CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

GOMEZ V. TRUMP: WELCOME TO THE BRAVE NEW WORLD OF MADE UP LAW UNDER INA 212(F)

Posted on September 8, 2020 by Cyrus Mehta

Before President Trump, one could hardly imagine that an American president would use INA § 212(f) to rewrite immigration law in a manner he saw fit and with whatever prejudices might be harboring in his mind. While INA § 212(f) does give extraordinary power to a president, Trump has exploited these powers beyond what could have been imagined when Congress enacted this provision. INA §212(f) states:

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 proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate

President Trump, in addition to various travel bans, sought to bar various immigrants and nonimmigrants from entering the US through Proclamations 10014 and 10052 under the pretext that they pose a threat to the US labor market during COVID-19. Several plaintiffs challenged the proclamations through by seeking a preliminary injunction, which resulted in *Gomez v. Trump* in the District Court of the District of Columbia. Judge Amit Mehta, who wrote the decision, upheld the validity of the proclamations under INA 212(f), but still ordered the State Department to process the visas of Diversity (DV) lottery winners before the Congressionally mandated deadline of September 30, 2020. The judge said that the government had "unreasonably delayed processing" of their visas. Others subject to the proclamation did not suffer the same irreparable harm as their visas could be processed even after September 30,

but DV lottery winners needed to be issued by the hard deadline of September 30 deadline. Judge Mehta drew a distinction between processing of the visas of DV lottery winners, which were not affected by the proclamations, and their ultimate entry into the US, which would still be prohibited under them.

Trump's proclamations will still bar immigrants and nonimmigrants from entering the US, including DV winners. The only saving grace is that DV lottery winners may some day hope to enter the US once the proclamations expire as their visas got processed before September 30. If Trump gets reelected, the ban may continue and DV winners, along with all the other immigrants and nonimmigrants, would likely still be barred from entering the US.

Apart from this narrow victory for DV winners, Judge Mehta's decision was a disappointment. Judge Mehta confirmed that INA 212(f) exudes deference under *Trump v. Hawaii*. This was the decision of the Supreme Court that upheld what has come to be known as Trump's Muslim ban since it fulfilled a campaign promise that he would ban Muslims if he became president. The watered down version of the proclamation that was upheld by the Supreme Court in Trump v. Hawaii banned nationals of Iran, Sudan, Somalia, Libya, Yemen, Chad and Syria, along with Venezuela and North Korea. Although the Ninth Circuit in *Doe v. Trump* distinguished the president's authority under 212(f) in domestic matters - as that involved a ban on immigrants who were unable to obtain specific health insurance - Judge Mehta gave short shrift to this distinction (see Trump is Not King, Cannot Rewrite Public Charge Law through Executive Fiat). Judge Mehta also did not discuss the other Ninth Circuit decision in *East Bay Sanctuary Covenant v. Trump,* where the Ninth Circuit concluded that the Trump administration had unlawfully done what the "Executive cannot do directly; amend the INA". In that case Trump through INA 212(f) prohibited asylum seekers from applying for asylum who crossed outside a designated port of entry even though INA § 208(a)(1) categorically allows any alien who is physically present in the United States to apply for asylum regardless of the manner of entry and even though it was not through a designated port of arrival. According to Judge Mehta, the plain language of INA 212(f) simply speaks in terms of restricting entry of aliens "detrimental to the United States"; and this detriment is not limited to any sphere, foreign or domestic. Since COVID-19 has resulted in changed economic circumstances, a court is not well equipped to evaluate the policy choices of the administration to restrict the entry of certain classes of aliens, according to Judge Mehta. Even if President

Trump based these restrictions on false pretenses, Judge Mehta held that the court's role in evaluating even this is constrained under INA 212(f). "Congress possesses ample powers to right that wrong. The scope of judicial review is circumscribed," according to Judge Mehta.

Judge Mehta also disagreed that the proclamations overrode the INA, and the exceptions and waivers in the proclamations still allowed noncitizens to enter the US. Judge Mehta, unfortunately, did not analyze that these exceptions, especially the State Department's National Interest Exceptions, imposed additional requirements that had no basis in the INA (see Trump's Work Visa Ban Violates the Immigration and Nationality Act And So Do the Exceptions). Take, for example, the requirement that: "The wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage rate by at least 15 percent (see Part F, Questions 10 and 11 of the LCA) by at least 15 percent. When an H-1B applicant will receive a wage that meaningfully exceeds the prevailing wage, it suggests that the employee fills an important business need where an American worker is not available." This additional wage requirement is entirely absent from the INA. Another example is a provision in the guidance which states that "L-1A applicants seeking to establish a new office in the United States likely do NOT fall into this category, unless two of the three criteria are met AND the new office will employ, directly or indirectly, five or more U.S. workers." The requirement that petitioners employ five or more U.S. workers also has no basis in the INA or in 8 Code of Federal Regulations. For L-1B applicants, the need to demonstrate significant and unique contributions to the petitioning company, that the specialized knowledge is specifically related to a critical infrastructure need and that the applicant has spent multiple years with the same company has no basis in the law or regulations. Under the existing INA and regulations, the L-1B applicant must demonstrate that he has had one year of qualifying experience in a managerial, executive or specialized knowledge capacity. Judge Mehta's decision is devoid of any analysis on how these exceptions have no basis in the INA, and instead, he held that they did not "expressly override" any "particular" provision of the INA and "liens still may travel to the United States under the visa categories established by Congress. "

Welcome to the new world of INA 212(f) jurisprudence under which law can be simply be made up without going through the arduous process of proposing bills in Congress and having them voted in both the chambers. Indeed, this law

can be invented through the stroke of a xenophobe's pen. Arch xenophobe Stephen Miller has been the architect of Trump's proclamations under 212(f). Either entire countries can be banned or entire visa categories pursuant to 212(f). The exceptions to these restrictions, based on national interest, can also be made up with no bearing on the actual visa category and subject to a consular officer's caprice and whim.

If President Trump is reelected, one should expect that he will continue to wholesale rewrite the INA and restrict immigration. If on the other hand Joe Biden is elected, the broad bans that Trump issued under 212(f) could be eliminated on January 21. In the meantime, even though *Gomez v. Trump* upheld Trump's power to rewrite the law under 212(f), it remains to be seen how other courts will interpret 212(f) with respect to Proclamations 10014 and 10052. The hearing for the preliminary injunction in *NAM v. Trump* is scheduled for a hearing on September 11 in the Norther District of California, which is in the Ninth Circuit where *Doe v. Trump* and *East Bay Sanctuary Covenant v. Trump* should still have sway. Let us hope that the court will rule differently in that case and the desired preliminary injunction will ensue.