Printed from
THE TIMES OF INDIA

Brace for immigration changes to be introduced overnight, warn attorneys, as inviting public comments is no longer required

TNN | Mar 26, 2025, 08.14 AM IST

A seemingly innocuous notice published last month, by Marco Rubio, Secretary, US Department of State, has wide ranging implications for immigrants in the US or those aspiring to work or study in America.

It reclassifies immigration and border-related regulations, stating that these are 'foreign- affairs functions. In other words, immigration policies can now bypass the public notice and comment rule making process, which is required under the Administrative Procedure Act (APA).

The 'foreign affairs function exception,' exempts certain activities from APA requirements like notice-and-comment rulemaking. By expanding this definition, the notification seeks to remove a vast array of government actions from APA procedural safeguards.

Under the APA the public can give comments on a draft regulation during a 30–60-day open window period. The concerned agency must consider these comments and respond in a final version of the policy.

In Trump's earlier regime, various policy changes had been overturned by courts as they had violated the APA. For instance, Stanford University, Cornell University, and various chambers of commerce, had successfully challenged policies that had proposed to hike wages of H-1B workers by as much as 40-100%; narrow eligibility norms for H-1B visas and reduce the visa tenure to one year in case of placement at client sites,

Judge Jeffrey S. White of the US district court (Northern District of California) in his order dated December 1, 2020, had held that the Trump administration had failed to show there was good cause to dispense with the rational and thoughtful discourse that is provided by the APAs notice and comment requirements.

No requirement for notice to comment:

Greg Siskind, co-founder of Siskind Susser, an immigration law firm, told TOI, “For years, we have seen US Citizenship and Immigration Services (USCIS) impose policies via a memo and lawsuits have successfully challenged this. So, I am guessing the Trump administration wants protection to make rules without any of the public facing protections required by the APA.”

“I think avoiding APA is exactly what they are trying to do,” added Steven A. Brown, partner, at the immigration law firm of Reddy, Neumann, Brown.

Florida based Ashwin Sharma, said, “Rubio’s memo is a procedural Trojan horse. It quietly unlocks the gates, granting Trump 2.0 unchecked freedom to reshape immigration law at will. While this sweeping power grab will inevitably face fierce legal pushback - courts have repeatedly rejected such overreaches - the immediate impact could still be devastating, especially for Indian nationals.”

"As a practical matter, this foreign-affairs determination attempts to create a regulatory fast track for the Trump administration's immigration agenda. Note that courts have historically been sceptical of broad applications of the foreign affairs exception, particularly in immigration contexts where the connection to diplomatic functions is tenuous. While agencies such as Department of State (DOS), Department of Homeland Security (DHS), USCIS, Department of Labour (DOL) and others, could now claim authority to revamp the H-1B program or eliminate H-4 EAD (work permit given to eligible spouses of H-1B workers) without public input, this approach contradicts decades of administrative law precedent that has required agencies to show specific, definite undesirable international consequences before invoking this exception. The ramifications extend beyond procedure—this

determination signals an intent to implement immigration changes rapidly and with minimal judicial oversight," said Rajiv S. Khanna, managing attorney at Immigration.com

What can be foreseen?

Sharma foresees, “Renewed and relentless attacks on H-1Bs: tightened eligibility standards, skyrocketing denials, and crushing requests for evidence during application-processing. As also elimination of H-4 work permits, stripping thousands of Indian families (especially highly educated spouses) of livelihoods. We need to brace for crippling new restrictions on the extended two-year tenure for Optional Practical Training (OPT) currently available to international students from the STEM (science, technology, engineering, mathematics) field, vilifying Indian students as backdoor immigrants, despite their essential contributions to US innovation.”

Khanna said, "Be mindful that this foreign affairs determination creates an unprecedented situation. Previously, the IT industry, universities, and advocacy groups had 30-60 days to analyse proposed immigration rules, identify problematic provisions, and submit substantive comments that agencies were legally obligated to address. Now, the first time these stakeholders might learn about a new H-1B or F-1 policy (governing international students), when it is published as a final rule and already in effect. For Indian IT companies with significant US operations and the nearly 75% of H-1B visa holders who are Indian nationals, this represents a dramatic reduction in procedural protections and predictability."

“By framing Immigration as part of broader foreign policy, it allows the Secretary of State to drastically reduce procedural safeguards, and potential challenges for visa applicants seeking redress or contesting decisions. It may also make it easier for the government to adjust policies in response to shifting international relations or diplomatic concerns, impacting the stability and predictability of employment-based visa programs,” said Kripa Upadhyay, immigration attorney at Buchalter.

Upadhyay explained, “Consular officers may be granted wider discretion in deciding whether to approve or deny visa applications. This could lead to increased subjectivity in interviews and decisions, with applicants facing potentially inconsistent treatment based on the consular officer's interpretation of foreign affairs considerations.”

“It is now entirely possible that an L-1A (intracompany visa) for an executive may be approved by USCIS officer, but rejected by a Consular officer who now gets to use national security and US foreign policy concerns as a decision-making factor which is subjective and has very little to do with the objective requirements that an applicant must meet per the Immigration and Nationality Act,” she added.

According to Khanna, "The government's procedural manoeuvre, paired with recent measures targeting immigration attorneys, suggests a comprehensive strategy to implement restrictive immigration policies with minimal resistance. I foresee a two-pronged approach: first, using the foreign affairs exception to rapidly publish final rules without notice and comment; second, discouraging legal challenges through sanctions against attorneys and firms who represent immigrants. For the Indian diaspora, which has traditionally relied on both administrative advocacy and litigation to protect its interests, this combination is particularly concerning. Companies and individuals should prepare for potential disruptions by developing contingency plans and exploring alternative visa categories or markets."

“Because the foreign affairs function can be subject to diplomatic and geopolitical changes, applicants may experience delays in the visa process as US consulates adjust to new policies or international relations dynamics. This could lead to longer waiting periods for interviews or decisions, as consular officers may need to coordinate with other US government agencies to ensure that visa approvals align with broader foreign policy goals,” added Upadhyay.

Can the new immigration policies that are introduced without following APA be challenged?

A hope remains, that new immigration policies that are thrust upon unsuspecting stakeholders, virtually overnight, could still be successfully litigated.Cyrus D. Metha, NY based founder of an immigration law firm, told

TOI, “I foresee that the administration will issue more regulations without getting public input. Obtaining such input from the public is a win-win for all as the administration can issue rules that would be acceptable and less likely to be challenged in court later as not being consistent with the statutory provision. After a Supreme Court decision last June 2024, (Loper Bright v. Raimondo), courts are no longer required to give deference to a government agency’s interpretation of the statutory provision enacted by Congress. Therefore, there is now a greater chance that a new rule could be successfully challenged in court as the government’s interpretation of the rule can be more easily set aside.”

Can this notice issued by the Department of State itself be challenged?

“The courts remain the ultimate arbiter of the limits of executive authority, and this determination pushes those boundaries to their extreme. In my assessment, there are strong grounds to challenge this notification based on administrative law precedent that has consistently rejected expansive interpretations of APA exceptions,” states Khanna.

According to Mehta, “It may be difficult to challenge the DOS notification itself as it is just a general pronouncement. However, when the administration next issues a rule and claims the foreign affairs function exception in the Administrative Procedure Act, the invocation of the exception can certainly be challenged in court on grounds that the rule has no relation to the foreign affairs of the US. In CAIR Coalition v. Trump, a rule barring asylum-seekers, who had travelled through other countries, from applying for asylum at the Southern Border was struck down as it did not meet the exception, among other grounds. To meet the ‘foreign affairs’ exception, a rulemaking must ‘clearly and directly’ involve a foreign affairs function of the United States.”

Sharma said, “The US Constitution grants Congress (and not the executive branch) the authority to regulate

immigration and foreign commerce. If challenged, courts are likely to recognize this DOS notification for what it is: an unconstitutional power grab thinly veiled as foreign policy."

"The next few months will show how far the administration can go in remaking immigration policy from the top down, and how firmly the courts and public push back to uphold transparency and accountability. As the dust settles, one thing is clear: immigration, especially high-skilled immigration from India, is the latest battleground for defining the limits of executive power in the US," concluded Sharma.