

LEGAL UPDATES

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Services

Business
Immigration and
Global Mobility
Labor & Employment

Professionals

CHRISTINE E. FABIN
KANSAS CITY:
816.983.8000
CHRISTINE.FABIN@
HUSCHBLACKWELL.COM

KELLI J. MEILINK
KANSAS CITY:
816.983.8309
KELLI.MEILINK@
HUSCHBLACKWELL.COM

Coronavirus and Foreign National Travel and Visas

UPDATED August 17, 2020

U.S. Department of State provides clarification on exemptions from visa ban

On August 12, 2020, the U.S. Department of State updated its guidance to clarify those who are considered exempt from the executive order suspending visa issuance for specific classes of visas because their travel would be in the national interest. Prior to this, visa exemptions were largely limited to those healthcare and public health professionals focused on alleviating the effects of the COVID-19 pandemic or otherwise invited to the U.S. by a government agency.

Here is who may be affected by this new guidance:

H-1B and L-1 workers who will resume employment with the same employer

H-1B and L-1 workers may apply for visas from the U.S. Consulate so long as the approved H-1B or L-1 petition is filed to enable them to continue “previously approved employment without change with the same employer.” This means, those individuals with H-1B or L-1 approval notices who are seeking to resume ongoing employment in the United States, in the same position, with the same employer and visa classification, will qualify for an exemption from the ban on the issuance of L-1 and H-1B visas.

H-1B workers whose travel is necessary to facilitate the immediate and continued economic recovery of the United States

Additionally, H-1B workers with approved H-1B petitions may be considered exempt if their travel is necessary to facilitate the immediate and continued

economic recovery in the U.S. The H-1B worker and employer must establish at least two of the following:

1. The approved H-1B petition contains a Labor Condition Application approved by the U.S. Department of Labor on or after July 1, 2020. If the Labor Condition Application was approved by the U.S. Department of Labor before July 1, 2020, the consular officer must determine that there is a continued need for the H-1B worker in the U.S. Regardless of the date the Labor Condition Application was approved, if the H-1B worker is currently performing the essential functions of the position for the employer outside the United States, then this criterion cannot be met.
2. The approved H-1B petition is for a senior-level position within the petitioning employer; or, the H-1B worker's job duties and qualifications indicate the individual will provide significant and unique contributions to the petitioning employer.
3. The wage rate listed in the approved H-1B petition, exceeds the prevailing wage rate by at least 15%.
4. The H-1B worker's credentials demonstrate unusual expertise in the specialty occupation in which the applicant will be employed.
5. Denial of visa due to the executive order will cause financial hardship to the U.S. employer.

L-1A workers who will fill senior-level positions and will fill a critical business need of the employer to meet a critical infrastructure need

Under the updated guidance, the U.S. Department of State will also issue L-1A visas for applicants who can establish at least two of the following criteria:

1. The L-1A worker will be a senior-level executive or manager.
2. The L-1A worker has spent multiple years with the company overseas.
3. The L-1A worker will fill a critical business need for a company meeting a critical infrastructure need. Critical infrastructure sectors include chemical, communications, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear reactors, transportation, and water systems.

L-1A workers seeking to establish a new office in the United States must meet additional criteria.

L-1B workers who are technical experts or specialists that will meet a critical infrastructure need

Finally, the U.S. Department of State will issue L-1B visas to technical experts or specialists meeting a critical infrastructure need. The L-1B must meet all three of the following criteria:

1. The L-1B applicant's proposed job duties and specialized knowledge indicate the individual will provide significant and unique contributions to the petitioning company.
2. The L-1B applicant's specialized knowledge is specifically related to a critical infrastructure need. Critical infrastructure sectors include chemical, communications, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear reactors, transportation, and water systems.
3. The L-1B applicant has spent multiple years with the company overseas.

Employers who believe they have a foreign national worker who qualifies for a visa under this updated U.S. Department of State guidance are encouraged to contact Kelli Meilink or Christine Fabin to discuss next steps, including arranging emergency appointments and interviews.

UPDATED April 24, 2020

U.S. Citizenship and Immigration Services has extended the suspension of in-person services at its local field offices and application support centers until at least June 4. The agency has stated that it is preparing to re-open offices in compliance with local and state orders on or after that date. All applicants or petitioners may continue to file applications or petitions online or via mail as normal during this time.

UPDATED March 20, 2020

U.S. Citizenship and Immigration Services (USCIS) announced they will begin accepting all immigration forms and documents with reproduced original signatures for submission dated March 21, 2020, and beyond.

USCIS announced the immediate suspension of premium processing service for all Form I-129 and Form I-140 petitions until further notice due to COVID-19. Furthermore, USCIS clarified that any pending Form I-129 or Form I-140 submitted using the premium processing service that has not yet been issued a receipt will be reviewed under normal processing times.

The U.S. Department of State announced that effective March 20, 2020, U.S. embassies and consulates will cancel all routine immigrant and nonimmigrant visa appointments. Embassies and consulates will continue to provide emergency and mission-critical visa services.

UPDATED March 19, 2020

On Wednesday, March 18th the United States and Canada announced they will begin suspending all “non-essential” travel between the two countries. Details of the agreement have not yet been finalized.

Effective Wednesday, March 18th U.S. Citizenship and Immigration Services (USCIS) announced it would be suspending all routine in-person services with applicants at all local field offices. These services include biometric appointments, permanent residence interviews and naturalization ceremonies. USCIS will send notices to applicants impacted by the closures and will allow applicants to reschedule services when normal operations resume.

UPDATED March 16, 2020

The United States has extended the travel ban to the United Kingdom and Ireland, effective Monday, March 16. This does not apply to U.S. citizens or lawful permanent residents.

U.S. Consulates worldwide continue to suspend visa services and cancel appointments. Those with scheduled visa appointments should continue monitoring their relevant consulate’s website for updated information on services. Should your appointment be canceled, you will need to reschedule your appointment for a time when services resume. There is no timetable at this time for when services will resume, but expect at least a two-month suspension in visa services.

It is expected that local U.S. Citizenship and Immigration Service field offices will begin canceling permanent residence interviews and biometrics appointments. As of Monday, March 16, many local field offices continue to hold interviews and appointments. However, changes to field office operations usually occur on the agency level, so office closures may occur quickly and without notice.

March 12, 2020

Concern for the spread of Coronavirus (COVID-19) has caused a number of organizations to consider new measures to prevent the spread of COVID-19, including school and office closures and event cancellations. Compounding these measures, President Trump announced restrictions on travel to the United States. These measures will impact foreign nationals who are in the United States or who are attempting to travel to the United States to work, attend school, conduct research and participate in other activities. Below is an overview of how travel and certain visa classifications will be impacted by measures to prevent the spread of COVID-19. We note that policies are changing daily, and we encourage you to check back or consult with an immigration attorney for updates.

Working from home for foreign national workers

The H-1B, E-3 and H-1B1 immigration classifications are location-specific, which means that the sponsored employee may only work for the sponsoring employer at the work location(s) specified in the Labor Condition Application filed with the H-1B petition. Changes in employment may require an amended visa petition. Generally, short periods of time working from home (10 days or fewer) should not affect the underlying immigration status provided that the employee continues to perform duties and be paid in accordance with the representations made in the underlying visa petition.

The L-1, E-1/E-2 and TN immigration classifications have more flexibility should sponsoring employers choose to have a temporary suspension of operations or request that employees work from home. Thus, similar to the above, short periods of time working from home should not affect the underlying immigration status, provided that the foreign national worker continues to perform work or activities in accordance with the representations made in the underlying visa petition.

Unpaid leave

Generally, most foreign national employees, including those in H-1B, who must take a period of short, unpaid leave due to a required quarantine or other COVID-19-related measure may do so, provided that the leave is approved and taken pursuant to the employer's policy.

It is recommended that any employer who is considering closures, work-from-home, or other arrangements consult with an immigration attorney to discuss the impact on any foreign national workers.

Program modifications and closures for F-1 and M-1 students and J-1 exchange visitors

F-1 and M-1 Students: On March 9, 2020, Immigration and Customs Enforcement published the following Broadcast Message, stating: "SEVP intends to be flexible with temporary adaptations. In all cases, schools and students should document any decisions made and be able to provide this information to SEVP upon request. Similarly, changes to workplace requirements may impact nonimmigrant students engaging in practical training. SEVP encourages such students to consult with their employer to seek alternative ways to maintain employment, such as teleworking or other arrangements."

J-1 Exchange Visitors: Similar to F-1 Visas, the State Department's Bureau of Educational and Cultural Affairs released a series of guidance for J-1 Sponsors and J-1 visa holders about adapting J-1 programs, including most recently stating: "We anticipate a range of changes to program circumstances that will affect exchange visitors. ECA asks sponsors and exchange visitors to consult with host organizations to seek alternative ways to maintain program objectives and/or employment, such as telework, online classes, or other arrangements, while preventing unnecessary exposure to the

disease and its spread. A temporary modification along these lines for exigent circumstances beyond a sponsor's or host entity's control does not undermine a program's consistency with the regulations."

Change to foreign national travel to the United States

The Trump Administration has imposed a series of travel bans on foreign nationals seeking to enter the United States from certain designated countries. Foreign nationals who were physically present within the following countries during the 14-day period preceding their attempted entry will be prohibited from entering the United States, with exceptions:

Austria, Belgium, China, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Iran, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

This ban will remain in effect until terminated by the President.

Employers should prepare for the possibility that foreign national employees who are physically present abroad may be unable to obtain a visa from a U.S. Consulate or enter the United States. Employers should use extreme caution before sending their foreign national employees internationally and clearly communicate those risks to their employees.

Exceptions to the Presidential Proclamation

Currently, the travel suspension related to the European Schengen Area does not apply to foreign nationals traveling from the United Kingdom. Additionally, the following travelers are not subject to the travel ban, but may be required to undergo additional screening upon arrival to the United States:

U.S. citizens;

U.S. lawful permanent residents;

Spouses of U.S. citizens and lawful permanent residents;

Parents and legal guardians of unmarried U.S. citizen children or lawful permanent resident children, under the age of 21;

Siblings of U.S. citizens or lawful permanent residents, provided that both are unmarried and under the age of 21;

Children, foster children or wards of U.S. citizens or lawful permanent residents;

Prospective adoptees seeking to enter the United States on an IR-4 or IH-4 visa;

Foreign nationals traveling at the invitation of the United States Government for a purpose related to containment or mitigation of COVID-19;

Foreign national air or sea crewmembers;

Foreign nationals who hold certain A, C, E-1 (as employees of TECRO or TECO), G and NATO nonimmigrant visa classifications;

Foreign nations who fall within the scope of section 11 of the United Nations Headquarters Agreement;

Foreign nationals whose entry would not pose a significant risk of introducing, transmitting, or spreading the virus, as determined by the CDC;

Contact us

Our attorneys are closely monitoring the impact of COVID-19 on international travel. Please contact Kelli Meilink or Christine Fabin if you have any questions.

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.