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Pabian Law's Presidential Proclamation Primer

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What's new in July 17th Update

Food supply chain exemption: many of our clients have asked about the exemptions to the Proclamation, with H-2B organizations particularly interested in the exemption for workers performing “services essential to the United States food supply chain.” The government’s transparency and communication on the exemptions has been extremely poor. There has been no update from the Trump Administration regarding who is covered by the food supply chain exemption or, if someone might qualify for one of the exemptions, how they would go about applying.

- Because there has been no additional guidance, our original interpretation of the food supply chain remains, which is that it unfortunately does not seem to apply to workers in the hospitality industry.
- We have been in touch with industry groups and congressional representatives who have reached out to the Trump Administration for clarifying guidance on the exemptions to the Proclamation, and we will provide updates as soon as possible if anything changes.

Workers inside U.S. on June 24th but without a visa: a big question that still remains is whether any individual inside the U.S. on June 24th is exempt from the Proclamation. The language of the Proclamation seems to exempt these individuals, regardless of whether they have a valid visa in their passports. However, recent government guidance seems to imply that U.S. consulates will not issue any new H, L, or J visas for the rest of 2020. Therefore, even if apparently exempt, these individuals would not be able to travel international prior to December 31st, as they would not be able to apply for a new visa to return to the U.S.

Q&A Section: just a reminder that there is a Q&A section to the bottom of this Primer to answer questions regarding specific travel scenarios related to the Proclamation.

Good News! – *H-2B Cap Update*: On July 15th, the House Appropriations Committee approved an amendment to the 2021 U.S. Department of Homeland Security (DHS) Appropriations Bill, which would give DHS the authority to add up to 63,000 additional visas for next year. This language is similar to what was included in the past few years, allowing DHS to increase the H-2B cap. Although it is not ideal (e.g., a permanent and mandatory increase of the cap), given the Trump Administration’s stance on immigration during the pandemic, it is great news that the language was included! The bill now goes to the full House for consideration.



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Overview

President Trump issued a Presidential Proclamation on Monday, June 22, 2020, which temporarily suspended entry to the U.S. for certain H-1B, H-2B, L-1, J-1 workers. The Proclamation was effective at 12:01am on June 24th (the “effective date”) and lasts through December 31, 2020.

The Proclamation may have different impacts on businesses depending on the type of organization. Therefore, we have divided the below into three separate sections: (1) companies generally; (2) winter-season H-2B organizations; and (3) summer-season H-2B organizations.

Note: much of the below mirrors the Client Alert emails that Pabian Law sent on June 23rd. Therefore, if you have already reviewed one of our Client Alerts, the below will likely be familiar.

Companies (non-seasonal)

Impact on your company: Other than new hires outside the United States and some foreign nationals needing to travel internationally, the Proclamation will have little impact on your immigration matters and processes and so much will continue as normal.

- It will only impact employees who are outside the U.S. or who need to travel abroad during the next several months and would not impact any foreign nationals who are already in the country.
- It does not apply to individuals who already had a valid H, L, or J visa in their passports on the effective date. Therefore, if you have an employee outside the U.S. with a valid visa issued prior to June 24th, they should still be able to enter the U.S. Additionally, if you have an employee who is currently inside the U.S. and had an H, L, or J visa in their passport on June 24th that is still currently valid, that employee should be able to travel internationally and reenter the U.S. using that specific visa without issue.

Visas included: It includes H-1B, H-2B, L-1, J-1 visas. It does **not** apply to O, P, E, B, and F visas.

- Notably, although there were rumors that OPT and CPT work authorization for F-1 students may be impacted, these were not included in the suspension on entry, which is great news!

Exceptions: there are limited exceptions built into the law for workers critical to the U.S. food supply chain, national security, medical care or medical research, or others critical to the national interest.



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Potential for changes: within 30 days, and every 60 days thereafter, the government is required to review and recommend potential revisions to the Proclamation. Therefore, it is certainly possible that it could be modified and certain visas could be removed from the suspension (or new ones added). Other exceptions could also be built in.

- We have already seen strong lobbying efforts from industry groups, so there is hope for change!
- Additionally, we expect this to be challenged in court and it may be halted or terminated.

Impact on Canadian citizens: Canadian citizens do not typically require visas to enter the U.S. On June 25, 2020, U.S. Customs and Border Protection (CBP) confirmed that Canadian citizens are exempt from the Presidential Proclamation. Therefore, Canadian H, L, and J visa holders can continue to enter the U.S. according to the terms of their visa, despite the Proclamation.

Impact on Green Cards: the Proclamation extends the April 22nd suspension on new green cards for individuals outside the country through December 31st. As with the previous suspension, this **does not** impact individuals who are going through the green card process while in the United States (“adjustment of status”) and therefore, will have a minimal impact on Pabian Law’s clients.

Future regulations may be coming: the Proclamation specifically mentions the possibility of new regulations that may be passed in the future impacting green cards and H-1B visas.

- However, any new restrictions on these programs would require the passage of a new regulation through the rulemaking process. Therefore, we should have plenty of advanced notice and will keep our clients and partners updated on any developments. Additionally, it is highly likely that these would be challenged in court and may not go into effect.

Winter-season H-2B organizations

Impact on your organization: The impact of the Proclamation depends on your organization’s specific situation and recruitment strategy.

- **For in-country H-2B petitions**: Since the Proclamation applies only to out-of-country workers, it will not impact H-2B petitions for in-country workers for the upcoming winter season (as long as those workers do not leave the country over the next few months).
 - Many of our summer-season clients are still moving forward with their season, despite COVID-19. We have heard from many clients who have brought workers into the country over the last few weeks. Therefore, we are hopeful that there will be many in-country H-2B workers available for transfers to winter-season



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organizations. Of course, the sooner you recruit, the better, if you have not already.

- J-1 change of status petitions are also exempt: the most common type of in-country petition is an H-2B change-of-employer petition, in which a winter-season employer hires a summer-season H-2B worker to transfer to their organization for the winter. However, recruiting in-country J-1 workers is also an option. Therefore, if you have potential hires who are currently in the U.S. in J-1 status, we could file a change-of-status petition to allow them to stay in the U.S. and work as H-2Bs for the winter season.
- **For out-of-country H-2B petitions**: Unless the Proclamation is halted or shortened (see below), this would delay the ability of your out-of-country workers to arrive until January 2021. Although some employers may be able to delay the arrival of their workers without much disruption, we understand that it may be difficult for others. For our clients where delayed start is not possible, we would be happy to work with you to identify additional in-country recruiting options to limit your reliance on out-of-country workers for the coming season.
 - **Note**: this does not impact that ability to move forward with out-of-country petitions. It only impacts when the workers would be able to apply for visas and enter the U.S. after the petitions are approved.

Suspension of J-1 Visas: J-1 summer work and travel, interns, and trainees are all covered by the suspension.

Exceptions: there are limited exceptions built into the law for workers critical to the U.S. food supply chain, national security, medical care or medical research, or others critical to the national interest.

- Many clients have asked us about the “food supply chain” exception. Based on the information that we have received to date, this does not apply to typical restaurant and hospitality businesses, as it is targeted at quick-serve/contact-free food supply operations. We are continuing to work with our industry group and congressional contacts to learn more information, and we will continue to provide updates to our clients.

Potential for changes: within 30 days, and every 60 days thereafter, the government is required to review and recommend potential revisions to the Proclamation, so there is a chance that the suspension on H-2Bs could end earlier than December 31st.

- We have already seen strong lobbying efforts from industry groups, so there is hope for change!
- Specifically, since H-2B employers are already required to recruit and offer the job to U.S. workers first, it is counterintuitive that H-2B visas would be suspended to protect



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U.S. workers in the economic recovery. Therefore, we are hopeful that H-2B restrictions may be removed early or successfully challenged in court before the winter-season begins.

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Long-term impact on J-1s: the Proclamation does not specifically mention long-term impacts on the J-1 program. However, we have continued to hear rumors of initiatives to scale back or eliminate parts of the J-1 program in the coming months, including the Summer Work and Travel Program, the Intern program, and the Trainee program. **This further increases the importance of moving forward with H-2B petitions to ensure staffing flexibility if J-1s visas are eliminated or restricted.**

Summer-season H-2B organizations

Impact on your organization: we do not expect this to impact summer-season H-2B employers at all, **unless** you have H-2B or J-1 workers who have not yet entered the country **and** do not yet have a valid visa. However, for out-of-country workers who will not already have visas on June 24th, those workers will be restricted from entering the U.S. for the rest of the summer season, unless the Proclamation is revised (see below).

- For your workers who are already here, we would not recommend that they travel outside the U.S. for the remainder of the season (even if they already have a visa), since the government has discretion to allow entry and we are unsure how this will be enforced.
- J-1 summer work and travel, interns, and trainees are all covered by the suspension.

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- Many clients have asked us about the “food supply chain” exception. As things currently stand, this does not apply to typical restaurant and hospitality businesses, as it is targeted at quick-serve/contact-free food supply operations. We are continuing to work with our industry group and congressional contacts to learn more information, and we will continue to provide updates to our clients.



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- We have already seen strong lobbying efforts from industry groups, so there is hope for change!
- Specifically, since H-2B employers are already required to recruit and offer the job to U.S. workers first, it is counterintuitive that H-2B visas would be suspended to protect U.S. workers in the economic recovery. Therefore, we are hopeful that H-2B restrictions may be removed early or successfully challenged in court.

Impact on Green Cards: the Proclamation extends the April 22nd suspension on new green cards for workers outside the country through December 31st. As with the previous suspension, this does not impact workers who are going through the green card process while in the United States (“adjustment of status”) and therefore, will have a minimal impact on Pabian Law clients.

Impact on 2021 summer season:

- Because the Proclamation is scheduled to end on December 31st, we do not anticipate this to impact the 2021 summer season.
- Additionally, we are still seeing many winter organizations moving forward with H-2B applications for the coming season (even if some workers may not be able to enter the U.S. until January 2021), and therefore, we expect in-country H-2B workers to still be available for in-country transfer petitions in the spring.
- H-2B cap: Finally, COVID-19 may reduce the number of organizations applying for H-2B visas in 2021. Therefore, your chances of being selected in the H-2B cap lottery may be higher next year.
- Long-term impact on J-1s: the Proclamation does not specifically mention long-term impacts on the J-1 program. However, we have continued to hear rumors of initiatives to scale back or eliminate parts of the J-1 program in the coming months, including the Summer Work and Travel Program, the Intern program, and the Trainee program. This further emphasizes the importance of moving forward with H-2B visas to ensure staffing flexibility if J-1s visas are eliminated or restricted.

Q & A

- 1) I had a valid H/L/J visa on June 24th. Therefore, based on the language of the Proclamation, I should be exempt. However, my visa will expire soon. Can I leave the country, renew my visa, and return to the U.S. prior to December 31, 2020?



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- a. The answer to this question is unclear. Based on the language of the Proclamation, this individual would be exempt from the suspension on entry. However, recent government guidance seems to imply that U.S. consulates will not issue any new H, L, or J visas for the rest of 2020. Therefore, unless further guidance is issued, **we strongly discourage any international travel unless the visa issued prior to June 24th will remain valid when travelling.**
- 2) I worked for Company A on an H-1B visa that was valid on June 24th. I have since transferred to Company B. I need to travel internationally before December 31, 2020, and the H-1B visa in my passport from Company A will still be valid. Can I use my valid visa to reenter the U.S.?
 - a. The answer to this question is unclear. Typically, in this situation, travel would be okay, as long as the individual travels with a copy of the Form I-797A Approval Notice for Company B's H-1B transfer petition. Nothing in the Proclamation seems to prohibit this. However, given the vagueness and uncertainty surrounding the Proclamation, we would still recommend avoiding this type of travel unless absolutely necessary. We would recommend reaching out to Pabian Law with specific questions.
- 3) I am an H-2B employee currently working for a summer-season organization. I am planning to transfer to a winter-season organization starting on October 1st. However, I am hoping to travel home for a couple of weeks between seasons to visit family, apply for a new H-2B visa, and return to start winter-season employment. Is this possible?
 - a. No – we would strongly discourage this. Although the Proclamation seems to exempt individuals who were inside the U.S. on June 24th, recent government guidance seems to imply that U.S. consulates will not issue any new H, L, or J visas for the rest of 2020. Therefore, unless further guidance is issued to the contrary, a worker in this situation would likely be stuck outside the U.S. until at least January 2021.

Conclusion

In summary, although this Proclamation is unwelcome news, depending on your organization, it may have minimal impacts on your business and your foreign nationals. For example, it does not have any impact on employees who are currently in the U.S. and intend to stay here through the end of the year. Also, it does not apply to in-country H-2B petitions and, for out-of-country petitions, would only delay the entry of workers until January at the latest. Also, there is hope that some of the restrictions could be rolled back or halted prior to December 31st.

For clients that are affected, we are committed to working with you to develop strategies to minimize any potential impact on your organization.



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Also, we are very grateful for and encouraged by all of the lobbying efforts and bipartisan support of immigration that we have seen in response to this Proclamation. We are hopeful that these voices will continue to be heard and the significant positive effects of immigration will overshadow any further attempts to limit it.

To learn more about the Presidential Proclamation, Pabian Law, and our services, please contact Keith Pabian at (617) 939-9444 or keith@pabianlaw.com. You can also visit our website at www.pabianlaw.com.