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GMS Flash Alert

Immigration Edition

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United States – State Department Broadens Exemptions to Entry Ban

On August 12, 2020, the U.S. Department of State (DOS) issued additional guidance on national interest exceptions to the June 22, 2020 Presidential Proclamation, which restricted the entry of certain nonimmigrants due to the COVID-19 pandemic.[1] The additional guidance broadens the exemptions to the entry ban for certain H, L, and J nonimmigrants, and allows those who qualify to request an emergency appointment at U.S. Consulates to obtain their visa and enter the U.S. while the entry ban remains in effect.

Under the new guidance, foreign nationals seeking H-1B or L visas to return to the United States to resume ongoing employment with the same employer and visa classification are exempt from the June 22 entry ban. H-1B and L visa applicants may also qualify for a national interest exception if their U.S. employer is fulfilling a critical infrastructure need in a designated industry, and the applicant meets certain eligibility criteria. The new guidance further provides exemptions for certain J nonimmigrants performing specialized childcare, public health, or educational roles, and those fulfilling critical and time sensitive U.S. foreign policy objectives.

WHY THIS MATTERS

The DOS' announcement clarified elements of the U.S. entry ban introduced on June 22, and should help facilitate the travel of certain foreign nationals to the United States who would otherwise be subject to the ban.

The full impact of the new guidance is variable at this time given the stringent criteria to qualify for a national interest exception, as well as reduced operations at U.S. Consulates. Globally mobile employees may face high scrutiny and delays when applying to qualify under the new entry ban exemptions, and should take this into account when scheduling their U.S. assignments and travels. Multinational employers with employees applying under these national interest exemptions are also advised to consult immigration legal counsel to ensure that such applications include robust information and documentation on the employees' eligibility to be exempt from the entry ban.

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Background

On June 22, 2020, President Trump issued a proclamation temporarily suspending entry to the United States for certain H, L, and J nonimmigrants, as well as their dependents, with limited exceptions.[2] In his proclamation, President Trump indicated that the entry ban was drafted in response to the COVID-19 pandemic, and aimed at protecting U.S. workers while the country recovers economically.

The DOS issued directives on exemptions to the entry ban on June 29, 2020 and July 16, 2020. The entry ban is scheduled to be in effect until December 31, 2020, with possibility of extensions beyond this date should the Administration deem it necessary. For prior coverage, see *GMS Flash Alerts* 2020-294 (June 23, 2020), 2020-301 (July 7, 2020), and 2020-326 (July 22, 2020).

National Interest Exceptions Guidance

On August 12, 2020, the DOS provided further guidance on the national interest exceptions to the June 22 entry ban, allowing a broader class of H, L, and J nonimmigrants to obtain a visa and enter the United States while the entry ban remains in effect. The new DOS guidance provides that the following classes of nonimmigrants may qualify for a national interest exception to the June 22 entry ban:

***NOTE**: For purposes of the new guidance, the DOS has defined critical infrastructure sectors to include 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.*

- H-1B Visa Applicants may be exempt from the entry ban if:
  - They are seeking an H-1B visa to resume ongoing employment in the United States in the same position with the same employer and visa classification; ***OR***
  - They are traveling to fulfill a substantial public health benefit, in support of a critical U.S. foreign policy objective, or at the request of the U.S. government; ***OR***
  - They satisfy two of the following criteria:
    - The U.S. employer has a continued need for the H-1B applicant's services, and possesses a labor condition application (LCA) approved by the Department of Labor for the applicant. This criterion is not satisfied if the applicant is currently performing or is able to perform the essential functions of the position from outside of the United States.
    - The U.S. employer falls within a critical infrastructure sector, and the applicant's role within the company will provide significant and unique contributions to the employer.
    - The wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage rate by at least 15 percent.
    - The H-1B applicant's education, training, and/or experience demonstrate unusual expertise in the specialty occupation in which the applicant will be employed.
    - Denial of the H-1B visa under the entry ban will cause financial hardship to the U.S. employer.
- L-1A Visa Applicants may be exempt from the entry ban if:
  - They are seeking an L-1A visa to resume ongoing employment in the United States in the same position with the same employer and visa classification; ***OR***
  - They are traveling to fulfill a substantial public health benefit, in support of a critical U.S. foreign policy objective, or at the request of the U.S. government; ***OR***

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- They are travelling to fulfill critical business needs of a U.S. employer within a critical infrastructure sector. To qualify under this criterion, applicants must satisfy **at least two** of the following:
    - The applicant will be a senior-level executive or manager.
    - 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 another employee following extensive training and significant cost incurred by the U.S. employer.
    - The applicant will fill a critical business need for a company meeting a critical infrastructure need in the United States.

  NOTE: L-1A applicants seeking to establish a new office in the U.S. must meet at least two of the above-criteria AND the new office will need to employ five or more U.S. workers.

- **L-1B Visa Applicants** may be exempt from the entry ban if:
  - They are seeking an L-1B visa to resume ongoing employment in the United States in the same position with the same employer and visa classification; ***OR***
  - They are traveling to fulfill a substantial public health benefit, in support of a critical U.S. foreign policy objective, or at the request of the U.S. government; ***OR***
  - They are travelling as a technical expert or specialist meeting a critical infrastructure need in the United States. To qualify under this criterion, applicants must satisfy **all three** of the following indicators:
    - The applicant's job duties and specialized knowledge demonstrate that he/she will provide significant and unique contributions to the U.S. employer.
    - The applicant's specialized knowledge is specifically related to a critical infrastructure need.
    - 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 another employee following extensive training and significant cost incurred by the U.S. employer.

- **J-1 Visa Applicants** may be exempt from the entry ban if:
  - They are an au pair possessing special skills and travelling to provide care for a minor U.S. citizen, lawful permanent resident (LPR), or nonimmigrant in lawful status with particular needs (e.g., medical, special education, or sign language); ***OR***
  - They are an au pair, whose travel into the U.S. would prevent a U.S. citizen, LPR, or other nonimmigrant in lawful status from becoming a public health charge, or ward of the state of a medical or other public funded institution; ***OR***
  - They are seeking a J-1 visa to care for a child whose parents are involved with the provision of medical care to individuals who have contracted COVID-19 or medical research at U.S. facilities to help combat COVID-19; ***OR***
  - They are travelling to participate in an exchange program conducted pursuant to an agreement between a foreign government and a U.S. government entity, where the agreement was in effect before June 24, 2020 and designed to promote U.S. national interests; ***OR***
  - They are seeking entry into the U.S. as J-1 interns or trainees hosted by a U.S. government agency, and their exchange program supports the immediate and continued economic recovery of the United States. Applicants must have a program number beginning with "G-3" on their Form DS-2019 to qualify under this criterion; ***OR***

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- They are seeking a J-1 visa to enter the U.S. as specialized teachers in accredited educational institutions. Applicants must have a program number beginning with "G-5" on their Form DS-2019 to qualify under this criterion; ***OR***

- They are travelling to the U.S. to participate in a J-1 exchange program that fulfills critical and time sensitive U.S. foreign policy objectives.

- Spouses of H, L, and J Visa Applicants are exempt from the entry ban if the principal H, L, or J beneficiary qualifies under a national interest exception.

The above exceptions are in addition to all previously announced public health, national security, and other exemptions that were already in place under the ban.

Process to Request Exemption

As part of the new guidance, the DOS clarified that applicants who believe they qualify for a national interest exception may request an emergency appointment at a U.S. Embassy or Consulate location, providing specific details on their eligibility for an exception. Applicants 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.

KPMG NOTE

No Further Guidance Yet on Other Entry Ban Exemptions

While the proclamation introducing the existing nonimmigrant entry ban included certain exemptions for humanitarian travel, public health response, and national security, the DOS has not issued further guidance on how foreign nationals may qualify under these exemptions.

Considerations for Employers and Travelers

Given the overall fluidity of the circumstances, it continues to be prudent for all nonimmigrants and their dependents to remain in the U.S. and avoid international travel, where possible. This will help ensure that nonimmigrant visa holders and their dependents avoid the risk of being unable to return to the U.S. should any further restrictions on entry be imposed by the Trump Administration unexpectedly.

Monitoring the Situation

KPMG Law LLP in Canada office is tracking this matter closely. We will endeavor to keep readers of *GMS Flash Alert* posted on any important developments as and when they occur.

FOOTNOTES:

1 To review the Department of State's August 13, 2020 additional guidance on national interest exemptions to the existing nonimmigrant entry ban, click here. See also, American Immigration Lawyers Association (AILA), "Frequently Asked Questions (FAQs) Regarding the June 22, 2020, Presidential Proclamation 10052, Suspending Entry of Immigrants and Nonimmigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the Coronavirus Outbreak and the June 29, 2020, Amendment to the Proclamation 10052" (AILA Doc. No. 20072138, August 12, 2020.

2 For information on the June 22, 2020 Presidential Proclamation restricting entry of certain nonimmigrants to the United States, see GMS *Flash Alert*: 2020-294 (June 23, 2020). For information on previously issued guidance on exemptions to the June 22, 2020 entry ban, see GMS *Flash Alerts* 2020-301 (July 7, 2020) and 2020-326 (July 22, 2020).

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