

What's Next For Trump's Travel Ban?

Law360, New York (February 13, 2017, 1:55 PM EST) -- On Jan. 27, 2017, the Trump administration issued Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," which included provisions for a 90-day restriction on travel into the United States by nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen (the "seven countries"), a 120-day restriction on refugee admissions and an indefinite restriction on Syrian refugee admissions. The government initiated detention and removal procedures, visa appointment cancellations and visa revocations for individuals deemed to be within the scope of these restrictions.[1]



Elizabeth Espín Stern

Key Milestones

- **Jan. 28, 2017, through Feb. 3, 2017:** Multiple court actions were filed, resulting in some temporary restraining orders (TROs) prohibiting the detention and removal of foreign travelers with valid immigrant and nonimmigrant visas. The administration clarified during this period that neither lawful permanent residents nor holders of third country passports are covered by the executive order's 90-day travel restriction.
- **Feb. 3, 2017:** While a federal judge in Boston declined to renew a TRO in the District of Massachusetts, a federal judge in the U.S. District Court for the Western District of Washington issued a TRO placing a nationwide block on the executive order's travel restrictions and refugee moratorium.
- **Feb. 4 through Feb. 7, 2017:** The U.S. Department of Homeland Security suspended "any and all actions" implementing the travel restrictions and refugee moratorium and reversed all visa revocations previously executed for nationals of the seven countries. The U.S. Department of Justice filed an emergency motion for stay of the TRO pending appeal, including a request for an immediate stay pending consideration of the motion. The Ninth Circuit denied the immediate stay, and it heard argument on the emergency motion on Feb. 7, 2017. Two states, Washington and Minnesota, challenged the executive order's constitutionality and legality under federal law.
- **Feb. 9, 2017:** A three-judge panel of the Ninth Circuit denied the DOJ's emergency motion, which left intact the district court's nationwide block, pending further court review.



Paul Virtue

Currently, the Ninth Circuit[2] has requested briefing from the parties regarding whether to consider the matter of the emergency motion by the en banc court; briefs are due by Feb. 16, 2017. In addition, the panel set a briefing schedule to address the merits of the executive order's travel restrictions and refugee moratorium; the last brief is currently due on March 29, 2017. Oral argument and a decision will follow sometime thereafter.

Current Status of Travel

Based on Ninth Circuit's decision on Feb. 9, 2017, pending further court decisions:

- Nationals of the seven countries may travel into the United States, apply for U.S. visas and use previously issued U.S. visas to enter the United States, and
- Refugee admissions will continue to be processed.

What is the Trump Administration Likely to Do in Response?

The administration has stated it is exploring all options, and there are reports it may pursue the following actions.

1. Issuance of a new executive order with more limited travel restrictions, presumably to supersede the current executive order.[3] With regard to the content of a new executive order, the precise parameters are not yet public. However, we can anticipate the following changes in a new executive order.

- Lawful permanent residents of the United States are likely to be exempt from travel restrictions, as the administration already took the position that unrestricted travel by this group is in the "national interest."
- Persons holding multiple passports are likely to be exempt from such travel restrictions so long as they travel on the passport of a nonrestricted country. This is also consistent with the position taken by the administration following issuance of the original executive order.
- Individuals with valid nonimmigrant visas (e.g., work or student visas) who have already been admitted to the United States may be made exempt from new restrictions for the duration of their current visas, although the administration has not taken a position on this group yet.
- Individuals with visas granted for diplomatic staffing and work with international organizations, as noted in the original executive order, will likely remain exempt from any travel restriction.[4]
- The basis for "case by case" exceptions to the travel restrictions may be clarified.

2. A petition for appeal to the U.S. Supreme Court, although this course of action is subject to the following

complications.

- The Supreme Court's normal processes for review typically take longer than the time limits included in the executive order (i.e., 90 days for the travel restriction and 120 days for refugee admissions). While the executive order restrictions on travel can be extended for nationals of restricted countries that do not comply with security-vetting information requests from the administration (see discussion below), a presidential proclamation is required to extend the ban.
- The administration would be raising its challenge at a time when the Supreme Court has a limited panel of eight justices, making it all the more challenging to obtain a favorable judgment from five justices.

What Risk Remains?

New travel restrictions could be reinstated through a new executive order or a court decision following any of the pending hearings.

- As noted above, it is virtually certain that any new action will exempt lawful permanent residents and holders of third country passports from travel restrictions.
- It is less certain that nationals of the seven countries who have valid U.S. nonimmigrant authorization (e.g., work visas such as H-1B or L-1, F-1 student visas or B-1/B-2 visitor visas) will be exempt from a revised travel ban.

Can Travel Restrictions Continue and/or be Expanded After 90 Days?

The following is possible as of April 27, 2017 (90 days from issuance of the original executive order).

An extension of the ban past 90 days if restricted countries do not provide requested Information about their nationals:

- While the original suspension of travel is for 90 days, the executive order allows President Donald Trump to prohibit entry of foreign nationals from countries that do not provide information designated by the secretary of homeland security, in consultation with the secretary of state and the director of national intelligence, needed to determine "that the individual seeking the benefit is who the individual claims to be and is not a security or public safety threat" until compliance occurs.

A designation of additional countries subject to travel restrictions:

- While the administration recently noted that no other countries were contemplated for addition to the restricted list, the executive order as originally drafted allows the secretary of homeland security to recommend additional countries for similar restricted treatment.

—By Elizabeth Espín Stern and Paul Virtue, Mayer Brown LLP

Elizabeth Espín Stern and Paul Virtue are partners at Mayer Brown in Washington, D.C. Virtue previously served as general counsel of the U.S. Immigration and Naturalization Service.

DISCLOSURE: Mayer Brown, as counsel for 127 companies, filed an amicus brief opposing the travel restriction with the Ninth Circuit on Feb. 5, 2017.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] These actions prohibited entry to the United States, prevented new applications for visas and revoked previously issued visas for affected nationals of the seven countries. If such individuals were already in the United States, however, these actions did not compromise their ongoing right to remain in the country and pursue the activities for which their visas were originally issued (e.g., work, study or visit), provided they did not travel outside the country.

[2] One of the Ninth Circuit judges made a *sua sponte* call for consideration of *en banc* review, which will require a majority vote of nonrecused judges to proceed to a hearing on the merits. If that majority vote succeeds, the *en banc* court will be convened, and consist of the chief judge and 10 nonrecused judges who are randomly drawn.

[3] There will likely be litigation in the various court actions as to whether a new executive order moots the controversy.

[4] This includes 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 for employees of international organizations.