

Trump Suspends New H-1B Visas Through 2020

Green card ban extended through Dec. 31

By Roy Maurer

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President Donald Trump signed an executive order (<https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/>) June 22 restricting foreign nationals from outside the U.S. using certain temporary employment-based visas through the end of the year and extending a green card ban enacted in April (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/trump-immigration-ban-limited-duration-scope.aspx) through Dec. 31.

The order freezes access to new H-1B visas used by professional and technology workers; H-4 visas awarded to the spouses of H-1B holders; H-2B visas used by seasonal workers in landscaping and hospitality; L-1 visas for executives and managers transferred within companies; and J-1 visas issued to interns, trainees or people on work-study summer programs.

Visa holders already in the U.S. or with already approved visas are exempted from the ban, as are health care workers focused on treating and researching Covid-19, and those working in the nation's food supply chain. Foreign national workers inside the U.S. may continue to apply for extensions of their currently valid visa status or seek an adjustment or change of status. The order takes effect June 24.

In the 2019 fiscal year, about 139,000 new H-1B petitions were approved (another 250,000 were extended); 77,000 L-1 visas were issued, as well as 66,000 H-2B visas for seasonal workers. There were about 200,000 new J-1 workers hired in 2018, according to the latest data available.

Trump had previously imposed a 60-day ban on green cards issued abroad, which was set to expire June 22. That order was aimed at certain family members of U.S. citizens and permanent residents who reside abroad, and effectively bypassed foreign nationals sponsored for employment visas.

The White House said the order was issued in response to the country's exceptionally high unemployment in the wake of the coronavirus pandemic. Officially, over 20 million people are counted as unemployed by the Department of Labor (DOL), while the unemployment rate is at 16.4 percent (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/how-to-read-us-unemployment-rate-bls-misclassification.aspx), higher than at any time since the Great Depression.

DOL Secretary Eugene Scalia said the president's order will "help ensure that the millions of Americans who are unemployed due to the coronavirus are first in line to fill job openings. While we added 2.5 million jobs in May, there are still many more Americans unemployed and eager to return to the workforce. Getting these Americans back into good-paying jobs is a top priority for the administration."

But groups such as SHRM and the U.S. Chamber of Commerce expressed disappointment with the visa restrictions contained in the order, saying that they will hinder critical recruiting and hiring and stunt business growth.

"As we work to address a growing skills gap, the pipeline of critically skilled workers for U.S. businesses must be preserved," said Emily M. Dickens, SHRM corporate secretary, chief of staff, and head of government affairs. "We're encouraged the Optional Practical Training program (<https://www.uscis.gov/opt>)—a crucial workforce development tool—was excluded from the executive order. However, new

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restrictions placed on H-1B, H-2B, J and L visa categories will negatively impact access to much needed global talent pools instead of strengthening the country's workforce."

Jesse Bless, the director of federal litigation at the American Immigration Lawyers Association, said that there's "certainly going to be litigation," arguing that the order violates federal immigration and administrative laws.

Practical Effect

One thing that is often lost in these discussions is the distinction between a visa and a visa status, said Rebecca Bernhard, a partner in the Minneapolis office of international law firm Dorsey and Whitney. "This executive order stops the Department of State from issuing certain new work visas to enter the U.S., but it does not cancel or affect the status of foreign workers already in the United States," she said.

"One large group of foreign workers and their U.S. employers can breathe a sigh of relief—those who won this year's H-1B lottery and who are waiting for their H-1B status to take effect on October 1," Bernhard added. "The vast majority of these people are not affected by the new executive order, since most people in this situation are already in the United States and will not need to travel abroad to obtain a visa."

She noted that the exemption covering the nation's food supply system should cover workers involved in meatpacking and processing plants, as well as all aspects of the food supply chain from production to transportation and logistics. "Most physicians, nurses and other medical personnel should still be able to obtain visas," under the exemption for medical personnel working on COVID-19 research or treatment, she said.

Leon Fresco, an immigration attorney in Holland and Knight's Washington, D.C., office, and primary drafter of the U.S. Senate's 2013 comprehensive immigration reform bill, pointed out that suspending the J-1 visa would have more of a political effect than a practical one. Most J-1 visas are given to those who come to the U.S. for summer employment, which has already been significantly curtailed because of the coronavirus, he said.

The fact that U.S. embassies and consulates are shut down across the world and neither currently conducting visa interviews nor issuing visas might limit the practical effect of the order, at least for the short term.

Even before the April executive order, the Trump administration had already ceased nearly every form of immigration due to the coronavirus pandemic. Nearly all visa processing has been halted, visa interviews have been postponed, and cross-border travel with both Canada and Mexico has been significantly reduced. Coronavirus-related entry bans are in effect for travel from numerous countries, including Brazil, China, and the European Union.

Future Regulations

Scalia said that the DOL is continuing to work on regulatory reforms to the H-1B visa program, including strengthening wage protections and addressing abuses in the program, and working to "identify businesses that misuse the H-1B program to the detriment of American workers."

Even before COVID-19, U.S. workers were being "replaced or undercut by foreign workers in tech and other industries," said Tom Homan, the former acting director of Immigration and Customs Enforcement. "With record unemployment crushing millions of Americans, especially young people just graduating from college, importing more foreign labor or allowing foreign nationals who are already here to continue to work while Americans continue to lose their jobs is simply unacceptable. Can any reasonable person imagine why we would need to bring in more than 100,000 foreign college students this summer on [J-1] summer work-travel visas? I can't."

Homan recommended that the Trump administration finish and publish regulatory actions which have been in the planning stages for years (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/dhs-ice-uscis-h1b-visa-l1-reforms-for-2020.aspx), including proposals that would redefine H-1B requirements, scale back the Optional Practical Training program for students and rescind work authorization for the spouses of H-1B workers.

Sarah Pierce, a policy analyst for the Migration Policy Institute in Washington, D.C., said there are legitimate concerns about some of the visa programs, but that the order ultimately will hurt U.S. companies and not necessarily prompt the hiring of more U.S. workers.

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