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DUI Arrest Could Now Lead to Visa Revocation for Employees in U.S. Even Without a Conviction

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Employers should be aware that foreign nationals in the United States on nonimmigrant work visas (such as H-1B, L-1, and O-1 visas) are subject to severe consequences following an arrest for driving under the influence (DUI) or driving while intoxicated (DWI), even when there is no finding of guilt. Per longstanding practice and U.S. Department of State (DOS) regulations, if the DOS discovers derogatory information about an applicant after a visa is issued, it may determine, after an evaluation of the facts, whether it is prudent to revoke the previously issued visa out of concern for public safety. In a shift from previous practice, the DOS has recently begun exercising this discretion in a more stringent manner.

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According to previous practice, derogatory information such as an arrest would only come to the attention of the DOS when a visa holder applied to renew his or her visa at a consulate abroad after his or her visa expired. However, the American Immigration Lawyers Association has reported an increase in notices of visa revocation from the DOS, including notices issued to individuals already present in the United States on nonimmigrant visas cancelling their currently valid visas and requiring them to reapply the next time they travel internationally.

Earlier this year, the DOS released new guidance implementing a policy of prudentially revoking previously issued nonimmigrant visas for DUI and DWI arrests that occurred within the past five years. This revocation does not require a final disposition or finding of guilt. Pursuant to the guidance, the DOS may revoke a visa, without definitive proof of visa ineligibility under the policy of prudential revocation "when it receives derogatory information directly from another U.S. Government agency, including a member of the intelligence or law enforcement community." The DOS receives information on arrests and convictions by interfacing with various databases, including other government agency databases, some of which may not have final dispositions of the criminal charges brought after an arrest. As a result, consular officers have significant discretion to revoke visas based on mere suspicion of visa ineligibility.

Note that a visa revocation of this type does not indicate a definitive finding of visa ineligibility and does not require a conviction or admission of commission of a criminal act. As noted above, such an arrest without a finding of guilt would previously require an applicant outside the United States to provide additional evidence regarding the conviction and a U.S. Citizenship and Immigration Services panel physician's report prior to applying for a new visa after the current visa expiration. There were no consequences following a DUI arrest until the individual applied for visa renewal, which might only be required every 5 to 10 years. But now, due to the immediate threat driving under the influence poses to public safety, the DOS has instructed consular officers to prudentially revoke visas after receiving information about a DUI arrest within the past five years.

Visa revocations and certain DUI incidents may be a basis for court-ordered removal from the United States. However, a notice of visa revocation for an individual already present in the United States does not necessarily require that the visa holder leave the United States unless specifically indicated and does not mean the individual is ineligible for a visa or inadmissible to the United States. At his or her discretion, a consular officer may revoke a visa and require the visa holder to leave the country immediately and report to a consular post abroad to reapply for a visa, subject to a new determination of visa eligibility. However, generally the foreign national receives an email notification stating that the visa holder must apply for a new visa the next time he or she travels abroad. In such a case, the current visa in the individual's passport is voided and he or she has to provide additional evidence and a medical screening in order to renew his or her visa abroad.

Employers, with their counsel, should give careful thought to whether and how to notify foreign national employees in the United States on work visas of the serious nature of drunk driving incidents and how they can affect their visa statuses and continued employability in the United States even if they are not convicted. Before an employee travels internationally, you may want to inform him or her of the effect arrests can have on admissibility, even if he or she has not been notified of revocation, as visas may be revoked without notice. If the employee has been arrested for a DUI or DWI, this must be disclosed the next time he or she applies for a visa, even if the visa has not been revoked. Under the Immigration And Nationality Act section 212(a)(1)(A)(iii), a medical exam by a panel physician is required to determine whether an employee is inadmissible due to a mental disorder posing a threat to himself, herself, or others, or a waiver of inadmissibility may be required before a new visa may be issued..

If an employee is arrested or a notification of visa revocation is received, the individual and his or her employer should review their options carefully to maximize their chances of renewing the visa and maintaining or extending nonimmigrant status. As scrutiny of public safety grounds for visa ineligibility increases, we are monitoring the evolution of the DOS's policy in this area and will notify clients of developments and best practices to avoid visa problems for employees.

TOPICS

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