



AMERICAN  
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# Practice Pointer

## Applying for a Waiver Pursuant to Presidential Proclamation 9645 (Travel Ban 3.0)

by AILA's Middle East Interest Group<sup>1</sup>

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### I. Overview of Presidential Proclamation 9645 (Travel Ban 3.0)

On September 24, 2017, President Trump announced through [Presidential Proclamation 9645](#) his third version of a travel ban, commonly known as the Muslim or Travel Ban 3.0. On June 26, 2018, in the case *Trump v. Hawaii*, the U.S. Supreme Court upheld Travel Ban 3.0 by a vote of 5 to 4, allowing the travel ban to remain in effect. While the Supreme Court's June 28, 2018 decision is still relatively recent, the Proclamation has in fact been in full effect since December 2017 due to prior orders by the Supreme Court allowing the Proclamation to operate in full, pending a final decision by the courts.<sup>2</sup>

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<sup>2</sup> Throughout this practice pointer, the terms "travel ban" "Presidential Proclamation" and "Travel Ban 3.0" are used interchangeably.

Travel Ban 3.0 currently imposes country specific restrictions on nationals for all immigrants and certain nonimmigrants from six countries: **Iran, Libya, North Korea, Somalia, Syria and Yemen**. It also imposes restrictions on certain visitors from **Venezuela**. (An earlier version of Travel Ban 3.0 included Chad, but this country was removed from the list on April 10, 2018). The Proclamation contains exemptions for certain individuals, such as lawful permanent residents and dual nationals traveling on a passport of a non-designated country. Travel Ban 3.0 applies to foreign nationals of the designated countries who: (i) were outside the U.S. on the applicable effective date; (ii) did not have a valid visa on the applicable effective date; and (iii) do not qualify for a reinstated visa or other travel document that was revoked under Presidential Executive Order 13769.<sup>3</sup>

Travel Ban 3.0 contains several exemptions (elucidated in [Section II](#) below). For nationals who are not subject to an exemption and are otherwise covered by the ban, the Proclamation sets forth a waiver scheme for affected nationals to demonstrate eligibility for a waiver based on three criterion: 1) undue hardship if entry is denied; 2) entry would be in the national interest; and 3) entry would not pose a threat to national security or public safety.<sup>4</sup> As of September 30, 2018, the Department of State (DOS) indicates that it has “cleared” 1,836 applicants for waivers after a consular officer determined the applicants satisfied all criteria and completed all required processing.<sup>5</sup> That a person has been “cleared” for a waiver does not confirm that this same number has been actually “granted” a waiver. Nevertheless, the numbers provided by DOS are a helpful guide for understanding the volume of cases that DOS has deemed to be eligible for a waiver.

To obtain a better understanding of how DOS was implementing the waiver process, AILA issued a call for examples in January 2018 and received a total of 42 case examples. These examples were summarized by AILA’s Middle East Interest Group (MEIG) and published in an AILA Practice Pointer in [March 2018](#). In June 2018, AILA issued a second call for examples to see how the waiver process has evolved if at all. This practice pointer summarizes the results of the AILA’s second call for examples and provides updated insights and tips for AILA members who are preparing and submitting a waiver on behalf of foreign nationals subject to the Presidential Proclamation based on information provided by DOS, as well as from reported best practices submitted by AILA members. Note that by issuing this Practice Pointer, AILA does not concede the legality of the Presidential Proclamation nor the legal basis for the waiver scheme in the first place.

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<sup>3</sup> For a summary of the travel ban, including those who are exempted, please see AILA’s [Summary of Presidential Proclamation 9645 \(Travel Ban 3.0\)](#).

<sup>4</sup> For more information about the Presidential Proclamation and its implementation, *see* Practice Alert: Implementation of Travel Ban 3.0, AILA Doc. No. 17092638, *available at* <https://www.aila.org/infonet/practice-alert-proclamation-sets-forth-rules>; *see also* Summary of Travel Ban, *available at* <https://www.aila.org/File/Related/17092638a.pdf>; Penn State Law, Center for Immigrants Rights’ Clinic, Resources on Travel Ban 3.0, *available at* <https://pennstatelaw.psu.edu/immigration-time-of-trump#Travel%20Ban%203.0>

<sup>5</sup> See notes from the DOS/AILA DOS Liaison Committee Meeting conducted on October 18, 2018, <https://travel.state.gov/content/dam/visas/AILA/AILA-Agenda-Fall-2018.pdf>.

## II. Determining Whether Your Client is Subject to the Travel Ban

Before evaluating whether your client is eligible for a waiver under the travel ban, it is important to first determine whether your client is subject to the travel ban. Currently, certain nationals from seven countries, **Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen** are prohibited from obtaining a visa and entering the United States, subject to exceptions and waivers set forth in in the Proclamation.

<b>Iran</b>	All immigrants and all nonimmigrants, except F (student), M (vocational student) and J (exchange visitor) nonimmigrants (though subject to enhanced screening).
<b>Libya</b>	All immigrants and temporary visitors on business or tourist visas (B-1/B-2).
<b>North Korea</b>	All immigrants and nonimmigrants.
<b>Somalia</b>	All immigrants (enhanced screening of all nonimmigrants).
<b>Syria</b>	All immigrants and nonimmigrants.
<b>Venezuela</b>	Certain government officials and their family members on business or tourist visas (B-1/B-2).
<b>Yemen</b>	All immigrants and temporary visitors on business or tourist visas (B-1/B-2).

### a. Who is exempt from Travel Ban 3.0?

The exceptions are listed in Sec. 3 of the [Presidential Proclamation](#) and include:

- Any national who is in the United States on the applicable effective date;
- Any national who had a valid visa on the applicable effective date;
- Any national whose visa was marked revoked or marked canceled as Presidential Executive Order 13769 who qualifies for a visa or other valid travel document under section 6(d) of Presidential Proclamation 9645.
- Any lawful permanent residents of the United States;
- Any foreign national who is admitted to or paroled into the U.S. on or after the applicable effective date;
- Any foreign national who has a document other than a visa (e.g., transportation letter, boarding foil, advance parole document) valid on the applicable effective date or issued on any date thereafter;

- Any dual national of a designated country traveling on a passport issued by a non-designated country;
- Any foreign national traveling on a diplomatic visa, NATO visa, C-2/U.N. visa, or G-1, G-2, G-3, or G-4 visa; or
- Any foreign nationals who have been granted asylum in the U.S., refugees who have been admitted to the U.S.; or individuals who have been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

In an October 2018 meeting between [AILA's DOS Liaison Committee and the DOS Visa Office](#), DOS provided additional clarification regarding the exceptions under section 3(b) of the travel ban. Specifically, DOS clarified that the following individuals from banned countries who are present in the United States on the applicable effective date would **not** be subject to any of the travel ban travel restrictions:

- Those present in the United States on the applicable effective dates in one nonimmigrant visa category, who depart the United States and apply for a nonimmigrant visa in a different category or an immigrant visa.<sup>6</sup>
- Those present in the United States after the expiration of their nonimmigrant status on the applicable effective date who depart the United States and apply for a nonimmigrant visa in a different category or an immigrant visa.
- Those in possession of a valid visa on the applicable effective date for the relevant nationality, but not present in the United States, who apply for a different nonimmigrant visa or an immigrant visa.

DOS indicated the following individuals would **not** be covered by an exception:

- Individuals who were **not** in the United States on the applicable effective date, but were issued a visa during the period the Travel Ban 3.0 was blocked by the courts.

### III. Establishing Eligibility for a Waiver

The entry restrictions of the Proclamation may be waived on a [case-by-case basis](#) for individuals impacted by the Proclamation if a consular officer or U.S. Customs and Border Protection (CBP) official determines, in their discretion, that the applicant meets each of the following three criteria: (1) denying entry would cause the foreign national undue hardship; (2) entry would not pose a threat to the national security or public safety of the U.S.; and (3) entry would be in the national interest. The Proclamation indicates that waivers may not be granted categorically but that waivers may be appropriate in individual circumstances, on a case-by-case basis. The Proclamation sets forth [several circumstances](#) in which case-by-case waivers “may be appropriate.”

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<sup>6</sup> DOS further noted that “[i]f an individual otherwise subject to the Proclamation was physically present in the United States on the applicable effective date for that nationality, then in future visa applications (in any visa classification), the applicant would be eligible for an exception to PP 9645’s travel restrictions.”

### **a. Who Determines Eligibility Under the Travel Ban Prongs?**

According to the DOS, there is a three-step analysis conducted by a consular post to determine visa eligibility for nationals of countries subject to the travel ban. The consular post determines if the applicant is 1) eligible for the visa category; and 2) in a category of person exempt from the travel ban; or 3) eligible for a waiver pursuant to section 3(c) of the Presidential Proclamation.

For those applicants who are not exempt from the ban, a waiver must be sought at the time of making the visa application. There is no form or fee required and consular officers are instructed to make a determination of eligibility for the ban for each applicant. Determining eligibility for a waiver requires evaluating each of the three criteria outlined in the Proclamation. These are: 1) undue hardship to the applicant if entry to the U.S. is denied; 2) entry would be in the U.S. national interest; and 3) entry would not be a threat to national security. The first two criteria are decided at the consulate. The consular post generally adjudicates the first two criteria on its own. However, the post may request guidance from the Visa Office (VO) if it seeks to clarify eligibility under the first two criteria.

The post must seek guidance from the VO, however, if the second criterion (national interest) involves a fact pattern outside those listed in the Proclamation at section 3(c)(iv). After the post determines that the first two criteria are satisfied by an applicant, the application is then referred to the VO for a national security review. If the first two prongs are not met initially, then the waiver is denied. If the applicant overcomes the first two prongs, then the consulate will consult with the VO regarding national security.

A visa applicant who is subject to the travel ban is likely to receive one of two refusal letters from the consular post. The first indicates that the applicant is inadmissible and not eligible for a waiver - this is a final determination. The second letter indicates that the application is undergoing the waiver review process.

### **b. Who has the burden to demonstrate eligibility for a waiver?**

By the terms of the Proclamation, the applicant has the burden to “demonstrate” eligibility for a waiver. Therefore, attorneys should prepare a waiver packet that demonstrates eligibility for all three criteria. By placing the burden on the applicant to demonstrate eligibility for the waiver, the consulate has the affirmative responsibility to consider evidence presented by the applicant before making a decision.

### **c. Undue Hardship Criterion**

#### **i. What constitutes “undue hardship?”**

The Proclamation does not define “undue hardship” nor does the term appear in the immigration statute. DOS has issued minimal [guidance to the public in December 2017](#) about how the Proclamation and waiver scheme would be implemented by DOS, but did not provide a definition of “undue hardship.”

In a [letter](#) from the Assistant Secretary of Legislative Affairs of DOS to Senator Van Hollen dated February 22, 2018, DOS indicated that in order to satisfy the undue hardship criterion, “*the applicant must demonstrate to the satisfaction of the consular officer that an unusual situation exists that compels immediate travel by the applicant and that delaying visa issuance and the associated travel plans would defeat the purpose of the travel.*”

More detailed guidance [obtained recently through FOIA](#) further clarifies that evidence of severe hardship in the applicant’s country of origin is not sufficient to make a showing of “undue hardship.” Instead, the focus of the analysis relates to whether there is a compelling reason for the applicant to travel immediately, rather than at a later time.

In preparing waiver applications, practitioners should review case law to evaluate how the undue hardship standard has been applied in the immigration law context. *See, e.g., In Re E-L-H*, 23 I&N Dec. 700 (A.G. 2004) (finding that the applicant has not shown that he would suffer undue hardship from being unable to travel abroad during the pending of the Attorney General’s review of his case, as he has not shown, for example, that his livelihood depends on the ability to travel, or that his ability to do so is preventing him from maintaining ties to close family members.); *see also Matter of DEG et. Al.*, 8 I&N Dec. 325 (B.I.A. 1959) (noting that the Service and the Board have, in the past, taken administrative notice that it would work an undue hardship upon the aliens residing in Mexico near the border if they were not permitted to enter the United States to obtain “ordinary necessities.”) Practitioners should also review case law to evaluate the degree to which “undue” hardship is the same or different from other forms of hardship included in immigration law, such as “exceptional” and “extreme” hardship. In preparing a waiver application, it is important to remind DOS that undue hardship is a lower standard than “extreme” and “exceptional” hardship. During the oral arguments before the U.S. Supreme Court in *Hawaii v. Trump*, Justice Breyer understood and commented that “undue hardship” is a lower standard than “extreme hardship.”

#### **d. National Interest Criterion**

##### **i. Demonstrating that the applicant’s entry would be in the national interest**

In considering whether an applicant’s entry to the United States would be in the national interest, the DOS indicated in a February 22, 2018 [letter](#) that “the applicant’s travel may be considered in the national interest if the applicant demonstrates to the consular officer’s satisfaction that a U.S.

person or entity would suffer hardship if the applicant could not travel until after visa restrictions imposed with respect to nationals of that country are lifted.”

**e. National Security / Public Safety Criterion**

**i. Demonstrating the applicant’s entry would not pose a threat to the national security or public safety of the United States**

In evaluating whether an applicant’s entry would not pose a threat to the national security or public safety of the United States, the DOS indicated in its February 22, 2018 [letter](#) that to establish that the applicant does not constitute a threat to national security or public safety, “the consular officer considers the information-sharing and identity-management protocols and practices of the government of the applicant’s country of nationality as they relate to the applicant. If the consular officer determines, after consultation with the Visa Office, that an applicant does not pose a threat to national security or public safety and the other two requirements have been met, a visa may be issued with the concurrence of a consular manager.”

**IV. Strategies and Timeline for Submitting a Waiver Request**

Per [guidance on the DOS website](#), there is no separate application for a waiver. DOS has stated on its website that an individual who seeks to travel to the United States “should apply for a visa and disclose during the visa interview any information that might demonstrate that he or she is eligible for a waiver.” DOS further reiterated in a meeting on October 18, 2018 between [AILA’s DOS Liaison Committee and the DOS Visa Office](#) that “[w]hile individual posts may vary, generally the applicant may present documentation supporting waiver qualifications at the time of the interview.” DOS further added that that a consular officer is not required to accept supporting documentation from an NIV or IV applicant during the interview, noting that “[w]hile the consular officer is required to review each applicant’s waiver qualifications, the officer is not required to accept additional documents unless he or she deems them necessary.”

As many visa applicants are at different stages in the process (e.g., filing an initial immigration application with U.S. Citizenship and Immigration Services (USCIS), pending administrative processing, etc.), the following is a breakdown of the different stages of when practitioners may consider submitting a waiver request, or documentation toward a waiver request, and the advantages or disadvantages of submitting at that given stage. Ultimately, determining when to submit waiver support documentation, depends on a case-by-case analysis and the consular post handling the visa issuance.

### **a. Initial Case Filing USCIS**

Waiver packets are not typically filed at the time that an immigration application is submitted to USCIS. However, this is an advantageous time to start making a record in support of a waiver request for the applicant; mainly due to the fact there is clear opportunity to submit documentation into the case file. In particular, cases with undue hardship factors that may lend themselves to grounds for an expedite request, are best documented at the outset of the case. Some AILA members have also included a written explanation for the submission of hardship evidence at the USCIS stage and explicitly requested a waiver. AILA members also report submitting a completed Form DS-5535 at the USCIS stage for individuals impacted by the travel ban, as well as for cases involving beneficiaries from Middle Eastern countries.

Form DS-5535, Supplemental Questions for Visa Applicants, is a questionnaire that collects additional information from immigrant and nonimmigrant visa applicants on elements like social media history and applies to those "who have been determined to warrant additional scrutiny in connection with terrorism or other national security-related visa ineligibilities."

### **b. Consular Processing & NVC Stage**

[According to the DOS website](#), the National Visa Center (NVC) will continue processing cases impacted by the travel ban. Individuals are [directed by DOS](#) to continue to pay fees, complete Form DS-260 immigrant visa applications, and submit financial and civil supporting documents to NVC. NVC will continue reviewing cases and scheduling visa interviews at U.S. Consulates overseas. [According to DOS](#), during the interview, a consular officer "will carefully review the case to determine whether the applicant is affected by the Proclamation and, if so, whether the case qualifies for an exception or may qualify for a waiver."

Many practitioners are refraining from submitting a comprehensive waiver packet at the NVC stage of the case, because of lack of familiarity with providing extra documents outside of what NVC has required, and also the concerns with delaying the NVC process. In addition, the length of the waiver request processing<sup>7</sup> and the opportunities practitioners have had in filing waiver requests at later stages, has led many practitioners to not file a waiver packet at the NVC stage.

However, the NVC stage is a good stage of submission for practitioners who are facing consular posts that have been opposed to filling any waiver packets either by email or at the visa interview (e.g. Abu Dhabi; [see Appendix A](#) for more consular specific tips). Filing the waiver support documents into the visa applicant's case file at the NVC stage where later stages will not be as advantageous ensures the documents stay with the file, and reach the Consular officer without complications.

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<sup>7</sup> The U.S. Embassy in Ankara is the only consular post that has reported on their webpage a timeline for waiver processing, which is currently indicating 6-10 months for processing.



Some attorneys also have submitted Form DS-5535 at this stage to assist the consular officer narrow down the data points for administrative processing.

Some attorneys report logistical difficulties with uploading waiver requests and evidence through the e-filing system at the NVC stage. In a recent stakeholder meeting on November 1, 2018 between AILA and the NVC, the NVC noted that this may be related to a capacity/storage issue when uploading documents to the NVC website. NVC is aware of the issue and is researching possibilities to increase capacity to accommodate larger submissions of documents. The NVC advised stakeholders to supplement the record through the [NVC public inquiry portal](#) using the NVC Case Number to link the supplemental evidence to the case.

### **c. Interview at Consulate Scheduled or Will be Scheduled**

Waiver requests should be given to the client to submit at the consular interview along with any bona fides. Some AILA members have indicated that they are mailing and/or emailing the waiver packet to the consular post ahead of the interview date in addition to sending a packet with their client. See [Appendix B](#) for a list of email addresses for a select number of U.S. Embassies and Consulates overseas.

Instruct your client to give the waiver request packet to the Consular officer. Some AILA members prefer to have their clients take an executive summary of the waiver request, and separately mail/email the full packet to the consular post ahead of the interview. Inform your client that the officer may refuse to accept the waiver materials. Visa applicants should be actively prepared to concisely state the basis of the waiver request in alignment with what is contained in the waiver request documentation, as some consular officers are taking down oral testimony.

In a meeting on October 18, 2018 between [AILA's DOS Liaison Committee and the DOS Visa Office](#), DOS noted that “[a]t the time of the interview, applicants have the opportunity to explain why they qualify for a waiver of PP 9645’s travel restrictions. A consular officer then may ask additional questions or ask for additional information to determine whether the applicant qualifies for a waiver.”

### **d. Case is Being Reviewed for Waiver Eligibility by Consulate**

This stage is Consulate-initiated, whether or not there is documentation on file to support a waiver. Sometimes this stage is evident on the Consular Electronic Application Center (CEAC) case status as “212(f)(W),” and other times the case is being considered for a waiver, but the CEAC case status indicates administrative processing. Either way, if you receive an email/letter indicating that the case is under waiver review, and nothing has been filed in support of the request, immediately

email the consular post informing them that you are preparing a waiver request. A complete waiver package should be submitted as soon as possible thereafter.

#### **e. Administrative Processing**

[According to the Department of State](#), administrative processing and the review of waiver eligibility may occur at the same time. If there is a reason for administrative processing unrelated to the travel ban, then the administrative processing may take even longer. Because administrative processing and waiver reviewability prongs can happen simultaneously, it is important to send a waiver request at this stage, if one has not already been filed.

Some AILA members indicate that they have submitted waiver requests for cases held in administrative processing by mailing and/or emailing the documentation to the consular post. There have been reports of visa denials for cases that had been in administrative processing, with no opportunity to submit a waiver. There have also been reports of letters or emails from consular posts stating a case has moved from administrative processing to waiver eligibility review, without a waiver on file. In some cases, submitting a waiver request may trigger a denial, while not requesting a waiver for a pending case may trigger a denial as well. Therefore, carefully consider the circumstances of your case, and discuss each option with your client(s). It is important to also note that sometimes CEAC case status will “toggle” between waiver review and administrative processing.

### **V. Evidence to Support A Waiver Request**

As explained earlier and pursuant to [the DOS website](#), there is no separate application form that applicants are required to complete in order to apply for a waiver. When preparing a waiver request, consider preparing a detailed cover letter/executive summary establishing the applicant's eligibility for the waiver under [the three criterion outlined above](#). Among the evidence that practitioners could consider including in a waiver packet to establish the applicant's eligibility for a waiver may include, but is not limited to:

- **Copy of Presidential Proclamation 9645:** Applicants who would face danger and instability in their home countries should highlight this fact in their waiver application and may consider including a copy of the Presidential Proclamation. DOS has stated in its guidelines that evidence of a war zone in the applicant's country is not relevant. However, attorneys should weave and incorporate evidence of war, violence and other armed conflict into other forms of hardship (ie. violence against women, poverty, limited or no healthcare, human rights abuses, oppression etc.) **BE MORE SPECIFIC** and argue that it counts! **FRAME** your evidence clearly so that it supports other forms of hardship.
- **Sworn declaration of the applicant** detailing their eligibility for the waiver.

- **Sworn declaration of the applicant's qualifying relative/employer/academic institution** describing the applicant's eligibility for the waiver and highlighting the need for the applicant in the U.S. and potential hardships faced by the qualifying relative if the waiver is not granted.
- **Country Conditions:** Include any evidence related to country conditions in the applicant's country which give rise to the applicant's imminent need to immigrate to the United States (i.e., war, human rights abuses, oppressive regimes, poverty, high unemployment, social oppression, religious persecution, violence against women, stifled freedoms, poor education, lack of effective medical treatment, contagious diseases, etc.)
- **Reference to the [DOS Travel Warnings](#) for the country at issue.** Argue hardship from the warnings announced by DOS for individuals who are traveling or residing in the banned countries.
- **Family Unity:** Family unity is a priority and separation assumes undue hardship. Include evidence of the bona fide relationship, including marriage certificate, birth certificate, and death certificate of immediate relatives and evidence of U.S. citizenship/LPR status for petitioners.
- **Adverse Economic Impact (for employment-based applicants):** Document evidence of adverse economic impact with a statement from the U.S. employer or business interest regarding the cost of recruitment, loss of business, impact on critical business projects, etc.; letter from applicant's employer documenting termination/resignation from overseas employment, copy of large contracts assigned to the applicant, etc.
- **Economic Hardship to U.S. citizen/LPR relative:** Document economic hardship to U.S. citizen/LPR relative by providing receipts for money transfers to support household overseas, paycheck stubs for the U.S. citizen/LPR applicant, employment contract or letter from employer or school showing limited time off for travel, etc.
- **Medical Hardship and Illness:** Document medical hardship/illness by providing applicant's medical reports, psychological evaluation reports, letter from physician including a specific diagnosis and symptomology related to illness, describing the limited treatment options in applicant's home country, prior attempts at treatment, prescription records, history of hospitalization (if applicable), letter from U.S. medical facility or physician who will treat the applicant, including scheduled appointment for applicant and proposed treatment and recovery schedule, and evidence of funds to pay for treatment.

- **Imminent travel date:** Provide evidence of imminent travel date, such as an airline itinerary, hotel booking, car rental booking, conference schedule, meeting agenda, etc.
- **Applicant is not a national security risk:** Include records of applicant's education, employment, family ties to show that applicant is low risk/low danger to the U.S. Demonstrate that applicant has lived in areas with no terrorist links or presence. Police clearance letters are also helpful even in countries where the police records are not accepted for NVC purposes (e.g. Iranian police clearances are not accepted by DOS, but are suitable for evidence towards lack of national security risk).
- **Previously issued visas from other countries:** If the applicant has other visas previously issued in their passports, argue that this is evidence of pre-clearance for national security risks.
- **Timing:** If the applicant's case was already approved and stuck in AP at the time of the implementation of the travel ban, argue that your case has already cleared national security review by DOS, USCIS, etc.
- **Review and discuss with your client their social media pages and military/police records** and evaluate for potential issues.
- **Form DS-5535:** Some AILA members have indicated that they are including Form DS-5535 with the application at the USCIS stage, such as when filing an I-130 petition for individuals from banned countries, as well as submitting the Form DS-5535 to the NVC. In addition, some AILA members are including Form DS-5535 in the waiver packet for the visa interview at the post. Members report that the majority of clients from Middle Eastern countries (including non-banned countries) are asked to complete this form or some version of this form through questions posed by the Consular post or a Word document containing a version of the form attached to an email from the Consular post.

## VI. Highlights from AILA's June 2018 Call for Examples

In response to AILA's second call for examples in June 2018, AILA received **26 case examples**, summarized below:

- **Nationalities:** Of the 26 case examples submitted, the vast majority of cases involve nationals of Iran (13), followed by nationals of Syria (7), and Somalia (3). The remainder are nationals of Libya (1), Malaysia (1), and Yemen (1).
- **U.S. Consular Posts:** The largest number of cases reported were processed in United Arab Emirates (6) and Turkey (6), followed by Jordan (2), Kenya (2), and Saudi Arabia (2). The

remainder of cases were processed at a wide range of Consulates, including Djibouti, Qatar, Malaysia, Kuwait, Spain, Italy, Canada, and Tunisia.

- **Visa Types:** The vast majority of the case examples were for visa applicants applying on the basis on an **approved I-130 petition for a relative of a U.S. citizen or lawful permanent resident (21)**. At least 13 of these cases involve an immediate relative of a U.S. citizen (i.e., a spouse, son/daughter under the age of 21, or parent of a U.S. citizen). Among the other cases reported were for diversity visa applicants (2), B-2 visa applicant (1), L-1 visa applicant (1), and EB-5 visa applicant (1).
- **Case Status:** The vast majority of cases reported to AILA have either been denied/refused, are stuck in administrative processing, or are pending waiver review. **Only three waiver approvals were reported to AILA National through this second Call for Examples**, however, please note that a handful of approvals have also been reported informally to AILA through various AILA listservs.
  - *Denied/Refused:* Five (5) practitioners report that their case has either been denied or refused by the U.S. Consulate.
  - *Administrative Processing:* Eight (8) cases report currently being stuck in administrative processing. Of these, members report many different experiences. Administrative processing pre-dates the Presidential Proclamation and has resulted in long delays for related cases. In some cases, the U.S. Consulate has resulted in long delays for related cases. In some cases, the U.S. Consulate refused to accept a waiver application. In other cases, members report receiving a written indication that the post is reviewing for waiver eligibility. In addition to cases submitted through AILA's Call for Examples, AILA received a report from a member who has at least 40+ Iranian clients who are stuck in administrative processing from before, during, and after the travel ban.
  - *Waiver Review Pending:* Five (5) practitioners report that their case is pending waiver review. Practitioners are reporting receiving written indication stating that the consulate acknowledges receipt of waiver.
  - *Waiver Approval:* Three (3) waiver approvals were reported to AILA through this second Call for Examples. The visa applicants are nationals of Somalia, Syria, and Iran and the waivers were approved by U.S. Consulates in Nairobi, Toronto, and Naples, respectively.
- **Approval #1:** This case involves a Somalian national and her 3 minor children who applied for visas based on an approved I-130 petition under the F2B preference category at the U.S.

Consulate in Nairobi, Kenya. The I-130 interview occurred on 11/15/2017. After several months pending with the Consulate, the attorney inquired about the case on 2/14/2018 and was notified that the visa application was denied due to the travel ban. On 3/20/2018, the attorney assembled a waiver packet and sent it via email to the post. The case was approved and the beneficiaries arrived to the U.S. on 4/16/2018. Evidence submitted as part of the waiver application included:

- Statement from the beneficiary establishing why she is eligible for a visa;
  - Documentation of the beneficiary's LPR mother;
  - Documentation of beneficiary's 4 LPR siblings and 1 U.S. citizen sibling, all of whom reside in the United States as LPRs, and active ties to those family members; and
  - Documentation of father of minor children's LPR status, and active ties of father to children.
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- **Approval #2:** This case involves an Iranian national who applied as a derivative spouse under the diversity lottery. This individual applied at the U.S. Consulate in Naples, Italy. A waiver was requested by the Consulate at the time of interview. The waiver packet was submitted after the interview was conducted while the principal applicant and derivative child were pending administrative processing. Evidence submitted as part of waiver application included:
    - Applicant and principal spouse's education and work experience;
    - Affidavits from U.S. Citizen and LPR family members in the U.S.;
    - Attorney's legal argument;
    - Copy of February 22, 2018 Department of State letter to Senator Van Hollen, [AILA Doc. No. 18030735](#), as reference to legal argument;
    - Applicant's declaration; and
    - Doctor's letter stating applicant was undergoing treatment for stress and anxiety relating to the waiver.
- 
- **Approval #3:** This case involves a Syrian national who applied for an L-1 visa at the U.S. Consulate in Toronto, Canada. A waiver was requested at the time of interview on 1/2/2018. The waiver request submitted on behalf of the visa beneficiary included:
    - Specific travel itinerary and port of entry to the U.S.;
    - Travel history to all countries over the last 15 years (listing separately each location, date of visit, source of funds, and length of stay);
    - Country of issuance and numbers of all previously held passports, full names of and dates of birth of any living or deceased siblings, children, former spouses/domestic partners;
    - Addresses during the last 15 years, if different than current address;
    - Phone numbers used in the last 5 years, including work, home, personal, and educational;

- Email addresses used in the last 5 years, including work, personal, and educational;
  - Unique usernames for any websites or applications used to create or share content (photos, videos, status updates, etc.) as part of a public profile within the last 5 years; and
  - A full description of employment history in the last 15 years.
- **Form DS-5535:** Of the 26 cases reported, four of the cases received a request to complete Form DS-5535.
  - **Process for submitting a waiver:** For members who have submitted a request for a waiver on behalf of their clients, there were many methods that have been reported. Several members report having their clients submit the waiver request at the time of the visa interview. Others have attempted to submit a waiver application via letter or email to the U.S. Consulate post-interview. Some members reported that the U.S. Consulate would not accept the waiver at the time of interview, but received indication that the post would be reviewing the case for waiver eligibility.

AILA has compiled experiences reported at specific consular posts based on reports from AILA members. Please see [Appendix B](#).

## VII. Frequently Asked Questions Regarding Who Is Subject to the Travel Ban

### a. What constitutes the applicable “effective date” for applicants ?

The administration has not publicly clarified what constitute the “effective” date of the proclamation, however, in documents obtained from DOS through a FOIA request made by the International Refugee Assistance Project (IRAP), the DOS provided the following guidance to consular officers (dated December 7, 2017) in response to the question of what are the applicable effective dates for applicants seeking to qualify for an exception under paragraph 19(a) and (b) of Presidential Proclamation 9645:

*Applicable effective dates are the dates that P.P.9645 affected nationals of the eight countries identified in the P.P. (i.e. applicable effective date for nationals of Somalia, Syria, Libya, Iran, and Yemen is September 24; applicable effective date for nationals of Chad, Venezuela, and North Korea is October 18).*

*Individuals covered by P.P. 9645 who possess a valid visa or valid travel document generally will be permitted to travel to the United States, irrespective of when the visa was issued.*

- b. My client has both a valid French and Iranian passport. She lives in the U.S. in H-1B status (visa in French passport). She would like to travel to Iran in December 2018. Will she have issues with reentry into the United States?**

By its terms, the ban applies to those outside the United States on the effective date so if your client was in the United States with a valid visa on the effective date, she is not covered. Further, the Presidential Proclamation does not restrict the travel of dual nationals, so long as they are traveling on the passport of a non-designated country.

- c. For purposes of the travel ban, what constitutes a “national” of a state?**

The term “national” means a person owing permanent allegiance to a state. For purposes of international law, an individual has the nationality of a state that confers it, but other states need not accept that nationality when it is not based on a genuine link between the state and the individual.

It is important to determine whether an applicant who is allegedly a citizen (or national) of or from a banned country is actually a national of the country. If it can be shown that the applicant is not a national of a banned country, then the travel ban does not apply to them. In order to do this analysis, it is necessary to understand the citizenship and nationality laws of the banned country as well as the applicant’s country of birth and the applicant’s parent’s countries of birth.

The law further defining what “national” means has seen little litigation within immigration, except for attempts to further define the term “U.S. national” in INA section 101(a)(22). The clearest case that defines a “national” under INA section 101(a)(21) is *Dhoumo v. Board of Immigration Appeals*, which states the following:

Nationality is a status conferred by a state, and will generally be recognized by other states provided it is supported by a "genuine link" between the individual and the conferring state. See Restatement (Third) of Foreign Relations § 211. . . . Birth in a state’s territory and descent from a national both “are universally accepted as based on genuine links. . . . Conferral of nationality based on a state success is also generally respected.”

*Dhoumo v. Board of Immigration Appeals*, 416 F.3d 172, 175 (2d Cir. 2005) (Petitioner provided evidence that China confers nationality on all Tibetan refugees and their descendants outside of China. The court found that the Petitioner presented substantial argument and evidence supporting his Chinese nationality and that the IJ and BIA’s failure to address the question of his nationality was in error).



When it can be argued that a visa applicant is not a national of the banned country, it may be possible to avoid the travel ban altogether. However, the potential consequences of claiming an applicant to be stateless (without nationality) or to not have the nationality of the banned country should also be considered. For example, lack of nationality may result in a different analysis when processing a refugee or asylum claim, and being stateless would undermine having non-immigrant intent. Therefore, care must be taken when evaluating and arguing certain nationality claims.

**d. If a principal visa applicant qualifies for an exception or a waiver under the Proclamation, does a derivative also get the benefit of the exception or waiver?**

Each applicant, who is otherwise eligible, can only benefit from an exception or a waiver if he or she individually meets the conditions of the exception or waiver

**e. If a non-immigrant visa (NIV) applicant receives a waiver of Presidential Proclamation 9645, must he or she obtain a waiver for any subsequent visa applications?**

No, once a visa applicant has received a waiver of Presidential Proclamation 9645 and he or she enters the United States, any future visa applications will not require another waiver. The individual is exempt from the travel ban due to having entered the United States. See exemptions to the travel ban outlined in [Section II](#) above.

## **VIII. Impact of the Travel Ban**

One way to examine the grave impact of the travel ban is to look at the number of visas issued to individuals impacted by the travel ban from December 2017 to present in comparison to visas issued in previous years. The numbers below show how drastically low visa issuance rates are for nationals of travel banned countries. All visa numbers enumerated below come from the [Department of State](#). The numbers are slightly inflated as visas issued between December 1-7, 2017, did not fall under the travel ban. Immigrant visa issuances for Chad have also not been factored in after April 1, 2018. Immigrant visas from Venezuela were not counted at all, as they were not part of the executive order.

**This is the approximate number of immigrant visas granted to nationals of the affected countries between December 2017 through the end of September 2018:**

<b>Chad*</b>	2 (*December 2017 to March 2018)
<b>Iran</b>	514

<b>North Korea</b>	5
<b>Libya</b>	76
<b>Somalia</b>	195
<b>Syria</b>	523
<b>Yemen</b>	499

To observe the impact of the travel ban on affected countries, we can look at Yemen and Iran as examples. All visa numbers come from the [Department of State](#). Over a period of eight years, Iranian nationals were issued an average of 7,520 immigrant visas annually, or approximately 626 visas per month. Over a period of eight years, Yemeni nationals were issued an average of 4,429 immigrant visas annually, or approximately 369 visas per month.

Looking at visa issuance numbers from 2010 to 2017, Iran and Yemen had the following numbers of immigrant visas granted annually:

**Iran**

2017 6,643  
2016 7,727  
2015 7,179  
2014 7,049  
2013 8,057  
2012 8,126  
2011 7,323  
2010 8,057

**Yemen**

2017 5,419  
2016 12,998  
2015 3,143  
2014 2,939  
2013 3,158  
2012 2,681  
2011 2,761  
2010 2,416

This data has been summarized and is available on the AILA website as a related resource.

## **IX. Conclusion & Next Steps**

Although it has been several months since the [U.S. Supreme Court allowed full implementation of Presidential Proclamation 9645](#), implementation of the waiver process by U.S. Embassies and Consulates remains inconsistent. While the U.S. Supreme Court upheld the travel ban in its entirety, informational collection and litigation challenging the waiver process remains important. AILA will continue to update its [practice alert on the travel ban](#) and this practice pointer on the waiver process as additional information become available.

## **Appendix A:**

### **Examples of Specific Consular Posts Based on Reports from AILA Members**

**Please note, not all posts and not all consular officers are accepting waiver packets.** Some consulates where there have been numerous reports of waiver packets not being taken into consideration or accepted are: Abu Dhabi, Djibouti, Kuala Lumpur, Cairo, and Riyadh. However, please note that some practitioners have been able to successfully file waiver requests at those enumerated consular posts. Also, this does not mean that these posts are not reviewing cases for waiver eligibility, but that they prefer not to receive information outside of what has already been filed or taken down orally at the interview. Some AILA members have been successful in handling travel ban cases at these consular posts by regular contact with the post by email in lieu of sending a waiver packet. However, it is best practice to attempt to submit a waiver request in the event that future litigation may be contemplated. The below information is provided as anecdotal experiences reported by AILA members from January 2017 to present.

#### **U.S. Embassy Yerevan**

- On August 22, 2018, an AILA member reported that an Iranian national was approved for a B-2 visa based on medical treatment by the U.S. Consulate in Yerevan. The interview was in June 2018 and the decision was received in August 2018. The member documented the case with all kinds of medical records related to the individual's spinal cord injury and acceptance into a program for treatment in the United States. The member did have a congressional office write a letter, but the office didn't do more than that. The waiver application was submitted by email ahead of the interview to which the member received a response that the applicant must bring it in person. The client did take the packet of documents to the interview which the Consular officer took.
- Consular officers have generally not taken waiver materials provided by applicants at the interview, but have looked them over during the interview and returned the materials to the applicant.
- One member reports that an attorney letter with evidence was considered after the interview and the case remains under review.
- Consular officers have asked applicants to provide a verbal explanation of hardship in lieu of accepting written evidence.
- Members report that Consular officers have stated to applicants "not to worry," leaving a false impression of approval.
- Medical emergency B-2 application was submitted in February and is still in the waiver review process.
- Direct attorney email inquiries to this post have been ignored and members report receiving standard form emails that are non-responsive.
- Consular post has issued letters to applicants stating "waiver under consideration."

Members report the following questions were asked of applicants during immigrant visa (IV) and nonimmigrant visa (NIV) interviews:

- Why do you live in Town A instead of Town B?
- Why did you change your major?
- Why did you change your college?
- Why did you change your advisor/employer?
- Why did your spouse/child not come with you?

#### **U.S. Consulate Abu Dhabi**

- Some Consular officers are asking applicants to verbally explain their hardships.
- Many reports that Abu Dhabi is not taking waiver request packets by email or in person.
- Form DS-5535, or similar questions, are being requested by email for all applicants subject to the travel ban.
- Upon submission of waiver request by attorneys, post requested DS-5535 (or similar questions by email).
- IV applicant (spouse of U.S. citizen) denied the opportunity to submit waiver at the interview and denied a visa because the applicant "did not qualify for a waiver at this time."

#### **U.S. Consulate Cairo**

- An AILA member reports that a Yemeni client moved to Cairo and wanted her case transferred from the U.S. Consulate in Djibouti to the U.S. Consulate in Cairo. The member emailed the U.S. Consulate in Cairo requesting to transfer the case. The U.S. Consulate in Cairo responded, "Unfortunately, Embassy Cairo will not be able to accept Yemeni transfer cases until after January 2019. We apologize for any inconvenience this may cause. Please resubmit your transfer request after January 1, 2019, for consideration."

#### **U.S. Consulate Dubai**

- Medical emergency B-2 application was submitted in January and is still in the waiver review process.

#### **U.S. Embassy Djibouti**

- At the visa interview, applicants given a letter stating that their case was under review for waiver eligibility with no request/invitation for evidence demonstrating hardship.
- Attorney used congressional liaison to contact post and received positive response. In other case, member reports that she did a lot of congressional outreach but it didn't seem to yield results.
- Attorneys report post is responsive to emails.
- Parent of U.S. citizen denied immigrant visas, with the Consulate stating that "a waiver will not be granted in your case" with no request from post for a waiver.
- Response that an AILA member received on medical cases: "Even for infants, we would need to see some evidence of a congenital heart defect or another medical issue of that

degree of difficulty that likely could not be successfully operated upon in Djibouti and if not treated would likely lead to the child's developmental harm or death.”

- On October 1, 2018, an AILA member reported received two (2) waiver grants and immigrant visas issued by the U.S. Consulate in Djibouti for citizens of Yemen. The member emailed the request to the Consulate, arguing that the visas should be issued based on 1) Section 6 of the Proclamation as they already had their approval notices before December 4, 2017 and should have had their visas printed rather than receiving a 212(f) denial letter. They referenced *Alharbi et al v. Miller*, a court case in the Eastern District of New York; 2) Section 3 - eligibility for a waiver, particularly given that there was a minor involved in the case.

### **U.S. Consulate Amman**

- On August 14, 2018, an AILA member reported two waiver approval granted to Syrian nationals by the U.S. Consulate in Amman who are LGBTQ: 1 was for a fiancé visa and the other an I-1-30 spousal petition. Both of the individuals had received either an F-1/J-1 visa sometime in the last 10 years. One of the individuals had been to the USA before. It took Amman about 3-4 months to issue the waiver decision.
- Attorney requested waiver by email and through applicant at the interview. Post replied with email that the case was "under review for waiver eligibility."
- Attorney successfully emailed evidence for waiver and applicant was told a decision would be made within 4-5 months.
- Form DS-5535 requested by post at the interview.

### **U.S. Consulate Doha**

- Syrian applicant told to "wait six months" after the interview and no waiver was required by post, passport and medicals returned to parent of U.S. citizen.

### **U.S. Consulate Khartoum**

- Spouse of U.S. citizen and parent of U.S. citizen children denied a visa, with Consulate citing “212(f) Presidential Proclamation 9645” and applicant advised to watch the news to re-apply.

### **U.S. Consulate Kuala Lumpur**

- Two AILA members have reported receiving waivers approvals for applicants applying for visas at the U.S. Consulate in Kuala Lumpur.
  - The first visa approval reported was for a Yemeni national who is spouse of a U.S. citizen. The member reports submitting a waiver package, which included documents of hardship due to war, famine, and outbreak of cholera, and financial hardship for U.S.
  - The second visa approval was for a Yemeni national who is the wife of a U.S. citizen. The member reports that no waiver documents were submitted. The

member contacted the U.S. Consulate which indicated that it did not need any documents or information. It took approximately 7 months from the time of the visa interview to the time that the visa was approved.

#### **U.S. Consulate Paris**

- An AILA member reports an approval of a B1/B2 visitor visa for an Iranian national. Her daughter is currently on a student visa in the United States and was undergoing surgery at UCLA Medical Center. The mother went for the interview, they did not issue visa pending review. Subsequently, a waiver request was submitted via email, which included a letter from the UCLA doctor, copy of previous visa, etc. In the waiver request it was noted that the daughter needs someone to care for her after a week of being in hospital after the surgery (per the doctor's letter) and that the mother had a visa previously the year before to visit the United States (so no security or overstay concerns). In a few weeks she was granted a visa and came to the United States.

#### **U.S. Consulate Tunis**

- Post notified attorney that waiver would be required at the applicant's interview. Applicant notified of waiver and case in administrative processing.
- Form DS-5535 required for applicant and spouse and requested at the interview.

#### **U.S. Embassy London:**

- Non-immigrant visa applicant denied visa due to failure to qualify for a waiver although applicant has lawful permanent resident siblings in the U.S.

#### **U.S. Embassy Nairobi**

- I-130 immediate relative (IR) applicant case placed in administrative processing, post did not request a waiver yet claimed that "information necessary for the waiver process was collected at the interview" in an email to a congressional staffer.
- I-130 IR applicant case in administrative processing "under 212(f)" and applicant told that post will contact them with a final determination.

#### **U.S. Embassy Riyadh:**

- Post advising IR and diversity visa applicants that case is in administrative processing and under review for waiver eligibility.
- Form DS-5535 requested at applicant's interview.

**Appendix B:**  
**Contact Information for Select U.S. Embassies & Consular Posts Overseas**  
*(valid as of October 2018)*

**ARMENIA** (Yerevan)

[consyerevan@state.gov](mailto:consyerevan@state.gov)

[IVYerevan@state.gov](mailto:IVYerevan@state.gov)

[IranIVYerevan@state.gov](mailto:IranIVYerevan@state.gov)

[IranNIVYerevan@state.gov](mailto:IranNIVYerevan@state.gov)

**DUBAI**

[Usvisadubai@state.gov](mailto:Usvisadubai@state.gov)

**DJIBOUTI**

[ConsularDjibouti@state.gov](mailto:ConsularDjibouti@state.gov)

**EGYPT** (Cairo)

[CairoIV@state.gov](mailto:CairoIV@state.gov)

[consularcaironiv@state.gov0020](mailto:consularcaironiv@state.gov0020)

**IRAQ** (Baghdad)

[BaghdadIV@state.gov](mailto:BaghdadIV@state.gov)

[BaghdadACS@state.gov](mailto:BaghdadACS@state.gov)

*Baghdad Portal*

<https://iq.usembassy.gov/visas/ivform>

[BaghdadACS@state.gov](mailto:BaghdadACS@state.gov)

**IRAQ** (Erbil)

[ErbilNIV@state.gov](mailto:ErbilNIV@state.gov)

[ErbilACS@state.gov](mailto:ErbilACS@state.gov)

**JORDAN** (Amman)

[Amman-IV@state.gov](mailto:Amman-IV@state.gov)

[USCIS.Amman@dhs.gov](mailto:USCIS.Amman@dhs.gov) (USCIS)

[support-Jordan@ustraveldocs.com](mailto:support-Jordan@ustraveldocs.com)

**LEBANON** (Beirut)

[BeirutIV@state.gov](mailto:BeirutIV@state.gov)



**MALAYSIA**

Kuala Lumpur IV [KLIV@state.gov](mailto:KLIV@state.gov)  
[KLConsular@state.gov](mailto:KLConsular@state.gov)

**MOROCCO**

[IVCasablanca@state.gov](mailto:IVCasablanca@state.gov)  
[ACSCasablanca@state.gov](mailto:ACSCasablanca@state.gov)  
[NIVCasablanca@state.gov](mailto:NIVCasablanca@state.gov)

**NAIROBI**

[ImmigrationVisaNairobi@state.gov](mailto:ImmigrationVisaNairobi@state.gov)  
[VisitorVisaNairobi@state.gov](mailto:VisitorVisaNairobi@state.gov)

**PAKISTAN**

[support-pakistan@ustraveldocs.com](mailto:support-pakistan@ustraveldocs.com)

**QATAR**

[IVConsularDoha@state.gov](mailto:IVConsularDoha@state.gov)  
[ConsularDoha@state.gov](mailto:ConsularDoha@state.gov)

**SAUDI ARABIA (Riyadh)**

[RiyadhIV@state.gov](mailto:RiyadhIV@state.gov)  
[RiyadhNIV@state.gov](mailto:RiyadhNIV@state.gov)

**TURKEY (Ankara)**

[AnkaraIV@state.gov](mailto:AnkaraIV@state.gov)  
[ankaraniv@state.gov](mailto:ankaraniv@state.gov)

Ankara Portal

IV: <https://tr.usembassy.gov/visas/contact-immigrant-visa-section/>

NIV: <http://ankaraniv.net/contactus.aspx>

American Citizen Services in Ankara:

<https://tr.usembassy.gov/u-s-citizen-services/contact-acs-ankara/>

**UNITED ARAB EMIRATES (Abu Dhabi)**

Abu Dhabi Portal: <http://abudhabiivo.net/contactus.aspx> (due to file size limitations, the email address below is the preferred method of contact)

[AbuDhabiIV@state.gov](mailto:AbuDhabiIV@state.gov)  
[AbuDhabiNIV@state.gov](mailto:AbuDhabiNIV@state.gov)