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Down to the Wire – Impending H-1B Changes

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Becki L. Young

Becki L. Young, co-founder of Grossman Young & Hammond, is a seasoned business immigration attorney with over 20 years of experience in the field. She has facilitated the sponsorship of foreign professionals, trainees, interns and individuals of "extraordinary ability." She regularly provides immigration law advice to clients in a broad range of industries.

Ms. Young is an active member of the American Immigration Lawyers Association (AILA). She frequently speaks at legal, business and hospitality conferences, and regularly contributes insight through published articles and commentary. She is highly recommended by Chambers & Partners and recognized as a Leading Legal Practitioner in Corporate Immigration by Who's Who Legal. Grossman Young & Hammond is rated Tier 1 National and Washington, D.C. for Immigration Law by US News & World Report / Best Lawyers. She is also recognized as a “Best Lawyer” in immigration by *Washingtonian* magazine.

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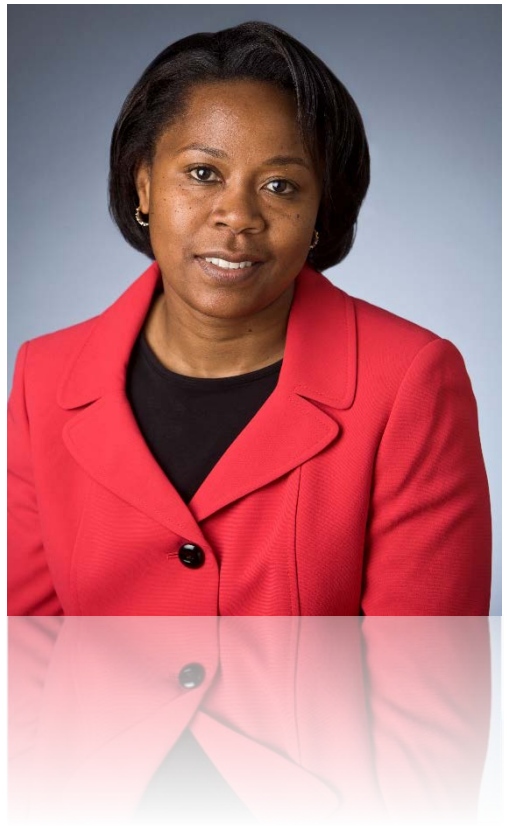
Khandikile M. Sokoni



Khandikile “Khandi” Mvunga Sokoni, Counsel, focuses her practice on a wide range of business immigration matters for a variety of clients. Prior to joining Grossman Young & Hammond, Khandi was a Partner with the firm True, Walsh & Sokoni, LLP where she focused on both general corporate law and immigration law, finding her true passion at the intersection of both practice areas. In her ten years there, she handled a wide range of immigration matters representing individuals as well as corporate clients including those in the software development, architectural and engineering industries.

After graduating from Cornell Law School, Khandi joined the Ithaca City Attorney’s Office. Khandi spent 13 years as an attorney for the City of Ithaca, including six years as Assistant City Attorney.

Khandi has held several leadership positions including President of the Tompkins County Bar Association (2015-16), President of the Finger Lakes Women’s Bar Association, a chapter of the Women’s Bar Association of the State of New York (WBASNY) (2010-11), a member of the New York State Bar Association (NYSBA) Committee of Bar Leaders, and a commissioner on the Independent Judicial Election Qualification Commission of the State of New York (IJEQC), the body charged with screening and ranking candidates seeking election as judges in New York’s Sixth Judicial District.

Program Summary and Goals

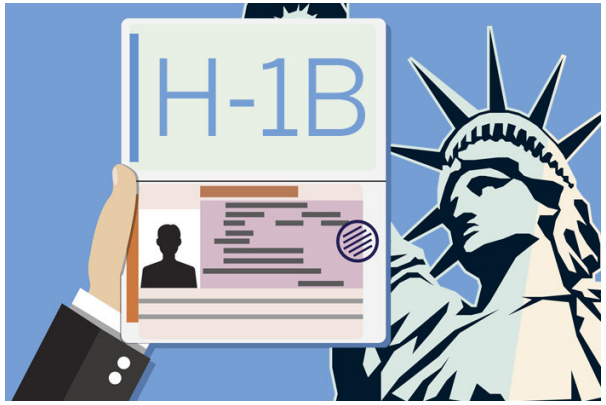
The Trump administration is rushing to push through as many immigration restrictions as it can in its final days. Recently announced H-1B changes will impact all petitions. Make sure you understand the new regulations and are prepared for how your or your employee's case will be affected. On December 1, 2020 a court struck down some of the proposed changes.

Goals of this Presentation:

- Raise Awareness.
- Highlight how these changes may affect you.
- What can you do to plan and prepare for the changes?

Nature of the H-1B Program

- Designed to enable US employers (businesses, research institutions) to access workers with skills in “specialty occupations”.
- For workers with a Bachelor’s Degree or higher (or the equivalent).
- Department of Labor must certify a Labor Condition Application (LCA) before employer can file an H-1B.



Congressional vs. Agency Authority

There is a distinction between congressional authority to enact laws and agency authority to adopt regulations. Regulations are administrative means of implementing the intent of congress in enacting the law.

Rule-making requires:

- Notice
- Comments
- Proposed Rule
- Final Rule

→Exceptions:

  - Emergencies
  - Trivial Changes

What does the law provide?

- Immigration and Nationality Act (INA).
- Allows admission to a foreign national "in a specialty occupation" or "…as a fashion model" and in the case of fashion model is of distinguished merit and ability". INA §101(a)(15)(H)(i)(b).
- Definition of "Specialty Occupation": INA §214(i)(1)(A): "The term specialty occupation" means an occupation that requires-
    - A. theoretical and practical application of a body of highly-specialized knowledge, and
    - B. Attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
- Congress limited the number of visas available.
    - Limits number of H-1B visas to 65,000 per year plus 20,000 for U.S Advanced Degree.
- The Administrative Procedures Act (APA) allows agencies to adopt regulations to help administer the laws as adopted by Congress.

What does the future of immigration look like?

To help understand how the proposed new regulations attempt to decimate the H-1B program as we know it, let us contrast the regulations as they stand now and what they are slated to become.

What does the future of immigration look like?

Prior Position

Selection Process:
Immigration and Nationality Act (INA) states that H-1B (cap-subject) petitions shall be prioritized in the order in which they are filed. Hence the lottery.

PROPOSED

Proposed Position

Replaces the fairness of the statute with wage level-based selection.

- First dibs go to Wage Level 4.
- 2nd dibs go to Wage Level 3.
- Then Wage level 2.
- If there are any visas left then maybe Level 1 **AND** petitions using private surveys

BUT

Number of petitions always surpasses number of visas available.

What does the future of immigration look like?

Prior Position

H-1B program is focused on skill not career level. Other categories specifically reserved for “advanced” level positions:

E.g.
- L-1A intracompany transferee visa category is limited to foreign workers at the managerial or executive level.

- E-2 visa category contains stipulations that foreign workers must be a managerial level or possess specialized skills that are essential to the petitioner.

- O-1 visa category is for those with extraordinary ability – not those just starting their careers.

Proposed Position

Effectively usurping the authority of Congress and converting H-1B program into an “advanced level only” visa. Only for those at DOL’s Wage Level 4.

PROPOSED

What does the future of immigration look like?

Prior Position

All Professions have Level 1, 2, 3 and 4 including medical doctors, engineers, attorneys, scientists and researchers.

Proposed Position

Reliance on Occupational Outlook Handbook effectively potentially elevating the threshold beyond what Congress authorized.

OOH publishes trends. If an occupation happens to have most entry-level professionals with PhDs does not make a PhD a requirement.

Congress saw it fit to set a Bachelor's Degree as the entry-level requirement.

PROPOSED

What does the future of immigration look like?

Prior Position

- In determining whether an occupation is a specialty occupation, you can demonstrate that the position meets any one of the following 4 criteria:
  1. A bachelor's degree or higher or its equivalent is normally the minimum requirement for entry into this position.
  2. The degree requirement is common to the industry for similar positions.
  3. The employer normally requires a bachelor's degree or higher for this position.
  4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree or higher.
- An H-1B petition for a 3rd party work site could be approved for up to three years at a time.

Proposed Position

- Meeting one of the regulatory criteria is a necessary part of—but not necessarily sufficient for— demonstrating that a position qualifies as a specialty occupation.
- "Normally"; "usually"; "common" replaced by the "always" standard.
- Third-party work site can only have an H-1B approval of 1 year maximum.

OVERTURNED

What does the future of immigration look like?

Current Position

To remain strong and competitive many US employers supplement their workforce with foreign talent with specialized skills through the H-1B program.

Proposed Position

New rules will **harm not help** U.S. employers.

OVERTURNED

Prevailing Wage Changes

Effective Immediately on October 8, 2020 DOL changed the way it calculated prevailing wages.

For example:

1) Level 1 Market Research Analyst in the Baltimore, MD MSA: **$37,170 per year → $58,074 per year (56% inc.)**
2) Level 2 Software Engineer in the Washington, DC MSA: **$97,406 per year → $143,125 year (47% inc.)**
3) Level 3 Civil Engineer in the Chicago, IL MSA: **$93,558 per year → $143,686 per year (54% inc.)**

Procedural Posture of Interim Final Rules

Chamber of Commerce of the United States of America et. al. v. US Dept. of Homeland Security. *Case No. 20-cv-07331-JSW*

Court held: ***1. Adoption of Prevailing wages in violation of APA was illegal.***

2. Timing was dubious

3. Decision was based on procedural flaws. Substance was discussed merely for purposes of highlighting these were neither trivial nor required by any emergency.

Four Options:

- Could do nothing (rule would go away).
- Could be appealed.
- Could have to go through notice and comment rulemaking.
- Could be reversed by the next administration (in time).

Can they really do this?

- Legally flawed.
- Violates rule making procedures.
- Record does not justify applying the rule-making exceptions.
- Chad Wolf’s appointment was illegal. Therefore, the regulations should not stand.

What can you do?

- Stay tuned.
- Be ready to file LCA's now, if possible.
- Be ready to file petitions at the earliest opportunity.
- Plan for alternative solutions such as PERM/Green Card options.

CONCLUSION/SUMMARY

- Prevailing wage rules (reversed for now).
- Definition of specialty occupation reverts to what it was.
- Lottery selection unfortunately was not part of the lawsuit. That stands.

Submit your comments!

- Despite the ruling, AILA is encouraging members and supporters to file comments because:
  1. The gov't could seek to stay the decision, and win, which would bring the rule back into effect.
  2. If the gov't does not appeal, it could reissue a new rule relying on the comments received prior to 12/7, effectively treating the IFR as a Notice of Proposed Rulemaking (NPRM).
     - This is not the norm but this administration is known to cut corners and may have some legal basis for this strategy based on the decision in *Little Sisters of the Poor*
       - Held that when an agency improperly relied on an IFR and was not authorized to exercise the good cause exception, it could mitigate by considering the comments filed in response to the IFR and skip the new NPRM step.

- Submit your comments here: https://www.aila.org/about/announcements/aila-comment-guidance-dhs-h-1b-interim-final

Questions?