

## BAL Analysis: Proclamation Suspending New Temporary and Permanent Visas

June 25, 2020

### EXECUTIVE SUMMARY

- On June 22, President Trump signed a proclamation entitled “Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak.” It took effect at 12:01 a.m. EDT on June 24 and is set to expire December 31, 2020.
- The [proclamation](#) imposes new restrictions on nonimmigrant (i.e. temporary) work visas and extends the existing [restrictions](#) on immigrant (i.e. permanent) visas that took effect on April 23.
- The proclamation does not affect foreign nationals who, on the effective date, are in the United States or have a valid visa or travel document that authorizes them to enter the U.S.
- The new restrictions on nonimmigrant visas apply to the H-1B, H-2B, L-1, and J-1 categories, subject to certain exemptions, and include those following to join an applicant (e.g., H-4 and L-2).
- The government has confirmed that Canadian nationals are exempt from the proclamation even if they are entering to work in a restricted visa category (e.g., H-1B, H-2B, L-1, or J-1).
- Other impediments to travel to the U.S. by foreign nationals remain in place and are not affected by the proclamation, including consular closures, restrictions on travel based on 14-day physical presence in certain countries, and restrictions on non-essential travel across U.S. land borders.
- The proclamation makes no changes to filing fees, but does direct the Department of Labor and the Department of Homeland Security to issue regulations or take other actions to protect U.S. workers.

***Note: BAL has confirmed with senior agency officials that they are still reviewing the proclamation and working through a number of questions related to its implementation. There is a lack of certainty regarding how the administration will interpret and apply key provisions of the proclamation. Because of these issues, and the fact that visa processing timelines at U.S. consulates remain unpredictable, BAL recommends that foreign national employees in the U.S. do not depart the U.S. unless they are able to remain in their destination country for an extended period of time.***

### CONTEXT

*This proclamation comes at a time when travel to the United States by foreign nationals is extremely limited. The following restrictions remain in place, and any analysis of a foreign national’s ability to enter the U.S. must take them into account:*

- *Physical presence-based travel restrictions: Foreign nationals who have been physically present in Brazil, China, Iran, Ireland, Schengen Area countries or the United Kingdom during the 14-day period prior to seeking entry to the U.S. may not enter the U.S. unless they fall under an exemption. These restrictions are based on physical presence in those countries, apply to all non-exempt foreign nationals regardless of whether they hold a valid visa, and are in effect until*

*terminated by the President. They could also be expanded by the President to different geographies with little or no notice.*

- *Consular closures: U.S. consulates are still not offering routine visa services, which means it is difficult or impossible for foreign nationals who are outside the U.S. and are in need of a new visa to obtain one. When consulates do reopen, significant delays should be expected.*
- *Land border restrictions: Non-essential travel across the land borders from Canada and Mexico remains restricted until at least July 21.*

## **NEW RESTRICTIONS ON TEMPORARY WORK VISAS: SCOPE AND EXEMPTIONS**

### **Who is subject to the new restrictions on nonimmigrant (temporary) visas?**

The proclamation applies to any foreign national who:

- Is outside the United States on the effective date of the proclamation (June 24);
- Does not have a nonimmigrant visa that is valid on the effective date; and
- Does 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 the proclamation or issued on any date thereafter that permits him or her to travel to the U.S. and seek entry or admission.

*This means that a person is not subject to the proclamation if he or she is:*

- *In the United States on June 24; or*
- *Has a valid nonimmigrant visa on June 24 (even if outside the country); or*
- *Has another official travel document (e.g., advance parole travel document) valid on June 24 or issued thereafter.*

### **Which nonimmigrant visa categories are affected?**

The proclamation applies to the following nonimmigrant work visa categories: H-1B, H-2B, L-1, and J-1 (if the foreign national is participating in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program), and any immediate family member accompanying or following to join a foreign national described above (e.g., H-4, L-2).

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

The following individuals are exempt:

- U.S. lawful permanent residents (i.e. green card holders);
- Foreign national spouses and children of U.S. citizens;
- Foreign nationals seeking to enter the U.S. to provide temporary labor or services essential to the U.S. food supply chain; and

- Any foreign national whose entry would be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.

### **Who will qualify for the “national interest” exemption?**

The proclamation directs the Secretaries of State, Labor, and Homeland Security to establish standards to define categories of foreign nationals covered by this exemption, including those that are:

- Critical to the defense, law enforcement, diplomacy, or national security of the U.S.;
- Involved with the provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized;
- Involved with the provision of medical research at U.S. facilities to help the U.S. combat COVID-19; and
- Necessary to facilitate the immediate and continued economic recovery of the United States.

The proclamation also directs the Secretary of State and the Secretary of Homeland Security to exercise their authority to exempt foreign national children who would “age out” of eligibility for a visa as a result of the nonimmigrant or immigrant visa proclamations.

## **Visa Stamps**

A citizen of a foreign country who seeks to enter the United States generally must first obtain a U.S. visa, which is placed in the traveler’s passport, a travel document issued by the traveler’s country of citizenship. Canadians may be eligible to travel to the United States without a visa if they meet certain requirements.

Having a U.S. visa allows an individual to travel to a port of entry, airport, or land border crossing, and request permission of the Department of Homeland Security (DHS) Customs and Border Protection (CBP) inspector to enter the United States. While having a visa does not guarantee entry to the United States, it does indicate to CBP that a consular officer at a U.S. Embassy or Consulate abroad has determined the individual is eligible to seek entry for that specific purpose.

A visa stamp is different from the underlying nonimmigrant petition (e.g. Form I-129), the Form I-797 (Notice of Action), or a Form I-94 (Arrival/Departure Record). For more information, visit the Department of State’s [website](#).

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

The proclamation states that the consular officer must make the discretionary determination of whether an individual is eligible for an exemption. Therefore, a foreign national who is subject to the proclamation must establish eligibility for an exemption when he or she applies for a new visa. The Department of State (DOS) has authority to implement the proclamation as it relates to visa issuance, and the Department of Homeland Security (DHS) has authority over implementation as it relates to entry to the U.S. The proclamation directs the two agencies to establish procedures for implementation.

### **Does the proclamation apply to a Canadian national who is outside of the U.S. on June 24 and who is not in possession of a valid visa stamp on that date?**

DHS headquarters has confirmed to BAL that a Canadian national who is outside of the U.S. on June 24 and who is not in possession of a valid visa stamp will not be subject to the proclamation. Because it may take some time for DHS to disseminate that guidance to ports-of-entry, Canadian workers should be advised that they may in the interim encounter delays when seeking entry from Canada.

### **Does the proclamation apply to other nonimmigrant work visa categories?**

The proclamation applies only to the visa categories named in the order, and foreign nationals accompanying or following to join applicants in those categories. Therefore, other temporary work visa categories such as the O-1, E-3, and TN categories are not impacted. H-1B1 visas are not named in the proclamation, but the government is not issuing any H-1B1 visas and is not allowing the entry of any H-1B1 visa holders pending further guidance from headquarters.

## **NEW RESTRICTIONS ON TEMPORARY WORK VISAS: PRACTICAL IMPACT**

### **What is the practical impact on U.S. companies?**

The new restrictions on nonimmigrant visa entries will apply only to foreign nationals who are outside the U.S. on the effective date (June 24) and do not hold a valid visa on the effective date or other official travel document. Because U.S. consular posts remain closed for routine visa services and appointments, these individuals already face uncertain timelines for entry to the U.S. Travel restrictions based on physical presence in certain countries contribute to the already uncertain environment for foreign nationals who are outside the U.S. When consulates reopen, those who are subject to the proclamation but are not prevented by other travel restrictions from entering will need to qualify for an exemption to obtain a visa. All visa applicants will face significant delays when consulates reopen, due to case processing backlogs and new COVID-19 physical distancing measures.

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

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.” 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 recent restrictions imposed during the pandemic.

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. The government may also face legal challenges if it implements the proclamation in a way that is inconsistent with the text of the proclamation.

**Does the proclamation affect individuals already in the U.S. who need to change or extend status?**

No. The proclamation does not affect people who are currently in the U.S. as of the effective date, and does not affect U.S. Citizenship and Immigration Services (USCIS) adjudications within the U.S. However, the proclamation directs the immigration agencies to issue regulations that could affect eligibility for work visas. These actions could affect people who are already here.

**ANALYSIS: FOREIGN STUDENTS**

**Does the proclamation affect foreign students on Optional Practical Training (OPT) who remain in the U.S.?**

No. The proclamation makes no mention of international students on F-1 visas or OPT, and will not affect an F-1 student's ability to remain in the U.S. in F-1 status.

**Does the proclamation apply to a foreign student who is present in the U.S. on June 24 if that student later departs the U.S. and seeks to obtain a new F-1 visa stamp or return on an existing, valid F-1 visa stamp?**

No. The proclamation makes no mention of international students on F-1 visas or OPT, and will not affect an F-1 student's ability to obtain a new F-1 visa stamp or return on an existing, valid F-1 visa stamp. Please see question below regarding risks associated with an F-1 student seeking a work visa after June 24.

**ANALYSIS: FOREIGN WORKERS IN THE U.S.**

*Please see warning note at beginning of FAQ*

**Can a foreign national who is in the U.S. and holds a valid visa on June 24 depart the U.S. and re-enter on that same visa stamp?**

Yes, so long as they are not subject to physical presence-based travel restrictions. If a person has a valid visa or other valid official travel document that allows travel to the U.S. on June 24, they are not subject to the proclamation. They may enter the U.S. using that same visa or travel document as long as it remains valid.

**Can a foreign national who is in the U.S. and holds a valid visa on June 24 depart the U.S. , obtain a new visa stamp in the same visa category, and re-enter the U.S.?**

Yes, so long as they are not subject to physical presence-based travel restrictions. If a person has a valid visa or other valid official travel document that allows travel to the U.S. on June 24, they are not subject to the proclamation. If their visa stamp expires after June 24, the proclamation will not prevent the individual from obtaining a new visa stamp in the same category.

**If a foreign national is in the U.S. on June 24 and has a valid B-1 or F-1 visa on that date, may he or she depart and obtain a visa stamp for a restricted visa classification (e.g., H-1B, L-1, H-2B, J-1) while the proclamation is in effect? For example, can an individual who is in possession of a valid F-1 visa stamp on June 24 later obtain an H-1B visa stamp (e.g., in October)?**

Yes. The text of the proclamation states that the ban will only apply to a foreign national who is outside of the U.S. and “does not have a nonimmigrant visa that is valid on the effective date of the proclamation.” The text does not impose any requirement that the foreign national enter pursuant to the qualifying visa stamp or in the same visa category.

**Is a foreign national who is in the U.S. on June 24, but who is not in possession of a valid visa on that date, subject to the proclamation if he or she departs the U.S. and applies for a visa in a restricted work visa category (i.e. H-1B, L-1, H-2B, J-1)?**

No. The proclamation applies only to a foreign national who is outside the U.S. on the effective date and who does not have a valid nonimmigrant visa on the effective date of the proclamation.

**If a foreign national is in the U.S. on June 24, and his or her visa stamp expires while the proclamation is in effect (i.e. after June 24 and before December 31), will the foreign national become subject to the proclamation if he or she departs the U.S. and applies for a visa in a restricted work visa category (i.e. H-1B, L-1, H-2B, J-1)?**

No. The proclamation applies only applies to a foreign national who does not have a valid nonimmigrant visa *on the effective date of the proclamation*.

## **ANALYSIS: FOREIGN WORKERS OUTSIDE THE U.S.**

**Can a foreign national who has a valid visa on June 24 but is outside the country on that date enter the U.S. on that same visa?**

Yes, so long as they are not subject to physical presence-based travel restrictions. If a person has a valid visa or other valid official travel document that allows travel to the U.S. on June 24, they are not subject to the proclamation. They may enter the U.S. using that same visa or travel document as long as it remains valid.

**Can a foreign national who has a valid visa on June 24 but is outside the country on that date apply for a work visa that is subject to the proclamation (e.g. H-1B, L-1, H-2B, J-1)?**

Yes, so long as they are not subject to physical presence-based travel restrictions. If a person has a valid visa or other valid official travel document that allows travel to the U.S. on June 24, they are not subject to the proclamation. They may enter the U.S. using that same visa or travel document as long as it remains valid, or they may apply for a new visa.

**ANALYSIS: ADVANCE PAROLE AND OTHER TRAVEL DOCUMENTS**

**What happens if a foreign national is issued an advance parole document before or after June 24?**

The proclamation does not apply to individuals who 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 June 24 “or issued on any date thereafter that permits him or her to travel to the United States and seek entry or admission.”

**IMMIGRANT VISA RESTRICTIONS: SCOPE AND EXEMPTIONS**

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

The proclamation relating to immigrant visas went into effect on April 23, and was initially in effect for 60 days. The June 22 proclamation extended the restrictions until December 31, 2020. The proclamation bars entry by individuals seeking to enter as immigrants who:

- Were outside the U.S. on the effective date of the proclamation (April 23);
- Did not have an immigrant visa that is valid on the effective date; and
- Did 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 immigrant visa 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 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;
- Members of the U.S. Armed Forces and their spouses and children;
- 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*

- Individuals applying for visas to enter the U.S. pursuant to the EB-5 Immigrant Investor Program.

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

The proclamation directed consular officers to determine in their discretion whether an applicant has established eligibility for an exemption, and required the DOS and DHS to establish procedures to implement the proclamation.

## **IMMIGRANT VISA RESTRICTIONS: PRACTICAL IMPACT**

#### **What was the practical impact of this proclamation on U.S. companies?**

The proclamation did not change the status quo, as most U.S. consulates were not offering routine visa services or issuing immigrant visas at the time it went into effect. Now that the restrictions have been extended until December 31, 2020, the impact will depend on when consulates begin to reopen. Once consulates are able to reopen and start issuing visas again, individuals who are subject to the proclamation will need to qualify for an exemption to obtain a new immigrant visa.



**Do the immigrant visa restrictions affect adjustment of status applicants or other USCIS adjudications?**

No. The restrictions are based on the authority to suspend “entry” and under U.S. immigration law, and 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.” The restrictions do 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 were outside the U.S. on the effective date and did not have a valid immigrant visa or other travel document as of the effective date.