PRACTICE ADVISORY[1]
June 15, 2017

The Muslim Travel Ban: What is the Impact of the Supreme Court's June 26, 2017 Decision

*****Update July 19*****

In response to the government's restrictive implementation of the Supreme Court's decision in *IRAP*, the plaintiffs in *Hawaii v. Trump* asked the District Court to enforce the injunction or, in the alternative, modify it in accord with a broader reading of the Supreme Court decision. On July 13, 2017, District Court Judge Derrick Watson granted plaintiffs' motion in part, ordering the Trump Administration to expand its interpretation of the Supreme Court's order. On July 14, 2017, the government filed both an appeal of the district court decision to the Ninth Circuit Court of Appeals, and a motion with the Supreme Court seeking clarification of its stay decision in *IRAP*.

On July 19, 2017, the Supreme Court stayed part of Judge Watson's modified injunction but left the rest intact. As a result, the Trump administration currently is enjoined from:

1. Applying section 2(c), 6(a) and 6(b) of Executive Order 13,780 to exclude grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States.
2. Applying Section 6(a) and 6(b) of Executive Order 13,780 to exclude refugees who ~~(i) have a formal assurance from an agency within the United States that the agency will provide, or ensure the provision of, reception and placement services to that refugee; or (ii)~~ are in the U.S. Refugee Admissions Program through the Lautenberg Program.

In its modified injunction, the District Court also held that the government could not apply sections 6(a) and 6(b) of the Executive Order to exclude refugees who have a formal assurance of assistance from a U.S.-based refugee resettlement organization. In its July 19, 2017 order, the Supreme Court stayed this portion of the modified injunction pending resolution of the government's appeal to the Ninth Circuit.

The Department of State has updated its guidance on the travel ban to comply with the modified injunction.

 This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The authors of this practice advisory are Mary Kenney, Aaron Reichlin-Melnick, and Leslie Dellon.

Because of two nationwide federal court injunctions, President Trump's revised travel ban, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, Exec. Order No. 13780, 82 Fed. Reg. 13209 (EO-2), did not take effect in March 2017 as intended. On June 26, 2017, the Supreme Court partially stayed these injunctions. *Trump v. IRAP*, __ U.S. __, Nos. 16-1436 (16A1190), 16-1540 (16A1191), 2017 WL 2722580, at *6 (June 26, 2017). Pursuant to this decision, EO-2 remains enjoined with respect to the majority of foreign nationals otherwise subject to it. However, EO-2's travel and refugee bans now have been partially implemented pursuant to guidance issued by the Department of State (DOS) and the Department of Homeland Security (DHS) following the Supreme Court's decision.

This practice advisory will address the Court's decision and detail how DOS and DHS are implementing those portions of EO-2 that are no longer enjoined.

BACKGROUND

1. What is included in EO-2?

On March 6, 2017, President Trump issued a revised Muslim travel ban, replacing an earlier ban that had been struck down as unconstitutional by several federal courts. The revised ban, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, Exec. Order No. 13780, 82 Fed. Reg. 13209 (EO-2), includes the following provisions:

- **Section 2(c)** suspends the entry of nationals from six Muslim-majority countries – Iran, Libya, Somalia, Sudan, Syria, and Yemen—for 90 days[2] from the effective date of the order.
- **Section 3(c)** provides for case-by-case waivers of the entry ban in § 2(c).
- **Section 6(a)** suspends decisions on refugee applications and the travel of refugees to the United States for 120 days following the EO-2 effective date. During this period, the Secretary of State is to review refugee processing and adopt additional procedures necessary to ensure that refugees do not pose a security threat.
- **Section 6(b)** limits refugee admissions for fiscal year 2017 to 50,000 and suspends any entries above that number.
- **Section 14** designates the effective date of EO-2 as March 16, 2017.

2. Is anyone exempt from the travel ban in EO-2?

Yes. The following categories of nationals from the affected countries are not subject to EO-2:

- Individuals in the United States pursuant to a valid visa on June 26, 2017;
- Lawful permanent residents;
- Dual nationals traveling on a passport issued by a nondesignated country;
- Those admitted to or paroled into the United States on or after the effective date of EO-2;
- Those with a travel or entry document (such as an advance parole document), other than a visa, valid on the effective date of EO-2 or issued thereafter;

[2] It is possible—if not likely—that this 90 day period will be extended.

- Those traveling on a diplomatic visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa;
- Asylees, refugees already admitted to the United States, those granted withholding of removal, protection under the Convention Against Torture or advance parole.[3]

Note that those who seek to enter the United States to apply for asylum are not discussed in EO-2 or any of the guidance issued subsequent to the Supreme Court's decision. Regardless, the Department of Homeland Security (DHS) must continue to apply governing statutory and regulatory standards with respect to their entry.[4]

3. Did EO-2 take effect on March 16, 2017?

No. In separate lawsuits, two federal district courts enjoined key provisions on a nationwide basis. See *International Refugee Assistance Project v. Trump*, ___ F. Supp. 3d ___, 2017 U.S. Dist. LEXIS 37645 (D. Md., Mar. 16, 2017) (IRAP) (addressing First Amendment Establishment Clause claim and issuing a nationwide preliminary injunction against implementation of § 2(c)); *Hawai'i v. Trump*, ___ F. Supp. 3d ___, 2017 U.S. Dist. LEXIS 36935 (D Haw., Mar. 15, 2017) (entering temporary restraining order (later converted to a preliminary injunction) against implementation of §§ 2(c), 6(a), 6(b), as well as provisions in §§ 2 and 6 pertaining only to internal executive review). The Fourth and Ninth Circuits, respectively, subsequently upheld these injunctions with respect to EO-2 §§ 2(c) and (6). *See IRAP*, 857 F.3d 554 (4th Cir. 2017); *Hawai'i v. Trump*, ___ F.3d ___, No. 17-15589, 2017 WL 2529640 (9th Cir., June 12, 2017) (per curiam).[5] As a result of the injunctions, §§ 2(c) and 6 did not go into effect.

The government filed a petition for certiorari in each case and also asked the Supreme Court to stay—or hold in abeyance—both injunctions until the Court ruled on the merits of the appeal. On June 26, 2017, the Court granted certiorari in both cases and consolidated the appeals for argument in October 2017. As discussed fully below, the Court also issued a partial stay of the injunctions on June 26, 2017.

4. How did the Court narrow the nationwide injunctions issued by the Fourth and Ninth Circuits?

The Court partially granted the government's motion for a stay by narrowing the injunctions so that they would apply to foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. The Court explained that "§ 2(c) may not be enforced against" such individuals but that "[a]ll other foreign nationals are subject to the provisions of EO-2." *Trump v. IRAP*, __ U.S. __, Nos. 16-1436 (16A1190), 16-1540 (16A1191), 2017 WL 2722580, at *6 (June 26, 2017). Significantly, the Court applied this same standard to the refugee provisions, EO-2 §§ 6(a) and 6(b). *Id*. at *7. Thus, refugees with a credible claim of a bona fide relationship with a U.S. person or entity cannot be subject to the suspension in refugee

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3 EO-2 at §§ 3(a) and 3(b).

4 *See* 8 U.S.C. §§ 1158, 1225; 8 C.F.R. Part 208 and §§ 235.1-235.8.

5 However, the Ninth Circuit limited the *Hawaii* injunction so that it did not cover the internal agency reviews ordered by EO-2. *Hawai'i v. Trump*, ___ F.3d ___, No. 17-15589, 2017 WL 2529640, at *28-*29 (9th Cir., June 12, 2017) (per curiam).

processing under § 6(a) or to the FY 2017 cap on refugee admissions under § 6(c). In sum, no one with a credible claim of a bona fide relationship to a U.S. person or entity should be prevented from traveling to or entering the U.S. due to EO-2.

IMPLEMENTATION OF EO-2 FOLLOWING THE SUPREME COURT'S DECISION

5. When did the travel ban go into effect?

The injunctions in *IRAP* and *Hawaii* prevented EO-2 from taking effect on March 16, 2017, as originally intended. On June 14, 2017, President Trump issued a memorandum purporting to establish a new effective date.[6] Pursuant to this memorandum, the effective date of each enjoined provision of EO-2 is the date on which the injunctions "are lifted or stayed with respect to that provision."[7] Thus, the effective date of EO-2 §§ 2(c), 3(c), and 6(a) and (b) as applied pursuant to the Supreme Court's partial stay of the injunctions is now June 26, 2017. The memorandum further provided for a 72 hour delay period after any injunction was lifted. Therefore, the travel ban went into effect on June 29, 2017 at 8 p.m. EST.

6. What guidance has the federal government issued with respect to the travel ban under § 2(c)?

Immediately following the Court's stay decision, DHS issued a statement confirming that it would consult with Department of Justice (DOJ) and Department of State (DOS) and provide "additional details on implementation" which would "be done professionally, with clear and sufficient public notice, particularly to potentially affected travelers, and in coordination with partners in the travel industry."[8] On June 28, 2017, DOS issued further implementation instructions to its consulates overseas, which Reuters published the following morning.[9] On June 29, DHS also issued guidance.[10] Collectively, this guidance addresses how the government will apply the Supreme Court's decision with respect to both admission at ports of entry and visa and refugee processing overseas. This guidance is discussed below, divided according to application of the guidance at ports of entry, visa processing, and refugee processing.

PORTS OF ENTRY

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6 *Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence, Subject: Effective Date in Executive Order 13780* (June 14, 2017).

7 *Id.*

8 *DHS Statement On U.S. Supreme Court Decision On The President's Executive Order On Protecting The Nation From Foreign Terrorist Entry Into The United States*, DHS (June 26, 2017).

9 IMPLEMENTING EXECUTIVE ORDER 13780 FOLLOWING SUPREME COURT RULING -- GUIDANCE TO VISA-ADJUDICATING POSTS, U.S. Dep't of State (June 28, 2017), *available at* http://live.reuters.com/Event/Live_US_Politics/989297085 [hereinafter DOS Guidance].

10 *Frequently Asked Questions on Protecting the Nation From Foreign Terrorist Entry into the United States*, DHS (June 29, 2017).

7. Who will be permitted to *enter* the United States under current guidance?

Pursuant to the DOS and DHS guidance, the following individuals will be permitted to enter the United States:

- Individuals from the six targeted countries who are exempt under EO-2: *See* Q.2, above, for a list of these individuals.[11]
- Individuals from the six targeted countries traveling on a visa that is valid on or after June 29, 2017.[12]
- Individuals from the six targeted countries who were present in the United States on June 26, 2017 and have a valid multiple-entry visa and plan to travel abroad.[13]
- Refugees from any country who were formally scheduled for transit prior to 8:00 p.m. EDT on Thursday, June 29, 2017.[14]
- Refugees from any country who are determined to be exempt from EO-2 under the Supreme Court's decision or for whom DOS grants a waiver.[15] For more on refugee exemptions and waivers, see Q. 17 and 18, below.
- Family members of refugees who have been approved to follow-to-join refugees or asylees.[16]

VISA PROCESSING

8. What visa classifications are exempt from EO-2 pursuant to DOS guidance?

DOS has determined that EO-2 remains enjoined with respect to certain visa classifications because "a bona fide relationship to a person or entity is inherent in the visa classification."[17] DOS is treating these visa classifications as "exempt" from EO-2. *Id*. Thus, the

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[11] *See* EO-2 at §§ 3(b)(i)-(vi) (listing exceptions to the travel ban); DOS Guidance at §§ 10(b)-(j).

[12] *See* EO-2 at § 3(a)(iii) (listing the scope of the travel ban as excluding all visa-holders on the effective date of the order); DOS Guidance at § 10(d); DHS Guidance at Q1 and Q5.

[13] DHS Guidance at Q.7. Note that an individual from one of the six targeted countries in the United States on June 26 with a visa valid for only a single entry will not be able to enter following a trip abroad unless he obtains another visa. Because he is exempt from EO-2 based on his presence in the United States on June 29, EO-2 will not apply to his application for a new visa. Id. at Q.6

[14] *Id.* at Q.4.

[15] *Id.* at Q.12.

[16] *Id.* at Q.34; DOS Guidance at §§ 10(a) and 19. Pursuant to DOS guidance, family members of individuals granted refugee or asylee status (V92 and V93 cases) who have filed I-730 petitions with USCIS are considered to have a bona fide relationship that exempts them from EO-2. *Id*. at § 19.

[17] DOS Guidance at § 10(a).

following list of "exempt" classifications includes both those listed in EO-2 and those which DOS has determined remain enjoined**.**

- **Family- and employment-based (other than EB-1) immigrant visa applicants:** Following the Supreme Court's decision, DOS determined that all applicants for family- or employment-based immigrant visas have a credible claim to a bona fide relationship, *except* for applicants for an EB-1 visa an possibly some applicants for EB-4 visas and EB-5 visas and SIV visas.[18] These latter visa applicants will need to demonstrate either a bona fide relationship with a U.S. person or entity or be found eligible for an EO-2 waiver. See Q.10-12 and 15, below.
- **Nonimmigrant visa applicants *except* for B, C-1, C-3, D, or I visa applicants:** The State Department has determined that "a bona fide relationship with a person or entity in the United States … is inherent in the visa classification" for all applicants for nonimmigrant visas except the ones listed above.[19] Thus, all F, H, J, K, L, M, O, P, Q, and R nonimmigrant visa applicants are considered exempt from EO-2. Note that in its original guidance, DOS did not categorically exempt applicants for fiancé(e) visas. DOS subsequently revised its guidance by including K visas on the list of exempt classifications.[20]

9. Can a visa applicant in a non-exempt classification be found "exempt" from EB-2?

Yes. An individual who falls within a visa classification that is not categorically exempt will be found exempt if he or she demonstrates a credible claim to a bona fide relationship with a U.S. person or entity.

10. What constitutes a "bona fide relationship"?

The Court did not define the term "bona fide relationship," but did provide several examples of what would satisfy this standard. For individuals who seek to visit or live with a family member in the United States, a "close familial relationship is required."[21] The Court then pointed to the relationships of two of the plaintiffs—with a spouse and mother-in-law, respectively—as examples of such a close family relationship.[22] With respect to an "entity," the Court explained that "the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2."[23] To illustrate this, the Court stated:

> The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too

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18 *See id.* at § 10(a) (excluding "certain self-petitioning employment-based first preference applicants with no job offer in the United States" and SIV visa applicants from a list of immigrant visas which are categorically exempt from the travel ban).

19 *Id.*

20 *See Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States*, Dep't of Homeland Sec. (June 29, 2017) (revised June 30, 2017 and now listing fiancées as exempt from the ban).

21 *Trump* v. *IRAP*, Nos. 16-1436 and 16-1540, slip op. at 12 (June 26, 2017).

22 *Id.*

23 *Id.*

would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience.[24]

In contrast, someone who enters into a relationship in order to avoid EO-2 would not have such a relationship. "For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion."[25]

11. How has DOS interpreted "close familial relationship"?

DOS has construed "close familial relationship" very narrowly. DOS guidance indicates that only parents, mothers- or fathers-in-law, spouses, fiancé(e)s, children, adult sons or daughters and siblings (including half-siblings) are included.[26] Under this guidance, grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers- and sisters-in-law and any other family members are not considered to be "close" family members.[27] Thus, a visa applicant's relationship with any of the family members in the latter categories would not exempt them from EO-2 per DOS guidance. Instead, in order to receive a visa, these applicants would need to qualify for a waiver.

Senior government officials stated on a press call that they drew the line with respect to what constituted "close" family members based upon the family-based visa preference categories in the Immigration and Nationality Act.[28] Contrary to this, however, the Supreme Court recognized that a relationship with a mother-in-law constituted a close family relationship.[29] Relationships with in-laws do not convey any immigration benefits under the family-based visa system. Thus, the Court's recognition of this relationship provides strong support for an argument that family members who are more distant than those recognized in the family preference categories should satisfy the standard. On June 29, 2017, the plaintiffs in *Hawaii v. Trump* asked the District Court to clarify whether DOS erred in its limited interpretation of the term.[30]

Under DOS guidance, nonimmigrant visa applicants coming to visit a parent, mother- or father-in-law, spouse, child, adult son or daughter, or a sibling (including half-siblings) should be able to demonstrate that—based upon this relationship—they are exempt from EO-2.[31]

12. What constitutes a "formal, documented" relationship with a U.S. entity?

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24 *Id.*

25 *Id.*

26 DOS Guidance at § 11. DOS and DHS subsequently reversed their initial determination that fianceés were not included.

27 *Id.*

28 Senior Administration Officials, *Background Briefing on the Implementation of Executive Order 13780 Protecting the Nation From Foreign Terrorist Entry Into the United States*, Dep't of State (June 29, 2017), *available at* https://www.state.gov/r/pa/prs/ps/2017/06/272281.htm.

29 *Trump* v. *IRAP*, Nos. 16-1436 and 16-1540, slip op. at 12 (June 26, 2017).

30 Josh Gerstein, *Hawaii challenges Trump stance on Supreme Court travel ban ruling*, Politico (June 30, 2017), *available at* http://www.politico.com/story/2017/06/29/hawaii-challenges-trump-ban-240122.

31 DOS *Guidance* at § 11.

The Supreme Court made clear that a student who has been accepted at an American school would be exempt due to a relationship with a U.S. entity, as would a lecturer invited to address an American audience.[32] DOS guidance further indicates that an I-visa applicant employed by a foreign media organization that has a news office based in the United States would be exempt.[33] To-date, no further formal guidance has been issued.

13. Will bona fide relationships established after June 26 be recognized?

Yes, as long as the relationship is bona fide and not formed for the purpose of evading EO-2, it should be recognized.[34]

14. Who is most at risk of being found to not be exempt from EO-2?

The following groups of individuals are those most at risk of being found not to be exempt from EO-2, either because they do not have a relationship with a family member in the United States or because they do not have a "formal, documented" relationship with a U.S. entity that was "formed in the ordinary course" of business. If found non-exempt, these visa applicants would have to receive a waiver in order to be granted visas.

- **Tourists:** Nationals of the designated countries traveling on B-2 visas who are not planning to visit "close family members"—as defined by the State Department[35]—in the United States or who are coming for other reasons (including sight-seeing).

- **Business travelers**: Nationals of the designated countries traveling on B-1 visas for business conferences or other short-term, non-contractual business interactions will likely be subject to the travel ban. DOS has clarified that "a hotel reservation, whether or not paid, would not constitute a bona fide relationship with an entity in the United States."[36]

- **Diversity Visa applicants:** The State Department's guidance suggests that "[b]ased on the Department's experience with the DV program, we anticipate that very few DV applicants are likely to be exempt from the E.O.'s suspension of entry or to qualify for a waiver."[37]

- **Certain specialized employment visa categories**: Individuals applying for visas which do not require an employment offer from a US entity, including EB-1 visas, some EB-4

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32 *Trump* v. *IRAP*, Nos. 16-1436 and 16-1540, slip op. at 12 (June 26, 2017).

33 DOS Guidance at § 12.

34 *See id.* at § 10(a) (noting that "[t]he E.O.'s suspension of entry does not apply to … [a]ny applicant who has a credible claim of a bona fide relationship with a person or entity in the United States.").

35 *Id.* at § 11.

36 *Id.* at § 12.

37 *Id.* at § 8(c).

visas, and potentially EB-5 visas, may be subject to the travel ban if they cannot demonstrate a bona fide relationship.[38]

15. How will visa processing be carried out under DOS guidance?

The DOS guidance shows that—by contrast to the aftermath of the issuance of the first Executive Order—visa processing will largely continue as normal. Importantly, all visa interviews, including for nonimmigrant, immigrant, and diversity visa applicants, will remain scheduled and the National Visa Center will continue to schedule immigrant visa appointments for nationals of the six designated countries.[39]

Decisions on visa applications will be made pursuant to a three-step process:

- First, the consular officer will determine whether the applicant is eligible for the visa for which he or she was applying, "without regard" to EO-2.[40] If the person is not eligible for a visa, the visa will be denied as usual.

- Second, the consular officer will then consider whether the applicant is exempt from EO-2 because the applicant has a credible claim of a bona fide relationship to a U.S. person or entity.[41] If the applicant is exempt, the visa will be issued with an annotation stating "Exempt or Waived from E.O. 13780," and the consular officer will enter a "clear case note" in the file stating "the specific reason why the applicant is exempt."[42] If the consular officer is unsure as to whether a person is exempt, the State Department has instructed the officer to "refuse[] the case under INA 221(g)" and then "request an advisory opinion from VO/L/A/ following current guidance in 9 FAM 304.3-1."[43]

- Third, if the applicant is not exempt from the travel ban, the consular officer will consider whether the applicant qualifies for a waiver under EO-2.[44] If the consular officer

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38 *See id.* at § 10(a) (excluding "certain self-petitioning employment-based first preference applicants with no job offer in the United States" from a list of immigrant visas which are categorically exempt from the travel ban).

39 *See* DOS Guidance at §§ 5 ("GSS vendors and posts will continue scheduling NIV applicants of the six indicated nationalities"), 7 ("The National Visa Center (NVC) will continue to schedule immigrant visa (IV) appointments for all categories and all nationalities"), 9 ("The Kentucky Consular Center (KCC) will continue to schedule additional DV-2017 appointments for cases in which the principal applicant is from one of these six nationalities").

40 *See id.* at §§ 6(a) ("Officers should first determine whether the applicant is eligible for a [nonimmigrant] visa under the INA, without regard to the E.O."), 7(a) ("Officers should first determine whether the applicant is eligible for the [immigrant] visa, without regard to the E.O"), 8(a) ("Officers should first determine whether the applicant is eligible for the DV, without regard to the E.O").

41 *See id.* at §§ 6(b), 7(b), 8(b), 16 ("Consular officers should determine whether individuals are exempt from the E.O. … before considering the availability of a waiver ….").

42 *Id.* at § 13.

43 *Id.*

44 *See id.* at §§ 6(b), 7(b), 8(b). See below for more information on the waiver process.

determines that the applicant qualifies for a waiver, the visa will be issued with an annotation stating "Exempt or Waived from E.O. 13780," and the consular officer will enter a case note in the file which "must reflect the basis for the waiver."[45] If the consular officer determines that the applicant does not qualify for a waiver, then the visa "should be refused" and the consular officer should request an advisory opinion from VO/L/A/.[46]

16. How will consulates evaluate eligibility for the national interest waivers described in EO-2?

Under EO-2, individuals from the six designated countries who are subject to the travel ban nevertheless may be granted a visa if the applicant "demonstrate[s] to the [consular] officer's satisfaction … that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest."[47] All three criteria must be met. Although EO-2 instructs that such waivers should be decided on a "case-by-case basis," it also provides nine listed scenarios where such waivers "could be appropriate," specifically where:[48]

1. the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

2. the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

3. the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

4. the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a U.S. citizen, lawful permanent resident, or noncitizen lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

5. the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

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45 *Id.*at § 17.

46 *See id.* at §§ 6(c) (such applicants "should be refused by entering the code "EO17" into the Consular Lookout and Support System (CLASS)" which "represents a Section 212(f) denial under the E.O."), 7(c) (such applicants "should be refused 221(g) [sic] and the consular officer should request an advisory opinion from VO/L/A."), 8(c) (such applicants "should be refused 221(g) [sic] and the consular officer should request an advisory opinion from VO/L/A following current guidance in 9 FAM 304.3-1").

47 EO-2 at § 3(c).

48 *Id.* at §§ 3(c)(i)-(ix).

6. the foreign national has been employed by, or on behalf of, the U.S. government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the U.S. government;

7. the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 et seq., traveling for purposes of conducting meetings or business with the U.S. government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

8. the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

9. the foreign national is traveling as a U.S. government-sponsored exchange visitor.

EO-2 itself provides no guidance as to how these waivers should be adjudicated, or indeed how an applicant would demonstrate that his or her entry would be in the national interest. However, DOS has provided guidance on how the national interest waiver process will operate. First, DOS notes that some of the listed examples "are considered exemptions in light of the Supreme Court's ruling."[49]

Additionally, and significantly, consular officers are instructed that "[u]nless the adjudicating consular officer has particular concerns about a case that causes the officer to believe that that issuance may not be in the national interest," a determination that a case falls under any of the 9 examples specifically identified in EO-2 "is a sufficient basis for concluding a waiver is in the national interest."[50] Determining that a case falls under some of these circumstances may also be a sufficient basis for concluding that denying entry during the 90-day suspension would cause undue hardship."[51]

Although the State Department guidance does not include any information on how an applicant should prove that he or she is not a "threat to national security," this guidance suggests that an applicant who falls within the waiver categories listed in EO-2 likely will be granted a national interest waiver.

Applicants who do not fall within the waiver categories listed in EO-2 may nevertheless demonstrate to the consular officer that they deserve a waiver. If the officer believes that the applicant is eligible for the waiver, he or she must submit the applicant's case to the Visa Office for consideration, and the Visa Office will reply "within two business days."[52]

REFUGEE PROCESSING

17. What guidance has the federal government issued with respect to the refugee ban under EO-2 §§ 6(a) and (b)?

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49 *Id*. at § 15; see also §§ 15(a)-(e). The State Dep't Guidance omits four categories listed in EO-2 that are now covered under the Supreme Court's stay decision.

50 *Id.*

51 *Id.*

52 *Id.* at § 18.

As with EO-2 § 2(c), the Supreme Court left in place the injunctions as applied to refugees who possess "bona fide relationships" to individuals or entities in the United States. DOS guidance instructs that refugees who demonstrate that they have a close familial relationship with a person in the United States will be exempt from EO-2. See Q. 11, above, for a discussion of what DOS has determined to constitute a close family relationship.

Unfortunately, the government has concluded that a refugee's relationship with a resettlement agency in the United States will not satisfy the test for a relationship with a U.S. entity. In a media briefing on June 29, 2017, the State Department stated "that the fact that a resettlement agency in the United States has provided a formal assurance for refugees seeking admission is not sufficient, in and of itself, to establish a bona fide relationship under the [Supreme Court's] ruling."[53] When asked why they were taking this position, senior officials explained that the Supreme Court provided "limited guidance" and "[w]hile the SCOTUS ruling did provide some specific examples related to visas, there were no specific examples related to refugees per se."[54]

Contrary to the position taken by DOS in its guidance, there is a strong argument that all refugees have a relationship with a U.S. entity that satisfies the Supreme Court's test. All refugees have a "formal" relationship with a refugee resettlement agency (such as HIAS and IRAP, the two organizational plaintiffs in *IRAP*) that is both "documented" and "formed in the ordinary course." As part of this relationship, the resettlement agency provides the refugee at least one year of financial support and assistance in integrating into the United States.[55] Moreover, these relationships are not formed for the purpose of evading EO-2, but rather pursuant to Congressional directive.[56] Therefore, under the plain terms of the Court's decision, this relationship should be sufficient to exempt a refugee from EO-2.

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[53] Senior Administration Officials, *Background Briefing on the Implementation of Executive Order 13780 Protecting the Nation From Foreign Terrorist Entry Into the United States*, Dep't of State (June 29, 2017), *available at* https://www.state.gov/r/pa/prs/ps/2017/06/272281.htm.

[54] *Id.*

[55] The refugee resettlement process is carried out by the Department of State's Bureau of Population, Refugees and Migration (*see* https://www.state.gov/j/prm/about/index.htm) and the Office of Refugee Resettlement of the Department of Health and Human Services (*see* 45 C.F.R. § 400.1 *et seq.*), pursuant to Congressional directive (*see* 8 U.S.C. § 1522). All refugees admitted to the United States are assigned to a refugee resettlement agency, which provides a range of services intended to integrate the refugee into U.S. society. *See, e.g.*, The U.S. Refugee Resettlement Program—an Overview, https://www.acf.hhs.gov/orr/resource/the-us-refugee-resettlement-program-an-overview. In many respects, the relationship between the refugee and the U.S. resettlement agency is similar to the relationship between a student and the university at which she has been accepted. In both situations, the U.S. entity has committed to providing services to the foreign national: the U.S. school by agreeing to accept—and thus, educate—the foreign student; and the resettlement agency by agreeing to assist the refugee with housing and other supportive services.

[56] See 8 U.S.C. § 1522(a)(1)(B) (Stating that it is the "intent of Congress that in providing refugee assistance under this section— (i) employable refugees should be placed on jobs as soon as possible after their arrival in the United States; (ii) social service funds should be focused on employment-related services, English-as-a-second-language training (in nonwork hours where possible), and case-management services; and (iii) local voluntary agency activities should be

18. Will refugee processing continue?

DHS has indicated that refugee interview will continue but that "USCIS officers have been instructed that they should not approve a refugee application unless the officer is satisfied that the applicant's relationship complies" with the "bona fide relationship" requirement.[57] DHS also indicates that, until the 50,000 refugee ceiling is met, the Secretaries of DHS and of State may decide jointly that, pursuant to § 6(c), that refugee applicants can be interviewed and considered for admission "if the entry is in the national interest and does not pose a threat to the security or welfare of the United States."[58] However, there is no indication that such joint determinations are being made.

Interviews and processing of the applications of the family members of refugees who seek to follow-to-join are continuing.[59] DOS indicates that "by their nature, almost all V93 cases will have a clear and credible close familial relationship with the Form I-730 petitioner in the United States and qualify for issuance" under the Supreme Court's decision. under this exemption.As with applicants for nonimmigrant or immigrant visas, consular officers are instructed to first establish eligibility for a refugee visa "without regard to the E.O." and then determine whether the refugee is exempted from the refugee ban.[60] However, unlike with the travel ban, a national interest waiver is not available for refugees; thus, any refugee who is not exempted from EO-2 will have his application denied.[61]

Finally, the State Department has stated that refugees who have already been scheduled to travel to enter the United States *will be permitted to enter* as long as their flights are schedule for before July 7th.[62]

PRACTICE TIPS

Listed below are some initial practice tips that an attorney might consider.

19. What if client's visa is denied even though there is a bona fide relationship?

Attorneys seeking information about the status of, or reasons for the denial of, a visa application have a number of administrative options they may pursue, including emailing LegalNet@state.gov, and contacting the post.

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conducted in close cooperation and advance consultation with State and local governments); see also 45 C.F.R. § 400.1(b) (stating that the purpose of the refugee resettlement program is "to provide for the effective resettlement of refugees and to assist them to achieve economic self-sufficiency as quickly as possible.").

57 DHS FAQ at Q. 28.

58 *Id.*

59 *See* State Dep't Guidance at § 20.

60 *Id.* at § 20(a).

61 *Id.* at § 20(c) ("Applicants who are not exempt from the E.O.'s suspension of entry provision should be refused.").

62 *See* Background Briefing on Implementation, *supra* (stating that "refugees who are in transit through July 6th will be able to travel").

In addition, attorneys may seek advisory opinions on legal issues, which, has proven successful in some cases. See 22 C.F.R. §§ 42.81(c) & (d).

Finally, within one year of a visa denial, attorneys may seek reconsideration if they can provide additional evidence to overcome inadmissibility. 22 C.F.R. § 42.81(e). In *Rivas v. Napolitano*, 714 F.3d 1108 (9th Cir. 2013), the court held that reconsideration under this regulation is not discretionary, and, thus, a district court may exercise mandamus jurisdiction to compel the consulate to act on a request for reconsideration.

In addition, an attorney might:

- Obtain the written refusal notice from the client and get as much information as you can from the client about what transpired.
- If the denial was for insufficient information, determine if it is possible to submit additional information and the process for doing this.
- If resubmission not an option, contact the consular section and ask for more information about the decision.
- Request review by the consular officer's supervisor.

The Visa Office states that it will review consular officer decisions only if there is an error of law (although practitioners report that in some instances it is possible to get review of other issues). Where there has been a misapplication of law, then Visa Office review may be available through LegalNet.[63] For example, a legal question would be presented if the consular officer denied the visa because she erroneously concluded that the applicant lacked a bona fide relationship because he was not the stepchild or the adopted child of a U.S. parent.

20. What if the attorney believes that CBP has erred in refusing to admit a client?

Be proactive. Attorneys might wish to advise their clients of the following before he or she departs for the U.S.:

- Client should carry an original or copy of a signed Form G-28 (attorney representation notice), if possible, and/or have attorney's contact information readily available to him or her.
- The client can decline any efforts by CBP officers to withdraw his or her application for admission or to sign a statement that does not accurately record what the client said.

In addition, it is advisable for attorneys to:

- Obtain an original(s) or copy(ies) of a Form G-28 (notice of appearance) in the event that the attorney may need to intervene on client's behalf upon arrival
- Client should provide you with the flight information.

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[63] An Advisory Opinion may be requested through legalnet@state.gov. *See* 9 FAMe 103.4 for the purpose and scope of LegalNet and the requirements for submitting a request.

21. What can the attorney do at the airport?

For clients from affected countries who may be detained at U.S. airports, contact us at clearinghouse@immcouncil.org for more assistance.