

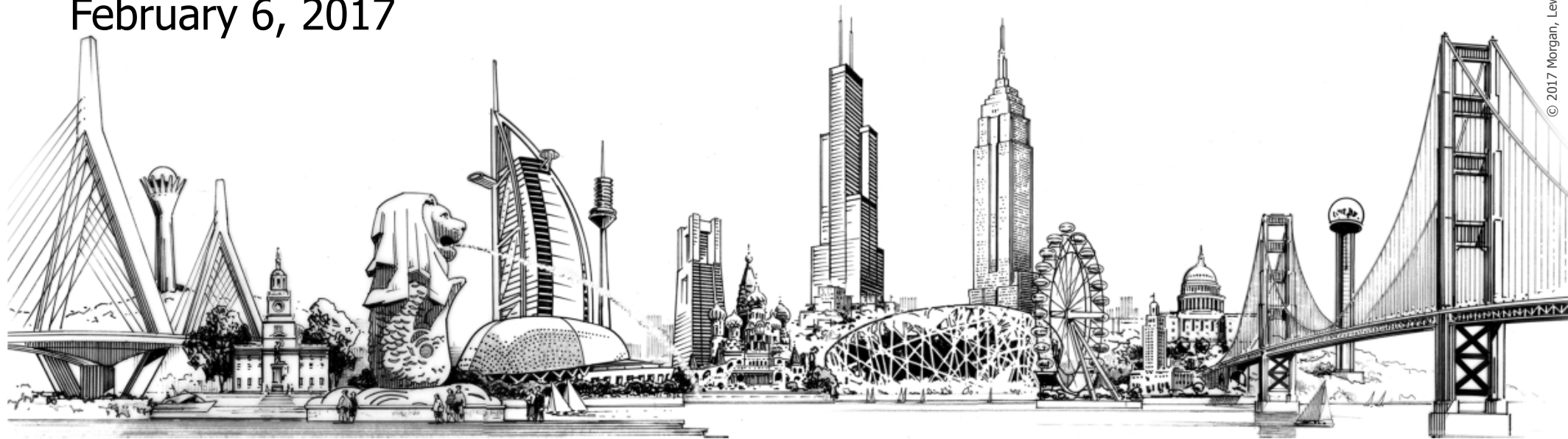
Morgan Lewis

NEW EXECUTIVE ORDERS ON IMMIGRATION: WHAT EMPLOYERS NEED TO KNOW

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February 6, 2017



Today's Discussion

- **Executive Order (EO) of January 27, 2017**

- Status of the EO under the federal court injunction
- How the EO was being implemented prior to the TRO
 - Impact on individuals from Syria, Iran, Iraq, Libya, Somalia, Sudan, Yemen
 - Impact on refugees from Syria and elsewhere
 - Visa interview waiver program
 - Possible expansion of specified countries
- Considerations for employers and impacted individuals

- **Draft Future EOs**

- Overhaul of US immigration policy and practices
- Potential revocation of Deferred Action for Childhood Arrivals
- Possible expansion of E-Verify
- Potential changes to STEM Optional Practical Training (OPT) and spousal employment authorization
- Future of the H-1B program
- Public benefits and immigration

EXECUTIVE ORDER OF JANUARY 27, 2017

**PROTECTING THE NATION FROM
FOREIGN TERRORIST ENTRY INTO
THE UNITED STATES**

Federal Court Injunction

- January 30, 2017
 - State of Washington lawsuit challenging the EO on constitutional and various statutory grounds
- February 1, 2017
 - State of Minnesota joins the lawsuit
- February 3, 2017
 - Nationwide temporary restraining order granted
- February 4, 2017
 - The Department of Justice (DOJ) filed an emergency motion requesting that the 9th Circuit enter a stay pending appeal of the district court's February 3, 2017, injunctive order.
 - The 9th Circuit denied DOJ's request for an immediate administrative stay and ordered briefing with all pleadings due by Monday, February 6, 2017 at 3:00 p.m. PST.



Travel Ban Based on Specified Countries

- Travel ban on individuals who are “from” Iraq, Iran, Syria, Sudan, Libya, Somalia, and Yemen.
 - Suspends all entry into the United States by both immigrants and nonimmigrants from certain predominantly Muslim countries—for a period of 90 days
 - Individuals with any type of visa, including visitor (B-1/B-2) and work visas (e.g., H-1B, L-1, O-1)
 - Immigrant visas
 - Exception for most diplomatic visas (A, NATO, C-2, G-2, G-2, G-3, G-4)
 - In effect for 90 days—until April 27, 2017; may be extended
 - Does not affect individuals using a US passport, including naturalized US citizens from the named countries
 - Syrian refugees are indefinitely barred from entering the United States, and all refugee admissions are suspended for 120 days
 - List of countries could be expanded

US Permanent Residents

- After initial confusion, it appears that lawful permanent residents (LPRs) (green card holders) from the specified countries are NOT subject to the restrictions in the order.
 - Reports of coerced abandonment of residence
 - Reports of denied boarding at overseas airports
 - Global Entry for LPRs from specified countries reportedly being canceled
- Adjustment applicants and TPS beneficiaries with an existing advance parole travel document appear to be eligible to travel.
 - EO did not explicitly revoke parole documents, which are not visas
 - Still risky given the uncertainty
 - New applications for parole will be put on hold based on USCIS directive

Dual Citizens Including One Specified Country

- Citizens of the specified countries who hold dual citizenship with another country (e.g., UK, Canada) are not supposed to be subject to the ban
 - Inconsistent reports of denied boarding; scope of enforcement is unclear.
 - CBP FAQ states that the country of the passport presented is supposed to control
 - According to the US Embassy in London:

- **Dual Nationals:** Dual nationals with a valid passport issued by any country not restricted under the Executive Order may schedule appointments and apply for visas. U.S. embassies and consulates will process visa applications and issue visas to otherwise eligible applicants who apply with a passport from an unrestricted country, even if they hold dual nationality from a restricted country. Those who qualify for visas will be permitted to travel to and apply for admission to the United States.
- **Landed Immigrants of Canada:** Landed immigrants of Canada (not including refugees) who hold passports of a restricted country can apply for an immigrant or nonimmigrant visa to the United States, if the individual presents that passport, and proof of landed immigrant status, to a consular officer. These applications shall be made at a U.S. consular section in Canada.

Other Individuals Impacted

- Individuals who are not citizens of one of the specified countries but who are residents of or have other strong ties to any of these countries may be subjected to secondary screening.
- While US citizens should not be subject to additional screening, there are reports of US citizens who were born in a specified country being subjected to secondary screening.
- Permanent residents who have been abroad for periods of six months or longer may face additional challenges related to abandonment.
 - A reentry permit is recommended where possible

What WAS DHS doing under the EO?

- US Citizenship and Immigration Services (USCIS)
 - Cessation of processing requests for immigration benefits for matters other than naturalization
- Customs & Border Protection (CBP)
 - Full enforcement of EO at ports of entry and preclearance
 - Direction to airlines not to board banned individuals
 - Detention and removal of non-LPR citizens of specified countries at ports of entry
 - Enhanced secondary screening of individuals with strong connections to specified countries
 - Non-US citizens who are dual citizens of specified countries
 - Review of personal property, social media accounts, personal electronic devices

What is DHS Doing Now?

- Business as usual . . .
- USCIS is adjudicating applications
- CBP is admitting impacted individuals
 - Physically canceled visas receiving I-193 waiver without fee
 - Airlines issued instructions to board impacted individuals.

DHS Statement on Compliance with Recent Court Order

Release Date: February 4, 2017

For Immediate Release
Office of the Press Secretary
Contact: 202-282-8010

WASHINGTON - In accordance with the judge's ruling, DHS has suspended any and all actions implementing the affected sections of the Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States."

This includes actions to suspend passenger system rules that flag travelers for operational action subject to the Executive Order.

What WAS the State Department doing under the EO?

- “Provisional” revocation of all nonimmigrant and immigrant visas
 - Provisional revocation of a **nonimmigrant** visa could make the visa holder subject to removal. INA § 237(a)(1)(B). Awaiting clarification.
 - Nonimmigrant visas provisionally revoked are not cancelled; they may become valid when the ban is lifted.
 - Cancellation of all consular visa interviews for nationals of specified countries
- Suspension of the Visa Interview Waiver program
 - Not to be confused with the Visa Waiver program.
 - Statute provides for interview waiver under certain conditions.
 - EO rolls back an expansion of the program from 2012 that created additional interview waiver options.
 - Interviews NOT required for children under 14 years of age and applicants age 80 and over (INA § 222).
 - Interview waiver should still be available for renewals based on visas expired within the last 12 months, same classification, same consular post.
 - Could increase delays in obtaining appointments and in visa processing times.

What is the State Department doing now?

- Visa interviews being rescheduled
- Visa being issued
- Physically canceled visas need to be replaced; applicants will be required to pay relevant fees
- From www.travel.state.gov alert on February 4, 2017

The Department of State had, under the Executive Order, provisionally revoked all valid visas of nationals of those seven countries, with limited exceptions. That provisional revocation is now lifted, and those visas are now valid for travel to the United States, if the holder is otherwise eligible. Individuals whose visas are expired, or were physically cancelled, must apply for a new visa at a U.S. embassy or consulate, absent a Customs and Border Patrol (CBP) decision to grant parole or waive the visa requirement at the port of entry. We are looking further into this issue and will revise this site with any updates.

Action for Employers

- Remain vigilant with respect to new developments
 - Morgan Lewis will continue to monitor and provide updates
- Provide accurate information to your workforce on the parameters of the EO to ensure that all potentially impacted employees and their family members are properly advised.
- In the event the EO is reinstated:
 - Cancel all international travel by employees or individuals doing business with your company who will be subject to the travel ban.
 - Identify any pending requests for immigration benefits on behalf of individuals from one of the specified countries in order to assess the implications of any suspension in the processing of those petitions or applications.
 - Prepare for potential disruption with service providers whose employees may be impacted by the EO.
 - Expect more challenging adjudications at USCIS, CBP, and State Department.
 - Consider additional possible actions you can take to address concern and anxiety within your workforce.

Advice for Travelers

- Holders of multiple passports should present the passport that is least likely to invite scrutiny.
- Individuals from affected countries who are currently in the United States and have valid nonimmigrant visa status should monitor developments closely and carefully consider any upcoming international travel plans.
 - Those who travel might consider having an executed Form G-28 in a carry-on
- Fourth Amendment rights are limited at the border, including for US citizens
- Take special precautions with personal and work technology
 - Travel only with clean/reset devices where possible

DRAFT EXECUTIVE ORDERS

Draft EO: DACA Cancellation

- Draft titled: Ending Unconstitutional Executive Amnesties
 - Ends the 2012 Deferred Action for Childhood Arrivals (DACA) program of prosecutorial discretion
 - Work permits already issued remain valid until expiration; no renewal
 - No issuance of advance parole travel documents
 - Rescinds the November 2014 expansion of DACA and the Deferred Action for Parents of Americans (DAPA) program that was not implemented and subject to legal challenge.
- Note to employers:
 - Do not take adverse employment action against DACA employees in anticipation of their possible loss of employment eligibility.

Draft EO: Foreign Worker Visa Programs

- Draft titled: “Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs”
- The draft order appears to be laying the groundwork for future legislative and regulatory action and a larger revision of policy generally
 - Most major changes to worker visa programs require legislative or regulatory action.
 - DHS to submit a report within 90 days
 - to “review all regulations that allow foreign nationals to work in the United States, determine which of those regulations violate the immigration laws or are otherwise not in the national interest and should be rescinded, and propose for notice and comment a rule to rescind or modify such regulations.”
 - DHS, State Department, Department of Labor (DOL) to propose regs or make policy changes “to restore the integrity of employment-based nonimmigrant worker programs and better protect U.S. and foreign workers affected by these programs”

Draft EO: Foreign Worker Visa Programs

- Establish a commission or advisory committee within one year to conduct a top-to-bottom review of US immigration policy and recommend changes to make the system more merit based.
- Review of H-1B and other Temporary Worker Programs
 - US DOL to
 - Investigate “the extent of any injury to US workers caused by the employment in the United States of foreign workers admitted under nonimmigrant visa programs” and issue a report on its findings within 18 months.
 - File an initial report within nine months limited to the use of H-1B, L-1, and B-1 programs and “their harm to US workers.”
 - DHS to explore ways to make “allocation of H-1B visas more efficient and ensure that beneficiaries of the program are the best and the brightest.”

Draft EO: Foreign Worker Visa Programs

- Expansion of site visits
 - Requires DHS to start performing site visits at places of employment of L-1 nonimmigrant workers, including third-party worksites, within 180 days.
 - Instructs DHS to develop a plan to expand the site-visit program to cover all employment-based visa programs within two years.
- Expansion of E-Verify
 - Instructs DHS to propose options for incentivizing and expanding participation by employers in E-Verify, including by conditioning certain immigration-related benefits on participation in E-Verify
- Review eligibility for and usage of EADs
- End the B-1 in Lieu of H-1B/H-3
- Review the J-1 summer work travel program and improve protections for US workers

Draft EO: Foreign Worker Visa Programs

- Reversal of OPT – STEM 24-month extension
 - The order looks to scale back the use of OPT and calls for the secretary of DHS to “reform practical training programs for foreign students to prevent the disadvantaging of US students in the workforce, better protect US and foreign workers affected by such programs, restore the integrity of student visa programs, ensure compliance, and improve monitoring of foreign students.”
- Change to availability of “parole”
 - This appears to target a draft USCIS rule that would allow certain international entrepreneurs to be considered for extended parole in order to start or scale their businesses here in the United States.
- Review of E-2 treaty investor visa category for foreign entrepreneurs “so that activity allowed for such entrepreneurs conforms to the requirements of the immigration laws.”

Considerations for Employers

- Consider filing H-1B petitions on behalf of employees currently in EADs that are based on their dependent status, where a spouse is the principal nonimmigrant (e.g., H-4, L-2, E-2)
- Evaluate foreign students on OPT for H-1B consideration and possible early initiation of green cards.
- Ensure that a company protocol is in place for USCIS site visits, both for your own employees and for contractors on your site.
- Be prepared for enhanced worksite enforcement of employment eligibility verification rules.
- Expect more restrictive and demanding adjudications of requests for immigration benefits and for admission at ports of entry.

Draft EO: Financial and Benefits Accountability

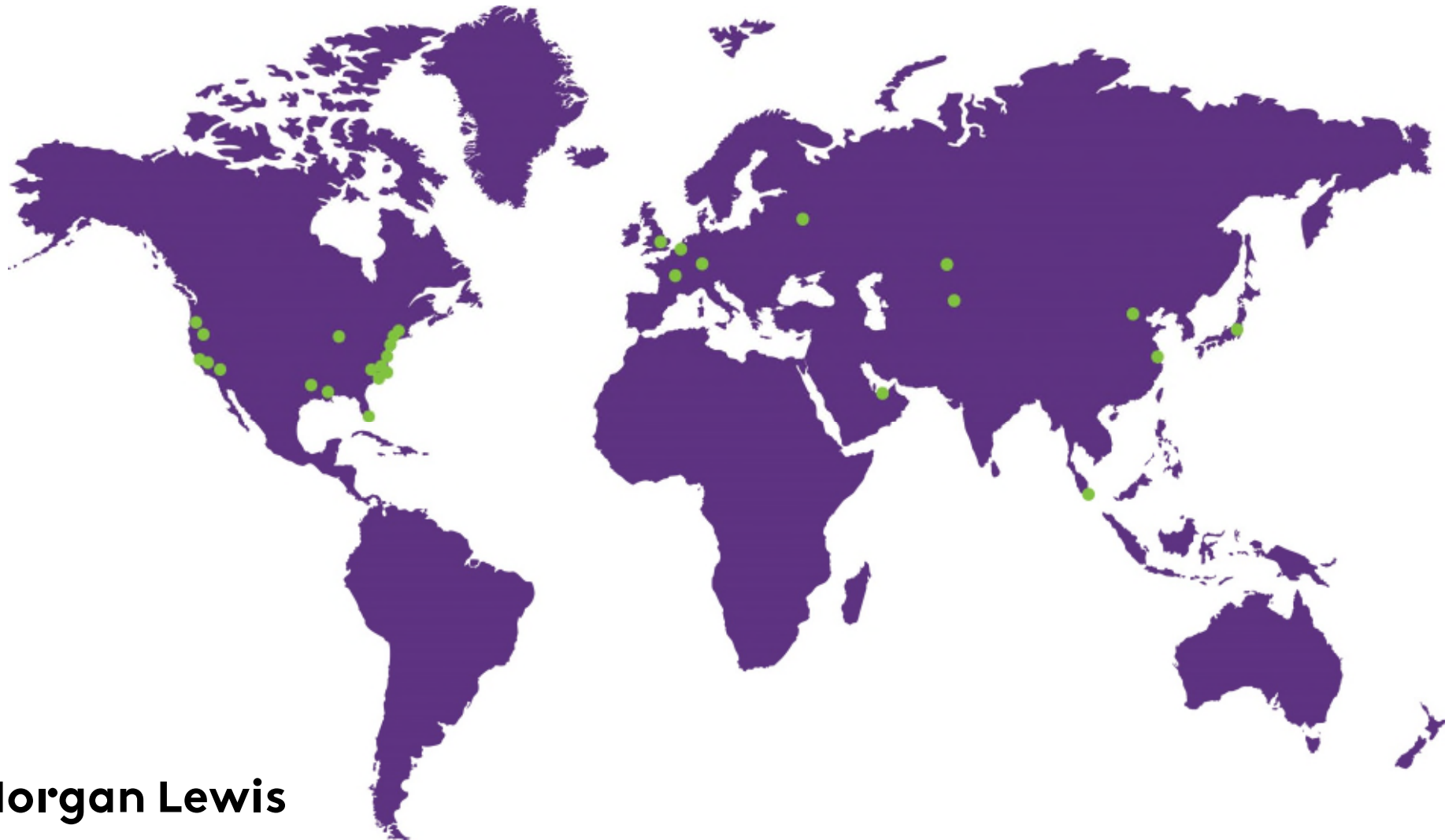
- Draft titled: “Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility”
 - Current law contains a “public charge” ground of inadmissibility
 - Legal immigrants currently have access to some public benefits in limited circumstances
 - The EO would expand the type of public benefits that would result in a person being deemed to be inadmissible as a public charge to include any type of federal benefit “determined in any way on the basis of income, resources, or financial need”
 - Immigrants would be inadmissible if likely to become a public charge under the expanded definition
 - Nonimmigrants who accept such benefits would be subject to deportation
 - The EO also requires the government to pursue reimbursement from “sponsors” who have executed affidavits of support.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Dallas	Los Angeles	Philadelphia	Silicon Valley
Astana	Dubai	Miami	Pittsburgh	Singapore
Beijing	Frankfurt	Moscow	Princeton	Tokyo
Boston	Hartford	New York	San Francisco	Washington, DC
Brussels	Houston	Orange County	Santa Monica	Wilmington
Chicago	London	Paris	Shanghai	



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