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Immigration attorneys find it hard to advise clients during transition to Trump

By Eli Wolfe

With just a week until the Jan. 20 inauguration, President-elect Donald J. Trump’s immigration policies have crystallized around pledges to deport millions of people living in the country illegally, enhance vetting for new immigrants, eliminate so-called sanctuary cities and build a wall along the border with Mexico.

But what the mercurial Trump wants to do versus what he can and will do remains a thorny question in the legal community, making it difficult for immigration attorneys to know exactly what to tell their clients.

"The president-elect jumps around a bit," said Mitch Wexler, a partner in the immigration law firm Fragomen, Del Rey, Bernsen & Loewy LLP. "There will be changes, but I'm just not sure where he’s going to come out."

According to Wexler and other business immigration attorneys, Trump’s administration may feature a crackdown on various visa categories as part of his attempt to protect U.S. jobs. He noted that Trump’s plan to dismantle the North American Free Trade Agreement (NAFTA) is unsettling for some of his client employers, who rely on NAFTA’s TN visa as a quick and easy way to bring in employees from Canada and Mexico.

Avi Friedman, a partner with the immigration firm Wolfsdorf Rosenthal LLP, said that it’s a challenge to offer counsel to clients when so little is known about what Trump will actually do once in office. As an example, he noted that many of the international students he works with are concerned that Trump could introduce stricter criteria for individuals applying for visas to study in the U.S. While Friedman can tell them that it’s unlikely there will be many immediate changes to visa categories for the coming year, he can’t predict whether Trump or the Republican-controlled Congress will eventually introduce restrictions or roll back provisions like the Optional Practical Training component of the F-1 visa that allows foreign students to work in the U.S. for a limited period after graduation.
"It's going to be business as usual, or even more business than usual, coming up in 2017 because of the fear of the unknown and what could get taken away," Friedman said.

According to Wexler, Trump's desire to protect U.S. jobs could mean that the process for obtaining a visa will slow down.

"What's significantly going to impact many of my clients are processing delays," Wexler said. He pointed out that H-1B visas for highly-skilled foreign workers are popular in the tech sector and relatively easy to get approved.

But the process could become significantly longer if Trump requires employers to conduct a labor market test before seeking foreign workers. Wexler said meeting this requirement could be financially difficult for some clients, while others may simply give up on acquiring visas and move their projects overseas.

"I'm not seeing this as a significant boom for our core business," Wexler said.

Processing delays could be exacerbated even further if Trump institutes "extreme vetting" procedures for incoming visitors or immigrants. Bo Cooper, a partner at Fragomen, said clients could experience slowdowns similar to the delays that occurred immediately following 9/11.

"There's no real way of speeding those up and that can slow business and slow life down in significant ways," Cooper said.

Several attorneys commented that Trump may end up supporting the EB-5 immigrant investor program, which gives visas to foreign investors who spend $500,000 or more on projects that create U.S. jobs. Wexler noted that Trump's son-in-law, Jared Kushner, has used the program to partially finance Trump Bay Street, a 50-story luxury apartment building in Jersey City.

Immigration attorneys said they anticipate sweeping and potentially catastrophic consequences for their clients as Trump rewrites policies addressing illegal immigration. Marc L. Van Der Hout, a San Francisco-based immigration attorney, said the phone in his office has been ringing off the hook with clients concerned about their status as recipients of the Deferred Action for Childhood Arrivals (DACA) program. It was established in 2012 to allow undocumented immigrants who were brought to the U.S. as children to apply for temporary work authorization and protection from deportation.

"What people are worried about is what he will do with the DACA kids," Van Der Hout said, adding that there will almost certainly be an increased need for good immigration attorneys.
But the advice that attorneys can provide to clients is limited by the lack of clarity around what options their clients actually have. Andres Ortiz, an associate at Fragomen who works on removal defense matters, noted that several of his clients are in the process of applying or reapplying for DACA status and they are now uncertain whether it makes sense to continue their applications, given that Trump had called the program illegal and unconstitutional.

Ortiz noted that under Trump, the U.S. Citizenship and Immigration Services could be compelled to surrender the personal information of DACA recipients and applicants to Immigration and Customs Enforcement (ICE).

"Naturally flowing from that, if somebody's information is in the system, we have to worry about whether they are going to be harmed by going and applying again," Ortiz said.

Immigration attorneys are also preparing for the wave of litigation that will likely follow if Trump makes good on his pledge to deport two to three million people who don’t have legal permission to be in the country.

Jennifer Chacón, a law professor at UC Irvine’s School of Law, said that Trump is likely to continue President Obama’s policy of deporting those in the country illegally if they have been convicted of serious criminal acts. But she noted that there is also a strong possibility that he will undo the administration’s policy of prosecutorial discretion in cases involving those residing illegally in the U.S. with no criminal convictions.

"We're more likely to see an increase in high-visibility policies that have some precedent, so work-site raids, home and neighborhood raids, and an increased focus on nebulous gang enforcement," Chacón said, citing examples of immigration enforcement that occurred during the Bush administration.

Susan J. Cohen, the chair of the immigration practice at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC, said that in light of Trump’s promise to ramp up enforcement efforts, employers would be wise to make sure I-9 employment eligibility verification forms for their employees are in order.

Chacón said that enforcement efforts could quickly overwhelm the backlogged immigration courts. According to the TRAC Immigration Project, there are 526,175 pending deportation cases in the U.S. and almost 96,000 in California alone, while there are fewer than 300 immigration judges to cover the entire country. The human rights organization Human Rights First suggested in an April 2016 report that Congress approve funding for approximately 150 more judges and support staff to whittle down the number of cases. While Trump has pledged to triple the number of ICE agents, he has not indicated whether he will increase funding for the courts.
Chacón noted that some immigration cases can already take months or even years to reach a court hearing, which means people in the country without legal permission who are detained during the Trump administration may end up spending longer stretches of time in detention facilities.

Andres Ortiz said he’s received an uptick in calls from first-time clients who are panicking needlessly about their status. But he has also encountered clients with issues that don’t have a clear answer.

As an example, he pointed to the provisional unlawful presence waiver — a provision established through an executive action by Obama that allows people who entered the country illegally but are close relatives of U.S. citizens to return to their home countries and apply for legal residency without being subjected to a three- to 10-year bar on reentry. It’s unclear whether Trump will eliminate this provision, which makes it impossible to give confident advice to clients.

"I have a couple of clients who are eligible to get their green cards through that process and they are unsure if they’re going to be able to make it for a year or two if the Trump administration undoes this regulation," Ortiz said.

"Until we get more information, it’s difficult for us to really meaningfully address the fear that people have," Ortiz added.

Several attorneys mentioned that the heightened anxiety around Trump’s election has been a windfall for notarios — unscrupulous legal consultants who overcharge clients for useless, and sometimes dangerous, advice. According to Chacón, the swelling number of notarios has underscored the need for qualified and affordable legal representatives in states with large populations of people who have entered the country without legal permission.

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