



## ALERTS

### **Biden Administration Voids Travel Restrictions Affecting Majority-Muslim Countries, Changes Effective Dates**

January 22, 2021

#### Highlights

The Biden administration has already taken the necessary steps to rescind travel bans, including those that affected majority-Muslim countries

A “midnight regulation” memo from the Biden administration will affect various regulatory initiatives tied to the H-1B program, including the lottery, and potentially delay effective dates

Recently revised U.S. guidelines for international travelers entering the country remain in place for now

The Biden administration quickly took steps to reverse several proclamations, executive orders and policies related to immigration to the United States, including some that occurred in January 2021 before the inauguration. Many of the voided policies may not go into effect as planned, [according to a White House letter](#) that has requested a 60-day delay.

Here is a look at some of the reversals and what they mean for U.S. employers and immigrants.

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## Travel Restrictions Affecting Majority-Muslim Countries Rescinded

One of the first actions that the new Biden administration took on Jan. 20, was to [rescind the travel restrictions the prior administration](#) had imposed relatively early on. These travel and immigration restrictions affected several predominantly Muslim and African countries and were collectively captured through a series of Presidential Proclamations (Presidential Proclamations 9645 and 9983). Citizens of the following countries were also affected by these restrictions in some capacity: Iran, Libya, North Korea, Somalia, Sudan, Syria, Venezuela, Yemen, Kyrgyzstan, Burma, Eritrea, Nigeria, and Tanzania.

President Biden's proclamation rescinded four prior Presidential Proclamations and Executive Orders (EO 13780, Proclamations 9645, 9723, and 9983) and directed U.S. consulates and embassies all over the world to take expeditious action to redress the harm caused.

Further, the president has also directed the U.S. Department of State to conduct a review of the efficacy of certain enhanced vetting procedures enacted by the previous administration, including Form DS-5535 that could result in its rescission or modification. This form became notorious as a tool that the Department of State used to capture social media identifiers for visa applicants to the United States.

## H-1B Rule on Selection Process is Changing

On Jan. 8, the Department of Homeland Security (DHS) published a final rule, "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions," which modifies the H-1B cap selection process, amends current lottery procedures, and prioritizes wages.

Specifically, the rule replaces the lottery used for H-1B cap-subject petitions with a selection process based on the Department of Labor's Occupational Employment Statistics four-level wage system. H-1B registrations offering a wage that exceeds or equals the highest wage level for the occupation and geographic location are prioritized over registrations that fall into one of the three lower wage levels. The same process continues down the four level wage system: level 4 wages are prioritized over level 3 wages, level 3 wages are prioritized over level 2 wages, and level 2 wages are prioritized over level 1 wages. A lottery will be implemented if the number of registrations for a specific wage level exceeds the number of allocated H-1B visas (65,000 for the regular cap and 20,000 for the advanced degree cap).

This change only affects H-1B cap-subject petitions and it will be implemented for both the H-1B regular cap and the H-1B advanced degree exemption. The order of selection has not been changed by the final rule.

Through a memo issued on January 20, the Biden administration's chief of staff, Ron Klain, ordered federal agencies to consider postponing for at least 60 days the effective dates of regulations that had been published but not yet taken effect. This would essentially postpone the effective date of the H-1B Rule changes to March 21, 2021.

Since the rule stated that it would apply to registrations submitted 60 days

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from the date of publication and the DHS registration schedule is expected to close by March 20, this rule appears to be unlikely to apply to this year's H-1B lottery. The Biden administration could then be expected to take further steps to assess whether or not to apply this rule to the H-1B lottery in future years.

This rule is also expected to be vulnerable to legal challenge if the Biden administration chooses to move forward with its enactment

## **H-1B Rule on Prevailing Wages Impact on Hiring**

On Jan. 14, the U.S. Department of Labor (DOL) published a final rule, "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," amending existing regulations governing the prevailing wage determination process for permanent labor certifications for immigrant visas and labor condition applications (LCA) for certain nonimmigrant visas (H-1B, H-1B1, E-3). The final rule changes the computation of wage data resulting in significantly higher prevailing wages for all occupations and all wage levels in the DOL's Occupational Employment Statistics (OES) wage survey administered by the Bureau of Labor Statistics. The current wage levels will remain in effect until June 30, 2021.

The new percentiles corresponding to each prevailing wage level change as follows:

- Level I Wage: 35th percentile of the OES wage data distribution - (currently 17th percentile)
- Level II Wage: 53rd percentile of the OES wage distribution - (currently 34th percentile)
- Level III Wage: 72nd percentile of the OES wage distribution - (currently 50th percentile)
- Level IV Wage: 90th percentile of the OES wage distribution - (currently 67th percentile)

The periods of transition to the full OES wage levels for each occupation in the database would be staggered over three years as follows:

- July 1, 2021, to June 30, 2022, - 85 percent of final wage level of OES Wage Data for the occupation
- July 1, 2022, to June 30, 2023 - 90 percent
- July 1, 2023, to June 30, 2024 - 95 percent
- July 1, 2024, onward - 100 percent

The final rule takes effect on March 15, 2021, during the H-1B registration period. However, the Biden administration issued, on Jan. 20, a memorandum delaying implementation of all "midnight regulations" for 60 days (i.e. those that have been published, but not taken effect). In addition, if the rule takes effect, it is likely to be challenged in federal court on substantive grounds.

In both its content and speed of implementation, this rule was seen as

highly controversial since it was enacted during an economic downturn and some courts agreed. Federal courts, through litigation by a coalition of private employers, universities and bar associations, blocked the initial interim final rule (issued Oct. 8, 2020 with immediate effect). The basis of these decisions was the failure to follow the required notice and comment procedures under the Administrative Procedure Act (APA).

If this rule remains, employers will likely not use prevailing wages based on the DOL's OES wage data, as the levels would be too elevated to permit hiring of talented highly skilled labor to supplement their U.S. workforce. The alternative would be use of costly private surveys, if they are available for the particular occupation in a geographic area.

## **Strengthening the H-1B Nonimmigrant Visa Classification Program**

After a federal court blocked DHS's initial attempt to fundamentally modify the H-1B specialty occupation category through the "Strengthening the H-1B Nonimmigrant Visa Classification Program Final Rule," the agency had attempted to finalize a "skinny version" of the same regulation. On Jan. 15, DHS sent a copy of the regulation to the Federal Register for publication; however, the rule was never published. As such, the Jan. 20 White House memo would immediately withdraw this regulation.

This rule would have fundamentally modified the requirements for establishing an employer-employee relationship, particularly in the context of employees working at third party sites. The regulation would have also recognized multiple employers and required "secondary" employers to also file labor condition applications with the DOL and I-129 H-1B petitions with the U.S. Customs and Immigration Service. Corresponding guidance issued by the DOL's Wage and Hour Division and the Employment and Training Administration based on the new regulation would be rendered moot.

## **New U.S. Travel Guidelines Are in Play**

The U.S. Centers for Disease Control (CDC) announced this month a requirement for all air travelers entering the U.S. to obtain a negative coronavirus test three days prior to travel, effective Jan. 26. This new CDC rule mandates that if the passenger does not provide a negative test result or proof of recovery, the airline must prohibit the traveler from boarding.

All passengers, both U.S. citizens and foreign travelers, will be required to submit to airlines written documentation, such as laboratory test results (paper or electronic) or documentation of having recovered from COVID-19, if they did indeed have the virus, before being allowed to board the plane.

These requirements have no current expiration, but may remain in place during the current higher infection rate. Further, they expand upon an earlier rule, effective since Dec. 28, 2020, requiring travelers from the United Kingdom to present negative viral test in light of the new strain of the coronavirus.

Individuals who have had a COVID-19 vaccine are not exempt. Travelers may be able to change their tickets or receive a credit from the major

airlines under flexible ticket-change policies during the pandemic.

On Jan. 21, President Biden issued another executive order that may expand additional health safety measures for travelers. "[Executive Order on Promoting COVID-19 Safety in Domestic and International Travel.](#)"

The order directs government agencies, including the Department of Health and Human Services, Homeland Security and TSA, to take regulatory action under CDC guidelines to require travelers to produce proof of a recent negative COVID-19 test prior to entry and to consider additional measures of self-quarantine or self-isolation after entry, if appropriate. The agencies will submit their recommendations within 14 days to the administration.

While media reports indicated that the outgoing administration planned to rescind COVID-related travel restrictions on Europe, the UK, and Brazil, the Biden administration's press secretary, Jen Psaki, announced on Jan. 18 that the new administration was unlikely to rescind these travel restrictions just yet, due to the ongoing public health crisis. At this time, it is unclear exactly what form the new administration's restrictions on travel from certain regions of the world will take.

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