

# Updated: Current Immigration Impact and Compliance Flexibility due to COVID-19

Alert

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**May 19, 2020 Update:** Our alert below summarized the March 20, 2020 announcement by the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) to allow temporary flexibility in Form I-9, Employment Eligibility Verification compliance. Employers who have workplaces that are operating under a remote work policy may defer the in-person review of the employee's identity and employment authorization documents, and instead inspect the employee's documents for Section 2 of the form remotely. The in-person review of the original documents must then take place within three days of returning to work. This temporary guidance was set to expire May 19, 2020. Because of ongoing precautions related to COVID-19, DHS has extended this policy for an additional 30 days.

Due to the coronavirus (COVID-19) pandemic, U.S. federal agencies have issued numerous interim policy changes impacting immigration laws, which are summarized below.

## IMMIGRATION AND CUSTOMS ENFORCEMENT

### Form I-9 Completion – Temporary Remote Document Inspection Option

In light of national efforts to promote social distancing to reduce the spread of COVID-19, the Department of Homeland Security (DHS) [announced](#) temporary flexibility in the longstanding requirement that an employer or its authorized representative inspect an employee's identity and authorization document(s) in person. This pertains only to employers and workplaces that are operating under a remote work policy; if employees are physically present at a work location, there are no exceptions to the requirement for in-person document verification. This temporary flexibility allows employers to comply with ICE

# Updated: Current Immigration Impact and Compliance Flexibility due to COVID-19

requirements related to hiring practices while also working remotely.

As of March 20, 2020, such employers completing the Form I-9, Employment Eligibility Verification, may delay in-person, physical inspection of the required original documents. Instead, using the temporary flexible option, an employer may inspect the document(s) required under Section 2 of the form remotely. This can be accomplished by review of a scanned document, faxed document or video inspection. Employers must inspect the Section 2 documents remotely and retain copies of the document(s), within three business days from the date of hire.

After normal operations resume, employers will be required to perform a physical inspection of original documents that were inspected remotely, within three business days. When physical inspection of the original document(s) takes place, employers must write “COVID-19” in the Additional Information field in Section 2 as the reason for the physical inspection delay. In the same field, they should add “documents physically examined” and add the date of the physical inspection regarding the documents reviewed as to Section 2 or 3, as appropriate.

These provisions may be utilized by employers from March 20, 2020 for 60 days or within three business days after the termination of the national emergency, whichever comes first.

Employers who engage in remote onboarding of new hires and avail themselves of remote inspection and verification of Section 2 documents, will be required to retain written documentation of their telework policies. Employers should create and maintain written policies for remote work, remote onboarding and the temporary option to utilize remote verification of Section 2 documentation.

Employers may designate an authorized representative to act on their behalf to complete Section 2 of the Form I-9. An authorized representative may be anyone the employer designates to complete and sign the Form I-9 on the employer’s behalf. The employer is advised to review the completed Form I-9 for accuracy and correctness as the employer will remain liable for any violations in connection to the verification process.

## Form I-9 Audits – Notices of Inspection (NOIs)

Effective March 19, 2020, employers who were served NOIs by ICE during the month of March 2020 and have not already responded will be granted an automatic extension for 60 days from the effective date. At the end of the 60-day extension period, ICE will determine if an additional extension will be granted.

Going forward, ICE will continue to monitor the ongoing national emergency and provide updated guidance as needed.

# Updated: Current Immigration Impact and Compliance Flexibility due to COVID-19

## U.S. CITIZENSHIP AND IMMIGRATION SERVICES

### Premium Processing Suspended

Effective March 20, 2020, U.S. Citizenship and Immigration Services (USCIS) announced the immediate and temporary suspension of premium processing service for all Form I-129 and I-140 petitions until further notice due to COVID-19. Any pending request for premium processing not adjudicated within the 15 calendar day period will receive a refund.

This temporary suspension includes petitions filed for the following categories:

- I-129: E-1, E-2, H-1B, H-2B, H-3, L-1A, L-1B, LZ, O-1, O-2, P-1, P-1S, P-2, P-2S, P-3, P-3S, Q-1, R-1, TN-1 and TN-2.
- I-140: EB-1, EB-2 and EB-3.

This suspension does not prevent H-1B workers changing employers because the new employer can still file a petition for new employment and the H-1B employee can start working for the new employer upon filing and before the transfer petition is approved if following the existing portability provisions.

This suspension directly impacts a foreign national's ability to timely change their immigration classification because the new status cannot be effective until the petition is approved.

While there is no premium processing, there is still the ability to seek expedited processing for compelling cases.

### Signature Flexibility

USCIS also announced that it will loosen its original wet signature requirement during the national emergency. USCIS will accept all immigration benefit forms and other documents bearing an electronically reproduced original signature, which would include scans, faxes or photocopies of originally handwritten signed documents and forms. Original signed documents containing the 'wet signature' must be retained. USCIS may request at any time the original document, and if not produced, may negatively impact the adjudication of the immigration benefit sought.

### USCIS Office Closures

Local USCIS field offices and Application Support Centers (ASC) have canceled all in person interviews and biometric appointments through at least April 1, 2020. Cancellation notices will be sent to all impacted applicants. Cancelled appointments will be automatically rescheduled within 90 days of USCIS field offices and ASC resuming operations.

# Updated: Current Immigration Impact and Compliance Flexibility due to COVID-19

## DEPARTMENT OF LABOR

On Friday, March 20, 2020, the U.S. Department of Labor (DOL) addressed questions related to the DOL's administration of immigration-related programs during the COVID-19 pandemic. The DOL confirmed that the Office of Foreign Labor Certification (OFLC) remains fully operational and continues to process Prevailing Wage Determinations, Labor Condition Applications, and Labor Certification Applications.

### Processing Prevailing Wage Determinations, Labor Condition Applications and Labor Certifications

- OFLC will permit requests for extensions to deadlines regarding the processing of Prevailing Wage Determinations and Labor Certifications (e.g., Requests for Information, Notices of Deficiency and Notices of Audit Examination).
  - Prevailing Wage, H-2A, H-2B, CW-1, and Permanent Programs – Response Deadlines. If the specific deadline falls within the period from March 13, 2020 through May 12, 2020, the employer's response will be considered timely if received by May 12, 2020.
  - Permanent Program – Filing Date Extensions. Employers are required to begin recruitment no more than 180 days before filing an Application for Permanent Labor Certification (Form ETA-9089), and to complete most recruitment measures at least 30 days before filing.
    - Employers who started recruitment within 180 days preceding the president's emergency declaration on March 13, 2020, will be able to use recruitment completed within 60 days after the regulatory deadlines have passed. Delayed recruitment must have started on or after September 15, 2019 and the filing must occur by May 12, 2020.
    - Employers who have already completed the recruitment steps during the required 180-day timeframe should continue to file Forms ETA-9089 under existing regulatory requirements.
  - Administrative Review or Appeals: Employers can request extensions of time related to appeals of OFLC actions (g., denials of Forms ETA-9089, debarments, or revocations)

### Moving H-1B, H-1B1 and/or E-3 Employees to Worksites NOT Listed on Labor Condition Applications (LCA) - Telecommuting

- Employers can move H-1B, H-1B1, and E-3 employees to new worksite locations within the same area of intended employment without filing new LCAs (and I-129 Petitions for H-1B employees) as long as notice requirements are met.
  - While the notice (either paper or electronic) is normally required to be provided on or before the date the employee begins work at the new worksite location, in light of the COVID-19 pandemic, the notice will be considered timely when placed as soon as practical and no later than 30 calendar days after the

# Updated: Current Immigration Impact and Compliance Flexibility due to COVID-19

worker begins work at the new worksite location.

- Employers can move H-1B workers to unintended worksite locations outside of the area(s) of intended employment after filing new LCAs/Form I-129 petitions or without filing new LCAs/I-129 Petitions when the employer relies on the short-term placement rules.
  - Per the short-term placement rules, an H-1B employee can work at an anticipated location for up to 30 workdays per year OR 60 workdays per year when the employer can show that the employee maintains his/her permanent worksite and residence in the area of intended employment. Importantly, the employer shall cover the cost of travel, lodging and meals in connection with the short-term placement. As such, the short-term placement rule may not be a workable solution for employers requesting their employees to telecommute from locations outside of the area(s) of intended employment and new LCAs/Form I-129 petitions might be required.

## Terminating H-2A, H-2B or CW-1 Employment

- H-2A, H-2B and CW-1 employers with foreign employees on site may request to terminate the job order and/or work contracts early citing “contract impossibility” due to the impact of the COVID-19 pandemic.
  - The employer obligations under the work contract are in places until a favorable “contract impossibility” determination from the DOL.
  - The employer should document its efforts to comply with the contract impossibility requirements applicable to the H-2A, H-2B or CW-1 visa programs.

## Filing Emergency H-2A Applications

- H-2A employers with a critical need for H-2A workers to perform agricultural labor due to COVID-19 can file emergency H-2A applications with OFLC.
  - DOL may waive the time period for filing and test the domestic labor market on an expedited basis.

## U.S. CUSTOMS AND BORDER PATROL

### United States Border Crossing

On March 20, 2020, the DHS announced a dedicated joint effort with Canada and Mexico to prevent the spread of COVID-19 and close both the northern and southern land borders of the U.S. for non-essential travel. The travel restrictions went into effect at 11:59 p.m. EDT on March 20, 2020 and will remain in effect until 11:59 p.m. EDT on April 20, 2020. Non-essential travel includes tourism, such as sightseeing, recreation, gambling or attending cultural events in the U.S. Critical services such as food, fuel, health care and life saving medicines that must reach people on either side of the border on a daily basis will continue

# Updated: Current Immigration Impact and Compliance Flexibility due to COVID-19

to operate. Customs and Border Patrol (CBP) has determined "essential travel" to include:

- Citizens and lawful permanent residents returning to the U.S.
- Individuals traveling for medical purposes
- Individuals traveling to attend educational institutions
- Individuals traveling to work in the U.S.
- Individuals traveling for emergency response and public health purposes
- Individuals engaged in lawful cross-border trade (e.g., truck drivers supporting the movement of cargo between the U.S. and Canada)
- Individuals engaged in official government travel or diplomatic travel
- Individuals engaged in military-related travel or operations

At this time, the travel restrictions do not apply to air, rail or sea travel, but do apply to commuter rail and ferry travel.

It is expected that business travel will continue across borders, but include additional screening. Individuals with valid U.S. travel documents should continue to be admitted to the U.S., but expect to answer detailed questioning regarding their proposed activities in the U.S. As CBP has wide discretion in determining which activities are considered within the "essential travel" to qualifying in the U.S. during the COVID-19 crisis, it is possible that an applicant may be denied entry to the U.S.

## Trusted Traveler Program

CBP announced that the Trusted Traveler Program enrollment centers are temporarily closed until May 1, 2020. The temporary closures includes Global Entry, Nexus and FAST locations. Applicants seeking an enrollment interview will need to reschedule their appointment once operations resume.

## DEPARTMENT OF STATE

On March 19, 2020, the Department of State issued a Level 4 "do not travel" advisory globally and recommended that all U.S. citizens avoid global travel and any U.S. citizens abroad make arrangements to return to the U.S. as commercially available flights may become limited.

U.S. consulates and embassies have suspended routine services. All nonimmigrant and immigrant visa appointments at U.S. consulates and embassies have been canceled and will be rescheduled at a future date. Anyone with a visa appointment is advised to check the consular post where their appointment was scheduled for the latest information on consular services amid the COVID-19 crisis. Machine Readable Visa

# Updated: Current Immigration Impact and Compliance Flexibility due to COVID-19

fees that have been paid will be applied for future appointments within one year of payment. U.S. consulates and embassies will continue to review emergency requests on a case by case basis.

Note that there are also travel restrictions in place. Starting March 13, 2020, the federal government suspended travel between the U.S. and many countries for the next 30 days, which could be extended longer. This ban applies to all foreign nationals who were physically present in any of the impacted countries during the 14-day period preceding their entry or attempted entry into the U.S. U.S. citizens, legal permanent residents, certain immediate relatives of U.S. citizens or lawful permanent residents are not subject to the ban, but must undergo extensive screening at one of the national airports and self-quarantine for 14 days upon arrival in the U.S. when arriving from one of the identified countries on the current travel restriction list.

The travel restrictions include the following countries: China, Iran, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

Stinson's COVID-19 task force will continue to monitor immigration-related changes and provide periodic updates. Due to the dynamic nature and rapidly changing circumstances, we urge employers to contact your Stinson professional to assist with any case specific questions.

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## RELATED CAPABILITIES

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