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## Another Kind of Wall

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The current administration has dramatically reshaped our national immigration policy, which historically has centered on uniting close family members, employer sponsorship and humanitarian protection. The impact of new policy guidelines and enforcement priorities impacts not only immigration attorneys, but touches all aspects of law, including labor law, criminal defense and family law.

This article will focus on the significant changes in policy and enforcement occurring on a national level. It is noteworthy that Governor Brown signed into law three new provisions intended to protect immigrant workers and others in California. The new laws became effective January 1, 2018:

1. AB 450 provides protection to California workers and imposes fines on employers who voluntarily consent to warrantless searches or inspection by Immigration and Customs Enforcement (“ICE”) agents.
2. SB 54 is a controversial rule that sets forth California as a sanctuary state, mandating that local law enforcement officers not provide assistance to ICE agents. This provision attempts to combat problems faced by communities where law enforcement cooperates with ICE, which has a chilling effect on crimes being reported and witnesses cooperating with police.
3. Lastly, AB 103 requires California to: monitor the conditions of federal immigration detention facilities to ensure humanitarian practices are being followed, and to prevent California’s municipalities from entering into new contracts with ICE for the purpose of detaining immigrants in jails.

These three new laws were passed in direct response to the current administration’s increased enforcement efforts, including the noteworthy raids that have taken place across California. It should be noted that in March of this year, Attorney General Jeff Sessions brought an action in the Ninth Circuit contesting the constitutionality of the new California laws.

Despite overwhelming evidence of the value that immigrants bring to our country, a series of recent executive orders have been effectively slowing and hindering *legal* immigration without congressional action. These efforts on a federal level have separated families, impacted business development and increased waiting times for lawful immigrants. This article will focus only on

the most significant of the recent executive orders and administrative policy shifts impacting both employers and immigrants in our communities.

While President Trump continues his focus on strengthening the physical barrier with Mexico, his administration has quietly shifted interior enforcement priorities and adjudication policies to become more restrictive, including refugee policies and the administrative processing of all immigrant visa petitions.

### Enforcement priorities

The prior administration set three levels of enforcement depending on the severity of an immigrant's criminal or immigration violation(s). These priority levels were coupled with consideration of an immigrant's equities based upon family ties. The current policy has effectively eliminated this concept of prosecutorial discretion and has made all individuals unlawfully present in the U.S. an enforcement priority.

### Extreme vetting

A new concept of so-called "extreme vetting" has been introduced to better secure our country, which has had the direct effect of causing both delays and uncertainty for many legal immigrants, including those working in critical capacities for large tech companies and start-ups. The United States already has a robust and comprehensive vetting procedure in place, which involves comprehensive background checks on all applicants for immigration benefits through numerous national databases. The opaque new vetting process further complicates and strains an already burdensome system of checks. The vetting process has also been expanded to include the monitoring of social media activities of immigrants, as well as the increased search of electronic devices at the border.

### Administrative processing

In addition to the concept of extreme vetting there has been increased use of "administrative processing", which further delays adjudication for visa applicants overseas. Administrative processing is a term used by the Department of State for cases that appear to meet the basic eligibility requirements but require additional background or security checks. Individuals subject to administrative processing generally are not given notice as to the issue involved. Individuals can expect delays from 2 to 12 months when subject to administrative processing, which can cause significant inconvenience for U.S. companies that require their skills and expertise.

### Interviews in the U.S.

Effective October 1, 2017, all employment-based "green card" applicants and their family members, (including asylum-seekers and refugees who have already been vetted and admitted to the United States), must attend an in-person interview at their local USCIS district office. This is a significant departure from a long-standing policy that waived individual interviews unless a particular issue needed to be addressed. Most employment-based individuals have already been vetted prior to entry and when renewing their visas, as they are required to maintain strict authorized status while working in the United States. Interviewing large numbers of additional

employment-based and refugee petitions has resulted in significantly longer wait times for all applicants, including family-based petitions and naturalization cases.

#### Buy American, Hire American (BAHA)

Effective January 2017, the current administration announced its BAHA policy designed to ensure higher wages and employment rates of U.S. workers and to protect U.S. economic interests by enforcing laws governing the admittance of foreign workers. Under particular scrutiny is the H-1B program for skilled workers and specialty occupations, a visa category through which many companies are able to employ highly-skilled workers in areas such as engineering. In effect, the current directive changes the process to make it more difficult and costly for U.S. employers. Specifically, petitions filed for computer programmers and related occupations are no longer automatically considered professional positions. In addition, cases previously approved are no longer given direct deference even though a previously submitted application for the same employer and exact same position remains valid. This means applications previously approved for the same position and same employer can be denied based upon the nuances of BAHA.

#### Employment for spouses

Effective February 2015, DHS implemented a policy to allow spouses of H-1B workers who have applied for and received approval of an immigrant visa petition (the second step towards obtaining a “green card”) to secure employment authorization (EAD). Prior to February 2015, spouses of H-1B professional workers could remain in the U.S. legally, but were not authorized to work. This rule allowing H-4 spouses to secure employment authorization has been welcomed by both immigrant families and employers. It is a popular program which has allowed some 100,000 H-4 spouses to receive work authorization, while they wait up to a decade for visa numbers to become available for permanent residence. The current administration is poised to eliminate this benefit, which will most certainly cause a large number of families to suffer financial hardship, as well as create another interruption in business opportunities for employers.

#### “Chain migration”

Historically, immigration rules and regulations have been directed towards two components, family-based immigration and employment-based immigration, in more or less equal numbers. The concept of family unit unification has long been central to our country’s immigration law. Despite this, recent attention has been given to the elimination of “chain migration”. This term has no exact meaning or definition. The current administration has employed this term to set forth principles that have very little empirical data behind them. The waiting period for most family-based petitions (adult children - over 21 years old - and brothers and sisters) can take from 10 to 20 years, depending on nationality. Only immediate relatives, which are defined as the spouses of U.S. citizens, parents of U.S. citizens, or unmarried sons and daughters of U.S. citizens under age 21, are exempt from lengthy immigration quotas that have made it challenging for immigrants to legally bring their close family members to the United States.

#### Extended processing times for visa petitions

Under the current administration, the processing times for the majority of visa petitions have lengthened substantially, and in some cases processing times have more than doubled. The lengthy

processing times make it difficult for employers and employees to timely ensure compliance with immigration regulations.

### Conclusion

The recent spending bill of \$1.3 trillion passed by Congress provides funding for a portion of the physical wall with Mexico, but no path to status for DACA recipients, and only increases the allowance for H-2B visas for seasonal, foreign temporary workers to provide service to employers such as hotels and golf courses.

The conflict between federal law and California's new laws (AB540, AB103, and SB54) will be decided by the courts. Many of the new restrictive measures have come forward as executive orders with no congressional oversight or reinterpretation of existing law. However, these changes will have far-reaching impacts on U.S. businesses and the country's economy. To simply conclude that immigrants do not benefit the United States economically, overlooks the lasting contributions in business, education and the sciences made by foreign-born individuals that have allowed the United States to excel as a leader in technology, innovation and scientific research.

It has become clear that all individuals seeking admission to the U.S. will face additional challenges in the near future, regardless of whether they have legal status, employer sponsorship, or have already received refugee or asylee status. There is concern that through increased enforcement within the U.S., lengthy adjudications, and restrictive policies, the U.S. is isolating itself behind a wall that will impact our worldwide reputation.

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