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Practice Area: Immigration Law

Education

- *University of Minnesota Law School*, J.D., 2005
- *University of Florida*, Political Science and Economics, 2001

Languages

- Portuguese and Spanish

Ms. Fischer is based in our Miami office, where she manages the firm's immigration law practice. Her clients include large and small companies, and she advises them in all aspects of employment-based immigrant and nonimmigrant visas. Ms. Fischer represents internationally recognized individuals pursuing lawful permanent residence through Extraordinary Ability (EB-1) Petitions, National Interest Waivers (NIWs), and Investment/Job Creation (EB-5). Born and raised in Brazil, Ms. Fischer's background affords her practice the great benefit of her Latin culture and language skills. She has a singular ability to relate to clients' concerns and expectations immigrating to the United States. Ms. Fischer is a member of the Florida Bar and the American Immigration Lawyers Association. She is a graduate of the University of Minnesota Law School, where she was an editor for the Minnesota Journal of International Law.

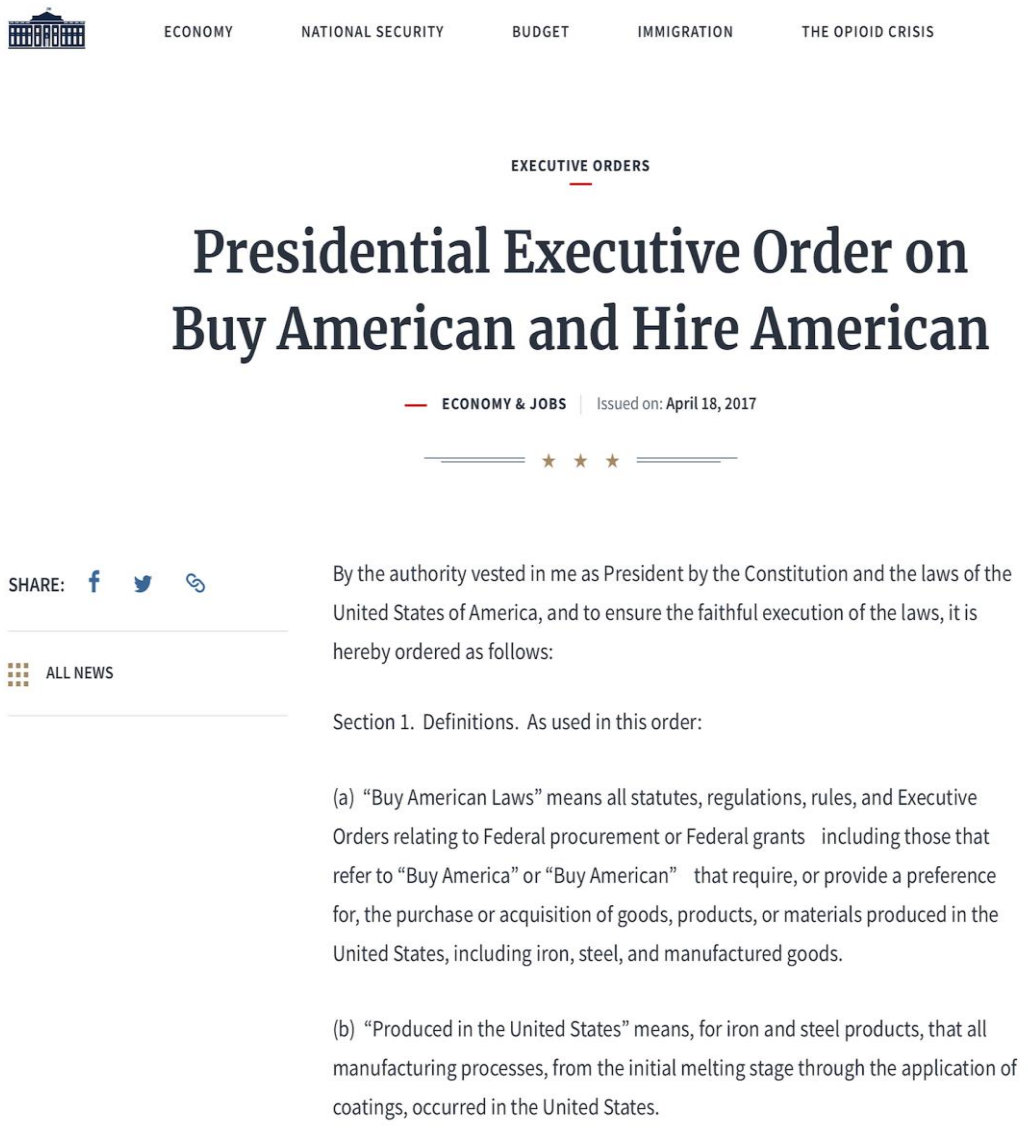
US Immigration: Changes in the Trump Era

On January 23, 2017, the White House issued a memorandum called "Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs. This was not intended to be leaked to the public. *See* *https://www.nafsa.org/uploadedFiles/NAFSA_Dojo/Professional_Resources/Browse_by_Interest/International_Students_and_Scholars/DraftEOworkprograms.pdf*

In April 2017, President Trump signed a "Buy American and Hire American" executive order, directing government officials to "rigorously enforce" immigration laws.

The result:

- Tougher adjudication of H-1B visas and L-1A visas
- Higher percentages of RFEs being issued
- Agency policy of "delay and deny" petitions
- Increased levels of green card applications



ECONOMY NATIONAL SECURITY BUDGET IMMIGRATION THE OPIOID CRISIS

EXECUTIVE ORDERS

Presidential Executive Order on Buy American and Hire American

ECONOMY & JOBS | Issued on: April 18, 2017

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By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure the faithful execution of the laws, it is hereby ordered as follows:

Section 1. Definitions. As used in this order:

(a) "Buy American Laws" means all statutes, regulations, rules, and Executive Orders relating to Federal procurement or Federal grants including those that refer to "Buy America" or "Buy American" that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods.

(b) "Produced in the United States" means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

Adapting to Immigration Policy and Procedures under the Trump Administration

- E-2 visas
- More green card petitions:
  - Dual O-1/EB-1 Filings
  - National Interest Waivers
  - EB-5 Petitions
- Extreme vetting of visa applications, ensuring well structured business plans for business internationalization – L-1A visas
- Advocacy through litigation

E-2 visas

- Investor visas under bilateral treaties with the U.S. - http://travel.state.gov/content/visas/en/fees/treaty.html

- Requirements:
  (1) Requisite treaty exists between the two nations
  (2) Nationality test
  (3) Substantiality test
  (4) Marginality test
  (5) Business Enterprise must be real and operating, or apparently ready to commence operations (in the case of a startup company)
  (6) Investment must be “at risk”

- E-2 visas apply to:
  - Investors who come to "develop and direct" the enterprise; and
  - Employees who share the nationality of the treaty investor, and will fulfill an executive/supervisory position; or possesses skills essential to the firm's operations in the United States.

E-2 visas

Under Trump's Buy American, Hire American Executive Order, Consular Officers are being tougher on E-2 adjudications. 9 FAM 402.9-4 has been revised. For example:

- Marginality Test: A marginal enterprise is an enterprise that does not have the present or future capacity to generate enough income to provide more than a minimal living for the treaty investor and his or her family. **An enterprise that does not have the capacity to generate such income but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise.** The projected future capacity should generally be realizable within five years from the date the alien commences normal business activity of the enterprise.

- While job creation has never been specifically required, Consular Officers are now reviewing cases to ensure that businesses will not displace American workers. Job creation has become a very important factor to be considered in these applications.

E-2 visas

Consular officers are also focused on:

- Fraudulent visa applications
- Intent to depart the U.S. when E-2 status terminates

Even though we have been seeing a higher level of scrutiny, E-2 visas are still being routinely approved. The key is that, in the past, many of these applications were being filed by "*notarios*" who are not licensed to practice law. Current E-2 visa applications require much more diligent preparation. The key to success lies in the details: thorough review of every document submitted as evidence; strong legal arguments set forth in the legal memo, and client preparation for a rigorous interview about the nature of their commercial enterprise.

NAFTA's replacement by USMCA: deal is expected to be signed by the end of November 2018; but Congress must vote to approve it. Negotiations thus far would preserve the existing immigration provisions under NAFTA see:
https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/16%20Temporary%20Entry.pdf

Extraordinary Ability Petitions

– Applies to individuals that have extraordinary abilities in the sciences, arts, education, business, or athletics.

- a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor – as measured by sustained national or international acclaim and recognition in the respective field of endeavor.
- Minimum showing - 3 of the following criteria (*but see* Kazarian):
    1. Receipt of nationally or internationally recognized prizes or awards for excellence in field of endeavor
    2. Membership in association that requires outstanding achievements of its members, as judged by national or international experts
    3. Published material in major media or trade publications about foreign national and his/her work
    4. Participation, either individually or as part of a panel, as a judge of the work of others in field of endeavor
    5. Original contribution of major significance in field of endeavor
    6. Authorship of scholarly articles, published in professional or major trade publications or other major media
    7. Work displayed in artistic exhibitions or showcases
    8. Leading or critical role for an organization or establishment of distinguished reputation
    9. Command a high salary or other significantly high remuneration, in comparison to others in the field
    10. Commercial success in the performing arts

National Interest Waivers

Applies to advanced degree professionals or individuals with exceptional ability.
Goal: to waive the labor certification requirement for individuals who substantially rise above others in their fields of endeavor and whose expertise would serve the national interest of the United States.

- ***Matter of Dhanasar***, 26 I&N Dec. 884 (AAO 2016):
  - Most recent decision – December 2016
  - Replaced NYSDOT (1998) and revised the framework for evaluating National Interest Waivers (NIWs)
  - Normal process: labor certification process (testing the U.S. labor market and proving to the U.S. Department of Labor that there are no U.S. workers, able, willing, qualified and available for the job in question)
  - Waiver: self-petition under INA §203(b)(2)(B)(i) - if the petitioner can demonstrate that he/she will substantially contribute to the U.S. economy, culture, educational interests or welfare
  - Three-part test:
    1. Foreign national's proposed endeavor has both substantial merit and national importance;
    2. Foreign national is well positioned to advance the proposed endeavor; and
    3. On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

Investment/Job Creation Petitions

- **EB-5 Program:**
  - Minimum investment of $500,000 (TEA) - $1,000,000 (non-TEA)
  - At-risk requirement – requires investment due diligence
  - Must establish the lawful source of the invested capital
  - Job Creation - the investment must result in the creation of at least 10 permanent full-time jobs
  - Illiquid investment and slow adjudication period (currently 20 months plus 7 months for NVC scheduling)
  - **2 types of investments:**
    - **Direct investments:** (not subject to government reauthorization) – require creation of 10 direct jobs
    - **Indirect investments**: known as "regional center" investments – may use econometric multipliers – must result in the creation of 10 direct, indirect, and/or induced jobs – (subject to government reauthorization – current sunset date: December 7, 2018)

L-1A Executives and Managers

- Greater numbers of RFEs on L-1A Petitions:
  - (startups) – it is no longer sufficient to submit a business plan detailing the planned growth of your business for the first year. USCIS is now requiring viability studies, contracts with potential clients, and sufficient financial commitment to ramp up U.S. operations during the one (1) year startup period.
  - (operational business enterprises) – USCIS is placing a lot of focus on the managerial or executive duties of the professional that is being transferred to the U.S. It is very important to carefully explain the corporate structure of the business, and the duties and responsibilities of the employees being supervised by the multinational transferee. The beneficiary cannot be a first line supervisor. USCIS is now often requiring corroboration to statements made by the company with respect to the managerial/executive duties that the transferee exercises and will exercise in the U.S.
  - (majority owner of business enterprises) – USCIS recently started issuing RFEs questioning the temporary nature of the executive/managerial position in the U.S. This is in direct contradiction with the regulations, which establish that L visas have dual intent, and therefore, do not have to show the temporary nature of their transfer to the U.S.
  - (functional managers) – USCIS issued a memorandum of law in November 2017 adopting *Matter of G- Inc.,* which holds that a beneficiary is employed in a managerial capacity as a "functional manager" if the petitioner demonstrates that the function is a clearly defined activity; the function is "essential" and core to the organization; the beneficiary will primarily manage, as opposed to perform, the function; the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function; and the beneficiary will exercise discretion over the function's day-to-day operations.

Employment-Based AOS Interviews

U.S. Citizenship and Immigration Services

USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants

Release Date: Aug. 28, 2017

WASHINGTON – U.S. Citizenship and Immigration Services (USCIS) will begin expanding in-person interviews for certain immigration benefit applicants whose benefit, if granted, would allow them to permanently reside in the United States. This change complies with Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States," and is part of the agency's comprehensive strategy to further improve the detection and prevention of fraud and further enhance the integrity of the immigration system.

Effective Oct. 1, USCIS will begin to phase-in interviews for the following:

• Adjustment of status applications based on employment (Form I-485, Application to Register Permanent Residence or Adjust Status).

• Refugee/asylee relative petitions (Form I-730, Refugee/Asylee Relative Petition) for beneficiaries who are in the United States and are petitioning to join a principal asylee/refugee applicant.

Previously, applicants in these categories did not require an in-person interview with USCIS officers in order for their application for permanent residency to be adjudicated. Beyond these categories, USCIS is planning an incremental expansion of interviews to other benefit types.

"This change reflects the Administration's commitment to upholding and strengthening the integrity of our nation's immigration system," said Acting USCIS Director James W. McCament. "USCIS and our federal partners are working collaboratively to develop more robust screening and vetting procedures for individuals seeking immigration benefits to reside in the United States."

Conducting in-person interviews will provide USCIS officers with the opportunity to verify the information provided in an individual's application, to discover new information that may be relevant to the adjudication process, and to determine the credibility of the individual seeking permanent residence in the United States. USCIS will meet the additional interview requirement through enhancements in training and technology as well as transitions in some aspects of case management.

Additionally, individuals can report allegations of immigration fraud or abuse by completing ICE's HSI Tip Form.

For more information on USCIS and its programs, please visit uscis.gov or follow us on Twitter (@uscis), YouTube (/uscis), Facebook(/uscis) and Instagram (@USCIS).

- USCIS -

Last Reviewed/Updated: 08/28/2017

Litigation - Mandamus Actions

- "Mandamus Action" litigation is now being used to compel the United States government to act on administrative matters.

- USCIS has a legal duty to adjudicate matters. Trump's new policies have created huge backlogs on adjudications and these delays are causing harm to clients, who find themselves in limbo for long periods of time.

- A writ of mandamus should only be started when all reasonable administrative remedies are exhausted.

- Courts cannot compel a favorable decision on Client's behalf. They can only compel the government to act. However, our experience has been that, once a lawsuit is brought in federal court, the pressure exerted by the lawsuit is enough to bring an inactive case to adjudication. Unless there are compelling reasons to do so, the U.S. Attorney General prefers not to defend the inaction of USCIS if the case can be resolved without an actual trial.

Conclusion

- **Immigration is a complex and dynamic legal field which can impact all aspects of a client's business, as well as the life changing decisions of the families involved.**

Today's immigration laws, policies, and regulations require complex, strategic approaches that are unique to each client. At our firm, clients demand our undivided attention and creativity. We draw upon our depth of experience and strategic approach to find unique solutions to the most complex immigration matters. We bring strong case management skills to manage client expectations and build client relationships. Our commitment to excellence is what sets us apart to other immigration law firms.

For more information, please contact our office:

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