IN WHAT AREAS DOES THE EXECUTIVE BRANCH HAVE AUTHORITY TO CHANGE CURRENT POLICY AND RULES GOVERNING THE HIRE OF HIGH-SKILLED FOREIGN WORKERS?

On April 18, 2017, President Trump signed the "Buy American and Hire American" (BAHA)[1] Executive Order (EO) announcing that it shall be the policy of the executive branch to buy American and hire American. In describing the "Hire American" policies, the EO states that in order to protect U.S. workers, the Trump administration will rigorously enforce the immigration laws. The EO directs the Departments of State, Justice, Labor and Homeland Security to take two actions as soon as practicable: (1) propose new rules and issue new guidance "to protect the interests of United States workers in the administration of our immigration system," and (2) suggest reforms specifically about the H-1B visa program such that "H-1B visas are awarded to the most skilled or highest-paid petition beneficiaries."

This outline attempts to answer the question: what actions are the agencies most likely, within current statutory and regulatory limitations, to take in order to implement a "Hire American" policy regarding the H-1B program and related programs? Part I of this memo makes general observations to set the stage for Part II in which individual potential issues are analyzed in detail.

❖ (I) GENERAL OBSERVATIONS

1) REDUCING LEGAL IMMIGRATION

The BAHA EO will encourage and facilitate agency action by senior officials with an agenda to restrict legal immigration

Key White House advisors on immigration and agency political appointees with immigration responsibilities are clear about their commitment to reducing legal immigration. This administration is expected to develop options for implementing BAHA initiatives, many of which will likely be contrary to the interests of the business community.[2]

Comments and current undertakings by Department of Homeland Security (DHS) officials and White House staffers reflect an interest in utilizing BAHA as a launching point and framework for (1) taking steps to require the payment of higher wages and the occupational average wage in order to qualify for H-1B status, (2) reexamining the H-1B lottery, (3) rescinding Obama administration employment-based regulations and revisiting parole authority, (4) raising filing fees, (5) tightening enforcement of the Labor Certification requirement and expanding the required information needed to complete the Labor Condition Application, and (6) intensifying enforcement generally. Each of these six issue areas is explored below.

Takeaway. The business community should anticipate actions that touch on each of these six high-skilled immigration areas. Where appropriate, industry should be developing facts, data, and legal theories that could be used to challenge such administrative steps.

[1] Acronym for the EO referred to as "baja."

[2] For example, when DHS was given authority by Congress to issue more H-2B visas in an appropriations bill signed into law May 5, 2017, the Department's response was limited. Congress authorized the admission of up to about 70,000 additional H-2B lesser skilled workers during FY17, but DHS chose to cap the additional allocation to no more than 15,000 and require a showing of "irreparable harm" by sponsoring employers, and the agency not publish the rule until July 19, 2017 (https://www.gpo.gov/fdsys/pkg/FR-2017-07-19/pdf/2017-15208.pdf) allowing only two months for employers to process the new H-2B visa petitions.

2) LITIGATION

The administration is not litigation averse

The administration's record of defending lawsuits concerning the travel ban and its pronouncements concerning sanctuary cities illustrate it is not averse to litigation. While it appears the incoming U.S. Citizenship and Immigration Services (USCIS) Director is well-aware of the statutory and regulatory boundaries of the Immigration and Nationality Act (INA)[3] and the Administrative Procedure Act (APA),[4] it may be that the administration will be willing to test these boundaries to implement policy changes as quickly as possible. As a general matter, the APA must be complied with in changing regulations. However, there are many examples where DHS has traditionally implemented policies and procedures by means of guidance and other subregulatory actions outside of the notice-and-comment rulemaking process. It is thus critical that an assessment be made of the statutory and discretionary authorities applicable to discrete issues of concern, as attempted in Part II of this memo below.

Takeaway. Where prior policies were announced through notice and comment rulemaking, current administration officials are well-aware these require notice and comment rulemaking to amend or repeal. However, the administration may be inclined to revise or rescind even long-standing policies without public input and the business community should carefully evaluate whether such actions potentially violate the requirements set forth under the APA.

3) DEREGULATION

Avoiding costly new rules, implementing the 2-for-1 mandate, and the impact of these principles on APA notice and comment rulemaking

The administration announced in January that no regulations would be finalized in FY17 with a cost more than zero, including regulations repealing current regulations, and that for every final rule in FY17 its costs will be offset by the elimination of existing costs associated with at least two prior regulations, where permitted by law.[5] Despite two Office of Management and Budget (OMB) memos issued to explain how agencies should implement this EO,[6] uncertainty remains, at least within DHS, as to how compliance with this new EO can be achieved. This is important when considering Obama administration employment-based immigration regulations that the administration may wish to repeal, as this mandate has the potential to complicate the ability of the agency to act.

Although the "2-for-1" mandate only presently applies to FY17, the applicability period of this requirement could be lengthened thereafter. Regardless of whether the administration extends this regulatory initiative, at a minimum the current "2-for-1" mandate suggests a means to convince the administration to concentrate on regulatory reforms that are cost-savers and to avoid changes that are costly or burdensome, either to the economy, businesses, or innovation.

As a general concept, the current administration may possess a particularly strong incentive to rescind cumbersome policies and regulations[7] or promulgate policies and regulations that minimize bureaucracy.

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[3] Immigration and Nationality Act, first enacted in 1952 (Title 8 of the United States Code, section 1101 et seq.).
[4] Administrative Procedure Act, first enacted in 1946 (Title 5 of the United States Code, section 500 et seq.).
[5] "Reducing Regulation and Controlling Regulatory Costs," EO 13771 signed January 30, 2017 https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf.
[6] Interim guidance to regulatory policy officers throughout the federal government was issued on February 2, 2017 by OIRA (OMB's Office of Information and Regulatory Affairs) https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017 and final guidance on EO 13771's "2-for-1" provision was issued by OIRA on April 5, 2017 https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation.
[7] Even if this Administration is acutely attentive to removing unnecessary or excessive regulation, or "deregulation," this has been a theme of the executive branch for decades. It was least a stated goal regarding certain industries in multiple administrations, such as airline deregulation (by Carter in 1978, even though Reagan often is more associated with this) and

For example, while the administration is laser-focused on vetting foreign nationals entering the United States, it has nevertheless recognized the value of facilitating legitimate travel into the United States and avoiding bureaucratic delays at U.S. airports. This is evidenced by the fact that the administration has expanded Global Entry by adding Argentina (May 2017) and India (July 2017) and acknowledged the value of continuing and expanding the Preclearance[8] program. It's not clear as of yet what relationship these approaches have, if any, to the President's interest to "deconstruct" the so-called "administrative state,"[9] but stakeholders advocating for reforms that enhance efficiency may find an audience within the administration.

Takeaway. There may be opportunities to work with the administration when the issue involves policy changes that make clear gains in efficiencies and eliminating burdens, which, generally speaking, fit into a good-governance theme. These goals should be made part of any advocacy effort whenever credibly possible.

❖ (II) MOST LIKELY AGENCY ACTIONS IN RESPONSE TO THE BAHA EO

There are six probable areas in which the executive branch is most likely to explore action concerning the BAHA EO, without relying on further amendment by Congress to the INA. Each of these is discussed below.

1) HIGHER WAGES

What could the agencies do? The White House language in the BAHA EO and agency action preceding and following the EO suggest a focus on attempting to bar or discourage H-1B petitions for entry-level professionals or for H-1B workers not being paid at least the occupational average wage.[10] An approach that prefers the payment of the average occupational wage actually *divorces* wages offered to H-1B professional workers from market rates (young professionals and on-campus hires of newly minted college graduates, including those with a master's or a doctorate, do not receive salaries similar to those earned by their more experienced colleagues), which is extremely problematic for the employer community. This is the same approach encouraged by the Economic Policy Institute (see comments by Daniel Costa)[11] and the Durbin-Grassley legislation (S. 180 in the 115th Congress) – and the administration is clearly looking for ways to implement these concepts. The administration, however,

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financial deregulation (whenever there is a Republican president). Recently, we have witnessed attempts to "reinvent government" (Clinton) or conduct a "regulatory retrospective" (Obama) as reflective of a commitment to deregulation.

[8] DHS's Preclearance program provides pre-flight inspection for individuals traveling to the U.S. on flights from certain countries (https://www.cbp.gov/border-security/ports-entry/operations/preclearance). Pre-flight inspection was first started with Canada pursuant to NAFTA, and is now viewed as a key security tool while also facilitating international travel to the United States. GAO's most recent report on the Preclearance program (https://www.gao.gov/assets/690/682255.pdf) was issued just after President Trump's inauguration, and all indications are that the Administration is going to continue expansion of this program with improved monitoring as suggested by GAO.

[9] For a good article summarizing the underlying terminology and issues in the debate about the "administrative state" and how the Trump administration may view the issue, read this recent George Mason-AEI article https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2904043.

[10] The average wage for the occupation in a geographic area of employment would reflect an average of wages paid to the most experienced and highest-educated workers in an occupation as well as the least experienced workers with only the minimum level of education required for the same occupation. Obviously, the average would consistently overstate the wages due or typically paid to entry-level workers in the profession. There are three types of "average" wages: (1) the "mean" relates to what is most commonly referred to as the "average," and is technically "the arithmetic mean," calculated by adding up the values and then dividing by the number of values; (2) the "mode" refers to the most frequently occurring wage; and (3) the "median" is the middle value in a range of wage figures. The median is sometimes higher and sometimes lower than the mean. Nevertheless, White House staff seem to use the terms median and mean interchangeably. The Durbin-Grassley legislation (section Sec. 101(a) of S. 180, creating new 212(n)(1)(A)(i) of the INA) refers to the occupational median wage, while current DOL prevailing wage rules refer to calculating the weighted arithmetic mean for wage levels.

[11] For example, see the transcript of Costa's comments on the day the BAHA EO was announced http://www.pbs.org/newshour/bb/h-1b-visa-program-foreign-workers-improved/.

seems to be focused on preferring highly compensated H-1B workers, which may lead to administrative review and manipulation of wage levels.

Takeaway. It is critically important to *separate* analysis of (1) a general policy in H-1B adjudications to favor petitions on behalf of higher paid foreign professionals and (2) how USCIS handles or prioritizes H-1B petitions when the agency must order simultaneous submissions. While the administration might mix-and-match the two issues, stakeholders should be aware that the statutory authority and legal arguments relevant to the general policy question and the ordering of simultaneous petitions are distinguishable. The latter issue is explained below in the discussion on the H-1B lottery. With regard to the former, Congress would have to amend the law if USCIS wants to prefer H-1B petitions that pay the occupational mean or bar altogether those H-1B petitions that do not offer such wages. But by administrative fiat, the agency could wreak havoc on H-1B adjudications and the hiring practices of many employers by starting to issue Requests for Evidence (RFEs) and, ultimately, denials on the issue of whether a job is a qualifying specialty occupation based on salary offered or whether the job level stated by the employer is accurate.

Details. Congress defines an H-1B worker in the INA as an alien coming to the United States to provide services "in a specialty occupation." The statute further defines a "specialty occupation" that qualifies for H-1B classification as "an occupation that requires theoretical and practical application of a body of highly specialized knowledge."[12] It is certainly possible that DHS could move forward with a rulemaking that further defined a body of highly specialized knowledge as one that commands a high level of compensation relative to others working in the occupation. However, implementing this change in policy in a public manner would not only be time-consuming, but it would need to be accomplished over likely public objections by various stakeholders, including the business community.

Absent proposing such an approach through notice and comment rulemaking, USCIS could begin to erode its long-held interpretations in defining specialty occupations by including wage considerations in the process of evaluating whether an occupation is a specialty occupation. This could be done by having the Administrative Appeals Office (AAO) within USCIS issue non-precedent decisions that nevertheless communicate issues and adjudicative standards to adjudicators. In particular, non-precedent decisions or further policy memos could be issued replicating the approach described in a March 2017 policy memo that was ostensibly limited to the "computer programmer" occupation, a policy memo that standing alone can be, and is being, used to prefer more highly-compensated H-1B beneficiaries.[13]

The March 31st policy guidance from USCIS on computer programmers (hereafter referred to as the Computer Programmer memo) attempts to clarify the agency's position concerning occupations where it is not clear whether a bachelor's degree or above is required. The Computer Programmer memo stands for the principle that when current information from the Department of Labor's Occupational Outlook Handbook suggests that industry hiring standards for a given occupation do not set the possession of a bachelor's degree as a minimum requirement for jobs in that general field of work, the offered salary level

[12] With regard to qualifying for H-1B status, Congress has provided the following requirements in the INA to define a specialty occupation, at section 214(i):

214(i)(1) The term specialty occupation means an occupation that requires–
(A) theoretical and practical application of a body of highly specialized knowledge, and
(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
214(i)(2) For purposes of [H-1B status], the requirements … with respect to a specialty occupation are–
(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
(B) completion of the degree described in paragraph (1)(B) for the occupation, or
(C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

[13] USCIS Policy Memorandum https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf (March 31, 2017, PM-602-0142 "Guidance Memo on H1B Computer Related Positions").

will be used to determine if the particular job offered is a qualifying specialty occupation position that requires such a degree. Moreover, though, footnote 6 of the Computer Programmer memo unequivocally states that:

> "If a petitioner designates a position as Level I, entry-level position, for example, such an assertion **will likely contradict a claim that the proffered position is particularly complex, specialized, or unique**[14] compared to other positions *within the same occupation*."[15] (Italics in original, bolding added for emphasis.)

This logic embedded within the Computer Programmer memo could easily be replicated in other occupations, especially because nothing in footnote 6 of the Computer Programmer memo suggests the admonition should be limited to computer programmers. Furthermore, the memo seems to invite USCIS adjudicators to conduct a de novo review of the DOL certified Labor Condition Application (LCA) regarding the wage and skill level designated by the employer for the job opportunity.[16] USCIS adjudicators would then review the job duties described by each employer sponsoring an H-1B worker to reassess whether the job offered is correctly associated with wage level one, two, three, or four.[17] In particular, the Computer Programmer memo states that "USCIS officers must also review the LCA to ensure the wage level designated by the petitioner corresponds to the proffered position."[18]

Thus, the Computer Programmer memo indicates three adjudicative approaches that the administration can suggest are merely strict compliance with existing law and regulation: focus on salary based on DOL's Occupational Outlook Handbook pronouncements on industry hiring standards, consider level one inconsistent with a finding of a qualifying H-1B specialty occupation, and review the wage level being offered for the position.[19] These interpretations in H-1B adjudications will amount to other ways for the administration to implement its policy preference to eliminate or discourage the sponsorship of entry-level hires in the H-1B program, hires who are by definition not paid as much as more experienced hires. This ignores the fact that many employers would be shut out from utilizing the H-1B classification when hiring young professionals in jobs that require university degrees – at either the undergraduate or graduate level – but less than two years of employment experience. This is the definition of a "level one" employee under the Department of Labor's rubric for identifying wage levels.[20]

Similarly, any effort by the administration to insert a preference for H-1B beneficiaries that receive at least the occupational average wage[21] would be highly disruptive to employers. In particular, difficulty would arise for employers who pay less than the occupational mean when hiring young professionals. This is because many employers, if not the vast majority of employers, have starting salaries for young, less-experienced professionals *below* the occupational mean or the occupational median. Almost all employers in the United States make many hires every year of entry-level American professionals who

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[14] Compare section 214(i)(1) of the INA as delineated supra at footnote 12.
[15] See footnote 6 of the Computer Programmer memo (supra at footnote 13), at p. 3 of the memo.
[16] Inserting a new presumption that Requests for Evidence (RFEs) will be issued to question wage leveling sows disorder in the H-1B program because the wage leveling system itself is complex. DOL's Prevailing Wage Determination Policy Guidance (http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf) is a 36-page instruction document for placing jobs in one of the four wage levels based on the tasks, knowledge, skills, education, training, and experience associated with the job. Even the first step of this process is not always straightforward; the first step is to place the offered H-1B job into a particular detailed occupational code (one of the 840 detailed occupations identified by DOL's Standard Occupational Classification (SOC) system) by comparing the employer's job requirements to the occupational requirements described in the Department of Labor's Occupational Information Network (O*Net), http://online.onetcenter.org, to determine the minimum requirements generally required for acceptable performance in the job being filled by the sponsoring employer.
[17] DOL's Prevailing Wage Determination Policy, referred to id., explains the four levels at p. 7.
[18] Computer Programmer memo, supra footnote 13, citing to the April 2015 AAO precedent decision *Matter of Simeio Solutions* (26 I&N Dec. 542, 546).
[19] See DOL's Prevailing Wage Determination Policy Guidance, supra footnote 16.
[20] Id.
[21] The average wage for the occupation will always be higher than the wage paid entry-level workers, as discussed supra at footnote 10.

receive starting wages less than the occupational mean wage. A requirement that entry-level H-1B workers receive the occupational mean would necessitate H-1B workers being paid a higher salary than their American coworkers – an untenable result.

2) H-1B LOTTERY

What could the agencies do? In announcing BAHA, the administration stated its interest in revising the terms of the H-1B lottery[22] in high-demand years.[23] However, absent legislation authorizing specific changes to the management of the H-1B program, the administration's options to do so are very limited. The only directive Congress provided concerning the ordering of petitions is that "Aliens subject to the [H-1B] numerical limits *shall* be issued visas or otherwise provided nonimmigrant status *in the order* in which petitions are filed for such visas or status."[24] (emphasis added) A logical reading of the statute is that all petitions considered simultaneously filed have to be considered equally and that qualitative differences between petitions cannot prioritize or order such petitions. Because Congress has given no indication that any *qualitative* characteristics of H-1B petitions can be considered in prioritizing adjudication of received petitions, it does not appear USCIS has the authority to consider wages, either by level or total compensation, in determining the order of adjudication of H-1B petitions. In addition, the agency does not possess the authority to consider occupation, type of employer, business model of employer, or job level in setting the order of petition consideration.

It appears the only likely change the agencies could implement is to slightly prefer individuals who possess a U.S. master's or above through a small, albeit important, tweak to the administration of the current H-1B lottery. The current practice is for USCIS to first operate a lottery for up to 20,000 cap-exempt H-1B petitions filed on behalf of foreign professionals that have earned a U.S. master's or above prior to conducting the lottery for the general 65,000 H-1B cap. Instead, USCIS could conduct a lottery for the 20,000 set-aside exemption that is available for US graduate students second, after first giving those same students a shot at the general 65,000 lottery for cap-subject H-1B petitions. Arguably, this change could be made without rulemaking because the current practice was never subject to rulemaking, although the technical language of the INA suggests that USCIS's interpretation of looking at the 20,000 exemption first is correct.[25]

Takeaway. Legislation is required to allow USCIS to consider prioritization in the H-1B lottery by skill level or wage level, except that USCIS could change how it awards the 20,000 set-aside for H-1B beneficiaries that are graduates of master's or higher degree programs in the United States; this would add some preference for U.S. master's or above. Preliminary analysis suggests that conducting the 65,000 lottery first and then allocating the 20,000 set-aside second might add about 5,000 more petition approvals in a lottery year to beneficiaries with a U.S. master's or above. In other words, comparing the number of cap-subject H-1B approvals out of the 85,000 cap that were issued to beneficiaries with a U.S. master's or above shows that this approach would add about 5,000 more cap-subject H-1Bs going to U.S. graduate degree holders.

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[22] See https://www.whitehouse.gov/the-press-office/2017/04/17/background-briefing-buy-american-hire-american-executive-order.

[23] For the last five years, the H-1B cap has been met during the first five business days when petitions can be filed.

[24] Section 214(g)(3) of the INA (emphasis added).

[25] The H-1B numerical limit and exemption statute reads as follows with [bracketed] text and ***highlights*** added for clarity:

214(g)(5) The ***numerical limitations*** contained in paragraph (1)(A) [ie, the current 65,000 cap] ***shall not*** apply to any nonimmigrant alien issues a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who–
(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), or a related or affiliated nonprofit entity;
(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or
(C) has earned a master's or higher degree from an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), ***until the number of aliens who are exempted*** from such numerical limitation during such year ***exceeds 20,000***.

Details. The administration's BAHA-related rhetoric emphasizes a correlation between H-1B visas being awarded to the "most-skilled" and those H-1B visa holders that are the "highest-paid" and suggests an interest in using the wage leveling system of the Department of Labor to prioritize certain H-1B petitions in a lottery year. However, the INA does not appear to allow USCIS to change the H-1B lottery by preferring higher paid workers (level four first, then level three, and so on). It is likely that political appointees at USCIS, including the likely new USCIS Director and the new USCIS Chief Counsel, are well-aware of these restrictions. Nevertheless, it may be that the Administration will explore several options in defining perceived ambiguities in the statutory text in order to implement desired changes.

For example, in recent litigation, a federal district court found that USCIS's current policy of a random lottery was a reasonable interpretation of the INA but not a required outcome.[26] Plaintiffs in *Walker Macy* lost their lawsuit against USCIS where they sought to require the agency to maintain a waiting list for H-1B nonimmigrants as is done for Employment-Based and Family-Based immigrants waiting for green cards. While the court rejected the plaintiffs' arguments concerning waiting lists, the court wrote that

> "The relevant question is whether the statute unambiguously directs how to handle multiple submissions received on the same day or at the same time. The statute does not. It provides no guidance on how to "order" simultaneous submissions."[27]

Some questions exist about whether USCIS's own regulations require the agency to retain a lottery if there are multiple H-1B petitions received simultaneously, or whether such lottery must be random under the agency's regulations. Part of this speculation is grounded in the reality that the regulatory text establishing the random lottery is not clear.[28] While the 2005 regulations establishing the random lottery state that the agency "may" employ a random lottery in years where demand exceeds supply before the end of the fiscal year, the regulation does not permit any other means of addressing such an occurrence. And, in explaining the regulatory text to stakeholders, the preamble's interpretation of the regulation is that "USCIS *will* employ a random selection process" (emphasis added).

With respect to H-1B beneficiaries with U.S. graduate degrees, adding some preference for these H-1B workers would certainly be consistent with the Hire American EO and it seems feasible under the statute.

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[26] *Walker Macy v USCIS*, Case Number 3:16-cv-00995 (D.Or. 2017)(March 17, 2017 decision granted USCIS's motion for summary judgment).

[27] Id at p. 20.

[28] The lottery regulation is found at 8 CFR 214.2(h)(8)(ii)(B). There was no H-1B lottery, random or otherwise, until USCIS issued an interim final rule in 2005 announcing and explaining it. There were years before 2005 when H1B numbers were used before the end of the FY, but legacy INS and USCIS simply monitored filings and cut them off. In fact, the H1B cap has been met before the end of the FY in all FYs since FY97, except for the three years when the cap was set at 195,000 (FY01, 02, 03). When the random lottery regulation was published, the H-1B cap had never been met prior to the start of the FY. The lottery regulation evolved as follows:

- The May 2005 regulation https://www.gpo.gov/fdsys/pkg/FR-2005-05-05/html/05-8992.htm was promulgated because USCIS expected that the new allocation of 20,000 H-1B numbers set aside for U.S. master's and above would result in demand for that set-aside being met separately and before the regular 65,000 cap. The 2005 regulation says USCIS "may randomly select from petitions received on the final receipt date" (not will). The preamble announcing the 2005 random lottery rule explained that "to ensure the fair and orderly allocation of numbers in a particular classification subject to numerical limits, USCIS will employ a random selection process" (will, not may). Reading the 2005 final rule in total, it is clear from the explanatory preamble that USCIS was announcing that the agency "shall" conduct a random lottery in years where demand outstrips supply. But since it is in the preamble, that is, presumably under even a conservative reading of APA law, just a contemporaneous interpretation.
- In 2008, USCIS published a revision to the lottery regulation https://www.gpo.gov/fdsys/pkg/FR-2008-03-24/pdf/E8-5906.pdf to address the problem of H-1B demand exceeding the statutory supply on the first business day petitions for an FY can be filed, which had occurred in 2007. The March 2008 regulation was promulgated just before the filing period for FY09 because of the agency's experience in the filing season for FY08 (i.e., April 1, 2007) where for the first-time demand exceeded supply on the first day when petitions could be filed. The 2008 regulation says USCIS "will randomly apply all of the numbers among the petitions received on any of the first five business days" (will not may).

Since FY2006,[29] USCIS has interpreted the 20,000 set-aside statute as a directive to allocate the 20,000 set-aside first, so that petitions filed on behalf of aliens who earned master's degrees (or higher) from U.S. institutions of higher education are automatically first set-aside for consideration in the 20,000 pool. USCIS could "flip" the lotteries by first considering all petitions for the 65,000 cap, which would give aliens with US Masters or above a slightly higher chance of being selected in a lottery year. While the current policy has been in place for over ten years, it was never the subject of regulation or significant public discussion. Several Members of Congress specifically complained about the USCIS approach when it was first announced in 2005, and have been proponents of "flipping" the lotteries.

It might also be possible for USCIS to consider lottery changes that only address *quantitative* issues, that might theoretically improve the ability of all filers to have access to their H-1B petition being considered. For example, if the 65,000 lottery was divided into two separate lotteries, that might give more of an equal chance to smaller employers or employers of any size that request a small number of H-1B workers. In such a situation, all petitions would be considered in one lottery with no more than a certain number for each employer and all petitions not selected would be considered in the second lottery. There is no indication that USCIS is considering such an approach.

It should be noted that a proposed rule in 2011 concerning the H-1B lottery was actually a "pre-registration" system that was intended to address operational concerns[30] of USCIS in conducting the lottery in high demand years, and if reinstituted would not satisfy any of the goals of BAHA EO. The business community roundly criticized the 2011 proposal, which was promptly dropped by USCIS.[31] Another possible avenue is to propose a new pre-registration regulation taking in account stakeholder concerns in order to prepare for a time when there is legislation authorizing an H-1B lottery which would prioritize petitions by wages paid.

3) FINAL REGULATIONS FROM THE OBAMA ERA

What could the agencies do? DHS could rescind certain Obama administration employment-based immigration regulations that improve the current immigration system, as these rules have been criticized by immigration restrictionists. Absent rescission, the administration may take steps behind the scenes to effectively limit the benefits associated with these regulations or related policies by imposing new administrative burdens upon employers that use specific visa programs.

Takeaway. DHS has unquestioned authority to engage in such rulemaking, and has started the process to discuss such efforts. For each of these rules, DHS would have to engage in notice and comment rulemaking to rescind or amend the rule. There is little the agency could do to effectively and consistently undermine these rules without engaging in rulemaking since the current regulations create binding obligations on adjudicators. However, it is also true DHS could engage in internal training that would lead to various provisions being implemented differently than originally outlined in internal training documents. Similarly, where the agency has companion or related policy guidance on topics tied to the regulations, the agency could easily revise such guidance. The business community should consider *now* whether these rules are critical, and if so, take active steps to develop facts, collect data, and conduct research on legal theories to challenge a final rule that undoes all or part of these rules.

Details. In the final two years of the Obama administration, four employment-based immigration rules were published as final regulations, each of which is being actively evaluated by DHS to be rescinded in whole or in part:

[29] The law creating the 20,000 set-aside for advanced degrees was signed in December 2004 and became effective on May 12, 2005. However, according to DHS officials, the agency first began tracking the cap for US Masters and above in FY 2006.
[30] https://www.gpo.gov/fdsys/pkg/FR-2011-03-03/pdf/2011-4731.pdf.
[31] The US Chamber's comment concerning the 2011 pre-registration proposal was typical of the response by the business community https://www.uschamber.com/comment/comments-registration-requirement-petitioners-seeking-file-h-lb-petitions-behalf-aliens.

- ***H-4 spousal work authorization regulation***.[32] The final rule was published February 2015 and went into effect at the end of May 2015. There is little discretion left to adjudicators reviewing requests by qualifying H-4 spouses for an Employment Authorization Document (EAD), so the only way for DHS to completely undo this policy is to suggest that it did not have authority to promulgate such a policy or explain that the justification for such a policy, while rational two years ago, is no longer the best policy choice. DHS already has indicated its focus on at least considering a repeal of the H-4 employment authorization rule, by having DOJ make a court filing in April in the *Save Jobs* litigation contesting the regulation – DOJ requested a six-month continuance to reassess the rule.[33] The administration is particularly focused on DHS grants of work authorization to categories of foreign nationals where access to such employment authorization documents is not directly mandated by the INA, such as EADs for H-4 dependents. In late July, USCIS started making data publicly available concerning EAD issuance, presumably to lay the groundwork for its reassessment of EAD practices generally and the H-4 rule specifically. [34]

- ***Entrepreneur parole regulation, the so-called "IER" (International Entrepreneur Rule).***[35] The final rule was published January 2017, and was set to go into effect in July. It was expected that DHS would first publish a revised final rule delaying the effective date[36] and then a NPRM proposing the rescission of the rule, and later, after public comments are considered, a final rule rescinding the IER in its entirety. Writing and publishing three Federal Register rule documents will consume significant time and agency resources. On July 11, 2017, DHS started the process to void the IER by publishing a Notice in the Federal Register delaying the effective date and stating its intent to engage in notice and comment rulemaking to rescind the regulation.[37]

  Perhaps of more concern, the IER creates an opening for the administration to review other uses of parole by the Obama administration (parole-in-place for alien spouses of military personnel, advance parole for DACA recipients) and the parole authority generally.[38] Since 1993, legacy INS and then USCIS has utilized advance parole as the means to grant travel authorization to virtually all

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[32] https://www.gpo.gov/fdsys/pkg/FR-2015-02-25/pdf/2015-04042.pdf (final rule published Feb. 25, 2015). The final rule, responding to about 13,000 public comments, establishes that H-4 dependent spouses of H-1B workers being sponsored may apply for an Employment Authorization Document (EAD) in certain circumstances. In the first three years of implementation, 25,000 to 40,000 H-4 spouses have obtained an EAD, including extensions (the EAD is issued in a one-year increment and USCIS data on EADs for H-4s includes both initial issuance and extensions).

[33] *Save Jobs USA v DHS*, Civil Action No. No. 16-5287 (DC Cir. 2017) (June 23, 2017 order by the DC Circuit officially delaying the oral argument that had been scheduled for March 27, 2017, postponing it six months to September 27, 2017 based on a request by DHS to suspend the challenge to the H-4 rule, saying the Trump administration needs time to decide on revising the regulation).

[34] On July 25, 2017, USCIS posted two different sets of EAD data on its website, one on EADs mandated by statute http://bit.ly/2we1Gew and one on EADs not mandated by statute http://bit.ly/2vz7O3Y.

[35] https://www.gpo.gov/fdsys/pkg/FR-2017-01-17/pdf/2017-00481.pdf (final rule published Jan. 17, 2017 to go into effect July 17, 2017). The final rule helps a small subset of entrepreneurs, estimated by DHS to be up to 3,000 annually, who have venture capital backing to be present in the United States to develop their business.

[36] While the APA, as a general matter, stands for the principle that a change in a rule's effective date requires notice and comment (see *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir.)(stay of EPA's effective date delay granted July 3, 2017). DHS's theory of APA compliance regarding the IER is that the agency qualifies for a "good cause exception" to the notice and comment rulemaking obligation because allowing a program to commence that the Administration has no intent of implementing would be unnecessarily costly for the public and for the federal government.

[37] https://www.gpo.gov/fdsys/pkg/FR-2017-07-11/pdf/2017-14619.pdf.

[38] "Parole" under the immigration statute relates to a discretionary authority given by Congress to the executive branch to facilitate the temporary entry into the United States of foreign nationals on case-by-case basis for either humanitarian reasons or for significant public benefit (see section 212(d)(5) of the INA). The parole authority anticipates that there will be insufficient flexibility in the other provisions of the INA to accommodate a particular situation. For example, when the Afghan girls' robotics team was permitted to come to the US in July 2017 they had been granted parole. In some cases, "advance parole" is granted for foreign nationals already in the United States; advance parole documents allow individuals to return to a United States port of entry after temporary foreign travel. For example, most employment-based immigrants seeking a green card obtain advance parole as this is the tool the government uses to permit pending permanent residents to travel, when they have completed all the legal processes to become green card holders but are awaiting completion of their Adjustment of Status request.

employment-based Adjustment of Status (AOS) applicants without each individual being required to document a business emergency or humanitarian need. Elimination or restriction of such parole authority would have dire consequences to any employer sponsoring a foreign worker for Lawful Permanent Resident status. In order to change its approach to advance parole for AOS applicants, DHS could require each individual to document the need for travel for each trip outside the United States. It is not clear if DHS would feel compelled to engage in notice and comment rulemaking on this issue since the current approach was adopted by a 1993 policy memo. However, all indications are that parole authority will be broadly reviewed and reconsidered by this administration.

- ***STEM OPT regulation***.[39] The final rule was published March 2016 and went into effect mid-May 2016. A lawsuit challenging DHS's authority to issue the rule and DHS's compliance with the APA in finalizing the rule was thrown out of federal court in April 2017.[40] The 2016 rule, unlike the initial STEM OPT rule, sets up Immigration and Customs Enforcement (ICE) site visits and USCIS authority to confirm that STEM OPT participants are being compensated commensurately with similar U.S. workers. There would thus be some discretion under the existing rule for DHS to tighten enforcement, depending on the internal training in these areas. Interestingly, the incoming new USCIS Director was a key player in writing the original 2008 regulation so it would be odd for him to undo the program altogether.

  Nevertheless, it is clear that USCIS political appointees and White House staff are actively evaluating STEM OPT rescission, primarily under two theories: DHS does not have legal authority to enact a STEM OPT extension program, and such a program disadvantages Americans graduating with STEM degrees. In general, no department of the federal government ever concedes it lacks statutory authority to undertake actions previously completed and DHS in particular has been careful since the Department's inception in 2003 to take an expansive view of its immigration policy authority under the INA and the Homeland Security Act. Moreover, USCIS and its predecessor agency, INS, have been issuing some form of post-graduation practical training authorization to foreign students earning degrees from U.S. universities since 1947. Multiple immigration laws have passed over the last 70 years touching on foreign students, none of which have overturned this well-known exercise of agency authority. Thus, it will be tricky – and novel – for DHS to argue that it now does not possess this authority. It is clear that the White House supports the view expounded by certain administration officials that the STEM program has a negative impact on America's STEM students. Depending on how entrenched these views are, there might be an opportunity to educate senior decision-makers. For example, the following public comments by White House officials as part of the background briefing on April 17, 2017[41] regarding the Hire American EO are misleading:[42]

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[39] https://www.gpo.gov/fdsys/pkg/FR-2016-03-11/pdf/2016-04828.pdf (final rule published Mar. 11, 2016). The final rule, responding to over 50,000 public comments, requires employers to utilize E-Verify in order to hire a STEM OPT extension participant and establishes new enforcement, monitoring, and oversight provisions, including: ICE may conduct site visits of employers hiring STEM OPT participants, participating employers must provide STEM OPT participants duties, hours, and total compensation commensurate with those provided to the employer's similarly situated US workers, participating students may only work in positions where they will use and develop the STEM knowledge of their degree field, participating employers must report material changes or deviations in the STEM OPT participant's terms of employment and may not employ a STEM OPT participant if they do not know with specificity the location(s) where the F-1 nonimmigrant will be employed, participating employers must certify that they are in compliance with all applicable state and federal requirements relating to employment (including, for example, anti-discrimination laws), and participating employers may not use STEM OPT participants to replace full- or part-time, temporary, or permanent US workers.

[40] *Washington Alliance of Technology Workers v DHS*, Civil Action No. 16-1170 (D.DC 2017) (April 19, 2017 decision dismissed Washtech's lawsuit).

[41] See https://www.whitehouse.gov/the-press-office/2017/04/17/background-briefing-buy-american-hire-american-executive-order.

[42] The statements are misleading because, among other things, they presume a so-called "fixed pie" of jobs and do not reflect the limitations of Census Bureau data on employment of STEM graduates. On the fixed jobs pie: See the September 2016 National Academy of Sciences report on immigration, accessible (free download) at https://www.nap.edu/catalog/23550/the-economic-and-fiscal-consequences-of-immigration (p. 283, 284, which concludes that immigration makes the U.S. economy larger by adding workers and population); and see also, Cato Institute https://www.cato.org/blog/immigrations-real-impact-wages-employment (the "fixed pie implication is inappropriate to any kind of reasonable economic analysis of the effects of

- "We graduate about twice as many STEM students each year as find jobs in STEM fields."
- "Every single worker who graduates from a technical school will earn a higher wage if our guest worker programs are not being used to drive down wages."
- "Every worker who graduates from a technical school will have a better chance of finding a job if there's less competition that's artificially created for those positions."

- ***High-skilled immigration modernization regulation, the so-called "AC21" rule.***[43] The final rule was published November 2016 and went into effect mid-January 2017. This regulation attempts to codify or clarify policies implemented through changing guidance at legacy INS and USCIS since 2000, and, therefore, is best thought of as a "good government" rule. An extensive effort has already been undertaken by USCIS to train adjudicators on the new rules, and it may be impractical to alter such training. However, USCIS has always struggled with consistency regarding the issues regulated in the AC21 rule. Some of the policies considered new in the AC21 rule and possibly objectionable to the new Chief Counsel at USCIS are: 1) 60-day grace period for most work-authorized nonimmigrants after ending employment, 2) no automatic revocation of immigrant visa petitions based on employer withdrawal if such withdrawal occurs more than 180 days after approval, 3) affiliation definition for organizations that are related to or affiliated with universities and thus exempt from H-1B caps, 4) no temporal limits on reclaiming full six years of H-1B status, and 5) availability of Employment Authorization Document in compelling circumstances if a foreign worker is a beneficiary of an approved I140 Immigrant Visa Petition.

4) RAISE FILING FEES

What could the agencies do? Officials mentioned an interest in higher filing fees in rolling out its BAHA EO.[44] Which fees these may be is unclear because DOL, USCIS, and the State Department are significantly constrained in setting fee levels. Congress would have to act if DOL wants to impose filing fees for either Labor Condition Applications (LCA) or Applications for Permanent Employment Certification (PERM Labor Certification), because DOL does not have authority to charge fees for either. With respect to filing fees at USCIS, such fees may only be raised by the agency when directly tied to the costs of adjudication. Since the George H.W. Bush Administration, when legacy INS became a user-fee agency for benefits adjudication, any hikes in filing fees set by the agency for adjudication of H-1B petitions must be set through the notice and comment rulemaking process. The agency has no authority to adjust the fee amounts collected for certain purposes when Congress has set those amounts by statute e.g. fraud prevention fee, ACWIA fee. While the State Department could set new consular fees, these particular fees must be tied to actual costs incurred by the Department in visa issuance.

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immigration on the labor market"). On graduating too many STEM students: While certain Census Bureau data do identify that a large percentage of bachelor's level graduates with STEM degrees are not employed in STEM fields, for the particular data in question the Census Bureau makes no accounting of STEM graduates that use the technical and quantitative skills developed in their STEM courses in high-skilled jobs in medicine, law, business, academia, or management. For example, for purposes of these Census Bureau studies, an individual with a chemistry degree who becomes a physician is considered a STEM graduate not employed in a STEM field (medicine is not a STEM discipline). Notably, other analysis by the Census Bureau finds that more than one out of five U.S. STEM graduates who are not employed in a core STEM field are working in a managerial or business position utilizing quantitative skills developed through their STEM studies and often directly related to their degree; that more than one in eight STEM graduates are working in healthcare (including 594,000 who were working as physicians); and that another 522,000 are considered outside of STEM because they are educators in U.S. universities, where they are teaching in the field of their STEM major and educating the next generation of STEM workers. See, e.g., U.S. Census Bureau, ''Where do College Graduates Work: A Special Focus on Science, Technology, Engineering and Math'' (July 2014) and U.S. Census Bureau, "The Relationship between Science and Engineering Education and Employment in STEM Occupations" (Sept. 2013).

[43] https://www.gpo.gov/fdsys/pkg/FR-2016-11-18/pdf/2016-27540.pdf (final rule published Nov. 18, 2016). The final rule, responding to over 25,000 public comments, codified the agency's implementation of the American Competitiveness in the 21st Century Act, Pub. L. 106-313 (October 17, 2000) and other laws, focused on various procedural and technical issues related to high-skilled foreign workers, such as immigrant visa petitions filed by sponsoring employers, cap-exemptions established by Congress regarding H-1B status, and backlogs for Adjustment of Status based on employer sponsorship.

[44] See https://www.whitehouse.gov/the-press-office/2017/04/17/background-briefing-buy-american-hire-american-executive-order.

Takeaway. Raising fees associated with the filing of H-1B petitions seems highly unlikely unless USCIS develops new vetting procedures and then documents the costs associated with such vetting. The agency cannot propose new fees unless tied to user fees and actual costs incurred by the agency in adjudicating the benefit requests being sought by users. USCIS just finalized such a rule in 2016, and it would be difficult to satisfy legal requirements to document costs justifying higher fees. With regard to higher fees *not* tied to actual adjudication costs, Congress would be required to act (as with the so-called "50-50" filing fee or H-1B training fee).

5) LABOR CONDITION APPLICATION AND PERM LABOR CERTIFICATION

What could the agencies do? The BAHA EO directly lists enforcement of the PERM Labor Certification law as a priority, by referring to the need to rigorously enforce and administer "section 212(a)(5)" of the INA. No other specific sections of the INA are listed in the EO. Presuming this reference is an intentional signal, it suggests that DOL will be stepping up audits and changing audit criteria in reviewing Applications for Permanent Employment Certification (PERM Labor Certification) and that USCIS will more carefully review I140 Immigrant Petitions based on approved PERM Labor Certification.

The administration may also create a greatly expanded Labor Condition Application (LCA), similar to the type proposed by DOL in 2012. The LCA is necessitated by 212(n) of the INA, and encompasses a variety of congressionally mandated parameters, including a requirement that LCA data be made publicly available. Stakeholders provided extensive comments in response to the proposed LCA expansion then, identifying a number of privacy law issues, inconsistencies with INA requirements and current DOL regulatory provisions, and practical concerns; later, the proposal was withdrawn by the agency.[45] The expanded LCA proposed in 2012 required the collection of commercially protected information as well as personally identifiable information about each H-1B worker, imposed requirements to obtain a new LCA any time there was a job site change within the same metropolitan statistical area, and had a variety of burdensome and disconcerting results for H-1B employers, with the idea of vastly improving the ability of DOL to investigate possible employers participating in the H-1B program and troll for possible LCA violations. On August 3, 2017, DOL started the process to expand the information collected as part of the LCA process by publishing a Notice in the Federal Register.[46]

Takeaway. Section 212(a)(5)(i) of the INA requires that, for most immigrants seeking an Employment-Based green card, DOL issue a certification if an employer wants to offer indefinite employment to an immigrant and sponsor the immigrant for a green card. In summary, this statute mandates that such certification can only be issued by DOL if "such skills" of the alien are required to perform "such a job" being offered in such geographic "area of employment" such that the "wages of similar US workers" in the same geographic are not negatively impacted. DOL has much discretion to tighten its practices in a more enforcement-oriented approach to these requirements. For example, in March 2017, DOL issued new FAQs concerning the so-called "minimum requirements" questions on the Form ETA-9089 Application for Permanent Employment Certification that would have had a dramatic, negative impact on employers. After immediate feedback from stakeholders, DOL withdrew the new policy guidance – at least temporarily.

The new Chief Counsel at USCIS comes from the AAO where there has been a focus on inaccuracies and changes in employment in Labor Certification-based I140 Immigrant Visa Petitions. The EO might be signaling a new era in USCIS adjudications elevating such issues as potential abuse and even fraud.

Section 212(n) of the INA lays out a very detailed scheme for the form and function of the LCA. It's not at all clear that what the administration prefers is envisioned, or permitted, by the LCA statute. In any

[45] The Chamber's comment in response to DOL's 2012 proposal on LCA expansion details the problems with this approach https://www.uschamber.com/comment/comments-dol-form-eta-9035-labor-condition-application-nonimmigrant-workers.
[46] https://www.gpo.gov/fdsys/pkg/FR-2017-08-03/pdf/2017-16293.pdf.

event, an LCA process analogous to that proposed in 2012 would have a significant and negative impact on many employers, which discourage use of the H-1B program.

6) MORE ENFORCEMENT

What could the agencies do? In the weeks leading up to the BAHA EO, the administration announced an intent to engage in more enforcement concerning high-skilled immigration and the H-1B category specifically.

The Office of Immigrant and Employee Rights (formerly the Office of Special Counsel, OSC) at the Department of Justice has stated that it is looking for H-1B employers that prefer to hire non-US workers.[47] The Fraud Detection and National Security directorate (FDNS) at USCIS has stated it will prioritize its H-1B site visits this year to audit H-1B workers employed by dependent H-1B employers[48] (FDNS conducts about 15,000 site visits annually of H-1B employers).

In addition to these efforts, the Office of Immigrant and Employee Rights might step up enforcement of the "document abuse" provisions now that there is a new regulation finalized under the Obama Administration that eliminates intent.[49] This regulation codifies the approach of the Obama Office of Special Counsel to penalize employers when it is presumed they have asked new hires for different documents confirming employment verification based on discriminatory purpose. It is not known yet whether the Office of Immigrant and Employee Rights will enforce this broad new authority, given that it appears to be inconsistent with the 1996 law that required employer discriminatory intent for document abuse violations of the INA.[50]

Takeaway. These are enforcement tools that DOJ and USCIS certainly may use and do not require rulemaking or public policy guidance.

❖ (III) SUMMARY TABLE

The following table summarizes on one-page the Trump administration's activities in the employment-based immigration space at the six-month mark of the administration, including a condensed recap of the agency action issues discussed above.

[47] https://www.justice.gov/opa/pr/justice-department-cautions-employers-seeking-h-1b-visas-not-discriminate-against-us-workers (April 3, 2017).
[48] https://www.uscis.gov/news/news-releases/putting-american-workers-first-uscis-announces-further-measures-detect-h-1b-visa-fraud-and-abuse (April 3, 2017 announcement).
[49] https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-30491.pdf (see response to comments regarding implementation of discriminatory intent requirement in the final rule's preamble, at p. 91771-91775). The Chamber's comment on the proposed rule explains the issue https://www.uschamber.com/comment/comments-the-justice-department-standards-and-procedures-the-enforcement-the-immigration-and.
[50] See section 274B(a)(6) of the INA, which was established by section 421 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208 (Sept. 30, 1996).

TRUMP ADMINISTRATION PRIORITIES IN EMPLOYMENT-BASED IMMIGRATION

Legislative	Regulatory	Sub-Regulatory
1. ** Change legal immigration green card statute to convert all Employment-Based into points-based system and eliminate all Family-Based except for spouses and minor children of USCs and LPRs (S. 1720, new RAISE Act). 2. * Mandate H-1B prioritization in all years, based primarily on wages paid. 3. *** Change H-1B classification to require payment of occupational median wage in the area of employment (S.180). 4. *** "Small" H-1B bill to institute key H-1B changes (starting point is subset of S.180). 5. Increase training, fraud detection or other H-1B fees not tied to administrative cost of H-1B adjudication. 6. Establish PERM and LCA filing fees for DOL, which could be justified at least in part as a needed funding source for more enforcement-type review.	1. *◊ Finalize EB-5 regulation that more than doubles TEA investment amount and reduces by at least half those projects that could qualify for TEA designation. 2. **♠ Collect more data on the LCA form, along the lines of DOL's 2012 proposal, and assess DOL's authority to use LCA data to prioritize H-1Bs. 3. **Implement small-scale and temporary (FY17) H-2B expansion while avoiding reinstituting a returning worker exemption. 4. *Rescind H-4 spousal work authorization regulation. 5. *Rescind international entrepreneur regulation (IER), as an improper exercise of parole authority. See also connection #9 in sub-regulatory column. 6. *Rescind STEM OPT extension regulation (a form of this rule has been on the books since 2008 but not required by statute). 7. Rescind current 12-month OPT regulation (a form of this rule has been on the books since 1947 but not required by statute). 8. Reassess EAD eligibility and authority for any EAD-eligible classification not mandated by statute. 9. Require all H-1B employers to file for and wait for official prevailing wage determination from DOL before filing I-129 H-1B petition. 10. * Require all H-1B employers to provide more information the Labor Condition Application (LCA), to facilitate more enforcement. 11. Increase H-1B filing fees, by tying hire fees to additional new vetting. 12. Revise regulatory definitions of "specialty occupation" to tie to most experienced, best and the brightest, and/or highest paid. 13. The NAFTA renegotiations may lead to regulatory changes concerning the TN status that authorizes certain Canadian and Mexican professionals to work in the U.S. However, USTR's renegotiation objectives https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf released July 17, 2017 do not mention the movement of professionals or the TN classification. In order to negotiate changes to the TN category compliance with 214(e) of the INA is necessary, but it does not appear that immigration statute changes would be needed.	1. *♠More restrictive interpretations in benefits adjudications, especially H-1B petitions and the classification of any job as a level 1 position as part of effort to restrict use of H-1B when position is not highly compensated. 2. *♠ Change H-1B lottery to prioritize US Masters by conducting 65k lottery before lottery for 20k set-aside. 3. ♠Reassess DOL process in reviewing and certifying LCAs, in order to determine if classification at level 1 can be questioned under current law and regulation. See also, connection to #2 in regulatory column regarding expanded LCA form. 4. **More DHS Fraud Detection and National Security (FDNS) site visits generally. 5. **Establish targeted FDNS site visits, not just randomly generated visits, focusing on dependent employers. 6. *More DOL investigations and charges regarding LCAs. 7. **Encourage and look for complaints about citizenship discrimination, where H-1B workers or foreign workers are allegedly preferred over US citizens. 8. **Restrict use of H-1B classification for "computer programmers." 9. *Restrict use of DHS parole authority (impacts all employment-based immigrants that file adjustment of status). See also, connection to #8 in regulatory column regarding EAD eligibility. 10. **Change PERM Labor Certification adjudication at DOL as well as review once case goes to USCIS as part of an I140 immigrant petition. 11. **Provide public data showing volume of foreign nationals legally working in the U.S. and, where possible, their salaries. See data posted July 25, 2017 https://www.uscis.gov/laws/buy-american-hire-american-putting-american-workers-first. 12. More ICE site visits of STEM OPT employers.

This table does not address travel-related or student-related priorities that are grounded in national security and vetting concerns, even though they intersect with employment-based immigration interests. Instead, this table focuses on priorities tied to the employment-based immigration system, meaning either the employment-based immigrant visa preferences for green cards or the nonimmigrant visa statuses based on employer-sponsorship and work in the U.S. * Known agency and/or WH efforts to assess and pursue are underway.
◊ Likely the "first out of the gate" regulatory priority as of August 2017, in order to drive legislative debate because EB5 expires FY17.
♠ Top BAHA focus (highest priorities seen by Administration as key to implementing Buy American Hire American EO from Apr 18, 2017).
** Administration already officially announced. *** Durbin-Grassley bill addresses (S.180 in 115th).