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U.S. Immigration News
New law restricts Visa Waiver/ESTA visitors
Effective Immediately

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Background

The Visa Waiver program allows citizens of 38 designated countries to travel to the United States without a visa for business or pleasure, for periods of up to 90 days. To utilize this program, qualified visitors simply complete a form online through the Electronic System for Travel Authorizations (ESTA), which then provides electronic proof of travel authorization within 48 hours, unless the individual is listed as a person prohibited from traveling to the United States or is otherwise ineligible for visa-free travel. Twenty million visitors per year come to the United States pursuant to this program.

New Law Reflects Security Concerns about Visitors with Ties to Iraq, Iran, Syria or Sudan

The U.S. Congress enacted changes to the Visa Waiver/ESTA program on December 18, 2015, in conjunction with the 2016 budget (the 2016 Consolidated Appropriations Act). No guidance was provided at that time about how the new security-related restrictions would be implemented. The Visa Waiver bill was attached to the U.S. budget law following the terrorist attacks in Paris and California.

The “Terrorist Travel Prevention and Visa Waiver Program Reform” bill imposed restrictions on visitors who have traveled to Iraq, Iran, Syria, or Sudan (not including South Sudan) since March 1, 2011, as well as individuals who hold dual citizenship with a Visa Waiver country and one of the four countries listed in the new restrictions. This has sparked controversy and challenges, especially on behalf of individuals who automatically hold dual citizenship in Iraq, Iran, Syria, or Sudan, by operation of law, solely as a result of their father’s citizenship, without ever having traveled to those countries or requested such dual citizenship. The law also allows the Secretary of Homeland Security to designate additional countries as “areas of concern” in the future.

Implementation of the Restrictions

On January 21, 2016, the U.S. Customs and Border Protection (CBP) began implementing the changes required under the new law. **Effective immediately**, individuals whose prior ESTA applications referenced dual citizenship with both a Visa Waiver country and a restricted country will have their previously granted ESTA authorization revoked. They should receive notice via email that their current ESTA is no longer valid. Persons with revoked ESTA authorization will not be allowed to board an airplane to the United States. All persons affected by the new restrictions will have to apply for a visitor visa at a U.S. Embassy or Consulate outside of the United States in order to travel here. This involves

completing a visa application form online, paying a visa application fee, booking an interview appointment, appearing for an interview at the Consulate office, being fingerprinted and answering questions under oath. Those who have traveled to one of the four restricted countries will have to explain legitimate purposes for their visits.

The Department of Homeland Security (DHS) outlined potential waivers to these restrictions that the Secretary of Homeland Security may grant. The categories of visitors who may be eligible for waivers include humanitarian NGO members who traveled on official duty, journalists, individuals who traveled on behalf of international organizations or sub-national governments, or those who traveled to Iraq for legitimate business purposes. The Secretary will consider whether a requested waiver is in the national security interests of the United States, on a case-by-case basis.

U.S. Customs and Border Protection has stated that a new ESTA application form is scheduled to be released in late February 2016 to address exceptions for diplomatic- and military-related travel, as provided in the Consolidated Appropriations Act. In addition, CBP plans to provide information to answer frequently asked questions.

The law also requires countries that participate in the Visa Waiver program to have electronic, fraud-resistant passports. By April 1, 2016, all passports for ESTA travelers must meet these requirements. Participating governments must also certify by October 1, 2016, that they require such fraud-resistant passports for individuals who enter their countries.

Persons Who Are Not Affected by this Change

Canadian citizens are visa-exempt pursuant to a treaty between the U.S. and Canada and are not affected by these new restrictions on Visa Waiver/ESTA travel.

The new procedures do not directly affect persons with U.S. work visas or other types of visas allowing them to travel to the United States. However, as described below, other visa applicants may experience delays when volumes of visa applications at U.S. Consulate offices increase. In addition, Consular officers may ask additional questions during interviews of other visa applicants who have traveled to Iraq, Iran, Syria or Sudan since March 1, 2011.

Notify Affected Associates

I recommend that you notify any colleagues, business associates, customers, suppliers, conference attendees, friends or family members who travel to the United States pursuant to ESTA authorization. If they are directly affected by the new restrictions, they will need to plan to apply for a visitor visa (often issued as a combination B-1/B-2 visa, which can be used for business or tourism purposes).

Tips

Plan for potential delays in other visa application cases. The increase in visitor visa applications that will be filed by former Visa Waiver visitors may cause delays at U.S. Consulate offices for all nonimmigrant visa applications. The Department of State has indicated that it will add staff members at U.S. Consulate offices if application volumes increase, and it will develop ways to expedite interview

appointments for former ESTA travelers with imminent needs for visas. Despite these statements, I recommend that persons planning to apply for U.S. visas allow more time than usual for obtaining an interview appointment and more time for the Consulate to process the application after the interview. During the post-interview processing, the applicant's passport will remain at the Consulate office.

If someone has ESTA authorization and is not sure whether it is still valid, I suggest checking the status of their ESTA authorization before making plans to travel to the United States. They may check the status at the designated CBP website: <https://esta.cbp.dhs.gov>.

If you have questions about these changes, please contact Susan R. Blackman at sblackman@wilsav.com. We will continue to monitor this situation as additional guidance emerges and government procedures are clarified.