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# Summary and Issues of Particular Concern with Presidential Executive Order Targeting Hong Kong Visa Applicants

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## New Presidential Executive Order Targets Hong Kong Visa Applicants

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In a speech in the White House Rose Garden on July 14, 2020, the President announced that he had signed an executive order ending U.S. preferential treatment for Hong Kong. In the President's words, "Hong Kong will now be treated the same as Mainland China: no special privileges, no special economic treatment, and no export of sensitive technologies."

The President's July 14, 2020 [Executive Order on Hong Kong Normalization](#) ("Executive Order" or "EO") is framed as a response to recent actions taken by the People's Republic of China ("PRC"), including the publication of a new security law for Hong Kong on June 30, 2020.

The text of the Executive Order includes a number of immigration-related provisions which seek to suspend or terminate various provisions of U.S. immigration law deriving from the Hong Kong Policy Act enacted by Congress in 1992. The Hong Kong Policy Act sought to provide stability to Hong Kong by allowing the United States to continue to treat Hong Kong separately from Mainland China for purposes of bilateral relations, commerce, transportation, cultural and educational exchanges, visa allocations and certain other matters after the 1997 handover of sovereignty to China.

The new EO seeks to take away benefits currently enjoyed by citizens of the Hong Kong S.A.R., such as shorter wait times for immigrant visas, the ability to apply for Fulbright scholarships, and exemption from complex "export control" regulations applicable to the PRC.

The Hong Kong Policy Act (which the EO seeks to suspend) preserved immigration-related benefits for the inhabitants of Hong Kong by maintaining provisions of the Immigration Act of 1990 which:

Increased the available immigrant numbers for Hong Kong

Granted special-immigrant status to certain alien employees in the United States Mission in Hong Kong, and

Provided a limited number of visas for certain employees of defined U.S.-based businesses in Hong Kong

In addition, the EO imposes broad and sweeping travel bans upon persons seeking nonimmigrant or immigrant admission to the U.S. who have been involved, directly or indirectly, in the enforcement or implementation of the new security law (Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Administrative Region). This extends to family members or employees of individuals or companies involved in the enforcement of the new national security rules, and those who offer them "material support." This is an extremely broad provision which borrows language from similar "anti-terrorism" policies.

The EO also directs U.S. agency heads to propose for the President's consideration any further actions deemed necessary to end special conditions and preferential treatment for Hong Kong. Although the EO calls for "reallocation" of refugee admissions to Hong Kong ("based on humanitarian concerns, to the extent feasible"), it is not realistic to expect that any large number of refugee admissions will be granted to Hong Kong passport holders, given both the [low number of admissions under the refugee ceiling set by the current administration](#), and the broad language in EO Section 4 banning entry of Hong Kong residents on various grounds (discussed in more detail below).

The following select issues raised by the Executive Order are of particular concern Hong Kong visa applicants.

### **1. Will immigrants born in Hong Kong be subject to the same multi-year wait times as immigrants born in Mainland China?**

Section 2(a) of the Executive Order suspends Section 103 of the Immigration Act of 1990, which provides that Hong Kong is to be treated as a separate foreign state, and not a dependent area of another country, for purposes of the allocation of preference visas under the Family-based and Employment-based provisions of the Immigration and Nationality Act ("INA"). This suspension will subject Hong Kong born immigrant visa applicants under the Family and Employment-based preference categories to the same wait times as applicants born in Mainland China. Due to oversubscription, backlogs faced by applicants chargeable to the China quota are significantly longer for all classes of Employment-based immigrant visas than backlogs for the Worldwide quota (non-oversubscribed countries), which applied to Hong Kong prior to the EO.

Especially hard hit are prospective Hong Kong EB-5 immigrants who will no longer fall under the Worldwide quota (which is "Current", meaning that visas are immediately available to applicants chargeable to non-oversubscribed countries), but will now face wait times under the China quota (which are estimated to exceed ten years for intending immigrants with relatively recent priority dates).

The EO's stripping of separate country status for purposes of immigrant visa allocation is a serious concern for prospective immigrants who would otherwise be eligible to take advantage of Hong Kong immigrant visa chargeability, but are now subject to China-born wait times. In short, the EO

results in substantially longer wait times for Hong Kong born Employment-based immigrants, even for those individuals already in the process of immigrating to the United States who may have committed to the process in reliance on advantageous chargeability provisions that have been in place for nearly three decades.

Although there will almost certainly be legal pushback against the Trump Administration on this particularly harsh aspect of the EO, unless there is a policy reversal on the part of the current administration, or change of administrations and termination, reversal or modification of this suspension, this EO could mean many years of added wait time for prospective immigrants whose visas would previously be charged to the Hong Kong quota.

## **2. Will Visa Applicants from Hong Kong be unable to qualify for visa waivers and other preferential visa provisions which are not available to applicants from Mainland China?**

Section 3(b) of the EO calls for the amendment of the U.S. Citizenship & Immigration Services ("USCIS") regulation at 8 CFR § 212.4(i) to "eliminate the preference for Hong Kong passport holders as compared to PRC passport holders" in connection with the revocation of nonimmigrant waivers of inadmissibility granted under Section 212(d)(3) of the INA. Specifically, 8 CFR § 212.4(i) states:

Revocation. The Deputy Commissioner or the district director may at any time revoke a waiver previously authorized under section 212(d)(3) of the [INA] and shall notify the nonimmigrant in writing to that effect.

As USCIS has yet to amend this regulation as directed by the EO, the exact impact of any such amendment(s) is not currently known. By its text, however, the EO directs only the elimination of preferential treatment in the context of revocation of nonimmigrant waivers of inadmissibility under INA 212(d)(3) and would not encompass the entire range of preferences granted to Hong Kong as compared to PRC passport holders. The efficacy of addressing broader issues of the preferential treatment granted to Hong Kong passport holders through amendment of a regulation specifically focused on revocation of waivers is questionable.

Again, this directive causes concern for Hong Kong visa applicants, although the impact could be delayed as implementing these measures will require the action of a separate body (here, USCIS) to promulgate amendments to its regulations before these changes may take effect. As part of the executive branch, USCIS is no doubt in the process of amending its regulations already, but it will still need to follow the Administrative Procedures Act, including any required notice and solicitation of public comments, before regulatory amendments may take effect.

## **3. Will Hong Kong passport holders be barred from participation in the Fulbright exchange program?**

Section 3(i) of the Executive Order directs responsible agencies to "take steps to terminate the Fulbright exchange program with regard to China and Hong Kong with respect to future exchanges for participants traveling both from and to China or Hong Kong." This provision of the order will effectively terminate eligibility for the J-1 Exchange Visa program used by many U.S. universities, government and private research institutions, hospitals, and other organizations to bring promising students, research scholars, post-graduate medical students, and other categories of exchange visitors to the U.S. from the Hong Kong S.A.R. as well as the PRC.

The Executive Order instructs agency heads to commence actions to further the purposes of the order, consistent with applicable law. This directive does not appear to be aimed at individuals who already hold J-1 visas, but could prevent future applicants from qualifying for these visas.

#### **4. Who will be subject to the “Hong Kong travel ban”?**

Sections 4 through 7 of the Executive Order block the property interests (or freezes the assets) of, and imposes a ban on the nonimmigrant or immigrant entry to the United States of persons who the U.S. government determines to:

Have been involved, directly or indirectly, in enforcing or implementing the new national security laws imposed on Hong Kong;

Have been directly or indirectly “responsible for or complicit in, or.. have engaged in” actions or policies that “undermine democratic processes or institutions” or “threaten the peace, security, stability, or autonomy” of Hong Kong; censorship; or “extrajudicial rendition, arbitrary detention, or torture” or human rights violations.

The ban also applies to any individual who is the “leader or official of” any “entity” (including both businesses and government entities) determined by the U.S. to fall in these categories, and, using the lexicon of “anti-terrorist” provisions of U.S. law, to persons who have “materially assisted” any person who the U.S. government has determined falls into the categories described in Section 4.

Because these provisions extend to persons involved “indirectly” in the actions described in this section, to individuals who have “materially assisted” others who are subject to the ban, and under Section 7 to immediate family members or persons “employed by, or acting as an agent of” persons whose property or interests are blocked under Section 4, the travel ban provision of the EO may be expected to have a wide application. It is not unreasonable to expect that there will be some legal challenge to the provisions of this new travel ban; however, the publication of the EO will likely entail immediate additional screening of current immigrant and nonimmigrant visa applications by residents of Hong Kong.

#### **5. What is the Effective Date of the EO?**

Pursuant to provisions of the [Hong Kong Policy Act of 1992](#), if the President determines that Hong Kong “is not sufficiently autonomous” to justify special treatment under a particular U.S. law, the President may issue an executive order, which must specify the laws and provisions affected by the order, and be published in the Federal Register. [Publication of Executive Order 13936 of July 14, 2020 in the Federal Register](#) occurred on July 17, 2020.

The EO, issued July 14, 2020, instructs agencies to commence appropriate actions to effectuate the purposes of the order “within 15 days.” According to the EO, Donald Trump may “reconsider” whether or not to implement the EO based on his determination that changes in China’s action ensure that Hong Kong is “sufficiently autonomous.”

This means that the provisions of the EO, including suspension of Section 103 of the Immigration Act of 1990 (impacting treatment of Hong Kong under per-country levels for visa availability purposes), will have become effective as early as July 17, 2020, with some delay as additional measures are implemented by various government agencies.

#### **Overall Impact**

The Executive Order may be seen, in part, as an attempt to use the suspension of immigration benefits, trade preferences, and other privileges extended to Hong Kong to leverage concessions from China in its treatment of Hong Kong. In the opinion of [knowledgeable China policy experts](#), such an attempt is misguided, as the status of Hong Kong is considered by the leadership in Beijing to be an important and exclusively internal Chinese matter relating to sovereignty over the recovered former colony, and not a matter where China will bend its will to the desires of foreign interests.

As this administration has a checkered record, at best, in shepherding its policy directives through the regulatory or legislative process, the impact of the EO may be mitigated to the extent that it requires the enactment of regulations or Congressional approval. As discussed above, however, some provisions will take effect immediately without action by Congress or regulatory amendments.

As such, this Executive Order is one of many attacks the Trump Administration is making on legal immigration to the United States. In ordering any suspension of the application of U.S laws to Hong Kong after the 1997 handover, the Hong Kong Policy Act of 1992 states that the President should consider the terms, obligations, and expectations expressed with respect to Hong Kong in the [Joint Declaration](#) entered into by the United Kingdom and the People's Republic of China in 1984. It is not unforeseeable that a more informed U.S. President will reconsider the EO in light of the text and spirit of the Joint Declaration, and amend or rescind the EO to better support the people of Hong Kong. It may be hoped that such a determination will result in a termination or substantial revision of the more punitive aspects of the Executive Order.

On this basis, it is reasonable to expect that a new administration will take steps to amend or otherwise mitigate the effects of the present EO, but unless this occurs, the EO (along with others like it) will have a negative impact on immigration to the United States.

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