

Viewpoint: Biden administration could offer a new dawn for H1-B visas

Sean Randolph – January 21, 2021

In its first weeks the Biden administration has laid out an ambitious agenda, including broad-based immigration reform. Addressing immigration, never an easy topic in Congress, out-of-the-gate is a bold move that will generate intense debate. But there's an aspect of the immigration issue that should engender more bipartisan agreement — access for U.S. businesses to the skilled and educated immigrants they need to be competitive.

Numerous studies over the years have confirmed an essential fact: Immigrants tend to be more entrepreneurial than native-born Americans and have a high propensity to found companies. In 2019, one in four entrepreneurs was an immigrant. More than half of unicorns launched in the U.S. have been founded by people from other countries. The ranks of CEOs, CTOs and VPs for engineering are filled with immigrants who came here as students or on H-1B or other visas.

In the Bay Area, close to 45% of tech companies have been founded by immigrants and more than half of all of technology workers are immigrants. A preponderance of graduate students in science and technology at Bay Area universities are immigrants holding F-1 visas.

The Trump administration actively suppressed immigration at every level — not just undocumented immigrants but legal, high-skilled immigrants as well. Undoing that damage will be an important task for the new administration.

Take H-1Bs, the visa used by tech and other companies to fill high-skilled workforce gaps. In recent years denial rates have risen sharply. Spouses of H-1B holders, often skilled individuals themselves, were denied the ability to work. In June it was announced that the issuance of new H-1B and other work-related visas such as H-2B (for seasonal workers), J-1 (for work-study summer students) and L-1 (for intra-company executive transfers) would be suspended until 2021 due to the pandemic and unspecified threats to American jobs. An attempt was made, but later withdrawn, to terminate visas for students who were forced to take classes online when the pandemic forced campuses to close.

In October, a new set of rules was issued that sharply raised minimum pay thresholds for visa holders to levels unaffordable by most businesses, changed the lottery by prioritizing applications for the highest-paying jobs, and narrowed the definition of qualifying “specialty occupations.” This last rule also impacted current visa holders by applying the new standards to applications for renewal. The effect was to make continued use of the program impractical for most businesses.

Now, with pushback by businesses and universities, and a change of administration, the clock is being reset. A November lawsuit by the Bay Area Council, the U.S. Chamber of Commerce and others successfully blocked October's changes to the lottery and salary thresholds on procedural grounds, but earlier this month modified rules were issued after those deficiencies were corrected. The other Trump proposal to redefine who is eligible for a visa, however, was not published so has not gone into effect.

So where happens next? The new administration has the discretion to change how immigration law is interpreted and enforced, and almost certainly will. Administrative rules that have not been formally adopted can be rescinded, but rules already in place can only be changed through new administrative procedures, which will take time.

Comprehensive immigration reform is near the top of the legislative agenda. New policies and the bill sent to Congress should include measures to ensure that America's doors are open to legal, high-skilled immigrants. These include protecting the right of spouses of H-1B visa holders to work, exempting individuals who hold advanced STEM degrees from numerical visa caps, eliminating country quotas for green cards, creating a startup visa for company founders, and enabling the number of H-1B visas to float to meet the market.

Selectively engaging skilled immigrants gives the U.S. a competitive advantage, allowing it to offset an ageing workforce, support business formation, and expand employment. Support for the H-1B program, including reform proposals, should be bipartisan and independent of other immigration issues. For now, businesses, current visa holders and others who are planning to apply can expect more welcoming policies in the Biden administration than under its predecessor.

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