



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

A Conversation about Eligibility and Process

August 20, 2020

Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

“Seyfarth” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Speakers



Mahsa Aliaskari
Senior Counsel
Los Angeles



Dyann DelVecchio Hilbern
Partner
Boston



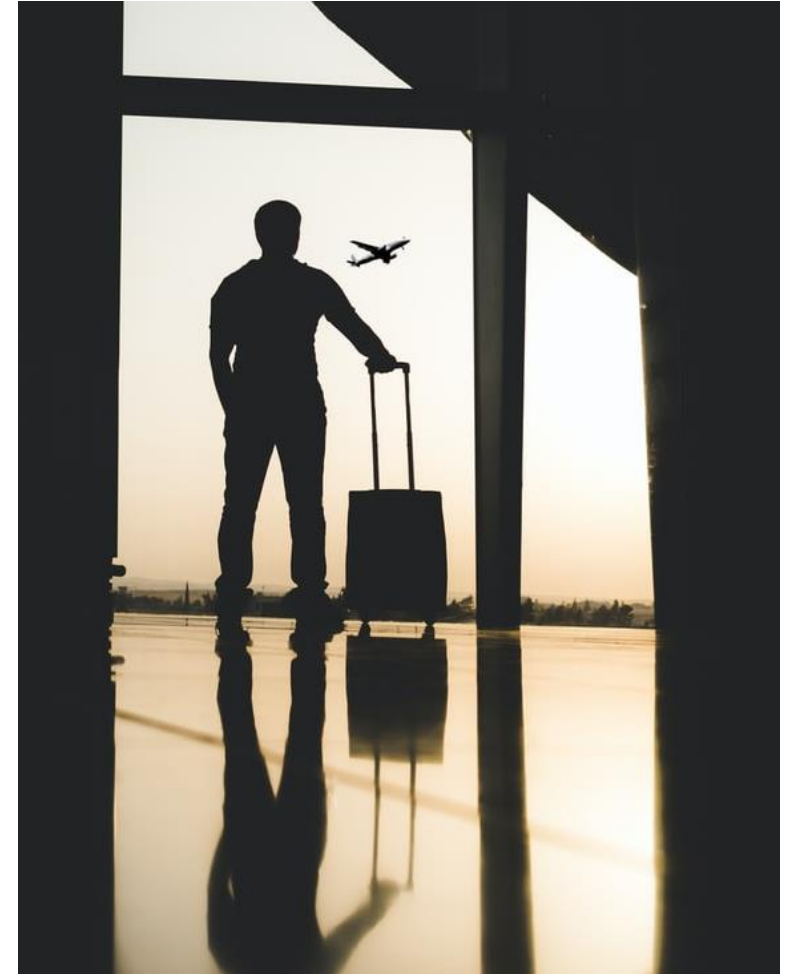
Gabe Mozes
Partner
Atlanta



Angelo Paparelli
Partner
Los Angeles

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.

Helpful DHS Resource: **“Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response,”** (May 19, 2020), accessible at:

https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers.pdf.



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](mailto: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:



Entries	Issue Date	Expiration Date
M	AUG2020	AUG2025
Annotation NIE TO PP ON NOVEL COVID & LABOR MARKET		

How do you know if the NIE has been approved?

In the context of a FN with an existing valid visa

EMBASSY OF THE UNITED STATES OF AMERICA

Berlin, Germany
Visa Section

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> [gcc01.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> [gcc01.safelinks.protection.outlook.com]

We also encourage you to visit: <https://www.coronavirus.gov/> [gcc01.safelinks.protection.outlook.com]

Kind regards,

Visa Section

U.S. Embassy Embassy Website:



SBU -PRIVACY OR PII

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.
- Plan for entry to the US at COVID-19 designated airport:
<https://www.dhs.gov/coronavirus/protecting-air-travelers-and-american-public>

Questions?

