# FBT Immigration Update: May/June 2017

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## Travel Ban Is Partially Implemented by U.S. Supreme Court Decision

On June 26, 2017, U.S. Supreme Court announced that it will hear arguments in the next term regarding the contentious "travel ban" contained at Section 2(c) of President Trump's revised Executive Order (EO) signed on March 6, 2017, and partially lift the stay on the implementation of the travel ban.

Section 2(c) of EO 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States," contains a 90-day travel ban on the entry of certain nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen. Following court orders from U.S. District Courts in Hawaii and Maryland, the U.S. Government was blocked from implementing Section 2(c) and was unsuccessful on appeal before the Fourth Circuit Court of Appeals and the Ninth Circuit Court of Appeals. However, with the June 26th announcement, the matter will be reviewed by the U.S. Supreme Court in October 2017.

In addition to agreeing to review the decisions of Fourth and Ninth Circuits, the U.S. Supreme Court also partially granted the Government's applications to stay the preliminary injunctions that had been in place since March 2017. The stay is only effective "to the extent the injunctions prevent enforcement of §2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States."

On June 28, 2017, the Department of State (DOS) issued a cable to all consular posts providing guidance on how to implement Section 2(c) in light of the U.S. Supreme Court's ruling. In the cable, DOS stated that Section 2(c) does not apply to applicants having (1) a close familiar relationship with a person in the U.S. or (2) a bona fide relationship with a U.S. entity.

A close familiar relationship with a person in the U.S.:


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- includes parents (including parents-in-law), spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings, whether whole or half, and includes step relationships.
- does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law, and any other "extended" family members.

As for bona fide relationships with a U.S. entity, the cable provides the following as acceptable examples:

- Applicants employed by foreign media that have a news office based in the U.S.
- Students from designated countries who have been admitted to U.S. educational institutions.
- A worker who accepted an offer of employment from a company in the United States or a lecturer invited to address an audience in the United States.

In addition, the following applicants are deemed to have a bona fide relationship to a person or U.S. entity:

- Applicants with established eligibility for a nonimmigrant visa (e.g., H-1B, L-1, etc.) as well as their spouse and children, but applicants for B, C-1, D, I, or K visas must still affirmatively establish a bona fide relationship.
- Applicants with established eligibility for immigrant visas as immediate relatives or in the family-based or employment-based categories, with a few exceptions.

Also, the exemptions and waivers written into the revised March 2017 EO to address the deficiencies of the original January 2017 EO are still available (e.g., the ban does not apply to U.S. permanent residents or residents or dual nationals travelling on the passport of an unrestricted country.) The Department of State's FAQ and Department of Homeland Security's FAQ provide greater detail on how the government will administer the travel ban. The existence of exemptions and waivers coupled with the changes made to the travel ban due to the U.S. Supreme Court ruling significantly reduces the reach of the travel ban. Nonetheless, employers should ensure


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employees from Iran, Libya, Somalia, Sudan, Syria, and Yemen who will travel are adequately prepared with documentation in the event they are questioned at an airport or upon re-entry.

## New DOS Form Goes into Effect for Visa Applicants Requiring Greater Scrutiny

On May 4, 2017, the Department of State (DOS) announced through the Federal Register that it was seeking emergency Office of Management and Budget (OMB) approval of, and public comment on, its proposed new form (DS-5535) to collect additional information from certain immigrant and nonimmigrant visa applicants to "more rigorously evaluate applicants for terrorism or other national security-related visa ineligibilities." The OMB approved DOS' request and the DS-5535 is now in effect for a 180-day period ending November 30, 2017.

If a consular officer determines that a visa applicant requires greater scrutiny, he/she may request:

- Travel history during the last 15 years, including source of funding for travel.
- Address history during the last 15 years.
- Employment history during the last 15 years.
- All passport numbers and country of issuance held by the applicant.
- Names and dates of birth for all siblings.
- Name and dates of birth for all children.
- Names and dates of birth for all current and former spouses, or civil or
- domestic partners.
- Social media platforms and identifiers, also known as handles, used during the last five years.
- Phone numbers and email addresses used during the last five years.

As stated in the notice, the DOS created the DS-5535 to "implement the directive of the President, in the *Memorandum for*


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*the Secretary of State, the Attorney General, the Secretary of Homeland Security* of March 6, 2017, seeking additional protocols and procedures focused on 'ensur[ing] the proper collection of all information necessary to rigorously evaluate all grounds of inadmissibility or deportability, or grounds for the denial of other immigration benefits.'"

## The Limited Return of H-1B Premium Processing

H-1B Premium Processing has been lifted for J-1 Physicians filing for a change of status who are under the Conrad 30 Waiver Program or who have an Interested Government Agency Waiver. Physicians who received medical training in the U.S. in J-1 status are subject to a two-year foreign residence requirement. A J-1 Physician with a foreign residence requirement can have that requirement waived under the Conrad 30 program or by obtaining an Interested Government Agency waiver. To be eligible for the Conrad 30 Waiver Program, the J-1 medical doctor must agree to be employed full-time in H-1B status at a health care facility located in a Health Professional Shortage Area (HPSA) or Medically Underserved Area or Population (MUA/ MUP) and agree to begin employment within 90 days of receipt of the waiver. The suspension of Premium Processing on April 3, 2017, posed a significant hurdle to the timelines required under the Conrad 30 Waiver program.

However, in the grand scheme of H-1Bs, this is a small percentage of cases eligible for premium processing. The Conrad 30 Waiver Program entails 30 slots per state. The Interested Government Agency waivers are also limited in scope. H-1B employers and beneficiaries that remain affected by the suspension may continue to seek expedited processing if one of the following criteria can be met:

- Severe financial loss to company or person
- Emergency situation.
- Humanitarian reasons.
- Nonprofit organization whose request is in furtherance of the cultural and social interests of the United States


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- Department of Defense or national interest situation. (These particular expedite requests must come from an official U.S. government entity and state that delay will be detrimental to the government.)
- USCIS error.
- Compelling interest of USCIS.

Approval for expedited processing is discretionary and USCIS will review such requests on a case-by-case basis. Upon receipt of a request for expedited processing, USCIS should make a decision as to whether to grant or deny the request within three to five days.

## White House Wants to Give DOL the Ability to Charge Fees for Immigration Filings

On May 23, 2017, the White House released its FY2018 budget entitled "A New Foundation for American Greatness," and it calls for legislation that would permit the Department of Labor to charge fees for prevailing wage determinations, PERM applications, and H-2B non-agricultural workers, and adjust fees associated with H-2A agricultural worker applications. The relevant section of the Budget states:

> The Budget proposes authorizing legislation to establish and retain fees to cover the costs of operating the foreign labor certification programs, which ensure that employers proposing to bring in immigrant workers have checked to ensure that American workers cannot meet their needs and that immigrant workers are being compensated appropriately and not disadvantaging American workers. The ability to charge fees for these programs would give the Department of Labor a more reliable, workload-based source of funding for this function (as the Department of Homeland Security has), and would ultimately eliminate the need for discretionary appropriations. The proposal includes the following: 1) charge employer fees for its prevailing wage determinations; 2) charge employer fees for its permanent labor certification program; 3) charge employer fees for H-2B non-agricultural workers; and 4)


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retain and adjust the H-2A agricultural worker application fees currently deposited into the General Fund. The fee levels, including possible expedited processing fees, would be set via regulation to ensure that the amounts are subject to review. Given DOL OIG's important role in investigating fraud and abuse, the proposal also includes a mechanism to provide funding for OIG's work to oversee foreign labor certification programs.

## EB-3 China Retrogresses in July 2017 Visa Bulletin

USCIS designated the Department of States' *Application Final Action Dates* chart as controlling for the month of July 2017. Under the July 2017 *Application Final Action Dates* chart, there is one significant development that employers should be aware of: as of July 1, the EB-3 China category will retrogress nearly three years from October 1, 2014 to January 1, 2012. Recently, the EB-3 China category has had more advantageous dates than the EB-2 China category. As a result, many employers filed EB-2 eligible petitions in the EB-3 category to permit beneficiaries to benefit from the category's faster priority dates. However, the downgrading has finally led to retrogression in this category and, for the first time in many months, the EB-2 China category is ahead of the EB-3 China category.

Aside from that change, the EB-3 Worldwide category is backlogged just over one month to June 8, 2017; EB-2 China and EB-2 India continue a slow march forward, having each only advanced 22 days to March 22, 2013, and July 22, 2008, respectively; and both EB-1 China and EB-1 India remain severely backlogged to January 1, 2012.

If you have questions relating to these topics, please contact David Janklow or Peggy Shukairy in Frost Brown Todd's Labor and Employment Practice Group.

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