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MEMORANDUM

ISSUE:

WHAT EFFECT DOES A U.K. CAUTION HAVE ON A FOREIGN NATIONAL'S U.S. NONIMMIGRANT VISA APPLICATION?

BACKGROUND INFORMATION & OVERVIEW:

When an individual commits a **minor** crime in the U.K., the police or the Crown Prosecution Service (CPS) can decide to give an out-of-court disposal instead of taking the case to court. This disposal can be a “**caution**”. Cautions are **official warnings** that an individual's behavior or actions are not acceptable. Cautions are meant to be used for less serious crimes in the U.K. There are different kinds of cautions that the police use, depending on the crime committed. A simple caution is a warning for a minor crime. A police can give a simple caution if: (i) there is enough evidence that an individual is guilty; (ii) the individual is 18 years or older; (iii) the individual admits to committing the crime; (iv) the individual agrees to be given a caution. If the individual does not admit to the crime or accept the caution, the police may charge the individual instead and the case can go to court. **A caution is not a conviction under U.K. law but it can go on an individual's criminal record. The police may record the caution in their databases.**

THE APPLICABLE RULES & REGULATIONS:

Under INA 212 (A)(2)(A)(I)(I), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), is inadmissible.

INA 101(a)(48)(A); 9 FAM 40.21(a) N3.1 defines the term “conviction” and states as follows:

“The term “conviction” means, with respect to an alien, a formal judgment of guilty of the alien entered by a court or, if adjudication of guilty has been withheld, where – (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.”

9 FAM 40.21(A) N5 discusses alien admissions to crimes involving moral turpitude. It states as follows:

*“If it is necessary to question an alien for the purpose of determining whether the alien is ineligible to receive a visa as a person who has admitted the commission of the essential elements of a crime involving moral turpitude, you [the Consular Officer] shall make the verbatim transcript of the proceedings under oath a part of the record. **In eliciting admissions from visa applicants concerning the commission of criminal offenses, you must observe carefully the following rules of procedure** which have been imposed by judicial and Board of Immigration Appeals decisions:*

- (1) You should give the applicant a full explanation of the purpose of the questioning. The applicant must then be placed under oath and the proceedings must be recorded verbatim.*
- (2) The crime, which the alien has admitted, must appear to constitute moral turpitude based on the statute and statements from the alien. It is not necessary for the alien to admit that the crime involves moral turpitude.*
- (3) Before the actual questioning, you must give the applicant an adequate definition of the crime, including all essential elements. You must explain the definition to the applicant in terms he or she understands; making certain it conforms to the law of the jurisdiction where the offense is alleged to have been committed.*
- (4) The applicant must then admit all the factual elements, which constituted the crime (Matter of P--, 1 I&N Dec. 33).*
- (5) The applicant’s admission of the crime must be explicit, unequivocal and unqualified (Howes v Tozer, 3 F2d 849).”*

ANALYSIS AND APPLICATION:

At the U.S. Embassy in London, Visa Coordination Unit (VCU) appointments must be scheduled by visa applicants who have been arrested or convicted of a crime and other possible ineligibilities. **A visa applicant who has received a U.K. caution should disclose any arrest at the outset when scheduling a visa interview appointment.** This will initiate a process to determine whether the visa applicant requires a special interview with a Visa Coordination Unit (“VCU”) officer or whether the visa applicant can be seen and interviewed at the next available regular visa interview appointment. **Generally, as U.K. cautions are not considered convictions under U.K. law and also under U.S. immigration law, it is unlikely that someone with only a caution will actually be interviewed by a VCU officer although this is still theoretically possible.**

The vetting process at the U.S. Embassy in London is the same for anyone with an arrest or conviction. When contacting the U.S. Embassy in London, certain documentation should be provided including a completed, signed and dated VCU-1 form, the Association of Chief Police Officers (“ACPO”) Police Certificate (which provides details of the police records), and any relevant court records.

If a foreign national receives a caution in the U.K., the police caution must be declared on a U.S. visa application, even where the caution has been “stepped down” under English law and therefore does not appear on the visa applicant’s police certificate. An ACPO Police Certificate can display a list of convictions, cautions, reprimands and warnings which are “live” for the purposes of English criminal law. **The Police Certificate can also display the phrase “No Live Trace” which means that although the applicant does have convictions and/or cautions recorded against them, these offences have been “stepped down”.** Once a record has been “stepped down”, it is only available to the police and is not disclosed on documents such as the U.K. Police Certificate or U.K. Criminal Records Bureau (CRB) check. Whether or not an offence is “stepped down” depends on the category of the offence. Offences are “stepped down” after a set period of time. **To reiterate, although a U.K. caution is not considered a conviction, the visa applicant should still declare the arrest (where applicable) and caution when applying for a U.S. visa.**

If a foreign national receives a **caution** by the police or Crown Prosecution Service in the U.K. for a **crime involving moral turpitude**, the issue of whether the individual’s admission when the caution is issued impacts his or her eligibility to receive a U.S. visa arises. The FAM requirements indicate that **for an admission made by the visa applicant to impact his or her eligibility to receive a U.S. visa, the individual must admit to the commission of the essential elements of a crime involving moral turpitude. The visa applicant must admit to all factual elements of the offense and the admission of the crime must be explicit, unequivocal and unqualified. The admission made by an individual who receives a caution in the U.K. does not affect the individual’s eligibility for a U.S. visa as the admission does not necessarily meet the specific requirements outlined in the Immigration and Nationality Act.** There are very strict rules concerning what constitutes an admission under U.S. immigration law. A full and complete admission made by a foreign national to a U.K. official in writing in connection with a U.K. caution is not sufficient as an admission for the purposes of providing a basis of excludability or inadmissibility even if the crime is one which supports exclusion. The attorney should still explore in detail the incident and the circumstances in which the admission was made.

Please also note that while a U.K. caution for a crime involving moral turpitude may not render a foreign national ineligible to receive a U.S. visa, it is important to note that the arrest for a crime involving moral turpitude will render the foreign national ineligible to travel to the U.S. on the Visa Waiver Program if the foreign national is a citizen of a Visa Waiver Program participating country. As a U.K. caution follows an arrest, a foreign national who has been arrested in connection with a crime involving moral turpitude will not be eligible for Visa Waiver Program travel and will need to apply for a U.S. visa at the U.S. Embassy in London.

CONCLUSION:

In conclusion, U.K. cautions are not considered convictions under U.K. criminal law and also under U.S. immigration law. Furthermore, admissions made by a foreign national in connection with a U.K. caution do not create grounds of excludability although theoretically a U.K. caution may involve further and more detailed questioning of the foreign national by a Consular Officer regarding the commission of a crime.*

* This memorandum is authored by Katherine Chow, a Partner at Goldstein & Lee, P.C. in New York City, who focuses her practice on the representation of clients on a wide variety of corporate employment-related nonimmigrant and immigrant visa matters. Ms. Chow is admitted to practice law in the state of New York and is also admitted to the Roll of Solicitors in England and Wales (Non-Practising). The author would like to acknowledge and thank Martin L. Rothstein, Edward Gudeon, Susan McFadden and Daniel Parisi for their significant contribution and concrete suggestions and comments to this memorandum.