RSST LAW GROUP
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UNITED STATES TRAVEL RESTRICTIONS

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As COVID-19 has spread across the United States and around the world, a number of Presidential Proclamations and other government restrictions have been implemented to restrict travel to the U.S. in an effort to contain the spread of the virus. While these restrictions are changing regularly, following is a summary of the restrictions that are most likely to impact our clients. Please keep in mind that, even if a traveler is exempt from one restriction, they may still be subject to one of the other restrictions.

Limited Services at U.S. Consulates and Embassies

After being suspended since March 20, resumption of routine visa services began on July 15 on a post-by-post basis. Applicants should check post-specific websites for updates on what services are available. The volume and type of cases each post processes depends on local conditions.

Applicants with an urgent need to travel should continue to follow the guidance provided at their Embassy's website (go to usembassy.gov for a list) to request an emergency appointment. On April 8, the Department of State (DOS) specifically indicated that medical professionals with an approved U.S. nonimmigrant (I-129) or immigrant (I-140) visa petition or a certificate of eligibility in an approved exchange visitor program (DS-2019), particularly those working to treat or mitigate the effects of COVD-19, should follow the procedures to request an emergency visa appointment, but noted that local government restrictions may limit the ability of some embassies and consulates to process emergency visas.

DOS guidance issued on August 12 indicates that it may not process applicants for a visa interview appointment who appear to be subject to entry restrictions under any of the below policies related to COVID-19 unless the applicant also appears to be eligible for an exception under the applicable Presidential Proclamation(s).

On August 25, DOS temporarily expanded the ability of consular officers to waive the in-person interview requirement for certain individuals. Until December 31, 2020, individuals applying for a visa in the same classification as a previous visa which expired within the past 24 months (expanded from the previous policy of 12 months) may be eligible for an interview waiver.

Suspension of Entry for Individuals who have been Physically Present in Certain Countries

There are a number of active Presidential Proclamations which suspend entry into the United States for any immigrants or nonimmigrants falling within the restricted categories. Five of these orders suspend entry for certain individuals who have been physically present in any of the following countries or regions within the 14 preceding days:

1. Brazil (since 11:59pm on May 26)
2. People's Republic of China, excluding Hong Kong and Macau (since February 2)
3. Iran (since March 2)
4. Any of the 26 countries that make up the Schengen Area, which consists of 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, and Switzerland (since 11:59pm on March 13) – see July 16 DOS update below
5. United Kingdom or Ireland (since 11:59pm on March 16) – *see July 16 DOS update below*

The following individuals are not subject to these restrictions on entry:

- U.S. citizens and lawful permanent residents;
- Spouses and children (under age 21) of U.S. citizens or lawful permanent residents; and
- Parents and siblings (under age 21) of U.S. citizens or lawful permanent residents, provided the U.S. citizen/permanent resident child is unmarried and under age 21.
- On July 16, DOS announced that certain business travelers, investors, treaty traders, academics and students from the Schengen Area, United Kingdom, or Ireland may qualify for National Interest Exemptions (NIEs). Qualified business and student travelers who are applying for or hold valid visas or ESTA authorization may now travel to the U.S. DOS indicates it is also continuing to grant NIEs for humanitarian travel, public health response, and national security.

Effective September 14, individuals not subject to restrictions on entry are no longer required to enter the United States through select airports or subject to enhanced screening procedures. Individuals may still be subject to self-quarantine based on state or Federal guidance.

Suspension of Entry for Nonimmigrants and Immigrants outside the United States

In addition to the country-specific travel restrictions, two Presidential Proclamations address the suspension of entry of certain immigrants and nonimmigrants who were outside of the United States without valid visas at the time of the proclamations. Presidential Proclamation 10014 was issued on April 22 and addressed only immigrants (those entering the U.S. for the first time to become permanent residents). Presidential Proclamation 10052 was issued on June 22 (and slightly amended on June 29) and expanded the restrictions to certain nonimmigrants.

On August 12, DOS issued guidance on National Interest Exemptions (NIEs) to the travel restrictions imposed by Presidential Proclamations 10014 and 10052. *See further discussion, below*.

Restriction on Entry for New Immigrants

Proclamation 10014 suspended the entry of first-time immigrants for the duration of the order. Specifically, the order applies to individuals who were outside of the United States at 11:59pm on April 23, did not hold a valid immigrant visa at that time, and did not have a valid official travel document other than a visa (e.g. transportation letter, boarding foil, or advance parole document).

The restrictions do not apply to (among others):

- U.S. permanent residents;
- Spouses and children (under 21) of U.S. citizens;
- Individuals seeking to enter the U.S. on an immigrant visa as a physician, nurse, or other healthcare professional; to perform medical research or other research intended to combat the spread of COVID-19; or to perform work essential to combating, recovering from, or otherwise alleviating the effects of the COVID-19 outbreak, and the spouse and unmarried children (under 21) of these individuals;
- Any individual whose entry would be in the national interest, as determined by the Secretaries of State or Homeland Security or their designees.

Restriction on Entry for New Nonimmigrants

Proclamation 10052 further suspends entry of certain nonimmigrants "who present a risk to the U.S. labor market". Specifically, the expanded order applies to nonimmigrants who:

- Were outside the United States on June 24, 2020;
- Did not hold a valid visa stamp at that time in the nonimmigrant category in which they are seeking entry;
- Did not have another valid travel document (e.g. Advance Parole) on June 24; and
- Would be seeking to enter the U.S. in H-1B, H-2B, or L status, or as a J-1 intern, trainee, teacher, camp counselor, au pair, or on a summer work travel program, and all dependents of such individuals.

The suspension on entry does not apply to:

- U.S. permanent residents;
- Spouses and children of U.S. citizens;
- Other nonimmigrant categories (e.g. E, O, F, TN);
- Any nonimmigrants in the United States on June 24 and their derivative dependents;
- Any nonimmigrant outside the United States on June 24 who holds a valid visa stamp or other travel document, and their derivative dependents;

PLEASE NOTE: This exemption only applies if the individual will be entering the United States using that visa. If the visa expires while the Proclamation remains in effect, or the individual seeks to enter in a different status, the individual is no longer exempt from the Proclamation under this basis.

- Visa-exempt Canadians who are entering as H, L, or J nonimmigrants;
- Foreign national workers essential to the food chain; or
- Any individual whose entry is deemed to be in the national interest, and their derivative dependents. The Secretaries of State, Labor, and Homeland Security are instructed to establish standards to define which categories of individuals would fall into the national interest exemption, including those who are involved in providing healthcare to COVID-19 hospitalized patients, or those involved in COVID-19-related medical research, as well as those involved in law enforcement and defense, and those who are necessary to facilitate the immediate and continued economic recovery of the United States.

The August 12 guidance from DOS provides a more detailed explanation of circumstances that may qualify for NIEs, and outlines the protocols for applicants to request a NIE. Per the guidance, the following travel may be deemed to be in the national interest (and therefore travelers would be eligible to apply for a visa stamp):

- H-1B or L-1 travel by applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification. Note that, for H-1B workers, Consular Officers are instructed to review Part II, Question 2 of Form I-129 to determine if the petition indicated "previously approved employment without change with the same employer."
- H-1Bs and L-1s traveling as public health or healthcare professionals, or researchers 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). Note that travel to alleviate the effects of the pandemic may include secondary effects, such as researchers or public health/healthcare professionals in fields which are not directly related to COVID-19, but which have been adversely impacted by the pandemic.
- H-1B travel by technical specialists, senior-level managers, and other workers whose travel is necessary to facilitate the immediate and continued economic recovery of the United States. Such travelers much meet at least 2 of the following criteria:
    - The petitioning employer has a continued need for the services or labor to be performed by the H-1B worker within the United States. **If an applicant is currently performing or is able to perform the essential functions of the position remotely from outside the United States, this criterion is not met.** If not, the Consular Officer will consider an LCA certified during or after July 2020 as evidence of this continued need. If the LCA was certified prior to July 2020, the Consular Officer must be able to determine the petitioner's continuing need for the H-1B worker's presence in the U.S. from the visa application.
    - The applicant's proposed job duties or position within the petitioning company indicate the individual will provide significant and unique contributions to and

employer meeting a critical infrastructure need. Critical infrastructure sectors include, among others: communications; emergency services; energy; financial services; healthcare and public health; and information technology. However, employment in a critical infrastructure sector alone is not sufficient; the Consular Officer must establish that the applicant holds one of two types of positions: 1) Senior-level placement within the petitioning organization or job duties reflecting performance of functions that are both unique and vital to the management and success of the overall business enterprise; or 2) The applicant's proposed job duties and specialized qualifications indicate the individual will provide significant and unique contributions to the petitioning company.

- The wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage rate by at least 15%.
- The H-1B applicant's education, training, and/or experience demonstrate unusual expertise in the specialty occupation in which the applicant will be employed.
- Denial of the visa pursuant to Presidential Proclamation 10052 will cause financial hardship to the U.S. employer. Examples of financial hardship include: the employer's inability to meet financial or contractual obligations; the employer's inability to continue its business; or a delay or other impediment to the employer's ability to return to its pre-COVID-19 level of operations.

- L-1A travel by a senior-level executive or manager filling a critical business need of an employer meeting a critical infrastructure need (*see listing of critical infrastructure sectors above*). The applicant will fall into this category when at least 2 of the following indicators are present **and** the applicant is not seeking to establish a new office in the United States:
  - Will be a senior-level executive or manager;
  - Has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship;
  - Will fill a critical business need for a company meeting a critical infrastructure need.

  L-1A applicants seeking to establish a new office in the United States must meet 2 of the above criteria **and** the new office will employ, directly or indirectly, 5 or more U.S. workers.
- L-1B travel as a technical expert or specialist meeting a critical infrastructure need. The Consular Officer may determine that an L-1B applicant falls into this category if all three of the following indicators are present:
  - The applicant's proposed job duties and specialized knowledge indicate the individual will provide significant and unique contributions to the petitioning company;
  - The applicant's specialized knowledge is specifically related to a critical infrastructure need; and

- The applicant has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship.

- H-1B or L-1 travel supported by or based on 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.
- J-1 travel for an exchange program conducted pursuant to an MOU, Statement of Intent, or other valid agreement or arrangement in effect prior to June 24, 2020 between a foreign government and any federal, state, or local government entity in the U.S. that is designed to promote U.S. national interests.
- J-1 Interns and Trainees on U.S. government agency-sponsored programs (program numbers beginning with G-3 on Form DS-2019) in which the program is hosted by a U.S. government agency and supports the immediate and continued economic recovery of the United States.
- H-4, L-2 and J-2 holders who will accompany or follow to join a principal applicant who is a spouse or parent that is not subject to the Proclamation, including those granted a national interest exception. PLEASE NOTE: A NIE is not required if the principal applicant is not subject to Presidential Proclamation 10052 (i.e. if the principal was in the United States on June 24, 2020 or has a valid visa that they will use to seek entry to the United States).
- Travelers who believe they are eligible for a NIE should request a visa appointment at the closest U.S. Embassy or Consulate, providing specific details as to why they believe they may qualify for an exception. A decision will be made regarding whether the applicant meets an exception at the time of their visa interview.

Length of Restrictions

The immigrant and nonimmigrant entry restrictions are in place through at least December 31, 2020, and may be continued "as necessary." The Secretaries of Homeland Security, State and Labor may recommend modifications to the order within 30 days, then every 60 days thereafter while the Proclamation remains in effect.

Closure of Canadian and Mexican Borders to non-Essential Travel

Since March 21, 2020, all non-essential travel across the U.S.-Canada and U.S.-Mexico borders on land (including rail) or ferry has been limited; however these border restrictions do not apply to air travel. No travel for tourism or recreational purposes is allowed, but travel for essential commerce or trade remains permitted. Traveling to work or attend educational institutions in the United States is considered essential. The restrictions currently run through September 21, 2020, but may continue to be extended.

Satisfactory Departure for Visa Waiver Program

The Visa Waiver Program (VWP) does not allow for extensions of stay while in the United States. However, if an individual here under the VWP is unable to depart before their current period of admission expires due to circumstances outside of their control, they can request relief in the form of a Satisfactory Departure request. Such requests can be made to the USCIS Contact Center or any Customs and Border Patrol (CBP) Port of Entry or Deferred Inspection office (regardless of where the individual entered the U.S.). If granted, the individual will be given an additional 30 days in which to depart the U.S. without being considered to have overstayed their period of authorized admission. On April 13, USCIS announced that an individual's stay could be extended for an additional 30 days beyond the initial extension period where needed, and CBP announced on April 17 that it would also allow for an additional 30-day extension.

Each office handles these requests differently. For example, the Boston CBP office at Logan Airport will accept requests via email for individuals in the last 14 days of their authorized period of stay who are unable to depart because of COVID-19-related issues, such as: possible exposure; inability to board a flight due to flu-like symptoms (such as runny nose, headache, cough, sore throat, fever); no flights are available; or other health reasons.

Through USCIS, individuals can call the USCIS Contact Center within 5 days of the expiration of the VWP period of admission, answer some initial questions, then will be asked to email additional details and a copy of their passport biographic page. The request will then be forwarded to a USCIS local office for review and adjudication, and the decision will be emailed.

Non-COVID-Related Travel Restrictions

Unrelated to COVID-19, the so-called "Muslim Ban", which dates back to 2017, remains in effect indefinitely and is periodically updated based on a country's ability to meet a series of security criteria required by the United States. to properly screen and vet potential nonimmigrant and immigrant nationals of those countries. Currently Presidential Proclamations 9645 and 9943 establish the following restrictions on entry into the United States by nationals of the listed countries, as detailed by the State Department:

Not eligible for new Immigrant or Diversity Visas or any Nonimmigrant Visas:

- North Korea
- Syria

Not eligible for new Immigrant or Diversity Visas, or Nonimmigrant Visas except F, M, and J (which will be subject to enhanced vetting):

- Iran

Not eligible for new Immigrant or Diversity Visas, or B Nonimmigrant Visas:

- Libya
- Yemen

Not eligible for new Immigrant or Diversity Visas, except Special Immigrants whose eligibility is based on having provided assistance to the U.S. Government (no other restrictions):

- Burma
- Eritrea
- Kyrgyzstan
- Nigeria
- Somalia (nonimmigrants subject to enhanced vetting)

Not eligible for new Diversity Visas (no other restrictions):

- Sudan
- Tanzania

Limited Nonimmigrant Restrictions:

- Venezuela: No restrictions on immigrants. No new B visas for officials of certain government agencies and their immediate family members.

Note that none of these restrictions apply to nationals who are:

- U.S. permanent residents;
- Admitted or paroled into the United States on or after the effective date of the applicable order (ban);
- In possession of a visa or other travel document (e.g. Advance Parole) which was valid on the effective date of the applicable order or issued thereafter;
- A dual national of a non-designated country traveling on a passport issued by the non-designated country;
- Traveling on a diplomatic or diplomatic-type (NATO, C-2, or G) visa;
- Recipients of a grant of asylum; refugees already admitted to the U.S.; individuals who have been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

Consular Officers may, in their discretion, grant waivers on a case-by-case basis when they determine that the applicant's entry into the United States is in the national interest, would not pose a threat to the national security or public safety of the United States, and that denying entry would cause undue hardship. Waivers may be available in some of the following circumstances:

- The foreign national was previously admitted to the United States for a continuous period of work, study, or other long-term activity, was outside the U.S. on the effective date of the applicable order (ban), seeks to reenter the U.S. to resume the previous activity, and denial of reentry would impair that activity;

- The foreign national previously established significant contacts with the U.S. but was outside the U.S. on the effective date of the applicable order for work, study, or other lawful activity;
- The foreign national seeks to enter the United States for significant business or professional obligations, and the denial of entry would impair those obligations;
- The foreign national seeks to enter the United States to visit or reside with a close family member (e.g. a spouse, child, or parent) who is a U.S. citizen, lawful permanent resident, or lawfully admitted on a valid nonimmigrant visa, and denial of entry would cause the foreign national undue hardship;
- The foreign national is an infant, young child, or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;
- The foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee), and can document that they have provided faithful and valuable service to the U.S. Government;
- The foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), is traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;
- The foreign national is a Canadian permanent resident who applies for a visa at a location within Canada;
- The foreign national is traveling as a U.S. Government-sponsored exchange visitor; or
- The foreign national is traveling to the United States, at the request of a U.S. Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.