

# Immigration Strategies for Companies in the Coming Months



## Current Environment

As countries attempt to limit the spread of COVID-19, governments around the world are taking unprecedented measures to restrict movement of travelers and suspend immigration services. Companies have already felt the immediate effects of travel bans and the closure of U.S. visa services abroad. Businesses should also begin to consider how things will look in the coming weeks and how to prepare for the longer term consequences on immigration planning and business continuity.

There is no question the next few months will test the resolve of governments and companies. Drawing upon four decades of experience advising clients through government shutdowns, political upheaval, major economic downturns and uncertain policy environments, BAL offers the following insights into what companies should expect and how they should plan.



## 3-6 Month Outlook

Expect major delays caused by increased restrictions on international travel and the closing of immigration departments. The list of governments barring entry of travelers from high-risk countries is growing daily. The U.S. currently bans most travel from 30 countries. This is likely to expand to additional countries and possibly continue into the summer. Government immigration offices are closing or reducing services in-country and at their consulates around the world, especially in hot spots. The State Department has

temporarily suspended routine visa services at consulates throughout the world. Companies are also issuing policies to restrict employees from international travel and non-essential domestic travel. Has your company identified employees affected by government travel restrictions, as well as immigration office closures and conducted risk assessment for delays in the next three to six months?



## Work from Home Policies

As businesses close offices and introduce work-from-home policies, they remain obligated to comply with all relevant immigration and labor rules

### Form I-9: Physical Inspection

Companies are required by law to physically inspect new employees' documentation proving that they are work-authorized, and to reverify temporary forms of work authorization. The government recently provided guidance that allows certain employers to conduct I-9 review remotely, but employers must provide written documentation of their remote onboarding and telework policy for each employee. They must also follow additional procedures once normal operations resume that include physical review of employee documents. Companies that are eligible for this option and choose to use it will need to have protocols in place to meet these requirements and be able to document that they are in compliance with I-9 obligations.

### Posting Requirements

Employers are required to provide notice of filing of a Labor

# EXECUTIVE ANALYSIS: COVID-19

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Condition Application (LCA) with the Labor Department as part of the process to be able to file an H-1B petition. This 10-day posting gives notice to employees that the company is hiring an H-1B employee and should be posted where employees at the work location can see it. The Labor Department allows employers to post the LCA physically or electronically. If your employees are working from home or another remote location, you may be obligated to post the LCA at the new work location. For employees working from home or another temporary location, companies should consider electronic posting. Is your HR department prepared to post LCAs electronically?

Employers sponsoring employees in the PERM labor certification (green card) process must post the job opening on the company's premises for 10 days. Unlike the LCA posting, this notice must be at a physical location. The purpose of the posting is to give employees notice, which may be difficult to accomplish as a result of office closures. - Do your company's policies allow you to fulfill the physical posting requirements and notify your employees while working from home? The Labor Department has issued guidance providing temporary extensions on posting deadlines, and companies should ensure that they review any changes to their practice with counsel.

## Visa Restrictions on Work Location

H-1B visas require that the employee be placed at the job location stated in the H-1B petition. When the employee changes job locations outside the commuting distance of the stated work location, employers will likely be required to file a new LCA and an amended H-1B petition before the employee can begin working in the new location. When sending employees home or to other locations to work remotely, companies should assess which H-1B employees are affected and how to remain in compliance with these requirements.

## Signature Requirements

Your company has authorized signatories to sign and make attestations on immigration-related petitions. USCIS does not allow electronic filing for all types of immigration forms, and your signatory may need to sign forms in person. While the agency recently issued temporary measures allowing scanned copies of originals to be submitted, each original signed form must be retained, and the government can

request the original document with the handwritten signature at any time. To avoid filing delays, your company should have plans in place to ensure that authorized signatories can print and sign papers when necessary and retain the originals.



## Mobility Challenges

How much longer will travelers be able to move to a non-banned country for 14 days in order to reach their destination country? As the number of travel bans grows, these workarounds continue to decrease.

## Fewer Paths around Travel Bans

Companies should prepare for fewer available avenues for getting employees to their locations and consider their options for employees who are grounded in their home country or a third country. It is important to note that certain foreign nationals, such as immediate family members of U.S. citizens and green card holders, are exempt from the U.S. travel bans. The restrictions also allow travel for noncitizens whose entry is in the national interest. Questions remain about how these provisions will be implemented, as the government has not yet issued instructions for requesting an exemption.

## Visa Denials May Spike

Even when governments re-open consulates and immigration offices to full capacity, they will likely face huge backlogs and under-resourced departments. While companies should prepare for higher denial rates and ongoing challenges in obtaining approvals, they should also look for strategies to address continued delays and uncertainty.



## Furloughs and Layoffs

Changes in the economy will require employers to make tough decisions about whether to place employees on furlough or pursue layoffs. Immigration regulations add a level of complexity and legal requirements, often overlooked, for foreign nationals affected by such business decisions.

# EXECUTIVE ANALYSIS: COVID-19

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## Strategies for H-1B Employees, Other Temporary Visa Holders

Employers must be aware of the impact of placing immigration-supported employees on furlough and pursuing layoffs and understand all related costs and regulatory obligations. When an employer files an LCA for an H-1B visa, it agrees to pay the employee the required wages for the duration of employment. Employers must continue to pay employees on H-1B visas even if they are put on furlough or if there is not work for them to perform, unless the nonproductive time is due to reasons not related to employment, such as a worker's voluntary absence from work. If a company decides it must lay off or terminate an employee on an H-1B visa, it must follow certain steps, including providing the employee with the reasonable cost of transportation to the employee's last place of foreign residence.

## Impact on Green Cards

Employers are encouraged to conduct an analysis of employees who are in the midst of the green card process when making decisions about layoffs, which may have critical consequences on long-term talent retention and talent acquisition. Layoffs can significantly impact an employer's timeline for pursuing green cards for employees. Employers filing PERM labor certifications must attest that they have not laid off a U.S. worker in the same occupation and intended area of employment within the previous six months. While there are exceptions that allow employers to file sooner, this may still impact the timeline for obtaining a green card for employees.

## Agency Delays

USCIS has remained open during previous government shutdowns because it is fee-funded, but COVID-19 may require USCIS offices to shut down operations in new ways. Your company should plan for delays in USCIS processing times by identifying immigration-sponsored employees who may be affected by closures and delays

## Different Offices, Different Delays

Different USCIS locations have different capacity to respond

to and avoid office shutdowns. USCIS Field Offices and Application Support Centers (ASC) are normally open to the public and have already closed until at least April 7, 2020, - because of COVID-19. Employers should expect and plan for delays and postponement of interviews.

USCIS Service Centers, which process most employment-based immigration benefit applications, are closed to the public and, thus far, remain operational. Service Centers may be more resilient and remain in operation because many USCIS officers at these locations already work from home part time. So far, USCIS closures have focused on operations that provide in-person services, and Service Centers do not fall into that category. However, processing times will likely lengthen if staffing shortages occur with USCIS officers or the agency's many contractors.

## Filing Stateside versus Consular

The risk of employees losing valid work authorization grows greater every day, as renewals become increasingly difficult for most types of work visas. Companies, employees and candidates need to consider the risk of international travel and unavailability of consular interviews and come up with strategies to mitigate loss of status and compliance issues.

Travel bans and consulate closures make consular notification an uncertain route. For employees in the United States, USCIS has discretion to grant an extension and or change of status even if the employee was not in a valid nonimmigrant status at the time of filing. These filings are one alternative to consular notification, but they come with their own risks, as there is no guarantee the agency will exercise its discretion to forgive gaps in status.



## Policy Environment

COVID-19 and the economic fallout will shape future policy debates regarding the benefits and risks of global immigration and business travel. Countervailing forces will shape immigration policy discourse in the months and years to come—some will advocate the economic benefits of allowing people to move, while others

# EXECUTIVE ANALYSIS: COVID-19

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will say the health and economic risks of allowing people to move have become too high. No doubt, COVID-19 will change the way we move, travel and do business globally

## **The U.S. Economy is a Global Economy that Relies on Access to Global Talent**

Economic data consistently demonstrates that skilled immigration has a beneficial effect on U.S. employment rates, job creation and economic opportunities. U.S. businesses need access to high-skilled immigrants to compete in the global economy, especially in STEM fields where U.S.-born graduates are scarce. Policies that restrict immigration and travel would negatively impact U.S. business and may contribute to economic uncertainty after the COVID-19 crisis ends. Advocates for policy change and limiting immigration will need to weigh the economic consequences of future limitations on high-skilled immigration.

## **Increased Globalization Leads to Increased Risks of Pandemic**

In an economic downturn, immigration is not popular. Policymakers will inevitably seize on the COVID-19 crisis to try to put greater limits on immigration as a whole or on certain categories of immigration. Governments may also be concerned about another pandemic and impose more onerous health-related requirements, such as medical exams for all visitors and visa-waived nationals. Will we see exams and clearances for ESTA travel? Most likely, regulations will be put into place to safeguard public health around the globe. Companies should be prepared to engage in the immigration debate with policymakers to help shape reforms and ensure that immigration policies continue to support talent acquisition and retention needs once the pandemic subsides.