

Update On the Impact of COVID-19 on Business Immigration

A Discussion of 9 Key Issues | June 18th Web Seminar Summary

Thank you for your interest in KM&M's recent webinar **Update on COVID 19's Impact on Business Immigration**. We are pleased to share the following summary and updates reviewing the effect the pandemic has had in nine immigration and employment areas. This includes updates of evolving policies and the unique issues employers of immigrants face as a result of COVID-19. Our immigration and employment law attorneys also discuss delayed start dates for individuals on OPT, changes in work conditions, the impact of remote employment, furloughs, and terminations, executive orders, and other updates.

Key Issues

Travel Bans & Presidential Proclamations
USCIS Resumption of Public Services
Consular Updates
Terminations, Furloughs and Pay Reductions
Unemployment Compensation Issues
I-9 Remote Verification
LCA Posting Issues
H-1B Visa Petitions
Optional Practical Training (OPT)/
Unemployment issues

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1. Travel Bans & Presidential Proclamations

- Travelers generally cannot enter the US if they have been present within the past 14 days in China, Iran, Europe or Brazil. Excluded from the travel ban are US citizens and permanent residents (green card holders), certain family members of US citizens and green card holders, essential workers (e.g., health care, food supply, etc.) and others whose entry is in the national interest.
- To protect US workers in light of the high level of unemployment, President Trump announced in April that green cards will not be issued to most applicants outside the US until (at least) June 23, 2020. The practical impact of this proclamation is limited, as US embassies and consulates have been closed since March due to COVID-19, thereby preventing the issuance of green cards abroad except in emergency cases.
- President Trump recently announced the suspension of student (F) and exchange visitor (J) visas for Chinese graduate students and researchers whom the US government has reason to believe were, are or are likely to be, connected to China's "military civil fusion strategy." For now, the order only impacts such visa applicants who are physically outside the US. However, the government is examining whether to expand it to include such individuals who are currently inside the US.
- An expansion of the prior immigration bans, which was alluded to at the webinar, became effective by Executive Order on June 24th and now includes restrictions on the H-1B, H-2B, L-1 and J-1 visa programs. In addition, the Trump administration is considering several regulatory changes for H-1B visas, as well as for H-4 work permits and F-1 Optional Practical Training. These changes will take longer, as the Department of Homeland Security must undertake a notice and comment period during which the public can weigh in on the proposed changes.

2. USCIS Resumption of Public Services

- USCIS resumed in-person services at domestic field offices and support centers as of June 4th. However, several offices remain closed, including those in New York City and Brooklyn, except for emergency appointments. To schedule an emergency appointment go to www.uscis.gov/contactcenter. All appointments that were cancelled due to pandemic office closures will be rescheduled under strict protocols. For the latest updates regarding office schedules visit <https://www.uscis.gov/about-us/uscis-office-closings>.

3. Consular Updates

- All US embassies and consulates around the world have been closed for routine visa processing since March 2020. Emergency appointments are available on a case-by-case basis for serious medical emergencies or travel to perform COVID-related work in the US. We expect long delays to schedule visa interviews when the embassies start to reopen, and encourage everyone who needs an appointment to schedule their interview as soon as possible.

4. Terminations, Furloughs and Pay Reductions

- As a result of COVID-19, many employers are implementing terminations, furloughs and reductions in hours and wages. These actions affect employees differently, depending on their immigration status. In general, personnel actions that affect the employment status of employees (meaning, terminations and furloughs) affect everyone in all work visa categories. This is because, with limited exceptions, individuals with these visas must continue to work in order to maintain their immigration status. Some categories, such as H-1B and E-3 visas, impose strict and

specific wage and hour obligations. For H-1B and E-3 workers, a reduction in their work hours and pay rate is considered material and, therefore, requires an amended petition. On the other hand, other visas, such as the L-1, O-1, and TN, are not associated with strict wage and hour requirements. Because of this, the prevailing view is that a reduction in hours and salary does not require amended filings for these workers.

5. Unemployment Compensation Issues

- Eligibility for unemployment compensation depends on the status of the individual and the requirements of each State - which regulates its own unemployment insurance program, including eligibility criteria. Some States require that an individual be able and available to work. Individuals in green card status or an open market EAD are able and available to work. However, individuals in temporary nonimmigrant visa status (e.g., H-1B, L-1, E-1/E-2) are generally only authorized to work for a specific employer and would therefore not be considered able and available to work. As individuals in these visa categories are also required to remain employed by their visa sponsor, being unemployed is a violation of status. For nonimmigrants, accepting unemployment compensation could adversely affect the ability to extend the visa and/or apply for a new visa at a consulate abroad. It is our recommendation for the moment that nonimmigrant visa holders not apply for unemployment benefits as this could compromise their current visas or future status.

6. I-9 Remote Verification

- Employers have an obligation to physically inspect each employee's work authorization and identity documents, and to complete a Form I-9 verifying the employee's work authorization. DHS is allowing employers whose offices are closed during COVID-19 to inspect documents remotely (i.e. by video, fax or email) within

3 business days of the employee beginning work. Employers must still complete the Form I-9 as usual, and should physically inspect the documents within 3 days of resuming normal operations. For employers whose workplaces remain open, the usual physical presence requirements apply. DHS is also allowing employees to use identity documents that expired on or after March 1, 2020, but updated documents must be provided within 90 days of the termination of the policy.

7. LCA Posting Issues

- H-1B and E-3 visas require a certified Labor Condition Application (LCA), which sets the conditions of employment including hours and wages. Government regulations require the LCA, or a notice of filing containing the same information, to be posted at the worksite. Since COVID-19, a majority of people have been working remotely – meaning from home in most cases. The DOL has advised that H-1B and E-3 employees remain subject to the LCA posting requirement. For those working from locations that are within “normal commuting distance” of the certified LCA worksite (which is generally within 50 miles), the employees can simply post the LCA or a notice at their home. On the other hand, if an employee is working beyond the geographic scope of the LCA, the employer may be required to file an amended visa petition.
- LCA issues can also arise when employers file new petitions for H-1B and E-3 workers, or when filing extension applications. The regulations require that the LCA or notice of filing must be visible to US workers. Since hard copy notices are not visible in an office where no one is working, the better method may be to provide notice electronically, through the company's intranet, electronic bulletin board or similar placement, or by direct email to the other employees.

8. H-1B Visa Petitions

- H-1B applicants, including those selected in the recent H-1B lottery (as well as many other non-immigrant visa holders,) may confront changed circumstances, such as layoffs, furloughs, work-at-home requirements and reductions in wages. These changes will likely be considered “material changes” so as to require the filing of amended visa petitions together with new Department of Labor wage determinations. Job portability (the ability of an H-1B worker to transfer to another employer) still exists and may be more frequently utilized in the weeks and months ahead. The student “cap-gap” regulations continue.
- Premium processing (the government’s fast track program) has been reinstated after a lengthy pandemic-related suspension. Effective June 22nd all eligible I-140 visa petitions, all cap-subject and cap-exempt H-1B visa petitions, and all other non-immigrant visa petitions (e.g. L, O and P categories) will be eligible for premium processing. Under premium processing applicants will receive notification of government action within 15 days.

9. Optional Practical Training (OPT)/Unemployment issues

- During OPT, F-1 visa holders are permitted up to 90 days of unemployment. An additional 60 days of unemployment is permitted if on STEM OPT. F-1 students who exceed these limits are in violation of status.
- It is therefore critical for individuals with OPT to remain employed. OPT employment includes: paid employment, including part-time (at least 20 hours per week); self-employment; working as a contractor; and unpaid work, such as an internship. Employment with multiple employers is permissible. F-1 students with STEM OPT must continue to work for an E-Verify employer.

Note: On June 22nd, the White House issued a new presidential proclamation to restrict the entry into the United States of most H-1B, H-2B, J, and L nonimmigrants and their family members. Further information about this proclamation can be found on KM&M’s website.



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