

# CLIENT ALERT

June 24, 2020

1

## **NONIMMIGRANT AND IMMIGRANT VISA PROCESSING HALTED BY PRESIDENTIAL PROCLAMATION - EFFECTIVE JUNE 24 FOR CERTAIN NONIMMIGRANTS**

by Kathleen Campbell Walker<sup>1</sup>

After numerous rumors in the past few days regarding the suspension of immigration to the United States (U.S.), President Trump's Proclamation was finally published on [June 22](#) (June Visa Processing Proclamation or JVVP) after numerous discussions regarding its scope. Please refer to my prior summary on the [April 22, 2020 Proclamation 10014](#) as to the suspension of immigrant visa processing at consular posts (April Immigrant Visa Suspension Proclamation or AIVSP).

The JVVP references the unemployment rate in the U.S. and its associated economic contraction as the basis to suspend the entry, [through December 31, 2020](#), of certain immigrants and nonimmigrants to the U.S. While the Department of Homeland Security (DHS) and the Department of State (DOS) have yet to issue official guidance regarding the JVVP, this summary will outline some basic facts we know.

### **What is the effective date of the JVVP?**

- June 22 as to the continuation of the AIVSP. That means a continuation of the immigrant visa suspension explained above through December 31, 2020.
- June 24 at 12:01 am eastern daylight time through December 31, 2020 as to the new nonimmigrant entry restrictions.

Within 30 days of the effective date of the JVVP and every 60 days thereafter, the DHS Secretary in consultation with the Secretary of State and the Secretary of Labor will recommend any modifications as needed.

### **What agencies will be enforcing the provisions of the JVVP?**

U.S. consular officers of the Department of State and U.S. Customs and Border Protection (CBP) officers at our ports of entry are the agencies responsible for visa issuance and admission to the U.S., respectively. U.S. Citizenship and Immigration Services' (USCIS) processing of petitions and applications for benefits for the specified nonimmigrant categories are not affected at the moment.

### **What Nonimmigrant visa categories are affected by the JVVP?**

- a. An H-1B or H-2B visa and any alien accompanying or following to join such alien (H-4);
- b. (b) A J visa, to the extent the alien is participating in an intern, trainee, teacher, camp counselor, au pair, or summer work travel

- program, and any alien accompanying or following to join such alien (J-2); and
- c. (c) An L visa, and any alien accompanying or following to join such alien (L-2).

### **What is the significant impact of the JVVP?**

Many applicants for [immigrant visas at consular posts outside of the U.S.](#) will likely face an ongoing suspension of consular appointments to obtain immigrant visas through December 31, 2020. The same lack of consular appointments will occur now for certain L-1/L-2, H-1B/H-4, H-2B, and J-1/J-2 nonimmigrant visa applicants through December 31, 2020. It will be incumbent upon the visa applicants to prove that they are not subject to the JVVP. Of course, consular posts suspended most consular services back in March due to COVID-19, [as announced](#) by DOS. Currently, consular appointments are randomly available on a post by post basis for nonimmigrants. In addition, CBP officers at our ports of entry will deny admission to these affected nonimmigrants applying for entry to the U.S.

### **Who is exempted from application of the JVVP?**

- i. Any lawful permanent resident of the U.S.;
- ii. Any foreign national who is the spouse or child, as defined in section 101(b)(1) of the Immigration and Nationality Act, as amended (INA), of a U.S. citizen;
- iii. Any foreign national seeking to enter the U.S. to provide temporary labor or services *essential to the U.S. food supply chain*; and
- iv. Any foreign national whose entry would be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.

To determine who is covered under the "national interest" exemption, the Proclamation directs the Secretaries of State, Labor, and Homeland Security to establish standards to assess which individuals are:

- critical to the defense, law enforcement, diplomacy, or national security of the U.S.;
- involved with the provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized;
- involved with the provision of medical research at U.S. facilities to help the U.S. combat COVID-19;
- necessary to facilitate the immediate and continued economic recovery of the U.S.; or
- children who would age out of eligibility for a visa because of this proclamation or due to the AIVSP.

As to services essential to the food supply chain, on May 14, 2020, DHS issued a [final rule for H-2B workers](#) indicating that work essential to the U.S. food supply chain includes a variety of industries and occupations where the H-2B worker is performing temporary nonagricultural services or labor, including but not limited to work related to the processing, manufacturing, and packaging of human and animal food; transporting human and animal food from farms, or manufacturing or processing plants, to distributors and end sellers; and the selling

<sup>1</sup> Kathleen Campbell Walker is a member of Dickinson Wright PLLC and serves as a co-chair of the Immigration Practice Group. <http://www.dickinson-wright.com/> She is a former national president and general counsel of the American Immigration Lawyers Association (AILA) and is Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. She serves on the AILA Board of Governors. In 2014, she received the AILA Founder's Award, which is awarded from time to time to the person or entity, who has had the most substantial impact on the field of immigration law or policy in the preceding period (established 1950). She has testified several times before Congress on matters of immigration policy and border security.

# CLIENT ALERT

of human and animal food through a variety of sellers or retail establishments, including restaurants. We do not have guidance yet on the interpretation of this exemption in light of the proclamation.

## How does the JVVP define who is subject to the entry ban?

The suspension and limitation on entry applies only to any foreign national who:

- i. is outside the U.S. on the effective date of the proclamation (June 24);
- ii. does not have a nonimmigrant visa that is valid on the effective date of the proclamation; **and**
- iii. does not have an official travel document other than a visa (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on the effective date of this proclamation or issued on any date thereafter that permits him or her to travel to the U.S. and seek entry or admission.

So, in theory, affected nonimmigrant visa holders are only subject to the ban if they are outside of the U.S. on June 24, they do not have a valid visa on June 24, **and** they do not have a valid travel document on June 24. So, if you are inside of the U.S. on June 24, you should be able to apply for an L-1, H-1B, H-2B, or J-1 (including dependents) visa at a consular post, if appointments are available, and be admitted to the U.S. In addition, if you are outside of the U.S., but have a valid visa, then the ban should not be applied. Again, agency confirmation would be helpful.

## Will all entries to the U.S. be prohibited by the JVVP as to the affected nonimmigrant categories ([i.e. L-1, H-1B (not H-1B1), H-2B, and J-1 – and dependents])?

No, but we are waiting for further guidance from the federal agencies. Those in the U.S. or outside of it on June 24, who have valid nonimmigrant visas should not be affected. This means that they may apply for visas in the same category or another of the restricted categories. They should also be able to apply at ports of entry to be readmitted to the U.S. in those categories. On June 24, some CBP officers have indicated that the JVVP will not apply for foreign nationals with valid visas.

## Are those with expired visas but valid I-94 admission records and passports able to still use the [automatic visa revalidation](#) regulation at 22 CFR 41.112(d) to return to the U.S. and apply for new visas in the affected nonimmigrant categories?

We are not sure. If someone is in the U.S. before June 24, they will have a valid travel document to use to seek entry to the U.S. That document is an I-94 admission record along with their passport and expired visa. Until DHS provides guidance on this point, the safer course of action is to be in the U.S. and to remain in the U.S. until guidance is issued. On June 24, we are receiving word from some CBP

officers that automatic visa revalidation will NOT be affected by JVVP and that the I-94 issued by CBP or USCIS on an I-797 notice will not be considered as travel documents.

## Certainly, Canadians who are visa exempt are not subject to the JVVP?

Canadian nationals are visa exempt with respect to the affected nonimmigrant categories. Their passport and visa exemption serves as their travel document. The expectation is that Canadians will not be affected by the ban.... at least at the moment. In addition, the ability to apply for L status at ports of entry on the northern border should be untouched, but at present; certain northern ports of entry are suspending initial L adjudications for Canadians on June 23. We do not know yet the official word on this issue. On June 24, we are receiving word from some CBP officers that visa exempt Canadians will NOT be affected by JVVP.

## What about those in the U.S. or outside of the U.S. with [ESTA](#) Registrations?

Since an ESTA registrant is able to enter the U.S. as a B-1/B-2 visitor, don't they possess a travel document in the form of the ESTA registration? So, if the person is outside or inside of the U.S. with a valid ESTA registration on or after June 24, are they eligible to apply for one of the designated restricted nonimmigrant categories at a consular post (assuming appointment availability) and be admitted to the U.S., if the visa is issued? We will have to wait and see.

## Is being in the U.S. on June 24 enough to escape JVVP implications?

Based on the wording of the JVVP, it would appear the answer is yes. Thus, a visa application and subsequent admission to the U.S. in one of the restricted categories should be possible. Again, we will have to wait and see. I would hate to be a CBP or consular officer trying to figure this out and what documentation will be necessary to prove the required elements to qualify.

## Will the JVVP cause the imposition of other measures as to immigrant and nonimmigrant visa processing or admission to the U.S.?

**Possible.** Some of the measures included are as follows:

- Direct DHS and DOS to ensure compliance with biographic and biometric data collection requirements.
- Direct DHS to "take appropriate and necessary steps, consistent with applicable law, to prevent certain aliens who have final orders of removal; who are inadmissible or deportable from the United States; or who have been arrested for, charged with, or convicted of a criminal offense in the United States, from obtaining eligibility to work in the United States."

- Issue regulations or take additional actions to ensure that those who have already been admitted, or are seeking admission on an EB-2 immigrant visa, EB-3 immigrant visa, or H-1B nonimmigrant visa do not limit opportunities for U.S. workers in violation of labor certification or labor condition application regulations. These actions may include prioritizing the highest paid H-1B workers in the annual numerical cap.
- The Secretary of Health and Human Services will provide guidance to the Secretaries of State and Homeland Security regarding measures to reduce the risk of those seeking admission to the U.S. introducing or spreading COVID-19 within the U.S. This may require subjecting individuals to a COVID-19 test before arrival.

## Has the DOS resumed visa processing/consular services?

Somewhat. It is still very difficult to schedule [nonimmigrant](#) or [immigrant](#) visa appointments and visa processing is practically at a standstill in comparison to normal operations.

Currently, it is a maze to address travel ban proclamations, visa processing suspensions, USCIS processing times, and now this JVVP among other issues. It will be critical to assess the application of the JVVP as to each employee and to plan for delays in transfers of critical personnel, who fall subject to the proclamation through the end of the year. The presidential election is on November 3, which might have an interim effect. Again, we will have to monitor developments day-to-day in this unpredictable time.

## ABOUT THE AUTHOR



**Kathleen Campbell Walker** is a Member in Dickinson Wright's El Paso office. She can be reached at 915.541.9360 or [kwalker@dickinsonwright.com](mailto:kwalker@dickinsonwright.com).