Siskind Summary: Health Care Worker Provisions in the Health and Economic Recovery Omnibus Emergency Solutions Act (the "HEROES Act")

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Section 191203. TEMPORARY PROTECTIONS FOR ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS

During the period beginning on the first date of the public health emergency declared by the HHS Secretary (January 27, 2020) through 90 days after the date the emergency terminates, aliens physically present in the US who were providing "essential critical infrastructure labor or services" in the US prior to the 1/27/2020 and who are continuing to provide the services, shall be deemed to be in a period of "deferred action" and authorized for employment under INA Section 274A and the hiring of such workers is deemed not to violate immigration law. An employment authorization document will not be deemed necessary not will an appearance before DHS or any other federal agency for an interview, examination or other purpose. Deferred action means the deferral of any actions by DHS to remove a person and is what DACA is based on (DACA stands for Deferred Action for Childhood Arrivals).

DHS released a memorandum entitled the "Advisory Memorandum on Identification Essential Critical Infrastructure Workers During COVID-19 Response" that was updated on April 17, 2020. The memorandum includes workers in a variety of fields including

- Healthcare/public health (includes a broad variety of occupations

Workers, including laboratory personnel, that perform critical clinical, biomedical and other research, development, and testing needed for COVID-19 or other diseases.
• Healthcare providers including, but not limited to, physicians; dentists; psychologists; mid-level practitioners; nurses; assistants and aids; infection control and quality assurance personnel; pharmacists; physical, respiratory, speech and occupational therapists and assistants; social workers; optometrists; speech pathologists; chiropractors; diagnostic and therapeutic technicians; and radiology technologists.
• Workers required for effective clinical, command, infrastructure, support service, administrative, security, and intelligence operations across the direct patient care and full healthcare and public health spectrum. Personnel examples may include, but are not limited, to accounting, administrative, admitting and discharge, engineering, accrediting, certification, licensing, credentialing, epidemiological, source plasma and blood donation, food service, environmental services, housekeeping, medical records, information technology and operational technology, nutritionists, sanitarians, respiratory therapists, etc.
o Emergency medical services workers.
o Prehospital workers included but not limited to urgent care workers.
o Inpatient & hospital workers (e.g. hospitals, critical access hospitals, long-term acute care hospitals, long-term care facilities, inpatient hospice, ambulatory surgical centers, etc.).

o Outpatient care workers (e.g. end-stage-renal disease, Federally Qualified Health Centers, Rural Health Clinics, community mental health clinics, organ transplant/procurement centers, and other ambulatory care settings/providers, comprehensive outpatient rehabilitation facilities, etc.).
o Home care workers (e.g. home health care, at-home hospice, home dialysis, home infusion, etc.).
o Workers at Long-term care facilities, residential and community-based providers (e.g. Programs of All-Inclusive Care for the Elderly (PACE), Intermediate Care Facilities for Individuals with Intellectual Disabilities, Psychiatric Residential Treatment Facilities, Religious Nonmedical Health Care Institutions, etc.).
o Workplace safety workers (i.e., workers who anticipate, recognize, evaluate, and control workplace conditions that may cause workers' illness or injury).
• Workers needed to support transportation to and from healthcare facility
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• Workers needed to provide laundry services, food services, reprocessing of medical equipment, and waste management.
• Workers that manage health plans, billing, and health information and who cannot work remotely.
• Workers performing cybersecurity functions at healthcare and public health facilities and who cannot work remotely.
• Workers performing security, incident management, and emergency operations functions at or on behalf of healthcare entities including healthcare coalitions, who cannot practically work remotely.
• Childcare, eldercare, and other service providers for essential healthcare personnel.
• Vendors and suppliers (e.g. imaging, pharmacy, oxygen services, durable medical equipment, etc.).
• Workers at manufacturers (including biotechnology companies and those companies that have shifted production to medical supplies), materials and parts suppliers, technicians, logistics and warehouse operators, printers, packagers, distributors of medical products and equipment (including third party logistics providers, and those who test and repair), personal protective equipment (PPE), isolation barriers, medical gases, pharmaceuticals (including materials used in radioactive drugs), dietary supplements, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting or sterilization supplies (including dispensers), sanitary goods, personal care products, pest control products, and tissue and paper towel products.
• Donors of blood, bone marrow, blood stem cell, or plasma, and the workers of the organizations that operate and manage related activities.
• Pharmacy staff, including workers necessary to maintain uninterrupted prescription, and other workers for pharmacy operations.
• Workers in retail facilities specializing in medical good and supplies.
• Public health and environmental health workers, such as:
o Workers specializing in environmental health that focus on implementing environmental controls, sanitary and infection control interventions, healthcare facility safety and emergency

preparedness planning, engineered work practices, and developing guidance and protocols for appropriate PPE to prevent COVID-19 disease transmission.
o Public health/ community health workers (including call center workers) who conduct community-based public health functions, conducting epidemiologic surveillance and compiling, analyzing, and communicating public health information, who cannot work remotely.
• Human services providers, especially for at risk populations such as:
o Home delivered meal providers for older adults, people with disabilities, and others with chronic health conditions.
o Home-maker services for frail, homebound, older adults.
o Personal assistance services providers to support activities of daily living for older adults, people with disabilities, and others with chronic health conditions who live independently in the community with supports and services.
o Home health providers who deliver health care services for older adults, people with disabilities, and others with chronic health conditions who live independently in the community with supports and services.
• Government entities, and contractors that work in support of local, state, and federal public health and medical mission sets, including but not limited to supporting access to healthcare and associated payment functions, conducting public health functions, providing medical care, supporting emergency management, or other services necessary for supporting the COVID-19 response.
• Mortuary service providers, such as:
o Workers performing mortuary funeral, cremation, burial, cemetery, and related services, including funeral homes, crematoriums, cemetery workers, and coffin makers.
o Workers who coordinate with other organizations to ensure the proper recovery, handling, identification, transportation, tracking, storage, and disposal of human remains and personal effects; certify cause of death; and facilitate access to mental and behavioral health services to the family members, responders, and survivors of an incident.

Also included are a large number of occupations in the following fields

- law enforcement, public safety, and other first responders
- food and agriculture
- energy
- water and wastewater
- transportation and logistics
- public works and infrastructure support services
- communications and information technology
- other community- or government-based operations and essential functions
- critical manufacturing
- hazardous materials
- financial services
- chemical
- defense industrial base

- commercial facilities
- residential/shelter facilities and services
- hygiene products and services

Section 191204. SUPPLEMENTING THE COVID RESPONSE WORKFORCE.

Subsection A - Green Cards for Doctors Who Have Completed Physician National Interest Waiver Service Requirements

Expediting green cards for physicians with an approved I-140 under the physician national interest waiver program for physicians who have completed their five years of service before the date of enactment of the bill. Physicians in this category will be provided green cards outside the employment-based preference caps (using INA section 201(b)) and applications must be accompanied by a statement to DHS that the doctor has been practicing medicine or research involving the diagnosis, treatment or prevention of COVID.

Applications must be filed between the date of enactment of this bill and 180 days after the end of the emergency declared by HHS.

Subsection B - Expedited Processing for Nonimmigrant Petitions and Applications

DHS will expedite processing of application for nonimmigrants to practice medicine, provide health care, engage in medical research and participate in graduate medical education involving the diagnosis, treatment or prevention of COVID-19.

Within 15 days of receipt, DHS must conduct an initial review and issue a request for evidence ("RFE"). DHS must issue a decision within 30 days, or, if an RFE is issued, within 15 days of receiving the RFE response. Decisions must be emailed if an email address is provided.

This section takes effect on the day of enactment and ends 180 days after the end of the emergency declared by HHS.

Subsection C -Emergency Visa Processing

The Department of State shall "prioritize" processing of applications by people who are practicing medicine, providing health care, engaging in medical research or participating in graduate medical education involving the diagnosis, treatment or prevention of COVID-19 .

DOS will ensure that appointments are scheduled within 7 days after a request.

If routine appointments are not available, a consulate will interview by video or grant an emergency appointment or allow an applicant to apply elsewhere within 10 days of a request.

Interviews may be waived if

- the alien is applying for a new visa within 3 years after the date on which the person's prior visa expired;
- it's in the same visa category; and
- it's at the same consular post as issued the earlier visa
- there is no indication the person has violated immigration laws

This section takes effect on the day of enactment and ends 180 days after the end of the emergency declared by HHS.

Subsection D - Improving Mobility of Nonimmigrant Workers

During the effective period, DHS may approve H-1Bs for MDs providing direct patient care if they possess a license or other authorization required by a state to practice medicine, or is eligible for a waiver pursuant to an executive order, emergency rule or other action by a state.

DHS shall not require an employer of an H-1B physician to file a new or amended H-1B petition if, upon transferring to a new area of employment, the worker will be practicing medicine, providing health care or doing medical research involving the diagnosis, treatment or prevention of COVID-19 (note that this is broader than just physicians).

No new or amended petition needs to be filed for an H-1B worker to engage in telehealth.

Permissible Work Activities for J-1 Physicians

The diagnosis, treatment, or prevention of COVID-19 is an integral part of graduate medical education. J-1s can be redeployed to new rotations within an institution as needed and be paid for such work.

J-1s can do work outside the scope of the approved program if

- the work is related to the diagnosis, treatment and prevention of COVID-19;
- the J-1 maintains nonimmigrant status and complies with the terms of the program; and
- the J-1 Responsible Officer okays the additional work

The J-1 waiver work can include telemedicine and is based on where patients are located versus where the doctor is located (i.e. if the patients are in a shortage area and the doctor is not, that would be permissible).

Portability of O-1 Nonimmigrants

The same kind of job portability applicable to H-1B workers will apply to O-1 nonimmigrants.

Increasing the Ability of Physicians to Change Nonimmigrant Status

Change of status applications will be permissible for those subject to INA Section 212(e) (the J-1 home residence requirement).

The provisions in this "improving mobility" section take effect on the day of enactment and end 180 days after the end of the emergency declared by HHS. However, the provisions on telemedicine, O-1 portability and change of status while subject to INA Section 212(e) are permanent changes.

Subsection E - Conrad 30 Program

The Conrad 30 J-1 physician program is permanently reauthorized.

The Conrad 30 program becomes the Conrad 35 program with a permanent hike in per state waiver numbers from 30 to 35. There is also an elevator provision that allows that number to grow annually in 5 slot increments if Conrad waiver usage by all states is over 90% (states with in active programs – those using less than 5 waivers per year – are excluded). When the program grows to 45 waivers, the threshold to increase grows to 95% usage. There is a similar provision to shrink the program if usage declines (with a minimum waiver number remaining at 35).

Subsection F - Temporary Portability for Physicians and Critical Healthcare Workers in Response to COVID-19 Public Health Emergency

Within 30 days of enactment, DHS, in consultation with DOLS and DHS, shall set emergency procedures to provide employment authorization to facilitate the temporary deployment of people who practice medicine, provide healthcare, or engage in medical research involving the diagnosis, treatment, or prevention of COVID-19.

This section covers people in the US who are maintaining a lawful nonimmigrant status that authorizes employment with a specific employer incident to status and who are working in the US in a healthcare occupation essential to COVID-19 response, as determined by HHS.

DHS may grant employment authorization documents ("EADs") based on filing form I-765. Applications must include evidence of current nonimmigrant status, copies of degrees, licenses, credentials or other documents confirming the ability to work in the occupation and other evidence DHS may require (using a preponderance of the evidence standard).

DHS will convert pending EAD applications to this emergency program. DHS is authorized to charge a fee for this program.

RFEs must be issued within 15 days of receipt. Decisions must be issued within 30 days of receipt or 15 days of receiving a response to an RFE.

EADs will be valid for at least one year and will include the annotation COVID-19 and the documents may only be used for COVID-1 related work.

Clarifications

Maintenance of status – Regardless of a reduction in hours or end of work with the employer that sponsored the underlying nonimmigrant petition, an alien with an EAD under this section (including the spouse and children) shall be determined to be

- lawfully present in the US and
- continuously maintaining status for purpose of change of status and adjustment of status

An EAD is only valid for work described in this subsection and is valid for I-9 purposes.

Time spent by physicians doing COVID-related work involving direct patient care involving the diagnosis, treatment, or prevention of COVID-19 shall count toward the PNIW 5-year service requirement and the 3-year J-1 service requirement.

This section takes effect 30 days after the day of enactment and ends 180 days after the end of the emergency declared by HHS.

Subsection G – Special Immigrant Status for Nonimmigrant COVID-19 Workers and Their Families

DHS may grant green cards using special immigrant classification to people who file for these green cards under Section 204 of the Immigration and Nationality Act. The program covers individuals who, from the start of the emergency through 180 days after the end of the HHS emergency declaration, were authorized to work in the US and have maintained status and are engaging in the practice of medicine, providing healthcare services or doing medical research involving the diagnosis, treatment or prevention of COVID-19. Spouses and children are included.

Priority dates – visas are to be issued in the order in which visas under this program are filed except that a doctor shall maintain a priority date that was assigned with respect to an immigrant visa petition or application for labor certification that was previously filed.

Spouses and children may still be approved for special immigrant visas if the principal applicant dies. The petition may still be be approved. Children will be protected from aging out based on the date the petition in this section was approved. A spouse or child shall be considered to be

maintaining lawful nonimmigrant status until the date on which the adjustment of status application is accepted or two years from the death of the principal applicant.

The total number of principal applicants who may get these green cards is up to 4,000 per year for three fiscal years beginning after the date of enactment. Per country caps do not apply. Unused numbers can carry forward to future fiscal years. Spouses and children don't count in that 12,000 cap and the numbers do not count against the limits of the EB-4 category.