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Hot Topics – Recent Developments in Business Immigration

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- International Travel
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- International Travel During COVID-19

- **Considerations Before Leaving a Country**

- Exit Requirements / Restrictions - Over the course of COVID, some countries have imposed restrictions either completely shutting down international travel and preventing people from leaving (e.g. India early in the pandemic and likely soon), or requiring approval from the government prior to departure (e.g. the U.K. currently).
- The U.S. has not imposed any such restriction, other than preventing non-essential land travel to Mexico or Canada.
- COVID Testing Pre-Departure - Many airlines require that you present a negative COVID test taken within 72 hours prior to takeoff before they will let you board an international flight.
- **Takeaway:** If you travel to another country, you may not be able to leave until they lift a lockdown. Check with your airline to make sure you have proper documentation so they will seat you. The U.S. Embassy's website for any country that you travel to has a COVID-19 page that is useful to find out entry and exit requirements, as well as letting you know where you can obtain COVID tests in that country.

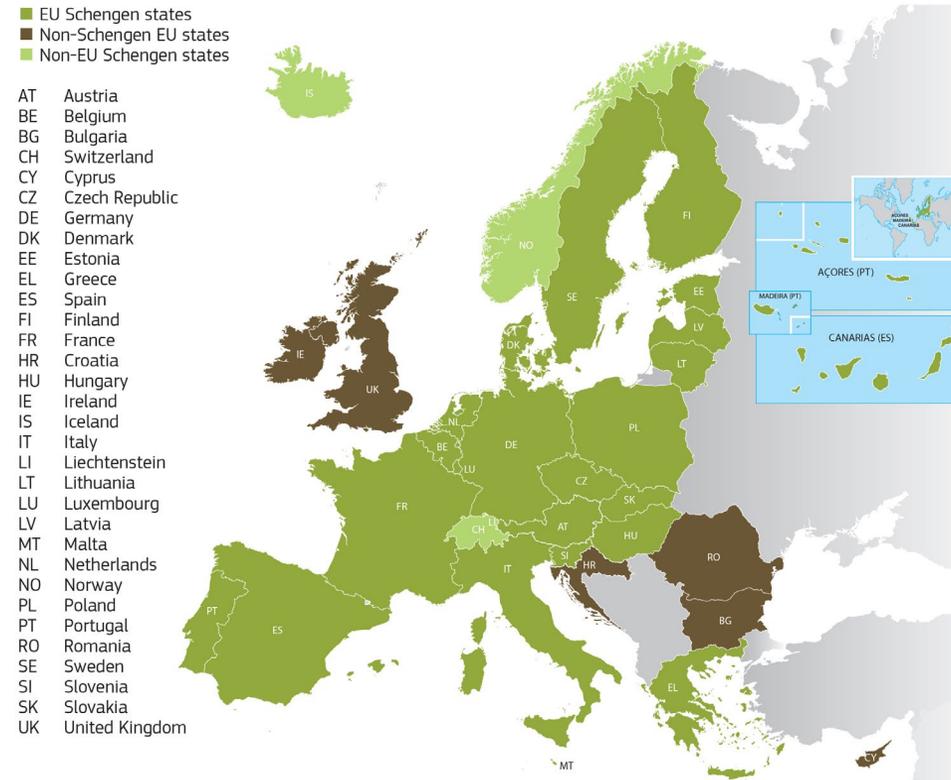
- International Travel During COVID-19 – cont'd

- **Considerations for Entering a Country**

- Testing to Avoid a Quarantine - Some countries, states, or localities have a separate COVID testing requirements that can have a separate timing requirement than the airline (e.g. the test must be within 72 hours of landing) and/or a quarantine requirement that may or may not be waived with testing.
- Quarantining in-country - Some countries have specific areas where you must quarantine (e.g. Canada requires that you stay in a government authorized hotel for 3 days).
- In-Country Testing Regimens - Some countries have mandated testing regimes at set intervals over a period of time (e.g. in Bermuda you are tested at the airport and must quarantine until you get the result, then you must be retested on days 4, 8, and 14).
- Effect of a Positive COVID Test - If you test positive for COVID, you may be unable to depart the country for a period or have other restrictions placed onto you.
- Possibility of Movement Restrictions or a Lockdown - Some countries have also locked down specific cities, states or localities preventing people who are in those areas from leaving. These could be imposed at any time.
- **Takeaway:** Check with the airline, the country, and the locality you are visiting to make sure you understand what testing and quarantining requirements there are in place, and keep checking on that information throughout your stay, as the information can sometimes change several times during the course of a week. The airlines and U.S. Embassy websites tend to have good information that they keep up to date on these requirements.

- **Travel Ban / Third Country Quarantining**

- **Background:** Shortly after COVID-19 was identified, then President Trump signed orders requiring that, with limited exceptions, anyone who has been physically present in certain countries within the 14 days prior to their attempted entry to the United States will be unable to be admitted. Since then, more countries have been added to address more dangerous variants of the COVID virus, or where the disease is spreading uncontrolled.
- **Current List of Countries Covered by the Travel Ban:**
 - China (but not Hong Kong or Macau),
 - Iran,
 - the Schengen Area (i.e. most of Europe, and Iceland), * **See Next Slide** *
 - the United Kingdom,
 - Ireland,
 - Brazil,
 - South Africa, and
 - India ***NEW as of 5/4/2021***



Source: ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/schengen_visa_en

The Schengen Area is every country that is colored green

- Travel Ban / Third Country Quarantining – cont'd
 - **Exceptions:** There are three ways to get around this travel ban:
 - Certain **individuals** are exempt due to them being:
 - a U.S. Citizen (“USC”) or Lawful Permanent Resident/Green Card Holder (“LPR”)
 - a close relative of a USC or LPR, including spouses, children (must be unmarried and under 21), and siblings (both the USC/LPR sibling and the foreign sibling are unmarried and under 21). **Note:** If a Foreign National has a USC minor child then they are exempt from the travel bans.
 - **Note:** There are other exemptions, but they are not likely to come up in the business context.
 - Obtain a **National Interest Waiver (“NIE”)** – More on this next.
 - **Quarantine in a “safe” third country** until it has been 14 days since the foreign national travelled to one of the countries covered by the ban – More on this coming as well.

- National Interest Waivers (NIEs)
 - **Background:** All proclamations involving the Travel Bans have a provision allowing the entry of any foreign national whom the Secretaries of State or Homeland Security have deemed “would be in the national interest.”
 - In Aug/Sep 2020, the State Department published guidance that F-1 students would automatically receive an NIE and loosened the standards related to H-1B and L-1 workers to allow employees in senior roles or who have special skills to obtain NIEs.
 - In March 2021, the State Department rescinded that special guidance related to H-1B and L-1 workers and replaced it with vague guidance that the foreign national must be providing “vital support for critical infrastructure,” or entering for “humanitarian travel, public health response, and national security.” **In our experience this new standard is virtually impossible to meet.**

- National Interest Waivers – cont'd

- **Current Standards:** In April 2021, the State Department has enumerated the following selected standards for different statuses and purposes
 - **Immigrants and Fiancé(e)s (K Visas)** – All Consular Processed green cards, and K visas for Fiancé(e)s of USCs qualify for an NIE. **NOTE:** Strangely, spouses of USCs do not automatically qualify for priority treatment.
 - **F-1 or M-1 Students** – Who will begin or will continue an academic program that commences on or after August 1, 2021 can simply appear at the airport and do not need to apply in advance for an NIE. **Note:** They can only enter the US up to 30 days prior to their program start date.
 - **Business / Work Visas** – The foreign national must be providing “vital support” for “critical infrastructure,” or entering or purposes related to humanitarian travel, public health response, and national security. **More on this in the next slide.**
 - **Note:** There are other provisions that apply but aren't related to business. They can be found at:
 - <https://travel.state.gov/content/travel/en/News/visas-news/updates-to-national-interest-exceptions-for-regional-covid-proclamations.html> (Immigrants, Fiancé(e)s, J-1, Pilots and Air Crew)
 - <https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exceptions-for-certain-travelers-from-china-iran-brazil-south-africa-schengen-area-united-kingdom-and-ireland.html> (Business/Work, F-1/M-1)

- National Interest Waivers – cont'd

- **Process to Apply** – Applications for NIEs are made through the U.S. Embassy website for the country the foreign national is in, and it's often not easy to find. The information is typically found on the Visas page of the website in a gray box near the top of the page, then click on the link to COVID FAQs or More Information which will then take you to a page with more information. In most cases the request must be made either through a text box on a website or by emailing specific information to a special inbox.
 - Must make a case that the foreign national provides “vital support” to a “critical Infrastructure sector” (see <https://www.cisa.gov/critical-infrastructure-sectors> for a list of the critical infrastructure sectors and why they are important).
 - Vital support relates to sustaining the supply and production chain for the critical infrastructure sector. Such people may provide safety training, installation, acquisition, and maintenance services. There also needs to be urgency related to the travel.
 - In our experience, the State Department does not currently put much weight into arguments about job retention or job creation related to the proposed travel. They want to find people whose presence is absolutely required to ensure that something related to critical infrastructure or COVID care will work properly, possibly to the point where they want the person to be bringing specialized tools to do their job.
- **If Approved** the Embassy will issue a letter that is valid for 30 days for the foreign national to enter the U.S. It often takes 2 - 4 weeks to get a response but it can take 6 weeks or longer to get a reply.
- **Example Experiences** – In the past couple of months we have only successfully obtained NIEs for two executives at a medical devices company that has technologies related to identifying blood clots, which are a major concern for those with COVID-19. Everyone else has been denied, even if in the past the person has received 3 or 4 NIE approvals.

- Quarantining in a Third Country

- **The Best Option?** Due to responses to NIE requests often taking a few weeks, and the current success rate being low, planning to quarantine in a third country will often be the fastest and most reliable way to avoid the Travel Bans, but comes with cost and some risk.
- **Considerations:** When picking the country to quarantine in, make sure that it's not subject to one of the travel bans, or experiencing a virus surge that makes it at risk for entering a lockdown. Additionally, there needs to be a direct flight from the "safe" third country to the U.S., or any connecting flights can't land in one of the affected countries. Double check the information in my "International Travel" slides to make sure you plan for any COVID testing and/or quarantining requirements. Check the country's U.S. Embassy's COVID page, as well as the airline's webpage, to make sure you understand the requirements ahead of time.
- **ESTA** – For those planning to enter the U.S. using ESTA instead of a work visa, they should be mindful to not enter the country they are quarantining in with an onward ticket to the U.S. already booked. We have heard reports of foreign nationals in that situation having their ESTA registrations revoked. Instead, they should wait until they have finished their quarantine before booking their flight to the U.S. Those with a work visa (e.g., H-1B or L-1) do not need to worry about this because they are not using ESTA.

- **Visa Appointment Availability**

- Due to the ongoing resurgence of COVID since the winter holidays, most Embassies and Consulates worldwide have either stopped all routine visa services or are working at an extremely limited capacity. **As a result, it can be extremely difficult or impossible to schedule a visa interview.**
- For those consulates with availability, they have been directed by the Biden administration to prioritize Immigrant Visas (Green Cards), Fiancé(e) Visas, and Student Visas.
- Furthermore, some clients have reported that even if they manage to schedule their interview, that they are later notified that the interview has been cancelled (as late as the day beforehand). **So even if a person has an appointment, we cannot guarantee they will be able to attend it.**
- **Drop Box Option:** If the foreign national is renewing a visa in a status that they previously received a visa stamp for and the stamp has expired within the past 4 years, then the State Department has expanded access to drop-box visa applications where the foreign national drops off their materials and the Consulate processes the visa without an interview. For the most part these continue to be accepted by consulates. **Takeaway:** Foreign nationals who are renewing an expired visa are the most likely to succeed.

- Updates on President Biden's Immigration Initiatives

- **Guiding Policy – Restoring Faith in Legal Immigration** – Biden issued an Executive Order (“EO”) on Restoring Faith in Legal Immigration, which stands in stark contrast to former President Trump’s “Hire American” EO (which was the basis that government agencies used to justify dismantling legal immigration under Trump). Biden’s order asks agencies to ensure laws and policies encourage full participation by immigrants in civic life, utilize processes to deliver benefits effectively and efficiently, and eliminate sources of fear that prevent immigrants from accessing government resources that are available to them. Our hope and expectation is that government agencies will restore old policies and enact new ones that will make things run more smoothly and predictably than they did under Trump.
- **A Return to Deference** – The government used to have a long-standing policy that they would generally give deference to prior approvals when adjudicating extension requests involving the same parties and facts. This is one of the first policies that Trump removed (using the “Hire American” EO), which meant that every filing was adjudicated as if it were brand new, even though some foreign nationals may have been on their third or fourth extensions. This resulted in the explosion of RFEs. In April 2021, Biden re-implemented the policy of according deference when there have been no material changes to the facts. Our expectation is that the number of RFEs will continue to reduce substantially as a result of the return to this policy.

- Updates on President Biden's Immigration Initiatives – cont'd

- **RFEs are generally trending down** – Even before the reinstatement of the deference policy, our office has anecdotally noticed that the RFE rates for H-1Bs have dropped dramatically, and when issued, they tend to be on predictable issues. We also have noted that L-1As continue to be given a hard time at the Texas Service Center and they continue to move the goal posts in the kinds of evidence they want to receive in order to approve an L-1A.
- **Government Customer Service Continues to be Poor** – Trump eliminated many specialty email boxes that attorneys could use to flag specific issues. He also implemented a hiring freeze, reduced use of contract services, and implemented an automated voice system for their customer service number which makes it virtually impossible to speak to a human being. The online e-request system also fails to handle non-typical situations, and recently some of the premium processing units stopped faxing courtesy RFE notices to the attorney. This has resulted in extremely frustrating and arduous processes to attempt to get the government to pay attention to or correct non-standard issues. The American Immigration Lawyer's Association has been engaged with the government to seek resolution of these issues, and we are hopeful that Biden's "Restoring Faith" EO will result in a better customer service experience.

- **Updates on President Biden's Immigration Initiatives – cont'd**
 - **Continued Forward Movement of the Visa Bulletin** – Since the end of 2020, we have noticed steady continued forward movement of the priority dates for foreign nationals who were born in India or Mainland China and who have been sponsored for an employment-based green card. In the past, the dates would only move forward a few days or weeks at a time. Currently they are jumping forward months at a time.
 - **Background** - The U.S. utilizes a complicated quota system to allocate immigrant visas (green cards). Normally, 140,000 employment-based green cards are issued each year. However, the quota system allows any of the left over, unused numbers from family-based green cards to roll into the following year's employment-based numbers. Since family-based green cards are typically processed through U.S. Embassies and Consulates abroad, the combination of COVID's forced closures of our Embassy operations abroad and Trump's order preventing the issuance of green cards abroad resulted in there being an extra 110,000 green cards available for employment-based use this year. This is what has been driving the forward movement of green cards. Our expectation is that next year there will continue to be additional unused family-based numbers, but we are unsure as to how many there will be since Biden eliminated the ban on foreign-issued green cards and has stated that Embassies and Consulates should prioritize those cases.