



## UPDATED FAQ ON TRAVEL BAN

*Posted on February 4, 2017 by Cyrus Mehta*

The following is an updated version of one adapted from frequently asked questions (FAQs) published by ABIL member firm Maggio & Kattar in response to President Trump's executive order, "Protecting the Nation From Terrorist Attacks by Foreign Nations," banning entry to the United States by individuals traveling from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen. These updated FAQs reflect the situation as of February 3, 2017. New developments continue to rapidly change implementation of the order.

### **What are the key points of this Executive Order?**

President Trump signed an Executive Order (EO) the afternoon of Friday, January 27, 2017, which, according to its introduction, is intended to "protect Americans." The EO became effective as of the date of signing. Among the EO's key provisions are:

- A 90-day ban on the issuance of U.S. visas to and entry to the United States of anyone who is a national of one of seven (7) "designated" countries—Iraq, Libya, Somalia, Sudan, Syria, and Yemen.
- An immediate review by the U.S. Department of Homeland Security (DHS) of the information needed from any country to adequately determine the identity of any individual seeking a visa, admission or other immigration benefit and that they are not "security or public-safety threat." This report must be submitted within 30 days and must include a list of countries that do not provide adequate information.
- The suspension of the U.S. Refugee Admissions Program (USRAP) for 120 days.
- The implementation of "uniform screening standards for all immigration programs" including reinstating "in person" interviews.
- A requirement that all individuals who need visas apply for them in

person at U.S. consulates, rather than allowing "mail-in" or drop-box applications.

### **What is an Executive Order? Can it be challenged?**

Does the EO change the law or regulations?

While the president has the authority to issue such orders if the administration deems the action to be in the public interest, the EO does not change, replace, or repeal existing statutes (laws) or regulations.

Legal challenges have already been made to provisions of the EO. Many believe that wide sweeping bans such as those on refugee admissions and visa issuance effectively discriminate against individuals on a religious basis, as all the countries are predominantly Muslim.

On Saturday, January 28, 2017, U.S. federal judge Ann Donnelly of the U.S. District Court for the Eastern District of New York in Brooklyn issued an emergency stay that temporarily blocks the government from sending people out of the country after they have landed at a U.S. airport with valid visas, including green card holders. On Friday, February 3, 2017, Judge James Robart of the U.S. District Court for the Western District of Washington, in Seattle, issued a temporary restraining order that should temporarily block the government from enforcing the travel ban at all. Several other federal courts have issued similar stays.

### **The 90-Day Travel Ban**

What exactly does the 90-day ban prohibit?

The ban halts visa issuance and entry to the United States for affected individuals.

The U.S. Department of State's (DOS) consulates around the world are not permitted to issue visas to individuals who are nationals of a designated country. Consulates will deny pending visa applications of any individuals who fall within the scope of the EO—both nonimmigrant (temporary) visas, such as Bs, Fs, and H-1Bs, *and* immigrant visas for those seeking to become U.S. permanent residents.

DOS has also indicated that all visas already issued to those within the scope of the EO have been provisionally revoked. The number of revoked visas is subject to significant uncertainty, although it is clear that it is large: a lawyer for the

Department of Justice advised a judge hearing one of the above-referenced cases that more than 100,000 visas had been revoked, but DOS then said the number was fewer than 60,000.

U.S. Customs and Border Protection (CBP) officers at border crossings, U.S. airports, and pre-flight inspection at certain foreign airports are not permitted to admit individuals who are nationals of designated countries or allow them to enter the United States, even if they have a facially valid visa.

Who is affected by the 90-day ban?

This ban applies to nationals of the seven (7) designated countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.

What does it mean to be a "national"?

A national is a citizen of a particular country, someone entitled to hold the country's passport. This encompasses someone born in the country or who is a citizen of the country. This may include individuals who were *not* born in the country but whose parents were, if such parentage entitles them to citizenship in that country. For example, someone born in Germany but whose parents were born in Iran may be considered an Iranian under Iranian law, and therefore may be considered subject to the ban.

Does the ban include "dual" nationals? What if the individual was born in one of the seven countries but is now a citizen of another country (e.g., Canada) and only holds that passport?

It is not entirely clear. The EO, as written, does appear to include those born in one of the designated countries even if they do not currently hold a passport from that country or no longer consider themselves a citizen of that country. Keep in mind that "country of birth" is listed on permanent resident cards and is usually listed on one's passport and that CBP and DOS consular officers review these documents.

However, on the afternoon of January 31, 2017, DHS Secretary Kelly held a press conference on the travel ban or, as he described it, a "temporary pause" on visa issuance and admission. On the question of the impact of dual nationality, acting CBP Commissioner Kevin McAleenan indicated that the individual would be evaluated based upon the passport presented and not on his or her "dual national" status. Presumably, an individual presenting a

passport from a non-designated country would not be impacted by the EO's restrictions, even if he or she also holds nationality in a designated country.

Statements by U.S. embassies (e.g., in London) and the governments of Canada and Australia are consistent with Secretary Kelly's indication that the restriction does *not* apply to dual nationals who present a passport from a non-designated country. For example, the U.S. embassy in London has stated on its website that "dual nationals of the United Kingdom and one of countries are exempt from the Executive Order when travelling on a valid United Kingdom passport and U.S. visa." Anecdotal reports from U.S.-Canada land border entry points also show that CBP is not applying the ban to Canadian dual nationals from the designated countries.

This "clarification," however, may conflict with a recent DOS cable to embassies and consulates worldwide in which the DOS provides the following guidance on who is considered to be a dual national: those who "possess a current passport from the restricted country, have been denied based on nationality in a designated country (but not on travel to the country without being a national of that country), or who have otherwise identified themselves as nationals of a restricted country including on a previous application or in an interview, including as a dual national."

Also, as of press time, some airlines reportedly were not allowing people in these situations to board, and not issuing airline tickets. Those traveling on non-covered passports may still be unable to get visas if they are known to be dual nationals of a covered country, and there is some risk that non-Canadian dual nationals with nonimmigrant visas (NIVs) might not be admitted if CBP realizes their NIVs have technically been provisionally revoked.

Therefore, there may be exceptions to the manner in which dual nationals are treated upon entry to the United States dependent upon a number of circumstances. Until there is amended guidance from the DOS, dual nationals should assume the ban could apply to them under the circumstances noted in the DOS cable discussed above.

Does the ban include permanent residents ("green card" holders)?

The Executive Order as originally written did seem to ban the entry of affected lawful permanent residents (LPRs), and was applied to at least some LPRs in practice. However, an "authoritative guidance" memorandum subsequently

issued by Counsel to the President Donald F. McGahn on February 1, 2017, “clarif” that the EO did not ban entry by LPRs. Based on this guidance, a federal judge hearing one of the lawsuits against the ban entered a permanent injunction against application of the ban to LPRs.

In addition, as discussed below in the question about "exceptions" to the ban, the EO includes a provision that allows the issuance of "visas or other immigration benefits" to affected individuals on a "case-by-case basis, and when in the national interest." On Sunday, January 29, 2017, prior to the “authoritative guidance” memo, DHS Secretary John Kelly issued a statement that attempts to clarify this provision as relates to lawful permanent residents. In this statement, Secretary Kelly notes, "Absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations."

Does the ban apply to someone who has just traveled to a designated country?

No. Unless the individual is a national of a designated country, the ban does not apply solely because he or she has visited one or more of the seven countries. Travel to one of the seven countries, however, may increase the likelihood of being questioned by CBP about the nature of the visit—why the person was in the country, for how long, etc., as already provided for in the December 2015 Visa Waiver Program Improvement and Terrorist Travel Prevention Act. Such individuals may be placed in secondary inspection on arrival at a U.S. airport so that CBP may question them about the purpose and nature of such travel.

Can an affected individual still board a plane and try to enter upon arrival at a U.S. airport?

There have been reports of airlines refusing to board individuals who appear to be affected by the EO's ban. Before making any travel plans, individuals should consult with an immigration attorney for individual counsel and advice.

Should affected individuals travel outside the United States?

Individuals who are affected by this ban must understand that if they depart the United States during the 90-day period, they will most likely not be able to return. The temporary halt in enforcing portions of the ban, discussed below, could end at any time. We caution affected individuals *not* to rely on the court's

temporary halt when making a decision to travel abroad.

What about individuals who are outside the United States and want to return?

Airlines may refuse to board anyone who appears to be affected by the ban. Those who are able to board a plane almost certainly will be refused admission (entry) to the United States on arrival at a U.S. airport. Anyone affected by the ban who is currently outside the United States should consult with an immigration attorney before attempting to return in order to understand the current state of affairs and the risks involved, and to develop a strategy based upon his or her individual circumstances.

What will happen to those who are refused entry by CBP?

Individuals who are refused admission by CBP will be instructed to make arrangements to return on the next outbound flight to the destination from which they arrived. While waiting to return abroad or for a decision on a waiver that would allow their entry (see below regarding exceptions to the ban), they will be held or detained by CBP. They will not necessarily be able to make phone calls or send emails or text messages. There is no right to an attorney for individuals who arrive at U.S. airports or land ports-of-entry and seek admission to the United States. In practice, many CBP officers will agree to speak with lawyers representing such individuals. Keep in mind that CBP officers will be overwhelmed in the coming days in dealing with these arrivals and that it may be difficult—even for experienced immigration attorneys—to communicate quickly with CBP. Wherever possible, advance planning will be critical.

Are there any exceptions to the ban?

As of Saturday January 28, 2017, the U.S. District Court for the Eastern District of New York issued an emergency stay of certain provisions of the EO. On Friday, February 3, 2017, the U.S. District Court for the Western District of Washington also issued a temporary restraining order against the application of the EO, the text of which had not yet been made public at the time of this update. Thus, the U.S. government is restrained from barring the admission of refugees seeking admission as part of the USRAP, holders of valid immigrant and nonimmigrant visas, and other individuals from the seven designated countries, and may be restrained from applying the travel ban in any other way as well. This stay applies nationwide. Several other federal courts have issued

similar stays.

At least one of the stays, issued in the District of Massachusetts, may potentially allow future flights to the United States, since CBP has been instructed by the court in that case to advise airlines with flights to Logan Airport that travelers who would otherwise be allowed into the United States will not be refused admission on account of the EO. The Western District of Washington stay may also allow further travel to the United States.

The EO as written permits DOS and DHS to issue visas, or other immigration benefits, to affected individuals on a "case-by-case" basis and when in the "national interest." It was this authority that DHS has used to allow admission of most LPRs, as discussed above. At this time, it is not clear how such requests will be adjudicated in other contexts or what factors the agencies will consider. Anyone seeking to make such a request is advised to consult with an immigration attorney in order to prepare a strategy and supporting documentation.

Can CBP detain individuals?

Individuals who are refused admission and who agree to return on an outbound flight will be detained or held by CBP until they can depart.

At this time, we do not know how CBP will be dealing with those who seek to challenge the refusal of admission. There were credible reports that CBP was detaining LPRs notwithstanding the court cases and Secretary Kelly's statement of January 29, 2017 . It is also possible that CBP may agree to defer the inspection of such individuals, which means that CBP will give them an appointment to return to CBP at a later date to review their case. At this time, it is not known how CBP will be handling such situations; different CBP officers and airports may take different actions.

Any affected individual thinking of traveling to the United States should consult with an immigration attorney about his or her individual circumstances. The EO does not change the existing immigration law, including the right to apply for asylum.

How are the U.S. consulates implementing the ban on visas?

According to credible sources, the DOS issued a cable to all embassies and consular posts to suspend the issuance of nonimmigrant and immigrant visas



for nationals of designated countries. The EO has an exception for nationals of the seven designated countries who are applying for A, G, NATO, C-2, and C-3 visas; presumably affected individuals seeking A, G, NATO, C-2, and C-3 visas may still apply for and expect to receive these visas, if otherwise eligible.

Consulates will stop scheduling and conducting interviews of affected individuals. They also will stop issuing (printing) visas for anyone who was already interviewed but who has not yet received the visa. Courier services will be instructed to return the unadjudicated applications to the affected individuals. Consular posts are beginning to post alerts on their websites to advise individuals of the suspension of visa issuance "effective immediately and until further notification." It is unclear whether DOS will refund visa fees (which are normally valid for one year), although refunds appear unlikely.

The DOS, through this cable, has reiterated that the ban applies to "dual nationals," which DOS notes includes those who "possess a current passport from the restricted country, having been denied ESTA based on nationality in a designated country (but not on travel to the country without being a national of that country), or who have otherwise identified themselves as nationals of a restricted country including on a previous application or in an interview, including as a dual national." Please see item above on conflicting reports on the application of the ban to dual nationals.

With regard to immigrant visas for those affected by the ban, the DOS will cancel currently scheduled interviews and will not schedule immigrant visa interviews for March or April.

How will the EO affect applications pending before U.S. Citizenship and Immigration Services (USCIS)?

According to credible reports, including conversations with USCIS officers at local USCIS Field Offices, DHS leadership initially received email instructions over the weekend to suspend the adjudication of immigration applications by affected individuals from any of the seven designated countries. However, on February 2, 2017, Acting USCIS Director Lori Scialabba issued a memorandum indicating that the entry bar would not affect adjudication of benefits for persons in the United States, adjudication of benefits for LPRs, or adjudication of visa petitions for persons outside the United States (since those petitions do not directly confer travel authorization). That is, it will not affect most applications pending before USCIS, although refugee adjudications will be



affected, and adjudication of I-730 refugee/asylee relative petitions for beneficiaries outside the United States will be subject to further guidance.

What does the EO mean for the immigration status of someone who is in the United States?

The EO only affects those who are applying for visas (nonimmigrant and immigrant), seeking entry, or actively applying for an immigration benefit (e.g., change or extension of status, adjustment to permanent resident, naturalization, and other benefits noted above).

Might the ban be longer than 90 days?

The EO states that the ban on visa issuance and entry is in place for 90 days. The ban, however, will not be lifted automatically at the end of the 90 days (which would be April 27, 2017). Instead, DHS is required to report whether countries have provided information "needed ... for the adjudication of any ... benefit under the INA ... to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat." If the country does not report or presumably if any such reporting is not found to be adequate, the country then would have 60 days to comply in providing such information or the travel ban would become indefinite.

Will the ban be extended to include other countries?

The EO's call for a DHS report based, in part, on information provided by other countries that the U.S. government says it needs to properly review and vet individuals appears to allow for DHS to recommend including additional countries in the ban, until they "comply" and provide the U.S. government with information DHS is requesting of them. This certainly leaves open the possibility and even likelihood of additional countries being included in the ban, should the other countries either not cooperate or not provide information deemed to be adequate by the U.S. government.

### Suspension of the U.S. Refugee Admissions Program (USRAP)

Who is affected by the suspension of USRAP?

All refugees being processed abroad and seeking admission to the United States are affected.

For most refugees, the suspension is at least 120 days. For Syrian refugees, the ban on admission is indeterminate. The EO states that refugee processing and

admission of Syrian refugees shall cease until such time as the President has determined that sufficient changes have been made to the program to ensure its alignment with the national interest. There is no further clarification of what may be deemed "sufficient" or "national interest." This provision effectively eliminates the processing of refugee applications by and admission of Syrian refugees.

How long is the suspension of USRAP?

The USRAP is suspended for 120 days. During this time, the DOS and DHS are required to review the application and adjudication process to determine what additional procedures to take to ensure that refugees "do not pose a threat to the security and welfare of the United States" and to implement those procedures. After the 120 days, DOS can resume refugee admissions only for nationals of countries that are found to have sufficient safeguards to ensure the security and welfare of the United States.

Are certain refugees or countries a priority?

The EO states that once the USRAP starts allowing refugees to enter, DOS is to prioritize refugees with religious-based claims, if the refugee's religion is a minority religion in the individual's country of nationality. The EO does not address the issue of subsects or minority groups within a country's predominant religion.

How many refugees will be let into the United States?

The EO states that DOS and DHS may admit 50,000 refugees for fiscal year 2017 (after the suspension is lifted). This represents a more than 50% reduction in the number of refugee admissions. If the suspension continues for more than 120 days, it is questionable whether the United States will admit any refugees during the 2017 fiscal year.

Are there any exceptions to this ban on refugee admissions?

Yes. As mentioned above, as of Saturday, January 28, 2017, the U.S. District Court for the Eastern District of New York issued an emergency stay of the EO. Thus, the U.S. government is restrained from barring the admission of refugees seeking admission as part of the USRAP, holders of valid immigrant and nonimmigrant visas, and other individuals from the seven designated countries. This stay applies nationwide. Several other federal courts have

issued similar stays.

The EO as written permits DOS and DHS to admit individuals as refugees on a case-by-case basis when in the national interest.

Even during the 120-day suspension period, the DOS and DHS may continue to process and admit refugees with religious-based claims, if the religion is a minority religion in the country of nationality.

#### Elimination of Mailed-In Visa Applications or the "Drop-Box" Application

The EO eliminates the ability of some individuals who need visas to apply for their visas at a U.S. consulate *without* an in-person interview. Previously, some individuals—due to age, or the fact that they were repeat applicants—could mail in their passports to the U.S. consulate or use a "drop-box" system when applying for a visa. This visa interview waiver program has been suspended. Now, anyone who needs a U.S. visa will be required to make an appointment at a U.S. consulate and appear in person for the visa interview.

The impact of this change may be significant, imposing increased burdens on consular staff, longer wait times to schedule visa appointments, and longer waits for individuals to receive their passports and visas back from the consulate. U.S. employers who await the arrival or return of employees may also be negatively affected given these anticipated slowdowns in the process to obtain U.S. visas.

Does the Executive Order change the Visa Waiver Program or ESTA?

No. The "visa interview waiver program" is different from the Visa Waiver Program (VWP), which allows citizens of 38 named countries to travel to the United States. The VWP is still in effect. Citizens of most Western European countries, and others (e.g., Australia, New Zealand, Japan, Singapore), may still seek admission to the United States on the basis of their passports and an ESTA clearance.

The Executive Order is at

<https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>. There may be further updates to these FAQs as the situation develops.