



SUMMARY AND ANALYSIS OF EXECUTIVE ORDER “Protecting the Nation from Foreign Terrorist Entry into the United States”

January 27, 2017

This document will be updated with additional analysis as more information becomes available. A detailed section-by-section summary and analysis of the order follows the executive summary.

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EXECUTIVE SUMMARY

On Friday, January 27, 2017, President Trump signed an executive order, “Protecting the Nation from Foreign Terrorist Entry into the United States” The provisions contained in the order are unlikely to make our nation safer. Instead, they will leave thousands of refugees who face life-threatening danger without protection by halting all U.S. refugee admissions for four months and Syrian refugee admissions indefinitely. The order also imposes a 90-day ban on entry for all nationals of seven predominantly Muslim nations without requiring any individualized determination based on specific intelligence that the person is a security risk. Broad language in the order appears to be designed to target people of Muslim faith. The order also imposes additional security protocols, including a requirement that U.S. government officials interview every person who applies for a nonimmigrant visa.

Suspension of U.S. Refugee Admissions Program (USRAP): The order suspends the USRAP for 120 days. Exceptions can be made on a case-by-case basis if it is in the national interest, the person would not pose a risk, and the person is a religious minority facing religious persecution, or the admission of the person is required to conform U.S. conduct to an international agreement, or when a person is already in transit and denying admission would cause hardship. In addition, for the current fiscal year, the order reduces the number of refugees to be admitted to the U.S. by more than half from an initial goal set by President Obama of 110,000 to 50,000, dropping U.S refugee admissions to the lowest level in a decade. Having already admitted 29,895 refugees as of January 20, 2017, the United States would only admit 20,000 more refugees for the remainder of the year. The order also directs DHS to determine the extent to which state and local jurisdictions may have greater involvement in determining the placement or resettlement of refugees in their jurisdictions.

Ban on Syrian Refugees: The order halts the processing and admission of Syrian refugees indefinitely, until the President determines that sufficient changes have been made to ensure that the admission of Syrian refugees is in the national interest. Last year the U.S. accepted about 10,000 Syrians fleeing the civil war—far fewer than other Western countries.

Ban on Entry of Nationals of Muslim-Majority Countries: The order bans immigrant and nonimmigrant entries, for at least 90 days, for nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria, and

Yemen [by reference to INA §217(a)(12)]. Other countries may be added and adjudications of other immigration benefits could be impacted. As described in Section 1, the order also calls for the exclusion of people who “would place violent ideologies over American law” or “who engage in acts of bigotry or hatred (including ‘honor’ killings, other forms of violence against women, or the persecution of those who practice religions different from their own)...” This language is vague and appears highly susceptible to discriminatory abuse against people of Muslim faith.

Requires In-Person Interviews for Most Nonimmigrant Visa Applicants. The order suspends the Visa Interview Waiver Program (VIWP), requiring all nonimmigrant visa applicants to attend an interview unless an interview is not required by statute. The VIWP allowed consular officers to waive the interview requirement for applicants seeking to renew nonimmigrant visas within 12 months of expiration of the initial visa in the same classification. Suspending the VIWP will place enormous burdens on U.S. consulates and embassies (particularly high-volume posts) by increasing already extended interview wait times and processing times, wasting limited resources, and decreasing the quality of consular interviews. The VIWP has been used to waive the interview requirement only for travelers who have already been vetted and determined to be a low security risk and who have a demonstrated track record of stable employment and stable travel. Limited consular resources should be primarily devoted to high risk or new visa applicant cases where eligibility or security is a concern.

Screening of all Immigration Benefits: The order directs federal agencies to develop screening standards and procedures for all immigration benefits to identify fraud and detect whether a person intends to do harm. Agencies are directed to create a process to evaluate the person’s “likelihood of becoming a positively contributing member of society” and “ability to make contributions to the national interest.” These standards are not required by law (except in very limited circumstances), are extremely subjective, and will create significant and often insurmountable barriers for many individuals.

Biometric-Entry Exit: The order directs agencies to expedite the completion and implementation of a biometric entry-exit system and includes reporting requirements. Since 1996, Congress has mandated that an automated entry-exit system be developed and implemented at all air, land, and sea ports of entry in an attempt to track those who overstay their visas. While DHS implemented biometric entry in 2006, a biometric exit system has been held up by numerous obstacles and logistical issues. The completion of an integrated biometrics entry-exit system would require significant funding. The FY 2016 Consolidated Appropriations Act authorizes up to \$1 billion for a biometric exit program, to be collected through fee surcharges over a period of up to 10 years. DHS has noted that a comprehensive entry-exit system at all ports of entry will require additional resources.

SECTION-BY-SECTION AND ANALYSIS

Sec. 1 and 2: Purpose and Policy

- Discusses the purpose of the visa issuance process and how it has to keep America safe.
- The U.S. “should not admit those who engage in acts of bigotry or hatred (including “honor” killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Sec. 3: Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern

- Pursuant to INA §212(f), suspends “entry” (immigrants and nonimmigrants) of “aliens from countries” designated pursuant to INA §217(a)(12) for 90 days from the date of the EO.
- Countries identified in INA §217(a)(12) and later added to the list of countries with Visa Waiver restrictions are: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.
- Excludes diplomats, NATO visas, C-2s (United Nations-related visas), and G visas (international organization officials and employees and their immediate family members).
- DHS, DOS and Director of National Intelligence (DNI) will conduct an immediate review to determine the information needed from any country for adjudication of any visa, admission, or other benefit under the INA to make sure that the person is who they claim to be and is not a security or public safety threat.
- Within 30 days, DHS must submit a report to the President of its conclusions and include a list of the countries that do not provide adequate information for adjudications. Identified countries will be given 60 days to start providing required information.
- After 60 days, DHS will submit a list of countries recommended to be included in a Presidential Proclamation prohibiting the “entry of foreign nationals” (excluding diplomats, NATO, C-2s, and G visas) from countries that have not complied until compliance occurs.
- Additional countries may be added at any time.
- Narrow exception permitting issuance of visas or other immigration benefits “to nationals of [such] countries” on a case-by-case basis when it is in the national interest during the suspension period.
- Imposes reporting requirements 30, 60, 90, and 120 days from the date of the EO.

Questions and Analysis:

- INA §212(f) pertains to “entry” but title and paragraphs (a) and (g) reference “other immigration benefits under the INA.” To what extent does this apply to immigration benefits (adjustment of status, nonimmigrant extensions, etc.) adjudicated by USCIS?
- Does the suspension on “entries” also mean that DOS must cease issuing visas? Paragraph (g) states that visas and other immigration benefits may be issued if “in the national interest” during the suspension period but paragraph (c) states that only “entries” are suspended. Title also refers to “suspension of issuance of visas.”
- Section 3 references “aliens from countries” designated pursuant to INA §217(a)(12), “foreign nationals” from such countries, and “nationals” of such countries. Who does this encompass? Citizens? Nationals? Dual citizens or nationals? What if a person is a dual citizen of a designated country but hasn’t been there in 20 years?

Sec. 4: Implementing Uniform Screening Standards for All Immigration Programs

- Directs DOS, DHS, DNI, and the FBI to implement a program to identify individuals “seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission.”
- Program must include:
 - Uniform screening standards and procedures (such as in-person interviews);
 - The creation of a database of identity documents;
 - Amended application forms with questions “aimed at identifying fraudulent answers and malicious intent”;

- A mechanism to ensure that individuals are who they claim to be;
 - A process to evaluate the person's "likelihood of becoming a positively contributing member of society" and "ability to make contributions to the national interest"; and
 - A mechanism to assess whether the applicant has the intent to commit criminal or terrorist acts after entering the United States.
- Imposes reporting requirements 60, 100, 200 days of the date of the EO.

Questions and Analysis:

- This type of additional screening will result in significant backlogs at USCIS offices at the local and service center level, consular processing backlogs, and crowding of secondary inspection sites at CBP ports of entry, resulting in a stifling of business and economic contributions of those seeking to come to the U.S.
- The U.S. already has a robust system in place for vetting all visa applicants, particularly after the expansion of security screening after 9/11.
- In addition, several of these components already exist. For example, all individuals are required to have biometrics captured, and to have fingerprints taken to confirm identity at interviews with DHS and DOS.
- How does the government purport to measure "likelihood of becoming a positively contributing member of society" and "ability to make contributions to the national interest."? Such a determination is inherently subjective and will create significant and often insurmountable barriers for many individuals.
- Legally, unless the person is applying for an employment-based national interest waiver, then there is no statutory requirement for an applicant to show that his/her presence will benefit the U.S. national interest.
- This kind of screening will be time intensive, will require additional government resources, and will duplicate investigations that are already being undertaken with respect to security issues.
- Will this type of screening be done by CBP upon seeking admission? If so, this will create significant delays at CBP ports of entry. Also, CBP officers aren't trained or necessarily qualified to make determinations on whether a person will contribute to society or the national interest.

Sec. 5: Realignment of U.S. Refugee Admissions Program for Fiscal Year 2017

- Suspends U.S. Refugee Admissions Program (USRAP) for 120 days.
- Halts processing and admission of Syrian refugees indefinitely, until the President determines sufficient changes have been made to ensure USRAP aligns with national interest.
- Limited exceptions allowing for the admission of individual refugees on a case-by-case basis if it is in the national interest, including when the person is a religious minority in his/her country of nationality facing religious persecution, when admitting the person would enable the U.S. to conform its conduct with a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship. Admission cannot pose a risk to the United States.
- During 120 day period, DOS/DHS shall review the USRAP application and adjudication process and determine/implement additional procedures to ensure those who are approved do not pose a threat.
- Applicants already in the USRAP process may be admitted once revised security procedures are implemented.

- After 120 days, USRAP admissions will resume only for nationals of countries where DOS, DHS, and DNI have jointly determined that additional procedures are adequate to ensure U.S. security.
- Once USRAP is resumed, refugee claims based on religious persecution are to be prioritized, but only if person is a minority religion in their country of nationality. DOS and DHS shall recommend legislative changes to assist with such prioritization if necessary.
- Refugee ceiling is lowered from 110,000 to 50,000 for remainder of FY 2017.
- Imposes reporting requirements on the prioritization of claims 100 and 200 days from the date of the EO.
- Directs DHS to examine laws to determine the extent to which state and local jurisdictions may have greater involvement in determining placement or resettlement of refugees in their jurisdictions.

Questions and Analysis:

- 50,000 would be the lowest ceiling on refugee admissions in a decade, and comes at a time when the world is experiencing a massive forced migration crisis.
- Completely halting the refugee process for 4 months is unprecedented. After 9/11, USRAP was suspended for less than 3 months.
- The 120 day suspension will mean that U.S. families that have already been separated for many months, if not years, will be further delayed from reuniting.
- Refugees are already required to go through an extensive vetting and security clearance process that includes background checks, biometrics, medical screening and in-person interviews.

Sec. 6: Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility

- Directs agencies to consult and *consider rescinding* TRIG [INA §212(a)(3)] exemptions and waivers and implementing memoranda.

Sec. 7: Expedited Completion of the Biometric Entry-Exit Tracking System

- Directs agencies to expedite completion and implementation of a biometric entry-exit tracking system for all travelers to the United States.
- Imposes reporting requirements in 100, 200, 365 days of the date of the EO, and every 180 days thereafter until system is fully operational.

Questions and Analysis:

- Biometrics have been collected from most individuals upon entry since 2009 (US-VISIT, ESTA) but it has been much more challenging to implement a system for collecting data from those departing from the U.S.
- DHS has identified three primary obstacles that have delayed implementation of the collection of exit data: (1) collection of such data would disrupt the flow of travelers through air terminals; (2) air carriers and airport authorities have so far blocked testing of a method that incorporates the collection of biometric data into passenger processing at the departure gate; and (3) questions about which personnel would be responsible for collecting departure data.
- Even with a system in place, the benefits of knowing who has left the country are not as significant as knowing who is entering the country.

- While biometric data collection upon exit might give better information about who has overstayed a period of authorized admission, it would *not* tell law enforcement where the individual *is located* within the country.

Sec. 8: Visa Interview Security

- Directs DOS to immediately suspend the Visa Interview Waiver Program and ensure compliance with INA §222 interview requirements.
- Expands Consular Fellows Program “to ensure that nonimmigrant visa interview wait times are not unduly affected.”

Questions and Analysis:

- INA §222(h) requires a personal interview of a visa applicant, but grants consuls abroad discretion to waive the requirement.
- Suspending the VIWP will place enormous burdens on U.S. consulates and embassies (particularly high-volume posts) by increasing already extended interview wait times and processing times, wasting limited resources, and decreasing the quality of consular interviews.
- Visa interview waivers are only granted to low risk travelers who have already been vetted by the U.S. government, such as the very elderly, very young, or individuals who have demonstrated a track record of stable employment, stable travel, and/or a previous determination of low security risk. Consular resources should be devoted to high risk or new visa applicant cases where eligibility or security is a concern.
- The VIWP is largely utilized for employment-based nonimmigrant applicants, such as H, O, P, and L, who are simply seeking a renewal visa. Requiring everyone to go through an interview will impede the ability of employment based visa applicants to obtain a visa and return to the U.S. quickly, which will disrupt U.S. businesses and the flow of commerce.
- Requiring every person to be interviewed, even those that have already been vetted, will increase security risks for already crowded consulates and embassies, as more people will be required to enter the premises.
- Consular Fellows must be hired, trained (including language training in some cases), and obtain security/country-specific clearances. In addition to the fact that these Fellows will be inexperienced, it will take a significant amount of time and resources to place them at consular posts, and this will not lend quick relief to increased processing times and resource challenges.
- Imposing additional visa application burdens on foreign nationals invites reciprocal requirements being imposed by foreign governments, thereby restricting the ability of American citizens to travel abroad for business or tourism.

Sec. 9: Visa Validity Reciprocity

- Directs DOS to review all nonimmigrant reciprocity agreements to ensure they are “truly reciprocal” in terms of visa validity periods, fees, and other treatment.
- Directs DOS to adjust reciprocity agreements to the extent practicable for countries that do not treat U.S. nationals equally.

Sec. 10: Transparency and Data Collection

- Directs DHS, in consultation with the AG, to collect and publish, in 180 days and every 180 days thereafter, information regarding:

- The number of foreign nationals in the U.S. who have been charged or convicted with terrorism-related offenses while in the U.S.; removed from the United States based on terrorism-related activity or national security reasons;
 - The number of foreign nationals in the U.S. who have been radicalized after entry into the U.S. and engaged in terrorist acts or provided support to a terrorist organization; and
 - Information regarding the number and types of acts of gender-based violence against women or honor killings by foreign nationals people in the U.S.
- Directs DOS to report costs associated with USRAP at the federal, state, and local level within one year.

Sec. 11: General Provisions.

- EO will be implemented consistent with applicable law and subject to appropriations.
- EO does not create any enforceable rights or benefits.