PRACTICE ADVISORY[1]
February 8, 2017 (Updated)

CHALLENGING PRESIDENT TRUMP'S BAN ON ENTRY

By The American Immigration Council[2]

On Friday, January 27, 2017, President Donald Trump issued an Executive Order (EO), entitled Protecting the Nation From Foreign Terrorist Entry Into the United States, which went into immediate effect upon signing. Section 3(c) of this EO imposes a 90-day suspension of visa issuance to, and entry into the United States by, most immigrants and nonimmigrants from seven predominantly Muslim countries, with case-by-case exceptions in the national interest available under Section 3(g). The seven countries are: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[3] After agency review, this suspension may be extended, and the government may add other countries that do not meet "vetting" requirements. In addition, Section 5 of the EO suspends the U.S. Refugee Admissions Program for 120 days, directs the prioritization of certain religious persecution claims, suspends the admission of Syrian refugees indefinitely, limits the number of refugee admissions to 50,000 for Fiscal Year 2017, and provides for certain case-by-case exceptions to the refugee bans.[4]

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[2] Aaron Reichlin-Melnick was the principal author of this practice advisory, and Melissa Crow and Leslie Dellon provided assistance in drafting and updating it. The authors wish to thank Michelle Mendez, Denyse Sabagh, and Palma Yanni, who provided helpful comments during the writing process. Questions regarding this practice advisory should be directed to clearinghouse@immcouncil.org.

[3] These seven countries were designated under the provisions of INA § 217(a)(12) (8 U.S.C. § 1187(a)(12), which provides for an exception to the Visa Waiver Program for nationals of certain designated countries. This provision, which was enacted in 2015 and first implemented in January 2016, H.R. 2029, Consolidated Appropriations Act, 2016, P.L. 114-116 (2015), excludes from the Visa Waiver Program individuals who are nationals of designated countries or who had visited those countries on or after March 1, 2011, and requires them to seek advance consular approval before traveling to the United States. The EO references INA § 217(a)(12) solely for the list of countries designated and does not appear to affect the operation of that provision.

[4] The EO includes case-by-case exceptions in the national interest for refugees, with particular reference to those facing persecution as religious minorities in their countries of nationality.

The EO was purportedly issued pursuant to 8 U.S.C. § 1182(f), which grants the executive branch broad authority to suspend the entry of individual noncitizens or a class of noncitizens into the United States. However, the President's authority under § 1182(f) is subject to statutory and constitutional limits, which have generated a myriad of ongoing legal challenges to the EO.

This practice advisory provides information about how the EO is being implemented, offers resources and practice tips for attorneys whose clients are affected by the entry ban under Section 3(c) of the EO,[5] and summarizes legal challenges that have been filed to date.

I. Implementation

EO Implementation Temporarily Suspended

As of this writing, a temporary restraining order (TRO) issued in *State of Washington v. Trump*, Case No. 17-35105, has halted the implementation of the EO ***nationwide*****.** Issued on February 3, 2017 by the United States District Court for the District of Washington**,** the TRO prohibits the federal government from enforcing: § 3(c) (the 90-day ban on "immigrants and nonimmigrants" entering the United States); § 5(a) (the 120-day ban on the U.S. refugee program); § 5(b) (prioritizing certain religious-based refugee claims); § 5(c) (indefinitely suspending Syrian refugee admissions); and § 5(e) (to the extent the section "purports to prioritize refugee claims of certain religious minorities," permitting the discretionary admission of refugees on a case-by-case basis in the national interest). Pending a further court order, these EO provisions cannot be enforced at any U.S. port of entry (land or air).

On February 4, the federal government appealed to the U.S. Court of Appeals for the Ninth Circuit, filing a combined emergency motion for an immediate administrative stay and for a stay pending appeal. The Ninth Circuit denied the administrative stay, set a very short briefing schedule for the emergency motion, and heard oral argument on February 7.[6] On February 9, the Ninth Circuit issued a unanimous (3-0) decision denying the government's request for a stay. The Court first found that the EO's injury to state universities gave Washington standing to sue, then rejected the government's claim that the EO was unreviewable and held that the government had not demonstrated a strong likelihood of success on appeal.[7]

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[5] Section 3(c) provides: "[P]ursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on 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)."

[6] The Ninth Circuit has posted a video of the argument before the District Court, an audio recording of the oral argument before the Ninth Circuit, and selected filings from its docket.

[7] The Ninth Circuit's decision is available here.

Categories of foreign nationals not subject to the EO, even if implementation resumes

A. Lawful permanent residents (LPRs) from the affected countries

The Administration's position has evolved from LPRs being barred from entry under the EO, to being categorically eligible for a "national interest" waiver (under § 3(g) of the EO), to the correct position that LPRs are ***not*** included in the EO.

CBP has stated as part of a series of Questions and Answers about the Executive Order that "[u]nder the recent guidance from the White House," the EO does not apply to returning LPRs.

B. Dual nationals from the affected countries

Because the EO refers to individuals "from" the affected countries, the federal government initially applied it to both individuals born in the affected countries and individuals who are dual nationals of one of those countries. Then, "country exceptions" began to appear, such as for citizens of the United Kingdom and of Canada. However, on February 2, the U.S. Department of State (DOS) posted an "alert" confirming that dual nationals with passports issued by countries not subject to the ban are to be treated like other applicants from "unrestricted" countries:

> This Executive Order does not restrict the travel of dual nationals from **any** [emphasis in original] country with a valid U.S. visa in a passport of an unrestricted country. Our Embassies and Consulates around the world continue to process visa applications and issue nonimmigrant and immigrant visas to otherwise eligible visa applicants who apply with a passport from an unrestricted country, even if they hold dual nationality from one of the seven restricted countries. Please check with your local Embassy or Consulate for country specific information.

U.S. Customs and Border Protection (CBP) has confirmed in its "Questions & Answers" that dual nationals from the affected countries are being admitted to the United States "when eligible," based on the travel documents they present. The DOS and CBP pronouncements reflect that even if the EO is implemented again, a dual national who presents a valid passport issued by an "unrestricted country," which contains a valid U.S. visa, and who is otherwise eligible to be admitted to the United States, will not be subject to the travel ban.

Still uncertain: USCIS adjudication of applications and petitions filed by or on behalf of foreign nationals from the affected countries

Clarification is still required as to what will happen to applications or petitions pending with U.S. Citizenship and Immigration Services (USCIS) if EO implementation resumes. On January 30, 2017, one publication reported that USCIS had taken the position that decisions on all pending immigration benefits applications or petitions filed by or on behalf of nationals of the affected countries within the United States, including applications for asylum, adjustment of status and naturalization, would be suspended indefinitely as a result of the EO. A leaked email, supposedly sent to all USCIS field offices by Daniel M. Renaud, Associate Director of Field Operations for USCIS, allegedly stated:

> Effectively [*sic*] immediately and until additional guidance is received, you may not take final action on any petition or application where the applicant is a citizen or national of Syria, Iraq, Iran, Somalia, Yemen, Sudan, and Libya … Field offices may interview applicants for adjustment of status and other benefits according to current processing guidance and may process petitions and applications for individuals from these countries up to the point where a decision would be made.
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> At that point, cases shall be placed on hold until further notice and will be shelved with specific NFTS [National File Tracking System] codes which will be provided through the Regional Offices … Offices are not permitted [to] make any final decision on affected cases to include approval, denial, withdrawal, or revocation.
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> Please look for additional guidance later this weekend on how to process naturalization applicants from one of the seven countries listed above who are currently scheduled for oath ceremony or whose N-400s have been approved and they are pending scheduling of oath ceremony. We expect to issue more detailed guidance and procedures as needed in the coming days.

It is unclear what—if any—authority USCIS relied on to justify this decision. It appears that USCIS may have backtracked from this position. A February 2, 2017 memo from the Acting Director, USCIS, states:

> Section 3(c) of the Executive Order does not affect USCIS adjudications of applications and petitions filed for or on behalf of individuals in the United States regardless of their country of nationality. Section 3(c) also does not affect applications and petitions for individuals outside the United States whose approval does not directly confer travel authorization (including any immigrant or nonimmigrant visa petition).
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> USCIS will continue adjudicating all affirmative asylum cases according to existing policies and procedures.

The memo also states that USCIS will continue certain refugee interviews.

If this memo reflects USCIS' current position, then even if the EO resumes, USCIS could still approve family-based (including refugee/asylee relative petitions) and employment-based petitions. Whether the individuals abroad, who are the beneficiaries of these petitions, could obtain the particular visas necessary to travel to the United States would remain an open question.

II. Practice Tips and Resources

LPR clients from affected countries who are physically present in the United States should be discouraged from traveling outside the country unless absolutely necessary even though CBP has referred on its website to White House guidance stating that the EO does not apply to them. Clients who *must* travel should be aware that they could still be referred to secondary inspection upon returning to the United States for further questioning. The inspection may include questions about their religious beliefs and their political views, as well as requests for access to their social media accounts (e.g., Facebook or Twitter usernames and passwords).

If a client decides to depart, consider providing him or her with a copy of a signed Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative), along with a legal opinion letter specifying the basis for reentry into the United States. Clients also should be made aware that CBP officials may encourage them to relinquish LPR status, and be advised not to sign any forms before consulting with counsel.

Clients from affected countries who are outside the United States and seek to enter (or reenter) on any visa that was valid before the EO was issued and has not expired should travel to the United States as soon as possible since no one can predict how long the court order will remain in effect. This includes those whose visas were physically cancelled pursuant to the EO. Prior to the entry of the TRO in *Washington v. Trump*, DOS had "provisionally revoked" immigrant and nonimmigrant visas of nationals from the affected countries. If DOS or CBP had physical possession of a passport (for example, if DOS had placed a visa in the passport but had not yet returned the passport to the individual, or an individual had presented himself to a CBP officer for admission to the United States), the visa would have been physically cancelled. Otherwise, visas were "virtually" cancelled so that nationals of the affected countries no longer had valid entry documents for admission to the United States, although the visas themselves remained "untouched."

As a result of the TRO, even those individuals whose visas were physically cancelled can currently travel to the United States and be admitted if otherwise eligible. On February 4, 2017, DOS issued an "alert" indicating that provisionally revoked visas are once again valid for travel to the United States. However, the alert also states that unless CBP grants parole or waives the visa requirement at the port of entry, individuals whose visas were physically cancelled or have now expired will have to reapply. CBP has informed the American Immigration Lawyers Association (AILA), but has not publicly posted, that it will waive the visa requirement and that it has advised airlines to contact CBP for authorization to permit boarding.

Clients from affected countries who are currently in the United States and have valid nonimmigrant visa status should be discouraged from traveling abroad since they could be "stuck" abroad if the EO travel ban is reinstated. Any dual national with a valid visa in a passport

issued by an "unrestricted" country can continue to travel.[8] Clients also should be advised of the risks of overstaying their validity periods.

For clients who are nationals of one of the affected countries and have applied to USCIS for a benefit that is not being adjudicated, attorneys should consider filing a mandamus action in federal court. Under the Mandamus and Venue Act, 28 U.S.C. § 1361, a court may compel an agency to take action, but cannot compel the agency to exercise its discretion in a particular manner or grant the particular relief a plaintiff seeks. For more information about filing immigration-related mandamus actions, please see American Immigration Council Practice Advisory, Mandamus Actions: Avoiding Dismissal and Proving the Case.

For clients from affected countries who may be detained at U.S. airports despite the court order, we recommend that you consider filing habeas corpus petitions seeking their release. Links to three sample habeas petitions prepared by the Worker and Immigrant Advocacy Rights Clinic at Yale Law School—for returning LPRs, non-LPRs, and "next friends" filing on behalf of family members of non-LPRs—are provided for reference. We encourage attorneys to consider various other legal claims referenced in the pending legal challenges discussed in Section III, below.

For additional information on the implications of the EO, please see AILA's Practice Alert on the travel ban. If you have additional questions, please feel free to email the Council at clearinghouse@immcouncil.org.

III. Legal Challenges Under the EO

Pending challenges to the EO fall into three categories discussed below. For details regarding the status of particular cases and pleadings filed to date, please see Lawfare or the University of Michigan Law School Clearinghouse.

Challenges to CBP actions at airports

Habeas petitions and complaints were filed in various U.S. district courts across the country challenging, among other things, the detention of individuals from the affected countries with valid entry documents at JFK International Airport (E.D.N.Y.), Logan Airport (D. Mass.), Dulles International Airport (E.D. Va.), and Los Angeles International Airport (C.D. Ca.). Some of the suits were framed as class actions, while others were filed on behalf of individuals.

[8] These dual nationals also can still apply for and be issued a visa, if otherwise eligible, but the ever-present risk that another visa will not be issued may be greater under current circumstances. Thus, clients should be cautioned before travel if their visas have expired, or will expire, while they are abroad. The same advice provided above for LPRs as to the G-28, legal opinion letter, and not signing any forms applies here. Dual nationals also should be made aware of alternatives they could propose to CBP officials (such as requesting that they be paroled into the United States and scheduled for deferred inspection, instead of withdrawing their application or otherwise relinquishing nonimmigrant status), so that they will be able to consult with counsel before a final CBP determination is made.

The petitions and complaints encompass a variety of constitutional and statutory challenges, including:

- Violations of procedural and substantive due process rights under the Fifth Amendment;
- Violation of the equal protection component of the Due Process Clause of the Fifth Amendment because the EO unjustifiably discriminates on the basis of national origin, was substantially motivated by animus against Muslims, and has a disparate effect on Muslims;
- Violation of the Establishment Clause of the First Amendment by giving preference to non-Muslims;
- Violations of the Immigration and Nationality Act by depriving individuals of the right to apply for asylum and other humanitarian protection and/or to have immigration benefits petitions and applications adjudicated;
- Violations of the Administrative Procedure Act; and
- Violations of the Religious Freedom Restoration Act.

Temporary restraining orders were granted in several of these cases:

- In the JFK case, the court issued a nationwide stay of removal on January 28, temporarily preventing the government from deporting refugees and other individuals from the affected countries who had lawful authority to enter the United States. In a separate January 28 order, the court directed the government to produce a list of names of all individuals detained by the government pursuant to the EO. On February 3, the court extended the TRO until February 21.

- In the Dulles case, the court issued a TRO on January 28, ordering the government to give lawyers access to all LPRs being detained at the airport and prohibiting them from removing any petitioners who were detained. However, two of the named petitioners who were sons of a U.S. citizen (also a named petitioner) were removed by CBP after being coerced into abandoning their applications for admission on immigrant visas (to become LPRs).[9] After granting the Commonwealth of Virginia's motion to intervene in the case, the court extended the TRO through February 10, and ordered the federal government to provide the Commonwealth with a list of any Commonwealth resident who had been denied entry or removed from the United States since the EO was issued, and who was already an LPR or had an immigrant visa or a valid student visa (including dependents). While the individual petitioners voluntarily dismissed the suit on February 7, Virginia is proceeding with a motion for preliminary injunction, which is currently scheduled for hearing on February 10.

[9] On January 30, an amended habeas petition and class complaint for declaratory and injunctive relief was filed to include individuals who had immigrant visas in their passports but were coerced into abandoning their claims to lawful permanent residence and returned to their departure countries, as well as returning LPRs who were coerced into abandoning their LPR status. On February 6, the named petitioners who had been turned around at Dulles reportedly returned to the U.S. and were inspected and admitted as LPRs.

- In the Logan Airport case, the TRO that had been in effect until February 5 (under which individuals from the affected countries who arrived at Logan Airport with valid entry documents could not be detained or removed and had to be screened by CBP in accordance with pre-EO legal standards, and CBP had to notify the airlines accordingly) was not extended. The court concluded that the action was moot as to the two named petitioners who had been admitted to the United States. An amended habeas corpus petition and complaint for declaratory and injunctive relief was filed on February 1.

Involvement by State plaintiffs

In the JFK, Dulles, and Logan Airport cases discussed above, the relevant states – the State of New York, the Commonwealth of Virginia, and the Commonwealth of Massachusetts (along with the University of Massachusetts) – have moved to intervene as plaintiffs. Other states have filed independent challenges, based on their proprietary interests (including economic losses resulting from bans on entry for tourists, students, and workers, among others) and as *parens patriae*, to protect the health, safety and welfare of their residents.

- As discussed in § I, *supra*, the States of Washington and Minnesota were successful in obtaining a temporary restraining order, of indefinite duration, prohibiting nationwide implementation of the EO.

- On February 3, Hawaii filed suit in the federal district court in Hawaii, along with a motion for a temporary restraining order.

Other pending legal challenges

- On January 30, the American Immigration Council, the Northwest Immigrant Rights Project (NWIRP), and the National Immigration Project of the National Lawyers Guild (NIPNLG) filed a nationwide class action lawsuit, *Ali v. Trump*, in federal district court in Seattle, Washington. This case is before the same judge who entered the TRO in the case filed by the States of Washington and Minnesota. The case challenges the suspension of immigrant visa processing under the EO for nationals of the seven affected countries, who are prohibited from traveling to the United States, and their petitioning USC and LPR relatives in the United States. The plaintiffs allege that § 3 of the EO violates an explicit statutory prohibition on discrimination under 8 U.S.C. § 1152(a)(1)(A), as well as their constitutionally protected rights to family, marriage and equal protection. A motion for a temporary restraining order and preliminary injunction was filed on February 6, 2017.

- On February 1, the ACLU, NIPNLG, NWIRP, the Law Offices of Stacy Tolchin, and Perkins Coie LLP filed an amended complaint in *Wagafe v. Trump*, a class action lawsuit in the Western District of Washington that challenges USCIS's suspension of adjudication of pending applications for immigration benefits for individuals from the seven affected countries who are residing in the United States, including, but not limited to, applications for asylum, naturalization, lawful permanent residence and employment

authorization. The parties claim that suspending adjudication violates the INA and that the government has a mandatory duty to adjudicate; that the EO violates the Establishment Clause of the First Amendment and the Procedural and Substantive Due Process Clauses, as well as the equal protection component of the Due Process Clause of the Fifth Amendment and that the "extreme vetting" of naturalization and adjustment of status applications violates the INA, its implementing regulations and the APA.

- On January 30, the Council on American-Islamic Relations filed a nationwide class action, *Sarsour v. Trump*, in the Eastern District of Virginia. The plaintiffs identified by name are described as Muslim and as holding positions with various organizations that work to protect the rights of Muslims in the United States. The unnamed plaintiffs are identified as Muslims lawfully present in the United States, including U.S. citizens, LPRs, students and asylees, many of whom are from the affected countries. The plaintiffs challenge their inability to travel freely into and out of the United States, as well as their inability to apply for immigration benefits or to renew existing benefits. The complaint alleges violations of the Establishment and the Free Exercise Clauses of the First Amendment, the APA, and the equal protection component of the Due Process Clause of the Fifth Amendment. The complaint is notable for its allegations that the "secondary purpose" of the EO is the "initiation of the mass expulsion of Muslims" who are immigrants or nonimmigrants residing in the United States by "denying them the ability to renew their lawful status or to receive immigration benefits" solely based on religious beliefs.

- On January 31, the Arab American Civil Rights League, on behalf of its members, and individual plaintiffs who are LPRs, filed *Arab American Civil Rights League v. Trump* in the federal district court for the Eastern District of Michigan. Plaintiffs maintain that the EO violates the Establishment Clause of the First Amendment, the equal protection component of the Due Process Clause of the Fifth Amendment, substantive due process under the Fifth Amendment for denying the right to familial association by prohibiting travel, the APA, and the Religious Freedom Restoration Act. Plaintiffs allege that the EO as written prohibits LPRs from traveling abroad or returning to the United States, despite later statements by the government that LPRs were not included in the EO. On February 2, the court issued an order permanently enjoining the government from applying Sections 3(c) (the 90-day travel ban) and 3(e) (any subsequent travel ban) to LPRs. The court also issued a separate order setting a hearing on plaintiffs' motion for TRO for February 13.

- On February 2, the ACLU of Northern California, the ACLU of Southern California, the ACLU of San Diego, and the ACLU National Immigrants' Rights Project, along with Keker Van Nest & Peters LLP as counsel for plaintiffs, filed *Al-Mowafak v. Trump*, a class action lawsuit, in the federal district court for the Northern District of California. Plaintiffs are three students at California universities, the ACLU of Northern California, and Jewish Family & Community Services East Bay. The individual plaintiffs seek to represent a class of all people who are nationals of Iran, Iraq, Libya, Somalia, Sudan,

Syria, or Yemen and who currently are, or recently have been, lawfully present in California and who would be able to travel to the United States or leave and return to the United States if not for the Executive Order. Claims for relief arise under the First Amendment Establishment and Free Exercise Clause and Speech and Assembly Clauses (on behalf of U.S. citizens who seek to communicate and assemble with people affected by the travel ban), equal protection under the Fifth Amendment Due Process Clause, the Religious Freedom Restoration Act, and the INA and APA.

- On February 7, the ACLU and the National Immigration Law Center filed *International Refugee Assistance Project v. Trump*, a nationwide class action lawsuit, in federal district court in Baltimore, Maryland, on behalf of the International Refugee Assistance Project and the Hebrew Immigrant Aid Society (HIAS), in their own right and on behalf of their clients, and on behalf of individual plaintiffs. The organizations maintain that the EO has caused substantial harm to their missions and also seek to represent any individuals in the United States who have been affected by the EO, including all U.S. citizens and LPRs who have petitioned for family members from one of the seven affected countries, any refugees in the United States who seek to be reunited with family, and any current visa-holders in the United States who cannot travel abroad because of the EO. The individual plaintiffs include U.S. citizens and LPRs who are Muslims, all of whom come from countries included in the EO. The plaintiffs allege that Sections 3 and 5 of the EO violate the Establishment Clause by discriminating against Muslims, as well as their equal protection rights. In addition, the plaintiffs allege that the EO violates the INA's explicit statutory prohibition on discrimination under 8 U.S.C. § 1152(a)(1)(A), the Refugee Act's requirement that the refugee status be granted "without regard to … religion," the Religious Freedom Restoration Act, and the APA.