



Untangling the Waiver Scheme in [Protecting The Nation From Foreign Terrorist Entry Into The United States](#)

On March 6, 2017, President Donald Trump [signed an Executive Order](#) that among other things suspends the entry of nationals from six countries, all of which have Muslim populations of more than 90%. The goal of the revised order was to avoid legal controversy but within hours before the EO was to go into effect, a federal court in Hawaii blocked the most controversial sections of the EO through a tool known as a temporary restraining order. Broader [summaries](#) of the revised EO and [litigation](#) are available [here](#). This document focuses on one section of the revised EO: waivers for nationals from the six designated countries.

Section 3(c) of the revised Executive Order [Protecting The Nation From Foreign Terrorist Entry Into The United States](#) includes a waiver scheme for certain nationals who would otherwise be suspended from entering the United States. The burden is on the foreign national to show that his or her entry 1) would not pose a national security threat and would be in the national interest and furthermore show that denying entry would impose “undue hardship.” The revised EO goes on to list the following nine situations in which a waiver would be appropriate:

- (i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;*
- (ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;*
- (iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;*
- (iv) the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;*
- (v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;*

(vi) *the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;*

(vii) *the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 et seq., traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;*

(viii) *the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or*

(ix) *the foreign national is traveling as a United States Government-sponsored exchange visitor.*

There are many unanswered questions about the waiver scheme contained in the revised EO, but here are a few attempts to answer them:

What is Undue Hardship?

“Undue hardship” is a new term coined by the revised EO and therefore not defined in the immigration statute or the regulations. Notably, the current immigration law uses terms such as “extreme hardship” “exceptional hardship,” and “exceptional and extremely unusual hardship” for certain waivers and applications for relief. Each of these standards are different but the case law and agency interpretations reveal a high standard. For example, [recent agency guidance](#) confirms that “extreme hardship” is more than the “usual level of hardship that commonly results from family separation or relocation.”

Is the Waiver Automatic for Individuals Who Fall into One of the Nine Categories?

No. If and when the waiver process becomes operational, applications will be handled on a case by case basis. The nine examples listed in the revised EO are merely illustrations and do not guarantee that an individual in one or more of these categories will receive a waiver. Also, unlike exemptions, waivers are discretionary which means that two individuals with similarly relevant facts may achieve different results.

What has the Department of State said about the Waiver Scheme?

A [leaked Department of State Cable \(DOS\) dated March 10, 2017](#) suggests that a person who falls within one of the nine categories should be able to satisfy the hardship-national interest-national security test: “*Unless the adjudicating consular officer has particular concerns about a case, determining that a case falls under any circumstance listed in this paragraph is a sufficient basis for concluding a waiver is in the national interest. Determining that a case falls under some of these circumstances may also be a sufficient basis for concluding that denying entry during the 90 -day suspension would cause undue hardship.*” In addition to listing the nine examples contained in the revised EO, the March 10 DOS Cable lists four additional examples:

- *The applicant is a high-level government official traveling on official business who is not eligible for the diplomatic visa normally accorded to foreign officials of national governments (A or G visa). Examples include governors and other appropriate members of sub-national (state/local/regional) governments; and members of subnational and regional security forces;*

- *The applicant is traveling to participate in a Department of Defense (DoD) program that DoD deems mission critical;*
- *The applicant is traveling to participate in a major cultural, media, and other national event such as a U.S. Olympic Committee sponsored competition that would support U.S. government objectives;*
- *Cases where all the three criteria are met ...and the Chief of Mission or Assistant Secretary of a Bureau supports the waiver*

The March 10 DOS Cable goes on to say that individuals who receive a waiver should have the following notation on their visa “*Waiver of Executive Order Approved*” and also documented in the case notes. Finally, the leaked cable states: “*If the applicant does not qualify under one of the listed waiver categories ...but the interviewing officer and consular manager believe that the applicant meets the requirements ...and therefore should qualify for a waiver, then the case should be submitted to the Visa Office for consideration.*”

Why Did the White House Expand the Waiver Scheme? Presumably, the White House included a waiver scheme and examples in order to avoid litigation by individuals who have been or would be injured if denied entry into the United States. On March 16, 2017 however, [one Maryland court](#) found that the waiver scheme only presented an additional hurdle to foreign nationals otherwise affected by the suspension on entry: “*[A]lthough some of the Individual Plaintiffs' relatives may be eligible for a waiver under the Second Executive Order, because the waiver process presents an additional hurdle that would delay reunification, their claims are ripe.*” *In reaching this conclusion, the Maryland court cited to a case involving the Fair Housing Act which found that ripeness "assuming that [plaintiffs] successfully prove at trial that this [challenged] additional hurdle was interposed with discriminatory purpose and/or with disparate impact, then the additional hurdle itself is illegal whether or not it might have been surmounted"*

What Questions Are Outstanding? How immigration officers will adjudicate the waivers? Will there be a form? What is “undue hardship?” What is “national security?” Does an individual have to make an affirmative request? What type of evidence is required to satisfy the three-part test and/or listed examples in the revised EO and DOS cable? Does DOS have the capacity to manage the waiver process? How long will applicants have to wait before a decision is made on a waiver application?

What Happens Now? Currently, the revised EO is on hold because of court orders in Hawaii and Maryland.

This document was created on March 27, 2017 and does not constitute legal advice.