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US Suspends Admission of Certain Foreign Nationals: The Impact on Employers.

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The Why?

- The Administration states that, after a review of “nonimmigrant” or temporary immigration programs, the Secretaries of Homeland Security and Labor determined that the “admission of workers within several nonimmigrant visa categories also poses a risk of displacing and disadvantaging United States workers during the current [economic] recovery.”
- The Administration predicts that the suspension of entry of certain nonimmigrant workers will create roughly 500,000 jobs in the U.S.
- The new ban on certain nonimmigrants in H-1B, H-2B, L-1 and J-1 statuses is meant primarily to impact foreign nationals currently abroad who do not yet have visas issued, but as we discuss herein, the State Department has indicated by tweet that it may invoke it to deny visa renewal applications in these categories. It is not clear if this is the State Department’s official position, and a clarification is expected.

The What?

- This is an entry ban, announced pursuant to Section 212(f) of the Immigration and Nationality Act.
- Section 212(f) provides the President with sweeping power to suspend the entry of, or place restrictions on the entry of immigrants and nonimmigrants for whatever period he or she deems necessary, provided that the President determines that such entry would be detrimental to U.S. interests.
- Broad executive power under 212(f) was affirmed 2018 in *Trump v. Hawaii*, which upheld the President's travel ban on nationals from certain predominantly Muslim countries.

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Entry Ban for Certain Persons in H-1B, H-2B, L-1 and J-1 Nonimmigrant Classifications

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Which nonimmigrant classifications are impacted by the terms of the new entry ban?

- The new ban impacts the following “nonimmigrant” or temporary classifications:
 - H-1B Specialty Occupation status, and accompanying or following to join H-4 dependent family members;
 - H-2B Temporary Worker status, and accompanying or following to join dependent family members;
 - J-1 status, if seeking admission to participate in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and accompanying or following to join J-2 dependent family members; and
 - L-1 Intracompany Transferee status (L-1A and L-1B), and accompanying or following to join L-2 dependent family members.

Which classifications are NOT impacted by the terms of the new ban?

- The new ban does NOT apply to the following commonly used nonimmigrant classifications:
 - H-1B1 visas for Chileans and Singaporeans
 - E-1 and E-2 visas for “treaty nationals”
 - E-3 visas for Australians
 - F-1 student visas
 - J-1 visas for classifications other than those enumerated in the ban, for example, researchers and scholars
 - O-1 visas for those with extraordinary ability and international recognition
 - TN status for Canadians and Mexicans under the USMCA (formerly known as NAFTA)

Who is not permitted to enter the U.S. under the new ban?

- The new ban bars admission to the U.S. in H-1B, H-2B, L-1 or J-1 status of foreign nationals who:
 - are outside the United States as of the effective date of the proclamation; AND
 - do not have a valid nonimmigrant visa as of the effective date of the proclamation; AND
 - do not have a valid and official travel document other than a visa as of the effective date of the proclamation that permits him/her to seek admission to the United States.
- The Proclamation also requires the State Department to “implement” the Proclamation, meaning that visas will be denied to persons covered by the Proclamation
- **In other words: Per the plain language of the proclamation, if a foreign national was outside the U.S. on 12:01 Eastern Time on June 24, 2020, without a valid visa or entry document, he or she will not be able to obtain a visa and enter the U.S. as an H-1B, H-2B or L nonimmigrant, or in one of the impacted J classifications.**

State Department FAQ issued: Expansion of the Ban

- Last week the Department of State issued a set of FAQ's, followed by an exchange of tweets, that appear to modify the ban beyond its plain language.
- According to the State Department, anyone who departs the U.S. after the date of the proclamation, and seeks visa issuance/renewal in one of the impacted classifications, will NOT be issued a new visa prior to the end of 2020.
- This is effectively a shut-down of all visa services in the classifications enumerated by the proclamation until the end of the year.
- If the Department of State's interpretation stands:
 - Anyone who is in the U.S. in valid status but with an expired visa should not travel.
 - Those who have emergency travel situations but would require valid visas in one of the impacted classifications to return to the U.S. will face tremendous hardships.

Who is NOT subject to the ban?

- Individuals who are currently physically present in the United States;
 - Those requiring visa renewal in an impacted classification should not travel abroad.
- Individuals who are outside the United States and hold a valid nonimmigrant visa or travel document as of June 24, the effective date of the proclamation;
 - Individuals abroad with valid visas in an impacted classification will NOT be able to renew those visas before January 2021 if it expires, under the State Department interpretation of the Proclamation. They may want to re-enter the U.S. during current visa validity.
- US lawful permanent residents (i.e., Green Card holders);
- Alien spouses and children of US citizens;
- Individuals seeking to enter the United States to provide temporary labor or services essential to the United States food supply chain, and;
- Individuals whose entry would be in the national interest.

What will be considered to be in the “national interest”?

- Individuals providing medical care for hospitalized COVID-19 patients
- Individuals engaged in COVID-19 related research
- Individuals who “are critical to the defense, law enforcement, diplomacy, or national security of the United States”
- Individuals who “are necessary to facilitate the immediate and continued economic recovery of the United States”
- DHS, DOL and DOS are directed to establish standards to define national interest exceptions

What can we conclude about the impact of the new ban on current employees and global mobility?

- A person who is currently physically present in the United States in H-1B, H-2B, L-1 or J-1 status or an applicable dependent status can remain in the United States and can continue to work if otherwise authorized to work; may extend a period of stay; and may transfer employment to another employer in accordance with the person's nonimmigrant status.
- A person who is currently physically present in the United States may seek to change status through USCIS to one of these statuses and will be unaffected by the proclamation (this includes persons whose H-1B petitions are subject to the annual cap and will be changing status to H-1B on October 1).
- A person who is outside the United States now but holds an H-1B, H-2B, J-1, or L-1 visa that was valid on June 24 would be able to return to the United States to take up or resume employment, assuming the visa remains valid.

Employment Prohibition for Persons Convicted, Charged, or Arrested for Criminal Offense

- Proclamation requires DHS to take steps to prevent persons who have been arrested for, charged with, or convicted of a criminal offense in the United States, from obtaining eligibility to work in the United States
- Prohibition Would Apparently Apply Without Regard to the Gravity of the Alleged Crime or to Whether or Not the Crime Occurred
- Would Result in Effective Removal from United States
- Provision Probably Unconstitutional and Subject to Legal Challenge

Canadians

- Canadians do not require visas to enter the U.S. in most visa classifications
- Per guidance from USCBP HQ, Canadians are exempt from the Proclamation
- This means that Canadians should be permitted to continue to apply for admission in H-1B, H-2B, L-1 or J-2 status at ports of entry after the effective date of the proclamation and be issued an “official travel document other than a visa” in the form of an I-94 admission record.

How long will the ban last?

- The ban will be in effect until December 31, 2020, unless it is lifted earlier.
- The Proclamation provides for a review after each 60 day period.

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Status of Other Bans Currently in Effect

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The June 22 Proclamation extends the ban on certain immigrants

- In April the White House issued a proclamation suspending entry of certain employment-based and family-based immigrants
- The April ban essentially applies to those who were completing the green card process abroad through “consular processing” in employment-sponsored and certain family-sponsored classifications.
- This ban has now also been extended to December 31, 2020.

COVID-related travel restrictions continue

- Travel restrictions on individuals who were physically present in certain countries for the past 14 days continue.
- Those countries include:
 - UK
 - The Republic of Ireland
 - “Schengen” Countries: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.
 - Brazil
 - Iran
 - China

Status of U.S. Consular Posts

- U.S. consular posts abroad remain closed to the public.
- Some posts have begun accepting registrations for E visa companies.
- Some posts are scheduling interviews, but many interviews have been cancelled.
- Consular closures effectively bar numerous others not currently subject to the ban.

European Union Relaxing Broad Travel Ban

- On June 15 EU member states opened their borders to each other.
- It has been reported that the EU member states have decided that citizens from 15 countries may be allowed to travel to the EU starting July 1.
- The United States is **not** on the initial list of countries.
- Initial countries include Canada, New Zealand, Australia, South Korea, Japan, Georgia, Uruguay, Morocco, Tunisia, Algeria, Serbia, Montenegro, Rwanda and Thailand.
- China may also be included if Beijing decided to allow EU citizens to enter effective July 1.

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Expected Regulatory Changes

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USCIS is expected to announce regulatory changes in the coming weeks

- These changes may come as “interim final” rules, meaning that they will become immediately effective without the standard “notice and comment” period.
- An agency can do this for “good cause.”
- The changes may include:
 - New H-1B regulations with higher wage requirements, restrictive definitions for “specialty occupation,” new rules regarding the “employer-employee” relationship and potentially higher filing fees
 - Termination of H-4 employment authorization
 - Changes to F-1 OPT

Other possible changes

- The Proclamation also states that “The Secretary of Labor shall, in consultation with the Secretary of Homeland Security, as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action to ensure that the presence in the United States of aliens 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 does not disadvantage United States workers . . .”
- This signals that we may see regulatory changes to the PERM process for testing the U.S. labor market, including the possibility that employers of some foreign nationals with approved PERM-based immigrant visa petitions may be required by DOL to “refresh” the PERM labor market test.

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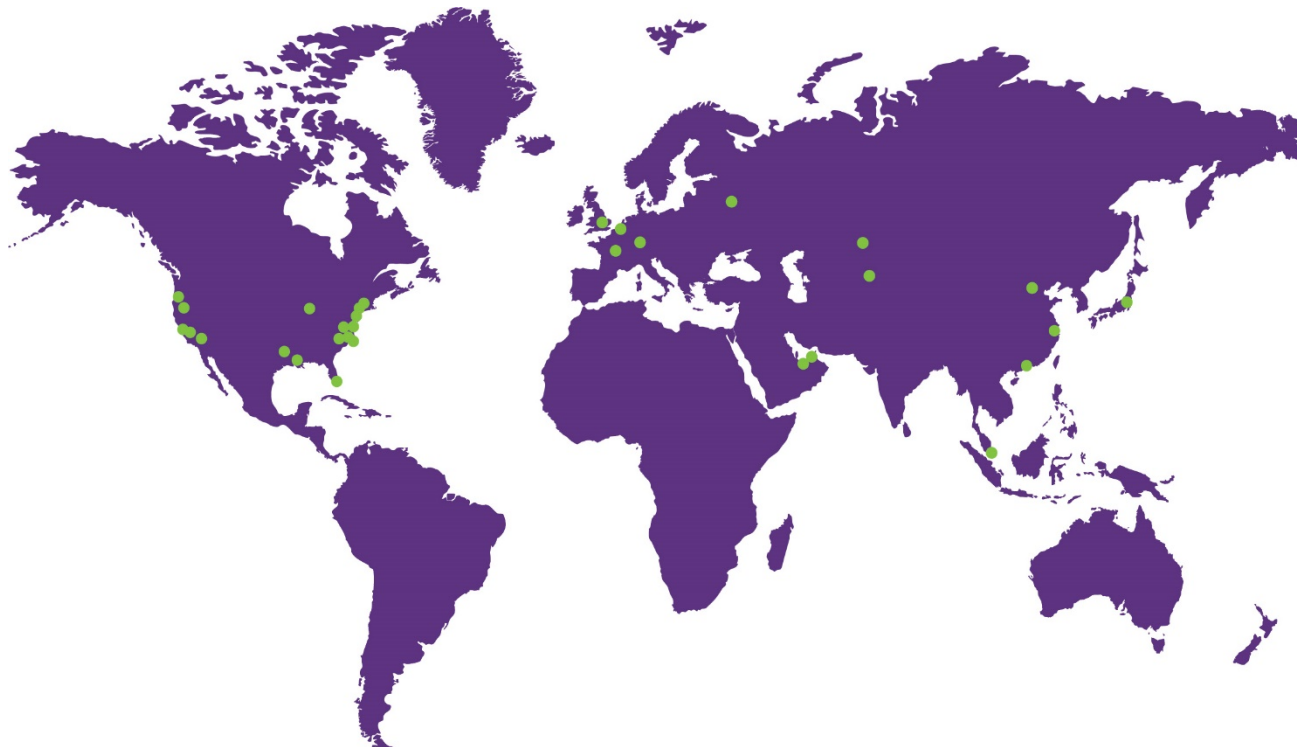
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