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FALLOUT FROM TRUMP'S MUSLIM BAN: REQUIRING USE OF SOCIAL MEDIA ON VISA APPLICATION FORMS

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On May 31, 2019, the State Department added new questions to visa application forms, DS-160/DS-156 Nonimmigrant Visa Application and Form DS-260, Immigrant Visa Application. Visa applicants now have to disclose the social media platforms that they have used within the previous five years and provide their user names or handle for each platform. This information needs to be provided through a drop down list of common social media platforms, although some of the platforms listed are defunct. Applicants are instructed to not provide the passwords for these accounts. Additional questions requesting the applicant's current e mail and phone number, as well as a list of additional e mail addresses and phone numbers used in the past five years also now appear on the forms. If applicants are unable to provide the precise details, they can insert "unknown", but this could result in additional screening or delays during the visa process.

The new policy has caused worldwide concern as it is expected to affect 710,000 immigrant visa applicants and 14 million nonimmigrant visa applicants.

This policy has its genesis in President Trump's travel ban of January 27, 2017 executive order 13769, which banned nationals from seven Muslim countries from entering the US- Iraq, Syria, Iran, Sudan, Libya, Somalia and Yemen. After this executive order was blocked by courts, the Trump administration issued a repackaged March 6, 2017 executive order 13780, which banned nationals from six of the seven countries subject to the original executive order. Iraq was taken off the list. After even the March 6, 2017 executive order was found unconstitutional by the fourth and ninth circuit courts of appeals, the March 2017 executive order was subsequently revised through a third proclamation

9645 dated September 24, 2017, which was upheld by the Supreme Court in *Trump v. Hawaii*. Chief Justice John Roberts, in writing the 5-4 majority opinion, found that Section 212(f) of the Immigration and Nationality (INA) "exudes deference to the President" and thus empowers him to deny entry of noncitizens if he determines that allowing entry "would be detrimental to the interests of the United States." There has already been much criticism of this decision. Although Trump made various utterances regarding his animus towards Muslims during his campaign and even after he became president, the majority found the third version of Trump's ban on its face and that it did not violate the Establishment Clause of the First Amendment of Constitution.

Section 5 of the March 6, 2017 executive order provided the basis for the new social media screening policy:

Implementing Uniform Screening and Vetting Standards for All Immigration Programs. (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

Section 5 of the September 24, 2017 proclamation further provided:

Reports on Screening and Vetting Procedures. (a) The Secretary of Homeland Security, in coordination with the Secretary of State, the Attorney General, the Director of National Intelligence, and other appropriate heads of agencies shall submit periodic reports to the President, through appropriate Assistants to the President, that:

(i) describe the steps the United States Government has taken to improve vetting for nationals of all foreign countries, including through improved collection of biometric and biographic data;

(ii) describe the scope and magnitude of fraud, errors, false information, and unverifiable claims, as determined by the Secretary of Homeland Security on the basis of a validation study, made in applications for immigration benefits under the immigration laws; and

(iii) evaluate the procedures related to screening and vetting established by the Department of State's Bureau of Consular Affairs in order to enhance the safety and security of the United States and to ensure sufficient review of applications for immigration benefits.

Subsequently, in March 2018, the State Department provided 60 day notices in the federal register regarding its intent to include social media information in the DS 160 and DS 260 visa applications. Although AILA provided comprehensive comments in response to the notices expressing concern about how these questions would discourage individuals from applying for a visa, rendering it impossible to respond accurately to questions relating to temporary telephone numbers as well as concerns about how it will be used, the State Department nevertheless went ahead and introduced these additional questions on May 31, 2019.

The new questions on social media thus stem from the same executive order that caused worldwide consternation against the US when it banned millions of people from mainly Muslim countries in keeping with Trump's earlier campaign pledge to ban Muslims. Although the September 24, 2017 executive order was upheld by the Supreme Court, the US has suffered worldwide reputational damage due to the indiscriminate banning of persons solely because because of their nationality. Countries like Iran and Yemen have been particularly affected as many thousands of their nationals have legitimate ties with the US. Thousands of families remain separated as a result of what is widely come to be known as Trump's Muslim ban.

Justifying the new questions on social media, a State Department official stated, "As we've seen around the world in recent years, social media can be a major forum for terrorist sentiment and activity. This will be a vital tool to screen out terrorists, public safety threats, and other dangerous individuals from gaining immigration benefits and setting foot on U.S. soil." But social media has never

been a reliable indicator in determining whether someone is a threat to US or not. A post that was written many years ago could also be taken out of context and be easily misunderstood or misinterpreted, resulting in a denial of the visa. This would also create a chilling effect on people and some may feel that participating in a political online discussion could hinder their visa approval hopes.

There is also no ground of inadmissibility in the INA that should apply if one legitimately opposes the United States, its polices or even President Trump. Even if one wishes to come to the US as a visitor for pleasure to participate in a peaceful protest that in itself should not be the sole basis for denying a visa. Under 22 CFR 41.31(b)(2) pleasure is defined as "egitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment and activities of a fraternal, social or service nature." Clearly, being part of a peaceful protest with like-minded people could constitute activities of a "fraternal" or "social" nature. 9 FAM 402.2-4(A)(3) also contemplates as visitors for pleasure "articipants in conventions of social organizations." Still INA 214(b) provides unbridled discretion to a consular officer to refuse most nonimmigrant visas as such an applicant "shall be presumed to be an immigrant" until it is established that he or she is entitled to the nonimmigrant status under INA 101(a)(15). The consular officer need not provide a reason for the refusal. Even if the visa applicant can demonstrate his or her ties with the home country, the visa can still be refused if all the activities in the US are not consistent with the visa. *See* 9 FAM 302.1-2 (B)(6). Furthermore, if the social media profile is not consistent with an applicant's employment history that is required for the eligibility of a visa, such as an L-1 intracompany visa that requires one year of prior employment with a qualifying entity abroad, it could be used as a basis for denial, and even a recommendation to the USCIS to revoke the underlying visa petition.

Unfortunately, there exist grounds of inadmissibility that may trigger upon a review of one's social media. One ground is under INA 212(a)(3)(A)(i), which allows a consular to find inadmissible one, if there are reasonable grounds to believe that he or she seeks to enter the US to engage principally or incidentally in "any other unlawful activity." Still, one's legitimate expression of free speech on social media should not lead to the inference that this person will engage in unlawful activity in the US. Then, there is also the extremely broad ground of inadmissibility for terrorist activity under INA 212(a)(3)(B)(II) that allows a

consular officer to render the applicant inadmissible if there is a reasonable ground to believe that he or she is engaged or is likely to engage in terrorist activity. Even with respect to this ground, one's expression of free speech that is generally protected under the First Amendment, however objectionable it may be to the consular officer, ought not to lead to an inference that the applicant will engage in terrorist activity.

Then, there is the possibility that if the information on social media use is not submitted accurately on the visa application due to a misunderstanding, the issuance of the visa can be held up, or worse, the applicant can be rendered inadmissible for fraud or willfully misrepresenting a material fact pursuant to INA 212(a)(6)(C)(i). Someone who inadvertently forgets to reveal a social media handle from over 4 years ago can argue that the misrepresentation was neither willful nor material. According to 9 FAM 302.9-4(B)(4), the "term 'willfully' as used in INA 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise." Even if an applicant willfully misrepresents, it must be a material misrepresentation. A misrepresentation is material if "he misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she be inadmissible." *See* 9 FAM 302.9-4 (citing *Matter of S- and B-C*, 9 I. & N. Dec. 436, at 447). Unfortunately, even when one can overcome a finding of inadmissibility, it is a very difficult and protracted process to convince a consular officer to reverse an unfavorable determination. Moreover, deleting social media handles prior to completing a visa form will serve no benefit whatsoever, as the question asks for use of social media in the past 5 years without regard to whether one is using them presently or not. It will also lead to further suspicion and thus delays and denials.

The additional questions on visa forms relating to social media are a logical extension of Trump's Muslim ban – rather it is more like going down the proverbial slippery slope. The countries affected by the ban were few but the added instruction on the forms to profile and suspect people based on their social media use will impact millions more. It remains to be seen whether other countries will also impose similar questions on their visa forms. Such copycat actions can be used to retaliate against American visa applicants or by other countries who want to screen out nationals of countries they find undesirable. The questions will dissuade applicants from visiting the US temporarily for

legitimate purposes. These questions will also unfortunately result in unfounded and arbitrary denials of visa applications of those who are coming to the US both temporarily and permanently, thus depriving US educational institutions of foreign students and US businesses from increased business through tourism. Those legitimately sponsored for permanent residency by family members, employers or through investment will also be adversely impacted. The policy is also going to create a chilling effect on people as some may feel participating in a political online discussion could hinder their visa approval hopes. It would hope that people are not denied a visa based on a tweet that's deemed to be against American policies that is consistent with free speech protected under the First Amendment. Otherwise, the only loser will be America, whose standing has already been diminished after the implementation of the Muslim ban.