



MID-FEBRUARY 2016 IMMIGRATION UPDATE

Posted on February 14, 2016 by Cyrus Mehta

Headlines:

1. [U.S. Implements VWP Changes in Response to Terrorism Concerns](#) – Under the new “Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015,” travelers in several categories are no longer eligible to travel or be admitted to the United States under the VWP.
2. [USCIS Advises Employers To Identify Returning Workers Who Are Exempt From FY 2016 H-2B Cap](#) – USCIS reminds employers that H-2B workers identified as “returning workers” are exempt from the FY 2016 annual H-2B cap. USCIS is urging H-2B employers to identify returning workers when filing petitions.
3. [State Dept. Estimates Visa Number Availability in the Coming Months](#) – The Department of State’s Visa Bulletin for March 2016 includes estimates of visa number availability (potential monthly movement) in the coming months.
4. [DHS Extends TPS for Sudan](#) – Last month, DHS announced that it was extending and redesignating temporary protected status (TPS) for South Sudan. DHS has also announced that it is extending the designation of Sudan for TPS for 18 months, from May 3, 2016, through November 2, 2017.

Details

1. U.S. Implements VWP Changes in Response to Terrorism Concerns

On January 21, 2016, the United States began implementing changes to the Visa Waiver Program (VWP) under the “Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015.” Under this new law, travelers in the following categories are no longer eligible to travel or be admitted to the United

States under the VWP:

- Nationals of VWP countries who have traveled to or been present in Iran, Iraq, Sudan, or Syria on or after March 1, 2011 (with limited exceptions for travel for diplomatic or military purposes in the service of a VWP country)
- Nationals of VWP countries who are also nationals of Iran, Iraq, Sudan, or Syria

The Department of Homeland Security (DHS) said these individuals will still be able to apply for visas using the regular immigration process at U.S. embassies or consulates. For those who need a U.S. visa for urgent business, medical, or humanitarian travel to the United States, U.S. embassies and consulates will process applications on an expedited basis.

Under the new law, travelers who currently have valid Electronic System for Travel Authorizations (ESTAs) and who have previously indicated holding dual nationality with one of the four countries listed above on their ESTA applications will have their ESTAs revoked.

The Secretary of Homeland Security may waive these restrictions if he determines that such a waiver is in the law enforcement or national security interests of the United States. Such waivers will be granted only on a case-by-case basis. As a general matter, categories of travelers who may be eligible for a waiver include:

- Individuals who traveled to Iran, Iraq, Sudan, or Syria on behalf of international organizations, regional organizations, and sub-national governments on official duty;
- Individuals who traveled to Iran, Iraq, Sudan, or Syria on behalf of a humanitarian nongovernmental organization (NGO) on official duty;
- Individuals who traveled to Iran, Iraq, Sudan, or Syria as journalists for reporting purposes;
- Individuals who traveled to Iran for legitimate business-related purposes following the conclusion of the Joint Comprehensive Plan of Action (July 14, 2015); and
- Individuals who traveled to Iraq for legitimate business-related purposes.

In addition, DHS said it will continue to explore whether and how the waivers can be used for dual nationals of Iraq, Syria, Iran, and Sudan. The Department of State has recommended including waivers for dual nationals who emigrated

from Iran in the aftermath of the Revolution, dual-Iranian nationals who were born outside of Iran, and dual-Iranian nationals traveling to the United States for business purposes or as part of official duties as an employee of a humanitarian NGO.

Any travelers who receive notification that they are no longer eligible to travel under the VWP are still eligible to travel to the United States with valid nonimmigrant visas issued by a U.S. embassy or consulate. Such travelers must appear for interviews and obtain visas in their passports at a U.S. embassy or consulate before traveling to the United States.

The new law does not ban travel to the United States, or admission into the United States, and the great majority of VWP travelers will not be affected by the legislation.

An updated ESTA application with additional questions is expected to be released in late February 2016 to address exceptions for diplomatic and military-related travel provided for in the new law.

DHS's announcement is at

<https://www.dhs.gov/news/2016/01/21/united-states-begins-implementation-changes-visa-waiver-program>.

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2. USCIS Advises Employers To Identify Returning Workers Who Are Exempt From FY 2016 H-2B Cap

U.S. Citizenship and Immigration Services (USCIS) recently reminded employers that effective December 18, 2015, H-2B workers identified as “returning workers” are exempt from the fiscal year (FY) 2016 annual H-2B cap of 66,000 visas. USCIS is urging H-2B employers to identify returning workers when filing petitions.

A returning worker is defined as an H-2B worker who was previously counted against the annual H-2B cap of 66,000 visas during FYs 2013, 2014, or 2015. USCIS noted that this means:

- In general, if the employer submits a petition requesting an employment start date in FY 2016 (from October 1, 2015, through September 30, 2016) for an H-2B worker, the H-2B worker can only be considered a returning worker if he or she had been previously issued an H-2B visa or provided

H-2B status between October 1, 2012, and September 30, 2015.

- If the prospective worker is in the United States in H-2B status, and is seeking to extend his or her stay, change employers, or change the terms and conditions of employment, then the worker would not be counted toward the H-2B cap and the employer would not need to request classification of the person as a returning worker.
- Any prospective H-2B worker who does not qualify as a returning worker will be subject to the FY 2016 H-2B cap unless he or she has previously been counted toward the H-2B cap or is cap-exempt.

USCIS noted that under the *Consolidated Appropriations Act of 2016*, the returning worker program only applies to petitions pending or approved on or after December 18, 2015, requesting named H-2B workers with an employment start date beginning in FY 2016.

Filing Requirements

In addition to the current rules regarding the filing and processing of the Form I-129, Petition for a Nonimmigrant Worker, the following additional requirements are applicable for H-2B returning workers, USCIS said:

- **Certification**: In the petition, the employer must complete and include the H-2B Returning Worker Certification, which must be signed by the same person who signed Part 7 of the I-129. The certification states: "As a supplement to the certification made on the attached Form I-129, Petition for a Nonimmigrant Worker, I further certify that the workers listed below have been issued an H-2B visa or changed to H-2B status during one of the last three (3) fiscal years."
- **Named workers**: The H-2B Returning Worker Certification must include the *full* name of the returning worker. If the returning worker is in the United States and the employer is petitioning to change his or her status to H-2B, it may be in the employer's interest to include evidence of previous H-2B admissions, such as a copy of the worker's visa, to prevent processing delays.
- **Multiple workers**: A single petition may be filed on behalf of more than one worker. However, any returning workers must be listed on the H-2B Returning Worker Certification. For multiple named workers, "Attachment 1" to the I-129 (pages 35 and 36) must also be completed, and USCIS recommends that employers file petitions for returning workers

separately from petitions for new H-2B workers.

- **If the petition is approved:** The U.S. Consulate may deny visas, or a U.S. Customs and Border Protection (CBP) port inspector may refuse admission, if workers cannot be confirmed as returning workers, or are otherwise ineligible for admission or visa issuance. USCIS said the Departments of Homeland Security and State will work together to confirm that all certified returning workers qualify for the program.

Petitioners: An employer may request to designate H-2B workers as returning workers if the employer named beneficiaries who meet the definition of returning workers on an H-2B petition that was pending or approved on or after December 18, 2015, but did not include the required certification. In such cases, the employer should submit by **March 4, 2016**, the H-2B Returning Worker Certification with a copy of the Form I-797 receipt notice to the address where the employer filed the petition. The employer should write “Attn: H-2B Supervisor” on the envelope. This certification must meet the signature and named worker requirements listed above.

Each petition must include a temporary labor certification (TLC) from the Department of Labor (DOL). The process for TLCs is described on the DOL website at <http://www.dol.gov/index.htm>. USCIS will accept a copy of the TLC in cases where the original TLC has previously been accepted by USCIS.

The USCIS announcement is at <https://www.uscis.gov/news/alerts/h-2b-returning-workers-exempted-h-2b-cap-fiscal-year-2016>. The I-129 is at <https://www.uscis.gov/i-129>. The H-2B Returning Worker Certification is at <https://www.uscis.gov/sites/default/files/files/form/i-129sup.pdf>.

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3. State Dept. Estimates Visa Number Availability in the Coming Months

The Department of State’s Visa Bulletin for March 2016 includes estimates of visa number availability (potential monthly movement) in the coming months. Estimates for the employment-based categories include:

Employment First: Current

Employment Second:

Worldwide: Current

China: Up to five months

India: Up to three months

Employment Third:

Worldwide: The rapid forward movement of this cut-off date during the past 10 months should generate a significant amount of demand for numbers. When such demand begins to materialize, it will be necessary to limit movement of this cut-off date.

China: Up to five months

India: Up to one month

Mexico: Will remain at the Worldwide date

Philippines: Up to four months

Employment Fourth: Current for most countries

Employment Fifth: This category will remain "Current" for most countries.

China-mainland born: Slow forward movement

The above projections for the employment categories indicate what is likely to happen on a monthly basis through June based on current applicant demand patterns, the Visa Bulletin explains. Recent trends in cut-off date movements are not guaranteed for the future, and it is possible that "corrective" action may be required to maintain number use within the applicable annual limits. The Visa Bulletin notes that determinations of the actual monthly cut-off dates are subject to fluctuations in applicant demand and a number of other variables.

The Visa Bulletin for March 2016 is at

<https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-march-2016.html>.

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4. DHS Extends TPS for Sudan

Last month, the Department of Homeland Security (DHS) announced that it was extending and redesignating temporary protected status (TPS) for South Sudan. DHS has also announced that it is extending the designation of Sudan for TPS

for 18 months, from May 3, 2016, through November 2, 2017. DHS said it determined that an extension of the current designation was warranted because of the ongoing armed conflict and extraordinary and temporary conditions that prevent Sudan's nationals from returning safely.

Current TPS Sudan beneficiaries seeking to extend their TPS status must re-register during a 60-day period that began January 25, 2016, and runs through March 25, 2016. U.S. Citizenship and Immigration Services (USCIS) encourages beneficiaries to re-register as soon as possible.

The 18-month extension also allows TPS re-registrants to apply for a new employment authorization document (EAD). Eligible Sudan TPS beneficiaries who re-register during the 60-day period and request a new EAD will receive one with an expiration date of November 2, 2017. USCIS said it recognizes that some re-registrants may not receive their new EADs until after their current work permits expire. Therefore, USCIS is automatically extending current TPS Sudan EADs bearing a May 2, 2016, expiration date for an additional 6 months. These existing EADs are now valid through November 2, 2016.

The notice is at

<https://www.uscis.gov/news/temporary-protected-status-extended-sudan>. The

related Federal Register notice is at

<https://www.gpo.gov/fdsys/pkg/FR-2016-01-25/html/2016-01387.htm>.

Additional information on how to file is at

<https://www.uscis.gov/humanitarian/temporary-protected-status>.

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