6 Priorities For Employment-Based Immigration Reform

By **Maria Fernanda Gandarez and Avram Morell**

Maria Fernanda Gandarez

Avram Morell

As the U.S. painfully plods toward a leadership transition on Jan. 20, the immigration world anxiously awaits changes from the new administration.

Most of the chatter has focused on anticipated policy shifts in the humanitarian aspects of immigration — asylum, the Deferred Action for Childhood Arrivals program, family separation and unification, and priorities in removal of the undocumented.

But if you believe that foreign professionals and skilled workers are good — indeed, necessary — for our economic recovery, you would add a number of doable and impactful changes to the immigration wish list for the Biden administration. While there are many to choose from, here are just six ways in which the new team in D.C. can address some of the damage wrought by the outgoing administration and clear some of the barriers preventing foreign talent's contributions to our recovering economy.

Repeal and reimagine the H-1B specialty occupation category.

In the past few years of the Trump administration, the H-1B category has been attacked in unprecedented ways. The definition of specialty occupation has been narrowly reinterpreted, and employers have been receiving overly burdensome requests for further evidence, unjustifiably claiming that the employer's degree requirements for the position were too broad and therefore, could not support a specialty occupation.

These assertions neglect to recognize the realities of today's workforce, require a response that costs employers significant time and money, and can still lead to the denial of an H-1B petition that is otherwise approvable.

This effort to undermine the H-1B category, and business immigration as a whole, led many employers to forgo sponsoring qualified applicants to avoid the high risk of receiving such a request and subsequent denial. If employers chose to proceed with sponsoring a candidate for an H-1B, they had to deal with a different and rather arbitrary standard created by U.S. Citizenship and Immigration Services, which was telling employers, the experts in their respective fields, what the degree requirements should be for their positions.

This movement deters U.S. employers from hiring the most qualified candidates they can find for their positions, creates unnecessary unpredictability and delays in the hiring process, and can lead to loss in productivity, growth and facilitation of jobs for U.S. workers.

While there isn't just one, single policy change that led to this shift in interpretation and application of the regulations, the "Buy American, Hire American" executive order and other similar anti-immigration policies encouraged USCIS to heavily rely upon their discretion to issue more requests for evidence and denials than ever before. On Oct. 6, 2020, the Trump administration sought to codify this extreme interpretation of the definition of "specialty occupation" as a final rule, which the court vacated due to lack of notice.

Striking down these policies and preventing the U.S. Department of Homeland Security from proceeding with this overly restrictive standard would help to liberate this visa category and others from the stringent requirements they currently face. This would open up the category to more employers, such as startups and smaller employers that still play a large role in the U.S. economy but have found the recent changes too difficult to overcome, leading to a smaller pool of qualified candidates.

If the overall purpose of business immigration policy is to feed and boost the U.S. economy, roadblocking U.S. employers on their path to growth would be counter to that goal.

Now we look to the Biden administration to not only prevent DHS from moving forward with a restrictive final rule, but to broaden the definition of specialty occupation to account for today's modern economy and employment marketplace, rather than remain artificially tethered to 20th century notions of the relationship between a very specific degree and a professional position.

Take a fresh look at prevailing wages for H-1B and labor certification.

Prevailing wages in connection to the labor condition application required for an H-1B, H-1B1 or E-3 visa, as well as labor certification Employment and Training Administration Form 9089 applications, have historically served as a method of ensuring fair compensation for foreign workers and protecting the U.S. labor market.

However, the U.S. Department of Labor has broad discretion in setting the statistical methodology for the wage levels reported in its survey. This past fall, the DOL promulgated new regulations governing prevailing wages, which shifted the methodology to severely increase the wages. While the court struck down this proposed rule, the DOL has now published a new version of the regulations with a similar goal: to drive the wage levels up.

But arbitrarily raising the prevailing wage levels in a manner that does not align with the current marketplace data for these positions does not create jobs for U.S. workers. It does, though, prevent employers from utilizing the H-1B visa for positions where there are insufficient U.S. workers, particularly in the quantitative, science and technology areas.

We hope the new administration will keep this proposed rule from being published in its final form. Further, we suggest a reexamination of the prevailing wage survey and system, which, with each passing year, seems more and more out of step with the labor market.

Develop an H-1B selection system that does not bend toward the highest bidder.

Viewing salary as the number one factor in determining whether a petition should be selected for the H-1B quota is a narrow-minded approach that fails to consider the true business need for highly skilled workers in entry level positions. Yet, the new USCIS rule published on Jan. 8 does just that. It ranks priority in selection based upon the Occupational Employment Statistics survey wage level, looking to select first from petitions with a Level 4 wage.

The major blind spot of this rule is that many U.S. employers aren't seeking to hire senior-level employees into new positions. Rather, expanding employers need workers in entry-level and mid-level positions, who would be proportionately paid entry to mid-level wages, to build a strong workforce and remain competitive within and outside of the U.S.

If employers are limited to hiring H-1B employees — who are crucial to the success of many

companies — at the highest wage levels, this will cripple their growth efforts. Smaller businesses and startups may not be able to afford to pay the highest wages and would lose access to the highly skilled pool of foreign candidates.

Furthermore, F-1 students educated at U.S. universities may not be able to find jobs in the U.S. out of school as U.S. employers will be unable to pay the required salary, leading to fewer international students. This rule would then have an effect that is opposite to the one intended, which is to boost the U.S. economy by attracting and retaining highly skilled foreign workers.

Thus, we ask Team Biden to halt the implementation of the new H-1B selection rule and revisit — through a statutory and regulatory lens — the entire H-1B selection process to develop a system that enables and encourages smart and strategic hiring for U.S. businesses.

Repeal the ban on H, L and J visas. Immigrants don't take jobs; they make jobs.

Presidential Proclamation 10052, which restricts many new L, H and J visas, was recently extended until March 31, once again bringing disappointment and delays to U.S. employers who were hoping to finally bring over their highly skilled foreign professionals and, frequently, senior-level employees to the U.S.

Business plans have been placed on hold because it's difficult to proceed when the manager or executive leading the expansion effort can't get into the U.S. In turn, employers must also hold off on hiring anyone in connection to these stalled plans — this includes U.S. workers. Due to COVID-19, it's become even more critical that businesses be allowed to proceed with their efforts to grow, oftentimes under the leadership and through the specialized knowledge of these foreign workers, creating more jobs for U.S. workers.

We encourage President-elect Joe Biden to use his executive authority to reverse this proclamation as soon as he assumes office.

Reinstitute in-country visa renewal, a doable alternative during consular COVID-19 closures.

COVID-19 exacerbated many of the drawbacks in the U.S. immigration system, not the least of which is the requirement for nonimmigrant workers in the U.S. to apply at a U.S. consulate abroad in order to obtain a visa stamp to facilitate international travel. Since consulates closed at the beginning of the pandemic, there have been extremely limited alternatives for those seeking to depart and reenter the U.S. if their visa stamps have already expired.

These circumstances separated families at their most vulnerable times and kept them apart through emergencies, as many could not go home in fear they would not be able to return to the U.S. Similarly, crucial professional meetings were canceled, and businesses suffered.

Reinstituting in-country visa processing, which for many years was available by mail through the U.S. Department of State in Washington, D.C., could largely solve this problem. This process is nearly identical to the drop-box method of visa renewal abroad, which has grown in popularity and effectiveness, especially during the pandemic.

If implemented, it could significantly ease the burden on under-staffed consulates. In addition, offering in-country visa renewals for those who have already obtained their initial

visa stamp abroad would provide much-needed relief for nonimmigrants workers and their employers in the knowledge they would be able to depart and return to the U.S. as necessary.

It's clear that even with a vaccine rolling out around the world, the effects of COVID-19 will linger for years, and the delays caused by consulate closures will likely push through this year and into the next. At least while consulates cannot operate at normal capacity, the in-country visa renewal option would be a viable and humane alternative.

Provide premium processing for employment authorization documents.

Many workers and employers are plagued by the very long wait times for employment authorization cards. This simple adjudication process, which is often nearly automatic once a certain nonimmigrant status is confirmed, has become a source of suffering and frustration to so many.

Ideally, USCIS would marshal rulemaking and process changes to turn this into a brief process. But, in the meantime, we wish the administration would consider alleviating some of the economic angst by extending the premium processing program to cover these largely administrative adjudications.

This move would increase funding to USCIS and provide stability and security for foreign workers and U.S. employers, allowing them to make plans for their business growth without worrying about losing key members of a project halfway through or being in a position where they're scrambling to rework their organizational structure, which can cause loss of jobs, downsizing, and additional pressure on the remaining employees.

We don't expect the incoming administration to fix the whole immigration system. Still, these suggested, achievable practical changes can make employment-based immigration work much better for U.S. employers and help build back our economy.

Maria Fernanda Gandarez and Avram Morell are partners at Pryor Cashman LLP.

Pryor Cashman member Eugenia Joe contributed to this this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.