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Immigration Executive Order Remains Blocked

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A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit on February 9, 2017, unanimously upheld the temporary restraining order (TRO) previously issued by the lower court in Washington state, blocking enforcement of the Executive Order titled "Protecting the Nation From Foreign Terrorist Entry Into the United States." This means the Executive Order will not be enforced while the court considers the government's appeal of the TRO.

What Went Before

On January 27, 2017, the White House issued an Executive Order which, among other things, suspends for at least 90 days the entry into the United States and the issuance of visas to persons "from countries of particular concern." These countries include Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen; the Executive Order provides for the possible addition of other countries at a later date. The Executive Order also suspends the admission of all refugees into the United States for 120 days and prohibits indefinitely the admission of Syrian refugees. Under the Executive Order, preference in refugee selection goes to individuals claiming religious persecution who are members of minority religious groups within their home countries.

The State of Washington, later joined by the State of Minnesota, filed a lawsuit on January 30, 2017, claiming that certain parts of the Executive Order are unconstitutional and violate federal law, and seeking to have those parts of the Executive Order stayed (i.e., blocked) while their claims are adjudicated. The U.S. District Court for the Western District of Washington issued the TRO, temporarily preventing implementation of those portions of the Executive Order, and the Ninth Circuit denied the government's request for an immediate stay of the TRO. On February 9, 2017, the Court of Appeals denied the government's request to lift the TRO and to permit implementation of the

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Executive Order while the government's appeal of the TRO proceeds. As a result of the court's decision, the usual rules governing issuance of visas, admission of refugees and travel into the United States of persons from the proscribed countries remain in place.

The Ninth Circuit's Order

In deciding whether to stay the TRO, the appellate court was not required to make a final determination on the claims raised in the lawsuit. Rather, it had to decide only whether the government had proved so far that it was likely to succeed in defeating the claims of the States of Washington and Minnesota; the degree of hardship that would result if the court were to lift the stay and permit the Executive Order to be enforced during the course of the lawsuit versus leaving the stay in place and blocking the Executive Order; and the public interest in granting or denying the stay. While acknowledging that the litigation is at a very early stage and the evidence submitted thus far has been limited, the court ruled that the government had not met its required level of proof that it was likely to succeed or that irreparable injury would result if the TRO remains in place.

In reaching this decision, the appellate court made a number of important rulings, including a finding that the States of Washington and Minnesota had standing (i.e., a sufficient stake in the outcome) to bring the lawsuit due to the detrimental effect of the Executive Order on their state universities. The court also strongly repudiated the government's claim that a U.S. president's decisions about immigration policy are not reviewable by the courts even when the decisions allegedly clash with constitutional protections. The court did not find it necessary to address the religious discrimination claims raised until later in the lawsuit.

What This Means to You

The case will now proceed at a more normal pace, and the parties will prepare the evidence for a more full presentation to the court. Thus far, there is no indication that the government will pursue any other course. In the meantime, those parts of the Executive Order subject to the TRO will not be enforced, and the usual rules will apply concerning the admission of non-citizens to the United States, including pre-existing rules about admitting refugees and individuals from the "countries of concern."

People whose travel plans were interrupted by the Executive Order and who may have been delaying further travel while the situation remained fluid may view this decision at least as an extended window of time in which to complete their plans. Employers, educational institutions, family members and other interested parties may continue to follow developments here.

Contact Us

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If you have questions about immigration or how the Executive Order may affect you or your organization, please contact Toni Blackwood, Kelli Stout or Tiffany Hutchens of Husch Blackwell's Immigration team.

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