

Extraordinary ability visa: Safe haven during executive order storm

By [Andrew M. Wilson](#)

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It all started with a tweet late one night in April 2020. My phone started beeping and buzzing with texts. HR and corporate counsel worried about news they had just read. An apoplectic client concerned about the future. President Trump had tweeted that he plans to suspend immigration to the United States.

Suspend immigration to the U.S.? It was late, but even my fatigued shelter-in-place mind questioned whether this concept was legal or pragmatic. Had Donald Trump become Donald Quixotic for anti immigration groups?

A few days later a new Immigration Executive Order was released titled *Presidential Proclamation (10014) Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*. My quick cursory review indicates that the executive order only affects a limited group of individuals for perhaps only the next 60 days -individuals who are outside the U.S. pursuing an immigrant (permanent) visa. Nonimmigrants (i.e., TN, H-1B, L-1, O-1 etc.) are not affected. I breathed an initial sigh of relief as this does not seem like a big deal.

Wait, this is a big deal

A complete reading of the executive order unfortunately shows two potential future threats hiding in plain sight:

- The rationale for executive order, specifically that the entry of a specific group of foreign nationals is "detrimental to the interests of the United States."
- Section 6 of the executive order indicates that additional measures will be evaluated, including a possible recommendation on non-immigrant visa categories that are deemed to negatively affect the U.S. economy.

Big impact questions were now flooding my head. While the current executive order affects only a limited group of people, could it set up the foundation for future restrictions? Could a president determine during any economic downturn that legal immigration is detrimental to the interest of the U.S.? What non-immigrant visas may be in the crosshairs under s. 6 of the proclamation?

Will there be a new immigration executive order?

- My best guess is yes. There are some clear signs that the current administration will issue a new executive order restricting some non-immigrant visa categories. Those signs include:
- Reports that Stephen Miller, senior adviser to President Trump, advised anti-immigration groups that current

guest worker programs are up for review.

- Four senators recently sent President Trump a letter urging him to suspend all-new guest worker visas for 60 days and to suspend certain guest worker programs (H-1B, H-2B, F-1 OPT) for up to a year.
- Immigration is often used as a scapegoat during economic troubles and a distraction during political turmoil. We have both of those scenarios right now, as well as an upcoming election where immigration can be used for political purposes.

What does this have to do with the O-1 visa category?

The H-1B category has been a target of the current administration for nearly three years. It is reasonable to speculate that a new immigration executive order may include some restrictions on H-1Bs. If true, those who would normally pursue H-1B work authorization may need to find another non-immigrant visa option.

Based on current and recent immigration discussions, it is also reasonable to speculate that the O-1 visa category is not likely to be included in any new immigration executive order. It is not a visa that is known to be controversial, and it is actually used by many scientists and researchers who may be working on research intended to alleviate the effects of the COVID-19 pandemic.

In addition, factor in continued scrutiny of those applying for TNs that may involve technical sales or managerial roles, and the O-1 may be an important alternative to certain NAFTA cases as well.

What are requirements for an O-1?

Pursuant to NAFTA 8 CFR §214.2(O), O-1 classification applies to an individual alien who has extraordinary ability in the sciences, education, business, athletics etc. which has been demonstrated by sustained national or international acclaim and who is coming temporarily to the U.S. to continue work in the area of extraordinary ability.

According to 8 CFR §214.2(o)(3)(iii), an alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

- Receipt of a major, internationally recognized award, such as the Nobel Prize; or
- At least three of the following forms of the documentation set forth under 8 CFR §214.2(o)(3)(iii) (B)(1) - (8).

Most individuals need to qualify by meeting at least three of the regulatory criteria. Those applicable to science or business include:

- Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date and author of such published material, and any necessary translation;

- Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
- Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
- Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
- Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
- Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

If the above criteria do not readily apply to an individual's occupation, comparable evidence may be used to establish eligibility.

We have utilized the O-1 visa category for individuals in many fields, including researchers, economists, technical sales professionals, marketing executives, IT professionals, coaches, professional speakers etc. It is important to note that the position in the U.S. does not need to require someone of extraordinary ability, but rather the individual must simply meet the regulatory criteria and continue to work in their field.

With a new immigration executive order on the horizon, and continued scrutiny of certain TN occupations, the O-1 visa category may be a viable option for certain individuals. It should be looked at more closely now more than ever.

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