

Inconsistent COVID Travel Bans Are Hurting The US

By **Angelo Paparelli** (March 11, 2021)

On Feb. 23, President Joe Biden declared: "America is back, the trans-Atlantic alliance is back." [1] Apparently, however, Antony Blinken, the newly installed U.S. secretary of state, didn't get the memo.

On March 2, he rescinded previous national interest determination regarding categories of travelers eligible for national interest exceptions under Presidential Proclamation No. 10143 relating to the Schengen Area of China, the United Kingdom and Ireland. [2]

As the U.S. Department of State's announcement of the rescission noted, Proclamation 10143, issued on Jan. 25, restricted the issuance of visas and U.S. entry to "certain technical experts and specialists, senior-level managers and executives, treaty-traders and investors, professional athletes, and their dependents."



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National interest exceptions for travelers from these trans-Atlantic countries had been granted — at times with relative ease at some U.S. embassies and consular posts — based on previous State Department guidance.

Under the prior guidance, executives, managers and specialists in the E-1 and E-2 (treaty traders and investors), H-1B (specialty occupation workers) and L-1 (intra-company transferees) visa categories, whose visit could be shown as likely to confer substantial economic benefit on the U.S., would often be approved. [3]

Now, however, as explained in this communique by the U.S. embassy in Rome, "[senior] executives and managers traveling to observe operations, hold regular meetings with U.S. clients, and/or for routine operational travel will no longer be considered eligible for a National Interest Exception." [4]

Inexplicably, Blinken's abrupt change in policy did not include Brazil or South Africa — two nations included in Presidential Proclamation 10143 — even though these countries are hotspots for particularly contagious variants of COVID-19. [5]

Nor does the new policy apply to travelers from China or Iran — countries typically considered U.S. adversaries. [6]

Also unexplained in the State Department announcement, students traveling from the Schengen Area, the U.K., or Ireland with valid F-1 academic or M-1 vocational visas do not need to contact an embassy or consulate to seek an individual national interest exception to travel, and students approved for F-1 or M-1 visas "will automatically be considered for a [national interest exception] to travel."

Equally mystifying and anomalous, on Feb. 24 Biden issued Presidential Proclamation 10149, which revoked a different Trump-era COVID-19-based proclamation — No. 10014 on "Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak" — asserting, in part, that the earlier proclamation "harms industries in the United States that utilize talent from around the world." [7]

Still more confounding, there has been no change to the COVID-19 labor market ban in Presidential Proclamation 10052, and the different, more-easily-attainable national interest exception standards for H-1B, L-1 and J-1 exchange visitor visa categories, as the Department of State reaffirmed them as recently as Feb. 24.[8]

In rescinding the "substantial economic benefit" national interest exception criteria applicable to travelers from the Schengen Area, U.K. and Ireland, Blinken now requires American consular officers to be satisfied that the applicant will provide vital support of critical infrastructure sectors, as defined by the U.S. Department of Homeland Security, or critical infrastructure-linked supply chain support.

According to the DHS Cybersecurity and Infrastructure Security Agency, there are "16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof." [9]

They include chemical, commercial facilities, communications, critical manufacturing, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, health care and public health, information technology, nuclear reactors, transportation and water/wastewater systems.

I understand that the State Department has internally offered examples of national interest exceptions that consular officers are allowed to approve on their own initiative under the new "vital support of critical infrastructure" standard. These would include airline personnel conducting essential safety training or mechanics essential to the purchase of aircraft, food industry specialists and specialized repair technicians for critical manufacturing.

Other examples would include multimillion-dollar business transactions involving U.S.-based, contractually required inspections as a condition to closing, or otherwise necessary to complete critical elements of the deal.

If, however, the preceding criteria cannot be satisfied, but a national-interest-exception applicant's travel from the Schengen Area, U.K. or Ireland would directly support the creation or retention of U.S. jobs, then the State Department's visa office would need to preapprove the exception before it could be issued.

Under this directly-support test, the proposed activity must take place on American soil, and would be time-sensitive in that it could not be postponed or conducted remotely — for example, where a U.S. manufacturing facility requires a noncitizen to repair an assembly-line malfunction that prevents American workers from performing their jobs, and would not merely involve a routine factory tour.

This flurry of ghoulish national-interest-exception standards — for pandemic-related proclamations issued, revoked, revised, rescinded, revived or resurrected — makes no sense from many policy perspectives.

Public Health

If the pandemic is truly a danger to the populace, why are students visa holders allowed to enter en masse? And why are Brazil and South Africa exempted from the new, tougher vital support/critical infrastructure national-interest-exception standard when the coronavirus threat is as great or greater in those countries than from trans-Atlantic sources?

Foreign Policy

Why are travelers from adversaries such as Iran and China eligible for national interest exceptions under a more lenient and explicit standard of proof while business executives, managers and essential personnel from our trans-Atlantic allies are required to satisfy a more stringent, nebulous standard, and can be denied if traveling to observe operations, hold regular meetings with U.S. clients, and/or for routine operational travel?

Economic Policy

Why is "harm [to] industries in the United States that utilize talent from around the world" a basis to rescind PP 10014 but not an equally compelling ground to eliminate visa and entry bans applicable to travelers from trans-Atlantic ally nations?

Rule of Law

Why is the State Department adjudicating and denying applications for entry to the U.S. when its consular officers only have authority to determine so-called visa ineligibilities and not admissibility to enter the country?

And why is U.S. Customs and Border Protection directing national-interest-exception requestors to American embassies and consular posts when Section 212(f) of the Immigration and Nationality Act — the asserted legal basis for all of these presidential proclamations — prescribes categories of individuals whose entry to the U.S. is suspended, given that CBP must determine an individual's admissibility to enter the country?

Interdepartmental Accountability

Why is the State Department using appropriated funds unlawfully under Title 31 of the U.S. Code, Section 1301(a), which states "appropriations shall be applied only to the objects for which the appropriations were made," by performing CBP-authorized functions?

Fortunately, we should know the answer to these questions no later than May 3. This is when the secretary of state, the U.S. attorney general and the secretary of homeland security are "required to review existing regulations, orders, guidance documents, policies, and any other similar agency actions ... that may be inconsistent with the policy" enunciated by Biden on Feb. 2 in his "Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans."^[10]

By this deadline, these cabinet officers must submit a plan to the president that will:

- Identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits, and make recommendations on how to remove these barriers, as appropriate and consistent with applicable law; and
- Identify any agency actions that fail to promote access to the legal immigration system ... and recommend steps, as appropriate and consistent with applicable law, to revise or rescind those agency actions.

I respectfully offer the hope that one of the barriers to remove in the secretaries' plan will be the seemingly senseless and irreconcilable sets of confusing and ambiguous national-interest-exception criteria that harm U.S. businesses, American workers, and our economy, and close our doors to allies while doing little in substance to protect us against the spread of COVID-19.

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[1] David E. Sanger, "Biden Declares 'America Is Back' on International Stage," N.Y. Times, Feb. 23, 2021, accessible here: <https://www.nytimes.com/live/2021/02/19/world/g7-meeting-munich-security-conference>.

[2] U.S. Department of State announcement, "National Interest Exceptions for Certain Travelers from the Schengen Area, United Kingdom, and Ireland," Mar. 2, 2021, accessible here: <https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exceptions-from-certain-travelers-from-the-schengen-area-uk-and-ireland.html>; "Proclamation on the Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease," Presidential Proclamation No. 10143, accessible here: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/proclamation-on-the-suspension-of-entry-as-immigrants-and-non-immigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease/>.

[3] For background see, Angelo A. Paparelli, blog post, "Pursuing a National Interest Exception to the Presidential Entry Bans on Economic Grounds — Not A Fool's Errand," accessible here: <https://www.bigimmigrationlawblog.com/2020/07/pursuing-a-national-interest-exception-to-the-presidential-entry-bans-on-economic-grounds-not-a-fools-errand/>; Seyfarth Shaw Business Immigration Group, slide deck, "Getting Your Key Employees Back to the U.S. under the National Interest Exceptions to Presidential Proclamations ~ A Conversation about Eligibility and Process," accessible here: https://www.seyfarth.com/dir_docs/publications/082020_getting-your-key-employees-into-the-us-under-the-national-interest-exceptions-to-pres-proclamations.pdf.

[4] Announcement, "Expansion of National Interest Exception Travel Students, Business Travelers, Investors, and Academics," U.S. Embassy (Rome), undated, accessible here: <https://it.usembassy.gov/wp-content/uploads/sites/67/210303-NIE-EN.pdf>.

[5] Manuela Andreoni, Ernesto Londoño and Letícia Casado, "Brazil's Covid Crisis Is a Warning to the Whole World, Scientists Say," N.Y. Times, Mar. 3, 2021, accessible here: <https://www.nytimes.com/2021/03/03/world/americas/Brazil-covid-variant.html>; Rachael Rettner, "South African coronavirus variant: All your questions answered," Live Science, Feb. 1, 2021, accessible here: <https://www.livescience.com/south-african-coronavirus-variant-faq.html>.

[6] Presidential Proclamation No. 9984, "Suspension of Entry as Immigrants and

Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures To Address This Risk," Feb. 5, 2020, accessible here: <https://www.federalregister.gov/documents/2020/02/05/2020-02424/suspension-of-entry-as-immigrants-and-nonimmigrants-of-persons-who-pose-a-risk-of-transmitting-2019>; Presidential Proclamation No. 9992, "Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus," Mar. 4, 2020, accessible here: <https://www.federalregister.gov/documents/2020/03/04/2020-04595/suspension-of-entry-as-immigrants-and-nonimmigrants-of-certain-additional-persons-who-pose-a-risk-of>.

[7] Presidential Proclamation No. 10149, "Proclamation 10149 of Feb. 24, 2021 Revoking Proclamation 10014," Feb. 24, 2021, accessible here: <https://www.federalregister.gov/documents/2021/03/01/2021-04279/revoking-proclamation-10014>; Presidential Proclamation No. 10014, "Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak," Apr. 27, 2020, accessible here: <https://www.federalregister.gov/documents/2020/04/27/2020-09068/suspension-of-entry-of-immigrants-who-present-a-risk-to-the-united-states-labor-market-during-the>.

[8] Presidential Proclamation No. 10052, "Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak," Jun. 25, 2020, accessible here: <https://www.federalregister.gov/documents/2020/06/25/2020-13888/suspension-of-entry-of-immigrants-and-nonimmigrants-who-present-a-risk-to-the-united-states-labor>; U.S. Department of State announcement, "National Interest Exceptions to Presidential Proclamation 10052 Suspending the Entry of Nonimmigrants Presenting a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak," Feb. 24, 2021, accessible here: <https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exceptions-to-presidential-proclamation-10052-suspending-the-entry-of-nonimmigrants-presenting-a-risk-to-the-united-states-labor-market-during-the-economic-recovery-following-the-2019-novel-coronavirus-outbreak.html>.

[9] Web page, "Critical Infrastructure Sectors," Cybersecurity and Infrastructure Security Agency, U.S. Department of Homeland Security, accessible here: <https://www.cisa.gov/critical-infrastructure-sectors>.

[10] "Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans," Feb. 2, 2021, accessible here: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/>.