

**SUMMARY AND QUESTIONS/ANALYSIS OF EXECUTIVE ORDER
“Border Security and Immigration Enforcement Improvements”**

January 25, 2017

Sec. 1 and 2: Purpose and Policy.

- States that the purpose of the order is to “direct executive departments and agencies ... to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.”

Sec. 3: Definitions

- Provides definitions for the following terms: “asylum officer,” “southern border,” “border states,” “the Secretary,” “wall,” “executive department,” “regulations,” and “operational control.”
- Defines wall as a “contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.”
- Defines “operational control” as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.”

Sec. 4: Physical Security of the Southern Border of the U.S.

- Directs DHS to take immediate steps to obtain complete operational control of the southern border, including:
 - Planning, designing, and constructing a wall.
 - Allocating federal funds for the southern border wall.
 - Projecting long-term funding for the southern border wall.
 - Undertaking a comprehensive study on the security of the southern border within 180 days, including current state and strategy to obtain full operational control.

Questions and Analysis:

- Note that, according to section 3, “complete operational control” would mean zero unlawful entries.

Sec. 5: Detention Facilities

- Directs DHS to immediately construct detention facilities at or near the southern border.
- Directs DHS to assign asylum officers to immigration detention facilities to conduct credible and reasonable fear interviews.
- Directs DHS to assign immigration judges to immigration detention facilities to conduct removal proceedings.

Questions and Analysis:

- The Federal government is under a Continuing Resolution until April 28th, so it is unclear if significant funds exist to implement these plans. The direction to build facilities, and assign asylum officers and immigration judges to detention facilities will be of little utility without additional hiring and appropriations, as most asylum officers are already spending much of their time processing CFIs and RFIs. Additionally, EOIR has been unable to hire enough immigration

judges to meet the number for which they received appropriations in FY2017. It is unclear whether asylum officers or immigration judges would be deemed exempt from the recently-announced hiring freeze.

Sec 6: Detention for Illegal Entry

- Directs DHS to immediately take action to detain noncitizens apprehended “for violations of immigration law pending the outcome of their removal proceedings or their removal ...to the extent permitted by law.”
- Directs DHS to issue guidance on detention authority including the termination of “catch and release.”

Questions and Analysis:

- The language in this section is broad enough that it could be interpreted to mandate detention for anyone in removal proceedings. However, DHS’s detention authority is limited by the INA (especially, in §276(a), for individuals pending §240 proceedings), and such an interpretation would run afoul of these provisions. Moreover, this detention provision is in the “Illegal Entry” section of the Executive Order, which is focused on the southern border, and it references “catch and release,” so it may be intended to be limited to individuals that are apprehended at the border.
- Note that “catch and release” ended 10 years ago. See [AILA Immigration Policy Update – “Catch and Release.”](#) (AILA Doc. No. 16090803)

Sec. 7: Return to Territory

- Instructs DHS to ensure that applicants for admission arriving on land from contiguous territories, described in INA §235(b)(2)(C), are returned to the territory from which they came pending a formal removal proceeding.

Questions and Analysis:

- INA §235(b)(2)(C) refers to INA §240 proceedings and excludes people subjected to expedited removal per INA §235(b)(2)(B)(ii).
- If the administration’s intentions are to have this apply to asylum seekers, they would have to end expedited removal for that population and instead issue those individuals NTAs.

Sec. 8: Additional Border Patrol Agents

- Directs DHS to hire 5,000 additional Border Patrol agents as soon as practicable.

Questions and Analysis:

- CBP is currently required to have 21,370 agents, but has been unable to meet this requirement.

Sec. 9: Foreign Aid Reporting Requirements

- Directs head of each executive department and agency to identify and report to DHS within 30 days all Federal aid given to the Government of Mexico for the past five years.
- Within 60 days, DHS must submit a consolidated report to the President.

Sec. 10: Federal-State Agreements

- Instructs DHS to enter into INA §287(g) agreements.
- Directs DHS to authorize state and local law enforcement officials to investigate, apprehend, or detain aliens – through 287(g) agreements, or otherwise “to the extent permitted by law, and with the consent of State or local official.”
- Allows DHS to structure 287(g) agreements in whatever way is most effective for enforcing immigration laws and obtaining operational control over the border for that jurisdiction.

Questions and Analysis:

- Concern that language of this section – authorizing delegation of federal immigration enforcement authority to state/local actors through 287(g) agreements “or otherwise” – may contemplate informal, even verbal delegations of such authority that will lack transparency and accountability.

Sec. 11: Parole, Asylum and Removal

- Directs DHS to ensure that the parole and asylum provisions of the INA “are not illegally exploited to prevent the removal of otherwise removable aliens.”
- Directs DHS to ensure that referrals to asylum officers and credible/reasonable fear determinations for those in “expedited removal” and “reinstatement of removal” are conducted “in a manner consistent with the plain language of these provisions.”
- Directs DHS to take action to apply “expedited removal” to the maximum extent permitted by statute: to any individual who has not been “admitted or paroled” who cannot prove she has been continuously present in the U.S. for the 2 years prior to being determined inadmissible. (INA §235(b)(1)(A)(iii)(II)).
- Directs DHS to ensure that humanitarian parole authority (INA §212(d)) is exercised only on a “case by case” basis, in accordance with the “plain language” of the provision, and only when a noncitizen can demonstrate “urgent humanitarian reasons” or “significant public benefit” (the existing criteria in the statute) that is “derived” from such parole.
- All DHS personnel must be trained on the unaccompanied children sections of the Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA) and the Homeland Security Act of 2002 to ensure that these children “are properly processed, receive appropriate care and placement” while in DHS custody, and when appropriate, “are safely repatriated in accordance with law.”

Questions and Analysis:

- Current policies restrict the application of expedited removal to noncitizens apprehended at ports of entry or within 100 miles of any U.S. border who cannot prove they have been continuously present for 14 days. This directs the Secretary to expand ER authority to cover anyone in the nation who entered without inspection within two years.
- By statute, expedited removal only applies to certain categories of noncitizens: those (1) who lack valid entry documents, (2) who commit fraud or misrepresent a material fact to obtain admission, or (3) who falsely claim U.S. citizenship. That is, expedited removal only applies to those who are inadmissible under INA §§212(a)(6)(C) and (a)(7)). The EO does not alter these baseline criteria.
- It is unclear whether the parole section is meant to apply to the parole of only of asylum seekers, or whether it could be interpreted more broadly to apply to the parole of adjustment applicants, individuals with Temporary Protected Status (TPS), etc.

Sec. 12: Authorization to Enter Federal Lands

- Directs the DHS Secretary, the Secretary of Interior, and any other agency head to:
 - Authorize U.S. officers and employees, and certain State and local employees to have access to Federal lands as is necessary to carry out the EO.
 - Enable the officers and employees to be able to perform actions necessary on Federal lands to carry out the EO.

Sec. 13: Priority Enforcement

- Directs the AG to create prosecution guidelines and emphasize that the prosecution of offenses having a nexus to the southern border should be highly prioritized and given the necessary resources.

Sec. 14: Transparency

- DHS must publicly report the number of noncitizens apprehended at or near the southern border on a monthly basis.
- The method of reporting data will be uniform across all DHS components.

Sec. 15: Reporting

- Both DHS (within 90 days) and the AG (within 180 days) are required to report to the President on the progress of the directives outlined in the EO.

Sec. 16: Hiring

- OPM must facilitate hiring of personnel to carry out the EO.

Questions and Analysis:

- It is unclear whether the Administration means that employees necessary to carry out this EO – including additional Border Patrol officers and possibly additional asylum officers and immigration judges – are exempt from the recently announced hiring freeze. The Administration would likely consider BP officers exempt as jobs deemed “necessary to meet national security or public safety responsibilities,” but it is less clear if the same would apply to asylum officers and immigration judges.

Sec. 17: General Provisions

- Nothing in this order shall affect the legal authority of any executive department or agency, or the functions of OMB.
- The EO shall be implemented consistent with applicable law and subject to the availability of appropriations.
- The EO is not intended to create any right or benefit enforceable at law or in equity.