



THE FUTURE OF WORK AND VISA RULES IN THE AGE OF COVID-19

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Since COVID-19 afflicted the world, people have learned to work remotely from home and the [office seems to be less relevant](#). Most white collared work can be carried out remotely through Zoom Video or Microsoft Teams. Jack Dorsey, the head of Twitter, said that the company's employees can work from home "forever." This view may not be shared by all. 85% of French office workers are back at their desks. Reed Hastings, the founder of Netflix, said that working from home is a pure negative. Facebook recently leased an iconic building in Manhattan in the hope that New York's business will spring back to life.

While the debate on the relevancy of the office will continue even after the pandemic, US visa rules have not been able to cope with remote work. As a result, they can be used against remote workers, especially by the Trump administration that has been hostile to foreign workers as they have been perceived, albeit erroneously, as a threat to the US labor market. This has been more so during COVID-19.

President Trump has imposed a broad work visa ban under [Proclamation 10052](#). In the [State Department's National Interest Exceptions](#) to President Trump's work visa ban under Proclamation 10052, one of the exceptions for banned H-1B visa entrants is if the employer can demonstrate that it has a continuing need for their services. Even if the employer can demonstrate a continuing need for a specialized H-1B worker, the State Department guidance goes on to state that "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."

The Trump administration ought not be allowed to negate immigration to the US under the assumption that work can be carried out remotely. It is for the

employer in the US to decide whether the services of a skilled worker is needed in the US. Even if the office is being used less or none at all since the pandemic, this does not mean that there will be no need for an office, and workers may still need to congregate occasionally so that they can collaborate, share ideas, mentor and train. Even if the work is completely remote during the COVID-19 period, it makes sense to have people work during the same time zone in the US.

Another conundrum arises when H-1B workers have been forced to work remotely from their home during the pandemic. The DOL rules technically consider the home to also constitute a [place of employment](#) (as that is where the work is being actually being performed), and thus there is a need to post the Labor Condition Application in two conspicuous locations, which in the home would likely be on the refrigerator and bathroom mirror (see [LCA Posting Requirements at Home During the COVID-19 Pandemic: Should I Post on the Refrigerator and Bathroom Mirror](#)) This is silly as the whole purpose of the LCA is to inform US workers about the H-1B position. There are no US workers at the home of an H-1B worker. It makes no sense to force an H-1B worker to post an LCA in the home, which might trigger a time consuming and costly amendment of the H-1B petition. If the LCA is not posted, it could result in penalties for the employer and maintenance of status issues for the H-1B worker.

A final observation applies to people who are in the United States as visitors for pleasure and have not been able to leave due to the pandemic. This visitor could have a normal 8 hour work day in the US over Zoom video on behalf of an employer who has no connection with the US. The tourist visa does not allow any sort of work to be performed in the US. If one who is on B-2 visitor visa works remotely in the US for a job based outside the US, could remote work while in B-2 status be used against an unwitting visitor to find that she violated her status. It should clearly not as the visitor is not working for an employer in the US or is even being paid from a US source. Even prior to remote work becoming fashionable, a visitor for pleasure could have attended to work e mails relating to a job outside the US and would not be considered to be violating status. It is common for visitors to another country to keep in touch with their work even when they visit another country. Even before the age of smart phones, nothing prevented a tourist in the United States from jotting notes on a yellow pad in preparation for a business meeting that would

take place in her home country after he returned.

While working during the pandemic seems to be changing the paradigm about how we think about work, it is hoped that visa rules will be applied in a commonsensical fashion. People should not be penalized for engaging in unauthorized work if their work has no connection to the US. The same should be true for a US worker who is stranded in another country and engages in full time remote work for the US employer. That country's visa laws should not penalize this person. Similarly, an H-1B worker forced to work at home should not be required to post an LCA on the refrigerator, and then penalized along with the employer, for failure to do so. Finally, even if remote work has become more prevalent, this does not in any way justify the barring of people to the US on legitimate visas under the assumption that the work can be performed remotely.