

September 4, 2019

The Honorable Lindsey Graham  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Jerrold Nadler  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Doug Collins  
Ranking Member  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Subject: Implementation of the Waiver Provision in the Travel Ban

Dear Chairman Graham, Ranking Member Feinstein, Chairman Nadler, and Ranking Member Collins:

On behalf of the American Bar Association, I write to express our serious concern regarding recent troubling reports concerning the implementation of Presidential Proclamation 9645, known as the "Travel Ban." We urge Congress and the Administration to take measures to ensure that the waiver provision of the Ban is implemented consistent with the rule of law.

As you know, in *Trump v. Hawaii*<sup>1</sup>, the Supreme Court majority concluded that the Travel Ban is facially neutral as to religion and does not reflect an anti-Muslim bias, based in significant part on the existence of a provision authorizing "case-by-case waivers" from the Ban. However, information on the implementation of that waiver program increasingly suggests that the program may be more illusory than real.

According to data released by the State Department in early April 2019, in the first 11 months of the Travel Ban's full-scale implementation, consular officers ruled on nearly 38,000 applications for visas filed by individuals subject to the Ban who otherwise qualified for the visas but needed waivers to get them. A shocking 94% of those

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<sup>1</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

applications were denied.<sup>2</sup> Similarly, from FY 2016 to FY 2018, the number of immigrant visas issued to nationals of the five Muslim-majority countries that are subject to the Ban plummeted 84%, from 25,538 to 4,167. Temporary visas from those countries dropped by 78% during that period, from 46,461 to 10,398.<sup>3</sup> The most recent data – released by the Department of State in June 2019 – are even more bleak. While the earlier data indicated that roughly 6% of applicants had been issued visas pursuant to the waiver process, these latest data indicate that the figure had dropped to 5.1%.<sup>4</sup>

One of the serious issues is that the case-by-case waiver program lacks transparency. There is no separate application form, and some of those seeking waivers report that evidence of eligibility they try to proffer is rejected. Moreover, although the Travel Ban directs the Secretaries of State and of Homeland Security to issue guidance on the process for obtaining a waiver, we understand that only internal guidance has been issued. No such guidance has been provided to assist those seeking waivers. In addition, the Ban provides for the issuance of waivers by consular officers (or the Commissioner of Customs and Border Protection, or the Commissioner's designee). Yet some reports indicate that, while consular officers are authorized to deny waivers, only State Department officials in Washington, D.C. may grant them.<sup>5</sup>

Lawsuits now pending in the federal courts are seeking information as to how (as a practical matter) officials are applying the three established criteria for a waiver – “undue hardship” for the applicant, any national security or public safety threat to the United States, and the U.S.’s national interest. Significantly, in *Emami v. Nielsen* in the Northern District of California, the Court denied the government’s motion to dismiss the case, holding that the facts alleged suggest that “a *de facto* policy of blanket denials has usurped individualized waiver decisions.”<sup>6</sup>

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<sup>2</sup> See, e.g., Yeganeh Torbati, *Only 6 percent of those subject to Trump travel ban granted U.S. waivers* (Reuters, April 4, 2019) (quoting an immigration attorney stating that consular officers “are actually actively telling applicants, ‘We don’t want your materials in support of a waiver’”), <https://www.reuters.com/article/us-usa-immigration-visas-exclusive/exclusive-only-6-percent-of-those-subject-to-trump-travel-ban-granted-us-waivers-idUSKCN1RG30X>.

<sup>3</sup> See Stuart Andersen, *Muslim Travel Ban: Less Immigration And Few Waivers*, FORBES, March 11, 2019, <https://www.forbes.com/sites/stuartanderson/2019/03/11/muslim-travel-ban-less-immigration-and-few-waivers/#25ceb43127f0>.

<sup>4</sup> See Department of State Report: Implementation of Presidential Proclamation 9645 – December 8, 2017 to March 31, 2019 (released June 2019) (reporting that “approximately 5.1 percent of subject applicants [had] been issued a visa pursuant to the waiver process as of March 31, 2019), <https://travel.state.gov/content/dam/visas/presidentialproclamation/Combined%20-%20Report%20on%20Implementation%20of%20PP%209645%20December%2007%202017%20to%20March%2031%202019.pdf>.

<sup>5</sup> See, e.g., Declaration of Christopher Richardson, Esq., filed in *Al Harbi v. Miller*, No. 18-00435 (E.D.N.Y., June 1, 2018) (former Consular Officer attesting, *inter alia*, that “there really is no waiver” and that “the Supreme Court was correct to point out that the waiver is merely ‘window dressing’”; describing the waiver application process which, in essence, allows consular officers to deny waivers, but requires the approval of State Department officials in Washington, D.C. to grant them), <https://www.nilc.org/wp-content/uploads/2018/08/PARS-Equality-Ctr-v-Pompeo-complaint-exhibits-2018-07-31.pdf>.

<sup>6</sup> *Emami v. Nielsen*, No. 18-01587, Order re Motion to Dismiss (N.D. Cal., Feb. 4, 2019), <https://www.courthousenews.com/wp-content/uploads/2019/02/TravelBanWaiverMtd-ORDER.pdf>.

In *International Refugee Assistance Project (IRAP) v. Trump*, the District Court for Maryland similarly denied a government motion to dismiss, concluding that the plaintiffs' claims counter the government's assertions that the Ban serves a national security purpose.<sup>7</sup> In addition, in *Mosleh v. Pompeo*, the District Court for the Eastern District of California ordered the State Department to provide additional, more detailed information concerning its implementation of the Travel Ban's waiver provisions, chastising the government for its "bare bones," "boilerplate" explanation.<sup>8</sup>

Congressional oversight of the Administration's implementation of the Travel Ban's case-by-case waiver provision is needed to ensure that the waiver program is being administered fairly and consistently and is free from religious or any other form of impermissible discrimination. We urge Congress to mandate congressional consultation and detailed and periodic reporting on how the program has been and is being implemented. Further, we urge Congress to call on the Departments of State and Homeland Security to publish specific instructions for potential waiver applicants and their counsel on how to apply for a waiver and to clearly explain the criteria for granting a waiver.

The negative impacts of the Travel Ban have been felt around our nation and the world and across a broad spectrum of the population – including families, students, and businesses.<sup>9</sup> We must ensure that individuals who may be eligible have a fair and transparent process to seek a waiver. Waiver applicants – and those who anxiously await them here in the U.S. – deserve no less.

Sincerely,



Judy Perry Martinez

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<sup>7</sup> *Int'l Refugee Assistance Project v. Trump*, No. 17-0361, 2019 U.S. Dist. LEXIS 75398 (D. Md. May 2, 2019) (including *Iranian Alliances Across Borders (IAAB) v. Trump*, No. 17-2921, and *Zakzok v. Trump*, No. 17-2969, consolidated with lead case) (granting defendants' motion to dismiss as to plaintiffs' Administrative Procedure Act claim and denying motion as to plaintiffs' constitutional claims, including Due Process, Establishment Clause, and Equal Protection claims).

<sup>8</sup> *Mosleh v. Pompeo*, No. 19-00656, Interim Memorandum Decision and Order re Plaintiffs' Request for Preliminary Injunction (E.D. Cal., June 19, 2019) (ordering government to provide more detailed information concerning implementation of the Travel Ban's waiver provision), <https://drive.google.com/file/d/19Z1maflwdcKokkwzgWCsmh8E1mXE1HZY/view>.

<sup>9</sup> See *Travel Ban Forces Americans to Wait Years for Loved Ones*, U.S. News and World Report, May 8, 2019, <https://www.usnews.com/news/us/articles/2019-05-08/travel-ban-forces-americans-to-wait-years-for-loved-ones>; Nina Roberts, *Travel Ban Takes its Toll on Small Businesses*, Marketplace, April 12, 2019, <https://www.marketplace.org/2019/04/12/travel-ban-takes-its-toll-small-businesses/>.