

What You Need to Know About President Trump's New Travel Ban

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Introduction

On March 6, 2017, President Trump signed a new executive order (the “New Order”), implementing a new travel ban. However, unlike the original travel ban (which became effective immediately), the New Order will become effective at 12:01 am EDT, on March 16, 2017. This ten-day delay is intended to provide sufficient time for affected parties (including international airlines and government agencies) to prepare for the ban, in an attempt to avoid the same confusion caused by the original travel ban.

The New Order formally replaces [Executive Order 13769](#) (the “Previous Order”), which imposed an immediate travel ban on citizens of certain designated countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) when it was signed by President Trump on January 27, 2017. On February 3, 2017, [a federal court judge imposed a temporary restraining order](#), blocking the implementation of the Previous Order.

The New Order is similar in many ways to the Previous Order so it is still likely to be challenged in the courts. However, it does attempt to address some of concerns that were raised when the Previous Order was implemented. The New Order also attempts to clarify certain points that were unclear from the language of the Previous Order. A summary of key provisions contained in the New Order appears below.

Iraq Not Subject to the Travel Ban

The New Order no longer applies to citizens or nationals of Iraq. It rationalizes this decision by claiming that the close cooperative relationship between the United States and the Iraqi government, the strong United States diplomatic presence, the significant presence of United States armed forces in Iraq, and Iraq’s commitment to fighting ISIS justifies different treatment for Iraq.

Nevertheless, the New Order states that decisions regarding the issuance of visas or granting admission to Iraqi nationals should be subjected to “additional scrutiny” to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

Reinstatement of the Travel Ban for a Period of 90 Days

Scope of the Travel Ban

The New Order once again suspends the entry of nationals from the designated countries (which now includes only Iran, Libya, Somalia, Sudan, Syria, and Yemen) for a period of 90 days from its effective date (March 16, 2017). However, it makes clear that the travel ban will apply only to citizens of these designated countries who:

- Are outside the United States on the effective date of the New Order;
- Did not have a valid visa at 5:00 pm EST on January 27, 2017 (when the Previous Order became effective); and
- Do not have a valid visa on the effective date of the New Order.

In other words, a foreign national who has already lawfully entered the United States may continue to remain there. Also, a foreign national who obtained a valid visa prior to the effective date of the Previous Order and whose visa is still valid after the new travel ban becomes effective may use it to enter the United States.

Visas that were provisionally revoked solely as a result of the Previous Order were later reinstated by DOS after the temporary restraining order blocked the original travel ban. The New Order makes clear that no immigrant or nonimmigrant visa issued before its effective date shall be revoked as a result thereof. In other words, any visa provisionally revoked due to the Previous Order is still considered valid for the purposes of the New Order and may be used to enter the United States after the new travel ban becomes effective, as long as it is still valid at the time of entry.

The Previous Order used vague language to describe who would be subject to the travel ban, which created confusion. For example, it did not clearly explain whether the travel ban would apply to persons born in one of the designated countries but who were not citizens of those countries. The New Order now makes clear that it applies only to nationals (i.e. citizens) of one of the designated countries.

Exceptions to the Travel Ban

The New Order also provides for the following exceptions to the travel ban:

- Any lawful permanent resident of the United States. When the Previous Order was first implemented, the White House initially claimed that U.S. permanent residents would be subject to the travel ban. However, shortly after the Previous Order came into effect, the U.S. Department of Homeland Security (“DHS”) announced a blanket national interest exemption

for U.S. lawful permanent residents. The New Order now explicitly exempts U.S. permanent residents from the travel ban.

- Any foreign national who is admitted to or paroled into the United States on or after the effective date of the New Order.
- Any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document.
- Any dual national of a designated country who is traveling on a passport issued by a non-designated country. Due to the vague language of the Previous Order, [it was initially unclear whether dual nationals who also held citizenship from a non-designated country would be subject to the travel ban](#). The U.S. Department of State (“DOS”) initially claimed that Canadian dual citizens from one of the designated countries would not be allowed to enter the U.S. However, President Trump’s National Security Adviser later told the Canadian Government that Canadian dual citizens who also held citizenship from one of the designated countries would not be affected by the travel ban. When United States Customs and Border Protection (“USCBP”) finally published a FAQ page for the Previous Order on its website, it also confirmed that dual citizens entering the United States using a passport issued by a non-designated country would not be affected. The New Order now explicitly exempts such dual nationals from the travel ban, if they are travelling on a passport issued by a non-designated country.
- Any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa. This exemption also appeared in the Previous Order.
- Any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

Waivers of the Travel Ban

The New Order also allows nationals of one of the designated countries to seek a waiver on a case-by-case basis, if they can demonstrate to DOS or USCBP that denying them entry would cause undue hardship, that their entry would not pose a threat to national security, and that their entry would be in the national interest.

A similar waiver authority appeared in the Previous Order but it referred only to the national interest. The New Order now appears to also require: (a) evidence undue hardship, and (b) evidence that that the foreign national’s entry will not pose a threat to national security. This could suggest that a higher eligibility threshold will now apply to such waivers.

One positive change is that the New Order now provides specific examples of when case-by-case waivers may be appropriate:

- 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 effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;
- The foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

- The foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;
- 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 during the suspension period would cause undue hardship;
- 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;
- 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 employee can document that he or she has provided faithful and valuable service to the United States Government;
- The foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act, 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 that statute;
- The foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or
- The foreign national is traveling as a United States Government-sponsored exchange visitor.

The reference to landed Canadian immigrants (i.e. Canadian permanent residents) is both reassuring and troubling. Although it suggests that Canadian permanent residents are likely to obtain a case-by-case waiver, it also makes clear that they require one.

After the Previous Order was implemented, the Canadian Government was informally told that Canadian permanent residents would not be affected by the travel ban. When USCBP published its FAQ page for the Previous Order on its website, it also confirmed that permanent residents of Canada (not including refugees) who held passports from one of the designated countries could still apply for admission to the United States, if they present their passport with a valid immigrant or non-immigrant visa along with proof of their Canadian permanent resident status. However, the FAQ page also stated that travel had to originate in Canada and be made through a Canada-U.S. land port of entry or a preclearance office at a Canadian airport.

Based on the above, it appeared as though a blanket national interest waiver may have been granted to Canadian permanent residents, provided that their travel originated in Canada and they were inspected by USCBP at a land port of entry along the Canada-U.S. border or at a preclearance facility at a Canadian airport. However, this no longer appears to be the case.

The New Order makes clear that Canadian permanent residents are in fact subject to the travel ban and instead advises them to seek a case-by-case waiver from a U.S. consular post located in Canada. Although the New Order specifically lists Canadian permanent residents as an example of when a case-by-case waiver might be appropriate, it requires them to formally apply for a case-by-case waiver through a U.S. consular post.

True, a national of one of the designated countries who holds a valid visa that was issued prior to the effective date of the Previous Order should still be allowed to enter the United States

under the New Order, regardless of whether they are Canadian permanent residents. So it is arguable that Canadian permanent residents are no worse off than they were under the prior USCBP guidance.

Nevertheless, the prior USCBP guidance had strongly suggested that Canadian permanent residents would not be subject to the ban, likely on the basis of a blanket national interest waiver. The New Order now makes clear that this is not the case.

The only positive news for Canadian permanent residents (and other potential waiver applicants) is that a waiver of the travel ban is very different from the nonimmigrant waiver of inadmissibility that foreign nationals typically require if they are found to be inadmissible under the Immigration and Nationality Act (for example, based on criminal grounds). Nonimmigrant waivers required for visa applicants in order to waive traditional grounds of inadmissibility (such as criminal offenses) must be requested from the Admissibility Review Office of USCBP (through a U.S. consular post) and they can take more than six months to obtain. Since case-by-case waivers of the travel ban may be granted directly by DOS, they can be adjudicated much more quickly, especially if DOS delegates this authority to consular officers.

Suspension of Decisions on Refugee Applications

The New Order will again suspend decisions on applications for refugee status under the U.S. Refugee Admissions Program (“USRAP”), for a period of 120 days after the effective date. However, it now makes clear that the suspension will not apply to refugee applicants who were formally scheduled for transit by the Department of State before the effective date of the New Order.

The Secretary of State and the Secretary of DHS may also jointly decide to admit individuals as refugees on a case-by-case basis, as long as they determine that it is in the national interest and does not pose a threat to the security or welfare of the United States. A similar provision was included in the Previous Order.

Once the 120 day period has ended, the number of refugees who will be admitted in fiscal year 2017 will be capped at 50,000. A similar cap of 50,000 was included in the Previous Order.

On a positive note, the New Order no longer contains language requiring the prioritization of refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual was a minority religion in the individual's country of nationality. Critics of the Previous Order had claimed that this language would prioritize the refugee claims of Christian minorities residing in predominantly Muslim countries.

In addition, the Previous Order suspended the entry of Syrian nationals as refugees until President Trump determined that sufficient changes had been made to the USRAP to ensure that admission of Syrian refugees was consistent with the national interest (i.e. indefinitely). This language no longer appears in the New Order.

Suspension of the Visa Interview Waiver Program

The New Order requires the immediate suspension of the Visa Interview Waiver Program, which allows certain visa applicants to obtain visas from a U.S. consular post without having to attend an in-person interview. However, the suspension will not apply to foreign nationals traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa. It also will not apply to foreign nationals traveling for purposes related to an international organization designated under the International Organizations Immunities Act or traveling for purposes of conducting meetings or business with the United States Government. A similar provision was included in the Previous Order.