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Consular Processing Post Pandemic

Consular Processing in a Post Travel Ban Termination World

Author Contact Information:
Kathleen Campbell Walker
Dickinson Wright PLLC
El Paso, Texas

kwalker@dickinson-wright.com

Consular Processing in a Post Travel Ban Termination World

By Kathleen Campbell Walker[1]

2021 has provided a constant roller coaster of changes and challenges for immigrants and nonimmigrants as well attempting to obtain their visas at consular posts of the United States (U.S.) globally. Many visa applicants resorted to litigation against the Department of State (DOS) to try force an appointment opportunity. For example, on September 9, 2021, the U.S. District Court Judge Amit Mehta of the District of Columbia initially granted summary judgment to the plaintiffs regarding their claims that the State Department had created a "No Visa" policy for diversity visa applicants by refusing to consider diversity visa applicants for national interest exceptions (NIEs) due to Presidential Proclamation 10014 issued by President Trump.[2] This policy was exacerbated by the prioritization scheme applied by DOS globally as to the slow reopening of its consular posts for immigrant and nonimmigrant visa processing in addition to the various travel bans imposed due to presence of applicants in countries with high COVID-19 outbreaks.

As background, due to the global spread of COVID-19 and the declaration by the Secretary of Health and Human Services (HHS) on January 31, 2020 of a public health emergency in the U.S., on March 13, 2020, Proclamation 9994 was issued by Former President Trump to declare that the COVID-19 outbreak in the U.S. constituted a national emergency as of March 1, 2020 (CV-PP).[3] CV-PP was based on sections 201 and 301 of the National Emergencies Act (50 U.S.C. §1601 et seq.) and the constitutional authority vested in the President.

The CV-PP led to the suspension of consular services by the DOS on March 20 and the ensuing chaos regarding the processing of immigrant and nonimmigrant visas by DOS at its consular posts worldwide. Services for U.S. citizens were prioritized. Consular posts were instructed to continue

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[1] *Kathleen Campbell Walker is co-chair of the Immigration Practice Group of Dickinson Wright PLLC and based in El Paso, Texas. She a past president (2007) and general counsel (2009) of the American Immigration Lawyers Association (AILA). She began practicing immigration law in 1986. In 2014, Ms. Walker received the AILA Founder's Award, given from time to time to the person or entity having the most substantial impact on the field of immigration law or policy. She served on the Council of Foreign Relations Independent Task Force on U.S. Immigration Policy. She is board certified in Immigration and Nationality Law by Texas Board of Legal Specialization. In addition, she is recognized in Chambers USA (Band One), Chambers Global (Band One), International Who's Who of Business Lawyers, Super Lawyers, and Best Lawyers in America. She is rated AV® Preeminent™ in Martindale-Hubbell®. In 2014, Ms. Walker received the AILA Founder's Award, given from time to time to the person or entity having the most substantial impact on the field of immigration law or policy.*

[2] See 85 *Fed. Reg.* 23441 (April 27, 2020) and Summary Judgment issued by U.S. District Judge Mehta in *Goh, et. al v. DOS, et al*.(Case No.1:21-cv-00999/APM) (AILA Doc. No. 21091004) (Sept. 9, 2021) (*Goh Case*). Note that on September 29, 2021, Judge Mehta issued a Final Order reserving 7,393 diversity visa numbers for fiscal year 2021, which ended on September 30, 2021. The order gives the Biden Administration the authority to issue these reserved diversity visas after the end of the 2021 fiscal year. The order also notes that as of September 26, 2021 only 15,001 diversity visas of the 54,750 allotted for the fiscal year (approximately 27%) were issued for fiscal year 2021. In comparison, between 1998 and 2016, the State Department issued an average of 47,404 diversity visas per year or between 86 to 95% of the total annual diversity visas allotted by Congress. The order further describes that while the pandemic's impact on the consular posts was in part the reason for the dramatic reduction in diversity visa processing, the primary culprit was the State Department's "complete cessation" of adjudicating diversity visa applications for five months and its unlawful deprioritizing of those applications when immigrant visa adjudications resumed. Please refer to the DOS Diversity Visa 2021 Update at this link: https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-2021-update.html (AILA Doc. No. 21091307 posted September 13, 2021).

[3] 85 *Fed. Reg*. 15337 (March 18, 2020).

to provide mission-critical and emergency visa services only. Mission critical visa services included: adoption [only where the principal applicant (PAP) was in country], age-out immigrant visa (IV) cases, diplomats and officials, H-2 visas, medical emergencies, SQ/SI special immigrant (SIV)cases, and other purposes of travel categorized by the post's senior consular managers or Chiefs of Mission (COM) as mission-critical.

The National Visa Center (NVC) and the Kentucky Consular Center (KCC) also suspended most immigrant/diversity visa pre-processing, but continued to process age-out and adoption cases for review when the applicable post resumed processing. Posts were instructed to use NVCExpedite@state.gov to request limited expedited immigrant visa processing for urgent medical or humanitarian circumstances. The global template provided to advise visa applicants of the suspension of visa services was as follows:

> *Information for visa applicants regarding novel coronavirus: As of x date, the United States Embassy and/or Consulates in x country/post name is/are cancelling/suspending routine immigrant and/or nonimmigrant visa appointments. [If applicable] From x date, the U.S. Embassy/Consulate is not accepting applications by/through [Interview Waiver, Renewal by Mail, Drop Box, Mail-in] for [list all categories post accepts]. We will resume routine visa services as soon as possible but are unable to provide a specific date at this time. The MRV fee is valid and may be used for a visa appointment in the country where it was purchased within one year of the date of payment. If you have an urgent matter and need to travel immediately, please follow the guidance provided at [GSS Vendors email, website link, or call center number] to request an emergency appointment.*

The initial prioritization plan for immigrant and nonimmigrant processing was amended multiple times. Please refer to the excellent outline of the history of the prioritization changes in *Goh* case at footnote 2. The prioritization plan resulted in the creation of basically an inadmissibility ground for visa applicants not fitting in a high Tier priority level. In trade parlance, DOS created its own trade barrier.

The most recent prioritization update was posted on September 13, 2001. See Attachment 1. [4] Currently, the State Department continues to focus resources on immigrant visa processing with immediate relatives, fiancés, and returning resident visa being given the top priority.

The CV-PP was also followed by a series of restrictive presidential proclamations based on an individual's physical presence in certain countries for a period of 14 days preceding entry or attempted entry to the U.S. The DOS interpreted this "entry" restriction to include the issuance of visas, which was determined as an illegal interpretation by the court in the *Goh* case among others. The proclamations (travel bans) also referred to the President's authority under the Constitution as well as the provisions of §212(f) and §215(a) of the Immigration and Nationality Act, as amended (INA), for the legal authority for issuance. These proclamations did not apply to U.S. citizens (USC) and legal permanent residents (LPR) among other exemptions. Below is an updated list of travel bans continued or commenced under the Biden Administration:

[4] *See* https://travel.state.gov/content/travel/en/News/visas-news/immigrant-visa-prioritization.html .

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