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The Latest Executive Order on Immigration: Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak

On June 22, the Administration released the latest in a series of Executive Orders on immigration.

The title of the new Order is "Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak." Although the title of the Order references "entry" (meaning the physical point at which a foreign national presents themselves to US Customs for inspection at a land, sea or air border) the order itself confusingly focuses on visa issuance (which happens at US overseas consular posts and is the responsibility of the State Department). At this time, it is safe to assume that the affected individuals will neither be issued visas, nor allowed entry.

The Order was effective as of 12:01 am on Wednesday June 24.

Let's unpack the order:

- **Extension of Prior (Immigrant) Visa Ban**: Extends Proclamation 10014, the last Executive Order on immigration, until the end of this calendar year (December 31, 2020). To refresh your memory that Executive Order banned the entry of immigrants (new "green card" holders / permanent residents) who were outside the US and had not yet received immigrant visa stamps in their passports (with some exceptions). That proclamation issued April 22, 2020 to much fanfare has had basically zero real-life impact, since it prohibits the issuance of immigrant visas at US consulates, which were closed (and not issuing visas) prior to April 22 and remain closed today.

- **New Non-Immigrant Visa Ban and Exceptions**: Bans the entry of certain nonimmigrants (temporary workers) who are outside the US, have not yet received nonimmigrant visas stamps in their passports, and do not have an alternative travel document (such as an advance parole document).
    - Which nonimmigrant categories are impacted?
        - Those in the H1B, H2B, J1 (intern, trainee, teacher, camp counselor, au pair, and summer work travel), and L1 categories, and their dependents.
        - Importantly, many categories of nonimmigrants are NOT covered by the order including: B1 and B2 visitors, E treaty traders and investors, E3 Australians, F1 students, H1B1 Chileans and Singaporeans, H3 trainees,

other J1 categories (including students, researchers, physicians, and professors), O and P workers, and TN Canadian and Mexicans under the NAFTA.

- What other conditions are required for the order to apply?
  - The order only applies to those individuals who were outside the US on the effective date of the order, which is June 24. So technically, any worker who was in the US in H1B, H2B, J1 or L1 status on that date could travel overseas at a later date, get a new visa and return. Also anyone who was in the US in a different status on that date and who changes to H1B, H2B, J1 or L1 status could theoretically do the same. But the consensus among immigration lawyers is that this is an extremely risky proposition, and that all individuals currently in the US in H1B, H2B, J1 or L1 status should stay put for now.
    - To reiterate, the order does not preclude a change of status to H1B, H2B, J1 or L1. Someone outside the US on the effective date could enter the US in a different status, and then change to H1B, H2B, J1 or L1 in the US. However, it is critical to keep in mind issues of intent: you cannot enter the US in one status with the intent to change to another (this is entry fraud which has serious consequences). For example, entering the US on a B1 visa with the intent to change immediately to H1B status could be considered visa fraud. This is true not just because of the Executive Order but is part of longstanding immigration law. In order to show that fraud exists the government must show that the foreign national knowingly and willfully intended to violate the terms of her visa. It is a high bar. But it something to be aware of given this provision and the likelihood that USCIS officers will be looking very closely for fraud when they receive change of status petitions.
  - The order only applies to those individuals who do not yet have visa stamps in their passports. If you are a new (or extending) H1B, H2B, J1 or L1 worker and you already received a visa in your passport (prior to the closure of US consular posts in mid-March) and have been stuck overseas due to COVID, you should be able to (re)enter the US. However, if you are a new (or extending) H1B, H2B, J1 or L1 worker with an approved application / petition and you were not able to obtain a visa stamp prior to the COVID-related consular closures, you are now stuck outside the US until the end of the year. While this impacts many new applicants who have never lived/ worked in the US, it also impacts individuals, particularly those in H1B or L1 status, who may have lived in the US for many years, traveled abroad for what was expected to be a brief trip, got stuck overseas due to COVID, and now are facing an extended ban (and the news this week has reported many stories of individuals who are

physically separated from their family members who remained behind in the US).

- At this time US overseas consular posts remain closed, so, like Proclamation 10014 this Order will have little impact until they reopen.
- Also, an entry ban remains in place with regard to individuals physically present in most of Europe, as well as China, Iran, and Brazil. Until those bans are lifted this Order will have little practical impact on individuals currently in those jurisdictions.
- One piece of good news: It has been confirmed by US Customs that Canadians who are visa exempt are exempt from this order (so may continue to enter the US in H1B, H2B, J1 and L1 status).

- The order only applies to those who do not have an alternative travel document. The order specifically mentions an advance parole document (which would be relevant to workers, especially those in dual intent statuses such as H or L, who have pending adjustment of status applications and have received advance parole) as well as transportation letters or boarding foils (which are very rarely seen).
    - Two options to keep in mind in extremely compelling cases are humanitarian and significant public benefits parole. Although these are rarely issued, they are worth mentioning. The authority for this type of parole is under INA Section 212(d)(5). Whether to admit someone on this type of parole is totally in the discretion of USCIS and while there is no right to obtain work authorization, the parolee may request employment authorization if it is not "inconsistent with the purpose and duration of parole." Whether the USCIS grants an EAD is in their discretion.
- Who is exempt from the order? The first exception for legal permanent residents can be disregarded since a legal permanent resident would not be entering the US on a nonimmigrant visa. The remaining three exceptions are:
    - Spouses and children of US citizens.
    - Individuals seeking to enter the United States to provide temporary labor or services essential to the United States food supply chain.
    - Individuals whose entry would be in the national interest. The Order directs the Secretaries of State, Labor, and Homeland Security to determine standards for those to whom such an exemption would be available, and recommends they consider individuals who are: critical to the defense, law enforcement, diplomacy, or national security of the United States; involved with the provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized; involved with the

provision of medical research at U.S. facilities to help the United States combat COVID-19; or necessary to facilitate the immediate and continued economic recovery of the United States.

- Finally, children who would age out of eligibility for an immigrant visa because of the April proclamation are also exempted.

- **Other Notable Provisions**
  - This Order contains some very concerning language ordering the Secretary of Labor to consider promulgating regulations or take other appropriate action to *ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit, or who are seeking admission or a benefit, pursuant to an EB-2 or EB-3 immigrant visa or an H-1B nonimmigrant visa does not disadvantage United States workers*. This provision appears to have a retroactive intent and the concerns with it are well-explained in this article: https://www.forbes.com/sites/stuartanderson/2020/06/25/trump-may-attempt-to-force-long-time-h-1b-visa-holders-out-of-us. This section also orders the Secretary of Labor to step up its LCA enforcement efforts.
  - There is an additional overly broad and disturbing paragraph in Section 5, which states that DHS will take steps, consistent with law, to prevent certain individuals who have final orders of removal; who are inadmissible or deportable from the U.S.; have been arrested for, charged with or convicted of a criminal offense, from being able to work in the United States. This provision really has nothing to do with preventing the entry of nonimmigrant temporary visa holders, and seems to have been thrown in at the end of the proclamation to make the order encompass as many foreign nationals as possible. The consequences of this provision are potentially very far reaching. For example, people who have been granted relief under the Convention Against Torture are granted the ability to work; will this be taken away? What do they mean by criminal offense and what type of work authorization would be impacted?
  - This section also states that all foreign nationals applying for visas, entry, or immigration benefits in the US will be required to provide biometrics. Since biometrics are already taken at by DOS at consular posts, by CBP on entry, and by USCIS for dependents of nonimmigrant workers, we can only imagine this is meant to impose a biometrics requirement on I129 beneficiaries.
  - Finally, this section suggests that the Administration may reconsider how H1B cap cases numbers are allocated, giving preference to higher paid individuals. Note that the next H-1B cap "season" is not until March 2021, so the results of the November election will likely have a substantial impact on this and other provisions of the Order.

- **Severability Provisions:**
  - The Order contains a final section on severability, in which the drafters of the proclamation are clearly trying to insulate the order from litigation. Indeed

under the immigration statute the President has very broad authority to exclude immigrants from the US by proclamation whenever he determines, and for how long he determines, that their entry would be detrimental to the interests of the US. This was upheld by the US Supreme Court in the Muslim Travel Ban cases. Nevertheless, the scope of this Order seems to go well beyond denying entry to immigrants and is actually abrogating the required rulemaking procedures which the Supreme Court recently upheld in the DACA decision.

- The language of this section suggest the Administration recognizes that they are likely to be sued for many of the provisions in this Order. They state that if they are sued on any particular provision, the remainder of the proclamation will continue to be valid. It is unclear how they have the legal authority to make this kind of statement.
- In a second provision this section on severability, which almost seems to be a nod to the recent DACA decision by the Supreme Court, the drafters state that if anyone files a claim against them because of a procedural irregularity, they will just implement those procedural requirements. In the DACA litigation, the majority of the Supreme Court found that the government acted in an arbitrary and capricious way not because they sought to end the DACA program but because they did not follow the required procedures. The majority decision in that case makes clear that they could terminate the DACA program if they follow the correct legal process. In the case of this Order, it seems the drafters are taking this into account.

In conclusion, this Order covers a lot more territory than just the entry of certain nonimmigrant workers. Many sections are poorly drafted, and significant questions remain about how broadly certain provisions will be applied. We can certainly expect judicial challenges to some of the provisions of this Order.

Grossman Young & Hammond will continue to provide updates and analysis as guidance develops. If you need specific advice about how the order impacts you or your employees, please contact our office to schedule a consultation.