

Immigration Executive Orders – What You And Your Clients Need To Know

Cyrus D. Mehta

Practising Law Institute

February 15, 2017

Three Executive Orders Relating To Immigration

- **Protecting the Nation from Foreign Terrorist Entry into the United States – January 27, 2017.** <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>
- **Enhancing Public Safety in the Interior of the United States - January 25, 2017.** <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>
- **Border Security and Immigration Enforcement Improvements – January 25, 2017.** <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>

Protecting the Nation from Terrorist Entry (Travel Ban)

- A 90-day ban on the issuance of U.S. visas to and entry to the U.S. of anyone who is a national of one of seven “designated” countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.
- An immediate review by the U.S. Department of Homeland Security (DHS) of the information needed from any country to adequately determine the identity of any individual seeking a visa, admission or other immigration benefit and that they are not “security or public-safety threat[s].” This report must be submitted within 30 days and must include a list of countries that do not provide adequate information.
- The suspension of the U.S. Refugee Admissions Program (USRAP) for 120 days.
- Indefinitely bans Syrian refugees.
- The implementation of “uniform screening standards for all immigration programs” including reinstating “in person” interviews.
- A requirement that all individuals who need visas apply for them in person at U.S. consulates, rather than allowing “mail-in” or drop-box applications.

Travel Ban – Litigation Update

- Several federal courts issued TROs on individual cases, including in New York, Boston, and Virginia.
- On February 3, 2017, Judge James Robart of the U.S. District Court for the Western District of Washington, in Seattle, issued a TRO [http://cdn.ca9.uscourts.gov/datastore/general/2017/02/03/17-141_TRO_order.pdf] that temporarily blocks the government from enforcing the travel ban at all.
- DHS announced on February 4 that it has “suspended any and all actions implementing the affected sections of the Executive Order” [<https://www.dhs.gov/news/2017/02/04/dhs-statement-compliance-recent-court-order>].

Travel Ban – Litigation Update

- On February 9, the Court of Appeals issued a published Order denying the motion for stay pending appeal [<http://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf>].
- Entry ban is not in effect and travelers from the affected countries are being allowed to enter the United States.
- WH Advisor Stephen Miller stated that the Trump Administration may issue new EO that will survive judicial review.

Travel Ban – Litigation Update

- In the meantime, the case will also proceed before Judge Robart, as he denied a government request to postpone further proceedings pending action by the Ninth Circuit [<http://www.cnn.com/2017/02/13/politics/trump-delay-travel-ban-seattle/>].
- There were also reports that the government might also seek an emergency stay from the Supreme Court [<http://www.scotusblog.com/2017/02/9th-circuit-keeps-trumps-immigration-order-hold/%20>], or from Justice Anthony Kennedy as Circuit Justice for the Ninth Circuit, or seek en banc review at the Ninth Circuit (that is, review by the whole court or a larger 11-judge panel). None of these things appear to have happened as of 6 pm EST on February 14, although a judge of the Ninth Circuit did call for a vote on rehearing en banc, and so an order of the court's En Banc Coordinator requested the parties to file briefs regarding their position on such rehearing by February 16 [https://d3bsvxk93brmko.cloudfront.net/datastore/general/2017/02/10/17-35105_Supplemental%20Briefing%20Order.pdf].
- For a comprehensive overview of legal challenges, see American Immigration Council Practice Advisory https://www.americanimmigrationcouncil.org/practice_advisory/challenging-president-trumps-ban-entry.

Takeaways from Washington v. Trump, Ninth Circuit

- WA had standing based on harms to its public universities – some would not be able to enter state colleges while others would be blocked from doing research.
- President does not have unfettered discretion, and his authority is reviewable on immigration, as in national security matters, when they go beyond the Constitution.
- EO was defective on its face as it included green card holders, who have due process rights when they arrive in the US.
- Even others, like nonimmigrants, may have due process rights when linked to US citizens or institutions.

Takeaways from *Washington v. Trump*, Ninth Circuit

- WA also made serious Establishment Clause claim, arguing that EO was intended to disfavor Muslims, based on Trump's campaign statements of his intention to impose a Muslim ban. However, the Ninth Circuit reserved judgment on this, as there was a showing of Due Process violations.
- When balancing the government's claim concerning national security with the public interest, the Ninth Circuit observed that the government had not established a sufficient threat to national security besides just saying so.

Important Takeaway from Aziz v. Trump

- Judge Leonie Brinkema of the U.S. District Court for the Eastern District of Virginia issued an Opinion on February 13 finding that the Commonwealth of Virginia was likely to succeed on its challenge to the merits of the travel ban based on violation of the Establishment Clause of the First Amendment, and so entered a preliminary injunction [<http://wtvr.com/2017/02/13/virginia-court-grants-preliminary-injunction-against-immigration-ban/>]
- The injunction forbids enforcement of the ban against anyone who resides in Virginia, or is a student at or employed by an educational institution administered by Virginia, and who was an LPR or had a valid immigrant visa, work visa or student visa as of 5 pm Eastern time on January 27. Even if the TRO from the Western District of Washington were to be stayed, this more limited preliminary injunction could remain in effect.

Important Interpretations of Travel Ban if Stay or Injunction are Lifted

- Does not apply to dual nationals who enter the U.S. on a passport other than the passport of the country that is banned.
- Does not apply to lawful permanent residents.
- Entry bar would not affect adjudication of benefits for persons in the U.S., adjudication of benefits for LPRs, or adjudication of visa petitions for persons outside the U.S.
- Underlying visas will be revoked, although non-immigrant can still maintain status but could theoretical be placed in removal.
- Allows for exceptions on case by case basis when in the national interest, but it is not entirely clear how it will be applied.
- DOS and DHS may admit 50,000 refugees for fiscal year 2017 (after the suspension is lifted) - represents a more than 50% reduction in the number of refugee admissions.
- For details, see Entry Ban FAQs – Updated 2/14/2017,
<http://cyrusmehta.com/blog/2017/02/15/entry-ban-faqs-updated-2142017/>

Executive Order on Enhancing Public Safety in the Interior of the United States (Interior Enforcement)

- Directs DHS to hire 10,000 new ICE officers, to the extent permitted by law and subject to appropriations availability.
- Reverses Obama administration's priorities for deportation and drastically expands priorities.
- Bolsters federal-state agreements under INA 287(g).
- Cuts off federal grants to Sanctuary jurisdictions.

Highlights of Interior Enforcement EO: Expanded Priorities for Removable Non- citizens

- Have been convicted of any criminal offense;
- Have been charged with any criminal offense, where such charge has not been resolved;
- Have committed acts that constitute a chargeable criminal offense;
- Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- Have abused any program related to receipt of public benefits;
- Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
- In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Additional Highlights of Interior Enforcement EO

- Ensure assessment and collection of fines/penalties under law from unlawfully present immigrants.
- Implement sanctions provided under INA 243(d) on recalcitrant countries who do not accept their nationals subject to removal from US.
- Exclude persons who are not US citizens or LPRs from Privacy Act regarding personally identifiable information.
- Provide reports on immigration status of incarcerated non-citizens under supervision of Federal Bureau of Prisons and US Marshals Service, as well as on immigration status of convicted non-citizens in State prisons and local detention centers throughout the US.

Effects of Interior EO

- ICE arrested 600 non-citizens across 11 states in last week; ICE claims it is routine enforcement but advocates believe it is enhanced enforcement pursuant to the new EO. <http://www.vox.com/policy-and-politics/2017/2/14/14596640/immigration-ice-raids>
- ICE arrested a DACA recipient, Daniel Ramirez, who has filed a constitutional challenge to his arrest and detention. <https://www.nytimes.com/2017/02/14/us/illegal-immigration-daca-arrest.html?smprod=nytcore-iphone&smid=nytcore-iphone-share>
- In the NYC area, the fact sheet ICE put out, <https://www.ice.gov/doclib/news/library/factsheets/pdf/factsheet-fugops-ny.pdf>, indicates that 38 of the 41 people arrested had criminal convictions.

Executive Order: Border Security and Immigration Enforcement Improvements (Border Security)

- Secure the southern border through immediate construction of a wall.
- Detain individuals apprehended on suspicion of violating federal or state law, including federal immigration law, pending further proceedings.
- Expedite determinations of apprehended individuals' claims of eligibility to remain in the US.
- Remove promptly individuals whose claims to remain in US have been rejected, after imposition of any criminal or civil sanctions.
- Cooperate fully with States and local law enforcement.

Highlights of Border Security EO

- Construction of new detention facilities near southern border to accommodate expanded detained population.
- Stricter application of the parole statute and regulations.
- Expansion of expedited removal to the maximum extent possible – including individuals without documents and cannot prove that they have been continuously present for the prior 2 years.
- Applicants for admission arriving on land from Mexico and Canada are returned to those countries to await their removal proceedings in US; problematic if in Mexico as one can face persecution there and be deported back to home country.

Know Your Rights

- You have the right to remain silent. You may refuse to speak to immigration officers.
- Carry a KYR card and show it to an immigration officer who stops you.
- Do not open your door – unless ICE has a warrant signed by a judge.
- You have the right to speak to a lawyer.
- Before you sign anything, talk to a lawyer.
- Always carry with you any valid immigration document you have.
- If you are worried ICE will arrest you, let the officer know you have children.

Questions at Port of Entry/Border

- If asked about your political opinions, answer truthfully and emphasize that you are entering for purposes of conducting legitimate and peaceful activities.
- CBP can find inadmissible a non-citizen who may engage in unlawful activity in US under INA 212(a)(1)(3).
- DHS can also expeditiously remove nonimmigrants. Ask for voluntary withdrawal rather than summary removal order that triggers 5 year bar.
- USC or LPR can refuse to provide secure data unless served with a warrant, but then be prepared to stay many hours at the airport. *US v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc); *US v. Flores-Montano*, 541 U.S. 149 (2004).
- Nonimmigrants may face expedited removal for refusing to do so.
- See *What Are Your Rights If Border Agents Want To Search Your Phone?*
<https://www.nytimes.com/2017/02/14/business/border-enforcement-airport-phones.html>

Rights of Lawful Permanent Residents – Green Card Holders

- US must be your home in order to avoid allegation of abandonment of residence at POE.
- LPRs should not be regarded as seeking an admission into US unless they have triggered grounds in INA 101(a)(13)(C):
 - Has abandoned or relinquished that status;
 - Has been absent from US for continuous period in excess of 180 days;
 - Has engaged in illegal activity after departing US;

Rights of Lawful Permanent Residents – Green Card Holders

- Has departed from US while under legal process seeking removal of alien from US, including removal proceedings and extradition proceedings;
- Committed an offense identified in INA 212(a)(2), unless since such offense non-citizen was granted relief under 212(h) or 240A(a); or
- Is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to US after inspection and authorization by immigration officer.

Rights of Lawful Permanent Residents – Green Card Holders

- Do not be coerced into signing I-407 to abandon LPR status; burden of proof is on DHS to establish through clear, convincing and unequivocal evidence that you are not entitled to the status.
- LPR should seek removal proceeding rather than be refused admission.
- Abandonment of LPR status by signing I-407 can also have serious tax consequences.

Draft Executive Orders

- Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Program.
- Executive Order on Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility.
- Executive Order – Ending Unconstitutional, Executive Amnesties.

Additional Resources

- Impact of President Trump's Executive Orders on Asylum Seekers, <https://harvardimmigrationclinic.wordpress.com/2017/02/08/hirc-releases-report-on-effect-of-executive-orders-on-refugees-urges-canada-to-reconsider-safe-third-country-agreement/>
- National Immigration Law Center Updates on EOs and Know Your Rights, <http://us11.campaign-archive1.com/?u=f6c2f9aea8a6a89b0e6dc23e0&id=3e0c3b2965&e=ad6c8eff96>
- The University of Michigan School of Law webpage tracking challenges to the EO: <https://www.clearinghouse.net/featuredCase.php?id=40>