

President Issues Narrower Executive Order on Immigration

March 7, 2017

International Employment

Yesterday, President Trump issued a [new Executive Order](#) (the “Order”) titled “Protecting the Nation from Foreign Terrorist Entry into the United States.” This new Order replaces the so-called “travel ban” Executive Order [issued January 27](#) (the “Prior Order”) which was subject to a nationwide [temporary restraining order](#) issued by the U.S. District Court for the Western District of Washington, a stay of which was denied by the United States Court of Appeals for the Ninth Circuit. The new Order, which has narrowed the class of foreign nationals affected, replaces the Prior Order in full and will go into effect on March 16, 2017 (the “Effective Date”).

Overview of New Provisions

Change to the list of restricted countries. The biggest change in the new Order relates to the class of foreign nationals affected. Nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen (the “Restricted Countries”) who are outside the United States on March 16, and do not have a valid U.S. visa as of that date, will be barred from entering the United States for a period of 90 days beginning on the Effective Date. Iraq has been removed from the list of Restricted Countries. However, the Order still contains a section directing U.S. officials to subject applications by Iraqi nationals to “thorough review” in an attempt to discern whether the individual has any ties to ISIS or other terrorist organizations.

Lawful permanent residents and current visa holders no longer affected. Whereas the Prior Order prohibited entry to any national of a Restricted Country, this Order does not apply to such nationals who are current lawful permanent residents of the United States (green card holders), or nationals who presently have a valid visa, nor does it apply to parolees, dual nationals travelling on the passport of a non-restricted country, asylees, refugees who have already entered the United States, and those who have been granted withholding of removal or protection under the Convention Against Torture. Individuals holding diplomatic visas, NATO visas, U.N. visas, G visas, and International Organizations Immunities Act visas, as well as those entering the country for meetings with the U.S. government, are also exempt.

Expanded opportunities for exceptions. The Order also expands the opportunities for U.S. officials to make exceptions to the Order’s provisions on a case-by-case basis. The Prior Order only permitted the Secretaries of State and Homeland Security to make exceptions for visa applicants. The new Order now provides that any consular officer or authorized U.S. Customs and Border Protection (“CBP”) official can make an exception for nationals from the Restricted Countries either in issuing a visa or permitting entry to the United States. The Order also sets forth a detailed but non-exhaustive list of potential scenarios that would justify an exception.

Changes to the Refugee Admissions Program. With respect to the Refugee Admissions Program, the Order suspends the program for 120 days while application and adjudication processes are reviewed to determine what additional procedures are needed. Unlike the Prior Order, however, there is no longer a priority to admit refugees who are religious minorities. In addition, Syrian refugees are no longer subject to an indefinite ban on entering the United States. The annual cap on refugee resettlement will still be lowered from 110,000 to 50,000.

Clarifying the scope of affected individuals. The Order also clarifies some details that led to confusion in airports after the Prior Order was issued. For example, the Order does not affect any individual who received a visa stamp prior to the Effective Date. The Order also provides that anyone whose visa was revoked or cancelled as a result of the Prior Order is entitled to a new travel document confirming that the individual is permitted to travel to the United States and seek entry. Similarly, revocation of an individual's status under the Prior Order cannot be the basis for inadmissibility or denial of status in the future.

Visa interview waiver program. The new Order maintains the Prior Order's temporary suspension of the Visa Interview Waiver Program, thus ensuring that all individuals seeking a non-immigrant visa undergo an interview. However, the new Order exempts from this suspension any individuals traveling on diplomatic visas, NATO visas, U.N. visas, G visas, and International Organizations Immunities Act visas, as well as those entering the country for meetings with the U.S. government.

Considerations for Employers

While the scope of the new Order is narrower than that of the Prior Order, employers should nonetheless determine whether any current or potential employees will be affected by its provisions.

Unlike the Prior Order, the new Order specifically exempts from restriction any individual who has a visa valid as of the effective date. Therefore, any previously affected employees with current immigration status should be able to travel during the 90-day "travel ban" period, if they have a valid visa issued before March 16.

However, in light of the difficulties travelers faced during implementation of the Prior Order, it would be in an employer's best interest to minimize unnecessary travel while authorities adjust to the guidance in the new Order. In addition, employers should bear in mind that since the Prior Order was issued, the media has reported an increase in the detention of individuals at borders and an apparent increase in requests from Customs and Border Patrol agents to search mobile devices carried by detained individuals. This practice has given rise to controversy relating to classified or confidential company information that may be stored on electronic devices carried across the border.

Employers should also advise any employee whose status was temporarily revoked as a result of the Prior Order to seek a new travel document reaffirming the employee's ability to enter the United States. Employers should ensure that the immigration status of employees from restricted countries is up to date and that no employee's visa is set to expire while he or she is travelling outside the United States on business.

United States Citizenship and Immigration Services (“USCIS”) will continue to process visa petitions (i.e., H-1B, L-1, and O-1) for prospective hires from one of the Restricted Countries, but unless those employees have a valid visa issued before March 16, they would not be able to engage in international travel until at least June 14, 2017 (90 days from the Effective Date), and possibly longer. There is nothing preventing the Trump Administration from extending the temporary travel restrictions beyond the 90-day mark, so any travel planning should take that uncertainty into account. Furthermore, after the 90-day review period (and any extensions), the Administration is likely to impose new requirements and restrictions on visa applicants from both the Restricted Countries and potentially from other countries.

If an employer has an employee from a Restricted Country who needs to travel during the 90-day “travel ban” period, the company should consider whether one of the Order’s new exceptions might apply. The Order permits exceptions for foreign nationals who can demonstrate that denial of entry would cause “undue hardship,” including undue hardship on significant business or professional obligations. In the event that a company identifies any such employees, it should consult counsel to determine whether application for an exception may be submitted.

Continued Monitoring

While President Trump’s new Executive Order was drafted specifically for the purpose of minimizing legal controversy, many advocacy groups have threatened to challenge any immigration restrictions whatsoever. With one TRO already successfully entered against the Prior Order, employers should continue to monitor legal developments with respect to this new Order. Employers should also monitor other developments from the Trump Administration related to immigration. Three days before this new Order was issued, USCIS announced that beginning on April 3, 2017, it will temporarily suspend premium processing for all H-1B visa petitions for up to six months. Note that the H-1B program itself remains intact, at least for the time being; it is only premium (expedited) processing of H-1B cases that has been impacted. In addition, as noted in our [prior alert](#), other changes to the H-1B program may be forthcoming.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Employment practice:

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