THOMSON REUTERS
Westlaw®

Another day, another executive order: Targeting nonissues in H-1B hiring practices

By Amy Haberman, Esq., and Zlato "Zack" Hadzismajlovic, Esq., *McCarter & English LLP**

AUGUST 7, 2020

On August 3, 2020, President Trump signed an executive order ("EO") entitled "Aligning Federal Contracting and Hiring Practices With the Interests of American Workers."[1]

Perhaps by design, it signals widespread review of the negative impact of the use of H-1B workers. As explained below, it's a nonsolution to a nonproblem and will have no immediate impact on the hiring of H-1B workers. Why?

It would be surprising if any contractor or subcontractor affirmed that either U.S. workers or national security was adversely impacted by the hiring of the H-1B worker.

A June 22, 2020, EO[2] already directed the Secretaries of Labor and Homeland Security to issue regulations or take other actions to ensure that the presence of H-1B workers in the United States does not disadvantage U.S. workers. To date, these regulations have not been promulgated.

The EO directs federal agencies to review federal contracts awarded in fiscal year 2018 and 2019 and assess the following:

(1) whether contractors (including subcontractors) used temporary foreign labor for contracts performed in the United States, and, if so, the nature of the work performed by temporary foreign labor on such contracts; whether opportunities for United States workers were affected by such hiring; and any potential effects on the national security caused by such hiring; and

(2) whether contractors (including subcontractors) performed in foreign countries services previously performed in the United States, and, if so, whether opportunities for United States workers were affected by such offshoring;

(3) whether affected United States workers were eligible for assistance under the Trade Adjustment Assistance program authorized by the Trade Act of 1974; and any potential effects on the national security caused by such offshoring.

McCarter analysis: The nature of the data culled in (1) and (2) must involve the contractors themselves as the primary responders in order to arrive at an accurate assessment.

It would be surprising if any contractor or subcontractor affirmed that either U.S. workers or national security was adversely impacted by the hiring of the H-1B worker.

Consider the following:

- Every direct employer of an H-1B worker already attests under penalty of perjury that hiring said worker will not adversely affect similarly situated U.S. workers.
- Every H-1B employer already attests under penalty of perjury whether the work performed by the H-1B worker is export controlled.
- No foreign national is eligible to work on classified projects.
- U.S. technology and consulting companies are among the largest employers of H-1B workers and, concurrently, some of the largest recipients of federal contracts. In fiscal year 2019, for example, Deloitte LLP and Microsoft Corporation reportedly secured $2.2 billion and $739 million, respectively, from federal agencies.
- U.S. universities receive even higher sums from the federal government, mainly for research and development. In fiscal year 2019, for example, the California Institute of Technology was reported to have received more than $3 billion or nearly three times the amount received by Johns Hopkins University. The vast majority of the H-1Bs sponsored by these universities are not even subject to the annual numerical cap.

Additionally, the EO calls upon the head of each agency that enters into contracts to:

(1) conduct an assessment of any negative impact of contractors' and subcontractors' temporary foreign labor hiring practices or offshoring practices on the economy and efficiency of federal procurement and on the national security, and propose action, if necessary and as appropriate and consistent with applicable law, to improve the economy and efficiency of federal procurement and protect the national security;

(2) review the employment policies of the agency to assess the agency's compliance with Executive Order 11935[3] of

September 2, 1976 (Citizenship Requirements for Federal Employment), and section 704 of the Consolidated Appropriations Act, 2020, Public Law 116-93, prohibiting contractors from replacing U.S. citizens and green card holders with foreign workers and also outlawing offshoring of government work; and

(3) within 120 days of the date of the order, submit a report to the Director of the Office of Management and Budget summarizing the results of the reviews and recommending, if necessary, corrective actions.

Finally, the EO also gives the Secretaries of Labor and Homeland Security 45 days to take actions to protect U.S. workers from any adverse effects on wages and working conditions caused by the employment of H-1B visa holders at job sites (including third-party job sites), including measures to ensure that all employers of H-1B visa holders, including secondary employers, adhere to the Labor Condition Attestation ("LCA") requirements of section 212(n) of the Immigration and Nationality Act.

While the restriction on outsourcing appears to make economic sense, less so does the conflation with H-1B workers.

McCarter analysis: With regard to (2), Executive Order 11935 has barred noncitizens (with limited exceptions) from employment in the federal civil service since 1976 so it appears odd to require a wholesale federal agency review of an already illegal practice.

While the restriction on outsourcing appears to make economic sense, less so does the conflation with H-1B workers. For instance, the H-1B2 category was created by statute specifically to allow foreign professionals to serve in DoD cooperative research and development.

A "Fact Sheet" released contemporaneously with the EO claims to "combat employers' misuse of H-1B visas, which were never intended to replace qualified American workers with low-cost foreign labor."

This attempt to further the myth that H-1B workers offer a cheap alternative to U.S. workers conveniently ignores the legal requirement that prior to hiring an H-1B worker, every employer must make the following attestations in an LCA posting that must be reviewed and certified by the DOL:

- That the employer will pay the H-1B worker at least the same rate it pays U.S. workers;
- That the employment of the H-1B worker will not adversely affect the working conditions of U.S. workers similarly employed in the area of intended employment; and
- That there is no strike or lockout at the place of employment.
- These attestations must be posted, wage rate included, at the place of employment, even when this is a third-party job site. The information must be made available to the H-1B worker's colleagues, should they request it, in a public access file.

The LCA attestations ensure that the hiring of an H-1B worker does not negatively impact U.S. workers, and instead support the claim of many U.S. companies that the H-1B pipeline represents a valuable source of global talent.

Any impact related to this EO is dependent on whether President Trump is reelected.

Assuming that scenario, those performing as federal contractors or subcontractors should identify what, if any, roles are outsourced to perform on said contracts and what strategic solutions can be implemented in the short term.

Notes

1 https://bit.ly/33zTsRg

2 https://bit.ly/3fw93n3

3 https://bit.ly/3fvLT0h

This article appeared on the Westlaw Practitioner Insights Commentaries webpage on August 7, 2020.

* © 2020 Amy Haberman, Esq., and Zlato "Zack" Hadzismajlovic, Esq., McCarter & English LLP

ABOUT THE AUTHORS

Amy Haberman (L) is chair of **McCarter & English**'s Labor & Employment Practice Group in New York and partner-in-charge of the group's Immigration Practice. She helps domestic and multinational corporate clients address their employment-based immigration needs. She can be reached at ahaberman@mccarter.com. **Zlatko "Zack" Hadzismajlovic** (R), a partner in the New York office of McCarter and head of the Global Trade, CFIUS and Export Controls Practice, focuses on international trade, export controls and customs matters as well as U.S. and U.K. immigration and global mobility issues. He can be reached at zh@mccarter.com. This article was originally published Aug. 4 on the firm's website. Republished with permission.