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THE REAL THREAT TO THE US ECONOMY IS TRUMP'S PROCLAMATION, NOT THE NONIMMIGRANT WORKERS IT BANS

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President Trump has mastered the Dark Arts of immigration bans. On June 22, 2020, Trump signed yet another Presidential Proclamation further restricting immigration into the United States. The new proclamation is an extension of the previous proclamation issued on April 22, 2020 that suspends certain green card applications and limits highly skilled workers and several nonimmigrant visa categories. The proclamation is effective as of June 24, 2020 and expires on December 31, 2020. The proclamation may be modified during this period as deemed necessary.

The Proclamation supposedly cites a desire to preserve jobs for American workers and high unemployment rates in the face of the COVID-19 pandemic as a rationale for suspending the entry of certain green card applicants and highly skilled workers. It states without any foundation "American workers compete against foreign nationals for jobs in every sector of our economy, including against millions of aliens who enter the United States to perform temporary work. Temporary workers are often accompanied by their spouses and children, many of whom also compete against American workers. Under ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy. But under the extraordinary circumstances of the economic contraction resulting from the COVID-19 outbreak, certain nonimmigrant visa programs authorizing such employment pose an unusual threat to the employment of American workers". In reality, however, both this Proclamation and the April Proclamation that it expands upon are part of a broader strategy by the Trump administration aimed at

curtailing all immigration.

Foreign nationals who were outside the United States on the effective date of the proclamation (June 24, 2020), do not have a nonimmigrant visa or other official immigration document (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on that date, and are seeking to obtain an H-1B visa, H-2B visa, L visa or certain categories of the J visa are barred. Additionally, accompanying or following to join dependents seeking to obtain H-4, L-2, or J-2 visas who were outside the U.S. on the effective date are also barred. However, if the principal H-1B, H-2B, J-1, or L-1 beneficiary is already in the United States, or otherwise exempt (see below), it is unclear at this time whether this bar will apply to dependents who will subsequently apply for H-4, L-2, or J-2 visas at the U.S. Consulate.

The Proclamation does not apply to: anyone who was inside the United States on June 24, 2020, individuals who are outside the United States and have a nonimmigrant visa or other official immigration document (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on June 24, 2020, Lawful permanent residents of the United States (green card holders), spouses and children of U.S. citizens, individuals seeking to enter the United States to provide temporary labor or essential to the United States food supply chain; and anyone whose entry would be in the national interest as determined by the Departments of Homeland Security and State. CBP headquarters has confirmed that Canadians entering as H, L or J nonimmigrants are exempt from the proclamation.

The Proclamation also seems to leave open the door for other measures aimed at restricting the entry of certain categories of immigrants, or even taking action against individuals who have already been admitted. Section 5(b) of the Proclamation states that: "The Secretary of Labor shall, in consultation with the Secretary of Homeland Security, as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit, or who are seeking admission or a benefit, pursuant to an EB-2 or EB-3 immigrant visa or an H-1B nonimmigrant visa does not disadvantage United States workers in violation of section 212(a)(5)(A) or (n)(1) of the INA (8 U.S.C. 1182(a)(5)(A) or (n)(1))". INA 212(a)(5) renders a foreign national who seeks to enter the United States to perform skilled or unskilled labor is inadmissible unless it has determined that there are

not a sufficient number of US workers who are qualified for the same job and the employment of such foreign nationals will not affect the wages and working conditions of US workers. Most foreign nationals have already received labor certifications after their employers unsuccessfully conducted a recruitment of U.S. workers in the labor market. Though this provision does not have any present effect, it seems to enable the administration to take further actions to limit the number of immigrant visa workers in the United States. One could even imagine the provision being invoked to rescind some individuals' approved labor certifications and I-140 visa petitions, should the administration decide to do so in the future. This would have a devastating impact on the hundreds of thousands of people born in India who have been waiting for green cards in the EB-2 and EB-3 backlogs. Of course, such an action would be challenged in court since INA 204(j) has specifically allowed adjustment of status applicants whose applications have been pending for more than 180 days to "port" to new employers and still keep intact their labor certifications and I-140 visa petitions. Thus, there are provisions in the INA that contemplate that once the labor market has been tested, the test need not be repeated over and over again, even if the foreign national's green card has been delayed due to EB-2 and EB-3 backlogs.

Another insidious provision in the Proclamation, section 4(c)(ii), directs the DHS consistent with applicable law to "prevent certain aliens who have final orders of removal; who are inadmissible or deportable from the United States; or who have been arrested for, charged with, or convicted of a criminal offense in the United States, from obtaining eligibility to work in the United States." While there are existing provisions in the INA that deem foreign nationals inadmissible for all of the above reasons, one who has been charged or arrested of a criminal offense should not be deprived of eligibility to work in the United States if the charges were dismissed or proved baseless, and the foreign national did not admit to the essential elements of a crime that would render him/her inadmissible.

The Proclamation stands to have a devastating impact on individuals in a variety of scenarios. Due to numerous travel restrictions that have been put in place as a result of COVID-19, many individuals may have left the United States with a valid visa that has expired while that have been trapped outside the country. Under the new Proclamation, these individuals would not be able to reenter the United States. Family members of a principal visa holder are likely

to be similarly impacted. One such situation arises when a principal visa holder was in the United States on the effective date of the Proclamation, but has dependent family members who are currently outside the U.S. without a valid visa. Because individuals who were inside the United States on June 24th, 2020 are exempt from the proclamation, David Isaacson is of the opinion that family members of an individual who is in the United States are not "accompanying or following to join" an individual whose entry is suspended. Thus, spouses and children of an individual who is exempt from the Proclamation should arguably be able to reenter the United States, but one does not have any faith whether Trump's State Department will agree with this perfectly reasonable interpretation. Indeed, although the proclamation clearly states that it will not apply to one who was present in the United States on June 24, 2020, the State Department seems to be indicating on Twitter that if such a person leaves, a visa will not be issued during the validity of the proclamation. This seems to be inconsistent with a plain reading of Section 3(i) that states that the proclamation will apply to an individual who "is outside the United States on the effective date of this proclamation."

The situation is more complicated when reversed, however, with a principal visa holder, for example an H-1B, abroad and his/her H-4 spouse is in the United States. It is unclear how the Proclamation would apply to the H-4 spouse in this situation. Even if the H-4 spouse currently is in valid status, they would only be able to remain in the United States for a limited period of time before being deemed to be in violation of their status. The USCIS allows dependents of nonimmigrant visa holders to remain in the United States while the principal is temporarily outside the country. At the same time, USCIS prevent the "parking" of dependents in the United States for extended periods of time if the principal nonimmigrant worker only comes for occasional work visits. Thus, if the H-1B is stranded abroad for several months until the end of the ban, which could potentially be extended beyond the end of 2020 depending on who wins in the presidential election this November, the H-4 spouse may no longer be considered to be in valid status. If the principal H-1B spouse's job has been terminated, this would imperil the status of the H-4 spouse and children even sooner.

As with the April Proclamation, Trump relied on section 212(f) of the Immigration and Nationality Act (INA) to ban nonimmigrant workers. Although Trump also derived authority from 212(f) to issue the travel bans, the third

iteration of which was upheld by the US Supreme Court in Trump v. Hawaii, there may be a basis to distinguish the latest Proclamations from the travel bans (see Building the Case to Challenge Trump's Immigration Bans). The president cannot wholesale re-write laws enacted by Congress, and decide the sort of immigrant he prefers over another based on personal whim and prejudice (see also Reflecting on the Supreme Court DACA Decision in Comparison to Trump's Immigration Bans. In its recent decision on DACA, the Supreme Court held that the administration has to factor in reliance interests before rescinding a benefit under the APA). This most recent Proclamation represents another attempt by the administration to draw artificial distinctions between certain categories of immigrants. The J visa category, for example, is impacted only "to the extent the alien is participating in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program". Other categories of J visas were exempted from the proclamation, including the student and alien physician categories. The Proclamation also excludes other categories of nonimmigrant visas, including treaty trader (E-1) and investor (E-2) categories, entirely. Lawsuits are bound to be filed not just by H-1B visa holders separated from their families, as they would be the most sympathetic plaintiffs, but also by large multinational corporations whose highly placed executive who would otherwise be able to enter on the L-1A visa has been banned.

In conclusion, this proclamation disproportionately impacts Indians the most as they are the largest users of the H-1B visa. It is no coincidence that in 2016 Steve Bannon, who was then a strategist to Trump and chairman of Brietbart News expressed concern that too many CEOs of successful Silicon Valley tech companies were immigrants from Asia. Many of them came to the United on an H-1B, which has been targeted by this proclamation. This sort of hostility against immigrants has been expressed frequently by Trump and his senior advisor Stephen Miller. Brietbart News, from which Miller and other xenophobes in the Trump administration draw inspiration, has consistently railed against Indian immigrants and H-1B visa holders. The proclamation will not protect American jobs by cruelly separating the H-1B worker from the H-4 spouse and children, many of them who have been in the US for many years waiting for their green cards in the EB-2 and EB-3 backlogs. Nor will this proclamation bring back American jobs when it bans a specialized knowledge intracompany transferee on an L-1 visa who had in depth knowledge of a company's products and can help it to grow in the United States, which in turn

would create more jobs. While the proclamation flunks the economic test, for the xenophobe it is a dream come true as it incorporates an exhaustive wish list for restricting immigration under the cover of the pandemic that would otherwise have been impossible to pass through Congress.

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