



# US Wavers on Visa Waiver Program

by Satnam Singh and Jeffrey T. Talbert

Legislation passed at the end of 2015 made changes to the Visa Waiver Program (VWP). Congress perceived that the VWP, which relaxes the requirements for entry into the United States, might be manipulated by terrorists to achieve easy entry. The new legislation seeks to address Congress' concern, but may reach too far.

The VWP began in 1986. It's governed by § 217 of the Immigration and Nationality Act (INA). The program allows travelers from certain countries to enter the US for business or pleasure without obtaining a visa in advance. Currently, thirty-eight countries,<sup>1</sup> — mostly European countries, and Australia, Brunei, Chile, Japan, New Zealand, Singapore, South Korea, and Taiwan — are part of this program, with more than twenty million visitors utilizing it each year. The VWP was created to facilitate efficient and secure inbound travel to the US, and requires pre-travel authorization of travelers who are pre-approved

through the program. In designating a country to participate, the Department of Homeland Security, in consultation with the secretary of state, considers only those countries the US holds “the best law-enforcement and security relationships with.”<sup>2</sup> Each program country must permit US citizens to enter that country for business or tourism without a visa.<sup>3</sup>

Instead of applying for and obtaining a visa at a US embassy or consular office before traveling to the US, a citizen of a program country, after obtaining pre-travel authorization via the Electronic System for Travel Authorization (ESTA),<sup>4</sup> simply travels to the US and presents his or her passport at the point of entry. ESTA authorization is normally good for two years. The usual visa requirement is waived, accounting for the name of the program. Assuming the traveler clears inspection at the point of entry, the traveler is permitted to stay in the US for ninety days.<sup>5</sup> In exchange for the convenience of traveling to the US without a visa, the traveler gives up certain options available to travelers who enter with a visa. For example, the traveler cannot extend his or her stay beyond ninety days, cannot change to a status other than traveler under the

VWP, and waives the right to contest (other than for asylum) any action for removal.<sup>6</sup>

In response to recent tragedies in Paris and California, the White House announced at the end of November 2015 new security enhancements for the VWP and a willingness to work with Congress to make additional improvements. On December 08, 2015, the House overwhelmingly passed H.R. 158, the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015. The House passed the bill by a vote of 407 to 19.<sup>7</sup> The bill was received in the Senate on December 09, 2015, and marked as S. 2362. The text of this bill, like the refugee bill passed in November, was rushed to the floor with little review (no committee markup or hearings on the legislation).

Many organizations expressed concern over the language of the bill, saying it was overbroad and would have unintended consequences. For example, the bill would potentially make travel more difficult for journalists and humanitarian aid workers. During a Senate Foreign Relations Committee hearing on the Joint Comprehensive Plan of Action (JCPOA) on December 17, 2015, Senator Chris Murphy (D-Conn.) asked the State Department's coordinator for JCPOA implementation, "Have the Europeans raised concerns to you or have others raised concerns to you about that specific provision?"<sup>8</sup> State Department official Stephen D. Mull replied that both he and Secretary of State John Kerry had heard from "very senior" European officials "that it could have a very negative impact on the deal."<sup>9</sup>

According to media reports, the European Union was keenly concerned as well. David O'Sullivan, the European Union ambassador to the US, in an open letter on December 14, 2015, said that the VWP member countries are "really quite concerned about what is happening and fear that this could be extremely counterproductive."<sup>10</sup> Despite the criticism, the bill was tacked on to the 2016 Omnibus Appropriations Bill, a must-pass bill that would prevent a government shutdown. On December 18, 2015, the House passed the 2016 Omnibus Appropriations bill on a vote of 316–113. The bill was promptly passed by the Senate and signed by President Obama on the same day.<sup>11</sup>

In general, the part of the appropriations legislation addressing the VWP, titled "Terrorist Travel Prevention and Visa Waiver

Program Reform" (the Act) has three components:

1. The Act terminates VWP privileges of nationals of Iraq, Syria, Iran, and Sudan. These four countries are not VWP countries. The import of this provision is to terminate VWP privileges for travelers who are nationals of Iraq, Syria, Iran, or Sudan and also nationals of a VWP country.<sup>12</sup> This provision is effective immediately.
2. The Act terminates VWP privileges of all individuals who have traveled to Iraq, Syria, Iran, or Sudan on or after March 1, 2011.<sup>13</sup> This provision is effective immediately.
3. Travel documents and procedures are improved. By April 1, 2016, all VWP travelers must have machine-readable electronic and fraud resistant passports which contain relevant biographic and biometric information.<sup>14</sup> By October 1, 2016, VWP countries must certify that they require such passports for entry into their countries.<sup>15</sup> By the end of February 2016, the ESTA application was to be changed to add additional questions.<sup>16</sup> VWP countries must report lost or stolen passports within a day of being notified.<sup>17</sup> If a US agency determines that a visa waiver country is not sharing information effectively, DHS can terminate the country's participation in the VWP.<sup>18</sup> Finally, the Act establishes that Congress wants the United Nations to standardize globally the introduction of electronic passports featuring biometric and biographic information.<sup>19</sup>

The Department of Homeland Security (DHS) or the Department of State may add additional countries to the list of Iraq, Syria, Iran, and Sudan.<sup>20</sup> The Act provides limited exceptions to the revocation of VWP privileges described above. One exception applies to travelers who are members of the military or federal government full-time employees of

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VWP countries who visited Iraq, Syria, Iran, or Sudan on official business.<sup>21</sup> This exception does not apply to dual nationals. Another exception permits the DHS to exempt individuals on a case-by-case basis.<sup>22</sup>

Canadian citizens are visa exempt. Canadian citizens who are also citizens of Iraq, Syria, Iran, or Sudan are not affected by the Act.

Nationals of Iraq, Syria, Iran, or Sudan are not prevented from coming to the US. They can come to the US but may not use the VWP to do so. Instead, they must apply for and obtain a visa before traveling to the US.<sup>23</sup>

## The Department of Homeland Security (DHS) or the Department of State may add additional countries to the list of Iraq, Syria, Iran, and Sudan.

On January 21, 2016, the DHS and the Department of State issued a joint press release on the new law. On January 22, 2016, US Customs and Border Protection (CBP), a branch of DHS, issued frequently asked questions. The press release and FAQs provide guidance on how the Act will be implemented.

On or about January 21, 2016, CBP will e-mail individuals known to be dual nationals affected by the Act. The e-mail will revoke their ESTA authorization. As soon as possible, CBP will e-mail individuals known to have traveled to Iraq, Syria, Iran, or Sudan since March 1, 2011, that their ESTA authorization is revoked. In each case, CBP will use the e-mail address the individual used on the ESTA application. Individuals who could be affected by the Act should check their ESTA authorization before traveling to the US to determine if the authorization has been revoked. If CBP does not revoke an affected individual's ESTA authorization, that individual should not expect he or she will be admitted to the US. Instead, the affected individual should apply for a visa.<sup>24</sup>

The Department of State is prepared to expedite visa applications of affected individuals who have urgent travel plans. CBP's FAQs provide examples of categories of travelers who may qualify for a case-by-case waiver of the ban on VWP privileges. The Act applies only to individuals who are seeking admission to the US. Individuals who have already been admitted to the US are not affected.

The VWP provisions were apparently meant to reform the VWP and prevent future terrorist attacks by people who might abuse the VWP. Given the events in Paris, California, and around the world, Congress' concern about safety of US citizens is laudable.

However, Congress passed the Act with little or no debate or consideration of the issues. In its haste, Congress made questionable decisions that discriminate against particular countries and nationalities, which may dismantle and adversely affect the American tourism industry and useful programs like the VWP and ESTA. It may be difficult for affected travelers to visit the US for legitimate purposes for the foreseeable future. The US Travel Association cautioned that the Act could cost the US billions of tourism dollars over the next five years.<sup>25</sup> Although the government represents that travel to the US is still open to travelers who can no longer use the VWP and that these travelers need only obtain a visa, one wonders how welcome their applications will be. Heightened scrutiny of their applications would not be surprising. Amendments to the Act would serve to avoid unintended discrimination and damage to tourism and business interests and help preserve advantageous relationships with VWP countries.

### Endnotes:

- 1 U.S. Customs and Border Protection (CBP) Frequently Asked Questions (FAQs) — <http://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>
- 2 <http://immigrationimpact.com/2015/12/09/house-passes-visa-waiver-program-bill-that-excludes-nationals-of-syria-iraq-iran-and-sudan/>
- 3 <http://www.cbp.gov/travel/international-visitors/visa-waiver-program>
- 4 CBP FAQs — <http://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>
- 5 INA § 217(a)(1), 8 US Code § 1187(a)(1)
- 6 INA § 217(b)(2), 8 US Code § 1187(b)(2)
- 7 <http://www.govtrack.us/congress/votes/114-2015/h679>
- 8 <http://www.foreign.senate.gov/hearings/the-status-of-jcpoa-implementation-and-related-issues-121715>
- 9 <http://www.foreign.senate.gov/hearings/the-status-of-jcpoa-implementation-and-related-issues-121715>
- 10 See David O'Sullivan, European Union's (EIU) Ambassador to the United States, and the ambassadors to the U.S. of the 28 EU member states, Opinion, What the Visa Waiver Program means to Europe, THE HILL (Dec. 14, 2015), <http://thehill.com/blogs/congress>

-blog/foreign-policy/262999-what-the-visa-waiver-program-means-to-europe

11 <http://clerk.house.gov/evs/2015/roll705.xml>;  
<https://www.congress.gov/bill/114th-congress/house-bill/2029/all-actions?overview=closed>

12 Consolidated Appropriations Act, 2016 (CAA 2016), Division O, Title II, § 203 adding INA § 217(a)(12), 8 US Code § 1187(a)(12)

13 CAA 2016, Division O, Title II, § 203, adding INA § 217(a)(12), 8 US Code § 1187(a)(12)

14 CAA 2016, Division O, Title II, § 202, amending INA § 217(a)(3), 8 US Code § 1187(a)(3)

15 CAA 2016, Division O, Title II, § 202, amending INA § 217(a)(3), 8 US Code § 1187(a)(3)

16 CBP FAQs — <http://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>

17 CAA 2016, Division O, Title II, § 204, amending INA § 217(C)(2)(D), 8 U.S. Code § 1187(c)(2)(D)

18 <http://www.dhs.gov/visa-waiver-program>

19 <http://www.congress.gov/bill/114th-congress/senate-bill/2362/text>; Senate Bill 2362, § 11.

20 CAA 2016, Division O, Title II, § 203, adding INA § 217(a)(12), 8 US Code § 1187(a)(12)

21 CAA 2016, Division O, Title II, § 203, adding INA § 217(a)(12), 8 US Code § 1187(a)(12)

22 CAA 2016, Division O, Title II, § 203, adding INA § 217(a)(12), 8 US Code § 1187(a)(12)

23 CBP FAQs — <http://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>

24 CBP FAQs — <http://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>

25 <http://www.ustravel.org/press/us-travel-forcasts-huge-economic-losses-if-vwp-disrupted>



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