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Trump Immigration Policy Now Blocks World's Most Highly Skilled

**Stuart Anderson** Senior Contributor ⓘ

Leadership Strategy

I write about globalization, business, technology and immigration.

The U.S. Consulate General in Frankfurt, Germany. (Photo by Boris Roessler/picture alliance via ... [+]

PICTURE ALLIANCE VIA GETTY IMAGES

Today, even the most highly skilled individuals in the world cannot enter America under the Trump administration's immigration policy. Reports from attorneys and a statement from the State Department confirm that U.S. consular officers in Europe are denying O-1 visas for individuals with "extraordinary ability" based on a health pretext. The strict interpretation of

Trump presidential proclamations means individuals that U.S. Citizenship and Immigration Services (USCIS) have found to “possesses extraordinary ability” or a “record of extraordinary achievement” are – and will be – refused visas in Europe and cannot come to America.

What is an O-1 visa?: “The O-1 nonimmigrant [temporary] visa is for the individual who possesses extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry and has been recognized nationally or internationally for those achievements,” according to U.S. Citizenship and Immigration Services. The State Department’s [Foreign Affairs Manual](#) provides a similar definition for consular officers.

To obtain an O-1 visa, an individual must receive an approved petition from USCIS after documenting their ability and achievement. Then, he or she must be approved for a visa at a U.S. consulate. However, Trump administration policy often makes that no longer possible.

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Background: On March 11, 2020, the Trump administration issued [presidential proclamation 9993](#), which stated, “The entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the Schengen Area during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited.” The [Schengen Area](#) includes almost all European countries.

On March 14, 2020, [presidential proclamation 9996](#) extended a similar set of restrictions to cover England, Scotland, Wales, Northern Ireland, and the

Republic of Ireland. (A [NAFSA resource](#) contains a list of executive branch Covid-19 travel restrictions.)

A [presidential proclamation](#) (P.P. 10052), issued on June 22, 2020, suspended the entry of foreign nationals on H-1B, L-1 and certain other temporary visas (but not O-1 visas) until at least December 31, 2020. The proclamation extended [P.P. 10014](#), which suspended the entry to the U.S. of most immigrant visa applicants.

State Department Reply on Visa Policy: Attorneys say clients applying for O-1 visas intend to quarantine for 14 days in a country not subject to the proclamations yet are still being denied visas. That removes the possibility of a visa holder quarantining in a non-banned country before they enter the United States, which should be sufficient to gain entry.

“Is it the policy of the State Department to deny all O-1 visa applicants in the Schengen area?” I asked the State Department.

A State Department official replied on background and confirmed that O-1 visa applicants cannot get visas to the United States unless they qualified for a “national interest exception,” which relatively few would.

“To the extent that an O-1 applicant believes that he/she meets the exception requirements, the applicant can apply for an exception and consular officers will make that determination,” said the official.

The reason for the policy is the March 11, 2020, (presidential proclamation 9993) travel ban for the Schengen Area. “On March 11, 2020, the president signed a proclamation suspending the entry into the United States of any foreign nationals who were present in the 26 European countries comprising the Schengen Area during the 14-day period preceding their entry or attempted entry into the United States,” said the official.

After noting the measures were extended to the United Kingdom and Republic of Ireland, the official added, “Certain business travelers,

investors, treaty traders, academics, and students may qualify for national interest exceptions under Presidential Proclamations (PPs) 9993 (Schengen Area) and 9996 (United Kingdom and Ireland). Qualified business and student travelers who have valid visas or ESTA [Electronic System for Travel Authorization] authorization may travel to the United States even as PPs 9993 and 9996 remain in effect. Consular officers also continue to consider national interest exceptions for qualified travelers seeking to enter the United States for purposes related to humanitarian travel, certain public health and healthcare travel, and national security.”

Attorneys believe administration policy harms their clients and the United States. “The statement from the State Department appears to confirm that the current position is not to issue visas to anyone who is subject to Presidential Proclamations 9993 and 9996 but does not qualify for a national interest exception,” said Rita Sostrin, a partner with Sostrin Immigration Lawyers, LLP, in an interview. “National interest exceptions are generally reserved for an exclusive group of frontline workers, and most visa applicants would not meet the standard.”

Sostrin believes the Trump administration has twisted the proclamation’s purpose and is now simply enacting additional restrictions on immigration. “The spirit of the proclamations is to limit the spread of Covid-19, not to refuse visas to qualified individuals. This will hit particularly hard O-1 visa applicants, who have already been approved by USCIS as individuals of extraordinary ability – the highest legal standard – to work in non-medical/non-scientific fields like arts, culture and entertainment, as they are unlikely to qualify for a national interest exception.”

The State Department published a few paragraphs on the [national interest exceptions](#), but the wording is similar to the statement from the official above.

“I can’t help but feel this is just another effort by the current administration to restrict admission into the United States of even some of the world’s most

talented people,” said Debbi Klopman, a Brooklyn, NY-based immigration attorney, in an interview. “The travel bans were certainly, at least initially, motivated by strong public health concerns. This current policy appears driven by an anti-immigrant culture within the administration.”

Examples of O-1 Visa Refusals: Attorneys provided examples of recent O-1 visa refusals.

- A filmmaker was refused an O-1 visa at the U.S. consulate in Paris on August 4, 2020. “My client is a highly accomplished filmmaker who has worked on numerous award-winning productions,” said Rita Sostrin. USCIS approved his O-1 petition and he received a visa interview in Paris. He was planning to quarantine in another country but the consular officer refused his visa after a short interview. “There was no discussion of his qualifications or the merits of his O-1 eligibility,” said Sostrin. “It appears that he was simply denied because of the Schengen ban, although the reason listed was the proclamation that restricts H, L and J visas.”
- A Polish actress and singer of note was refused an O-1 visa on August 5, 2020, at the U.S. consulate in Warsaw. Debbi Klopman believes the visa should have been issued to her client. “Proclamation 9993 is not a ban against visa issuance in Schengen Area countries,” she said. “The consequences of a visa refusal or denial in such circumstances are significant. There is every likelihood she will no longer be able to obtain authorization to travel to the United States. A visa denial creates significant roadblocks to the applicant the next time he or she attempts to obtain a visa.”
- An O-1 visa was refused to a material designer at the U.S. consulate in Frankfurt on July 28, 2020. “The officer refused the visa, simply stating that they would not issue the visa until after the Schengen Area travel ban is lifted,” said Christy Turovskiy, a Portland-based business immigration attorney at Hammond Neal Moore, LLC, in an interview. “The officer indicated that the only way the visa applicant could be allowed to travel is if

the work is related to Covid-19 or if the applicant is married to a U.S. citizen. While these are two of several factors that can be considered for a national interest exception waiver, these are not requirements for visa issuance.”

Strategy: “My current advice to a nonimmigrant visa applicant is to travel to a non-travel-banned country where the U.S. embassy is open and processing temporary visas,” said Debbi Klopman. “They should document their arrival and their 14-day stay. An appointment should be arranged for visa processing at this non-travel banned country on or after day 15 following arrival. The applicant should then fly *directly* to the United States.” She notes that transit through a travel-banned country triggers the ban and the visa holder will be banned from traveling through the transit country to the United States.

Christy Turovskiy points out another problem with the Trump administration’s policy and consular officer refusals. “These proclamations are bans based upon a person’s physical presence in an affected country within 14 days immediately preceding entry to the United States,” she said. “Yet the government is creating a hurdle for foreign nationals to later enter the United States even after the travel ban is lifted or after they make an intervening trip for at least 14 days in a country that is not listed within the proclamations.”

She says that refusing visas due to the proclamations is misguided. A visa is the stamp, representing a “travel document” that allows a person to apply for admission to the United States. It does not guarantee admission to the United States but allows the person to appear at the airport or land port of entry and be inspected. “The consular officers should be issuing the visas and it is the job of inspectors at ports of entry to decide whether to allow someone to enter the United States using that visa. Customs and Border Protection is the agency that may refuse someone entry if he or she is subject to the travel ban – if they have been in one of the affected regions during the 14 days before seeking entry to the United States.”

Donald Trump has spoken repeatedly about a “[merit-based](#)” [immigration system](#). That rings hollow and appears to be just a code phrase for less immigration when even people who meet the highest standards for obtaining a visa are refused.

Opponents of immigration often have argued that if a foreign national was extraordinary, they could just get an O-1 visa. Like most such arguments, it is not true, particularly during the Trump years. Today, if Superman and Wonder Woman lived in Europe, it appears they would fail to possess enough extraordinary ability to obtain a visa to enter the United States.

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Stuart Anderson

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