

# **CURRENT TRAVEL RESTRICTIONS AND THE ABILITY TO FILE CERTAIN IMMIGRATION PETITIONS AND APPLICATIONS**

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## **CURRENT TRAVEL RESTRICTIONS AND THE ABILITY TO FILE CERTAIN IMMIGRATION PETITIONS AND APPLICATIONS**

With successive presidential proclamations and executive orders in recent months, there can be considerable confusion around what type of immigration petitions and applications can be filed, and who can enter the United States. This white paper is aimed at clarifying some of the issues and answering some commonly-asked questions regarding what immigration processes can be undertaken during this time.

### **EXECUTIVE SUMMARY**

As described in detail below, there are three travel bans currently in place affecting travel to the United States by foreign nationals. In addition, US consular posts abroad are either closed or are reopening with limited service, making it difficult for eligible foreign nationals to obtain visas to come to the United States. As a whole, this situation is creating severe complications for global mobility. By and large, foreign nationals present in the United States in lawful immigration status who do not need to travel internationally are not impacted by these conditions. Immigration processes that are NOT impacted by the travel bans and consular closures include the following:

- Employment-based green card initiations, such as PERM labor certifications and immigrant visa applications
- Filing and processing of Adjustment of Status applications, the final stage of the green card process if done while physically present in the United States
- Transfers of H-1B workers who are in the United States, from one employer to a different employer
- Filing of certain nonimmigrant visa petitions including O and TN petitions
- Extensions of stay for all nonimmigrant classifications including H-1B, L-1, O, TN, and E

### **THE THREE PROCLAMATIONS IMPACTING TRAVEL TO THE US**

Since March 2020, there have been three presidential proclamations which, separately and together, act to restrict entry of certain foreign nationals into the United States. All of them are currently in force.

#### **COVID-19-Related Entry Bans<sup>1</sup>**

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<sup>1</sup> The proclamation numbers for these travel bans are as follows:

PP 9984 (China)

PP 9992 (Iran)

PP 9993 (Schengen)

PP 9996 (UK/Ireland)

PP 10041 (Brazil)

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This travel ban, which was originally issued in March 2020, relates to an individual's physical presence in a specified country during the 14 days prior to travel to the United States. With certain exceptions, it bans entry into the United States individuals who were physically present in the following countries any time within the 14-day period prior to entry:

- United Kingdom
- The Republic of Ireland
- The "Schengen" Countries: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.
- Brazil
- Iran
- China, Hong Kong, Macau

This list may be expanded at any time. It is crucial to note that this ban relates to **physical presence, not nationality or citizenship**. Thus, for example, a UK national who has been in Canada for the past 14 days would not be subject to this entry ban.

The following classes of individuals are exempt from the ban:

- US citizens
- US green card holders (permanent residents)
- Spouses of US citizens and green card holders
- Parents and legal guardians of US citizens and green card holders (as long as the US citizen or green card holder is under the age of 21 and unmarried)
- Siblings of US citizens and green card holders (as long as both are under the age of 21 and unmarried)
- Children, foster children, wards, or prospective adoptees of US citizens and green card holders
- Individuals invited to the United States by the government for purposes of containing or mitigating COVID-19

In addition, the US State Department announced that certain foreign students including holders of F-1 visas may enter the United States notwithstanding this ban. Customs and Border Protection has also clarified that professional athletes can travel to the United States and do not require national interest exception.

In certain circumstances it is possible to obtain a "National Interest Exception" of this entry ban. Grounds for a "National Interest Exception" may include a role as a senior level executive or manager providing strategic direction to a company as well as individuals involved in COVID-19-related research or treatment. It is important to note that granting such waivers is a matter of discretion by the government agencies with jurisdiction and therefore there can be no guarantee of success with a national interest waiver request. Moreover, such waivers are for one entry only.

Those entering from these specific countries who are either exempted or subject to an approved waiver must fly into certain specified US airports.

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## **Proclamation 10014: Ban on Issuance of Certain Immigrant Visas (Green Cards) Abroad**

In April 2020, President Donald Trump issued a proclamation suspending entry of certain employment-based and family-based immigrants. **This ban only applies to those who were completing the green card process abroad through “consular processing” in employment-sponsored and certain family-sponsored classifications**, including parents and adult children of US citizens, siblings of citizens, and immediate relatives of lawful permanent residents. There are some exceptions for certain close relatives of US citizens. This ban has now also been extended to December 31, 2020.

It is important to note that this ban does not impact foreign nationals currently in the United States pursuing or being sponsored for green cards. Most employment-sponsored green card applicants pursue the final stage of the green card process through filings in the United States known as “adjustment of status.” Adjustment of status is not impacted by this ban at all. Moreover, all agencies in the United States that handle various parts of the employment-based green card process are continuing to process such cases.

## **Proclamation 10052: Entry/Visa Ban for Certain Nonimmigrant Visa Applicants**

The entry ban, which took effect on June 24 and will remain in effect until the end of the year, suspends visa issuance and entry to individuals in the following categories:

- H-1B Specialty Occupation status, and accompanying or following to join H-4 dependent family members
- H-2B Temporary Worker status, and accompanying or following to join dependent family members
- J-1 status, if seeking admission to participate in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and accompanying or following to join J-2 dependent family members
- L-1 Intracompany Transferee status (L-1A and L-1B), and accompanying or following to join L-2 dependent family members

This ban is meant to prevent issuance of new visas in the above-listed classifications to foreign nationals who did not hold these visas previously.

It is crucial to understand that this ban **does not impact any foreign nationals who were in the United States as of June 24 who held valid visas in the above-listed classifications. That means that anyone who was present in the United States on the effective date of the ban in H-1B or L-1 status, who travels abroad thereafter and must obtain a new visa in order to return, remains eligible to obtain that visa in order to return to the United States.<sup>2</sup> Any individual who was abroad on the effective date of the ban but has a valid H-1B or L-1 visa may return to the United States with that visa.**

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<sup>2</sup> Note that the Department of State is applying this interpretation inconsistently at the moment, and given limited service at consular posts and the travel bans, it may be challenging to have visas renewed even where a foreign national is eligible.

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**Moreover, the ban does not prevent or prohibit the transfer to a new employer of individuals who are in the United States maintaining valid H-1B status with a different employer (“H-1B transfers”).**

The new ban does NOT apply to the following commonly used nonimmigrant classifications:

- H-1B1 visas for Chileans and Singaporeans
- E-1 and E-2 visas for “treaty nationals”
- E-3 visas for Australians
- F-1 student visas
- J-1 visas for classifications other than those enumerated in the ban, for example, researchers and scholars
- O-1 visas for those with extraordinary ability and international recognition
- TN status for Canadians and Mexicans under the USMCA (formerly known as NAFTA)
- Canadians are not impacted by the ban at all. Canadians with valid work visas (or applying for work visas) and their dependents may enter the United States via air travel; Canadians with valid work visas (or applying for work visas) may enter the United States via land border crossing only if they can show that they are “essential.”
- Issuance of dependent visas to spouses and children of foreign nationals in the US, holding visas in the affected classifications

There are also certain National Interest Exceptions available for this ban. As discussed below, they are somewhat more specific than the National Interest Exceptions available to the country-specific COVID-19 ban described above. These exceptions must be obtained through a US consular post abroad, and are discretionary.

## **CRITERIA FOR NATIONAL INTEREST EXCEPTIONS**

For a time after the announcement of these travel bans, there existed no formal procedures for requesting exceptions. With respect to the regional COVID-19 entry bans, the process for and success of an exception request was essentially dependent upon the discretion of CBP at the particular port of entry. However, the State Department has recently released specific processes and criteria for requesting exceptions to both the regional COVID-19 bans and Proclamation 10052 relating to specific nonimmigrant visa classifications. In most cases, those requiring a national interest exception to the regional COVID-19 entry bans will have to request the exception from the US consular post that has jurisdiction over their place of residence, rather than asking CBP directly. The criteria are relatively unspecific; however, as discussed above, individuals involved in COVID-19-related research and/or treatment, as well as certain senior executives and managers providing strategic direction to a company have a strong chance of obtaining an exception.

With respect to national interest exceptions to Proclamation 10052 relating to particular nonimmigrant visa classifications, the State Department has articulated very specific and detailed criteria. H and L workers generally must work in sponsoring organizations within certain industries, including public health, healthcare, critical infrastructure, food supply, and other specified industries. For H-1B workers who are not involved in COVID-19 research or treatment but are technical specialists, senior level managers, and other workers whose travel is necessary to facilitate the immediate and continued economic recovery of the United States, there are five specific criteria set out, and the applicant must meet at least two of the

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five in order to be considered for an exception. Anyone seeking a national interest exception to Proclamation 10052 must seek an emergency appointment with the consular post as a first step. [Read the State Department's criteria for granting national interest exceptions.](#)

## THE INTERPLAY OF THE BANS, AND VISA ISSUANCE AND TRAVEL IN THE CURRENT ENVIRONMENT

A great deal of the confusion around the operation of the bans stems from the interplay between the various bans and the additional complications caused by the fact that US consular posts are only reopening slowly, with limited service for visa issuance. Thus, for example, a foreign national might be currently living abroad in one of the Schengen countries with an O visa approval but no visa issued in the passport yet. While this individual would not be subject to Proclamation 10052 relating to H's, L's, and J's, it may be quite difficult for the individual to travel, because he or she will still need to request an appointment with the local US consular post for visa issuance, and these may only be available on an emergency basis. Once an appointment is secured and the visa is issued, this individual may still require a National Interest Exception to the country-specific COVID-19 travel ban. Another example would be a foreign national with a valid travel document such as an advance parole (a special travel document obtained during the final stage of the green card process) who decides to go home to visit family in China. This foreign national would be able to depart the country but would not be able to return to the United States pursuant to the COVID-19-related ban, unless he or she obtains a National Interest Exception.

## PROCESSES THAT ARE NOT IMPACTED BY THE TRAVEL BANS

To summarize, the following is a nonexclusive list of processes that are NOT impacted by the various travel bans currently in place:

- Employment-based green card initiations, such as PERM labor certifications and immigrant visa applications
- Filing and processing of Adjustment of Status applications, the final stage of the green card process if done while physically present in the United States
- Transfers of H-1B workers who are in the United States, from one employer to a different employer
- Filing of certain nonimmigrant visa petitions including O and TN petitions
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## Return to Work Resources

We have developed many [customizable resources](#) to support employers' efforts in safely returning to work. These include tracking of state and local orders on return to work requirements and essential/nonessential work; policy templates and guidelines for key topics such as social distancing procedures, temperature testing, and workplace arrangements for high-risk employees; and [webinar training](#) on safety measures for return to work. [View the full list of return to work resources](#) and consult our [workplace reopening checklist](#).

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## Coronavirus COVID-19 Task Force

For our clients, we have formed a multidisciplinary Coronavirus COVID-19 Task Force to help guide you through the broad scope of legal issues brought on by this public health challenge. Find resources on how to cope with the post-pandemic reality on our [NOW. NORMAL. NEXT. page](#) and our [COVID-19 page](#) to help keep you on top of developments as they unfold. If you would like to receive a digest of all new updates to the page, please [subscribe](#) now to receive our COVID-19 alerts, and download our biweekly [COVID-19 Legal Issue Compendium](#).

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