

PUBLICATION

U.S. Immigration System Plagued by Coronavirus

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With the White House extending social distancing guidelines through April 30 in the wake of increasing COVID-19 infections and deaths in the U.S., it appears that many U.S. immigration implications for business purposes will continue or increase for the foreseeable future.

Trapped or Scared to Leave on Time?

DHS has not issued any blanket, automatic extension of people's periods of U.S. stay in temporary status (yet).

WVP Visitors: Within 14 days of the end of the normal 90 days allowed, a traveler here under the Visa Waiver Program (using ESTA registration) may ask USCIS for up to 30 days of "satisfactory departure." If the traveler is unable to depart within that extra 30 days, it can ask USCIS for another 30 days. To request satisfactory departure from USCIS, a VWP entrant should call the USCIS Contact Center at 1-800-375-5283.

Temporary Visa Entrants (all classifications): Before the current authorization ends according to your I-94 record (see www.cbp.gov/i94), file an application to extend stay in the same classification or change to another classification. For most work authorizing classification, this automatically authorizes up to 240 days of work authorization until a decision is made. If USCIS takes longer to decide the extension than the period requested, file a further extension application before that requested period expires. People who previously preferred to get new U.S. visas on next foreign travel will need to face the scrutinizing eyes of USCIS adjudicators instead. Most people who would have needed to travel internationally and return will need to just stay put in the USA.

Those who fail to apply on time to change or extend status could file late and request forgiveness from USCIS, which USCIS has discretionary authority to do, but this prospect cannot be counted on. In the absence of such forgiveness, those who stay longer than technically allowed become deportable, the visas in their passport are automatically canceled by law, and their future requests for visas or entry might be tainted by overstay. Once an overstay reaches 180 days, a person becomes inadmissible to return once having departed. Longer stays could trigger becoming a U.S. "tax resident" with numerous tax consequences (consult your tax counsel).

Sent Home or Laid Off from Work?

People on work visas normally are considered in violation of status and deportable upon ceasing the authorized work. Employers must pay H-1B workers even if "benched" unless they are offered the costs of travel to their home country. Unavailability for work due to COVID-19 infection, quarantine, or caring for another could trigger complex considerations requiring individualized analysis. Unemployment compensation normally is not available to people who cannot stay here. If a foreign worker somehow is awarded unemployment compensation, it should not affect "public charge" inadmissibility under new rules that only consider federal public benefits as strong grounds.

For certain visa classifications (especially H-1B, E-3, or H-1B1), work from home or reduction in hours or pay rate may trigger some special filings or postings, but for others it is fine. Layoffs in the relevant occupation may affect certain H-1B, PERM, and other filings.

Closures of All Public Interfacing Agencies

Visa functions of most U.S. consulates throughout the world are essentially closed. Fees paid will be good for a year. Appointment systems seem to anticipate reopening in July, but of course things could change. Special requests for expediting are conceivable, but success will be rare in compelling "emergency travel" circumstances, although the State Department has specifically mentioned H-2A and H-2B temporary workers, international adoptions in late stages of processing, and medical workers and especially those who may treat COVID-19 patients.

ESTA registrations for travelers on the Visa Waiver Program are canceled and suspended for all the countries that are subject to the current U.S. travel ban, which bans entry for anyone who has been in China, Iran or Europe during the prior 14 days. This means such visitors can only travel with visas that are unavailable from closed consulates.

All USCIS interviews, biometric intake, ceremonies, and other appointments are closed. USCIS will send re-scheduling notices. People whose Infopass appointments (for such things as interim I-551 stamps for conditional residents awaiting adjudication) must watch for reopening and then call USCIS to reschedule. USCIS plans to re-use previous biometrics where possible to avoid new biometrics intake, particularly for extension of work cards.

Trapped Outside the U.S.

Workers who are unable to return to U.S. jobs because of COVID-19 restrictions are not prohibited by any U.S. immigration laws from working outside the U.S., but such work might trigger obligations and liabilities under the laws of the country where the work is physically being performed. No U.S. immigration-related law would restrict an employer from suspending or terminating their employment.

People who were not able to travel to the U.S. within the validity dates of nonimmigrant and immigrant visas they already have been issued will need to apply for re-issuance by consulates once they reopen.

Immigration Filings

USCIS has been increasingly accepting scanned copies of hand signatures to forms, and now they will accept such for Forms I-129, I-539, and I-131 as well, but signing parties are required to retain the originally signed paper in case USCIS asks for it.

The new electronic registration process for the H-1B lottery was not interrupted and ended on March 20. Winners are being instructed to file their H-1B petitions with USCIS within the originally planned 90 days.

Postings for existing workers about H-1B cases should be done electronically if workers are at home. PERM notices must be posted on paper, and employers perhaps should wait until workers return to the office to post. DOL has extended by 60 days the periods when posting notices and other recruitment can be completed (recruitment must have started on or after September 15, 2019, and the filing must occur by May 12, 2020), and says it will grant extensions of time and deadlines for requests and requirements.

All "premium processing" was suspended as of March 20, because USCIS cannot anticipate having the staff to keep up with the 15-day processing. This could leave many foreign nationals in the U.S. unable to work while waiting for lengthy adjudication.

USCIS has announced that it will automatically extend deadlines 60 days to file an appeal of a USCIS denial or to respond to USCIS requests for evidence, notices of intent to deny, notices of intent to revoke a petition, or notice of intent to terminate an EB-5 regional center if the denial of notice was dated between March 1 and May 1, 2020.

Trusted traveler applications to CBP are suspended.

Employment Verification Relaxed

Given that even human resources personnel are working from home, ICE will allow employers to complete Form I-9 remotely instead of seeing the worker and original documents in person (writing "COVID-19" in "Additional Information"), but only if no one is at the workplace, and once normal operations resume a company representative must complete in-person verification within three business days (writing "Documents physically examined on [date]" under "Additional Information"). This is in effect until the earlier of May 19, 2020 or the termination of the National Emergency. Employers instead may allow any person to be a "company representative" completing section 2 of Form I-9 and reviewing the worker and documents, but the employer is responsible for the representative acting correctly.

USCIS recognized that E-Verify queries arising from completed I-9 forms might be entered late (use the original hire date and select "Other" and enter "COVID-19" as the reason for late query) and has extended the normal 10 days allowed to resolve a "tentative non-confirmation" arising from an E-Verify query by participating employers, emphasizing that employers should take no adverse action during the delayed TNC resolution.

ICE has automatically extended by 60 days the time to respond to a notice of I-9 inspection.

While this article offers a summary of the impact of the continuing pandemic on U.S. immigration, we have not addressed expected expirations of special situations, because no one really knows when they will end. In general, business should keep in mind that travel remains generally unadvisable, and planning international placements is more than difficult.

If you have questions about information in this alert or other COVID-19 related immigration questions, please contact the author of this alert or any member of Baker Donelson's [Immigration Group](#). Also, please visit the [Coronavirus \(COVID-19\): What you Need to Know information page](#) on our website.