



Untangling the Waiver Scheme in [Presidential Proclamation on Enhancing Vetting Capabilities & Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats](#)

On September 24, 2017, President Donald Trump signed a Proclamation that among other things suspends the entry of certain nationals from eight countries: Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen. This document focuses on one subsection of the Proclamation: waivers for nationals from the eight designated countries who are covered by the ban. Broader information about the Proclamation is available [here](#).

Section 3(c) of [Presidential Proclamation on Enhancing Vetting Capabilities & Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats](#) 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 (A) denying entry would cause the foreign national undue hardship; (B) entry would not pose a threat to the national security or public safety of the United States; and (C) entry would be in the national interest.

The Proclamation states that case-by-case waivers will not be issued categorically, and goes on to list the following ten situations in which a waiver would be appropriate:

(A) 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 applicable effective date under section 7 of this proclamation, seeks to reenter the United States to resume that activity, and the denial of reentry would impair that activity;

(B) the foreign national has previously established significant contacts with the United States but is outside the United States on the applicable effective date under section 7 of this proclamation for work, study, or other lawful activity;

(C) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations;

(D) 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 would cause the foreign national undue hardship;

(E) 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;

(F) 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 foreign national can document that he or she has provided faithful and valuable service to the United States Government;

(G) 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;

(H) the foreign national is a Canadian permanent resident who applies for a visa at a location within Canada;

(I) the foreign national is traveling as a United States Government-sponsored exchange visitor; or

(J) the foreign national is traveling to the United States, at the request of a United States Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.

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

What is Undue Hardship?

“Undue hardship” is a new term originally coined in the second Executive Order (and again in the Proclamation), 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 Ten Categories?

No. If and when the waiver process becomes operational, applications will be handled on a case by case basis. The ten examples listed in the Proclamation 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.

Who Makes a Decision about the Waiver? According to [guidelines](#) from the Department of State, consular officers at the Department of State will make determinations about whether to issue a visa based on a listed waiver category.

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 Proclamation? 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?

This document was created on September 26, 2017, is a living document, and does not constitute legal advice.