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US IMMIGRATION AND COVID-19

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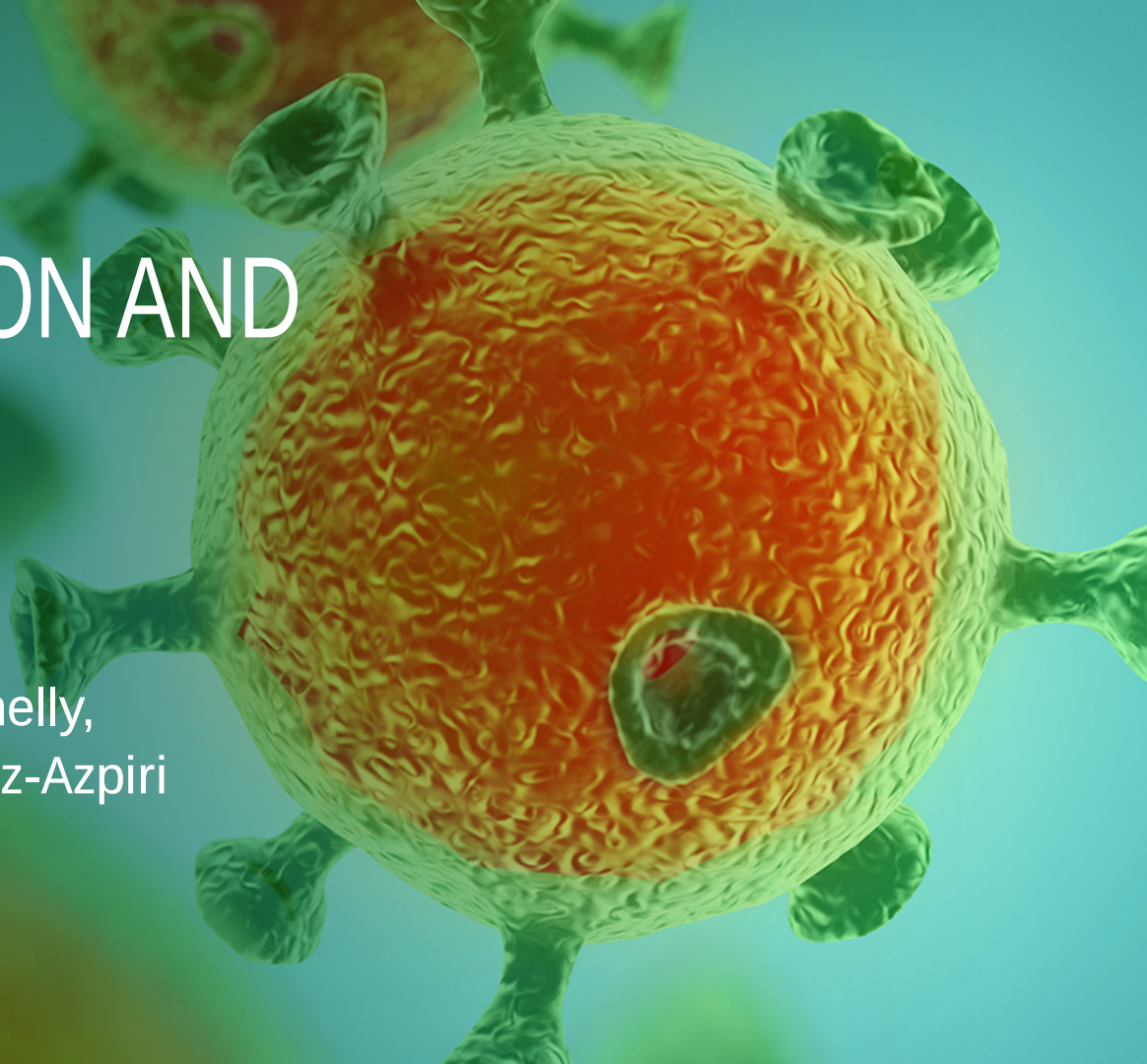


EXECUTIVE ORDER SUSPENDING THE ENTRY OF IMMIGRANTS

Executive Order Suspending the Entry of Immigrants

What is the most important takeaway?

- The Executive Order does NOT impact nonimmigrants (individuals on temporary work visas.)
- The Executive Order does NOT impact foreign nationals currently in the U.S. pursuing labor certifications, immigrant visa petitions or applying for adjustment of status (the final stage of the green card process when filed in the US.)
- Family-based immigrants who are subject to the proclamation, principally the immediate relatives of permanent residents, will feel the brunt of the impact of the new restrictions.

Executive Order Suspending the Entry of Immigrants

Who is Impacted

Those who are subject to the suspension include family-based and employment-based immigrant visa applicants who are ***outside the U.S. waiting for immigrant visa issuance and are:***

- Parents and adult children of U.S. citizens;
- Immediate relatives (spouses and children) of permanent residents;
- Siblings of U.S. citizens;
- Employment-based immigrants including:
  - EB-1 individuals of extraordinary ability and outstanding researchers;
  - EB-2 individuals with advanced degrees, exceptional ability, or waivers of the labor certification requirement in the national interest; and
  - EB-3 professional and skilled workers.

Executive Order Suspending the Entry of Immigrants

- **Major Exceptions**
  - Foreign nationals who were already issued immigrant visas at U.S. consular posts
  - Physicians, nurses or other healthcare professionals seeking to perform medical research or other research intended to combat the spread of COVID-19; or to perform work essential to combating, recovering from, or otherwise alleviating the effects of the COVID-19 outbreak, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees; and any spouse and unmarried children under 21 years old who are accompanying or following to join the individual
  - EB-5 Immigrant Investor Program applicants
  - Spouses of United States citizens

Executive Order Suspending the Entry of Immigrants

- **Who is exempted under the Executive Order?**
  - Foreign national who are already lawful permanent residents of the U.S.;
  - Foreign nationals already in the United States;
  - Individuals seeking to enter the United States to work on a temporary basis (nonimmigrant visa holders); or
  - Applicants for adjustment of status to permanent residence in the United States.

Travel During COVID-19

- Northern and Southern land ports of entry closed to all but “essential” traffic until May 30
- TN and L-1 applications considered essential; Canadian airports continue to process TN and L-1 applications
- If have to travel, please consider restrictions on entry in target country (No domestic flights in India until May 3, no international flights until June 1; no Indian visas to nationals of certain countries)
- Travel within US possible, but please consider local lockdown rules
- US ban continues on entry for person who have been present in certain countries, including Schengen countries, UK, Ireland, Iran and China

USCIS Response to the COVID-19 Crisis?

- Most local USCIS offices closed—adjustment interviews canceled
- Four Service Centers still open—VSC temporarily closed, then reopened
- Premium processing suspended
- Processing of nonimmigrant petitions and applications continues; RFE rate appears to have declined
- Communication regarding exercise of discretion for late filings
- Allows reproductions of signatures on petitions and applications
- 60-day grace period has not been extended to 180 days

CHANGES IMPACTING H-1B WORKERS

Changes in Work Locations for H-1B Workers

- Changes within an “MSA”/Work from Home
  - An MSA is a “Metropolitan Statistical Area.”
  - When and H-1B worker is working from home or from a different worksite, if the worker’s home or new worksite is in the same MSA or within a reasonable commuting distance from the primary worksite, a new Labor Condition Application (LCA) is not required, provided there are no other changes in the terms and conditions of employment.
  - Although a new LCA and H-1B petition are not required, the employer must have the LCA posted for 10 days in two conspicuous locations at the new worksite and update the corresponding public access file.
  - DOL has not made any exceptions to this for WFH situations during the COVID-19 outbreak, except to offer an extension of time to do the posting to 30 days from the date the H-1B started working at the new worksite.

Changes in Work Locations for H-1B Workers

- **Changes outside an MSA**
  - "Short-Term Placement:" Under certain circumstances, an H-1B employer may assign an H-1B employee at a new worksite outside the MSA of the primary worksite for up to 30 days in a one-year period, and in some cases 60 days in a one-year period (where the employee is still based at the "home" worksite), without obtaining a new LCA. In these instances, a new LCA and H-1B petition are not required, provided there are no other changes in the terms and conditions of employment.
  - Short-term placement is not available where there is already an LCA covering the area of intended employment for the occupational classification. The short-term placement provisions provide H-1B employers with flexibility in assignments to afford enough time to obtain an approved LCA for a worksite outside the area of intended employment where the H-1B employer intends to have a continuing presence.
  - Short-term placement requires the employer to pay a per diem.
  - If the H-1B worker is going to work from a worksite outside the MSA for more than 60 days, an H-1B amendment is required.
    - NOTE: NO PREMIUM PROCESSING CURRENTLY AVAILABLE
- **Solving the problem of LCA posting in an empty office**
  - Where H-1B petitions must be filed when an employee is currently working from home, but will later be working at the primary worksite, the posting can be done at the H-1B workers home first; then later at the worksite. Alternatively, electronic posting is also permitted.

Salary Reductions for H-1B Workers

- The “Required Wage”
  - An H-1B worker must be paid the higher of the actual wage paid to similarly occupied U.S. workers or the prevailing wage in the area of intended employment. This is the “required wage.”
  - Where there is an across-the-board salary reduction impacting all similarly occupied workers, there is by definition a new “actual wage.”
  - If the new actual wage is above the prevailing wage, no H-1B amendment is required.
  - If the new actual wage is below the prevailing wage, the employer must pay the prevailing wage, as that is the “required wage.”

Reduction in Hours for H-1B Workers

- H-1B workers are permitted to work part-time.
- There is no minimum number of hours, but extremely low hours may result in a request for evidence (RFE) on availability of specialty occupation work.
- A range of hours can be listed, but the top of the range should not be over 35 hours.
- Any reduction in hours requires a new LCA and an H-1B amendment.
- Unavailability of premium processing may mean that the amendment may not be adjudicated before the H-1B worker is returned to full time status. The amendment may be withdrawn at that point.

Furloughs and H-1B Workers

- Employers are prohibited by regulation from temporarily furloughing H-1B workers.
- This is considered by DOL to be a “benching” violation and can result in the assessment of back wages and penalties.
- Employers who would have no choice but to terminate an H-1B worker instead of furloughing the worker on a temporary basis might consider offering the worker a period of voluntary unpaid leave. However, it is not clear if DOL would consider such an agreement truly voluntary.
- Most regulatory obligations on H-1B employers also apply to the H-1B1 and E-3 classifications.

CHANGES IMPACTING OTHER NONIMMIGRANT WORKERS

Reductions in Salary and/or Hours, Furloughs, for Other Nonimmigrants

- No specific regulatory prohibitions on reduction in salary for most other nonimmigrant visa classifications, including E-1/E-2, L, TN and O
- No specific regulations governing reduction in hours for these classifications; however, the work promised in the visa petition must constitute the visa holder's "primary activity"
- No prohibition on temporary furloughs for these workers
- "Material changes" in employment must be reported; no specific timeline required.

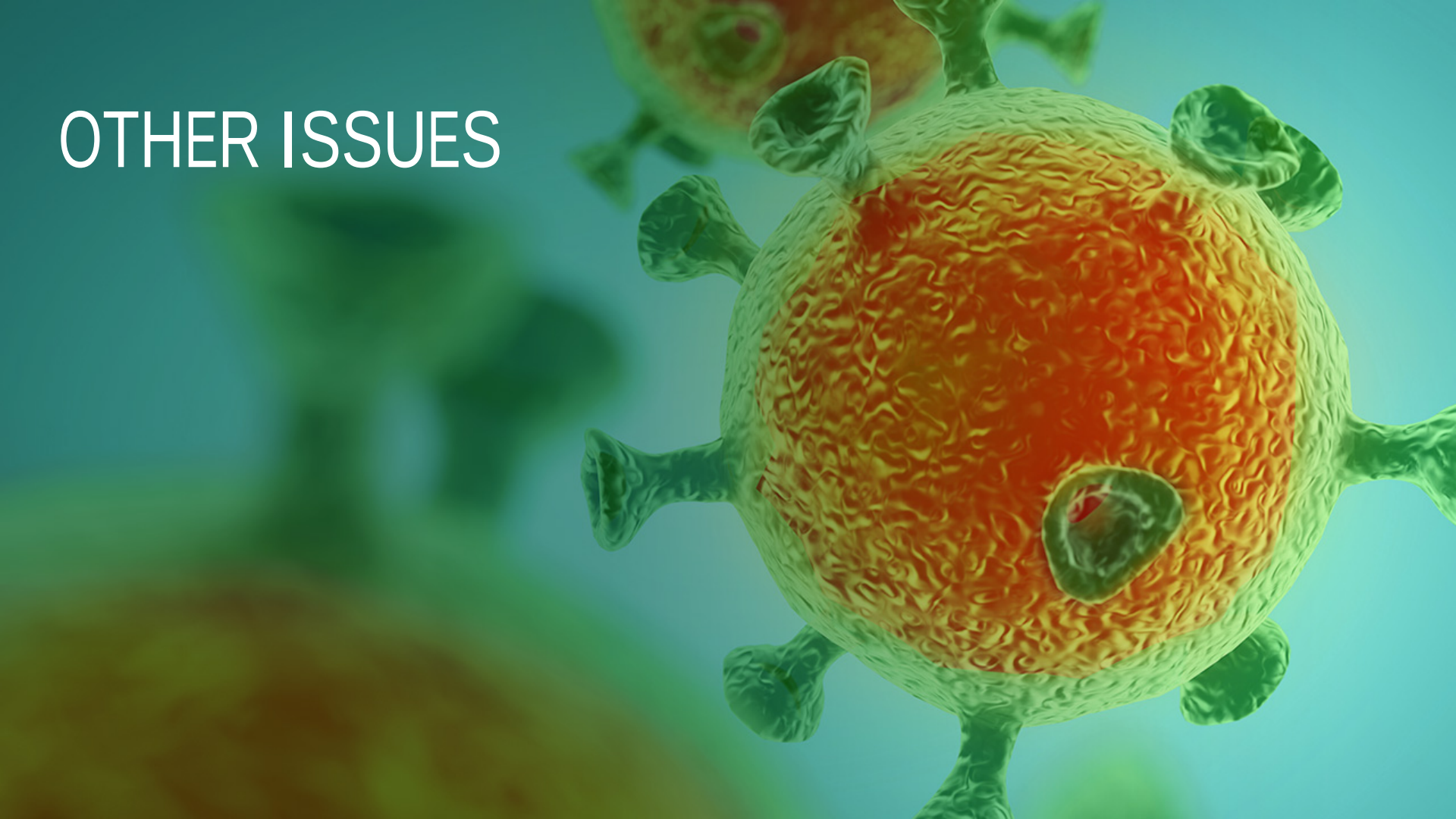
F-1 and J-1 Visa Holders

- Employers may reduce salaries of F-1 OPT workers.
- Reductions in hours for F-1 OPT workers should be reported to the F-1's educational institution.
- With respect to furloughs and terminations, F-1 OPT workers may only be unemployed for a cumulative period of 90 days. After 90 days of unemployment, F-1 OPT workers are considered to have failed to maintain lawful status.
- For F-1 STEM OPT Workers:
  - Any change in work conditions, including salary and hours must be reported to the educational institution.
  - STEM OPT workers are permitted a cumulative total of 150 days of unemployment.
- Impact of changes to J-1 visa holders will depend on the type of J-1 and the J-1 program

Terminations and the 60-day “Grace Period”

- **Employer Obligations upon Termination for Various Visa Categories**
  - H-1B and O-1 – must offer the reasonable cost of return transportation home
  - H-1B affirmatively notify USCIS of petition withdrawal to avoid penalties for back wages
  - May also considering withdrawing the LCA
  - F-1 Students – Employer must notify F-1 sponsoring academic institution of termination if employed under STEM OPT
  - Other visa classifications that are not governed by LCA do not have the same notification obligations
- **Grace Period**
  - E1, E2, E-3, H1B, H1B1, L1, O1 and TN visa holders are entitled to a 60 day grace period post termination during which they can remain in the United States and either wrap up their affairs or change status to a different visa sponsor or type. A foreign national may seek new employment during the grace period and may apply for any visa classification for which he or she is eligible.
  - F-1 Students have 60 day grace period under different provisions.

OTHER ISSUES



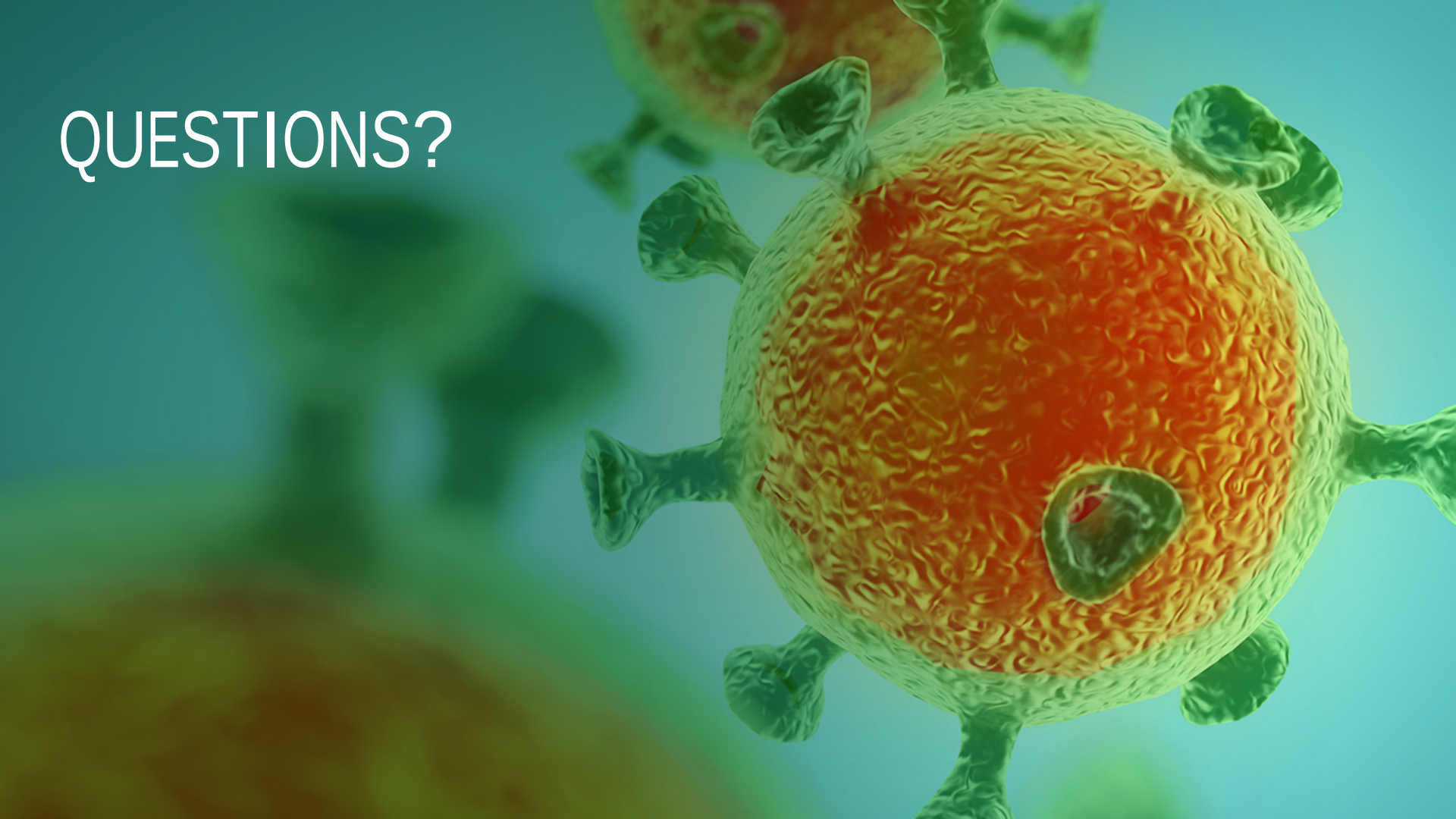
Impact of Current Economic Conditions on PERM Adjudications

- “PERM” labor certification is a test of the U.S. labor market to determine if a U.S. worker is qualified and available for a position that an employer wishes to offer to a foreign national on a permanent basis.
- A PERM labor certification is the first stage of the green card process in several employment-sponsored green card classifications.
- Because the PERM process is a labor market test, given the sudden economic downturn and the current high levels of unemployment, we anticipate much greater DOL scrutiny of PERM applications.
- PERM processing will likely lengthen; audits will increase.
- There is new language in PERM audits requiring, among other things, an explanation of what each U.S. worker candidate could not learn the skills required in a reasonable period of on-the-job training.

Eligibility of Foreign Nationals for Unemployment and for the Family First Coronavirus Response Act Stimulus Checks

- Whether nonimmigrants are eligible for unemployment benefits is dependent on the rules of a particular state's unemployment program.
- In most cases, in order to receive unemployment benefits, the applicant must be "available to work."
- Many states are expanding their unemployment programs to afford benefits to foreign nationals in certain temporary visa categories, at least for the duration of the "grace period."
- Receipt of unemployment benefits is not considered a negative factor under the new "public charge" analysis required during the green card process.
- Foreign nationals who are U.S. residents for tax purposes and have SSN's are eligible to receive stimulus checks.
- Receipt of stimulus checks is not considered a negative factor under the new "public charge" analysis required during the green card process, because it is considered a tax credit.

QUESTIONS?



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Presenter Biography

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A recognized leader in immigration and nationality law, Eleanor Pelta counsels clients on legal and strategic issues arising from the international movement of key personnel, from the individual transfer of high-ranking executives to high-volume transfers of expert staff. Her experience includes the use of blanket visa programs and the qualification of companies as “treaty investor” or “treaty trader” entities. Additionally, Eleanor counsels businesses on the immigration implications of corporate changes, such as mergers, acquisitions, downsizings, reductions in force, and salary-level changes.

A co-leader of the firm’s global immigration practice, Eleanor’s practice involves assisting employers of all sizes and in all industries in understanding and complying with the immigration laws relating to the hire and retention of foreign talent. This includes advising clients on, and supporting them with, temporary and permanent US immigration options for executive, business, artistic, scientific, and information technology (IT) personnel. In addition, the practice supports the global movement of client personnel. Eleanor counsels employers on the compliance aspects of US immigration laws, including employment eligibility verification and avoiding immigration-related unfair employment practices. She develops and performs nationwide I-9 compliance training for human resources personnel, and assists clients during immigration-related government audits. She frequently counsels tax and payroll managers regarding the US tax obligations of foreign nationals. Additionally, she helps clients think and work proactively by providing them with advice on immigration policy development and review, use of immigration-related technology, and internal immigration-related audits. As part of Morgan Lewis’s cross-practice global workforce team and in tandem with the firm’s labor, employment, and benefits lawyers, Eleanor provides integrated cross-border advice, counseling, and strategic planning on immigration issues.

Presenter Biography

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Eric S. Bord is nationally-recognized as a leading business immigration attorney and counselor to clients on corporate immigration issues involving the recruitment, hiring, transfer, and retention of personnel worldwide. He also heads Morgan Lewis's immigration compliance and risk management practice and regularly advises businesses on compliance and risk management in connection with their global immigration programs. This includes counseling on compliance with I-9 and E-Verify rules, representing clients during immigration investigations and in response to charges, and conducting immigration due diligence for corporate transactions.

Eric's clients come from a variety of industries, including the retail/eCommerce, financial, technology, healthcare and life sciences, energy, manufacturing, and media sectors. Clients hire Eric to manage their global immigration programs or to partner with their in-house immigration teams. He covers the entire spectrum of business immigration, including all matters for temporary and permanent business, technical, scientific, and executive personnel as well as outbound/global visas.

Clients value Eric as an immigration lawyer in a full-service law firm, where his strategic guidance and experience are informed by his work with lawyers in other practices that intersect with immigration, such as labor and employment, benefits, tax, and mergers and acquisitions.

A frequent author and speaker on immigration topics, Eric also develops and conducts training programs for clients and human resources professionals on the PERM labor certification process, the U.S. visa and immigration system, I-9 and immigration compliance, and immigration issues for in-house counsel, among other topics.

Eric's legal practice has focused exclusively on immigration and nationality law since the early 1990s. Prior to attending law school, he was associate director of Latin American and Caribbean programs at The Carter Center. After graduating from law school in 1990, he was a full-time consultant to The Carter Center on initiatives to promote democracy, human rights, and development.

Presenter Biography

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James Vázquez-Azpiri counsels corporate clients on hiring and retaining foreign employees in his business immigration law practice. He advises businesses on labor certifications, specialty occupation petitions, and intracompany transfers. Clients rely on James for guidance through immigration law compliance during mergers, acquisitions, and corporate restructurings. He helps clients think and work proactively by providing them with traditional compliance policy reviews and audits, case management and litigation technology, and international executive travel and foreign resident worker visa processing.

A co-leader of the firm's global immigration practice, James is part of Morgan Lewis's cross-practice Global Workforce team. The group provides integrated cross-border advice, counseling, and strategic planning across the spectrum of labor, employment, benefits, and immigration issues.

Legal and human rights groups have acclaimed James's pro bono work. He has received both the C. Anthony Friedrich Memorial Award from the International Human Rights Law Group and the Wiley W. Manuel Award for Pro Bono Legal Services from the State Bar of California.

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Shannon A. Donnelly counsels on employment-based immigration law, providing strategic advice related to global immigration policies and best practices. Shannon works with clients to facilitate the mobility of key foreign executives and managers, specialized knowledge, and professional employees and regularly works with multinational employers to help manage their cross-border business travelers, global mobility programs, and global compliance programs.

Recognized as one of *Chambers USA*'s “Leaders in Their Field” and recommended by *The Legal 500*, Shannon provides I-9 compliance training, E-verify proficiency, and counseling to U.S. employers on policy development in international mobility, compliance, and related immigration issues.

Shannon has represented and advised clients across a number of industries, including financial services, information technology, economic consulting, manufacturing, healthcare, and the nonprofit sector.

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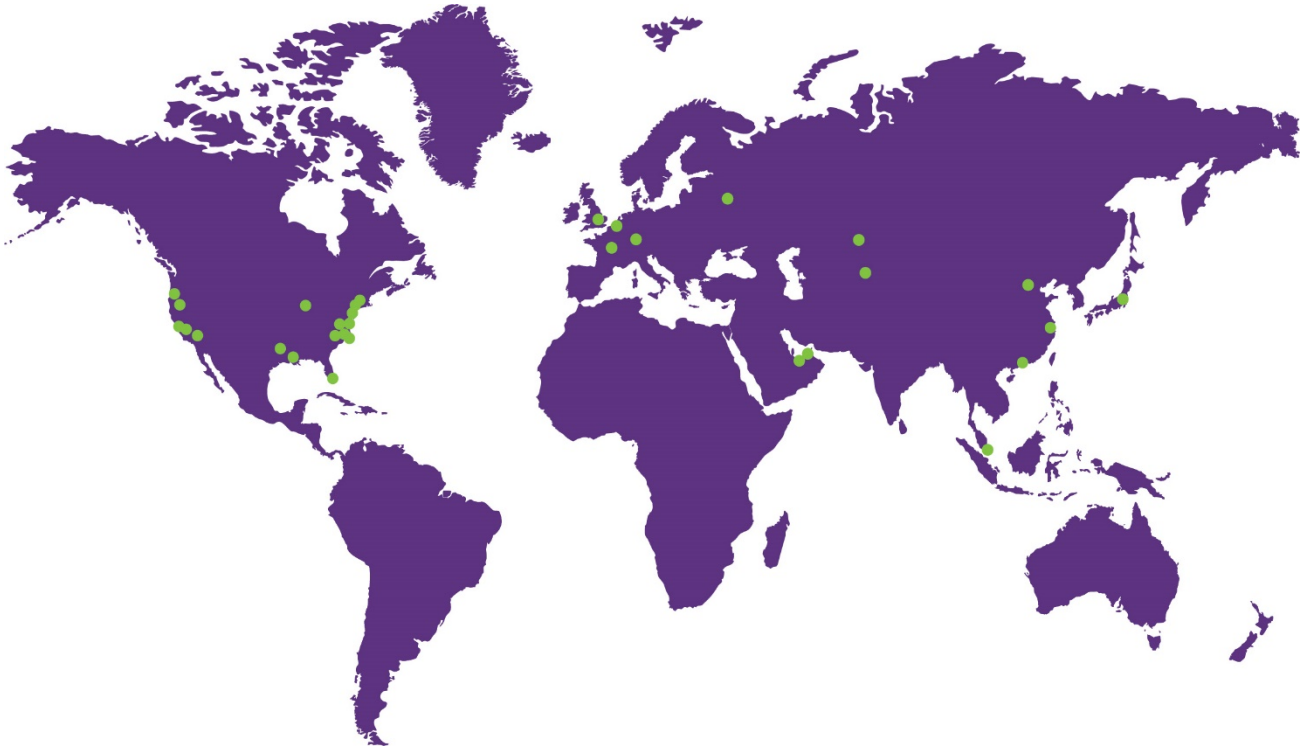

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