



Fox Rothschild Podcast

Featuring Partners Robert Whitehill and Catherine Wadhwani

We're talking today on FoxCast with Robert Whitehill and Catherine Wadhwani in Pittsburgh about the topic of "walls" – the barriers which prevent high-quality talent from coming from abroad to the United States workplace. Bob recently published a guest column about this in the Pittsburgh Post-Gazette, and a number of Catherine's posts on the firm's popular [Immigration View](#) blog have been among the most-read in the nation. Bob, Catherine, good morning.

Robert Whitehill: Thank you.

Catherine Wadhwani: Good morning.

Question: Bob, what do you foresee for the balance of 2018?

Robert Whitehill: I see more of the same. This administration is building walls, preventing immigrants from coming to the United States, preventing immigrants from staying in the United States. Recently USCIS announced a change in its mission statement. Its now principal service is securing the homeland, not necessarily welcoming immigrants. There's been a travel ban. There has been a withdrawal of humanitarian benefits in regard to those people who have had temporary protected status. U.S. admissions of refugees are at record lows, notwithstanding the high number of refugees worldwide, and business immigration is similarly being affected. One of the things that we are doing here at Fox is we have added two qualified immigration partners, Kristen Schneck and Mark Harley, to try to address these issues directly with and for our clients.

Catherine Wadhwani: Yes, and their joining the firm right now is very timely, because for those seeking asylum here, USCIS recently announced that it will return to its pre-2015 policy of processing applications on a "last in/first out" basis. With a reported backlog of more than 300,000 applications, this will cause even further delay for those who have been waiting the longest.

Robert Whitehill: And then there's DACA, and that's Deferred Action for Childhood Arrivals. The administration sought to withdraw the program, and the withdrawal has been enjoined and the program continues. But it puts at risk the hundreds of thousands of young people, whose only violations have been entering the United States as children without inspection or proper papers.

Question: What about prosecutorial discretion in removal proceedings?

Catherine Wadhwani: U.S. Immigration and Customs Enforcement, also known as "ICE," is not exercising discretion, which would give relief to those with minor immigration law or trivial criminal violations. In addition, immigration judges are being pushed by the Department of



Justice to handle and resolve more cases. So there are changes on many fronts that are putting stress on the overall systems that are in place.

Question: *Bob, what about the nation's image as the pre-eminent country in which to build a career?*

Robert Whitehill: Let's be frank. The United States is not the welcoming place it once was, and some people are just not coming anymore. Some business enterprises are leaving so that they may hire and retain professional talent they need without the frustration and expense of having to climb over the current immigration walls. The number of foreign students, for example, in the United States has diminished – and all of this in light of the fact that there is full employment in this country.

Catherine Wadhwani: And of course, a reduction of foreign students translates into a reduction of available, educated talent. There are thousands of foreign students graduating each year, that are facing a potential immigration dead end, even though they have a valued degree from one of our universities and a job offer from a U.S. employer that needs them. The H-1B wall has gotten higher and will likely be more difficult to scale this year.

Question: *Bob, how does a foreign national even qualify for an H-1B?*

Robert Whitehill: The H-1B is a temporary worker. It's a non-immigrant visa that is highly sought after, and has been over-subscribed over the course of the last few years. The employer must offer a position that's called a "specialty occupation" to the potential beneficiary, and that specialty occupation requires that the minimum requirement for the job includes a bachelor's degree or the equivalent. The employer for its part must have an employer-employee relationship with the beneficiary and must offer to pay, and be able to pay, the prevailing wage in an amount that has been determined by the U.S. Department of Labor.

Question: *How's the federal government making an effort to make entry-level H-1B's even more difficult to obtain?*

Robert Whitehill: One thing that they are doing, and there will probably be more strategies for this fiscal year, is that they have conflated specialty occupation with level 1 or entry-level wages. So it is more difficult to obtain an H-1B, and more documentation as to the requirements of the position is necessary. For example, one of my clients, a major university, was seeking an H-1B for a post-doctoral fellow. The USCIS required evidence that a person doing the work requiring a no less than a doctorate was in a position requiring at least a bachelor's-level education. Now that's not a joke, but it seemed pretty funny at the time. But it cost the university time and money, and it cost the post-doc frustration as well as delay in his research efforts.

Catherine Wadhwani: There are other examples. So for about 40 percent of the fiscal year 2018 H-1Bs were subjected to requests for evidence – some were serious, others were as confusing as what Bob just described with his university client. We're seeing and hearing a lot of requests for



more evidence, and this creates delay, and extra work and expense that wouldn't have been the case in the past.

Robert Whitehill: Moreover, USCIS has announced that it will no longer stand behind prior adjudications, prior approvals, in considering extensions for certain non-immigrant visas: the H-1B, O-1, L-1 and others. More requests for evidence by the government can be expected due to this *de novo* review standard. One has to question, is this weakening or strengthening our ability to compete in the global market?

Question: Catherine, how does the government police employment-side immigration?

Catherine Wadhwani: For those employers fortunate enough to have approved petitions to employ the foreign workers that they need, USCIS has greatly increased its fraud detection audits. These audits have been in place since 1986, but the efforts are much more expansive now. And now all applicants for permanent residence, including those based on employment, have to be interviewed in-person by an immigration officer. In the past, interviews were only for employment-based cases which were at random or had a problem. Not that there is anything wrong with fraud detection, which of course is important, but the dramatic increase in the number of cases to be interviewed adds to processing time for an already long process.

Question: Bob, how's this playing out in the courts?

Robert Whitehill: As the administration is seeking to sharply reduce legal immigration, not illegal immigration but legal immigration, and to revoke Obama-era administration policies, there have been lawsuits that have been filed at almost every step of the way. With every action by the administration to revoke or rescind or alter a benefit, there have been lawsuits that have been filed to protect the rights of immigrants.

Catherine Wadhwani: And when USCIS sought to delay the implementation of the International Entrepreneur Parole program, which enables foreign entrepreneurs to invest in U.S. enterprises and to employ U.S. workers, an injunction action was filed in one of the U.S. District Courts. The court recently required USCIS to open the program. In doing so, USCIS begrudgingly stated that it will comply with the court order and implement the program, but it's also seeking to remove the program.

Question: Bob, any final thoughts?

Robert Whitehill: Final thoughts? Well this is a nation of immigrants. It always has been and hopefully always will be. On my desk there is a saying from Winston Churchill, "Never, never, never quit." We hopefully will continue to fight for the rights of immigrants to make their contribution and to continue to make their contribution to this nation.

Narrator: Well, thank you Bob, and thank you Catherine. Listeners, to confidentially discuss how the barriers to immigration might impact your organization, please contact Bob Whitehill at



412-394-5595 or at rwhitehill – that's R-W-H-I-T-E-H-I-L-L – at foxrothschild.com, or contact Catherine Wadhwani at 412-394.5540 or at cwadhwani – that's C-W-A-D-H-W-A-N-I – at foxrothschild.com.

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