



**Fragomen and  
Tech San Diego Webcast:  
U.S. Immigration During the  
COVID-19 Pandemic**

May 19, 2020

FRAGOMEN

# WITH YOU TODAY



**KARINE WENGER**

Partner  
San Diego

[kwenger@fragomen.com](mailto:kwenger@fragomen.com)



**MONICA GHIGLIA**

Senior Associate  
San Diego

[msherman@fragomen.com](mailto:msherman@fragomen.com)

# A World of Difference in Immigration

Immigration attorneys, solicitors, and consultants worldwide



**Immigration in the Trump Administration: What You Need to Know**



**Brexit: What You Need to Know**



**Migration in the European Union**



**Australian Immigration: Seeking Highly Skilled Migrants**

## Latest alerts

ent for All Countries Except China and India; Modest Advancement for Most Others; USCIS to Honor Final Action D

## INSIGHTS

[VIEW ALL →](#)

Immigration Update: Coronavirus

Worldwide Immigration Trends  
Report Q1 2020 Supplement

Fragomen Guides US Visa Holders  
Through Fog of Pandemic

The Am Law 100 Found Success in



27 APR 2020 FRAGOMEN

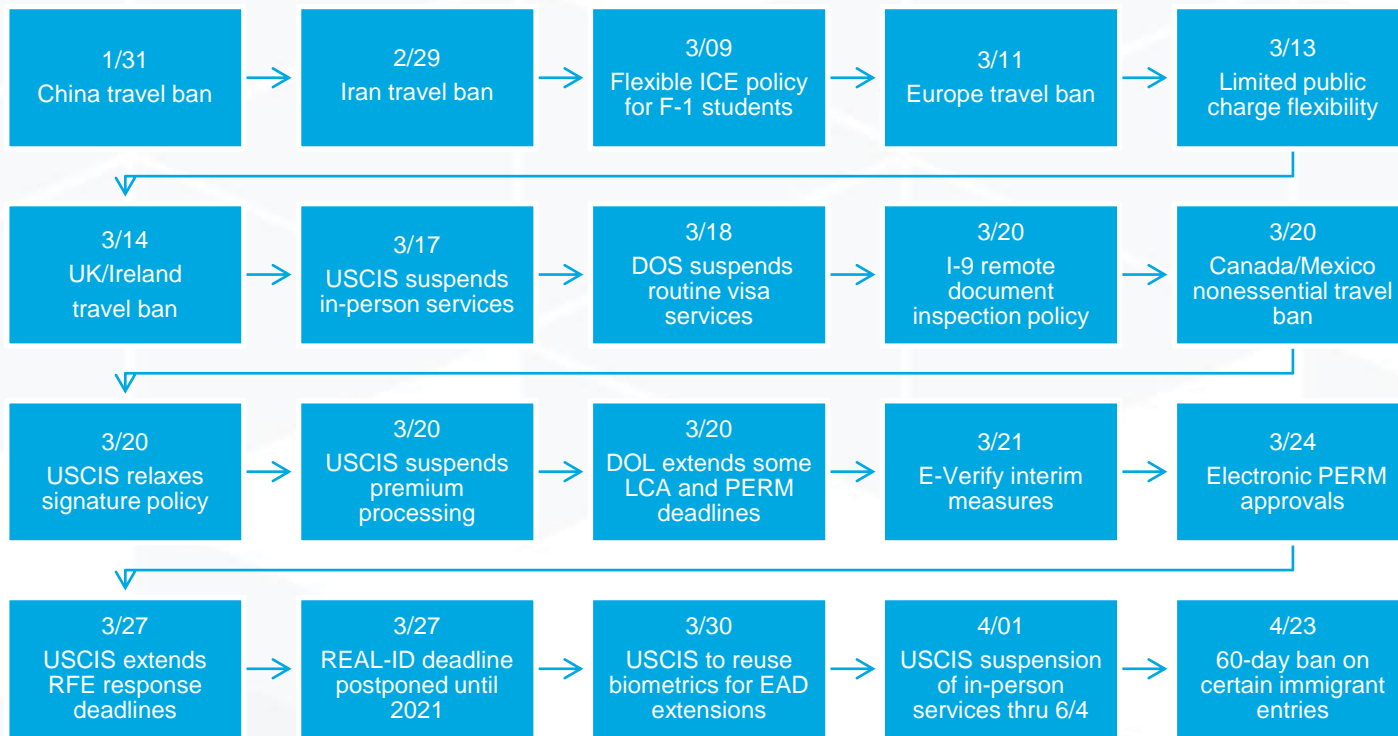
### Immigration Update: Coronavirus

The spread of the coronavirus has caused entry and exit bans, quarantines and travel restrictions throughout the world. Check this page for up-to-date

A photograph of an airport tarmac at dusk or dawn. A large commercial airplane is parked at a gate, with its tail fin visible on the right. A jet bridge is connected to the aircraft's door. In the background, there is an airport terminal building with large glass windows and several tall light poles. The entire image is overlaid with a semi-transparent dark blue filter and several thin, light blue diagonal lines that create a geometric pattern across the frame.

# U.S. IMMIGRATION IN THE COVID-19 EMERGENCY: WHERE WE ARE TODAY

# COVID-19 IMMIGRATION MEASURES





# U.S. IMMIGRATION COMPLIANCE AND THE COVID-19 EMERGENCY

- ▶ Travel bans and restrictions remain in place, and new bans have been implemented
- ▶ Routine consular appointments remain suspended
- ▶ U.S. immigration agencies have offered some flexibility to nonimmigrants— but not enough
  - No special COVID-19 relief for nonimmigrants with expired or expiring periods of admission, green-card holders with expired reentry permits
  - Longstanding relief measures remain available but are subject to U.S. government discretion
- ▶ Limited options for foreign nationals not selected in the FY 2021 H-1B cap lottery
- ▶ Complex compliance issues for employers considering workforce changes due to COVID-19 business impact



1

# PRESIDENTIAL PROCLAMATION ON IMMIGRANT ENTRY & ONGOING COVID TRAVEL RESTRICTIONS

# PRESIDENTIAL PROCLAMATION

## RESTRICTING SOME IMMIGRANT ENTRY

- ▶ 60-day ban on entry of IV applicants who do not yet have immigrant visas issued by a consulate.
  - Effective for prospective immigrants outside the U.S. as of 11:59pm EDT on April 23, 2020
- ▶ Ban is narrow. Exemptions include –
  - U.S. lawful permanent residents; and spouse and minor children of U.S. citizens
  - EB-5 immigrants
  - Foreign nationals seeking to enter on immigrant visas as healthcare professionals
  - Foreign nationals whose entry is in the national interest or furthers U.S. law enforcement goals
- ▶ Impact on nonimmigrant programs
  - No immediate impact on H-1B, L-1 and other temporary worker programs
  - DHS and DOL ordered to recommend measures to prioritize U.S. workers over nonimmigrants
- ▶ Could Proclamation be extended and broadened after 30-day review?





# US-CANADA and US-MEXICO

## TRAVEL RESTRICTIONS

- ▶ Land crossings at US-Canada and US-Mexico borders restricted to “essential travel” only
  - What is essential travel?
  - Exemptions
    - U.S. citizens and lawful permanent residents
    - Individuals with valid travel documents
  - Restrictions do not apply to air travel

# STATUS OF COVID TRAVEL BANS

- ▶ Travel bans remain in place for travel from China, Iran, Ireland, the UK, and the 26 countries of the European Schengen Area
- ▶ Exemptions for U.S. citizens, lawful permanent residents and some immediate family members, among others
- ▶ Availability of waivers



2

## ISSUES FOR NONIMMIGRANT VISA HOLDERS IN THE US

# OPTIONS FOR NONIMMIGRANTS

## WITH AN EXPIRING PERIOD OF STAY

- ▶ Timely-filed extension of stay with 240 days of additional work authorization
  - Available to E-3, H-1B, H-1B1, L-1, O-1, TN nonimmigrants
- ▶ Change of status to another nonimmigrant category
  - H-4, L-2 or E-2 dependent category; F-1 student category; B-2 visitor category
  - Suspension of USCIS biometrics services may delay these change of status and EAD applications
- ▶ Changes of employer
  - H-1B portability
- ▶ No premium processing, but expedite requests remain available subject to discretion

# ISSUES FOR NONIMMIGRANTS

## TEMPORARILY WORKING FROM HOME

- ▶ Normal Commuting Distance (DOL COVID-19 FAQ Round 3)
  - If an H-1B/E-3/H-1B1 employee normally commutes between his/her home and the worksite listed on the LCA, the home is within normal commuting distance and thus within the area of intended employment. This is a more expansive interpretation than previously used by DOL.
  - DOL FAQ does not address LCA notice requirements specifically
- ▶ Considerations for including home address in extension filings
- ▶ F-1 STEM OPT holders permitted to work remotely during crisis and are not required to update training plan but should report to DSO



3

## THE GREEN CARD PROCESS DURING COVID-19



# ISSUES FOR GREEN CARD CASES

- ▶ The Office of Foreign Labor Certification (OFLC) has offered some limited accommodations for employers sponsoring permanent foreign workers during the crisis
  - The 180-day window for PERM recruitment and Notices of Filing was extended by 60 days, provided that recruitment began between September 15, 2019 and March 13, 2020, and that the PERM filing occurs by May 12, 2020
- ▶ Considerations for recruitment
  - DOL has not relaxed its requirement that employers post a hard copy of the Notice of Filing for 10 consecutive days at the actual worksite where the foreign beneficiary will be employed
  - No permissible alternative to hard copy postings
  - Where employers did not already post the NOF while workers were still at worksite, they should refrain from physically posting the NOF until workers return to the worksite

# 4

## WAGE REDUCTIONS, FURLOUGHS & LAYOFFS DURING THE EMERGENCY

# FURLOUGHS, REDUCED HOURS & LAYOFFS

- ▶ Reductions from full-time to part-time employment: Is an amended USCIS petition required?
- ▶ H-1B, E-3 and H-1B1 reductions in pay: Are a new LCA and USCIS amended petition required?
- ▶ When can nonimmigrant employees begin work and be paid under a reduced schedule?
  - H-1B portability rules
  - F-1 OPT students
  - All other nonimmigrant employees

# FURLOUGHS, REDUCED HOURS & LAYOFFS

- ▶ Termination of nonimmigrant employees – compliance issues
  - H-1B, H-1B1 and E-3 employees – bona fide termination
  - O-1 employees
  - Offer of return transportation
  - Availability of 60-day grace period

# FURLOUGHS, REDUCED HOURS & LAYOFFS

- ▶ Impact of layoffs or furloughs to PERM process
  - Layoff of a U.S. worker in area of intended employment and same or related role as foreign worker
    - Must hold PERM filing for six months; or
    - Must notify and consider all potentially qualified laid off U.S. workers
  - Review WARN notices
  - Furloughs not specifically addressed by PERM regulations but may lead to audits, denials or Supervised Recruitment
  - May evaluate other green card options, if PERM process impacted

# FURLOUGHS, REDUCED HOURS & LAYOFFS

## GOVERNMENT INVESTIGATIONS AND COMPLIANCE

- ▶ Post-COVID, Labor Department enforcement actions likely to surge
  - Complaints by whistleblowers and H-1B employees
  - Willful or substantial noncompliance
- ▶ Is your organization's compliance house in order?
  - LCA public access files
  - Wage reductions
  - Layoffs and other workforce restructuring
  - PERM in an economic downturn
- ▶ Involving immigration counsel and your GC





5

## COMPLIANCE UPDATES

# FLEXIBILITY IN I-9 VERIFICATION REQUIREMENTS

- ▶ **DHS has issued interim guidelines for remote I-9 verification during the COVID-19 emergency**
  - If all employees are working remotely due to crisis, employer may inspect the employee's identity and employment authorization documents virtually when completing Section 2 of Form I-9, or when completing Section 3 for I-9 reverifications
  - When normal operations resume, employers must physically inspect documents within 3 business days for any I-9 completed remotely
  - Interim guidelines remain in effect through June 19, or until 3 days after the national emergency is over, whichever comes first
  - Effective May 1, 2020, identity documents found in List B set to expire on or after March 1, 2020, and not otherwise extended by the issuing authority, may be treated the same as if the employee presented a valid receipt for an acceptable document for Form I-9 purposes

# E-VERIFY GUIDANCE FOR EMPLOYERS

- ▶ E-Verify has provided guidelines for employers and employees whose fulfillment of E-Verify obligations may be delayed due to the COVID-19 emergency
  - E-Verify is not relaxing the three-day deadline for initiating an E-Verify case
  - Employers still required to create E-Verify cases for their new hires within three business days from the date of hire as indicated on the employee's I-9 form
  - If E-Verify case creation is delayed because of COVID-19 precautions, employers are instructed to enter "COVID-19" as the reason for the delay after selecting "other" in the date-field dropdown menu
  - E-Verify is extending the timeframe for affected employees to resolve Tentative Nonconfirmation responses
  - Employers may not take adverse action against an employee whose E-Verify case is in interim status

A hand is shown pointing upwards with the index finger. The background is a blurred image of a person, possibly in a meeting or presentation. Overlaid on the image are several thin, light blue lines forming a geometric pattern. The word "QUESTIONS?" is written in a bold, light blue, sans-serif font, centered over the hand.

**QUESTIONS?**



**THANK YOU!**

**FRAGOMEN**