

Mobility: immigration alert

August 2020

United States

DOS issues guidance on qualifying criteria for national interest exceptions to Presidential Proclamations suspending the entry of immigrants and non-immigrants

Executive summary

On 12 August 2020, the U.S. Department of State ("DOS") published guidance detailing the criteria to qualify for National Interest Exceptions to the 22 June 2020 Presidential Proclamation ("Proclamation") which suspended the entry of certain immigrant and nonimmigrant visa applicants.

Background

The Proclamation extended the prior suspension of immigrant visa issuance and suspended the issuance of H-1B, H-2B, J-1, and L-1 nonimmigrant visas until 31 December 2020.

The Proclamation already has exemptions, including, among others, H-1B, H-2B, L-1, and J-1 visa holders and their dependents currently in the US and individuals outside of the US who held a valid visa or other official travel document (such as Advance Parole) as of 22 June 2020.

National Interest exceptions

In its 12 August 2020 announcement, DOS provided a non-exclusive list of the types of travel that may be considered by Consular Officers to be in the national interest. This included H-1B and L-1 visa renewal applicants seeking to resume ongoing employment in the United States in the same position, with the same employer, in the same visa classification. Additionally, certain H-1B and L-1 health care professionals working to alleviate the effects of COVID-19 and certain individuals

requested by the US government to meet contractual or treaty obligations may also be issued a visa. DOS outlined other specific exceptions to the Proclamation for H-1B and L-1 applicants, along with exceptions for J-1 and H-2B applicants.

H-1B applicants

In addition to H-1B visa applicants seeking to resume ongoing employment, DOS may also grant visas under the national interest exception to individuals whose travel is necessary to facilitate the immediate and continued economic recovery of the US. A consular officer may determine that a new H-1B visa applicant will be eligible for this exception if two of the following five criteria are met:

1. The US employer has a continued need for the services to be performed by the H-1B nonimmigrant. This criterion is met by presenting a Labor Condition Application ("LCA") approved on or after July 2020 by the Department of Labor, evidencing the company's continued need for the H-1B worker. For LCAs approved before July 2020, the Consular Officer may review the application to determine the continuing need for employment within the US. This criterion is not met if an individual is currently performing, or is able to perform, the essential functions of the position remotely from outside the US.

2. The applicant's proposed job duties indicate the individual will provide significant and unique contributions to an employer meeting a "critical infrastructure" need.
 - ▶ Critical Infrastructure sectors include the 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 sectors.
 - ▶ The role must involve senior level placement, perform functions unique and vital to the management of the organization, or provide significant and unique contributions to the employer.
3. The salary paid to the H-1B applicant exceeds the prevailing wage rate by at least 15%.
4. The H-1B applicant's education, training, and/or experience demonstrate unusual expertise in the specialty occupation in which he or she will be employed.
5. Denial of the visa would cause financial hardship to the US employer.

L-1A applicants

In addition to L-1 visa applicants seeking to resume ongoing employment, Consular officers may determine that a new L-1A applicant will be eligible for a visa if two of the following three criteria are met:

- ▶ The applicant will be a senior-level executive or manager.
- ▶ The applicant has spent multiple years with the company overseas.
- ▶ The applicant will fill a critical business need for a company meeting a "critical infrastructure" need.

L-1B applicants

Consular officers may determine that an L-1B applicant will be eligible for this exception if all of the following three criteria are met:

- ▶ The applicant's proposed job duties and specialized knowledge will provide significant and unique contributions to the petitioning company;
- ▶ The applicant's specialized knowledge is specifically related to a "critical infrastructure" need; and
- ▶ The applicant has spent multiple years with the company overseas.

US consulates remain closed or offer limited visa services

Due to the COVID-19 pandemic, US embassies and consulates continue to offer limited visa services. Applicants who believe they are eligible for a visa based on the above criteria are instructed to request an emergency visa appointment. A consular officer will determine visa eligibility pursuant to an exception at the interview.

What this means

The criteria listed above for H and L visa holders has expanded the eligibility of H and L applicants to obtain visas. Current and prospective foreign national employees of companies who were previously unable to obtain certain H or L visas to the US may now be eligible for one if they meet the criteria outlined above. These individuals would still be subject to country-specific travel restrictions due to the COVID-19 pandemic. For more information on the COVID-19 travel restrictions, visit the EY Global COVID-19 Immigration Tracker at: https://www.ey.com/en_gl/tax/how-covid-19-is-disrupting-immigration-policies-and-worker-mobility-a-tracker.

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ey.com/en_ca

George Reis, Managing Partner
+1 416 943 2535
george.reis@ca.ey.com

Alex Israel, Partner
+1 416 943 2698
alex.d.israel@ca.ey.com

Batia Stein, Partner
+1 416 943 3593
batia.j.stein@ca.ey.com

Christopher Gordon, Partner
+1 416 943 2544
christopher.d.gordon@ca.ey.com

Roxanne Israel, Partner
+1 403 206 5086
roxanne.n.israel@ca.ey.com

Jonathan Leebosh, Partner
+1 604 899 3560
jonathan.e.leebosh@ca.ey.com