



IMMIGRATION UPDATE - MARCH 16, 2020

Posted on March 16, 2020 by Cyrus Mehta

Headlines:

[COVID-19 Update: News and Advice for Employers](#) – This article presents a few highlights of developments in the short term.

Judges Reject USCIS Arguments on H-1B Specialty Occupation Requirements and Invalidate USCIS Policies that Adversely Impacted IT Consulting Companies – Two recent cases concern USCIS interpretations of qualifications for H-1B specialty occupations.

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COVID-19 Update: News and Advice for Employers

As most of us know by now, the World Health Organization (WHO) has declared pandemic status for the novel coronavirus, which causes the disease COVID-19. This means that the epidemic's geographic reach is global. The spread of the virus could be mitigated or could increase, and the longer-term outlook remains uncertain. With respect to its effects on travelers to the United States and employment-based immigration, the following are a few highlights of related developments in the short term:

- President Trump ordered a ban, without warning, on travelers coming to the United States from or through European (Schengen-area) countries, where the virus is on the rise, with the exception of U.S. citizens and U.S. lawful permanent residents, who are allowed back but must be screened for signs of illness before returning. The Europe ban is in addition to an earlier China ban. The Europe order has thrown many travelers' plans into

chaos. Even U.S. citizens and permanent residents currently abroad are feeling the effects, as their flights back home have been changed or canceled in many cases due to airlines' cutting large numbers of flights. In some cases would-be passengers with tickets are blocked from rescheduling online and told to call the overwhelmed airlines to reschedule, only to be met with nonstop busy signals. And those who make it to the United States are faced with hours-long waits in crowded airports for screening procedures.

- The Trump administration said on March 14, 2020, that the ban would be extended to travelers coming to the United States from the United Kingdom and Ireland, again with the exception of U.S citizens and lawful permanent residents who will be funneled through special airports for screening. This ban will take effect on midnight March 17, 2020, ET.
- The bans, and all of the ensuing chaos, will have an impact on employers that are trying to bring workers to the United States, and on workers trying to get back home.
- Businesses who have instructed their employees to work from home must ensure they still comply with Department of Labor rules about the geographic scope of positions; for example, as specified for H-1B (specialty occupation) employees on the labor condition application. In general, H-1B and E-3 employees may work from home in the same metropolitan statistical area (MSA) as their approved work locations without an amended petition. L-1, TN, and O-1 nonimmigrants may work from home for brief periods of time without an amended petition.
- If there are furloughs and other temporary disruptions in employment, employers must continue to pay the wage rate, especially for H-1B and E-3 employees. Terminations may affect the maintenance of an employee's nonimmigrant status, which could also result in unlawful presence, thus triggering the three- and ten-year bars to reentry into the United States.
- Visitors for business or pleasure who are admitted on visas are eligible to apply for an extension of their status. Those who were admitted under a visa waiver may apply for an additional 30-day period for satisfactory departure based on a showing of their inability to travel back to their home countries.
- Petitioning employers should document and date any coronavirus-related instructions from either the petitioning employer or the end-client in third-party worksite scenarios.

- Government office closings are another potential issue, as appointments and decisions are delayed.
- USCIS has posted an announcement telling ill people not to come to an appointment regardless of whether they were exposed to the coronavirus. The announcement tells people to follow the instructions on their appointment notices to reschedule appointments or interviews if they have traveled internationally to any country outside the United States within 14 days of the appointment, if they may have been exposed to the coronavirus, or if they have flu-like symptoms.
- Similarly, attorney's offices in some cases are limiting travel and in-person meetings and holding client appointments and consultations via phone and video.
- S. Citizenship and Immigration Services (USCIS) is implementing a nationwide "remote work program" for its employees, which may increase adjudication delays. A USCIS letter announcing the program makes no mention of the virus, but it is likely that the agency will make greater use of the program as containment strategies are rapidly implemented in many sectors nationwide.

Details:

- Presidential proclamations, <https://www.govinfo.gov/content/pkg/FR-2020-02-05/pdf/2020-02424.pdf> (China), <https://bit.ly/2QeZQWi> (Europe); UK and Ireland, <https://bit.ly/2vkfEQq>
- News report on expanded ban to the UK and Ireland, <https://www.wsj.com/articles/coronavirus-closes-national-borders-apples-tores-11584183924>
- Advice for employers, <https://www.seyfarth.com/news-insights/essential-covid-19-immigration-planning-for-us-employers.html>; <https://www.klaskolaw.com/news-politics/coronavirus-considerations-hand-l-status-employees/>; <https://www.fosterglobal.com/blog/h-1b-and-l-1-telecommuting-as-precaution-against-covid-19/>
- CDC strategies and resources for employers (interim guidance), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> ,

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

- Federal News Network, "Agencies Expand, Loosen Telework Requirements Amid Coronavirus Spread,"
<https://federalnewsnetwork.com/workforce/2020/03/uscis-to-launch-nationwide-telework-program-amid-coronavirus-spread/>
- USCIS coronavirus announcement,
<https://www.uscis.gov/about-us/find-a-uscis-office/if-you-feel-sick-please-consider-canceling-and-rescheduling-your-uscis-appointment>
- USCIS letter to American Federation of Government Employees,
<https://www.afge.org/globalassets/documents/generalreports/2020/signetd-remote-work-9a-030920.pdf>
- Department of Homeland Security coronavirus page,
<https://www.dhs.gov/coronavirus>

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Judges Reject USCIS Arguments on H-1B Specialty Occupation Requirements and Invalidate USCIS Policies that Adversely Impacted IT Consulting Companies

Three interesting cases were decided recently that relate to recent restrictive U.S. Citizenship and Immigration Services' (USCIS) interpretations in H-1B petitions:

- On March 5, 2020, in *InspectionXpert Corporation v. Cuccinelli*, a federal judge rejected U.S. Citizenship and Immigration Services' (USCIS) argument supporting denial of an H-1B petition because the employer did not require a degree in a particular subspecialty for the "Quality Engineer" position. The employer wanted to hire a worker, who has a master's degree in mechanical engineering, to "use his knowledge of CAD and mechanical engineering to develop, design, and execute software test plans, scenarios and scripts for CAD-focused software in order to identify software problems and their causes."

Among other things, the judge concluded that a position can qualify as specialty occupation even if it permits a degree in more than one academic discipline. Referring to *Kisor v. Wilkie*, a Supreme Court case decided in 2019, the judge also noted that USCIS had not shown that the service center's decision reflected the agency's authoritative or official position or interpretation, rather than "a

more ad hoc statement not reflecting the agency's views."

- In another case, *3Q Digital, Inc. v. USCIS*, a district court judge ruled that USCIS acted "arbitrarily and capriciously" in denying an H-1B petition for a search engine marketing account manager. Among other things, the judge said the agency abused its discretion in determining that a baccalaureate or higher degree or its equivalent was not normally the minimum requirement for entry into such a position, and that the position required a degree in a specific field. The judge noted that a degree in one specific major was not required.
- In a third case, *ITServe Alliance v. Cissna*, a district court judge nixed a USCIS policy defining an employer-employee relationship for employers of H-1B workers as well as a 2018 policy and 1991 regulation requiring that IT firms provide a detailed itinerary and contracts for potential H-1B workers for the entire three years of their visa stay. The court recognized that H-1B visas historically have allowed the growth of a business model whereby U.S. employers obtain H-1B visas for foreign workers who are trained in information technology (IT) and assign such workers to other U.S. companies that need IT assistance for a period of time. USCIS had withdrawn longstanding guidance memos and adopted its own guidance, which has caused the H-1B approval process to slow dramatically and resulted in a high level of rejected visa petitions from employers in the IT industry but not others.

Details:

- Court decision (*InspectionXpert*), <https://nfap.com/wp-content/uploads/2020/03/InspectionXpert.March-5-2020.pdf>
- Court decision (*ITServe Alliance*), <https://www.law360.com/articles/1252105/attachments/0>
- Forbes, "Judge Slaps Down USCIS in Significant H-1B Court Case," <https://www.forbes.com/sites/stuartanderson/2020/03/09/judge-slaps-down-uscis-in-significant-h-1b-visa-court-case/#3c087b3b4307>
- Times of India, "U.S. Court Victory: IT Service Companies No Longer Restrained by USCIS Memorandum," <https://bit.ly/3a4e5pb>

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Firm in the News

Cyrus Mehta was quoted in The Economic Times, in an article entitled "Future Tense for Indian Students as US Campuses Shut Down". The article is at

<https://economictimes.indiatimes.com/industry/services/education/future-tense-for-indian-students-as-us-campuses-shut-down/articleshow/74629998.cms>

Cyrus Mehta was quoted in Times of India, in an article entitled "U.S. Court Victory: IT Service Companies No Longer Restrained by USCIS Memorandum".

The article is at

<https://timesofindia.indiatimes.com/business/india-business/us-court-victory-it-service-companies-no-longer-restrained-by-uscis-memorandum/articleshow/74575360.cms>

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