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Immigration & Nationality Law

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Immigration Executive Order – Travel Ban Q & A¹

Background

On January 27, 2017, the President of the United States issued an [Executive Order](#) (“EO”) that immediately impacted individuals from seven countries: Iraq, Iran, Syria, Sudan, Libya, Somalia and Yemen. Among other provisions, the EO placed a temporary ban on entry to those from one of the seven countries for a period of 90 days. At the end of the 90-day period, the travel ban may be extended, modified or possibly terminated.²

The [Department of Homeland Security](#), its [agencies](#) and the [U.S. State Department](#) have faced challenges in implementing the EO. Government officials have made numerous conflicting statements about the EO and travel ban. Additionally, there are a number of lawsuits involving the EO in the federal court system. There are presently a substantial number of significant questions without clear answers.

The purpose of this document is intended to provide a basic outline of general visa-related issues, the EO, and its impact on employment-related travel and visa issues.

Basic Inspection and Admission Requirements

What are the basic inspection and admission requirements for those entering the United States?

Everyone entering the U.S. is subject to inspection, generally by the [U.S. Customs and Border Protection](#) (“CBP”) at a point-of-entry. Non-citizens of the U.S. must be lawfully admitted. The CBP is charged with determining that the person seeking admission to the U.S. is not entering to violate U.S. laws, endanger public or national security, or oppose, control or overthrow the U.S. government by force, violence or other means. It is important to note that naturalized U.S. citizens take an oath at the time of becoming citizens to support the U.S. Constitution.

What does the CBP inspect at the time of admission?

The CBP reviews an individual’s documents (passport, visa stamp, other supporting documentation, etc.) and makes a determination to admit at the primary point-of-entry, or may refer the person to secondary inspection for further questioning and review. The CBP may ask to confirm or clarify information presented in the visa application associated with the admission. There have also been media reports that the CBP may also inspect phones, computers and social media accounts at the time of entry.

The CBP also questions a person's intent regarding the intended stay. The law presumes that every applicant is coming to the U.S. to remain permanently. For example, those entering as temporary B-visa visitors must satisfy the inspecting officer that he or she will only remain in the U.S. for a temporary period of time and then depart the U.S. Also, those granted U.S. permanent resident status ("green card" holders) must demonstrate their intent to retain permanent resident status upon each admission.³

Visa Waiver Program ("VWP")

What is the VWP?

Subject to certain exceptions, the VWP permits citizens of [38 countries](#) to travel to the U.S. for business (B-1) or tourism (B-2) for stays up to 90 days without applying for a visa. It is critical to note that each VWP admission is still considered an application for a visa with associated conditions, to include the inability to change or extend visa status and the waiver of rights to a removal hearing. All potential VWP visitors must process through the [Electronic System for Travel Authorization](#) ("ESTA") and obtain an authorization from the system and renew the authorization when the initial authorization expires.

What restrictions are associated with VWP travel?

In certain instances, the U.S. government may bar a VWP-eligible person from future use of the program for immigration law violations, such as overstaying a prior visa.

Pursuant to a [2015 law](#), the ESTA system asks several questions to determine eligibility to use the VWP, specifically whether or not one has been present in Iraq, Iran, Syria, Sudan, Libya, Somalia, and Yemen, other than excepted travel for military or official government business. In addition to questions regarding presence in one of the seven countries, the ESTA system asks:

- Have you ever been issued a passport (or national identity card for travel) by any other country?
- Are you now a citizen or national of any other country?
- Have you ever been a citizen or national of any other country?

Depending upon the responses, the ESTA system may not issue an authorization and require the person to apply for a visa at a U.S. Embassy or Consulate.

The EO and dual-nationals

There are a number of people who are citizens of more than one country. They are referred to as "dual-nationals."

What is the impact of the EO on dual-nationals of VWP countries?

A dual-national may have citizenship from both a VWP country, such as the United Kingdom, and an EO-covered country, such as Iran. The dual-citizen in this example may or may not have been permitted to utilize the VWP. There have distinctly conflicting statements by government officials whether or not a citizen of both a VWP country and a country on the EO list is subject

to the ban on entry. There have also been conflicting opinions among the DHS agencies and the U.S. State Department. It is possible that a dual-national of a VWP and an EO-covered country may be permitted to board a plane to the U.S., but returned to the home country after attempting to enter the U.S. on the VWP. A person with this type of dual-nationality may consider applying for a B-1/B-2 visa stamp at the U.S. Embassy or Consulate in the VWP country prior to attempting entry to the U.S. in lieu of utilizing the VWP with a valid ESTA authorization, but that action would not guarantee admission.

What is the impact of the EO on dual-nationals of non-VWP countries?

In order to be admitted to the U.S., a person with this type of dual-nationality is required to apply for a non-immigrant visa stamp at a U.S. Embassy or Consulate outside of the U.S., but the CBP could still not permit entry at either Pre-flight Inspection or the U.S. point-of-entry based upon the EO country of citizenship.

What is the impact of the EO on dual-nationals with Canadian citizenship?

Canadian citizens are generally “visa-exempt,” meaning that they are exempt from applying for a visa stamp at a U.S. Embassy or Consulate in advance of an entry to the U.S. In many Canadian airports, the U.S. Customs and Border Protection operates “Pre-flight Inspection” points. This means that a dual-national of Canada and an EO-covered country may be permitted to board the plane, but there is no guarantee that the person would not be returned to Canada upon entering the U.S. A person with this type of dual-nationality may consider applying for a non-immigrant visa stamp at a U.S. Embassy or Consulate in Canada, but the CBP may still not permit entry at either Pre-flight Inspection or the U.S. point-of-entry.

The EO and U.S. Permanent Residents (Green Card holders)

What is the impact of the EO on U.S. permanent residents seeking admission to the U.S.?

As indicated above, U.S. permanent residents must demonstrate maintenance of their conditioned status. However, this is another area that has been officially discussed and administered in an inconsistent manner. A U.S. permanent resident who is from an EO-covered country will be placed into secondary inspection and subjected to questioning, to include a likely review of electronic devices and social media accounts. It is prudent to expect the CBP to exercise discretion on a case-by-case basis, meaning that a U.S. permanent resident who is from an EO-covered country may or may not be permitted to re-enter the U.S. Therefore, someone in this situation should avoid travelling outside of the U.S. until at least April 27, 2017, possibly longer depending upon the future actions associated with the travel ban.

What should a U.S. permanent resident do if asked to give up his or her Resident Alien Card and sign a form stating that he or she desires to abandon permanent resident status?

A U.S. permanent resident should not give up his or her Resident Alien Card and should not sign a form abandoning permanent resident status. If confronted with this situation, the person should not make any decisions until after consulting with legal counsel.

Can the CBP and DHS detain a U.S. permanent resident from an EO-covered country?

Yes, the CBP and DHS may take action to place a U.S. permanent resident in detention for further processing. If placed in this situation, the person should seek legal counsel.

The EO and Refugees and Asylees

What is the impact of the EO on individuals granted refugee or asylum in the U.S.?

The EO suspends entry of new Refugees for a period of 120-days from January 27, 2017. The EO indefinitely suspends the entry of new Refugees from Syria.

Admissions of Refugees from an EO-covered country would likely be banned from re-entry until at least April 27, 2017.

It is unclear if the EO is intended to impact those already granted Refugee or Asylee status from non-EO covered countries and who desire to travel outside of the U.S.

Therefore, Refugees and Asylees should avoid travelling outside of the U.S. until at least April 27, 2017, possibly longer depending upon the future actions associated with the travel ban.

The EO and Non-entry Processes

How does the EO impact the adjudication of U.S. Citizenship and Immigration Services (“USCIS”) applications and petitions?

Although the operative language of the EO is explicitly limited to immigrant and non-immigrant entry, the USCIS has been directed to delay action on any petition or application where the applicant is a citizen or national of Syria, Iraq, Iran, Somalia, Yemen, Sudan, and Libya. This may or may not preclude action in cases of dual-nationality with a non-EO covered country.

This means that the processing and approvals of temporary work visa extension petitions for EO-covered individuals will be delayed, along with applications for benefits like Employment Authorization Documents. In several cases, there are automatic extensions of work authorization for limited periods of time.

In cases involving “change of status” petitions, an EO-covered individual should be permitted to remain in the U.S. while the petition is pending in what is referred to as “an authorized period of stay.” However, these periods of authorized stay do not generally permit work authorization.

Anyone from an EO-covered country or a dual-national of EO-covered country may encounter problems in the upcoming [H-1B visa lottery](#) in early-April. Affected individuals in the U.S. in an existing non-immigrant status are generally permitted to remain in the U.S. the petition is adjudicated. However, many F-1 students in Optional Practical Training may encounter work authorization problems after the “cap gap” period expires on September 30th.

Finally, applications of EO-covered individuals for U.S. permanent resident status or for U.S. citizenship will have their processing delayed for at least 90 days.

How may the EO affect those from non-EO covered countries?

The EO suspended the Visa Interview Waiver Program and will require visa applicants from non-EO covered countries to schedule and attend visa interviews. In countries such as India, this program made it easier to apply for new visa stamps while visiting the country. The suspension of this program will increase the interview volume and may result in longer waits for interview appointments, especially around higher demand periods (ex. the start of college in the U.S. and around U.S. holidays). Individuals who will depart the U.S. should plan accordingly, if a visa stamp is required for re-entry to the U.S., allow adequate time to attend visa interview appointments.

Similarly, if possible, individuals should seek extensions or changes of status in the U.S. as an alternative to consular visa processing.

Conclusion

The issues associated with this Executive Order are very dynamic. The foregoing questions and answers are subject to change on short notice, depending upon action by a wide range of government officials. In light of the level of uncertainty, prudent employers and employees should consult with legal counsel about specific situations and questions about the impact of the EO.

¹ Disclaimer: This information is intended only to provide general information in summary form on legal topics. The contents hereof are not legal advice and should not be relied upon as such. Specific legal advice should be sought in particular matters. The choice of a lawyer is an important decision and should not be based solely upon advertisements.

² Following 9-11, the U.S. government mandated that certain citizens of the following countries were required to register and maintain registrations with the government under the NSEERS program: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen. One potential outcome of the EO review period may be the addition of other countries, possibly from the NSEERS list.

³ For additional information on U.S. permanent resident status, see: <https://www.uscis.gov/sites/default/files/files/nativedocuments/M-618.pdf> - pages 7 through 18, discuss requirements to maintain status.