



GMS Flash Alert

Immigration Edition

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United States – Guidance Now for Implementing Court-Ordered Parts of Travel Ban

As announced earlier this week, on June 26, 2017, the U.S. Supreme Court granted certiorari and consolidated two key cases in the travel and refugee ban litigation: *Trump v. IRAP* and *Trump v. Hawaii*.¹ The cases will be heard during the first session of the new Court term that begins in October. (For prior coverage, see GMS [Flash Alert 2017-110](#), June 27, 2017.)

According to the cable issued by the Department of State, **implementation of the Executive Order (hereinafter, “EO-2” or “E.O.”) is to commence at 8:00pm EDT on June 29, 2017.**

To clarify who may and may not be impacted by the travel ban, the U.S. Department of State² and the American Immigration Lawyers Association³ have provided the below guidance.

WHY THIS MATTERS

It is critical that nationals from Sudan, Syria, Libya, Somalia, Iran, and Yemen and their immigration counsel and global mobility managers (if applicable) understand how the Court-ordered parts of the E.O. will be implemented, as immediately their ability to enter and leave the United States could be impacted.

From a cross-border business perspective, nationals from these countries employed or with an offer of employment by a U.S. entity (prior to June 29, 2017) may be permitted to enter and leave the United States with a valid visa.

“Bona Fide” Relationships with Persons, Entities in the United States

Bona Fide Relationship with a Person in the United States

The Court noted that the facts of the cases at hand illustrate the type of relationships that would qualify as bona fide, stating, “For individuals, a close familial relationship is required.”⁴ The Court stated that an individual who seeks to enter the United States to live with or visit a family member, such as a spouse or mother-in-law, “clearly has such a relationship.” The Department of State (“DOS”) provided further clarification stating that, “close family” is defined as a parent, parent-in-law, spouse, child, adult son or daughter, son-in-law, daughter-in-law, sibling (half or whole) – fiancés and step-relationships are also included. “Close Family” however does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-laws and sister-in-laws, and any other “extended” family members.

Bona Fide Relationship with an Entity in the United States

With regard to entities, the Court stated, “the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2.” The Court specifically stated that (i) students who have been admitted to a U.S. university, (ii) a worker who has accepted an offer of employment from a U.S. company, or (iii) a lecturer invited to address a U.S. audience, would have such a relationship.

The Court stated that a relationship with a U.S. entity or individual that was entered into for the purpose of avoiding the travel ban will not be recognized as bona fide.

Qualifying Situations

1. Individuals with Currently Valid Visas

The Department of State has confirmed that the suspension of entry in the E.O. does not apply to individuals who are inside the United States on June 29, 2017, who have a valid visa on June 29, 2017, or who had a valid visa at 8:00 p.m. EDT January 29, 2017, even after their visas expire or they leave the United States. The DOS also stated that no visas will be revoked based on the E.O., even if issued during the period in which Section 2(c) was enjoined by court order or during the 72-hour implementation period.

Thus, an individual with a valid nonimmigrant or immigrant visa should be permitted to board a plane and present himself/herself for inspection at a U.S. airport or land port of entry.

2. Business Visas (H, L, E, I, O, P, Q, R, and Employment-Based Immigrant Visas)

The Court stated that a worker who has accepted an offer of employment from a U.S. company would have a bona fide relationship to a U.S. entity.

What is not clear is whether individuals with employment-based visas that do not require a petitioning employer (EB-1, National Interest Waiver) would be able to demonstrate a relationship to a U.S. entity.

3. Family-Related Visas (K, V, and Family-Based Immigrant Visas)

The Court’s order is clear that individuals who “wish to enter the United States to live with or visit a family member” have close familial relationships. A spouse and a mother-in-law were included by the Court and as referenced above, the DOS provided further clarity on this point. While originally “fiancés” were not defined as “close family” for the purpose of obtaining a K visa, a last-minute change meant fiancés are to be considered close family members and therefore allowed to travel to the United States.⁵

4. Students and Trainees (F, M, J)

The Court stated that students who have been admitted to a U.S. university would have such a relationship. Presumably, the same would apply for vocational students and J-1 exchange visitors who would have a relationship to a U.S. program sponsor.

5. Visitor for Business (B-1)

The Court stated that a lecturer invited to address a U.S. audience would have a bona fide relationship to a U.S. entity. It is unclear at this time how individuals traveling to the United States for business conferences or other short-term, non-contractual, business interactions will be treated; however, to the extent possible, attorneys should equip such individuals with evidence of a “formal, documented” relationship with a U.S. entity “formed in the ordinary course” of business. The DOS stated further that in addition to the relationship being formal and documented, it must have been formed “in the ordinary course rather than for the purpose of evading the EO2.” In regards to documentation, the DOS stated that “a hotel reservation, whether or not paid, would not constitute a bona fide relationship with an entity in the United States.”

6. Visitor for Pleasure (B-2)

As noted above, the Court recognized that individuals who wish to “visit a family member,” such as a spouse or mother-in-law, have close familial relationships. Individuals from the six designated countries who are not planning to visit family members and who are coming for other reasons, such as sight-seeing and tourism, may be barred from entering.

7. Lawful Permanent Residents, Asylees, and Others Exempted from EO2

EO- 2 exempts from coverage lawful permanent residents, individuals who have been granted asylum, those already admitted as refugees, individuals traveling on advance parole, and those granted withholding of removal and/or Convention Against Torture (“CAT”). All of these individuals should be permitted to travel freely without having to demonstrate a bona fide relationship with a person or entity in the United States.

8. Diplomats and Dual Nationals

Also exempt from the EO-2 travel ban are individuals traveling on diplomatic and related visas [NATO, C-2, G-1, G-2, G-3, or G-4] and dual nationals traveling on passports issued by a non-designated country. These individuals should still be permitted to travel freely without having to demonstrate a bona fide relationship with a person or entity in the United States.

Individuals Applying for Visas

The DOS has stated that for the next 90 days, all new applicants for a visa will be “reviewed on a case-by-case basis, with consular officers taking into account the scope and exemption provisions in the E.O. and the applicant’s qualification for a discretionary waiver.” In regards to the criteria to obtain a waiver, the following three criteria must be met:

- a.) Denying entry during the 90-day suspension would cause undue hardship;
- b.) His or her entry would not pose a threat to national security; and
- c.) His or her entry would be in the national interest.

The following examples⁶ are circumstances in which an application may be considered for a waiver:

- a.) The applicant has previously established significant contacts with the United States but is outside the United States on the effective date of the E.O. for work, study, or other lawful activity;
- b.) The applicant seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;
- c.) The applicant is an infant, a young child, or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;
- d.) The applicant is traveling for purposes related to an international organization designated under the International Organizations Immunities Act ("IOIA"), traveling for purposes of conducting meetings or business with the United States government, or traveling to conduct business on behalf of an international organization not designated under the IOIA; or
- e.) The applicant is a permanent resident of Canada who applies for a visa at a location within Canada.

Refugees

In addition to what we noted in number 7 above, the U.S. Refugee Admissions Program (USRAP) is suspended for 120 days, except for those cases where the Supreme Court has kept the temporary injunction in place for any applicant who has a credible claim of a bona fide relationship with a person or entity in the United States. Any such relationship with a "person" must be a close familial relationship, as defined above. Any relationship with an entity must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading the Executive Order.

KPMG NOTE

The Court did not specifically mention refugee resettlement agencies as a qualifying entity. Therefore, the government may take the position that refugees without family connections in the United States are not covered by the narrowed injunction.

Next Steps

Individuals affected by the E.O., should consult as soon as possible with their qualified immigration counsel to ascertain their status and appropriate next steps in light of the new rules.

As always, KPMG Law LLP will endeavor to provide updates regarding the implementation of the permitted parts of the E.O. as information becomes available.

FOOTNOTES:

- 1 For the Supreme Court's opinion, [click here](#).
- 2 Subject: (SBU) IMPLEMENTING EXECUTIVE ORDER 13780 FOLLOWING SUPREME COURT RULING – GUIDANCE TO VISA-ADJUDICATING POSTS AILA Doc. No. 17062901. (Posted 6/29/17)
- 3 AILA Doc. No. 17012670. (Posted 6/27/17), [click here](#). *(Please note this URL is to a 3^d party (non-KPMG, non-governmental) website):*
- 4 For the Supreme Court's opinion, [click here](#).
- 5 For a news source on this development, see: M. Zanona, "White House reverses course on including fiancés in Trump travel ban criteria," The Hill (online), June 29, 2017. To view the article *(please note this URL is to a 3^d party (non-KPMG, non-governmental) Web site)*, click [here](#).
- 6 Examples are from the DOS memo: Subject: (SBU) IMPLEMENTING EXECUTIVE ORDER 13780 FOLLOWING SUPREME COURT RULING – GUIDANCE TO VISA-ADJUDICATING POSTS.

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Contact us

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