Resisting President Trump's Visa Revocations

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President Trump signed an Executive Order the afternoon of Friday, January 27, 2017 which, according to its introduction, is intended to "protect Americans" but had the effect of banning travel of certain persons into to the United States who are mainly nationals of mainly Muslim countries. Citing INA 212(f), which broadly authorizes the President to suspend "any aliens or class of aliens into the United States" that would be detrimental to its interest, the EO became effective as of the date of signing, though it is currently subject to a Temporary Restraining Order. Prior to the TRO, the issuance of the EO without notice caused a great deal of hardship to legitimate travelers who had already embarked on their journey to the United States and stranded others who had not yet commenced their journey. The EO has been subject to widespread condemnation, protests and lawsuits. Although there is much debate on the validity of the EO and whether the President has authority to impose a blanket ban on legitimate travelers from predominantly Muslim countries, which appeared to be consistent with his campaign statements to impose a "Muslim ban," there has not been much discussion on the practical impact of revocations of the underlying nonimmigrant and immigrant visas that had been issued to at least 60,000 individuals when the EO took effect.

Among the EO's key provisions are, although further details can be found on our firm's FAQ:

- A 90-day ban on the issuance of U.S. visas to and entry to the United States of anyone who is a national of one of seven (7) "designated" countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.
- An immediate review by the U.S. Department of Homeland Security (DHS) of the information needed from any country to adequately determine the identity of any individual seeking a visa, admission or other immigration benefit and that they are not "security or public-safety threat[s]." This report must be submitted within 30 days and must include a list of countries that do not provide adequate information.
- The suspension of the U.S. Refugee Admissions Program (USRAP) for 120 days.
- The implementation of "uniform screening standards for all immigration programs" including reinstituting "in person" interviews.
- A requirement that all individuals who need visas apply for them in person at U.S. consulates, rather than allowing "mail-in" or drop-box applications.

Although the EO is currently not in effect as a result of the TRO issued by the U.S. District Court for the Western District of Washington on February 3, 2017, this blog will focus on the impact of the revocation of a nonimmigrant visa of an individual who is already in the United States assuming the TRO is lifted. A panel in the Court of Appeals for the Ninth Circuit is currently considering the government's appeal for an emergency stay of the Western District of Washington TRO. **[Update: later in the day on February 9, after this blog post was published, the Ninth Circuit panel issued** a published decision denying the government's emergency motion for a stay pending appeal**.]** Even if the Ninth Circuit does not issue the stay, the government will most likely seek an emergency stay from the Supreme Court, and thus the fate of the EO, and of the hundreds of thousands impacted under it, still hang in balance at the time of writing.

In conjunction with the EO, the Department of State issued a notification provisionally revoking all valid immigrant and nonimmigrant visas, as follows:

Upon request of the U.S. Department of Homeland Security and pursuant to sections 212(f) and 221(i) of the Immigration and Nationality Act and 22 CFR 41.122 and 42.82, and in implementation of' section 3(c) of the Executive Order on Protecting the Nation from Terrorist Attacks by Foreign Nationals, I hereby provisionally revoke all valid nonimmigrant and immigrant visas nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to the exceptions discussed below.

The revocation does not apply to visas in the following nonimmigrant classifications: A-1, A-2, G-1, G-2, G-3, G-4, NATO, C-2, or certain diplomatic visas.

The revocation also does not apply to any visa exempted on the basis of a determination made by the Secretaries of State and Homeland Security pursuant to section 3(g) of the Executive Order on a case-by-case basis, and when in the national interest.

This document is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any person.

What is the impact of the revocation of a visa of someone who is already lawfully in the United States? Take the example of a national from one of the banned countries who was issued an F-1 student visa, and has already been admitted into the United States in F-1 status when the visa is revoked. The revocation of the visa would not impact this student's ability to maintain F-1 status so long as she is enrolled in the designated school and is complying with all the other terms of her status, such as not engaging in unauthorized employment. If the student leaves the United States, assuming the EO is in effect, she will not be able to come back to the United States. Hence, it is imperative to remain in the United States and continue to maintain status until such time that the ban has been lifted, and the revocation of the underlying visa has also been lifted. After the court issued the TRO, the State Department restored the visas and the above revocation notification is not in effect. However, the visas of the nationals of the 7 countries will again likely get provisionally revoked if the TRO is stayed.

Some people who came into the United States while the ban was still in effect had their visas actually cancelled. This is different to the situation when the visa got provisionally revoked after the EO came into effect. They would have to seek new visas or will need to have their admissions without a visa waived if they arrive at a port of entry so long as the ban is not in effect. Unless there is an emergent circumstance for a person with a cancelled visa to attempt to come to the United States and seek a waiver, it is advisable that such a person apply for a new visa before entering the United States.

In the event that the President adds other countries in a future Executive Order, those nationals will also be subject to visa revocation, and if they are already in the United States, they must maintain status. For example, if the affected national is in H-1B status, he must continue to remain in the employment of the petitioning entity that applied for the H-1B visa classification on his behalf. This individual may also seek an extension of status or change of status while in the United States. It is also likely that visas will get revoked of persons even if their countries are not on a banned list if there is basis or suspicion of future inadmissibility such as becoming a public charge. Even prior to President Trump, the DOS was provisionally revoking visas if a nonimmigrant in the US was convicted of a driving while intoxicated offense. A person caught in this situation besides maintaining status, and is unable to overcome the ground of inadmissibility at the US consulate (which is unlikely if there is a blanket ban on the person's country) should remain in the United

States and continue to maintain status. So long as the individual maintains status, and does not stay year beyond the expiration of the I-94, the revocation of the visa should also not trigger unlawful presence for purposes of triggering the 3 and 10 year bars under INA 212(a)(9)(B). This individual must also make efforts to become a permanent resident as soon as possible either through a family-based or employment-based sponsorship. Adjusting to permanent resident status in the United States would be the solution to the problem. The government has clarified that the travel ban under the EO does not apply to permanent residents. Still, permanent residents must also be careful to not be coerced in signing I-407 abandonment applications. Permanent residents have a right to seek a removal hearing, and the government has a heavy burden to provide that a permanent resident is not entitled to that status.

Note that a nonimmigrant whose visa has been revoked is technically subject to removal. INA 237(a)(1)(B) provides:

Present in violation of law. _ Any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorization admission into the United States as a nonimmigrant) has been revoked under section 221(i) is deportable.

Thus, even if one is not in violation of the INA, but whose nonimmigrant visa has been revoked, is amenable to be placed in removal proceedings. If the sole basis of placing the individual in removal proceedings was due to the revocation, under INA 221(i), the revocation can be challenged in removal proceeding. There is an arguable basis to challenge such a revocation based on INA 212(f), which provides in part:

Suspension of entry of imposition of restriction by President. - Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamations, and for such period as he shall deem necessary, suspend the entry of aliens any restrictions he may deem to be appropriate.

INA 212(f) applies to a suspension of an entry into the United States. An individual who was previously admitted in nonimmigrant status has already made such an “entry” into the United States and should therefore not be subject to a visa revocation under INA 212(f).

Finally, the revocation of an immigrant visa, once the individual has already been admitted as a permanent resident, should have no adverse impact. There would obviously be an adverse impact if the immigrant visa is revoked before the individual has proceeded to the United States. Even under these circumstances, if the immigrant visa is revoked unbeknownst to the person and could not have been ascertained through reasonable diligence, she can seek a waiver under 212(k) either at the port of entry or in removal proceedings, and if victorious, can be admitted as a permanent resident. If the EO takes effect, the DOS will revoke the visas en masse as was done the last time, and this individual is not likely to be aware of the revocation while on the journey to the United States and would thus be a good candidate for a waiver under INA 212(k).