

**Anna M. Ludwikowski**

The George Washington University Law School, United States of America

aludwikowsk@law.gwu.edu

ORCID ID: <https://orcid.org/0000-0001-6641-8643>

## The Influence of Populistic and Protectionist Policy of the Trump Administration on the Treatment of Foreign Nationals Applying for Immigration Benefits

**Abstract:** The article focuses on the obstacles to legal immigration imposed by the Trump administration against those who are already in the US pursuant to their valid non-immigrant classification and those who are abroad and trying to reunite with family members in the US or seeking entry having a legitimate job offer from a US employer. Recent changes in US immigration policy have been achieved through restrictive interpretation and enforcement of existing law by the USCIS which is part of the Department of Homeland Security, and by the State Department (DOS) rather than by substantive legislative changes done in Congress. The article provides an overview of the most recent governmental restrictions affecting so called “business immigration” and family-based immigrant processing, and also restrictions on suspension of entry to the US due to Covid-19, introduced through presidential proclamations. Although the federal courts blocked several of these administrative initiatives, the anti-immigrant atmosphere is having a big negative impact on many groups of foreign nationals. Nationalistic notions of “making America great again” that should be accomplished through “buy American and hire American” principle, and legal uncertainty causing ongoing federal lawsuits will undoubtedly lead to America’s further isolationism if President Trump wins the November 2020 election.

**Keywords:** Immigration law, immigration policy, Congress, President, Supreme Court, federal lawsuits, visas, presidential proclamations, executive orders, international students, foreign workers

### Introduction

The United States of America for years was proudly portrayed as a “nation of immigrants”, a land founded and built by immigrants. Immigration to the US is still increasing. According to most recent data available, there were 44.7 million

immigrants residing in the United States as of 2018, which is 14% of the population<sup>1</sup>. This number includes naturalized US citizens, permanent residents (green card holders) and undocumented immigrants (about 11 million). In addition to immigrants, there are also non-immigrants residing legally in the US. This category includes those foreigners who are in the US on temporary basis and for specific purpose: students, non-immigrant workers, exchange visitors, visitors for business or tourism, etc. In Fiscal Year 2019, more than 8.5 million non-immigrants visas were issued by US posts<sup>2</sup>.

Under the Trump administration the attitude towards newcomers is becoming more and more hostile, and the symbolic change in this approach was done through the revision of the mission statement of the US Citizenship and Immigration Services (USCIS), the agency within the Department of Homeland Security (DHS), and adjudicating petitions for immigration benefits. After the appointment of Francis Cessna as a new USCIS Director in February 2018, the language referring to the US as nation of immigrants was deleted. Currently, the mission of the agency is “to administer the immigration system through adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honouring our values”<sup>3</sup>.

Donald Trump while still on the campaign trail left no doubt about his attitude to immigrants. He called for “a total and complete shutdown” of Muslims entering the United States “until our country’s representatives can figure out what the hell is going on”<sup>4</sup>. One of his biggest campaign promises was to build the wall on the border with Mexico and immediate termination of DACA (Deferred Action of Childhood Arrivals) -the program suspending deportation of children of undocumented immigrants if they were under 16 when their parents brought them to the US and if they have lived there for at least 5 years<sup>5</sup>.

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1 American Immigration Council, <https://www.americanimmigrationcouncil.org/research/immigrants-in-the-united-states>, (accessed April 23, 2020).

2 Department of State, Nonimmigrant Visa Statistics, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXVI-A.pdf> (accessed July 10, 2020).

3 See R. Gonzales, America no longer a nation of immigrants, USCIS says, NPR, February 22, 2018, <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says> (accessed July 20, 2020).

4 J. Johnson, Trump calls for “total and complete shutdown of Muslims entering the United States,” *Washington Post*, December 7, 2015, <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?noredirect=on>(accessed April 23, 2020).

5 A. Restuccia, A. Johnson, Trump at war with himself over Dreamers, *Politico*, August 30, 2017, <https://www.politico.com/story/2017/08/30/trump-immigration-dreamers-242152>, (accessed April 24, 2020). See also: A. Ludwikowski, *The Role of Congress, President and the Supreme Court in Defining Immigration Policy in the United States, “Ad Americam”*, vol. 14, 2013, p. 108–109.

Trump started his presidency with issuing controversial executive orders, such as “travel bans”, barring entry into the US from Muslim majority countries. While the first two bans were enjoined by the courts, the third executive order<sup>6</sup> was upheld by the Supreme Court (in *Trump v. Hawaii*) which split sharply along partisan lines<sup>7</sup>. The Court held that this ban neither violated the Immigration and Nationality Act nor the Establishment Clause of the Constitution and reversed the lower courts’ preliminary injunctions. The third travel ban (Travel Ban 3.0) includes 7 countries: Iran, Libya, North Korea, Syria, Venezuela, Yemen and Somalia. The Supreme Court confirmed that under Section 1182(f) of INA, the president has a broad discretion to suspend the entry of non-citizens into the United States, and the Proclamation was the result of a “worldwide, multi-agency review” that determined that entry by certain non-citizens would be detrimental to the interests of the United States<sup>8</sup>.

Another move to limit the numbers of newcomers to the US by the Trump administration was a substantial reduction of refugees’ admission. At the beginning of each fiscal year, the president, in consultation with Congress, sets caps on the number of refugees to be accepted by the country annually. President Trump reduced the number of refugees the United States accepts annually - first reducing the 110,000 level originally set for FY 2017 by the Obama administration to 50,000, then to 45,000 for FY 2018, to 30,000 for FY 2019 and to a record low 18,000 for FY 2020, since 1980<sup>9</sup>.

These examples were cited to describe the anti-immigrant atmosphere regarding those foreign nationals who either remain outside the US and are trying to enter it from abroad legally (coming on non-immigrant or immigrant visas, or as refugees), and those who are already in the US. This article will focus on the obstacles to legal immigration, imposed by the Trump administration against those who are already

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6 “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public Safety Threats,” Proclamation No. 9645, 82 Fed. Reg. 45161 (Sep. 24, 2017).

7 *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). The five Justices appointed by Republican presidents (Justices Roberts, Kennedy, Thomas, Alito, and Gorsuch) voted to uphold the ban, while the four Justices appointed by Democratic presidents (Justices Breyer, Kagan, Sotomayor, and Ginsburg) would have enjoined the ban. Justice Thomas wrote separately to question the practice of district courts issuing nationwide injunctions. 138 S. Ct. at 2424–2429 (Thomas, J., concurring).

8 Thus, according to the Supreme Court, the Travel ban 3.0 does not exceed presidential power, and adding two non-Muslim countries made the ban more religion-neutral. In January 2020, President Trump issued yet another travel ban: “Presidential Proclamation: Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats,” Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020), adding restrictions on six new countries - Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania.

9 J.M. Krogstad, Key facts about refugees to the US, Pew Research Center, October 7, 2019, <https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/> (accessed April 20, 2020).

in the US pursuant to their valid non-immigrant classification and those who are abroad and trying to reunite with family members in the US or seeking entry having a legitimate job offer from a US employer. The author, who is a practicing immigration attorney, has first-hand knowledge about recent changes in the policy affecting the rights of lawful non-immigrant foreign nationals who are coming to the US with the temporary intent to either work or study, and those who are applying for permanent residence based on a job offer from a US employer.

Recent changes in US immigration policy have been achieved through restrictive interpretation and enforcement of existing law by the USCIS which is part of the Department of Homeland Security, and by the State Department (DOS) rather than by substantive legislative changes done in Congress<sup>10</sup>. The most recent law on immigration passed by Congress was H-1B Reform Act signed by President G.W. Bush in 2004<sup>11</sup>. Since then, Congress has not been able to pass any major law, not to mention comprehensive immigration reform.

There were several bills introduced either in the House or in the Senate; however, they never received sufficient support to be passed by both chambers. President Trump expressed his support for one of these proposals: the “RAISE Act” (Reforming American Immigration for a Strong Economy) proposed by Republican Senators T. Cotton and D. Purdue<sup>12</sup>. This bill sought to reduce levels of legal immigration to the United States by 50% and introduced so called “points-based system”. It would eliminate most family preferences, diversity visa program and take immediate relatives’ status from parents of US citizens<sup>13</sup>. However, the bill did not receive a vote in the Senate, despite Republicans holding the majority. It was reintroduced in 2019 without any further success.

The next parts of this article will be devoted to the measures taken by President Trump during his term to accomplish his nationalistic immigration policy goals and curbing legal immigration without seeking Congress’ advice or approval.

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10 See 2018 report of Migration Policy Institute, written by S. Pierce, J. Bolter, and A. Salee, Andrew: 2018. US Immigration Policy under Trump: Deep Changes and Lasting Impacts. Washington, DC. Migration Policy Institute, pp. 3–5 and 7–9, [https://government.report/Resources/Whitepapers/c2673a0f-5adc-4b74-94e1-58b87f6e98d9\\_TCM-Trump-Spring-2018-FINAL.pdf](https://government.report/Resources/Whitepapers/c2673a0f-5adc-4b74-94e1-58b87f6e98d9_TCM-Trump-Spring-2018-FINAL.pdf) (accessed July 20, 2020).

11 It was a part of Title IV of the Consolidated Appropriations Act, 2005 that focused on changes to regulations governing H-1B visa. This legislation reduced the H-1B annual cap from 195,000 to 65,000 visas but introduced exemptions for the first 20,000 applicants with US advanced degrees per year.

12 White House. President Donald J. Trump Backs RAISE Act, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/> (accessed April 24, 2020).

13 The category of immediate relatives includes: spouses, parents and unmarried children under 21, of US citizens. Immediate relatives are not subject to any numerical quotas, so they are receiving immigration benefits much faster than those in family-preference categories (for example, spouses of permanent residents). INA § 201 (b).

## 1. Buy American and Hire American (BAHA)

On April 18, 2017, President Trump signed the “Buy American and Hire American” Executive Order (“BAHA”), which confirmed the tough stance his administration would be taking on business immigration, particularly on the H-1B non-immigrant visa category (the only visa type specifically named in the Executive Order)<sup>14</sup>. Although the Executive Order itself did not put into action any substantive changes, it directed the agencies responsible for immigration – including those within the Departments of State, Homeland Security and Labor – to propose new rules and reforms “to protect the interests of the United States workers in the administration of our immigration system”<sup>15</sup>. In light of the Trump administration’s pronouncement, the named government agencies have adopted questionable policies to reinterpret INA provisions of the relevant statutory criteria and methods they use to adjudicate immigration benefits. BAHA in a protectionist way aims to “create higher wages and employment rates for US workers,”<sup>16</sup> and its effect on legal immigration is seen in several areas of the procedure. The most visible aspect was an aggressive issuing of requests for evidence in H-1B and L-1 petitions filed by US companies on behalf of foreign professional workers. H-1B non-immigrant classification is designated for foreign workers who have a job offer in a “specialty occupation”, meaning that a bachelor’s degree or foreign equivalent is required for entry into a given profession. H-1B classification is most often granted to IT specialists (software engineers, information systems managers, database administrators), financial analysts, statisticians, and civil engineers, to name a few. L-1 classification was designed by Congress to allow multinational companies to transfer key employees to related entities (subsidiaries, branches, etc.) in the US. Multinational companies can use the L visa category to transfer their managers and executives (L-1As) and employees with specialized company knowledge (L-1Bs) who have worked for the company abroad for one of the previous three years. Both H and L visa are non-immigrant visas issued for a temporary period only, and they are “employer specific,” meaning that the foreign national is authorized to work only for the company that secured approval of the petition from the USCIS.

There are quotas (caps) on H-1B visas that can be issued each fiscal year. It is not enough that the US employer extends a valid job offer meeting the prevailing wage requirements set up by the US Department of Labor for each profession in all locations (counties) within the United States, and pays all filing fees to the government. First, the petition must be selected for processing. This year, the USCIS received approximately

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14 See Exec. Order No. 13788, 82 Fed. Reg. 18837, 18839 (Apr. 21, 2017).

15 Id at 18838.

16 BAHA, Section 2(b).

275,000 registrations for H-1B 85,000 available slots<sup>17</sup>. It shows that those visas are in high demand by US employers; however, only 65,000 visas for applicants with a bachelor's degree can be issued each year, plus additional 20,000 for those applicants who attained a US master's degree or higher. Only the petitions selected in the lottery conducted by the USCIS can be submitted for processing.

After the promulgation of BAHA, we see a significant increase in the H-1B denials. Most of them are based on the USCIS's new policy of reinterpreting INA: USCIS has been interpreting "specialty occupation" increasingly narrowly. Essentially, the agency has been taking the position that the occupation for which H-1B classification is sought must require a degree in the specific field (for example, an architect needs to have a degree in architecture). USCIS insists on positions that accepts a range of education (as opposed to one-degree major), a bachelor's degree in a specific specialty is not required, and therefore the position cannot be an H-1B specialty occupation. The agency has stated that a position as a market research analyst does not qualify for specialty occupation because the OOH states "market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have backgrounds in business administration, the social sciences, or communications"<sup>18</sup>. In essence, USCIS's newly restrictive interpretation of what constitutes a specialty occupation has paved the way for the substantial increase in denials of H-1Bs petitions, especially for positions of market research analysts and computer systems analysts<sup>19</sup>.

L-1 petitions for intracompany transferees are denied at even higher rate, although this approach is harming US business, and disregarding employers' priorities in hiring someone who has internal knowledge about the parent, subsidiary or branch overseas, rather than an American worker without those special insights. The Trump administration definitely puts a greater emphasis on protecting the local labor market and American workers than on US employer's particular priorities and business needs. Thus, US companies are encouraged to search for employees within the US "to create higher wages and employment rates for US workers".

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17 USCIS, <https://www.uscis.gov/news/news-releases/fy-2021-h-1b-cap-petitions-may-be-filed-april-1>, April 1, 2020 (accessed September 23, 2020).

18 USCIS relies heavily on the Occupational Outlook Handbook(OOH), a publication of the US Department of Labor's Bureau of Labor Statistics to obtain information regarding the requirements for a specialty occupation, despite OOH's disclaimer: "(...) education requirements for occupations may change over time and often vary by employer or state. Therefore, the information in the *OOH* should not be used to determine if an applicant is qualified to enter a specific job in an occupation", [https://www.bls.gov/ooh/about/disclaimer.htm?view\\_full](https://www.bls.gov/ooh/about/disclaimer.htm?view_full).

19 L. Dellon, USCIS consistently denies H-1B petitions. This Lawsuit Argues it is Misinterpreting the Law, "Immigration Impact", April 17, 2020, <https://immigrationimpact.com/2020/04/17/uscis-h1b-class-action-lawsuit/?emci=28c66e67-2a80-ea11-a94c-00155d03b1e8&emdi=cf21f97e-6182-ea11-a94c-00155d03b1e8&ceid=4494015#.XqCev0BFzOb> (accessed April 22, 2020).

In addition to higher denial rates under the Trump administration, the Requests for Evidence (RFEs) increased from 22.3% in FY 2015 to 40.2% in FY 2019<sup>20</sup>. Responding to draconian Requests for Evidence are costly because attorneys need more time to respond to absurd and often non-related questions asked in these requests than to prepare an initial petition.

To conform with BAHA, the Department of State is also adjudicating non-immigrant visa applications at their consular posts with the goal to “create higher wages and employment rates for workers in the United States, and to protect their economic interests. DOS has made changes to its Foreign Affairs Manual (FAM) with respect to providing guidance to consular officers regarding of issuing of H, L, O, P, and E visas”<sup>21</sup>.

In addition, on October 23, 2017 the USCIS announced that it would no longer defer to prior determinations of eligibility when adjudicating petition extensions involving the same parties and underlying facts as the initial petition<sup>22</sup>. The adjudicating officers must apply the same level of scrutiny to both initial petitions and extension requests for certain non-immigrant visa categories. As a result, the extensions of H-1B and L-1 status are also subject to massive requests for additional evidence, the procedure is delayed, and the uncertainty for employer and employee deepens. For example, an IT company who employed a software developer for the past three years and is interested in extending this contract for additional three years (up to six years maximum stay in this non-immigrant category) cannot be certain that the petition will be approved, even if there are no changes in terms of employment that previously passed USCIS’ criteria, and must have a backup plan in case the petition will be denied, and the employee would need to leave the country before the completion of the project.

## **2. Policy Memo on new calculation of unlawful presence of students**

The Trump administration is also targeting international students. On May 10, 2018, USCIS posted a policy memorandum changing the way the agency calculates

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20 NFAP Policy Brief, H-1B approved petitions and denial rates for FY2019, National Foundation of American Policy, February 2020, <https://nfap.com/wp-content/uploads/2020/02/H-1B-Denial-Rates-Analysis-of-FY-2019-Numbers.NFAP-Policy-Brief.February-2020-1.pdf> (accessed April 25, 2020).

21 See, respectively: 9 FAM 402.10-2(b), 9 FAM 402.12-2(d), 9 FAM402.13-2(c), and 9 FAM 402.9-2 (b).

22 PM-602-0151: Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status, <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf> (accessed April 24, 2020).

unlawful presence for those who were in student (F non-immigrant), exchange visitor (J non-immigrant), or vocational student (M non-immigrant) status<sup>23</sup>.

Under federal regulations, students and exchange visitors are admitted to the US for “duration of status”. “Duration of status” is defined as the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the Service for attendance by foreign students, or engaging in authorized optional practical training (OPT) following completion of studies<sup>24</sup>. Accordingly, their authorized stay does not have a fixed end date, as is the case for other visa categories. Under the prior policy, which had been in place for 20 years, the unlawful presence count began only after a formal finding of a status violation by a DHS officer in the course of adjudicating an application for immigration benefits or by an immigration judge in the course of removal proceedings.

Unlawful presence begins to accrue when the period of authorized stay expires or after an entry to the U.S. without being admitted or paroled (crossing the border illegally). Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 imposes re-entry bars on those who accrue “unlawful presence” in the US. The three-year bar to re-entry into the US applies to individuals who have been unlawfully present in the US for a continuous period of more than 180 days, but less than one year, and who voluntarily depart the US. The ten-year bar to re-entry into the U.S applies to individuals unlawfully present in the US for an aggregate period of one year or more who depart voluntarily or are removed (deported)<sup>25</sup>.

Under the policy described in USCIS’s August 2018 memo, unlawful presence would have begun to accrue the day after a status violation, if the violation occurred on or after August 9, 2018, or on August 9, 2018, if the violation occurred prior to August 9, 2018. Students would have been subjects to a very harsh penalty of three- or ten-year bar on re-entry to the US -even for minor or inadvertent status violations (for example, not notifying USCIS about changing the dormitory). In some instances, students might not know they have committed violations in some cases until after more than 180 days had elapsed from the status violation, and they were already subject to a three-year re-entry bar.

On February 6, 2020, the US District Court for the Middle District of North Carolina issued a nationwide injunction, permanently enjoining USCIS from enforcing the Policy Memorandum<sup>26</sup>. The Court concluded that the August

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23 PM- 602–1060.1, *Accrual of Unlawful Presence and F, J, and M Nonimmigrants*, August 9, 2018, <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf>, (accessed April 24, 2020).

24 8 CFR 214.2(f)(5)(i).

25 INA §212(a)(9)(B)(i).

26 *Guilford v. Wolf*, <https://www.uscis.gov/sites/default/files/document/injunctions/Guilford-College-v.-Nielsen-summary-judgment-permanent-injunction.pdf> (last accessed June 5, 2020).

2018 Policy Memo impermissibly conflicts with the text of the INA, pursuant to which a non-immigrant is not “deemed to be unlawfully present” until “after the expiration of the period of stay authorized by the Attorney General”<sup>27</sup> and, based on Administrative Procedure Act (APA) provision, the court held unlawful and set aside the agency actions as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”<sup>28</sup>.

The Trump administration did not appeal the decision; probably it realized that it had no chances of overturning the decision on both of the substantive and procedural defects (USCIS violated the provisions of the APA that require notice and comment rulemaking prior to issuing a substantive policy enforcement change)<sup>29</sup>.

### 3. Public Charge Rule

In February 2020, the US Supreme Court again sided with the Trump administration to allow enforcing a harsh rule towards foreigners, this time those applying for permanent residency in the United States (“green cards”).

According to federal law, an individual seeking admission to the United States or seeking to adjust status is inadmissible if the individual, “at the time of application for admission or adjustment of status, is likely at any time to become a public charge”<sup>30</sup>. In other words, such individual is not eligible for a green card.

In making a public charge determination, immigration officers review all of applicant’s circumstances, including: age, health, family status, assets and resources, and education and skills. The immigration officer may also consider Affidavit of Support prepared on behalf of the intending immigrant by his/her sponsor. Under previous longstanding policy, a sponsor’s Affidavit of Support in family-based cases could overcome negative factors in a public charge determination. Under a new rule, such affidavit is just a positive factor in the above-mentioned totality of the circumstances test. It is not sufficient on its own to protect an applicant for a green card from being determined “likely to become a public charge”.

The Trump administration changed the scope of public charge inadmissibility rule through restrictive interpretation of existing law. In addition, both the US Department of Homeland Security and State Department enacted new rules on Public Charge which after a lengthy legal battle in federal courts came into effect on

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27 8 U.S.C. § 1182(a)(9)(B)(ii).

28 5 U.S.C. § 706(2)(A).

29 See: JDSUPRA, Why the Guilford College Decision is so Important? Klasko Immigration Law Partners, LLP, February 18, 2020, <https://www.jdsupra.com/legalnews/why-the-guilford-college-decision-is-so-56133/> (accessed June 18, 2020).

30 INA 212(a)(4).

February 24, 2020, after the US Supreme Court allowed for the rule's enforcement nationwide<sup>31</sup>.

Until recently, the emphasis in public charge determination was put on cash benefits received from the government. According to a new policy, "public charge" means an alien who receives one or more public benefits, for more than 12 months in the aggregate within any 36-month period. The use of public benefits, application for receiving such benefits or certification to receive Medicaid (other than for emergencies, for those under 21, or pregnant women), Supplemental Nutrition Assistance Program – SNAP (food stamps), Section 8 Housing and Public Housing for more than 12 months in a 36-month period beginning on February 24, 2020 are now considered a heavily weighted negative factor in a public charge determination.

As a result, applications for permanent residence ("green card") became much more complicated with the new public charge rule. The application requires submitting more supporting documents than before February 24, 2020 (for example, credit history and credit score, proof of enrolment in US health insurance, and policy coverage statements). Unfortunately, for seniors, this may become a barrier to immigrating to the US, because of a number of negative factors (age, lack of knowledge of English, pre-existing medical conditions and no perspective for finding a job) that are typically prevailing in their case. It means that sponsoring one's own parents for a green card will be much more difficult, even if the US citizen sponsor's financial situation is very stable; the sponsor's guarantee is not good enough to eliminate likelihood of parents becoming a public charge<sup>32</sup>.

#### 4. Covid-19 related restrictions

After the coronavirus outbreak, it was obvious that travel restrictions will be imposed to protect the country. From January 31 to March 14, 2020, clearly motivated by health concerns arising globally, President Trump signed four separate proclamations suspending entry of foreigners who were physically present in China, Iran, Schengen Area, and lastly in UK and Ireland, within the 14 days preceding entry or attempted entry into the US<sup>33</sup>.

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31 DHS rule: 8 CFR 212.20–23; DOS rule: 22 CFR 40.41. More on Supreme Court's ruling: see, J.E. Moreno, The Supreme Court allows 'public charge' rule to take effect nationwide, "The Hill", February 2, 2020, <https://thehill.com/regulation/court-battles/484196-supreme-court-allow-public-charge-rule-to-take-effect-across-country> (accessed July 19, 2020); See also: Immigrant Legal Resource Center (ILRC), Public Charge, <https://www.ilrc.org/public-charge> (accessed July 19, 2020).

32 R. Kitson, Coming to America. Limited Immigration Options for Senior Parents, "ABA Experience", vol. 30, no. 3, April/May 2020, pp. 11–16.

33 Presidential Proclamations on Novel Coronavirus, US Department of State, June 29, 2020, <https://travel.state.gov/content/travel/en/News/visas-news/presidential-proclamation-coronavirus.html> (accessed July 20, 2020).

But not all restrictions can be included in “obvious restrictions” category. On Monday night April 20, 2020, President Trump tweeted: “In light of the attack from the Invisible Enemy, as well as the need to protect the jobs of our GREAT American Citizens, I will be signing an Executive Order to temporarily suspend immigration into the United States!”<sup>34</sup>. This dramatic tweet was clearly meant to create uncertainty and fear among immigrants and at the same time please the anti-immigrant groups that support Trump’s hard policy on immigration. For two days there was a lot of speculation regarding the scope of a new ban, and fears that it would also cover those who already applied for a green card inside the United States. On April 22, the Presidential Proclamation 10014 was published on the White House website<sup>35</sup>.

The ban suspends entry of spouses and minor children of permanent residents, parents of US citizens and adult and married children of US citizens, those who won visa lottery, and all employment-based immigrant visas, except EB-5 investors. In other words, it means that immigrant visas cannot be issued to the above-mentioned categories of potential immigrants – however, if they have a valid visa as of April 23, 2020, their entry to the US cannot be denied based solely on the language of the proclamation.

As the title of the proclamation makes clear, the ban applies only to entries, so those who are already in the US are not affected by the ban. Their green cards applications should continue to be processed. In addition, petitions for Alien Relative that initiate the permanent residence process should still be accepted for processing by the USCIS. So, for example, a US citizen can still file the petition on behalf of his parents with the agency. Once the petition is approved, the USCIS would send it to National Visa Center that in turn will send it to the appropriate US Consulate for processing of an immigrant visa.

On one hand, many foreign nationals started to feel relieved once the Proclamation was published. Most consulates around the world are still closed due to COVID-19, and visa services are suspended anyway, so the ban has not been changing too much in the short term.

On the other hand, it was reasonable to expect that the administration may want to extend the ban after 60 days for an indefinite period of time using a high unemployment rate to shut down legal immigration. In addition, Section 6 of the Proclamation imposed a duty on the Secretary of Labor and the Secretary of Homeland Security, in consultation with the Secretary of State, to review non-

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34 See Q. Owen, Trump’s threat of total immigration ban ignites outrage, confusion, ABC News April 21, 2020, <https://abcnews.go.com/Politics/trumps-threat-total-immigration-ban-ignites-outrage-confusion/story?id=70265156> (accessed April 26, 2020).

35 Proclamation Suspending Entry of Immigrants Who Present Risk to the US Labor Market During the Economic Recovery Following the COVID-19 Outbreak, April 22, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/> (accessed April 23, 2020).

-immigrant programs and recommend to the President other measures appropriate to stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers. Those expectations came true as the first Covid-19 Proclamation led to a subsequent proclamation issued on June 22, 2020 which suspended entry of certain H-1B, H-2B, J-1 and L-1 workers until December 31, 2020<sup>36</sup>. The June 22, 2020 proclamation affects those who are abroad and do not have a valid visa stamp; it does not apply to foreigners in the H, L, J status who already are in the US. It also extends the effective period of the April 22 proclamation until December 31, 2020. Significantly, both proclamations leave no doubt the US suspended the entry not for health-related issues but because of “risk to US labor market”. It is consistent with Trump’s downplaying the virus threat and hoping it “will go away” “even without the vaccine”<sup>37</sup>. In addition, it can be speculated that the June 22 proclamation was directed not to actual H, L, J visa holders but rather to conservative anti-immigrant Trump supporters who were pleased to hear that their chances of finding new jobs or being re-hired after furloughs and layoffs would become higher by eliminating foreign competition.

In July 2020, Trump again tried to use the coronavirus to impede legal immigration. On July 6, the Student and Exchange Visitor Program (SEVP) which is part of Immigration and Customs Enforcement (ICE) agency, unexpectedly announced the modifications to temporary exemptions for non-immigrant students taking online classes due to the pandemic for the fall 2020 semester<sup>38</sup>. If the order had been implemented, F-1 and M-1 students attending schools operating entirely online would not have been able to take a full online course load and remain in the United States. This change could affect tens of thousands of international students. The State Department would not have issued visas to students in online-only programs and Customs and Border Protection would not have allowed these students to enter the country even if they had a valid visa in their passport. Two days later, on July 8, The Massachusetts Institute of Technology (MIT) and Harvard University filed a lawsuit and asked the court to prevent ICE and DHS from enforcing the new guidance and to declare it unlawful<sup>39</sup>. The argument in the suit was that the order has the effect of

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36 Proclamation Suspending Entry of Aliens who Present a Risk to the US Labor Market Following the Coronavirus Outbreak, June 22, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/> (accessed July 14, 2020).

37 According to The Washington Post, since the beginning of the pandemic, President Trump repeated 34 times that ‘the virus will go away’: [https://www.washingtonpost.com/video/politics/22-times-trump-said-the-coronavirus-would-go-away/2020/04/30/d2593312-9593-4ec2-aff7-72c1438fca0e\\_video.html?](https://www.washingtonpost.com/video/politics/22-times-trump-said-the-coronavirus-would-go-away/2020/04/30/d2593312-9593-4ec2-aff7-72c1438fca0e_video.html?) (accessed September 23, 2020).

38 ICE, <https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during#wcm-survey-target-id> (accessed July 15, 2020).

39 Harvard and MIT vs. DHS/ICE, US District Court for the District of Massachusetts, Case 1:20-cv-11283, [https://www.pacermonitor.com/view/BVPHELQ/President\\_and\\_Fellows\\_of\\_Harvard\\_v\\_](https://www.pacermonitor.com/view/BVPHELQ/President_and_Fellows_of_Harvard_v_)

forcing schools to reopen on campus and thus cause the students, faculty and other staff members to be exposed to Covid-19<sup>40</sup>.

Facing the numerous lawsuits from 17 states and District of Columbia, backed by more than forty US universities and colleges, a week later, on July 14, the administration rescinded the rule and reversed to its earlier guidance from March 13 acknowledging unusual circumstances and suspending limits around online education during the pandemic<sup>41</sup>. Accordingly, the foreign student visas and legal status will be unaffected even if the schools decide to offer only distance learning in the Fall 2020 semester<sup>42</sup>.

## 5. The unclear future of DACA

It should be emphasized that controversial DACA program does not provide its recipients any pathway to citizenship; it only grants the eligible applicants “deferred action”: a protection from deportation. However, it provides an eligibility for work authorization that can be renewed every two years. It was established by President Obama’s executive order due to the inactivity of Congress to pass the legislation to resolve the issue of legal status of childhood arrivals<sup>43</sup>.

By way of background, on August 1, 2001, the bipartisan legislative proposal was introduced to the U.S. Senate called the Development, Relief, and Education for Alien Minors Act – DREAM Act, that would open a pathway for certain undocumented immigrants who were brought to the United States as children to apply for U.S. legal permanent residency and eventually be eligible for US citizenship<sup>44</sup>. Congressional gridlock has stopped the DREAM Act from becoming law every time it has been introduced in Congress<sup>45</sup>. On June 15, 2012, President Obama announced his

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United\_States\_Department\_of\_Homeland\_\_madce-20-11283\_\_0001.0.pdf (accessed July 20, 2020).

40 Ibidem, p. 14.

41 M. Chin, Seventeen states sue Trump administration over new students visa guidelines, “The Verge”, July 13, 2020, <https://www.theverge.com/2020/7/13/21322780/ice-lawsuit-states-universities-international-students-visa-pandemic-trump> (accessed July 18, 2020).

42 Provided that the students have been in valid F-1 or M-1 status since March 9, 2020, they will be able to continue to take online classes based on the March 9, 2020 policy. See: ICE.gov, Broadcast Message: Follow-up: ICE continues March Guidance for Fall School Term <https://www.ice.gov/doclib/sevis/pdf/bcmFall2020guidance.pdf> (accessed July 28, 2020).

43 For more detailed explanation of DACA in Polish literature, see: R.R. Ludwikowski, A.M. Ludwikowski, *Prezydencjalizm Amerykański w Przymyśle Reformy Imigracyjnej Baraka Obamy* [American Presidentialism in the Light of Barack Obama’s Immigration Reform], “Krakowskie Studia Międzynarodowe”, nr 4, 2015, pp. 129–148.

44 American Dream Act, H.R.1751, 111th Congress (2009–10).

45 L.C. Romero, Activism Leads, The Law Follows: DACA and its Fate at the Supreme Court, American Bar Association (ABA), April 28, 2020, <https://www.americanbar.org/groups/crsj/>

decision to stop deportations of Dreamers and make them eligible to obtain work permits. Effectuating this new policy, then secretary of the Department of Homeland Security, Janet Napolitano, issued a memorandum to the immigration agencies that explicitly deprioritized Dreamers from deportation<sup>46</sup>. According to 2017 statistics, almost 80% of DACA beneficiaries came from Mexico<sup>47</sup>.

On September 5, 2017, under Trump's directive, the DHS rescinded DACA<sup>48</sup>. It opened the door to states wide litigations and finally, in June 2020, the Supreme Court rejected the DHS attempt to end DACA<sup>49</sup>. The court's decision was made on procedural grounds; the Supreme Court ruled that the agency violated Administrative Procedure Act (APA), as DACA termination was done in an arbitrary and capricious manner<sup>50</sup>. Although the Court's ruling was a tremendous victory for DACA recipients, what happened next was not comforting at all. It became clear that Trump administration wanted to eliminate those benefits at all costs. First of all, in a nonprecedential move the USCIS issued a statement of his Deputy Director for Policy Joseph Edlow on the USCIS website, openly disapproving the US Supreme Court for not agreeing to end DACA: "Today's court opinion has no basis in law and merely delays the President's lawful ability to end the illegal Deferred Action for Childhood Arrivals amnesty program"<sup>51</sup>. Secondly, the USCIS refused to accept new applications for DACA, notwithstanding the Supreme Court's ruling, and started sending rejecting notices to the applicants. On July 17, 2020, the federal district court in Maryland ruled that the Trump administration must resume accepting new applications for the DACA program and comply with a recent Supreme Court

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publications/human\_rights\_magazine\_home/immigration/activism-leads-the-law-follows/ (accessed July 20, 2020).

46 Ibidem.

47 USCIS, [https://www.uscis.gov/sites/default/files/document/data/daca\\_population\\_data.pdf](https://www.uscis.gov/sites/default/files/document/data/daca_population_data.pdf) (accessed July 4, 2020).

48 Memorandum on Rescission of Deferred Action of Childhood Arrivals (DACA), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> (accessed June 14, 2020).

49 Department of Homeland Security v. Regents of University of California, 591 US (2020), [https://www.supremecourt.gov/opinions/19pdf/18-587\\_5ifl.pdf](https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf)

50 The Court noted: 'We do not decide whether DACA or its rescission are sound policies. "The wisdom" of those decisions "is none of our concern." *Chenery II*, 332 U. S., at 207. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.' Ibidem, p. 29.

51 At the time of writing this article, the statement was still posted on the USCIS's website: <https://www.uscis.gov/news/news-releases/uscis-statement-on-supreme-courts-daca-decision> (accessed September 24, 2020).

ruling<sup>52</sup>. However, on July 28, 2020, the DHS issued the statement announcing that it will reject the initial DACA requests, and that the extensions of valid DACA status will be granted for one year only<sup>53</sup>.

The agency's open disregard for the court's ruling causes legal chaos and uncertainty, and even more confusion arises because of President Trump's flip-flop stands on the issue. After the Supreme Court ruling, Trump said he would move quickly to terminate the program again — in a way that would pass muster with the Supreme Court. But a few days later, in the interview with Telemundo, when asked whether he really wants to deport approximately 30,000 US hospital workers who are on DACA, he said that in “next four weeks” he will be signing “a big immigration bill”, that will include DACA and provide a road to citizenship to those who are on DACA program<sup>54</sup>. So basically, he claims that he has presidential authority to decide about DACA future and create new immigration benefits through executive order – although his main argument for eliminating DACA always was that President Obama abused his power by creating a temporary program deferring deportations. According to Trump's statement during the above-mentioned interview, he not only considers extending DACA (“and everyone will be so happy of it”<sup>55</sup>) but also creating the pathway to US citizenship for Dreamers. Reversing his course on this issue is highly possible though – even through a random tweet.

## Conclusions

In July 2020, the polls were showing Joe Biden's double-digit lead over Donald Trump 52% to 40% of votes<sup>56</sup>, however 2 months later Biden's approval dropped,<sup>57</sup> and

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52 See, C. DeChalus, Trump admin must accept new DACA applications, court rules, “Roll Call”, July 17, 2020, <https://www.rollcall.com/2020/07/17/trump-administration-must-accept-new-daca-applications-court-rules/> (accessed July 21, 2020) and P. Alvarez, Judge orders Trump administration to accept new DACA applications, CNN, July 17, 2020, <https://www.cnn.com/2020/07/17/politics/daca-trump-judge/index.html> (accessed July 21, 2020).

53 DHS, Department of Homeland Security Will Reject Initial Requests for DACA As It Weighs Future of the Program, July 28, 2020, <https://www.dhs.gov/news/2020/07/28/department-homeland-security-will-reject-initial-requests-daca-it-weighs-future> (accessed July 28, 2020). See also Memo of Chad Wof, Acting Secretary of DHS, [https://www.dhs.gov/sites/default/files/publications/20\\_0728\\_s1\\_daca-reconsideration-memo.pdf](https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf) (accessed July 28, 2020)

54 Telemundo, July 17, 2020, <https://www.telemundo.com/noticias/2020/07/10/exclusive-trump-sign-merit-based-immigration-executive-order-would-include-path-tmvo9506039> (accessed July 21, 2020).

55 Ibidem.

56 CNN Poll of Polls, July 20, 2020, <https://www.cnn.com/2020/07/20/politics/poll-of-polls-july-trump-biden-coronavirus/index.html> (accessed July 20, 2020).

57 S. Milligan, Biden's Shrinking lead is a Jolting Reminder for Democrats – Trump Could Win, U.S. News, September 2, 2020, <https://www.usnews.com/news/elections/articles/2020-09-02/joe->

at the time of writing this article it is very difficult to predict a winner of November 3 elections. Of course, it can be expected that Biden's win would lead to overturn on harsh internal policies of USCIS, and that the agency will reduce the number of unnecessary requests for evidence, and denials of benefits based on unreasonable standards will decrease. DACA will be extended until Congress finally passes the long-awaited legislation addressing the issue of more than 700,000 immigrants who were brought to the US as children. The students would be able to focus on their coursework (either in classroom settings or online), and practical training options giving them hands-on experience in their field of study.

Nevertheless, Trump's core base remains strong, and if he wins November 2020 elections, it can be expected that his immigration policy will become even harsher, to please his hard-line supporters. He may play with DACA until elections to please Latino voters but most likely, if elected, he would continue his efforts to eliminate DACA, and extend Covid-19 related restrictions to create more jobs for Americans. He will also try to reduce family-based immigration, making family reunification more bothersome, and support legislation in Congress to create a points-based system for employment-based green cards without increasing the numerical cap of immigrant visas that can be granted each year. The US will become less attractive for international students who are already exploring educational opportunities and post-graduate professional training in Canada or Australia instead<sup>58</sup>. Practical Training Reform has been on DHS's Regulatory Agenda since 2017, and in Fall 2019, ICE was directed to amend the existing regulation and revise the practical training options after graduation for students in F-1 and M-1 status<sup>59</sup>. It is highly probable that OPT program will be limited, or even suspended, to promote economic recovery during Covid-19 pandemic. It also appears that Trump is utilizing Covid-19 to bring the current immigration system closer to the earlier-mentioned RAISE Act that he openly supports. As noted earlier, the presidential proclamations halt immigrant

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-bidens-shrinking-lead-is-a-reminder-for-democrats-trump-could-win (accessed September 23, 2020).

58 See, for example, S. Anderson, Trump Plans Far-Reaching Set of Immigration Regulations, *Forbes*, Nov. 21, 2019, <https://www.forbes.com/sites/stuartanderson/2019/11/21/trump-plans-far-reaching-set-of-new-immigration-regulations/#310bfb4d262a> (accessed July 21, 2020) and P. Bourke, Five reasons why international students are choosing Canada over the United States, *Moving2Canada*, <https://moving2canada.com/international-students-choosing-canada-over-the-united-states/> (accessed July 21, 2020)

59 Office of Information and Regulatory Affairs, OMB, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1653-AA76> (accessed July 20, 2020). See also: NAFSA, Practical Training Reform, June 3, 2020, <https://www.nafsa.org/professional-resources/browse-by-interest/practical-training-reform> (accessed July 20, 2020).

visas for family and employment-based petitions, diversity visa lottery program<sup>60</sup> and entry of certain non-immigrants (H-1B, L-1, and J-1).

To sum up, on the basis of the analysis presented above, it should be noted that the chances of strengthening business and educational exchange between the US and European countries are rather slim under the current President. To the contrary, the nationalistic notions of “making America great again” that should be accomplished through “buy American and hire American” and legal uncertainty causing ongoing federal lawsuits will undoubtedly lead to America’s further isolationism. Trump’s negative perception of foreign presence in the US – no matter if it is based on pursuing education, cultural exchange or business needs of foreign companies and investors – gives less and less incentives to foreign students and professionals to seek accomplishments in the US, either on a temporary or permanent basis.

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60 However, in *Gomez v. Trump*, U.S. District Court for the District of Columbia temporarily barred the Trump administration from applying Presidential Proclamation 10014 to Diversity Visa Winners. The court decided that though the green card applicants cannot enter the U.S. through the end of 2020, it does not mean that the State Department should stop issuing those immigrant visas. Case No. 20-cv -0141, <https://cases.justia.com/federal/district-courts/district-of-columbia/dcdce/1:2020cv01419/218517/41/0.pdf?ts=1592990279> (accessed September 24, 2020).

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