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President Trump's Latest Immigration Proclamation – Will It Impact Your Employees?

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On April 22, 2020, the President signed Proclamation 10014 which temporarily suspended U.S. Embassies from issuing green cards (permanent residency) for immigrants applying outside the U.S for 60 days. Yesterday, the President issued an extension of the original Proclamation affecting green cards until December 31, 2020. The President also expanded the Proclamation to prevent H-1B, H-2B, J-1, and L-1 nonimmigrant visa seekers (and their dependents) who are currently outside the country from entering the United States until December 31, 2020, in an effort to mitigate the economic impact of COVID-19 on U.S. workers. Employers should be aware of the potentially disproportionate impact that this proclamation may have in certain industries such as universities employing J-1 exchange scholars, landscaping companies employing H-2B workers, international companies employing L-1 executive or specialized knowledge workers.

The Proclamation, as written, will not impact nonimmigrants inside the United States on June 24, 2020, or nonimmigrants seeking to enter the United States who already have a valid nonimmigrant visa. For technology and healthcare employers, many international student graduates employed under F-1 Optional Practical Training are generally unaffected because they are currently in the U.S. H-1B cap-subject petitions for employees in the U.S. are not impacted, unless the applicant must undergo a consular interview abroad. The Proclamation also exempts healthcare professionals conducting medical research or medical care for COVID-19 patients, workers who provide essential services to support the food supply chain, spouses and children of U.S. citizens, and foreign nationals whose entry would be “in the national interest” as determined by the Secretary of State and the Secretary of Homeland Security.

Nonimmigrants outside the U.S. seeking to transition to H-1B, H-2B, J-1, and L-1 status (and applicable dependent visa categories) who need to attend a consular interview will be affected. However, these affected applicants outside the U.S. already faced significant closures of U.S. Embassies around the world due to COVID-19. This Proclamation is expected to cause significant disruption to J-1 exchange visitors and H-2B seasonal non-agricultural workers, due to the short duration of their employment season.

Who Is Impacted in the Latest Proclamation:

- Only applicants for **H-1B, J-1, H-2B, and L-1 visas** and their

dependents;

- Who **are outside the U.S.** on June 24th, 2020; AND
- Who **do not currently have a valid nonimmigrant visa** or official travel document (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on the effective date above, or issued on any date thereafter that permits them to travel to the United States and seek entry or admission.

Applicants who satisfy **all** requirements above will be refused entry into the U.S. by US Customs and will not be granted visas by US Embassies abroad.

Who Is Not Impacted:

- Foreign nationals currently in the United States on nonimmigrant visas (including H-1B, H-2B, H-4, J-1, J-2, L-1 and L-2)
- Foreign nationals seeking an extension or change of status by applying to USCIS while present in the U.S.
 - Except H-1B, H-2B, J-1, and L-1 visa applicants and their dependents seeking consular processing will be refused entry.
- The “cap gap” rules for F-1 visa holders seeking H-1B change of status are not impacted by the order.
- Foreign nationals with valid visas seeking to extend or change status to H-1B, H-2B, H-4, J-1, J-2, L-1 and L-2 at the consulate office abroad.
 - However, due to COVID-19, most consulate offices are closed and travel restrictions imposed in U.S. and other countries have limited the ability for foreign nationals to obtain visas abroad
- Foreign nationals outside the U.S. seeking to enter the United States on nonimmigrant visas not specifically affected by the order (such as F-1, E-3, B-1, O-1, H-2A, or TN visas)
- Lawful permanent residents
- Foreign national who is the spouse of a United States citizen or who is under 21 years old and is the child of a United States citizen
- Foreign nationals entering for national interest purposes
 - critical to defense, law enforcement, diplomacy or national security;
 - involved in medical care for individuals currently hospitalized and infected with COVID-19;
 - involved in medical research in the U.S. to assist the U.S. in combating COVID-19;
 - necessary to facilitate immediate and continued U.S. economic recovery; or
 - essential to the U.S. food supply chain.

What Do We Not Know:

In perhaps the most concerning portion of the Proclamation, the President instructs the various immigration-related agencies to consider more regulations or actions related to PERM Labor Certifications and H-1B Labor Condition Applications as soon as practicable, to ensure U.S. workers are not adversely impacted. While no specific measures have been proposed yet, it is unclear what new measures could be implemented as stringent measures already exist to elevate adjudication standards for EB-2 and EB-3 immigrant visas and H-1B nonimmigrant visas. Prior proposed measures have focused upon increased audits of PERM recruitment processes, heightened scrutiny on H-1B prevailing wage salaries, and more aggressive adjudication standards for H-1B specialty occupations. More importantly, these new potential measures would not impact the H-1B lottery season, which already took place in March 2020.

Due to the short six month validity period of these measures, it appears unlikely that the government will be able to issue final regulations, due to the time-consuming process of obtaining public comment on proposed measures. Historically, prior efforts by the President and USCIS to curtail the use of H-1B visas, has been met with resistance by federal courts. Most recently, after being repudiated in federal court, USCIS was forced to rescind a 2010 Policy Memo defining employer-employee relationships within H-1B employment, and two days ago, the USCIS released a new Policy Memo with a relaxed standard.

With the increase in government scrutiny, we would advise employers to consult with an immigration attorney before sending any immigrant workers overseas.