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Practical Considerations for Employers on the Immigration-related Executive Order

January 30, 2017

International Employment

Introduction

As has been widely reported, President Trump issued an Executive Order ("the Order") on Friday, January 27, 2017, entitled "Protecting the Nation from Foreign Terrorist Entry Into the United States," which, among other directives, bans individuals from Iran, Iraq, Syria, Sudan, Libya, Yemen, and Somalia (the "Covered Countries") from entering the United States for at least the next 90 days following the date of the Order.

The Order also suspends the U.S. Refugee Admissions Program ("USRAP") for 120 days, during which time the USRAP's vetting procedures will be reviewed; indefinitely bans all refugees from Syria from entering the U.S.; and reduces the total number of refugees permitted to enter the U.S. in 2017 from over 100,000 to 50,000.

Overview

The Order has wide-ranging implications for employers who may employ visa or green card holders from the Covered Countries. In particular, these employees may either be traveling abroad or have plans to travel abroad on company business or otherwise. While the holders of a small number of visas are exempted from the Order (including diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas), most visas, including the common H1-B, L-1, and F-1 visas, are covered by the Order.

Employees from the Covered Countries who hold visas covered by the Order may have difficulty entering or reentering the U.S. if they are outside U.S. borders or travel outside U.S. borders during the period in which the Order's terms are in effect. Green card holders from Covered Countries also may be subjected to heightened scrutiny when reentering the country, despite statements that they are not technically included in the Order.

Four federal courts (the Eastern District of New York, the Eastern District of Virginia, the District of Massachusetts, and the Western District of Washington) have issued partial temporary stays of the Order on constitutional and other grounds, primarily preventing the removal of immigrants, refugees, and visa-holders from the Covered Countries who arrived at U.S. borders in the hours after the Order was issued until further hearings can be held. However, the media continues to report that visa-holders, lawful permanent residents, and refugees are being subjected to heightened screening or detained, in some cases in spite of court orders to the contrary.

Steps to Take

In light of these developments, it may be prudent for employers with employees implicated by the Order to give consideration to some or all of the following steps.

Determine Which Employees Are Affected, but Exercise Caution When Doing So. Employers should consider issuing a statement of company policy inviting affected employees to contact human resources or another designated office if they are from a Covered Country or anticipate any problems so that the company can provide support. Employers can reach out to known visa-holders, but should be sensitive that seeking out information from other employees concerning their national origin could give rise to complaints of discrimination or harassment. In addition, federal regulations technically do not permit the inspection of I-9 documentation for any purpose other than establishing work authorization.

Advise Employees of the Consequences of Travel Abroad. Employers should caution employees that if they were born in, or are citizens of, the Covered Countries, they should avoid travel (business or personal) outside the U.S. for at least the next 90 days, regardless of their current visa or green card status and even if those employees hold dual citizenship. Employers should direct employees who are scheduled to travel on company business to notify the company if they may be affected by the Order so that the company can determine whether alternate plans can be made or whether immigration counsel should be consulted.

Recommend Foreign National Employees and Green Card Holders Consult Immigration Counsel. If travel absolutely cannot be avoided, employers may want to recommend that employees from Covered Countries seek and retain immigration counsel before leaving the country, or take steps to obtain immigration advice for these employees. Such employees may want to bring certain documentation or information with them to try to protect themselves from detention or undue scrutiny in their travels or reentry.

Be Aware That Company Devices May Be Searched or Seized. Employees who are detained at U.S. borders may have their electronic devices searched or confiscated, even if these devices belong to the employer. Employers should consider giving employees clean devices that do not contain sensitive company information if they are going to travel abroad; for employees who are already abroad, employers should consider requesting that employees back up all company information currently stored on their devices before they attempt to return to the United States.

Consider Assistance to Employees Stranded Abroad. Employers may currently have employees who are stranded outside the U.S. because they were traveling abroad on company business at the time the Order was issued. Employers may be limited in how much help they can offer to such employees, but there are some possible courses of action. For example, an employer may try to assist an employee in gaining entry to a friendlier or nearer country, such as Canada, if the employee is traveling in a remote location or is at risk in their travels (though a visa may be required). An employer may consider enabling employees to work remotely for the time being, perhaps from another company location abroad, until further guidance is issued or the Order expires.

Finally, employers should be aware that the Order does provide that the Secretaries of State and Homeland Security “may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are

otherwise blocked." The Order does not specify a procedure for seeking a waiver under this provision, but it may be possible for an employer of certain high-ranking executives or other unique employees to appeal to the Secretary of State or the Secretary of Homeland Security through appropriate channels on that employee's behalf in order to secure entry or return to the U.S. for such an employee.

Make Alternative Plans for Any Visa-Holders Cleared for Entry Who Have Not Arrived. Employers may have employees from the Covered Countries who obtained H1-B or other visas while abroad, and who have not yet arrived in the U.S. Pending further clarification from the Trump Administration, such employees should be advised to remain in their current country, as they will not be permitted entry into the U.S. if they seek to travel here within the next 90 days. Even if the 90-day ban is not extended, it is possible that the administration could direct the Department of State to cancel such visas, and require the employees to reapply under a revised vetting procedure. Employers will want to make alternative plans in the meantime, and may need to make difficult choices concerning whether to hold or fill positions held by such visa-holders.

Anticipate the Effect on Employees in the U.S. The Order also applies to the adjudication of "benefits" under the Immigration and Nationality Act ("INA"). "Benefits" may include an individual's current immigration status, such as an authorization to work in the U.S. While there is no mention in the Order of deporting persons currently residing in the country legally, individuals from the Covered Countries may encounter difficulty in obtaining change in status, status extension, or employment reauthorization during this 90-day period. Employers may want to consult immigration counsel before seeking any changes in status on behalf of employees—or encourage affected employees to do so—and should anticipate and plan for delays and possible denials.

Remember Legal Obligations. Notwithstanding the Order, federal employment laws still prohibit discrimination on the basis of national origin, religion, and citizenship status. Employers should be thoughtful about taking any action perceived to be adverse to current employees located in the U.S. based on their being implicated by the Order, and should not seek additional documentation from employees who may be affected by the Order (unless an employee's visa status is nearing expiration), as doing so may be cited as evidence of citizenship discrimination. Employers should be sensitive to possible claims of harassment or discrimination in the workplace that might arise from heightened tensions between employees or as a result of affected employees feeling targeted or singled out because of the Order.

Expect Further Developments. Employers should know that the Order provides that additional countries may be added to the current list of countries from which entry is prohibited, and provides that a Presidential proclamation will be issued in the near future prohibiting the entry of foreign nationals from a list of specified countries. At the same time, further legal challenges are anticipated and additional guidance and clarifications are expected. In addition, a draft Executive Order is under consideration that would subject the H1-B program and other immigration policies and procedures to further review. Employers should keep abreast of the changing landscape to best protect employees.

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