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BAL ANALYSIS:
COVID-19 AND U.S. IMMIGRATION LAW

March 16, 2020

Government policies related to the COVID-19 outbreak are changing rapidly. Please check www.balglobal.com and sign up for the firm's News Alerts to stay abreast of the latest developments.

GENERAL QUESTIONS

What are the current U.S. in-bound travel restrictions related to COVID-19?

Europe 2.0 – UK, Ireland: *will take effect at 11:59 p.m. eastern daylight time on Monday, March 16, 2020*

Foreign nationals who have been physically present in the United Kingdom (UK) or Ireland during the 14 days before attempting to travel to or enter the United States will be denied entry. The entry ban does not apply to U.S. citizens, lawful permanent residents, immediate family of U.S. citizens/lawful permanent residents, and a limited number of other foreign national travelers. The ban also does not apply to persons aboard a flight scheduled to arrive in the U.S. that departed prior to 11:59 p.m. eastern daylight time on March 16, 2020.

Europe 1.0 – Schengen Area: *took effect at 11:59 p.m. eastern daylight time on Friday, March 13, 2020*

Foreign nationals who have been physically present in the Schengen Area during the 14 days before attempting to travel to or enter the United States will be denied entry. The entry ban does not apply to U.S. citizens, lawful permanent residents, immediate family of U.S. citizens/lawful permanent residents, and a limited number of other foreign national travelers. The ban also does not apply to persons aboard a flight scheduled to arrive in the U.S. that departed prior to 11:59 p.m. eastern daylight time on March 13, 2020.

The Schengen Area includes: 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, and Switzerland.

The UK and Ireland were not included in the travel restriction but are subject to restrictions as of March 16.

Iran: *took effect at 5pm on March 2, 2020*

Foreign nationals who have been physically present in Iran, during the 14 days before attempting to travel to or enter the United States will be denied entry. The entry ban does not apply to U.S. citizens, lawful permanent residents, immediate family of U.S. citizens/lawful permanent residents, and a limited number of other foreign travelers.

China: *took effect at 5pm on February 2, 2020*

Foreign nationals who have been physically present in China (excluding Hong Kong and Macau), during the 14 days before attempting to travel to or enter the United States will be denied entry. The entry ban does not apply to U.S. citizens, lawful permanent residents, immediate family of U.S. citizens/lawful permanent residents, and a limited number of other foreign travelers.

Are there exemptions or waivers available under the new restrictions on travel from Europe?

The Proclamation exempts certain foreign nationals, including those whose entry:

- Is at the invitation of the U.S. government for a purpose related to containment or mitigation of the virus;
- Centers for Disease Control and Prevention (CDC) determines would not pose a risk of introducing, transmitting, or spreading the virus;
- Department of State (DOS) and Department of Homeland Security (DHS) determine based on the Attorney General's recommendation would further important U.S. law enforcement objectives; and
- DOS and DHS determine would be in the national interest.

The Proclamation does not specify a process for claiming these exemptions, and directs DOS and DHS to establish procedures for implementing the Proclamation. Travelers who believe they fall into an exemption should contact BAL counsel. They should be prepared to present documentation to their airline showing that they are exempt from the restrictions. As of March 16, airlines are being instructed to call their applicable Customs and Border Protection (CBP) Regional Carrier Liaison Group (RCLG) office with any questions regarding the scope or implementation of the proclamations, including the authorization of any foreign national to board an aircraft or travel to the U.S. to seek admission. The RCLG will answer questions and if they determine a traveler qualifies for an exemption, will "clear" the airline to allow them to board.

Neither DOS nor DHS has yet announced any formal procedures for requesting exemptions. The government has provided no timeline for when, if ever, it will promulgate instructions on how to request a determination of non-applicability. Because many Europeans may travel to the U.S. without obtaining a visa, it is unclear which government agency would receive or adjudicate a request. BAL is seeking clarity from the U.S. government and will continue to update the guidance as information becomes available.

Will people not subject to the restrictions be subject to screening upon arrival in the U.S.?

The Proclamation itself does not address screening or quarantine measures, but DHS has announced that travelers will be subject to "enhanced entry screening where the passenger will be asked about their medical history, current condition, and asked for contact information for local health authorities. Passengers will then be given written guidance about COVID-19 and directed to proceed to their final destination, and immediately home-quarantine in accordance with CDC best practices." A DHS fact sheet states that travelers must self-quarantine for 14 days after their arrival.

Flights from all restricted countries will be diverted to the following thirteen (13) U.S. airports: John F. Kennedy International Airport (JFK), New York; Chicago O'Hare International Airport (ORD), Illinois; San Francisco International Airport (SFO), California; Seattle-Tacoma International Airport (SEA), Washington; Daniel K. Inouye International Airport (HNL), Hawaii; Los Angeles International Airport, (LAX), California; Hartsfield-Jackson Atlanta International Airport (ATL), Georgia; Washington-Dulles International Airport (IAD), Virginia; Newark Liberty International Airport (EWR), New Jersey; Dallas/Fort Worth International Airport (DFW), Texas; Detroit Metropolitan Airport (DTW), Michigan; Boston Logan International Airport (BOS), Massachusetts; and Miami International Airport (MIA), Florida.

Has there been guidance about enforcement of the restrictions?

U.S. Customs and Border Protection posted the following alert: "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. ESTA will not refund applications that are canceled due to this Proclamation. Travelers who have questions about whether they are subject to, or exempted from, the Proclamation should refer to the Proclamation language, and consult with the U.S. Department of State and the air carrier, as appropriate, in advance of travel to avoid travel disruptions."

How are other countries responding to COVID-19?

Over a dozen countries, including Australia, India, Singapore, South Korea, and Japan, have imposed travel restrictions similar to those of the United States.

Will the U.S. impose additional travel restrictions?

In the event the COVID-19 virus continues to spread, it is expected that the U.S. government will impose additional travel restrictions to slow the spread of the virus. We anticipate the government will continue to focus on whether the individual has been present in a location where the outbreak is widespread and the amount of time that has passed since the person was in that location before traveling to the U.S.

Will the U.S. close the southern border?

Addressing the spread of COVID-19 across the southern border is a concern of the Department of Homeland Security. At this time, discussions regarding travel restrictions along the southern border are in the planning stage.

Is U.S. Citizenship and Immigration Services (USCIS) closing offices in the U.S.?

The most up-to-date information on USCIS office hours and closures can be found on the USCIS website. Currently, all USCIS offices are open except the Albany, NY field office, which was closed Monday, the 16th. The Application Support Center (ASC) and USCIS field office in Seattle, WA were closed for a week due to a case of COVID-19, but the ASC reopened March 10 and the field office reopened March 11. No other USCIS offices have been closed. If USCIS closes other offices, the agency will send notices with

rescheduling instructions to applicants and petitioners with scheduled appointments impacted by this closure. ASC appointments missed due to the office closure will be rescheduled by USCIS and applicants will receive a new appointment letter in the mail. Individuals who had InfoPass or other appointments at a USCIS field office must reschedule through the USCIS Contact Center.

Will USCIS suspend the H-1B online registration system or delay the start of the 90-day filing period for cases selected in the lottery?

At this time, there are no reported plans to suspend or cancel the H-1B online registration system or delay the filing window for registrations selected in the lottery.

EMPLOYEE INTERNATIONAL TRAVEL

Is it possible to obtain a consular appointment in a country that is subject to travel restrictions?

We encourage you to check the Department of State website, which provides country specific information on consular services, and sign up for BAL's News Alerts. It is essential to take into account this fluid environment in making travel plans, as additional delays and closures are expected in the coming days. Please contact your BAL attorney to confirm the current status. U.S. embassies and consulates have closed or limited services in a growing number of locations, including China, India, Italy, France, Ireland, Spain, Germany, and Argentina. We have received reports that posts in Canada will limit consular services. The U.S. does not have consular posts in Iran, so no change has resulted from the Iran restrictions.

Our company has an employee outside the U.S. who is subject to a travel restriction and that employee is presently prohibited from traveling to the U.S. What options are there to expedite the employee's return to the U.S.?

Some companies are allowing employees who are subject to the 14-day travel restriction to travel to "clean countries" so that the employees can start the 14-day clock on when they can seek admission to the U.S.

A number of considerations should be worked through before taking this approach, including but not limited to: (i) whether the employee will be allowed to work and remain in the other country, especially if there is a delay in visa issuance or departure from that country; (ii) mobility costs and company policies; (iii) the possibility that the U.S. government could expand travel restrictions in a way that undermines or conflicts with that strategy; and (iv) the increased scrutiny that could arise for an employee with irregular travel.

Should our company continue to pursue Blanket L-1 visas at the U.S. consulate or shift those cases to USCIS petition filings?

Companies are re-evaluating their existing practices related to L-1 visas and whether it is best to file petitions with USCIS or utilize the Blanket L visa program at consulates outside of the U.S. There are

many variables and it is a very unpredictable environment, but we do anticipate that international travel restrictions will drive the trend towards USCIS filings.

USCIS denied a petition (e.g., H or L) filed by our company on behalf of an employee. Normally, the employee would depart the U.S., but our company currently prohibits international travel or the employee does not wish to travel overseas. What options are available to the company and the employee?

USCIS has not issued any guidance that changes the legal obligations for companies or for employees. Absent another basis for remaining lawfully in the U.S. (e.g. adjustment of status application), the employee is out of status and will begin accruing unlawful presence.

Companies may consider several options:

- *Refile with nunc pro tunc.* The company may refile the benefit request and, if the employee has been out of status, ask USCIS to excuse the failure to maintain status based on the fact that COVID-19 prevented the employee from departing the country. A request will be stronger if the company can document that the employee would have been required to travel to a country where COVID-19 is widespread or if the individual or family members are at a greater health risk. A decision on whether to excuse the failure to maintain status is in the sole discretion of the government. It is too early to know how USCIS will respond to those requests. Note that the employee will be out of status and accruing unlawful presence and is not authorized to work in the U.S. until the petition is approved (unless there is an independent basis for work authorization).

- *Allow employee to remain in U.S. without working.* The company may consider allowing the individual to remain in the U.S. without providing services to the company. The employee will be out of status and accruing unlawful presence, and there are legal risks for the company. We strongly encourage any company considering this option to consult with BAL counsel.

- *Relocate employee to third country*. The company may be able to transfer the employee to a third country. A number of considerations should be worked through before taking this approach, including but not limited to: (i) determining whether the employee will be allowed to work and remain in the other country, especially if there is a delay in visa issuance or departure from that country; (ii) mobility costs and company policies; (iii) the possibility that the U.S. government could expand travel restrictions in a way that undermines or conflicts with that strategy; and (iv) the increased scrutiny that could arise for an employee with irregular travel.

FORM I-9/E-VERIFY

Our company is not allowing new hires to report to a company office, but is allowing new employees to begin working at a personal residence or at another office location. How can our company comply with Form I-9 and E-Verify obligations?

The government has not issued any guidance regarding Form I-9 and E-Verify obligations during the COVID-19 outbreak. Therefore, the regulations and requirements that mandate completion of the Form I-9 and E-Verify at the time of hire remain in place.

Companies that on-board an employee at a remote office or straight to telework must address the legal requirement that a company official or agent physically review an original Section 2 Form I-9 document within three days of the first day of work for pay. Below are industry trends for complying with these legal obligations:

- Option 1: Remote Agent
  - Where possible, companies are utilizing a remote agent (i.e. someone who is not an employee of the company) to complete that physical review and attestation process of Section 2. The company remains liable for any errors made on the Form I-9. Thus, the practice is not without risk. To mitigate the risk that the agent does not properly complete the I-9, a company should put in place a review process to check for errors after Section 2 is completed by the remote agent. BAL also recommends pursuing training options for remote agents, such as preparing a cheat sheet to provide to the agent to assist in completing Section 2.
- Option 2: Push Back Start Date
  - In situations where a remote agent verification is not possible and physical review of documents cannot be completed within the required timeframes, companies are pushing back start dates several weeks.
- Option 3: Virtual Verification
  - If no remote agent is available and the company is unable to delay the start date, some companies are using "virtual verification" processes. The regulations and agency guidance clearly require physical presence and utilizing this approach is non-compliant. We strongly encourage any company considering "virtual verification" processes to consult with BAL counsel to evaluate legal risks.

WORK FROM HOME (WFH)/REMOTE WORKERS

What should our company be aware of when requiring an H-1B visa holder to telework or otherwise work from a different location?

The government has not issued any guidance related to COVID-19 that alters an employer's obligations related to the employment of H-1B workers.

If an H-1B beneficiary is moving to a new worksite outside the commuting area of the address on his or her H-1B petition (referred to as the "area of employment" in government regulations), a new Labor Condition

Application (LCA) is generally required. If a new LCA is required, the company must file an amended H-1B petition. The employee may begin working at the new worksite once the amended petition is filed with USCIS. For purposes of immigration compliance, a personal residence "home office" is treated the same as a corporate office or shared office location, as a worksite.

If an H-1B beneficiary is moving to a new worksite within the same commuting area, a new LCA is not generally required. If no new LCA is required due to the change in worksite, and there are no other material changes in employment, the company would not need to file an amended H-1B petition. A worksite within the same Metropolitan Statistical Area ("MSA") (e.g., county) is always considered within the same commuting area. Generally, a commute of up to 50 miles is considered within the same commuting area.

If the worksite is within the same commuting area, the company must still post the LCA or a posting notice at the new worksite on or before the H-1B beneficiary's first day of employment at the new worksite. For example, an H-1B visa holder presently authorized to work at a worksite within the New York City MSA (NYC) may not trigger the need for a new LCA if merely transferred to a new worksite in NYC. Nevertheless, the company would still need to post the previously certified LCA or a posting notice at the new worksite before the H-1B employee moves to the new worksite.

The Department of Labor has indicated in informal guidance that it does not expect employees to post at their houses. However, the agency has never issued formal guidance memorializing this. The safest approach is to still complete posting even if the new worksite within the commuting area is the employee's home. As described in more detail below, employers may comply with the notice requirement electronically, which would likely cover employees' home offices within the commuting area. Of course, if the home office is outside the commuting area, a new LCA and amended H-1B petition generally must be filed and posting must be completed, just as it would be for a company office or shared office space. Companies are advised to consult with BAL counsel to ensure their posting practices are compliant.

In a few narrow situations, an H-1B visa holder may work at a new location that will not be considered a new worksite. In these cases, the company does not need to file a new LCA or amended H-1B petition. A location can only be considered a "non-worksite" if the arrangement falls into one of the following categories:

- Employee Development Activity: H-1B beneficiaries may engage in "employee development activity," such as a formal training class, in another location without triggering the need for an LCA or amended H-1B petition. Instructors or their support personnel do not qualify for this exception under the regulations.

- Peripatetic Occupations: If the normal duties of the occupation require frequent travel, the location will not be considered a worksite provided (i) the travel is on a casual, short-term basis, which can be recurring but not excessive, and (ii) no single visit may exceed five consecutive work days. Note that the occupation itself must require frequent travel (i.e. not just the employer's business model) and the government regulations provide that "a computer engineer who works on projects or accounts for weeks or months at a time" would be deemed to be working at a worksite.

- Casual, Short-Term Trips: An H-1B beneficiary with a principal place of employment may visit other locations on a casual, short-term basis if no single visit exceeds 10 consecutive business days. The H-1B beneficiary must spend "most work time at one location;" the occasional travel to other locations "must be on a casual, short-term basis;" and the travel must be "recurring but not excessive."

In limited circumstances, a company may place an H-1B beneficiary at a new worksite for up to 30 days, and in some cases 60 days (where the employee is still based at the "home" worksite), without obtaining a new LCA under the "short-term placement" regulatory provision. In these situations, the company does not need to file an amended or new H-1B petition, provided there are no material changes in the terms and conditions of the H-1B worker's employment. A significant impediment to using the short-term placement provision is that a company may not have a valid LCA in place for the occupational classification at the place of employment. This restriction prevents most companies from using the short-term placement provision.

How should our company comply with Labor Condition Application (LCA) posting obligations if access to the relevant office (worksite) is prohibited or restricted?

The Department of Labor has not issued any guidance related to COVID-19 that alters an employer's obligations related to LCA compliance. An employer must therefore provide notice of its filing of an LCA to employees at the intended worksite in the occupational classification for which the employer seeks H-1B workers on or within 30 days before the employer files the LCA.

If hard copy posting cannot be accomplished, a company could choose to electronically notify all affected employees at the worksite. An employer may accomplish this by any means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its "home page" or "electronic bulletin board" to employees who have, as a practical matter, direct access to these resources; or through e-mail or an actively circulated electronic message such as the employer's newsletter. An employer may also provide notice through its public Internet site if the process complies with the 2019 DOL Field Assistance Bulletin No. 2019-3. Because LCA posting rules are complex and evolving, we encourage clients to consult with BAL counsel.

What should in-house immigration professionals be aware of if they themselves are instructed to work from home?

Aside from the issues related to LCA posting, the most immediate challenge for in-house professionals is signing government forms and supporting documents. Because benefit requests filed with USCIS may only be signed by a person with the authority to sign on behalf of the petitioning entity, in-house immigration professionals may be required to make alternate arrangements if they are not present in the office to sign forms or if it is not possible to complete that function from home.

As a general rule, a law firm may not sign a form requesting a benefit from USCIS on behalf of a company, even if there is a Power of Attorney in place. It is therefore recommended that you locate a designated alternate authorized person(s) who can sign documents on your behalf. Authorized persons may include, but are not limited to:

- An executive officer of a corporation or P.C. with authority to act on behalf of the corporate entity and legally bind and commit the corporate entity in all matters (for example, chief executive officer, president, or vice president);
- A managing partner or managing member of an LLC or LLP;
- A duly authorized partner of a partnership;
- An attorney employed in an employer-employee relationship by a corporation or other legal entity as its legal representative, or as a legal representative by the corporation or other legal entity's legal department in an employer-employee relationship (for example, in-house counsel, or other attorney employees or contractors);
- A person employed within the entity's human resources, human capital, employee relations, personnel, or similar department who is authorized to sign legal documents on behalf of the entity;
- An executor or administrator of an estate;
- A trustee of a trust or a duly appointed conservator; or
- Any other employee of the entity who has the authority to legally bind and commit the entity to the terms and conditions attached to the specific request and attestations made in the request.
- A sole proprietor is the only person authorized to sign a request filed on behalf of a sole proprietorship.

If that is not an option, we recommend that you consult with your BAL professional to evaluate options to address the legal signature requirements during the COVID-19 outbreak.

COMPLIANCE/ENFORCEMENT

Has USCIS issued policy guidance on how the Fraud Detection and National Security Directorate (FDNS) will handle administrative site visits during this time?

USCIS has not issued any formal guidance. BAL has confirmed with FDNS contacts that the agency will postpone a site visit until the specific office reopens. If FDNS determines that the applicant appears to have returned from either Wuhan, China or Tehran, Iran, or other location subject to travel restrictions, the interview will likely be postponed.

What are an employer's obligations with respect to the payment of H-1B workers who have entered the U.S. and are unable to begin working or who are placed on leave?

H-1B workers must be paid the required wage rate for all nonproductive time caused by conditions related to employment, such as lack of assigned work, lack of a permit, or studying for a licensing exam. No payment is required under the H-1B program for nonproductive time due to reasons not related to employment, such as a worker's voluntary absence from work or a hospitalization, etc. Nonproductive pay requirements begin with the earliest of the applicable following events:

- The H-1B worker "enters into employment" with the sponsoring employer, which occurs when the worker first makes him/herself available for work or otherwise comes under the control of the employer, such as reporting for orientation or studying for a licensing exam;

- No later than thirty (30) days after the H-1B worker is first admitted into the U.S. pursuant to the H-1B petition, whether or not the H-1B worker has "entered into employment";
- For a worker already in the United States, generally no later than sixty (60) days after the date the H-1B worker becomes eligible to work for the employer (the approval date found on the U.S. Citizenship and Immigration Services (USCIS) Notice of Action, Form I-797), whether or not the H-1B worker has "entered into employment."

STUDENTS AND EXCHANGE VISITORS

How should a company handle an F-1 student who must remain outside of the United States or otherwise is affected by the COVID-19 virus?

Students are encouraged to consult with their DSO's to obtain the most up-to-date information and guidance from the U.S. Immigration and Customs Enforcement (ICE) Student and Exchange Visitor Program (SEVP). SEVP has issued some guidance on how they will work with students affected by COVID-19 and Designated School Officials (DSO's), including allowing for delayed program start dates, medical reduced course loads, or a "case-by-case" resolution of issues for the student being outside of the country for long periods of time. On March 12, SEVP sent the following message to NAFSA: Association of International Educators: "SEVP is committed to remaining flexible in allowing schools to make temporary procedural adaptations so nonimmigrant students can continue to make normal forward progress in their program of study. They can temporarily engage in distance-learning, either from within the U.S. or outside the country, in light of COVID-19. SEVP will provide updated guidance as the scope and length of this situation becomes more clear." On March 13, SEVP pubished additional guidance regarding emergency procedures implemented by schools.

If COVID-19 prevents an F-1 student from being able to work pursuant to Curricular Practical Training (CPT) or Optional Practical Training (OPT), will such time count as unemployment under F-1 student regulations?

ICE/SEVP has not yet provided guidance regarding how OPT unemployment days will be construed when the foreign national F-1 student on OPT is prevented from starting or continuing their OPT position in the U.S. because of COVID-19 restrictions. However, SEVP issued a broadcast message March 9 indicating that it intends to be flexible with temporary adaptations and encouraging students engaging in practical training to consult with their employers regarding any changes to workplace requirements. BAL is monitoring guidance from ICE/SEVP and will provide updates as more information is provided.

Has the Department of State issued guidance regarding J-1 exchange visitors?

Yes. Since Feb. 7, the Department of State's Bureau of Educational and Cultural Affairs (ECA) has recommended restricted travel to the U.S. for exchange visitors who had been in China within the previous 14 days and for those planning to travel back to China before April 1. As of March 6, however, the guidance was expanded to additional exchange visitors who are currently outside the U.S. and those already in the country.

For new exchange visitors who are currently outside the U.S., and who have traveled to China or a country affected by COVID-19 in the past 14 days, sponsors should delay their start date until at least April 1 or later. Sponsors should also issue them a new initial certificate of eligibility (Form DS-2019), which allows them to request an interview at a U.S. consulate abroad. If the exchange visitor has already secured a J-1 visa stamp, the sponsor should issue an amended Form DS-2019 with a start date after April 1. Sponsors should delay the start date of new exchange visitors until they have been outside of the impacted country (and are not exhibiting symptoms of the COVID-19 virus) for at least two weeks.

Current exchange visitors who are outside the U.S. may have their records kept in SEVIS until they are able to return to the U.S. and continue with their original program objectives. However, depending on the validity dates of their J-1 visa, they may need to renew their visa before they are able to return to the U.S. If an exchange visitor requests withdrawal, the sponsor may shorten their SEVIS records accordingly.

Employer sponsors should also take action to extend the programs of exchange visitors who are currently in the U.S., and this may require more attention to compliance. According to the State Department guidance, sponsors should reinstate (if necessary) and extend the program for current exchange visitors with a new end date of April 1, 2020. Extensions, however, require that the exchange visitor's activities remain consistent with the original purpose of travel to the U.S. and should be documented in the extension. Also, program extensions must be supported with funding by the exchange visitor, sponsor or other third parties.