

Paris and San Bernadino Attacks Prompt Revisions to the U.S. Visa Waiver Program

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As a result of the Paris and San Bernadino attacks, the United States began closely scrutinizing its Visa Waiver Program ("VWP"). Of course, Ms. Tashfeen Malik (one of the San Bernadino attackers) entered the United States under K-1 status, using an actual fiancee visa that she had obtained from a United States consulate. Her husband, Syed Farook, was a United States citizen. In other words, neither attacker had actually used the VWP to enter the United States.

In any event, reforms to the VWP were included in the *Consolidated Appropriations Act, 2016* [Public Law 114-113] (the "Act"), which President Obama signed into law on December 18, 2015. The two most significant changes to the VWP, as a result of the Act, are as follows:

- It requires that all VWP applicants be in possession of machine-readable passports. Beginning on April 1, 2016, the Act also requires that all passports must be electronic and fraud resistant, and must contain relevant biographic and biometric information. Governments of participating VWP countries must certify that they meet these requirements by April 1, 2016, and must also certify by October 1, 2016 that they require these passports for entry into their countries.
- More importantly, any individual who is a dual citizen of Iran, Iraq, Sudan (but not including South Sudan), or Syria, or who has visited any of those countries since March 1, 2011, is ineligible for travel to the United States under the VWP. In other words, an Iranian citizen who also holds United Kingdom citizenship will no longer be eligible to use the VWP. The Department of Homeland Security or Department of State may also designate additional countries as "areas of concern" or state sponsors of terrorism in the future, and if they do, similar restrictions will apply to individuals from those countries as well.

A VWP prohibition also applies to any individual (regardless of citizenship) who has visited Iran, Iraq, Sudan, or Syria since March 1, 2011. However, an exception to this prohibition (but not the dual national prohibition) applies to individuals who are either a member of the military of a VWP country or a full-time employee of the federal government of a VWP country, who has

traveled to one of the excluded countries on official orders. In other words, it not sufficient to merely be a member of the military or a federal government employee of a VWP country; the individual must also have traveled to the excluded country on official orders.

On January 21, 2016, the Department of Homeland Security ("DHS") and Department of State ("DOS") issued a joint statement addressing these changes (the "Joint Statement"). In this Joint Statement, DHS/DOS stated that (as of that date) travelers who currently had a valid Electronic System for Travel Authorization ("ESTA") and who had previously indicated on their ESTA application that they held dual nationality with one of the four excluded countries would have their current ESTAs revoked.

The Joint Statement also stated that, under the new law, the Secretary of Homeland Security had the authority to waive these restrictions, if he determined that such a waiver was in the law enforcement or national security interests of the United States; such waivers would be granted only on a case-by-case basis. As a general matter, categories of travelers who may be eligible for a waiver include:

- Individuals who traveled to Iran, Iraq, Sudan or Syria on behalf of international organizations, regional organizations, and subnational governments on official duty;
- Individuals who traveled to Iran, Iraq, Sudan or Syria on behalf of a humanitarian NGO on official duty;
- Individuals who traveled to Iran, Iraq, Sudan or Syria as a journalist for reporting purposes;
- Individuals who traveled to Iran for legitimate business--related purposes following the conclusion of the Joint Comprehensive Plan of Action (July 14, 2015); and
- Individuals who have traveled to Iraq for legitimate business--related purposes.

Whether ESTA applicants will receive a waiver will be determined on a case-by-case basis, consistent with the terms of the law. DHS/DOS will also continue to explore whether and how the waivers can be used for dual nationals of Iraq, Syria, Iran and Sudan.

It should be mentioned that a dual national of one of the excluded countries (Iran, Iraq, Sudan, or Syria) who also holds Canadian citizenship will not be subject to any additional restrictions since Canada is not a participant of the VWP. Canadian citizens are visa exempt under [8 CFR 212.1\(a\)](#); this visa exemption exists independently from the VWP.