

## **BAL Analysis: Proclamation Suspending Permanent Immigration**

April 22, 2020

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### **EXECUTIVE SUMMARY**

- President Trump signed a [Proclamation](#) on April 22 restricting entry to the United States by immigrant visa applicants (i.e. permanent immigration) for 60 days, subject to potential renewal.
- The Proclamation will take effect at 11:59 p.m. EDT on Thursday, April 23.
- Today's Proclamation does not affect foreign nationals seeking to enter the U.S. on temporary visas (e.g., H-1B visas), but it orders the federal immigration agencies to review nonimmigrant programs and recommend other "measures appropriate to stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers" within 30 days.
- The Proclamation does not affect foreign nationals seeking to adjust status (i.e. obtain permanent resident status from within the United States).

### **SCOPE AND EXEMPTIONS**

#### **What is the scope of the restrictions?**

The Proclamation bars entry for 60 days by individuals seeking to enter as immigrants who:

- Are outside the U.S. on the effective date of the proclamation;
- Do not have an immigrant visa that is valid on the effective date; and
- Do not have an official travel document other than a visa (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on the effective date of this proclamation or issued on any date thereafter that permits him or her to travel to the U.S. and seek entry or admission.

#### **Who is exempt from the restrictions?**

##### *Categorical Exemptions*

- U.S. citizens; or
- Lawful permanent residents (who are present inside the U.S. or who are outside the U.S.).

##### *Public Health/COVID-19 Exemptions*

- Individuals seeking to enter the U.S. on an immigrant visa:
  - As a physician, nurse, or other healthcare professional;

- To perform medical research or other research intended to combat the spread of COVID-19; or
- To perform work essential to combating, recovering from, or otherwise alleviating the effects of the COVID-19 outbreak, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.

#### *Family-Based Exemptions*

- Spouses and unmarried children under 21 years old of individuals who are exempt under the above health-related grounds, who are accompanying or following to join;
- Spouses and children under 21 years old of U.S. citizens; or
- Prospective adoptees seeking to enter the U.S. pursuant to the IR-4 or IH-4 visa classifications.

#### *Law-Enforcement/Military Exemptions*

- Individuals whose entry would further important U.S. law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee;
- Any member of the U.S. Armed Forces and any spouse and children of a member of the U.S. Armed Forces;
- Any individual seeking to enter the U.S. pursuant to a Special Immigrant Visa in the SI or SQ classification, subject to such conditions as the Secretary of State may impose, and any spouse and children of any such individual; or
- Any individual whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.

#### *Special Interest Exemption*

- Any individual applying for a visa to enter the U.S. pursuant to the EB-5 Immigrant Investor Program.

#### **Does the Proclamation affect temporary visa holders?**

No. However, it requires the Secretary of Labor, Secretary of Homeland Security, and Secretary of State to review nonimmigrant programs and recommend to the President “other measures appropriate to stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers” within 30 days.

#### **Does the Proclamation affect adjustment of status applicants?**

No. The Proclamation does not affect individuals who can apply for permanent residence from within the U.S. without having to obtain a visa at a consulate abroad. The Proclamation applies to people who are outside the U.S. on the effective date and do not have a valid immigrant visa or other travel document as of the effective date.

### **How can an exemption be requested?**

The Proclamation directs consular officers to determine in their discretion whether an applicant has established eligibility for an exemption, and requires the Department of State and Department of Homeland Security to establish procedures to implement the Proclamation.

### **What will an immigrant need to show to qualify for an exemption based on his or her work “combating, recovering from, or otherwise alleviating the effects of the COVID-19 outbreak”?**

This exemption is broader than what was included in prior public health proclamations. The determination will be at the discretion of the U.S. government. BAL will engage further with the U.S. government to obtain information about the process. It is not yet known whether the government will issue guidance to consular officers, and of course there is no prior experience to draw upon at this time.

## **PRACTICAL IMPACT**

### **What is the practical effect of this Proclamation for U.S. companies?**

The Proclamation does not change the status quo, as most U.S. consulates are currently not offering routine visa services or issuing immigrant visas. The impact will depend on whether the administration extends the restrictions past 60 days.

Companies will be focused on whether the Proclamation will inhibit their ability to resume full operations once public safety permits international travel. Once consulates are able to reopen and start issuing visas again, the Proclamation would prevent the issuance of new immigrant visas as long as it is in effect.

### **Will the ban be extended beyond 60 days?**

The Proclamation states that it will expire 60 days from the effective date and “may be continued as necessary.” No later than 50 days from the effective date, the Proclamation requires the Department of Homeland Security, Department of State, and Department of Labor to recommend whether the President should continue or modify it.

### **What legal authority is the President relying on to take this action?**

The president has broad authority under section 212(f) of the Immigration and Nationality Act (INA) to deny entry to the United States:

*Whenever the President 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, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants*

*or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.*

The Trump administration has used this authority as the basis for multiple travel restrictions, including the original travel ban that the Supreme Court upheld and the most recent [restrictions](#) on travel from China, Iran, most of Europe, the UK, and Ireland, to prevent the spread of COVID-19.

The central statutory constraint imposed on the exclusionary power under section 212(f) is that the President must have found that the entry of any aliens or class of aliens would be “detrimental to the interests of the United States” in order to exclude the alien or class of aliens. The statute does not address (1) what factors should be considered in determining whether aliens’ entry is “detrimental” to U.S. interests; (2) when and how proclamations suspending or restricting entry should be issued; (3) what factors are to be considered in determining whether particular restrictions are “appropriate”; or (4) how long any restrictions should last.

#### **Will this action be challenged in court?**

We should expect legal challenges to the new Proclamation arguing that the President’s latest exercise of authority under 212(f) is not sufficiently tailored, but it is too early to predict how litigation will affect the Proclamation. In 2018, the U.S. Supreme Court held in *Trump v. Hawaii* that section 212(f) “exudes deference to the president in every clause.” However, the Court also noted that the President had “craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country’s distinct circumstances.”

#### **Will this Proclamation impact U.S. Citizenship and Immigration Services (USCIS) adjudications?**

Nothing in the Proclamation directs USCIS to take or refrain from taking any action on pending or future requests for benefits or applications. The legal authority the government is relying upon in the Proclamation is based on the suspension of “entry” of foreign nationals. Under U.S. immigration law, foreign nationals who are present in the U.S. who are seeking a change of status or an extension of status are not considered to be seeking an “entry.”