IADC COMMITTEE NEWSLETTER

EMPLOYMENT LAW

February 2017

IN THIS ISSUE

This article addresses what employers should know about the January 27, 2017 Executive Order concerning visa issuance and travel into the United States.

What Employers should know about the January 27, 2017 Executive Order Concerning Visa Issuance and Travel into the United States

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The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Introduction

On Friday, January 27, 2017, President Trump signed an Executive Order (EO) titled "Protecting The Nation From Terrorist Attacks By Foreign Nations." The EO addresses immigration practices in US Consular posts and Embassies around the world, and inspection and admission practices at the United States border. Considerable press coverage, of dramatically varying accuracy, has followed issuance of this EO. It is important for employers with foreign national employees to know how this EO will or will not affect them.

The Principal Operational Effects of the EO

90 day Ban on Certain Visas

A 90 day ban on issuance of visas, for entry into the United States, to anyone who is a national of seven (7) select countries. Those countries are Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. These countries were targets of the prior administration's action in February 2016, which banned, or severely curtailed visa-waiver travel into the United States, if the individual had traveled to any of the listed terrorism-connected countries within specified periods.

Potential Exception to Ban

A 90 day ban on the entry to the United States of nationals of the seven (7) countries listed in (A). Note, though, an exception to the entry ban couched in vague language was included in the EO.

Mandate to Department of Homeland Security

The Department of Homeland Security (DHS) has been ordered to immediately assess the information needed- from other countries- to adequately determine within 30 days, the identity of persons seeking immigration benefits from the United States, such as visas or admission, and that the applicant is not a "security or public-safety" threat. Countries which do not provide adequate information will be identified and listed.

Suspension of Refugee Admissions

The EO suspends the operation of the United States Refugee Admissions Program for 120 days. This program is the broad name given to an amalgam of services by United States agencies and private US and International participants, which together comprise and administer the active identification, vetting recommendation, processing and resettlement of persons as refugees in the US.

"Uniform Screening Standards"

The EO calls for the development and implementation of "uniform screening standards for all immigration programs" to reduce the risk of admitting persons who would be a security or public threat. Part of

this includes expanding the use of 'in-person' interviews for visa applicants.

In-Person Application for Visas

The EO requires persons, who need visas to enter the United States, to apply for their visa in person at the Consulate, instead of transmitting them by mail or drop box.

Questions and Analysis

What Employees are Subject to the Ban?

The first question is whether or not an employer's employees are affected. Obviously, if the person is not a national of a listed country, the entry and visa ban of the EO does not apply. Since the EO bans "nationals" of the listed countries, its scope appears to capture dual citizens and others whose birth may qualify them as "nationals" of a listed country. This means that traveling on the passport of the unlisted country is not a guaranteed way to avoid the entry ban. Importantly, on February 2, 2017, the US Department of State announced "Our Embassies and Consulates around the world will 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." https://travel.state.gov/content/travel/en/news/important-announcement.html Hopefully this State Department position will be manifested at the border by CBP admitting individuals on unrestricted country passport US visas. Employers, unaware of an employee's dual national status, will not be in a position to consult on the issue. Indeed, the stigma of being a national of a listed country could reinforce the decision to keep it secret.

Considerations of Travel by Employees

Several direct consequences of the EO should be considered by employers. Because the EO applies to green card[1] holders and non-immigrants alike, and since exceptions to the ban are to be dealt with solely on a case-by-case basis, employers with employees from the affected countries should know that, if they leave the United States, for any reason, it may be extremely difficult, or impossible, for them to return over the short or intermediate term. They should, thus, seriously consider any decision to depart the United States.

Employees from these countries who are already overseas may similarly find it extremely difficult, or impossible to return to the United States. This is especially true if the person holds only a non-immigrant visa, as opposed to a green card. As mentioned above, Section 3(g) addresses exceptions to the general ban, stating, generally, that the Secretaries of State and the Department of Homeland Security may admit individuals

[1] Green card holder is the common term for persons admitted as lawful permanent residents.

despite the ban "on a case-by-case basis, and when in the national interest."

Potential Green Card Exemption

Over the weekend of January 28-29, 2017, Department of Homeland Security Secretary, J. Kelly, stated that valid Green-card holders with no other 'derogatory' information would be candidates for the 'case by case' exception to the ban. The CBP declared on January 29, 2017, consistent with Secretary Kelly's declaration, the entry of green card holders was "in the National Interest" so long as no "significant derogatory information indicating a serious threat to public safety and welfare" was found concerning the individual.[2] How that will play out, and whether or not green-card status will prove to be, as claimed, a "dispositive factor" for admission, on a case by case basis, remains to be seen.

Actions to Limit EO Application

Following the issuance of the EO, on Saturday night, January 28, 2017, United States District Judge Ann Donnelly of the Eastern District of New York, enjoined the EO "from, in any manner or by any means, removing individuals with refugee applications approved by U.S. Citizenship and Immigration Services as part of the U.S. Refugee Admissions Program, holders of valid immigrant and non-immigrant visas, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen legally authorized to enter the United States."[3] This affects, however, persons already here.

On Sunday morning, January 29, 2017, United States federal judge, Allison Burroughs and Magistrate Judge Judith Dein of Boston entered a temporary injunction order requiring that the secondary inspection rules, in effect before the EO, shall remain in effect, Refugee applicants and visa holders shall not be detained or removed, and CBP must alert the airlines that passengers will not be detained or returned pursuant to the order. The Order's duration was seven (7) days. A similar seven (7) day Order was entered by a Virginia United States District judge for the Eastern District of Virginia prohibiting removal of green-card holders, and requiring that any detained green card holders at Dulles International Airport be provided access to counsel. Another emergency Order was entered by a federal judge in Washington State, staying the removal of two unidentified individuals and setting a follow up hearing for February 3, 2017 to determine whether the stay should be continued. No. 2:17-cv-00141 (W.D. Wash. 2017).

The New York and Boston TROs apply nation-wide.

[2] https://www.dhs.gov/news/2017/01/29/dhs-statement-compliance-court-orders-and-president%E2%80%99s-executive-orders.

[3] *Darweesh, et al v. Trump, et al,* 17 No. 1:17-cv-00480 (E.D.N.Y. January 28, 2017).

Conclusion

In summary, employers with affected employees should avoid assigning them to overseas errands, and reconsider travel for new or scheduled projects. If the affected employees are already out of the United States, particularly non-immigrant visa holders, employers should seek to, where possible, to place them at work in overseas locations. They probably will not be back soon. United States green card holders should be in a position for re-entry under a case by case examination. However, careful consideration must be given ahead of time to ensure, 1) their overseas airline will allow them to board and, 2) consider their ability, upon arrival, to prove a clean record, which means no 'derogatory' information will be available about the person.[4]

How long will it really last? There is no answer beyond the 90 day ban and 120 suspension of the refugee admissions stated in the EO. The extent to which the reported rulings, and additional lawsuits will be obeyed at the border, and in the field, remains to be seen. Further, management-side lawyers must be flexible and attentive in order to see and react to what policy and practice consequences will flow after the initial 90 days of the EO expire.

[4] The information that may have to be elicited could reasonably have implications for employers' liability for national origin discrimination, if not handled with care.

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