

Immigration Practice Group

Minette A. Kwok
Lynda Won-Chung
Rebecca D. Rambow
Jennifer L. Brill

Nonimmigrant Visa Processing Update

The Impact of a DUI/DWI Arrest or Conviction

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As the United States continues to tighten border security, we wanted to notify you/your employees of new, stricter policies regarding non-immigrant (e.g., B, H, L, E, O, etc.) visa processing at U.S. consulates abroad for individuals who have had one or more alcohol-related arrests or convictions. This applies to both first time applicants and to those applicants renewing their visas. Individuals specifically impacted are those who:

1. Have had a single drunk driving arrest or conviction within the last 3 calendar years; or
2. Have had two or more drunk driving arrests or convictions (*in any time period*).

These individuals will be referred for a medical examination by the consular officer prior to the adjudication of the visa application. Such a referral will likely slow down the visa application process significantly. Therefore, visa applicants should plan accordingly.

Individuals other than Canadian nationals are required to have a valid non-immigrant visa when entering the U.S. The visa application process includes submitting a biographical form (Form DS-156) which contains the question: "Have you ever been arrested or convicted for any offense or crime, even though subject of a pardon, amnesty or other similar legal action?" As has always been the case, any individual with an arrest or conviction of any sort should answer this question "yes," even if the arrest or conviction was later dismissed, vacated, pardoned, or similarly excised. Answering "no" when the individual is aware of a past arrest or conviction could open the individual to being found inadmissible to the U.S. due to misrepresentation.

If the applicant has had an arrest or conviction was for a drunk driving (e.g. DUI) incident and falls under one of the two categories noted above, the Consular Officer **must** now refer the applicant to a panel physician for a medical examination. Additionally, the Consular Officer **must** refer the applicant for a medical examination "if there is any other evidence to suggest an alcohol problem;" thus, other arrests or convictions may also trigger this review.

Though any individual with an arrest or conviction who meets the criteria above will have to be referred for an examination, this referral will not necessarily lead to automatic visa rejection.

The visa will be denied if the panel physician finds:

1. There is a mental disorder (alcohol abuse); AND
2. One or both of the following:
 - a. There is current harmful behavior associated with the mental disorder; OR
 - b. There is a history of harmful behavior associated with the mental disorder *that is judged likely to recur in the future*

Consular officers have been specifically instructed that neither drunk driving nor alcohol abuse by themselves are sufficient grounds for a finding of ineligibility and denial of the visa.

Applicants must be prepared for visa processing delays, even when renewing a visa. To date, there is no mechanism to expedite this process as the panel physician recommendation may take several weeks to be forwarded to the consulate and acted on by the Consular Officer. The medical exam is to be conducted in accordance with the Center for Disease Control's current technical instructions (<http://www.cdc.gov/NCIDOD/DQ/pdf/ti-alien.pdf>) which will include compiling a medical history including questions of drug and alcohol use, history of harmful behavior, history of psychiatric illness and review of any other records that are available (e.g. police, employment, etc.). As such, the applicant should bring copies of his/her medical records, along with all documentation regarding the arrest/conviction and disposition of the matter to assist the panel physician and speed the process. In some cases, a second interview with the Consular Officer may be required after the medical examination.

In addition to the medical examination, an individual with any arrest or conviction must undergo National Crime Information Center (NCIC) processing which will require the applicant to pay an \$85 fee for fingerprinting and wait for the FBI results which can take anywhere from 1 day to 2 months at current processing times, depending upon the consulate.

You and your employees will want to remain closely aware of the potential for lengthy delays in visa processing if the applicant is referred for an examination. This is recent guidance from the Department of State; it is hoped that in the future, as consulates develop processes and procedures to deal with these directives, the delays will become shorter. At this time, however, significant extra time should be built into any travel plans which include a visa application.

This information is offered as guidance and should not be construed as legal advice for every situation. We recommend you contact your attorney prior to your departure on information concerning your particular situation.