



Business Immigration in the COVID-19 Era: Confronting the Current Challenges

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U.S. and Canada

Canadian Workers in the United States



- U.S. northern and southern border closures extended to October 21.
- Employers seeking to hire Canadian nationals should sponsor TN visas (TN is not a category affected by the Presidential Proclamations).
- Foreign nationals must show that the work is essential (in the U.S. national interest, related to health care, etc.)
- Canadian nationals can submit TN applications at a Class A Point of Entry or at a designated pre-clearance/pre-flight inspection station.
- The border closure is intended to limit the spread of COVID-19 and is not a visa-based restriction: Canadian nationals who would like to come to the U.S. through a land port of entry contact the CBP at their land Port of Entry (PoE) to determine how their officers deem what is and is not “essential travel.”

Timeline:

Trump Administration Proclamations/Actions Currently In Effect

- 1 Buy American, Hire American EO (April 17, 2017)
- 2 Travel Bans (Sept. 24, 2017 & Jan. 21, 2020)
- 3 Restricts entry of immigrants and nonimmigrants from Iran (Feb. 29, 2020)
- 4 Restricts entry of immigrants and nonimmigrants from Europe (Schengen Area) and UK /Ireland (March 11 & 14, 2020)
- 5 Closure of northern & southern borders (March 20, 2020, extended until October 21)
- 6 Restricts entry into the U.S. of certain categories of immigrants (April 22, 2020 extended until December 31 unless renewed)
- 7 Restricts entry into the U.S. of immigrants and nonimmigrants from Brazil (May 24, 2020)
- 8 Restricts the entry into the U.S. of certain students and researchers from China (May 29, 2020)
- 9 Restricts the entry into the U.S. of certain categories of non-immigrants (H-1B, H-2B, L-1, and J), and extension of the prior restriction of entry into the U.S. of certain categories of immigrants (June 22, 2020, expires December 31 unless renewed.)
Greatest Impact on Michigan/Detroit area businesses
- 10 Directs federal agencies to contract with those who prioritize the hiring of U.S. citizens and green card holders over foreign workers on contract positions (Aug. 3, 2020)

Timeline:

Trump Administration Proclamations/Actions Currently In Effect



- The proclamations restricting foreign nationals from entering the U.S. on nonimmigrant or immigrant visas are **set to expire on December 31**, unless the President chooses to renew them.
- With respect to some of the country-specific proclamations restricting travel to those foreign nationals physically present in those countries, **these proclamations are still in effect until December 31, 2020**.
- If a foreign national from one of the country-specific proclamations (U.K., China, Schengen Area of Europe, Iran, Brazil, etc.), restricting travel is able to travel to the U.S., **these foreign nationals are no longer limited to enter the U.S. at certain designated ports of entry by air as of September 15, 2020**, as had been previously required.

Presidential Proclamations – Long Term Projections

Second Trump Administration v. Biden Administration

- Maintain or possibly expand proclamations restricting entry into the U.S. of foreign nationals holding specific types of visas.
- Piecemeal exceptions to the restrictions on an ad-hoc basis.
- Move U.S. immigration into a merit-based system.
- Maintain current practices of immigration enforcement.



- Rescind Trump Administration's discriminatory travel and immigration bans.
- End the freeze on Green Cards for new immigrants.
- Award visas for permanent, employment-based immigration in a way that is responsive to labor market needs.
- Humane immigration enforcement mechanisms that are more consistent with American values.

Presidential Proclamation 10052: Managing Visa Expirations for Foreign Nationals in Affected Categories



- Proclamation 10052 (issued June 22, 2020): Suspends the issuance of foreign nationals seeking to enter the United States who are under the following visa categories: **H-1B** (specialty occupation workers); **H-2B** (seasonal workers); **J** (select category of students, researchers) to; and **L** (intracompany transferees).
- Travelers not in one of the affected categories may still enter the U.S. if they have a valid visa or travel document. Examples: B-1/B-2 (business traveler/business visitor), O-1 (extraordinary ability).
- In July 2020, Dept. of State has announced phased-in resumption on a post-by-post basis. For foreign nationals whose visas are soon to expire and are outside the U.S., we recommend that they contact the U.S. embassy/consulate to which they wish to apply to check on the current status of visa processing.
- Another option for foreign nationals outside of the U.S., who are restricted from entering the U.S. due to a presidential proclamation, is to apply for a **National Interest Exemption (NIE)**. (Next slide)
- For foreign nationals whose visas are soon to expire and are inside the U.S., we advise that they do not leave the U.S. Instead, they should file a petition with the USCIS to extend their nonimmigrant status. Foreign nationals who are pursuing extensions of status within the U.S. for nonimmigrant category that authorizes employment, may work up to 240 days while the extension petition is pending.

Presidential Proclamation 10052:

National Interest Exceptions (NIEs) for Nonimmigrant Visas

National Interest Exceptions (NIE) determined by US Embassy/Consulate based upon whether:

- The work or activity is related to healthcare or research design to alleviate COVID-19 (**H-1B, L-1A, L-1B only**);
- The work or activity is related to a U.S. government request to meet critical foreign policy objectives (**H-1B, L-1A, L-1B only**);
- The work or activity is necessary to facilitate U.S. economic recovery if 1) foreign national was previously employed/trained by petitioning U.S. employer; 2) foreign national is traveling to U.S. based on temporary labor certification; and 3) visa denial will cause employer immediate hardship (**H-2B only**);
- The work or activity entails resuming ongoing employment in the U.S. in the same position with the same employers in the same visa classification, and forcing the replacement of the foreign national employee would cause undue hardship;
- The work or activity is technical or managerial in nature and will help facilitate U.S. economic recovery – subject to specific criteria (**H-1B only**);
- The foreign national is a senior level executive or manager filling a critical business need or critical infrastructure need of the employers – subject to specific criteria (**L-1A only**);
- The work or activity involves a technical expert or specialist meeting a critical infrastructure need – subject to specific criteria (**L-1B only**);
- **J-1 specific criteria** include caring for a minor U.S. citizen or Green Card holder (au pairs); providing child care for parents involved in providing COVID-related medical care; the activity prevents a U.S. citizen, Green Card holder, or other nonimmigrant from becoming a public charge; involves an exchange programs; or involves interns or trainees on U.S. government agency sponsored programs.

Presidential Proclamation 10052: Applying for a National Interest Exception



- The foreign national would submit electronically the Form DS 160 (Nonimmigrant Visa Application) to the U.S. Department of State and select a date for a visa appointment.
- The foreign national will then be given an opportunity to request an emergency visa appointment and would need to indicate the basis for the emergency visa.
- The embassy or consulate may grant the request for an earlier or emergency visa appointment.
- At the visa appointment, the foreign national would present his or her request for an NIE to the consular official.
- The foreign national will need to bring a signed statement confirming the work or activity to be engaged is in the U.S. national interest. Documentation supporting the NIE request should also be brought to the visa appointment. Consular officials have been given broad discretion to grant NIE requests as part of the visa application process.

Beginning October 2 USCIS Fees Take Effect



- Initially proposed in November 2019, the new USCIS filing fees will go into effect on October 2, 2020, and broadly constitute a 20% increase over the current USCIS filing fees.
- This dramatic increase changes established USCIS practice of maintaining reasonable filing fees for petitions so that cost was no barrier to obtaining an immigration benefit. Instead, this is a clear step toward a “beneficiary pays” approach.
- The intention of the U.S. government is very clear, they wish to make the fees so costly that U.S. businesses will only petition for a minimal number of skilled foreign workers.

Beginning October 2, 2020: USCIS Fee Increases Take Effect

Immigration Benefit Request	Current Fee	Final Fee	Change	Percent Change
Form I-129 (Petition for a Nonimmigrant Worker (H-1B; H-1B1))	\$460.00	\$555.00	\$95.00	21%
Form I-129 (Petition for a Nonimmigrant Worker (L-1))	\$460.00	\$805.00	\$345.00	75%
Form I-129 (Petition for a Nonimmigrant Worker (TN))	\$460.00	\$695.00	\$235.00	51%
Form I-129 (Petition for a Nonimmigrant Worker (E-1; E-2; or E-3))	\$460.00	\$695.00	\$235.00	51%
Form I-129 (Petition for a Nonimmigrant Worker (H-2B))	\$460.00	\$715.00	\$255.00	55%
Form I-140 (Immigrant Petition for Alien Worker)	\$700.00	\$555.00	-\$145.00	-21%

Fees with the greatest impact on Michigan and Detroit area businesses' talent mobility objectives.

Beginning October 2, 2020:

Recent Changes: Additional Changes to USCIS Fees and Processes



- **USCIS Premium Processing Service Will Take Longer:** Time for USCIS examiners to adjudicate a petitions extended from 15 calendar days to **15 business days**.
- **USICS Premium Processing Fee May Be Increased Annually:** USCIS is now allowed to increase the Premium Processing filing fee at its discretion without going through the rulemaking process.
- **Limits Beneficiaries:** The new fee rule limits the number of named beneficiaries to 25 that may be included on a single petition for H-2A, H-2B, H-3, O-2, P, Q, E, and TN workers.
- **PL 113-114 Fee to Apply to Initial H-1B and L-1 Filings and H-1B and L-1 Extension of Stay Filings:** U.S. employers that employ 50 or more workers, with 50% or more of their workers in the U.S. in H-1B or L-1 status, are currently required to pay an extra filing fee of \$4,000.00 (H-1B) or \$4,500.00 (L-1) when filing an initial petition. The new filing fee rule now requires the PL 113-114 filing fee to be paid not only with the initial H-1B or L-1 petition filing for the foreign national, but **now requires this filing fee to be paid when the U.S. employer is subsequently extending the status of the foreign national.**

Current Challenges

Proposed Regulatory Changes to the H-1B Program

September 2020: Trump Administration Proposes Two Major Regulatory Changes

Strengthening the H-1B Nonimmigrant Visa Classification Program (Proposed USCIS Rule Change)

- The specific language of the proposed rule change has not been made available to the public.
- Proposes to revise the definition of *specialty occupation* in order to “increase focus on obtaining the best and brightest foreign nationals”;
- Proposes to revise the definitions of *employment and employer-employee relationship* to “better protect U.S. workers and wages”;
- Proposes “additional requirements to ensure employers pay appropriate wages to H-1B visa holders: could restrict the ability of employers to sponsor certain individuals for H-1B category.

Restructuring of H-1B, H-1B1, E-3 and PERM Wage Levels (Proposed DOL Rule Change)

- The specific language of the proposed rule change has not been made available to the public.
- Expected that the rule will tighten wage criteria, increase wage levels and enhance oversight and enforcement.

Current Challenges

Proposed DHS Changes to Biometric Testing



September 3, 2020: Dept. of Homeland Security (DHS) issued a Notice of Proposed Rulemaking that would expand the scope of its biometric testing on immigrants and their families.

- Authorizes expanded use of biometrics beyond background checks to include identity verification, secure document production, and records management.
- Any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request, including United States citizens, must appear for biometrics collection without regard to age unless DHS waives or exempts the biometrics requirement.
- Enables the DHS to use facial, iris, and voice recognition technologies.
- Enables the DHS to collect DNA from migrant families in custody to verify the genetic relationship of family members.



COVID-19: Confronting the Current Challenges

Concluding Recommendations

- Employers should move quickly with petition and application filings before increased fees take effect on October 2.
- Employers should expect longer processing times for Premium Processing cases.
- Employers should check the expiration dates of their H-1B and L-1 employees and file extension of stays before the October 2, to avoid paying the additional filing fee of \$4,000 (H-1B) and \$4,500 (L-1).
- Foreign employees within the U.S. and whose visas are near to expiring should not leave the U.S. but file a petition for extension of status.
- Employers should plan budgets accordingly, especially when sponsoring nonimmigrant visas or extension of stays.
- Employers should factor in increased time for petitions and applications to be adjudicated by the immigration authorities.
- Employers should avoid having their foreign nationals travel internationally due to the limited number of consular services.
- Consider immigration visa categories not affected by the proclamations including O-1 (extraordinary ability), B-1, B-2, etc.



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