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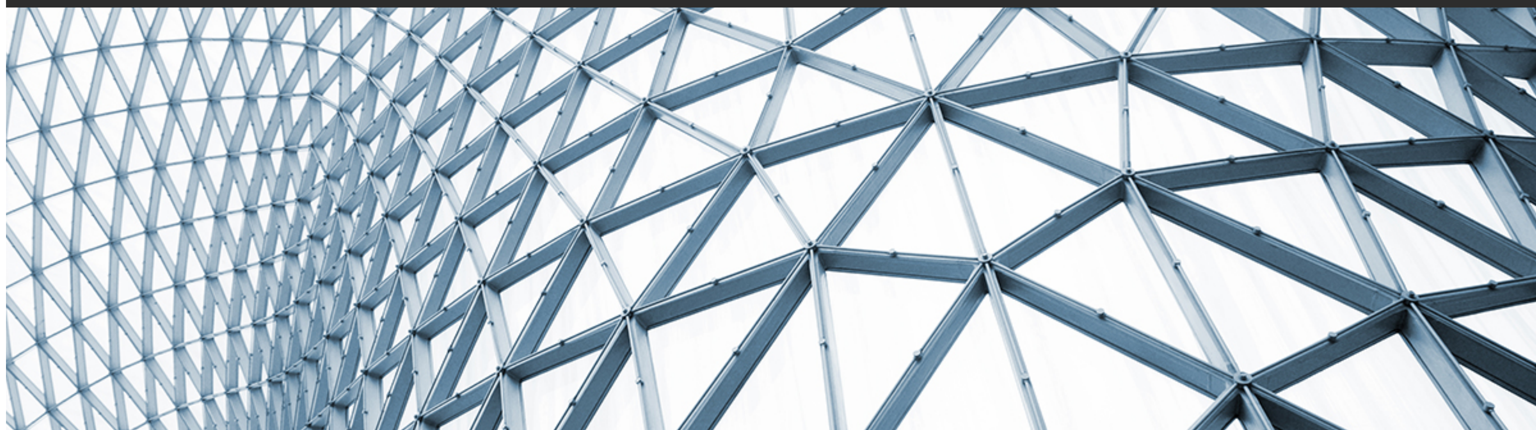

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New Immigration Policy Focuses On Alcohol-Related Charges

In an apparent change in policy, U.S. immigration authorities are now taking a hard-line approach to individuals who have alcohol-related charges or offenses, marking a significant shift in how U.S. Citizenship and Immigration Services and the U.S. Department of State treat visa holders in this predicament. Employers and employees alike should take note of this development as the consequences of having an alcohol related-charge or offense will likely mean USCIS will find individuals ineligible for an extension of status request, forcing them to leave the country and process a visa stamp at a U.S. Consulate abroad.

Extension of status requests are typically made not only when individuals are nearing the expiration of their current visa status, but also when they are making a request to change employers. The troubles of affected visa holders, however, will continue when they leave United States: U.S. Consulates abroad will then require them to be evaluated by a designated panel physician who will evaluate whether the visa applicant has a physical or mental disorder associated with alcohol use that may pose a threat to the property, safety or welfare of others in the United States.

To make things worse, U.S. Consulates are now revoking the visa stamps of affected foreign nationals when they receive a law enforcement report of a DUI-related arrest or conviction regardless of whether individuals are in the United States or abroad at the time. Because these actions are taken on health-related grounds a conviction is not necessary for individuals to be adversely impacted. Most individuals are unaware that their visas are revoked until they try to return to the United States after travel abroad. This is causing unexpected travel headaches, lengthy stays abroad waiting for visas to be issued, and interruption in work schedules for employers and employees.

What has Changed?

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Previously, only visa holders with (1) a single alcohol-related arrest or conviction within the last five years, or (2) two or more alcohol-related arrests or convictions were affected. Under new policy, it only takes a single alcohol-related charge to trigger action by U.S. authorities. Prior to the change, affected visa holders would only need to deal with the consequences when they made a visa application at a U.S. Consulate abroad. Whereas USCIS is now identifying alcohol-related offenses and denying requests for an extension of status in any visa classification.

Furthermore, before this policy change U.S. Consulates would only refer affected visa holders to a panel physician whenever a visa application was made. Now, U.S. Consulates are responding to law enforcement reports proactively by revoking the visa stamps of anyone who has an alcohol-related charge even in situations where an individual hasn't made a visa application. Many individuals with alcohol-related charges are reporting receipt of letters from the Department of State notifying them of their visa revocation. The Department of State has confirmed that visa revocation will be effective only upon departure from the United States.

What are the Legal Grounds Supporting this Action?

USCIS is denying extension requests requiring individuals to leave the country and apply for a visa stamp at a U.S. consulate abroad. Under the regulations for extensions of stay, "Every nonimmigrant alien who applies for admission to, or an extension of stay in, the United States must establish that he or she is admissible to the United States, or that any ground of inadmissibility has been waived." As mentioned above an alcohol-related charge is a health ground of admissibility, which means that a conviction is not required and charges alone can trigger inadmissibility. Although affected visa holders are not removable from the United States, they will be unable to work lawfully in the United States if their underlying period of H-1B stay has expired. This makes a motion to reconsider or an appeal an unlikely option for an employer as the easiest solution in most cases will be to have individuals travel abroad to process a visa stamp at a U.S. Consulate.

With USCIS denying extension requests filed under regular processing some five to six months after the initial filing date, many affected individuals find themselves having to leave the country immediately to avoid reaching unlawful presence thresholds and potentially being subject to the three- and 10-year bars to admission. Employers who are filing H-1B change of employer petitions should considering filing without a request for extension if beneficiaries have enough time on their existing H-1B petitions with prior employers, as USCIS is only applying this new policy to petitions requesting an extension. Furthermore, employers facing this situation should consider premium processing cases, where permissible, as early as possible to buy some time for contingency planning, such as organizing remote employment options abroad, avoiding costly last-minute airline tickets and hotels, and reducing employee concerns.

Will USCIS Extend this Policy to Change of Status Requests?

There are reports circulating among the immigration bar that USCIS is expanding this policy to change of status requests and F-1 optional practical training (OPT) employment authorization document (EAD) applications. Indeed, while there is no comparable inadmissibility language in the change of status context, the regulations do provide USCIS with discretionary authority to deny a change of status request and, therefore, USCIS could exercise its discretion and use an alcohol-related charge as grounds to deny a change of status request.

If a Visa Application is Denied By a U.S. Consulate, Can it Be Appealed? What Else Can Be Done?

Unfortunately, there is no formal appeal process to challenge a consular officer's decision to deny a visa application. The nonreviewability of Consular decisions was affirmed by the U.S. Supreme Court in 2015 in the *Kerry v. Din* case. In addition, neither the visa applicant nor the attorney providing assistance can review the panel physician's medical report. Individuals may seek an advisory opinion from the Department of State's Visa Office about the application of law or regulation used by consular officers.

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Visa applicants can also challenge the findings of panel physicians by asking the consular officer to request an advisory opinion from the U.S. Centers for Disease Control and Prevention (CDC), which the consular officer can refuse to do without recourse. Both of these options involve a lengthy process and are unlikely to change the decision to deny the visa application. Most applicants are left having to secure a nonimmigrant waiver of inadmissibility through the U.S. Department of Homeland Security's Admissibility Review Office. Regrettably, nonimmigrant waivers are taking at least six months to process, during which time the visa applicant is stuck abroad.

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