

January 30, 2017

## **PRESIDENT TRUMP ISSUES EXECUTIVE ORDER ON IMMIGRATION**

To Our Clients and Friends:

On Friday January 27, 2017, President Trump issued an Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry into the United States Executive Order." (Available [here](#).)

The Executive Order imposes, among other things, a 90-day ban on entry into the United States for any purpose by non-U.S. citizens from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The State Department has advised individuals from the affected countries seeking visas to enter the United States not to schedule or attend interviews, or pay fees for such visas, until further notice.<sup>[i]</sup> Over the weekend, three federal courts blocked implementation of various parts of the Executive Order. Additionally, the Administration has announced that implementation of the Executive Order will be somewhat relaxed for U.S. lawful permanent residents. However, confusion persists at airports both here and abroad. For example, it has been reported that some individuals have not been permitted to board U.S.-bound flights, and that upon arrival in the United States, other individuals have been subjected to inconsistent treatment, including detention by Customs and Border Protection ("CBP") officers or often lengthy screenings. Additionally, in some cases, individuals are reportedly unable to communicate with their family members or legal counsel.

Although the legal landscape is continuing to evolve, as we describe below, this Client Alert provides an overview of the Executive Order, the district court decisions enjoining portions of the Executive Order, and guidance that may assist companies and others impacted by the Executive Order. As we understand that responding to inquiries involving the Order may be our clients' most pressing concern, we start with a brief background of the Executive Order and provide guidance companies may want to consider. We then provide an overview of the legal landscape that exists as of Monday, January 30, 2017. This alert is informational only, and you should, of course, seek legal advice specific to any particular situation.

### **I. Overview of the Executive Order**

The Executive Order has the stated purpose of "protect[ing] the American people from terrorist attacks by foreign nationals admitted to the United States." Among its provisions are the restriction of "immigrant and nonimmigrant" entry of non-citizens from seven countries for 90 days, suspension of all refugee admission for 120 days, and indefinite prohibition of refugees from Syria.

#### **A. Individuals Covered and Not Covered by the 90-day Ban**

Section 3(c) of the Executive Order "suspend[s] entry into the United States, as immigrants and nonimmigrants" for 90 days of "aliens" from Iran, Iraq, Libya, Somalia, Sudan, Syria, and

Yemen. Subject to certain exceptions, this suspension applies regardless of travel origin, type of visa, or U.S. immigration status.

The Executive Order provides that the "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." Sec. 3(g). The Executive Order also explicitly exempts only certain categories of visas for diplomats, NATO business, United Nations business (C-2), and international organization staff (G-1, G-2, G-3, G-4)). Sec. 3(c).

The Executive Order is drafted broadly enough to cover lawful permanent residents (i.e., green-card holders), and there are reports that in the first 36 hours of implementation, the CBP officers denied re-entry to such individuals. However, on Sunday, January 29, the Department of Homeland Security ("DHS") announced 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" under Section 3(g) of the Order.<sup>[ii]</sup> Since that announcement, reports from across the country suggest that such individuals are now being admitted under this discretionary authority, after extended screening upon arrival.

The Executive Order also implicates dual citizens who are not U.S. citizens. However, exactly how such individuals will be addressed by CBP is uncertain. There are some indications that such individuals will be treated similarly to green-card holders--subject to increased scrutiny, but generally admitted. However, admission appears to be discretionary, and, as of now, there is no clearly announced policy. The United Kingdom Foreign Office announced on Sunday, January 29 that the United States is not applying the ban to individuals who are dual citizens of the United Kingdom and one of the banned countries, if such individuals are travelling from the United Kingdom.<sup>[iii]</sup> On Monday, January 30, the U.S. Embassy & Consulates in the United Kingdom made a similar announcement, confirming that "[d]ual nationals of the United Kingdom and one of [the seven covered] countries are exempt from the Executive Order when travelling on a valid United Kingdom passport and U.S. visa."<sup>[iv]</sup> In addition, various news outlets have reported--quoting Canadian government officials--that the United States is not applying the ban to individuals who are dual citizens of Canada and one of the banned countries.<sup>[v]</sup> U.S. officials, however, have yet to make a similar announcement.

U.S. citizens are not covered by the language of the Executive Order. As described below, however, non-U.S. citizens from countries other than the seven covered countries may still be affected by the Executive Order's suspension of the Visa Interview Waiver Program. Suspension of this program is likely to increase the time necessary for issuance of U.S. visas.

## **B. Other Provisions**

A few other provisions of the Executive Order should also be noted, as they may hinder travel to the United States by those not directly affected by the country-specific ban.

- The Executive Order suspends the Visa Interview Waiver Program, which allows those renewing certain types of visas to skip a consular interview under certain circumstances. *See* Sec. 8(a). This program is commonly used by low-risk travelers, including many employment-based

visa applicants, in order to expedite the time in which visas are obtained for travel to the United States. Suspension of this program is likely to slow, perhaps significantly, the process of renewing a visa, as it appears to impose a requirement that all visa applicants be interviewed in person.

- The Executive Order requires the Secretary of State to review "all non-immigrant visa reciprocity agreements." Sec. 9. This raises the prospect that certain visas will be scaled back in the future, such as by reducing the number of allowed visits in a period or the length of an allowed stay under a visa.
- The Executive Order suspends the U.S. Refugee Admissions Program for 120 days (Sec. 5), and indicates certain priority for religious minorities upon its limited resumption. This is generally understood to apply to Christian refugees from Muslim-majority nations.

Finally, it is possible that the list of affected countries will expand after the 90-day ban period. The Executive Order directs the DHS to submit for inclusion a list of any other countries that "do not provide adequate information" regarding admission of their citizens. Sec. 3(b). At the end of the 90-day period, DHS or the State Department may also "submit to the President the names of any additional countries recommended for similar treatment." Sec. 3(f).

## **II. Issues for Companies to Consider**

There is no "one size fits all" approach for companies addressing employee and business issues related to the Executive Order. In the immediate term, companies should consider preparing a uniform communications plan for their employees, particularly those who are or may be affected by the Executive Order. Companies should also consider whether plans or policies are needed for travel by executives, employees, or other stakeholders. Although this situation is fluid and continues to develop, as further described below, we believe companies should also be mindful of whether they will need to develop strategies to deal with the impact of the Executive Order, both internally and as it relates to potential shareholder and business relations.

Specific questions that companies may want to consider with respect to the Executive Order include:

- *Outreach to employees who may be affected.* Although the administrative and judicial interpretation of the Executive Order continues to evolve, meaning that the full scope of individuals who may be affected is in flux, companies should consider proactively identifying and reaching out to all employees who may be affected. As noted above, the Executive Order, on its face, applies to both immigrants and non-immigrants from the seven covered countries. Thus, employees traveling for business or leisure may be equally affected. In addition, as discussed above, there have been indications that lawful permanent residents may be subject to additional questioning when entering the United States from one of the seven covered countries, even if those individuals are not subject to detention. Note that different employees' immigration statuses may compel differing guidance on how to approach any issues that arise in the enforcement of the Order.

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- *Outreach to employees who may have family members affected.* It is important to remember that for some of your employees, even if they are not directly impacted by the Executive Order, they will have family and loved ones who are directly impacted. We have received reports of many family members detained and separated from other family members upon arrival at an airport. We have heard reports about family members traveling abroad who are now fearful of not being able to return home to reunite with a family member. Companies may consider providing counseling and support for your employees who are facing these concerns.
- *Communicating with employees.* Companies should consider identifying employees who frequently travel to and from the affected countries or who are visa holders from affected countries, to explain company plans with respect to the Executive Order. In particular, employees from affected countries who are currently outside the United States, but have a legal right to re-enter, should be advised to stay in communication with individuals in the United States about their travel plans, in the event they have difficulty re-entering the country, and have a plan to obtain appropriate assistance in that event. For employees currently in the United States but who are from the affected countries or frequently travel to the affected countries, consider whether travel abroad is necessary before the full scope of enforcement of the Executive Order is known and understood.
- *Identifying a point of contact.* Consider identifying a contact point for any employee questions or concerns regarding the Executive Order. Furthermore, ensure that this contact is prepared to field questions from affected or potentially affected employees, to discuss visa renewal or travel to and from the affected countries, and to refer employees with specific issues to the appropriate resources.
- *Communicating with shareholders, business partners and other stakeholders.* Companies should consider whether communications with shareholders, business partners or other stakeholders regarding potential impacts on business as a result of enforcement of the Executive Order are appropriate.
- *Modifying travel and meeting obligations.* Companies should consider modifying (or allowing for employee choice regarding) employee travel obligations, as appropriate to the company's business needs, to avoid potential difficulties with travel to and from the United States. Likewise, if companies have board members or executives affected by the Executive Order, or business stakeholders who will not be able to enter the United States due to the Executive Order, consider whether meetings can be conducted remotely or outside the United States. Companies involved in pending litigations that may require employee travel to the United States, should consider seeking the advice of litigation counsel to determine what, if any, notice to the relevant court or parties may be advisable at this stage.
- *Reviewing non-discrimination policies.* Companies may wish to send reminders of applicable equal employment policies. Many employers have included such statements in communications regarding the Order. Companies may also wish to consider how their policies apply to employment and hiring decisions in light of travel restrictions.

This list addresses just some of the issues that companies will face in light of the Executive Order. Gibson, Dunn & Crutcher's lawyers, including its employment, securities, administrative law, constitutional law, and sanctions teams, are available to assist clients with navigating these and other issues that arise with respect to enforcement of the Order.

### **III. District Court Orders Blocking Implementation of the Executive Order**

As of the morning of January 30, three district courts--in New York, Massachusetts, and Virginia--have issued orders of varying general applicability temporarily (a) halting deportations resulting from the Executive Order and (b) providing certain other relief. Other federal courts, including those in the Central District of California and the Western District of Washington have issued relief specific to individual applicants.

#### **A. Nationwide Stay of Removal--*Darweesh v. Trump*, No. 17 Civ. 480 (AMD) (E.D.N.Y. Jan. 28, 2017).**

On Saturday, January 28, two visa holders of Iraqi origin detained at JFK Airport in New York filed suit relief on behalf of themselves and others similarly situated, along with a petition for writ of habeas corpus. They also asked the court for an emergency stay of removal of similarly situated people nationwide.

Judge Ann Donnelly of the Eastern District of New York granted relief that evening, enjoining the President, DHS, CBP, and other respondents from removing (i) refugees, (ii) visa-holders, and (iii) individuals from the nations affected by the Executive Order.

The court found that the petitioners--two individuals who were detained at JFK, along with all others similarly situated--"have a strong likelihood of success" with respect to their Due Process and Equal Protection challenges to the Executive Order. The court also found that, absent the stay, there was an "imminent danger that . . . there will be substantial and irreparable injury" to those subject to the Executive Order.

On Sunday, January 29, petitioners filed a motion for clarification and enforcement of the order. The motion cited reports that similarly situated people "have been placed on planes, possibly deported, and subject to intimidation to sign removal orders after the issuance of the Court's Order." Among other things, petitioners seek confirmation that the court's order applies to all similarly situated people nationwide.

On Monday, January 30, the case was assigned to Judge Carol Bagley Amon.

#### **B. Nationwide Stay of Removal and Detention--*Tootkaboni v. Trump*, No. 17-cv-10154 (D. Mass. Jan. 29, 2017).**

On Saturday, January 28, two lawful permanent residents of Iranian origin who were detained at Logan Airport in Boston filed a similar action for relief, and also applied for an emergency stay on a nationwide basis.

Early Sunday, Judge Allison D. Burroughs and Magistrate Judge Judith Dein of the District of Massachusetts issued a temporary restraining order ("TRO") prohibiting removal and detention of those subject to the Executive Order (i.e., refugees, visa-holders, and individuals from the affected nations). The court made the same findings as the *Darweesh* Court, described above. The TRO is in effect for seven days, with the court to set a further hearing date prior to its expiration.

The court also directed respondents to limit secondary screening--an airport security measure that some critics have associated with profiling--to comply with the regulations and statutes in effect prior to the Executive Order, including 8 U.S.C. § 1101(a)(13)(C), the statute providing the standards by which a lawful permanent resident may be regarded as "seeking admission" into the United States. The court also issued instructions to CBP, apparently intended to address the issue of airlines turning away passengers on international flights destined for Logan Airport, stating that CBP "shall notify airlines that have flights arriving at Logan Airport of this Order and the fact that individuals on these flights will not be detained or returned based solely on the basis of the Executive Order."

### **C. Stay of Removal of Lawful Permanent Residents at Dulles--*Mohammed Aziz v. Trump*, No. 1:17-cv-116 (E.D. Va. Jan. 28, 2017)**

On Saturday, January 28, two brothers of Yemeni origin detained at Dulles International Airport filed an emergency application seeking a stay of removal on behalf of themselves as lawful permanent residents and others similarly situated at that same airport, as well as seeking access to counsel.

Judge Leonie M. Brinkema of the Eastern District of Virginia issued a TRO forbidding removal of any lawful permanent residents from Dulles for seven days. The court also directed that respondents "shall permit lawyers access to all legal permanent residents being detained at Dulles International Airport."

On January 30, petitioners filed a First Amended Complaint, adding new allegations that they were coerced into surrendering their green cards and then flown to Addis Ababa airport in Ethiopia.<sup>[vi]</sup>

### **D. Other Court Actions and Orders**

Individuals seeking relief on an individual basis only, and not on behalf of others similarly situated, have sought habeas corpus and/or other relief in a number of other district courts with jurisdiction over relevant international airports.

For instance, on Saturday, January 28, a visa holder of Iranian origin detained at LAX in Los Angeles filed suit in the Central District of California, seeking habeas corpus, declaratory, and injunctive relief. *See Vayeghan v. Kelly*, No. CV 17-0702 (C.D. Cal. Jan. 28, 2016). Before the court could consider the emergency application for a TRO, however, "he was placed on a flight to Dubai to be removed to Iran." But Judge Dolly M. Gee issued a TRO on January 29, directing respondents to "transport Petitioner back to the United States and admit him under the terms of his previously approved visa." The court found, among other things, "a strong likelihood of success" on the petitioner's claims under the Equal Protection Clause, Establishment Clause, and Immigration and Nationality Act, and also pointed to "the public interest in upholding constitutional rights." The court set a hearing to show cause regarding preliminary injunctive relief for Friday, February 10.

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On Saturday, January 28, Judge Thomas S. Zilly of the Western District of Washington granted an emergency stay of removal with respect to two petitioners being detained at Seattle-Tacoma International Airport. A full hearing on the stay is set for Friday, February 3. The matter is *Doe v. Trump*, No. C17-126 (W.D. Wash. Jan. 28, 2017).

In addition, there are at least two broad-based suits being filed today. First the Council on American-Islamic Relations ("CAIR") has filed suit in the Eastern District of Virginia, focusing on the Executive Order's "apparent purpose and underlying motive . . . to ban people of the Islamic faith from Muslim-majority countries from entering the United States."<sup>[vii]</sup> The case raises challenges under the Establishment, Free Exercise, and Due Process Clauses, and seeks broad injunctive relief against most aspects of the Executive Order restricting travel to the United States. See *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Jan. 30, 2017). Second, the attorney general of Washington State has announced he will file a suit in the Western District of Washington, also seeking to have key provisions declared unconstitutional and requesting injunctive relief.<sup>[viii]</sup>

Finally, we are aware of other actions being filed in the Northern District of Illinois (Chicago O'Hare International Airport); the Northern District of California (San Francisco International Airport); the Central District of California (LAX); and the Northern District of Texas (Dallas-Fort Worth International Airport). Additionally, there are at least fifteen actions pending in the Eastern District of New York, including the *Darweesh* matter discussed above.

## IV. On-the-Ground Observations at Airports Nationwide

Although deportations appear to have stopped and DHS has indicated it will comply with the court orders described above, reports from airport observers indicate that confusion continues regarding the implementation of the Executive Order and compliance with these court orders. The Administration, however, has contradicted these reports, but has acknowledged that some individuals were affected and slowed down in their travel.<sup>[ix]</sup>

Attorneys at various airports around the country have reported denial of access to detainees. Despite court orders mandating attorney access to potential clients, CBP has reportedly refused to allow some detainees to speak in person with counsel.<sup>[x]</sup> Other lawyers have reported that CBP has been averse to inquiries for information. In Los Angeles, for example, CBP closed its airport office, making it difficult to determine the number, identity, and legal status of potential detainees.

Detainees have reported extensive examinations and confiscations of luggage and personal belongings.<sup>[xi]</sup> Multiple reports circulated detailing investigations into detainees' social media accounts and corresponding questioning regarding personal religious beliefs and political views, particularly related to President Trump and his administration. Some detainees stated that individuals wearing headscarves were targeted for additional vetting. Wait times varied widely, from half a day or longer to an hour or less. There have also been reports that some detainees have been pressured into renouncing their lawful status under threat of being banned from re-entry for up to five years.<sup>[xii]</sup>

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Finally, many individuals have reported undergoing more rigorous screening at the point of embarkment. As part of that process, individuals may be denied permission to board if there is an expectation they will not be admitted to the United States upon arrival.[xiii]

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The issues described in this Client Alert are rapidly changing. Gibson Dunn is dedicated to staying at the forefront of these issues for the benefit of our friends and clients, and will update you with significant developments.

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[i] U.S. State Dept., "Urgent Notice: Executive Order on Protecting the Nation from Terrorist Attacks by Foreign Nationals," Jan. 27, 2017 (<https://travel.state.gov/content/visas/en/news/executive-order-on-protecting-the-nation-from-terrorist-attacks-by-foreign-nationals.html>).

[ii] U.S. Dept. of Homeland Security, "DHS Statement On Compliance With Court Orders And The President's Executive Order," Jan. 29, 2017 (<https://www.dhs.gov/news/2017/01/29/dhs-statement-compliance-court-orders-and-president%E2%80%99s-executive-orders>).

[iii] U.K. Foreign & Commonwealth Office, "Press Release, Presidential Executive Order on Inbound Migration to United States," Jan. 29, 2017 (<https://www.gov.uk/government/news/presidential-executive-order-on-inbound-migration-to-us>).

[iv] U.S. Embassy & Consulates in the U.K., "Updated Guidance on Executive Order on Protecting the Nation from Terrorist Attacks by Foreign Nationals," Jan. 30, 2017 (<https://uk.usembassy.gov/updated-guidance-executive-order-protecting-nation-terrorist-attacks-foreign-nationals/>).

[v] *See, e.g.*, Daniel Dale & Emily Mathieu, "Canadian dual citizens exempted from Trump's travel ban," *Toronto Star*, Jan. 28, 2017 (<https://www.thestar.com/news/world/2017/01/28/passport-holders-of-7-muslim-majority-countries-cant-board-air-canada-flights-to-us.html>).

[vi] As of Sunday night, it is unclear how the matters in Massachusetts and Virginia, brought by lawful permanent residents, are affected by DHS's statement on January 29 that "the entry of lawful permanent residents is in the national interest."

[vii] Council on American-Islamic Relations, "CAIR to Announce Constitutional Challenge to Trump's 'Muslim Ban' Executive Order," Jan. 27, 2017 (<https://www.cair.com/press-center/press-releases/14062-cair-to-announce-constitutional-challenge-to-trump-s-muslim-ban-executive-order.html>).

[viii] KOMO Staff, "State attorney general to file lawsuit against Trump immigration order," *KOMO News*, Jan. 30, 2017 (<http://komonews.com/news/local/state-attorney-general-plans-major-announcement-on-trump-immigration-plan>).

[ix] *E.g.*, Berkeley Lovelace Jr, "White House spokesman Sean Spicer says immigration ban 'small price to pay' for safety," *CNBC*, Jan. 30, 2017 (<http://www.cNBC.com/2017/01/30/white-house-spokesman-sean-spicer-immigration-ban.html>).

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[x] *See, e.g.*, Edward Helmore, et al., "Border agents defy courts on Trump travel ban, congressmen and lawyers say," *Guardian*, Jan. 29, 2017 (<https://www.theguardian.com/us-news/2017/jan/29/customs-border-protection-agents-trump-muslim-country-travel-ban>).

[xi] *See, e.g.*, Nadel Issa, et al., "As hundreds protest, attorneys seek info on how many are detained," *Chicago Sun-Times*, Jan. 29, 2017 (<http://chicago.suntimes.com/politics/calm-before-the-storm-ohare-quiet-sunday-morning/>).

[xii] *See, e.g.*, Joseph Goldstein, et al., "Lives Rewritten With the Stroke of a Pen," *New York Times*, Jan. 29, 2017 ([https://www.nytimes.com/interactive/2017/01/29/nyregion/detainees-trump-travel-ban.html?\\_r=0](https://www.nytimes.com/interactive/2017/01/29/nyregion/detainees-trump-travel-ban.html?_r=0)).

[xiii] *See, e.g.*, Evan Perez, et al., "Inside the confusion of the Trump executive order and travel ban," *CNN*, Jan. 30, 2017 (<http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/>).



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