

A Review of Immigration Changes in 2020



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By Kate Kalmykov, Nataliya Rymer, and Dima Al-Attar | December 2, 2020 | New Jersey Law Journal

There have been a large number of developments in the field of immigration in 2020. Some were measures implemented in light of the Coronavirus Disease (COVID-19) pandemic, and others were introduced by the Trump Administration as part of its immigration policies. Most, if not all of these developments, have had a profound effect on the field and practice of immigration law and, as the COVID-19 pandemic continues to present a health crisis across the world, further changes should be expected.

Embassy and Consulate Closures

In February 2020, the U.S. Department of State (DOS) announced closures of the U.S. Consular Posts around the world due to the COVID-19 pandemic. At that time, it was announced that while a certain amount of emergency services including U.S. citizen services were available, visa applications were not being processed. In June 2020, DOS announced that U.S. Consular Posts would begin to reopen based on both COVID-19 conditions in each specific country and the availability of staff. However, even for those Consular Posts that have re-opened since that time, appointments have been limited, and waits may be lengthy due to limited staff.

In light of all of these issues, many U.S. employers have asked employees to refrain from international travel—both due to COVID-19 related risks as well as issues with Consular operations. Instead of sending their foreign national employees to process for new visas outside of the U.S., as historically had been the preferred practice for a number of visa types, employers are opting to process most of their visa extensions in the U.S. This is to avoid the need for visa processing and international travel for their foreign national employees.

Presidential Proclamations

Since the beginning of this year, a number of processes and procedures have been changed via Presidential Proclamations, with stated purpose to address the various dangers caused by the COVID-19 pandemic. Specifically, President Trump issued a number of proclamations addressing U.S. entry and visa issuance, all of which continue to be in force. While each offers a number of exceptions, these are limited and are at the discretion of the Consulate or U.S. Customs and Border Protection, who review and adjudicate the related requests.

Presidential Proclamation 9984, signed in January 2020 and effective as of Feb. 2, 2020, suspended entry into the U.S. for those who were physically in the People's Republic of China (excluding Hong Kong and Macau) within 14 days prior to entering the United States. The proclamation provided for a number of exceptions, including those for U.S. citizens and green card holders, and their immediate relatives, such as spouses, parents, siblings and children. Presidential Proclamation 9992 became effective March 2, 2020, and applied to those who were physically present in the Islamic Republic of Iran within 14 days of attempted entry to the U.S., providing identical exceptions.

Subsequently, the president issued Proclamation 9993, which applied identical limitations on those aliens attempting to enter the U.S. within 14 days of presence in any of the 26 countries within the Schengen Region. The Schengen Region includes Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden and Switzerland. Identical exceptions were inscribed within the proclamation. Shortly thereafter, Presidential Proclamation 9996 applied identical limitations to those entering from United Kingdom and Ireland, once again providing for identical exceptions. No announcement regarding the expected sunset date of these proclamations has been made as of this date. Finally, Proclamation 10041 provided identical limitations for entry from Brazil, likewise providing identical exceptions.

President Trump also signed proclamations that affected entry for various aliens regardless of their presence prior to their attempted entry. Specifically, Proclamation 10014 suspended entry by individuals outside of the U.S. not in possession of immigrant visas as of April 23, 2020. However, the proclamation exempted a number of foreign nationals, including spouses and children of U.S. citizens, nurses, physicians, and others whose purpose for U.S. entry relates to the fight against the COVID-19 pandemic, and individuals in the immigrant investor (EB-5) category. While this proclamation was initially made valid through June 2020, it was subsequently extended until, at the earliest, Dec. 31, 2020. Effective June 24, 2020, Presidential Proclamation 10052 suspended entry of foreign nationals with H-1B and H-2B visas (and dependents), as well as L-1 and certain J-1 visas (and dependents). It applied to those outside of the U.S. without valid visas as of June 24, 2020, and provided a number of exemptions, which have continued to be expanded via announcements by the U.S. Department of State through the end of August 2020.

These proclamations, along with the limited consular operations as well as an extraordinary number of affected foreign nationals in need of various exemptions, have deeply affected consular processing and, in

turn, entry to the U.S. of many foreign nationals. No announcement has been made to date regarding sunseting or expanding Proclamations 10014 and 10052 after its current Dec. 31, 2020 expiration date.

Inadmissibility

USCIS has expanded its consideration of potential inadmissibility basis for foreign nationals based on its expansion to the “public charge” rule. While the Immigration and Nationality Act (INA) has a number of considerations pertaining to the determination of whether someone is admissible to the U.S. (or eligible for entry or grant of status such as a green card holder), USCIS has expanded these considerations to require extensive additional information and documents to demonstrate “self-sufficiency” as well as any usage of its expanded list of public benefits.

• Public Charge Rule

This is a highly contested rule that has been the subject of continuing and ongoing litigation. After a number of regional and nation-wide injunctions, the rule is currently enforceable. To comply, applicants for green cards are required to complete an additional form and submit voluminous additional documents in order to satisfy the requirements of this rule. Employers filing extensions or changes of visa status for their foreign national employees must have them attest to whether they have ever received a number of various local, state and federal benefits in each filing.

• Proposed Rule Regarding F-1 Foreign Students

In September 2020, the U.S. Department of Homeland Security (DHS) published a proposed rule outlining a major overhaul to the terms of visa status for F-1 foreign students. The proposed rule includes elimination of “duration of stay” validity for F-1 students in favor of imposing a maximum of four-year validity period, with only two-year validity for nationals of certain countries, thereafter requiring filings of permission to extend stay and studies. Additionally, it limits the number and types of programs into which foreign students may enroll. This proposed rule was available for comment, and DHS expects to review the comments and publish the final rule sometime next year.

Changes Affecting Wages for Foreign Nationals and H-1B Requirements

In October 2020, U.S. Department of Labor implemented, without allowing comment, a new rule raising dramatically levels of prevailing wages to be paid to foreign nationals in a number of work visa statuses as well as in connection with green card sponsorship. This rule is currently the subject of ongoing litigation.

DHS, for its part, has published a proposed rule making substantial changes to the H-1B work visa classification. These changes include limiting the very definition of specialty occupation—one for which an H-1B petition may be filed by an employer; revising the definition of who is or is not a U.S. employer; and providing expansive limitations for those filings where positions involve spending some or all of the time at a third-party work site. Separately, DHS has proposed to alter significantly the way in which petitions for new H-1B employment are adjudicated for each Government Fiscal Year. Historically, based on U.S. regulations and statute, USCIS has conducted a lottery for random selection of qualifying petitions. The agency has now proposed altering the lottery to give strongest preference to the petitions with the highest wages, and the lowest preference to with lower wages.

Fee Increases and Form Changes – The Final Rule

In Aug. 2020, the agency announced that that it would increase fees dramatically for most filing types as of Oct. 2, 2020. The agency further clarified that it would also release new forms associated with each of the affected filings prior to the effective date. Shortly prior to the effective date however, a federal judge granted a motion for preliminary injunction against this rule, which continues to be in effect as of today.

Conclusion

This year has seen a flurry of activity in the field of immigration, all of it affecting individuals and employers alike. It is important to continue to pay close attention as new developments are announced frequently and are often quite complex. Continuing regular communication with immigration counsel and remaining vigilant during this time will ease navigating these near constant changes.

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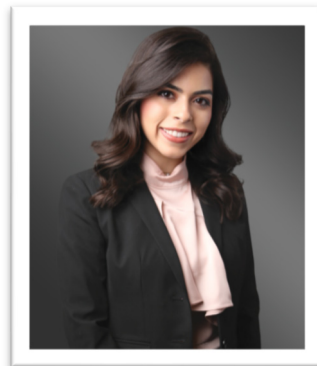
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