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Department of State Issues New Exceptions to Presidential Proclamations

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Practices: Immigration

EXECUTIVE SUMMARY

On August 12, 2020, the Department of State (“DOS”) issued a policy memorandum creating and confirming several new exceptions to the June 22, 2020 Presidential Proclamation suspending the issuance of visas to certain H-1B, H-2B, L-1 and J-1 applicants.

The June 22 Proclamation suspended the issuance of H-1B, H-2B, L-1 and J-1 visas through December 31, 2020, except for persons who already possessed a valid visa or other travel documents issued prior to June 24, 2020. While certain limited exemptions were stated, this Proclamation effectively prevented the transfer of necessary personnel to the US and prevented persons with an expiring visa from returning to a Consulate to apply for a renewal. While the President’s stated goal was to preserve US jobs, to the surprise of no one, the effect of the Proclamation was the opposite, as executives, managers and certain highly skilled specialists, whose functions were essential to creating jobs, were being prevented from coming to the US. Therefore, over the intervening weeks since the issuance of the Proclamation, various conferences were held, and tweets issued, which attempted to clarify the Proclamation. Unfortunately, a tweet is not policy and could not be relied upon.

While the Proclamation created an exemption for persons entering the US to fill medical, public health or US government functions, the policy issued on August 12 clarifies certain exceptions to the Proclamation in several key aspects:

1. The Policy appears to exempt persons who were in the US on June 24, 2020 or held a valid visa on that date from applying for a renewal of that visa. The Policy states:

“The Proclamation does not apply to applicants who were in the United States on the effective date of the Proclamation (June 24), or who had a valid visa in the classifications mentioned above (and plans to enter the United States on that visa), or who had another official travel document valid on the effective date of the Proclamation. If an H-1B, H-2B, L-1, or J-1 non-immigrant is not subject to the Proclamation,

then neither that individual nor the individual's spouse or children will be prevented from obtaining a visa due to the Proclamation. The Department of State is committed to implementing this Proclamation in an orderly fashion in conjunction with the Department of Homeland Security and interagency partners and in accordance with all applicable laws and regulations."

2. With regards to H-1B nonimmigrants, the Policy appears to exempt, in addition to the aforementioned, healthcare, COVID-19 research or government professionals, persons who will be entering the US to resume ongoing employment in the US with the same employer in the same visa classification or travel by persons whose presence is necessary to "facilitate the economic recovery of the United States" by demonstrating that they meet certain conditions.
3. With regards to the L-1A Executive or Managerial classification, the Policy again allows persons to enter the US to resume ongoing employment in the US with the same employer in the same visa category. Additionally, the Policy appears to allow for the application of a new visa for a "senior level executive or manager" who will fill a critical business need for a company in a "Critical Infrastructure" sector. A Critical Infrastructure sector is defined as "chemical, communications, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear reactors, transportation, and water systems." In order to qualify, the L-1A applicant will have to establish two of the following:
 - a. "(The applicant) will be a senior-level executive or manager;
 - b. (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; or
 - c. (The applicant) will fill a critical business need for a company meeting a critical infrastructure need."
4. With regards to the L-1B Specialized Knowledge classification, the Policy exempts persons who will enter the US to resume ongoing employment in the US with the same employer in the same position. A person may apply for a new L-1B visa if, again, the person is needed to fill critical infrastructure need (which is defined above) and can meet all of the following:
 - a. "The applicant's proposed job duties and specialized knowledge indicate the individual will provide significant and unique contributions to the petitioning company;
 - b. The applicant's specialized knowledge is specifically related to a critical infrastructure need; AND
 - c. 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."

There are similar provisions for the H-2B and J-1 classifications, the foregoing are especially applicable to multinational businesses that employ numerous US workers.

It should be noted that by granting these exceptions, the DOS Policy is placing additional requirements on the visa classifications that are not contained in the Immigration and Nationality Act, the Immigration Regulations or the Department of State Regulations. In our opinion, the DOS Policy does attempt to render moot the various lawsuits filed against the Administration to invalidate the underlying Proclamations. Nevertheless, the DOS Policy should provide some relief from the blanket suspension of visa issuance as initially set forth in the Proclamation.

While we have quoted extensively from the Policy, you can access the full DOS Policy by clicking this [link](#).