

What Employers Need to Know about President Obama's New Immigration Executive Order

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President Barack Obama's new immigration policy contains a number of measures designed to make it easier for U.S. businesses to hire and retain highly skilled foreign-born workers while also permitting those workers to advance their careers.

On Nov. 20, President Obama issued a number of executive actions to revise U.S. immigration policies that he said are important steps to fixing the country's broken immigration system.

The bulk of attention has focused on the creation of a new deferred action program for an estimated 5 million undocumented parents of U.S. citizens and lawful permanent residents, who would be eligible to apply for work authorization permits for a period of three years if they register with U.S. Citizen and Immigration Services (USCIS), pass a criminal background check and pay taxes.

Somewhat lost in the mix, however, was a slew of policy changes that President Obama said are intended to "make it easier and faster for high-skilled immigrants, graduates, and entrepreneurs to stay and contribute to our economy, as so many business leaders have proposed."

While many of these policies require further action, the following are possible changes that will affect the hiring and retention of high-skilled foreign born workers:

- **Employment-based Green Cards:** Employers may sponsor foreign-born workers for lawful permanent residence, or a "green card," based on permanent employment in the United States. Workers with approved employment-based immigrant petitions (Form I-140) can wait years for a green card, however, due to the limited number of immigrant visas available and bureaucratic inefficiencies. This has prevented U.S. employers from attracting and retaining highly skilled workers. The President has directed USCIS and the Department of State to ensure that all available green cards are issued each year, to revise the content and format of the Department of State's Visa Bulletin to make them more easily understood, and to change regulations if needed.
- **Increased Worker Portability:** Foreign-born workers with approved employment-based immigrant visa petitions who have been waiting more than 180 days to apply for a green card, also known as applying for an Adjustment of Status, can change jobs without jeopardizing their green card application. The process, known as porting, permits the worker to take a new job in the "same or similar" occupational classification as their old job. Unfortunately, uncertainty about what constitutes a "same or similar" occupation has prevented workers from changing employers, seeking new job opportunities or accepting promotions for fear that doing so might void their approved immigration visa petition. To eliminate this uncertainty, USCIS is expected to issue guidance to make clear that a worker can accept a promotion to a supervisory position or otherwise transition to related jobs "within his or her field of endeavor."

- **Clarification of “Specialized Knowledge” in Intracompany Transfers:** The L-1 visa program for “intracompany transferees” allows multinational companies to transfer employees who are managers, executives or have “specialized knowledge” to the United States from foreign operations. Vague guidance and inconsistent interpretation of the term “specialized guidance” has made it difficult for companies seeking L-1B visas for employees. To correct this problem, USCIS is expected to issue a memorandum that provides clear guidance on the meaning of “specialized knowledge” and clarify L-1B eligibility standards for adjudicating officers. The guidance is expected to be issued by January 2015.
- **H-4 Spousal Work Authorization:** Currently, the spouses of H-1B visa holders are not permitted to work in the United States. H-1B visa holders work in specialty occupations or have advanced degrees. In May, USCIS published a proposed rule that would permit a spouse, known as H-4 visa holder, to work if the H-1B visa holder is in the process of getting a green card. This rule is reportedly expected to be finalized by January 2015.
- **Visa Eligibility for Foreign Inventors, Researchers, and Entrepreneurs:** USCIS is expected to devise a program that will permit inventors, researcher and start-up entrepreneurs to temporarily pursue research and development opportunities in the United States if they have been awarded substantial U.S. investor financing, can demonstrate a promise of innovation and job creation through the development of new technologies, or are engaged in cutting-edge research. USCIS is also expected to clarify the standard by which a “national interest waiver” can be granted to non-citizens with advanced degrees or exceptional ability who seek a green card without employer sponsorship. Currently, the “national interest waiver” is underutilized based on limited guidance on when it may apply.
- **Reforming Optional Practical Training for Certain Foreign Students:** Certain foreign nationals studying in the United States on a non-immigrant F-1 student visa may be permitted to stay in the United States for temporary employment in their field of study. This is known as optional practical training (OPT). USCIS is expected to develop new regulations that would expand the degree programs that are eligible for OPT and to extend the period of time for OPT beyond the 29 months currently available for students engaged in science, technology, engineering and mathematics (STEM). This extension would benefit employers by keeping talented STEM graduates from departing the country and taking their skills overseas. In addition, USCIS is expected to take steps to ensure that OPT employment is consistent with U.S. labor market protections to safeguard the interests of U.S. workers in related fields. This may include a prevailing wage requirement for OPT employment.
- **Review of PERM Regulations:** Before certain petitions for visas may be approved permanent employment, the U.S. Secretary of Labor must certify that (1) there are not sufficient U.S. workers who are able, willing, qualified and able to perform the work; and (2) the employment of the petition beneficiary will not adversely affect the wages of and working conditions of similarly employed U.S. workers. The process for this certification, known as PERM, requires a number of regulatory steps by the employer submitting the petition. Given that technological advances have dramatically altered industry recruitment practices, the Department of Labor (DOL) is initiating a review of the PERM and its regulations. As part of this overhaul, the DOL will seek input on the following:
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Options for identifying labor force occupational shortages and surpluses and methods for aligning domestic worker recruitment requirements with demonstrated shortages and surpluses;

- Methods and practices designed to modernize U.S. worker recruitment requirements;
 - Processes to clarify employer obligations to ensure PERM positions are fully open to U.S. workers;
 - Ranges of case processing timeframes and possibilities for premium processing, and;
 - Application submission and review process and feasibility for efficiently addressing nonmaterial errors.
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- **Enforcement Group to Protect Immigrant Rights:** Federal immigration enforcement agencies, the Department of Justice, the DOL, the Equal Employment Opportunity Commission and the National Labor Relations Board have formed a working group to prevent employers from deterring an employee from asserting workplace rights and protections because of the employee's immigration status. The Enforcement Group is expected to develop policies and procedures that promote workers' cooperation with labor and employment law enforcement authorities without fear of retaliation or removal while the investigation is ongoing.

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