

Impact of COVID-19 on U.S. Immigration

Employment and Family-Based

Natalie Uhrmacher, Esq.
Senior Counsel
Malik & Popiel, P.C.

U.S. Immigration Framework

Parties Involved

- In a typical temporary or permanent residency sponsorship case, the Department of Labor, the U.S. Citizenship and Immigration Service, as well as the U.S. Department of State play a part in the process.
 - The Department of Labor (the “DOL”) ensures that U.S. workers are not being displaced
 - H-1B Specialty Occupation sponsorship, the employer must affirm that it is paying at least the prevailing wage rate for the position.
 - In the PERM Labor Certification process, the employer is required to affirm the intention of paying the prevailing wage rate when the permanent residency is granted; that the position requirements are normal for the occupation in question; as well as affirm and outline the steps taken to recruit U.S. workers for the position.

U.S Immigration Framework Cont'd

- The U.S. Citizenship and Immigration Services (the “USCIS”)
 - The primary responsibility of the USCIS is to determine whether the employer (a) has the ability to pay the proffered wage; and (b) that the selected individual is qualified for the position and (if in the United States) has maintained valid status.
- The U.S. Department of State (the “DOS”)
 - In the context of the issuance of nonimmigrant (temporary) visas, the DOS ensures that parties have not previously violated U.S. immigration laws, are admissible, and are seeking to enter the U.S. for legitimate and permissible purposes as guided by the designated nonimmigrant visa category sought.
 - In the context of permanent residency processing, the DOS allocates the Immigrant Visa numbers against each designated region and Employment-Based Category.

U.S. Immigration Framework Cont'd

- The National Visa Center (the “NVC”)
 - After U.S. Citizenship and Immigration Services (USCIS) approves an immigrant visa petition, the petitioner is forwarded to the National Visa Center (NVC) in Portsmouth, NH for immigrant visa pre-processing. Immediate relative categories do not have yearly numerical limits. However, family preference and employment based immigrant categories have numerical limits each year; therefore, lengthy wait times are involved for processing to begin.
 - Once the NVC receives all of the necessary documentation, the case is then forwarded to the relevant consulate and the green card interview is scheduled. At this time, consulates and embassies are closed due and interviews everywhere have been cancelled.

Terminology

- ▶ Visa: Stamp in passport which enables individual to enter the country which issued the visa (“boarding pass”)
- ▶ Status: Immigrant or nonimmigrant category in which an individual is admitted to the U.S.
- ▶ Adjustment of Status: Process of applying for a “Green Card” inside the U.S. Nonimmigrant to Immigrant
- ▶ Change of Status: Process of changing from one nonimmigrant category into another nonimmigrant category i.e. F-1 to H-1B
- ▶ Consular Processing: Process of applying for a “Green Card” or other visa category outside the U.S.
- ▶ Premium Processing: Paying an additional \$1,440 to USCIS to adjudicate certain petitions in 15 calendar days

COVID-19 Challenges-Travel

- ▶ Closure of Northern and Southern Borders
 - ▶ On March 20, 2020, the Department of Health and Human Services issued an Interim Final Rule and the CDC issued a concurrent order that together closed the Northern and Southern borders to all non-essential travel.
 - ▶ Both the HHS and CDC invoked 42 USC § 265, a public health statute that permits the Surgeon General to suspend entry to the U.S. of anyone deemed to be a “serious danger or introduce[ing] a communicable disease.”
 - ▶ Essential Travel includes: U.S. citizens and lawful permanent residents returning to the United States, individuals traveling for medical purposes; individuals traveling to attend educational institutions; individuals traveling to work in the United States; individuals traveling for emergency response and public health purposes; individuals engaged in lawful cross-border trade; individuals engaged in official government travel or diplomatic travel; members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and individuals engaged in military-related travel or operations. Non-essential travel includes individuals traveling for tourism purposes.
 - ▶ Borders will remain closed until at least June 21, 2020.

COVID-19 Challenges-Travel Cont'd

- ▶ Several Presidential proclamations established restrictions on the entry of certain travelers into the United States in an effort to help slow the spread of coronavirus disease COVID-19).With specific exceptions, foreign nationals who have been in any of the following countries during the past 14 days may not enter the United States.
 - ▶ China
 - ▶ Iran
 - ▶ European 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)
 - ▶ Republic of Iran
 - ▶ Brazil

COVID-19 Challenges-Travel Cont'd

- ▶ Presidential Proclamation Suspending Entry of Immigrants who present Risk to the U.S. Labor Market During Economic Recovery Following Covid-19 Outbreak
 - ▶ With national unemployment rates an historic levels, this proclamation is meant to prevent recently approved Permanent Residents presently outside the U.S., without a valid immigrant visa, and without a valid travel document, from entering the U.S. for 60 days (from April 23, 2020).
 - ▶ Specific exemptions among others include: current Permanent Residents; aliens seeking an immigrant visa as a physician, nurse, or other healthcare professional; to perform medical research intended to combat spread of COVID-19, or provide other essential work relating to alleviating the effects of COVID-19; EB-5 Investors...etc...
 - ▶ On May 5, 2020, The Healthcare Workforce Resilience Act was introduced to Congress which would seek to enhance the healthcare workforce during the COVID-19 pandemic by recapturing 40,000 unused immigrant visas (from 1992-2020) for doctors and nurses and provide expedited processing.

COVID-19 Challenges-Travel Cont'd

- ▶ **Visa Waiver Program (VWP)** Enables most citizens or nationals of participating countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa. Status under VWP is non-extendable.
- ▶ With Ports of Entry including Deferred Inspection sites presently closed, and travel restrictions in foreign countries, tourists admitted pursuant to the Visa Waiver Program will overstay their granted status and will be unable to depart the U.S.
- ▶ Pursuant to 8 CFR § 217.3(a), if an emergency prevents an alien admitted under VWP from departing the U.S. within the period of authorized stay, a period of Satisfactory Departure may be granted, not to exceed 30 days. If the departure is made within the period of Satisfactory Departure, alien is regarded as having made a timely departure without overstaying. Subsequent period of Satisfactory Departure may be granted.
- ▶ Requests for SD may be made at CBP POE or Deferred Inspection site regardless of individual's initial port of arrival. Remote requests are now being accepted as well.

COVID-19 Challenges- H-1B Amendment Required?

- ▶ H-1B Specialty Occupations
 - ▶ Employment category for individuals holding at least a bachelor's degree, require filing a Labor Condition Application ("LCA") with the DOL and are location specific.
 - ▶ H-1B holders are permitted 6 years in H-1B status. No less than 1 year prior to the end of the 6-year period, an employer must begin the permanent residency process in order to continue to employ the individual.
 - ▶ The DOL requires notice to U.S. workers that an H-1B worker is being hired. Notice must be visible to U.S. workers. Posting requirement may be met by electronic notice to U.S. workers.
 - ▶ "Material" changes such as change in worksite often require an amendment petition filed with USCIS
 - ▶ Massive layoffs, furloughs, stay-at-home orders, and other economic repercussions have caused significant material changes to H-1B employment.

COVID-19 Challenges- H-1B Posting Requirement

- ▶ Working from Home is permitted in H-1B filings, however, the home address must be listed in the Labor Condition Application under normal circumstances.
- ▶ If home address is within the same Metropolitan Statistical Area (“MSA”) as the worksite listed in the LCA, neither a new LCA nor an H-1B amendment with USCIS is required. But, the current LCA should be posted at the employee’s home for 10 consecutive business days.
- ▶ If the employee’s home is outside the MSA, 20 CFR §655.735 permit a “short-term placement” for H-1B workers to work from an address not listed in the LCA for up to 30 workdays each year (6 weeks).
- ▶ If quarantine lasts longer than the 30 days, the employer would need to file a new LCA to cover the employee’s resident and file an amended petition.

COVID-19 Challenges-Payment of Offered Wage During Non-Productive Status

- ▶ DOL Regulations require employers pay the wage set forth in the LCA. COVID-19 has prompted employers to reassess their business operations in light of layoffs, reduced hours, or suspended services.
- ▶ Non-Productive status is defined as any time during the validity of the LCA and H-1B Petition where an employee is unable to work.
- ▶ If the employee is in non-productive status due to a decision of the employer, the employer remains obligated to pay the wage.
- ▶ If the employee is in non-productive status at the request of the employee or because they are unable to work, the employer is **not** required to pay the wage. Examples include, voluntary travel, maternity leave, etc...

COVID-19 Challenges-Payment of Offered Wage During Non-Productive Status

- ▶ Can an employer bench or otherwise render an employee non-productive and stop paying the offered wage where the employee is unable to work from home during a shelter-in-place order? **NO**
 - ▶ Benching the employee is not permitted in this scenario because the conditions were not created by the employee. Otherwise the employer may be liable for fines, back wage obligations, and barred from filing immigrant and nonimmigrant petitions again.
- ▶ Is the employer required to pay the offered wage if the employee contracts COVID-19 and is unable to work? **Maybe**
 - ▶ The regulations do not require an employer to pay the required wage if an employee is not able to work due to a reason not work-related or required by the employer. However, an argument can be made that the employer's policies require the individual to quarantine and therefore the non-productive status is related to an employer-policy.

COVID-19 Challenges-Payment of Offered Wage During Non-Productive Status

- ▶ If the H-1B Employer no longer seeks to employ the H-1B worker, DHS regulations require the employer notify USCIS and the employer is required to offer payment of return transportation back to the employee's home country.
- ▶ If the H-1B Employer seeks to convert a full-time employee to a part-time employee, this constitutes a material change and an amendment must be filed with USCIS.

COVID-19 Challenges-PERM Labor Certifications

- ▶ Employment-based Permanent residency filings consist of three steps: 1) PERM Labor Certification Application; 2) I-140 Immigrant Petition; and 3) I-485 Adjustment of Status Application
- ▶ The filing of the PERM and subsequent I-140 petition allow H-1B workers to renew their H-1B status beyond the 6-year limitation
- ▶ PERM regulations require that prior to filing a PERM, or Labor Certification application, the Employer must notify its workforce that is seeks to fill a specific vacancy. Notice of Filing must be physically placed at the worksite where the Beneficiary will be employed. In addition, notice must be placed in any and all in-house media the employer normally uses to recruit.

COVID-19 Challenges-PERM Labor Certifications

- ▶ What if there is a stay-at-home order in place and the workforce will not see the Notice?
 - ▶ If possible, wait until the quarantine ends to post the Notice of Filing
 - ▶ If waiting is not possible, post notice at worksite *and* provide additional notice to employees working from home electronically including by direct email or direct hard-copy mailings to affected employees

COVID-19 Challenges-PERM Labor Certifications

- ▶ In response to the COVID-19 pandemic, the DOL's Office of Foreign Labor Certification (OFLC) has started emailing certified PERM applications, as opposed to hard-copy mailing the original PERMs.
 - ▶ The effect of emailed PERMs is that the second step of the employment-based green card application (the I-140 Petition) cannot be filed in "premium processing."
 - ▶ For H-1B employees nearing their 6 years in H-1B status, an I-140 approval is necessary to keep working in H-1B status. If the I-140 cannot be premium processed, and the H-1B employee runs out of time, they may not be able to continue working when his/her status runs out.

COVID-19 Challenges-Public Charge Considerations

- ▶ On February 24, 2020, USCIS implemented its final rule relating to the Public Charge Ground of Inadmissibility
 - ▶ The final rule clarifies the factors considered when determining whether someone is likely at any time in the future to become a public charge, is inadmissible (under section 212(a)(4) of the INA, 8 U.S.C. 1182(a) (4)) and, therefore, ineligible for admission or adjustment of status.
 - ▶ The final rule also requires aliens in the United States who have a nonimmigrant visa and seek to extend their stay in the same nonimmigrant classification or to change their status to a different nonimmigrant classification to demonstrate, as a condition of approval, that they have not received, since obtaining the status they seek to extend or change, public benefits for more than 12 months, in total, within any 36- month period.
 - ▶ USCIS announced that it would not consider testing, treatment, nor preventative care (including vaccines) related to COVID-19 as part of its public-charge determination, nor as related to the public benefit condition applicable to certain nonimmigrants seeking an extension or change of status, even if such treatment is paid for by one or more public benefits.

COVID-19 Challenges-Unemployment Insurance

- ▶ Will obtaining unemployment insurance impact my client's immigration application under the public charge rule?
 - ▶ Unemployment insurance payments are not generally taken into consideration in the public charge determination. DHS will not consider federal or state retirement, Social Security retirement benefits, Social Security Disability, post secondary education, and unemployment benefits as public benefits under the public charge inadmissibility determination as these are considered to be earned benefits through the person's employment and tax deductions.
- ▶ Who is Eligible for Unemployment Insurance?
 - ▶ Under the Federal Unemployment Tax Act, foreign nationals typically qualify for regular unemployment benefits if they are authorized to work. States may require stricter rules.
 - ▶ Each state is different in how it handles unemployment insurance. Some states limit eligibility to permanent residents, others require the unemployed individual be able to establish they are "able to work, available to work, and actively looking for work." Many nonimmigrants such as H-1B and L-1 holders are only authorized to work for a single employer. Thus if they lose their job they would not qualify as they are not "able and available to work."

COVID-19 Challenges-Unemployment Insurance

- ▶ Foreign workers who are employed in the U.S. pursuant to an employment authorization document (EAD), such as H-4 spouses of H-1B workers, Adjustment of Status Applicants, DACA Recipients, TPS recipients, applicants for asylum and refugees have unrestricted employment authorization so generally these individuals would be “available for work.”
- ▶ Undocumented workers cannot collect unemployment insurance as they were not work authorized during the designated period in which their wages were earned and cannot demonstrate they are “available to work.”

Covid-19 Challenges-CARES Act

- ▶ Will receiving a recovery rebate under the CARES Act impact my client's application under the public charge rule? No
- ▶ Issuance of the one-time recovery rebate is structured as an automatically advanced tax credit to be disbursed by the Treasury Department. The final rule on inadmissibility on public charge grounds is clear that tax credits are not taken into account for the purposes of the public charge determination.

COVID-19 Challenges-Public Charge Considerations

- ▶ Who is eligible for a Recovery Rebate?
 - ▶ Only individuals with valid social security numbers and people who qualify as “resident aliens” as defined by the IRS are eligible to receive the payment. Non U.S. citizens are considered nonresident aliens unless they meet one of the two tests set forth by the IRS: the green card test or the substantial presence test.
 - ▶ **Green Card Test**: Lawful Permanent Residents are considered resident aliens if they were LPRs at any time during the calendar year
 - ▶ **Substantial Presence Test**: To meet this test, an individual must have been physically present in the U.S. for a designated minimum threshold period outlines by the IRS. Note that the IRS exempts certain nonimmigrant visa statuses from the physical presence calculation, such as individuals temporarily present in the U.S. under F, J, M, or Q visa. Most work-authorized immigration statuses such as H-1B, L-1, O-1, and TN, are **not** exempted and may be able to meet the substantial presence test.
 - ▶ Taxpayers who provide an individual taxpayer identification number (ITIN) are ineligible for the credit.

Questions?

Natalie Uhrmacher, Esq.
Senior Counsel
Malik & Popiel, P.C.
7606 Transit Rd., Suite 200
Buffalo, New York 14221
Telephone: (716) 689-7770
Email: nuhrmacher@malikpopiel.com