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US IMMIGRATION & NATIONALITY LAW

WILL THE IMMIGRATION PROVISIONS IN THE AI EXECUTIVE ORDER BRING MEANINGFUL CHANGE OR BE MERE WINDOW DRESSING?

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On October 30, 2023, President Biden issued an Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI). The stated purpose of the order is to ensure that the "development and use of AI" is governed "safely and responsibly". The executive order further lays out eight "guiding principles and priorities" for the development and use of AI: "a.) Artificial Intelligence must be safe and secure, b.) Promoting responsible innovation, competition, and collaboration will allow the United States to lead in AI and unlock the technology's potential to solve some of society's most difficult challenges, c.) The responsible development and use of AI require a commitment to supporting American workers, d.) Artificial Intelligence policies must be consistent with Administration's dedication to advancing equity and civil rights, e.) The interests of Americans who increasingly use, interact with, or purchase AI and AI-enabled products in their daily lives must be protected, f.) Americans' privacy and civil liberties must be protected as AI continues advancing, g.) It is important to manage the risks from the Federal Government's own use of AI and increase its internal capacity to regulate, govern, and support responsible use of AI to deliver better results for Americans, and h.) The Federal Government should lead the way to global societal, economic, and technological progress, as the United States has in previous eras of disruptive innovation and change". Although the executive order sets out numerous broad guidelines aimed at ensuring that AI is developed and used responsibly, it also includes several provisions that lay the groundwork for immigration policy innovations for AI experts.

Section 5 of the Executive Order first directs the DHS Secretary to "review and initiate any policy changes the Secretary determines necessary and appropriate to clarify and modernize immigration pathways for experts in AI and other critical and emerging technologies, including O-1A and EB-1 noncitizens of extraordinary ability; EB-2 advanced-degree holders and noncitizens of exceptional ability…" Although the executive order does not further specify what measures the DHS Secretary should take to achieve these goals, it is hoped that the criteria for O-1As and EB-1 and EB-2 I-140s could be expanded to make it easier for AI experts to qualify. In an emerging field such as AI, it could be difficult for a prospective O-1A candidate to demonstrate, for example, authorship of scholarly articles in the field or receipt of nationally or internationally recognized prizes or awards for excellence in the field, as such scholarly publications and awards may not exist yet. O-1 and EB-1 candidates may already submit "comparable evidence" to establish eligibility if the listed criteria are not readily applicable to their occupation. This policy could allow prospective O-1 and EB-1 candidates to establish extraordinary ability by highlighting other evidence more relevant to the field of AI, to which the traditional criteria may not readily apply. Interestingly, the executive order further states: "for purposes of considering updates to the "Schedule A" list of occupations, 20 C.F.R. 656.5, the Secretary of Labor shall publish a request for information (RFI) to solicit public input, including from industry and worker-advocate communities, identifying AI and other STEM-related occupations, as well as additional occupations across the economy, for which there is an insufficient number of ready, willing, able, and qualified United States workers". "Schedule A" occupations are those for which the Department of Labor has "predetermined there are not sufficient U.S. workers who are able, willing, qualified, and available pursuant to regulation", so employers may file an I-140, Immigrant Petition for Alien Workers for a beneficiary in these occupations without a labor certification. For years the only Schedule A occupations have been nurses and physical therapists, and immigrants of exceptional ability in the sciences or arts, including college and university teachers, and immigrants of exceptional ability in the performing arts. Although a rulemaking would be required to add occupations to the Schedule A list, this change, if it were to go into effect, would be a significant change that would allow U.S. employers to sponsor noncitizen AI professionals for permanent residence without going through the burdensome labor certification process. The list of Schedule A occupations has not changed for decades, so it is high time that the list be

expanded even beyond AI occupations to include others for which there are a shortage of U.S. workers, such as other computer occupations.

The executive order also states that the DHS Secretary should "continue its rulemaking process to modernize the H-1B program and enhance its integrity and usage, including by experts in AI and other critical and emerging technologies, and consider initiating a rulemaking to enhance the process for noncitizens, including experts in AI and other critical and emerging technologies and their spouses, dependents, and children, to adjust their status to lawful permanent resident". On October 23, 2023, DHS promulgated a proposed rule amending its H-1B regulations. Cyrus Mehta's previous blog discusses significant features of the proposed rule in depth. One of the points of concern in new the rule is its redefinition of "specialty occupation" to require studies in a field that is "directly related" to the H-1B position. The proposed rule further states, "A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. A position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position." As AI is an emerging field, there are likely few degree programs that are specifically AI-focused as yet, so the definition of specialty occupation should not be narrowed such that it thwarts the ability of an AI specialist to obtain an H-1B visa. Given that AI is beginning to be used in fields ranging from finance to graphic design, introducing flexibility into the O-1A, EB-1/EB-2, and H-1B criteria could benefit numerous noncitizens who work with AI in some capacity.

The executive order also includes provisions that may benefit noncitizen students studying AI. It instructs the Secretary of State to "consider initiating a rulemaking to expand the categories of nonimmigrants who qualify for the domestic visa renewal program covered under 22 C.F.R. 41.111(b) to include academic J-1 research scholars and F-1 students in science, technology, engineering, and mathematics (STEM)" and "establish, to the extent permitted by law and available appropriations, a program to identify and attract top talent in AI and other critical and emerging technologies at universities, research institutions, and the private sector overseas, and to establish and increase connections with that talent to educate them on opportunities and resources for research and employment in the United States, including overseas

educational components to inform top STEM talent of nonimmigrant and immigrant visa options and potential expedited adjudication of their visa petitions and applications". The State Department recently announced that it will soon launch a pilot stateside visa renewal program for certain H-1B and L-1 visa holders. Stateside visa processing was available for some nonimmigrants in the past, but has been suspended since 2004. Adding J-1 research scholars and F-1 STEM students to the list of nonimmigrants who can renew their visas in the U.S. would be a significant expansion of the reintroduced program, but would require a rulemaking to actually take effect.

Not all of the executive order's provisions concerning J-1s will be beneficial for noncitizen research scholars, however. The executive order directs the Secretary of State to "consider initiating a rulemaking to establish new criteria to designate countries and skills on the Department of State's Exchange Visitor Skills List as it relates to the 2-year foreign residence requirement for certain J-1 nonimmigrants, including those skills that are critical to the United States". This requirement prevents certain J-1s from changing to H or L status in the U.S., adjusting status, or receiving an immigrant visa or H, L, or K visa until they have first spent two cumulative years in their home country. Waivers of this requirement are only available to J-1 who can meet certain very narrow criteria, such as establishing that their departure from the U.S. would result in exceptional hardship to their U.S. citizen or LPR spouse or child, or that they would face persecution if they returned to their home country. Expanding the skills list could result in more J-1 scholars being required to return to their home countries for two years after completing their programs, rather than being able to remain in the U.S. to take up employment and contribute to developments in the AI field.

Many of the immigration policy changes suggested in the executive order could greatly benefit noncitizen AI experts. However, the executive order itself in many instances merely directs the relevant agencies to "consider initiating a rulemaking" to implement the changes. So, while the policies laid out in the executive order may come as largely welcome news to noncitizen students, scholars, and professionals in the AI field, some changes remain aspirational for now until put into effect through a regulation. However, USCIS directly implemented changes to its Policy Manual regarding O-1s and EB-1s in STEM fields, so it is hoped that the agency will take similar action to assist AI experts. .

While the executive order intends to bring about positive changes that would

enable AI experts to work in the US, only Congress can bring about meaningful change. While the executive order can provide guidance to USCIS officers to consider O-1, EB-1 and EB-2 petitions in favor of the AI specialist, the potential changes may not be so attractive to the AI specialist who may be considering other countries like Canada and the UK if the backlogs in the employment-based categories continue to persist especially for those born in India. Moreover, if the H-1B cap continues to remain at 85,000 subjecting applicants to a randomized lottery, the best and the brightest in the AI field will choose to go somewhere else as America is not the only game in town. Unless Congress acts fast to infuse more visas in the legal immigration system, the changes in the executive order may prove to be only window dressing.

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