Trump Suspends Immigration to Remove "Competition" From U.S. Unemployed

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Immigration Alert

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Citing the overall unemployment rate in the United States, President Trump issued an expanded version of Proclamation 10014, titled "Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak." Dispensing with country-specific or health-based reasons for suspending the entry of foreign nationals, President Trump now suspends the entry of highly skilled professional workers, intracompany transferees, temporary agricultural workers and certain scholars (foreign nationals in H-1B, L-1, H-2B and J-1 classifications) so as to ensure there will be less competition for the 25 million recently jobless U.S. workers. Given that the newly suspended entries will account for approximately 325,000 individuals, this policy promises to yield back 1.3% of the 25 million lost jobs. The Proclamation takes effect on June 24, 2020, and remains in effect through December 31, 2020.

Who Is Impacted by the Ban?

Proclamation 10014 initially suspended the entry of foreign nationals as immigrants or lawful permanent residents (green card holders) for a period of 60 days, subject to certain exceptions. Because such persons hold "open market" employment authorization documents, which presumably allow them to compete with U.S. workers for jobs, and given the current state of the economy, the President has now extended the ban on entry through December 31, 2020.

Furthermore, the entry of additional workers through the H-1B, H-2B, J and L nonimmigrant visa programs has been suspended through December 31, 2020. The ban will apply to any foreign national who:

(i) is **outside the U.S.**;

(ii) does not have a valid nonimmigrant visa; and

(iii) does not have an official valid travel document other than a visa (such as a transportation letter, an appropriate boarding foil or an advance parole document).

Who Is Exempt From the Ban?

The suspension does not apply to the following categories of foreign nationals:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is the spouse or child of a United States citizen;

(iii) any foreign national seeking to enter the United States to provide temporary labor or services essential to the United States food supply chain; and

(iv) any foreign national whose entry is deemed to be in the national interest by the Secretary of State, the Secretary of Homeland Security or their respective designees. "National interest" may include visa applicants who "are critical to the defense, law enforcement, diplomacy, or national security of the United States; are involved with the provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized; are involved with the provision of medical research at United States facilities to help the United States combat COVID-19; or are necessary to facilitate the immediate and continued economic recovery of the United States."

Additional Steps to Be Taken

- The Secretary of Health and Human Services, through the Director of the Centers for Disease Control and Prevention, is charged with providing guidance to the Secretary of State and the Secretary of Homeland Security on measures that could reduce the risk that aliens seeking admission or entry to the United States may introduce, transmit or spread SARS-CoV-2 within the United States.
- The Secretary of Labor and the Secretary of Homeland Security are charged with considering regulations or other appropriate action to ensure that the presence in the United States of foreign nationals in H-1B nonimmigrant status, or those seeking lawful permanent resident status pursuant to an EB-2 or EB-3 immigrant petition, "does not disadvantage United States workers."
- The Secretary of Homeland Security is charged with the following actions:
  - In coordination with the Secretary of State, provide that a foreign national should not be eligible to apply for a visa or for admission or entry into the United States or other benefit until biographical and biometric information is collected, including but not limited to photographs, signatures and fingerprints;
  - Take appropriate and necessary steps to prevent foreign nationals from obtaining eligibility to work in the United States if they are subject to final orders of removal; are inadmissible or deportable from the United States; or have been arrested for, charged with or convicted of a criminal offense in the United States; and
  - Consider regulations or other appropriate action regarding the efficient allocation of visas pursuant to H-1B cap regulations, and ensure that the presence in the United States of H-1B nonimmigrants does not disadvantage United States workers.

As noted above, these restrictions become effective on June 24 and are to be reevaluated for possible modifications within 30 days of that date, and every 60 days thereafter, by the Secretary of Homeland Security, the Secretary of State and the Secretary of Labor.

What Does This Mean for Employers and Their Employees Presently in the U.S. in Nonimmigrant Status?

The U.S. Department of Labor and U.S. Citizenship and Immigration Services continue to accept and adjudicate applications and petitions, including applications for lawful permanent residence and extensions, amendments, or changes of nonimmigrant status, filed on behalf of foreign nationals living and working in the U.S. While the Proclamation is in effect, however, employers should caution any foreign national employees present in the United States not to travel abroad. Even if the foreign national holds a valid visa or other travel document, any international travel must be discussed with immigration counsel in advance.

Employers should also review with counsel any employees who may require travel to extend their status, such as blanket L visa holders, so that alternative plans can be made.

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Were one intent on protecting U.S. workers, it is difficult to believe that one would select for suspension the categories the President has here. The H-1B category comprises highly skilled professional workers, often STEM graduates, and generally is exhausted within days of the start of the annual lottery that caps new H-1B visas at 85,000. U.S. employers pay thousands of dollars in filing fees to take a chance that their candidate will be among those selected to fill the coveted annual slots. The L-1 category, created in 1970 to allow multinational corporations to internally transfer executive, managerial and specialized knowledge employees, seems an odd choice to protect U.S. workers, since one can obtain an L-1 only if one has worked for the transferring company for at least one year abroad. Both the H-1B and L-1 categories are thought to be net job creators given the positive impact they have on U.S. companies.

The J-1 category includes scholars, trainees and even au pairs who, generally, must complete a two-year home residency requirement following their stay in the United States. It is difficult to believe that any U.S. employer would consider the J-1 a solution to any permanent open position. Finally, H-2B workers are, by and large, temporary and seasonal workers often utilized in sectors that were shunned by U.S. workers long before the pandemic.

The President appears to believe that if U.S. employers have more limited access to highly skilled and educated foreign workers, they will somehow suddenly conjure substitutes in the local labor force. This is akin to saying that if Jackie Robinson had been kept out of the majors, the league would have risen to his level on its own. The risk here is that globally sought-after talent will go elsewhere, and with them the jobs.