



212(F) Proclamation Travel and Visa Restrictions and National Interest Exception Process

July 24, 2020

Summary

Recent regulatory changes have imposed significant barriers to entry into the United States as part of the national response to the coronavirus pandemic. In the memo below, we summarize the current state of the law, analyze the mechanisms to arrange travel to the U.S. for certain individuals, and identify the key executive branch players.

Background

The Immigration & Nationality Act (INA) provides the President of the United States unilateral authority to suspend entry of any foreign alien, class of aliens, or nationality for a period of time deemed necessary by the president in accordance with INA [Section 212\(f\)](#), if the president determines that such aliens would be “detrimental to the interests of the United States.” The statute reads:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

COVID-19 212(f) Proclamations

In response to the COVID-19 pandemic, President Trump issued a series of 212(f) proclamations restricting foreign entry into the United States as part of an effort to reduce the likelihood of infected foreign travelers and immigrants spreading the virus in the U.S.

- On January 31, 2020, President Trump issued a 212(f) proclamation prohibiting any foreign national who had been in [mainland China](#) within 14 days (excluding Hong Kong and Macau) from entering the United States. Only U.S. citizens, legal permanent residents (LPRs), and immediate relatives of U.S. citizens were excluded from the proclamation.
- On February 29, 2020, President Trump issued a similar order preventing non-LPR foreign travelers who had been in [Iran](#) within 14 days from entering the United States.
- On March 11, 2020, President Trump issued 212(f) proclamations restricting travel on non-LPR foreign nationals who had been in the [Schengen Area, Ireland, and the United Kingdom](#); and,

- On May 24, 2020, President Trump issued a proclamation for non-citizens, non-LPR travelers from [Brazil](#).

Separately, on March 20, 2020, the U.S. Department of State suspended routine visa services at all U.S. embassies and consulates, in effect cancelling all routine immigrant and nonimmigrant visa appointments.

The current travel restrictions apply to individuals who have been present in the following countries up to 14 days prior to entering the United States, with exceptions for U.S. citizens, legal permanent residents, spouses and children of U.S. citizens, EB-5 visa holders, and approved health professionals:

- China
- Iran
- Europe – Schengen Area
 - Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Monaco, San Marino, Vatican City
- United Kingdom (England, Scotland, Wales, Northern Ireland)
- Ireland
- Brazil

It is worth noting that the proclamation does not ban citizens from the above countries from entering the United States. In fact, a citizen from the above countries (excluding most Iranian citizens) could be present for at least 14 days in another country that is not subject to a 212(f) proclamation restriction before traveling directly to the United States. For example, a British citizen who is present in Jamaica for 14 days, without entering a country subject to 212(f) restrictions in the interim, could travel to the United States. The 212(f) restriction would not apply to that British citizen.

We also understand that an agreement between the U.S. and Greece may be released in the coming days, which would allow bilateral travel to resume with certain health certifications.

Restricted Visa Categories

On June 22, 2020, President Trump extended a 212(f) proclamation ([Presidential Proclamation 10052](#)) originally issued on April 22, 2020 ([Executive Proclamation 10014](#)), that suspended entry of individuals with immigrant visas for 60 days in an effort to protect U.S. citizens from competition in the job market and minimize tension on the U.S. health care system. This order exempts LPRs, spouses and children of U.S. citizens, health care professionals, EB-5 investors, and those who already held valid immigrant visas prior to the issuance of the original proclamation.

Presidential Proclamation 10052, which expires at the end of the year, suspends visa issuance and entry to the U.S. for the following:

- H-1B and H-2B visas, and any alien accompanying an H-1B and H-2B visa holder;
- J visas for the specific employment as an intern, trainee, teacher, camp counselor, au pair, summer work travel program, and any alien accompanying a J-visa holder; and,
- L visas, and any alien accompanying an L-visa holder.

Individuals with valid visas who are present in the United States are exempt from the proclamation.

Exceptions to Travel Restriction Proclamations – National Interest Designations

The president's June 212(f) proclamation provides some broadly described, but difficult to attain, pathways to waive the proclamation restrictions.

The proclamation requires the Secretaries of State, Labor, and Homeland Security to consult with each other to develop and define national interest waiver categories and procedures that are:

- Critical to the defense, law enforcement, diplomacy, or national security of the United States;
- Involved with provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized;
- Involved with the provision of medical research at United States facilities to help the United States combat COVID-19; and,
- Necessary to facilitate the immediate and continued economic recovery of the United States.

Though the proclamation provides consular officials the power to determine if a nonimmigrant meets the scope and limitations of entry into the United States, we understand that some consulates will not grant visas without prior approval or direction from leadership at the State Department.

Therefore, a business or organization seeking a waiver must demonstrate to either the Secretaries of State, Labor, or Homeland Security a compelling reason to develop a specific waiver category that meets the national interest criteria above. Most organizations who are seeking waivers that do not relate to the medical and national security purview must develop a convincing case that a waiver granting visas benefitting their industry would provide immediate benefit to efforts to promote economic recovery in the U.S.

Should either of the three cabinet secretaries agree to develop a national interest waiver category, the Secretary of State would instruct the Bureau of Consular Affairs and the Secretary of Homeland Security would instruct the U.S. Citizenship and Immigration Services (USCIS) and U.S. Customs and Border Protection (CBP) to coordinate the issuance of visas and necessary travel documentation to permit individuals entry into the United States. We understand that guidance is under development and may be issued soon.

Because the United States has not been successful in minimizing the spread of the COVID-19 virus, it is likely U.S. officials are considering national interest exemption proposals that are narrow in scope and offer a limited number of people entry into the United States, and which do not undermine the spirit and intention of President Trump's proclamation to strengthen U.S. job security and reduce the spread of COVID-19 infections in the United States.

On July 16, 2020, the State Department [announced](#) national interest exceptions for student travelers from the Schengen Area, the United Kingdom, and Ireland with an F-1 or M-1 visas. Student travelers with J-1 visas can initiate the exception process with U.S. embassies and consulates. Likewise – the State Department proclaimed in the same announcement it is also providing national interest exceptions to business travelers, investors, treaty traders, and academics who entering the U.S. for humanitarian, public health, and national security reasons.

On July 17, 2020, the State Department announced a [list of exceptions](#) to P.P. 10052 and P.P. 10014. Individuals with the above visas are exempted from the restriction if the visa holder is applying for a renewal and their existing visa is set to expire before end of the year or two weeks after the expiration of the presidential proclamation.

- For H-1B and L-1 visa holders exceptions cover public health and healthcare professionals, or those who can offer substantial public health benefit or those that alleviate effects of pandemic including health professionals assisting areas that have been adversely affected by COVID-19.
- H-1B exceptions also cover individuals travelling to support a U.S. government agency or entity that meets “critical U.S. foreign policy objectives” as identified by the Department of Defense or other federal agency, performing research, providing IT support and services for projects deemed as essential to a U.S. government agency.
- Likewise, exceptions are allotted to H-2B visas holders whose travel is based on the request of a U.S. government agency or entity that meets critical U.S. foreign policy objectives or satisfies treaties or contractual obligations.
- The State Department also provides exception to J-1 visas holders for au pairs and childcare caregivers to those in special needs or children of parents who have contracted the virus or parents involved in medical research. Other exceptions for J-1 visas are extended to interns, trainees, and specialized teachers involved in exchange programs involved in federal-sponsored programs.
- Dependent visas, including the H-4, L-2, and J-2 visas are permitted to individuals associated with visa holders who are exempt from P.P. 10052.
- Individuals who seek exception to the P.P. 10014 or 10052 can pursue petitions via visa appointments at U.S. embassies and consulates.

On July 21, a number of leading business associations filed a federal lawsuit in the Northern District of California arguing that the employment visa ban is not rationally related to the COVID crisis. At this time, the timing for the litigation is not known.

Designated Airport of Entry

Should an individual who is subject to a 212(f) restriction achieve a national interest exemption and fly to the United States, they will be directed to one of the following 15 airports which have been designated to accommodate travelers coming from 212(f) countries:

1. Boston-Logan International Airport (BOS), Massachusetts
2. Chicago O’Hare International Airport (ORD), Illinois
3. Dallas/Fort Worth International Airport (DFW), Texas
4. Detroit Metropolitan Airport (DTW), Michigan
5. Daniel K. Inouye International Airport (HNL), Hawaii
6. Fort Lauderdale-Hollywood International Airport (FLL), Florida

7. George Bush Intercontinental Airport (IAH), Texas
8. Hartsfield-Jackson Atlanta International Airport (ATL), Georgia
9. John F. Kennedy International Airport (JFK), New York
10. Los Angeles International Airport, (LAX), California
11. Miami International Airport (MIA), Florida
12. Newark Liberty International Airport (EWR), New Jersey
13. San Francisco International Airport (SFO), California
14. Seattle-Tacoma International Airport (SEA), Washington
15. Washington-Dulles International Airport (IAD), Virginia

Quarantine and Isolation

Once permitted travelers arrive in the U.S., they will proceed with standard customs processing before undergoing enhanced entry screening by U.S. customs officials, which could involve random temperature checks and questions about personal medical history, current health condition, and contact information for their local health authorities.

In February 2020, the Department of Health and Human Services (HHS) issued an [interim final rule](#) that would require airlines with flights arriving in the United States with passengers who may have been present in China within 14 days of the flight to share passengers' and crewmembers' identifying information to the Centers for Disease Control and Prevention (CDC) prior to the plane's arrival. A [joint framework document](#) issued by HHS, DHS, and the Department of Transportation on July 2, 2020, allude to ongoing talks between the CDC and airlines to develop a mutually workable standard of compliance. We understand the discussions revolve around the development of a new 'app' that passengers would use to provide biographical information to the U.S. government.

After travelers have been permitted to proceed to their destination, the CDC recommends travelers also complete a 14-day home-quarantine. Though it does not appear the U.S. Department of Health and Human Services (HHS) has effectuated such enforcement, some states have imposed stay-at-home orders. In theory, a foreign national who has attained a 212(f) national interest waiver may be subject to a state or local government's future stay-at-home or quarantine order that could prevent them from working or engaging in the activity they arrived in the United States to perform.

Travel Restrictions from Canada and Mexico into the U.S.

Since March 20, 2020, the U.S. has developed two separate but mutually determined agreements with Canada and Mexico to restrict non-essential travel at terrestrial ports of entry.

Permitted "essential travel" from Canada to the U.S. and from Mexico to the U.S. includes:

- Travel for medical purposes
- Travel to attend educational institutions
- Travel to work (specifically mentioning farming and agricultural industry)
- Travel for emergency response and public health purpose
- Lawful cross-border trade (commercial trucking)
- Official government or diplomatic travel
- Members of the U.S. armed forces returning to the U.S.

- Military-related travel or operations

The restrictions specifically forbid travel across the border for tourism purposes, including sightseeing, recreation, gambling, or attending cultural events.

The original March 20 order has been extended four times, with the most recent extension is set to expire on August 20, 2020, unless it is renewed once again.

Process for Obtaining a Waiver

The federal government has issued very little formal guidance about how to obtain a waiver of either the health and/or labor restrictions, but senior officials recently suggested a few potential courses of action. Officials at both DHS and State have directed waiver applicants to file official letters with the consular office from a which a traveler would be seeking a visa (or in the destination country if a visa is not needed). These requests are reviewed by consular officials for review, and a response is generated from that office.

Requests for national interest exemptions can be directed to the State Department's general submission email address: ca-va-nie@state.gov.

However, current visa holders seeking national interest exemptions to geographic 212(f) proclamations are directed first to the State Department's email address above, and can later be sent to the CBP's email: cbpofoccc@cbp.dhs.gov.

- If an applicant is seeking to have a political appointee in the administration weigh in before a decision is made, we have been advised to submit as much information as possible as to the reasons for the waiver to such political appointees *BEFORE* an official request is entered into the State Department system.
- For employment visas, a very strong case of uniqueness or economic benefit to the U.S. must be made to justify the waiver request.
- Travelers who do not need a new visa, or no visa at all (such as Visa Waiver Program travelers) still should engage the consular office seeking a waiver.
- Travelers hoping to utilize a non-banned third country (such as Jamaica or Columbia) to travel to the U.S. have been advised by CBP to purchase one airline itinerary with a 14-day layoff in such country to be able to demonstrate to CBP that they are not subject to the 14-day bar and have been in a non-banned third country for the requisite time. Purchasing two separate tickets may hinder CBP's ability to recognize the appropriateness of the entry into the U.S.

Conclusion

The process for achieving a national interest exception to President Trump's 212(f) travel and visa restriction proclamations have been shared with us by administration officials. However, we do not anticipate the approval process for such waivers requests to be cut-and-dried. It is likely that the fluid response to the federal government's ability to control the spread of the virus and the resulting economic uncertainty will prompt future changes to the waiver petition process.

