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(Representative image)

MUMBAI: The proclamation announced today by US President Donald Trump, is a mixed bag for the Indian diaspora. Foreign nationals outside the US, who were to begin work on an H-1B visa or even L-1 visas (intra company transfer) – but do not as yet hold a valid visa, as well as dependents who were to accompany them (be it spouses or dependent children) will have to wait longer, till the ban expires.

As a major chunk of new H-1B visas are allotted to Indians, this proclamation is a huge set-back. However, all foreign nationals holding a valid visa, advance parole or other US travel document, will not be impacted even if they are outside the US. Thus, those having valid visas – be it the primary visa holder, or dependents such as spouse (on H-4 visa) but held up in India can fly back. The ban comes into effect from June 24 and remains in place till end of 2020, unless it is further extended.



Donald Trump suspends H-1B, H-4 visas till year end

H-2B aspirants and select category of J-1 exchange program participants (interns, trainees, teachers, camp counsellors, au-pairs and summer work travel participants) who are outside the US and are not holding a valid visa will also be impacted by the ban.



H-1B suspension: Who is affected by Trump's new rules on work visas?

Impact on H-1B aspirants: The H-1B cap lottery process for the fiscal 2020-21 (which commences on October 1) has been completed. Sponsoring companies have up to June end to file complete applications for H-1B cap beneficiaries who have been selected in the lottery. The United States Citizenship and Immigration Services (USCIS), is expected to open premium processing for the H-1B cap category in the latter half of June. Companies hiring such employees had hoped to have them onboard from the start of the fiscal year, presuming international travel bans had been lifted.

In the light of today's proclamation, Rajiv Khanna, managing attorney of Immigration.com explained to TOI, "Once their H-1B applications are approved, these employees will not be able to join in October, but will have to wait, as this ban lasts until the end of the year."

There is an annual quota of 85,000 for H-1B cap visas (including Master's cap). Plus, there is the non-cap category. H-1B cap exemption applies to certain employers such as educational institutions.

As per a USCIS report 'Characteristics of H-1B speciality occupation workers' issued in April 2018, of the 1.08 lakh new H-1B visas allotted in fiscal 2017, Indians bagged the highest share with an allotment of 67,815 visas (63%). According to industry watchers, typically between 60-70 percent of the new H-1B visas are issued to Indians, the sponsoring employers comprise of both MNCs and Indian headquartered companies,

with the former hiring in larger numbers. “This ban disproportionately impacts Indian nationals,” states Cyrus Mehta, founder of a New York based immigration law firm.

Impact on students changing visa status: The proclamation does not impact those foreign nationals present in the US, including those awaiting a change of status under the H-1 cap. Snehal Batra, managing attorney at NPZ law group, told TOI, “Since they are already in the US, many students on Optional Practical Training (OPT) should not have a problem with a change of status to H-1B. We strongly advise against them leaving the US under these circumstances because then they would most likely be subject to the Trump’s proclamation and suspension of entry into the US.”

Impact on Intra-company transfers: “L-1 visa applicants are not directly competing with the US work force as they are foreign executives, managers or specialised knowledge employees of global and international organizations being transferred to the related US entity. It does not make sense to suspend their entry,” adds Batra.

“In fact, US employers with foreign affiliates should be able to transfer key personnel to compete in the global market place. This no doubt would help US businesses in their recovery efforts. Moreover, it is illogical to suspend L-1 visas for ‘new office’ situation because these start-ups are investing large sums of money and creating jobs for US workers,” she adds.

Exceptions carved out: While the proclamation does not explicitly carve out any exception such as for doctors or nurses, it provides for discretionary waiver of the ban for foreign nationals whose entry to the US would be in national interest. This includes, “Those who are needed to facilitate the immediate and continued economic recovery of the US, those involved with clinical care or research related to the diagnosis, treatment and prevention of COVID-19, and those who are critical to the defence, law enforcement, diplomacy or national security.”

Lawsuits may be filed: Trump has also extended the duration of the earlier ban on those who were outside the US and waiting for a green card through a local US consulate or embassy process.

Immigration experts do foresee lawsuits being filed against the immigration bans. Cyrus Mehta, founder of a New York based immigration law firm, told TOI, “Today’s proclamation is in complete violation of the Immigration and Nationality Act and should be blocked by a court soon. The ban does nothing to create more jobs in the US. The victims of the ban are highly skilled non-immigrants who have niche positions in the US companies, which in turn are helping in the US economic recovery.”

“Anyone in the US with a visa and those changing status, and those with actual visa stamps in their passport who travel abroad are exempt from Trump’s newest proclamation. However, those who are outside the US waiting on H-1B visas or USCIS approvals will be waiting on a ruling from the Courts on the legality of Trump’s proclamation on what I expect to be several lawsuits challenging the basis of the order,” Charles Kuck, managing partner at the immigration law firm of Kuck Baxter told TOI.

“Although we are disappointed by this new immigration ban, we are certainly not surprised. This administration has consistently used pretexts to restrict immigration and this latest ban represents just that.” Fiona McEntee, founder of an immigration law firm.

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The American Immigration Lawyers Association (AILA) has voiced its strong disapproval of this ban. AILA President Jennifer Minear stated, “We are all still in the middle of an unprecedented global health and economic crisis that requires us to use all of the tools and resources available to keep Americans healthy and strengthen our economy. Being able to draw on the best and the brightest from around the world has always been an incredible advantage for America. This Presidential Proclamation ignores this reality and will make emerging from this crisis more difficult and expensive.”

What can happen next? The proclamation orders the Secretary of Labour to consult with the Secretary of Homeland Security and consider promulgating regulations or take other appropriate action to ensure that H-1B non-immigrants and EB-2 and EB-3 immigrants (green card holders) or those applying for such visa or green card categories do not disadvantage American workers. Immigration experts view that proposed regulations could impose more stringent norms for such visa and green card categories – by way of higher wages or a restrictive definition of speciality occupation that determines H-1B eligibility.