Any information in this seminar does not constitute legal advice and is for informational purposes only. For legal opinions, please schedule a consultation with one of our attorneys.
About Us

Wolfsdorf Rosenthal LLP is a full-service, technology-focused, top-rated immigration law firm.

With offices in Los Angeles, New York, Boston, Oakland, San Francisco, Santa Monica and Shanghai, we are internationally renowned for providing exceptional, efficient and client-focused services.
Our expertise stems from cutting-edge scholarship, regular presentations at national and international forums, and prestigious leadership roles including past national President and current Vice President of the 15,000-member American Immigration Lawyers Association (AILA).
Cliff Rosenthal

- Founding Partner of Wolfsdorf Rosenthal LLP
- Over 20 years of experience and a thorough knowledge of the immigration law practice
- Who’s Who Legal, Thought Leader in Corporate Immigration (2021)
- Best Lawyers Recognition (2018-2021)
- Super Lawyers, Rising Star (2008-2012)
- Former member of the American Immigration Lawyer Association (AILA) Board of Publications, Distance Learning, and Healthcare Committees, and past Chair of AILA’s Religious Worker Committee
- Current Southern California AILA Customs and Border Patrol Liaison

Contact: CRosenthal@Wolfsdorf.com
Agenda

- President Biden's immigration agenda
- Status of President Trump's rules
- Travel update during Covid-19 ("travel bans")
- Questions and answers
President Biden and Immigration So Far…

- Increased the refugee quotas to 125,000
- Rescinded prior guidance that prevents certain computer positions from obtaining H-1B visas
- Executive order to implement a comprehensive three-part plan for safe, lawful, and orderly migration across the southern border, as well as to review the Migrant Protection Protocols program
- Executive order establishing task force to reunite families that remain separated
- Executive order requiring agencies to conduct a top-to-bottom review of recent regulations, policies, and guidance that have set up barriers to the legal immigration system
- USCIS notification that not enforcing the regulatory changes set out in the final fee change rule
- Executive order that revokes “Buy American, Hire American” policy
- Executive order requiring a negative COVID-19 test from airline passengers traveling to the U.S.
- Memorandum directing DHS will pause removals of certain noncitizens ordered deported for 100 days
- Memorandum directing the DHS Secretary to preserve and fortify DACA
- Proclamation declaring national emergency will no longer be used to construct wall at the southern border
U.S. Citizenship Act of 2021 (Comprehensive Immigration Reform)

1. Eight-year pathway to citizenship for many undocumented migrants (5-year temporary status to file for green card, plus 3 years for citizenship)
2. Shorter process for agricultural workers, TPS and DACA
3. Enforcement plan deploying technology to patrol the border
4. Creates refugee processing in Central America to discourage migrants from coming to the U.S.-Mexican border
5. Family-based: clears backlogs, recaptures unused visas, eliminates lengthy wait times, and increases per-country visa caps; eliminates “3 and 10-year bars”; allows immigrants to join family in U.S. on temporary basis while waiting for green cards
6. Employment-based: clears employment-based visa backlogs, recaptures unused visas, reduces lengthy wait times, and eliminates per-country visa caps; makes it easier for graduates of U.S. universities with advanced STEM degrees to stay in U.S.; improves access to green cards for workers in lower-wage sectors; provides dependents of H-1B visa holders work authorization; and children are prevented from “aging out”
1 SEC. 3408. CLARIFYING DUAL INTENT FOR POSTSECONDARY STUDENTS.
2
3 (a) IN GENERAL.—Section 101(a)(15)(F)(i) of the
4 Immigration and Nationality Act (8 U.S.C.
5 1101(a)(15)(F)(i)) is amended by striking “an alien hav-
6 ing a residence in a foreign country which he has no inten-
7 tion of abandoning, who is a bona fide student qualified
8 to pursue a full course of study and who” and inserting
9 “a noncitizen who is a bona fide student qualified to pur-
10 sue a full course of study, who (except for a student quali-
11 fied to pursue a full course of study at an institution of
12 higher education) has a residence in a foreign country
13 which the noncitizen has no intention of abandoning, and
14 who”.

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Status of President Trump's Immigration Rules

1. STEM OPT rules
2. F-1/J-1 D/S rule
3. H-1B lottery selection rule
4. H-1B prevailing wage rule
5. H-1B specialty occupation
6. H-4 EAD rule
7. Public charge rule
**STEM OPT Rules**

- **Fundamental question:** Were the regular OPT and STEM OPT programs legally instituted?
  - Plaintiff argued:
    - Congress did not authorize OPT
    - Program gives work authorization to employees after they completed their studies (i.e., no longer students)
  - Court held:
    - Congress did not specifically address whether programs such as OPT could be instituted by DHS and therefore it left this question open
    - OPT programs are reasonable applications of DHS’s wide authority on regulating immigration regulations
    - Since 1983, these programs have been instituted unchallenged and Congress has never objected
    - The definition of a student is broader than just attending classes, i.e., OPT is not a program for non-students
    - Both OPT and STEM OPT programs are therefore permissible
  - Washtech immediately appealed, which is currently pending

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Rule to Eliminate F-1 and J-1 Duration of Status

- September 25, 2020: DHS published proposed rule to eliminate duration of stay (D/S) for F, J, and I status
- Rule went through 30 days of comments and DHS must review the comments (over 35,000), respond, and if necessary, revise the proposed rule
- Regulatory Freeze memorandum: DHS had not yet sent a final duration-of-status rule to the Office of the Federal Register, likely means that no final rule could advance “until a department or agency head appointed or designated by the President … reviews and approves the rule.”
- Admission in F, J or I status granted until program end date on I-20 or DS-2019; not to exceed 4 years or 2 years (if in a group subject to 2-year admission)
- Grace period for F status reduced from 60 to 30 days
- Limits amount of times student can pursue another F-1 program at the same education level to 3 times
- Automatic cap-gap extension after October 1, if H-1B is selected and still pending
- For F-1 program extension, will eliminate “normal progress” standard to compelling academic circumstances, documented medical condition or exceptional circumstances beyond control of the student
Who is Subject to a Limited 2-year Admission?

- Birth or citizens of countries on the State's Sponsor of Terrorism List (currently North Korea, Iran, Sudan, and Syria)
- Citizens of countries with student and exchange visitor total overstay rate of greater than 10% according to the most recent DHS Entry/Exit Overstay report (see https://www.dhs.gov/publication/entryexit-overstay-report)
- Individuals DHS determines U.S. national interests warrants limiting admission (example in rule is a student enrolled in nuclear science courses)
- Those enrolled in unaccredited schools
- Those enrolled in language training programs.
- School or exchange programs not participating in E-Verify
H-1B Lottery Selection Rule

• January 9, 2021: DHS announced new H-1B selection rule
• Priority given to those organizations that pay the highest wages
• Wages are based on the skills required – therefore prioritizes the most highly skilled positions
• Four levels of wages:
  i. Level I for entry-level workers
  ii. Level II for qualified employees
  iii. Level III for experienced employees
  iv. Level IV for fully qualified employees with enough experience to plan, modify and approve standard procedures
• Once all Level IV petitions are approved, then will go to level III, etc.
• Expected that no Level 1 positions will be accepted
• If alternate survey is lower than Level 1, it will be classified as Level 1. CBA?
• February 4, 2021: DHS announced postponement until December 31, 2021 to develop, test and implement
### H-1B Lottery Selection Rule

You selected the All Industries database for 7/2020 - 6/2021.

Your search returned the following: Print Format

<table>
<thead>
<tr>
<th>Area Code</th>
<th>31080</th>
</tr>
</thead>
<tbody>
<tr>
<td>Area Title</td>
<td>Los Angeles-Long Beach-Anaheim, CA</td>
</tr>
<tr>
<td>OES/SOC Code</td>
<td>15-1132</td>
</tr>
<tr>
<td>OES/SOC Title</td>
<td>Software Developers, Applications</td>
</tr>
<tr>
<td>GeoLevel</td>
<td>1</td>
</tr>
<tr>
<td>Level 1 Wage</td>
<td>$37.56 hour - $78,125 year</td>
</tr>
<tr>
<td>Level 2 Wage</td>
<td>$47.90 hour - $99,632 year</td>
</tr>
<tr>
<td>Level 3 Wage</td>
<td>$58.25 hour - $121,160 year</td>
</tr>
<tr>
<td>Level 4 Wage</td>
<td>$68.59 hour - $142,667 year</td>
</tr>
<tr>
<td>Mean Wage (H-2B):</td>
<td>$58.25 hour - $121,160 year</td>
</tr>
</tbody>
</table>

This wage applies to the following O*Net occupations:

15-1132.00 Software Developers, Applications

- Develop, create, and modify general computer applications software or specialized utility programs. Analyze user needs and develop software solutions. Design software or customize software for client use with the aim of optimizing operational efficiency. May analyze and design databases within an application area, working individually or coordinating database development as part of a team. May supervise computer programmers.

O*Net™ JobZone: 4

Education & Training Code: No Level Set

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H-1B Lottery Selection Rule

• February 18, 2021: U.S. Citizenship Act of 2021:

SEC. 3407. WAGE-BASED CONSIDERATION OF TEMPORARY WORKERS.

Section 212(p) is amended by adding at the end the following:

“(5) In determining the order in which visas shall be made available to nonimmigrants described in section 101(a)(15)(H)(i)(b), and to any other category of non-immigrants deemed appropriate by the Secretary of Homeland Security, the Secretary of Homeland Security, in consultation with the Secretary of Labor, may issue regulations to establish procedures for prioritizing such visas based on the wages offered by employers.”
Three main options to determine the wage:

I. If there is a **collective bargaining agreement** (CBA), the CBA wage is always the prevailing wage (other options only apply if no CBA)

II. Bureau of Labor Statistics (BLS) **Occupation Employment Statistics Survey** (OES) – i.e., DOL’s own survey

III. Employer-provided surveys (“alternate wage source”)

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New DOL Wage Rule “Strengthening Wage Protections”

- On October 8, new DOL regulation raised prevailing wages for the H-1B, E-3, H-1B1 and immigrant classifications (PERM Labor Certifications)
- Only applies to the DOL’s OES wage survey – therefore, CBA still governs and may also obtain alternate survey
- DOL has raised prevailing wages for OES by restructuring its 4 levels of wages for each occupation

<table>
<thead>
<tr>
<th>SKILL LEVEL</th>
<th>OLD PERCENTILE</th>
<th>NEW PERCENTILE</th>
</tr>
</thead>
<tbody>
<tr>
<td>LEVEL I</td>
<td>17</td>
<td>45</td>
</tr>
<tr>
<td>LEVEL II</td>
<td>34</td>
<td>62</td>
</tr>
<tr>
<td>LEVEL III</td>
<td>50</td>
<td>78</td>
</tr>
<tr>
<td>LEVEL IV</td>
<td>67</td>
<td>95</td>
</tr>
</tbody>
</table>
Examples of the New Rule’s Application

• In LA, the lowest wage for a Medical Scientist and a Natural Science Manager is **91K** (up 28%) and **146K** (up 98%) respectfully.

• Common combination: Software Developers/Computer Managers – bachelors plus 5 years of experience (or master plus 4) will get 95% wage (i.e., highest wage).

• Wages are significantly higher than what most US workers receive.

• NATIONAL FOUNDATION FOR AMERICAN POLICY: Wages at all levels up on average 40% - some even 100-200% higher.
Current Status of New DOL Rule

- Litigation:

  *Chamber of Commerce, et al., v. DHS, et al.* and *Purdue University, et al., v. Scalia, et al.* halted implementation of the interim rule for failing to follow the Administrative Procedure Act

- February 1, 2021: DOL published rule to delay the final rule implementation until May 14, 2021
H-1B Specialty Occupation Rule

- Will narrow the definition of “specialty occupation”
- Solidifying Employer-Employee relationship requirement
- Will enhance DHS’s ability to enforce compliance through worksite inspections; monitoring compliance before, during, and after an H-1B petition is approved
Background

Only specialty occupations qualify for H-1B classification, which DHS defined as a position that requires a bachelor’s in a narrow specific field as a minimum requirement for the occupation.

- Courts generally held that it must be “normative”, “typical” or “common” for the position to require the specialty bachelor’s degree; not that it was mandatory.

- Similarly, courts held that a wide range of degree specialties could satisfy a specialty occupation based on similar skills learned (e.g., mechanical engineering for software engineering).
New Specialty Occupation Definition

• Positions that require a general degree, such as business administration or a liberal arts major cannot be a specialty occupation without further specialization

• Although a position may have a range of degrees or specialized knowledge, each qualifying field must be directly related to the position (possible example: data scientists may require computer science or statistics)

• No longer can you show a “normative” requirement for a specialty bachelor’s, but that it is one of the following:

I. Bachelor’s or higher degree in a directly related specific specialty is the minimum requirement for entry into the occupation

II. Bachelor’s or higher degree in a directly related specific specialty is the minimum requirement for entry into parallel positions at similar organizations in the employer’s United States industry

III. The employer has an established practice of requiring a U.S. baccalaureate or higher degree in a directly related specific specialty for the position. The petitioner must also establish that the proffered position requires such a directly related specialty degree to perform its duties

IV. The specific duties of the proffered position are so specialized, complex, or unique that they can only be performed by an individual with a bachelor’s or higher degree in a directly related specific specialty
Worksite Enforcement

• Verification of information and evidence submitted through:
  — Telephonic and electronic verifications
  — On-site inspections at the organization’s headquarters, satellite offices or the worksite (including third-party worksites)

• Refusal of the petitioner or a third-party to cooperate with a site visit may be grounds for denial or revocation of any H-1B petition, including any third-party worksites
H-1B Specialty Occupation Rule

- Litigation:
  
  *Chamber of Commerce, et al., v. DHS, et al.* halted implementation of the interim rule for failing to follow the Administrative Procedure Act

- January 20, 2021: White House Chief of Staff Ron Klain issued a memorandum regarding review of pending regulatory actions which directs, in part, that all rules pending at the *Federal Register* that have not been published must be immediately withdrawn

- As a result, the *modified* version of the Strengthening the H-1B Nonimmigrant Visa Classification Program Final Rule sent to the *Federal Register* on January 15, but not yet published, will be withdrawn
H-4 EAD Rule

- Rule to end this category has been removed
- President Biden announced his immigration bill, which would provide work authorization to certain spouses
- But still litigation pending to end this category...
Public Charge Rule

- Public charge is a ground of “inadmissibility.” Those that are likely to become dependent on the government in the future as a “public charge” are inadmissible to the United States.

- Prior to Trump administration, dependence refers to reliance on cash-aid for income support or long-term institutional care paid for by the government.

- New rule considers more benefits and requires substantial documents to prove the person will not become a public charge (including credit reports).

- February 2, 2021: Executive Order signed by President Biden for agencies to review the effect of the new public charge rule on the immigration system within 90 days.
## Executive Orders & Proclamations

<table>
<thead>
<tr>
<th>COVID-19</th>
<th>Economic</th>
<th>National Security</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>China, Schengen</strong> (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), <strong>UK</strong>, <strong>Ireland, Iran, Brazil, South Africa</strong></td>
<td>Consular Immigrant Visa Ban (with exceptions)</td>
<td>Certain F-1/J-1 Graduate Students from China</td>
</tr>
<tr>
<td>Travel Ban Affecting Certain NIV Visas</td>
<td>Extended through March 31, 2021</td>
<td></td>
</tr>
</tbody>
</table>

Additionally, agreements with Canada & Mexico to limit all **non-essential travel across** borders
Presidential Proclamation 10052 extended to March 31, 2021

**Who is affected?**
Suspends and limits the entry of any individual seeking entry pursuant to H-1B, H-2B, J, or L visa, and any dependents.

**Special categories**
J visa suspension applies to any intern, trainee, teacher, camp counselor, au pair, or summer work travel program. Scholars and research categories remain exempted.
### Nonimmigrant Visas

<table>
<thead>
<tr>
<th>Not Impacted</th>
<th>Impacted</th>
</tr>
</thead>
<tbody>
<tr>
<td>B-1/B-2 or ESTA</td>
<td>H-1B</td>
</tr>
<tr>
<td>H-2A</td>
<td>J-1 (except scholars)</td>
</tr>
<tr>
<td>H-3</td>
<td>H-4</td>
</tr>
<tr>
<td>O-1</td>
<td>H-2B (researchers)</td>
</tr>
<tr>
<td>P</td>
<td>L-1A, L-1B (doctors)</td>
</tr>
<tr>
<td>TN</td>
<td>L-2</td>
</tr>
<tr>
<td>I</td>
<td>J-2</td>
</tr>
</tbody>
</table>
Who does the June 22, 2020 travel ban apply to?

Any person who:

✓ Is outside the United States on the effective date of this proclamation;
✓ Does not have a nonimmigrant visa in one of the categories that is now suspended on which they are seeking entry, that is valid on the effective date of this proclamation; and,
✓ Does not have an official travel document other than a visa (such as a transportation letter, an appropriate boarding foil, or an advance parole document) valid on the effective date of this proclamation or issued thereafter that permitting the person to travel to the United States and seek entry or admission.
Who is Exempt from the Travel Ban?

- **Lawful permanent resident** of the United States;
- **Spouse** or **child** of a **United States citizen**;
- Any individual seeking to enter the United States to provide temporary labor or services essential to the United States **food supply chain**
- Any individual whose entry would be in the **national interest** as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.

**Expiration:** March 31, 2021 (unless extended)
National Interest Exception (NIE)

Exceptions for individuals whose travel is in the national interest as determined by the DOS/DOL/DHS. The standard for an NIE is as follows:

• Are critical to the defense, law enforcement, diplomacy, or national security
• Are involved with the provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized
• Are involved with the provision of medical research at U.S. facilities to combat COVID-19
• Are necessary to facilitate the immediate and continued economic recovery of the U.S.
• Are children who would age out of eligibility for a visa because of these proclamations
NIE Logistics

Two ways to request an NIE:

1. Go through the U.S. Consulate or Embassy
   - If a visa is required, must obtain the NIE through U.S. Consulate or Embassy
   - Can still request an NIE if you have a valid ESTA or visa

2. Go through a CBP port of entry
   - Some require a request to a U.S. Consulate or Embassy first
   - Currently, Atlanta CBP has been the most responsive.
Consular appointments available at some posts, but cancellations common
Currently visa services are provided only on an emergency basis

Certain USCIS district offices have resumed in-person appointments
Employment-based adjustment of status applications have been approved without interviews

- Policies are local; vary city-to-city & consulate-to-consulate
- Emergency visa procedures in place with high threshold
- CBP protocols for Canadian TNs (land vs air)
Mail-In Renewals

The mail-in option allows for individuals to request visa renewal through mail-in option. This means that the appointment is bypassed, and the visa is issued without having to go the embassy or consulate.

Must be physical present in the country applying
Name: Cliff Rosenthal
Email: crosenthal@wolfsdorf.com
Phone: (310) 570-4088

We look forward to serving your global immigration needs