Unpacking the DS-160 and DS-260 Forms—Tips for Consular Processing Practices

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INTRODUCTION

In 2009, the Department of State (DOS) introduced the online DS-160 nonimmigrant visa application to replace the previous paper form, the DS-156. A few years later, beginning in 2013, DOS began to phase in the online DS-260 immigrant visa application to replace the former paper form DS-230.[1] As envisioned by DOS, migrating the nonimmigrant and immigrant visa applications online would solve a host of problems—eliminate the need to store reams of paper forms, standardize the preparation process, minimize the risk of misplacing or misfiling documents, and facilitate the actual visa interview by reducing the required documents that the applicant had to present to the consul.

[1] Both the DS-160 and DS-260 can be accessed via the Consular Electronic Application Center (CEAC): https://ceac.state.gov/ceac/.

Despite these advantages, the adoptions of both the DS-160 and the DS-260 were not without controversy. Predictions of massive problems when the DS-160 was launched were overblown, but it took some time for the new form to work as intended. Uploading the photos on the DS-160 proved challenging for many applicants, and software glitches caused applicants to lose data and spend much longer filling out the forms than anyone had anticipated. There was widespread confusion about who could fill out and electronically submit the forms—a real concern for consular processing practices, which had grown comfortable with preparing and submitting the older paper forms for their clients. And ever since the DS-160 came online, DOS has been struggling to find a way to incorporate into it the specific data requested of E visa applicants, resulting in a highly unsatisfactory workaround that requires those applicants to fill out both the DS-160 and the old paper DS-156E supplemental form. In part because of the growing pains of the DS-160, DOS took longer to test and bring the DS-260 online, recognizing that it Page 110 captured much more data than the DS-160 and wishing to avoid the disruptions that a problematic roll-out would cause.

These problems are now largely resolved (other than the persistence of the DS-156E). The DS-160 actually works pretty well for most applicants and marks a distinct improvement over the old DS-156 in many ways, while the DS-260 is operating in a similar manner at busy immigrant visa (IV) processing posts. Consular officers and their staffs certainly appreciate no longer having to search through paper files, and their work spaces have been liberated from rows of metal filing cabinets and the need to periodically box and ship paper forms back to DOSfor long-term storage. Electronic data is much easier to retrieve and review, and advance submission of the forms means that applicants who discover errors on the forms they submitted

can submit updated forms rather than having to address the issue for the first time at the interview window. Concerns about applicants being unable to access computer terminals to prepare and submit their forms turned out to be overblown.

One thing that has not changed since both forms were launched, however, is that clients need help and guidance to make certain that they are filling them out accurately. This can be harder to do than with the previous paper forms, because the requirement that the forms be electronically submitted by the applicant alone increases the chances that this will take place without adequate oversight or review by counsel. Applicants are therefore at greater risk of harming their cases by misunderstanding one of the questions on the forms, misstating their circumstances, or neglecting to provide accurate answers to key questions about past interactions with U.S. immigration or consular officers. In addition, the use of drop-down boxes on both forms to give applicants (and counsel) the opportunity to explain and provide background information for some of their answers is a considerable temptation to over-explain—to use the form to persuade, instead of doing so at the interview itself. This can easily backfire.

These drawbacks do not mean that it is harder to work with the DS-160 and DS-260 than with their predecessor paper forms. Both forms are improvements over their predecessors that can make things easier for clients and attorneys.

How Do the DS-160 and DS-260 Differ?

The DS-160 and the DS-260, function in a similar manner and share many attributes in common. Both are online, fillable forms that collect data required of applicants for nonimmigrant and immigrant visas. The DS-160 asks for identifying information about the applicant, his or her spouse and children, parents, place and date of birth, purpose of travel, address in the United States, and details about prior visa applications and issuance. It also asks a series of very specific questions directly tied to the statutory grounds of inadmissibility in Immigration and Nationality Act (INA) section 212(a). The same information and questions are also part of the DS-260. Both forms must be signed electronically and submitted by the applicant only. The DS-160 captures a photo of the applicant, which is not part of the DS-260. The latter also asks the applicant questions about Social Security that are not asked of nonimmigrant visa applicants on the DS-160. Page 111

However, the DS-260 is considerably more labor intensive to fill out, because it captures far more data than the DS-160—an exemplar put on the Consular Electronic Application Center (CEAC) website by the Department of State to help navigate people through the process of filling out the form runs to 76 pages.[2] In addition to information about the applicant, the DS-260 asks for information about all former spouses, all children, employment, work and training information, former residences, travel, and medical issues. It also asks for considerable information about the petitioner. The stakes involved in an immigrant visa petition are higher than those in a nonimmigrant petition, and accordingly, the government needs to know more about the beneficiary, his activities, and his family. The need to collect and store all of this data was a principle reason that the DS-260 took so much longer to adopt than the DS-160. It also means that the opportunities for error in completing and submitting the DS-260 are more numerous than is the case with the DS-160.

[2] Department of State (DOS) Bureau of Consular Affairs, “DS-260 Exemplar,” (Oct. 2013), *https://travel.state.gov/content/dam/visas/DS-260%20Exemplar.pdf*.

Although they are not identical, the DS-160 and DS-260 pose the same challenges for applicants and counsel alike. What follows are some practice pointers on how you can help your clients deal with these forms and avoid mistakes that can adversely affect their ability to qualify for the visas they seek.

PRACTICE TIPS

Don't Let Your Client Submit Their DS-160 or DS-260 Forms Without First Sending Them to You for Review.

Because both the DS-160 and DS-260 are online forms designed to be submitted electronically, the temptation for clients to "do it themselves" and push the button to send in their forms without first running things by counsel is considerable. The instructions on *travel.state.gov* encourage this by pointing out up front to applicants that only they can push the button to transmit their forms and by making no direct mention of the attorney's role.[3] It is never a good idea for clients to send in their visa application forms without first having them reviewed by counsel. The best way to make certain this doesn't happen with your clients is to incorporate automatic review of the forms into your standard procedures for assisting visa applicants. For example, those clients who are able to come to your office can be assisted to fill out their forms while there and, when they are complete and reviewed, the client can then upload their photos and submit the form electronically from one of your work stations. While this will not work for clients that reside abroad or who are unable to come to your office, you can provide them written guidance for filling out the forms themselves that also explains how they can save their forms and download and send you copies of the application for your review before transmission. Page 112

[3] The CEAC instructions page (https://ceac.state.gov/genniv/) states that "other people" can assist with the DS- 160 visa application, but also notes that U.S. law (22 CFR §41.103) requires the applicant and no one else to electronically sign and submit his or her own application unless they qualify for an exemption due to age or infirmity. Nowhere in the instructions is the attorney's role in assisting visa applicants acknowledged.

Whatever mechanism you adopt to facilitate your review of your client's DS-160 and DS-260, it is crucial that you don't jeopardize their cases by sending these forms yourselves, even if the client authorizes you to do so. The client's electronic signature on his or her DS-160 or DS-260 is their assertion that the contents are truthful under penalty of perjury. If you transmit an application with an error you made in filling out the form, your client will be held responsible for this.

Identify the "Red Flag" Questions for Consuls and Make Certain Your Client's Answers Are Truthful.

Both the DS-160 and DS-260 request a great deal of information from visa applicants. How this information may be used by consular officers varies; for example, data about employment and education will be of value in determining whether E or L applicants are qualified for the visa category for which they are applying; personal data identifies the applicant and his or her family members, and provides a way to cross reference other visa applications they may have presented. Mistakes in providing this data—an incorrect date of birth or a wrong passport number—can and will be noted, but these can usually be relatively easily explained at the interview. However, consuls will focus very closely on the applicant's answers to questions about visa applications and denials, so it is very important to make certain that the details provided by the applicant on the forms—including dates, locations of visa applications, and outcomes of interviews—are factually correct. Similarly, the applicant's answers to the laundry list of questions about past actions that could lead to inadmissibility will be closely scrutinized. It is absolutely essential that all of these questions be answered truthfully, even when you believe that the actions in which your client engaged do not constitute the elements of inadmissibility. Keep in mind that by submitting his or her DS-160 or DS-260, the applicant is certifying that the information it contains is truthful. If this turns out not to have been the case, the applicant can found inadmissible under INA section 212(a)(6)(c) at his or her interview for having made a material misrepresentation. If for some reason the erroneous information is not detected or elicited at the visa interview, the applicant could suffer the same fate at his or her adjustment or naturalization hearing if it is uncovered by the adjudicator at that time.

It is of particular importance to make certain that the applicant's information about past arrests or convictions is accurate. The DS-160 and DS-260 both ask the applicant the same question concerning criminal activity:

> "Have you ever been arrested or convicted for any offense or crime even though subject of a pardon, amnesty, or other similar action?"

The wording of this question is designed to provide as much clarity as possible to applicants, but it remains a persistent source of concern, particularly for applicants from countries where arrests and/or convictions are regularly expunged from official records, or where juvenile arrests are not made part of the applicant's personal records. In such jurisdictions, an applicant may believe that she can honestly state that she has not been arrested or convicted because she is not considered to have any arrest record under the laws applicable to her. U.S. immigration law, however, does Page 113 not make any distinction between arrests and/or convictions that have been expunged or judicially removed. Because of this, you must press to obtain all relevant information from your client about past arrests and convictions, no matter how minor, and if they acknowledge any, ensure that they answer the above question with "yes." This is true for arrests that led to dropped charges in addition to those that resulted in court action. The client need not worry that there will be no opportunity to clarify what happened—a "yes" answer to this question creates a drop-down box that gives the opportunity to provide an explanation of what happened.

When Prompted to Provide an Explanation for "Yes" Answers to the Questions Concerning Security, Medical, and Criminal Actions on the DS-160 and DS-260, Keep the Answers Short and Simple—Resist the Temptation to Provide Too Much Detail

The availability of drop boxes in which to put explanatory background information in response to "yes" questions on the DS-160 and DS-260 can be a very mixed blessing for visa applicants. Consular officers do not want the applicant to use his or her visa application as a substitute for their visa interview—the purpose of these forms is not to give the applicant a way to argue for his or her visa issuance. Instead, the forms are designed to give the consuls the facts that they need to conduct an informed interview and reach sound decisions on admissibility and visa issuance. Many applicants and their counsel see the opportunity to provide background information on their client's arrests, prior visa applications, or past associations as another way of advocating for them before the consul. As a consequence, they allow their clients to insert far too much verbiage in the drop-down boxes. Consular officers do not have a great deal of time to review these forms—in fact, the first opportunity they have to review the applications comes immediately prior to the interview itself. Anything that slows them down at that point will not be helpful and can be counterproductive if the consul concludes that the client and his or her counsel are "protesting too much."

The best approach to answering these questions is to be factual. If a client has been arrested but not convicted, or the charges were dropped, this can be confirmed in a simple one or two sentence explanation. It is not necessary to add in background on what happened or the basis under local law for the dismissal or the case. Any more detailed information that the consul could conceivably require should be contained in the official court or police records that the applicant received, and which should be brought to the interview for the consul to review. The fact that the applicant believes that a conviction was improper or unjustified may be of great importance to him or her, but it is not relevant to the fact that an arrest or conviction took place, and should not be part of what is put in the explanation. Consuls need to know what happened, when it happened, what the charges were, and how they were resolved—either by conviction, fine, prison term, dismissal, or expungement.

Similarly, all that is relevant about a previous visa denial is where it took place, when, and basic information about the basis of the denial. To illustrate: Page 114

> "I applied for a visitor's visa in Brussels on May 10, 2014, but my application was denied because the consul felt I would not return/was not persuaded that I had no immigrant intent"; or

> "My application for a business visa in London on May 10, 2014, was denied because I had a criminal conviction that made me inadmissible"; or
>
> "I applied for a tourist visa in Milan on May 10, 2014, but was denied because I did not advise the consul of three prior visa denials."

It is not necessary to provide more detail than this. Information about previous visa denials will be in the Consular Lookout and Support System (CLASS) already, including notes about what took place at the interview, and if you add too much detail into this box, it could conceivably conflict with what the previous consul put into his or her notes. It's also not necessary to specify the provision of the INA that was applied by the previous consul, although it's not harmful to reference it.

The situation is more delicate when circumstances that point to possible inadmissibility are being brought to the consul's attention for the first time at the interview. In such instances, the DS-160 and DS-260 should be used to make the consul aware of what happened before the applicant reveals it at the interview, and that will require putting a bit more information in the drop-down boxes. That does not mean that the applicant should argue or advocate for why what happened was not a ground of inadmissibility or a material misrepresentation, however. The place for such assertions should be in a separate letter or brief that you have prepared for the consul to review. Finding the balance between acknowledging something that took place on the visa application and the need to put it in context for the consul will require careful drafting and full cooperation from the client. Again, the objective is to be forthcoming on the forms but not argumentative or adversarial.

Review the Submitted DS-160 and DS-260 Before the Interview Takes Place to Ensure That No Misleading or Incorrect Information Has Been Inadvertently Transmitted; If the Form Needs to Be Changed or Amended, Have the Client Submit a Corrected Version Before the Date of The Visa Interview

One of the advantages of the electronic DS-160 and DS-260 is that both can be re-sent after the fact if any mistakes or inaccuracies are discovered before the interview takes place. This is actually a more common occurrence than one might expect. First, the large amount of data that are captured by both forms (especially the DS-260) increases the chance that some of it may be erroneous, due to typos or hasty proofreading. This is more likely to be the case if the client is filling out and sending the forms from a different location. Even if you've previously reviewed screenshots of the form before transmission, you can't be there to confirm that all of your recommended fixes are incorporated by the client. Have the client send you a copy of the application as transmitted so that you can go over it one more time. Page 115

Second, clients can and do provide different information after the form has been sent; for example, they may suddenly remember a prior visa refusal or an arrest when they were young. Such an omission from either form could well be a material misrepresentation. But, if you find this out before the interview, you can neutralize that omission by submitting a corrected version that is accurate. While the consul will be able to notice that a follow-on application has been submitted by the applicant, they will not seek to compare the two versions to see why this was done and will always use the most recently submitted version.

Every online form has drawbacks, and the DS-160 and DS-260 are no exceptions. But with the right procedures in place, they can work well for you and your clients and help make the visa application process easier to navigate.