

## What To Know About The US Visa Waiver Program Changes

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Effective Jan. 21, 2016, certain individuals are now required to apply for a visa at a U.S. consulate or embassy instead of traveling to the U.S. visa-free under the visa waiver program. The change affects Europeans and nationals of other participating countries of the visa waiver program, including Japan, Australia and South Korea who hold dual nationality with Iran, Iraq, Sudan or Syria, as well as anyone who has traveled to one of these four countries since March 2011.



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### Visa Waiver Program

The U.S. visa waiver program allows nationals of 38 participating countries to travel to the U.S. for 90 days or less without first obtaining a visa at a U.S. embassy or consulate. As a reciprocal program, these countries, in return, permit U.S. citizens to travel to their countries for a similar length of time without a visa for business or tourism. U.S.-bound tourists and business travelers from member visa waiver program countries may submit online applications via the Electronic System for Travel Authorization (ESTA) and can then travel to the U.S. for business or tourism without first obtaining a visa from a U.S. embassy or consulate.

Restrictions to the visa waiver program are being implemented as part of the budget deal passed by Congress last month and included in the “Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015.” Although the 38 participating ESTA countries have not yet announced reciprocal changes to their visa programs in response (for which mechanisms exist under the terms of the visa waiver program), it is anticipated that they will. This means that U.S. citizens may be required to obtain a visa before visiting a visa waiver program country for business or tourism.

Travelers who are dual nationals of Iran, Iraq, Syria or Sudan with active ESTA approvals should have already been notified that their ESTA approvals have been revoked. These individuals are still eligible to travel to the U.S. with a valid nonimmigrant visa issued by a U.S. embassy or consulate for which they will be required to appear for an interview to obtain the visa in their passports before traveling to the U.S. Expedited appointments may be available for individuals with urgent travel needs.

U.S. Customs and Border Protection urges travelers to check their ESTA status [here](#) prior to making any travel reservations or traveling to the U.S. The U.S. Department of State has also announced that an updated ESTA application will be released in late February 2016.

It is worth noting that it is unclear how nationality is defined for purposes of identifying “dual

nationality” with Iran, Iraq, Syria or Sudan. There has been no guidance issued that identifies whether “nationality” will be defined strictly, (as in whether an individual holds a current, valid passport from Iran, Iraq, Syria or Sudan) or if “nationality” will be interpreted more broadly (for instance, by whether an individual has ever held such a passport or whether an individual is entitled to hold such a passport under the country’s laws, even if never issued one previously). It is possible that the inclusion of any new questions within the updated ESTA application due in February may clarify this. For the time being, travelers who think they might be considered a dual national of these countries should check their ESTA status carefully and consider preemptively applying for a U.S. visa to avoid any travel issues that could arise.

### **Waiver of Restriction and Exceptions**

The U.S. Department of Homeland Security signaled that certain categories of travelers may be eligible for waivers of ESTA revocation on a case-by-case basis. In particular, following implementation of the Joint Comprehensive Plan of Action between Iran and the E3/EU+3 countries on Jan. 18, 2016, U.S. Secretary of State John Kerry directly assured Iran that the administration could exercise executive authority to waive the visa waiver program limitation for visitors to Iran.

The State Department notes that the secretary of DHS may waive these restrictions if he “determines that such a waiver is in the law enforcement or national security interests of the United States. ... As a general matter, categories of travelers who may be eligible for a waiver include:

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

It remains unclear as to exactly how an individual who falls into one of these categories may apply for a waiver and what information may be required of them, although the CBP recommends contacting them directly with any questions or concerns via their website. FAQs have also been posted on the CBP website regarding the visa waiver program changes [here](#).

The U.S. visa waiver program changes specifically exclude and exempt those who have been present in Iran, Iraq, Sudan or Syria for diplomatic or military purposes in the service of a visa waiver program country. For individuals who are exempt from the act because of their diplomatic or military presence in one of the four countries but has their ESTA denied or revoked, the CBP recommends visiting the CBP website, or contacting the CBP information center [here](#). The individual may also apply for a

nonimmigrant visa at a U.S. embassy or consulate.

### **Speculative Effect on U.S. Citizens Traveling to Europe**

According to a Jan. 27, 2016, letter from the deputy chief of mission of the European Union Delegation to the U.S. addressed to the executive director of the National Iranian American Council, the EU could respond reciprocally to the changes in the U.S. visa waiver program if the changes are not lifted by April of this year. The letter notes that the EU's reciprocity mechanism could mean suspension of visa-free travel for all (and not only some) U.S. travelers to EU countries. The ultimate decision to enact this response lies with the European Parliament, so any changes are purely speculative at this time.

If this particular approach is enacted, however, thousands of U.S. travelers will be impacted, requiring business travelers and tourists to obtain visas from European consulates or embassies in the U.S. before traveling to Europe. It remains to be seen whether the EU Commission will adopt such an act and whether the European Parliament would ultimately enact the legislation.

### **Conclusion**

Following the changes to the visa waiver program, dual nationals of Iran, Iraq, Sudan and Syria who travel to the U.S. using the visa waiver program should first verify their ESTA status and, if found to have been revoked or denied, then make appointments at a U.S. consulate or embassy to obtain a B-1/B-2 visa. Visa applicants should note that proof of ties to their home country (i.e., the country that is their current place of residence) is required at the time of interview and should also note that a visa denial will have an impact on a future ESTA application, should it be reinstated.

Individuals from visa waiver program member countries who have traveled or been present in Iran, Iraq, Syria or Sudan since March 2011 (whether or not nationals of such countries) should similarly make plans to obtain a U.S. visa at an embassy or consulate if U.S. travel is anticipated. Although the State Department has indicated willingness to staff up consulates and embassies to meet increased demand for B-1/B-2 visas, it is unclear whether such additional staff will be in place soon to meet urgent needs for visa appointments.

Individuals who believe they qualify for a waiver based on the categories outlined above should continue to pay close attention to their ESTA status as well as updates regarding mechanisms to apply for a waiver. So far, no details have been provided, so individuals with travel plans are urged to play it safe and obtain visas in anticipation of ESTA revocation.

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