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Pushing the Envelope on Immigration Reform by Presidential Fiat

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PUSHING THE ENVELOPE ON IMMIGRATION REFORM BY PRESIDENTIAL FIAT

By Kathleen Campbell Walker¹

Since the inauguration of President Trump, immigration policy has been the subject of numerous executive orders and executive proclamations, which continue to test the limits of administrative overreach in the field of United States (U.S.) immigration law. This article will focus upon the visa related impact of Executive Order (E.O.) 13788 entitled, “Buy American and Hire American,” issued on April 18, 2017² (Hire American E.O.) as well as from E.O. 13780 issued on March 6, 2017³ (Protecting the Nation E.O.) and its related Presidential Memorandum (Enhanced Vetting P.M.).⁴

Background

For a little historic frame of reference, the U.S. Supreme Court (SCOTUS) in the *Youngstown Street*⁵ case explained that a President’s power to issue executive orders must originate from either an act of Congress or the Constitution itself. In the *Youngstown Street* case, Justice Jackson’s analysis has been used as a framework for courts to test the validity of executive actions.⁶ In pertinent part, Justice Jackson notes in his concurrence that:

When the President acts in absence of either a congressional grant or denial of authority, he can rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference of quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.⁷

Whether these E.O.s and the related P.M. were issued in this “twilight zone” is subject to debate, but the origin of the focus on these actions appears to be traceable back to positions taken by former Senator Jeff Sessions (now the U.S. Attorney General) and his immigration restrictionist friend from Iowa, Senator Grassley. Of particular relevance in the E-2 treaty investor category are the questions asked by Senator Grassley in 2016 of the Department of State (DOS), in his capacity as Chairman of the Senate Judiciary Committee.⁸ Chairman Grassley requested information on whether the DOS or U.S. Citizenship and Immigration

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² 82 Fed. Reg. 18337-39 (April 21, 2017). For a listing of E.O.s and P.M.s issued by President Trump, please refer <https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>.

³ 82 Fed. Reg. 13209 -19 (March 9, 2017).

⁴ 82 Fed. Reg. 16279-81 (April 13, 2017).

⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁶ Contrubis, John, “Executive Orders and Proclamations,” Congressional Research Service Report for Congress (Updated March 9, 1999) at p. CRS-7.

⁷ *Youngstown supra n. 5* at 635-638.

⁸ See Letter from DOS, Assistant Secretary of Legislative Affairs, Julia Frifield to Chairman Grassley related to the E Treaty Investor visa dated June 15, 2016. [https://www.judiciary.senate.gov/imo/media/doc/2015-06-12%20State%20to%20CEG%20\(E-2%20Visas\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2015-06-12%20State%20to%20CEG%20(E-2%20Visas).pdf)

Services (USCIS) kept track of how much E-2 essential workers are paid and if payment of an E-2 essential worker of an amount below the prevailing wage would trigger further review. In addition, DOS clarified that no single federal department or agency has sole and final authority over foreign national investors.

It is important to review the August 2013 report prepared by the Department of Homeland Security's (DHS) Office of Inspector General (OIG)⁹ (Report) in response to a request from Senator Grassley regarding potential fraud or abuse in the L-1 intracompany transferee visa program. Part of the report focused on the use of the L-1 visa category as a safety valve for those H-1B visa applicants who might be unsuccessful in obtaining a cap subject H-1B nonimmigrant visa number. Of course, the H-1B category requires that an applicant not only be hired in a qualifying specialty occupation, but the H-1B regulations also require the payment of the higher of the actual or prevailing wage for the area of intended employment. Without the wage requirement in the L-1 nonimmigrant category, the L-1B specialized knowledge option fell under high scrutiny as to the type of knowledge necessary to qualify for the visa. Subsequently, in August of 2015, USCIS issued an adjudications policy memorandum providing further interpretation to the field officers regarding how L-1B petitioners may demonstrate that an applicant possesses qualifying "specialized knowledge."¹⁰

These points of concern are being indirectly and directly addressed through the implementation measures being taken in response to the above-mentioned E.O.s by DHS, DOS, and the Department of Labor (DOL).

Administration Staffing

It is also relevant and important to consider the current cast of policy makers and managers within the administration regarding the development of policy changes and memoranda as well as the E.O.s and P.M.s related to immigration.

1. Lee Francis Cissna – Confirmed as USCIS Director on October 5, 2017. He was the prior director of immigration policy at USCIS. From 2015 to 2017, he was detailed by DHS to the office of Chairman Grassley of the Senate Judiciary Committee.¹¹
2. Stephen Miller – Senior policy advisor to President Trump and former communications director for Senator Sessions.
3. Julie Kirchner – USCIS Ombudsman and former executive director for the Federation for American Immigration Reform (FAIR). She previously served as an advisor to acting Commissioner of U.S. Customs and Border Protection (CBP), Kevin McAleenan.
4. John Feere – Advisor to Thomas D. Homan, acting Director of U.S. Immigration and Customs Enforcement (ICE). Former legal policy analyst for the Center for Immigration Studies (CIS).

With this group of individuals, it is certainly predictable to see the extensive efforts to restrict the use of discretion in the application of immigration and to implement restrictive policies.

⁹ "Implementation of L-1 Visa Regulations," Office of Inspector General, U.S. Department of Homeland Security, OIG-13-107 (August 2013).

¹⁰ USCIS L-1B Adjudications Policy Memorandum (PM-602-0111) (August 17, 2015). https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/L-1B_Memorandum_8_14_15_draft_for_FINAL_4pmAPPROVED.pdf

¹¹ See <http://thehill.com/blogs/floor-action/senate/354051-senate-votes-to-confirm-key-trump-immigration-official>.

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