

BAL ANALYSIS

EXECUTIVE ORDER SUSPENDING IMMIGRATION

April 21, 2020 (1:30pm)

EXECUTIVE SUMMARY

- Late Monday night, President Trump tweeted: “I will be signing an Executive Order to temporarily suspend immigration into the United States!” The President’s focus on protecting jobs of U.S. citizens signals a shift in messaging.
- The text of the Executive Order has not been released. The White House and Department of Homeland Security (DHS) have been working on the Executive Order over the past week, so it could be released at any time.
- It is expected that the Executive Order will suspend the “entry” of nonimmigrants and immigrants who are outside of the U.S. We cannot rule out a directive affecting U.S. Citizenship and Immigration Services (USCIS) adjudications, but we anticipate the focus will be on foreign nationals who are outside of the country, as this is where the President has the broadest legal authority to impose restrictions.
- The restrictions will likely have exemptions (e.g., agricultural workers, etc.), but the scope of those exemptions and the process for requesting them is not yet known.
- With visa operations and most international travel already suspended today, the immediate impact of the Executive Order will be muted. Companies will be focused on whether the Executive Order will inhibit their ability to resume full operations once public safety permits international travel.

BACKGROUND

President Trump said on Monday, April 20th, that he intended to close the United States to people trying to immigrate into the country to live and work, a drastic move that he indicated would protect American workers from foreign competition once the nation's economy begins to recover from the shutdown caused by the coronavirus outbreak.

"In light of the attack from the Invisible Enemy, as well as the need to protect the jobs of our GREAT American Citizens," Mr. Trump wrote on Twitter, "I will be signing an Executive Order to temporarily suspend immigration into the United States!"

LEGAL AUTHORITIES

Presidential Proclamation Suspending Entry of High-Skilled Workers

The president has broad authority under section 212(f) of the Immigration and Nationality Act (INA) to deny entry to the United 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 any restrictions he may deem to be appropriate.

The Trump administration has used this authority as the basis for multiple travel restrictions, including the original travel ban that the Supreme Court upheld and the most recent restrictions on travel from China, Iran, most of Europe, the UK, and Ireland, to prevent the spread of COVID-19.

The central statutory constraint imposed on the exclusionary power under section 212(f) is that the President must have found that the entry of any aliens or class of aliens would be "detrimental to the interests of the United States" in order to exclude the alien or class of aliens. The statute does not address (1) what factors should be considered in determining whether aliens' entry is "detrimental" to U.S. interests; (2) when and how proclamations suspending or restricting entry should be issued; (3) what factors are to be considered in determining whether particular restrictions are "appropriate"; or (4) how long any restrictions should last.

In 2018, the U.S. Supreme Court held in *Trump v. Hawaii* that section 212(f) "exudes deference to the president in every clause." However, the Supreme Court also noted that the President had "craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances." We should expect legal challenges to the new Executive Order arguing that the President's latest exercise of authority is not sufficiently tailored, but it is too early to predict how litigation will affect the Executive Order.

PRACTICAL IMPACT

The U.S. government has already suspended all routine nonimmigrant and immigrant visa processing and most companies currently prohibit international travel. As such, the immediate impact of the Executive Order will be muted. Companies will be focused on whether the Executive Order will inhibit their ability to resume full operations once public safety permits international travel. Below are several initial areas of focus for U.S. companies as they evaluate potential downstream impacts:

Scope of Travel Restrictions

The administration has issued multiple travel bans in 2020 with different scopes based on the circumstances. No details have been released yet about the scope of the new restrictions. Will the new travel ban restrict all entries, irrespective of whether the foreign national has a visa or is otherwise visa exempt? Will it restrict entry only by foreign nationals who require a new visa? If it applies to visa adjudications, does it apply to foreign nationals who previously held the same visa status (i.e. renewal applicants) or does it only apply to first-time applicants for a visa category?

Scope of Exemptions

We expect the Executive Order will contain exemptions for agricultural workers and some health care workers. We anticipate there will be other exemptions, but their scope and how they will be applied is still being worked out. The government has not yet provided a clear process to request an exemption from the restrictions on entry from Europe that were imposed on March 14 and remain in effect.

Duration of Travel Ban

The duration of the travel ban is unknown. Unconfirmed rumors suggest that it may last ninety (90) days. The durations of prior travel bans have been inconsistent, and the mechanism for ending all of the travel bans is unknown. As federal and state governments begin to reopen the economy, and companies resume international travel, the duration of the Executive Order will become central to any analysis of impact.

Impact on USCIS Adjudications (e.g., change/extension of status)

The legal authority the government will likely rely upon is based on the suspension of “entry” of foreign nationals. Under U.S. immigration law, foreign nationals who are present in the U.S. who are seeking a change of status or an extension of status are not considered to be seeking an “entry.” However, we cannot rule out that the administration will seek to restrict or further delay stateside USCIS adjudications. Opponents of legal immigration are asking the Trump administration to seize the moment and take action to aggressively reduce the number of high-skilled foreign workers in the country.

Reciprocal Action by Other Governments

The U.S. does not operate in a vacuum, and we cannot rule out that other governments will respond to the U.S. action by restricting the entry of U.S. workers into other countries.

CORPORATE STRATEGY

Executive Briefing

Executive briefings should avoid guesswork and should focus on the current status of international travel restrictions and what the announcement means in the near-term (little) and long-term (not yet known). Executives are juggling a number of COVID-19 challenges and it may be helpful to remind them that U.S. visa processing is already suspended, that companies were already planning on delays at U.S. consulates, and that USCIS processing times have been slowing down over the past six months. They should be advised that, until text is released, no one can rule out harm to employees already in the U.S.

Employee Communications

Companies should proactively communicate with employees through different channels (e.g., written communications, teleconference, etc.). Employee anxiety will be very high and it is important that companies maintain credibility while pushing out information and, when appropriate, addressing rumors or incorrect media reports.

Workforce/Immigration Program Strategies

Companies can and should reevaluate program strategies to account for expected delays at U.S. consulates and any new Executive Order. The following are proactive strategies to consider to mitigate the effects of certain delays and potential restrictions.

- Prioritize petitions where the company can establish “essential” work by beneficiaries (e.g., food supply chain, public health safety, etc.) and develop case records to support expedite requests;
- Evaluate whether a petition should be filed as a change-of-status, taking in to account that USCIS processing delays make that analysis difficult;
- Initiate cases earlier than normal to allow time for lengthy consular or USCIS processing;
- When filing for a change of status on behalf of a beneficiary, evaluate whether the beneficiary’s current status should be extended first to allow time for the change of status to be processed;
- If needed, amend or modify a current H-1B cap filing to request a change of status;
- Advise an F-1 foreign student to extend his or her Optional Practical Training (OPT) (if possible) even if he or she was selected to file an H-1B cap petition; and
- Move up your timeline to evaluate alternative countries where a foreign national may work if U.S. entry is delayed or suspended.