

# Labor and Employment 2018 Symposium

## Buy American, Hire American?

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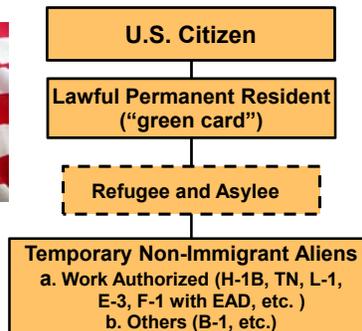
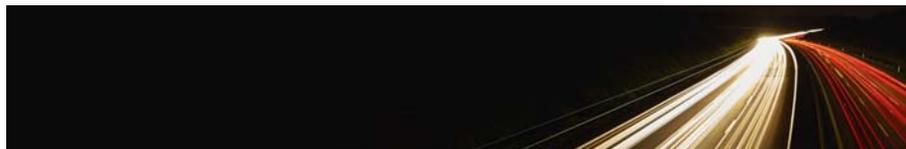
# ahead of the curve

Workplace law trends for today and beyond.  
Come up to speed to stay ahead.

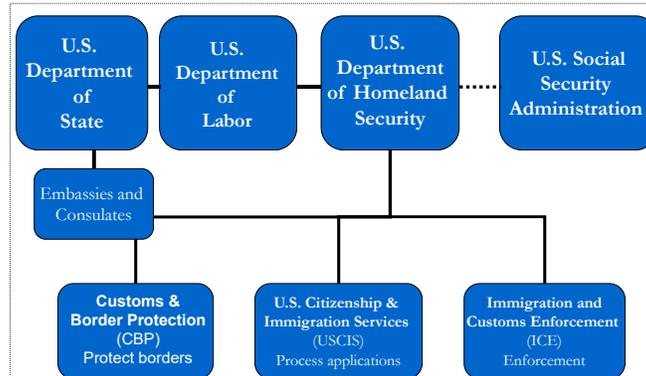
## “Buy American, Hire American” and “Extreme Vetting”

### U.S. Employment-Based Immigration Updates

Saiko McIvor  
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## Governmental Agencies



## Immigrants

**Immigrants and their US-born children: 86.4 million people, or 27 percent of the overall U.S. population**

**In 2016, 1.49 million foreign-born individuals moved to the U.S.**

<b>India</b>	<b>175,100</b>
<b>China/Hong Kong</b>	<b>160,200</b>
<b>Mexico</b>	<b>150,400</b>
<b>Cuba</b>	<b>54,700</b>
<b>The Philippines</b>	<b>46,600</b>



**11.4 million unauthorized immigrants reside in U.S.**

## Lawful Permanent Residents

The top five U.S. states by number of immigrants:

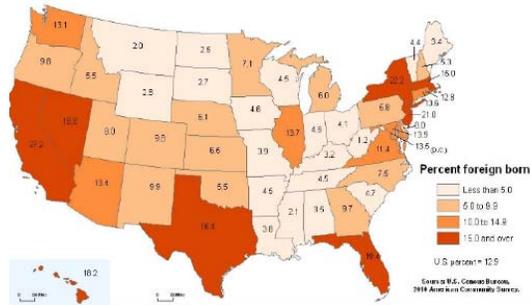
California (10.7 million)

Texas (4.7 million)

New York (4.5 million)

Florida (4.2 million)

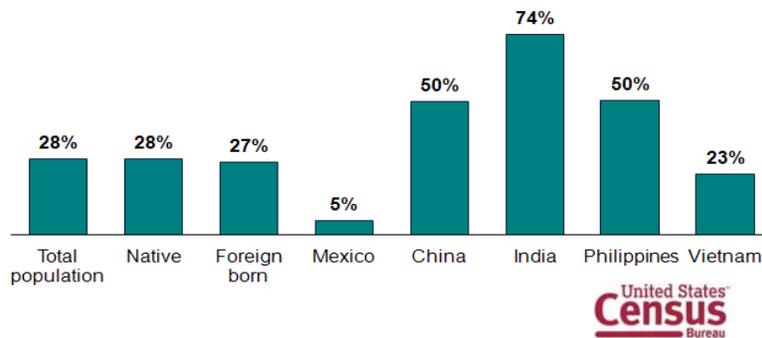
New Jersey (2 million)



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## Percentage of Population With a Bachelor's Degree or Higher Education by Nativity Status and Country of Birth (Population 25 years and over)



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## Travel Ban

- **Currently affects citizens of 7 countries: Iran, Libya, Syria, Yemen, Somalia, North Korea and Venezuela**
- **Challenged by 16 states and currently reviewed by the U.S. Supreme Court**



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## Deferred Action for Childhood Arrivals (DACA)

- **Since June 2012**
- **800,000 “Dreamers”**
- **Eligible immigrant youth who came to the U.S. before age 16**
- **DACA gives them:**
  - 1) **2-year protection from deportation, and**
  - 2) **a work permit**

**Challenged by Trump and Congress**

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## Foreign Student Enrollment

- Nationwide, the number of new foreign students declined an average of 7 percent this past fall
- Foreign student enrollment tops 1 million at U.S. colleges and supplies \$39 billion in revenue
- Many colleges are losing foreign students to other countries (Australia, Canada, UK, New Zealand) and are financially devastated
- Future Decline in Qualified STEM and Other Foreign Graduates



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## I-9 Audit and Raid by ICE

- DHS mandates to increase immigration enforcement through both initial adjudications and subsequent worksite investigations.
- In 2018, hundreds of businesses have been raided or served Notices of Inspection.
- This is believed to be just the tip of the iceberg.



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## Effect of “Extreme Vetting” Executive Orders on Employers

- Increased ICE activities
- Increased Site-Visits for H-1B and L-1s
- Mandated interviews for employment-based green card applications
- Increased processing time for all cases filed with USCIS
- De Novo review of extension cases
- Increased level of scrutiny (higher rate, in some cases 40%, of push-backs) on all applications filed with USCIS
- Increased level of scrutiny (higher rate of delays and denials) on all applications filed with consular offices
- Heightened level of fear among employees



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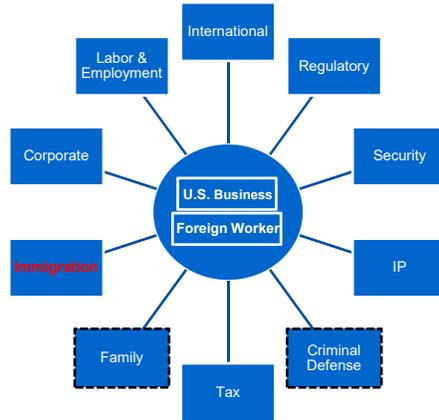
## What Can Employers Do?

- Have perfect I-9s and compliance documents
- Have Plan B, even Plan C and D
- Document thoroughly to avoid push-backs
- Employees may avoid unnecessary international travels
- Expect longer adjudication time
- May file green card sponsorship applications earlier
- Pay attention to deemed export control law



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## Collaboration



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## Common Non-Immigrant Visa Classifications

Visa Category	Purpose of Travel	Required: Before applying for visa*
E-3	Australian professional specialty	DOL
B-1/B-2	Business visitor/Visitor for Pleasure	N/A
J	Exchange visitor	SEVIS
H-1B1	Free Trade Agreement (FTA) Professional: Chile, Singapore	DOL
Q	International cultural exchange visitor	USCIS
L	Intra-company transferee	USCIS
TN/TD	NAFTA professional worker: Mexico, Canada	N/A
P	Performing athlete, artist, entertainer	USCIS
R	Religious worker	USCIS
H-1B	Specialty occupation worker	DOL then USCIS
F, M	Student: academic, vocational	SEVIS
H-2A	Temporary agricultural worker	DOL then USCIS
H-2B	Temporary worker performing other services or labor of a temporary or seasonal nature.	DOL then USCIS
E-1/E-2	Treaty trader/treaty investor	N/A

\*Before applying for a visa stamp at a U.S. embassy or consulate, the following is required:

- DOL:** The U.S. employer must obtain foreign labor certification from the DOL
- USCIS:** The USCIS must approve the petition or application
- SEVIS:** Program approval must be entered in the Student and Exchange Visitor Information System (SEVIS)
- N/A:** Not Applicable - additional approval by another U.S. government agency is not required

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## H-1B Specialty Occupation Worker

- Allows a foreign national to be employed in the U.S. on a temporary basis in a “specialty occupation”
- Basic eligibility requirements:
  - Position must require at least a bachelor’s degree in a relevant field, or equivalent, and
  - Employee has such a degree or equivalent.
- Initially granted for up to 3 years; six-year maximum stay (can extend under certain circumstances - AC-21).
- Employer-specific.
- Allows “dual intent” - good choice for people intending to apply for permanent residence.



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## H-1B: Prevailing Wage

[FLC Wage Results](#) [New Quick Search](#) [New Search Wizard](#)

You selected the All Industries database for 7/2017 - 6/2018.

Your search returned the following: [Print Format](#)

**Area Code:** 33460  
**Area Title:** Minneapolis-St. Paul-Bloomington, MN-WI MSA  
**OES/SOC Code:** 15-1132  
**OES/SOC Title:** Software Developers, Applications  
**GeoLevel:** 1  
**Level 1 Wage:** \$30.58 hour - \$63,606 year  
**Level 2 Wage:** \$37.80 hour - \$78,624 year  
**Level 3 Wage:** \$45.01 hour - \$93,621 year  
**Level 4 Wage:** \$52.23 hour - \$108,638 year  
**Mean Wage (H-2B):** \$45.01 hour - \$93,621 year

This wage applies to the following O\*Net occupations:

**15-1132.00 Software Developers, Applications**

Develop, create, and modify general computer applications software or specialized utility programs. Analyze user needs and develop software solutions. Design software or customize software for client use with the aim of optimizing operational efficiency. May analyze and design databases within an application area, working individually or coordinating database development as part of a team. May supervise computer programmers.

O\*Net™ JobZone: 4

Education & Training Code: No Level Set



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## H-1B: Cap

- 65,000 new H-1Bs per fiscal year.
- Additional 20,000 for those with U.S. Master's degrees or higher.
- Cap does not apply to:
  - extension of stay petitions
  - change of employer petitions
  - certain organizations exempt from the cap (universities, non-profit research organizations, government research organizations)
- Submission window period starts April 1 of each year for the fiscal year starting October 1 of the same year.
- The USCIS received 190,098 petitions this cap season (the lowest number of cap cases filed in the last six years).



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## H-1B: Who Are the Petitioners? Top 10 Occupations (FY 2017)

Top 10 Occupations (based on SOC Codes)	Computer Systems Analysts	248,839	22.6%
	Software Developers, Applications	177,285	16.1%
	Computer Occupations, All Other	102,363	9.3%
	Computer Programmers	102,008	9.2%
	Software Developers, System Software	64,248	5.8%
	Management Analysts	45,293	4.1%
	Accountants and Auditors	30,599	2.8%
	Electronics Engineers, Except Computer	30,126	2.7%
	Operations Research Analysts	25,510	2.3%
	Financial Analysts	17,221	1.6%

Source: U.S. Department of Labor



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## H-1B: Where Are the Petitioners Located? Top 10 States (FY 2017)

Top 10 States	California	255,661	23.2%
	Texas	111,598	10.1%
	New York	85,709	7.8%
	New Jersey	64,210	5.8%
	Illinois	54,369	4.9%
	Pennsylvania	50,106	4.5%
	Washington	49,712	4.5%
	Florida	39,449	3.6%
	Massachusetts	37,457	3.4%
	Georgia	35,901	3.3%

Source: U.S. Department of Labor



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## H-1B: MN State Statistics

### H-1B

Occupation	Positions Certified	Average Wage Offer
Computer Systems Analysts	5,176	\$77,056.64
Software Developers, Applications	2,604	\$83,457.21
Computer Occupations, All Other	1,878	\$70,401.13
Computer Programmers	1,726	\$67,143.20
Management Analysts	1,025	\$76,668.60

Source: DOL (2016)



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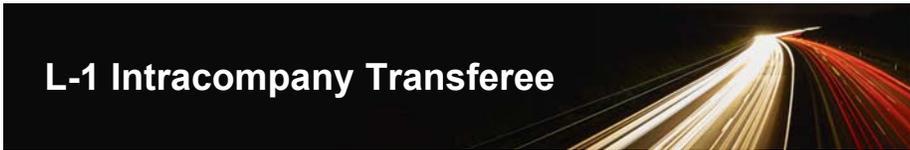


## H-1B: Recent Developments

- Increase in Requests for Evidence (RFE) and denials
- USCIS Computer Programmer Policy Memorandum
- USCIS H-1B Third Party Worksite Memorandum
- Elimination of a longstanding policy of deference in non-immigrant extension petitions
- Intent to terminate work authorization for H-4 spouses
- Increase in administrative site visits
- Potential revamping of the H-1B program



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## L-1 Intracompany Transferee

- Qualifying corporate relationship between the U.S. & foreign entities required (parent, subsidiary, affiliate, branch office).
- Prior employment abroad: one out of the last three years:
  - Executive
  - Managerial
  - Specialized Knowledge
- Nature of U.S. Position:
  - Executive
  - Managerial
  - Specialized Knowledge
- 5 (L-1B-specialized knowledge) or 7(L-1A-executive/manager) years maximum.



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## TN NAFTA Professionals

- Available only for certain Canadian and Mexican professionals (accountants, engineers, lawyers, pharmacists, scientists, etc.)
- Employer-specific
- Canadians can apply at the port of entry
- 3 years maximum at a time
- Scrutinized occupations:
  - Management Consultants
  - Computer Systems Analysts
  - Scientific Technicians
  - Economists



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## Treaty Trader (E-1) & Treaty Investor (E-2)

- There must be a treaty of commerce/navigation between a country and the U.S. allowing E-1 or E-2 visas
- The U.S. business and the individual must have the same nationality
- Applicant must act in executive/managerial capacity or have essential skills/qualifications
- Treaty Trader
  - substantial trade
  - principally between U.S. and treaty country (more than 50% of total international trade volume)
- Treaty Investor
  - must invest substantial capital in U.S. enterprise
  - investment must be “at risk” and not “passive”
  - Investor’s possession and control of invested funds
- Admission to U.S. in two year increments



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## O-1 Extraordinary Ability

- Requires significant accomplishment in fields of science, art, education, business or athletics - “sustained national or international acclaim”
- Petition must demonstrate extraordinary ability by submitting evidence of:
  - International major price (e.g., Nobel) **OR 3 of the following:**
    - Lesser prizes / awards
    - Membership in associations in the field which require outstanding achievement
    - Leading/critical role in distinguished organization
    - Publications about foreign national and his or her work
    - Authorship of scholarly articles
    - Participation as a judge of the work of others
    - Evidence of original contributions of major significance
    - Evidence of high salary (commercial success in arts)
    - Other comparable evidence



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## Paths to Permanent Residency

- Family
- **Employment**
- Diversity Lottery
- Refugee/Asylum
- Special Legislation



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## Employment-Based (EB) Categories

- EB-1:** Extraordinary ability aliens, outstanding researchers, multinational executives or managers
- EB-2:** Advance-degree professionals and aliens of exceptional ability\*
- EB-3:** Professional, skilled and unskilled workers\*
- EB-4:** Special Immigrants
- EB-5:** Investors

\* Requires Labor Certification



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## Other Recent Developments Impacting Employment-Based Immigration

### USCIS:

- All employment-based green card applicants must now attend an in-person interview.
- Advance parole applications denied for applicants who travel abroad before their applications are approved.

### CBP:

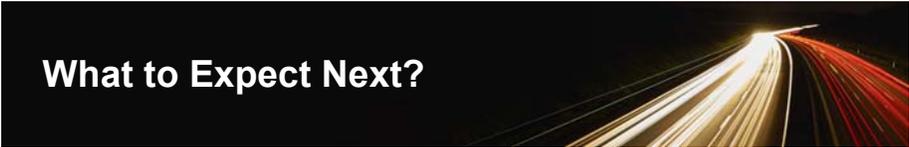
- Greater levels of scrutiny imposed on individuals seeking entry to the U.S.
- CBP agents are more strict about business activities for which they believe work visas are required.
- CBP may request passwords to cell phones, laptops, and other devices from any traveler, including U.S. citizens.

### DOS:

- Extreme vetting and visa issuance challenges.
- Long administrative processing delays.



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## What to Expect Next?

- **More changes: the landscape is always changing.**
- **Increased scrutiny of petitions/applications for immigration benefits.**
- **Increase in audit investigations and unannounced worksite visits.**

*“I want to see at least 400% increase in work site operations. We’re not just talking about arresting the aliens at these work sites, we are also talking about employers who knowingly hire people who are unauthorized to work.”*

- Tom Homan, ICE Deputy Director, at a press conference in Washington, DC, December 2017



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## How to Best Prepare

- **Act early!**
- **When sponsoring a foreign national for a work visa, carefully review the position description, terms of employment and the beneficiary’s qualifications.**
- **Maintain good compliance practices: I-9 and LCA public access files.**
- **Review/establish policies and procedures.**
- **Ensure that foreign workers traveling internationally carry complete paperwork.**



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## Questions?



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