U.S. Congressional Action Restrictions on Travel to the U.S. and EB-5 Investment Options for Immigrating to the United States from the Middle East

By Charles C. Foster

Prior to adjourning for the holidays, as part of the Omnibus Bill the U.S. Congress approved on December 18, 2015, Congress included a number of immigration provisions that will have a substantial impact on both business travelers to the United States from the Middle East as well as an increasing number of Middle Eastern foreign nationals who are considering acquiring Lawful Permanent Residency or so-called “green card” status in the United States for personal, business and even security reasons.

Visa Waiver Program Restrictions
Specifically, the Omnibus Bill included HR 158, which among other things, bars Middle Eastern nationals with dual European citizenship from using the Visa Waiver Program that allows entries into the United States without a visa for stays of 90 days or less. This includes any foreign nationals who have “traveled to” or who are “nationals of” Iran, Iraq, Sudan or Syria, requiring them to first obtain a highly discretionary B-1/B-2 Visitor visa from the appropriate U.S. Consulate in order to seek to enter into the United States. Although not clear, it is possible that a person born and raised in a European country such as France, but whose father or mother was a citizen of Iran, Iraq, Sudan or Syria would be forced to obtain a B-1/B-2 Visitor visa before visiting the United States even if that person had a European passport and had never been in any of the aforementioned countries. Nationality is governed by each country’s laws and is broader than citizenship. These provisions also bar people who had traveled at any time since March 1, 2011 to the primary states where ISIS operates, i.e. Iraq and Syria, as well as states labeled by the U.S. as State Sponsors of Terrorism, which includes Iran and Sudan.

The Visa Waiver Program was first adopted by Congress in 1986. It currently allows foreign national visitors from 38 countries to enter the United States without a visa for a period of time up to 90 days, provided that the foreign national has not been deemed ineligible for a visa and is traveling on a designated approved carrier. To participate, foreign countries must meet certain
conditions including a requirement that they offer reciprocal rights to U.S. citizens traveling to their country.

Furthermore, all travelers who use the Visa Waiver Program are required to hold a “tamper resistant, machine readable passport including certain biographical and biometric information as designated by the U.S. Department of Homeland Security (DHS).” Under HR 158, the DHS is also required to determine whether more countries should be added to the restricted list and countries currently participating are required to certify that they are scanning all travelers through international criminal data bases to continue participation in the program. The DHS is also required to research ways to incorporate improved anti-fraud protection into the Electronic Systems for Travel Authorization (ESTA), which is used to screen proposed visa waiver travelers prior to departure.

Heightened scrutiny of both the process by which nonimmigrant and immigrant visas are issued, particularly with the focus on the K-1 Fiancé visa issued to the U.S. citizen spouse of the couple who killed multiple individuals in San Bernardino and the failure prior to the issuance of the K-1 Fiancé visa to inspect the social media of the visa applicant could very well have a negative impact on the visa issuing process, at the very least slowing the process down as the U.S. Department of State institutes more vigorous screening of all visa applicants, particularly visa applicants from the Middle East.

Since the Visa Waiver Program is based on reciprocity, there is a concern that even American citizens of Middle Eastern origin could be negatively impacted as it could possibly trigger reciprocal restrictions from other participants in the Visa Waiver Program. Thus, as the United States now requires Iranian, Iraqi, Syrian and Sudanese Europeans to obtain visas to travel to the United States, conceivably the EU nations will require Iranian, Syrian, Iraqi and Sudanese Americans to obtain visas to travel to Europe.

Given the strong reaction to tragic events in both Paris and San Bernardino and the related political fallout in the presidential primaries, it is possible that when the U.S. Congress reconvenes in January, it may consider even further immigration restriction.
EB-5 Investor Visa Option Short Term Extension

On a more positive note, included in the Omnibus Bill was an extension of the EB-5 Regional Center investment program without any changes through September 30, 2016, the end of the fiscal year. What this means is that the significant legislative effort to raise the minimum investment in Targeted Economic Areas (TEAs) from $500,000 to $800,000 and to restrict the number of urban EB-5 Regional Center projects that could qualify for the lower TEA investment level at $500,000 rather than $1,000,000 was not approved. If Congress had approved the proposed EB-5 legislative changes, the minimum investment would have risen from $500,000 to $800,000, but of greater concern, most urban projects would have to qualify at the normal investment, which would have been increased to $1,200,000.

While Chinese investors have accounted for approximately 85% of all the foreign nationals qualifying for Lawful Permanent Residency under the EB-5 program, more and more Middle Eastern foreign nationals are seeking to take advantage of this relatively direct and quick way to qualify for Lawful Permanent Residency or so-called “green card” status. The EB-5 Regional Center program is the only possible way to acquire green card status for those individuals who do not have any immediate or close family ties in the U.S. such as a spouse, parent, adult child or sibling or would not have the opportunity and/or qualifications to be sponsored for Lawful Permanent Residency by a U.S. employer.

While Congress extended the EB-5 program through September 30, 2016, once Congress reconvenes in January, 2016, it is very likely that there will be a continuing effort to raise the minimum dollar amounts and to make other significant changes. Thus, for those individuals considering obtaining green card status in the United States for themselves or their children who may be of college age, commencing the process at the earliest possible date may allow them to still qualify at the $500,000 lower dollar investment amount, as Congress almost certainly will raise the minimum investment prior to September 30, 2016.

Following the Great Recession of 2008-2009 and the enactment of Dodd Frank, more and more attractive Regional Center projects have become available as major developers have sought to utilize the EB-5 Regional Center program for part of the financing of their projects, primarily
hotels and other real estate projects in major U.S. cities. Once Congress acts, not only will there be a higher minimum dollar investment, but there may be restrictions making the utilization of the EB-5 program for major hotel and other real estate developments in attractive metropolitan areas less feasible.

Stay tuned for further Congressional action.

Charles C. Foster, Chairman, Foster LLP, Attorney at Law, Houston, Texas
Board Certified in U.S. Immigration and Nationality Law; past national President, American Immigration Lawyers Association; senior immigration policy advisory to President George W. Bush