



# IMMIGRATION AND NATIONALITY ACT TRUMPS AMERICA FIRST

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President Trump's [America First](#) policy has influenced how the United States views trade, immigration, the environment and global alliances. It is a radical departure from how the United States viewed itself before Trump took office. While previously the United States took the lead in forging the Paris climate accord, Trump withdrew from it. While the United States has promoted free trade as a basis for growing prosperity between nations, Trump withdrew from the Trans Pacific Partnership, which took years to negotiate under American leadership, and has signaled his intention to withdraw from NAFTA and the free trade agreement with a crucial ally South Korea. Although the title is deceptive, Trump's America First doctrine, unfortunately, abdicates America's leadership role in the world.

It is worth noting that the term America First also has an [ignoble history](#), and has been associated with anti-Semitism. The America First Committee (AFC) was founded in 1940 and opposed the involvement of the United States in World War II. AFC's most notable spokesman Charles Lindbergh, the aviator, expressed not only sympathy for the persecution of Jews in Nazi Germany, but further suggested that Jews were advocating that the United States enter a war that was not in the national interest. The AFC met a sudden death a few months later by disbanding when Japan attacked Pearl Harbor, which naturally propelled America's involvement in World War II.

Trump has now again championed America First, which has already had a pernicious impact on immigration policy. Pursuant to America First that withdraws this nation's outreach to the world by welcoming immigrants, Trump issued travel bans, increased immigration enforcement regardless of priorities, intends to cancel the Deferred Action for Childhood Arrivals (DACA) program

and has provided full throated support for legislation that [curbs legal immigration](#). On April 18, 2017, President Trump signed the “[Buy American and Hire American](#)” Executive Order No. 13788. The EO 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. The EO 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.

Although the administration has yet to influence any legislation in Congress or change rules, the impact of the EO is already being seen in the [increased number of Requests for Evidence \(RFEs\) challenging the paying of Level 1 wages](#), even though employers have legitimately offered positions to entry-level workers under the H-1B visa program. The administration has also indicated that entry level Computer Programmers may not qualify for the H-1B visa. The State Department has made the following changes to the Foreign Affairs Manual with respect to providing guidance to consular officers regarding the issuance of nonimmigrant H, L, O, P and E visas:

#### 9 FAM 402.10-2 Overview of H Visas

1. 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

1. 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>

#### 9 FAM 402.13-2 Overview of O visas

1. 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)(O) must be adjudicated.

<https://fam.state.gov/FAM/09FAM/09FAM040213.html>

#### 9 FAM 402.14-2 Overview of P visas

1. 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)(P) must be adjudicated.

<https://fam.state.gov/FAM/09FAM/09FAM040214.html>

#### 9 FAM 402.9-2 Overview of E visas

1. 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. You must also remember that the basis of this classification lies in

treaties which were entered into, at least in part, to enhance or facilitate economic and commercial interaction between the United States and the treaty country. It is with this spirit in mind that cases under INA 101(a)(15)(E) should be adjudicated.

<https://fam.state.gov/FAM/09FAM/09FAM040209.html>

What is interesting that even though the Buy American Hire American Executive Order singles out H-1B visas, the FAM has been amended to incorporate America First principles into other temporary visa programs that do not require payment of US source wages. 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 the new EO, this may be viewed as suspect if it does not create higher wages and employment rates for US workers. The Buy American Hire American EO was not in existence when Congress created the L, E or O visa provisions in the Immigration and Nationality Act. 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.

If government agencies seek to reinterpret INA provisions in light of the Buy American Hire American EO resulting in denials of visa petitions, those decisions ought to be challenged as they are contrary to the plain meaning of the statute as well as Congressional intent. A presidential executive order cannot supersede a law previously passed by Congress. A case in point is

[\*Chamber of Commerce v. Reich\*](#), 74 F.3d 1322 (1996) which held that a 1995 executive order of President Clinton violated a provision of the National Labor Relations Act. President Clinton's EO No. 12, 954 declared federal agencies shall not contract with employers that permanently replace lawfully striking employees. The [lower district court](#) held that the president's interpretation of a statute was entitled to deference under [\*Chevron U.S.A. Inc. v. NRDC\*, 467 U.S. 837 \(1984\)](#). The DC Court of Appeals, however, overruled the district court, without explicitly stating whether the president's interpretation was entitled to *Chevron* deference or not. Based on the holding in *Chamber of Commerce v. Reich*, if visa petitions and applications are denied under President Trump's interpretation of INA provisions pursuant to the Buy American Hire American EO, they too ought to be challenged as being violative of the INA and it ought to be further argued that the president's interpretation of a statutory provision, unlike a government agency, is not entitled to *Chevron* deference.

What the Trump administration cannot change through Congress, it is trying to do so through executive orders. The Buy American Hire American EO further tries to jolt the immigration system that has been carefully crafted by Congress over the years. Quite apart from pleasing Trump's political base it is unclear whether the EO will create more jobs. Most [economists credibly argue that more immigrants create more jobs](#), and that restricting immigrants will not necessarily create more jobs for American workers. America's [most successful companies have been founded by immigrants and most of its recent Nobel prize winners were not born](#) in the United States. The plain meaning of statutory provisions in the INA should prevail over ideologically motivated executive orders under Trump's America First doctrine. Thankfully, the courts will provide a forum to allow those adversely impacted by new interpretations to demonstrate that the INA trumps America First.

On this Labor Day, it is worth reflecting whether a more welcoming immigration policy will benefit America more than Trump's America First. Immigrants do not come to America because it is great; in fact, to the contrary, they come to America and make it great! America First will make the nation less great.