



OVERCOMING A COVID TRAVEL BAN THROUGH THE NATIONAL INTEREST EXCEPTION

Posted on February 28, 2021 by Cyrus Mehta

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Although the Trump era has ended, some of its draconian immigration policies continue to linger, including the COVID travel bans. On January 25, 2021, President Biden issued Presidential [Proclamation 10143](#), entitled “Proclamation on the Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease”, which effectively extends many of the Trump administration’s COVID bans. Proclamation 10143 suspends the entry into the United States of noncitizens who were physically present in the Schengen Area, the United Kingdom, Ireland, Brazil, or South Africa within the 14 days preceding their attempted entry into the United States. As with the Trump-era COVID bans, Proclamation 10143 outlines several categories of individuals who are exempt from the ban, including certain relatives of U.S. citizens and LPRs, diplomats, members of the Armed Forces, and those working to treat or contain COVID-19. Importantly, “any noncitizen whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees” is also exempt from the ban.

The DOS further clarified this exception, issuing [guidance](#) which stated that “certain business travelers, investors, treaty traders, academics, students, and journalists may qualify for national interest exceptions under the Presidential Proclamation (PP) covering travelers from the Schengen Area, United Kingdom, and Ireland”. F-1 and M-1 students who have valid visas may enter the United States without a national interest exception (NIE) waiver, while business travelers, investors, academics, J-1 students, journalists, and treaty traders must seek an NIE before traveling, whether they currently hold a valid visa or

are seeking one. H-2A and certain H-2B travelers who have been present in South Africa may qualify for an NIE “if they are providing temporary labor or services essential to the United States food supply chain.”

Despite the exceptions, Proclamation 10143 still has enormous potential to snare unwary travelers. One might assume that a noncitizen flying back to the United States from a country not enumerated in the Proclamation would be exempt from the ban. However, if individuals have a layover, however brief, in a Schengen country’s airport in Frankfurt or Paris, they become subject to the ban. Ideally, travelers want to ensure that they are not passing through the countries listed in the ban at all. Once this complication arises, though, the noncitizen can travel to a second country that is not subject to the ban and spend at least 14 days there before attempting to reenter the United States. Someone who lives in a country subject to the Proclamation, though, this might not be possible. It could cause an individual living in Brazil, for example, undue hardship to have to spend 14 days in a second country before coming to the United States. During the pandemic, each country has imposed its own travel restrictions and it may not be easy to hop from one country to another before entering the U.S.

The other way that a noncitizen subject to the ban may reenter the United States is by obtaining a national interest exception waiver. To do so, one needs to contact the relevant consulate, usually by email, to request a waiver. The email must state the noncitizen’s biographical details, contact information, and proposed itinerary. A copy of the noncitizen’s passport biographical page and visa page should be attached. Most importantly, an NIE request must outline the justification for the waiver. It may be especially helpful to demonstrate that the noncitizen is working in a significant role in critical infrastructure. One may reference the [CISA guidelines](#) for a list of essential infrastructure, which includes healthcare, education, transportation, financial services, and communications and IT, to highlight only a few industries. The consulate may approve or deny the waiver straight way, or may request that additional information be provided.

In some instances, an NIE waiver request may also be made to CBP rather than a consulate. CBP at JFK airport, for example, requires that a noncitizen first request a waiver through DOS. If 14 days have passed without a response from DOS, CBP will entertain the waiver request. The noncitizen may be required to demonstrate proof that they have attempted to follow up with DOS beyond the

initial waiver request. CBP at JFK will also take NIE waiver request in emergency or humanitarian cases. Other ports of entry may have similar policies. For a list of the policies of other ports of entry on regarding the NIE, see *Practice Alert: National Interest Exemption (NIE) and Satisfactory Departure (SD) Procedure Spreadsheet for Requests at CBP Ports and Preclearance Locations Due to COVID-19*, AILA InfoNet at Doc. No. 20032043 (July 22, 2020).

The COVID bans are not the only Trump era immigration policies that remain in effect. Although Biden recently [rescinded](#) Proclamation 10014, which suspended certain green card applications, and restricted some nonimmigrant visa categories, Proclamation 10052 is very much alive. Proclamation 10052, an extension of Proclamation 10014, restricts the entry of individuals who were outside the United States without a visa or other immigration document on the effective date of the Proclamation, June 24, 2020, and are seeking to obtain an H-1B visa, H-2B visa, L visa or certain categories of the J visa. We have discussed both [Proclamation 10014](#) and [Proclamation 10052](#) in our previous blogs. Proclamation 10052 was extended to March 31, 2021 at the end of the Trump administration, and will continue to impose hardship and separate families until that date if it is not rescinded by the Biden administration. Notably, a noncitizen who has been in one of the countries listed in Proclamation 10143 without a visa since June 24, 2020 would be subject to both Proclamations. Proclamation 10052 also exempts “any alien whose entry would be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees”, but the national interest exceptions for H-1Bs and Ls in Proclamation 10052 have different standards from the NIE in the COVID ban.

As detailed in a prior [blog](#), it is reiterated that there are better ways to curb the spread of COVID-19 than imposing travel bans. Given the number of exceptions to these bans, it is questionable how effective they could be at controlling COVID-19, since an exempt traveler is just as likely to have contracted COVID as a noncitizen who is covered by the Proclamation. Currently the United States [requires](#) travelers to provide a recent negative COVID test before entering. Even if a negative COVID test is not considered a sufficient safeguard against the spread of COVID-19, however, other measures could be imposed, such as requiring travelers to quarantine for a few days before entering the United States. As the vaccine becomes more readily available, noncitizens who provide proof of vaccination should also be able to freely enter the United States.

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