# FBT Immigration Update: December 2016/January 2017

Jan 30, 2017

**Categories:**
Publications

## President Trump issues executive order suspending entry of foreign nationals from seven countries and the U.S. refugee program

On January 27, 2017, President Trump signed an executive order that suspends immigrant and nonimmigrant aliens from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from entering the U.S. for a period of 90 days; suspends the U.S. Refugee Admissions Program (USRAP) for 120 days; indefinitely suspends the entry of Syrian refugees into the U.S.; and suspends the Visa Interview Waiver Program.

The executive order is facing several legal challenges following its implementation and it has been difficult to determine its full scope and reach. For example, until a January 29 statement from Department of Homeland Security Secretary John Kelly, it was not clear whether the 90-day travel ban extended to U.S. permanent residents. In his statement, Secretary Kelly, utilizing a power granted to him under the executive order, stated the entry of lawful permanent residents has been deemed "to be in the national interest" and "a dispositive factor in our case-by-case determinations," essentially exempting them from the suspension. Also, there is confusion on how the same travel ban applies to dual-citizens. Some clarity was achieved on January 28 when, based on reports, National Security Adviser Michael Flynn stated that the executive order does not apply to dual-citizens holding Canadian passports. For now, employers should read the executive order broadly, erring on the side of caution, when analyzing how it may impact future international travel plans for affected employees currently in the U.S.

Also, while the executive order focuses on the 90-day ban for foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen as well as suspension of the refugee program, it also impacts all foreign nationals that were eligible to renew their passport visa


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stamps through the Visa Interview Waiver Program, as the program has been suspended. While the executive order indicates that measures will be taken to prevent an increase in visa interview wait times, employers should assume, at least in the short-term, that delays will occur.

We will keep employers updated as the situation develops and we gain more clarity.

## AAO issued a precedent decision altering the National Interest Waiver criteria

On December 27, 2010, the U.S. Citizenship and Immigration Services' Administrative Appeals Office (AAO) published a precedent decision that significantly alters the criteria for the EB-2 National Interest Waiver (NIW) immigrant visa category. The decision is *Matter of Dhanasar,* 26 I&N Dec. 884 (AAO 2016). As a result of this decision, foreign nationals seeking permanent residence by bypassing the job offer requirement and labor certification process through a NIW must establish the following:

- The foreign national's proposed endeavor has both substantial merit and national importance.
- The foreign national is well positioned to advance the proposed endeavor.
- On the balance, it would be beneficial to the U.S. to waive the requirements of a job offer and thus of a labor certification.

Overall, the new NIW framework relaxes the eligibility criteria. Under the prior framework, announced in 1998 in *Matter of New York State Department of Transportation* (NYSDOT), a foreign national had to demonstrate the following:

- The foreign national sought employment in an area of substantial intrinsic merit.
- The proposed benefit would be national in scope.
- The national interest would be adversely affected if a labor certification were required for the alien.


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Under the new framework, most importantly, the last prong has been significantly altered. Previously, to meet the third prong, a foreign national had to establish that it would "…serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications." Now, as the AAO made clear in *Matter of Dhanasar*, a foreign national does not have to compare himself or herself to any U.S. workers or show any harm to the national interest. In the words of the AAO, the change to the third prong creates a "more flexible test" that is "meant to apply to a greater variety of individuals," including entrepreneurs and self-employed individuals.

## Employers must now use the new Form I-9

As discussed in our last update, USCIS recently published the new Form I-9. While there was a grace period during which time employers had the option of using the previous version of the form, employers must now use the new Form I-9. For more information on the changes, please review our previous update.

## Status of USCIS final rules affecting the employment-based immigration system

On January 17, 2017, the final rule principally affecting the following components of the employment-based immigration system went into effect:

- Immigrant petition (I-140) revocations
- H-1B extensions beyond six-year limit
- Priority date retention
- 60-day grace period
- 10-day grace periods
- I-140 job portability
- Adjudication of employment authorization documents (EADs)
- Issuance of EADs due to "compelling circumstances"

On the same day, a second final rule was published in the Federal Register, this one concerning the recently proposed parole for


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entrepreneurs. However, while published, it will not go into effect for another 180 days and, more importantly, appears to fall within the scope of paragraph three of the January 20, 2017, memorandum issued by the White House that freezes all regulations pending review. Therefore, it appears this final rule may still go into effect, but only after it has been reviewed and approved by a "department or agency head appointed or designated by the President after noon on January 20, 2017."

If the rule becomes effective, USCIS will be permitted to parole into the U.S. entrepreneurs of startup companies that meet the following criteria:

- The entrepreneur must have a substantial ownership interest in the startup company (at least 10%) and have an active and central role in the company's operations.
- The company must have been founded in the U.S. within the past five years.
- The startup must have substantial and documented potential for rapid business growth and job creation, as evidenced by (1) the receipt of an investment of at least $250,000 from one or more qualified investors; (2) receipt of at least $100,000 in government awards or grants; or (3) partially meeting the first and/or second criteria as well as providing other credible and compelling evidence of the startup's substantial potential for rapid growth and job creation.

Under the final rule, entrepreneurs would be granted up to two and a half years to live and work in the U.S. to build up the business. In addition, only three entrepreneurs connected to a single startup may receive parole under this rule. They would receive employment authorization incident to status, and their spouses would be eligible to apply for employment authorization.

In addition, admitted entrepreneurs may apply to extend their parole status for up to an additional two and a half years if:

- The entrepreneur possesses at least a five percent ownership interest and continues to have an active and central role in the startup.


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- The startup continues to have potential for rapid growth and job creation by showing it has (1) received at least $500,000 in qualifying investments, qualified government grants or awards, or a combination of such funding, during the initial parole period; (2) created at least five qualified jobs with the start-up entity during the initial parole period; (3) reached at least $500,000 in annual revenue in the United States and averaged 20 percent in annual revenue growth during the initial parole period; or (4) partially satisfies one or more of the above criteria and can provide other credible and compelling evidence.

At the time the final rule becomes effective, eligible entrepreneurs will be able to submit their applications utilizing a new form (Form I-941, Application for Entrepreneur Parole).

## ACICS loss of ED accreditation impacts SEVP certification of affected schools

On December 12, 2016, the U.S. Department of Education announced that it stripped the Accrediting Council for Independent Colleges and Schools (ACICS) of its status as an accrediting agency. As a result, the ability of ACICS-accredited schools and programs to participate in the Student and Exchange Visitor Program (SEVP), which enables schools to enroll F and M nonimmigrant students, has been impacted. In lieu of accreditation, a school and program may provide additional evidence to obtain SEVP-certification. However, accreditation is required for English as a Second Language (ESL) programs and institutions seeking to provide students with eligibility to apply for 24-month science, technology, engineering, and mathematics (STEM) optional practical training (OPT) extensions. Government guidance for affected schools and students may be found here.

## DOJ publishes final rule on unfair immigration-related employment practices

The Department of Justice (DOJ) published a final rule in the Federal Register on December 19, 2016, regarding its enforcement of


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the provisions of the Immigration and Nationality Act (INA) concerning unfair immigration-related employment practices. The Immigration Reform and Control Act of 1986 (IRCA) contains an anti-discrimination provision to prohibit certain unfair immigration-related employment practices. One prohibited employment practice includes requesting more or different documents or rejecting valid documents during the Form I-9 process. However, in 1996, Congress amended the details concerning this practice to make it clear that it was unlawful if done "for the purpose or with the intent of discriminating against an individual." The DOJ, through the present final rule that went into effect on January 18, 2017, has finally updated the regulations to reflect the Congressional changes made in 1996. In addition, the final rule addresses:

- Changes to how charges of discrimination are filed and processed.
- Clarifications made to definitions of certain statutory terms.
- New definitions of statutory terms.
- Codification of Special Counsel's existing authority to seek and ensure the preservation of evidence during investigations.
- Changing the name of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to the Immigrant and Employee Rights Section.

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