

Many are wondering about changes to immigration with the new administration. In this article, we'll take a brief look at how H-1B petitions may be affected.

The H-1B visa allows U.S. employers to hire foreign nationals for positions requiring specialized knowledge, obtained through a bachelor's degree or higher in a specific specialty field, or equivalent experience.

H-1B visas are governed by laws made by Congress and regulations developed by the agencies that administer these programs (USCIS, State Department, CBP). Any change to the laws must go through Congress, and any change to regulations has to go through an administrative review process, taking at least 30 days.

Therefore, any dramatic change to the program would have to go through Congress or a review period, so there would be some advance warning of a major change. If the administration tries to make a major change on its own (say, by executive order) the courts might reject the change as being against the law.

That said, the administration can make changes that affect the programs without changing the laws. Executive orders are one way to make changes to how the law is implemented, and these could affect some people through actions like Executive Order 13769 (the "Muslim travel ban" of 2017). In the long term, if these orders are contrary to the law, they'll likely be rescinded or overturned, but there may be some short- to medium-term disruptions that are unpredictable

Another way the administration can change the H-1B program is through the leaders they put in place at the agencies that implement the program, such as USCIS. While not changing the law, this can have a big effect on how visas are adjudicated. Here, it's helpful to look at what happened in 2017-2020.

During this time, H-1Bs were adjudicated more strictly. That is, more petitions were denied, and many more Requests For Evidence (RFEs) were issued. From 2013-2016, H-1B approval rates were above 90%, but in 2018, approval rates dropped to 76%. These changes were not across the board, however, and some types of petitions were adjudicated more strictly. Which ones?

First, in keeping with the administration's goal of protecting American workers and wages, lower wage positions faced greater scrutiny. In fact, the administration planned to make this preference for higher wage positions a permanent change to regulations, but this did not happen. It is likely that they'll try this again, but as noted above, any permanent change will take time.

Second, petitions from IT outsourcing companies have always been scrutinized by USCIS, but much more so from 2017-2020. Additionally, if the H1B position paid a relatively low

wage (in the bottom 25-40 percentile for the job and area) you could expect an RFE and possibly a denial.

Third, USCIS relied excessively on the Department of Labor's *Occupational Outlook Handbook* (OOH) in adjudicating petitions. The OOH describes occupations and their requirements, and some occupations are described in vague or ambiguous terms, allowing USCIS to question the position.

Though an H-1B petition only needs to meet one of four criteria to show that the position is a "specialty occupation," USCIS strongly emphasized the first criteria (a bachelor's or higher degree is normally the minimum entry requirement for the position). Using the OOH as its "authoritative source" for this criteria, if the position appeared questionable according to the OOH, USCIS was likely to issue an RFE, and sometimes a denial – even if the position met other valid H-1B criteria.

An example is the Data Scientist job, which is clearly a specialty occupation. Though this job has existed for at least a decade, it wasn't added to the OOH until a few years ago. Before then, petitioners had no choice but to shoehorn the role into a job classification that might not fit, like statistician, information research scientist, or software developer. All these jobs share aspects of the Data Scientist job, but their differences could make petitions vulnerable to scrutiny.

Despite these changes, many H-1B petitions were approved during the previous administration, even when facing some of the challenges described above. It is helpful to have guidance from an immigration lawyer who has navigated these trends in the past and responded favorably.

In summary, we can expect restrictive changes to immigration programs like the H-1B classification, both large and small. It's impossible to predict the changes, but dramatic changes will take time to get through Congress or the administrative process. Smaller changes will probably start soon after the new administration takes office, and will most likely be similar to the ones that happened from 2017-2020.