



Steve Maggi, Esq.

SMA Law Firm

Email: [smaggi@smalawyers.com](mailto:smaggi@smalawyers.com)

Tel: +1 (917) 657 1132

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# Navigating the U.S. Immigration Machine: Managing Your U.S. Business Plans in the Rapidly Changing Landscape July 29, 2020

# Navigating the U.S. Immigration Machine – The Main Components (Entities) of a Federal System

- USCIS – Adjudicates petitions used for future visa applications, change of status and adjustment of status
- CBP – Controls borders – decides who enters or not
- ICE – Enforces deportation orders and exec. directives
- US Department of State – Controls the US embassies and consulates – adjudicates visa petitions and determines admissibility
- Executive Branch – In 2020 the most powerful – enacts ***executive legislation*** which puts new directives and orders into effect immediately – used to direct and control the other heads



# USCIS - Immigration Petition Processing

- USCIS processes petitions of all kinds, including employment-based petitions that allow US employers to hire/sponsor foreign nationals for both temporarily and permanently
- It has continued to process cases and I-129 and I-140 petitions now allow for premium processing
- This is very important for the maintenance of status for individuals – Change or Extension of Status are crucial now that travel back into the US is difficult
- In-person services are still temporarily suspended, appointments for fingerprinting and interviews on hold



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# Customs Border Protection: During Covid-19: U.S. Entry Restrictions

- Proclamation 9993 and its extensions prohibit travel *directly from* Schengen Area countries, UK, Ireland, China, Iran and Brazil
- Any traveler with a valid ESTA who is subject to the Proclamation and who attempts to travel the United States in violation of the Proclamation will have their ESTA canceled
- 60 days have come and gone since the originally decree, so this has been extended – Probably in place until end of year
- The work-around for all current visa holders is to come to the US through another country not listed above with a valid visa after 14-day quarantine – no guarantee of entry so should document length of time in third country

# ICE (Immigration & Customs Enforcement)

- ICE ENFORCES orders to deport – It rounds people up and puts them in detention centers for placement in deportation hearings
- This has traditionally been associated with those are undocumented foreign nationals or overstays
- This will also be triggered for those who do file timely for change of status if they lose their jobs or need to extend their status (since travel to the US is difficult, anyone physically present should remain in the US and make sure to maintain legal status)

# Dept. of State: Consular Processing of Visas

- Beginning March 13, routine visa appointments were suspended worldwide (only American citizen services open) – no word on when they will reopen- this is key to planning hiring of foreign nationals, start dates
- US Embassy in Luxembourg is still not programming any new appointments except “applications of persons whose travel provides a substantial economic benefit to the U.S. economy”.
- Executive orders have also shut down processing of employment-based visas (EB-2 and EB-3), as well of L-1, H-1B, J-1 and H-2B visas for the rest of the year – there appear to be no exceptions to this except J-1 researchers
- Remember that each consulate/embassy is its own island – Each one applies the laws in a slightly different way and has its own procedures – check websites and work with a professional



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# \*Executive Branch - Orders Barring and Limiting Immigration

- The most recent order, which went into effect June 24, blocks entry of foreign nationals who received their visas on/after that date, specifically those who apply for J-1, H-1B, H-2B and L-1 visas, until December 31, 2020.
- This means all individuals who currently hold those visas may still enter the U.S., as long as they adhere to the entry restrictions discussed previously.
- The newest executive order upholds the pause on consular processing of immigrant work-based visas until December 31, 2020 - these individuals will still be eligible for the visas when the order expires.



# Immigration Trends that fuel the Machine

- Visa denial rates rose about 15% per year since 2017, and denials by USCIS also rose year by year, most notably the H-1b (6% denials under Obama, 40% under Trump) – this was part of the President’s campaign to protect American jobs
- Denial increases for other visas crucial to foreign companies & entrepreneurs launching US ventures: the E-2 Treaty Investor Visa & L-1 Intracompany Transfer Visa
- This was escalated/accelerated from the moment Covid-19 could be used to justify further measures which keep immigrants out of the U.S. or force them to leave in whole or in part, for a prolonged period of time (now until end of 2020).
- More changes have been made to the immigration system and the way the laws are applied since February then in the previous 3 years of the Trump administration.



# National Interest Exceptions

- On July 10th, 2020, Washington announced that certain travelers from Schengen area countries could resume traveling to the United States if, as determined by a Consular Officer, they qualify as a National Interest Exception (NIE) to President Trump's March 11, 2020 Presidential Proclamation that suspended routine travel from the Schengen Area to the United States. Those traveling as students (F1 and M1), researchers (certain J1 programs), investors (E2), or business travel (B1) may be eligible for the exception. Effective July 15, 2020, the following travelers may apply to be considered for the NIE:

# How to make the Machine Work for You: National Interest Exceptions to the Pause on Visa Processing

- At the present time US Embassy in Luxembourg is only processing visa applications of persons whose travel provides a “substantial economic benefit to the U.S. economy”, including category E-2 visas. More information is available on the website <https://lu.usembassy.gov/visas/>
- Examples are listed in the ‘National Interest Exceptions’ link on the right side.
- The application should be prepared as explained at <https://travel.state.gov/content/travel/en/us-visas/employment/treaty-trader-investor-visa-e.html> and the applicant should send a hard copy of the complete file in an organized folder in c/o the Consular Section at least two weeks before the interview. No special formatting is required.

# Those eligible for the NIE are:

## B1 Business Visitors

- 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 of a defined period.
- Senior-level managers and executives, and their dependents, who provide strategic direction necessary for the success of the company or venture.

## P1 Professional athletes

Professional athletes, dependents, and essential staff who enter the United States to participate in major sporting events, which bolster the U.S. economy.

# NIE Eligible Categories (cont'd)

## E-1 and E-2

- Investors: Travel in connection with investment or trade in the U.S. economy that generates a substantial economic impact, including investors and treaty-traders and the senior-level employees who provide strategic direction or expertise essential to the success of the investment, and their dependents.
- Good news – Since E-2 visas exist to create American jobs through US investment in new entities set up by foreign nationals, all E-2 petitions that would normally have qualified should qualify for this exception – ECONOMIC PLUS = NEW JOBS FOR AMERICANS
- F-1/M-1 Students and J-1 Researchers

## NIE – Current visa holders – Verification process (alternative to 3<sup>rd</sup> country/quarantine before entering)

- Non-Student Travelers with Valid Visas or ESTA Travelers that already have valid visas or ESTAs and believe they qualify for an NIE for economic, investor, or exchange visitor related purposes must verify with a Consular official that they qualify. To do so, travelers should send the following information, along with supporting documentation, to [luxembourgconsular@state.gov](mailto:luxembourgconsular@state.gov)
- Supporting documents may include letter of invitation, confirmation of participation in a conference, etc. Please allow three business days to review your documents and qualifications. You will be notified by e-mail if you meet the NIE requirements

# Limitations on NIE Travel

- NIE travelers issued full-validity visas but the exception is only valid for a single entry within 30 days of approval.
- An individual who departs the US must ask for another exception
- Admission remains subject to a determination by Customs and Border Protection officers at ports of entry and that they may be subject to a 14-day quarantine upon arrival. Furthermore, all travelers must fly into one of 15 airports specifically designated for international arrivals listed [here](#).

# Inside the Machine (Dealing with USCIS) - U.S. Employers and Foreign Employees: Basics

- In 2019 U.S. companies had between 1.5 and 2 million foreign workers/trainees/interns who they sponsor for visas
- Bright line rule – Foreign employees' status is tied directly to their employment status – NO JOB, NO STATUS - Employer goal is to maintain their status if possible by keeping them on payroll
- Foreign employees who are laid off or what reducing salaries, moving them to sick leave, or furloughing could nullify their legal status



# Alternatives to retaining foreign workers full-time – Part-time employment – H-1B visa

- Most sponsorships/work visas require 35+ hours a week to maintain status
- H-1B visas employees may work full-time or part-time, allowing for some flexibility – shifting to part-time requires an amended petition – can go down to 15 hours a week but must be paid the prevailing hourly wage
- If you fire an H-1B employee they can either look for a new sponsor and submit an H-1B transfer within 60 days of termination or leave the U.S.
- H-1B workers for are terminated and leave the country can be re-hired within one year of being fired, but must process at a US embassy/consulate based on new approved application (are exempt from H-1b lottery)



# Alternatives to firing foreign employees

- H-1B 60-day grace period to change sponsors does NOT apply to other visas statuses
- For other visas categories – Employees in E-1, E-2, L-1, O-1 and TN - prevailing wage requirement and a salary reduction generally does not constitute a material change that triggers a need to file an amendment.
- Observation (not suggestion) – Generally checks on salaries don't happen until there is an extension of status or consular visa application and so rule of thumb would be to maintain some salary and then get it back to normal level before applying (and pray for mercy!)

# The Elephant in the Room: Looking Ahead

## Effects of the Presidential Election

- US market entry, timing and success will be shaped the results of the 2020 Presidential election
- The immigration measures in place and the negative trends in adjudications could be reversed quickly should Biden be elected
- If Trump is re-elected, inevitably it will lead to further barriers on visas and petitions presented in the U.S., and potentially extended or more extreme restrictions on L-1s, H-1Bs, J-1s, H-2Bs and immigrant visas, so it's important to keep up on the ever-evolving Proclamation Exceptions.
- L-1 and H-1B visas create more jobs than they take away so extending these measures will lead to higher unemployment and discourage foreign companies and entrepreneurs

# What to do Now: Visa Choice for Foreign Entrepreneurs and Companies Looking to Launch in the U.S.

- First rule of thumb has always been when E visa is possible to choose it over the L visa
- Longer duration (up to 5 years depending on the country), less cost, lower chance of denial
- Applies when nationality of the US entity (as determined by % of ownership) matches nationality of person being sponsored
- L-1 has come under fire with the Trump administration and no new visas to be issued before end of the year and E-2 now eligible for National Interest Exception so can be processed now

# Getting Your Ducks In A Row

- If using L visas, do all basic set up now for 2021 launch – Incorporate and prep all company documents, set up bank account, properly fund account (substantiality test), secure sufficient physical premises, put money into action – then apply for Jan 2021 start date
- For all L and E visa holders already in the US, make sure to extend all statuses so no one falls out of status – make sure company is running and people on payroll when you apply and provide updated business plan with future plans for growth/rebound with hiring projections and potentially additional capital infusions
- Be careful when bringing employees back in who are outside to comply with the restrictions, use third countries and quarantine to work around the travel ban or if easier, applying for the National Interest Exception
- If hiring foreign nationals outside the U.S., use visas that can be argued to meet the National Interest Exception (E-2, or O-1, E-3 or TN for executives and managers)

# Take Home Lessons

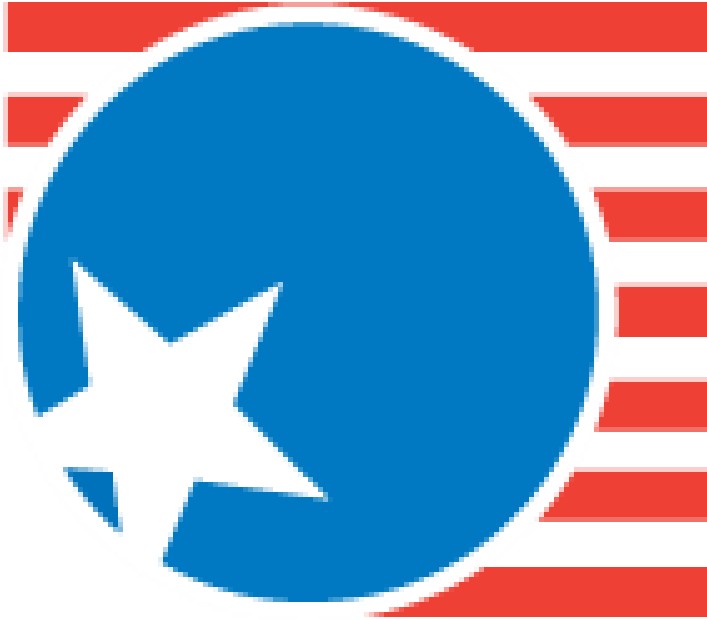
## Managing Foreign Employees in the US

- Protect the status of employees by not firing them
- Look to H-1B transfer window as a way of tapping into the talent pool physically present in the US
- Extend status of existing employees and keep them in the US to not risk being stuck overseas

# Take Home Lessons (cont'd)

## US Market Entry

- Apply for E-2 with National Interest Exception as soon as you are ready
- Proceed with caution! Look to 2021 for concrete plans for non E-2 cases – start projecting for early 2021 launch – You can submit petitions to USCIS in the Fall for early 2021 start
- Build your business plan and don't rush in – keep abreast of any new changes and adapt your plan and the timing – the situation is constantly changing



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# Questions???

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