability, including O-1 visas or green card sponsorship for employees who have “extraordinary ability” in the sciences, arts, education, or business as defined by USCIS regulations
- Treaty visas and options for employees from specific nations (e.g. E-3 for Australian nationals and H-1B1 for Chilean and Singapore nationals)
- Trainees (H-3 or J-1)
- Short-term employees (H-2B)

Considering options at this time and anticipating any relevant filing deadlines and expiration dates will help employers best prepare to avoid or anticipate involuntary termination of an employment relationship and potential complications with the work authorization of staff.