Immigration Rules under the Trump Administration

By
Kenneth J. Harder
www.dunbarharder.com

On March 6, 2017 the Trump Administration issued Executive Order (EO) 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States." The EO affects several immigration benefits, processes and procedures. Two changes that received the most attention in the media include the introduction of a temporary travel ban for nationals of six, primarily Muslim countries and the temporary suspension of the U.S. refugee admissions program. The remaining sections of the EO require implementation of a broad set of new rules and regulations governing the screening and vetting procedures associated with visa issuance and other immigration benefits. These less heralded sections of the EO, however, may ultimately have the greatest impact.

The March 6th EO had an effective date of March 16th. On March 15th, however, a U.S. District Court in Hawaii issued a Temporary Restraining Order (TRO) enjoining sections 2 and 6 of the EO which precludes enforcement of the travel ban for nationals of six countries and the suspension of the refugee admissions program.

Significant parts of the March 6th EO, however, remain in effect. The manner and impact of the implementation of the new rules and regulations governing the screening and vetting procedures associated with visa issuance and other immigration benefits is not yet known at the time of this writing. The detailed instructions already issued to consular posts by the U.S. Department of State, however, suggest that, at least in some cases, the impact will be profound.

Background

On the evening of January 27, 2017 without advance notice, the Trump Administration issued an EO that had a wide set of instructions affecting the U.S. immigration system. Provisions of the EO that had the most immediate and dramatic effects were those suspending the admission of refugees to the United States and banning travel for nationals of seven countries. There appeared to be very little advance coordination for the implementation of the EO. Chaos ensued at U.S. ports of entry and international airports across the globe as travelers were refused admission to the U.S. or denied boarding of aircraft bound for the U.S. The January 27th EO used ambiguous terminology that was broadly interpreted by U.S. Department of State consular officers abroad and by Customs and Border Protection (CBP) officers at U.S. ports of entry.

Initially, the January 27th EO caused the refusal of admission of U.S. lawful permanent residents who were citizens of Syria, Iran, Iraq, Somalia, Sudan, Yemen and Libya, the seven countries whose citizens were temporarily banned from traveling to the U.S. In addition, persons who are dual nationals of one of these seven countries traveling with a passport for a non-restricted country were initially denied entry to the U.S. A firestorm of protests erupted from private citizens, social and legal organizations and foreign governments whose dual national citizens were denied admission to the U.S. Within two days following the

announcement of the EO, the administration backtracked, confirming that the EO would not apply to U.S. permanent residents or dual nationals. The damage, however, already had been done.

Media coverage of chaos and confusion at airports around the world stoked the fires of the rumor mills that were working overtime. Stories that were circulating in the days after the EO was published included rumors that the EO was being expanded to include countries in Latin America. Given the previous rhetoric of the Trump Administration concerning immigration, particularly from Mexico, such rumors found fertile ground and spread quickly. Such rumors, while apocryphal, caused widespread panic among normally calm communities around the U.S. and otherwise sober-minded members of the business community around the world. Executives from Latin America expressed concern about whether travel to the U.S. was still possible to attend to business interests. U.S. permanent resident aliens, who are not citizens of one of the seven countries affected by the EO, feared they may be unable to return to the U.S. following travel abroad.

Finally, a U.S. District Court issued a TRO prohibiting enforcement of the January 27th EO's travel ban and suspension of the refugee admissions program.

Clarifications in the March 6, 2017 EO

Perhaps due to lessons learned following the chaotic release of the January 27th EO, section 3 of the March 6th EO clarifies in its terms the scope of the travel ban for nationals of six countries. Iraq, an ostensible ally of the U.S. in the fight against extremists in that country, was removed from the original list of seven countries whose citizens were banned from traveling to the U.S. Also, the March 6th EO makes clear that only those nationals of designated countries outside the U.S. who had no valid U.S. visas were to be affected by the travel ban, no previously issued visa would be revoked by the EO and those with visas revoked by the January 27th EO would be issued a travel document to return to the U.S. A list of persons exempted from the travel ban includes, *inter alia*, U.S. resident aliens, dual nationals traveling with a passport of a non-restricted country, certain diplomats and those already granted asylum or admitted as a refugee.

Furthermore, the section 3 March 6th EO provides for a waiver of the travel ban on a case-by-case basis where denial of a visa would cause undue hardship, the individual does not pose a threat to national security and the entry of the person would be in the U.S. national interest. Specific fact patterns are provided in the EO that would be appropriate for the issuance of a waiver of the travel ban.

Since enforcement of section 2 of the March 6th EO currently is enjoined, the exemptions and waivers provided by section 3 have no operative effect at this time. Section 4 of the EO requiring additional inquiries for applications for visas and immigration benefits filed by Iraqis, however, appears to remain in effect. It remains unclear at this writing whether immigration authorities will consider the factors identified in section 3 as appropriate circumstances for a waiver when adjudicating immigration benefits for Iraqis.

Introduction of Uniform Screening and Vetting Standards for all Immigration Programs

The TRO enjoining enforcement of sections 2 and 6 of the March 6th EO left in place section 5 that introduces uniform screening and vetting standards for all immigration programs. The EO orders the Department of State, Department of Homeland Security, the Attorney General and the Director of National Intelligence to create and implement an enhanced program to identify persons seeking admission to the U.S. based on fraud, or to cause harm through terrorism, extremism, criminal activity or otherwise present a risk of harm.

Applications for any U.S. visa or immigration benefit already are subjected to significant biometric and biographic background checks. The EO, however, requires implementation of a uniform baseline for screening and vetting standards and procedures. Specifically, the EO instructs the responsible parties to create a database for identity documents, new application forms to better identify fraud, new processes to verify the identity of applicants for immigration benefits and assess whether an applicant has an intention to commit or support terrorist acts.

The EO does not identify instances in which current screening and vetting procedures failed to fulfill these objectives or gaps in current protocols that should be closed. In fact, current visa and immigration benefit application background checks are quite extensive. It is not uncommon, for example, for a visa application to be delayed by weeks or even months while waiting completion of security background "administrative processing" by a consulate.

March 6, 2017 Presidential Memorandum

On the same day that the Trump Administration issued the March 6th EO it also issued a Presidential Memorandum with the ponderous name "Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry into the United States, and Increasing Transparency among Departments and Agencies of the Federal Government and for the American People." This comprehensive title aptly describes the memorandum's objectives.

Section 3 of the Memorandum sets forth its objectives. It directs the Department of State and the Department of Homeland Security, in consultation with the Attorney General, to implement procedures as soon as practicable for enhanced screening and vetting procedures for all visa applications and immigration benefits. The purpose of the new procedures is identified in two broad sets of instructions. First, new procedures are to focus on preventing entry into the U.S. by foreign nationals seeking to commit or support violent, criminal, or terrorist acts. Second, new procedures must be implemented to ensure collection of information needed to rigorously enforce current grounds of inadmissibility and deportability as well as grounds for the denial of immigration benefits.

The Memorandum's second objective—collecting information to support rigorous evaluation of the basis to deny entry, enforce deportation and to deny immigration benefits—is ominously vague. It appears to invite a more restrictive interpretation and application of laws and regulations by immigration officials. At this time it is not yet clear whether this new policy heralds an era of greater restrictions by immigration authorities when deciding applications for admission and determining eligibility for immigration benefits.

Section 4 of the Memorandum requires gathering monthly data for each visa issued and adjustment of status completed including the total number approved as well as the visa

category and nationality of the recipient. In addition, Section 4 requires measuring costs associated with the refugee admission program. It is not clear from the terms of the Memorandum exactly how this information will be put to use. It may, however, provide a metric for evaluating the extent to which immigration laws are more restrictively enforced. Based on the context within which the instruction to gather this information appears, it is possible that this information could be used to justify new restrictions on a future date.

Cables to Consular Posts

To the animate the objectives of the EO and the Presidential Memorandum of March 6th, the Secretary of State sent a series of Cables to consular posts with instructions on their implementation. The first of these, dated March 10, 2017, provided detailed instructions for the implementation of the travel ban for the nationals of Syria, Iran, Somalia, Sudan, Yemen and Libya as well as identifying exemptions and options for waivers. A Cable sent to posts on March 16th halts the implementation of the travel ban and suspension of the refugee program while instructing posts to continue to follow guidance on the heightened screening and vetting protocols for visa applications that had been provided in a Cable on March 15th.

The March 15th Cable reiterates the objectives articulated in the Presidential Memorandum of March 6th requiring implementation of new processes and procedures for screening and vetting visa applicants. It then instructs posts to continue "to increase scrutiny of visa applicants for potential security and non-security related ineligibilities." Consular officers are further instructed that they should not hesitate to refuse any application presenting security concerns in order to "explore all available local leads" or to await the outcome of a Security Advisory Opinion (SAO).

Consular officers are admonished by paragraph 4 of the Cable to remember that "all visa decisions are national security decisions." The Cable further reminds consular officers that any nonimmigrant visa applicant who may not comply with the terms of the visa category should be refused under section 214(b) of the Immigration and Nationality Act (INA). This is a curious subject for a Cable from the Secretary of State. Already in all nonimmigrant visa applications, consular officers are required by section 214(b) to deny applications when the applicant has failed to carry his burden of demonstrating eligibility for the visa category to the satisfaction of the consular officer.

Paragraph 5 of the March 15th Cable instructs posts to immediately implement new screening procedures detailed in the Cable. It further informs posts that these are preliminary measures with additional procedures yet to come. Consulates are instructed to convene working groups of law enforcement and security partners to develop lists of criteria for identifying visa applicants that warrant increased scrutiny. Detailed questions are outlined in the Cable for use by posts interviewing persons identified by the law enforcement working groups. These instructions, however, were rescinded by another Cable issued by the Secretary on March 17th. Pending a review of the specific questions set forth in the March 15th Cable by the Office of Management and Budget, consular officers are required to follow exiting protocols to follow up on any concerns that arise in the course of a visa interview and use SAOs as appropriate.

The March 15th Cable also requires posts, with certain exceptions, to request an SAO for visa applications received from nations of the six countries subject to the travel ban. These instructions, however, were suspended in the Cable that was sent to posts on March 16th.

Limiting Visa Interviews

Both the March 15th and March 17th Cables instruct consular posts to limit the number of visa interviews to 120 per day for each consular officer. The reason given for this limitation is to ensure that consular officers have adequate time for "proper focus" on each application. Both Cables acknowledge that imposing this limit may cause the interview backlog to rise. Given the provisions of the March 6th EO suspending the visa interview waiver program, it appears likely that the waiting time for visa application appointments may rise in the foreseeable future.

The visa interview waiver program was established by Section 222(h) of the INA. It requires all applicants of nonimmigrant visas to be interviewed unless a consular officer waived the interview as permitted by the terms of the statute. As recently as October 2016, the Department of State Visa Office was indicating that it planned to expand use of the visa interview waiver program in order to accommodate the ever increasing demand for nonimmigrant visas coupled with static or shrinking consular resources.

To alleviate the additional demand for visas appointments the EO calls for the expansion of the Consular Fellows Program. This program allows the Department of State to hire persons to perform consular duties, including issuing visas on a non-career basis. The hiring of such personnel is subject to the availability of appropriations. In practical terms, obtaining funding, receiving applications, performing background checks, hiring and training individuals to fill this role will take many months, if not years. Any relief to visa appointment backlogs through expansion of the Consular Fellows Program will be well into the future.

Given the explicit cancellation of the expansion of the visa interview waiver program along with the imposition of the limit on the number of visa interviews that may be conducted by consular officers each day, it appears to be certain that there will be an increase in the time waiting for visa interview appointments to become available.

Conclusions

During the period of a few weeks from the end of January 2017 to the middle of March, a bewildering series of Executive Orders affecting U.S. immigration policies were issued, followed by court orders enjoining some, but not all parts of them. This confusing situation is compounded by the simultaneous issuance of a Presidential Memorandum with instructions to the Department of State, the Department of Homeland Security and the Attorney General to implement new protocols for screening and vetting applications for visas and other immigration benefits. The Memorandum, in turn, spawned a series of Cables from the Secretary of State to visa issuing posts with instructions to implement, then suspend implementation, of some but not all parts of the EO and previously issued Cables.

Given this state of affairs, a certain level of confusion could be expected. This dynamic policy situation takes place in a political climate that is explicitly hostile to immigration of all types. In such an environment, it is not unusual that there appears to be a growing sense of

uncertainty about the feasibility of travel to the United States whether for tourism or business.

As of this writing at the beginning of April 2017, there has been no change in any law or regulation governing the eligibility of a foreign national for a U.S. immigration benefit. The admonishment in the March 6th Presidential Memorandum to rigorously evaluate all grounds for the denial of immigration benefits, however, appears to signal an intention to adopt a more restrictive interpretation of rules governing eligibility for those benefits.

In recent years U.S. Citizenship and Immigration Services has demonstrated ever greater restrictive interpretations of immigration laws governing employment-based visa categories. What further restrictions are augured by the March 6th pronouncements remain unknown. Based on the explicit policies announced in the EO, the Presidential Memorandum and the Department of State Cables implementing them, longer waits for visa appointments at U.S. consulates seem an almost certain outcome. Anticipating such delays and planning ahead for any travel to the U.S. is the best action that any individual or company can make at this time.

Bibliography of Resources

82 Fed. Reg. 13209 March 9, 2017, Executive Order 13780 of March 6, 2107, Protecting the Nation from Foreign Terrorist Entry into the United States.

Summary and Analysis of Executive Order, AILA Doc. No. 17030660.

Q&A: Protecting the Nation From Foreign Terrorist Entry To The United States, March 6, 2017, Office of Public Affairs, https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states .

Presidential Memorandum "Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry into the United States, and Increasing Transparency among Departments and Agencies of the Federal Government and for the American People." https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security .

Summary of Presidential Memorandum on Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, AILA Doc. No. 17031307.

March 10, 2017 Cable to Diplomatic and Consular Posts, AILA Doc. No. 17032335.

March 15, 2017 Cable to Diplomatic and Consular Posts, AILA Doc. No.17032333.

March 16, 2017 Cable to Diplomatic and Consular Posts, AILA Doc. No. 17032336.

March 17, 2017 Cable to Diplomatic and Consular Posts, AILA Doc. No. 17032337.

Practice Alert: DHS and DOS Implementation of Executive Order Imposing Travel and Refugee Ban, AILA Doc. No. 17012670.

State of Hawai'i and Ismail Elshikh vs. Donald J. Trump, *et al.*, CV. NO. 17-00050 DKW-KSC, Order Granting Motion for Temporary Restraining Order, AILA Doc. No. 17020631.

AILA/Department of State Liaison Meeting, October 6, 2016, Agenda question 2.d., AILA Doc. No. 16100705.