



changes to the visa waiver program enacted

February 1, 2016

practice areas

immigration

On December 18, 2015, Congress enacted **HR 158 "Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015" ("the Act")**, which changed Visa Waiver Program ("VWP") traveler eligibility requirements for a limited group of individuals. The new VWP restrictions imposed by the Act are now being implemented as advised in a press release issued by the U.S. Department of Homeland Security ("DHS") on January 21, 2016.

Background:

The VWP is a special program which was created in 1986 to enhance trade and travel with designated countries so the State Department could focus resources on higher-risk travelers and issues. Administered jointly by DHS and the State Department, the VWP permits visa-free travel for eligible citizens of 38 program partner countries around the world. These countries include Western Europe, Japan, Australia, S. Korea, Taiwan, and others. Canadian citizens are visa exempt and are not participants in the VWP.

In return, those 38 countries must permit U.S. citizens to travel to their countries for similar purposes and similar length of time without having to obtain a visa.

New Restrictions:

Most notably, *with only a few limited exceptions*, the Act prohibits certain individuals from traveling to or being admitted in the U.S. without a visa. These individuals may still travel to the U.S., however, they must first obtain a visa in their passports prior to travel to the U.S. and cannot take advantage of the VWP. DHS has stated that for those who need a U.S. visa for urgent business, medical, or humanitarian reasons, U.S. embassies and consulates are ready to process applications on an expedited basis.

The newly ineligible VWP travelers include:

1. **Nationals of VWP countries who have traveled to, or been present in, Iran, Iraq, Syria, or Sudan (but not including South Sudan) on or after March 1,**



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2011.

Limited exception: An exception exists if it is established that the otherwise ineligible VWP individual traveled to a prohibited country on official orders for the following purposes: a) performing military service in the armed forces of a VWP program country, or, b) carrying out official duties as a government employee of a VWP program country.

2. **Nationals of VWP countries who are also dual nationals of Iran, Iraq, Syria, or Sudan.** Dual nationality may be conferred through parent lineage so 'nationality' must be analyzed closely.

Currently, there are no exceptions available for dual nationals.

For travelers who fall into the first category of having traveled to one of the four countries listed above, CBP has advised that they will not be revoking their ESTA clearances, however, upon admission to the U.S., the CBP officer at the port of entry will make a determination based on whether they qualify for an exception (travel for official government or military service purposes only). Other restricted travelers may be eligible to apply for a waiver, granted at the discretion of DHS. Instructions on applying for such waivers have not been made available but DHS has provided general information that certain travelers *may* be eligible to apply for waivers if travel is for the following purposes: *travel on official duty on behalf of international organizations, regional organizations, and sub-national governments on official duty; travel on behalf of a humanitarian NGO on official duty; travel as a journalist for reporting purposes; travel to Iran for legitimate business-related purposes following the conclusion of the Joint Comprehensive Plan of Action (July 14, 2015); and travel to Iraq for legitimate business-related purposes.* **DHS waivers will be discretionary and will only be reviewed and granted on a case-by-case basis.**

For travelers holding dual nationality in one of the four designated countries, CBP has advised that the individuals will receive notice, via email, on or about January 21, 2016 that their current ESTA has been revoked and is no longer valid for travel under the VWP. Currently, DHS has not provided information for exceptions or waivers for these individuals but maintain that they are exploring possibilities.

A new online ESTA application with additional questions is expected to be released by DHS in late February 2016 to address these new changes.

We remind those travelers subject to the new restrictions that they are *not* banned from travel to the United States. They may still travel to the U.S., but must first apply for the appropriate visa at a U.S. Embassy or Consulate abroad prior to travel. The visa process typically requires submission of in-depth personal and biographic information, biometrics, and other related supporting documentation, followed by an in-person interview at the U.S. Consulate with a consular officer. We also note that changes to the VWP under the Act do not impact individuals who were previously not eligible to travel to the U.S. under the VWP.

In addition to the new travel restrictions discussed above, other notable changes imposed by the Act include:

- By April 1, 2016, all VWP travelers must use an electronic passport for travel to the U.S.



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- DHS will implement other changes to the program and its systems to enhance information sharing of terrorism and criminal data, including the use of INTERPOL databases for border screening purposes.

Concerned travelers should check their ESTA applications prior to making any travel arrangements to the United States at <https://esta.cbp.dhs.gov>.

Should you have any questions regarding eligibility for travel under the VWP and whether this law impacts you or someone you know, please contact the MSK attorney with whom you work, or you may contact the authors of this alert, Fuji Whittenburg (fyw@msk.com) or Benjamin Lau (bcl@msk.com).

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