

“DOS” AND “DON'TS” FOR ATTORNEYS REPRESENTING VISA APPLICANTS (AND FOR CONSULAR OFFICERS, TOO!)

by Liam Schwartz, Avi Friedman, and Anastasia Tonello*

The relationship between U.S. consular officers and attorneys is a delicate one. The parties are constantly trying to maintain a balance that respects both parties' rights and obligations. Consular officers would benefit from permitting the attorney to facilitate their adjudications through proper case preparation and legal citations. Attorneys, in turn, would benefit from receiving background information necessary to best serve the client/visa applicant from consular officers.

Often, as attorneys, we are frustrated by an inability to gain real-time responses from consular posts to questions that are not addressed on consular websites or responses to case inquiries. Consular officers may decline to communicate with an attorney who is perceived as unprepared or an overzealous advocate.

We believe that the ultimate success of this process lies with holding attorneys and consular officers accountable for maintaining a constructive working relationship. It is with this in mind that we offer the following list of “DOS” and “DON'Ts” for nonimmigrant (NIV) and immigrant visas (IV) cases. In addition to general suggestions for attorneys, the list relates to special processing issues: E visa applications in London, third-country national (TCN) visa processing in Canada and Mexico, and security advisory opinions (SAOs).

The list ends with a number of proposed “DOS” and “DON'Ts” for consular officers involved in the visa application process. These proposals are offered with respect, and in recognition of the many pressures placed on visa officers in the course of their work. We hope these proposals will underline the belief expressed by William D. Morgan—who did more than anyone to promote the consular function within the Department of State (DOS)—that in reality, lawyers are “our friends and supporters.”¹

ATTORNEY ACCOUNTABILITY

General

- To ensure that clients receive the most efficient service, the best place to start to learn about a consular post's visa operations and any special application procedures, is the post's website. In recent years, DOS has made significant progress in improving individual consular post websites to provide more uniform and helpful information to the public. Consular post websites may be accessed through the DOS's own web-

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¹ http://memory.loc.gov/cgi-bin/query/D?mfdirp:3:/temp/~ammem_1cMn.

site: www.usembassy.gov. Other valuable sources of information are AILA publications including *Consular Practice Handbook* (2010–11 Ed.) and the AILA mentor program.

- Be sensitive to overseas posts' limited resources—use the post's website and public telephone information services for routine questions and information. In this regard, don't insist on e-mailing or talking to a consular officer simply to obtain general information that is available through automated or other easily available sources; the locally engaged staff (LES) can often provide this information as well (if not better) than anyone else.
- When inquiring about a pending case, observe post procedures for such inquiries and respect any special rules concerning hours for or preferred means of inquiry.
- Utilize the interview scheduling procedure detailed on the post's website. In many cases, scheduling an appointment is possible only through a post's Internet-based appointment system.
- Recognize that consular officers cannot pre-adjudicate visa applications. Decisions on visa issuance (and on related matters, such as the need for "additional administrative processing") will be made only at the time of the visa interview.
- If you have questions about a pending case or visa refusal, don't telephone cold and expect the consular officer to recall your client's case. Instead, contact the post in writing first before calling. Explain in a brief but detailed e-mail or fax the nature of the inquiry and include any relevant documents and case numbers. If necessary, you can then follow up with a phone call (it may be best to call in the afternoon when visa interviews are normally completed for the day). *TIP*: Make sure the post has a G-28 or other notice of appearance on file before seeking to discuss a case.
- Explain to the client that expeditious consular processing of the visa application is not covered by the \$1,000 that may have been spent to obtain USCIS premium processing.
- Be mindful of Petition Information Management Service (PIMS) issues. PIMS records are created by the Kentucky Consular Center (KCC) and the system serves as the primary source of evidence used in determining petition approval for all nonimmigrant petition-based visa categories (H, L, O, P, Q, and R). The PIMS Petition Report contains a record of all petitioners recorded by the KCC as having approved petitions since 2004. In addition, many of the records contain information from KCC's Fraud Prevention Unit. To avoid possible delays, most posts require applicants to submit petition information in advance and will attempt to undertake the PIMS clearance procedure prior to the visa interview, thereby limiting the time applicants have to wait until the visa is approved.
- For IV cases, the protocol is the same. Check the post's website for public information. Contact the post via e-mail or fax with proof of representation attached. Include the client's case number and a brief but detailed explanation of the issue. Ask the consular officer what you can do to facilitate adjudication, whether any documents are missing or what may need to be updated.

Preparing the Application

- Prepare well in advance, as there may be heavy delays at the post—especially during summer and holiday seasons.
- Unless the case involves a unique factual or legal situation, refrain from giving a "heads-up" to the consulate to "pave the way" for the application.
- Learn as much as you can about the facts of the case and the relevant immigration history of the applicant and any employing company. The more an attorney knows about a client, the greater the potential for the attorney to assist his or her client in a concrete way. This is particularly true of more complicated applications, such as employment visa requests.
- Help the client prepare for the interview, and fully brief him or her on the visa interview process so that the interview can be as effective as possible for both the client and the interviewing officer.
- Alert the client that visa interviews are typically brief in nature. Employment-based NIV and IV clients should be prepared to respond to questions about his or her proposed employment in the United States. Family-based IV clients should be told to expect questions about dates of birth for themselves, spouse, and

children; dates of marriage(s), divorce(s), or death(s) of spouses; familial relationships on which the IV is being sought, and the details of any immigration violations or criminal offenses.

- Advise the client on the eligibility requirements of the visa for which he or she intends to apply, and alert him or her to the possibility of delay (for example, due to the need for a special advisory opinion), referral to a panel physician or of visa refusal.
- If the client has a criminal history, check the post's procedures as a police certificate and/or special appointment may be required.
- Ensure that clients read and understand their visa application forms and documents before going to the interview. This is particularly critical if the applicant does not have a good command of the language used in the form.
- Make sure the client carefully completes either the DS-160 (or DS-156 and, if necessary, the DS-157 and DS-158, if these are still accepted at the post) and accurately answers all questions completely.
- Stress to the applicant the importance of answering all questions truthfully, both on the application form and during the interview, and warn of the possibility of permanent exclusion if he or she makes any material false statements.
- If applicable, inform the client of the importance of being upfront about any previous arrest or conviction or past problems with U.S. immigration or consular officials, and make sure the applicant is prepared to present relevant court or immigration records as well as police certificates at the time of interview.
- If you suspect the visa application will be denied because of a specific ground of ineligibility (such as a past criminal conviction), brief the client about the waiver process and prepare the waiver request for the client to submit, if possible, to the interviewing officer immediately after the denial or at the time of the waiver appointment that may occur at a later date.
- Make sure the applicant is prepared to explain, and, if necessary, document previous stays in the United States.
- Send supporting documents directly to the client, not to the post. The best way to ensure that the documentation you wish to submit in support of the application is immediately available at the time of the interview is to have the applicant hand-carry it to the interview.
- Contact the post first (particularly in time-sensitive cases) if you plan to submit NIV applications for a large group of aliens, such as sports teams, performance groups, delegations, groups of workers, etc. This allows the post to advise the attorney in advance on application procedures and the types of materials the applicants will need to bring with them. Advance notice helps ensure that both the post and the applicants are prepared for the group application and thereby facilitates prompt and efficient processing.
- In group-visa application cases, assist the applicants in arranging their supporting documentation in an orderly fashion. This facilitates more efficient review of the cases and helps speed up the interview process.
- Recognize that a neat and well-organized document package in and of itself does not lead to visa issuance. Applicants are each individuals, and, while documents for one may have assisted in showing eligibility, the same document(s) may not be sufficient for another applicant with the same or similar circumstances.

Application and Interview

- Have the applicant apply at the appropriate post, *i.e.*, where he or she resides or last resided abroad, or at a post designated to process "homeless" applications.
- Consider TCN processing in Canada or Mexico so the applicant can possibly avoid the added cost and time delays of processing in his or her home country post, but be mindful that these posts may have their own additional costs and or delays for some applicants (discussed at greater length below).
- Respect whatever rules the consulate has established for attorney presence at interviews.
- Inform the client that visa interviews can be unpleasant and even intimidating. The client will often wait for several hours to be called for an interview that lasts only three minutes. During these critical 180 seconds, the applicant stands and the consul sits on opposite sides of heavy bullet-proof glass.

- Stress to the client that the consular officer interviews people, not documents. While it is important to submit a well-documented case, don't overwhelm the officer with unnecessary documents just to "paper the file." The consul's decision to issue or deny the visa will depend heavily on how well the client presents his or her case at the interview window. Accordingly, your role as attorney in preparing the client for the visa interview cannot be overstated.
- Impress upon the client that the visa process has become subject to an increased level of unforeseeable delay, also known as administrative processing. Reasons for administrative processing include: the applicant has a criminal conviction; the applicant has a name and date of birth that closely resemble those of a known criminal; the applicant is a national of a country listed as a state sponsor of terrorism; the applicant will be exposed to sensitive technology during his or her visit to the United States.
- Have the client review the application documents as if preparing for a school exam. The night before the interview, encourage the client to write a statement of his or her eligibility for the visa (or practice explaining it orally in front of a mirror).
- Ensure the client understands the basic requirements for the visa. For example, practitioners need to make sure the client understands that when he or she applies for a B-2 visa, the applicant has the burden of convincing the consular officer that he or she is only coming to the United States to visit and that he or she has strong ties to his or her home country and plans to return there. The H-1B applicant should understand that he or she may need to show that the job requires a degree and that he or she must have a degree or degree equivalent that is relevant to the job. The same is true for the IV applicant.
- *Tips for the IV and NIV client:* Don't give up jobs, take kids out of school, commit to lease payments on a U.S. home, or put the family dog up for adoption in anticipation of receiving a visa. The reality of modern-day visa processing is that "it ain't over 'til it's over"—in this case, until you actually see the visa stamp in your passport.

In the Event of a Visa Denial

- If you are present at the visa interview and the client is refused a visa, accept that it may be necessary to submit any countervailing arguments or requests for review in writing. Be sensitive to the time and crowd pressures in many NIV and IV units. Don't argue the case at length at the window, since this may antagonize the consular officer.
- If you are not present at the visa interview and the visa application is denied, debrief the client as soon as possible about what was said at the interview. Bearing in mind that clients may add their own "spin" to their recollection of the interview Q&A, it is always best to also contact the post to ask for the official version of the grounds for the visa denial.
- When presenting arguments following a denial, cite the specific section of the *Foreign Affairs Manual* (FAM) or other relevant law or regulation that supports your client's position. Be sure to include specific facts about your client's case to demonstrate that the FAM, case law, government memoranda, or regulations apply to your case.
- Don't settle for a bad decision if you have a good case and you believe an error was made. Reapply or seek review within the consulate. Consult with an AILA mentor or seek the advice of other attorneys through AILA list serves.
- When asking for review of a case, present your case succinctly, addressing all relevant facts and citing legal authority for your arguments. Don't overwhelm the consular officer with large volumes of unnecessary documents when seeking a review.

- If the reviewing consular officer upholds the denial, and you remain convinced that an error of law has been committed, you may seek an advisory opinion from the Visa Office, via LegalNet.² Bear in mind that factual determinations by the consular officer are nonreviewable—period!
- If your client has been refused and you have already exhausted all opportunities for review and been unable to overcome the refusal, do not seek repeated further reviews unless you have new arguments to raise or new information to provide.
- Accept that some cases cannot be saved; preserve your efforts so that you can build-up goodwill with the post for cases that merit it.
- Whatever the outcome, maintain a courteous and professional tone throughout. A confrontational manner or abusive tone is usually counterproductive and does not serve your client's interests.

Miscellaneous Tips

- Recognize the time pressures that most posts are under, and don't call with unnecessary frequency or drop by without an appointment in the hope of being able to meet with a consular officer.
- Inform the post if you have ceased representing an applicant or have taken over a case from another attorney.
- Don't rely on Freedom of Information Act (FOIA) requests to obtain information on the reasons for a visa refusal or other visa-related information, as this procedure is not an effective means to obtain such information. Visa records are confidential under Immigration and Nationality Act (INA) §222(f) and are therefore generally exempt from release under FOIA. The only visa records that can be obtained under a FOIA request are documents either submitted by or sent to the applicant. Thus, the applicant will not learn anything new about the case from any documents that might be obtained through a FOIA request. If you do not believe you have received sufficient information about the grounds of refusal or other issues, you should write to the post or the Visa Office.

Special Considerations for E Visa Applications in London

- Check the embassy's website³ repeatedly throughout your case preparation process, as procedures, required documentation, and formats may change regularly with little notice.
- Follow the instructions regarding required format, documentation, and presentation of the case.
- If a business plan is included with the application, read it and ensure the initial applicant has read it and that it makes good business sense.
- When submitting an E registration application on behalf of a treaty trader or investor, provide an e-mail address on the DS-156E so that the E visa unit can contact you with any issues.
- Do not push the E visa unit to expedite cases unless there are extraordinary circumstances. Most likely, they will not expedite; dealing with expedite requests takes time away from adjudications.
- Make sure your initial applicant is able to demonstrate strong ties to his or her home country with intent to return.
- For British applicants, make sure they are able to demonstrate a U.K. domicile (which may be different than the U.K. tax domicile).
- Make sure your initial applicant is well versed on the finances, investment, and operations of the business. If the initial applicant is not a senior member of the business, ensure the applicant has the contact information for a senior employee in the company who can answer these types of questions about the company.
- Closely review 9 FAM 41.51 on E visa requirements and make sure your case deals with all relevant sections.

² LegalNet can be reached via e-mail at legalnet@state.gov. For a complete listing of government contacts, see AILA InfoNet at AILA Doc. No. 09052767 (posted Sept. 21, 2009). Department of State (DOS) Visa Office inquiry procedures are published on AILA InfoNet at AILA Doc. No. 08121971 (posted Dec. 19, 2008).

³ www.usembassy.org.uk/cons_new/visa/niv/e.html.

- Deal with shortcomings in your application and explain them. The treaty officer will not ignore them and neither should you.
- If a case is denied, and you believe there has been an error in application or understanding of the law, argue your case through a concise legal brief sent by e-mail or fax. E visa officers in London are regularly rotated so it may be possible that your knowledge of the FAM on the issues of your case is much broader and more accurate than that of the adjudicating officer.
- Most E visa officers in London are open to e-mail communication with attorneys as long as you remain polite and do not bombard them with e-mails.

Special Considerations for TCN Processing in Mexico and Canada

- Do not send TCN visa applicants to a border post if they initially entered the United States on a B-1/B-2 visa and subsequently were approved for a student or employment category, regardless of whether they have a change of status approval issued by U.S. Citizenship and Immigration Services (USCIS). Generally, only "clearly approvable" TCN cases should be processed in Canada⁴ or Mexico.⁵ Cases with complex admissibility issues are usually not suitable for TCN processing at a border post.
- Advise your client to obtain the applicable visa for entering Canada or Mexico. Counsel also may require a work visa if representing or accompanying the client to the visa interview at post. Contact the Mexican or Canadian consulate and review their respective websites for information on visa/entry requirements. U.S. attorneys representing clients at U.S. posts in Mexico are advised to obtain an FM-3 work visa from a Mexican consulate/embassy having jurisdiction over their place of residence.⁶
- Make sure that your client is not subject to INA §222(g).⁷ Section 222(g) generally prohibits a visa applicant who is out of status from applying for an NIV at a border post. Applicants in J or F status with D/S (duration of status) are not subject to §222(g) *unless* USCIS or an immigration judge has made a formal finding that the alien has violated his or her visa status. Even for applicants not subject to §222(g), many border posts will not approve NIV applicants outside the grace period (60-day grace period for F; 30-day grace period for J).
- Applicants from the "List of 26" countries (a classified list of predominantly Muslim countries), applicants who are citizens and/or nationals of Cuba, Syria, Sudan, Iran, and North Korea, and applicants who were subject to National Security Entry/Exit Registration (NSEERS)⁸ may not apply at posts in Mexico (unless they are resident in the consular district); such applicants can generally apply in Canada. If applying in Canada, they should be prepared to wait either in Canada or outside of Canada (if they have a multiple-entry Canadian visa) while routine security checks are pending. Also, remind these applicants that they must have complied with special registration and departure registration requirements.
- The U.S. Embassy in Mexico City recently announced major changes to the TCN NIV application policy in Mexico. TCNs may now apply to renew NIVs at all of the 10 posts in Mexico, including the five border posts (Tijuana, Nogales, Ciudad Juarez, Nuevo Laredo, and Matamoros). However, the Mexican posts will only accept TCN applicants seeking to renew their E-1/E-2, F, H (not including H-2), I, J, L, M, O, P, and R visas. They will not accept TCN applicants who changed status in the United States (for example an F-1 with change of status to H-1B, or a J-1 with change of status to H-1B, or even an H-1B entry with a change of status to L-1).
- Similarly, consular posts in Canada will accept H-1B visa applicants from TCNs only if the applicant was previously issued an H-1B visa in his or her home country, or if the applicant possesses a degree from Canada or the United States.

⁴ For instructions regarding third country nationals (TCNs) in Canada, see www.consular.canada.usembassy.gov/canada.asp.

⁵ For instructions regarding TCNs in Mexico, see www.usembassy-mexico.gov/eng/evisas_third_country.html.

⁶ For a list of Mexican consulates in the United States, go to www.mexonline.com/consulate.htm.

⁷ A list of scenarios under which Immigration and Nationality Act (INA) §222(g) is applicable can be found at 9 FAM 40.68 Exhibit I - Summary Chart INA §222(g) Scenarios.

⁸ 8 Code of Federal Regulations (CFR) §264.1.

- Don't submit TCN E visa applications in Canada (the E program in Canada is limited to Canadian citizens and permanent residents only).
- Make sure to pay the visa application fee in advance. The posts in Mexico require the visa application fee to be paid in advance at a branch of BANAMEX. The posts in Canada require the visa application fee to be paid in advance at a branch of ScotiaBank. Reciprocity fees in Mexico and Canada usually are paid in U.S. cash at the post after the visa has been approved (most posts also accept credit card payment and local currency for reciprocity fees).
- Don't plan on your clients reentering the United States under automatic revalidation if they are denied their visa or are subjected to a security check or other delay. On April 1, 2002, DOS changed the automatic revalidation provision of 22 Code of Federal Regulations (CFR) §42.112(d). Automatic revalidation applies for trips to Canada or Mexico of 30 days or less provided that the applicant has not applied for a visa and is not from the DOS designated State Sponsors of Terrorism⁹ that includes Cuba, Iran, Sudan, and Syria. If an applicant applies for a visa at a border post or is a national of one of those countries, it is necessary to have a valid U.S. visa (or advance parole) to reenter the United States. Rejected visa applicants now must travel back to their home country directly from Mexico or Canada. Prior to this change, applicants who were denied (or delayed issuance of) a visa were able to return to the United States using an expired visa and a valid Form I-94 that automatically revalidated their visa.
- Some posts in Canada accept Australian E-3 visa applicants and Singaporean and Chilean H-1B1 visa applicants under the Singaporean and Chilean Free Trade Agreements, but this is done on a case-by-case basis.

Special Considerations for SAOs

- Anticipate a possible Visas Condor security clearance if your client was subject to special registration. While the exact criteria of the Visas Condor are classified, it appears to be based on several factors including:
 1. Information disclosed on Form DS-157 (such as travel to predominantly Muslim countries in the last 10 years, prior employment, military service, specialized skills or training);
 2. Country of birth, citizenship, or residence—persons born in the T-4 State Sponsors of Terrorism and/or "List of 26" countries will likely be subject to a Condor security check; and
 3. Most Condor SAOs clear within several weeks.
- Don't anticipate a quick resolution for a Visas Donkey SAO. A Donkey clearance is for a name "hit" based on noncriminal issues and is not nationality-specific. For instance, a U.K. citizen with the name "Mohammad Khan" or "Muhammad Ali" will very likely be subject to a Donkey clearance. These clearances can take 10–14 weeks to process, while a few take substantially longer. Unfortunately, it is not possible for posts to pre-screen applicants or to begin the SAO process before the visa interview.
- Don't expect to still find the Technology Alert List (TAL) on the DOS website.¹⁰ Visas Mantis SAOs are normally processed within two–eight weeks. Applicants potentially involved in "dual use" activities should anticipate a Mantis SAO and should bring to their interview a detailed and complete résumé, a complete publications list, abstracts of papers or other published materials, and a detailed letter from their employer and/or U.S. sponsor explaining the nature of the proposed work or meeting/presentation, or project descriptions (in lay terms). The employer/sponsor should explain whether the work has any possible military application and, if applicable, that the information is in the public domain or found in academic courses.
- Advise clients that mandatory Integrated Automated Fingerprint Identification System (IAFIS) clearances will reveal any National Crime Information Center (NCIC) record associated with the applicant's finger-

⁹ www.state.gov/s/ct/rls/crt/2006/82736.htm.

¹⁰ The last unclassified Technology Alert List (TAL) version is published on AILA InfoNet at Doc. No. 03030449 (posted Mar. 4, 2003).

prints. To help flesh out any fragmentary information in the NCIC database, applicants should be prepared to present certified final court dispositions, arrest records, and legal briefs at the time of the interview.

- Expect false hits to occur for visa applicants with common names (*e.g.*, John Smith or Carlos Gonzalez). As many as half of the names recently entered into the CLASS system are Latino. This has resulted in an alarming number of false hits and delays for persons with common Latino names. Fortunately, the advent of the Integrated Automated Fingerprint Identification System (IAFIS) and the Automated Biometric Identification System (IDENT) allows the post to process clearances on many false hits on the same day, while clearances for positive hits are often cleared by the next day.
- Ask your client if he or she has ever had any alcohol-related incidents. DOS issued a guidance in 2007¹¹ that required consular officers to refer NIV applicants with prior drunk driving issues to panel physicians for medical examination if an applicant has:
 - a single drunk driving arrest or conviction within the last three calendar years, or
 - two or more drunk driving arrests or drunk driving convictions in any time period.
- Request a consular officer to expedite an SAO for exigent circumstances. It is advisable to submit an expedite request letter from the petitioner detailing the emergent reasons for the applicant's urgent return to the United States. Clearly, physicians in medically underserved areas and other applicants whose travel furthers a U.S. government interest or humanitarian concern are strong candidates for such a request. All requests for expeditious review must be approved by the chief or deputy chief of the Coordination Division in the Visa Office.
- If a security check has been pending for over 90 days, attorneys can inquire via e-mail to LegalNet. The subject line caption should state "Overdue SAO". Attorneys may also call the Visa Office Public Inquiries line at (202) 663-1225.¹²

CONSULAR OFFICER ACCOUNTABILITY

We respectfully propose that DOS's Visa Office reaffirm guidance on working with attorneys sent to consular officers in 1999 (99 State 21138)¹³ by sending an updated version to all U.S. consular posts. This renewed guidance would set forth standards for conoff accountability in the visa process. Such standards might include the following:

- Consulates shall post their preferred method and manner of communications on their websites, and shall use their best efforts to respond initially to an attorney's inquiry within a specified timeframe of no more than two full business days.
- The posts shall create attorney inquiry e-mail addresses for legal and procedural issues not referenced on the post's website, similar to that provided by the National Visa Center. After receipt of a legitimate inquiry from the attorney, a post shall use its best efforts to reply to such an inquiry within two business days of receipt.
- Consular officers always shall provide a denial letter to the applicant for a nonimmigrant or immigrant visa that clearly advises of the precise obstacle to visa issuance, in accordance with the FAM.¹⁴ Denial letters shall not consist merely of a pre-printed form with a box checked indicating the section of law.
- A uniform mechanism shall be adopted by posts for redress by attorneys of both procedural and legal errors concerning a visa denial. For example, if a post requires the original of a Blanket L approval, there should be a way to address such a procedural error on a same-day or next-day basis. Thus, consulates shall

¹¹ DOS Cable, "Guidance on Processing Visa Applicants with Drunk Driving Hits," *published on AILA InfoNet at Doc. No. 07071670 (posted July 16, 2007).*

¹² AILA-DOS VO Inquiry Procedures *published on AILA InfoNet at Doc. No. 08121971 (posted Dec. 19, 2008).*

¹³ *Published on AILA InfoNet at Doc. No. 03010241 (posted Jan. 2, 2003).*

¹⁴ 9 FAM 41.121 N7 (Refused Applicants Have Reasonable Opportunity to Establish Eligibility).

devote resources to allow for phone calls or e-mails to try to address such issues post-interview in a required format.

- If the attorney believes that the consular officer is not applying the applicable law or regulation, the attorney will submit the required form, and such issue shall be noted in bold on the attorney's refusal reply as "LEGAL APPLICATION ISSUE." The posts shall use best efforts to reply to such refusal inquiries within two business days or less, so that if an advisory opinion must be sought, it can be commenced as soon as possible.
- It is a waste of resources, however, to have to request an advisory opinion on a legal or procedural matter clearly established in FAM or regulations. For such matters, we would request some type of inquiry methodology to quickly address such simple matters as for example, the application of dual intent to an H-1B case. We would suggest an e-mail or phone inquiry option on a same-day basis for applicants in these situations.
- Consular officers and staff shall not inquire as to attorney's fees paid by an applicant or to demean the value of attorney representation to an applicant. In addition, consular officers and staff shall not slander or denigrate the attorney's work on a case. If the consular officer believes the attorney has committed malpractice, the officer should advise the attorney's state bar via a complaint.

CONCLUSION

An effective—and efficient—visa application process is the goal of consular officers and attorneys alike. Achieving this goal relies in large part on ensuring the accountability of consular officers and counsel to the process. The authors hope that this list of "DOs" and "DON'Ts" makes at least a small contribution toward facilitating a "win-win" relationship between consular officers and attorneys, in which visa applicants are the true victors.



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HELP! I'VE GONE ABROAD FOR VISA STAMPING AND I'M STUCK IN "ADMINISTRATIVE PROCESSING!"

by
Myriam Jaidi*

Contacting an immigration attorney prior to leaving the US for visa stamping abroad has become more important than ever. Individuals, especially those traveling to India, must develop a strategy in the event of a problem at the consulate. Going for a visa stamp can be daunting for anyone – whether you have a law degree or no education whatsoever, whether you work for a Fortune 500 company or for a small business, the process is intimidating for one main reason: it is completely unpredictable. Even if one follows all the instructions on the consular website, goes prepared with documentation in hand, and has a full understanding of the visa sought, things may go awry. Two people with the same job at the same company may have completely different experiences. One may emerge without issue, visa stamp happily in hand. The other may find himself or herself holding a letter printed on colored paper requesting additional information or simply stating that "administrative processing" is required before the visa can be processed.

These colorful pieces of paper, also called 221(g) letters, are actually visa refusals pursuant to the Foreign Affairs Manual (see 9 FAM 41.121 PN 1.2-3), although the letters themselves do not state as much. They indicate that the visa has been placed in "pending" status or that further processing has been "suspended." The fact that these letters actually constitute refusals is important to acknowledge the next time an individual fills out a DS-160 or applies for ESTA. Otherwise, he or she may be denied a visa or entry for fraud (for failing to respond "yes" to the question of whether he/she has ever been refused/denied a visa).

The name "221(g) letter" derives from the section of the Immigration and Nationality Act providing the authority to issue the denial. Section 221(g) of the Immigration and Nationality Act provides as follows:

No visa or other documentation shall be issued to the alien if

- it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 212, or any other provision of law,
- the application fails to comply with the provisions of this Act, or the regulations issued thereunder, or
- the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 212, or any other provision of the law....

Types of 221(g) Letters

One version of the 221(g) letter we have seen requests the following with regard to H-1B visa applications (and sometimes with regard to H-4 visa applications):

From the petitioner

- A full copy of H-1B petition as filed with the USCIS
- An original H-1B approval notice
- Petitioner's income tax return for the last 2 years and financial statements
- A notarized list of all the petitioner's employees. The list should show all employees' names, their specific job titles, start and end dates, their individual salaries, their immigration status, and which project/client they are working with.
- State Unemployment Wage Reports showing all wages paid to each employee in the state, for the past three quarters as filed to all states
- A letter (on letterhead) from the personnel department at the US job site stating that there is a vacancy for you.
- A letter from the client company (if applicable) sponsoring the project and a copy of the contract between the U.S. based petitioner and the client company, stating the timing, terms and agreement for your project.
- A detailed and specific description of the internal development project to which you will be assigned. Include a complete technical description of the project, employer, timeline, current status, number of employees assigned, worksite location, and marketing analysis for the final product.

From the individual applicant (or spouse of the H-4 applicant)

- Your license to practice your profession in the U.S.
- Original or certified copies of your academic credentials
- Evidence of previous work experience in the petitioned filed.
- Evidence of extension of legal status in the U.S.
- Your federal income tax returns and W-2 forms for the past 3 years
- Copies of pay stubs for the past 3 months.

Another version of the 221(g) letter requests the following (and sometimes indicates a specific format for delivery – PDF, Word document, Fax, etc.):

- Invitation: An invitation letter from the sponsoring organization in the US. For graduate students, workers, and exchange visitors, the letter should include your supervisor or advisor and details about your work.
- Resume: A detailed resume/CV, including your professional and academic background, and a list of all your publications.

- Research: A complete and detailed description of 1) your past research; 2) your current research; and 3) any research you intend to conduct in the US. You must include a description of the practical applications of your research or study.
- Position: Your current job title and a full description of your work.
- Purpose: A detailed statement of the purpose of your visit to the US.
- Itinerary: An itinerary of all locations you will visit in the US, including dates, contact names, organizations, addresses, and telephone numbers.
- Funding: Name of the person or organization who is funding your trip.
- Travelers: A list of all the travelers who will accompany you, including family members and colleagues.
- Travel: Dates and locations of all your international travel for the last ten years, except for US travel.

In one astonishing case, the spouse of an H-1B visa holder went to the US consulate in Mumbai to obtain an H-4 visa stamp. The H-1B spouse had changed employers and planned to re-enter the US using the visa stamp from the old employer and the new I-797 approval notice relating to the new employer, as CBP policy allows. During the interview, the consular officer asked if the H-4 visa applicant had the H-1B spouse's passport. It was produced and the consular officer cancelled the H-1B stamp and noted on the 221(g) letter: "Husband must qualify for new visa before woman can get H4."

As you can see from the samples above, producing the documentation required by consulates can be tremendously burdensome. Knowing what may be required prior to travelling to attend a visa interview is crucial, as it allows the applicant and his or her employer to prepare carefully for a visa interview, to decide what documentation to bring and what documentation to leave behind (e.g., a relative's passport), and to strategize in the event of delay. The "administrative processing" can take as little as two weeks or as much as several months, or more. As the consulate noted on one version of a 221(g) letter: "We are unable to provide a more specific completion date."

Although consular officers are not supposed to re-adjudicate USCIS decisions on a petition, they have significant individual power over visa issuance, notwithstanding the transfer of power from the Department of State (DOS) to the Department of Homeland Security (DHS) effected by the Homeland Security Act of 2002. An approval by DHS is to be considered *prima facie* evidence that the requirements for a particular status have been met. See *Cable, DOS, 04-State-41682 (February 25, 2004)* available here <http://bit.ly/hNc4X5>. However, the foreign affairs manual notes that "if information develops during the visa interview (e.g., evidence which was not available to DHS) that gives [the consular officer] reason to believe the beneficiary may not be entitled to status, [the officer] may request any additional evidence which bears a reasonable relationship to this issue." 9 FAM 53 N2.2. It is not readily apparent that consuls issue a 221(g) letter based on information that develops during an interview and not previously available to the DHS, given anecdotal evidence of consular officers reflexively handing out 221(g) letters regardless of what transpired during an interview. In any event, when an applicant receives a 221(g) letter or other request for evidence from a consular officer, it is prudent to fully respond to the consular officer's requests as instructed or risk final denial and, possibly, future ineligibility or revocation of the approval by USCIS.

221(g) letters have been issued for many years, but in recent months US consulates in India have increased their use of such letters. A variety of factors may be influencing this trend. First, in the "Neufeld Memo" era (please see our previous articles on the Neufeld Memo, available here <http://bit.ly/iefgsy> and here <http://bit.ly/f181Ao>), where companies who place employees at client sites to perform services, especially Indian IT companies, have been subjected to increased scrutiny by USCIS to prove the employer-employee relationship, it is not much of a surprise that the scrutiny for such companies has increased at consular posts as well. Consulates request tax returns, notarized employee lists, State Unemployment wage reports, etc., to verify that the employer exists and has the right to control the beneficiary's work. Closely tied to this type of inquiry is the consular focus on fraud. Where a consular officer believes fraud may be involved, or receives a fraud warning from the Kentucky Consular Center (KCC), significant documentation will be requested to prove the job, the company, and visa application are genuine. Employers should know that the KCC contacts employers *as well* as end clients to verify information submitted to the consular post. Therefore, employers and their clients should be advised and prepared to answer inquiries. If an employer inadvertently fails to respond to a query from the KCC, it will be very difficult to dislodge the "fraud warning," which would become deeply embedded in the system.

The release of sensitive technology is a long-standing factor that has recently taken on much greater significance in the petition process. This is likely an important contributor to the current 221(g) trend at Indian consulates. Although implementation has been suspended until February 20, 2011, in November 2010, USCIS announced a radical change to the I-129 petition process for H-1B, H-1B1 Chile/Singapore, L-1, and O-1A status. The new Form I-129, issued November 23, 2010, will require (starting February 20, 2011) the petitioning employer (and the attorney preparing the form) to attest to compliance with Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) by certifying that a license is not required or that a license will be obtained prior to the release of covered technology to the foreign national. For more information on export control rules, see <http://bit.ly/eqzEMm>. The trend toward more frequent 221(g) letters requesting information about research and the applications thereof are most likely triggered at the consulates by a concern under the Technology Alert List (TAL), which may in turn be impacted by the export control regulatory and licensing frameworks that have recently become more important to DHS processing of nonimmigrant visa petitions. Concerns under the TAL create an interesting tension with the US government's recognition of the importance to the US economy of foreign nationals with degrees in Science, Technology, Engineering and Mathematics (STEM) fields. This concern was manifested by a rule change in 2008 enabling individuals with STEM degrees to obtain a 17-month extension of Optional Practical Training time, see the regulations here <http://bit.ly/fcnbOI>. The TAL on the other hand reflects a suspicion of these same individuals that can result in significant delays for them at US consulates abroad, seemingly undermining the urgent need for their services in the United States.

There are also other issues at play that can cause delay -- name checks, criminal history checks, visa violation checks. In light of all of these issues, as well as the unpredictability, and the seemingly unfettered power of consular officers, what can be done? There is no magic solution, but here are some pointers:

Be prepared. What does this mean?

Review your educational and work history, review the petition filed on your behalf with USCIS, and review any contact you may have had with the criminal justice system. Collect all your documents related to these issues.

If you work in a science/technology field, review the latest release of the Technology Alert List, which was made in 2002 and is available here <http://bit.ly/dT2fPO>, to determine whether your work may fall under any of the listed categories. The current version of the TAL has been defined as "Sensitive But Unclassified" and the Department of State does not release updated versions to the public. See 9 FAM 40.31 Exhibit I. If the consular officer decides your position raises concerns under the TAL, you will most likely be asked to present the documents indicated in the second 221(g) sample discussed above. Also review the section on the TAL in the Foreign Affairs Manual, which includes interview questions. 9 FAM 40.31 Notes available here <http://bit.ly/e4TuNd>.

If you have had any arrests or criminal convictions, even for minor issues, be sure to discuss them with your attorney prior to leaving and have certificates of dispositions and perhaps even a memo of law explaining how you are not "inadmissible." Please see our previous article available here <http://bit.ly/gmHPLv>.

Be patient, and as discussed above, follow the instructions on the 221(g) letter carefully. In addition, have your attorney contact the consulate to follow up on your case. If the delay is significant, ask your attorney to contact the Visa Office, which can be reached by phone at (202) 663-1225, by fax at (202) 663-3899 or by email at legalnet@state.gov.

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Current Visa Wait Times For India, Philippines and China (9/12/11)

India:

New Delhi

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 3 Days

Student/Exchange Visitors Visas: 2 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 3 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 2 Days

Hyderabad

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 6 Days

Student/Exchange Visitors Visas: 2 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 2 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 5 Days

Kolkata

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 2 Days

Student/Exchange Visitors Visas: 2 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 2 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 1 Day

Chennai (Madras)

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 12 Days

Student/Exchange Visitors Visas: 4 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 12 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 1 Day

Mumbai (Bombay)

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 7 Days

Student/Exchange Visitors Visas: 7 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 7 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 7 Days

Philippines:**Manila**

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 10 Days

Student/Exchange Visitors Visas: 7 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 10 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 3 Days

China:**Beijing**

Typical Wait Time (Calendar Days*) .for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 14 Days

Student/Exchange Visitors Visas: 9 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 14 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 2 Days

Chengdu

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 9 Days

Student/Exchange Visitors Visas: 3 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 7 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 1 Day

Guangzhou

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 6 Days

Student/Exchange Visitors Visas: 5 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 6 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 3 Days

Shanghai

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 21 Days

Student/Exchange Visitors Visas: 9 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 21 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 3 Days

Shenyang

Typical Wait Time (Calendar Days*) for a Nonimmigrant Visa Interview Appointment

Visitors Visas: 15 Days

Student/Exchange Visitors Visas: 10 Days

All Other Nonimmigrant Visas*** (Excludes: A, G, K, and V): 15 Days

Typical Wait Time (Workdays**) for a Nonimmigrant Visa To Be Processed****: 4 Days

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