A Glimpse Into the Immigration Crystal Ball

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Anyone who has dealt with the Immigration Service or ICE over the past 2 years would agree that we are living in a fairly contentious pro-enforcement immigration environment.

In looking forward to 2019, our crystal ball tells us to expect more of the same.

The trend of deliberately voluminous and combative Requests for Evidence from USCIS is expected to continue along with a surge in worksite compliance enforcement (I-9 audits) from ICE and the reversal of rules that were once beneficial to certain foreign nationals.

H-1B and L-1 Adjudications

On April 18, 2017 an Executive Order, "Buy American Hire American" ("BAHA") was signed, and set off a chain reaction that resulted in a palpable difference in the adjudications process of H-1B and L-1 visas.

According to the National Foundation of American Policy,[1] by the fourth quarter of Fiscal Year 2017 ("FY 2017"), almost 70% of H-1B applications filed received Requests for Evidence (RFEs). In fact the number of RFEs received in the fourth quarter of FY2017 alone almost equaled the number of RFEs for the first three quarters combined, with 63,184 RFEs issued in the fourth quarter alone compared to 63,599 in the first, second and third quarters combined. This drastic increase began in July 2017, less than three months after the signing of BAHA.

Within the increase of RFEs, there is an evident national origin disparity. Applications filed on behalf of Indian nationals received RFEs at a higher rate than those of any other country. We believe this disparity is related to higher scrutiny of applications in the Information Technology industry. In the fourth quarter of FY2017, 72% of H-1Bs filed on behalf of Indian nationals received RFEs as compared to 61% from all other countries. More significantly, the denial rate of H-1Bs for Indian nationals rose 42% from the third to fourth quarter of FY 2017 alone, with 16% of H-1B petitions denied in the third quarter and 23.6% of H1B petitions denied in the fourth quarter.[2]

The same trend has been seen in the adjudication of L-1 petitions filed with the USCIS Service Centers in the United States. Denials of L-1B petitions rose from 21.7% to 28.7% in FY 2017, representing a 33% increase, with almost half of petitions filed on behalf of Indian nationals being denied in the final quarter of FY 2017. While the statistics for the full fiscal year of 2018 have not yet been released, it is reported that the denial rate for L-1B petitions in the first quarter of FY 2018 was 30.5%, and 29.2% in the second quarter of FY 2018. The rate of denial for L-1A petitions increased by 67%, from 12.8% to 21.4% in FY 2017.[3]

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[1] The National Foundation for American Policy is a 501(c)(3), non-profit, non-partisan research organization focused on immigration, international trade and other global issues. NFAP's research has been cited on over 100 occasions in authoritative sources such as the *Wall Street Journal*, *New York Times* and *Washington Post*. See https://nfap.com/about-us/

[2] https://nfap.com/wp.../H-1B-Denial-and-RFE-Rates.DAY-OF-RELEASE.July-2018

[3] Id.

While the rate of RFEs for L-1 petitions remained fairly consistent, the occurrence of RFEs continued to be inflated.

Aside from BAHA, another driving force behind the increase in RFEs and denials is the loss of the long-standing practice of deference to prior adjudications. On October 23, 2017, that practice was officially rescinded by USCIS wreaking havoc on the adjudications of extensions and amendments of previously approved H-1B and L-1 petitions.

We expect to see similar trends in the year 2019, perhaps not with the same level of increase, but do not necessarily expect these numbers to climb any higher.

ICE Worksite Enforcement Spike

The year 2018 saw a significant increase in compliance enforcement with regard to I-9 regulations and employment-based record keeping.

ICE instituted a two-phase enforcement effort in the year 2018. The first phase was conducted from January 29th through March 30th 2018 and resulted in 2,540 Notices of Inspection (the Notice of Inspection, or "NOI" is the notification given to employers that an I-9 audit is being conducted), and 61 arrests. In July, the second phase began and resulted in 2,738 NOIs being issued, resulting in 32 arrests.[4]

In its totals for FY 2018, ICE reported that a staggering 6,848 worksite investigations were opened by Homeland Security Investigations ("HSI") in FY 2018, as compared to 1,691 in FY 2017. Similarly, HSI opened 5,981 I-9 audits in FY 2018, as compared to 1,360 in FY 2017; a 400% increase.

Further, FY 2018 saw HSI make 675 criminal arrests and 984 administrative worksite-related arrests, as opposed to FY 2017 in which ICE made 139 criminal arrests and 172 administrative arrests. This is an increase of more than 500% year over year.

Continued targets for I-9 audits will likely include factories/manufacturing companies, food packaging companies, restaurants, construction companies and staffing companies. However, we also expect that in the coming year, random audits will rise and thus the types of companies subjected to I-9 audits will not be limited to those industries listed above.

Once ICE comes knocking on the door, and issues a NOI, a business has 3 business days to produce payroll records and all I-9s. Thus, the best protection for any employer is to maintain and conduct internal audits of I-9 records before a NOI is issued. A company that completes internal audits and I-9 training prior to an audit has the added defense of "good faith" compliance which is a powerful bargaining tool in order to negotiate fines and reduce them significantly if ICE ever does come knocking on the door.

[4] https://www.ice.gov/news/releases/ice-delivers-more-5200-i-9-audit-notices-businesses-across-us-2-phase-nationwide

Rescission of Employment Authorization for certain H-4 visa holders

Many Executive Orders signed by the prior administration have been negated in the past 2 years, and one of the next on the proverbial chopping block may be the current eligibility for certain H-4 non-immigrant visa holders to obtain work authorization in the United States.

The current rule, in place since 2015, allows H-4 dependent visa holders to obtain work authorization if an immigration petition (I-140) has been approved for the H-4's spouse, and there is a quota backlog which does not otherwise allow for the final stage of the green card application to be filed.

The proposed rule (RIN 1514-AC15) to rescind this grant of work authorization was initially expected to be published in February 2018 but was delayed.[5] At this point we continue to wait for the proposed rule to be sent to the Office of Management and Budget (OMB) to be reviewed as a Notice of Proposed Rule Making. There is reason to believe that this proposed rule will become a final rule in the year 2019 in keeping with the spirit of BAHA. However, the current federal government shutdown is preventing this process from moving forward at the moment, so there is at least some hope that this rule may survive the year.

The Supreme Court may have good news in store this year- *Kisor v. Wilkie*

Because there is always a silver lining, the U.S. Supreme Court will hear arguments this year in a new matter, *Kisor v. Wilkie*. *Kisor* is a challenge to two key precedents (*Auer v. Robbins* and *Bowles v. Seminole Rock& Sand Co*) which give agencies automatic deference in their reading and interpretation of their own regulations. USCIS often cites *Auer* in decisions where it applies heightened standards for reviewing the "employer-employee" relationship or creates new evidentiary standards for demonstrating that a position qualifies as a specialty occupation.

If the court were to reverse the ruling in *Auer v. Robbins* (one of the decisions it is reviewing in *Kisor*), this will remove USCIS's ability to consistently change its interpretation of regulations that have been on the books for decades, essentially moving the goal post every time practitioners adjust to the new standards being imposed by USCIS. This could, in effect, force the agency to settle on more reasonable definitions and standards of review.

It should be noted that if the *Kisor* ruling does overturn *Auer*, this will *not* mean that deference will be completely removed from federal agencies, but instead, the *Skidmore* standard of deference would control. The *Skidmore* standard allows a federal agencies' interpretation of its own regulation to be "weighed" based on its ability to persuade, but does not allow for absolute deference, which is what federal agencies currently enjoy. Thus, with this new case, the stage is set for the U.S. Supreme Court to force USCIS to live reasonably within the four corners of the regulations which would negate the existence of many of the RFEs it issues now.

[5] https://www.natlawreview.com/article/uscis-publishes-notice-proposed-rule-making-to-remove-employment-authorization

The reason for our collective optimism in the Supreme Court agreeing to hear arguments in *Kisor* exists in the unlikely prospect that that the Supreme Court has agreed to hear this particular case for the purpose of affirming longstanding precedent. In fact, we know that in their time on the Circuit Courts, both Justices Gorsuch and Kavanaugh have expressed support for reigning in the level of deference afforded to federal agencies and have sought to limit the unbridled power of federal agency interpretation. So our prediction is that in the year 2019, we may very well see the USCIS served with some accountability and oversight if it goes too far adrift of its own regulatory standards.

Summary

Given BAHA and its trickle-down effect on U.S. immigration policy, anyone seeking to file an application for an immigration benefit in the year 2019 should approach the process with careful optimism. In the year 2019 the practice of immigration law will continue to present a challenging environment but with the proper professional assistance, any employer can navigate the labyrinth of regulations and policies to achieve success in the process. We remain optimistic – so should you.

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