

IMMIGRATION

President Trump's Third, Indefinite Travel Ban Takes Blows from Courts

by Heather Frayre

Federal judges in [Hawaii](#) and [Maryland](#) have temporarily blocked the implementation of President Trump's most recent travel ban, which was issued by Presidential Proclamation on September 24, 2017 (Proclamation) and set to take effect October 18, 2017. The more sweeping ruling by the federal court in Hawaii blocks implementation of the Proclamation as to all countries except Venezuela and North Korea, and the decision by the Maryland federal court declares the ban unenforceable toward those individuals with a bona fide relationship to a person or entity in the United States (U.S.).

Essentially, the Proclamation imposes certain restrictions on the entry of nonimmigrants and immigrants who are nationals of Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia. The type of restriction varies from country to country and the restrictions are of indefinite duration. The Proclamation was allegedly crafted based on recommendations by the Department of Homeland Security (DHS) pursuant to [Executive Order 13780](#), which included a requirement for a global review of each foreign government's information sharing practices, policies, and capabilities.

For a detailed analysis of the Proclamation, which is President Trump's third attempt at instituting a travel ban, please click [here](#).

What Are the Takeaways from the Two Decisions?

The Hawaii Decision: U.S. District Judge Derrick Watson ruled that the Proclamation likely exceeds the scope of presidential authority permitted by the Immigration and Nationality Act (INA), as amended. His ruling is effective nationwide and prohibits implementation of the Proclamation's provisions, except as to nationals of North Korea and Venezuela.

The Maryland Decision: U.S. District Judge Theodore Chuang found that the Proclamation likely violates the Establishment Clause of the Constitution as well as the INA. As for the scope of the injunction issued by the Maryland district court, Judge Chuang ruled that the Proclamation is blocked as it would apply to those with a bona fide relationship with a person or entity in the United States. This language echoes that used

by the U.S. Supreme Court when it temporarily restored President Trump's second travel ban issued by Executive Order (E.O.) back in June of this year. In that decision, the Supreme Court temporarily allowed implementation of the E.O., but eliminated from its purview those with a "bona fide relationship with a person or entity in the United States."

Where Are We Headed?

These court actions are just the beginning of what is anticipated to be a protracted legal battle that may very likely head to the Supreme Court yet again. The Supreme Court was positioned to hear oral arguments on the legality of an earlier iteration the travel ban this month. One of those cases has been dismissed, and the other will likely be dismissed as well. Both of the cases that were set for argument this month were based on the decisions of these same two federal courts that have issued injunctions on the Proclamation. This travel ban battle is far from over.

What Should Employers Do?

It is unlikely that the Proclamation in its current form will have much of an effect on employers because the current pool of affected travelers is very small. It is important to remember that the Proclamation is still in effect for certain government officials from Venezuela seeking visitor visas as well as travelers from North Korea who do not have bona fide relationships with persons or entities in the U.S.

U.S. consulates still exercise, however, a great deal of discretion in adjudicating visa applications. Thus, while the Proclamation may be "mostly dead" for now, individuals from the restricted countries should expect increased scrutiny and prepare for it accordingly with counsel. Additionally, we are just at the beginning stages. An appeals court or the Supreme Court could ultimately reinstate the Proclamation or a portion of its content. Thus, careful pre-planning for visa applications is crucial.

Here are a few things that an employer can do:

1. Assess travel plans for employees of affected nationalities based on implementation.
2. Consider the ability of those who are dual nationals to travel on a non-restricted country (under the ban) passport.
3. Consider rescheduling meeting locations and using internet-based meeting options.

4. When necessary, compile documentation and information for a potential waiver application under the standards set forth in the Proclamation even though it is not in effect in full, such documentation may be required to withstand the heightened scrutiny that will likely continue to be applied toward individuals from these targeted countries.

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