

Immigration Predictions Under A Trump Presidency

By **Becki Young**, Hammond Young Immigration Law LLC

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After a long and acrimonious presidential campaign, Donald J. Trump will be inaugurated as the 45th president of the United States on Friday, Jan. 20, 2017.

Immigration was the number one issue in Trump's campaign.

Trump the candidate boasted that he would deport the now estimated 11 million people living in the U.S. illegally; build a wall along the U.S.-Mexico border and "make Mexico pay for it;" abolish Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA) (President Barack Obama's deferred action programs); ban all Muslims from the United States; and perform "extreme vetting" of foreigners applying to enter the country.



Becki L. Young

As president, will Trump stick to these promises? Even if he has a will to do so, does he have a way? What can we expect in the next four years, in terms of immigration policy and practice?

On the first day after the election, I received queries from clients expressing general concern and hungry for information on any immigration-related developments: a company worried about the future of the J-1 trainee visa, a Canadian concerned that Trump will eliminate the North American Free Trade Agreement (and the companion TN immigration status), and a human rights activist with an extraordinary ability visa, worried about his ability to remain in the U.S. I also had a sobering call about immigration options for a U.S. citizen who lives in Israel and is engaged to a Palestinian Muslim.

Not only do the Republicans now control the White House, they also have a majority in the Senate and the House of Representatives. And critically, over the next four years Trump may have the opportunity to appoint as many as four U.S. Supreme Court justices. He will immediately be able fill the seat of the late conservative Justice Antonin Scalia, and likely also have the opportunity to replace the court's two senior progressive members Justice Ruth Bader Ginsburg (age 83) and Justice Stephen Breyer (age 78), as well as centrist Justice Anthony Kennedy (age 80).

President-elect Trump's expected Cabinet picks as well as his close circle of immigration advisers reflect the anticipated tone for immigration policy in the upcoming administration. Kris Kobach, secretary of state of Kansas, and of counsel with the Immigration Law Reform Institute, the legal arm of the top anti-immigration group Federation for American Immigration Reform, is leading the transition team on immigration. Mark Krikorian, executive director of the right-leaning Center for Immigration Studies (CIS),

has also been an adviser to the campaign. Sen. Jeff Sessions, R- Ala., and former New York City Mayor Rudy Giuliani, both leading immigration opponents, are being considered for various Cabinet roles; in particular both are in the running for the position of U.S. attorney general.

The fate of DACA and DAPA, which came to a head in the Supreme Court's last term, will almost certainly be resolved through executive action once Trump takes office in January, so the composition of the court is unlikely to have an impact on this issue. However, we can say with a fair degree of confidence that the court will decide many other immigration-related cases in the coming years.

According to attorney Sandra Grossman, a Washington, D.C.-based immigration lawyer at Grossman Law LLC and a vocal advocate for immigrants' rights:

While Obama was not able to pass comprehensive immigration reform, he was able to exercise his executive authority to develop and implement some policy changes, which helped ameliorate increasingly difficult conditions for immigrants. Chief among those was deferred action for childhood arrivals or DACA which gives a temporary reprieve to undocumented young persons who were brought here illegally through no fault of their own. But Obama also expanded the provisional waiver process which vastly broadens the pool of individuals eligible for obtaining residency in the U.S. by showing hardship to a US citizen or lawful permanent resident family member.

Finally, under the Obama administration, we saw a recognition that it was neither feasible nor necessary to deport all undocumented persons and instead the administration developed a tier system of deportation priorities mostly focused on apprehending criminals and frequent immigration violators. All of these executive actions and policy changes appear to be at risk under a Trump presidency. Why? Because while truly changing the immigration system is a monumental task requiring congressional cooperation and acquiescence, it's much easier and quicker to reverse executive action and policy. We can expect Trump to prioritize this in his first 100 days. At risk will be the well-established legal notion that the immigration laws ought to favor family unity and that the laws should be interpreted in favor of immigrants.

The following are some of the changes we may expect to see in federal immigration policy in the next four years:

- **Border Wall:** Building a wall along the entire U.S.-Mexico border, and making Mexico pay for it, is the first priority in Trump's 10-point plan for immigration and one he has reiterated throughout the campaign. Yet the message about the border wall has been mixed. The cost may be prohibitive (one estimate put it at \$25 billion). His close adviser Newt Gingrich stated recently: "He'll spend a lot of time controlling the border. He may not spend very much time trying to get Mexico to pay for it, but it was a great campaign device."

And there are recent indications that at least part of the border wall might become a border fence, a possibility that Trump had rejected previously. Immigration advocates have expressed great dismay over the border wall proposal. According to Grossman:

"In regard to the wall, Trump made great promises of a securing the U.S.'s southern border. But at what expense will he do so? The U.S. has a vast and comprehensive legal system regarding

the protection of refugees and asylees who arrive at our border. For example, each individual who shows a fear of return is entitled to a credible fear interview in which he/she may establish the right to apply for asylum or protection in the United States. Under the Obama administration, this system of protection already underwent frequent challenges related to that government's policy of subjecting individuals to family detention. Under the 1951 Refugee Convention, The Convention Against Torture and under U.S. law, we are required to provide certain protections to persons who may be subjected to torture or persecution in their home country. It remains to be seen to what extent these principles would be compromised or violated under a Trump presidency."

- **Mass Deportations:** Trump's position on deportations has fluctuated wildly — at times he has threatened mass deportations of the 11 million people living in the U.S. illegally — an action the conservative-leaning American Action Forum estimated would cost between \$400 billion to \$600 billion and take 20 years. His 10-point plan says he will "move criminal aliens out day one, in joint operations with local, state and federal law enforcement." His latest pronouncement is that he will deport up to 3 million criminals living in the U.S. illegally immediately upon assuming office.
- **Mandatory Detention:** Trump has promised mandatory detention of "anyone who illegally crosses the border." The cost of this proposal is estimated at over \$14 billion over a five-year period.
- **Overturing Obama's Executive Actions (DACA and DAPA):** It's predicted that these provisions will be an immediate fatality of the Trump presidency; renewing (or lodging a new application) will not likely be an option. Whether the work authorization of those currently granted DACA and DAPA will be revoked remains to be seen. Further, the federal government may use the information it has collected from DACA and DAPA applicants to identify and target those living in the U.S. illegally for deportation.
- **Legalization/Comprehensive Immigration Reform (CIR):** Based on promises by Trump during the campaign to deport the entire population of those living in the U.S. without legal permission and the recent appointment of leading CIR opponent Kris Kobach to spearhead his transition team on immigration policy it is safe to assume that there will be no comprehensive effort during the Trump presidency to legalize the population of people living in the country illegally.
- **Extreme Vetting:** In August Trump proposed "extreme vetting" of immigrants to the U.S., which he said would include a test given to applicants "to determine if they share Western liberal values like LGBT and religious tolerance." Such an idea is hard to square with his previous proposal to ban all Muslims from the U.S., though that proposal was later revised to suggest that instead of targeting a particular religion he would "ban immigration from countries where terrorism is widespread and vetting is poor." Trump has recently suggested he would put such a ban in place on the first day of his presidency.
- **Asylum/Refugee Status:** The president has great latitude in setting the annual quotas for admission of refugees to the U.S. We can expect refugee numbers to drop precipitously during the Trump presidency, despite the fact that we are in the midst of the largest global refugee crisis since WWII, with more than 60 million displaced people around the world.

- **Temporary Protected Status (TPS):** Authority to designate citizens of a country for TPS (which offers temporary refuge in the U.S. to those who are temporarily unable to safely return to their home country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions) is vested in the secretary of homeland security. Given the current roster of candidates for the cabinet role, we can expect the list of countries granted TPS to dwindle, and the status of those countries already designated for TPS to not be renewed.
- **LGBTQ Immigration:** Trump has a complicated history on LGBTQ issues, and for much of his career, has actually taken quite a progressive view. During the campaign he expressed his personal opposition to gay marriage and his support for HB2, the North Carolina anti-transgender bathroom law. But just this week Trump confirmed that same-sex marriage is a matter of settled law and he is "fine" with it, which would suggest that the ability of U.S. citizens to sponsor their same sex spouses for immigration benefits is secure, at least for the time being.
- **NAFTA:** One of Trump's campaign promises was to withdraw from NAFTA; as president he could do this unilaterally simply by giving six months' notice. In October Trump listed withdrawing from or renegotiating the NAFTA as one of the top priorities for his first 100 days. If in fact he chooses to withdraw as opposed to renegotiating, TN status for Canadians and Mexicans would cease to exist. What would happen to individuals in the U.S. in TN status remains to be seen.
- **Employment-Based Immigration:** Trump's 10-point plan doesn't have a lot to say on legal immigration, except that he wants to "reform legal immigration to serve the best interests of America and its workers, keeping immigration levels within historic norms." However, we can glean a few morsels from the recent news:
 - **H-1B:** The H-1B is the primary vehicle for temporary foreign work authorization in the U.S.; the current annual quota of 85,000 is vastly insufficient to meet current demand by U.S. businesses. The H-1B category has long been controversial, with one side of the debate saying it lacks adequate protections for U.S. workers and others arguing it benefits U.S. businesses and that the quota should be increased.

Trump's policy on H-1B's has been anything but clear. On the one hand he has expressed support for skilled, legal immigration (and in fact his own companies have sponsored more than a thousand foreign workers). On the other hand, he has proposed a wage floor for the H-1B category, and a requirement that employers show that they have not been able to find U.S. workers before sponsoring foreign workers for H-1B positions. In March, regarding his own companies' reliance on the H-1B visa he said they "shouldn't be allowed to use it" and added "we shouldn't have it. Very, very bad for workers." The fiscal year 2018 H-1B "cap filing season" will be gearing up right around the time that Trump takes office in January. It remains to be seen what changes will be in store.

- **Optional Practical Training (OPT):** Sen. Sessions, a key Trump adviser on immigration policy, last year introduced a bill eliminating OPT (the 12-month period of work authorization available after completion of a U.S. degree, followed by an additional 24 months for some science, technology, engineering and math (STEM) graduates). We can expect a similar sentiment in the upcoming administration, as Sessions continues to advise on immigration policy.

- **Highly Skilled Worker Rule/Entrepreneurial Parole:** In November 2015 the U.S. Department of Homeland Security published a proposed rule known as the "I-140 EAD Rule," to provide job flexibility to highly skilled immigrants with pending immigrant visa petitions (that can take more than a decade in some cases to adjudicate). The final rule was submitted to the Office of Management and Budget on Oct. 25, 2016. The next steps are OMB approval and publication in the Federal Register; the fate of this rule remains to be seen, though quashing this business-friendly provision will not necessarily be the highest priority of the Trump administration. A second regulatory provision that would provide "entrepreneurial parole" for foreign entrepreneurs with significant startup investment and the potential to create jobs for U.S. workers is still in the proposed rule stage, and its fate remains uncertain.
- **Enforcement (Raids and Audits):** We can expect a sharp increase in workplace enforcement during the Trump administration. This will include worksite raids by U.S. Immigration and Customs Enforcement to identify, detain and deport those without work authorization; audits of I-9 files by ICE to confirm corporate compliance with employment verification rules; visits by the Fraud Detection and National Security (FDNS) Directorate at U.S. Citizenship and Immigration Services to confirm that companies are adhering to the requirements of nonimmigrant visa programs such as the H-1B and L-1; and site visits by the U.S. Department of State to confirm compliance with J-1 program regulations.
- **E-Verify and Biometrics:** Over the summer Trump adviser and New Jersey Gov. Chris Christie proposed using mechanisms such as E-Verify, the federal government's electronic employment eligibility verification system, and biometric data to track immigrants "like FedEx packages." We can expect more of such electronic enforcement initiatives this during the Trump Presidency.

In addition to these potential executive and legislative actions, we will surely see an increase in immigration-related litigation during the Trump presidency as immigration advocates (such as the American Immigration Council, the American Civil Liberties Union, the Mexican American Legal Defense and Educational Fund, and the National Council of La Raza) watch the administration and Congress closely to ensure that Constitutional rights are protected and that all parties act in compliance with existing laws and regulations. In addition to class actions and social impact legislation brought by pro-immigrant groups, it is likely that individual attorneys will turn to the court to seek remedies on behalf of their immigrant clients, in an increasingly hostile climate.

Advocates are already on high alert for violations of civil liberties and basic human rights. Grossman says:

Perhaps one of the greatest risks of a Trump presidency is the creation of politically divisive, and generally negative atmosphere around the issue of immigration and immigrants in general. His rhetoric on Muslims and Mexicans may have the effect of providing anti-immigrant individuals, including in law enforcement within the DHS itself, a 'carte blanche' to violate the due process and individual rights of people living in the U.S. without legal permission. For example, Supreme Court precedent clearly establishes that immigrants within our borders have the same right to due process as U.S. citizens and residents. Yet, in raids on workplaces and in homes, ICE agents have abused and violated those rights. We will likely see an uptick in these kinds of enforcement

actions resulting in more litigation on the part of advocates and immigrant rights groups, but also resulting in the separation of more families in violation of the law.

Remember that legal and policy change can occur in various ways — some faster than others. In cases where an executive action is involved (DACA and DAPA), where the president has authority to act unilaterally (NAFTA), or where administrative policy guides current action (prosecutorial discretion re: deportation and worksite enforcement priorities, regulatory interpretations such as recent policy guidance on L-1B adjudication), change could be swift and decisive. On the other hand, proposals that would require legislation, or a change in agency regulations (proposed changes to the H-1B program) would happen more slowly.

During the Obama administration, many legislative and policy changes (in immigration and elsewhere) were stymied because Republicans chose to obstruct the president rather than giving him "a win." If we can say one thing about the next few years it is this: many Republicans view the election results as a mandate for swift and decisive action, and with control of the White House, the Senate and the Congress, they have not only the will but also the way to get things done in Washington, in a manner we have not seen in years.

Becki L. Young is co-founder of Hammond Young Immigration Law LLC.

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