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US IMMIGRATION & NATIONALITY LAW

EXTENDING THE IMMIGRANT AND NONIMMIGRANT VISA BANS: THE LAST GASPS OF 212(F) JURISPRUDENCE UNDER TRUMP

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On the last day of 2020, Trump issued a Presidential Proclamation extending two previous Proclamations - Proclamation 10014 (Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak) and Proclamation 10052 (Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak). Proclamation 10014, signed in April 2020, suspends certain green card applications, and restricts some nonimmigrant visa categories. Proclamation 10052 of June 22, 2020, itself an expansion of Proclamation 10014, curtailed the entry of individuals who were outside the United States without a visa or other immigration document on the effective date of the proclamation and were seeking to obtain an H-1B visa, H-2B visa, L visa or certain categories of the J visa. Our previous blog discusses Proclamation 10052 in detail.

Trump's latest Proclamation extends the restrictions imposed by the previous Proclamations to March 31, 2021. The administration's stated rationale for the Proclamation is high unemployment due to the COVID-19 pandemic, and a desire to preserve as many jobs as possible for American workers. This reasoning stands in sharp contrast to Trump's recent boast that unemployment rates have fallen below 6.7%. It appears that the Proclamation is actually the Trump administration's last effort at restricting the immigration of highly skilled workers before President-elect Biden takes office in January. The extensions continue to rely on INA 212(f), which gives the president broad power to

suspend the entry of foreign nationals whose entry would be detrimental to the interests of the US. While invoking INA 212(f), Trump has invented new law regarding visa categories outside what Congress enacted through the Immigration and Nationality Act. Trump relied on INA 212(f) to issue the various iterations of the travel ban and Presidential Proclamation 9822, which banned individuals who cross the Southern border between ports of entry from applying for asylum in the United States, to cite only a few examples. Another example where the Trump administration invented the law, as discussed in a prior blog, was in the exceptions to Proclamation 10052. One exception can be availed of by showing that the H-1B worker is being paid 15% over the prevailing wage. The additional wage requirement is entirely absent from the INA.

Like planting a time bomb, the Trump administration has foisted on Biden the unpleasant choice of rescinding the Proclamation come January 20, likely to be a politically unpalatable move given that unemployment rates will probably remain high in the coming months as the pandemic drags on, or letting the Proclamation expire on its own on March 31, 2021. Regardless of which strategy the Biden administration chooses to pursue, would-be immigrants and highly-skilled foreign workers can take comfort in the fact that the Proclamation will be relatively short lived.

If the Biden administration chooses to rescind the proclamations before March 31, they must be mindful of a recent Ninth Circuit decision which has also upheld the Trump administration's invocation of 212(f), this time as the authority for Presidential Proclamation 9945, "Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans.", which barred immigrant visa applicants for entering the United States unless they could demonstrate the ability to acquire health insurance within 30 days of entry or pay for healthcare expenses on their own. *John Doe #1 v. Trump*, No. 19-36020, D.C. No. 3:19-cv-1743-SI, *1-2 (9th Cir. 2020). In *Doe #1 v. Trump*, the plaintiffs alleged, among other causes of action, that Proclamation 9945 exceeded the President's authority under INA § 212(f). *Id*. at 10. The Ninth Circuit rejected this argument and upheld the healthcare proclamation, citing to *Trump v. Hawaii* in stating that INA § 212(f) grants the President broad discretion to restrict entry. *Id*. at 22; *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018). The court reasoned that INA § 212(f) limits the President's authority in three ways –

the President must find that entry of a certain class of immigrants is detrimental to U.S. interests, the limitations on entry imposed must be "temporally limited", and the President must properly identify the "class of aliens" who are subject to the restrictions. *John Doe #1 v. Trump* at *22-26. The Ninth Circuit also indicated that another potential limitation is that a proclamation may not "expressly override" a provision of the INA, which may exist where the statute solves the "exact problem" as the proclamation. Thus, even if the healthcare proclamation overlapped with the public charge ground of inadmissibility at INA 212(a)(4), the imposition of an additional ground of inadmissibility via INA 212(f) will not be viewed as the proclamation overriding the public charge provision. Finding that Proclamation 9945 did not exceed any of these limitations, the court upheld it as a valid exercise of the President's authority under INA § 212(f). *Id*. at *26.

The Ninth Circuit's decision in *Doe #1 v. Trump* may, unfortunately, make it more difficult to challenge Presidential Proclamations issued in reliance on INA § 212(f) as an invalid exercise of Presidential authority. However, the decision can be read narrowly to apply only to Proclamation 9945. It might also give ammunition to those who may wish to challenge Biden's authority to rescind Proclamation 9945 and the extended Proclamations 10052 and 10014. The new administration must carefully follow the holding in the Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California* in rescinding Trump's proclamations under INA 212(f) to ensure the rescissions are not found to be arbitrary and capricious under the Administrative Procedure Act. The Biden administration must provide a detailed and cogent reason for rescinding Trump's proclamations. In *Department of Homeland Security v. Rege*nts, in which the Supreme Court held that the rescission of DACA was a violation of the APA, the Court stated that an agency must comply "with the procedural requirement that it provide a reasoned explanation for its action" in rescinding an existing policy. *Department of Homeland Security v. Regents of the University of California*, 591 U. S. ___, *29(2020). Special consideration should also be accorded to "whether longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 579 U. S. ___, (2016) (slip op., at 9) (quoting *Fox Television*, 556 U. S., at 515). A previous blog post discusses *Department of Homeland Security v. Regents* in greater detail. Given the detrimental impact that Proclamation 9945, together with

Proclamations 10052 and 10014, has on U.S. interests, it is hoped that the Biden administration will be able to provide ample and well-reasoned justifications for rescission. Should President-elect Biden rescind the healthcare Proclamation soon after taking office, and withdraw the appeal before the Ninth Circuit's mandate ensues after 45 days, the opinion may become a moot one.

The *Doe #1 v. Trump* opinion may limit the avenues for challenging Proclamation 9945, along with Proclamations 10052 and 10014. Although the ban was enjoined by the court in *NAM (National Association of Manufacturers) v Trump*, that ruling was limited to the plaintiff organizations that brought the suit. Therefore, the extension will still be effective on others. The Ninth Circuit's ruling in the healthcare proclamation case, *Doe 1 v. Trump*, may have jeopardized *NAM v. Trump*, already limited in its application, since the decision in *NAM v. Trump* was based partly on the idea that the healthcare Proclamation exceeded presidential power. However, all this may not matter if Biden withdraws the appeal before the mandate ensues and also rescinds Proclamation 10052.

We trust that the Biden administration will ensure that *Doe #1 v. Trump* does not become precedent in the Ninth Circuit, and that it will carefully rescind Trump's proclamation.

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