

Blog Post

The Time for Certain Foreign National Workers to Stop Traveling Abroad is NOW, Not After the Inauguration

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One of the simplest but most important steps that employers should take to minimize the workforce disruptions associated with the upcoming change in presidential administrations is to **avoid international travel by certain foreign national workers starting now, and to bring at-risk employees who are currently outside the country back into the U.S. as soon as possible.** Unpredictable and swift immigration policy changes over the next several months could make return extremely difficult for foreign national employees caught outside the country at the moment an unfavorable new rule or procedure is put into place. And in many cases, those caught in such circumstances will have no resort to U.S. courts, nor any other appeal rights. Even a person who leaves the U.S. now and expects to return before the presidential handover, such as for a family visit at the holidays, is taking a risk that unrelated delays or complications while away — a natural disaster or a lost passport — could subject the return trip to new, unexpected legal treatment under the next administration.

Employers should proactively review their workers' individual situations, and should not only forego assignments that include international work travel for those at risk, but also warn at-risk employees against personal travel. Managers and human

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resources executives should not assume that workers themselves will understand or be aware of these risks. Even in periods when underlying immigration policies are relatively stable, examples abound of well-meaning, unguided employees who become unavailable for work or upend their and their employers' intricate immigration planning because of incautious travel.

While not traveling outside of the U.S. in a time of immigration law uncertainty is prudent for almost anyone wanting to conservatively manage his or her immigration situation, **there are particular categories of workers who should be most cautious** — and about whom their employers should be most cautious — over the coming months, based on statements of the incoming administration or on policies previously implemented in the first Trump administration:

- Non-immigrant workers **who have not received “visa stamping” since their I-129s were last approved.** These include, for example, workers who have not traveled outside the U.S., and therefore have not received consular interviews, since being approved by the USCIS for a change from F-1 OPT status to H-1B status, or since being approved for an extension of an H-1B or L-1 stay. Also included are family members who have not received stamping for derivative visas. This is one of the circumstances in which employees themselves are most likely to overlook danger or to feel complacent, because they have USCIS approvals in hand. But in fact, traveling in these circumstances presents a myriad of risk points. The always-present chance that a consular officer may decline to issue a visa despite the previous USCIS approval is heightened if underlying adjudication standards change while the applicant is traveling. Interviews could be significantly delayed by sudden Department of State staffing changes or an abrupt change in the political posture of a given consular post with the change in administration. And there is a risk that the

administration may simply cease issuing new visas in certain categories altogether, as happened in 2020 amid the COVID-19 economic downturn.

- **People with pending applications to adjust status to permanent residence**, regardless whether the permanent residence is based on employment or a family relationship. The risks for this group are similar to those who leave the country relying on obtaining stamping for non-immigrant visas before returning. Once an individual in this circumstance leaves the country, he or she has abandoned the adjustment application, and will need a consular interview to receive the expected green card. Such interviews could easily become unavailable or inordinately delayed.
- **F-1 students who are beyond their program completion dates and are awaiting approval of OPT employment authorizations, and workers who have applied for STEM OPT extensions and whose automatic extensions have expired without their receiving decisions on the STEM extension applications.** Traveling outside of the U.S. in these circumstances is inadvisable at almost any time, and is exceptionally risky now.
- **Nationals of any of the countries affected by the January 2017 “Muslim ban” or by any of the subsequent related presidential directives**, including Chad, Egypt, Eritrea, Iran, Iraq, Kyrgyzstan, Libya, Nigeria, North Korea, Somalia, South Sudan, Sudan, Syria, Tanzania, Venezuela, and Yemen. Recent presidential campaign messaging suggests similar precautions are in order for those traveling on Palestinian Authority passports. This caution includes people who already have received current visa stamping and/or are permanent residents (“green card” holders), as the most far-reaching of the previous orders sought to bar entry even by travelers holding existing visas.

- **Recipients of Deferred Action for Childhood Arrivals (DACA) planning to travel on advance parole.** Advance parole is not set in stone. The government may revoke it at any time, even while the individual holding it is outside the country on a specific trip cited in the application for the parole. A DACA recipient who loses his or her advance parole while outside the U.S. will essentially have reverted to the state of a DACA recipient who leaves the country without parole. Very likely he or she will have lost the underlying DACA benefit. And given the complications of unlawful presence bars, the person may find it extremely difficult to return to the U.S. in the long run even if he or she would otherwise be eligible for another immigration benefit.
- **Anyone holding Temporary Protected Status** even if he or she has travel authorization associated with the TPS. Like advance parole, this travel authorization can be easily revoked, and a TPS beneficiary caught outside the U.S. when that happens will have little recourse for the revocation and may have few other options for re-entering the country.

These risks are nuanced and vary with individual circumstances. They also exist in additional situations not enumerated above. Employers and workers would do well to seek evaluations of their particular circumstances from immigration counsel before foreign national workers undertake any travel outside the United States in the coming months.

The Akerman Immigration Planning and Compliance group will be providing ongoing guidance on this and other developing topics as the new administration's policies take shape. Employers with questions or concerns regarding the status of their foreign national employees and international travel should reach out to their Akerman labor and employment attorney for assistance.

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