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State of Play in Business and Family Immigration

Authors: Robert C. Divine

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More than 78 days into the Biden Administration, less dust than expected or hoped has settled on the landscape for business and family immigration to the U.S. This article briefly assesses the state of play concerning COVID-based proclamations, appointment availability, and other issues.

COVID-19 Proclamations

President Biden has eliminated proclamations restricting all visas from predominantly Muslim countries and most family and business permanent residence visas, and he has let expire a proclamation categorically restricting H, L, and J visas. But he has extended and expanded proclamations that generally prohibit entry by people who have been physically present during the preceding 14 days in Europe (Schengen Area plus U.K. and Ireland), Brazil, Iran, and China. This essentially prevents visa applications from those countries in the absence of a "national interest exception" sought by email under standards that are narrowly defined for Europe and not defined at all for Brazil, Iran, and China. The only other option is to travel to another country for 14 days and then apply for a visa from there, if possible.

Biden has renewed regulatory restriction on most land travel from Canada and Mexico other than "essential workers," which have been interpreted at the ports to include most anyone with a work-authorizing visa. The Centers for Disease Control has added a requirement of ALL incoming travelers, even U.S. citizens, to pass a COVID-19 test taken within 72 hours before travel.

Consular Resource Limitations

The lifting of restrictions from proclamations seems hardly noticeable given the general unavailability of visa appointments at U.S. consulates around the world due to COVID-inspired lockdowns, travel restrictions, quarantines, etc. For permanent visas, consulates are making available limited appointments by visa category that the National Visa Center (NVC) is filling in order that applicants with available visa numbers had lodged all necessary papers with the NVC. It could be years before consulates work through this purely processing backlog.

For temporary visas, interview availability is wildly varying by country but overwhelmingly disappointing. Spot checks of [Visa Appointment Wait Times](#) published by the Department of State (DOS) reveal projected waits of a few weeks in a few places (especially for student visas), 999 days to "emergency appointments only" in many locations for visitor visas, and an equally wide range for "all other nonimmigrant visas." That DOS tool is increasingly inaccurate, and the only way to really test availability is to load the application data for a particular consular post and pay the fee, then try to schedule an appointment. Even after making an appointment an applicant should continue to monitor appointment availability, because new appointments might suddenly appear for dates earlier than those previously available. But then an appointment might suddenly be canceled or postponed. DOS says it is prioritizing "urgent needs, foreign diplomats, mission-critical categories of travelers (such as those coming to assist with the U.S. response to the COVID-19 pandemic, and workers who are essential to the American food supply), followed by students, exchange visitors, and some temporary employment visas."

Applicants can combine email requests for expediting appointments and for national interest exception to the proclamations affecting Europe, Brazil, Iran, and China.

Planning travel to appear at visa appointments in this environment can be maddening. Outbound travelers from the U.S. often face other countries' shifting limitations and requirements for pre-travel COVID-19 test results and post-arrival quarantine periods. A U.S. consulate might suddenly grant an expedite request and schedule an appointment for a date before the applicant could travel to the consular location or complete required quarantine.

USCIS Processing

USCIS **processing times** grew precipitously during the Trump Administration but have only become longer in Biden's short tenure. Permanent petitions even for family categories with visa numbers immediately available are projected to take about two years, while employment categories range from five to 21 months. EB-5 investors can expect to wait 29 to 58 months. Adjustment of status applications are projected to take up to five years in some places, and interim work and travel document applications are taking frequently more than six months.

Most temporary worker petitions are projected to take two to nine months, and premium processing within three weeks is available in most categories for an extra \$2,500. Change of status applications are projected to take between two to 23 months, often far longer than the maximum period of approval that can be requested.

The legal implications of long processing times are staggering and complex.

On a positive note, USCIS has continued to allow an extra 60 days to respond to most requests and denials, most recently for notices issued through June 30, 2021.

Eligibility Issues

On the substantive side, USCIS has announced relaxation of harsh interpretations of rules about use of H-1B classification for third party staffing situations, but the generally restrictive approach about what constitutes a specialty occupation has not changed. The Department of Labor (DOL) has delayed implementation of higher prevailing wage levels for H-1B cases and has requested public comment on the planned increases. DOL withdrew guidance that would have required third-party users of H-1B workers to file their own Labor Condition Applications. USCIS just completed its annual lottery under last year's rules, but Trump regulations to favor higher paid workers for next year's lottery will take effect December 31, 2021 unless Biden takes further action.

Trump's efforts to eliminate or greatly restrict F-1 Optional Practical Training and H-4 spouse work authorization have subsided, but lawsuits against those programs are not fully resolved, and eliminating H-4 spouse work authorization is on the Biden Administration's published regulatory agenda. Temporary Protected Status designations have been restored and expanded for several countries.

Biden has acceded to litigation against the Trump "public charge" regulatory redefinition and removed requirements for heightened financial disclosures by applicants.

Facing litigation to invalidate the 2019 regulations increasing the EB-5 minimum investment levels and restricting where lower investment amounts can be used, Department of Homeland Security (DHS) Secretary Mayorkas officially ratified the regulations that had been promulgated under improperly appointed officers during the Trump Administration. This may reduce hesitancy of investors to move forward at the \$900,000 level.

Permanent residents who have stayed long periods outside the U.S. due to COVID-19 concerns and restrictions remain at risk of losing their status and face hurdles in obtaining travel documents.

Employment Verification and Enforcement

DHS has continued to allow "flexibility" for employers still operating remotely to complete Form I-9 without otherwise required in-person interaction until May 31, 2021, but employers need to note limitations on that policy and to plan to update such I-9s with in-person verification once any on-site work resumes or on June 1.

Conclusion

Accomplishing temporary or permanent immigration to the U.S. has never been more complex and frustrating than today. Parties seeking status need to rely on thoughtful and practical advice from lawyers who are deeply aware of the ever-shifting complexities and how to navigate around them. If you have any questions, please contact [Robert Divine](#) or your Baker Donelson attorney.