Getting Your Key Employees Back to the U.S. under the "National Interest Exceptions" to Presidential Proclamations

A Conversation about Eligibility and Process

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What We’ll Cover in Today’s Program:

• Setting the Stage - Background and Context
• Visa vs. Entry Restrictions – what’s the difference?
• Exceptions, Exemptions, National Interest- what do they mean, and who do they include or exclude?
• Government’s latest announcements and impact on Employment Visa requests at Consular Posts
• Logistics and planning the request for exception
• Questions & Answers
Setting the Stage – Background and Context

• “Death by a Thousand Edicts”
  – Proclamations, Executive Orders, Memos, Policy Statements & Tweets
    – a never ending daily deluge

• Are you keeping up?
  – In the past 6 months alone, numerous additional updates due to COVID-19 and efforts to protect U.S. workers.
Setting the Stage – Background and Context

• Agencies affected:
  – DOS: Embassies and consulates
  – DHS:
    ▪ CPB - Ports of entry
    ▪ USCIS - Services within the U.S.

• Are the agencies talking to each other?
Setting the Stage - Regional COVID-19 Proclamation

• Entry Restrictions - applies regardless of visa status to individuals entering the U.S. from specific regions.

• Based on Geography:
  - Schengen Area, Iran, the UK, China, Brazil or Republic of Ireland

• Requiring 14-day quarantine in a “third country”

• What about U.S. persons?
  – Exceptions for U.S. Citizens, Lawful Permanent Residents, certain family members and other listed categories.
Setting the Stage - Presidential Proclamation
Labor Market Ban

• Presidential Proclamations:
  – Immigrant Visa Ban – P.P. 10014
  – IV Ban and new work visa ban – P.P. 10052
• Specific Visa Categories identified: H-1B, L-1, J-1, and H-2B
• WH efforts to block returning F-1 students from entering U.S.
  – Litigation victories in Federal Court
  – Limitation to the victories – New F-1 students starting new educational programs that are 100% virtual.
Exemption or Exception – What’s the Difference?

• Exemption = the Proclamation does not apply to you
  ▪ Regional COVID-19 Ban:
    - F-1 and J-1 students entering for an academic program
  ▪ Labor Market Ban:
    - Physical presence in U.S. on June 24, 2020

• Exception = the Proclamation applies to you and you must qualify under specific criteria to receive a waiver
  ▪ Regional COVID-19 Ban:
    - Humanitarian; COVID-19 mitigation
  ▪ Labor Market Ban:
    - Healthcare workers; critical infrastructure
Framework for Analysis

• Do you currently hold an unexpired visa stamp?
  – If yes, focus on the Regional COVID-19 Ban and look for exemptions
    ▪ If subject, consider traveling to 3rd country for 14 days or applying for Exception
      - If Exception required, check local Consulate or CBP guidance
  – If no, focus on the Labor Market Ban and look for exemptions
    ▪ If subject and an Exception is necessary, consider the following:
      - Have routine consular services resumed at the Embassy/Consulate?
      - If I need an emergency appointment, is there a basis for it?
      - If I can get an appointment, can I satisfy one of the Exceptions?
Deeper Dive – Labor Market Ban Exemptions

• Canadians: In most employment visa categories, Canadians are “visa exempt,” and eligible to enter at the Port of Entry (if “on the spot” adjudication is available) or present a previously approved USCIS I-797 Notice of Approval at the POE.

• H-1B1 Free Trade - Singapore/Chile Exempt

• Outstanding questions & emerging info from DOS administrative record release
  – Physical presence in U.S. on June 24, 2020
  – Unexpired visa stamp on June 24, 2020
Deeper Dive – Labor Market Ban Exceptions

• August 12th Announcement from DOS

• **Expanded** the list of exceptions for H-1B, L-1, J-1, and H-2Bs

• If Exception is granted, may obtain a visa and be permitted to enter the U.S. prior to December 31, 2020.

• Grant of Exception also means permission to “waive” the regional COVID-19 ban.
Who does this apply to? – Do We have an Answer?

• Key employees, executives and managers, job creators – different criteria apply based on visa category.

• Dependents may receive visas if the principal visa applicant receives the exception (H-4 or L-2, for example)

• “Mission Critical” – what does it mean?
  – to the consular post
    ▪ what are their scheduling priorities?
    ▪ how are you getting an interview?
  – to the company
Candidate Considerations for Exceptions

• Candidates and those yet to be on-boarded: has the employee already started working for your company in the U.S.? If not, no “track record.”

• Entry-level or junior employees with short tenure.

• Individuals whose presence in the U.S. is not truly crucial to the success of the enterprise.
“Critical Infrastructure Sectors”
(for H-1B and L-1 Discussion)

Chemical, communications, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, IT, nuclear reactors, transportation, and water systems.

Focus on H-1B
Exceptions may include:

• Health care professional or researcher working to alleviate the effects of COVID-19.
• Travel supported by a request from a U.S. government agency.
• Travel by applicants seeking to resume ongoing employment in the U.S. in same position with the same employer.
  – Checkbox on the I-129 should not be controlling
    ▪ Changes in worksite
    ▪ Changes due to COVID-19
Focus on H-1B (continued)

• Technical specialists, senior-level managers, and others whose travel is necessary to facilitate the economic recovery of the U.S.

• The Formula: At least 2 of these 5 factors:

(1) LCA certified during/after July 2020 --why is that significant?

(2) Significant and Unique Contributions to meet critical infrastructure need in a critical infrastructure sector. (Senior level placement or Unique & Significant)

(3) Wage – 15% above the Prevailing Wage

(4) Candidate Credentials: education, training, experience.

(5) Hardship to U.S. Employer
EXAMPLE FACT PATTERNS

- F-1 student is working on OPT, wants to travel to China for a few weeks, and then return to U.S.
- F-1 student left for the summer expecting to return in H-1B status from Brazil.
- H-1B employee has valid H-1B visa stamp, is currently in Germany, and wants to return to U.S. ASAP
- H-1B employee has been in the U.S. since March. Spouse is stuck abroad with no H-4 visa stamp and wishes to enter.
Focus on L-1A

**The Formula**: At least 2 of these 3 factors:

(1) Senior level executive or manager

(2) Has spent multiple years with the company overseas → substantial knowledge and expertise with the organization

(3) Will fill a crucial business need

- “New Office” L-1A beneficiaries do not qualify unless 2 of these 3 criteria apply AND the new office will directly or indirectly employ 5 or more U.S. workers.

- **Travel by applicants seeking to resume ongoing employment in the U.S. in same position with the same employer.**
Focus on L-1B
Exceptions may include:

• Health care professional or researcher working to alleviate effects of COVID-19.

• Travel supported by a request from a U.S. government agency.

• Travel by applicants seeking to resume ongoing employment in the U.S. in same position with the same employer.

• Travel as a technical expert or specialist meeting a critical infrastructure need.
L-1Bs, continued

The Formula:
All 3 of these criteria must be present:

(1) Significant and unique contributions to company.
(2) The specialized knowledge relates to critical infrastructure need.
(3) Applicant has spent multiple years with the company overseas.
Focus on J-1

Au Pair exceptions:

• Caring for a minor U.S. citizen, LPR, or nonimmigrant where special skills are required for child with particular needs (EX: medical, special ed, sign language). Child must be diagnosed by qualified medical professional.

• Where travel by the Au Pair prevents a USC, LPR, or other nonimmigrant from becoming a public health charge or ward of the state.

• Childcare services for a child whose parents are involved in medical care or research for people who have contracted COVID-19.

• An Exchange Program conducted pursuant to an agreement between a foreign government and any federal, state, or local U.S. government entity.
J-1s, continued

Interns and Trainees on U.S. government agency sponsor programs.

Specialized Teachers in “G-5” programs.

Other: Where the J-1 Exchange Visitor is involved in a program that fulfills critical and time-sensitive foreign policy objectives.
“OK, so I think we have a good case. How do we go about applying for the NIE?”

• Follow the instructions on the nearest U.S. Embassy or Consulate website (they’re not all the same) – May require sending a general email query to the post, e.g., to NIV[insert city where post is located]@state.gov

• Complete Form DS-160 and schedule an appointment (may be for months in advance -- take it anyway).

• Once online appointment is reserved, look for screen to request an emergency appointment – word the reason for requesting emergency appointment and NIE with care.
How do we go about applying for the NIE?” (Continued)

• Also concurrently reach out to the consular post to ask for an “emergency appointment” and NIE (request can be prepared by applicant, company, or outside attorney).

  – Attach evidence of eligibility (metrics on revenue and hiring expansion or contraction; connection to addressing critical infrastructure or COVID-19 challenges)

• Consider also using FAX transmittal in lieu of -- or in addition to -- email communications. Fax # is listed in Key Officers - US Department of State -- https://www.state.gov/wp-content/uploads/2019/10/Key-Officers.pdf

  – Address it to person listed in Key Officers as “CON” – Chief Consul

• Applicant should be “prepped” prior to visa appointment.
How do you know if the NIE has been approved?

In the context of a visa application:
How do you know if the NIE has been approved?

In the context of a FN with an existing valid visa.

Dear ALBERT EINSTEIN,

You have been granted a national interest exception to the travel restrictions.

Exceptions to the travel restrictions are valid only for a single entry and expire 30 days from the date your exception was approved (04-Aug-2020).

Please note that while you qualify for a National Interest Exception to the travel restrictions, you are still required to self-quarantine for 14 days upon arrival in the United States. See the following for more information: https://www.dhs.gov/news/2020/03/17/fact-sheet-dhs-notice-arrival-restrictions-china-iran-and-certain-countries-europe [gec01.safelinks.protection.outlook.com].

Before your travel to the United States, please visit the website: https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html [gec01.safelinks.protection.outlook.com]

We also encourage you to visit: https://www.coronavirus.gov/ [gec01.safelinks.protection.outlook.com]

Kind regards,

Visa Section

U.S. Embassy

EMBASSY OF THE UNITED STATES OF AMERICA

Berlin, Germany

Visa Section

[gec01.safelinks.protection.outlook.com]
What Should Employers be Doing Now?

• Consider your population of H-1B and L-1s (and H-2Bs and J-1s) who are currently “stuck” outside the U.S.

• Develop metrics around revenue and hiring expansion or contraction

• How would you apply these criteria?

• Do you have government contracts?

• You may not be in one of the critical infrastructure industries noted, but do you have key agreements or alliances with organizations in these sectors?

• Consider CBP Preclearance posts as an alternative.

Questions?