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POKING HOLES AT THE POORLY DRAFTED PROCLAMATION BANNING H-1B WORKERS THROUGH A $100,000 FEE

Posted on September 22, 2025 by Cyrus Mehta

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The Proclamation banning H-1B workers unless a $100,000 fee is paid is so blatantly unlawful that it rewrites parts of the INA. However, a successful challenge to the proclamation - after the Supreme Court upheld Trump's travel ban for nationals of mainly Muslim countries under INA 221(f) in Trump v. Hawaii - is not a foregone conclusion. This Proclamation is also issued pursuant to INA 221(g).

The Proclamation rehashes much of the objections to the H-1B visa program that have become outdated and seem to cast Indian heritage IT firms in an unfavorable light. H-1B workers are no longer cheap labor and provide great value to US companies, which in turn create more jobs for US workers. H-1B workers are mostly paid six figure salaries. The rules also ensure that H-1B workers are paid the higher of the prevailing or actual wage. A court may not challenge the President's rationale behind the proclamation, but a court could still evaluate whether the imposition of the $100,000 fee rewrites H-1B law or only supplants it. It is a complete rewrite of the law, and so a court should be able to distinguish this proclamation from Trump vs Hawaii. 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. Trump is not a King, and if he likes to be King, he should not be given unbridled power to rewrite provisions of the INA that Congress has enacted.

Otherwise, it makes a mockery of the separation of powers doctrine, which is a defining feature of democracy because it distributes governmental authority

among three distinct branches - legislative, executive and judicial.

Previously too when Trump imposed a similar ban, on October 1, 2020, U.S. District Judge Jeffrey S. White issued a preliminary injunction against the Trump administration's June 2020 proclamation that suspended the entry of foreign nationals on H-1B, L-1, H-2B and most J-1 temporary visas. Judge White ruled the president does not possess a monarch's power to cast aside immigration laws passed by Congress. The order in *NAM v. DHS* prevented the State Department and Department of Homeland Security from "engaging in any action that results in the non-processing or non-issuance of applications or petitions for visas in the H, J, and L categories which, but for Proclamation 10052, would be eligible for processing and issuance." See our prior blogs on challenging Trump's bans under INA 221(f) here and here, and discussing *NAM v. DHS* here.

USCIS Director Edlow's memo thankfully tamps down the widespread panic that the initial Proclamation caused and the $100,000 supplemental fee applies to H-1B petitions filed after 12.01 AM ET on September 21, 2025. The threat of litigation and the opposition from corporate America and universities forced the Trump administration to back off a bit.

However, the Proclamation was poorly drafted and did not state that it would apply to petitions filed on or after September 21, 2025 and lawyers had to do their job to advise clients consistent with the language of the Proclamation. The guidance clearly stated that the fee would apply to H-1B workers outside the US after September 21, 2025. Therefore, it was disingenuous of the White House to falsely accuse "corporate lawyers and others with agendas" for "creating a lot of FAKE NEWS around President Trump's H-1B Proclamation"

Edlow's memo does not make things clear at all. We do not know whether the Proclamation would apply to H-1B extensions filed after September 21, 2025 for workers who are outside the US and will apply for H-1B visa stamps assuming they were the subject of approved H-1B petitions filed before September 21, 2025 whether by the same or a different employer.

The Edlow memo also does nothing for the future of the H-1B program. Cap exempt employers who are universities and nonprofits affiliated with universities or research institutions will be hit with the $100,000 fee when they file a new petition. After next year's H-1B lottery selections in 2026, employers

will have to also pay the $100,000 fee for any new petition. It will be impossible for employers to hire talented students from US universities.

The White House subsequently issued an H-1B FAQ , but it again creates more confusion. It states that the Proclamation "requires a $100,000 payment to accompany any new H-1B visa petitions submitted after 12:01 a.m. eastern daylight time on September 21, 2025. This includes the 2026 lottery, and any other H-1B petitions submitted after 12:01 a.m. eastern daylight time on September 21, 2025." The Proclamation, because it is based on INA 212(f) which addresses the "entry of any aliens" or of "any class of aliens", should not apply to someone inside the US who is seeking an extension of stay, and it should also not apply to a change of status to H-1B in the US, even if the most recent White House guidance, which again is as poorly drafted as the prior clarifications and the Proclamation itself, does not state it. For example, if one is currently in F-1 status, the employer applies for this person in the 2026 H-1B lottery, the case gets selected and the new petition is filed as a change of status from F-1 to H-1B while the person has always been in the US, the $100,000 fee under the Proclamation should arguably not apply. The same would hold true if a non-profit cap exempt employer files a new H-1B petition after September 21, 2025 and requests the change of status for a beneficiary from F-1 to H-1B status.

The imposition of this fee will in effect kill the H-1B visa program and will no longer attract foreign talent to the shores of the US. US companies instead will also flee the US so that they can hire this talent overseas. Trump is in effect has killed the goose that laid the golden eggs by imposing this atrocious fee.

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