

# The Fundamentals of Lawyering at Consular Posts

[*The Consular Practice Handbook*, 3rd Ed. (2017)]

by [Jan M. Pederson](#)

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## SCOPE OF ARTICLE

The practice of immigration law often involves representing nonimmigrant and immigrant visa applicants before U.S. embassies and consulates. This article reviews the basic procedures for applying for nonimmigrant and immigrant visas at U.S. consular posts abroad. It focuses on the statutory and regulatory framework and provides practice tips for effective legal representation of clients in the context of consular absolutism in the post-9/11 world and attempts by the Bureau of Consular Affairs to further dilute the right to counsel in visa proceedings.

In addition to the relevant sections of the Immigration and Nationality Act (INA), the regulations of U.S. Citizenship and Immigration Services (USCIS) and the U.S. Department of State (DOS), the USCIS Adjudicator’s Field Manual (AFM),<sup>1</sup> and the DOS Foreign Affairs Manual (FAM),<sup>2</sup> one must be familiar with the most recent DOS cables and the specific policies and procedures at the consular post where the application will be made in order to effectively represent clients.<sup>3</sup> Page 20

<sup>1</sup> Available at <http://1.usa.gov/uscis-afm>

<sup>2</sup> Available at <http://fam.state.gov>

<sup>3</sup> The Rome District Chapter, Bangkok District Chapter, and Latin America and Caribbean Chapter of the American Immigration Lawyers Association (AILA) have robust listserves that provide real-time information on consular post policies, procedures, and personnel.

DOS regulations provide that clients do not have the right to representation by counsel at consular visa interviews. This anachronistic aspect of immigration law continues to be a matter of controversy, and is an important consideration when developing strategy and advising clients. DOS acknowledges that there is an appropriate role for the attorney in the visa process, stating:

In the sometimes-complex world of visas, a good attorney can prepare a case properly; weed out “bad” cases; and alert applicants to the risks of falsifying information. The attorney can help the consular officer by organizing a case in a logical manner, by clarifying issues of concern, by avoiding duplication of effort and by providing the applicant with the necessary understanding of the visa process.<sup>4</sup>

<sup>4</sup> Department of State (DOS) Cable, 83 State 323769 (Nov. 1983) from Cornelius D. Scully, III, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, to U.S. Consulate, Taipei.

DOS has an institutionalized anxiety about according visa applicants the right to counsel in a meaningful way, including the right of the applicant to have an attorney present at the visa interview. Although there is statutory authority to suggest that an applicant has a right to be accompanied by counsel,<sup>5</sup> DOS takes the position that whether an attorney is permitted to represent a client at a visa interview, and under what circumstances, is at the sole discretion of the consular post where the application is made. The current policy is described as follows:

<sup>5</sup> See Administrative Procedure Act (APA), 5 USC §555(b).

Each post has the discretion to establish its own policies regarding the extent to which attorneys and other representatives may have physical access to the Consulate or attend visa interviews, taking into consideration such factors as a particular consulate's physical layout and any space limitations or special security concerns. Whatever policies are set must be consistent and applied equally to all. For example, either all attorneys at a particular post must be permitted to attend consular interviews or all attorneys must be prohibited from attending interviews.<sup>6</sup>

<sup>6</sup> [9 Foreign Affairs Manual \(FAM\) 602.1-2\(b\)](#).

Where such fundamental rights are at stake, leaving the fate of the affected parties to the many posts where the visa applications are made and to which window an applicant is summoned for an interview is morally and legally indefensible.

Attorneys should familiarize themselves with the "access to counsel" policy at the particular post involved. Consular posts vary widely in their positions, from recognizing the right to counsel and facilitating counsel's presence at the visa interview to refusing attorneys admission to the building where the interview is conducted. The policies of consular posts are often reported on the AILA website. In Page 21 addition, minutes from the liaison meetings with DOS officials are posted on the AILA website.<sup>7</sup>

<sup>7</sup> <http://www.aila.org>, select InfoNet Research Library, select Documents by Type, select Liaison Activity under Agencies & Liaison, and search "DOS Meeting Minutes."

Permitting the consular officer to determine whether the applicant is entitled to legal counsel and the parameters of legal representation, if permitted at all, violates basic values of the American justice system. The American Bar Association, AILA, and the Administrative Conference of the United States have long taken the position that visa applicants should be accorded the right to have counsel physically present at visa interviews and the right to appeal visa denials. The lack of a right to counsel is a shameful vestige of a system that should be changed by either the U.S. Department of Homeland Security (DHS), in its authority over visa policy, or by legislation. AILA has drafted a "Petition for Rulemaking," which will be filed with DOS. The rule would implement a meaningful right to counsel that would provide for access to counsel at visa interviews.

**Practice Pointer:** During the visa process itself, many consular officers will discuss individual cases with attorneys by telephone or email. Before initiating a dialogue, it is wise to send an email to alert the consular officer as to the nature of the case (including case number) and the matter to be discussed.

Representing clients at consular posts is a challenging undertaking—particularly at posts where clients have no access to counsel, elevating the consular officer to prosecutor, judge, and jury. Recognizing this real-world fact, however unjust, is key to successful representation in the milieu of consular absolutism.

**Practice Pointer:** Courtesy counts, both on the part of the attorney and the client. The local consular employees are very often at consular posts for decades and they have a very long memory—negative and positive. They are usually the first point of contact with a consular section, and consular officers often rely

on their local expertise and knowledge in case adjudication. Be polite and thank them without fail, in writing and in person.

**Practice Pointer:** Always go through a mock interview via Skype with the client to impart interview skills and reduce anxiety.

**Practice Pointer:** A letter to the ambassador extolling the expertise and courtesy of a consular official and consular assistant with a copy to the officer or assistant will long be remembered. Page 22

## SOURCES OF AUTHORITY

### Statutory References

- Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101–1504, 1521-37).
- [Subchapter II, Part I—Selection System, INA §§201–210.](#)
- [Subchapter II, Part II—Qualifications for Admission of Aliens; Travel Control of Citizens and Aliens, INA §§211–219.](#)
- [Subchapter II, Part III—Issuance of Entry Documents, INA §§221–224.](#)
- [Subchapter II, Part IV—Inspection, Apprehension, Examination, Exclusion, and Removal, INA §§231–241.](#)
- [INA §245](#) (adjustment of status).
- [INA §248](#) (change of nonimmigrant classification).

### Regulatory References

- [8 CFR §§245, 248.](#)
- [22 CFR §§40–42.](#)

### Instructions/Interpretive Materials

DOS Foreign Affairs Manual (FAM). DOS substantive interpretations of the statutes and regulations pertaining to the issuance of visas are found in the FAM. The FAM can now be accessed online at <http://fam.state.gov> and has a keyword search feature. All sections have been renumbered, and not all new sections are currently available for online viewing. However, there is a cross-referencing spreadsheet (“crosswalk”) on the website so that practitioners can locate the new FAM citations.

Other sources of information include:

- **Consular Post Websites**—Consular post websites can be found at <http://www.usembassy.gov>. Always check the consular post website for important substantive and procedural details before commencing representation of a client and/or communicating with the post. It is important to note that the websites are written for the public, not specifically for attorneys.
- **Chief Consular Officers**—Contact information for senior officials at each post can be found at <http://www.state.gov/documents/organization/111812.pdf>.
- **DOS Websites**—Located at <http://www.travel.state.gov> and <http://www.state.gov>, these sites are useful sources of information. The visa reciprocity tables and information relating to the availability of civil documents listed by country are available online at <http://bit.ly/visa-reciprocity>.
- **AILA.org**—<http://www.aila.org> provides invaluable, up-to-date information posted by AILA National. Information includes DOS cables, memos, and minutes of meetings between Visa Office officials and

the AILA Department of State Liaison Page 23 Committee. Members may make inquiries of other members about practices at particular consular posts on the site at the AILA Message Center.

- **AILALink**—A comprehensive online immigration law library found at <http://www.ailalink.org>.
- **Visa Bulletin**—The Visa Bulletin, found at <http://bit.ly/VisaBull>, is a valuable monthly DOS publication describing immigrant visa preference categories, the numerical immigrant visa allocation system, and the worldwide movement of priority dates within the preference categories. The Visa Bulletin contains important information regarding DOS policies, regulations, and matters affecting immigrant visa issuance. It also provides diversity visa lottery program information. Attorneys may subscribe to the Visa Bulletin. An archive of previously published Visa Bulletins is available. A feature added in September 2015 is the publication of two sets of cut-offs dates —filing and final action dates—with an explanation of the significance of each.
- **Interpreter Releases**—A weekly publication that reports and analyzes current developments, cases, regulations, and other matters involving immigration law and agency procedures. It reproduces the latest cables from DOS and correspondence from USCIS. Interpreter Releases can be accessed by subscription online through Thomson Reuters, <http://www.thomsonreuters.com>.
- **Immigration Briefings**—A publication providing in-depth analysis of current immigration issues, available by subscription from Thomson Reuters.

## IMMIGRANT VISAS

### Consular Processing vs. Adjustment of Status

Permanent residence (green card) status is conferred either through issuance of an immigrant visa (IV) by a U.S. consular post abroad or through approval of an adjustment of status (AOS) application (Form I-485) by USCIS in the United States. For those present in the United States, both alternatives may be available in some circumstances.

One of the advantages of pursuing adjustment of status (AOS) for clients in the United States who are eligible is that AOS applicants have the right to challenge the denial of their applications in administrative tribunals (immigration court and the Board of Immigration Appeals (BIA)) and in federal courts. Denial of an IV at a consular post based on questions of fact is essentially nonreviewable, although questions of law are reviewable through the DOS advisory opinion process, which can be lengthy; the denial of an immigrant visa can be challenged in federal court in some circumstances. An example of a reason to pursue adjustment of status rather than consular processing in employment-based cases is where the applicant has ported employment, which is not permitted in consular processing.

Advising clients on whether to apply for consular processing at an American consular post abroad or adjustment of status in the United States (where the client is Page 24 in the United States and eligible for either process) is critically important and requires the application of legal knowledge as well as knowledge of consular post and USCIS processing times and practices. For many years, consular processing was often far more expeditious than adjustment of status. Thus, if there was no ground of inadmissibility and the basis for immigrating was solid (family or employment), the wisdom of experienced practitioners was to opt for consular processing. However, as consular processing has become delayed by the addition of the DOS National Visa Center (NVC) in Portsmouth, NH, into the process and by the increased risk of security clearance delays for many applicants, USCIS processing has become preferable, as processing times have been reduced for AOS. The principal applicant and family members are generally eligible for work permits and advance parole travel documents throughout the pendency of the application regardless of visa number retrogression and because of the waiver of in-person interviews in most employment- and many family-based cases. The surviving benefit of consular processing is knowing the date, time, and place that permanent residence will be conferred, absent unforeseen circumstances.

The most important caveat is that counsel must know the client's entire visa history, background, and prior statements on visa applications, particularly if it appears that a client may be subject to the three- or 10-year

unlawful presence bar. Attorneys must conclude with certainty that there is no ground of inadmissibility before recommending consular processing. After September 11, 2001, both granted and denied visa applications are retained forever in the DOS databases, and information sharing with other agencies has significantly increased. Counsel should carefully reconstruct prior visa applications with the client if counsel does not have a copy of the prior visa applications (DS-156 or DS-160) and should request the DOS file of the client under the Freedom of Information Act (FOIA). The processing times of FOIA requests have been reduced substantially; however, the FOIA response will generally produce only copies of redacted visa applications. Consular notes, which contain key information, are not released through an administrative FOIA request.

Clients must be thoroughly prepared for the in-person IV interview, leaving no question unanswered. In employment cases, clients are often quizzed at IV interviews on their knowledge of proposed job duties in the underlying employment petition and their employment history. In family-based cases, the client may be peppered with questions on the domicile of the petitioner, the immigration history of the petitioner, or intimate details about family life. The attorney should review with the client all documents that ever have been filed with USCIS, DOS, and the Department of Justice's Executive Office for Immigration Review (EOIR) (i.e., the immigration courts). Do not make the potentially disastrous error of believing that an approved I-130 or I-140 petition cannot be questioned by a consular officer. They often are, so prepare your client for intensive questioning on information contained in a PERM (Program Electronic Review Management) labor certification application, an I-140, I-130, or I-360 petition. Always make certain that the client has a copy of the complete petition filing and knows its contents. In employment cases, consular officers often pose detailed skills questions and administer skills tests at the visa interview. Competent lawyering mandates that an attorney prepare clients for this scenario at the IV visa interview. Mock interviews with clients via Skype have become an essential tool in the arsenal of effective lawyering.

The option of dual processing (simultaneously pursuing AOS and an IV) has been almost nullified with the centralization of most facets of IV processing, including document review and appointment scheduling, at the NVC. Attorneys are therefore tasked with closely evaluating each client's immigration history and immediate exigencies to determine which pathway to permanent residence should be pursued.

**Practice Pointer.** Interviews are usually waived by USCIS in employment-based and many nonspouse, family-based AOS cases (e.g., sponsorship of a parent), while IV interviews at U.S. consular posts cannot be waived. If a client does not interview well and the attorney will not be present at the IV interview, AOS may be the best alternative.<sup>8</sup>

<sup>8</sup> Employment-based I-485s are filed at a USCIS Lockbox facility for initial processing, and then sent to either the Texas Service Center or the Nebraska Service Center for adjudication. Family cases continue to follow a torturous route through the Chicago Lockbox to the National Benefits Center to district offices for interviews where the beneficiary resides in the United States, with widely divergent processing times, depending on local office timeframes and interview waiver policies. Family petitions by petitioners living abroad in a country where there is no USCIS office are now processed by the Chicago Lockbox and then transmitted for adjudication to a service center, with some emergent and humanitarian circumstances exceptions, permitting filing of an I-130 at a consular post. Local I-130 filings at consular posts require that the consular post obtain authorization from the overseas USCIS office to accept and adjudicate the I-130.

**Practice Pointer.** Attorneys should not proceed with consular processing blindly and should know the consular post before sending a client. This includes researching post personnel, policies, idiosyncrasies, hot-button issues, and attitudes toward your client's type of case and attorney representation before proceeding with presentation of a case. Much can be learned about the consular officer before whom application will be made through Google, LinkedIn, and other social media. AILA mentors are available to answer consular processing questions. The AILA Message Center is also a good source for obtaining post-specific information. For example, India posts for IT personnel can be problematic; in Manila, occupations such as accountants, financial analysts, and nurses are intensely scrutinized; in Cambodia and Vietnam, fiancé(e) and spouse cases are intensely scrutinized. Page 26

## Eligibility

An applicant is eligible for an immigrant visa if he or she meets the substantive, quantitative, and qualitative restrictions imposed by the INA.

### ***Immigrant Visa Categories***

An applicant for an IV must establish entitlement under one of the classifications enumerated in the INA.<sup>9</sup> An applicant is eligible to receive an IV if:

<sup>9</sup> [22 Code of Federal Regulations \(CFR\) §40.1\(i\)](#).

- The applicant is the beneficiary of an approved visa petition granting family-based immediate relative or preference classification, or employment-based preference classification; or
- The applicant is a derivative family member (*i.e.*, spouse or unmarried minor child under 21 of preference applicants); or
- The applicant is entitled to special immigrant status under [INA §101\(a\)\(27\)](#); or,
- The applicant qualifies for a visa under special legislation, such as the Chinese Student Protection Act of 1992,<sup>10</sup> Vietnam Amerasian program, or certain provisions of the Immigration Act of 1990 (IMMACT90),<sup>11</sup> such as the diversity visa lottery provisions.

<sup>10</sup> Pub. L. No. 102-404, 106 Stat. 1969 (“CSPA”).

<sup>11</sup> Pub. L. No. 101-649, 104 Stat. 4978., 5052 (effective Nov. 29, 1990) (“IMMACT90”) *as amended by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1733, 1751.

### ***Numerical Control and Priority Dates***

The allocation of IVs is controlled by a system of worldwide numerical limitations, based on foreign state chargeability and the chronological order of the visa applicant’s priority date.<sup>12</sup> “Immediate relatives” of U.S. citizens—*i.e.*, parents (where the U.S. citizen is at least 21 years of age), spouses, and unmarried children under the age of 21—are not subject to these limitations and therefore have no priority date.<sup>13</sup> For those who are chargeable to countries that are oversubscribed, meaning that there is a greater demand for visas than there are visas available, it is imperative that a priority date be established at the earliest possible moment, as this establishes the beneficiary’s place in the green card line, which in some cases may be several decades long.

<sup>12</sup> [22 CFR §42.51\(b\)](#).

<sup>13</sup> [22 CFR §42.21\(a\)](#).

Foreign nationals who are subject to the numerical limitations of the INA may establish a priority date through the proper filing of a PERM labor certification application or a preference visa petition, as required. A spouse or child of a principal alien acquired prior to the principal alien’s admission to the United States as a permanent resident is entitled to the priority date of the principal alien. A child born Page 27 of a marriage that existed at the time the principal alien was admitted for permanent residence is considered to have been acquired prior to the principal alien’s admission for permanent resident.<sup>14</sup> There are other provisions of law that provide for the retention and loss of priority dates and the derivation of priority dates, and a comprehensive review can be found in the FAM.<sup>15</sup> The date of filing—assuming subsequent approval of the underlying PERM labor certification and/or preference petition—establishes the priority date for visa issuance. For some classifications and nationalities, there is a long wait between the time a priority date is established and the time an immigrant visa becomes available. Once established, it is important to maintain the priority date, and counsel should advise clients of actions that could impact the priority date—such as marriage, divorce, or change of employment.

<sup>14</sup> [22 CFR §42.53](#).

<sup>15</sup> See [9 FAM §§502](#) and [503](#) for a detailed analysis of acquisition, retention, loss, and calculations of priority dates.

**Practice Pointer:** Employment-based priority dates in employment-based first, second, and third preferences generally are retained and transferable among these preferences and within the same preference to subsequent petitions when the I-140 has been approved. However, it is possible that a new employer would be required to file and obtain an approved PERM labor certification and an approved I-140 before the foreign national could become a lawful permanent resident (LPR) based upon an offer of employment. A priority date accorded by approval of an employment-based first, second, or third preference immigrant visa petition is retained by the beneficiary for any other first, second, or third preference employment-based immigrant visa petition approved subsequently for the same beneficiary.<sup>16</sup> In all cases, the beneficiary of multiple petitions is entitled to the earliest of the filing dates of multiple petitions. Subsequent petitions need not be filed by the same petitioner or for the same type of employment. However, where the applicant is no longer working for the initial petitioner, it would be reasonable to make inquiries to determine whether the first petition had been revoked. In a welcome change, USCIS published a final rule, effective January 17, 2017, that permits the foreign national to retain the priority date of an I-140, even where the employer withdraws the I-140 or the petitioning business ceases to exist, absent fraud or gross error. Page 28 <sup>17</sup>

<sup>16</sup> A priority date established in the employment-based first, second, or third preference category is not transferable to employment-based fourth or fifth preference petitions or to a family-sponsored petition.

<sup>17</sup> [80 Fed. Reg. 81899](#), “Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers.”

Counsel should also determine whether the client may be chargeable to a country other than where the client was born, known as cross-chargeability. Individuals who are chargeable to China, India, Mexico, and the Philippines are subject to lengthy backlogs in many employment and family preference categories, and if a client born in one of those countries may be charged to another country, many years may be shaved off the wait for a green card. The exceptions to the rule that chargeability is governed by country of birth are as follows:

- A child may be charged to the foreign state to which either parent will be charged if necessary to prevent separation from a parent or parents.<sup>18</sup>
- A principal spouse may be charged to the state of birth of his or her *accompanying* spouse if necessary to prevent their separation.<sup>19</sup> For example, if an Indian-born principal EB-2 applicant is married to an Indian citizen born in Germany, both applicants may be charged to the German quota if the spouses are applying for adjustment status at the same time. With respect to immigrant visa process, a complex set of rules apply with a six-month limitation for action.<sup>20</sup>
- A foreign national born in the United States who is not a U.S. citizen will be charged to the state of which the foreign national is a citizen or subject (e.g., children of accredited diplomats). However, birth to one parent holding diplomatic status and one American citizen parent in the United States would confer citizenship on the child. When both parents hold diplomatic status (A-1 and some A-2 visa holders), counsel should obtain a statement from the DOS Office of the Chief of Protocol confirming the dates diplomatic status was held by the parents and the type of immunity granted: limited or full immunity.<sup>21</sup>
- A child may be charged to the foreign state of either parent where that child is born in a foreign state where neither parent was born or had residence at the time of the foreign national’s birth.<sup>22</sup> This is known as the “missionary” rule of chargeability. The American Competitiveness in the 21st Century Act (AC21)<sup>23</sup> made significant changes to the composition and length of the permanent resident card line in an attempt to ameliorate the harm that oversubscribed per-country limits and USCIS backlogs caused to American businesses and their foreign national employees. Section 106(d) of AC21 recaptured employment-based visa numbers that were available but not used in Page 29 fiscal years 1999 and

2000 and made them available to the first three employment-based preferences (EB-1, EB-2, and EB-3), beginning in FY2001.

<sup>18</sup> [9 FAM 503.2-4\(A\)](#).

<sup>19</sup> [22 CFR §42.12\(c\)](#).

<sup>20</sup> [9 FAM 102.3-1](#).

<sup>21</sup> [22 CFR §42.12\(d\)](#).

<sup>22</sup> [22 CFR §42.12\(e\)](#).

<sup>23</sup> [Pub. L. No. 106-313](#), 114 Stat.1251 (codified at [8 U.S.C. § 1154\(j\)](#)).

Section 104 of AC21 removed the per-country visa limit in instances in which the overall visa number usage for employment-based visas is less than the numbers available without regard to per-country limits. This provision impacts primarily persons born in China, India, and the Philippines.

Current cut-off dates for the numerically limited visa categories may be accessed in the *Visa Bulletin*.<sup>24</sup> Visa demand experienced for each country and in each preference category impacts visa numbers available for all other countries and categories, because of the “fall down” and “fall across” system used to ensure that as many visa numbers as possible are used each fiscal year. Throughout the course of the fiscal year, DOS undertakes a statistical assessment as to whether additional visa numbers should be made available to the lower preference categories and to the oversubscribed countries. Whether there are free numbers to fall across and down visa categories depends on the demand experienced in the higher preference categories and the number of applications from countries that do not consistently experience an oversubscription. For example, it is not unusual to see forward leaps in the cut-off dates for EB-2 India and China in the third or fourth quarter of the fiscal year. However, the demand for visa numbers is dependent on a broad variety of factors, and priority date movement for each fiscal year will be different. Unused visa numbers do not carry over from one year to another; thus it is a “use it or lose it” situation.

<sup>24</sup> See <http://bit.ly/VisaBull>.

In addition to immediate relatives of U.S. citizens, other foreign nationals are not subject to the numerical limitations of the INA.<sup>25</sup> These include:

<sup>25</sup> [22 CFR §§42.21–23](#).

- Battered spouses/children;
- Returning resident foreign nationals;
- Certain former U.S. citizens;
- Qualifying ministers of religion and religious workers; and,
- Certain widows and widowers of U.S. citizens.

Historically, special immigrants defined at [INA §101\(a\)\(27\)](#) were not subject to numerical limitations, but IMMACT90 subsumed most of these categories under EB-4, allocating approximately 10,000 visas per year to this category. Applicants who are subject to the numerical limitations of the INA include:

- Family-based preference immigrants;
- Employment-based preference immigrants, including immigrant entrepreneurs/investors; and,
- Diversity immigrants.<sup>26</sup> Page 30

<sup>26</sup> [9 FAM 503.1-4](#), and [9 FAM 502.4](#).

### **Admissibility**

In addition to meeting the substantive categorical requirements for immigrant classification and having a visa number available, a visa applicant must otherwise be admissible. The applicant must pass muster under [INA](#)



[§212\(a\)](#), which delineates the grounds of inadmissibility. It is important to distinguish between grounds of inadmissibility under §212(a) and removability under [INA §237](#). Once an applicant has departed the United States to apply for a visa at a U.S. consular post abroad, the grounds of removability no longer apply.

## **Jurisdiction over Immigrant Visa Applications**

In most instances involving consular processing of immigrant visas, the application is made in the applicant's country of nationality or last residence. There are circumstances, however, in which the applicant is unable or unwilling to return to the home country and may be able to process the IV in a third country. Such circumstances may include fear of persecution, lack of consular services, or other hardship. DOS gives little weight to avoidance of costly travel or loss of time at work as a justification for third-country immigrant visa processing. The law permits the visa application to be submitted in any country, provided that the physical presence and other requirements are met.

In instances in which DOS has not designated a "homeless visa" processing post (see chart below) for an affected nationality, it is incumbent on counsel to locate a third-country processing post where the IV application will be accepted. Consular officers have proven understanding in accepting jurisdiction of the IV applications of same-sex marriage applicants where the foreign national spouse would normally process an IV in a home country hostile to same-sex marriage and where the applicant has a fear of persecution in returning to the home country, even where an asylum application has been denied.

### ***Home-Country Processing***

[22 CFR §42.61\(a\)](#) provides:

Alien to apply in consular district of residence. Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over that area if the alien can establish that he or she will be able to remain in the area for the period required to process the application. Finally, a consular office may, as a matter of discretion, or shall, at the direction of the Department, accept an immigrant visa application from an alien who is neither a Page 31 resident of, nor physically present in, the area designated for that office for such purpose. For the purposes of this section, an alien physically present in the United States shall be considered to be a resident of the area of his or her last residence prior to entry into the United States.

The physical-presence option has been diluted and become confusing with the insertion of NVC into the processing of immigrant visas, as processing times are unpredictable. If an applicant is physically present in a third country and anticipates being present for several months, is that sufficient for conferring physical-presence jurisdiction given that all IV processing is completed at the NVC and it does not publish processing times? The NVC needs to publish processing times by consular post to expand visibility and transparency and to guide all visa applicants and their attorneys in processing at a third-country post.

### ***Third-Country Processing***

Consular posts are not obligated to accept a visa application from an applicant who does not reside in the consular district. However, they must process a visa application for an applicant physically present in the consular district, even if the applicant is not a resident there, provided the applicant can demonstrate that he or she has permission to remain for the period necessary to process the visa.<sup>27</sup> The successful jurisdictional plea normally requires a showing of hardship, extenuating circumstances, or humanitarian considerations on behalf of an applicant that is "homeless" or unwilling or unable to process in the home country.

<sup>27</sup> [22 CFR §42.61\(a\)](#); [9 FAM 504.4-8\(C\)](#).

Consular posts are strongly urged by DOS to accept visa applications from applicants who are neither residents nor nationals of their districts if the applicant can demonstrate that legitimate hardship would result if they had to return to their last country of residence. Physical infirmity, advanced age, war, and lack of a visa-issuing post in the applicant's country are examples that may constitute hardship.<sup>28</sup> When a principal applicant and an accompanying spouse are citizens of or last residents in different consular districts, the applicants may choose at which post they wish to apply. For example, if the principal foreign national is a citizen of Lebanon whose last residence was Lebanon, and whose "accompanying" spouse is a citizen of Canada and whose last residence was Canada, the applicants may process their IV in Beirut or Montreal.<sup>29</sup> Note the distinction between country of nationality and country of last residence in determining place of application. The FAM notes state the consular district of last residence, not country of nationality, should generally be the place of application. In practice, DOS often permits processing in the country of citizenship or last residence.<sup>30</sup> To do otherwise would cause hardship to applicants Page 32 who were long-term residents of a country but citizens of another country. This is the situation with persons who were born in and resided in Persian Gulf countries most of their lives but are citizens of other countries, because Persian Gulf countries do not confer birthright citizenship if the parents are not citizens.

<sup>28</sup> See [9 FAM 102.3-1](#); [9 FAM 504.4-8\(D\)](#); [9 FAM 504.4-8\(E\)\(1\)](#) (defining homeless case).

<sup>29</sup> [9 FAM 504.4-8\(C\)](#).

<sup>30</sup> [9 FAM 504.4-8\(B\)](#).

IV applicants who are citizens of countries where no U.S. consular post exists or where visas are not issued, e.g., Iran, Libya, Somalia, Eritrea, South Sudan, and Syria, may apply at consular posts designated by DOS.<sup>31</sup> A list of current IV "homeless" processing posts, found at [9 FAM 504.4-8\(E\)\(1\)](#), is:

<sup>31</sup> 69 *Interpreter Releases* 1373 (Oct. 26, 1992) (describing processing procedures for homeless Cubans); 70 *Interpreter Releases* 789 (June 14, 1993) (adding Bosnia and Herzegovina to the homeless immigrant visa program).

#### **Homeless Nationalities Selected Processing Posts**

Eritrean	Addis Ababa and Nairobi
Iranian	Abu Dhabi, Ankara, Yerevan
Libyan	Casablanca
Somali	Nairobi
South Sudanese	Nairobi
Syrian	Amman

These designations are fluid as they are intertwined with global politics and subject to change without notice. It is incumbent upon counsel to check the consular post website or the FAM<sup>32</sup> for updates on designated IV processing posts for homeless nationalities. It is often possible to obtain consent from consular posts other than those listed above to process such cases.

<sup>32</sup> [9 FAM 504.4-8\(E\)\(1\)](#).

DOS authorizes and encourages posts to accept, on a discretionary basis, employment-based IV applications for nonresident applicants who are homeless or facing hardship as a result of long processing delays at USCIS.<sup>33</sup> The posts accepting such discretionary cases may cease to do so at any time and may stop accepting cases if the volume becomes too high.

<sup>33</sup> Although homeless applicants are encouraged to apply at the posts designated in the *Foreign Affairs Manual*, other posts are generally amenable to accepting homeless cases. [9 FAM 504.4-8\(E\)\(1\)](#).

An applicant seeking to apply for an IV in a third country also must qualify for admission to that country. Inquiry should be made as to whether a visa to enter the country may be obtained before selecting a third-country post. USCIS field offices will generally issue advance parole to applicants in the United States applying in a third country to facilitate admission and permit return to the United States if a processing delay

is encountered. The Office of International Affairs Headquarters of Page 33 USCIS issues advance parole to applicants who are or have been in deportation, exclusion, or removal proceedings.

DOS in the past has encouraged consular posts in home countries as well as in third countries to streamline IV processing consistent with security concerns by requesting IV consular posts to accept employment-based IV cases for beneficiaries whose last residence was in the post's consular district, upon presentation of: (1) an original I-797 approval notice for the I-140; (2) a copy of the I-140 petition with supporting documents (no certified copy necessary); and (3) a copy of the I-824 filing receipt.<sup>34</sup> Many months of waiting solely for an approved employment-based petition to work its way from USCIS to the NVC to the processing post were saved through this process.

<sup>34</sup> DOS Cable, "Corrected: DOS Cable on IV Processing of Adjustment Cases," AILA Doc. No. [00092773](#).

However, there is a decided trend to funnel IV cases through the NVC. The NVC is now responsible for the collection of the IV fees, applications, and supporting documentation, as well as the scheduling of appointments, for virtually every consular post. But consular posts may still entertain direct requests for IV processing and an interview at their discretion. The NVC process adds months of waiting time for those applicants who are immediately eligible and prepared to apply for an IV, in addition to the time that USCIS may take to adjudicate an I-824 and transfer the I-140 to the NVC.

**Practice Pointer:** If a third-country consular post willing to accept jurisdiction is identified before the petition (e.g., I-130, I-140, or I-360) is filed with USCIS, designate the post on the petition and annotate the first page of the petition in red ink to indicate that the post has accepted jurisdiction. It is important to include evidence that a third country has accepted jurisdiction, or the NVC may not honor the request. Taking this step may eliminate later having to request a transfer of the petition from one consular post to another, which takes many weeks. Counsel should also be aware that the post designated on an approved I-824 will not necessarily be honored by the NVC, so pay close attention to the designated post when the IV fee bill is received to determine whether the correct consular post has been selected by the NVC.

In preparing an application or petition, it is essential to contact the embassy of the third country in the United States to determine its policies for issuance of entry visas to individuals of the client's nationality. Such visas are more likely to be granted if the client can show proof of the IV appointment and/or "advance parole" Page 34 documenting the client's right to return to the United States even if the visa is not granted.<sup>35</sup>

<sup>35</sup> See letter from J. Cummings, Acting Director, Refugee, Asylum, and Parole INS, *reprinted in 71 Interpreter Releases* 18 (Jan. 3, 1994) Appendix IV.

Consular posts in relatively low-fraud/low-volume countries are often more willing to accept discretionary jurisdiction than those in countries with high fraud/high volume. In the post-9/11 world, consular officers may be more reticent to accept discretionary jurisdiction.

### **Inter-Post Case Transfers**

An applicant whose case is pending at one consular post may seek to have the case transferred to another post. This process is not without some peril (e.g., unanticipated delays, misplaced or lost files, etc.), and the applicant who attempts the transfer bears the risk as well as the burden of justifying the request. If a client insists on a file transfer against counsel's advice, it is advisable to have the client state in writing that counsel advised against a transfer and counsel is requesting a transfer at the client's instruction. It is often more time- and cost-efficient for an applicant to fly to the IV interview at the original processing post than to endure the frustration of attempting to have a file transferred. There are also other country-specific considerations in determining whether to request a file transfer when the applicant has relocated from one country to another during visa processing.

**Practice Pointer:** In countries such as Pakistan and Bangladesh, where consular officers and local employees are knowledgeable about the reliability of civil documents and local variations in names and name spellings, it may be in the applicant's interest to retain the case in the initial country rather than to relocate the case to the adopted country for processing.

### **Processing I-130 Relative Petitions**

In I-130 family-based cases, where the beneficiary is in the United States, AOS or consular processing for the beneficiary may be selected if the client is eligible for both methods of processing.

In family-based immediate relative (spouse, parent, or unmarried minor child under 21 of a U.S. citizen (USC)) visa cases where the beneficiary lives abroad with the petitioner in a country with a USCIS office, the USCIS office overseas accepts I-130 petitions from U.S. citizen petitioners resident in the consular district for six months, or in emergency or humanitarian situations. I-130s filed by U.S. citizen petitioners resident abroad in a country with no USCIS office must now file I-130 relative petitions in the United States unless an emergency or humanitarian situation exists and permission is granted by the overseas USCIS field office having jurisdiction over the consular post to accept and adjudicate the petition. The consular post must initiate the request to the USCIS office. In the past, exceptions generally Page 35 have been granted to U.S. military members stationed in war zones such as Iraq or Afghanistan, adoption cases, and other humanitarian circumstances. In countries with USCIS offices, contact USCIS to determine whether a humanitarian exception may be granted to the residence abroad requirement for the petitioner.

**Practice Pointer:** When discretionary acceptance of an I-130 by a consular post abroad is sought, contacting both the USCIS office with jurisdiction over the consular post and the consular post at the same time is often productive if the facts support a humanitarian exception.

### **Special Situations**

The June 26, 2013, U.S. Supreme Court decision in *United States v. Windsor*,<sup>36</sup> which overturned the definition of marriage in the Defense of Marriage Act (DOMA), changed the legal landscape for binational same-sex couples who seek to relocate to the United States. Legally married same-sex couples now enjoy the same rights as married heterosexual couples, both in terms of eligibility for green cards through marriage as well as derivative nonimmigrant visas for spouses of nonimmigrant workers. Same-sex binational couples still face challenges, especially when marriage between individuals of the same sex is not legal where they live. In such cases, counsel should consult the nonprofit organization Immigration Equality<sup>37</sup> for information regarding the legality of same-sex marriage worldwide, as some clients may need to travel internationally in order to marry and process immigrant visas.

<sup>36</sup> [570 U.S. \\_\\_\\_\\_](#), 133 S.Ct. 2675 (2013).

<sup>37</sup> <http://www.immigrationequality.org>.

Some clients may be hesitant to proceed with filing a visa application at the home-country consular post if the application requires the disclosure of information that would lead to conclusions about their sexual orientation. Some applicants might be deterred from applying at consular posts located in countries where homosexuality is punished and/or the ramifications of disclosure can range from social condemnation to death. If clients are a same-sex couple and would normally apply for a visa in a country where exposure of their sexual orientation runs the risk of harm, counsel should locate a consular post in a hospitable country, contact the consular officials in that country, and ask them to accept jurisdiction over the visa application. The Department of State has been most accommodating in this situation.

**Practice Pointer:** Be certain to ascertain that the beneficiary is eligible for AOS before filing. Review [INA §245](#), as well as [8 CFR part 245](#) and the AFM. Note that persons who entered without inspection cannot adjust status under [INA §245\(i\)](#) unless a priority date was established as a principal or derivative prior to April 30, 2001. Page 36

**Practice Pointer:** Inexperienced practitioners may make a tragic error by filing an adjustment application for a person who entered the United States as the K-1 fiancé(e) of one U.S. citizen petitioner, but who instead marries another U.S. citizen who files an I-130 petition and an I-485 adjustment application. It is black-letter law that a foreign national cannot adjust status based on any family or employment petition other than the family petition of the petitioner who filed the fiancé(e) petition. Such adjustment cannot be done. The human tragedy that results from an attempt to do so is immeasurable: at a minimum, removal from the United States, imposition of a 10-year bar to reentry, and imposition of a fraud bar based on the K-1 visa application. Attorneys who file such applications also are liable for malpractice and bar disciplinary proceedings.

**Practice Pointer:** Do not suspend disbelief in representing applicants in marriage cases. Do investigate the bona fides of the marital relationship before agreeing to represent clients in marriage cases. It is incumbent upon counsel to exercise due diligence. Learn the clients' cultures to assist in effectively representing the clients, and if the marriage raises red flags, decline representation and counsel the clients about the penalties for marriage fraud. Some red flags may include:

- Large age difference between spouses where the female is much older than the male, depending on culture and country of origin of the immigrating spouse;
- Immediate family members of one or both parties to the marriage are unaware of the marriage, unless explained;
- Spouses living apart other than for educational or professional reasons;
- Marriage not recorded in personnel records for one or both spouses;
- U.S. citizen petitioner has had multiple foreign national spouses for whom marriage petitions were filed; or,
- Spouses have lived apart in separate countries for long periods of time with infrequent visits by the U.S. citizen to the beneficiary abroad.

### **Dual Processing of Employment-Based Petitions**

In I-140 employment-based cases, AOS and consular processing may likewise be sought concurrently through dual processing if the beneficiary is present in the United States and finds a post that is still willing to process an IV based on the original notice of approval. Dual processing in employment-based cases is now virtually extinct, but in the event of unusual circumstances, posts may be willing to Page 37 entertain direct requests to process the immigrant visa through direct filing of the I-140 approval notice and Form DS-260.

USCIS permits concurrent filing of the I-140 and I-485 if the priority date is current and the client is otherwise eligible to file for AOS.<sup>38</sup> USCIS has also implemented premium processing (adjudication in 15 calendar days) of some I-140s in the EB-1, EB-2, and EB-3 categories,<sup>39</sup> with certain exceptions. Premium processing provides far more expeditious processing of eligible petitions for an additional fee of \$1,225, subject to change. However, the I-485 in such cases is not adjudicated with premium processing, and is placed in the I-485 queue based on the filing date of the I-140.

<sup>38</sup> 8 CFR §245.2(a)(2)(B); [67 FR. 49561–01](#), 2002 WL 1754105, July 31, 2002.

<sup>39</sup> Check <http://www.uscis.gov/premiumprocessing> for updates on premium processing.

**Practice Pointer:** To avoid the possibility of delay, a request for consular processing of an I-140 petition where the beneficiary is in the United States should be marked boldly in red ink on Forms I-140 and G-28, as well as any cover letter. If the beneficiary has a foreign address, indicate that address on Form I-140. Failure to do so may require the approval of an I-824 by USCIS to redirect an I-140 from an erroneous AOS designation to consular processing and to unearth the approved petition for transmittal to a consular post. The USCIS processing times of an I-824 can be extremely lengthy, and the client may wish to apply for adjustment of status if this occurs.

**Practice Pointer:** Most consular posts are no longer willing to process an individual for an IV before getting the I-140 petition from the NVC. DOS strongly encouraged posts in the past to process IVs on receipt of the original I-797 notice of approval, a copy of the I-140 petition and supporting documents, proof an I-824 had been filed (approval not necessary) with USCIS requesting the I-140 be sent to the consular post, along with Form DS-160 and all documents required for the IV interview.<sup>40</sup> If a client wants the benefits of dual processing, counsel should immediately contact the post to determine whether it is still willing to process IVs in this manner and under what circumstances. USCIS has attempted to thwart dual processing in the past, even stating it was not permitted.

<sup>40</sup> DOS Cable, “Corrected: DOS Cable on IV Processing of Adjustment Cases,” AILA Doc. No. [00092773](#).

## Immigrant Visa Application Process

Where the principal will apply for an IV at a consular post, the approved visa petition is sent by USCIS to the NVC in Portsmouth, NH, for initial processing. Page 38

### **No I-824 or Stop at NVC Required in “Following-to-Join” Immigrant Visa Cases**

DOS is in the process of developing a form and procedure where the functional equivalent of the I-824 would be filed directly with the NVC, rather than with USCIS. This process is in the developmental stages, so attorneys still should file following-to-join (FTJ) cases directly with the consular post. Anecdotal evidence suggests many consular posts erroneously insist that an I-824 be processed through USCIS in FTJ cases. The updated FAM note clearly permits and encourages bypassing USCIS and the NVC in the FTJ scenario,<sup>41</sup> resulting in efficiencies of process and savings of time to the client.

<sup>41</sup> [9 FAM 502.1-1\(C\)\(2\)](#), last updated on September 28, 2016, clearly indicates that no I-824 or interaction with the NVC is required or desirable for “following-to-join” immigrant visa cases.

### **The DOS National Visa Center (NVC)**

The NVC processes petitions received from USCIS, including Forms I-130, I-140, I-129F (fiancé(e)), I129-K-3, LIFE Act, I-600A (orphan), I-730 (asylee/refugee), I-526 (investor), and I-360 (special immigrant).<sup>42</sup> The majority of the petitions processed by the NVC are family petitions.

<sup>42</sup> The NVC website at <https://travel.state.gov/content/visas/en/immigrate/immigrant-process/approved/contact.html> contains information on processes and procedures.

**Practice Pointer:** It is important to note that the NVC is operated primarily by contractors, with a few DOS employees. Processing through the NVC adds several months to IV processing times. Thus, processing through the NVC should be avoided if possible, and if not, the case should be carefully monitored. The NVC is, however, responsive to emails from attorneys.<sup>43</sup>

<sup>43</sup> Attorneys may email the NVC with inquiries at [nvcattorney@state.gov](mailto:nvcattorney@state.gov). Only attorneys may use this email address. The NVC has also established a dedicated email for attorneys to monitor EB-5 IV cases, which is [NVCeb5@state.gov](mailto:NVCeb5@state.gov).

## The Case Process

When the NVC receives an approved petition from USCIS, the USCIS barcode is scanned into the system. Within 24 hours of receipt, there is a record of a USCIS receipt number. The next step is data entry, when an NVC case number is assigned to each case. For the rest of the processing at the NVC, and for processing at the post, the NVC case number will be the main case identifier. The case number must be referenced in all correspondence with the NVC and the consular post. It may take up to three weeks from petition approval for the NVC to complete data entry and begin sending the various transmittals to the attorney.

Once the case is logged in the NVC system, it will be processed for the consular post abroad, including fee collection, document collection, and appointment scheduling. Make sure that the NVC has a working email for the attorney, the Page 39 petitioner, and the beneficiary at all times. Also, make certain that address changes of the attorney, the petitioner, or the beneficiary are communicated to the NVC.

The NVC takes the following steps with respect to both standard review posts and appointment posts:<sup>44</sup>

<sup>44</sup> This process should begin immediately when the priority date is current. For preference categories experiencing backlogs, the Visa Office issues “qualifying dates” to the NVC, which are used to initiate the fee and document collection process. A qualifying date is a date approximately six months before DOS projects the priority date will be current.

- Complete a “Choice of Address and Agent” (Form DS-261) for the client online.
  - About three weeks after the NVC receives from USCIS a current priority date case or a case within the qualifying cut-off date, an instruction package, which contains the IV application processing fee bill and the Affidavit of Support processing fee bill, is emailed to the attorney. Fee bills are sent both via email and through regular U.S. mail in the event that the NVC does not have the email address of the attorney.
  - The fees must be paid. It is quickest and easiest to pay the fee bill online at <https://ceac.state.gov/CTRAC/Invoice/signon.aspx>. In order to use the online method, however, the payment must be made in U.S. dollars drawn on a U.S. bank. Once the payment is made, a receipt may be printed from the website or emailed to the applicant. *The NVC does not yet accept credit cards.* Thus, to save time, attorneys should obtain bank account information from the client at the time the case is opened, and the client should be instructed to maintain sufficient funds to cover the NVC fees. Those who do not have U.S. bank accounts or do not wish to pay online may mail a cashier’s check or money order, payable to the “U.S. Department of State,” to: National Visa Center, P.O. Box 790136, St. Louis, MO 63179-0136.<sup>45</sup> The Lockbox in St. Louis processes the payment and forwards the fee payment information to the NVC. Be advised that payment by mail will delay the processing of the case.
  - Once the payment is processed, the NVC will email a document cover sheet for each applicant. This sheet must be returned to the NVC with all required supporting documentation.<sup>46</sup> In a welcome change, the NVC will now accept copies of documents, thus eliminating the necessity to file original or certified copies with the NVC. Applicants still must bring all original documents to the interview (see discussion of required documents, below). All documents not already written in English or the official language of the country where the interview will occur must be translated into English. Page 40
  - The next step is to complete Form DS-260 online and submit it electronically through the Consular Electronic Application Center (CEAC).<sup>47</sup> To create a CEAC login, applications must have the following information: NVC case number, NVC invoice ID number, and beneficiary ID number. Be sure to enter data in all fields. Enter “not applicable” or “N/A” where that is the case. Failure to enter data in each space can delay the processing and result in a request for evidence (RFE) from the NVC.
  - DOS is rolling out electronic emailing of documents to the NVC. For some processing posts, emailing civil documents in PDF is required; for others, it is optional. A list of posts for which the various methods of transmission are accepted can be found at [https://travel.state.gov/content/visas/en/immigrate/immigrant-process/documents/Submit\\_documents.html](https://travel.state.gov/content/visas/en/immigrate/immigrant-process/documents/Submit_documents.html).
- Practice Pointer:** Be sure to include the required tax returns and supporting documents with the Affidavit of Support. The applicant’s name and NVC case number must be entered in the upper right-hand corner of each document. The NVC reviews all documents and forms for completeness. A checklist letter may be sent requesting missing or incomplete information.
- The NVC completes criminal and background checks. Once background checks are completed and a visa number is received, the NVC schedules the IV interview and emails an appointment letter to the attorney. The NVC will forward the electronic and physical files to the post.

<sup>45</sup> For complete and detailed instructions, see [https://travel.state.gov/content/visas/en/immigrate/immigrant-process/approved/step\\_2\\_pay\\_fees.html](https://travel.state.gov/content/visas/en/immigrate/immigrant-process/approved/step_2_pay_fees.html).

<sup>46</sup> This was formerly known as Packet III.

<sup>47</sup> <https://ceac.state.gov/iv>.

While NVC processing of an entire IV case may reduce waiting times for IV interviews at some posts, attorneys have found that, when processing is completed by the NVC, processing times have increased at historically efficient posts. Thus, many experienced practitioners view converting the entire world to NVC appointment review processing as creating, rather than eliminating, processing delays. It is generally not possible to obtain even a guesstimate from the NVC as to when the IV interview will be scheduled.

As of May 2017, the NVC has indicated that it takes about four to six weeks after receipt of a petition from USCIS to complete data entry and send the fee bill and other instructions, and has further indicated that it takes about 11 to 12 weeks to review submissions and to place a case in the appointment-ready queue.

The NVC has under consideration a request from immigration attorneys that approximate appointment dates at consular posts be published. Page 41

### **Supporting Documents**

The DOS website includes information about the availability of certain types of civil documents in each country and the appropriate authority to issue documents.<sup>48</sup> Copies of all required documents must be sent to the NVC. However, in the case of police clearance certificates, the NVC will deem the document to be not required where the applicant must be physically present in a third country to obtain a police certificate.

<sup>48</sup> [9 FAM 403.8](#); DOS, Bureau of Consular Affairs, "Reciprocity by Country," <http://bit.ly/visa-reciprocity>.

Supporting documents that are subject to change are valid for one year from the date of issuance. The documents that expire are Form DS-260, medical exams, and police clearances where the applicant visited or lived in a country subsequent to the date the police clearance was issued.

A detailed description of required documents is set forth at [22 CFR §42.65](#) and beginning at [9 FAM 504.4–4 \(A\)](#) (currently unavailable for online viewing).

- *Passport*—A passport must be valid for at least six months beyond the date of visa issuance.
- *Birth Certificate(s)*—A certified copy of the birth record of each applicant and each child (even if the child is not applying for a visa) is required. Delayed-issuance birth certificates are often accepted at many posts, and are often preferred to affidavits of birth. If a birth certificate is unavailable, secondary evidence of birth, such as school records, religious records, or affidavits, may be used, but only if accompanied by a certificate from the registrar of births having jurisdiction over the place where the person was born attesting that a birth certificate is unavailable. Thus, it is usually easier to obtain a delayed birth certificate, rather than obtaining a "no record" certificate in addition to two affidavits of birth.

**Practice Pointer:** Review birth documents carefully and compare them with the information contained in the FAM. Often names are abbreviated. Make sure all names are completely spelled out. For example, problems are encountered with Pakistani birth records as they often do not list the mother, thus necessitating a ceremony at the office of the civil registrar to include the name of the mother on the birth certificate; Indian birth certificates often do not list the name of the child and may not list the name of the mother. The only acceptable birth certificate from the Philippines is a birth certificate printed on National Statistics Office (NSO) paper; the stamp of the NSO on a birth certificate issued by local authorities or any other authority is not acceptable. Only if the NSO certifies there is no record of birth is alternate birth documentation accepted. The NSO Page 42 must issue a statement attesting to its unavailability, and the applicant must obtain a certified birth certificate from the local registrar of births.



- *Police Certificates and Clearances*—Each applicant, age 16 or over, is required to submit a police certificate, if available, from the country of current residence (except the United States), and any country where the applicant has resided at least six months since reaching age 16. Applicants must also submit a police clearance from the country of nationality, if different from the country of current residence, if obtainable and if residence in country of nationality exceeded six months, and from other countries where the applicant has resided for a year or more since reaching the age of 16, if available. Police certificates must be produced from any country where the applicant has been arrested, if obtainable. The consular officer has the right to request police clearance certificates from any other country if there is reason to believe the applicant might have a criminal record in such other country. U.S. police certificates are not required. However, consular officers reserve the right to request police records from law enforcement authorities in the United States. It is good practice for counsel to obtain the Federal Bureau of Investigation (FBI) rap sheet for applicants in the event the client has forgotten about a brush with the law while in the United States.

**Practice Pointer:** Mexican police clearances have recently been declared to be available and thus required for the immigrant visa interview.

- *Arrest, Court, and Prison Records*—A certified copy of the applicant's criminal record, and record of confinement in any correctional institution, if any, must be submitted. A complete certified record, including arrest record, complaint, indictment, and sentencing record, is required regardless of when the offense occurred or whether there has been any intervening amnesty, pardon, or expungement. Also, be certain to include a copy of the statute under which the client was convicted and sentenced.

**Practice Pointer:** If possible, criminal matters should be discussed with the consular officer in advance of an IV interview because of the complexity of issues regarding the immigration consequences of criminal convictions. An advisory opinion from the Visa Office Advisory Opinion Division (AOD) should be obtained in advance of the IV interview on legal questions of inadmissibility, if possible. It is most advisable to prepare a memorandum of law on issues of whether an interaction with law enforcement authorities has rendered a client inadmissible. The memo can be submitted to the consular post and to the AOD at DOS ([legalnet@state.gov](mailto:legalnet@state.gov)) prior to or at the interview.

- *Military Record*—An official record of the applicant's military service, if any, must be submitted. A record of service conduct and discharge may be required. Page 43 In the case of Iranian applicants, counsel should obtain a complete description of the military service, including rank, job description, location of service, and branch of the military. It also is helpful to provide information on the types of weapons on which the client trained. Note that the types of weapons available to, and used by, military authorities in a foreign country can be accessed on the Internet. With respect to Iran and other Middle Eastern countries with conflicts in recent years, this type of detail must be provided; thus, obtaining it initially may speed the immigrant visa to conclusion.
- *Marriage Certificate*—A certified copy of the applicant's marriage certificate, as well as proof of termination of any previous marriage(s) (e.g., divorce decree, death certificate, or record of annulment) must be submitted. Reference to the FAM to determine acceptable evidence of marriage in the country where the marriage was performed is required. In many countries, marriage records may be either religious or civil.
- *Photographs*—All applicants must submit at least two photographs that conform to precise specifications. Additional photographs may be required, depending upon the post. (Many require four.) Photo specifications can be found at <https://travel.state.gov/content/visas/en/general/photos.html>.
- *Evidence of Financial Support*—Evidence of financial support is required to document that an applicant will not become a public charge under [INA §212\(a\)\(4\)](#), in most family-based and some employment-based immigrant cases (e.g., family-based immigrants, including certain orphans and applicants for employment-based immigrant visas where a relative filed the immigrant visa petition or had a five percent or greater ownership interest in the business that filed the petition).<sup>49</sup>

<sup>49</sup> [9 FAM 302.8-2\(B\)\(2\)](#).

- Immigrants who do not require an Affidavit of Support include EB-5 immigrants, self-petitioning widows, self-petitioning battered spouses or children, children who will become citizens immediately upon admission to the United States under [§320 of the INA](#), and certain immigrants (and some spouses and parents) who have been credited with 40 quarters of coverage under the Social Security Administration (SSA).
- The petitioner is required to submit an Affidavit of Support (I-864 or I-864EZ, or I-134) and evidence of income within six months of the date of execution. If timely submitted, it remains valid indefinitely. The Affidavit of Support no longer requires an original signature. This welcome change applies to the I-864, I-864A, I-864W, and I-864EZ. The form must still be signed; typed names and electronic signatures will not be accepted. The Affidavit of Support must be accompanied by supporting documents demonstrating the affiant has the ability to support the applicant. For most IV applicants, Page 44 this evidence may include a notarized letter or offer of employment, bank statement(s), income tax return(s), and/or proof of ownership of real estate and other financial assets. Affidavits of Support are legally enforceable contracts when completed on I-864 or I-864EZ. DOS has imposed a processing fee for I-864 forms.<sup>50</sup>  
<sup>50</sup> <https://travel.state.gov/content/visas/en/immigrate/immigrant-process/documents/support/i-864-frequently-asked-questions.html>.
- In order for a petitioner, joint sponsor, or household member to be eligible to file an I-864 or I-864EZ, the petitioner must be over the age of 18 and be domiciled in the United States. If these requirements are not met by the petitioner, the visa cannot be issued.
- Those completing the I-864, I-864A or I-864EZ must submit proof of relationship and proof of immigration status. If the financial sponsor did not file a federal income tax return for the most recent year, a notarized statement indicating why taxes were not filed must be submitted. If the financial sponsor filed for an extension of time to file the most recent tax year federal tax return, an Internal Revenue Service (IRS) Form 4868 must be submitted or, in the alternative, a notarized statement attesting to the fact that an extension request was filed must be submitted. IRS transcripts may be obtained online at <http://www.irs.gov/individuals/get-transcript>.
- If the income of the sponsor does not meet the required poverty guidelines, either (1) a joint sponsor must file an I-864 with proof of relationship to the sponsor, proof of domicile, proof of U.S. immigration status (U.S. citizen, U.S. national, or lawful permanent resident) or (2) the income of a household member, who also must submit an Affidavit of Support, proof of income, and proof of legal status in the United States, can be used to meet the Poverty Guidelines.<sup>51</sup>  
<sup>51</sup> A detailed chart regarding the Affidavit of Support requirements can be accessed at: [https://travel.state.gov/content/visas/en/immigrate/immigrant-process/documents/Step\\_4\\_Collect\\_Financial\\_Documents.html](https://travel.state.gov/content/visas/en/immigrate/immigrant-process/documents/Step_4_Collect_Financial_Documents.html).
- The Visa Office has provided AILA with a list of technical issues that will result in rejection of an I-864.<sup>52</sup> In the same document, the Visa Office specifically stated that “[p]osts should not deny a case simply because there appears to be no discernible relationship between a joint sponsor and the applicant.”<sup>53</sup> There are still instances where consular officers outright discount the I-864 of a joint sponsor on the grounds that the affiant would be unlikely to support the IV applicant; however, because the I-864 co-sponsor Page 45 is legally liable under the I-864, consular officers must accept it at face value.  
<sup>52</sup> For the complete list, see “AILA Liaison/DOS Meeting Minutes (10/22/09),” AILA Doc. No. [10020230](#), at 19.b.  
<sup>53</sup> *Id.*
- The older, less cumbersome version of the affidavit of support, Form I-134, is still used for employment-based IV applicants (where the principal has a significant family ownership interest in the petitioner) and fiancé(e) visas.

**Practice Pointer:** Affidavit of support issues are one of the most common reasons for denial of an IV, especially in family cases. They are complex forms and are often a puzzle to even seasoned immigration attorneys. To avoid questions about the authenticity of tax return copies submitted with the affidavit of support, applicants may wish to request tax return transcripts and tax account transcripts

from the IRS. In emergencies, the IRS will fax a copy of the tax returns within a few hours. Generally, a need for tax returns for USCIS or consular interviews is considered a valid emergency by the IRS. Occasionally, the affiant or the applicant may be paying back taxes on an installment plan. Be sure to ask to avoid rude surprises at the IV interview. It is a prudent measure to obtain sponsors' or applicants' tax return transcripts at the beginning of the case to avoid problems at the end. Don't assume a client who drives to your office in a late model BMW, owns an airplane, owns a business, and pays his fees with a black American Express card will have tax returns that will pass muster for I-864 or I-134 purposes.

**Practice Pointer:** Send the client to the IV interview with an updated I-864, I-864EZ, or I-134 and current, notarized job letters, bank statements, and tax returns, even though updated Forms I-864 and I-864EZ are no longer required. Some consular posts require that the person filing the I-864 or I-864EZ sign an IRS release form authorizing the NVC or the consular post to obtain copies of tax returns directly from the IRS. Of course, consular officers may, in any case, request that such releases be executed to permit the IRS to directly transmit tax return copies to the NVC or consular post. In cases where the IRS status of the affiant may be called into question, counsel may want to have the sponsor obtain the records from the IRS in advance of filing the I-864 or I-134.

**Practice Pointer:** In family cases, if the petitioner has not filed income tax returns, counsel should have the petitioner execute an affidavit indicating why returns were not filed, along with a letter from the petitioner's accountant indicating the reasons returns were not filed. It would seem apparent that an 84-year-old widow who has never worked and lives with her son, who claims her on his tax return, generally would not have tax liability. However, on the theory that over-documentation is to be achieved, it is important to include these documents in appropriate Affidavit of Support cases. Page 46

- *USCIS and EOIR Proceedings*—Any record of deportation, removal, or exclusion proceedings must be provided, including a record of voluntary departure. Applicants who have been previously granted voluntary departure should also provide evidence of compliance with the voluntary departure order, such as passport stamps, plane tickets, boarding passes, and other credible documentation. Be sure to obtain the contents of both the USCIS and the EOIR files through a FOIA request for clients who have been in proceedings. Separate requests are required for EOIR records and USCIS files. USCIS FOIA responses can take many months to process; thus, filing an early FOIA request is critical.<sup>54</sup> USCIS will process FOIA requests on an expedited basis only if it determines that the request involves: (1) circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to someone's life or physical safety of an individual; or (2) an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.<sup>55</sup> The same standards for expedited requests are applied by U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP). Responses to FOIA requests are usually provided on a CD. Immigration court and BIA records can be reviewed by counsel upon request to the immigration court clerk without a FOIA request, which will expedite review. USCIS, CBP, and EOIR FOIA requests can be made online.

<sup>54</sup> Information on Freedom of Information Act (FOIA) requests from USCIS can be found at <http://www.uscis.gov/foia>.

<sup>55</sup> [6 CFR §5.5\(d\)](#). Further information on expedited FOIA requests can be found atp. 10 of the USCIS FOIA Request Guide, available at <http://www.uscis.gov/sites/default/files/USCIS/About%20Us/FOIA/uscisfoiarequestguide%2810%29.pdf>.

- *Entry/Exit Records*—Records of entry into and exit from the United States can be obtained for the previous five years in most cases from CBP online.<sup>56</sup> These records can be useful in proving lawful presence and compliance with voluntary departure orders.

<sup>56</sup> <https://http://www.cbp.gov/travel/international-visitors/i-94-instructions>><http://www.cbp.gov/travel/international-visitors/i-94-instructions>.

- *Translations*—All foreign language documents should be accompanied by a certified English translation.

- *Unobtainable Documents*—If the consular officer is satisfied that a required document is unobtainable, the officer may permit substitution of other satisfactory evidence upon a finding that the document cannot be obtained without hardship.<sup>57</sup> The applicant should document the efforts made to obtain the document in question, such as copies of applications made for missing documents, letters sent to government offices and/or relatives seeking the document in question, and (if possible) a letter from a government office Page 47 explaining that the document is not available. The consular officer is required to complete an internal form justifying the acceptance of secondary documentation. Thus, it can be expected that findings of unavailability will be rare.

<sup>57</sup> [22 CFR §42.65\(d\)](#).

**Practice Pointer:** There are very few truly “unavailable” birth and marriage documents today. Delayed birth certificates are generally preferred at posts in India and Pakistan, rather than “affidavits of birth,” particularly in employment cases. Beware of tribal birth, marriage, and divorce documents from African countries, as they are often not authentic. It is imprudent to rely on tribal documents without a factual investigation.

### **Medical Examination**

All IV applicants are required to undergo a medical and mental examination performed by a physician designated by the consular post in the country where the consular post is located. The medical examination, performed using Form DS-2054, is generally valid for six months, unless there is a Centers for Disease Control and Prevention (CDC)-designated condition found by the panel physician.<sup>58</sup> Applicants are advised to bring any available vaccination and other medical records with them to the medical examination. Medical exams performed by USCIS physicians in the United States are not accepted for consular interviews.

<sup>58</sup> [9 FAM 302.2-3](#). As of January 4, 2010, HIV infection is no longer a ground of inadmissibility, and an I-601 waiver is no longer required. [74 FR. 56547-01](#), 2009 WL 3514416, Nov. 2, 2009; [9 FAM 302.2-5\(B\)\(2\)\(c\)\(3\)](#).

Timing of the medical exam may also be an issue. While the medical exam at most consular posts can be scheduled one to three days before the interview, there can be a delay of up to one week at some posts. In addition, the results of the medical exam, or any follow-up testing required, may in some cases take several weeks to complete. The client should call the U.S. embassy panel physician well in advance of the interview to make arrangements for the medical exam. Medical exams may usually be expedited for an additional fee.

The health-related grounds of inadmissibility for immigrants require proof of vaccination against vaccine-preventable diseases, which include mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B, hepatitis B, and any other diseases as recommended by the Advisory Committee for Immunization Practices. A waiver of vaccinations is available if a medical determination is made that the vaccination is not medically appropriate, or the Attorney General determines that the vaccination would be contrary to the foreign national’s religious beliefs or moral convictions.<sup>59</sup> Due in large part to the controversy surrounding the requirement, particularly as it applied to young girls, the Page 48 vaccine for the human papillomavirus (HPV) was removed from the list of vaccines mandated for foreign nationals seeking permanent residence.

<sup>59</sup> [INA §212\(g\)](#).

A medical determination of inadmissibility under [INA §212\(a\)\(1\)\(A\)\(iv\)](#) for drug abuse or addiction, or under [§212\(a\)\(1\)\(A\)\(iii\)](#) for alcohol abuse, is a trap for the unwary. No associated harmful behavior is required for a finding of drug abuse or addiction to drugs. However, associated harmful behavior—past, present, or future—must be found for a finding of inadmissibility for alcohol abuse. There is no IV waiver available for drug abuse or addiction, although remission for one year will make the applicant eligible to reapply for an IV. It is important to read the statute, FAM notes, and DOS cables, because the scope of inadmissibility is extremely broad. Juvenile substance abuse, alcohol abuse, and DUIs, even though adjudicated in juvenile court where there are no convictions, may be considered. If an applicant admits any use of marijuana or other controlled substances to the panel physician, even if only recreational, the physician may find the applicant to

be a drug abuser or addict. If the applicant has one arrest for driving while intoxicated within the five years preceding the date of the medical exam, there is a risk the physician will make a finding that the applicant is an alcohol abuser with associated harmful behavior.<sup>60</sup> A single alcohol-related arrest or conviction within the preceding five years, or two arrests or convictions within the past 10 years, means a mandatory referral to a physician for a determination of inadmissibility due to alcohol dependence or abuse with associated harmful behavior for both nonimmigrant visa (NIV) and IV cases. For immigration purposes, alcohol abuse is considered a mental illness, and driving under the influence is associated harmful behavior. To establish substance abuse, physicians are instructed to document the use of the substance and its effects, showing dependence characterized by compulsive long-term use despite adverse consequences.<sup>61</sup> Attorneys should caution clients against casual chats with the embassy panel physician, as they are not confidential. The consular officer is bound by the panel physician's findings of fact and conclusions. It may not be prudent to permit clients to apply for a visa if there is a likelihood of an alcohol or substance abuse or addiction finding.

<sup>60</sup> A mandatory referral to panel physician of both nonimmigrant visa and immigrant visa applicants for an evaluation of inadmissibility under [INA §212\(a\)\(1\)\(A\)\(iii\)](#) for any applicant with one alcohol-related arrest or conviction within the preceding five years, or two or more arrests or convictions within the last 10 years, or "any other evidence to suggest an alcohol problem." [9 FAM 302.2-7\(B\)\(3\)\(b\)\(3\)](#). An alcohol abuser is not inadmissible to the United States unless there is harmful behavior associated with the condition that has posed, or is likely to pose, a threat to the property, safety, or welfare of the applicant or others. See [9 FAM 302.2-2\(A\)](#).

<sup>61</sup> [9 FAM 302.2-7\(B\)\(3\)](#).

**Practice Pointer:** It is important to advise clients that the panel physician will note admissions of drug or alcohol use, and that information can and will be used against them. The panel physician will refer the applicant to a psychologist or psychiatrist for an Page 49 evaluation in most cases. If a client has any indication of alcohol or drug abuse, competent lawyering requires counsel to have alcohol or drug testing, a report from a substance abuse counselor, and a hematologist report to take to an interview, assuming the collective reports conclude the client is not a substance or alcohol abuser. If the client is an alcohol or drug abuser, sending the applicant to a visa interview may be imprudent.

**Practice Pointer:** A finding of ineligibility based on a panel physician's determination that the visa applicant is a drug abuser or addict may prevent a subsequent successful visa application for many years. There is no waiver for drug abuse or addiction; rather, the applicant must demonstrate remission for one year and repeat the visa process and medical examination. The finding of inadmissibility is the medical opinion of the physician, and only an admission of a misdiagnosis would allow the consular post to withdraw the finding. No associated harmful behavior is required for a finding of admissibility for drug abuse or addiction but is required for a finding of alcohol use disorders.

**Practice Pointer:** The FAM sections on physical and mental disorders should be carefully studied. Immigrant visa applicants with valium prescriptions have been found to be drug abusers. Clients should be queried regarding alcohol and drug habits before the visa interview.

**Practice Pointer:** Counsel should review the health-related grounds of inadmissibility and the types of medical or mental conditions that may give rise to a finding of inadmissibility under [INA §212\(a\)\(1\)](#). In 2016, the CDC began requiring the gonorrhea test.

**Practice Pointer:** Bodies decorated with tattoos discovered during the mandatory medical examination are yet another possible game ender. Attorneys report visa denials of clients whose tattoos are stated evidence of affiliation with or membership in gangs or criminal organizations, a ground of inadmissibility for which there is no waiver.<sup>62</sup> The concurrence of the Visa Office is required to enter an ineligibility on this ground. It is important to ask clients if they have Page 50 any tattoos prior to the IV interview. Applicants who have tattoos associated with gangs, even on those disclaiming any affiliation, have been found inadmissible. Often attorneys do not have the opportunity to meet with derivative children applicants, so do not have the opportunity to observe their demeanor and tattoos. The Visa Office reports that during

FY2016, only 113 nonimmigrant visas and 121 immigrant visas were denied for gang-related grounds of inadmissibility.<sup>63</sup>

It is prudent to question the parents about their children's tattoos and incidents relating to alcohol or drugs. Juvenile arrests relating to drugs and alcohol do not constitute convictions but can be used to find the juvenile applicant a drug or alcohol abuser.

<sup>62</sup> [INA §212\(a\)\(3\)\(A\)\(ii\)](#), which provides that a visa applicant is inadmissible if a consular officer has reasonable ground to believe that the applicant is coming to the United States solely, principally, or incidentally to engage in any other unlawful activity, and [9 FAM 302.5-4\(B\)\(2\)](#). This ground of inadmissibility has been broadly applied to member of gangs, the Mafia, the Hells Angels, and similar groups, as well as those even suspected of association with or membership in these organizations. In *Hells Angels Motorcycle Corp. v. Napolitano, et al.*, Case 1:12-cv-01357 (D.D.C. 2012), the members of the Hells Angels challenged visa denials to its members on constitutional and statutory grounds. The suit was ultimately dismissed on jurisdictional grounds.

<sup>63</sup>

<https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXX.pdf>.

## Appointment Packet and Visa Interview

After all the necessary documents have been received and reviewed and other clearances obtained, a visa number is obtained from the Visa Office and a final appointment (formerly known as Packet IV) is sent either by the NVC or the consular post, by mail or email.

### *Visa Interview*

Form DS-260 is electronically signed when initially submitted and, at the time of the interview, the applicant affirms the information before the officer.<sup>64</sup> The eligibility for a visa is determined at the visa interview. Generally, the consular officer questions the applicant and reviews the documents within the purview of the various grounds of inadmissibility at [INA §212\(a\)](#). The applicant bears the burden of proof as to admissibility.

<sup>64</sup> [22 CFR §42.67\(a\)\(3\)](#).

***Practice Pointers on Common Causes of I-140 Petition Returns:*** In PERM labor certification cases, consular officers may administer “skills tests” at visa interviews. Make sure the client is fully prepared to demonstrate skills—particularly in the occupations of computer professionals, accountants, engineers, architects, financial analysts, market analysts, physicians, nurses, cooks, and oriental rug repairers. If the labor certification is for a cook, make sure the applicant can cook everything on the menu and can recite the ingredients in each menu item by heart. If a seamstress, rug repairer, or mechanic—historically suspect PERM labor certification occupations—make sure the client is comfortable with skills demonstrations and knowledge tests that may be given at the IV interview. It is often useful to send Page 51 clients to the visa interview with samples of their work product. Also send the client to the interview with a current résumé.

There is the legendary true story of a consular officer who denied a visa to a claimed auto mechanic because he didn't have dirt under his fingernails. (There were other signs the applicant did not have the experience claimed, but the clean fingernails were the tip-off). The visa petition was revoked. Attorneys have reported a recent increase in visa denials because an applicant cannot speak English and the consular officer concludes that English competency is required for the job duties. This problem reportedly occurs in Abu Dhabi (Iranian applicants) and the People's Republic of China.

The duty of competent representation always extends to preparing a client for the visa interview both in terms of documentation and types of questions asked. Never skip this step, regardless of the extra time and effort it may take to have a phone conversation in different time zones with a translator. It is well worth the effort.

Make sure you carefully prepare the visa applications, that your client is familiar with the petition and all supporting documents, and that the client can pass a skills test in employment-based cases. It is always a good idea for the visa applicant to have a conversation with the employer several days before the interview to confirm the job is still open, to finalize travel arrangements, and to complete other pre-employment protocols. Remember that many consular officers who are skeptical of a job offer may pick up the phone, call the U.S. employer, and ask questions about the business and the job offer. Thus, make certain that the employer is expecting a call from a consular officer and that the employees know to direct the call to the proper person at the employer's place of business.

**Practice Pointer:** Competent and successful lawyering at consular posts requires counsel to personally prepare visa applicants for the visa application process and interview. If the client cannot come to your office, Skype or other online video conferencing software is a very useful tool that will allow you to familiarize them with the questions that will be asked and will allow them to become more relaxed and comfortable with the process.

## Visa Issuance

An IV is valid for travel to the United States for a period of up to six months after issuance.<sup>65</sup> In some situations, the visa may be issued for a shorter period. For example, the validity may not extend beyond a date 60 days prior to the expiration of the applicant's passport, or when issued to an accompanying child, may not extend beyond the date on which the child becomes 21. Page 52

<sup>65</sup> [INA §221\(c\)](#).

Certain foreign nationals are not required to present a passport when applying for an IV.<sup>66</sup> Similarly, some foreign nationals are exempt from obtaining an IV in order to enter the United States in resident status.<sup>67</sup> Visa issuance does not guarantee admission to the United States, and the applicant will be scrutinized at the port of entry. In the post-9/11 world, many IV applicants for admission will be subjected to further scrutiny and security checks at the port of entry.

<sup>66</sup> [22 CFR §42.2](#).

<sup>67</sup> For the complete list of such applicants, see [22 CFR §42.1](#). The list includes children born after issuance of an IV to accompany a parent, children born of a national or LPR mother during a temporary visit abroad, and several classes of applicants previously admitted to the United States for permanent residence.

## Consular Petition Returns to USCIS

A concern in both NIV and IV consular processing is the possibility that a consulate will return a petition to USCIS for consideration of revocation. Long delays are the norm in "consular petition return" cases, and the applicant is often unable to return to the United States while the matter is pending. IV petitions, K-1 petitions, and K-3 petitions returned by a consular post to USCIS are sent by the consular post to the NVC.<sup>68</sup> The NVC then conducts a quality assurance review and forwards the petition to USCIS. The NVC also tracks and follows up on petitions, enabling counsel to determine the status of a returned petition and take corrective action. Delays in NVC or USCIS processing of returned petitions should be communicated to [legalnet@state.gov](mailto:legalnet@state.gov). Attorneys have reported consular returns of fiancé(e) petitions to USCIS where the petition expires and a new fiancé(e) petition is required, which itself is often returned to USCIS for consideration of revocation, resulting in long family separations, costly filing of petitions multiple times, and the denial of due process in many instances.

<sup>68</sup> [9 FAM 504.2-8\(A\)\(2\)](#).

**Practice Pointer:** There is occasionally a punitive tendency to return the I-140 petition to USCIS for consideration of revocation. As both consular officers and attorneys are generally aware, most issues generally can be resolved more easily by the consular officer at post than by USCIS. If counsel can reach the consular officer before the return of the petition to USCIS, it is advisable to provide additional evidence

directly to the consular post to address the consular officer's concerns. However, the Visa Office has recently affirmed that consular officers have no duty to notify counsel of either a proposed or actual petition return.

A petition return can be an effective visa denial if the process takes so long that the job is no longer available. Types of petition returns by consular officers to USCIS, reported by attorneys and consular officers, include, but are not limited to: Page 53

- Accountants in a small business owned by a person of the applicant's nationality;
- Marketing occupations in small businesses;
- Medical assistant or researchers where the applicant is a physician and the job is in a small private office; and
- Fiancé(e) cases where there are what DOS and USCIS have deemed to be suspicious circumstances in the relationship, as discussed above.

It is also important to consider whether the applicant is applying for a visa at a DOS designated "high fraud" post, where applicants will receive strict scrutiny. Examples of DOS-designated, high-fraud posts include the Philippines, Jamaica, Nigeria, and some posts in China and India.

A consular officer is permitted to issue the visa even after the petition is returned to USCIS if evidence sufficient to overcome the possible ground of revocation is submitted to the consular post. If the visa is issued, the consular officer notifies the NVC and USCIS that the ground of proposed revocation has been overcome.

An advisory opinion from the AOD may be requested in conjunction with attempting to provide additional evidence to the consular post. Attorneys may submit evidence to the AOD as long as copies are provided to the consular officer.

## Visa Refusal

An IV can be refused only on the basis of a ground specifically set forth by statute or regulation. When an IV is refused, the consul is required to give the applicant timely, written notification of the provision of law or regulation on which the refusal is based and to notify the applicant of any statutory provisions under which administrative relief may be available.<sup>69</sup> If the ground of ineligibility can be overcome by presenting additional evidence, the applicant should be given the opportunity to do so. If the ground of refusal cannot be overcome with additional evidence, the principal consular officer at a post (or a specifically designated alternate) must review the case without delay, record the review decision, and sign and date the prescribed form.

<sup>69</sup> [22 CFR §42.81\(b\)](#). See also 74 *Interpreter Releases* 1037–38 (July 7, 1997) (discussing DOS Cable, 97 State 114760 (June 18, 1997)); 17 *AILA Monthly Mailing* 51 (Jan. 1998).

If the grounds of ineligibility may be overcome by the presentation of additional evidence and the applicant indicates the intention to submit such evidence, a review of the refusal may be deferred. If the principal consular officer or alternate does not concur in the refusal, that officer must either: (1) refer the case for an advisory opinion, or (2) assume responsibility for final action on the case.<sup>70</sup> In practice, however, consular officers rarely request an advisory opinion or take the case away from a junior officer who will not reverse a decision. Generally, the reviewing officer Page 54 will discuss the case with a junior officer and persuade the officer that the decision should be reversed, if the supervisory officer believes the visa application should be approved.

<sup>70</sup> [22 CFR §42.81\(c\)](#).

Often the refusal notice, issued on Form OF-194, does not provide a meaningful explanation as to either the grounds of refusal or whether they can be overcome. The OF-194 is a preprinted form known as a "blue sheet." It is often vague and cryptic, requiring counsel to contact the post to learn the factual basis for the



denial. In a lethal blow to any modicum of due process in challenging visa denials, the U.S. Supreme Court in *Kerry v. Din* found that a consular officer's refusal to provide the factual basis for a visa refusal under [INA §212\(a\)\(3\)\(B\)](#) passed Constitutional muster.<sup>71</sup> The Court found that a consular officer's refusal to issue a visa to a U.S. citizen's foreign national spouse does not infringe upon a constitutionally protected interest of the citizen spouse. Interestingly, a group of former consular officers filed an amicus brief challenging the continuing validity of deference to a consular officer's discretionary decision, as very little is left to consular discretion in an era in which there is almost total reliance on government databases and watch lists in visa adjudications.

<sup>71</sup> See *Kerry v. Din*, [135 U.S. 2128](#) (2015). A good analysis can be found at <http://www.scotusblog.com/case-files/cases/kerry-v-din>.

### **Administrative Processing**

[INA §221\(g\)](#) is used as a catch-all for both proper and improper delays in visa issuance for "further administrative processing," which can mean nothing, something, or everything. It is a "catch-all" with often devastating consequences to visa applicants, their American employers, and American families. It can be a trap for the unwary attorney, as immigrant petitions can be returned to USCIS for consideration of revocation (see discussion above) often before counsel is advised of such, thus causing interminable delays. In many cases, the client and the attorney can supply answers to the questions posed by the consular officer without the necessity for a petition return to USCIS. Absent fraud, petition returns are widely perceived by attorneys to be punitive, resulting in months or even years of delay while the petition lies in USCIS processing purgatory.

**Practice Pointer:** It is critical to develop relationships of trust and respect with consular officers to maximize the chance that [§221\(g\)](#) refusals can be quickly resolved at post rather than suffer a petition return to USCIS. When a blue sheet is issued, quickly Skype interview the client, gather the facts, do the research, and then send a probative email to the consular post in an attempt to resolve outstanding issues short of a petition return. It is a good idea not only to send the email to the general post email for IV inquiries, but also to copy the chief of the visa section and/or chief of the IV section on the email. Emails to generic email addresses often result in the generation Page 55 of an auto-reply indicating that a response will be forthcoming within several days. Where the matter is time sensitive, such generic emails should be followed up with a call to the chief of the Consular Section on the Visa Chief.

**Practice Pointer:** It is advisable to actually ask the consular officer why the visa was denied rather than tell him or her why you think it was denied. While tempting, it is prudent to avoid ballistic tactics when discussing a case with consular officials. Due to the complexity of visa cases, the reason the client believes a visa was denied is generally not the correct reason the visa was denied. Rather than compose an elaborate brief as to why the visa was refused in error, based only on the client's recollection, find out from the consular officer why the visa was denied and begin baseline representation from there. This is a common error by even the most experienced attorneys, and it is difficult to resist the temptation to transmit a communication expressing righteous outrage at a wrongful refusal. A few days of patience will generally result in a better understanding of the basis for the denial, which tends to lead to a better outcome.

### **Waivers of Inadmissibility**

If an IV is denied based on a ground of inadmissibility, a waiver may be available. An IV applicant who is eligible for a waiver of inadmissibility may not file the waiver application (I-601) with USCIS until after the interview is completed and a finding of inadmissibility has been made.

### **Three- and 10-Year Unlawful Presence Bars**

Of all the grounds of inadmissibility, perhaps the greatest area of concern associated with the sunset of [INA §245\(i\)](#) and the resulting increase in IV interviews is [INA §§212\(a\)\(9\)\(B\)\(i\)\(I\)-\(II\)](#), which imposes three- and

10-year bars to admissibility for persons who were unlawfully present in the United States for certain periods subsequent to April 1, 1997. It is essential that applicants be prepared to address this issue at the visa interview with testimony and documentation for applicants who do not qualify for the I-601A stateside waiver filing (see discussion below).

DOS has published extensive guidance on determining unlawful presence.<sup>72</sup> In cases in which issues may arise as to whether the applicant accumulated unlawful presence, counsel should carefully document periods of stay in the United States and provide charts covering the periods of stay in the United States with the I-601 or I-601A applications to establish that the applicant is not subject to either of the bars, if such is the case. If subject to the three- or 10-year bars, counsel must determine if Page 56 the client is eligible for a waiver at the outset of representation. There are many complex fact patterns in an unlawful presence analysis, and the FAM and AFM should be consulted. Counsel should be aware that lawful time spent in the United States after the 3/10-year bar is triggered counts as time toward fulfilling the 3/10-year bar. It is time deemed to be spent in the home country. Where periods of lawful presence are intertwined with periods of unlawful presence with travel on advance parole during periods of lawful presence, the issue of whether periods of unlawful presence should be aggregated arise in light of the BIA's decision in *Matter of Arrabally and Yerrabally*,<sup>73</sup> which held that a departure under advance parole does not trigger the 3/10-year bars.

<sup>72</sup> See generally 9 FAM 302.9-14.

<sup>73</sup> See *Matter of Arrabally and Yerrabally*, [25 I&N Dec. 771](#) (BIA 2012).

### ***Criminal Convictions***

If a criminal conviction is the ground of inadmissibility, certified copies of arrest records, court records, and copies of the statutes under which the applicant was convicted and sentenced, along with translations if the documents are not in English, must be provided at the time of the visa interview. Waivers of inadmissibility are highly discretionary, and most IV waivers require a showing of extreme hardship to a qualifying relative (see discussion of factors considered at practice pointer, below). Waivers are available for only some criminal grounds of inadmissibility. For many grounds, such as drug abuse or addiction, public charge, student visa abuse, polygamy, aggravated felonies, false claims to citizenship, and terrorism, no waivers are available. Some grounds of inadmissibility are overcome through the passage of time, if other conditions are met. With respect to drug abuse/addiction, a demonstration of remission for at least one year will remove this ground of inadmissibility.

A waiver is available under [§212\(h\) of the INA](#) for crimes involving moral turpitude if the applicant is the spouse, parent, son, or daughter of a U.S. citizen or LPR. The general rule is to view the client's circumstances as a sentencing judge would and plan the hardship waiver long in advance of submission. U.S. relatives with chronic, serious illness and children with medical or mental disabilities are given significant weight in waiver applications. Even though a U.S. citizen or LPR child may not be a qualifying relative for many grounds of inadmissibility, hardship to nonqualifying relatives is often considered in the totality of the circumstances and considered as transferred hardship to a qualifying relative.

Waivers are available for fraud or misrepresentation of facts. [INA §212\(i\)](#) provides for a discretionary waiver in the case of an immigrant who is a spouse, son, or daughter of a U.S. citizen or LPR. They must establish that refusal of admission would result in extreme hardship to the family member. Page 57

### ***Provisional Waivers for Unlawful Presence (I-601A)***

As of March 2013, immediate relatives (spouse, parent, or child) of U.S. citizens who are present in the United States may seek a provisional waiver of unlawful presence from USCIS (Form I-601A) *prior to departing the United States* for an IV interview. In August 2016, a new regulation expanded the I-601A waiver eligibility to all individuals statutorily eligible for an immigrant visa if certain conditions are met. This waiver reduces the risk associated with departing the United States and the three- and 10-year bars, because the applicant's waiver application is adjudicated prior to departure. To qualify for an I-601A waiver, the applicant must meet the following conditions:

- Be physically present in the United States to file the application and provide the biometrics;
- Be 17 years of age or older;
- Have an immigrant visa petition pending with DOS
  - as the principal beneficiary of an approved I-130 (Petition for Alien Relative), an approved I-140 (Petition for Alien Worker), or an approved I-360 (Petition for Amerasian, Widow(er), or Special Immigrant) who has paid the immigrant processing fee; or
  - having been selected to participate in the Diversity Visa program; or
  - as the spouse of a child of the principal beneficiary of an approved visa petition who paid the immigrant processing fee or is a Diversity Visa program selectee
- Be able to demonstrate that the refusal of his or her admission to the United States will cause extreme hardship to his or her U.S. citizen or LPR spouse or parent;
- Be inadmissible only because of a period of unlawful presence in the United States ([INA §212\(a\)\(9\)\(B\)\(i\)](#)); and
- Meet all the additional requirements detailed in [8 CFR §212.7\(e\)](#) and in the Form I-601A instructions.

Applicants who do not meet the above-mentioned conditions are not eligible for a provisional unlawful presence waiver. Similarly, the applicant must not be in removal proceedings that have not been administratively closed; or in removal proceedings that have been administratively closed but have been placed back on the EOIR calendar at the time of filing; or have a final order of removal, exclusion, or deportation.

Counsel is well-advised to conduct an in-depth background interview of the client to determine that the only ground of inadmissibility is unlawful presence in order to avoid a rude shock at the immigrant visa interview when the consular officer in effect nullifies an I-601A waiver because other grounds of excludability apply. It is prudent Page 58 to obtain the client's FBI rap sheet and to file FOIA requests with USCIS and EOIR to make sure all possible bases of inadmissibility are covered.

### ***Waiver Processing***

Both I-601A and I-601 waiver processing have been centralized in the United States. Waiver applicants are required to file the I-601A with the designated USCIS Lockbox address listed on the USCIS website or the I-601A or I-601 instructions. They are currently adjudicated at the Nebraska Service Center, and the current processing times can be found on the USCIS website.

***Practice Pointer:*** A well-prepared and documented waiver application is even more critical now that I-601A and I-601s are centralized stateside, with adjudicators far removed from the real-life hardship of applicants. Organized, well-documented cases are respected by USCIS. It ultimately will save the attorney much time and money if a fully documented case is initially submitted.

Attorneys are also well-advised to be proactive in advising clients of factors favorably considered by USCIS in the waiver process, in particular, in adjudication of the "extreme hardship" analysis (see discussion of factors considered at practice pointer, below). For example, clients who are not active in their religious and civic communities should become so. Clients can volunteer at their children's schools and can volunteer in many other ways. As there is often a lead time of several years between the time a client consults an attorney and the time of adjudication of the waiver application, there is generally plenty of time for clients to improve their cases by being proactive. It is no longer sufficient to simply state that a U.S. citizen spouse and children depend on the applicant breadwinner for support. USCIS will look at the role the applicant plays in the lives of his or her children and many other factors. There is ample opportunity to improve the facts in the case and for clients to contribute to their community at the same time. Recent unpublished decisions by the Administrative Appeals Office<sup>24</sup> demonstrate that waivers of admissibility can be won through thorough documentation of economic and emotional hardships.

<sup>74</sup> Administrative Appeals Office (AAO) nonprecedent decisions can be accessed at <http://1.usa.gov/aaocases>.

**Practice Pointer:** Factors that are relevant in waiver applications include whether unlawful presence was willful or unknowing, length of time unlawfully present, length of time outside the United States after unlawful presence, good moral character, loss to community if not permitted to return to the United States, and extreme hardship to U.S. citizen or LPR spouses and/or children if the applicant is not permitted to return. The applicant must have a qualifying relative to be eligible to file for an immigrant waiver of the bar (spouse or son or daughter of a U.S. citizen or LPR) and must demonstrate extreme hardship to such relative. Page 59 If a client entered without inspection, it is a bit strained to argue that the client was unaware of unlawful presence.

Anecdotal evidence suggests many IV applicants are misled by coyotes, notarios, or unethical or incompetent lawyers about the impact of unlawful presence, so be certain to ask the client about prior advice received. Historically, consular and immigration officers have not accorded the weight that a bar association gives to the gravity of the victimization of a client who receives incorrect legal advice. Thus, if a client is unlawfully present due to bad legal advice, counsel should consider filing a bar complaint against the attorney to give substance to the allegation and perhaps a malpractice case.

## Visa Revocation and Termination of Registration for an Immigrant Visa

Visa issuance does not always guarantee LPR status. A consular officer may revoke an IV if the visa was obtained by fraud or misrepresentation, or if subsequent information reveals a ground of ineligibility prior to admission to the United States.<sup>75</sup> DOS may revoke a visa even after the applicant has commenced a journey to the United States, is in the United States, or has been admitted to the United States. Consular posts are encouraged to notify the foreign national of the revocation.

<sup>75</sup> [22 CFR §42.82](#).

### Termination of IV Registration

The regulations and FAM provide that, if within one year of being notified of the availability of a visa through the Follow-up Instruction Package for Immigrant Visa Applicants issued by the NVC, the applicant fails to apply for the visa, then the registration for an IV will be terminated.<sup>76</sup> One year after that, if the applicant has not established a basis for reinstatement, a termination of registration notice will be issued.<sup>77</sup> In extenuating circumstances, the consulate may allow reinstatement after the notice is issued.<sup>78</sup> If there is a final termination of IV registration, the petition will be destroyed. If a registration was improperly terminated or there are extenuating circumstances, it should be discussed with the consular post or the Visa Office AOD at the earliest possible time. Of course, counsel should take all steps to recreate the petition where it has been improvidently destroyed by a consular post.

<sup>76</sup> [22 CFR §42.83\(a\)](#); [9 FAM 504.13-2\(A\)](#).

<sup>77</sup> [22 CFR §42.83\(c\)](#); [9 FAM 504.13-2\(D\)](#).

<sup>78</sup> [9 FAM 504.13-3\(B\)\(a\)](#).

## Entry into the United States

Once the IV is issued, the applicant must enter the United States while the visa is still valid. At the port of entry, the applicant is inspected. [INA §204\(e\)](#) provides that an approved petition does not guarantee admission, and [INA §291](#) places the burden to establish eligibility for admission on the applicant. Once admitted, the person's Page 60 passport is stamped by CBP indicating admission as a lawful permanent resident. As of the date of entry, the person is considered an LPR, even though the alien registration card is received by mail at a later date. If the applicant had an I-485 pending or an "A" number with USCIS, it is critical to notify USCIS that the applicant was issued an IV with a new "A" number, to withdraw the I-485, and to request file consolidation.

## NONIMMIGRANT VISAS

### General Procedures and Considerations

Most applicants wishing to enter the United States on a temporary basis to visit, study, or work are required to obtain an NIV from an American consular post. There are exceptions to the visa requirements, which include Canadian citizens, except those in visa categories E-1, E-2, K-1, K-3, V, and S; applicants from Visa Waiver Program countries<sup>79</sup> entering for temporary business or pleasure for fewer than 90 days; applicants eligible for automatic visa revalidation; and parolees.<sup>80</sup> An applicant may be admitted without a visa when a waiver is granted by CBP for emergent or humanitarian reasons. There are several other exempt categories that are sometimes encountered.<sup>81</sup>

<sup>79</sup> A current listing of the countries participating in the Visa Waiver Program (VWP) can be accessed at <https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html>.

<sup>80</sup> 22 CFR §41.2(j) provides that “except as provided in paragraphs (a) through (i) and (k) through (m) of [22 CFR §41.2](#), all aliens are required to present a valid, unexpired visa and passport upon arrival in the United States. An alien may apply for a waiver of the visa and passport requirement if, either prior to the alien’s embarkation abroad or upon arrival at a port of entry, the responsible district director of the Department of Homeland Security (DHS) in charge of the port of entry concludes that the alien is unable to present the required documents because of an unforeseen emergency. The DHS district director may grant a waiver of the visa or passport requirement pursuant to [INA §212\(d\)\(4\)\(A\)](#), without the prior concurrence of the Department of State, if the district director concludes that the alien’s claim of emergency circumstances is legitimate and that approval of the waiver would be appropriate under all of the attendant facts and circumstances.” These are known as “Port of Entry” paroles.

<sup>81</sup> [9 FAM 201.1](#).

### Visa Waiver Program (VWP) Travelers and the Electronic System for Travel Authorization (ESTA) Program

Citizens of visa waiver countries may be eligible for admission to the United States for temporary business or pleasure for a period not to exceed 90 days per visit. In order to use the VWP, the applicant must have a valid approval through the Electronic System for Travel Authorization (ESTA) to travel to the United States. ESTA is a free, automated system used in advance of travel to determine the eligibility of visitors to travel to the United States under the VWP.<sup>82</sup> ESTA Page 61 applications may be submitted at any time prior to travel. An ESTA authorization generally will be valid for up to two years and for multiple entries into the United States. DHS recommends that travelers submit an ESTA application as soon as they begin making travel plans. Boarding international flights to the United States without ESTA approval is prohibited. Attorneys generally are not involved in this aspect of VWP travel unless ESTA denies permission to board.

<sup>82</sup> See CBP Electronic System for Travel Authorization, <http://www.cbp.gov/travel/international-visitors/esta>.

Just being a citizen of one of the visa waiver countries does not mean the applicant is eligible to use the VWP. One of the most frequently encountered issues is where an applicant has an application for a visa pending at an embassy and has been issued a refusal letter indicating the visa was refused under [INA §221 \(g\)](#). A refusal under this section is referred to as a “soft refusal,” and in many instances applicants and their attorneys do not consider it a refusal. For example, a common scenario is where an applicant who is awaiting the processing of a new or renewal E visa, which can be a lengthy process, needs to come to the United States for a few days for business meetings and attempts to enter under the VWP, and will likely be prohibited from doing so. Another situation encountered is where a client has a criminal arrest or conviction since the last ESTA authorization was issued, even where the arrest or conviction does not constitute a ground of ineligibility for admission.

### *New Restrictions on the Use of the Visa Waiver Program*

As of January 2016, the following categories of travelers are no longer eligible to travel or be admitted to the United States under the VWP: (1) citizens of VWP countries who have traveled to or been present in Iran, Iraq, Sudan, or Syria on or after March 1, 2011 (with limited exceptions for travel for diplomatic or military purposes in the service of a VWP country); and (2) dual citizens of VWP countries who are also citizens of Iran, Iraq, Sudan, or Syria. Persons barred from using the VWP must apply for a visa at a consular post. Consular posts have been instructed to process visas on an expedited basis for urgent business, medical, or humanitarian travel to the United States.

In air and sea ports of entry, CBP no longer issues paper I-94W forms to VWP travelers or paper I-94 forms to other NIV and parolees admitted to the United States, but continues to endorse the passport with an admission stamp, indicating date admitted, category of admission, and expiration date. Clients should always download their I-94 or I-94W information from the CBP website immediately upon arrival to ensure the visa classification and expiration dates are correct. If incorrect, attorneys should have them corrected at a designated deferred inspection airport. Attorneys and clients may have an I-94 corrected at any designated port of entry, which are listed on the CBP website.

### Automatic Extension of Visa Validity

A safety net for many travelers is automatic visa revalidation pursuant to [22 CFR §41.112\(d\)](#), which provides, in pertinent part, that the validity of an expired NIV may be considered to be automatically extended to the date of application for readmission Page 62 and be deemed converted to the status in which admission is sought for a nonimmigrant foreign national who:

- Is in possession of a Form I-94, Arrival-Departure Record, showing an unexpired period of initial admission or extension of stay, and in the case of a qualified F or J student or exchange visitor (or the accompanying spouse or child), is in possession of a valid Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status;
- Is applying for readmission to the United States after an absence not exceeding 30 days solely in contiguous territory (Canada or Mexico), or in the case of a student or exchange visitor or accompanying spouse or child, after an absence not exceeding 30 days in contiguous territory or adjacent islands;
- Has maintained and intends to resume nonimmigrant status;
- Is applying for readmission within the authorized period of initial admission or extension of stay;
- Has a valid passport;
- Does not require a waiver of ineligibility under [INA §212\(d\)\(3\)](#); and
- Has not applied for a new visa while abroad.

Thus, if a foreign national goes shopping in Canada or Mexico for the day, and is otherwise eligible for an automatic visa revalidation, it can be granted under the circumstances outlined above. However, if a foreign national goes to Canada or Mexico and applies for a new visa, this provision does not apply. Holders of passports from countries designated by the U. S. government as state sponsors of terrorism and supporting terrorism (Iran, Syria, or Sudan) cannot benefit from automatic visa revalidation.<sup>83</sup>

<sup>83</sup> [22 CFR §41.112\(d\)](#) and 9 FAM 403.9-4(E)(c).

Clients should be advised to carry with them and present all relevant immigration documents upon their return to the United States seeking admission under automatic visa revalidation, including the downloaded I-94 or I-94W. The travel history of nonimmigrant and parolee travelers to the United States can usually be accessed at <http://www.cbp.gov/I94>. The website contains a record of arrival and departure since 2009. The data is fairly accurate, but not perfect.

**Practice Pointer:** An expired visa in any category will qualify the applicant for automatic visa revalidation and readmission, if otherwise eligible. For example, a male citizen of Pakistan was admitted in B-2 status in 1992, changed status to F-1 in 1993, changed status to H-1B in 1999, and has maintained H-1B status since Page 63 1999. The B-2 visa has expired, and he has never had an F1 or H-1B visa. This person is eligible for visa revalidation and may be readmitted on his H-1B I-94 after a trip of less than 30 days to Canada or Mexico, if otherwise eligible for admission.

## Representation at Consular Posts

Finely honed skills as an advocate, legal scholar, and diplomat are required to effectively represent clients in the NIV process at consular posts. Lawyers often fail to undertake representation of the client in visa processing, concluding that their representation terminates with USCIS petition approval. Some lawyers consider themselves the representative of the employer only and so do not seriously represent the foreign national, and even fail to advise the foreign national to seek other counsel in the visa process. However, it can be persuasively argued that the employer, in hiring an immigration lawyer, wanted the foreign national to be issued a visa and report to work, so representation of the foreign national in visa proceedings is integral to effective representation of the employer as well. The retainer agreement should specifically include or exclude representation of a foreign national in the visa process.

The consequential decisions an attorney must make in the consular arena include which type of visa to request and where to apply for the visa. A thorough knowledge of consular posts and practices relating to the client is essential to strategic and effective lawyering in the visa process.

A USCIS-approved petition does not guarantee visa issuance, and visa issuance does not guarantee admission to the United States. Each applicant for admission must establish admissibility to a CBP inspector at a U.S. port of entry. It should not be assumed that either visa issuance or admission is pro forma. Rather, clients should be prepared for the consular interview as well as the border interview, and be provided with succinct attorney letters that explain the case, if explanation will facilitate visa issuance and admission.

An attorney may prepare a perfect, bullet-proof employment-based petition, approved by USCIS, only to encounter obstacles at the visa issuance stage. For decades, attorneys have protested, and officials at the Visa Office have agreed and reminded consular posts not to engage in readjudication of approved petitions, absent a suspicion of fraud or substantive ineligibility for the visa classification. In reality, consular officers peek behind visa petitions, particularly at high-fraud posts, so competent lawyering requires that both counsel and the visa applicant understand the contents of the petition, such as job title, job duties, compensation, and work locations.

In petition-based employment cases, once the petition is approved, counsel must determine when and where the beneficiary will apply for a visa. Factors to consider include attorney access to consular officers, complexity of the case, requirements for a security clearance or other administrative processing, and the policies of the post towards the type of case to be presented. Page 64

Strategic, effective lawyering includes selection of the consular post at which an NIV application will be made.<sup>84</sup> As a practice, for applicants in the United States, applications should be made at a border post in Canada or Mexico if the client is eligible to do so, as attorney dialogue on issues which might arise in a case is more likely to occur in Canada or Mexico than at high-volume consular posts time zones away.

<sup>84</sup> 9 FAM §403-2-4(B)(1) counsels that consular officers should rarely, if ever, reject nonimmigrant visa applications by persons who are physically present in, but not residents of, the consular district.

There are a myriad of reasons why it would be negligent for an attorney to permit the client to apply for a visa in his or her home country. The Department of State counsels its consular officers to rarely reject the applications of third-country nationals (TCNs) who are physically present in their consular district. Thus, effective lawyering requires counsel to review the situation in the home country in the context of a client's visa application and then determine whether the client should apply for a visa. A recent example in our practice

(where it was concluded that the client should not apply in the home country) includes a case in which a client was a public figure in the home country who was disliked by the officials at the American embassy, and the embassy would not permit counsel to be present at the interview. The case was accepted and decided at another consular post. Another example was where a Scandinavian family wanted to come to America for two years to supervise their two minor children while they attended private high school. As the FAM authorizes the issuance of B-2 visas to parents of minor children who have F-1 student status, the visa denials to the parents and minor children were unsupportable. After the home-country consul advised that he did not engage with attorneys and that it was unlikely he would ever issue visas to the family, the visa applications were successfully made in a third country. Another common reason to have a case accepted in a third country is where the home country visa wait times are lengthy, such as in Venezuela, which posts a 999-day wait for a tourist visa interview.

In E visa cases in which adjudication times and processes vary greatly, it is often prudent to apply in a third country where the waiting times are significantly shorter; the processes are less cumbersome, and there is opportunity for dialogue with the consular officer, which often facilitates adjudication in a timely manner.

The key to having a case hospitably received in a third country is being honest about the reason for the application. In the first case above, the client and the client's family were well-known in the third country as well, and the consular officers felt they could competently adjudicate the case. In the Scandinavian case, the acerbic emails from the home-country consul, as well as the lack of any persuasive notes in the consular database, were helpful in making a successful application in a third country. Seeking justice by applying at the appropriate consular post, be it in the home country or a third country, is essential to competent representation of a client. Presentation of a visa application in a third country requires comprehensive Page 65 documentation of home country ties in cases in which the presumption of [INA §214\(b\)](#) applies.

## NIV Application Procedure

Approximate waiting times for visa appointments and processing times can be found on the DOS website at <https://travel.state.gov/content/visas/en/general/wait-times.html>. Consular posts are instructed to report visa appointment wait times on a weekly basis, and the information is generally current. NIV-issuing consular posts require appointments for NIV interviews. Post-specific policies and procedures can be found in AILA's Consular Practice Handbook or on DOS's website at <http://www.usembassy.gov>. Expedited interviews are available in emergent circumstances. What is defined to be an emergent circumstance varies widely among posts.

The electronic Form DS-160 is now in use for all NIV applications worldwide. It must be electronically submitted through the Consular Electronic Application Center at <https://ceac.state.gov>. The questions are answered by completing fields or choosing from drop-down lists, and then advancing through the form page by page. A digital photo must be uploaded in most cases, but not all. When the DS-160 is complete, the applicant needs to sign and submit the form electronically by clicking the "Sign and Submit Application" button. The applicant must print and bring to the visa interview the DS-160 barcode confirmation page, which is generated upon submission.

**Practice Pointer:** Unfortunately, the DS-160 form is not designed to incorporate important supplemental information, which is often critical to informed consular decision-making. Make sure the client saves a copy of both the draft and the final DS-160 submitted by printing it out and emailing it to you. Prior to submission, counsel should carefully review the DS-160 and correct all errors. There is seldom a visa application completed accurately by a client.

After the DS-160 is submitted, the visa fee must be paid, either online or at a designated bank in the country of application. Once the fee is paid, an appointment at the selected consular post must be made by going to the consular post website and following the post-specific instructions.

NIV appointments are either made online or by telephone. The Machine-Readable Visa (MRV) fee must be paid before an appointment will be scheduled. Post policies vary on whether the MRV fee can be paid online



or whether it must be paid at a local bank. Local bank payments complicate the process when the client is in the United States. The applicant must bring the consular appointment confirmation and proof of the payment with him to the interview. In addition to the MRV fee, there may be a visa issuance fee pursuant to the reciprocity schedule between the United States and the applicant's country of nationality, which is paid at the time of visa approval at the consular post. Page 66

### ***Practice Tips for a Successful Visa Application***

Consular officers appreciate a short, bulleted summary of the case for the applicant to present at the interview, and report that few attorneys take the time to engage in this advocacy effort. In complicated cases, the executive summary should be accompanied by a detailed history of the case with indexed and tabbed exhibits. A short and polite letter to the consul at the post explaining issues in the application, such as interactions with the criminal justice system, prior overstays, and other aberrations, will facilitate an informed decision by the consular officer and will earn the attorney the respect of the consular officer for being knowledgeable and prepared.

***Practice Pointer:*** Attorneys should ensure the client presents the necessary documents to prove visa eligibility, including, in employment cases: a complete copy of the petition filing and USCIS approval notice, proof of prior immigration history (e.g., prior petition approvals, I-20s, etc.), tax returns with W-2 forms, paystubs for the current year, all passports with U.S. visas, professional and academic credentials, and a current résumé.

In B-1/B-2 visa cases, all prior passports with U.S. visas, evidence of compliance with prior U.S. visas, and proof of financial support while visiting the United States should be presented. An American Express card carries much more weight than a bank statement from a developing country with currency export controls or an invitation letter promising support from a friend or relative. American Express cards are preferred because there is usually no credit limit.

First impressions count, and attorneys should ensure the client dresses appropriately for the interview. If your client is applying for a student visa to attend Harvard or any reputable American university, he or she should attend the interview in a university t-shirt. An attorney's value added to the process in ensuring a well-prepared, appropriately attired visa applicant is immeasurable. A visa interview typically lasts one to two minutes, during most of which the consular officer is reading data on the computer screen. Few words are generally exchanged; thus, choreography is all-important. The consular officer has a minute or two to decide your client's fate, and you have had hours, weeks, and months to learn the client's history and motives.

Competent lawyering mandates that attorneys conduct a mock interview via Skype with the client prior to the interview. The mock interview will prepare the client on what to expect at the interview, will relax them, and will reduce what has come to be known among attorneys as the "consular terrors." Page 67

## **Overcoming Barriers to Success in NIV Processing**

### ***Presumption of Immigrant Intent***

[INA §214\(b\)](#) is historically responsible for the overwhelming majority of NIV denials.<sup>85</sup> This section of law has two parts, the first of which is often overlooked by attorneys. This statute requires visa denial if the applicant is not eligible for the visa classification sought, such as where an H-1B petition is for an engineer and the applicant is a nurse. The second section is the well-known immigrant intent ground of denial. The latter section provides that every applicant is presumed to be an immigrant until he or she establishes to the satisfaction of the consular officer at the time of the application for a visa, and the inspector at the time of the application for admission to the United States, that he or she qualifies as a nonimmigrant. A visa applicant subject to the rigors of overcoming §214(b) is presumed guilty until proven innocent.

<sup>85</sup> For recent visa issuance and refusal statistics, see DOS Worldwide NIV Workload by Visa Category FY2015, at <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2015NIVWorkloadbyVisaCategory.pdf>.

The presumption of immigrant intent is inapplicable to H-1B, H-4, K-1, K-2, K-3, L-1, L-2, and V visa applicants. In addition, H-1B, H-4, L-1, L-2, E, O-1, and O-3 beneficiaries are exempt from proof of maintenance of foreign residence. O-1 beneficiaries are treated similarly to H-1B beneficiaries.<sup>86</sup> Consular officers who cannot statutorily refuse visas under §214(b), but who have misgivings about the applicant or the application, may return a petition to USCIS with a request for consideration of revocation. This is a harsh measure, as such “returned petitions” cause punitive delays in visa issuance. Moreover, most issues can be resolved at post without the necessity of a lengthy petition return to USCIS via the DOS Kentucky Consular Center.

<sup>86</sup> [INA §101\(a\)\(15\)\(O\)\(i\)](#) (defining O-1 nonimmigrants without imposing a foreign-residence requirement); [8 CFR §214.2\(o\)](#); [9 FAM 402.13-10\(B\)](#) (stating that standards of temporariness and immigrant intent will generally not be applied to O-1, O-2, and O-3 visa applicants).

DOS issued two cables in 2005 providing strong ammunition in several common §214(b) situations, including instances in which a principal applicant is issued a visa (F-1 and J-1) and dependents are refused.<sup>87</sup> They are mandatory reading for attorneys representing students and exchange visitors. The directives in the 2005 cables have been somewhat diluted by recent revisions to the FAM note at 9 FAM §402.1-4(C).

<sup>87</sup> See [9 FAM 402.1-4\(C\)](#); DOS Cable, “DOS Cable Indicates 214(b) Not Equivalent to Inadmissibility,” AILA Doc. No. [05032279](#).

Application of the intending-immigrant prong of [INA §214\(b\)](#) to H-1B, H-4, L-1, and L-2 visas has been removed, and its removal has facilitated the entry of business nonimmigrants to the U.S., but visas can still be refused to H-1B and L applicants Page 68 under the subjective prong of §214(b) if the consular officer believes the applicant does not meet the substantive qualifications for the visa sought, or under [INA §221\(g\)](#) on the grounds that the applicant has failed to provide sufficient documentation to justify visa issuance. In such circumstances, approved NIV petitions may be returned by the consular officer to USCIS for consideration of revocation. The same strategies as are outlined in the Immigrant Visa section above should be considered.

### **Security Clearances**

DOS is required to produce a security advisory opinion (SAO) for males and females over the age of 16 born in, and who are nationals or citizens of, “T-3” countries, and for males over the age of 16 from the “List of 26” countries.<sup>88</sup> Affected individuals should plan on a delay in visa issuance, as security clearances in NIV cases are generally not commenced until after the visa interview. Since these checks began in November 2001, the processing times have fluctuated from a few days to many months. A list of categories of applicants subject to security clearances is classified information. If an expedited security clearance is legitimately needed, the request should be made at the time of the visa interview, as it is more difficult for a consular officer to request expedited handling after the SAO has been initiated and transmitted.

<sup>88</sup> “T-3” countries are countries determined by the U.S. government to be state sponsors of terrorism—Iraq, Sudan, and Syria. Iraqis and Libyans might still undergo intense security checks. DOS has not provided a list of countries subject to additional security clearances for males over the age of 16, but anecdotal evidence suggests the “List of 26” includes Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen.

**Practice Pointer:** The evidence suggests that security clearance delays have increased recently. It is worth noting that the instructions from the Visa Office to the consular posts indicate that a follow-up inquiry

on an SAO should not be undertaken until 60 days have elapsed since initiation of the SAO. Contact both the consular post and [legalnet@state.gov](mailto:legalnet@state.gov) if the clearance takes more than 30 days.

Applicants from Iran experience long SAO delays, particularly if applying in the United Arab Emirates (UAE) or Turkey, and there appears to be an increase in denials under [INA §212\(a\)\(3\)](#) (broadly defined terrorist grounds). In addition, Iranians are now ineligible for U.S. visas if they intend to study energy, nuclear engineering, nuclear science, petroleum engineering, and related fields.<sup>89</sup> No details Page 69 have been provided on how DOS defines “related fields,” but the broadest reading possible should be used in analyzing an Iranian student visa case. Syrian and Pakistani males appear to be at risk for lengthy SAO delays as well. Under the Trump administration, early attempts to bar all nonimmigrants and immigrants from seven Muslim-majority countries was attempted and did not succeed initially due to several court orders blocking some or all of the executive orders. It is clear that there will be further attempts to limit the admission of persons deemed undesirable by the Trump administration.

<sup>89</sup> The Iranian Threat Reduction and Syria Human Rights Act of 2012, [Pub. L. 112-158](#), §501, 126 Stat. 1214, 1258 (2012). “Section 501: Exclusion of Citizens of Iran Seeking Education Relating to the Nuclear and Energy Sectors of Iran: (a) In General.—The Secretary of State shall deny a visa to, and the Secretary of Homeland Security shall exclude from the United States, any alien who is a citizen of Iran that the Secretary of State determines seeks to enter the United States to participate in coursework at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 USC 1001(a) to prepare the alien for a career in the energy sector of Iran or in nuclear science or nuclear engineering or a related field in Iran.”

Applicants from China, Russia, and India often encounter delays in visa issuance if a consular officer determines that the Technology Alert List (TAL)<sup>90</sup> is applicable to the applicant’s field of study or work (e.g., astrophysics). Counsel should research TAL considerations and advise clients accordingly. The TAL covers a broad spectrum of technology and skills. The clearance cable for the TAL is known as a Visa Mantis.<sup>91</sup> Most other “List of 26” and “T-3” applicants will undergo a Visas Condor or Visas Donkey check.<sup>92</sup> Information on the types of security checks by nationality can be found in the FAM and in other parts of this Handbook. The online edition of the FAM has omitted much information on security clearances. The print editions contained information on the types of clearances and to which types of visa applicants they applied.

<sup>90</sup> [9 FAM 302.5-3\(B\)\(2\)](#) (currently unavailable for online viewing); [9 FAM 304.2-5\(B\)\(1\)](#) (currently unavailable for online viewing).

<sup>91</sup> The validity of Visas Mantis clearances has been extended if the applicant is returning to a previous program of study or professional assignment.

<sup>92</sup> For more information on security clearances, see T. Loke-Walsh and B. Wolfsdorf, “Consular Processing Enhances Electronic Security, Streamlines Visa Applications,” in *The Consular Practice Handbook 1* (AILA 2010–11 Ed.).

Facial recognition processing has been added to both NIV and IV applicants. This process can occasionally lead to visa issuance delays.

The post-9/11 visa regime has inserted a much more complicated process and has, in fact, transferred authority for visa adjudications from consular officers to database and watch-list adjudication in visa security cases. DHS has DHS Visa Security Units at many consular posts that have the authority to overrule a consular officer’s decision without advising the consular officer of the reason. There are institutional disincentives for a consular officer to challenge a security denial; thus, although there is a procedure for doing so, it is seldom used. Final visa adjudication in security cases has been ceded to DHS. DHS intends to expand its U.S.-based Pre-Adjudicated Threat Recognition and Intelligence Operations Team (PATRIOT) to more visa-issuing posts. This program makes it clear that the role of consular officers in discretionary decision-making has been diluted. Consular officers are often forced to issue a decision that is the product of information the consular officer has never seen, Page 70 much less exercised discretion in evaluating. The diminution of consular authority has resulted in the further evaporation of the extremely limited access of visa applications to counsel, review of visa denials, and transparency. Consular decision-making is no longer

absolute, and the denials of due process to visa applicants and their U.S. employer sponsors have become an even higher bar to justice and fundamental fairness in the visa process.

DOS instructs that where a DHS-generated basis for inadmissibility is discovered in the Consular Lookout and Support System (CLASS), the consular officer must assume that the finding was correct and (except in cases involving nonpermanent ineligibilities) should not look behind a definitive DHS finding or readjudicate the foreign national's eligibility with respect to the provision.<sup>93</sup> A recent terrorist-list victory for an applicant wrongly included on the list is *Ibrahim v. DHS* (seediscussion below),<sup>94</sup> but has been eclipsed by the Supreme Court's decision in *Kerry v. Din*.<sup>95</sup> The later decision is *Cardenas v. United States*.<sup>96</sup>

<sup>93</sup> [9 FAM 403.10-2\(B\)\(2\)](#) (currently unavailable for online viewing); "DOS Cable on Processing Cases With CLASS 'Hits,'" AILA Doc. No. [05052060](#).

<sup>94</sup> *Ibrahim v. DHS*, 62 F. Supp. 3d 909 (N.D. Cal. 2014).

<sup>95</sup> *Kerry v. Din*, [135 U.S. 2128](#) (2015).

<sup>96</sup> *Cardenas v. U.S.*, [826 F.3d 1164](#) (9th Cir. 2016).

### ***Personal Interview Waivers for Initial Visas***

In-person initial interviews may be waived on the basis of age (under 14 and over 79 years old), as well as for diplomats and other government officials and for renewals of certain categories of visas. Counsel should check the consular post websites and the DOS websites for current interview waiver policies. The discretion of consular posts to waive personal interviews has been restricted by President Trump's administration. Counsel should check the consular post websites and the DOS website for current interview waiver policies.

### ***Personal Interview Waivers (PIW) for Visa Renewals Recently Contracted by the Trump Administration***

Until recently, many posts permitted renewals of visas in the same category without an interview, provided other conditions were met. This represented a great savings in time, expense, and anxiety to visa applicants, even though they must still have biometrics taken. Prudent lawyering requires attorneys to check post websites for current interview waiver policies. Assisting clients in avoiding the possible delays and stress in the personal interview process is appreciated by clients. Many consular post websites have a "Visa Interview Wizard" interactive program for applicants to determine eligibility for a visa interview waiver. In a laudable policy change, Mexican posts now grant personal interview waivers to Mexican applicants applying in the same visa category where the last visa expired less than 12 months prior, in most circumstances. Consular officers reserve the right to require a personal Page 71 interview of applicants initially tracked for interview waivers. If eligible for a personal interview waiver, applicants may wish to apply in their home country if there are no other issues, rather than in a third country close to the United States, which would normally require an in-person interview.

Third-country national nonresident applicants cannot obtain interview waivers (e.g., Iranians and Syrians applying at any post).

### ***Practice Pointers for Obtaining Acceptance of Jurisdiction over an Out-of-District NIV Application Other Than at Border Posts***

DOS strongly encourages consular officers to accept jurisdiction over the NIV application of an applicant who is physically present in their consular district, but not a resident of the consular district, and expects the authority of a consular officer to reject such applications to be rarely used.<sup>97</sup> Despite this recommendation, occasionally a consul will reject an out-of-district NIV application, citing workload or lack of familiarity with conditions in the applicant's home country, or will simply deny a visa under [INA §221\(g\)](#) or [§214\(b\)](#) as an expression of reluctance to adjudicate an out-of-district application.

<sup>97</sup> [22 CFR §41.101\(a\)](#); [9 FAM 403.2-5\(B\)\(2\)](#).

If the applicant could apply for an NIV in his or her home country, counsel should explain why the applicant is not doing so and document legitimate business or personal reasons for their client's presence in the third country. For example, cases involving same-sex couples who do not want to apply for visas in the home country for safety or political reasons will generally receive sympathetic treatment in the home country. Consular officers at border posts generally do not pose this question, as the presence of third-country nationals in Canada or Mexico to apply for a visa is understood and routine.

Consuls at low-volume, low-fraud posts are more likely to accept discretionary jurisdiction, as consular officers at such posts will often have the time to discuss the application and review documentation in advance of presentation.

Males from the "List of 26" countries and males and females from "T-3" countries are sometimes not permitted to apply for NIVs at border posts in Mexico, but may apply at most Canadian posts, a policy always subject to change without notice.

If [INA §214\(b\)](#) applies to the type of visa sought (B, F, J), provide strong documentation of ties to the home country before you contact the third-country consular post. It is important to document the applicant's family ties, employment and business interests, and property ownership in the home country, as well as the U.S. visa histories of the applicant and all family members. In student and exchange visitor cases, it is important to document employment opportunities available to the applicant in his or her home country upon completion of study or employment in the United States in F and J cases. Page 72

Before contacting a third-country consular post, be certain that your client can obtain a visa, if necessary, to enter the third country and can remain in the country during processing time.

#### ***"Out-of-District" NIV Applications in Canada and Mexico; 22 CFR §41.112(d)***

If the applicant is in the United States, competent lawyering requires that the client be advised to apply for a visa at a consular post in Canada or Mexico, if eligible, unless the client is eligible for a personal interview waiver for a visa renewal in the home country. Clients should be counseled to travel to Canada or Mexico to apply for NIVs because of the ability of the attorney to contact a consular officer at the post if there is an issue and because of savings in time and expense. Clients should be counseled to avoid applying at the posts where DHS has officers looking over the shoulder of consular officers with the authority to overrule a consular officer and deny a visa. The Visa Security Units are currently operating at about 21 consular posts, including Pakistan and Saudi Arabia, and should be avoided because of the likelihood of a Kafkaesque visa denial; even the consular officer is often not privy to the reason for the DHS veto of visa issuance. The only recourse in such cases is litigation in the federal courts with the goal of having a court determine whether the act of a single law enforcement agent in entering a name in a database or on a watch list has any basis in fact. Such litigation is lengthy and costly. The most recent victory was in the Ibrahim case,<sup>98</sup> which took eight years for Dr. Ibrahim to clear her name, and which was traced back to a single FBI agent who entered the wrong information into a database. Attorneys working together can pool resources to reduce the cost of litigation for clients. Successful challenges to visa denials by anonymous databases and watch lists are less likely with the U.S. Supreme Court decision in *Kerry v. Din*,<sup>99</sup> which found that there is no right for a visa applicant to learn the factual underpinning of a visa denial.

<sup>98</sup> *Ibrahim v. DHS*, 62 F. Supp. 3d 909 (N.D. Cal. 2014).

<sup>99</sup> *Kerry v. Din*, [135 U.S. 2128](#), 2138 (2015).

Appointments for TCNs may be made online at the consular posts in Canada<sup>100</sup> and Mexico.<sup>101</sup> Posts in Canada and Mexico are given great latitude in determining the types of visas and categories of applicants they will accept. Thus, it is important to check the website or email the post about a particular type of case before making an appointment.

<sup>100</sup> <https://ais.usvisa-info.com/en-ca/niv>.

<sup>101</sup> <https://ais.usvisa-info.com/es-mx/niv>.

Out-of-status cases are accepted at border posts on a case-by-case basis. Counsel should be prepared to demonstrate that the out-of-status time was not a knowing, willful violation of the immigration laws. Some border posts will not accept NIV applications from TCNs who last entered the United States in B-2 status and changed status to another status such as F, H, or L. Border post policies are fluid and are subject to change without notice. AILA attorneys who represent clients at border posts would be excellent resources for information regarding current policies.

Generally, Mexican border posts will not accept visa applications from TCN applicants who do not speak English or Spanish. Canadian posts accept jurisdiction over TCNs applying for an initial E visa on a limited basis. The Consulate General in Toronto has announced that E-1 and E-2 visa applications for employees and their dependents of registered E-1 and E-2 companies may be made at the American embassy in Ottawa and the American consulates in Toronto, Vancouver, Calgary, and Montreal. If the company E registration has expired, employees and their dependents must apply in Toronto. The expansion of posts where application can be made and streamlining of the process is expected to make the process more accessible. For those applying in Mexico, the Consulates General in Tijuana and Monterrey adjudicate E-1 visas, and the Consulate General in Ciudad Juarez adjudicates E-2 visas. Mexican posts will renew E visas for third-country nationals. It is suggested that the applicant have a very solid E case where the applicant has previously been issued an E visa and demonstrate that the relevant evidence is based on a U.S. business before approaching a consular post in Mexico.

**Practice Pointer:** The Mexican government permits visa-free entry to all of Mexico with a valid U.S. visa and I-94. Many consular posts in Canada are receptive to TCN applications where security clearances are required. *Mexican posts will renew visas in all visa categories except B and H2 visas. It must be a renewal in the same visa category.*

In exceptional and humanitarian cases, applicants with pending visa cases may be paroled back into the United States by DHS if there is a delay in visa issuance in Canada or Mexico.

## INA §222(g): Restrictions on Shopping for Justice in NIV Cases

[INA §222\(g\)](#) eliminated the ability of some visa applicants to present their visa applications at a border post or any third-country consular post if they were unlawfully present in the United States for even a day, as indicated by the I-94 departure record or I-797. Such applicants are prohibited from applying for an NIV at U.S. consular posts outside the country of citizenship or last permanent residence (or, if there is no office in such country, at such other consular office as the Secretary of State specifies). This prohibition is permanent, but there are exceptions for “extraordinary circumstances.” <sup>102</sup>

<sup>102</sup> [22 CFR §41.101\(c\)](#).

As currently interpreted by USCIS and DOS, [section §222\(g\)](#) applies only if the applicant is admitted to the United States on the basis of an NIV. If the applicant is paroled into the United States, enters under the VWP, or enters under other provisions not requiring visas (e.g., Canadian nationals), §222(g) is not applicable. Of course, such persons may be separately inadmissible under [INA §212\(a\)\(9\)\(B\)\(i\)](#) if the period of unlawful presence exceeds 180 days. [INA §222\(g\)](#) applies only to visa overstays. If an applicant violates status in some other way but does not remain in the United States beyond his or her period of authorized stay, the applicant is not subject to §222(g).

**Practice Pointer:** [INA §222\(g\)](#) applies only to persons who have been admitted to the United States until a certain date as reflected on the I-94 and have overstayed that date. In contrast, persons admitted for “duration of status” (most commonly F and J nonimmigrants) do not fall under §222(g), despite having remained in the United States beyond the termination of their program or having otherwise violated the terms of their status, *provided*: (1) USCIS has not made a formal determination of a status violation in adjudicating an application for an immigration benefit (typically an application to extend or change nonimmigrant status); and (2) an immigration judge has not made a similar determination in removal proceedings. At the same time, be aware that even if the applicant does not technically fall under §222(g),

the consular officer may deny the visa on some other ground, particularly where the applicant has been out of status for a long period or has committed a willful status violation.

[INA §222\(g\)](#) is not applicable where USCIS favorably exercises its discretion and approves an application for change or extension of status retroactively (*nunc pro tunc*). [INA §222\(g\)](#) is applicable to an applicant whose timely filed extension/change of status application is denied by USCIS following the expiration date on the I-94 document regardless of the reason for the denial. Nonimmigrants admitted to the United States until a specific date who timely apply for extension or change of status, but who then leave the United States after the I-94 expires and before the decision on the application has been issued, are not subject to §222(g) if they can establish to the satisfaction of a consular officer that they were in an authorized period of stay prior to departure. The application must be timely and not frivolous, and the applicant must not have engaged in unauthorized employment. When these requirements have been met, the applicant's NIV should not be voided.<sup>103</sup>

<sup>103</sup> Legacy INS Memorandum, M. Pearson, "Section 222(g) of the Immigration and Nationality Act (Act) (IN-0014)," AILA Doc. No. [00030773](#).

**Practice Pointer:** Strategic lawyering mandates that *nunc pro tunc* requests for change or extension of status for clients in F, J, or any other status where they are admitted for "duration of status," rather than until a date certain, should rarely, if ever, be filed. Denial of the *nunc pro tunc* change or extension of status will convert the out-of-status time into unlawful presence time if the *nunc pro tunc* request is denied and the application of [INA §222\(g\)](#) is triggered, banishing the Page 75 client to forever applying for all nonimmigrant visas in the home country. Requesting a *nunc pro tunc* status extension is playing roulette with the client's future options. Likewise, if the client has a status approved until a date certain on an I-94 that is still valid, requesting a *nunc pro tunc* change or extension of status will also result in triggering §222(g), if the *nunc pro tunc* extension or change of status is denied. Clients are understandably anxious to leave the country and apply for a new visa, but resist the temptation to let the client instruct you. A denial of the *nunc pro tunc* request will not only trigger §221(g) but will usually start the unlawful presence clock ticking the day after the denial of the benefit. It is a chance your client should not be permitted to take if you are signing the G-28.

**Practice Pointer:** If the client has a status gap but is not unlawfully present, ensure they apply for a visa to enter the third country at the earliest possible moment, as many third countries will not issue visas if the applicant is not in status in the United States. A prudent practice is to advise clients to always have valid visas to Canada and Mexico in their passports in the event of an emergency.

The period after the filing of a bona fide request for asylum is a period of authorized stay under [§222\(g\)](#) if the request was filed before the applicant's authorized stay expired and the applicant does not work without authorization. In addition, if USCIS grants an out-of-status applicant voluntary departure, the period of voluntary departure is considered as a period of authorized stay, but does not cure any prior unauthorized stay.<sup>104</sup> Applicants granted temporary protected status (TPS) prior to the expiration of their authorized stay are not subject to [INA §222\(g\)](#) if they remain in TPS status throughout their stay in the United States. If the TPS grant is made after the applicant's authorized stay has expired, or if the applicant stays in the United States after the TPS status has expired, then §222(g) would apply.

<sup>104</sup> *Id.*

**Practice Pointer:** Notwithstanding the Visa Office instructions to consular officers to refrain from extensive interrogations and investigations of whether an applicant has acquired unlawful presence, counsel should prepare the client for the visa interview by including strong evidence that the applicant has no unlawful presence time, if such is the case. Neither an I-20 for students nor an IAP-66/DS 2019 form for exchange visitors is legal evidence of valid status. These forms should be accompanied by transcripts and letters from the schools for students and letters from the exchange program for exchange visitors stating the dates the applicant was a student or exchange visitor in good standing. Page 76

It is also important to send clients to visa interviews with a timeline of their immigration history in a short, bulleted summary and supporting documents, such as copies of all I-797 forms, I-94s, transcripts for students, letters from employers, W-2 forms, and tax returns for those who have previously been employed. Counsel should also submit a short brief regarding the difference between unlawful presence and out-of-status time, and describe any time the client has spent in these statuses.

**Practice Pointer:** Regrettably, some foreign nationals have plummeted into the dreaded state of unlawful presence through the malfeasance of an attorney. If such is the case, document the malpractice and file a complaint with the bar association. There have been reports from attorneys that such claims are not given the weight they ought to be given in various discretionary consular decisions. A legitimate bar complaint should be pursued.

**Practice Pointer:** It is important to distinguish between “out-of-status” and “unlawful presence” time for the purposes of determining whether the client is permitted to apply for a visa in a third country. An H-1B worker who is not complying with the terms and conditions of the petition is out of status, although not unlawfully present during the petition validity period. F-1 students who do not maintain student status are out of status, but not unlawfully present, unless USCIS or an immigration judge determines that the applicant has violated his or her status. Minors under the age of 18 who are unlawfully present do not accrue unlawful presence time for purposes of [§222\(g\)](#).

## Doctrine of Nonreviewability of Decisions

U.S. consular officers have exclusive authority to adjudicate applications for visas under [INA §104\(a\)](#), which provides:

The Secretary of State shall be charged with the administration and enforcement of the provisions of this chapter ... relating to ... the powers, duties and functions of diplomatic and consular officers of the United States except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas.<sup>105</sup> Page 77

<sup>105</sup> Professor Nafzinger in his law review article, “Review of Visa Denials by Consular Officers,” 66 Wash. L. Rev. 1, 24 (1991), observes that “the precise legislative intent behind this language is unclear. ... Probably the quoted language in §104(a) was intended not to immunize visa determinations from review, but rather to confirm by implication the power of the attorney general, rather than the secretary of state, to undertake the review.” See *also*, USCIS Interoffice Memorandum, D. Neufeld, L. Scialabba, and P. Chang, “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,” AILA Doc. No. [09051468](#).

The general rule is that a consular officer’s decision denying a visa is not subject to administrative or judicial review.<sup>106</sup> The doctrine of nonreviewability is premised upon Congress’s plenary power over the admission of applicants. Even the most sophisticated visa applicants can dissemble in the intimidating consular interview process and be unable to answer basic, simple questions. Thus, until the right to counsel becomes fully implemented and respected in the consular context, it is incumbent on counsel to prepare all applications and the applicant for the all-important visa interview.<sup>107</sup> The doctrine of consular absolutism has gained a third dimension in the wake of the USA PATRIOT Act<sup>108</sup> and subsequent acts that grant DHS the authority to reverse a consular officer’s decision to issue a visa on security grounds, without providing any factual basis for their decision either to DOS or the applicant. The right to know the factual bases for a visa denial has been further diluted with DHS having absolute power over the decision of the consular officer, who in turn has absolute power over the initial decision. The multi-layered, secret processes leading to visa denials, particularly in security cases, was unsuccessfully challenged in *Kerry v. Din*.<sup>109</sup> It is the most significant case challenging consular nonreviewability since *Kleindienst v. Mandel*, [408 U.S. 753](#) (1972). Amicusbriefs were filed by former consular officers and several other organizations.

<sup>106</sup> *Li Hing of Hong Kong, Inc., v. Levin*, 800 F.2d 970 (9th Cir. 1986); *United States ex rel Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929); *Garcia v. Baker*, 765 F. Supp. 426, 429 (N.D. Ill. 1990).



<sup>107</sup> *Fiallo v. Bell*, [430 U.S. 787](#), 799-800 (1977) (concluding that the judiciary should not test the intent of the legislature in the immigration context); see also *Centeno v. Shultz*, 817 F.2d 1212, 1213-14 (5th Cir. 1987).

<sup>108</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, [Pub. L. No. 107-56](#), 115 Stat. 272.

<sup>109</sup> *Kerry v. Din*, [135 U.S. 2128](#) (2015).

## Administrative Review

Administrative review of consular decisions is narrowly circumscribed. The regulations provide that a consular officer's decision may be reviewed at the consular post by the chief of the section, or referred to DOS for an advisory opinion.<sup>110</sup> If there is a difference of opinion between the adjudicating consular officer and the chief of the section at the post, the case will be automatically referred for an advisory opinion. However, in practice, a supervisory consular officer either persuades the adjudicating officer that a visa application was wrongly denied or may assume jurisdiction over the application and issue the visa. A consular officer's decision with respect to findings of fact is conclusive. As a result, advisory opinions are issued only as to issues of law. An advisory opinion regarding an issue of law is binding upon the consular officer.<sup>111</sup> Page 78

<sup>110</sup> [22 CFR §42.81\(c\)–\(d\)](#).

<sup>111</sup> [22 CFR §42.81\(d\)](#).

A request for an advisory opinion may be submitted to the AOD by the applicant or by the consular officer. A letter setting forth a statement of the facts and the section(s) of law and/or regulations involved should accompany a request for review by the applicant. If necessary, a brief discussing the issues and applicable legal authority should be included. If possible, counsel should attempt to resolve the case at the consular post first, before filing a request for an advisory opinion. Always copy the consular post on your request for an advisory opinion.

By presenting additional documents or facts, advancing legal arguments, or revisiting the relevant issues involved, the applicant's attorney can occasionally persuade the consular officer to reverse an otherwise negative preliminary finding or unfavorable decision. The attorney's intervention, whether personally at the consulate or as part of the review process, offers the opportunity for limited review. By becoming involved in the advisory opinion process early, counsel can ensure all evidence for the applicant is presented before DOS makes a decision.

DOS takes the position that advisory opinions are confidential, and will not release the opinion to the applicant or attorney. DOS will furnish only a letter notifying the attorney or the applicant of the decision and a summary of the basis for the decision.

**Practice Pointer:** In practice, it is challenging to secure meaningful supervisory review at a consular post. Counsel should attempt to present new, material evidence to support review. Additionally, review of a denial generally requires the visa applicant to make another interview appointment, submit a new DS-160, and pay the MRV fee again. Deliberate but expedited action is required after a denial, particularly if a visa petition is involved, as the petition may be returned by the consular officer to USCIS for consideration of revocation before counsel has an opportunity to attempt to resolve outstanding issues at the post. Rather than suggesting that the consular officer has committed error, it is preferable to indicate you are providing clarification and further information not previously presented. Illustrating these principles at work is a case this author filed, involving an 18-year-old Japanese student who had been admitted to a top college of music in the United States. He had spent the immediate preceding 10 years as an F-2 dependent of his mother, who earned a Ph.D. in the United States and returned to Japan with the applicant and his sister during the summer, following graduation of the mother from her Ph.D. program and the client from high school with a 1.8/4.0 grade point average. The applicant read the embassy website and prepared the documents listed on the website as required for a student visa application, which included a valid passport, valid I-20, affidavits of support from his father and his mother's friends, and his high school transcripts and diploma. The young student was baffled when the interviewing consular officer denied the visa because: (1) his high school grades were very low (true); (2) the Page 79 officer did not believe the

applicant's mother's friends would help support him; and (3) the applicant failed to disclose on his visa application that he had a juvenile arrest for painting graffiti in a public place (true). After thoroughly interviewing the applicant, his mother, and his American patron and benefactor, it was learned that his high school grades were very low because he had only 50 percent of his hearing and was too proud to advise school officials of his special needs, that he had won a statewide math competition, that he was a musical genius and had won a scholarship to a top musical school, that his parents were divorced, and that he had not intentionally failed to disclose a juvenile transgression. Affidavits of support were obtained from his father, his mother, and his American patrons. Also, a detailed résumé disclosing his academic awards and music awards and videos showcasing his talent were submitted. A detailed case summary was emailed to the chief of the NIV unit. The applicant had a second interview by another officer, at which time the visa was granted and the dreams of a young, talented musician came true. This case illustrates how important it is to interview clients in depth to prepare a case and to prepare the client for the visa interview.

## Judicial Review

An increasing number of cases and decisions indicate that an aggrieved visa applicant is not totally without a judicial remedy. In a recent decision by the U.S. Court of Appeals for the Second Circuit, the plaintiffs successfully challenged a visa denial on the grounds that it infringed upon the First Amendment rights of U.S. organizations when foreign scholars, artists, politicians and others are excluded. The Second Circuit quoted from the 1972 Supreme Court ruling in *Kleindienst v. Mandel* that organizations have a First Amendment right to "hear, speak, and debate with [a visa applicant]." <sup>112</sup> The visa applicant, a well-known Islamic scholar, had travelled extensively, giving lectures, and had been offered a tenured position at the University of Notre Dame before his visa was refused due to alleged contributions to a terrorist organization.

<sup>112</sup> See *Kleindienst v. Mandel*, [408 U.S. 753](#) (1972).

In an unpublished decision by the U.S. District Court for the Southern District of California, *Amidi v. Chertoff*,<sup>113</sup> the court held that it had jurisdiction to review whether a consular officer abused his discretion in failing to follow DOS procedures to terminate IV registration. The court ordered reinstatement of the wrongfully terminated petition and further ordered that the original I-130 petition priority date be reinstated. The plaintiff was the U.S. citizen petitioner and was held to be the real party in Page 80 interest. This decision is significant in increasing accountability of consular officers in their decision-making.

<sup>113</sup> See *Amidi v. Chertoff*, 2008 WL 2662599, (S.D. Cal. Mar. 17, 2008).

In *Abouezk v. Reagan*,<sup>114</sup> the plaintiffs were able to challenge a DOS advisory opinion. However, in *City of New York v. Baker*,<sup>115</sup> the court declined to order DOS to actually issue a visa,<sup>116</sup> but the court ordered that a visa may not be refused in violation of law. However, there is some reason for optimism that the doctrine can be indirectly attacked with the same result as direct review of consular visa denials. In *Brar v. Ridge*, the court indirectly ordered consular action by ordering USCIS to transmit instructions to the consular officials to follow the FAM.<sup>117</sup> The court found that denying the visa on the grounds of the previous denial would constitute an abuse of discretion and would be contrary to law. Attorneys are encouraged to explore ways in which consular visas denials can be challenged indirectly pursuant to §403 of the Homeland Security Act, which grants the DHS Secretary exclusive authority, through the Secretary of State, to control the issuance of visas by consular officers. As the DHS Secretary cannot defeat judicial review by claiming that his or her decisions are immune from judicial review, this is an avenue worth pursuing. Even the Hells Angels have tried to challenge visa denials to its members and have not been able to withstand dismissal on jurisdictional grounds.<sup>118</sup>

<sup>114</sup> *Abouezk v. Reagan*, [785 F.2d 1043](#), 1062 (D.C. Cir. 1986), *aff'd mem. per curiam*, 108 S. Ct. 252 (1987), on remand. No. 83-3741 (D.D.C. June 7, 1988). *But see De Castro v. Fairman*, 164 F. App'x 930 (11th Cir. 2006) (determining that the court lacked jurisdiction because De Castro only raised an issue of violation of due process on appeal).

<sup>115</sup> *City of New York v. A. Baker III*, 878 F.2d 507 (D.C. Cir. 1989).

<sup>116</sup> *Id.* at 512.

<sup>117</sup> Order at 14, *Brar v. Ridge*, No. C04-1401, 2005 WL (W.D. Wash. June 21, 2005).

<sup>118</sup> In *Hells Angels Motorcycle Corp. v. Napolitano, et al.*, Case 1:2012cv01357 (D.D.C. Aug. 16, 2012), the members of the Hells Angels challenged visa denials to its members on constitutional and statutory grounds. The suit was ultimately dismissed on jurisdictional grounds.

In an unpublished decision in 1990, *Shimizu v. DOS*,<sup>119</sup> a federal district court held that it had jurisdiction under the Administrative Procedure Act to review a consular officer's decision revoking the issuance of an NIV.<sup>120</sup> On the merits, the court ruled that the consul improperly revoked the visa and ordered its reissuance.

<sup>119</sup> See *Shimizu v. DOS*, No. CV 89-2741-WMB (C.D. Cal. May 31, 1990).

<sup>120</sup> See 67 *Interpreter Releases* 699 (June 25, 1990) (discussing *Shimizu v. DOS*, No. CV 89-2741-WMB (C.D. Cal. May 31, 1990)).

Success has been achieved in some cases through the commencement of a district court action, culminating in settlements in favor of aggrieved visa applicants. The lead plaintiff should be a U.S. citizen or a resident for the purpose of conferring standing. This type of litigation obviously requires a creative theory to overcome the probability of an early dismissal on jurisdictional grounds. *Kerry v. Din* has dealt a blow to court challenges to visa denials, but there are still avenues to pursue relief. Page 81

## **New Strategies to Achieve Access to Counsel for Visa Applicants**

The AILA Access to Counsel Committee intends to submit a Petition for Rulemaking to DHS and DOS in the near future asking that DOS adopt a rule providing for access to counsel for visa applicants. In addition, AILA has developed model rules for consular officers in ensuring access to counsel. Updates on these projects will be posted on the AILA website.

## **CONCLUSION**

As the policies of DHS, DOS, and USCIS continue to change in a time when the legitimate security concerns of the United States must be balanced with the needs of American businesses and academic institutions, it is more important than ever that practitioners remain current and well-informed regarding consular and immigration procedures. It is crucial that we safeguard our clients' interests and fully advise them regarding their options for attaining their desired status in the United States.

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