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## **THE EXECUTIVE ORDER SUSPENDING IMMIGRATION: WHAT IT COVERS AND HOW IT DISTRACTS FROM EFFECTIVE LEADERSHIP**

On Monday, April 20, 2020, Donald Trump tweeted that he would be “signing an Executive Order to temporarily suspend immigration into the United States!” This caused great consternation and confusion among immigrants and their families, US businesses, and the immigration bar. On April 23d, Mr. Trump issued his Order.<sup>1</sup> Now that we’ve had a chance to review it, we want to break it down and explain who it does and does not cover, how it does nothing to make us safer or strengthen the economy, and how it is another log on the anti-immigrant fire and a thinly-veiled distraction from the lack of effective leadership to actually combat the Coronavirus.

### **Who is Barred by the Order?**

The Order is relatively short and bars the following foreign nationals from immigrating permanently to the United States:

- *Foreign Nationals Overseas Who Lack an Immigrant Visa or Green Card.* With the exceptions discussed below, the Order applies to foreign nationals who do not have an immigrant visa or green card. Unless you are covered by an exception, you are barred from entering the United States as an immigrant even if you are processing, or planning to process, an immigrant visa at a US consul abroad. These visas could be through employment sponsorship, family sponsorship, or the Diversity Visa (DV) green card lottery as discussed below.
- *Foreign nationals outside the United States.* The Order only applies to individuals who were outside the US on April 23d, the date of issuance. Presumably, someone in the United States on that day could go home today, apply for an immigrant visa at the US Consulate there, and not be barred by the Order.

### **Who is Not Barred by the Order?**

- *Anyone in the United States on April 23.* This bears repeating. If you are in the United States, you remain eligible to adjust your status to lawful permanent residence or, presumably, to apply for an immigrant visa abroad (discussed below).

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<sup>1</sup> The Order is entitled “Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the Covid-19 Outbreak



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- *Nonimmigrants.* It is very important to note that the Order does not prevent nonimmigrants from entering the United States. As explained below, nonimmigrants are foreign nationals who enter the United States on a temporary basis and lack intent and permission to remain permanently.
- *Anyone with an Immigrant Visa.* You can immigrate if you already have an immigrant visa. An explanation of the green card process is helpful to understand this exception.

The Immigrant Visa (Green Card) Process. The process typically begins when the sponsor (e.g. an employer or US Citizen spouse) files an immigrant visa petition in the United States asking the US Citizenship and Immigration Services (USCIS) to find that the foreign national beneficiary satisfies the requirements for classification in a certain immigrant category, such as an outstanding researcher or the spouse of a US Citizen. On approval, when the beneficiary reaches the front of the visa waiting line (or if there is no line), he or she applies for permission to immigrate either through “adjustment of status” or “consular processing.” If the beneficiary is in the United States, in H-1B visa status for instance, s/he can apply to USCIS to “adjust” his or her status to lawful permanent residence. On approval, s/he will receive a green card. If the beneficiary is overseas, however, s/he must apply to the US Consulate in his or her home country for an immigrant visa. On approval, s/he will be granted an immigrant visa, can be physically admitted to the United States as a lawful permanent resident and will soon get a green card in the mail.

Anyone who is overseas and already has received an immigrant visa is exempt from the Order and can immigrate. (But keep in mind that the immigrant visa must be used within 6 months of issuance, which can be a problem given current global travel restrictions).

- *Lawful Permanent Residents.* The Order also does not apply to you if you already have a green card, lawful permanent residence or, as noted, an immigrant visa.
- *US Military Members.* If you are a member of the US military (or the spouse or child of a servicemember), the Order doesn’t apply to you.
- *Healthcare Workers.* The Order doesn’t apply to anyone overseas (and most immediate family members) who seeks an immigrant visa:
  - as a doctor, nurse or other healthcare professional
  - to perform COVID19 research
  - to perform work essential to combating or helping patients with COVID19.
- *Job Creation Investors.* The Order does not apply to anyone who has an approved “EB-5” petition. This visa category is for foreign nationals who invest \$1 million (or less in economically depressed areas) in projects that will create jobs for US workers.



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- *Special Immigrants.* The Order does not apply to anyone certain individuals who see to immigrate under USCIS “Special Immigrant” programs, and their spouses and children:
  - Afghanistan or Iraq nationals who supported the US Armed Forces as translators
  - Iraq nationals who worked for or on behalf of the US Government in Iraq<sup>2</sup>
- *Law Enforcement Aid.* The Order does not apply to you if you can satisfy the US Government that your immigration will advance important law enforcement objectives.
- *National Interest.* The Order doesn’t apply to you if you can show that your entry would be in the national interest.
- *Holders of Advance Parole or other Travel Document.* The Order does not apply to any foreign national who is overseas but who has Advance Parole or other official travel document.
- *Asylees and Refugees.* By its terms, nothing in the Order can limit the rights of asylees, refugees and foreign nationals that seek other forms of humanitarian relief. The Trump Administration’s assault on these forms of relief makes this suspect.
- *Spouse and Children of US Citizens.* The Order does not apply to a spouse, minor child or prospective adoptee of a US Citizen. In an especially harsh stroke, the Order bars from entry the parents of US Citizens and all family members of Lawful Permanent Residents (discussed below).

The Order gives the US Consulat the authority to decide if any of the above exemptions applies.

## ANALYSIS

### **The Order is a Harsh and Illusory Distraction from Failed Leadership and Does not Advance its Stated Purpose**

A close look at the Order reveals the actual limits of its reach and shows that it fails to promote its stated purpose. This leads to the inescapable conclusion that the Order is primarily a distraction from a failure of leadership in the war on Covid-19 and yet another log on the anti-immigrant fires.

The Order’s Limited Reach. The Trump Administration effectively gutted overseas visa processing more than one month ago when, on March 20, it suspended routine visa services at US Consulates around the world in response to the pandemic.<sup>3</sup> Since then, absent an emergency, immigrant visa

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<sup>2</sup> <https://www.uscis.gov/humanitarian/special-immigrants>

<sup>3</sup> <https://travel.state.gov/content/travel/en/traveladvisories/ea/routine-visa-services-suspended-worldwide.html>



applicants have been practically prevented from processing their cases and immigrating to the United States. Thus, although it is not readily apparent, the Order does little if anything to further curtail immigration.

The number of foreign nationals who are NOT affected by the Order also suggests that its surrounding fanfare is a lot of white noise. This is because it only bars “immigrants” but not “nonimmigrants” who comprise the vast majority of foreign nationals who enter the United States. Immigrants, a/k/a lawful permanent residents or green card holders, are those admitted to the United States on a permanent basis. To be eligible, they must meet the highly demanding requirements of a legal visa category. These can be based on a hard-to-fill job offer, extraordinary contributions, a close family relationship to a US Citizen or lawful permanent resident, a US investment that will create jobs, humanitarian considerations or a few other grounds. Nonimmigrants, on the other hand, enter the United States temporarily for a specific purpose. These include highly skilled H-1B professionals, certain investors, business visitors and tourists, and students, and their family members, to name a few.

The number of immigrants to the United States is dwarfed by the number of nonimmigrants who enter temporarily and are allowed to remain for various periods. Just over 1 million immigrants are admitted to the United States annually; more than 186 million nonimmigrants are admitted in a typical year. During the most recent year for which data is available, 90% of nonimmigrants were visitors for business or pleasure, and a small handful were temporary high-skilled workers, some agricultural workers and students, with their families. Currently, about 2.3 million nonimmigrants reside in the United States.<sup>1</sup> Thus, the exemption of nonimmigrants from the Order underscores its limited reach and its true purpose of distracting from failed leadership and appealing to anti-immigrant sentiment during an election cycle.

The Order is Temporary. Additionally, the Order is limited to 60 days, although it could be extended. By its terms, it was designed to protect job opportunities for marginalized US workers during record unemployment. Whether it will be extended most likely will depend on the state of the US economy, although we fear that political considerations will come into play.

The Order Fails to Promote its Stated Purpose. As its title shows, the Order is designed to protect jobs for US workers. The preamble states that the Order was designed to protect unemployed marginalized Americans, from competing for jobs during high unemployment. However, the Order fails to accomplish this end.

First, the Order shuts the door to the best and the brightest and the most highly educated from around the world and a host of others who will not compete for jobs with marginalized US workers. These include foreign nationals with demonstrated “extraordinary ability,” outstanding researchers, multi-national managers, advanced degree workers and those with exceptional ability and a college-education, all of whom are barred from entering in what are known as the “EB” or employment-based immigrant visa categories. While these workers could boost the economy, they clearly will not take jobs from the marginalized American worker.



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Second, the Order assumes that immigrants will seek to work once they get here. While some will, the Trump Administration's exceedingly onerous "public charge" requirements make this a disingenuous basis for banning their immigration. As a general rule, an immigrant visa applicant must show that s/he will not become a "public charge." This now requires voluminous evidence that the intending immigrant can support himself or herself and his or her household with an unprecedented degree of assets and income or that the sponsor can provide this level of support. Immigrants who are in a position to meet this high threshold are unlikely to compete with marginalized workers for low-skilled jobs. Accordingly, it is dishonest and cruel to close the doors to all immigrants, including family-based immigrants, based on an outcry for marginalized worker job protection. Rather, in barring all family-based immigrants other than the spouses and children of US Citizens, the Order accomplishes one of Mr. Trump's long-stated goals of ending what he calls "chain migration." Parents of US citizens, who have long been a preferred category under US immigration law, are barred by the Order. So are adult children of US Citizens, siblings of US citizens, as well as spouses and children of permanent residents. Congress has passed laws allowing these parents, children, husbands and wives to immigrate to join their families in the United States. The Order eviscerates this law and policy without reason.

### **Conclusion**

Mr. Trump's Order suspending immigration to protect the US labor market during the coronavirus pandemic is the legal equivalent of ear candling to treat liver disease. Neither works, and both are dangerous.

Fans of ear candling use a hollow candle to drip hot wax in the ear. They claim it creates negative pressure and funnels out unwanted ear wax. But there's no evidence that it works. Additionally, the FDA warns that it can block the ear canal, puncture the eardrum and cause other injuries. And it has nothing whatsoever to do with liver disease.

Mr. Trump's new Order, likewise, is unhealthy for us as a nation and economically toxic. It does nothing to protect job opportunities for marginalized Americans, which is its stated purpose. Instead, it closes our borders to the best and the brightest whose very help we need to wrestle the virus to the mat. It also cruelly separates families.

The corona virus does not discriminate on the basis of immigration status. Mr. Trump should behave accordingly.

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<sup>i</sup> [https://www.dhs.gov/sites/default/files/publications/Nonimmigrant\\_Population%20Estimates\\_2016\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Nonimmigrant_Population%20Estimates_2016_0.pdf)