

ACTIONS SPEAK LOUDER THAN WORDS: TRUMP'S POLICIES ON LEGAL IMMIGRATION WILL DECREASE U.S. COMPETITIVENESS FOR DECADES TO COME

BY SANDRA GROSSMAN, HANNAH STAMBAUGH, AND BECKI YOUNG

Speaking at a June 2018 press conference, President Trump announced, "We want people to come into our country . . . but we want them to come in based on merit." The Trump administration has consistently emphasized in words that the United States welcomes high-skilled, merit-based migration. This rhetoric stands in sharp contrast to the administration's messaging that refugees bring crime, strain U.S. resources, take U.S. jobs, and bypass viable legal pathways. President Trump has publicly urged lawmakers to back a merit-based immigration system and has supported the Senate's failed RAISE Act, which would have imposed a merit-based, points-based immigration system, slashed legal migration in half, significantly cut family-based migration by allowing family reunification only for spouses and children, and eliminated the diversity visa lottery. President Trump has tweeted that he supports high-skilled, legal migration "so that we will have the people ready, willing and able to help all of those companies moving into the USA!" Despite the rhetoric, those within the immigrant rights community are keenly aware that, while the President is saying to the U.S. people that he is promoting and developing a merit-based system, he is actually taking material steps to make it much more difficult for talented and skilled individuals to come to the United States. In doing so, the administration is destroying U.S. competitiveness in ways that will take decades to overcome.

While media attention is focused on the administration's recent attacks on refugees and the undocumented, a quieter but no less forceful battle is being waged against legal immigration. A barrage of new policies, often implemented through backdoor channels, internal memoranda, the hiring of enforcement-only minded immigration officials, and the pushing out of "immigrant-friendly" staff, is imposing significant barriers on entrepreneurs, students, academics, investors, and other skilled individuals who seek to bring their talents to the United States. This package of policies is rapidly increasing the administrative backlog and processing times for legal, skilled migration, is imposing burdensome and duplicative evidentiary burdens on employers and

migrants, and is ultimately making the United States a less desirable destination.

New and proposed policies attack legal, skilled immigration from all sides. Broadly, these policies include built-in assumptions of fraud and abuse and impose heightened evidentiary and vetting requirements beyond prior policies' already comprehensive requirements. The new policies often go well beyond the scope that Congress intended when developing immigration options for intending immigrants. Some examples of far-reaching policies with real harm for the U.S. economy and businesses include:

1) more complex vetting and screening procedures for individuals seeking immigration benefits from both overseas and within the United States, the most notable example being the recently upheld¹ "Travel Ban 3.0."² How is this having a chilling effect on exactly the kind of immigrants we want to attract? In 2016, for example, a world-class violinist ("Soltan"), residing in Dubai but of Syrian nationality, retained our law firm to process an "extraordinary ability" visa so that he could immigrate to the United States to produce music with U.S. orchestras and record labels. The "extraordinary ability" or "EB-1" visa was created by Congress in order to attract those individuals who have "reached the very top of their field of endeavor" in such varied fields as the arts, academia, science, and business.³ Unlike many other employment visas, the EB-1 category does not require a U.S. company to sponsor the foreign national.

¹ Trump v. Hawaii, 585 U.S. ___, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018).

² Presidential Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public-Safety Threats (Sept. 4, 2017), 82 Fed. Reg. 45,161 (Sept. 27, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>, 22 Bender's Immigr. Bull. 1198 (App. A) (Oct. 15, 2017).

³ 8 C.F.R. §204.5(h)(2).

The idea is that the foreign national is so skilled and so reputable that he will sponsor himself and that his entry into the United States is in the national interest.⁴

Since Soltan clearly met all of the eligibility criteria for the EB-1 visa, United States Citizenship and Immigration Services (USCIS) quickly granted his petition. Unfortunately, the U.S. embassy in Dubai first told Soltan that he was subject to the travel ban, but that he could apply for a waiver if he showed sufficient ties to U.S. companies. Of course, the whole point of the EB-1 visa, as envisioned by Congress, is that a U.S. employer is not required for persons who are so extraordinary that they will make contributions to the U.S. economy in their own right. Despite this fact, we worked diligently to obtain letters of support from U.S.-based orchestras and record labels. Ultimately, the U.S. consulate refused to consider the waiver,⁵ and Soltan was unable to immigrate to the United States. As a result of the administration's shortsighted policies, U.S. citizens will lose the benefit of Soltan's beautiful music. Tragically, U.S. orchestras and musicians will be denied the opportunity to develop new art and to create new opportunities for employment, all because Soltan is from one of the countries listed in the ban. Keeping out musicians is not making the United States safer and damages our cultural heritage and support for the arts.

2) a new requirement that all employment-based green card applicants attend an in-person interview at USCIS,⁶ unlike the former policy, which generally waived interviews absent an indication of fraud, inadmissibility, or ineligibility. Our firm recently represented a world-renowned Argentinian citizen ("Javier"), whose business acumen and talent earned him a spot at the Wharton School of Business. Javier has a specialty in turning around and reviving distressed businesses, including multi-million-dollar U.S. corporations. He

⁴ 8 C.F.R. §204.5(h)(5).

⁵ Although the executive order implementing the travel ban claims that affected individuals may apply for a waiver, and that these waivers may be granted on a case-by-case basis, immigration advocates and attorneys have found that the overwhelming majority of these waiver requests are being denied: Yeganeh Torbati, *U.S. issued waivers to Trump's travel ban at rate of 2 percent, data shows*, Reuters (June 26, 2018, 10:05 p.m.), <https://www.reuters.com/article/us-usa-immigration-ban/us-issued-waivers-to-trumps-travel-ban-at-rate-of-2-percent-data-shows-idUSKBN1JN07T>.

⁶ USCIS, USCIS to Expand In-Person Interview Requirements for Certain Permanent Resident Applications (Aug. 28, 2017), available at <https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants>.

wrote and published a book about his area of expertise, and some of the projects he worked on were turned into business cases studied at both Wharton and Harvard. Due to the new interview requirement, Javier and his family were made to wait over a year until the USCIS field office in Miami scheduled them for their interview. In the meantime, Javier experienced serious delays in his ability to travel, causing harm to his companies and his ability to make new deals, which would have resulted in substantial investment into U.S. companies. Ultimately, when we attended the interview, the USCIS officer was so badly informed as to the new interview policies that she apologized and did not even know what questions to ask. Indeed, the officer asked one of the authors for guidance on how to adjudicate Javier's visa petition. The new interview requirement is badly implemented, clogs up the USCIS interview system, and is a tremendous waste of resources for the U.S. taxpayer.

3) an increase in the number of immigrants placed in administrative processing,⁷ increasing wait times for visa application decisions. When a foreign national applies for a visa he or she usually must attend a visa interview at a U.S. consulate abroad. After the interview, if the consular officer must perform additional background checks or engage in additional screening, that officer may place the case in "administrative processing." This means there will be no immediate decision on the case. Although the Department of State claims that most administrative processing is completed within sixty days, this is often not the case; in fact, a visa applicant can be placed in administrative processing for an indefinite period. The American Immigration Lawyers Association reports that currently many Middle Eastern applicants have been waiting in this limbo for over six months. Our law firm represents a U.S. citizen ("Amir") who petitioned for his wife, "Fatima," and their infant son, "George," in 2016. Their pre-interview processing went smoothly, and Fatima and George were scheduled to attend an interview at the U.S. embassy in Beirut, Lebanon. However, shortly before their interview in late May 2017, the Department of State rolled out Form DS-5535 (Supplemental Questions for Visa Applicants). Although the stated purpose of this form is to allow consular officials discretion to use it when they believe a case merits additional review, immigration practitioners have noticed that the form is being disproportionately requested of applicants from Middle

⁷ Bureau of Consular Affairs, U.S. Department of State, Administrative Processing Information, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/administrative-processing-information.html>.

Eastern countries, whether or not these countries are subject to the travel ban. Sadly, Fatima was no exception. Nonetheless, she completed the form (which requests information on all social media handles, past email addresses, past phone numbers, and additional family information, among other things) and submitted it to the consulate, anticipating that she and George would be approved for their visas as soon as the consular officer could see that they posed no security risks to the United States. Fatima submitted her DS-5535 in early August 2017, and she has been in administrative processing ever since. Meanwhile, Amir struggles with the burden of maintaining his family abroad while maintaining his work and financial obligations in the United States.

4) the delayed implementation, and likely termination, of the proposed International Entrepreneur Rule,⁸ which would have granted parole to international entrepreneurs to stay temporarily in the US to develop their business. When announced by the Obama administration this rule created great buzz in the startup community because it filled a critical gap that current immigration law does not address. Startups create millions of new jobs every year—many more than large companies create in the same period.⁹ While there are numerous visa categories for employees of U.S. companies, the options for the self-employed are limited to (1) those with extraordinary ability, i.e., “among the handful of those at the top of the field worldwide”; (2) those doing high-level work in the U.S. national interest; and (3) business owners who invest a substantial amount of their own money (usually, at least \$200,000) and who are citizens of a country with which the U.S. has a bilateral investment treaty. Because the first two categories (extraordinary ability and national interest waiver) are so limited, and the last (treaty investor) excludes those who are not covered by a qualifying treaty (including citizens of India, China, Russia, Venezuela, and Brazil) as well those who’ve received venture capital funding from a U.S. source (since the funds are not attributed to the treaty country as foreign investment), the elimination of this rule would exclude an innovative and vibrant set of foreign entrepreneurs who could contribute immensely to the U.S. economy.

⁸ USCIS, International Entrepreneur Parole, 83 Fed Reg. 5238 (Jan. 17, 2017), <https://www.uscis.gov/humanitarian/humanitarian-parole/international-entrepreneur-parole>.

⁹ Peter Cohan, *Why Start-ups Matter*, Forbes (June 27, 2011, 8:36 a.m.), <https://www.forbes.com/sites/petercohan/2011/06/27/why-start-ups-matter/#1894e333620a>.

5) a new policy¹⁰ that limits employers’ ability to sponsor computer programmers (and, by extension, employees in numerous computer-related occupations) as well as most entry-level (or Level I) employees for H-1B visas, which are the most common visas available for professional workers in the United States. Though the guidance mentions only computer programmers, it has been extended to include a wide variety of IT occupations (including computer systems analysts) that have been routinely approved for H-1B status over the years and are generally acknowledged within the industry to require a bachelor’s degree, which is the legal requirement for an H-1B grant. In addition, the skepticism towards all entry-level jobs has led to USCIS questioning many jobs for which there is no argument about whether a bachelor’s degree is required — for example, attorneys have reported receiving Requests for Evidence (RFEs) asking for proof that an entry-level lawyer must have at least a bachelor’s degree;

6) a 45% increase in RFEs since 2016 for all H-1B positions¹¹ and new evidentiary requirements for H-1B third-party worksites¹² (not the employer’s) with retroactive applicability;

7) a new interpretation of the “economist” profession,¹³ which results in a substantial reduction in the types of economists and economics-related professions from Mexico and Canada that qualify applicants for Treaty National status under NAFTA, and could

¹⁰ USCIS, PM-602-0142, *Rescission of the December 22, 2000 “Guidance Memo on H1B Computer Related Positions”* (Mar. 31, 2017), <https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputer-RelatedPositionsRecission.pdf>, reprinted at 22 Bender’s Immigr. Bull. 526 (App. C) (Apr. 15, 2017).

¹¹ Yeganeh Torbati, *Trump Administration Red Tape Tangles up Visas for Skilled Foreigners, Data Shows*, Reuters (Sept. 20, 2017, 1:12 a.m.), available at <https://www.reuters.com/article/us-usa-immigration-employment-insight/trump-administration-red-tape-tangles-up-visas-for-skilled-foreigners-data-shows-idUSKCN1BV0G8>.

¹² USCIS, PM-602-0157, *Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites* (Feb. 22, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf>, reprinted at 23 Bender’s Immigr. Bull. 341 (App. D) (Mar. 15, 2018).

¹³ USCIS, PM-602-0153, *TN Nonimmigrant Economists are Defined by Qualifying Business Activity* (Nov. 20, 2017), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-1120-PM-602-0153_-TN-Economists.pdf, reprinted at 23 Bender’s Immigr. Bull. 130 (App. G) (Jan. 15, 2018).

seriously impact the ability of the U.S. financial services industry to attract top global talent;

8) a proposed policy to terminate H-4 (spouse of H-1B) work authorization,¹⁴ which, combined with heightened processing times, means that many spouses could wait years in the United States without authorization to work — contrary to the government's stated goals of stimulating the economy and preventing immigrants from placing a "burden" on the United States. This potential policy change is particularly alarming to the Indian community, where green card waits extend into the many decades (a recent Cato headline says it all: "150-Year Wait for Indian Immigrants with Advanced Degrees"; this headline is based on an actual numerical projection from current backlogs and is not hyperbole¹⁵), and where many spouses are highly educated professionals who are watching their entire professional lives waste away in the bureaucratic morass; and

9) threatened elimination of F-1 optional practical training (OPT)—a one-year work authorization for student visa holders (which includes a two-year extension for graduates in STEM fields), which enables the United States to have the best and the brightest from around the world come here to study at our universities.¹⁶

Collectively, these policies, and there are many more, have rapidly increased the administrative backlog and processing times¹⁷ for immigration benefits across the board. For example, as of April of this year, the national average processing time for I-140 applications (Immigrant Petitions for Alien Worker filed by U.S. companies seeking to hire those workers) in USCIS offices across the country has increased to 8.5 months, compared to 6 months in 2017 and 5.7 months in 2016. Processing for I-526 applications (Immigrant Petitions

by Alien Entrepreneurs) has increased from 16 months in 2016 to nearly two years. Times for employment and family-based adjustments of status (I-485) have increased from 6.8 to 10.7 months; those for petitions to remove conditions of residence (I-751) have increased from 9 to 15 months; and times for applications for travel documents (I-131) have more than doubled from 4.8 months to 10.4 months. Applications for employment authorization (I-765) — which were formerly required to be adjudicated within ninety days pursuant to a long-standing regulation that was eliminated last year — are now taking over four months. The processing time for citizenship applications (N-400s) has nearly doubled since 2016, from 5.6 to 10 months.

These policies are manifestly contrary to the administration's messaging that the United States welcomes talented immigrants who are "ready, willing and able to help all of those companies moving into the USA." They are also making our country less competitive and less attractive to the very people we want to immigrate here.

President Trump's proposed "merit-based" system is code for slashing *all* immigration. Onerous and duplicative evidentiary requirements and vetting, increasing procedural complexity, and increasing delays, accompanied by xenophobic rhetoric, reduce the United States' attractiveness as a destination country for immigrants who would benefit the United States economically and intellectually, and disincentivize employers from hiring talented foreign workers whose presence is in the national and global interest.

Economists are of the general consensus that immigration — particularly skilled immigration — has a positive effect on the United States economy. Immigration increases the country's GDP.¹⁸ Immigrants boost the economy by spending, paying taxes, creating new businesses, and more. Immigrants pay over \$90 billion in taxes and receive only \$5 billion in welfare annually.¹⁹ Indeed, robust immigration is not only economically desirable; it is essential to our nation's economic health. Despite claims that immigration causes undue competition for U.S. workers, employers in many sectors are

¹⁴ DHS Notice of Proposed Rulemaking, Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization, 83 Fed. Reg. 51,115 (Oct. 10, 2018).

¹⁵ David Bier, *150-Year Wait for Indian Immigrants With Advanced Degrees*, Cato Institute: Cato at Liberty, <https://www.cato.org/blog/150-year-wait-indian-immigrants-advanced-degrees> (June 8, 2018, 12:45pm).

¹⁶ Automatic Termination of Optional Practical Training for F-1 Students If They Transfer to a Different School or Begin Study at Another Educational Level, <https://www.uscis.gov/news/alerts/automatic-termination-optional-practical-training-f-1-students-if-they-transfer-different-school-or-begin-study-another-educational-level> (last reviewed or updated May 18, 2018).

¹⁷ USCIS, Historical National Average Processing Time for All USCIS Offices (last updated April 2018), <https://egov.uscis.gov/processing-times/historic-pt>.

¹⁸ Martha C. White, *Slash Immigration, and the GDP is the Victim, Research Finds*, NBC News (Aug. 15, 2017, 11:34 AM), <https://www.nbcnews.com/business/economy/slash-immigration-gdp-victim-research-finds-n792821>.

¹⁹ American Civil Liberties Union, *Immigrants and the Economy*, <https://www.aclu.org/other/immigrants-and-economy>.

struggling to find enough qualified U.S. employees – especially in skilled fields, like technology.²⁰ The economy is nearly at full employment, and this year there are a record 6.6 million unfilled positions in the country.²¹ Furthermore, the U.S. workforce is shrinking as the baby boomer generation reaches retirement age, and the U.S. Census Bureau estimates that by 2035, people over sixty-five years old will outnumber children for the first time in U.S. history.²² Immigration is, and will increasingly be, essential to mitigating the economic contraction caused by a shrinking workforce.

A new study from the University of Pennsylvania's Wharton School of Business concluded that the proposed RAISE Act, which would have cut legal immigration substantially and imposed a merit-based system, would have a negative effect on GDP, jobs, and per capita GDP, and would have only a negligible effect on wages. Implementing the RAISE Act would reduce the GDP by 0.7% and eliminate 1.3 million jobs by 2027, and would reduce the GDP by 2% and eliminate 4.6 million jobs by 2040.²³ Average hourly wages would rise by only 0.23% from \$42.02 to \$42.12 by 2027. The study concluded that job losses would “emerge because domestic workers will not fill all the jobs that immigrant workers would have filled.”

The Trump administration's attempts to silo the United States from immigration will make the United States less globally competitive in the long run. The President's policies will hurt, not help, U.S. workers and employers. The President's supporters should heed the old saying, “actions speak louder than words,” and realize that the administration is setting up barriers that will harm our economy and our country for years to come.

²⁰ U.S. Federal Reserve, *The Beige Book: Summary of Commentary on Current Economic Conditions* (March 2018), <https://www.federalreserve.gov/monetarypolicy/beigebook201803.htm>.

²¹ Abigail Hauslohner & Andrew Ba Tran, *How Trump is Changing the Face of Legal Immigration*, Washington Post (July 2, 2018), available at https://www.washingtonpost.com/national/how-trump-is-changing-the-face-of-legal-immigration/2018/07/02/477c78b2-65da-11e8-99d2-0d678ec08c2f_story.html?utm_term=.92687e942e96.

²² Dennis E. Nixon, *Without immigration, our economy is in Big Trouble*, CNN (Apr. 4, 2018, 1:32 p.m.), <https://www.cnn.com/2018/04/04/opinions/benefit-immigration-workforce-opinion-nixon/index.html>.

²³ University of Pennsylvania Wharton School of Business, *The RAISE Act: Effect on Economic Growth and Jobs* (2017), <http://budgetmodel.wharton.upenn.edu/issues/2017/8/8/the-raise-act-effect-on-economic-growth-and-jobs>.

Sandra Grossman is Managing Partner of Grossman Law, LLC in Bethesda, Maryland. **Hannah Stambaugh** is a law student at American University, Washington College of Law. **Becki L. Young** is Managing Partner of Hammond Young Immigration Law, LLC in Silver Spring, Maryland.

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