PUBLICATION

Updated: Trump Amends Proclamation to Expand Scope of Restrictions on Nonimmigrant Visas

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Originally Published June 23, 2020; Last Updated June 30, 2020

President Trump has issued a new Proclamation that immediately extends to December 31, 2020 its April 22 suspension of certain immigrant visas (family categories other than spouse and children of citizens; employment categories other than investors; and diversity lottery winners) and newly suspends issuance of new visas for certain H, L, and J nonimmigrants from June 24 to December 31, 2020.

The June 22 Proclamation, as amended on June 29, suspends new visa issuance to aliens in the following nonimmigrant categories:

- H-1B or H-2B;
- J-1 (intern, trainee, teacher, camp counselor, au pair, or summer work/travel);
- L-1A and L-1B; and
- any H, J, and L dependents accompanying or following to join those listed above.

This comes just as consulates were starting to reopen for visa appointments following worldwide closure due to the pandemic conditions.

The Proclamation exempts aliens whose entry is deemed by the consular office to be in the "national interest." The new Proclamation directs the Secretaries of State and Homeland Security to "establish standards" for the national interest exception, including applicants involved with defense, law enforcement, and national security; medical care or research directly connected to combating COVID-19; and immediate or continued economic recovery. It appears that aliens subject to the suspension should apply for visas as normal but bring to their interview evidence that could support the national interest exception, in hope that a consular officer and reviewing superiors will make a discretionary finding in their favor – probably after meaningful and unpredictable delay.

The new Proclamation's wording makes several things unclear:

- whether someone who was in H, J, or L status within the U.S. on June 24 and travels outside the U.S. and needs an H, J, or L visa to reenter is subject to the Proclamation's restriction on a new visa [according to a State Department Q&A, unfortunately, yes];
- whether it restricts the entry of Canadian citizen H, J, and L nonimmigrants who are generally exempt from visa requirements [informal reports indicate Canadian citizens are indeed exempt];
- whether someone whose visa expires after the Proclamation's effective date is subject to the suspension in applying for a new visa [according to a State Department Q&A, unfortunately, yes];
- whether workers and family who obtained extension of stay within the U.S. beyond the H, J, or L visa validity period may use "automatic revalidation" of visas to return from travel; and
- whether someone who had a valid travel document other than a visa (such as advance parole) on June 24 is subject to the bar on getting a new H, J, or L visa.

Obviously, people who are in the United States and want to avoid becoming ensnared in these Proclamations should avoid traveling outside the U.S. and should seek to extend their stay or change status within the U.S. as appropriate. Those outside the U.S. and possessing valid visas should consider coming to the U.S. as soon as possible. Those who must apply for a visa should seek competent counsel to make the best case for national interest.

We expect litigation to overturn this new Proclamation, including expansion of the ongoing litigation concerning Proclamation 10014. Businesses that depend on key H and L workers and managers will be particularly adversely affected and could make formidable litigants against this expansive use of emergency powers. Winners of the recent H-1B "lottery" should proceed to make their H-1B cap filings. Organizations should consider proceeding with filing of individual H and L petitions to USCIS for workers abroad in anticipation of early lifting of the visa suspension through litigation, political pressure, or case-by-case "national interest" exceptions.

The new Proclamation, as expounded on by White House officials, hints at several other possible actions:

- extension and expansion of COVID-related travel restrictions;
- increased audits and site visits and restrictive changes concerning PERM and H-1B filings, including setting the "prevailing wage" floor at the 50th percentile;
- expanded intake of biometrics in USCIS processing;
- restriction of work authorization applications; and
- further fiddling with H-1B number allocation rules and processes, particularly to allocate the 85,000 visas to workers offered the highest salaries rather than by random selection.

If you have any questions, please contact one of the authors or any member of Baker Donelson's Immigration Team.