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Surprise Denials of Entry to the U.S. Under The VWP Using ESTA

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Practices: Immigration

As travel to the U.S. is back on the rise, we have been receiving more frequent reports of travelers who have been denied or refused admission under the Visa Waiver Program (VWP) using Electronic System for Travel Authorization (ESTA). Some travelers are being denied admission because they are stretching the use of permitted business or tourism activities under the VWP, while others are being denied because they are inaccurately reporting the purpose of their visit to U.S. Customs and Border Protection (CBP) officers.

The VWP permits citizens of 40 countries to travel to the U.S. for business or tourism purposes and to stay up to 90 days without a visa. Although frequently confused with the VWP, ESTA is an automatic system that screens the eligibility of visitors to travel to the U.S. under the VWP, but ESTA approval does not guarantee entry to the U.S. CBP officers may deny entry to travelers at the port of entry for various reasons.

Under the VWP, the traveler's permitted activities are limited to certain business and tourism activities. Business activities are generally limited to attending meetings or consultations, participating in a business convention or conference, and conducting business negotiations, with several exceptions. These activities cannot be a performance of professional work, or skilled or unskilled labor. This is true even when the traveler does not receive any salary from a U.S. entity. For example, even when an employee of a foreign company is visiting the U.S. on behalf of the foreign company, the foreign employee is not permitted to perform work without an appropriate work visa. Unfortunately, many foreign nationals do not understand the difference between permissible and impermissible business activities under the VWP and have been denied admission due to statements which lead the CBP officer to believe that they will engage in work. Furthermore, VWP travelers can also be denied entry to the U.S. when they misrepresent the purpose of their planned visit. One frequent example that we see is when a VWP traveler tells a CBP officer that they are visiting for sightseeing purposes when the true intent is to engage in work. In situations like this, if the traveler admits that the true intent of the visit is to engage in work, CBP will deny entry on the basis that the traveler lied about the purpose of their visit.

Once entry to the U.S. is denied, the traveler will be detained and placed on the next available flight to their departure country, usually incurring the additional flight cost. The most significant consequence of a VWP denial of admission is that the individual will be banned from VWP travel for life. On all future travel to the U.S., the traveler will need to apply for an appropriate visa and disclose the prior denial of admission. To avoid these

consequences, VWP travelers must ensure that their planned activities are permissible under the VWP and be ready to accurately explain the purpose of their visit to CBP.

With the Biden Administration's recent announcement ending the Covid-19 vaccine requirements on May 11, 2023 for all international travelers to the U.S., travel to the U.S. will continue to grow. Properly planning business and personal trips will ensure a smooth entry to the U.S.

For any further inquiries on the use of the VWP and ESTA and planned business or work travel to the U.S., please contact an immigration attorney at Masuda, Funai, Eifert & Mitchell, Ltd.