

Business Immigration Weekly for February 8, 2016

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Practices: Immigration

NEW VISA WAIVER PROGRAM RESTRICTIONS IMPLEMENTED

Several immigration provisions were included in the Omnibus Appropriations Bill for FY2016 which was passed in December 2015. One of the most important involves new restrictions on Visa Waiver Program.

The Visa Waiver Program allows certain nonimmigrants to enter the United States as a Visitor for Business or Pleasure without having to previously secure a B-1/B-2 visa at their local U.S. Embassy or Consulate abroad. A Visa Waiver Program traveler is granted a period of authorized stay of 90 days. Prior to entry, the traveler must register with the Electronic System for Travel Authorization (ESTA) online and pay a nominal fee.

Citizens and nationals of the following countries are eligible to participate in the Visa Waiver Program: Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, and United Kingdom.

Nationals of Visa Waiver Program countries are no longer be permitted to utilize the Visa Waiver Program if they 1) travelled to or were present in the following countries on or after March 1, 2011: Iran, Iraq, Sudan or Syria; or 2) are also nationals of Iran, Iraq, Sudan or Syria. Exceptions are made for travel/presence in a prohibited country if the individual's purpose of travel was to fulfill military service for the armed forces of a Visa Waiver Program country or to comply with official duties as a full-time employee of a Visa Waiver Program country's government. These exceptions do not apply to individuals who are also dual-nationals with Iran, Iraq, Sudan or Syria.

Waivers are available in situations in the interest of law enforcement or national security. These may include individuals with travel/presence in a prohibited country on official business of an international, regional or sub-national organization, humanitarian NGO, or as a journalist; and individuals traveling for a legitimate business purpose to Iran after the Iran deal of July 14, 2015 (Joint Comprehensive Plan of Action) or Iraq.

Around January 21, 2016, travelers who are dual-nationals with a prohibited country should start receiving an email from the Department of State indicating that their ESTA authorization has been revoked. The Department of State is working on a timeframe for notifying individuals with travel/presence to a prohibited country. These individuals will also be notified directly by the Department of State.

These new restrictions are not a travel ban, but serves to better screen Visa Waiver Program travelers. Essentially, individuals who are covered must apply for a B visa at their local US Embassy or Consulate before entering the United States. Furthermore, in February 2016, the Department of State will revise the ESTA registration application to incorporate questions on travel/presence and nationality of a prohibited country and the military service/government employee exception. The Department of State has directed individuals who believe they may qualify for the exception should carry supporting documentation when they travel to the United States using the Visa Waiver Program. Travelers covered by these restrictions who are already physically present in the United States are not affected. However, they would not be able to return to the United States using the Visa Waiver Program after any international travel.

NEW GUIDANCE FOR I-9 SELF-AUDITS

The government recently released guidance for employers conducting self-audits of their Forms I-9, Employment Eligibility Verification. The six-page memorandum provides several guidelines for employers and can be viewed here: <http://www.justice.gov/crt/file/798276/download>

The memo emphasizes that an employer should proceed with a self-audit in a non-discriminatory or non-retaliatory manner. Additionally, the memo indicates that before conducting a self-audit, an employer should consider the scope, method and manner in which the employer will communicate the self-audit to its employees to ensure that its actions are not discriminatory or retaliatory. The memo recommends that employers inform employees in writing of the audit, explaining the scope and reason for the audit (self-audit or in response to a government notification). Employees with deficient I-9s should be addressed in private and should be provided a reasonable amount of time in which to correct the deficiency. The memo also reiterates the correct method of correcting the I-9 when deficiencies are found. Notably, the memo stresses that an employer is not required to terminate an employee in situations where the employee had no employment authorization when they were initially hired or presented fraudulent documents and currently are able to provide valid employment authorization documents.

NEW REGULATIONS AFFECTING H-1B1, E-3 AND EB-1 IMMIGRANTS

A new regulation will become effective on February 16, 2016 which will affect the following categories of nonimmigrants: H-1B1 for Chileans and Singaporeans, E-3 Australians and CW-1 CNMI-Only Transitional Workers; and the EB-1 Outstanding Professors and Researchers Immigrant category. For the nonimmigrant classes, the regulations are being amended to include H-1B1 and E-3 nonimmigrants in the categories that have employment authorization incident to status. This will clarify that these principal applicants are not required to request separate employment authorization from the Department of Homeland Security. Additionally, the H-1B1, E-3 and CW-1 nonimmigrant categories will be included in the classes of nonimmigrants whose employment authorization will be extended automatically for up to 240 days upon the timely filing of a request for an extension of stay with the US Citizenship and Immigration Services. The changes to the regulations affecting the EB-1 Outstanding Professors and Researchers Immigrant category involve the addition of language to allow petitioners to be able to submit documentation and evidence that is comparable to the other requirements listed in the regulations. This type of language was already included in other immigrant category regulations and will service to harmonize the regulations.

