

Questions and Answers: Executive Order "Protecting The Nation from Terrorist Attack By Foreign Nations" (or Muslim/Refugee Ban)

Alert: (updated February 17, 2017, 6:00am EST)

On February 3, 2017, the United States District Court for the Western District of Washington issued a [temporary restraining order](#), blocking the following sections of the Executive Order Protecting the National from Terrorist Attack by Foreign Nations”:

- 3(c): 90-day ban on “immigrants and nonimmigrants” from designated countries – Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.
- 5(a): 120-day ban on U.S. refugee program
- 5(b): Prioritization of certain refugee claims
- 5(c): Indefinite suspension of Syrian refugee admissions
- 5(e): Case-by-case refugee admissions

Though the court order is temporary, it applies nationwide. Due to the court order, [Department of Homeland Security](#) has indicated that it “will resume inspection of travelers in accordance with standard policy and procedure.” [Department of State](#) has also indicated that U.S. embassies and consulates will resume scheduling visa appointments for nationals of these seven countries. DOS has furthermore indicated that the “**provisional revocation [from the seven countries] is now lifted, and those visas are now valid for travel to the United States, if the holder is otherwise eligible.** Individuals whose visas are expired, or were physically cancelled, must apply for a new visa at a U.S. embassy or consulate, absent a Customs and Border Patrol (CBP) decision to grant parole or waive the visa requirement at the port of entry.”

*On February 9, 2017, the Ninth Circuit Court of Appeals [denied](#) the government’s motion to stay the district court’s order. Specifically, the court found “[W]e hold that the Government has not shown a likelihood of success on the merits of its appeal, nor has it shown that failure to enter a stay would cause irreparable injury, and we therefore deny this motion for a stay.” This means that the hold on the travel ban continues.

*On February 10, 2017, one judge from the Ninth Circuit Court of Appeals made a [sua sponte request](#) that a vote be taken as to whether the three-judge decision on February 9 should be reconsidered en banc (which means by the whole court). Briefs were due on February 16, 2017.” In its [brief](#), the government did not seek rehearing of the court ruling and instead alluded to creating a new Executive Order. Late February 16, the Ninth Circuit issued the following [order](#): “The United States has represented to the Court that the President intends to issue a new Executive Order and has urged the Court to “hold its consideration of the case until the President issues the new Order.” The United States has further represented that it will inform the Court of any new developments. En banc proceedings before this Court are stayed pending further Order of this Court.

What are highlights of the Executive Order?

- Suspends entry to the United States of anyone who is a national of one of seven (7) “designated” countries – Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.
- Suspends the US Refugee Admissions Program (USRAP) for 120 days.
- Indefinitely halts Syrian refugee admissions.
- Implements “uniform screening standards for all immigration programs” including reinstating “in person” interviews.
- Requires all individuals who need visas to apply for them in-person at US consulates.

What Is An Executive Order? Can It Be Challenged?

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. Several [legal challenges](#) have been made on behalf of individuals affected by the EO. Some of the outcomes from these legal challenges are nationwide and should be reviewed carefully.

What is the 90-day (Muslim Ban) ban?

The ban halts visa issuance and entry to the United States for affected individuals. This ban applies to nationals of the seven (7) designated countries - Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. This ban extends to both nonimmigrant (temporary) visas, such as Bs, Fs, H-1Bs, etc. *and* immigrant visas for those seeking to become US permanent residents.

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 7 countries but is now a citizen of another country (e.g., Canada) and only holds that passport?

There has been great confusion around this question. As written, the EO appears 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.

CBP indicated in [guidance on February 1](#) “Dual citizens: EO applies to Dual Citizens, but travelers are being treated according to the travel document they present. For example, if they present a Canadian passport, that is how they are processed for entry”. 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. Finally, DHS published in a news alert on [February 3](#) that the ban does not apply to “dual citizens with passports from a country other than the seven listed”.

Does the ban include permanent residents (lawful permanent residents or “green card” holders)?

The Executive Order as written is unclear. The guidance we have to date suggests that LPRs are exempt from the ban. [Guidance from the White House](#) dated February 1 indicates that the Muslim ban does not apply to Lawful Permanent Residents. An LPR who is from a designated country should consult with an immigration attorney before traveling.

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 7 countries. Travel to one of the 7 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 US 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 US 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. Moreover, there is no guarantee that this ban will end after 90-days.

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 US 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, 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, they will be held or detained by CBP. They will not necessarily be able to make phone calls or send emails or text messages. Arguably, there is no right to an attorney for individuals who arrive at US airports or land ports-of-entry and seek admission to the United States. In practice, CBP officers may agree to speak with lawyers representing such individuals.

How are the US consulates implementing the ban on visas?

On January 27, the Department of State issued a [cable](#) to all embassies and consular posts provisionally revoking “all valid nonimmigrant and immigrant visas of nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.” There is an exception for nationals of the 7 designated countries holding A, G, NATO, C-2 and C-3 visas.

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

The EO only impacts 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). But see above. It is unclear how the guidance on “revocation” by the Department of State will be interpreted.

What does the ban mean for those from the designated countries with pending applications or petitions before USCIS?

According to [guidance from USCIS](#) on February 3 “USCIS continues to adjudicate applications and petitions filed for or on behalf of individuals in the United States regardless of their country of origin, and applications and petitions of lawful permanent residents outside the U.S. USCIS also continues to adjudicate applications and petitions for individuals outside the U.S. whose approval does not directly confer travel authorization. Applications to adjust status also continue to be adjudicated, according to existing policies and procedures, for applicants who are nationals of countries designated in the Jan. 27, 2017, “[Executive Order: Protecting the Nation From Foreign Terrorist Entry Into the United States.](#)”

Are there any “exceptions” to the ban?

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.” At this time, it is not clear how such requests will be adjudicated 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. Likewise, federal court orders such as the one included in the “Practice Alert” above may impact how the ban is implemented.

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 US 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 US 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 US government.

REFUGEES

Suspension of the US Refugee Admissions Program (USRAP)

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

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 only resume refugee admissions for nationals of countries that are found to have sufficient safeguards to ensure security and welfare of the United States.

How many refugees will be let in to the United States?

The EO states that DOS and DHS may only 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 US will admit any refugees during the 2017 fiscal year.

Are there any exceptions to this ban on refugee admissions?

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.

OTHER PROVISIONS

Elimination of Visa Interview Waiver Program

The EO eliminates the ability of some individuals who need visas to apply for their visas at US 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 US 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 US visa will be required to make an appointment at a US 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. US employers who await the arrival or return of employees may also be negatively impacted given these anticipated slowdowns in the process to obtain US 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

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