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Possible U.S. travel options for foreign nationals amid the pandemic

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Recently, the Centers of Disease Control and Prevention announced that it would stop screening international passengers for COVID-19, even from what were deemed “high-risk” countries such as China, Iran, Brazil, and the majority of the Schengen Area in Europe (Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland).

The CDC had previously designated 15 airports where flights from those countries had been routed. Upon landing in the United States, all passengers had to undergo a COVID-19 “travel screening” where the individual’s health would be assessed for any indications that the COVID-19 virus might be present.

The CDC has now ended this practice, saying that it had “limited effectiveness.” The new policy allows international flights to be routed to any international airport in the United States.

Foreign nationals from “high-risk” countries

Generally, foreign nationals do not have unrestricted travel to the United States, even under the new policy. However, the State Department has provided some relief.

Since late January 2020, the Administration has issued seven proclamations directly or indirectly related to the COVID-19 pandemic. **Five of the proclamations** generally prohibited entry into the United States by nationals from China, Iran, the Schengen Area in Europe, the United Kingdom, and Ireland. The end of CDC screening does not affect those travel bans: they remain in effect.

This means that any foreign national who has been physically present in any of these countries 14 days before arrival in the United States will



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continue to be prohibited from entering the United States. The Trump Administration has issued two additional proclamations that **bar the entry of immigrants (Proclamation 10014)** and **nonimmigrant holders of H-1B, H-2B, certain J-1, and L-1 visas (Proclamation 10052)**. The travel restriction also applies to individuals who have only transited through an airport in any of these countries.

The only way for a foreign national to enter the United States from one of these regions is by meeting one of the few exceptions outlined in each of the proclamations. Limited relief applies to students from the Schengen area, the United Kingdom, and Ireland who have valid F-1 and M-1 visas, and their dependents. These individuals may travel to the United States while the health-related proclamations are in effect.

Any other foreign national must meet the criteria for a National Interest Exception, discussed below.

Obtaining an appointment for a nonimmigrant visa

A foreign national who can demonstrate either that he or she clearly qualifies for one of the exemptions from the travel ban or meets the criteria for a National Interest Exception may apply for a nonimmigrant visa. If so, the individual may be able to obtain a visa appointment even if the consulate is not currently open for regular visa processing. To confirm whether the consulate is open for nonimmigrant visa scheduling procedures, the foreign national should contact the consulate or embassy directly and review its website for the most current information.

It is important to note that the Department of State did not institute a uniform policy or process regarding NIE waivers. Therefore, the procedures vary at each consulate or embassy, and whether services are available will depend on local health conditions.

If the visa appointment is ultimately granted, this is not a guarantee that a nonimmigrant visa or NIE will be granted. The consular officer has full discretion to make this determination at the appointment.

National Interest Exception waiver

The Presidential proclamations restricting entry to the United States due to COVID-19 have an exception that states as follows:

“any alien whose entry would be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security, or their designees.”

The following categories of travelers may now qualify for national interest exceptions under Presidential Proclamations 9993 and 9996:

- **Public Health:** Travel as a public health or health care professional or researcher to alleviate the effects of the COVID-19 pandemic, or to continue ongoing research in an area with substantial public health benefit (e.g., cancer or other disease research).
- **Students:** All students, and their dependents, traveling to the United States on an F or M visa to pursue a full course of study, or on a J visa to participate in an exchange program as a bona fide student.

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- **Academics:** All exchange visitors and their dependents traveling to the United States on J visas in the following categories: Professors, Research Scholars, Short Term Scholars, or Specialists
- **Investors:** Travel in connection with investment or trade in the U.S. economy that generates a substantial economic impact, including investors and treaty-traders on E visas and the senior-level employees who provide strategic direction or expertise essential to the success of the investment, and their dependents.
- **Economic:** Temporary travel that provides a substantial economic benefit to the U.S. economy, including the following:
 - **Technical experts and specialists** to install, service, maintain, or receive training for vessels, machinery and other specialized equipment used by U.S. and foreign firms with a substantial investment in the United States. Travel is temporary in nature and for a defined period of time.
 - **Senior-level managers and executives**, and their dependents, who provide strategic direction necessary for the success of the company or venture.
 - **Professional athletes, dependents, and essential staff** who enter the United States to participate in major sporting events, which bolster the U.S. economy.

Regarding NIE waivers for specific nonimmigrant visa categories in Proclamation 10052, the State Department has provided guidance and examples of situations where a grant of an NIE waiver may be possible. The guidance is as follows:

For H-1B visa holders:

For travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit (e.g. cancer or communicable disease research). This includes those traveling to alleviate effects of the COVID-19 pandemic that may be a secondary effect of the pandemic (e.g., travel by a public health or healthcare professional, or researcher in an area of public health or healthcare that is not directly related to COVID-19, but which has been adversely impacted by the COVID-19 pandemic).

Travel supported by a request from a U.S. government agency or entity to meet critical U.S. foreign policy objectives or to satisfy treaty or contractual obligations. This would include individuals, identified by the Department of Defense or another U.S. government agency, performing research, providing IT support/services, or engaging other similar projects essential to a U.S. government agency.

For L-1 visa holders:

Travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit. This includes those traveling to alleviate effects of the COVID-19 pandemic that

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may be a secondary effect of the pandemic.

For H-2B visa holders:

Travel based on a request from a U.S. government agency or entity to meet critical foreign policy objectives or to satisfy treaty or contractual obligations. An example of this would be supporting U.S. military base construction (e.g. associated with the National Defense Authorization Act) or IT infrastructure.

For J-1 exchange visa holders:

Travel to provide care for a minor U.S. citizen, [lawful permanent resident], or nonimmigrant in lawful status by an *au pair* possessing special skills required for a child with particular needs (e.g., medical, special education, or sign language). Childcare services provided for a child with medical issues diagnosed by a qualified medical professional by an individual who possesses skills to care for such child will be considered to be in the national interest.

Travel by an *au pair* that prevents a U.S. citizen, lawful permanent resident, or other nonimmigrant in lawful status from becoming a public health charge or ward of the state of a medical or other public funded institution.

Childcare services provided for a child whose parents are involved with the provision of medical care to individuals who have contracted COVID-19 or medical research at United States facilities to help the United State combat COVID-19.

An exchange program conducted pursuant to [a Memorandum of Understanding], Statement of Intent, or other valid agreement or arrangement between a foreign government and any federal, state, or local government entity in the United States that is designed to promote U.S. national interests if the agreement or arrangement with the foreign government was in effect prior to the effective date of the Presidential Proclamation.

Interns and Trainees on U.S. government agency-sponsored programs (those with a program number beginning with “G-3” on Form DS-2019): An exchange visitor participating in an exchange visitor program in which he or she will be hosted by a U.S. government agency and the program supports the immediate and continued economic recovery of the United States.

Specialized Teachers in Accredited Educational Institutions with a program number beginning with “G-5” on Form DS-2019: An exchange visitor participating in an exchange program in which he or she will teach full-time, including a substantial portion that is in person, in a publicly or privately operated primary or secondary accredited educational institution where the applicant demonstrates ability to make a specialized contribution to the education of students in the United States. A “specialized teacher” applicant must demonstrate native or near-native foreign language proficiency and the ability to teach his/her assigned subject(s) in that language.

Critical foreign policy objectives: This only includes programs where an exchange visitor [sic] participating in an exchange program that fulfills critical and time sensitive foreign policy objectives.

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For dependent family members (H-4, L-2, and J-2, respectively):

National interest exceptions are available for those who will accompany or follow to join a principal applicant who is a spouse or parent and who is not subject to [Presidential Proclamation] 10052 (including those who have been granted a national interest exception). This exception can be extended to derivative applicants when the principal is currently in the United States or has a valid visa.

How to request an NIE waiver

If a foreign national already has a valid unexpired visa, or clearance to the United States through the Electronic System for Travel Authorization, the NIE waiver request can be made to the U.S. consulate or embassy where he or she is physically present. Otherwise, the request must be made at the same consulate or embassy where the foreign national is scheduled for a nonimmigrant visa appointment. Again, the process and evidentiary requirements will vary from one consulate or embassy to another. No specific guidance has been issued regarding the precise evidence needed to “prove” that a foreign national qualifies for an NIE waiver.

We strongly recommend that employers check with the specific consulate or embassy regarding its NIE waiver processes. If the foreign national is approved for an appointment, the employer should ensure that the foreign national is aware of the documentation needed to support the NIE waiver application. Once an NIE waiver is granted, the foreign national will either have an annotation on the visa foil in his or her passport, or will be provided a letter or email.

Finally, the NIE waiver is valid for only one entry into the United States, which must take place within 30 calendar days from the issuance of the NIE. An individual who leaves the United States and wishes to return must be reassessed for a new NIE waiver through the State Department or U.S. Customs and Border Protection.

Although the COVID-19 Presidential proclamations included China, Iran, and Brazil, it is not clear whether the consulates or embassies in these regions have been provided guidance on the issuance of NIE waivers or whether NIE waivers are being issued at all.

We will continue to monitor this developing issue. If you have any questions about this or other business immigration law issues, please do not hesitate to contact any of our **immigration attorneys**.

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