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LEGAL UPDATES

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New Visa Rules Target Transgender Individuals: Considerations for Employers and Educational Institutions

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Key takeaways

New visa policy targets transgender individuals: A directive from the Secretary of State requires visa applicants to disclose their sex assigned at birth, possibly affecting transgender travelers in all categories.

Increased visa denial risks: Consular officers can deny visas based on “reasonable suspicion” of a mismatch between gender identity and sex assigned at birth, leading to scrutiny and delays for transgender applicants.

Broad implications beyond sports: While aimed at transgender athletes, the policy’s vague wording may impact non-athletes like business travelers, students, and tourists.

Applies to new visa applications: Directive does not affect current visas or apply to those traveling under the Visa Waiver Program or from Canada.

A memo issued by Secretary of State Marco Rubio, titled “Guidance for Visa Adjudicators on Executive Order 14201: ‘Keeping Men Out of Women’s Sports,’” introduces new U.S. visa policies that affect transgender individuals seeking entry into the U.S. While the policy title focuses on transgender athletes and their participation in sports, its language seems to extend to all visa applicants, including business travelers, students, researchers, and others.

Key provisions of the memo

1. **Sex marker requirement:** All U.S. visa applications must reflect an applicant's sex assigned at birth, regardless of updated gender markers on official documents such as passports.
2. **Reasonable suspicion standard:** Consular officers are granted the authority to deny visa applications if they have "reasonable suspicion" that an applicant's sex does not align with their sex assigned at birth. Officers may request additional documentation, such as a birth certificate, if discrepancies are identified.
3. **Material misrepresentation:** Any discrepancies or omissions related to an applicant's sex assigned at birth may be considered "material misrepresentation" under U.S. immigration law, potentially resulting in permanent visa ineligibility.

Implications for transgender visa applicants

Although the memo explicitly addresses transgender athletes, its broad language suggests it can apply to other visa categories, including business, academic, and tourist visas. Transgender individuals with updated gender markers on their passports may face additional scrutiny during the visa application process if their gender identity does not align with their sex assigned at birth. Consular officers may request additional documentation, such as birth certificates, which could delay or disrupt travel plans for time-sensitive business engagements, semester start dates, employment commencement, etc.

The policy creates uncertainty for institutions and organizations that rely on international collaboration, such as universities, businesses, and advocacy groups. These entities must navigate a complex legal landscape while balancing federal compliance requirements with their own anti-discrimination commitments.

It is noted that the new rule applies only to people who need to apply for and obtain a visa to enter the U.S. It does not apply to citizens of the 42 countries—including Australia, New Zealand, Japan, and the entire EU—that are part of the Visa Waiver Program. The Visa Waiver Program, which allows visa-free entry for up to 90 days, is administered by U.S. Customs and Border Protection, so the State Department directive does not apply. Similarly, Canadian citizens are visa-exempt, so the new rule does not apply to them either.

Practical guidance for affected individuals and organizations

1. For transgender visa applicants

Be prepared to provide additional documentation, such as a birth certificate, to verify sex assigned at birth if requested by a consular officer.

Consult with an immigration attorney before applying for a U.S. visa, particularly if your gender marker has been updated on official documents.

Stay informed about updates to the policy and any legal developments that may affect its enforcement.

2. For employers and businesses

Anticipate potential visa challenges resulting in visa delays or denials.

Prepare contingency plans, including exploring alternative meeting locations or virtual participation options for international business engagements.

Provide legal support and resources for affected employees, including access to immigration attorneys.

3. For educational institutions

Work with international student offices to identify and support transgender students, faculty, and researchers who may be impacted by the policy.

Consider proactive communication strategies to inform affected individuals about the changes and provide guidance on navigating the visa application process.

What this means to you

The memo represents a significant escalation in the U.S. government's restrictions on transgender individuals. By making it a requirement to disclose sex assigned at birth, regardless of current legal gender identity, and granting consular officers broad discretion to deny visas, the policy may invite legal challenges on grounds of discrimination, due process violations, and conflicts with international human rights standards.

As its implementation unfolds, it will be important for affected individuals and organizations to remain informed and proactive. Legal challenges may arise, and future court rulings could influence the policy's enforcement or lead to revisions. In the interim, preparation and support will be essential for mitigating potential impacts.

Contact us

If you have questions regarding this State Department memorandum, please contact Tiffany Baldwin or your Husch Blackwell attorney.