March 2017 Special Immigration Alert:

President Trump Issues Revised Executive Order on Travel

USCIS Suspends Premium Processing for H-1B Petitions Starting April 3, 2017: All H-1B Petitions, Including H-1B Cap Petitions, Are Affected!

Use of New Form I-9 Is Now Mandatory

IRS Announces That Delinquent Taxpayers Face Revocation/Denial of U.S. Passports

DHS Issues Two New Memos on Enforcement/Border Security

---

1. President Trump Issues Revised Executive Order on Travel

Today, President Trump issued a revised executive order on travel that becomes effective at 12:01 a.m. EDT on March 16, 2017 ("March 16 EO"). The March 16 EO affects foreign nationals ("FNs") who are citizens or nationals of six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen (collectively, the "Six Countries"). In addition, the March 16 EO suspends, for at least 90 days, the entry into the United States of FNs from the Six Countries unless they hold a valid immigrant or nonimmigrant visa issued on or before 5 p.m. EST on January 27, 2017, or have obtained a waiver. January 27, 2017, is the date on which the President's initial executive order on travel was issued ("January 27 EO"). As our readers know, the January 27 EO was enjoined by the federal courts.

In addition to imposing a travel ban on FNs from the Six Countries, the March 16 EO:

- revokes the January 27 EO;
- applies only to FNs from the Six Countries who, on March 16, 2017:
    - are outside the United States;
    - do not have a valid visa issued prior to 5 p.m. EST on January 27, 2017; and
    - do not have a valid visa;

- does not apply to any FN from one of the Six Countries who:
    - holds a valid green card,
    - holds a valid document other than a visa (such as an advance parole document),
    - is a dual national and traveling on a passport from a country other than one of the Six Countries, or
    - is an FN granted asylum or a refugee;
- does not bar "landed immigrants" of Canada who hold passports from the Six Countries from applying for and obtaining visas if they secure a waiver;
- allows individuals from one of the Six Countries with visas issued prior to the deadline to secure entry into the United States if they satisfy all other admission requirements;
- indicates that the Department of State ("DOS") will not revoke valid visas held by affected FNs, but if an FN has only a single entry visa, he or she may not be able to secure a new visa if he or she departs the United States;
- does not apply to international students, exchange visitors, and their dependents from the Six Countries who are in the United States; if they hold visas that were provisionally revoked under the January 27 EO, those visas will remain valid for travel under the March 16 EO, but they may not be able to secure new visas if they depart the United States;
- permits FNs from the Six Countries to apply for waivers of its provisions from the DOS or U.S. Customs and Border Protection ("CBP"), and suggests that such case-by-case waivers might be appropriate when an FN:
    - is outside the United States but has previously been here for work, study, or another long-term activity, and the denial would impair that long-term activity;
    - has significant contacts in the United States but is out of the country pursuing valid work, study, or other lawful activities;
    - seeks admission for significant business or professional obligations, and the denial of entry would substantially impair those obligations;
    - seeks to come here to visit or reside with a close family member (e.g., spouse, child, or parent) who is an American citizen or FN with a green card or valid visa, and the denial would cause undue hardship;

- is an infant, a child or an adoptee, a person needing urgent medical care, or someone who presents other special circumstances;

- has been employed by the U.S. government and can document that he or she has provided faithful and valuable service;

- is traveling for an international organization or to conduct business on its behalf; or
- is coming as a U.S. government-sponsored exchange visitor;

- requires added security screening on FNs from Iraq;

- suspends, for 120 days, the travel of refugees to this country under the U.S. Refugee Admissions Program, unless the refugees had previously been formally scheduled for transit by the DOS;

- does not permanently bar refugees from Syria or provide a priority for religious minorities; and

- places a ceiling of 50,000 refugees who can be admitted in fiscal year 2017.

2. USCIS Suspends Premium Processing for H-1B Petitions Starting April 3, 2017: All H-1B Petitions, Including H-1B Cap Petitions, Are Affected!

Late Friday, March 3, 2017, U.S. Citizenship and Immigration Services ("USCIS") announced that it would suspend premium processing for all H-1B petitions filed on or after Monday, April 3, 2017. Accordingly, April 3, 2017, is the first day that H-1B cap petitions can be accepted for processing.

USCIS's announcement effectively means that premium processing is not available for *any* H-1B cap case, cap-exempt H-1B petition, or H-1B petition amendment or extension filed on or after April 3, 2017. USCIS suggests that this suspension could last six months or longer and is necessary to reduce current processing backlogs for H-1B petitions and extensions. In addition, USCIS indicates that this suspension of premium processing for H-1B petitions does *not* apply to I-129 petitions filed in any other visa classification, including the E, L, O, or TN classification, or to I-140 petitions currently eligible for premium processing.

This unexpected and last-minute change in USCIS policy threatens to impact a number of aspects of the H-1B application flow. First, F-1 students in Optional Practical Training (known as "OPT") for whom H-1B cap petitions will be filed on April 1, 2017, will be unable to travel abroad and still retain "cap gap" protection or even return to this country. Second, USCIS has not announced how it plans to manage the reporting that these students must do to their schools to secure and keep "cap gap" employment authorization, and to maintain status. Third, employees already in H-1B status who seek to change employers will not be able to secure prompt adjudication if the new employer's H-1B petition is filed on or after April 3, 2017, and this may further impede their willingness to change employers. Finally, those in H-1B status who had

made travel plans to secure new visas and were relying on premium processing to get an expedited approval of their extension applications must revise their plans if the extensions are not received by USCIS on or before March 31, 2017.

Employers and affected employees should contact their Epstein Becker Green attorney or case manager if they have any questions in this area.

3. Use of New Form I-9 Is Now Mandatory

USCIS reminds the public that the use of the new Form I-9 became mandatory on January 22, 2017. This means that every Form I-9 completed on or after that date must be done on the new form. The new Form I-9 can be obtained online at https://www.uscis.gov/i-9. At the same time, USCIS issued a revised version of its *Handbook for Employers* that guides employers through the Form I-9 provisions. This handbook is available at https://www.uscis.gov/i-9-central/about-form-i-9.

4. IRS Announces That Delinquent Taxpayers Face Revocation/Denial of U.S. Passports

In January 2017, the Internal Revenue Service ("IRS") announced that it will begin certifying to the DOS whenever taxpayers are "seriously" delinquent in paying federal taxes. According to the IRS, a "serious" delinquency is a tax debt that equals or exceeds $50,000. Once the IRS issues such a certification, the DOS is authorized to revoke the taxpayer's U.S. passport or deny any application for a U.S. passport that the taxpayer files.

According to the IRS's announcement, the agency will issue certification of a delinquent debt only as a last collection resort. In addition to requiring a serious delinquency, the IRS will not issue a certification unless a federal tax lien has been filed and proved ineffective, and all other administrative remedies have been exhausted without success. Certification also will not issue for serious delinquencies if (a) they are being liquidated in a timely manner pursuant to an installment plan or offer of compromise, (b) a collection due process hearing has been requested, or (c) collection has been suspended due to a request for innocent spouse relief.

5. DHS Issues Two New Memos on Enforcement/Border Security

On February 20, 2017, John Kelly, Secretary of the U.S. Department of Homeland Security ("DHS") issued two memorandums: (a) Enforcement of the Immigration Laws to Serve the National Interest ("DHS Enforcement Memo") and (b) Implementing the President's Border Security and Immigration Enforcement Improvement Policies ("DHS Border Security Memo"). Each reflects the new administration's policies toward immigration enforcement and border security.

A. The DHS Enforcement Memo

The DHS Enforcement Memo outlines the administration's enforcement priorities, which tilt toward aliens who (a) have committed, or been charged with committing, criminal offenses; (b)

have "abused" any public benefit program; (c) have been ordered removed, but remain; or (d) pose a risk to public safety or national security. At the same time, the DHS Enforcement Memo makes clear that any FN who is in the United States without authorization will be subject to removal and that no category or class of FNs is exempt from removal. To implement this objective, the DHS Enforcement Memo terminates all prior agency guidelines, directives, or programs, with the noted exception of the "Dreamers," who have been allowed to stay under former President Obama's executive order that applies to FNs who were brought to the United States as children (known as the "DACA Program").

To support these enforcement efforts, the DHS Enforcement Memo urges expansion of the Section 287(g) program, which allows state and local law enforcement officers to be designated as immigration officers authorized to enforce federal immigration laws. However, many states and localities have refused to participate in this program because they fear that it hinders local law enforcement by driving a wedge between the police and immigrant communities.

The DHS Enforcement Memo also directs agency personnel to make full use of their statutory authority to remove illegal aliens expeditiously. Under the Obama administration, the use of such "fast track" authority had been restricted to aliens apprehended within two weeks of entry or found within 100 miles of our border. Now, DHS proposes to use its fast track removal on any FN who cannot demonstrate that he or she has been here for two years. To support this objective, the DHS Enforcement Memo instructs U.S. Immigration Customs and Enforcement ("ICE"), the DHS agency with primary responsibility for immigration enforcement, to hire 10,000 additional ICE agents and 5,000 additional CBP border patrol agents, as well as "the additional operational and mission support and legal staff necessary to hire and support their activities." According to *The Wall Street Journal*, this will add approximately $4 billion to the annual budgets of these agencies, assuming that all the projected hiring can be achieved.

B. The DHS Border Security Memo

The DHS Border Security Memo addresses other aspects of the new administration's ambitious immigration enforcement program. This memo calls for using the "expedited removal" process to deport any alien who has been in the United States illegally for less than two years, wherever he or she is located. Under the Obama administration, this authority had been limited to apprehensions near the borders. The DHS Border Security Memo also requires detention of all aliens "deemed inadmissible" who arrive in the United States, pending a determination of their right to remain. Estimates are that this may require additional detention facilities for 200,000 people on a daily basis. Presently, the government has detention capacity approaching 35,000 beds, and this is estimated to cost $2 billion annually! *The Wall Street Journal* notes that it costs the federal government $125 per day to house an alien. Moreover, DHS acknowledges that it currently takes more than two years before it can schedule a removal hearing before an immigration judge. The costs of constructing these detention facilities and housing apprehended aliens until their cases can be heard will be enormous.

The DHS Border Security Memo also directs the "planning, design, construction and maintenance of a wall along the land border with Mexico to begin immediately, in the most appropriate locations." DHS has estimated that more than $21 billion will be required to cover

the cost of this project, but Congress has yet to appropriate any funds for this wall. At the same time, the DHS Border Security Memo requires ICE to return illegal aliens arriving from Canada or Mexico to "the territory from which they arrived, pending formal removal proceedings." It is unclear whether Canada and Mexico will cooperate in this effort and, if they do, whether it might create the type of refugee problem that has resulted in other parts of the world, making the border environment even less secure by destabilizing our neighbors.

Furthermore, although the DHS Border Security Memo acknowledges that aliens in this country are entitled to removal hearings, it does not suggest how immigration courts will handle the flood of new cases that these enhanced enforcement efforts will generate. Every FN in the United States, including those who arrive at our borders, is entitled to due process. The immigration courts already are overwhelmed. DHS reports that there are more than 530,000 cases currently pending. According to *The Wall Street Journal*, it may be necessary to hire more than 500 new immigration judges and applicable support staff to satisfy our constitutional obligations. Each position costs approximately $200,000 annually, plus the staff (translators and court personnel) and ICE prosecutors necessary to support this massive increase in caseloads. At the present time, however, the government has been unable to recruit sufficient immigration judges to fill its current appropriation of 250. Moreover, Congress has not appropriated any additional funds for this effort.

In short, there are many ambitious proposals in the DHS Enforcement and Border Security Memos. However, it remains to be seen whether Congress and the country have the political will to dedicate the tremendous resources required to support these efforts. These DHS memos, which require robust immigration enforcement against FNs whose only transgression is being in the United States, have the potential to supplant other items in the federal budget that may be more important to the American people. Moreover, the new administration's focus on enforcement may ignore broader political and economic issues. According to *The Wall Street Journal*, polls show that most Americans oppose the mass deportation efforts that these DHS memos direct. Also, the nation is graying and facing significant labor shortages in many areas. If the administration's policies spur economic growth, these shortages will worsen. To date, the administration has yet to develop a proposal for expanding legal immigration, which may be essential for a growing economy.

As we noted when President Trump was elected, his policies on immigration may spur a healthy public debate on immigration that leads to comprehensive immigration reform because the political, economic, and social costs of an enforcement-only policy may be so detrimental to the national interest.

For more information or questions regarding the above, please contact:

Robert S. Groban, Jr.

New York
212/351-4689
rgroban@ebglaw.com

Pierre Georges Bonnefil

New York
212/351-4687
pgbonnefil@ebglaw.com

Patrick G. Brady

Newark
973/639-8261
pbrady@ebglaw.com

Jungmin Choi

Newark
973/639-5226
jchoi@ebglaw.com

Jang Hyuk Im

San Francisco
415/399-6067
jim@ebglaw.com