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Business Immigration Mostly Untouched by New Travel Ban Standard

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By [Laura D. Francis](#)

The U.S. Supreme Court's new rule for when the president's travel ban applies largely appears to allow the entry of foreign nationals for employment purposes.

The standard set out June 27 for whether someone from one of the six majority-Muslim countries listed in the [executive order](#) can enter the U.S. is whether they have a "credible claim of a bona fide relationship with a person or entity in the United

States” (*Trump v. Int’l Refugee Assistance Project* , 2017 BL 218966, U.S., No. 16-1436, 6/26/17). Workers with a job offer are explicitly mentioned as individuals who should be allowed into the U.S. under this standard, the court said.

Companies with “existing employees from these affected countries that have a visa already or have been approved for a visa for new employment” should be able to demonstrate a bona fide relationship, Susan Cohen of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo in Boston told Bloomberg BNA June 27. For all intents and purposes, most of the travel ban is still on hold except for a “narrow class” of individuals with no ties to the U.S., she said.

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The Supreme Court “really broadened the scope of individuals who should be able to get visas,” Andrew Greenfield of Fragomen, Del Rey, Bernsen & Loewy in Washington, D.C., told Bloomberg BNA June 27. The March order allowed for waivers of the travel ban, but only if it’s in the national interest and denying the visa would cause undue hardship, he said.

Just proving a bona fide relationship with an individual or entity in the U.S. is “a far lesser standard” to meet, he said.

Discretion Raises Concerns

But “the amount of discretion that is available here” to consular and Customs and Border Protection officers remains concerning, said Becki Young of Hammond Young Immigration Law in Silver Spring, Md. The decision on what constitutes a bona fide relationship will be made on a case-by-case basis, she told Bloomberg BNA June 27.

“We’re waiting for guidance from the government agencies,” said Cohen, who heads her firm’s immigration practice. Right now “no one knows” what constitutes an “entity” that can have a relationship with a foreign national, or what kind of tie counts as a bona fide relationship, she said. “It’s very gray, there’s no clarity,” she said.

There are employment-related situations that do raise questions

under the new standard.

For example—individuals coming to the U.S. for a job interview may not have the requisite relationship with a U.S. employer. A person might be allowed in with evidence that the employer has requested an interview, such as a letter or evidence that the employer has paid for transportation, said Greenfield, who serves as managing partner of his firm's Washington, D.C., office.

Foreign nationals trying to obtain B-1 business visitor visas to attend a conference in the U.S. may not be so lucky, according to Young, a co-founder of her firm and head of its hospitality practice.

But an argument could be made that a conference qualifies as an “entity” under the Supreme Court's test if the relationship—the visitor's intent to attend—was established before the court's decision came down, Cohen said. That way it doesn't look like the individual signed up for the conference just to get around the travel ban, she said.

Immigrants who are sponsoring themselves for employment-based visas also are likely to be excluded from the U.S. under the new standard, Young said. These immigrants are allowed to self-sponsor because they're supposed to be the “cream of the crop,” she said—those seeking EB-1 extraordinary ability visas and EB-2 visas under the national interest waiver. The waiver allows for self-sponsorship for the visa if it would be in the national interest to admit the immigrant.

It's not likely that the Supreme Court was referring to self-employment when it mentioned an employment relationship, Young said.

Employers Should Prepare, Attorneys Say

To guard against potential visa denials, employers should make sure their workers don't just have approved petitions from the government, but also a “very up-to-date letter from the employer confirming that the employment is ongoing” as well as “recent pay stubs to prove that they've been employed,” Cohen said. For those with job offers, a recent offer letter should be included, she said.

And “start as early as possible” to get the ball rolling on getting a needed worker to the U.S., Young said. A lot of the foreign nationals who would be affected by the travel ban “get caught up in administrative processing anyway,” so their visa processing takes longer than usual, she said.

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Young also recommended getting petitions approved by U.S. Citizenship and Immigration Services even where not necessary, to avoid added scrutiny at the consulate.

At any rate, “there is no doubt in my mind that this will generate additional litigation,” Cohen said. That is, unless nobody is denied entry, which is unlikely, she said.

Right now “this is uncharted territory,” Cohen said.

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