



January 30, 2017

Special Immigration Alert: The Trump Administration's Recent Executive Orders on Immigration

This past week, the Trump administration issued three executive orders ("EOs") on immigration. Certain provisions of these EOs may immediately impact the immigration programs of, and foreign nationals ("FNs") working for, our clients. In this Special Immigration Alert, we will summarize these provisions.

1. **EO: Protecting the Nation from Foreign Terrorist Entry into the United States**

This EO, signed on January 27, 2017, directs the Secretary of State ("SOS") and related federal law enforcement and intelligence agencies to develop and implement enhanced visa application review processes that will facilitate the SOS's ability to prevent the admission of FNs who may seek to commit terrorist acts or engage in other illegal activities. The issue with this EO is that it is very broad and may ensnare FNs from countries considered hostile by the administration but who have already lived and worked lawfully in the United States for many years. Employers need to pay attention to these provisions and assess how they may impact their employees and operations. Specifically, this EO does the following:

- A. Creates a Travel Ban:** *Effective immediately, FNs "from" Iraq, Iran, Sudan, Libya, Yemen, Syria, and Somalia are barred from entering the United States for at least 90 days. This EO does not define the term "from." Therefore, "from" not only means citizens of these countries but also could mean FNs who (i) were born there, (ii) have repatriated to other countries from those seven countries, (iii) are dual nationals or citizens of those countries, or (iv) are traveling from those seven countries even though they were not born or have citizenship there.*

This bar extends to all immigrant or nonimmigrants "from" these countries, regardless of whether they have U.S. permanent residency (i.e., a green card), a valid U.S. visa, or another document (e.g., advance parole) allowing them to travel to the United States. This means that FNs from these seven countries with green cards are covered by the broad language of this EO and are not guaranteed entry back into the United States if they depart.

After this EO was issued, the Department of Homeland Security ("DHS") [announced](#) that it will admit green card holders in the national interest as a matter of discretion, absent

derogatory information about them. This position can change. *For this reason, employers may wish to educate immediately all FN employees from those seven countries about the risk of leaving the United States. If these FN employees travel internationally, they may not be allowed to return for a substantial period of time.*

This travel ban also places an additional burden on FNs who go abroad to demonstrate that they are not covered by its provisions. The travel ban extends only to FNs “from” the seven countries; it does not cover FNs from any other country. Thus, FNs traveling abroad and seeking to return to the United States should be prepared to prove that they are not from the seven countries. In addition to their passport, these FNs should carry a copy of their birth certificate (with English translation, if necessary) or, if they lack a birth certificate, comparable evidence of their country of birth.

This EO also provides for a 60-day post-review period to see if other countries should be added to the original list of seven countries. We will advise right away if more countries are added to the list.

- B. Implements Enhanced Visa-Screening Techniques:** This EO directs the SOS and other U.S. intelligence agencies to develop and implement enhanced security screenings to identify FNs who are seeking to enter the United States to engage in terrorist or other illegal activities. As a part of this process and effective immediately, the EO instructs the SOS to suspend all Visa Interview Waiver Programs (“VIWPs”) at all U.S. embassies and consulates around the world. This EO eliminates, effective immediately, the common “drop box” visa applications process that some U.S. embassies and consulates use for FNs applying for renewals of visas, such as H-1B, L-1, or O-1 visas, that are about to expire. This means that all visa applicants, not just those from the seven countries identified in the EO, must have in-person interviews by a U.S. consular officer before their visa applications can be approved and visas renewed.

This portion of the EO will have an instant impact on the international travel plans of FNs working for our clients because it will delay materially their ability to renew their visas. Due to the recent federal hiring freeze imposed by the Trump administration, it is unlikely that the SOS will be able to hire and train additional consular officers who will be required to handle the increased workload resulting from the need to interview the visa applicants who can no longer take advantage of the suspended VIWPs. This situation, in turn, will inevitably lead to extended delays in *all* visa applications that will prevent FN employees from returning in a timely manner to their employment. This EO may also lead to a review of the current Visa Waiver Program, which allows FNs from “low fraud” countries to enter the United States as temporary visitors without requiring a U.S. visa.

- C. Suspends the Refugee Program:** This EO immediately suspends the U.S. Refugee Admissions Program (“RAP”) for all refugees seeking to enter the United States over the next 120 days. Furthermore, this EO permanently bars Syrian refugees from the RAP. Upon resumption of the RAP, the SOS is directed to prioritize applications by individuals whose religious beliefs are considered a “minority religion” in their country of nationality. In addition, this EO announces that, to the extent legally permissible, the administration’s policy is to grant state and local jurisdictions authority over the placement or settlement of refugees within their jurisdiction.

- D. Directs Relevant Federal Agencies to Perform Additional Screening of All Applicants for Immigration Benefits:** This EO directs all federal agencies involved in the immigration process to implement “uniform” screening standards to (i) identify FNs

committing fraud or seeking admission to perform terrorist or criminal acts, (ii) identify “malicious intent,” and (iii) assess an applicant’s “likelihood of becoming a positively contributing member of society” and “contribution to the national interest.” For the most part, none of these requirements are contained in current immigration laws. So, it remains to be seen whether and how the respective agencies implement these broad and very subjective directives and terms.

Over the weekend, several federal district courts enjoined enforcement of portions of the EO. On January 28, 2017, the U.S. District Court for the Eastern District of New York issued a nationwide temporary restraining order (“TRO”) barring removal under this EO of any FN admitted to the United States with a refugee application approved under the RAP or any FN from Iraq, Iran, Libya, Somalia, Sudan, Syria, or Yemen who holds a valid immigrant or nonimmigrant visa or is otherwise authorized to enter the United States. See *Darweesh v. Trump*, 17 Civ. 480 (E.D.N.Y. Jan. 28, 2017)(AMD).

On January 29, 2017, the U.S. District Court for the District of Massachusetts issued a similar TRO that prohibits DHS from enforcing, for seven days, those portions of the EO that would bar entry into the United States of (i) FNs with approved RAP applications or (ii) FNs from the seven countries who (a) held valid immigrant or nonimmigrant visas, (b) are U.S. citizens, or (c) were otherwise authorized to enter the United States. See *Tootkaboni v. Trump*, Civil Action No. 17-cv-10154 (D. Mass. Jan. 29, 2017)(ADB). A similar TRO was issued by the U.S. District Court in the Eastern District of Virginia. See *Aziz v. Trump*, Case No. 1:17-cv-116 (E.D. Va. Jan. 28, 2017)(LMB). All of these TROs are scheduled to expire within seven to 10 days.

In response to the growing number of lawsuits challenging this EO, DHS issued [a press release](#) on January 29, 2017, in which it announced that all three of the Trump administration’s EOs on immigration would “remain in place” and that the federal government “retains its right to revoke visas at any time if required for national security or public safety.”

We anticipate that there will be more litigation around our nation as additional FNs returning to the United States will be impacted unexpectedly by the travel ban and/or refugee bars. Also, DHS may alter its positions as it gains experience with the implementation and consequences of these EOs. Thus, both the ultimate impact and the scope of President Donald J. Trump’s EOs on immigration remain uncertain.

2. EO: [Enhancing Public Safety in the Interior of the United States](#)

This EO was issued on January 25, 2017, and lays out the administration’s priorities for immigration enforcement within the United States. Specifically, this EO does the following:

- A. Expands the Grounds for Removal:** The EO directs DHS to prioritize for removal FNs who have committed, or been charged with committing, or engaged in activities that constitute “any criminal offense.” The problem with this directive is the extremely broad reach that it potentially could have. This EO does not distinguish between offenses, misdemeanors, and felonies. Innocent actions, such as jaywalking, minor traffic infractions, or other activities that are routinely handled as civil infractions by law enforcement may now subject a FN to a prioritized removal proceeding. Employers should immediately inform all FN employees who hold green cards, are here in nonimmigrant status, or are otherwise authorized to work of these new rules so that they do not run the risk of removal due to incidents that DHS previously ignored in its immigration enforcement efforts.

The potential impact of this provision is aggravated by two other provisions of this EO. The first provision directs DHS to immediately enter into cooperation agreements with states and localities that essentially will “deputize” them as immigration enforcement officers and authorize them to investigate, apprehend, and detain FNs in the United States. The second provision directs DHS and the U.S. Attorney General to devote the resources necessary to prosecute criminally all those who violate the immigration laws. In addition, those FNs who are permanent residents of the United States may be especially vulnerable under this EO because they may believe that their green cards insulate them from removal. When a permanent resident travels, however, he or she is subject to the same admissibility screening requirements as any FN seeking to enter the United States. In part, this means that he or she might be barred from entering the United States under the “criminal offense” provision for an uncharged arrest, DUI or DWI charge, or minor misconduct, infractions, or conduct that are yet to be prosecuted. Thus, it may be best for all FNs with potential problems in this area to stay in the United States until the full impact of this EO becomes clearer.

- B. Provides Crime Victims with Relief:** This EO directs U.S. Immigration Customs Enforcement (known as “ICE”) to establish an office to provide “proactive, timely, adequate, and professional services to victims of crimes committed by removable [FNs]. . . .”
- C. Eliminates Federal Funding of “Sanctuary Cities”:** This EO directs the U.S. Attorney General and DHS to ensure that so-called “sanctuary jurisdictions” are not eligible to receive federal funds, except those necessary for law enforcement purposes. And this EO permits DHS to determine which jurisdictions constitute a “sanctuary jurisdiction.”

3. EO: [Border Security and Immigration Enforcement Improvements](#)

This EO also was issued on January 25, 2017. The primary feature of this EO is the directive to DHS to obtain complete operational control of our nation’s southern border with Mexico by, among other things, planning, designing, and building a wall. However, this EO contains provisions that might impact FN employees. Specifically, this EO does the following:

- A. Requires the Detention of Certain FNs:** This EO directs DHS to detain any FN apprehended for immigration law violations and to keep him or her detained until removal proceedings are completed. Given the broad definition of the criminal offenses that might support a removal proceeding, this provision may provide DHS with a legal basis for detaining FNs in situations that previously were ignored by law enforcement.
- B. Gives Priority to Enforcement at the Southern Border:** This EO also directs the U.S. Attorney General to give priority to the prosecution of immigration and other offenses that have “a nexus to the southern border.” Clients in this area need to be especially vigilant because they may find FN employees in jeopardy for actions that previously may not have drawn the attention of federal, state, or local prosecutors.

In summary, the recent EOs issued by the Trump administration have added further complications and hurdles for employers seeking to manage a global employee population. It is incumbent on employers to understand the current immigration atmosphere and how best to educate employees and navigate the increasingly dangerous immigration minefield. If you have

questions, please contact any member of Epstein Becker Green's national Immigration Law Group.

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
pbonnefil@ebglaw.com



[Patrick G. Brady](#)

Newark
973/639-8261
pbrady@ebglaw.com



[Jang Hyuk Im](#)

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



[Jungmin Choi](#)

Newark
973/639-5226
jchoi@ebglaw.com

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