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TRUMP'S WORK VISA BAN VIOLATES THE IMMIGRATION AND NATIONALITY ACT AND SO DO THE EXCEPTIONS

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Trump's Proclamation 10052 has imposed a ban on foreign nationals seeking to enter the United States on H-1B, H-2B, L and J visas. Trump derived the authority to impose the ban from INA 212(f), which authorizes the President to suspend the entry into the United States of certain categories of individuals whenever he "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States". Trump has relied on this provision to issue numerous proclamations that practically rewrite the immigration laws of the United States.

Proclamation 10052 has been subject to a slew of lawsuits such as Gomez v. Trump, NAM v. Trump, and Panda v. Wolf. These lawsuits challenge Trump's authority to use INA 212(f) to alter the immigration laws, particularly where the administration has attempted to rewrite broad provisions of the INA by proclamation. For our prior commentary on Proclamation 10052, please see The Real Threat to the US Economy is Trump's Proclamation, Not the Workers It Bans, http://blog.cyrusmehta.com/2020/06/therealthreattotheuseconomyistrumpsproclamation.html and Trump's Visa Ban Causing Havoc to Families and Children, http://blog.cyrusmehta.com/2020/07/trumps-work-visa-ban-causing-havoc-to-families-including-children.html.

Perhaps as a way to moot out the lawsuits, the Department of State recently issued a list of circumstances under which waivers are likely to be issued for Presidential Proclamation 10052 restricting the entry of nonimmigrants. The

full list is at https://travel.state.gov/content/travel/en/News/visas-news/exceptions-to-p-p-10014-10052-suspending-entry-of-immigrants-non-immigrants-presenting-risk-to-us-labor-market-during-economic-recovery.html, and the most significant parts for H-1B and L-1 cases are reproduced below.

Those seeking to resume ongoing employment in the United States in the same position with the same employer and same H-1B or L-1 classification are most likely to benefit from the exceptions, assuming that they were not already exempted.

For H-1B applicants not seeking to resume on going employment in the same position and same employer, the most likely exceptions to apply are any two of number 1, 3, and 4 below. That is, new H-1B petitions filed during or after July where the wage is 15% above the prevailing wage or the applicant has a doctorate or professional degree or many years of experience; or pre-July petitions where the wage is 15% above the prevailing wage and the applicant has a doctorate or professional degree or many years of experience.

- For travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit (e.g. cancer or communicable disease research). This includes those traveling to alleviate effects of the COVID-19 pandemic that may be a secondary effect of the pandemic (e.g., travel by a public health or healthcare professional, or researcher in an area of public health or healthcare that is not directly related to COVID-19, but which has been adversely impacted by the COVID-19 pandemic).

- Travel supported by a request from a U.S. government agency or entity to meet critical U.S. foreign policy objectives or to satisfy treaty or contractual obligations. This would include individuals, identified by the Department of Defense or another U.S. government agency, performing research, providing IT support/services, or engaging other similar projects essential to a U.S. government agency.
- Travel by applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification. Forcing employers to replace employees in this situation may cause financial hardship. Consular officers can refer to Part II,

Question 2 of the approved Form I-129 to determine if the applicant is continuing in "previously approved employment without change with the same employer."

- Travel by technical specialists, senior level managers, and other workers whose travel is necessary to facilitate the immediate and continued economic recovery of the United States. Consular officers may determine that an H-1B applicant falls into this category when at least two of the following five indicators are present:

1. The petitioning employer has a continued need for the services or labor to be performed by the H-1B nonimmigrant in the United States. Labor Condition Applications (LCAs) approved by DOL during or after July 2020 are more likely to account for the effects of the COVID-19 pandemic on the U.S. labor market and the petitioner's business; therefore, this indicator is only present for cases with an LCA approved during or after July 2020 as there is an indication that the petitioner still has a need for the H-1B worker. For LCAs approved by DOL before July 2020, this indicator is only met if the consular officer is able to determine from the visa application the continuing need of petitioned workers with the U.S. employer. Regardless of when the LCA was approved, if an applicant is currently performing or is able to perform the essential functions of the position for the prospective employer remotely from outside the United States, then this indicator is not present.
2. The applicant's proposed job duties or position within the petitioning company indicate the individual will provide significant and unique contributions to an employer meeting a critical infrastructure need. Critical infrastructure sectors are 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. Employment in a critical infrastructure sector alone is not sufficient; the consular officers must establish that the applicant holds one of the two types of positions noted below:a.) Senior level placement within the petitioning organization or job duties reflecting performance of functions that are both unique and vital to the management and success of the overall business enterprise; OR
   b.) The applicant's proposed job duties and specialized qualifications

indicate the individual will provide significant and unique contributions to the petitioning company.

3. The wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage rate by at least 15 percent (see Part F, Questions 10 and 11 of the LCA) by at least 15 percent. When an H-1B applicant will receive a wage that meaningfully exceeds the prevailing wage, it suggests that the employee fills an important business need where an American worker is not available.
4. The H-1B applicant's education, training and/or experience demonstrate unusual expertise in the specialty occupation in which the applicant will be employed. For example, an H-1B applicant with a doctorate or professional degree, or many years of relevant work experience, may have such advanced expertise in the relevant occupation as to make it more likely that he or she will perform critically important work for the petitioning employer.
5. Denial of the visa pursuant to P.P. 10052 will cause financial hardship to the U.S. employer. The following examples, to be assessed based on information from the visa application, are illustrative of what may constitute a financial hardship for an employer if a visa is denied: the employer's inability to meet financial or contractual obligations; the employer's inability to continue its business; or a delay or other impediment to the employer's ability to return to its pre-COVID-19 level of operations.

Essentially the same public-health, government-supported, and ongoing-employment exceptions (the first three unnumbered bullet points) are in place for L-1A and L-1B cases, but the other exceptions are a bit narrower for them.

For an L-1A, the additional exception is:

- Travel by a senior level executive or manager filling a critical business need of an employer 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. An L-1A applicant falls into this category when at least two of the following three indicators are present AND the L-1A applicant is not

seeking to establish a new office in the United States:

1. Will be a senior-level executive or manager;
2. Has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship; or
3. Will fill a critical business need for a company meeting a critical infrastructure need.

L-1A applicants seeking to establish a new office in the United States likely do NOT fall into this category, unless two of the three criteria are met AND the new office will employ, directly or indirectly, five or more U.S. workers.

For L-1B cases, the additional exception is:

- Travel as a technical expert or specialist meeting a critical infrastructure need. The consular officer may determine that an L-1B applicant falls into this category if all three of the following indicators are present:

1. The applicant's proposed job duties and specialized knowledge indicate the individual will provide significant and unique contributions to the petitioning company;
2. The applicant's specialized knowledge is specifically related to a critical infrastructure need; AND
3. The applicant has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship.

Although the State Department guidance offers welcome exceptions for some H-1B and L-1 visa holders (as well as H-2B and J visa holders) who are seeking to overcome the latest ban, the guidance suffers from the same problem as the original proclamation – it amounts to a rewrite of the INA in violation of the Administrative Procedure Act. Take, for example, the requirement that: "The wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage rate by at least 15 percent (see Part F, Questions 10 and 11 of the LCA) by at least 15 percent. When an H-1B applicant will receive a wage that meaningfully exceeds the prevailing wage, it suggests that the employee fills an important

business need where an American worker is not available." This additional wage requirement is entirely absent from the INA.

Another example is a provision in the guidance which states that "L-1A applicants seeking to establish a new office in the United States likely do NOT fall into this category, unless two of the three criteria are met AND the new office will employ, directly or indirectly, five or more U.S. workers." The requirement that petitioners employ five or more U.S. workers also has no basis in the INA or in 8 Code of Federal Regulations. For L-1B applicants, the need to demonstrate significant and unique contributions to the petitioning company, that the specialized knowledge is specifically related to a critical infrastructure need and that the applicant has spent multiple years with the same company has no basis in the law or regulations. Under the existing INA and regulations, the L-1B applicant must demonstrate that he has had one year of qualifying experience in a managerial, executive or specialized knowledge capacity.

Despite the fact that Proclamation 10052 still places significant restrictions on the H-1B and L-1 visa categories, the new guidance may provide exceptions for several categories of individuals who would have been banned under the original proclamation. For example, the new guidance exempts many healthcare workers and medical researchers, not just those treating COVID-19 patients. Additionally, the exemptions might allow H-1B employees who were trapped outside the United States when the proclamation was issued to reenter. *See* Stuart Anderson, "New State Dept. H-1B Visa Guidance Won't Stop Immigration Lawsuits", Forbes (Aug. 13, 2020, 12:37 AM EDT), *available at*: https://www.forbes.com/sites/stuartanderson/2020/08/13/new-state-dept-h-1b-visa-guidance-wont-stop-immigration-lawsuits/#703a38fa4f47.

Even if an H-1B or L-1 visa holder is able to overcome the proclamation through a national interest exception, however, that individual could still be unable to reenter the United States if she had recently been present in one of the countries included in the proclamations banning travelers coming from certain countries due to COVID-19, such as Brazil or the Schengen Area. The new guidance does not include any exceptions to the proclamations banning travelers from Brazil and the Schengen Area, so employees prevented from entering the United States under these proclamations would likely need a separate exception. It is hoped that the State Department apply the same national interest exception under all the proclamations that a traveler has been

subjected to during Covid-19.

The new Department of State guidance is the latest example of the Trump administration attempting to rewrite the immigration laws in circumvention of the APA. The original proclamation is a rewrite of the law and so is the latest guidance that requires an applicant to qualify under the national interest exception. So long at this policy continues, lawsuits challenging Trump's authority to rewrite the INA in this way will likely be a key tool in ensuring the protection of visa holders and their U.S. employers.

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