An Extended Pause: New Presidential Proclamation Halts US Entry for Thousands of Workers

Article By
Samuel J. Mudrick
Squire Patton Boggs (US) LLP
Employment Law Worldview

- Administrative & Regulatory
- Coronavirus News
- Immigration
- Labor & Employment
- All Federal

Monday, June 22, 2020

As expected, President Trump signed a presidential proclamation (“Suspension of Entry of Immigrants and Nonimmigrants who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak” hereafter “Nonimmigrant Proclamation”) extending the duration of his prior suspension of immigrant visas (for those entering the U.S. permanently) and creating a new suspension for those seeking entry across a broad swath of nonimmigrant visas (those entering temporarily, particularly for employment).

Background

On April 22, 2020, president Trump issued 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”, which established a 60-day bar on certain types of immigrant visas, but did not affect nonimmigrant visas. Thousands of U.S. employers use nonimmigrant visas to hire temporary workers across many industries and include many categories of employment visas, such as the popular H-1B and L-1.
Today, President Trump’s new Nonimmigrant Proclamation extended the duration of the bar on immigrant visas through December 31, 2020 (with potential extensions thereafter) and created a new bar for those seeking to enter the U.S. in the following nonimmigrant visa categories: H-1B (specialty occupation), H-2B (temporary workers), L (intracompany transferees), and J (exchange visitors).

The new Nonimmigrant Proclamation will go into effect at 12:01 A.M. eastern daylight time on June 24, 2020 and be in force through December 31, 2020, with the potential for extensions thereafter.

The president deemed the immigrant and nonimmigrant bars necessary to avoid competition for U.S. workers during the economic downturn and high unemployment caused by the COVID-19 pandemic.

Who is Covered by the New Proclamation?

The new Nonimmigrant Proclamation affects most, but not all, foreign nationals seeking entry in the affected H-1B, H-2B, L, and J visa categories, with several caveats and exceptions. An analysis of the now extended April 22, 2020 immigrant Proclamation’s coverage and exceptions can be found here.

First, the new Nonimmigrant Proclamation only covers individuals who meet all of the following three requirements:

1. **Outside the United States on the effective date** of the Proclamation (June 24, 2020);
2. **Do not hold a nonimmigrant visa valid on the effective date** of the Proclamation; **AND**
3. Do not hold an official travel document other than a visa (e.g., transportation letter, boarding foil, or advance parole document). Such documents are rarely used by nonimmigrant visa holders in the affected categories.

The fact that the suspension will not cover those already holding visas will go far in limiting damage to the many U.S. employers utilizing these visa categories. Initial indications from the White House appear to show that those already on visas will not be barred from extending or renewing their visas while the new Nonimmigrant Proclamation is in place, but we expect written guidance in the coming days.

Would-be entrants in the following visa categories, **along with anyone accompanying or following to join them** (e.g., dependent family members), are now barred from receiving initial visas and entering the United States:

- **H-1B**: The H-1B is the workhorse visa for many industries, including tech and finance, with 85,000 new visas issued per year. While H-1Bs subject to the 85,000 visa quota apply in April each year, they normally cannot begin their H-1B positions until October 1 of the year they are approved. The Nonimmigrant Proclamation’s timing means it will stop many of the H-1B workers approved in 2020 who have not yet entered the U.S.
- **J**: The Proclamation bans entry for J visa holders **only in the following programs**: “intern, trainee, teacher, camp counselor, au pair, or summer work travel.” The J-1 visa is broken into 13 categories and used for a broad range of
temporary workers and exchange visitors, including professors, doctors, interns, and trainees, among others. For example, the J-1 is widely used to staff beaches, amusement parks, and camps during the summer. These summer work travel J-1 categories are now barred while those covering professors, doctors, and certain students are not impacted.

- **L**: The L visa covers intracompany transferees in two categories: (1) the L-1A for managers/executives and (2) the L-1B for those with specialized knowledge. An L-1 employee must be moving to a U.S. entity after at least a year of qualifying experience with a related foreign entity. A possible exemption for L-1A visas was broadly reported, but left out of the final Proclamation.

- **H-2B**: The H-2B visa is used to fill temporary positions in non-agricultural industries, such as landscaping, meat packing, and construction, among others, often to meet seasonal and temporary needs.

Ironically, many people affected by the Nonimmigrant Proclamation are already unable to enter the U.S. due to the ongoing closure of all U.S. Embassies and Consulates since March 2020 that has almost completely stopped the issuance of U.S. visas. There is no announced date for re-starting visa issuances in the near future.

Further, the ongoing COVID travel bans for individuals seeking U.S. entry after being physically present during the last 14 days in one of the 34 banned countries (China, Iran, the United Kingdom, the Republic of Ireland, Brazil, and 29 countries in the European Schengen area). Suspension of routine visa services at Embassies and Consulates and the COVID travel bans have been in place for several months, with no official word on when they might be lifted.

The Nonimmigrant Proclamation also calls on the relevant Executive agencies to study potential additional regulations and investigations into the implementation and possible changes to existing green card and temporary visa programs. Executive leadership has already mentioned using the coming weeks and months to shift the U.S. immigration system towards the president’s preferred “merit based” model, which has made no progress through legislative action. The Proclamation specifically calls for the following additional measures to be taken by the agencies:

- Issue regulations or take additional actions to ensure that those who have already been admitted, or are seeking admission, on an EB-2 immigrant visa, EB-3 immigrant visa, or H-1B nonimmigrant visa do not limit opportunity for U.S. workers. This will likely include changes and further restrictions to the Department of Labor’s Permanent Labor Certification Program (PERM) and the Labor Condition Application (LCA) Specialty Occupations with the H-1B, H-1B1 and E-3 Programs.

- The Department of Labor is also instructed to “undertake, as appropriate, investigations” of LCA violations by employers sponsoring H-1B visa holders.

- Consider issuing regulations or other actions concerning the allocation of visas and ensuring the presence of H-1B workers in the United States “does not disadvantage United States workers.” In other words, further changes and limitations to the annual H-1B lottery process are likely.

- Put measures in place to require nonimmigrants and immigrants to register their biometrics, including photographs, signatures, and fingerprints.
receiving a visa or admission into the United States.

- Take steps, consistent with law, to prevent certain individuals who have final orders of removal; who are inadmissible or deportable from the U.S.; or who have been arrested for, charged with or convicted of a criminal offense in the U.S., from being able to work in the United States. Could this mean the administration may attempt to issue rules denying work authorization to nonimmigrants arrested, charged or convicted of minor criminal offences?

The Nonimmigrant Proclamation is explicitly not intended to affect individuals seeking asylum, refugee status, or other forms of humanitarian relief.

**Who is Exempted from the New Proclamation?**

The Nonimmigrant Proclamation explicitly **exempts the following individuals**:

1. U.S. lawful permanent residents (aka green card holders).
2. The spouse or children of a U.S. citizen.
3. Foreign nationals seeking entry for “temporary labor or services essential to the United States food supply chain[.]”
4. Foreign nationals whose entry would “be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security[.]”

The Nonimmigrant Proclamation authorizes the Secretaries of State, Labor, and Homeland Security to define who falls under the “national interest” exception and states that any such standards should include those who are:

- “[C]ritical to the defense, law enforcement, diplomacy, or national security of the United States”[.]
- Provide medical care to hospitalized COVID-19 patients.
- Provide COVID-19 medical research in the U.S.
- Are “necessary to facilitate the immediate and continued economic recovery of the United States.”

The breadth of the final “economic recovery” category will likely be a legal battleground for companies outside the other named exempted categories.

**Will It Stand Up In Court?**

As with the president’s other immigration-related proclamations and executive orders, court challenges are likely. Given the Nonimmigrant Proclamation’s limited scope, non-application to existing visa holders, and exceptions, coupled with the broad executive immigration powers recognized by the US Supreme Court in its review of prior immigration travel bans, it stands a solid chance of withstanding judicial scrutiny, although lower courts may succeed in temporarily halting its effects.

© Copyright 2020 Squire Patton Boggs (US) LLP

National Law Review, Volume X, Number 174