

Breaking the Blockade

Strategies for Essential Foreign Workers

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Agenda



- Why has immigration eligibility for high-skilled workers become so complex?
- National Interest Exemptions to COVID-19 Visa Suspensions
- Standards for National Interest Exemptions
- Status of U.S. Consulates Issuing Visas
- U.S. Customs and Border Patrol Restrictions
- Q&A

**Why has immigration
eligibility for high-skilled
workers become so complex?**

Attenuated Immigration Process

- Establishing a basis for immigration: the petition process
- Getting a visa: consular operations/closures, country restrictions, national interest exemptions, consular discretion

Attenuated Immigration Process

- Role of carriers: exposure and growing role in the process
- Navigating CBP at the border
- Possible quarantine requirements

Trends in H-1B as well as Other Nonimmigrant Visa Petition Process

Adjudication Trends for Nonimmigrant Petitions

- Issuance of Requests for Evidence:
 - H-1B: around 40%
 - L-1: around 54%
 - O-1: around 26%



Adjudication Trends for Nonimmigrant Petitions

- Denial rates:
 - H-1B: around 21% for new petitions / 12% for extensions
 - Denials rate of over 30% for IT providers at remote locations
 - L-1: around 25%
 - O-1: around 10%



Adjudication Trends for Nonimmigrant Petitions

- Reasons cited for H-1B denials:
 - Position does not qualify as “specialty occupation”
 - Mismatch of applicant’s background to job requirements
 - Challenges to LCA classification
 - Challenges to employer-employee relationship
 - Role of salary as reflection of position and individual capabilities

Adjudication Trends for Nonimmigrant Petitions

- Reasons cited for L-1 denials:
 - Challenges to “specialized knowledge” (reversion to proprietary knowledge standard)
 - New office situation: standard of “doing business”
 - Challenges to definition of “executive” and “manager”

Adjudication Trends for Nonimmigrant Petitions

- Structural issues to denial/RFE spikes
 - Corollary of Buy American Hire American
 - Increase in current unemployment rate (1:1 displacement)
 - Role of discretion
 - Retraction of “deference policy” (payback to Obama adjudication standards)

National Interest Exemptions to COVID-19 Visa Suspensions

National Interest Exemptions to COVID-19 Visa Suspensions

- Overview of suspensions since COVID-19
- Exemptions described in Proclamations
- Stated purpose of Proclamations: protect the U.S. worker during Recovery
- National Association of Manufacturers et al. v. U.S. Department of Homeland Security

Exemptions Clarified in Department of State Announcements

- **July 10** – National Interest Exceptions for Certain Travelers from the Schengen Area, United Kingdom and Ireland
- **August 12** – exemptions for H-1B, H-2B, ESTA, L-1B/A, H-4, L-2 and J-2 applicants

August DOS Guidance

- A “non-exclusive list of the types of travel that may be considered”
- General process:
 - Visa required: follow procedures necessary to request an emergency appointment; in request, provide specific details as to eligibility for an exception
 - Visa exempt (ESTA): check website of nearest consulate for instructions on requesting an exemption

Standards for National Interest Exemptions: Who Needs Them and Why?

Standards for National Interest Exemptions

- Different criteria for each eligible visa type
- Themes present in criteria: protection of U.S. worker but also recognition that certain efforts critical to economic recovery and U.S. health
 - Standards articulated = not ominous, but plenty of room for discretion
 - Application of standards in practice = chaos!

H-2Bs

H-2B Temp Non-Ag Workers

- Criteria for NIE
- Process to apply at consular post
- Differing consulate practices
- Suggested documentation

H-1Bs

H-1B Specialty Occupation

- Criteria for NIE
- Process to apply at consular post
- Differing consulate practices
- Suggested documentation

ESTA (Visa Waiver Program)

ESTA

- Criteria for NIE
- Process to apply – DOS = consular post but what about CBP?
- Confusion
- Suggested documentation

L-1s

L-1 Exceptions

- Key – TNs excluded from visa suspension, though still subject to travel restrictions generally (i.e. Canada)
- L-1A and L-1B have different criteria to establish exception



L-1 Exceptions



- L-1A
 - Travel as public health/healthcare > **COVID-19** (even secondary effects)
 - US Agency request (foreign policy initiatives, treaty, contract) > think military or IT infrastructure
 - Resumption of ongoing employment! Same employer, same visa classification > show financial hardship

L-1 Exceptions

- L-1A, cont.
 - Senior executive/manager filing critical business need (chemical, communications, defense, food & ag, healthcare, technology, transportation, etc.) and meets 2/3 of the following:
 - Senior level executive/manager
 - Spent multiple years overseas
 - Filling critical business need for company meeting critical infrastructure need
 - NO opening offices

L-1 Exceptions

- L-1B
 - Public health/healthcare professional (COVID)
 - US agency
 - Resumption of ongoing employment

L-1 Exceptions



- L-1B, cont.
 - Travel as technical expert/specialist meeting critical infrastructure need all three:
 - Applicant's proposed job duties/knowledge will provide significant and unique contributions
 - Specialized knowledge related to critical infrastructure
 - Applicant has spent multiple years with the company overseas and has knowledge which can only be replicated with extensive training/financial hardship

J-1s: Those Applying from Places Where Direct Travel to the U.S. has Been Banned

J-1s

- Important update: proposed regulation to abandon D/S designation and instead grant status on year-to-year basis
 - Implications and challenges
 - Cross-currents between USCIS and Department of State
 - Relevance to expansion of premium processing

J-1s

- Existing holders of visas
- Expanded presumption of NIE for student/training-oriented programs or care programs

Status of U.S. Consulates in Issuing Visas

Status of U.S. Consulates



- Most consulates limited to USC services, slowly reopening
- Third-country consular processing – Mexico (Canada and EU dubious)
- Different processes for each consulate; disparate treatment for consulates within country

Status of U.S. Consulates

- **Mexico** – each consulate scheduling wildly different dates (next week, next year)
- **Canada** – pre-approval process to establish essential work
- **UK** – pre-approval process to establish exception (NIE)



U.S. Customs and Border Protection Restrictions and the Northern Border

Travel to Canada from the U.S.

- Fluid situation/requires updates
- Allowed to travel: Canadian citizens, dual nationals, permanent residence, although subject to quarantine requirement

Travel to Canada from the U.S.

- All others:
 - Need quarantine plan (14-day period)
 - Essential (non-discretionary) purpose
 - Travel directly from U.S.
 - Can cut short quarantine period if directly departing country (Order in Council issued under Section 58 of the Quarantine Act)

Travel from Canada to the U.S.

- Land border crossing:
 - Essential (non-discretionary) purposes
 - In place through end of year
 - Quarantine as a state matter
- Contrast to airline travel policies

Questions

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