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Executive Order Suspends the Admission of Certain Immigrants and Nonimmigrants from Seven Countries and the U.S. Refugee Admissions Program

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The EO has been partially stayed by several federal courts. The Department of Homeland Security (DHS) has announced that it will no longer enforce it against lawful permanent residents in the absence of "significant derogatory information indicating a serious threat to public safety and welfare," but questions remain on its application to those non-citizens who have already arrived in the United States, as well as dual nationals and those who have visited the seven countries in question in recent years.

The EO represents a significant change in U.S. immigration policy and is likely to have major implications for U.S. and non-U.S. companies that conduct business in the seven countries of concern or have employees from those countries on nonimmigrant visas (H-1B, L-1, O-1, etc.). Businesses should assess the potential impact on their operations, while taking into account that the situation is changing quickly and the exact application of the EO is evolving.

Visa and Entry Suspension (Section 3)

The key sentence on the suspension of visas and entry to the United States is contained in Section 3(c) of the EO:

> [P]ursuant to section 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).

INA 212(f), codified at 8 USC 1182(f), is a pre-existing law that gives the President broad authority to suspend entry or impose restrictions on the entry of "any aliens or a class of aliens" for such period as he shall deem necessary if their entry would be detrimental to the interests of the United States.

Under U.S. law, the term "immigrant" means "every alien except an alien who is within one of the [enumerated] classes of nonimmigrant aliens." INA 101(a)(15), 8 U.S.C. 1101(a)(15). This encompasses non-citizens who intend to reside in the United States permanently, including lawful permanent residents (known as "green card holders" or LPRs). Conversely, a nonimmigrant is a non-citizen who does not intend to reside in the United States permanently and is present in the country temporarily. Classes of nonimmigrants are enumerated in INA 101(a)(15), 8 U.S.C. 1101(a)(15), and include foreign workers, students, visitors, diplomatic personnel, and other categories of temporary visitors.

The countries explicitly identified in 8 U.S.C. 1187(a)(12)—Iraq and Syria—were originally included in the Terrorist Travel Prevention Act of 2015. That provision allows the Secretary of State or DHS Secretary to identify additional countries as "countries of concern" and thus covered by that provision. As of the signing of the Terrorist Travel Prevention Act of 2015, Iran and Sudan had already been designated by DHS as "countries of concern," and, two months later, DHS identified Libya, Somalia and Yemen as governments that have repeatedly provided support to acts of international terrorism and are, therefore, "countries of concern" covered by this provision. The DHS press release is available here.

8 U.S.C. 1187(a)(12) is a pre-existing law that restricts individuals from participating in the Visa Waiver Program (VWP) if they have traveled to those countries since March 1, 2011. The VWP governs the admission of visitors from 38 countries who are not required to obtain a U.S. visa prior to arriving to the United States for business or pleasure. It is unclear what it means to be "from" a country under the EO, but it likely includes citizens and nationals of one of those countries (i.e., those holding a passport of one of those countries).

Dual U.S. and foreign country citizens are exempt from the suspension of entry due to their U.S. citizenship. However, DHS has not provided an official clarification on whether dual

citizens who hold a passport of one of the seven countries, as well as a passport of another country (e.g., a dual Iranian and French citizen), are subject to the suspension.

As mentioned above, the term "immigrants" encompasses U.S. lawful permanent residents, or green card holders. On its face, the EO applies to immigrants and nonimmigrants equally, so green card holders who are citizens or nationals of the seven countries of concern should be covered by the entry suspension. On January 29, DHS issued a press release titled "DHS Statement On Compliance With Court Orders And The President's Executive Order," where it reiterated DHS Secretary John Kelly's earlier statement that "the entry of lawful permanent residents is in the national interest" and that "absent significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations." This means that LPRs who are citizens or nationals of the countries of concern can board planes for the United States and will likely be admitted to the country after questioning, absent Customs and Border Protection's (CBP) determination that they present a serious threat to public safety and welfare.

CBP may also interpret the EO to say that "from countries" means that the non-citizens' travel originates in those countries, no matter what their citizenship or nationality is. Again, since the signing of the EO, CBP has questioned travelers who have traveled to one of the seven countries. The White House has confirmed in media interviews that those "traveling back and forth [to the designated countries] … [are] going to be subjected to further screening." The EO is also unclear as to its application to someone who is not a citizen or national of the countries of concern, but has traveled to one of them. Since the signing of the EO, CBP has questioned those (including U.S. citizens) who have traveled to one of the seven countries, even if they were not citizens or nationals of those countries.

Visa Program Report and Lifting the Suspension

It is noteworthy that, after 90 days, the entry suspension is not automatically lifted. Rather:

- The EO also requires DHS to specify what kind of information it needs from any country (not just the seven countries of concern) regarding an applicant for an immigration benefit, "to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat," and to determine which countries do, and do not, provide such information.

- Within 30 days of January 27, 2017, DHS (in consultation with the Department of State and the Director of National Intelligence) must submit to the President a report on the results of the review, including DHS's determination of the information needed for adjudications and a list of countries that do not provide adequate information.
- If DHS determines that a country does not provide such information, that country will be informed that it has 60 days to begin providing it.
- If, after the 60-day period, the country does not begin providing such information, under Section 3(e) of the EO, it will be included in a future proclamation under INA 212(f) that would render citizens and nationals of that country ineligible for entry until such time as the country begins providing the requested information. This process could also expand the list beyond the seven countries of concern. By the same token, after the initial 90 days, any country on the original list of seven could possibly be removed from the list if it begins providing the information requested by DHS.

Refugee Suspension (Section 5)

The EO suspends the USRAP for 120 days. During that time, the EO mandates that the DHS Secretary, in consultation with the Director of National Intelligence, identify "additional procedures [that] should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States," and implement such additional provisions. The USRAP is to be resumed after 120 days for only the countries where "such additional procedures are adequate to ensure the security and welfare of the United States."

The entry of Syrian refugees is suspended indefinitely, subject to exceptions on a case-by-case basis, at the discretion of the Secretary of State and DHS Secretary, but only if those exceptions are in the national interest of the United States, including "when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a pre-existing international agreement, or when the person is already in transit and denying admission would cause undue hardship — and it would not pose a risk to the security or welfare of the United States."

Finally, the number of refugees permitted to enter the United States in fiscal year 2017 has been reduced from the current level of 110,000 to 50,000.

Questions and Uncertainties Going Forward

In addition to the fundamental question of "who is covered" by these rules, discussed above, there remain a number of considerations for individuals, companies and other organizations attempting to plan staffing, hiring and international travel in the coming days as a result of this new EO:

- *Legal Challenges*. Legal challenges have already been made to several provisions of the EO. On January 28, the District Court for the Eastern District of New York stayed the implementation of the EO as it applies to those citizens and nationals of the seven countries, as well as refugees, who have already arrived in the United States, but the stay does not order CBP to admit those individuals to the United States. Other federal courts have made similar rulings invalidating some provisions of the EO, including a ruling by a federal judge in Massachusetts disallowing the detention of those subject to the entry suspension and a ruling by a federal court in Virginia ordering CBP to allow permanent residents access to their attorneys. All of the rulings so far have been granted on an emergency basis and are temporary, and the courts will consider the validity of the EO in later proceedings.
- *Possible Expansion of the Suspension*. INA 217(a)(12) leaves open the designation of other countries, so the list of seven countries could be expanded on that basis as well.
- *Waiver of Entry Suspension*. Section 3(g) of the EO provides for the following "waiver" of the 3(c) or eventual 3(e) entry suspensions:

  > Section 3(g): Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, 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.

  It is not clear what the mechanism for requesting such a waiver would be or what factors DHS or the Department of State (DOS) would consider to determine that a waiver would be "in the national interest" of the United States.
- *Visa Issuance*. There have been reports that U.S. Embassies and Consulates have received instructions to immediately suspend the issuance of immigrant and nonimmigrant visas for anyone subject to the EO. Additionally, visa interviews have been canceled for affected individuals.

- *Adjudication of Immigration Benefits.* It is unclear what impact the EO will have on adjudication of immigration benefits, including green card ("adjustment of status") applications, naturalization applications, applications to change or extend nonimmigrant status, applications for employment authorization and advance parole travel documents, as well as applications for Temporary Protected Status. The EO directs suspension of the "issuance of visas and other immigration benefits," so the presumption is that the U.S. Citizenship and Immigration Services (USCIS) will suspend the processing of the applications filed by citizens and nationals of the countries of concern.

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