



# THE RESCISSION OF TRUMP'S BUY AMERICAN HIRE AMERICAN WILL BENEFIT IMMIGRANTS AND AMERICA

Posted on January 31, 2021 by Cyrus Mehta

## By Cyrus D. Mehta

On January 25, 2021, President Biden signed an executive order entitled the [Future is Made in All of America by All of America's Workers](#). This executive order revokes Trump's [Buy American Hire American Executive Order](#) (BAHA), 13788, of April 18, 2017. Although President Biden's Buy American executive order requires government agencies to purchase goods and services from US companies, as a way to boost production within the United States, it is not designed to impede immigration or hurt immigrants. While Biden's Buy American executive order has also been criticized in some quarters as representing [bad economics](#) - since forcing the government to buy only American products may raise the average cost and lower the average quality of everything the government buys - the purpose of this blog is not to critique the economics behind Biden's executive order but to celebrate the demise of BAHA.

Section 5 of the [BAHA EO](#) stated:

**Sec. 5. Ensuring the Integrity of the Immigration System in Order to "Hire American."** (a) *In order to advance the policy outlined in section 2(b) of this order, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the*

*prevention of fraud or abuse.*

*(b) In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.*

When BAHA was announced with great fanfare in April 2017, USCIS reviewed all its regulations, policies, and programs to comport with BAHA. BAHA was issued on the false premise that immigrants took away American jobs and were a threat to American workers. BAHA also falsely believed that immigration is a zero sum game where the presence of an immigrant in the US displaces a US worker. However, immigration can also be viewed as enhancing American jobs and [foreign nationals complement](#) US workers thus creating more growth and opportunities for further job creation. The BAHA executive order explicitly highlighted the H-1B visa program and directed the agencies to ensure that H-1B visas are awarded to the most skilled and highest-paid beneficiaries even though there was no basis to do that in the Immigration and Nationality Act. The USCIS began to deny routine H-1B and L-1 visa extensions in the name of BAHA. The State Department followed suit and so did the Justice Department and all other agencies in charge of implementing US immigration law. BAHA resulted in unfair denials of H-1B and L-1 petitions, and even US consuls at the State Department began asking visa applicants whether their entry into the US would comport with BAHA.

Even though there was no requirement in the INA for a demonstration that US workers would not be displaced when approving visa applications - for example, an intracompany transferee need not demonstrate that he or she will not be displacing Americans, or create new jobs - attorneys prepared visa applicants to demonstrate how their entry in the US would result in more jobs for US workers and thus be consistent with BAHA. This author advised in a [prior blog](#) that attorneys should not suck up to BAHA as there was no standard set forth to determine how a visa entrant would result in more jobs for American workers. BAHA now thankfully does not exist and attorneys need not have to go through the charade of coaching their clients to show how their entry would be consistent with BAHA even though those standards were nonexistent under the INA.

BAHA stemmed from [Trump's America First policy](#) that disgracefully influenced how the United States viewed trade, immigration, the environment and global alliances. It was 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 had 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 he also withdrew from other global alliances. Although the title was deceptive, Trump's America First doctrine, unfortunately, abdicated America's leadership role in the world. This thankfully will be restored by President Biden and without America First or BAHA guiding his administration.

It is worth noting that the term America First also has an [ignoble history](#), and was 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.

Now BAHA is dead, and can no longer roil US immigration policy. No longer may USCIS issue a [BAHA report card each year](#) boasting on how well it has done under BAHA by denying visa applications and harassing immigrants. Even pending regulations designed to impede legal immigration into the US, such as the [new H-1B lottery rule](#), may no longer rely on BAHA to move forward although this in itself may not be the basis to invalidate them in court. The newly promulgated [DOL wage rule](#) that artificially increases prevailing wages, thus creating obstacles for employers to obtain H-1B visas and permanent residency for foreign nationals, also mentions the BAHA executive order several times. The USCIS policy that [rescinded giving deference](#) to prior successful adjudications was based on BAHA (USCIS has touted this as one of its BAHA accomplishments). It is hoped that immigration policies and rules that were issued under BAHA, now rescinded, can provide an excuse for the Biden administration to abandon them as well as potentially provide further ammunition to litigators who challenge them in court. Even those who received

denials of visa petitions or applications that cited BAHA can potentially use that as a basis to challenge them in court or through additional administrative review.

The rescission of BAHA should also pave the way for new progressive laws and policies that view immigrants as an asset to the nation rather than a threat, which in turn will benefit both immigrants and America.