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Trump's First 100 Days: Immigration

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TRUMP'S FIRST 100 DAYS: IMMIGRATION

I. INTRODUCTION

On January 20, 2017, Donald J. Trump was sworn in as the 45th President of the United States. During his campaign, then-candidate Trump made it plain that he believed immigration was a significant issue facing the country and one he would address directly if elected President.

In the first 100 days of his Presidency, between January 20, 2017, and April 29, 2017, President Trump signed 32 executive orders.¹ Looking strictly at raw numbers, this means President Trump has signed more executive orders in the first 100 days than any other President in U.S. history, other than Franklin D. Roosevelt, who continues to hold the record with 99.² (President Truman, formerly second-place, is now in third place with 25 executive orders in the first 100 days.)

Of President Trump's initial 32 executive orders, five dealt directly with immigration:

- EO13767 "Border Security and Immigration Enforcement Improvements" (01/25/2017)
- EO13768 "Enhancing Public Safety in the Interior of the United States" (01/25/2017)
- EO13769 "Protecting the Nation from Foreign Terrorist Entry Into the US" (01/27/2017)
- EO13780 "Protecting the Nation from Foreign Terrorist Entry Into the US" (03/06/2017)
- EO13788 "Buy American and Hire American" (04/18/2017)

This paper will focus on the Executive Orders 13769 and 13780, commonly referred to as the "travel bans," and Executive Order 13788, which directs a review of the popular H-1B visa program. Finally, this paper will examine pending legislation targeting the H1B program and the use of same by the technology industry.

II. EXECUTIVE ORDERS

Whether a worker is an employee or an independent contractor determines the rights and obligations of entities and service providers in a wide variety of areas, including tax, wage and hour compliance, health insurance, mandatory leaves of absence, unemployment insurance, workers' compensation, intellectual property, vicarious liability, and even coverage under other laws (where coverage depends on how many employees an entity has). However, although certain themes emerge (namely control and reality), there is no one unifying test for deciding whether a service provider is an employee or a contractor. Instead, each of the various agencies and laws (including the common law) affected by the determination has its own take on the issue. A number of these tests are explored below.

A. EO 13769 – Travel Ban Part I

President Trump signed Executive Order 13768 on January 27, 2017.³ Citing the terrorist attacks of September 11, 2001, the EO asserts that "numerous foreign-born individuals have been

¹ http://www.presidency.ucsb.edu/executive_orders.php?year=2017 (last visited May 11, 2017).

² <https://fivethirtyeight.com/features/a-presidents-first-100-days-really-do-matter/>

³ 82 Fed. Reg. 8,977.

convicted or implicated in terrorism-related crimes” since that time and further that “the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles.”⁴ The EO further asserts, “Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.”⁵

To accomplish its stated purpose, EO 13768 made a series of changes, all of which took effect immediately. First, section 3(a) of the EO directed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to conduct an immediate review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the Immigration and Nationality Act (“INA”) to determine the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.⁶ Section 3(b) then directed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to President Trump within 30 days a report on the results of this review, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information.⁷

So as to “temporarily reduce” the “investigative burdens” on the relevant agencies conducting the review described above, and so as to ensure the “proper review and maximum utilization of available resources for the screening of foreign nationals” and “ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals,” section 3(c) of the Executive Order made one of its most controversial directives:

[P]ursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).⁸

This provision implemented President Trump’s so-called travel ban. Notably, it leveraged an existing list of countries, nationals of which are not eligible for participation in any visa waiver program the United States might establish.⁹ This list, which is found in the INA, explicitly includes Iraq and Syria as well as other countries that might be designated by the Secretary of State or the Secretary of Homeland Security under other specified statutes.¹⁰ As of the effective

⁴ *Id.* at § 1.

⁵ *Id.*

⁶ *Id.* at § 3(a).

⁷ 82 Fed. Reg. 8,977-78, at § 3(b).

⁸ 82 Fed. Reg. 8,977-78, at § 3(c).

⁹ See 8 U.S.C. 1187(a)(12).

¹⁰ 82 Fed. Reg. 8,977-78, at § 3(c).

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