

Immigration Update: The Invisible Wall

Elaine Kimbrell
Managing Partner

ekimbrell@david-ware.com

Samantha Hechtman
Senior Associate

shechtman@david-ware.com

504-830-5900

WARE IMMIGRATION

Metairie, LA - Denver, CO - Seattle, WA



Introduction – Polling Question 1



POLLING

Phased Reopening of USCIS and Consular Posts

- USCIS Field Offices began reopening to the public on June 4, 2020
- New COVID-19 restrictions are in place for anyone entering a USCIS facility
 - Only applicants, attorneys, and interpreters. Face masks required. Attorneys can now appear by telephone.
- Prioritizing naturalization cases and are slowly resuming biometrics services
- Most consular posts remain closed except for emergency services for U.S. citizens
- Consular posts are reopening on a case by case basis depending on the local situation



Travel Bans – Presidential Proclamations

- PP 10014 – April 22, 2020 – bans certain immigrants from entering the US for 60 days, does not apply to the following:
 - Foreign nationals with valid visas
 - Permanent residents
 - Healthcare workers/researchers working to fight COVID 19
 - EB-5 investors
 - Spouse of US Citizens
 - Children of US Citizens



Travel Bans – Executive Orders/Presidential Proclamations

- PP 10052 - June 22, 2020 – expires December 31, 2020 and suspends entry of the following nonimmigrants:
 - (a) an H-1B or H-2B visa, and any alien accompanying or following to join such alien;
 - (b) a J visa, to the extent the alien is participating in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and any alien accompanying or following to join such alien; and
 - (c) an L visa, and any alien accompanying or following to join such alien.



Travel Bans – Executive Orders/Presidential Proclamations

- PP 10052 applies only to any foreign national who:
 - (i) is outside the United States on the effective date of this proclamation;
 - (ii) does not have a nonimmigrant visa that is valid on the effective date of this proclamation; and
 - (iii) does not have an official travel document other than a visa that is valid on the effective date of this proclamation or issued on any date thereafter that permits him or her to travel to the United States and seek entry or admission.
- The suspension and limitation on entry does not apply to:
 - (i) any lawful permanent resident of the United States;
 - (ii) Spouses or children of United States citizens;
 - (iii) any alien seeking to enter the United States to provide temporary labor or services essential to the United States food supply chain; and
 - (iv) any alien whose entry would be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.



Travel Bans – Executive Orders/Presidential Proclamations

- PP – bans entry on entrants from 26 Schengen Area countries + UK, Ireland
- Restricts and suspends the entry of immigrants or nonimmigrants, who were physically present within the Schengen Area during the 14-day period preceding their entry or attempted entry into the United States.
- Does not apply to:
 - US Citizens
 - Family based immigrants
 - Government officials
 - Those whose entry would benefit the US national interest



Travel Bans – Executive Orders/Presidential Proclamations

- PP 9996 issued May 24, 2020 - bans entry on entrants from Brazil
- Restricts and suspends the entry of immigrants or nonimmigrants, who were physically present in Brazil during the 14-day period preceding their entry or attempted entry into the United States.
- Does not apply to:
 - US Citizens
 - Family based immigrants
 - Government officials
 - Those whose entry would benefit the US national interest

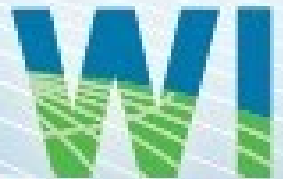


Travel Bans – National Interest Exceptions

- Must first be approved for an emergency appointment request and a final determination regarding visa eligibility will be made at the time of visa interview.
- Fall within one of the exceptions including Critical Infrastructure Area



Critical Infrastructure?



National Interest Exception – H1Bs

- For travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit (e.g. cancer or communicable disease research).
- Travel supported by a request from a U.S. government agency or entity to meet critical U.S. foreign policy objectives or to satisfy treaty or contractual obligations.
- Travel by applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification.
- Travel by technical specialists, senior level managers, and other workers whose travel is necessary to facilitate the immediate and continued economic recovery of the United States. Consular officers may determine that an H-1B applicant falls into this category when at least two of the following five indicators are present:
 - Applications filed after July 2020
 - Employee will provide significant and unique contributions to an employer meeting a critical infrastructure need
 - Wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage rate by at least 15 percent
 - H-1B applicant's education, training and/or experience demonstrate unusual expertise
 - Denial of the visa pursuant to P.P. 10052 will cause financial hardship to the U.S. employer.



National Interest Exception – L-1As

- Travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit.
- Travel based on a request from a U.S. government agency or entity to meet critical foreign policy objectives or satisfy treaty or contractual obligations.
- Travel by applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification.
- Travel by a senior level executive or manager filling a critical business need of an employer meeting a critical infrastructure need
- An L-1A applicant falls into this category when at least two of the following three indicators are present AND the L-1A applicant is not seeking to establish a new office in the United States:
 1. Will be a senior-level executive or manager;
 2. Has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship; or
 3. Will fill a critical business need for a company meeting a critical infrastructure need.



National Interest Exception – L-1Bs

- Travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit.
- Travel based on a request from a U.S. government agency or entity to meet critical foreign policy objectives or satisfy treaty or contractual obligations.
- Travel by applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification.
- Travel as a technical expert or specialist meeting a critical infrastructure need. The consular officer may determine that an L-1B applicant falls into this category if all three of the following indicators are present:
 1. The applicant's proposed job duties and specialized knowledge indicate the individual will provide significant and unique contributions to the petitioning company;
 2. The applicant's specialized knowledge is specifically related to a critical infrastructure need; AND
 3. The applicant has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship.



National Interest Exception – Schengen/UK/Ireland

- Certain business travelers, investors, treaty traders, academics, and students may qualify for national interest exceptions under Presidential Proclamations (PPs) 9993 (Schengen Area) and 9996 (United Kingdom and Ireland).
- Students traveling from the Schengen Area, the UK, and Ireland with valid F-1 and M-1 visas may enter
- Students seeking to apply for new F-1 or M-1 visas should check the status of visa services at the nearest embassy or consulate; those applicants who are found to be otherwise qualified for an F-1 or M-1 visa will automatically be considered for a national interest exception to travel.
- Business travelers, investors, academics, J-1 students, and treaty traders who have a valid visa or ESTA authorization that was issued prior to PP 9993 or 9996's effective date or who are seeking to apply for a visa, and believe they may qualify for a national interest exception should contact the nearest U.S. embassy or consulate before traveling.



Polling Question 2

- What is a Presidential Proclamation?



POLLING

H1B Trends

- New round of cap cases selected on August 14
- Buy American & Hire American (BAHA)
 - Signed by Pres. Trump on 4/18/2017
 - Seeks to create higher wages and employment rates for U.S. workers, protect their economic interests by rigorously enforcing and administering our immigration laws.
 - Directs DHS, in coordination with other agencies, to advance policies to help ensure H-1B visas are awarded to the most skilled or highest-paid beneficiaries.
 - H-1B fraud and abuse email
 - More site visits



H1B Trends

- H-1B Denial and RFE Rates at All-Time Highs
 - Denial rates for H-1Bs for Initial Employment - **6%** in FY 2015 to **32%** in the first quarter of FY 2019
 - Denial rates for H-1B Extensions - **3%** in FY 2015 to **18%** in the first quarter of FY 2019
 - RFEs Rates for all H-1Bs – **22.3%** in FY 2015 to **60%** in the first quarter of FY 2019
 - *Source: National Foundation for American Policy (NFAP) analysis of USCIS data in the H-1B Employer Data Hub.*



H1B Trends – Requests for Evidence

1. Specialty Occupation
2. Employer-Employee Relationship
3. Availability of Work (Off-site)
4. Beneficiary Qualifications
5. Maintenance of Status
6. Availability of Work (In-House)
7. LCA Corresponds to Petition
8. AC21 and Six-Year Limit
9. Itinerary
10. Fees

Source: Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs Were Issued for H-1B Petitions in Fiscal Year 2018

<https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/understanding-requests-for-evidence-h-1b-petitions-in-fiscal-year-2018.pdf>

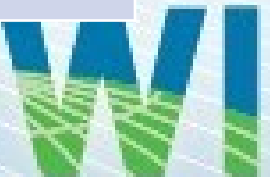


Current Climate - Employment Based Permanent Residence

- I-140 RFEs for ability to pay for large employers
- Long processing times
- EAD/AP renewals
 - Employment authorization pursuant to a pending Adjustment of Status may now be denied for discretionary reasons
 - Starting in October the cost of an EAD and AP application is no longer included in the Adjustment of Status fee. Must pay separately.
- I-485 Supplement J
- EB Interviews for all applicants
 - Interviews were waived and cases approved during COVID shutdowns. Unclear whether or not this will continue as USCIS tries to limit appointments at local Field Offices.
 - Increasing use of discretionary factors in denials for all adjustments
- Fee Increases



Form	Old Fee	New Fee
I-129 H1B	\$460	\$555
I-129L (includes L-1A, L-1B and L blankets)	\$460	\$805
I-129E & TN & I-129CW (includes E-1, E-2, E-3, TN and CW)	\$460	\$695
I-539, Application to Extend/Change Nonimmigrant status (Online Filing)	\$370	\$390 (online)
		\$400 (paper application)
I-140, Immigrant Visa Petition	\$700	\$555
I-485, Application to Adjust Status	\$1,140	\$1,130
Total Fees for Adjustment of Status Applications bundle -- I-485 with I-765, and I-131	\$1,225	\$2,270
I-765, Application for Employment Authorization (Non-DACA)	\$410	\$550
I-131, Application for Travel Document	\$575	\$590



Public Charge

Section 212(a)(4) of the INA: Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible. In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's

- Age;
- Health;
- Family status;
- Assets, resources, and financial status; and
- Education and skills



Public Charge Whiplash

- USCIS' final rule was published on August 14, 2019 and was supposed to go in effect on October 15, 2019 but was enjoined from implementation.
- The Supreme Court ruled on January 27, 2020 that the rule could go into effect despite multiple legal challenges in lower courts
- The revised I-485 application for adjustment of status and the new I-944 went into effect on Monday, February 24
- Another nationwide injunction went into effect on July 29, 2020 but was overruled on August 12, 2020. Injunction still applies to DOS.
- The I-944 form asks for extensive personal information including credit scores, debt information, asset values in the U.S. and abroad, proof of English language training even for native English speakers and information on immediate relatives financial history



Public Charge

- Proposed rule defines a public benefit as:
Any federal, state, local, or tribal cash assistance for income maintenance, including:
 - Supplemental Security Income (SSI), 42 U.S.C. 1381 et seq.;
 - Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 et seq.;
 - Federal, state, or local cash benefits programs for income maintenance (often called "General Assistance" in the State context, but which also exist under other names);



Public Charge – USCIS

- Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. 2011 to 2036c;
- Section 8 Housing Assistance under the Housing Choice Voucher Program as administered by HUD under 42 U.S.C. 1437f;
- Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) under Section 8 of the U.S. Housing Act of 1937 (42 U.S.C. 1437f);
- Medicaid, with certain exceptions, such as benefits received by individuals under the age of 21 and pregnant women (or for a period of 60 days after the last day of pregnancy); and
- Public housing under section 9 of the U.S. Housing Act of 1937



Public Charge – Department of State

- The evidentiary standard is preponderance of the evidence and takes into account the totality of the circumstances. Under this new standard, DOS's focus shifts from whether an individual is primarily dependent on cash assistance or long-term institutionalization to whether he/she is more likely than not to receive one or more of an expanded set of public benefits for more than 12 months in the aggregate within any 36-month period.
- Based on a totality of the circumstances approach, which considers at a minimum the applicant's age, health, family status, assets, resources, financial status, education, and skills.
- New rule is not retroactive per se, past use of certain public benefits may still be considered as a negative factor, but not a heavily weighted factor, if received prior to the effective date of October 15, 2019



Public Charge – Department of State

Redefining public charge as a noncitizen **who receives a specified public benefit for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months' worth of benefits).**

- Heavily weighted **negative factors** include and applicant:
 - 1) who is not a full time student w/ ability to work but has no current employment;
 - 2) who has received, been approved for or certified to receive public benefits for more than 12 months in the aggregate within a 36-month period;
 - 3) with a medical condition that is likely to require extensive medical treatment/institutionalization who is uninsured with low prospects for obtaining insurance or to pay for the costs of reasonably foreseeable medical costs; and
 - 4) an applicant who was previously found to be inadmissible by an immigration judge or based on a prior public charge finding.



Public Charge – Department of State

- Heavily weighted **positive factors** include that
 - 1) the applicant's household has income or assets or resources of at least 250 percent of the federal poverty guidelines (\$42,275 for a family of 2);
 - 2) the applicant has authorization to work and gainful employment with an income of at least 250 percent of federal guidelines; and
 - 3) the applicant has private unsubsidized health insurance (not Obamacare).



Polling Question 3



POLLING

QUESTIONS?

