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Immigration after the midterms: A new Congress, but who holds the power?

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Democrats' takeover of the House and Senate promises greater scrutiny of the Trump administration's immigration agenda. But with the President's executive powers intact and several major policy battles already before the courts, H-1B workers, Indian students and H-4 spouses may have to wait for relief.

The Democratic Party's victories in the US midterm elections have changed the balance of power in Washington, with the party securing control of both the House of Representatives and the Senate. But for millions of immigrants, international students and foreign professionals, particularly those on H-1B visas, the more important question is whether the change in Congress will translate into a change in immigration policy.

The answer, according to immigration attorneys and policy experts, is far from straightforward.

Democrats have secured at least 54 seats in the 100-member Senate and, in the preliminary House tally, at least 231 seats against 141 for Republicans, with several races still being counted. The results give Democrats control of both chambers for the first time during President Donald Trump's current term. The new Congress, the 120th, takes office on Jan 3, 2027.

The change gives Democrats considerable powers of oversight and the ability to scrutinise the administration's immigration policies. But it does not give them the power to automatically reverse executive orders, presidential proclamations or regulations already issued by federal agencies. That distinction is central to understanding what the election could mean for legal immigration.

Cyrus Mehta, an immigration attorney, cautions against expecting an immediate change in direction. Notwithstanding the midterm results, he says, the President retains the authority to issue regulations and policies through executive action.

"While there may be oversight committee investigations into ICE excesses and abuses, and DHS racial profiling, I think the administration will pretty much carry out its immigration agenda," Mehta says.

He believes the administration will continue to rely on executive powers, regulations and policy memoranda, particularly because passing major legislation in the Senate generally requires overcoming the 60-vote threshold.

"Congress may be able to question the administration regarding the justification for the $100,000 H-1B fee for hiring workers from outside the US, but its authority is limited to just that: holding hearings and asking questions. The administration will continue to implement rules and policies," he adds.

Ashwin Sharma, a Jacksonville-based attorney, points out that a presidential proclamation can be revoked by the President who issued it or struck down by a court. A final regulation can be undone through new rulemaking or a Congressional Review Act resolution, although the President could veto such a resolution.

Sharma adds, "What the new majorities actually hold is the power to deny appropriations to specific rules, the power to investigate and subpoena, and, in the Senate, the power to decline nominees and judges. Those are real, and they should take the most reckless anti-immigration tactics off the table. But they do not reverse the immigration agenda. Washington changed who holds the gavel, but not who holds the pen: for the next two years, immigration policy will be drafted in the West Wing and redlined in the federal courts."

Rajiv S. Khanna, managing attorney at Immigration.com, offers a more detailed account of the tools available to

the incoming Democratic majority. Congress, he says, can narrow the authority delegated to the executive through legislation, prohibit particular fees or write programmes such as OPT and H-4 employment authorisation into statute.

But there is a significant obstacle: the presidential veto. A bill must be signed by the President to become law, unless Congress secures a two-thirds majority in both chambers to override a veto.

Khanna believes Democrats could instead use spending legislation to attach restrictions on funding for particular immigration policies. They can also use congressional oversight to demand documents and testimony from officials responsible for implementing controversial measures.The Congressional Review Act offers another possible route for challenging certain final agency regulations. It allows Congress to pass resolutions of disapproval through an expedited process, although such a resolution still faces the possibility of a presidential veto. Proposed regulations and presidential proclamations are not covered in the same way.

Duden Freeman, a former senior official with the US Department of State (DOS), similarly cautions that a change in congressional control should not be confused with comprehensive immigration reform. “While the shift in Congress indicates increased accountability and oversight of the Department of Homeland Security (DHS) and DOS, I don’t expect most visa policies to change drastically,” she says.

“Everything the administration does that is not in line with the Constitution is taken to the relevant courts anyway,” Freeman says. She adds that real immigration reform may be easier to pass with a Democratic Congress but harder to secure with Trump in the White House.

For Doug Rand, a former senior official with DHS, the courts may prove to be the more consequential check on the administration’s immigration policies.

“The most important check on Trump’s immigration actions may not be the new Congress, but rather the courts. The original $100K H-1B fee was already blocked by a federal judge, and similar attempts to restrict legal immigration will likely meet the same fate,” Rand says.

The question, therefore, is not simply what Democrats can undo after January 3, but which of the administration’s policies can survive legal scrutiny.

H-1B: One fee blocked, another proposed

The H-1B programme is likely to remain among the most closely watched areas of immigration policy, particularly for Indian technology professionals and the employers who sponsor them.

The Trump administration’s $100K payment requirement for certain new H-1B petitions has encountered substantial legal resistance. A federal court in Massachusetts vacated the policy implementing the payment in June 2026, and the First Circuit declined to suspend that ruling in July. A second federal court in California blocked the fee in Sept. The administration has extended the underlying presidential proclamation through Sept 2027, but the fee remains blocked under the relevant court orders.

However, a separate proposal could create another financial hurdle. DHS has proposed a $103K fee for certain cap-subject H-1B petitions through formal rulemaking. As of the date of this draft, it remains a proposal rather than an implemented fee.

Kripa Upadhyay, an immigration attorney and partner at Buchalter, says: “While Congress could increase scrutiny and try to restrict the administration’s ability to collect the proposed H-1B fee by attaching a condition to government funding legislation, it cannot simply stop the separate regulatory process.”

Snehal Batra, managing attorney at NPZ&B, makes a similar point, noting that the administration is pursuing many of its immigration priorities through executive action and agency rulemaking rather than legislation.

“The President retains significant authority over immigration and can direct agencies like DHS, USCIS and ICE to pursue enforcement and regulatory priorities. While Democrats can increase oversight through hearings and investigations and make it more difficult to pass new restrictive legislation, they cannot simply undo existing executive actions. As a result, I expect the administration to continue advancing its immigration agenda through the executive branch, with many of the key battles playing out in the courts through challenges under the Administrative Procedure Act rather than in Congress,” she explains.

Proposed increase in prevailing wages for H-1B and PERM positions

Another concern is the proposed increase in prevailing wages for H-1B and employment-based green card programmes.

Currently, wages are pegged to four levels at roughly the 17th, 34th, 50th and 67th percentiles of market wages. The Department of Labor (DOL) proposes to raise these thresholds significantly. Entry-level (Level I) wages could rise from the 17th percentile to the 34th percentile, aligning them with what is currently considered mid-level pay. The DOL estimates that the changes would increase the average certified wage by about $14,000 per year per position.

Mitchell Wexler, senior counsel at Fragomen, a global immigration law firm, offers an important political qualification. “While Democrats may resist certain fees and restrictions on foreign students, Wexler believes that increased wage minimums for H-1B and employment-based green cards, as well as broader authority for employer enforcement, could find support among some congressional Democrats. “Those aren’t one-party issues as a rule,” he says.

PERM: More scrutiny for employers and green card applicants

Employment-based green card applicants could face another challenging period if the proposed changes to the PERM labour certification process move forward. The Department of Labour (DOL) is considering changes to recruitment requirements and additional protections for US workers, particularly in situations involving recent layoffs. The proposed overhaul had recently cleared White House review.

There is also concern over the suspension of PERM processing involving eight major employers, including Microsoft, Adobe, Cognizant, Infosys, TCS, Wipro, HCL and Capgemini.

The incoming Congress could demand explanations from the Department of Labor, according to the attorneys. Upadhyay says: “Congress can’t end the investigation. It can, however, demand the evidence behind it, question why only some companies were singled out, and probe the process. The most likely route to relief is a legal challenge by the companies themselves.”

F-1 students: Is the US becoming a less attractive destination?

For international students, particularly those from India, two policy changes are of concern: the proposed elimination of Duration of Status and the proposed fees for Optional Practical Training (OPT). The Duration of Status rule was finalised but blocked by a federal court before it could take effect. It would replace the existing framework with fixed periods of admission, subject to extensions.

DHS has proposed charging $70,000 for an initial OPT recommendation and $30,000 for subsequent periods, including STEM OPT extensions. Universities would be required to pay the fee before recommending a student for OPT and could potentially pass the expense on to students or employers.

On this front, Khanna believes that the House Oversight Committee is where a Democratic majority can make

itself felt fastest. Under House rules, the committee may investigate any matter at any time, even one assigned to another committee. It can compel testimony and the production of documents by subpoena. Officials involved in the $100,000 fee, the OPT fee and the EAD backlog could therefore be called to testify under oath, while the internal analyses behind these measures could be demanded.

Immigration attorneys also believe litigation could be the quickest way to challenge the proposed OPT fee.

H-4 spouses: Uncertainty over work authorisation

The automatic extension of Employment Authorisation Documents (EADs) has ended for renewal applications filed on or after October 30, 2025. DHS subsequently issued a final rule making the change permanent.

Khanna points out that Senate Democrats have already filed a resolution, S.J.Res. 99, against the interim version of this rule. However, the resolution would still require the President's signature to take effect.

The next concern is the possibility of eliminating the H-4 EAD programme altogether. Batra says: "Because the H-4 EAD has existed for more than a decade, DHS would be required to do more than simply change its mind. The agency would need to acknowledge its policy reversal, provide a reasoned basis for the change, and address the significant reliance interests of H-4 families and their employers. Given the program's longevity and the economic impact of rescission, any attempt to eliminate H-4 work authorisation would likely face substantial legal and procedural hurdles."

What changes on January 3?

The incoming Democratic Congress will have more opportunities to scrutinise the administration's immigration actions. Hearings, investigations, subpoenas and funding negotiations could put pressure on federal agencies.

But the attorneys do not expect the new congressional majority to automatically reverse the administration's immigration agenda.

Upadhyay believes that, for the immediate future, the courts and the presidential veto will matter more than the congressional majority.

"Where House oversight can do the most good is on pretextual delays. This administration has been assassinating legal immigration by slowing it to a crawl, without changing a single rule. Since Dec 2025, when the State Department ordered an online-presence review of every H-1B and H-4 applicant, consulates in India have cut daily interviews and cancelled appointments wholesale. Individuals are now offered H-1B interview dates more than six months out, and H-4 spouses often find no appointment at all. At USCIS, a standalone H-4 EAD renewal is taking more than a year, and with automatic extensions gone, every month of delay past the card's expiry is a month a lawfully present spouse cannot work. None of these nefarious, underhanded schemes, too numerous to count, appears in the Federal Register. The Oversight Committee can demand the staffing figures, the internal guidance and the emails behind these slowdowns, and put the officials responsible under oath. Like noxious black mould, furtive toxicity withers in daylight; dispelling secrecy is an important antidote," Khanna emphasises.

The incoming Congress may be able to subject immigration policy to greater scrutiny and use funding negotiations to press the administration. But with executive authority intact and major disputes continuing in the courts, the practical impact on H-1B workers, students, H-4 spouses and employment-based green card applicants will depend largely on how those legal and regulatory battles unfold.