

Legal Update

Trump Order Limiting—or Eliminating—Non-Immigrant Visas Is on the Horizon

President Trump is expected to issue an executive order in the next several days either eliminating, or significantly limiting, the availability of non-immigrant visas in categories of substantial importance to US companies (H-1B visas for specialty occupation workers, L visas for intra-company assignees, and other related categories), as well as eliminating or substantially curtailing the Optional Practical Training (“OPT”) program which currently allows foreign students graduating from US university programs to work for one to three years¹ after their graduation. The order would extend and expand the President’s April 22, 2020, [“Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak,”](#) which suspended for 60 days the issuance of new immigrant visas to applicants who are outside the United States, and include a mandate for subsequent rulemaking to address a wide-ranging series of measures to restrict non-immigrant visas.

A. Expected New Proclamation

- **Bar on Entry for H-1B, L-1, H-2B, and J-1 Categories.** The proclamation would bar entry to the United States of certain visa holders in the H-1B, L-1, H-2B, and J-1 categories. The H-1B ban, if adopted, is expected to impact all beneficiaries of cap-subject H-1B petitions with start dates of October 1, 2020.² The L-1 ban may, in contrast, impact only L-1B visa holders, i.e., specialized knowledge workers, as opposed to L-1A visa holders, i.e., executives and managers. There is also some speculation that L-1s may not be included in the ban to reentry at all. Restrictions on entry of H-2B temporary non-agricultural workers would be expected to exempt those whose work is essential to the maintenance of the US food supply chain.³ With regard to J-1 exchange visitors, current reports anticipate that, at a minimum, the subcategories for summer work, camp counselor, intern, and trainee programs would likely be banned.
- **Exceptions for Essential Workers and Competitive Recruitment Efforts.** The new proclamation, like the April 22 order, is expected to incorporate a number of exceptions, to be implemented by agency guidance, including for COVID-19-related exemptions, such as health care and food supply exceptions. Exceptions in cases where competitive recruitment efforts have yielded no qualified American candidates may also be incorporated.

- **Mandate for Rulemaking.** In addition to the entry ban, the proclamation is expected to direct agency rulemaking to restrict a wide variety of visas, as discussed in more detail below.
- **Challenges to the President’s Authority.** Like the April order, the new proclamation is expected to rely heavily on the President’s authority under Sections 212(f) and 215 of the Immigration & Nationality Act (“INA”). Section 212(f) provides the President with broad-based authority to suspend a class or classes of foreign nationals based on a finding that their entry will be detrimental to the country.⁴ Section 215 authorizes the President to impose reasonable rules, regulations, and orders on the arrival and departure of foreign nationals.⁵ In this instance, the Secretaries of the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”), in consultation with the Secretary of State, engaged in a 30-day review required by the April proclamation to identify “measures appropriate to stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers.” The anticipated restrictions may be vulnerable to challenge on the ground that there is no factual basis for believing that they will be effective in furthering the President’s stated goals of protecting the US labor market. Lacking such predicate findings, a court may find the measures arbitrary, capricious, and, thus, unlawful under the Administrative Procedure Act (“APA”).

The President is expected to issue the new proclamation later this month, and as early as next week. The limitations on the entry of nonimmigrants being considered are expected to be temporary (90-180 days).

B. Subsequent Rulemaking

In addition to the ban on entry/reentry, the proclamation may include direction to DHS to engage in rulemaking to address the following issues. The APA typically requires publication of a proposed rule for notice and comment rather than a final rule that would have immediate effect, but that subject is still under debate.

- **H-1B.** The President is likely to order that DHS proceed with the “[Strengthening H-1B](#)” rulemaking that has been listed on the DHS Unified Agenda⁶ for the last three fiscal years. The rule is likely to include provisions that would redefine the employer-employee relationship and the term “specialty occupation” and change required wage levels. In addition, the following H-1B-related actions are expected:
 - Imposition of a surcharge on all H-1B visa applications, currently reported to be set at \$20,000 per visa application.⁷
 - Intra-agency action, by which DOL’s Bureau of Labor Statistics (“BLS”) would be charged with revising the prevailing wage determination calculation to bring it more in line with the local median wage and making other technical improvements.
 - Requiring employers that are seeking to hire H-1B workers that are outside of the country to certify that they have recruited for US workers who are able, willing, qualified, and available to fill the positions.
 - Imposing additional burdens on H-1B-dependent employers.⁸
 - Joint Employer Labor Condition Applications (“LCA”)s. H-1B rulemaking is expected to introduce the notion of a joint employer relationship by professional service firms and their clients pursuant to which both the petitioning professional services firm and the client must obtain a certified LCA from DOL.

- Provision addressing employers who hire at Level 1 wage levels. An earlier proposal to limit entry of new H-1B workers to those who will be paid the greater of the highest level wage (Level 4) or \$100,000 would appear to have been abandoned in favor of a new provision. This new provision would allow such Level 1 hiring only for a two-year increment, after which extension would be available only if a Level 2 wage were paid (and similar future advancement through occupational levels).
- **Elimination of H-4 Spouses' Right to Work.** DHS may be directed to finalize the 2017 proposed rule to rescind employment authorization currently available to the dependent spouse of an H-1B worker whose pursuit of a green card has reached the point of the employer's petition (Form I-140) having been approved or who has been approved for extension of H-1B status under AC21⁹ but for whom the unavailability of an immigrant visa number prevents the H-1B worker and their H-4 spouse from applying to have their status adjusted to lawful permanent resident.
- **OPT.** Rulemaking to rescind the STEM [OPT](#) regulation finalized in March 2016 would restrict post-completion OPT in all instances, including for STEM OPT, to solely a 12-month period, in lieu of the current maximum period of 36 months for eligible STEM students.¹⁰ Consideration is apparently also being given to limiting OPT to foreign students who graduated in the top 5-15 percent of their class.
- **Notice and Comment.** While these changes should be issued as notice and comment rulemaking, there is certainly a valid concern that the agencies could invoke the good cause exception to proceed to interim final rulemaking without notice and comment, although that rulemaking would be very susceptible to challenge.

The administration is reported to be considering, among other changes, rescission of employment authorization for asylees, refugees, and beneficiaries of Temporary Protected Status, which would be directly at odds with clear statutory provisions authorizing employment and thus subject to challenge as being outside the authority of the executive.

While the government's principals continue to meet to try to reach consensus, Mayer Brown will continue its efforts to develop a framework for challenge should the White House decide to proceed with any of the measures certain to prove harmful and costly to US employers. Indeed, the US business community is paying careful attention to the developments and directing their concerns to the White House through the US Chamber of Commerce and a *Compete America*-sponsored business sign-on letter that attracted support from 324 companies. The *Workforce Coalition* letter to President Trump, offering strong support of the "continued, uninterrupted operation of the H-2B program," was submitted on behalf of hundreds employers and trade associations at the state, regional, and national levels. With that level of interest by trade groups and their US employer members, court challenges to the measures are virtually inevitable.

For a heat map of countries which have travel, quarantine or health checks, or visa restrictions, and which travelers are impacted by those restrictions, see our [Global Traveler Navigator tool](#).

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And for any legal questions related to this pandemic, please contact the authors of this article or Mayer Brown’s COVID-19 Core Response Team at FW-SIG-COVID-19-Core-Response-Team@mayerbrown.com.

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Endnotes

- 1 OPT is generally available to allow F-1 visa holders to work in their field of specialty for one year after graduation, with extensions of up to three years available to students with a degree in a Science, Technology, Engineering or Mathematics (“STEM”) field.
- 2 On an annual basis, US Citizenship & Immigration Services (“USCIS”) engages in a random lottery selection of employer-sponsored H-1B candidates subject to the congressionally mandated cap of 65,000 H-1B visas (commonly known as the “regular cap”) and 20,000 additional beneficiaries who have earned a US master’s degree or higher (the “advanced degree exemption” from the regular cap).
- 3 A proposal to require new recruitment and labor certification for non-essential H-2B workers even after the ban is lifted was also included among the agency recommendations.
- 4 Section 212(f) provides the President with the authority to “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” whenever the President finds that such entry would be “detrimental to the interests of the United States” for “such period as he shall deem necessary.” 8 U.S.C. §1182(f).
- 5 Section 215(a)(1) provides, “Unless otherwise ordered by the President, it shall be unlawful - (1) for any alien to depart from or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe ...”
- 6 The Unified Agenda describes the “Strengthening H-1B” rule as follows:
 - *The Department of Homeland Security (DHS) will propose to revise the definition of specialty occupation to increase focus on obtaining the best and the brightest foreign nationals via the H-1B program, and revise the definition of employment and employer-employee relationship to better protect U.S. workers and wages. In addition, DHS will propose additional requirements designed to ensure employers pay appropriate wages to H-1B visa holders.*

- *The purpose of these changes is to ensure that H-1B visas are awarded only to individuals who will be working in a job which meets the statutory definition of specialty occupation. In addition, these changes are intended to ensure that the H-1B program supplements the U.S. workforce and strengthens U.S. worker protections.*
- 7 Earlier reports had projected the fee at \$75,000 to \$100,000.
 - 8 An employer is considered H-1B-dependent if it has 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; 26 to 50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or 51 or more full-time equivalent employees of whom 15 percent or more are H-1B nonimmigrant workers.
 - 9 American Competitiveness in the Twenty-first Century Act of 2000, as amended by the 21st Century Department of Justice Appropriations Authorization Act.
 - 10 OPT was implemented in 1992 as a form of temporary work authorization available to international students pursuing an academic degree in the United States. Initially, eligible students could receive up to 12 months of OPT employment authorization while remaining in the United States under student status. The regulation was amended in 2008 to include a 17-month extension of OPT employment authorization for students who earn a degree in STEM fields. The STEM extension was expanded to 24 months in March 2016, increasing the maximum period of OPT to 36 months for eligible STEM students.

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