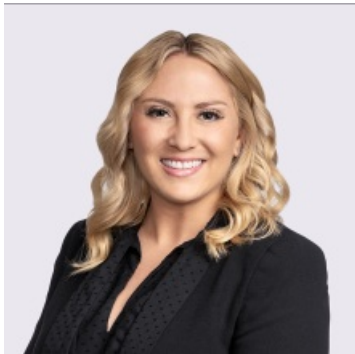# Hiring the Future: Navigating New Immigration Policies for AI and STEM Talent

By Jessica K. Lang & Kimberly M. Bennett

October 29, 2024

Meet the Authors
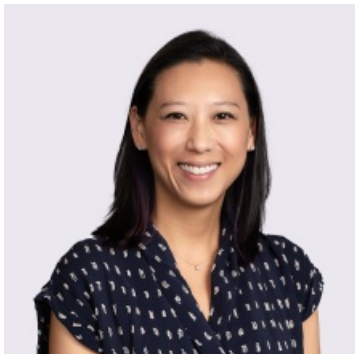
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October 29, 2024

United States technology employers increasingly look to add skilled AI talent to their ranks, including J-1 research scholars and F-1 STEM students. For organizations who do, it's crucial to consider recent United States Citizenship and Immigration Services policy changes and upcoming regulations which are important when developing new pathways and improving programs to attract and retain top foreign nationals with AI experience.

Transcript

INTRO

United States technology employers increasingly look to add skilled AI talent to their ranks, including J-1 research scholars and F-1 STEM students. For organizations who do, it's crucial to consider recent United States Citizenship and Immigration Services policy changes and upcoming regulations which are important when developing new pathways and improving programs to attract and retain top foreign nationals with AI experience.

On this episode of We get work™, we discuss recent regulatory developments in streamlining visa processes for noncitizens who seek to enter the U.S. to study, research, or work in an AI position or industry. Our hosts today are Jessica Lang, principal in the Boston office, and Kimberly Bennett, associate in the Pittsburgh office of Jackson Lewis and members of the Immigration group.

Jessica and Kimberly, the question on everyone's mind today is, what is the new guidance on immigration of AI and STEM workers, and how does that impact my business?

CONTENT

Jessica K. Lang
Principal

We have been hearing a lot about Executive Order 14110, sometimes referred to as the AI executive order.

- What do these changes mean for our tech clients? How can we utilize some of these changes to capitalize in bringing foreign national talent to the U.S.?

Obviously, AI and these emerging technologies and the tech fields rely on innovation to drive the market and to lead the U.S.

- How can we as employers use these resources to innovate and lead the sector in the U.S.? What are some of the key proposals that have been announced with the executive order?

Kimberly M. Bennett
Associate

Broadly speaking, this executive order is really recognizing STEM and the importance of STEM, and making it clear that the U.S. is going to implement different measures to try to attract foreign talent, particularly in certain STEM fields.

For instance, the executive order includes provisions to streamline visa processes for non-citizens who are seeking to enter the U.S. and going to be working in certain STEM fields, including studying or researching AI. There's also language discussing adding highly skilled talent in AI for J-1 research scholars, F-1 students in STEM fields — adding those fields to a list of key fields of importance to the United States. And then there have also been some changes to the H-1B program, and we can discuss that a little bit more together.

Also, USCIS itself is going to be implementing some AI tools that will hopefully help speed up processing times and maybe make things a little bit easier for the USCIS adjudicators as well. Although, as I think you'll be discussing, we do want to caution that those AI tools that immigration implements may cause a little bit more scrutiny that we need to be mindful of.

So let's start there. Do you want to talk a little bit about some of the changes that USCIS is implementing regarding the use of AI tools?

Lang

Yes. USCIS has been a bit behind the times in adapting to some of the newer technologies. The focus in incorporating some of these technologies will hopefully be beneficial in training adjudicators and providing a consistent basis for criteria points among the officers, as we've traditionally seen kind of a gap or disparity between different service centers that are adjudicating these petitions. So one thing, hopefully, it will help to do is provide significant training resources for the officers who look to these fields. What we typically notice is that they're not necessarily AI and tech experts themselves. So, perhaps, having training on these specific fields will enable them to be more proactive in understanding the petitions that they're reading and success rates will go up and we'll be able to bring people here sooner. Also, within that, see USCIS processing times reduce.

So, as they put together some of these online filing systems and move towards some of these electronic processes, we are hopeful that they will also be reducing the processing times overall to streamline how employers can bring foreign nationals to the U.S. and then how they can keep them here more long term.

Within that, there's a huge push for obviously the modernization of the H1B

program, which we've seen significantly change in the past few years. Do you want to speak a bit about what we've seen implemented on that front for the H1B?

Bennett

Absolutely. For the past few years we've been able to utilize the online H1B cap registration for the annual lottery process, which really has made everyone's lives a lot easier when it comes to H1B cap season.

But over the past year, we saw some additional changes that they had made to that online registration system following a few years of a lot — and I mean a lot — of registrants and, according to USCIS, a lot of fraud. So, they made some changes over this past year. March 2024 was the first year that they had what they called more of a beneficiary-centric selection process. Previously companies could enter H1B lottery registrations for an employee or a prospective employee, and then another employer could also do the same for that same beneficiary, for that same person. So there were companies putting in registrations potentially for the same person multiple times using different entities.

By switching to the beneficiary-centric selection process, rather than being able to put in a registration for the same person multiple times, now the registration is focused on that individual themselves rather than on the companies putting their registration in.

And why did this change things? It sort of eliminates the incentive for companies to register someone using entity A and then register them again using subsidiary B and then register them again using affiliate With this beneficiary-centric selection process, we saw less registrations in the past year which increases the chances of selection for those that actually were entered into the lottery.

The other change that we saw was changes to the "myUSCIS" accounts generally. They are moving towards online filings and they do have the capability to allow online filings for certain types of applications and petitions now. As part of that move, they changed the account for both the attorneys and the employers so that now employers can have these sorts of enterprise accounts: They can have multiple contacts being able to use the same company account. So, if you have an HR person sitting in one office that is in charge of all the H1B registrations for the people in their office, you can have another HR person sitting in a different office, be in charge of a whole other group of H1B lottery registrations. That change was helpful in making the process a little smoother and also allowing for the future changes that USCIS is going to make where online filings become more of the norm rather than the exception.

In my own attorney USCIS account, there's certain paper filings that I might file and they start showing up in my account. Even though I can't do anything— there's no functionality yet, I can't do anything with them — I can see them. And so, I can get an idea of where USCIS is going with the accounts and I can start to see how it's going to be really helpful and definitely streamline the process and also just make it a lot more visible to us on where our cases stand. I am actually super excited for those changes.

There were some other changes with the H1Bs. Maybe you want to talk about the proposed changes that will clarify and broaden H-1B eligibility?

Lang

This is actually a huge win in my opinion for tech. Typically USCIS might not be experts when they're reviewing these petitions. So, redefining what qualifies as a specialty occupation, which is the baseline foundation for an H1B visa, really helps tech companies and emerging technology companies to get their H1Bs approved without the burden of facing a request for evidence, particularly for positions like data scientists or AI engineers, BI developers, and some of those more nuanced positions didn't quite fit in a category that Department of Labor understood to be a "specialty occupation."

By redefining what that means in a clarifying practice pointer, we're now able to capitalize on certain definitions and alternatives that may help somebody qualify for the visa. That's definitely huge, in my opinion. In our own practice across Jackson Lewis, we've seen a reduction in requests for evidence and being able to cite to these new definitions and the new language that's come out of the executive order. So overall, really helpful for our clients.

They're also clearly focusing on entrepreneurship through some of the executive orders and the International Entrepreneur Program. As the Department of Labor and DHS streamline these processes, they've also tried to adapt or clarify what it means to qualify under certain other categories like the O-1 visa or the national interest waiver. Have you seen any of these come to fruition since the order has been announced?

Bennett

Yes. In terms of what you were just talking about with entrepreneurs, I actually just did a consultation the other day with a student who started their own company, of course, while they were in grad school. It's a tech company and they wanted to know if they are able to utilize their optional practical training to work for their own company as an entrepreneur. And I let them know about the new guidelines that now recognize, or at least clarify, that as an entrepreneur you can utilize your OPT work authorization to work for your own company that you've started. So that's one area in which we're already seeing people being able to utilize that. Before, it's not that you couldn't necessarily do that, but it wasn't made clear.

With a lot of the things that we're talking about today, particularly in terms of the USCIS policy guidance changes that they've made, it's not so much that they've actually changed anything, but they've made it clear that you can or cannot do certain things. You mentioned the O1 and the national interest waiver. With the O1 and the national interest waiver, you really could be working in any field, including STEM fields or in AI previously and qualify, but the regulations, the way that the policy guidance was worded, it didn't really recognize or give pertinent examples of how somebody working in those fields could meet the regulatory criteria. And the new guidance really just makes it clearer so that it's easier for people in those positions to make the argument that they qualify.

For example: An entrepreneur that's working in a startup. One of the criteria for both the O1 and the EB1 extraordinary ability classifications are arguing that you command a high salary. For an entrepreneur who maybe doesn't yet have a salary, how do they prove that? Well, the new policy guidance gives an example where if you're an entrepreneur in a startup, you might be able to show evidence that you have equity holdings or that you've won a government grant. It's those little changes and those small examples that USCIS is giving that are really going a long way to help broaden the potential eligibility for people. It makes it clearer for both the officer adjudicating the petition and for people who think, "OK, I might want to apply because it looks like I might be eligible now that I can see there's these certain examples that I could meet."

Lang

Yes. It's almost like an attitude shift that we're seeing with the government kind of putting focus and importance on these fields and helping the U.S. remain competitive and drive these innovations because they're proactively telling us that they recognize the significance, which in the past has been difficult to get them to do.

Bennett

In the EB2 national interest waiver context, they even outlined the factors that they're considering. Specifically, if you're applying for a national interest waiver, they highlighted the significance of letters from government agencies or quasi-government entities, and that STEM graduates that are working in a critical or emerging technology field would have an especially positive factor when balancing all of the factors of the petition. Advanced STEM degree holders that are working in those critical fields have a strong positive factor. An entrepreneur who is self-employed and won't be adversely affecting U.S. workers is another factor that they'll consider.

So really, again, like we were just saying, it's not necessarily a new policy, more than it's clarifying and making it much easier for people to make the arguments that they want to make about their eligibility.

Lang

I hope there's still more to come as they implement some of the pieces of the executive order. But like you definitely mentioned before, there's always the balancing of the pros and the cons. So being careful as an employer and filing your H1Bs and making sure that you're consistent across your petitions, is going to be more important as we move forward because of the use of AI that they'll be implementing on the government side, because they'll have the ability to sort of formula-ize and scrape petitions and compare against one versus the other. They'll have, I think, more resources now available to them, which should be a good thing.

But, of course, everything can be used however they wish. Being cognizant and being really vigilant as employers who do sponsor for nationals — whether it's the H1B or STEM OPT, the O-1 as you mentioned, or all the way through EB-1 and

national interest green cards — we really have to be careful and make thoughtful choices when submitting petitions and when sponsoring for nationals. Because as much as we are seeing changes made for the good, there will be more scrutiny placed on these petitions as they have more of these resources implemented.

Bennett

As practitioners, we need to be really mindful of some of the RFEs, the request for evidence, that we're getting as they start rolling out these AI tools in their adjudication processes. I'm curious to see what kind of requests we're going to see. I just envision this nightmare scenario where there's these crazy AI-written requests for evidence where — what do they call it when AI just makes something up? [hallucinating] I don't remember what the term is. I just imagine this nightmare scenario where they're not actually reading the petition but having AI read it and interpret it and coming up with crazy conclusions. As practitioners, we just need to be really aware of what we're seeing and being able to report that so that USCIS can improve their tools if need be.

And then, like you touched upon, just the use of those tools may lead to increased fraud review and enforcement. Employers just need to be super aware that everything you submit to the government, they have. And as they roll out these tools, they're going to be uploading it. That data will be there and it will be there forever. So that's something that kind of gives me a little bit of pause, even though I am looking forward to faster processing times.

Lang

Well, hopefully they'll just focus on training first and then move on to the more fancy equipment. But yes, hopefully this really does mark a shift in the government's view of foreign national talent in tech and biotech and life sciences and AI and all of these critical fields as we as practitioners know are so crucial to the U.S. and maintaining our ability to stay at the forefront of these fields and contribute to the U.S. economy and also to the world stage. It's the beginning. Hopefully we'll continue to see more expansion of these programs and the sort of intricacies we'll extend into other areas of immigration to really pave the way and kind of streamline these paths for employers.

We'll be releasing many blogs and articles as new updates come out. Anything you want to leave our guests with?

Bennett

One more thing I want to mention is that this isn't the first time that we've seen immigration or the government make changes that provide more opportunities for STEM students. In particular, I'm thinking of the 18-month STEM OPT extension for students who studied in a STEM field and are working for an e-Verify employer participant. This is just a good time to remind employers if they would like to take advantage of that 18-month STEM extension, if they have employees that are on OPT work authorization. But remember that if you enroll in eVerify, you have to use e-Verify. You are now obligated to use eVerify with every hire, not just for your STEM OPT employee. So just reminding employers: Take advantage

of the changes that are being made if they benefit you as an organization. But remember that there's a reason that they're incentivizing employers to use E-Verify. There's give and take.

I'd also like to remind employers that you still have to make sure that your HR processes are buttoned up and that you're being compliant in all areas, including, e-Verify, I9s, etc. Another quick note on that is that with the focus on STEM and AI, as an employer, you still have to comply with U.S. export control laws. As we're dealing with some of these technologies, that may be a factor. As a company, you need to make sure that your HR is trained not only in how to not discriminate against people but also in how to comply with the U.S. export control laws.

Just another thing to mention and another thing to make sure that you call Jackson Lewis about if you're not sure. Anything else?

Lang

Those are the highlights. We will keep everybody updated as the situation develops. Hopefully we'll see some more positive changes and implementations come out of the executive order. Obviously, this is a big year all around for changes in government and we'll see where the cookie crumbles. But hopefully all good things for our tech clients. We'll continue to be vigilant and keep you all updated.

Bennett

Thanks, Jessica.

Lang

Thanks, Kimberly.

OUTRO

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