



A NEW SCREENING SYSTEM FOR VISITORS TO U.S.

Visa Waiver Program uses online applications and electronic data base checks

By **ANDREW L. WIZNER**

Visitors to the U.S. will need to plan their travel in advance due to implementation of the new Electronic System for Travel Authorization (ESTA), which pre-screens visitors seeking to use the Visa Waiver Program in lieu of a nonimmigrant visa. Until now, U.S. Customs and Border Protection, an agency within the Department of Homeland Security, made the waiver program eligibility determination upon arrival at the port of entry to the U.S.

ESTA now provides visitors with a pre-determination of their Visa Waiver Program eligibility before embarking on a carrier to the U.S. Effective Jan. 12, 2009, U.S. Customs and Border Protection implemented the new travel requirement for visitors arriving by air or sea.

Visitors from designated countries avoid applying for a nonimmigrant visa, and therefore a visa interview, at a U.S. consulate by using the waiver program. The State Department has designated 35 countries to participate in the program. For a country to be eligible, a country must not exceed the statutory rate for nonimmigrant visa refusal and must provide machine-readable passports.

Visa Waiver Program visitors may enter the U.S. for up to 90 days, provided that they have a round-trip ticket and sign a Form I-94W Nonimmigrant Alien Arrival/Departure Form. The I-94W requires each applicant to provide information regarding their admissibility to the U.S. By signing the form, the applicant waives any

right to contest a determination regarding his or her admissibility, except in the case of an application for asylum. Grounds for

framework for determining whether a conviction is for a crime involving moral turpitude.

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Citizens of Visa Waiver Program countries may always apply to a U.S. consulate for a visitor or other visa instead of using the visa waiver. For those applicants who may be inadmissible, the consulate will review their applications and may waive the ground of inadmissibility. Citizens of waiver program countries are eligible for multiple entry visitor visas valid for 10 years.

Importantly, the use of the visa waiver

inadmissibility to the U.S. generally relate to crimes, previous immigration history, national security, and public health.

The I-94W contains a few "loaded" questions, which in some cases require legal analysis. For example, "Have you ever been arrested or convicted for an offense or crime involving moral turpitude or a violation related to controlled substance; or been arrested or convicted for two or more offenses for which the aggregate sentence or confinement was five years or more; or been a controlled substance trafficker; or are you seeking entry to engage in criminal or immoral activities?" Answering this question may pose a challenge, especially considering that then-U.S. Attorney General Michael Mukasey issued a decision on Nov. 7, 2008 in *Matter of Cristoval Silva-Trevino* reversing approximately 100 years of jurisprudence and establishing a new

does not provide any level certainty regarding the visitor's admissibility to the U.S. Customs and Border Protection may determine that a visitor is inadmissible upon arrival to the U.S. when the in-person screening occurs. In accordance with agreements with transportation carriers, these individuals are refused admission and undergo removal, with transportation out of the U.S. at the carrier's expense.

Screening Travelers

At the time of reservation or purchase of the ticketed travel, or at least 72 hours before departure to the United States, the Visa Waiver Program traveler must log on to <https://esta.cbp.dhs.gov>, and complete an online application. U.S. Customs and Border Protection will screen the trav-

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eler against its databases, including lost and stolen passport databases and certain watch lists. If approved, Customs and Border Patrol will issue an authorization valid for travel for two years or until the date of passport expiration, whichever is later.

If denied, the traveler may apply for a standard nonimmigrant visa at a U.S. consulate, in which case use of the Visa Waiver Program is unnecessary. Anecdotal evidence suggests that Electronic System for Travel Authorization may issue denials to individuals previously refused tourist visas on the grounds they are not certain to return to their home countries, as well as on the basis of the other statutory ineligibility grounds.

As of this date, ESTA-authorized travelers must still complete form I-94W, although federal officials plan to phase out use of the form once its messaging capabilities with participating carriers are validated. Thereafter, Customs and Border Protection would transmit travelers' authorization status to

airlines via the existing Advance Passenger Information System, which provides officials with pre-arrival and departure manifest data on all passengers and crew members.

Visa Waiver Program travelers might impose new demands on U.S. consulates for visitor visas. Taking a line from the program itself, the ESTA rule provides that no court shall have jurisdiction to review an eligibility determination under the system. Customs and Border Protection estimates that approximately 18 million visitors will use the waiver program in 2009. Currently, about one percent of travelers using the program are found to be inadmissible to the United States, but many of these 180,000 individuals may file applications for non-immigrant visas at U.S. consulates.

Taking into account that the new ESTA process produces a visa waiver travel authorization valid for only two years, the relative burden of applying at the U.S. consulate for a visitor visa valid for 10 years may

seem worthwhile. Obtaining a visa would avoid using ESTA five times over the same 10-year period. Over the next few years, Visa Waiver Program-eligible travelers may elect to forego ESTA and instead file nonimmigrant visa applications at U.S. consulates. If such a trend should develop, it would defeat one of the chief purposes of the Visa Waiver Program, which is to reduce nonimmigrant visa workloads at U.S. consulates for citizens or nationals of countries that have very low nonimmigrant visa refusal rates.

Only time will tell if the system works. Meanwhile, there remain concerns about the new system's capability to handle emergency travel. Also, it is unclear whether Customs and Border Protection will provide an error correction mechanism; for example, relating to a user's inadvertent data entry error leading to an ESTA denial. U.S. travelers might also begin to wonder whether Visa Waiver Protection countries will reciprocate by instituting similar programs. ■