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Certain Nonimmigrant Visa Entries Suspended, and Suspension on Issuance of Immigrant Visas Extended

By Elizabeth M. Klarin

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Restrictions on certain nonimmigrants wishing to enter the U.S. subject to work visa authorization were just announced. In addition, prior presidential proclamation 10014 suspending the issuance of immigrant visas to certain foreign nationals through U.S. Embassies and Consulates abroad—which expires today—has also been extended. The restrictions announced in today's Presidential Proclamation will begin at 12:01 am on Wednesday, June 24, 2020, and remain in place through December 31, 2020.

Who is impacted?

Nonimmigrant visa categories impacted by today's presidential proclamation include:

- **H-1B "specialty occupation" visas:** This ban will have a particularly stinging impact on recent H-1B visa winners, selected under this year's 2020 H-1B visa lottery. Those whose cases were approved—ostensibly permitting them to enter to begin work in H-1B status at the start of the fiscal year on October 1, 2020—will now be unable to enter the U.S. in early October to begin the petitioned-for employment. This may deeply hurt employers relying on valuable specialty occupation workers to fill professional roles, which historically has added significant knowledge and experience capital to augment existing U.S. workforces. The ban also applies to any foreign national accompanying or following to join a family member with H-1B status.
- **H-2B "temporary non-agricultural worker" visas:**
- **L-1 "intracompany transferee" visas:** This ban will apply to all L visa holders, and any foreign national accompanying or following to join such foreign national.
- **J-1 Exchange Visitor visas:** Exchange visitor entries are limited to the extent the foreign national is participating ir an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and any foreign national accompanying or following to join an individual in J-1 status.

These nonimmigrant restrictions apply to foreign nationals who:

- Are outside the United States as of 12:01 am on June 24, 2020;
- Do not have a nonimmigrant visa that is valid on the effective date of this proclamation; and
- Do not have an official travel document other than a visa (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on the effective date of this proclamation or issued on any date thereafter that permits him or her to travel to the United States and seek entry or admission.

NOTE: We are seeking clarification on the impact and applicability of this proclamation to Canadians—who are visa

exempt. We will post an update on this ASAP.

In addition, those seeking immigrant visas through a U.S. Embassy or Consulate outside the U.S.—permitting them to enter the U.S. to obtain a Green Card—will also have to wait until after December 31, 2020.

Who is NOT impacted?

IMPORTANTLY, MEDIA REPORTS WERE LARGELY SILENT ABOUT THE FACT THAT THIS BAN ON VISA ISSUANCE DOES NOT IMPACT THOSE ALREADY IN THE U.S. IN VALID NONIMMIGRANT STATUS. This means that, for example, an L-1 intracompany transferee visa holder working and living in the U.S. may continue to do so, and may still petition the government to extend his/her status from within the U.S. to the full duration of allowable time under the related regulations. Most nonimmigrant visa holders are only permitted to do so consecutively for a set period of time, before they are required to "reset the clock" by spending a certain amount of time living and/or working outside the U.S. before being allowed to reapply for new nonimmigrant status in the same visa category.

Also, the proclamation does NOT apply to:

- Any lawful permanent resident of the United States ("Green Card" holders);
- Any foreign national who is the spouse or child (as defined in the Immigration and Nationality Act, including certain unmarried people under age 21) of a United States citizen;
- Any foreign national seeking to enter the United States to provide temporary labor or services essential to the United States food supply chain; and

Exemptions also exist for individuals working in areas considered to be in the national interest of the United States, including foreign nationals:

- Whose presence is critical to the defense, law enforcement, diplomacy, or national security of the United States;
- Who are involved in the provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized;
- Who are involved with the provision of medical research at United States facilities to help the United States combat COVID-19; or
- Who are deemed necessary to facilitate the immediate and continued economic recovery of the United States.

Finally, an exemption is available to certain foreign national children who would, as a result of the suspensions in this proclamation or prior Proclamation 10014 (suspending entry into the U.S. of foreign nationals as immigrants), age out of eligibility for a nonimmigrant or immigrant visa.

The impact of travel outside the U.S. on nonimmigrants currently in the U.S.

For nonimmigrants impacted by this proclamation who benefit from an extension of their current work-authorized status from within the U.S., travel outside the U.S. will make them ineligible to reenter the U.S. despite their existing work authorization, through at least December 31, 2020.

The impact of travel outside the U.S. for those with expiring or expired visas has been uncertain since March 2020, when U.S. visa services (including issuance of new visas) were suspended worldwide. Visa services have not

resumed since, and a date for the resumption of visa services for those not impacted by today's presidential proclamation is as yet undetermined.

While petitioners and applicants can receive an extension of status from within the U.S. to permit them to continue to work and live in America, new visas are only issued outside the U.S. through a U.S. diplomatic post (such as a U.S. Embassy or Consulate). Therefore, beneficiaries of an extension of their current status are normally required to get a new visa once they travel outside the U.S. for work, to visit family or vacation, or for any other reason. With visa services suspended—and no timeline for the end to these suspensions announced—beneficiaries of an extension of status through the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) find themselves in the situation where they are authorized to work in the U.S., but unable to get a visa to re-enter the U.S. should they leave.

What caused this dramatic move?

Today's proclamation and the regulatory changes under consideration are more in a series of dramatic changes being enacted and considered by the current presidential administration, in the absence of agreement between the two U.S. houses of Congress on comprehensive immigration reform, and in light of skyrocketing unemployment figures in the U.S. resulting from the COVID-19 worldwide pandemic. Concerns over the further spread of the virus by foreign nationals is also contributing to the ongoing changes and chain reaction of presidential proclamations.

Other changes on the horizon

The proclamation also tasks the Secretaries of various U.S. government departments with doing the following:

- The Secretary of Labor, in consultation with the Secretary of Homeland Security, are tasked with considering promulgating regulations or taking other appropriate actions to ensure that the presence in the United States of foreign nationals who have been admitted or otherwise provided a benefit, or who are seeking admission or a benefit, pursuant to an EB-2 or EB-3 immigrant visa or an H-1B nonimmigrant visa, do not disadvantage United States workers.
- The Secretary of Health and Human Services, through the Director of the Centers for Disease Control and Prevention, will provide guidance to the Secretary of State and the Secretary of Homeland Security for implementing measures that could reduce the risk that foreign nationals seeking admission or entry to the United States may introduce, transmit, or spread SARS-CoV-2 within the United States.
- The Secretary of Homeland Security will:
  - Take action to ensure that foreign nationals be deemed ineligible to apply for a visa, admission or entry into the United States, or apply for other benefits, until they have been registered with biographical and biometric information (including photographs, signatures, and fingerprints);
  - Take steps to prevent certain aliens from obtaining eligibility for work authorization in the U.S.—including foreign nationals with final orders of removal; who are inadmissible or deportable from the United States; or who have been arrested for, charged with, or convicted of a criminal offense in the United States; and
  - Consider circulating regulations or taking other appropriate action regarding the efficient allocation of visas for temporary workers and trainees, including H-1B workers, and ensuring that the presence in the United States of H-1B nonimmigrants does not disadvantage U.S. workers.

In addition, regulatory changes are rumored to be in the works in conjunction with the U.S. Department of Labor

(DOL) and U.S. Department of Homeland Security (DHS). These include proposals:

- Requiring that H-1B workers paid at the lowest wage level (of the four wage levels set by the DOL) be granted a maximum of two years of employment authorization, instead of the current limit of up to six years. Upon request to extend or renew status, it is proposed that employers also be required to pay the individual no less than wage level two, or the worker's visa will not be extended. This poses significant challenges based on current trends, where any petitions submitted at a level 1 wage face likely challenges from U.S. Citizenship and Immigration Services in order to achieve approval. It's possible that, under the new minimum requirements, jobs at a level 2 wage might also come under attack.
- For a primary employer that has assigned a foreign national employee to working at a client's worksite, requiring that both the primary employer (e.g., an IT services company) and secondary employer (e.g., the client of the IT services firm) must file a Labor Condition Application with the Department of Labor for a given H-1B worker.
- For a Memorandum of Understanding between DHS and DOL to change how the U.S. Bureau of Labor Statistics will calculate its four wage levels, with the idea that all four wage levels will increase from their current rates.
- Imposing an additional $20k fee on all H-1B petitions (this is likely to be challenged in the courts if imposed).
- To redefine, by regulation, key terms connected with the H-1B program, including "specialty occupation," "employer," "employee," and "employer-employee relationship." These terms have been subject to redefinition (specifically, narrowing of the definition) on an arbitrary, policy basis over the last several H-1B petition cycles. While the regulatory definition of these terms might prevent future arbitrary and inconsistent application of the terms, it might also simply codify unreasonably restrictive definitions that have been applied over the course of the past several years.
- To rescind the ability of H-4 spouses of H-1B visa holders to apply for employment authorization
- To rescind the Science, Technology, Engineering and Math (STEM) Optional Practical Training extension rule, which currently allows up to an additional 24 months of employment authorization in OPT status beyond the normal one year of OPT status available to all recent graduates of U.S. universities. This would make it even more difficult for recent STEM graduates to qualify for H-1B specialty occupation status, which is most commonly used by foreign graduates of U.S. universities to apply their skills and learning achieved at U.S. universities for the benefit of the U.S. market.
- To limit qualification for employment authorization under the Optional Practical Training program to international students who are in the top 5%-15% of their graduating class.
- To rescind the work authorization of various categories of individuals, including Temporary Protected States (TPS) recipients, asylees, and refugees. This would make it difficult if not impossible for status recipients under these programs to support themselves and their families, and likely create a large number of foreign individuals in the U.S. who would be subject to deportation from the U.S. under the recently-revised public charge inadmissibility rule.

Questions?

Please reach out to any of us on the LMWF immigration team with questions or concerns about how the presidential proclamation or proposed rules will or could impact you or your business. We are strategically coordinating with impacted parties to help guide them through the challenges created by these government actions, and help them retain crucial foreign talent in the U.S.

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