AMERICAN
IMMIGRATION
LAWYERS
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DECONSTRUCTING THE INVISIBLE WALL:

How Policy Changes by the Trump Administration Are Slowing and Restricting Legal Immigration

#AILAStandsWithImmigrants

Deconstructing The Invisible Wall

Introduction

For decades, our country has reaped the extensive benefits of our legal immigration system. Immigrants living and working in the United States based on close family ties, employer sponsorship, humanitarian protection, and the Diversity Immigrant Visa program have made our nation stronger, better, and more vibrant by building strong family support systems and culturally enriched communities, and contributing to our shared economic growth by launching businesses, fueling entrepreneurship, driving innovation, and strengthening the U.S. labor force.

U.S. history is full of immigrant success stories that confirm how you come to the United States is less important than what you accomplish once you arrive.[1] No less than 43 percent of Fortune 500 companies were founded or co-founded by an immigrant or the child of an immigrant, and that figure rises to 57 percent among the Fortune 500 Top 35.[2] In Silicon Valley, more than half of new tech start-up companies were founded by foreign-born individuals.[3] Some of the most prominent immigrants who have helped launch successful U.S.-based businesses include Arianna Huffington (Huffington Post), Pierre Omidyar (eBay), Sergey Brin (Google), Elon Musk (Tesla, SpaceX), Jerry Yang (Yahoo), Hamdi Ulukaya (Chobani), and Jan Koum (WhatsApp). John Tu, co-founder of Kingston Technology and number 87 on the Forbes 400 list, immigrated to the United States based on sponsorship by his U.S. citizen sister and started a billion-dollar company that has created thousands of jobs for U.S. citizens.[4] Immigrants make a significant positive economic impact at the local and regional level as well, reviving declining towns with new businesses, driving workforce growth, and filling high-skilled jobs that are vital to local economies.[5] In

addition to the economic benefits of immigration, immigrants enrich our nation with cultural diversity and by building strong, family-oriented communities.[6]

Despite overwhelming evidence of the value immigrants bring to our country, since President Trump took office in January 2017, the administration has adopted dozens of policies and procedures that are slowing, or even stopping legal immigration, without any Congressional action. Humanitarian benefits are being eliminated or curtailed, permanently damaging our nation's reputation as a haven for the persecuted. Families are forced to remain separated for long periods of time due to new vetting procedures and policy changes that divert adjudication resources away from family-based applications. With respect to employment-based immigration, the business community has been hit with unprecedented scrutiny of nonimmigrant petitions for skilled workers, managers, executives, and others, a dramatic increase in Requests for Evidence (RFEs), the dismantling of rules to facilitate immigrant entrepreneurship, new interview requirements, and proposals to eliminate work authorization for spouses of certain H-1B workers, among many other changes. As a result, the uncertainty and unpredictability of the legal immigration process has increased dramatically, discouraging U.S. employers from recruiting foreign workers and dissuading foreign workers from seeking opportunities in the United States.

These policies, coupled with the administration's antagonism towards immigrants, have already had a measurable impact. In 2017, the number of H-1B petitions received by U.S. Citizenship and Immigration Services (USCIS) for fiscal year (FY) 2018 declined for the first time in five years: 199,000, down from 236,000 in FY 2017.[7] Between 2016 and 2017, international student enrollments in U.S. colleges and universities fell 4 percent overall, and enrollments at the graduate level in science and engineering fell 6 percent.[8] According to data released by the U.S. National Travel and Tourism Office, for the first three quarters of 2017, 2.3 million fewer visitors came to the U.S. as compared to the same period in 2016, a 3.8 percent drop.[9] As noted by the Visit U.S. Coalition, a drop in tourism translates into billions in lost revenues, and thousands of lost American jobs.[10] Meanwhile, USCIS, which has shifted away from its customer-focused philosophy, continues to struggle with crippling backlogs, slow processing times, and rising fees, and government agencies that have for years welcomed stakeholder dialogue and feedback are cancelling or declining requests for meetings and turning down outreach opportunities at conferences and events.

While President Trump continues his very public fight for the construction of a physical wall, little by little, he and his administration are quietly and very deliberately restricting and slowing the pace of legal immigration by building an "invisible wall." "Deconstructing The Invisible Wall" breaks down these policies and procedures into six broad categories:

- Travel Bans and Extreme Vetting
- Policies to Slow or Stop the Admission of Temporary Skilled Workers and Entrepreneurs to the United States
- Terminating or Curtailing Programs for Compelling Populations
- Imposing Hurdles on Naturalization of Foreign-Born Soldiers in the U.S. Military
- The Growing Backlog of Immigration Benefits Applications, Increasing Processing Times, and Increasing Fees
- Decreasing Focus on Stakeholder Input and Customer Service

Travel Bans and Extreme Vetting

From the very beginning of President Trump's term in office, the Administration has worked to implement onerous and unnecessary blockades to the entry of foreign nationals into the United States. Just one week after the inauguration, on January 27, 2017, the President signed Executive Order (EO) 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States."[11] Among other things, EO 13769 imposed a travel and entry ban on foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.

As a result of the White House's failure to coordinate with the Department of Homeland Security (DHS) prior to issuance of the order, chaos erupted in airports across the U.S. as reports emerged of mass visa revocations, permanent residents being denied entry, and U.S. citizens of Muslim faith being subjected to intense questioning and scrutiny.[12] "Travel Ban 1.0," which was eventually enjoined by the courts, modified, and reissued in two later iterations, was the first in a slew of new efforts to restrict travel and impose onerous screening and vetting standards on immigrants through executive order, presidential proclamation, and policy pronouncement.[13] These changes have been ordered notwithstanding the fact that the U.S. has some of the most comprehensive visa screening procedures in the world, which include identity, security, and background checks conducted through a multitude of interagency databases, cross-country information sharing, biometrics capture, and in-person interviews.[14] The following brief summaries of U.S. overseas and domestic screening protocols describe the procedures that were in place prior to the Trump administration.

U.S. Overseas Visa Screening Protocols[15]

For years, foreign nationals seeking visas to the United States have been required to undergo rigorous screening by Department of State (DOS) consular officers abroad, in coordination and consultation with DHS and other law enforcement agencies. Consular officers use the Consular Consolidated Database (CCD) a biometric and biographic database, to screen all visa applicants. The CCD stores photographs and 10-finger scans for all visa applicants and includes information about prior visa applications. The CCD also links with other databases, such as DHS's Automated Biometric Identification System (IDENT) and Traveler Enforcement Compliance System (TECS), and the FBI's Integrated Automated Fingerprint Identification System (IAFIS). Some consular officers have access to DHS's Arrival Departure Information System (ADIS), which allows them to identify prior overstays.

Consular officers are required to check all visa applicants against the Consular Lookout and Support System (CLASS), which includes significant data from law enforcement agencies such as the Federal Bureau of Investigation (FBI) and the Drug Enforcement Agency, to assess whether an individual might pose a threat to the United States. DOS has also partnered with the National Counterterrorism Center (NCTC) to utilize the Terrorist Identities Datamart Environment (TIDE) on known and suspected terrorists and uses facial recognition technology to screen visa applicants against a terrorist watchlist from the Terrorist Screening Center (TSC). Where national security or other concerns arise, consular officers are required to request a Security Advisory Opinion (SAO) from intelligence and law enforcement agencies, such as the National Counterterrorism Center (NCTC) and

The Travel Ban and Waiver Process

At present, travel restrictions are being imposed upon certain nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen pursuant to a September 24, 2017 Presidential Proclamation. Such travel restrictions can purportedly be waived if a visa applicant from one of the designated countries establishes each of the following three criteria: (1) denying entry to the U.S. would cause the foreign national undue hardship; (2) entry would not pose a threat to the national security or public safety of the U.S.; and (3) entry would be in the national interest. Despite this waiver scheme, the U.S. government has granted only a handful of waivers. Between December 8, 2017, when the Supreme Court ruled that the travel ban could be implemented, and January 8, 2018, DOS received more than 8,400 applications for visas from individuals subject to the ban.[a] As of February 15, 2018, only 2 waivers had been granted,[b] although DOS has since indicated that more than 100 additional waivers have been granted.[c] However, with a lack of guidance as to how the waiver criteria are interpreted and no clear application process, travel ban waivers remain elusive.

Nazanin*, a 42-year-old Iranian neuroscientist and expert in aging and dementia has a dream of relocating to the United States to pursue her career alongside other prominent researchers. In 2017, she filed a petition for permanent residence under the "national interest waiver" process, based upon her internationally recognized expertise as a neuroscientist and a leader and specialist in dementia. While she awaits a decision on her national interest waiver, she is concerned that even if it is approved, she will face an uphill battle in obtaining a waiver for her visa as a national of a country subject to the travel ban. These fears were elevated when she was recently refused a visitor visa and was unable to participate as an invited speaker at a professional

(Continued on next page.)

[a] DOS Responds to Senator Van Hollen's Concerns Over the Travel Ban Waiver Process, *http://www.aila.org/infonet/dos-responds-to-senator-van-hollens-concerns* (AILA Doc. No. 18030735).

[b] *Id.*

[c] Yeganeh Torbati, Mica Rosenberg, "*Visa Waivers rarely granted under Trump's latest U.S. travel ban: data.*" (Mar. 6, 2018), *https://www.reuters.com/article/us-usa-immigration-travelban-exclusive/exclusive-visa-waivers-rarely-granted-under-trumps-latest-u-s-travel-ban-data-idUSKCN1GI2DW*

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the FBI. In June 2013, DOS and the NCTC, along with other partner agencies, began conducting interagency counterterrorism screening of all visa applicants in an initiative known as the "Kingfisher Expansion" (KFE). Under KFE, valid visas are also reviewed to check for new information on emerging threats.

In addition, under the Visa Security Program, ICE special agents with expertise in immigration law and counterterrorism are sent overseas to diplomatic and consular posts to perform visa security activities. As of June 2015, there were 21 Visa Security Program (VSP) units in more than a dozen countries. Recently, the Pre-Adjudicated Threat Recognition Intelligence Operations Team (PATRIOT) initiative began to automatically screen information contained in visa applications against DHS databases prior to the applicant's visa interview. PATRIOT performs 100% screening of nonimmigrant visas at designated posts.

Domestic Immigration Screening Protocols[16]

Security screening and background checks of individuals who are physically present in the United States and seeking immigration benefits has also been very rigorous. In adjudicating applications for benefits, USCIS conducts four different background checks: two biometric fingerprint-based checks (FBI and IDENT) and two biographic name-based checks (FBI and TECS). Applicants for immigration benefits who require a background check are scheduled for an appointment to have biometrics (photograph and 10-prints) captured at a USCIS Application Support Center (ASC).

The FBI fingerprint check is a search of the FBI's IAFIS to identify applicants who have an arrest record. IDENT is the official DHS system that captures information regarding individuals encountered in DHS mission-related processes. The FBI name check process involves a search of both the Central Records System (CRS) and the Universal Index (UNI), while the TECS name check consists of a search of a database containing information from 26 different federal agencies, that includes records of known and suspected terrorists, sex offenders, people who are public safety risks, individuals with outstanding warrants, and suspected gang members, among others. If the background check reveals a law enforcement or national security issue, USCIS will collaborate with other agencies to determine whether an enforcement action should be initiated.

As described below, the administration has directed the implementation of numerous additional screening programs and initiatives that vary in scope and range, from new visa application questions to the creation of a unified National Vetting Center. These directives have been issued without any legitimate justification as to why the existing security protocols were insufficient. A January 2018 DHS report,[17] which attempted to explain the need for additional security was debunked as incomplete, misleading, and manufactured "to perpetuate a myth that immigrants — specifically, those from Muslim countries — are dangerous elements within our country."[18]

Heightened Visa Screening/New Form DS-5535

On March 6, 2017, President Trump signed EO 13780, a new version of "Protecting the Nation from Foreign Terrorist Entry into The United States." In addition to prohibiting the entry of individuals from six predominantly Muslim countries (Syria, Iran, Libya, Somalia, Sudan, and Yemen), suspending the

conference in the United States. As a precaution, Nazanin is exploring her options for immigrating to other countries that might be more welcoming and interested in benefitting from her research, which she has been unable to fully realize due to strict Iranian academic policies.

*Name changed to protect privacy.
—AILA Attorney, Minneapolis, MN

Marwa Nasser was born in Syria but has lived her entire life in Lebanon. She is married to Halim Halaby, a U.S. citizen. The couple met in Beirut at a wedding, fell in love, and were married a year later. Halim is the father of two U.S. citizen children, ages 9 and 5, of whom he has full custody. The elder child has a congenital heart condition and requires a pacemaker and close medical supervision. The children and Marwa have bonded over the course of several visits to Lebanon and they speak on the telephone every day. Marwa attended her immigrant visa interview at the beginning of December 2017, but because she is a Syrian national, she is subject to the travel ban and will require a waiver before she can be admitted to the U.S. to join her family. Three months later, the waiver is still pending. Without a mother to care for them, the children are struggling both in school and emotionally. With multiple trips to Lebanon to keep the family together, the financial impact has also been significant.

—AILA Attorney, Los Angeles, CA

A JANUARY 2018 DHS REPORT, WHICH ATTEMPTED TO EXPLAIN THE NEED FOR ADDITIONAL SECURITY WAS DEBUNKED AS INCOMPLETE, MISLEADING, AND MANUFACTURED "TO PERPETUATE A MYTH THAT IMMIGRANTS ARE DANGEROUS ELEMENTS WITHIN OUR COUNTRY"

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refugee resettlement program for 120 days, and reducing the number of refugee admissions for FY 2017 by more than half, the EO called for the immediate implementation of heightened screening and vetting standards, including a worldwide review to determine whether and what additional information is needed to issue visas and benefits to foreign nationals of each country.[19] DOS followed up with a cable to consular posts implementing the guidance set forth in the memorandum, and requested "emergency approval" of a form with supplemental questions for visa applicants.[20] Although a new form, Form DS-5535, was established for "visa applicants who have been deemed to warrant additional scrutiny in connection with terrorism or other national security-related visa ineligibilities," in practice, it may be used to impose additional screening standards on anyone DOS determines needs such screening, regardless of whether they are subject to the travel ban.[21] Among other things, the form requests the applicant's travel, address, and employment history for the last 15 years, including documentation of the source of funds for all travel during that time. This type of broad information collection places excessive burdens on applicants who may make unintentional errors that could lead to unwarranted denials and misrepresentation findings.[22]

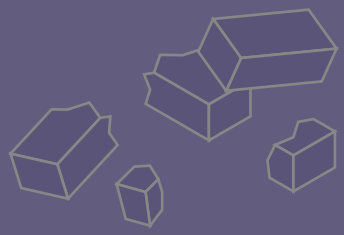
The DS-5535 also requires applicants to disclose their social media identifiers from the last five years. Because a review of social media profiles by necessity cannot be limited to the applicant, this raises significant privacy concerns. Examination of social media accounts would undoubtedly extend to U.S. citizens and businesses, which could chill constitutionally protected speech. Furthermore, casual and innocent exchanges on social media can easily be overanalyzed and misconstrued, resulting in unfair visa denials. CBP has also taken steps to collect social media information and has increased searches of electronic devices at ports of entry for both U.S. citizens and foreign nationals, which also raises privacy and constitutional issues.[23]

Interview Waiver Program

Under section 222(h)(1)(C) of the Immigration and Nationality Act (INA), the Secretary of State has discretion to waive the interview requirement for nonimmigrant visa applicants where it is deemed to be in the national interest or necessary due to unusual or emergent circumstances. In 2012, to promote travel and tourism to the U.S. as important drivers of job creation and economic growth, and to meet increasing demand and streamline the visa process given limited resources, DOS began implementing the Interview Waiver Program (IWP) at certain high-volume posts. Generally, applicants seeking a visa renewal in the same classification, who have already been thoroughly vetted and present a low security concern, could renew their visa without appearing at a consulate for an in-person interview. For example, the IWP was available to some Indian nationals seeking a renewal of an F-1 student visa or a professional H-1B or L-1 visa, and certain Chinese nationals seeking a renewal of a business visitor or tourist visa.[24] The visa interview could also be waived for first-time applicants for certain types of visas from Brazil and Argentina, if they were younger than 16 or older than 65 and applied in the consular district of their residence.[25]

On March 6, 2017, the IWP was suspended under EO 13780. Interview waivers are now only permitted for diplomats, foreign government and United Nations representatives, and employees of international organizations and NATO, as well as individuals who are applying for a visa renewal within 12 months of the

THIS TYPE OF BROAD INFORMATION COLLECTION PLACES EXCESSIVE BURDENS ON APPLICANTS WHO MAY MAKE UNINTENTIONAL ERRORS THAT COULD LEAD TO UNWARRANTED DENIALS AND MISREPRESENTATION FINDINGS



EXAMINATION OF SOCIAL MEDIA ACCOUNTS WOULD UNDOUBTEDLY EXTEND TO U.S. CITIZENS AND BUSINESSES, WHICH COULD CHILL CONSTITUTIONALLY PROTECTED SPEECH

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expiration of the prior visa.[26] Visa applicants under the age of 14 or over the age of 79 are also exempt from the interview.[27] This change places a significant burden on high-volume consular posts, as they must now dedicate already scarce resources to visa interviews for individuals that continue to be low security risks.

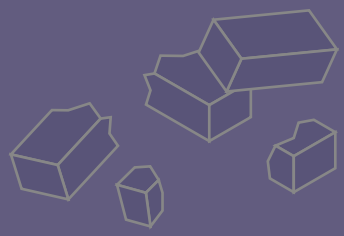
Administrative Processing

In addition to the more public heightened screening of designated groups of foreign nationals, many visa applicants are more quietly subjected to additional vetting through the "administrative processing" queue. "Administrative processing" is a general term used by DOS to refer to cases that appear to meet the basic visa eligibility requirements but require additional background or security checks or further review. Visa applicants are generally not given a reason why their cases have been placed in administrative processing, and although DOS advises that most administrative processing cases are resolved within 60 days, a specific timeline for resolution is not provided.[28] While administrative processing was certainly not rare prior to 2017, reports from AILA members suggest an increase in the number of cases that are being referred for administrative processing, as well as the length of time that cases remain in administrative processing. Reports indicate that applicants from Middle East countries often experience administrative processing delays of six months or more, with many cases taking upwards of a year to receive a final decision. These extremely lengthy delays cause significant hardships for families that are forced to remain separated during this time and disrupt U.S. businesses operations when key employees are unable to quickly return to the U.S. to resume employment.

Domestic Interviews

Visa applicants seeking to come to the United States are not the only ones that have been impacted by new screening and vetting procedures. Beginning October 1, 2017, all employment-based green card applicants, as well as spouses and children of asylees and refugees who have been admitted to the United States, must attend an in-person interview at a USCIS Field Office.[29] This policy change affects hundreds of thousands of individuals applying for permanent residence, even those who have lived lawfully in the United States for years and have been subjected to repeated background checks and interviews through visa and other benefits renewals. Prior to this, to prioritize limited resources on cases that require additional screening and scrutiny, such as marriage-based green card cases, the interview requirement for the majority of employment-based green card applicants was waived, unless there was some indication of fraud, inadmissibility, or ineligibility. During a September 28, 2017 stakeholder call hosted by the Office of the Citizenship and Immigration Services (CIS) Ombudsman, USCIS explained that with the goal of exhausting all employment-based numbers each year, a slow-down in processing of family-based cases and naturalization cases can be expected at least in the short-term. Longer-term impact will depend on the ability of USCIS to add additional staff and streamline procedures.[30] As with other vetting initiatives, the administration has failed to identify any specific risks or threats that would justify the need to interview those who have already cleared rigorous background and security checks and have no fraud indicators, at the expense of other types of immigration applications that require more careful attention.

THIS CHANGE PLACES A SIGNIFICANT BURDEN ON HIGH-VOLUME CONSULAR POSTS, AS THEY MUST NOW DEDICATE ALREADY SCARCE RESOURCES TO VISA INTERVIEWS FOR INDIVIDUALS THAT CONTINUE TO BE LOW SECURITY RISKS



VISA APPLICANTS ARE GENERALLY NOT GIVEN A REASON WHY THEIR CASES HAVE BEEN PLACED IN ADMINISTRATIVE PROCESSING, AND ALTHOUGH DOS ADVISES THAT MOST ADMINISTRATIVE PROCESSING CASES ARE RESOLVED WITHIN 60 DAYS, A SPECIFIC TIMELINE FOR RESOLUTION IS NOT PROVIDED

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National Vetting Center

On February 6, 2018, President Trump signed a Presidential Memorandum directing the establishment of a new National Vetting Center to coordinate immigration-related vetting activities across government agencies and identify individuals who present a threat to national security, border security, homeland security, or public safety.[31] This initiative is the latest in a long line of "extreme vetting" directives that are premised on the myth that immigrants are inherently dangerous. While the administration claims that the National Vetting Center will enhance the screening of people seeking to enter the United States and improve information sharing among federal agencies, the creation of a centralized vetting center would presumably require the expenditure of significant resources without any clear indication as to what value would be added to the already rigorous vetting process. Additional vetting that goes far beyond what is already conducted will lead to unwarranted investigations, extensive processing delays in visa and other adjudications, and the infringement of civil liberties.

All of these measures will require the expenditure of significant resources to implement and have been ordered without any specific, identifiable, or reasonable need-based justification or indication that they will ultimately enhance our national security. A reduction in travel and tourism to the United States, which is already palpable, means lost revenue, a reduction in trade and foreign investment, and less artistic, cultural, and scientific exchange.[32] In 2016, the U.S. brought in $247 billion in revenue from international travel to the U.S. and created one American job for every 67 visitors.[33] As of September 2017, the U.S. Department of Commerce reported that the number of foreign travelers to the U.S. decreased 3.8 percent.[34] It is clear that the restrictionist, anti-immigrant, and discriminatory atmosphere the administration has created through unsubstantiated vetting also comes at a cost to our reputation in the world as a nation that welcomes diversity, openness, and equality.[35]

Policies to Slow or Stop the Admission of Temporary Skilled Workers and Entrepreneurs to the United States

Since January 2017, the Trump Administration has erected numerous hurdles that make it harder for U.S. employers to hire and retain foreign workers to fill workforce gaps and drive our economy forward. In addition to the "extreme vetting" directives discussed above, these policy changes are driven by Executive Order 13788, "Buy American and Hire American" (BAHA).[36] The stated purpose of the "Hire American" portion of the order is to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering the laws governing the entry of foreign workers. EO 13788 also singles out the H-1B visa program and directs federal agencies to suggest reforms to help ensure that H-1B visas are awarded to the "most-skilled and highest-paid beneficiaries."[37] What BAHA fails to recognize

Policies to Slow or Stop the Admission of Temporary Skilled Workers and Entrepreneurs to the United States

Anne,* a citizen of Canada, came to the United States to study Community Health at a prestigious public school in the Midwest. Following graduation, she received an offer of employment from an organization that works with disabled individuals to place them in jobs and ensure they have the support and training to thrive. As a Client Care Coordinator, Anne works closely with her disabled clients, ensuring that they are provided the specialized training and feedback that is essential to their success. Her employer filed an H-1B petition on her behalf on April 1, 2017 and was elated when she was selected in the lottery for one of the 65,000 H-1Bs for FY 2018.

In August, the employer received a "Request for Evidence" questioning whether Anne's specialized training in Psychology, Mental Health and Stress Management, Community and Environmental Health, Drug/Health and Human Behavior, Coaching, and Motor Learning were sufficiently related to her position. In September, the employer responded with comprehensive documentation that included expert support letters, letters from similar organizations, proof of the complexity of her work, and even more detail regarding her job duties. As a small public interest-focused organization, Anne's employer cannot afford the $1,225 "Premium Processing" fee so they are forced to wait. In December, Anne lost her work authorization and has been sitting on her hands, waiting to get back to work ever since. This has caused extensive hardship to her employer, which has only 20 employees and a client-base of disabled individuals in need of Anne's expert assistance and guidance.

*Name changed to protect privacy.
—AILA Attorney, Minneapolis, MN

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is the critical role that foreign workers play in propelling U.S. competition in the global marketplace, advancing our economy, and creating jobs for U.S. workers.

Following the issuance of EO 13788, USCIS stated that it was working on a combination of rulemaking, policy guidance, and operational changes to implement the BAHA directives. USCIS kicked off its rulemaking efforts by seeking to terminate an Obama-era program designed to encourage foreign entrepreneurs to start businesses in the U.S. In addition, DOS made BAHA-related changes to its Foreign Affairs Manual (FAM), and the Department of Labor (DOL) and Department of Justice (DOJ) have stepped up monitoring and enforcement of H-1B employers.[38] Collectively, these actions have had a significant impact on our ability to attract innovators, and the ability of U.S. employers to supplement their workforces with foreign high-skilled workers.

Delaying and Dismantling of the International Entrepreneur Rule (IER)

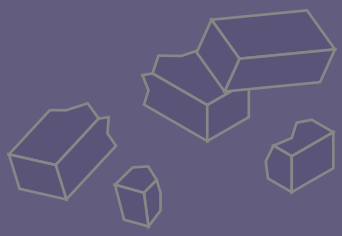
The entrepreneurial spirit is embedded in the fabric of the United States. Entrepreneurs contribute significantly to the U.S. economy and create jobs for U.S. workers.[39] Thus, supporting and retaining foreign entrepreneurs in the United States is an essential component of a strong U.S. economy and workforce.[40] With no dedicated "start-up" visa, our immigration laws are ill-equipped to accommodate international entrepreneurs who wish to establish and grow the next great businesses in the United States. To address this gap, in August 2016, DHS proposed a rule to grant parole to qualified international entrepreneurs to allow them to stay temporarily in the United States so that they can start and grow their own companies. The final rule, known as the "International Entrepreneur Rule," (IER) was published on January 17, 2017, and was set to take effect on July 17, 2017.[41] The IER allows DHS to grant parole, on case-by-case basis, to certain individuals who have been awarded substantial U.S. investor financing or who otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research. DHS estimated that approximately 3,000 entrepreneurs would be eligible for parole each year.[42] Yet just six days before USCIS was to begin accepting applications under the IER, DHS abruptly announced that it was delaying implementation until March 14, 2018, while it considered whether it would eliminate the program entirely.[43] In announcing the delay, DHS attempted to bypass the required notice and comment period, cutting off the public's ability to provide input on the value of the program.

The administration's failure to provide notice and comment, as required by the Administrative Procedure Act (APA), became the subject of litigation in fall 2017, when the National Venture Capital Association and other plaintiff entrepreneurs and organizations sued.[44] In December 2017, a federal district court judge agreed that the administration violated the APA and vacated the delay rule.[45] In December 2017, USCIS began accepting parole applications for entrepreneurs.[46] Nevertheless, the fate of the program remains grim, as the administration has made its intention to terminate the program clear.[47]

Rescission of Computer Programmer Memo and Mass Influx of RFEs

On March 31, 2017, the eve of the opening of the FY 2018 H-1B cap filing window, USCIS rescinded prior guidance from December 22, 2000 that

COLLECTIVELY, THESE ACTIONS HAVE HAD A SIGNIFICANT IMPACT ON OUR ABILITY TO ATTRACT INNOVATORS, AND THE ABILITY OF U.S. EMPLOYERS TO SUPPLEMENT THEIR WORKFORCES WITH FOREIGN HIGH-SKILLED WORKERS



IN DECEMBER 2017, USCIS BEGAN ACCEPTING PAROLE APPLICATIONS FOR ENTREPRENEURS. NEVERTHELESS, THE FATE OF THE PROGRAM REMAINS GRIM, AS THE ADMINISTRATION HAS MADE ITS INTENTION TO TERMINATE THE PROGRAM CLEAR

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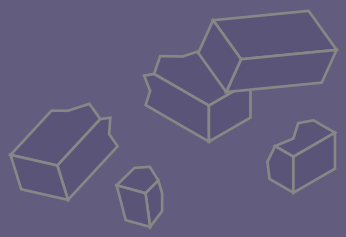
generally recognized the position of "computer programmer" as one that would merit eligibility as a "specialty occupation" under the H-1B visa program.[48] The new USCIS memorandum states that because the DOL's *Occupational Outlook Handbook* indicates that an individual with an associate's degree may enter the occupation of computer programmer, an entry-level computer programmer position would generally not qualify for an H-1B because by definition, a specialty occupation requires, at a minimum, a bachelor's or higher degree in the specific specialty.[49] In a footnote, the memo also directs H-1B adjudicators to review the DOL-certified Labor Condition Application (LCA) to ensure the designated wage level corresponds to the position, and cautions that a Level I wage associated with an entry-level position "will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions within the same occupation."[50]

The release of this memorandum after close to 200,000 H-1B cap-subject petitions were filed with USCIS caught thousands of employers and hopeful beneficiaries unaware.[51] As a result, H-1B petitioners were deluged with RFEs, questioning the appropriateness of DOL-certified wages and whether the proffered positions could be considered "specialty occupations." Not just limited to computer programmers and computer-related positions, RFEs were issued en masse across all professional positions, including engineers, accountants/controllers, lawyers, and physicians, with some RFEs questioning wages well beyond Level I and well into six figures. From January 1, 2017, to August 31, 2017, 85,000 RFEs were issued on H-1B petitions, a 45 percent increase over the same period in 2016.[52] The memorandum and ensuing RFEs, which specifically target H-1B wage levels, seek to perpetuate the myth that H-1B workers are a source of "cheap labor." However, USCIS's own data demonstrates the opposite: The median salary paid to an H-1B worker in FY 2016 was $80,000, slightly higher than the median salary paid to some U.S. workers in similar high-skilled occupations.[53]



THE RELEASE OF THIS MEMORANDUM AFTER CLOSE TO 200,000 H-1B CAP-SUBJECT PETITIONS WERE FILED WITH USCIS CAUGHT THOUSANDS OF EMPLOYERS AND HOPEFUL BENEFICIARIES UNAWARE

Restricting TN Classification for Economists

Pursuant to the North American Free Trade Agreement (NAFTA), qualified citizens of Canada and Mexico may seek TN (Treaty National) status to work in the United States in certain professional positions.[54] Among the designated professions that may qualify for TN status are economists.[55] On November 20, 2017, USCIS issued a policy memorandum restricting TN classification for economists to positions involving a narrow range of economic analysis duties. As a result of this new policy, activities that constitute a range of other professions related to economics, such as those performed by financial analysts, market research analysts, and marketing specialists no longer qualify for TN status.[56] This new guidance represents a significant policy shift and reverses longstanding USCIS practice of approving TN classification for positions involving economics-related duties. Although the impact on economists who were approved for TN classification prior to the new USCIS policy remains uncertain, some will be forced to abandon their lives and jobs in the United States if USCIS determines they no longer qualify for TN status. What is certain is that this policy shift represents another attempt by the administration to restrict legal immigration by interpreting the law in an overly narrow manner.

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H-1B Third Party Worksite Memo

On February 22, 2018, just weeks before the opening of the FY 2019 H-1B cap filing window, USCIS released a new policy memorandum imposing heightened evidentiary requirements for all H-1B petitions involving third-party worksites.[57]

Leading with a statement directed towards employment-based petitioners "who circumvent the worker protections outlined in the nation's immigration laws," this memo is another example of a policy that is premised on the incorrect assumption that the H-1B program is riddled with fraud and abuse.[58] Without citing specifics, or any data as to the actual rate of confirmed cases of fraud, USCIS claims that significant employer violations are more likely to occur in third-party worksite situations.

Employers who intend to place H-1B workers at a third-party worksite have for years been required to submit ample evidence to demonstrate an ongoing employer-employee relationship between the petitioning employer and the H-1B workers. This memo adds even more onerous evidentiary requirements on employers. It also imposes burdensome requirements on third-party companies, which will be called upon to provide contracts, work orders, itineraries, and detailed letters from authorized company representatives attesting to the nature and duration of the project for which H-1B workers are required, even though the third-party company is not the employer. Additionally, when seeking an H-1B extension, employers will be asked to show that the requirements of the H-1B program were met for the entire previous approval period, effectively requiring documentary evidence of retroactive compliance.

This new policy memorandum has already had an impact on employers, who have been forced to quickly adapt their H-1B filing procedures to address the additional documentary requirements for their FY 2019 H-1B cap cases, just weeks before the H-1B cap filing window opens. Given the increased scrutiny and heightened evidentiary standard that will be imposed upon these petitions, along with the assumption of fraud and abuse that this administration has associated with third-party placement cases, an increase in RFEs and denials of both initial H-1Bs and extensions is anticipated, with significant disruptions to U.S. business operations to follow.

Terminating H-4 Work Authorization

In February 2015, DHS implemented a rule permitting spouses of H-1B workers to apply for work authorization, provided that the H-1B worker has met certain milestones in the green card process.[59] Previously, the spouse of an H-1B worker was permitted to live in the United States on an H-4 visa but was not allowed to work. The rule was enacted in part to address the harsh effects of the massive immigrant visa backlogs that many H-1B workers encounter when applying for a green card. H-1B workers from India and China must wait many years, in some cases more than a decade, before a green card becomes available. By giving H-4 spouses permission to work, the rule reduces the economic burdens on H-1B families, allows H-4 spouses, many of whom are themselves professionals, to pursue work in their chosen careers, and facilitates integration of the family. More than 104,000 H-4 work permits have been approved as of June 29, 2017.[60] Work authorized H-4 spouses are making important contributions to the U.S. economy as doctors, nurses, computer engineers, teachers, entrepreneurs, and accountants, among many other professions.

THIS NEW POLICY MEMORANDUM HAS ALREADY HAD AN IMPACT ON EMPLOYERS, WHO HAVE BEEN FORCED TO QUICKLY ADAPT THEIR H-1B FILING PROCEDURES TO ADDRESS THE ADDITIONAL DOCUMENTARY REQUIREMENTS FOR THEIR FY 2019 H-1B CAP CASES, JUST WEEKS BEFORE THE H-1B CAP FILING WINDOW OPENS

Terminating H-4 Work Authorization

Swati* has a degree in Ayurvedic medicine from India. As the spouse of an H-1B professional who is seeking permanent residence, Swati was granted permission to work in the U.S. and as a result, has successfully developed a practice in the Twin Cities area. She is a leader in the field, frequently lectures on Ayurvedic principles and the health benefits of Ayurveda, and has improved the lives of many in her community. If the administration eliminates H-4s from the category of nonimmigrants authorized to accept employment, Swati will not be able to continue working which would have a significant negative impact on the lives of her clients, the financial well-being of her family, and her personal and professional life.

*Name changed to protect privacy.
—AILA Attorney, Minneapolis, MN

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Citing the BAHA executive order, DHS announced in the Fall 2017 regulatory agenda its intent to terminate work authorization for H-4 spouses.[61] As noted above, the stated purpose of BAHA is to protect the economic interests of American workers by rigorously enforcing and administering the laws governing the entry of foreign workers. However, with unemployment the lowest it has been in 17 years (4.1 percent as of February 2018), H-4 work authorized individuals represent only a tiny fraction of the total U.S. workforce and therefore, have no discernible impact on the U.S. unemployment rate.[62] Instead of protecting American jobs, this move would only serve to force thousands of individuals who are legally in the United States to abandon their careers and professional goals, forcing them back into a domestic role, and imposing unnecessary economic and personal hardships on families. It will also make it more difficult for U.S. businesses to retain top talent, as some high-skilled immigrants are deterred from accepting employment in the United States if their spouses are not eligible to work. The elimination of H-4 work authorization would also be disruptive to U.S. employers that have expended resources to train and integrate H-4 workers into their operations.

INSTEAD OF PROTECTING AMERICAN JOBS, THIS MOVE WOULD ONLY SERVE TO FORCE THOUSANDS OF INDIVIDUALS WHO ARE LEGALLY IN THE UNITED STATES TO ABANDON THEIR CAREERS AND PROFESSIONAL GOALS, FORCING THEM BACK INTO A DOMESTIC ROLE, AND IMPOSING UNNECESSARY ECONOMIC AND PERSONAL HARDSHIPS ON FAMILIES

Terminating or Curtailing Programs for Compelling Populations

The Trump administration has taken various steps to terminate or substantially curtail temporary and humanitarian-based programs and benefits, such as Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS) for certain countries, and the Central American Minors (CAM) programs. Collectively, these programs have provided protection to hundreds of thousands of vulnerable individuals and their families for many years, and in some cases, decades. For individuals in the United States, termination of DACA and TPS means a loss of legal status, a loss of work authorization and a means to provide for one's family, and exposure to the threat of deportation. For those outside the United States, the termination of the CAM program and significant cuts to refugee admissions means the loss of an opportunity to live a life of peace and security in our country.

Termination of Deferred Action for Childhood Arrivals (DACA)

Created in 2012, Deferred Action for Childhood Arrivals (DACA) has provided temporary relief from deportation and work authorization to nearly 800,000 young people brought to the U.S. as children.[63] To be eligible for DACA, individuals must have been under the age of 31 on June 15, 2012, have come to the U.S. before turning age 16, and have continuously resided in the U.S. since June 15, 2007. Applicants must also pass strict criminal background checks, be currently enrolled in school, have a high school diploma or GED, or have been honorably discharged from the military.[64]

On September 5, 2017, the Trump Administration announced the rescission of the DACA initiative and abruptly stopped accepting new DACA applications.[65] DACA recipients whose status expired before March 5, 2018 were permitted to renew their DACA but were required to submit their applications to USCIS on

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or before October 5, 2017.[66] Although the termination of DACA has been the subject of ongoing litigation, and complete termination of the program has been temporarily enjoined, the fate of DACA remains uncertain.[67] Without the federal court injunctions, by March 5, 2018, approximately 22,000 DACA recipients would have lost their deferred action because they were unable to renew during the small window provided, with remaining DACA recipients losing deferred action on a rolling basis until September 2019.[68] DACA recipients and their families are not the only ones affected when their DACA status expires. U.S. businesses, schools, hospitals, and universities have all been forced to terminate valuable employees that they have spent considerable time and money to train and develop professionally.

Termination of Temporary Protected Status (TPS) Designation

TPS is a form of humanitarian protection granted to nationals of designated countries who are facing an ongoing armed conflict, environmental disaster, or extraordinary and temporary conditions.[69] Congress established TPS in 1990 to prevent the removal of nationals to countries where life has become dangerous or untenable.[70] TPS beneficiaries receive temporary protection against removal and permission to work in the United States. Since its inception, TPS has been a lifeline to hundreds of thousands of individuals who are in the United States when disaster strikes in their home country. In January 2017, when the Trump administration was installed, ten countries had TPS designations: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen.[71]

Since January 2017, the administration has terminated TPS for El Salvador, Haiti, Nicaragua, and Sudan, and has signaled the possibility that TPS for Honduras will be terminated soon.[72] The decision to end TPS for these countries has thrown the lives of hundreds of thousands of individuals into turmoil as they face the reality of deportation and separation from their homes, their jobs, and their families. More than 325,000 TPS beneficiaries have been impacted by the administration's decisions to terminate TPS for Sudan, Nicaragua, Haiti, and El Salvador, and thousands more could be impacted if the Administration terminates TPS for Honduras.[73]

TPS Beneficiaries by Country[74]	
Country	Individuals with TPS as of October 12, 2017
El Salvador	262,526
Haiti	58,557
Nicaragua	5,305
Sudan	1,048
Honduras	86,031

Through TPS, hundreds of thousands of individuals have integrated into American society and become active and contributing members of our local communities. In many cases, TPS beneficiaries have resided in America for years, sometimes decades, while complying with the requirements of the TPS program. The majority of TPS beneficiaries from El Salvador and Honduras have resided in the U.S. for at least 20 years (51 percent and 63 percent, respectively), while 16 percent of Haitian TPS holders have resided in the country for at least two

Terminating or Curtailing Programs for Compelling Populations

Temporary Protected Status

Joanna*, a 31-year-old mother from Haiti was granted Temporary Protected Status in 2011 following the massive earthquake that devastated her home country. Beneficiaries of the 1998 Haitian Refugee Immigration Fairness Act, her father and four of her siblings are U.S. citizens and her mother is a lawful permanent resident. Joanna also has two U.S. citizen children: a newborn and a four-year-old. With the recent announcement that TPS will expire as of July 22, 2019, Joanna will soon find herself out of status and subject to removal with no real relief available to her. Her husband, Nico*, a 34-year-old citizen of El Salvador who also has TPS runs his own construction company but is facing a similarly dire situation with the recent announcement of the termination of TPS for nationals of El Salvador. For more than a decade, both Joanna and Nico have built their lives here in the United States and have nothing left in their home countries.

*Name changed to protect privacy.
—AILA Attorney, New York, New York.

THE DECISION TO END TPS FOR THESE COUNTRIES HAS THROWN THE LIVES OF HUNDREDS OF THOUSANDS OF INDIVIDUALS INTO TURMOIL AS THEY FACE THE REALITY OF DEPORTATION AND SEPARATION FROM THEIR HOMES, THEIR JOBS, AND THEIR FAMILIES

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decades.[75] As long-standing members of communities across the U.S. and a vital share of the labor force, TPS holders have added value to the U.S. economy through income and property taxes, Social Security and Medicare contributions, job creation, and spending.

Elimination of the Central American Minors (CAM) Program

Established in 2014 in response to a surge in the number of unaccompanied minors and individuals making the often-treacherous journey from El Salvador, Guatemala, and Honduras to the U.S., the CAM program provided a legal pathway for qualified children and their family members to apply for refugee resettlement or parole while still in their home country.[76] Under the CAM Refugee Program, children with a parent who resides lawfully in the U.S. could apply for refugee resettlement. The CAM Parole Program offered a possible alternative for family reunification for those found ineligible for refugee status.

On August 16, 2017, DHS terminated the CAM Parole Program.[77] Parole that was granted but had not yet been used to enter the U.S. was rescinded, preventing 2,444 minors from El Salvador, 231 from Honduras, and 39 from Guatemala from entering the country.[78] In November 2017, the Department of State stopped accepting new applications for refugee status through the CAM program.[79] According to a December 21, 2016 report from the Office of the CIS Ombudsman, as of mid-December 2016, the CAM program enabled more than 1,800 children and family members to relocate to the United States.[80] By cancelling the CAM program, the Trump Administration has effectively cut off a viable channel for children in vulnerable and desperate situations to seek protection in the U.S., and has plunged thousands of families into a state of uncertainty as to whether minors lawfully in the U.S. on CAM-based parole will be refused an extension and exposed to deportation.

Slashing Refugee Admissions

The Trump Administration has also set its sights on refugees, irrevocably damaging the reputation of the United States as a beacon of hope for the persecuted. On March 6, 2017, as part of Executive Order 13780, the U.S. Refugee Admissions Program (USRAP) was suspended for 120 days while the administration conducted a review of the program.[81] This was followed by the implementation of additional screening and vetting procedures in October 2017, and an additional 90-day review period for 11 countries identified as posing a high risk to the U.S.[82] Following the 90-day review, DHS announced in January 2018 further "enhancements and security recommendations" for individuals from those 11 countries, including additional screening and administering the USRAP in a more "risk-based" manner.[83] In September 2017, President Trump declared an unprecedented reduction in the number of refugees to be admitted to the U.S. – from 110,000 under the prior administration to just 45,000 in FY 2018.[84] However, based on current trends, the International Refugee Committee (IRC) projects that only 21,292 refugees will ultimately be resettled in FY2018.[85] Of those that have been resettled thus far, only 0.5 percent are Syrian (compared to 15 percent over the same period the prior year), 1 percent are Iraqi (compared to 15 percent), and only 13 percent identified as Muslim (compared to 48 percent).[86] While the reason for the exponential drop in refugee resettlement numbers has not been articulated by the administration, it is undoubtedly tied to stricter

Central American Minors Program

Josue, an 18-year old boy from El Salvador was granted parole under the Central American Minors (CAM) program, along with his mother, allowing them to flee the death threats and violence of their gang-riddled neighborhood in El Salvador and join Josue's father and brother in Minnesota. With the discontinuation of the CAM program in 2017 by the Trump administration, Josue's permission to live and work in the U.S. will expire in September 2018. It is unclear whether he will be granted an extension. In the meantime, Josue has built a life free from fear in his new home. He attends church with his family every Sunday and works building chairs for commercial spaces and residential homes and has become an integral part of the community. Josue has family in only two places: El Salvador and Minnesota. If he is unable to stay in the United States, he does not know where he would go.[d]

THE TRUMP ADMINISTRATION HAS ALSO SET ITS SIGHTS ON REFUGEES, IRREVOCABLY DAMAGING THE REPUTATION OF THE UNITED STATES AS A BEACON OF HOPE FOR THE PERSECUTED

d Angilee Shah, "As Trump Ends Obama-era Protections for Salvadorans, a Family in Minnesota Has Few Good Options to Stay Together," PRI (Mar. 2, 2018), *available at https://www.pri.org/stories/2018-03-02/trump-ends-obama-era-protections-salvadorans-family-minnesota-has-few-good*.

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vetting, and some have speculated that it is a deliberate tactic to slow down processing so that fewer refugees enter the U.S.[87]

Imposing Hurdles on Naturalization of Foreign-Born Soldiers in the U.S. Military

Having served in the U.S. military in every major conflict since the Revolutionary War, immigrants have a long history and connection to our armed forces, often filling critical roles involving skills that are otherwise in short supply.[88] Special provisions in the Immigration and Nationality Act allow immigrant members of the armed forces and veterans to expedite the process of becoming a U.S. citizen through naturalization.[89] In addition, in 2009, the Department of Defense (DOD) introduced the Military Accessions Vital to the National Interest (MAVNI) program to recruit immigrants with language skills and medical training into the armed forces. In exchange for a service commitment, MAVNI recruits are generally permitted to file an application for naturalization after completing the enlistment process.[90] Since 2009, "more than 10,000 individuals have joined or signed contracts to join the military through the MAVNI program…"[91] These recruits have been highly sought after in Special Operations Command due to cultural skills that are vital to training and combat with foreign troops.[92] Many MAVNI recruits have served as interpreters on military missions to Africa, Asia, and the Middle East, and have helped fill shortages of military health professionals, like dentists. They have also trained U.S. soldiers in language and culture.

On October 13, 2017, DOD announced two new policies that impact foreign-born military personnel.[93] Under the first policy, prior to entering the armed services, all lawful permanent residents (LPRs) must complete a background investigation and receive a favorable Military Security Suitability Determination (MSSD) and National Security Determination (NSD), a process that can take a year or longer due to backlogs.[94] Previously, LPRs could ship to basic training upon initiation of the background investigation, provided all other entry screening requirements had cleared. Under the second policy, foreign-born military personnel, including MAVNI recruits, cannot receive a certification of honorable service (USCIS Form N-426), which is necessary to expedite naturalization, unless they (1) complete all screening requirements and receive a favorable MSSD; (2) complete the required initial military training; and (3) complete at least 180 consecutive days of active duty service, or one year of service in the Selected Reserve of the Ready Reserve.[95] Exceptions to the required service periods are made for individuals who serve in active duty status in a hazardous duty area. Previously certified N-426 forms were recalled and decertified for individuals who had not completed the new screening and suitability requirements.[96]

As acknowledged by the Office of the CIS Ombudsman, "[t]he delivery of military immigration benefits to our service members, veterans, and their families is essential to military readiness and to national security."[97] Collectively, these new administrative policies have left thousands of military personnel and aspiring military personnel in limbo, as they are suddenly and unexpectedly forced to wait to begin basic training or await completion of their naturalization. Although multiple lawsuits have resulted in the granting of preliminary injunctions

Imposing Hurdles on Naturalization of Foreign-Born Soldiers in the U.S. Military

Ray* is a certified network engineer from India. He came to the U.S. in 2008 as a student and completed a master's degree in electrical engineering in 2010 from Southern Illinois University. Ray heard about MAVNI in 2009 at a campus Army recruitment drive. Eager to serve the country he considers home, he enlisted in the U.S. Army Reserves as a Combat Engineer in 2016 while in H-1B status. Because of the recent changes to MAVNI, Ray has still not received clearance to move forward with his naturalization application and time is running out on his H-1B visa while he waits to be shipped out. In the meantime, Ray and his wife became parents to twin babies who were prematurely born. Without U.S. citizenship, Ray cannot sponsor his wife for a green card, leaving her on an H-4 visa which is totally dependent on his H-1B status. If Ray ships without naturalizing, his wife's H-4 will expire and she will not be able to stay legally in the U.S. with their two children who require special care.

*Name changed to protect privacy.

Charles Choi studied at Cornell University, receiving a bachelor's degree in industrial and labor relations, followed by a master's degree in applied statistics in 2016. In May 2016, he enlisted in the U.S. Army Reserve through MAVNI. While in college, he successfully completed a solo-ascent of Denali (Mt. McKinley), climbed Mt. Everest, and completed an Ironman race. Charles currently works as a data scientist in Memphis in STEM OPT status, while he awaits to ship out. Charles' battalion commander has given him high praise for the skills and leadership he brings to his unit and has encouraged him to pursue officer training. Unfortunately, with his naturalization on hold and only a little more than a year left on his STEM OPT, Charles' future as an officer in the U.S. Army Reserve is at risk.

Dan is 24 years old, born to Korean missionary parents in the Philippines. In November 2015 he enlisted in the U.S. Army and is hoping to ship out soon. However, as a South Korean national, Dan is subject to a mandatory military service, which if not fulfilled, places him at risk of imprisonment due to charges of desertion. If he is unable to naturalize before he ships

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temporarily preventing portions of these new policies from moving forward, if allowed to stand, these policies will have a significant chilling impact on the ability of the armed services to recruit troops who possess unique language abilities and specialized skills.[98]

The Growing Backlog of Immigration Benefits Applications, Increasing Processing Times, and Increasing Fees

The Growing Backlog and Increasing Processing Times

For more than a decade, USCIS has worked to reduce case backlogs and improve processing times. On June 17, 2004, USCIS announced a "Backlog Elimination Strategy," focused on "working smarter and eliminating redundancies," while enhancing national security.[99] At that time, USCIS identified the backlog as 3.7 million cases that exceeded their cycle time. USCIS generally defined "backlog" as "the number of pending applications that exceed acceptable or target pending levels for each case type," less the number of pending applications that cannot be completed due to statutory caps or other bars.[100] Over the course of the next couple of years, USCIS reported regularly to Congress on its efforts to reduce the backlog.[101] On September 15, 2006, USCIS announced the elimination of the naturalization backlog, with an average processing time of five months, down from 14 months in February 2004.[102]

Over the past several years, the overall workload of USCIS has grown substantially, and backlogs have crept back up. In FY 2016, "USCIS received approximately 8.070 million applications for benefits, a 5 percent increase over FY 2015 and a 34 percent increase over FY 2012."[103] The number of pending petitions across major product lines, including immigrant petitions for relatives, investor-based petitions and applications, adjustment of status to lawful permanent resident, naturalization, and humanitarian-based programs have grown significantly between FY 2016 and FY 2017.[104] The backlog of asylum applications, which "has grown by more than 1750 percent over the last five years," logged in at 311,000 as of January 21, 2018.[105] At the end of FY 2017, a total of 5.6 million applications and petitions were pending with USCIS as compared to 4.3 million at the end of FY 2016.[106]

Although data reflecting the current "backlog" based on a similar definition employed by the agency during the Backlog Elimination Strategy years does not appear to be available, increasing processing times continue to be a major stakeholder concern. Delays and the ensuing repercussions on the lives of individuals and U.S. businesses are significant, and include job loss, loss of critical business contracts, delayed education, the inability to travel internationally for important family and business events, and the inability to renew driver's licenses.[107] Although processing times on individual product lines may vary depending on the resources available at each individual service center, a review of USCIS processing times over the past year indicates an overall increase in the length of time it takes to adjudicate employment-based green card petitions

out, and if he is sent to Korea as his duty station, there is a high probability that he will be arrested, even if he is serving in the U.S. Army.

Xing Lu is a Ph.D. student at the University of Miami, focusing on meteorology and physical oceanography. In January 2016, she signed an active duty contract with the Army through MAVNI, inspired to serve the country that had given her so much over the last nine years. Xing Lu was supposed to ship out August 2016 and had arranged with the university to finish her Ph.D. while serving. But due to the changes imposed on military naturalizations, her life has been plagued with uncertainty. She has had to delay graduation to maintain her student status, she is unable to travel to attend international academic meetings or for family emergencies, and she has been unable to serve her country as a proud U.S. citizen. In addition, her spouse's career plans have been placed on hold and she finds herself in a perpetual state of limbo, torn between giving up on her dream to serve and seeking an academic position, and hoping that her clearance will eventually come through.

DELAYS AND THE ENSUING REPERCUSSIONS ON THE LIVES OF INDIVIDUALS AND U.S. BUSINESSES ARE SIGNIFICANT, AND INCLUDE JOB LOSS, LOSS OF CRITICAL BUSINESS CONTRACTS, DELAYED EDUCATION, THE INABILITY TO TRAVEL INTERNATIONALLY FOR IMPORTANT FAMILY AND BUSINESS EVENTS, AND THE INABILITY TO RENEW DRIVER'S LICENSES

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and applications (Forms I-140 and I-485), certain types of applications for employment authorization (Form I-765), applications for travel documents (Form I-131), applications for change/extension of status (Form I-539), and applications to replace permanent resident card (Form I-90), to name a few.[108] A review of Field Office processing times indicates that naturalization processing times today vary widely depending on jurisdiction, from 5 months to well over one year, with an average processing time of approximately eight to nine months.[109]

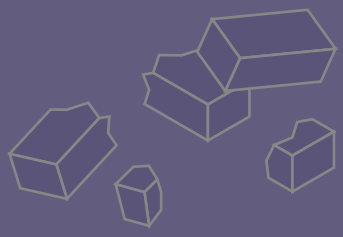
Long-pending applications for employment authorization documents (EAD) are particularly concerning. While regulatory changes that went into effect on January 17, 2017, provide an automatic extension of work authorization for up to 180 days for certain categories of EADs and the ability to file an EAD extension up to 180 days prior to expiration, the long-standing regulatory requirement that USCIS adjudicate EAD applications in 90 days was eliminated.[110] On a February 27, 2018, CIS Ombudsman's stakeholder teleconference, it was reported that approximately 24 percent of EAD applications are taking longer than 180 days to process.[111] Therefore, a significant percentage of EAD applicants, even those who benefit from an automatic extension of employment authorization, risk losing their jobs or their ability to work for several months. This creates significant hardships for families that depend on that income and employers who are forced to locate and train new workers.

Policy Changes that Add to the Backlog

According to the CIS Ombudsman, "[p]rocessing delays at the agency are largely due to fluctuations in filing levels, the lag time between fee increases and the onboarding of new staff, the complexity of case review, enhanced fraud detection, and new security check requirements."[112] However, increased processing times can also be attributed in part to policy changes that have resulted in an increase in RFEs or an overall increase in the volume of applications and petitions that are filed. Such policy changes and practices include:

- **Rescission of the 2004 "Deference" Policy.** In October 2017, USCIS rescinded guidance from 2004 that directed USCIS officers to give deference to prior determinations when adjudicating nonimmigrant employment-based extension petitions involving the same position and the same employer.[113] The new policy states that USCIS officers "should not feel constrained" in issuing RFEs.[114] The prior guidance permitted officers to give weight to the fact that the same beneficiary or applicant had already received an approval by the government for the same position. Now, however, petitioners are required to submit more documentation proving that the beneficiary remains qualified for a position that he or she has been filling for as long as three years. As a result of this new policy, adjudicators will spend more time reviewing cases, more time issuing RFEs, and more time reviewing RFE responses, even though there has been no change in the employer or the position.

- **Domestic Interviews.** As noted above, beginning October 1, 2017, all employment-based green card applicants, as well as spouses and children of asylees and refugees who have been admitted to the United States, must attend an in-person interview at USCIS. During a September 28, 2017 stakeholder call hosted by the Office of the CIS Ombudsman, USCIS explained that with the goal of exhausting all employment-based numbers each year, a slow-down in



HOWEVER, INCREASED PROCESSING TIMES CAN ALSO BE ATTRIBUTED IN PART TO POLICY CHANGES THAT HAVE RESULTED IN AN INCREASE IN RFES OR AN OVERALL INCREASE IN THE VOLUME OF APPLICATIONS AND PETITIONS THAT ARE FILED

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processing of family-based cases and naturalization cases can be expected at least in the short-term.[115]

- **Burdensome and Duplicative Requests for Evidence (RFEs).** Also noted above, policies that are announced with little to no public notice can quickly lead to a massive increase in RFEs. This was the case during the FY 2018 H-1B cap window, when the night before USCIS was to begin accepting H-1B cap cases, USCIS reversed its long-standing policy memo on H-1Bs for computer-related occupations, which reportedly led to a 45 percent increase in H-1B-related RFEs.[116] In addition to an increase in RFEs that can be tied to specific policy changes, AILA members have long reported that many RFEs request information or documentation that has already been submitted, apply an evidentiary standard that goes beyond the regulatory standard of "preponderance of the evidence," and are sometimes even followed by a second RFE raising new issues not previously flagged in the first RFE. These surges in RFEs increase the total amount of time needed for a USCIS officer to issue a final decision and thus increase overall processing times.

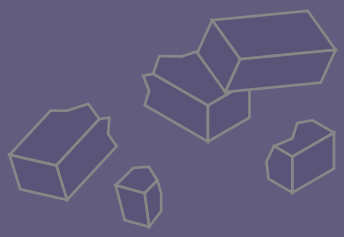
- **Denial of Certain Advance Parole Applications.** USCIS has recently begun denying certain applications for travel documents, requiring the applicant to refile the application and adding to the backlog. In 2004, USCIS confirmed to AILA that notwithstanding the form instructions, which state that an advance parole application will be deemed abandoned if the applicant departs the United States prior to its approval, such applications would not be denied if the applicant is otherwise authorized to depart and return to the U.S. with a valid nonimmigrant visa. In the summer of 2017, USCIS changed its policy and began denying these applications, thus forcing applicants to either forego travel during the months that the application is pending, even though they have a valid visa, or file a new application upon their return to the U.S. Most impacted by this policy change are H-1B and L-1 employees whose ability to engage in international travel is often an essential component of their work. The imposition of unnecessary impediments to travel can have an adverse impact on the profitability and competitiveness of their U.S. employers.

- **Requiring "Bridge" Applications for F-1 Students.** A change that began unfolding in 2016, that serves no legitimate purpose and only adds to the backlog, is the relatively recent USCIS policy to require individuals changing from one nonimmigrant status to F-1 student status to file so-called "bridge" applications to maintain their underlying nonimmigrant status when USCIS processing delays prevent the change of status from being timely adjudicated. The regulations do not require bridge applications, and for years, USCIS also did not require them. This new policy creates unnecessary confusion and issues surrounding the "intent" of the applicant, an extremely important concept that is an inherent component of our immigration system. In addition, requiring individuals to file unnecessary applications only serves to contribute to the ever-growing backlog of pending applications and petitions, and is a clear waste of USCIS resources.

Increasing USCIS Fees

As an agency, USCIS is funded almost entirely by fees associated with applications and petitions for immigration benefits. Fees are deposited into the Immigration Examinations Fee Account (IEFA), which represents the majority

POLICIES THAT ARE ANNOUNCED WITH LITTLE TO NO PUBLIC NOTICE CAN QUICKLY LEAD TO A MASSIVE INCREASE IN RFES



REQUIRING INDIVIDUALS TO FILE UNNECESSARY APPLICATIONS ONLY SERVES TO CONTRIBUTE TO THE EVER-GROWING BACKLOG OF PENDING APPLICATIONS AND PETITIONS, AND IS A CLEAR WASTE OF USCIS RESOURCES

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of USCIS budget authority.[117] To ensure that the actual cost of processing immigration benefits requests is reflected in its fee structure, USCIS regularly reviews and adjusts fees as necessary. In 2007, USCIS significantly revised its fee structure, but committed to implementing meaningful improvements in processing times and customer service, including a 20 percent average deduction in case processing times by the end of FY 2009.[118] In addition, USCIS committed to reducing processing times to four months, in four key applications: (1) Application to Renew or Replace a Permanent Resident Card (Form I-90); (2) Application to Register Permanent Residence or Adjust Status (Form I-485); (3) Immigrant Petition for Alien Worker (Form I-140); and (4) Application for Naturalization (Form N-400).[119]

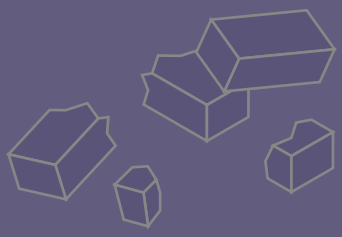
On October 24, 2016, USCIS published its current fee schedule, which raised fees across all product lines by a weighted average of 21 percent, effective December 23, 2016.[120] In announcing the new fee schedule, USCIS acknowledged that "since it last adjusted fees in FY 2010, the agency has experienced elevated processing times compared to the goals established in the 2007 fee rule," but recommitted to achieving those 2007 goals as soon as possible.[121] According to the Fall 2017 regulatory agenda, USCIS is once again reviewing its fee structure and intends to publish a Notice of Proposed Rulemaking to revise immigration fees in October 2018.[122]

Policies and practices that slow the processing of immigration benefits applications and increase case backlogs slow the lawful admission of temporary and permanent immigrants. Rising fees and broken promises to reduce processing times, coupled with restrictive policies, deter U.S. businesses from utilizing the U.S. immigration system as a viable option for supplementing their U.S. workforces and discourage aspiring immigrants from seeking a better life in the United States.

Decreasing Focus on Stakeholder Input and Customer Service

For many years, AILA and other stakeholders have enjoyed collegial relationships with the government agencies that administer our immigration laws. Frequent and open collaboration on immigration-related policy and procedural issues was encouraged, as the mutual benefit from reciprocal information sharing and dialogue was clear: clarification on legal issues and interpretations, the creation of processing efficiencies, and an overall greater understanding of the challenges faced by all parties in carrying out their respective missions. As the premier bar association for immigration attorneys with a unique depth of knowledge of our complex immigration system, federal agency personnel would frequently turn to AILA for feedback on proposed policies and regulations and encouraged discourse on complicated legal issues and the real-world impact of contemplated policy changes on immigrant communities, U.S. citizens, and U.S. businesses.

However, with respect to some agencies, this dynamic has shifted. At the headquarters level, agencies such as USCIS, and the Executive Office for Immigration Review (EOIR), which houses the immigration courts and the Board of Immigration Appeals, have cancelled meetings, declined to respond to



RISING FEES AND BROKEN PROMISES TO REDUCE PROCESSING TIMES, COUPLED WITH RESTRICTIVE POLICIES, DETER U.S. BUSINESSES FROM UTILIZING THE U.S. IMMIGRATION SYSTEM AS A VIABLE OPTION FOR SUPPLEMENTING THEIR U.S. WORKFORCES AND DISCOURAGE ASPIRING IMMIGRANTS FROM SEEKING A BETTER LIFE IN THE UNITED STATES

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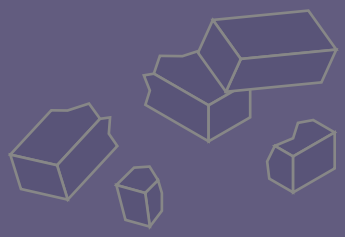
meeting requests, and/or failed to articulate a policy or plan for future stakeholder engagements. As a result, stakeholders are left with no direct means to raise questions, except through general public inquiry channels, and complex legal and policy questions identified by attorneys and accredited representatives go unaddressed.

In addition, USCIS is shifting away from its customer service-oriented mission. In 2003, when the Department of Homeland Security was created, Congress purposefully separated the enforcement functions and the service functions of the legacy Immigration and Naturalization Service into three components: CBP (border enforcement and inspections); ICE (interior enforcement) and USCIS (adjudication of immigration benefits).[123] Although the adjudication of immigration benefits is connected to national security, the mission of USCIS, as opposed to ICE and CBP, has historically focused on customer service and immigration benefits. Toward that end, for years USCIS's mission statement read:

> *USCIS secures America's promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.*

However, on February 22, 2018, USCIS officially marginalized the "customer service" aspects of its mission by removing references to "customers" and America as a "nation of immigrants."[124] The new mission statement reads:

> *U.S. Citizenship and Immigration Services administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.*[125]



USCIS OFFICIALLY MARGINALIZED THE "CUSTOMER SERVICE" ASPECTS OF ITS MISSION BY REMOVING REFERENCES TO "CUSTOMERS" AND AMERICA AS A "NATION OF IMMIGRANTS"

These symbolic gestures have been accompanied by the erection of barriers that reduce access to helpful, accurate, and timely information on individual case matters, including:

- **USCIS InfoPass.** The InfoPass system allows individuals to schedule an appointment at a USCIS field office to speak to an immigration officer regarding their case.[126] Though it varies according to jurisdiction, AILA members routinely report a shortage of InfoPass appointments, with some attorneys stating they have been unable to secure an appointment on behalf of a client for weeks on end. This creates significant hardships for individuals who are unable to resolve complicated case issues that cannot be addressed through the USCIS phone or online inquiry system, who need an emergency travel document, or proof of lawful permanent residence to commence employment.

- **Deficiencies in USCIS Customer Service Tools.** AILA members also routinely report an inability to obtain substantive or informative responses on individual cases through the USCIS toll-free customer service number, or online "e-Request" tool.[127] In many cases, stakeholders report receiving generic responses that simply instruct them to wait an additional 30 or 60 days and follow up again. In addition, AILA members frequently report incorrect or outdated information in the USCIS Case Status Online system.[128]

- **Incomplete and Outdated Processing Time Reports.** Although USCIS processing times should give the public a reasonable estimate as to how long it takes to adjudicate each type of benefit request, processing time reports are

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based on data that is approximately 30-45 days old and are generally difficult to comprehend. On January 4, 2017, USCIS took a step towards improving the way processing times are presented by providing specific dates on the reports for each product line, as opposed to the general number of weeks or months processing spans.[129] Although this is helpful, other problems with processing times remain. For example, processing times for some application and petition types remain unavailable, and the processing times that are available do not reflect RFE-related delays.

- **Restrictions on Congressional Liaison.** USCIS has also reportedly placed restrictions on how Members of Congress can assist constituents with their immigration cases. In December 2017, USCIS sent an email to Capitol Hill staffers announcing new privacy release requirements.[130] The email indicates that USCIS will respond to congressional requests only if the request is accompanied by a privacy waiver that: (1) includes a "handwritten and notarized signature" (no electronic signatures); (2) names only the congressional office as the authorized recipient; (3) includes full translations of any non-English text, along with translator certifications; and (4) is "newly signed and dated for a follow-up question or status update request after the initial/previous inquiry received a meaningful and accurate response and has been closed for 30 days."[131] These new requirements, which translate into unnecessary red tape, create additional obstacles for U.S. citizens, businesses, and immigrants seeking information or assistance on their case, and could bar Congressional staffers from speaking with the attorney of record, which is often necessary to get a full understanding of the issue and steps taken to date.

The lack of timely and accurate data, the inability to obtain substantive information on a pending application or petition, and the creation of bureaucratic hurdles to seeking congressional assistance erodes public trust, frustrates the ability of affected stakeholders to make personal and professional plans, and elevates stakeholder anxiety surrounding the immigration process.

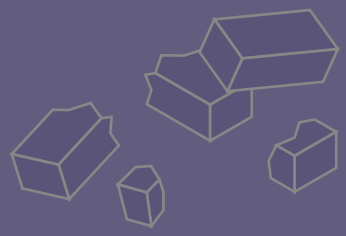
More Bricks in the Kiln

The invisible wall has risen quickly and will undoubtedly continue to rise higher. In addition to the future regulatory actions noted above, the Fall 2017 regulatory agenda includes even more proposals to restrict immigration, including:

- **INA §212(e) Waivers.** An Interim Final Rule creating a presumption against recommending waivers of the INA §212(e) two-year home-country residency requirement for no-objection and exceptional hardship cases.[132]

- **Public Charge.** A Notice of Proposed Rulemaking to define the term "public charge" and outline DHS's policy regarding the public charge inadmissibility determination.[133]

- **H-1B Registration.** A Notice of Proposed Rulemaking to establish an H-1B electronic registration program for cap-subject petitions, which may include a modified selection process to help ensure that H-1B visas are awarded to the most-skilled or highest-paid beneficiaries in accordance with section 5(b) of EO 13788, Buy American and Hire American.[134]



THE LACK OF TIMELY AND ACCURATE DATA, THE INABILITY TO OBTAIN SUBSTANTIVE INFORMATION ON A PENDING APPLICATION OR PETITION, AND THE CREATION OF BUREAUCRATIC HURDLES TO SEEKING CONGRESSIONAL ASSISTANCE ERODES PUBLIC TRUST, FRUSTRATES THE ABILITY OF AFFECTED STAKEHOLDERS TO MAKE PERSONAL AND PROFESSIONAL PLANS, AND ELEVATES STAKEHOLDER ANXIETY SURROUNDING THE IMMIGRATION PROCESS

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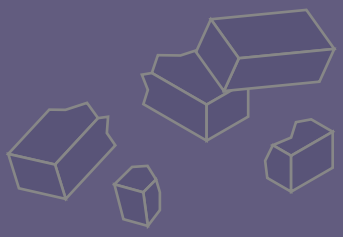
- **H-1B Specialty Occupation and Employer-Employee Relationship.** A Notice of Proposed Rulemaking to revise the definition of "specialty occupation" to focus on obtaining the best and the brightest H-1B workers, revise the definition of employer-employee relationship, and ensure employers pay appropriate wages to H-1B visa holders.

- **Practical Training for Students.** A Notice of Proposed Rulemaking to make comprehensive changes to the practical training programs for F and M nonimmigrant students "to improve protections of U.S. workers who may be negatively impacted by employment of nonimmigrant students…."[135]

In addition, we can expect even more restrictions placed on legal immigration through policy guidance that is typically issued quickly and without notice. Other policies will not be announced at all, and will be revealed only by observing adjudication trends, through Freedom of Information Act requests, or through investigative reporting.

Conclusion

How high will the invisible wall be a year from now? Two years from now? At the beginning of the next administration? It is difficult to predict. But one thing is for sure: When the tide eventually turns and we start to move back toward our legacy as a "Nation of Immigrants," it will take years to chip away at the policies and rules that comprise the invisible wall, and years to undo the damage to our country and our reputation in the world as a result of these policies and practices.



IT WILL TAKE YEARS TO CHIP AWAY AT THE POLICIES AND RULES THAT COMPRISE THE INVISIBLE WALL, AND YEARS TO UNDO THE DAMAGE TO OUR COUNTRY AND OUR REPUTATION IN THE WORLD AS A RESULT OF THESE POLICIES AND PRACTICES

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