CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

# DON'T ALWAYS SUCK UP TO BUY AMERICAN HIRE AMERICAN

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President Trump's Buy American Hire American Executive Order (BAHA) has little relevance in an economy where the unemployment rate is 4% and the Labor Department has reported that there is a record high of 7.3 million job openings. BAHA has however been deployed to make life harder for legal immigrants who do their best to remain in status while pursuing lawful permanent residence. They also benefit the United States as their employers need them and follow the law in filing appropriate visa applications. For example, H-1B visa renewals that were routinely approved previously are now being denied in the name of BAHA. The USCIS has recently released new H-1B data that reflects an increase in requests for evidence and denials in 2019, again pursuant to BAHA.

BAHA aims to create higher wages and employment rates for U.S. workers, and directs the Secretaries of State, Labor, and Homeland Security, as well as the Attorney General, to issue new rules and guidance to protect the interests of U.S. workers in the administration of the immigration system. BAHA highlights the H-1B visa program and directs the agencies to ensure that H-1B visas are awarded to the most skilled and highest-paid beneficiaries. BAHA, however, is merely an executive order. It should not take precedence over the Immigration and Nationality Act. Still, the USCIS uses BAHA as justification to refuse otherwise approvable H-1B petitions. Some of these H-1B denials are absurd. The author recently heard that the USCIS denied a petition filed on behalf of a pathologist by an established pharmaceutical company.

Following BAHA, the State Department also swiftly made changes to the Foreign Affairs Manual regarding guiding consular officials in issuing nonimmigrant H, L, O, P and E visas. The changes relating to H and L visas are reproduced below

as examples:

9 FAM 402.10-2 Overview of H Visas

On April 18, 2017, the President signed the Executive Order on Buy American Hire American (E.O. 13788), intended to "create higher wages and employment rates for workers in the United States, and to protect their economic interests." The goal of E.O. 13788 is to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse, and it is with this spirit in mind that cases under INA 101(a)(15)(H) must be adjudicated.

https://fam.state.gov/FAM/09FAM/09FAM040210.html

9 FAM 402.12-2 Overview of L visas

On April 18, 2017, the President signed the Executive Order on Buy American Hire American (E.O. 13788), intended to "create higher wages and employment rates for workers in the United States, and to protect their economic interests." The goal of E.O. 13788 is to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse, and it is with this spirit in mind that cases under INA 101(a)(15)(L) must be adjudicated.

https://fam.state.gov/FAM/09FAM/09FAM040212.html

Based on these FAM changes, here have been several anecdotal reports of consular officers asking visa applicants as to how their employment will further BAHA by creating jobs for American workers or not depressing their wages. Some have been questioned whether their employers first tried to hire American workers even when such recruitment is not required under the specific visa. Such questioning is entirely inappropriate and not consistent with the law under which the visa petition was approved.

For example, the remuneration of an intracompany transferee on an L-1 visa can emanate from a US or a foreign source. See *Matter of Pozzoli*, 14 I&N Dec. 569 (RC 1974). The L visa also does not mandate a certain wage or a test of the U.S. labor market.  An E visa treaty trader or investor does not need to be paid wages. Still, under BAHA, this may be viewed as suspect if it does not create higher wages and employment rates for US workers. BAHA was not in existence when Congress created the L, E, H-1B or O visa provisions in the INA. According

to the legislative history for the 1970 Act, the L-1 visa was intended to "help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the organization." H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.). There is also no indication in the plain text of INA 101(a) (15) (L) that the purpose of the L visa was to "create higher wages and employment rates for workers in the United States, and to protect their economic interests." If Congress desired that objective in the L visa program, it would have stated so more explicitly. Indeed, Congress did speak about protecting US workers in INA 101(a)(15)(H)(ii)(b) requiring an H-2B worker to perform temporary services or labor only "if unemployed persons capable of performing such service or labor cannot be found in this country." Therefore, if Congress desired the same purpose for the L or the O visa, as it did for the H-2B visa, it would have said so. Even with H-1B visas, unless an employer is a dependent employer, there is no obligation on the part of the employer to recruit for US workers. Regarding wages too, if an employer is legitimately hiring a worker for an entry level position in an H-1B specialty occupation, the employer is under no obligation under the law to pay the highest level wage.

As a result of all visa applications being viewed through the prism of BAHA, attorneys feel the need to advise their clients to answer questions of consular officials relating to BAHA. Some attorney are also indicating in H-1B and other visa petitions (both nonimmigrant and immigrant) as to how the beneficiary will further BAHA. While it may be tempting for us as attorneys to invoke BAHA as if it is a deity with magical powers, it may also lead us down a rabbit hole. Apart from not being law and only an executive order, BAHA sets no standard for the attorney to guide the client. If the attorney indicates that the H-1B worker's entry into the US will create more jobs, there is no metric to establish this. The only metric we have under current immigration law include specific labor market tests under the permanent labor certification program, the H-2A and H-2B programs and the H-1B program for dependent employers or willful violators. These rigid criteria have not been followed in other visa petitions such as an L-1 or an H-1B (for a non-dependent employer or an employer who is not a willful violator), and they do not need to.

If a client is asked inappropriately regarding whether the position will impact American workers or not, the client should be prepared to answer that the visa petition met all the criteria under the statutory and regulatory provisions, and

was approved accordingly. There is no need for the client, or the attorney, to improvise on why the applicant’s employment in the US will result in more jobs for US workers.  Advancing the client’s cause under BAHA will lead to more questions from the adjudicating official, which could be arbitrary and cannot he held up to an objective legal standard.

This is not to say that an applicant should never make a BAHA argument in his or her favor. There may be some instances where the argument in favor of BAHA is clear cut or the official asks specific questions where an answer may be readily available.  The purpose of this blog is to caution against the talismanic invocation of BAHA, when there is no metric or standard, under which an adjudicating official can be held up to. BAHA has also been used most effectively to deny immigration benefits. If an official infuses the adjudication process with BAHA, resulting in a denial, it could be grounds for appeal. Even at the consular level, which is generally immune from administrative or judicial review, a denial of a visa application based on BAHA would potentially allow the applicant to seek an advisory opinion from the Visa Office if the denial was contrary to the statutory provision.  If the applicant already conceded that the official could ask for extraneous evidence under BAHA and provided it, it may be harder to appeal such a denial. Therefore, in the opinion of this author, it is best to not always suck up to BAHA.