Department of State/AILA Liaison Committee Meeting
November 3, 2022

Introduction

The Department of State's Office of the Assistant Legal Adviser for Consular Affairs (L/CA), in coordination with the Visa Office in the Bureau of Consular Affairs, appreciates the opportunity to discuss issues of concern to the American Immigration Lawyers Association (AILA). We believe these discussions, and publication of Department responses to issues raised by AILA on Travel.State.Gov, are valuable opportunities to provide insight and clarity concerning the Department's current immigration policies and procedures. Following are Department responses to issues raised by AILA in anticipation of the meeting scheduled for November 3, 2022.

AILA thanks the Department of State for its continued engagement with AILA, including the recent Roundtable with Consular Affairs leadership. We believe these discussions on issues of mutual concern are valuable opportunities to provide insight and clarity for our members and the public concerning current immigration policies and procedures while also providing useful feedback to DOS. AILA is eager to review DOS's responses to the questions below.

Consular Processing

1. To reduce administrative burden on posts, as well as to provide better visibility to applicants and attorneys regarding TCN procedures, would DOS encourage posts to better communicate their specific TCN processing policies and protocols either on their public-facing websites or in Travel.State.Gov instructions?

2. In light of the recent humanitarian pro-democratic protests in Iran sparked by Mahsa Amini's death, coupled with Iranians' inability to safely travel outside of the country to process as a TCN at neighboring posts, would DOS consider temporary accommodations for Iranian visa applicants with legitimate travel needs (e.g. F-1s or immediate relative IV applicants), such as scheduling visa interviews at the Embassy of Switzerland where it currently provides limited consular services to U.S. citizens in Tehran or permitting virtual visa interviews?

Response to Questions 1 and 2: Nonimmigrant visa applicants, including students, can apply at any embassy or consulate where they are physically present and can obtain a visa appointment. Iranian applicants are already being seen at posts around the world. Immigrant visa applicants can request to transfer their case to another embassy or consulate if they are unable to travel to the post where their case is assigned. As to virtual interviews, we are always exploring more efficient ways to apply technological innovations to improve our processes; however, setting any legal obstacles aside, immigrant visa applicants are required to appear before a consular officer to biometrically execute their applications and take an oath and nonimmigrant visa applicants also must provide fingerprints. For these and other reasons, including the far greater benefit of interview waivers for NIV cases, when available, video interviews would be of limited utility.

Interview Waivers

3. In its recent roundtable engagement with AILA, DOS confirmed that the Interview Waiver Program (IWP) is an efficient use of consular resources to reduce backlogs, and as a result, is seeking to extend the IWP at least until the end of 2023. We appreciate the Department's commitment to continuing the IWP, however, issues in its implementation have been raised by members. It appears that some appointment scheduling systems incorrectly identify applicants that are clearly not eligible for IW as eligible, and invite them to send in their passports for visa issuance. In these instances, once the passport is submitted to post it is determined that the applicant is not eligible for an interview waiver, the applicant has to be contacted, their passport has to be returned, and they have to then schedule an in-person interview appointment. These errors create additional work for posts and significantly delay the process for applicants. AILA members have reported this happening in Canada and France. Please address the following:

a. Is DOS aware of this happening in other missions or posts?
b. Have steps been taken to address this issue?
c. Is there a mechanism for reporting problems with the IWP, such as lengthy delays in adjudications after applicants have sent in their documents or erroneous eligibility for interview waivers where the applicant is clearly not qualified?
d. If an applicant is incorrectly selected for IW, what steps should they take to rectify the situation and ensure the interview process is completed expeditiously?

Response: The Department is not aware of this issue happening at posts. Applicants experiencing issues with applications submitted via interview waiver processes should contact the relevant post for information. While individual cases must be addressed by the relevant post, if AILA members have observed significant numbers of applicants erroneously being identified as eligible for interview waivers by the appointment scheduling systems at particular posts, based on common factors, we would be pleased to receive such consolidated information from AILA (i.e., on the numbers of similarly situation cases at identified posts and the common factors leading to the erroneous identification at the post). After reviewing that information, we would plan to follow up with posts, as appropriate.

E Visas

4. 9 FAM 402.9-6(A)(a)(4) informs officers that one of the determinations in evaluating E-2 Treaty Investor applications is that the: "Enterprise is a real and operating commercial enterprise," and is then referred to 9 FAM 402.9-6(C) for further discussion. The first sentence of 9 FAM 402.9-6(C) states: "The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity." The third sentence of 9 FAM 402.9-6(C) continues the description of the enterprise to state, "It cannot be a paper organization or an idle speculative investment…". Especially in the context of start-up

businesses, defining these terms will provide greater clarity and guidance to E-2 visa applicants. Please confirm:

a. Are the words "operating" at 402.9-6(A)(a)(4) and "active" at 402.9-6(C) used interchangeably?

Response: Almost. The term "active" at 402.9-6(C) was used to ensure that new enterprises that had not yet begun producing services or commodities, but which were actively taking steps to become operational, could also provide a basis for E visa issuance.

b. In defining a real and active enterprise in the above FAM provision, is the term "real" (first sentence) used as the opposite of "paper" (third sentence); and the term "active" (first sentence) used as the opposite of "idle" (third sentence)?

Response: All of these terms are intended to make clear that a qualifying E enterprise must be a commercial or entrepreneurial enterprise that produces services or commodities.

5. U.S. companies were eligible to apply for PPP loans during the pandemic. Further, initial guidance suggesting that foreign-owned businesses may not be eligible for PPP funds was quickly corrected, making it clear that foreign-owned entities in the U.S. could qualify for PPP loans. In many ways, meeting the PPP loan forgiveness criteria demonstrates that a company is real, active, and more than marginal. However, AILA members report that some E visa applicants are being denied at least in part due to a company's acceptance of a PPP loan, with the implication being that such acceptance equates to marginality of the U.S. business. Has any guidance been provided to posts regarding a company's acceptance and use of PPP loans and its potential impact on E visa application adjudications?

Response: The Department has not issued universal guidance to U.S. embassies and consulates on the eligibility of E visa applicants whose businesses received PPP loans. We would not expect receipt of a PPP loan to suffice as the sole factor in the marginality analysis, but it generally would be an appropriate factor to consider, in conjunction with other relevant factors relating to the present and future capacity of the enterprise to generate income.

FAM Language Issues and Clarifications

6. Members have requested clarification on the term "time of application" as it is used in various contexts throughout 9 FAM 403.2-4. How does DOS interpret the term "time of application" used in 9 FAM 403.2-4? It is used in three different contexts, excerpted below:

- 9 FAM 403.2-4(A) uses the term "time of application" in guidance requiring the Consular Officer to accept an NIV application from a visa applicant resident in the consular district, even though the applicant may be physically absent from that district "at the time of application."

- 9 FAM 403.2-4(C) uses the term "time of application" in guidance forbidding Consular Officers from accepting or processing an NIV application when the applicant is neither a resident of nor physically present in the consular district "at the time of application."
- 9 FAM 403.2-7(A) uses the term "time of application" in the scope of guidance, reminding Consular Officers of their duty to approve or refuse cases "at the time of application."

7. While the Definitions subchapter at 9 FAM 102.3 defines "application for visa" as "to file or make an application for a visa," it does not define the time element related to filing or making of an application. Defining the exact moment when an application is considered by DOS to be made or filed is critical to visa adjudications, for both the applicant and the officer. Miriam-Webster's Dictionary defines "at the time of" as "when something happened." Please clarify when exactly a visa application is considered by DOS to be made or filed. Is it when the three components of "Making an Application" (9 FAM 403.2-3) are completed?

Response to Questions 6 and 7: Department of State regulations at 22 CFR 40.1(l)(1) define "make or file an application" for a nonimmigrant visa as "submitting for formal adjudication by a consular officer of an electronic application, Form DS-160, signed electronically by clicking the box designated 'Sign Application' in the certification section of the application . . . with any required supporting documents and biometric data, as well as the requisite processing fee or evidence of the prior payment of the processing fee. . . ." As used throughout the FAM provisions cited, it appears that "time of application" refers to the period between the applicant's attempt to make an application, whether in person or through the interview waiver program, until the officer initially reviews the application to ensure compliance with the Department's place of application regulations at 22 CFR 41.101.

Entertainers and Artists (B Visas)

8. AILA members are reporting that in the context of B visas for entertainers and artists (9 FAM 402.2-5(G)), some applicants are being refused B visas and instructed by the officer that the performer should apply for a P visa based on the language in the FAM. The applicant is then left to assume that they may only apply for a P visa, regardless of whether or not they are eligible. This is confusing for both the applicant and legal counsel. Consistent with DOS policy of not recommending a visa classification, can DOS update the language at 9 FAM 402.2-5(G) from "which in most cases will be P" to "which in most cases will be an employment-based visa" to be broader and to reflect that the applicant may apply for other appropriate visa categories as well (e.g., I, O-1, O-2 and P visas), based on analysis and advice of legal counsel?

Response: The Department appreciates this suggestion and will consider revising the FAM language to avoid suggesting performers are required to apply for P visas or precluded from applying for other types of visas.

Non-Canadian L-2 Spouse Visa Issue in Toronto

9. AILA has received reports that the U.S. Consular Post in Toronto post is requiring non-Canadian citizen L-2 dependents of a Canadian L-1 principal applying for a visa pursuant to 9 FAM 402.12-16(A) to submit an approved Form I-797, Notice of Action for the principal Canadian L-1 even after the principal L-1 visa application has been adjudicated at the Port of Entry (POE) and the Canadian L-1 principal has been admitted to the U.S. in L-1 status. These derivative L-2 family members are being refused by post under INA § 221(g) and are then made to wait outside the U.S. until the I-797 is processed by USCIS, which can take several months. Our understanding has always been that where the principal Canadian L-1 is visa-exempt, and applies for L-1 status at the POE, evidence of lawful admission to the U.S. in L-1 status (e.g., I-94/entry stamp) is sufficient evidence of maintenance of status for adjudication of an L-2 visa for a dependent family member. Is Form I-797 required in these cases? If not, given that it takes several months to get the Form I-797 from USCIS, can DOS please remind posts that they can use evidence of the principal applicant's L-1 admission at the POE to adjudicate L-2 visa applications by dependents?

Response: The consular officer can accept evidence of current L-1 status (e.g. the I-94 or entry stamp) in cases where the L-1 is visa exempt. We have engaged directly with Consulate General Toronto to clarify this issue.

B-1 visas for After Sale Servicing of Computer Software

10. 9 FAM 402.2-5(E)(1) provides that a B-1 visa may be appropriate for "An applicant coming to the United States to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the United States or to train U.S. workers to perform such services." The FAM section does not define "commercial or industrial equipment or machinery." For reference, a similar provision regarding those seeking entry to the U.S. under the USMCA (8 CFR 214.2(b)(4)) includes computer software in its definition of the same terms. May consular officers issue B-1 visas to individuals seeking to enter the U.S. to provide after-sales contractual service in the U.S. for computer software purchased abroad?

Response: The question warrants careful consideration. We will consult DHS, as appropriate, in considering whether an update to the FAM Note is needed.

Visa Reciprocity Schedule for Dual Nationals

11. Members have reported issues with dual nationals applying for an NIV (e.g. B-2, E-2), and rather than being issued the visa per the reciprocity schedule attached to the passport with which they are applying for the visa (e.g. United Kingdom, France, etc.), applicants are being issued the visa per the reciprocity schedule attached to the 2nd nationality (e.g. Iran, Syria, Iraq), which is not being presented nor used when submitting the visa application. For example, an applicant who is a dual national of France and Iran, applying for an E-2 visa with his French passport, is being issued a single-entry, 3-month E-2 visa, limited because of

his second nationality, Iran. This appears to be contrary to 9 FAM 403.8-3(A)(a), which provides: "Applicants with more than one country of nationality are subject to the reciprocity schedule of the country that issued the passport the applicant submits with the visa application." In light of these occurrences, can DOS remind consular officers of this FAM provision for dual national visa applicants? Can DOS confirm that in general, unless specific "special circumstances" apply, visas should be issued for the maximum period allowed per 9 FAM 403.8-5.?

Response: Department regulations at 22 CFR 41.112(c) authorize consular officers to issue a nonimmigrant visa for a period of validity that is less than that prescribed on a basis of reciprocity and a number of applications for admission within the period of the validity of the visa that is less than that prescribed on a basis of reciprocity, if warranted in an individual case. Absent case-specific concerns, consular officers are instructed to issue nonimmigrant visas for the maximum validity allowed based on the nationality of the passport presented.

Immigrant Intent and NIV Refusals

12. AILA members have reported NIV applicants being refused a visa because they had either an I-130 immigrant visa petition (spouse/child of US citizen) or DV Lottery application pending, and "therefore were not eligible for an NIV (INA214(b))." These applicants were told to wait for immigrant visa issuance to enter the U.S. Especially in the context of a pending I-130, this appears to be inconsistent with 9 FAM 402.2-4(B)(4), which specifically states: “An applicant spouse or child, including an adopted applicant child, of a U.S. citizen or noncitizen resident may be classified as a nonimmigrant B-2 visitor if the purpose of travel is to accompany or follow to join the spouse or parent for a temporary visit.” Can DOS please reiterate guidance to posts that having either an I-130 petition or a DV lottery application pending, in and of itself, is not demonstrative of immigrant intent as a sufficient basis to refuse a visitor visa?

Response: The pendency of an immigration petition, by itself, is not dispositive of eligibility for a nonimmigrant visa; however, a refusal under INA 214(b) indicates the applicant did not establish eligibility for the visa category being applied for or did not overcome the presumption of immigrant intent. INA 291 places the burden of proof on the applicant. Consular officers are expected to evaluate an applicant’s circumstances holistically, while applying the standards established under the INA and other immigration laws. If AILA members are seeing a pattern at a particular post of NIV applicants being told their cases are being denied solely because of a pending immigration petition, we would welcome AILA’s identifying posts where this is a pattern, along with the number of observations of such refusals at each post.

13. AILA previously discussed the issue of Afghan nationals applying for F-1 and J-1 visa applications during our January 2022 meeting. AILA appreciates the updated FAM guidance issued in December 2021 clarifying that F-1 students did not need to demonstrate their intent to return to their home country necessarily, but that they had intent to depart the U.S., per 9 FAM 402.5-5 (E)(1)(c). Members report that over the last six months, many Afghan F-1

students have been refused, under 214(b), citing failure to demonstrate intent to return to Afghanistan and issues related to funding, even when full funding is offered to the scholar. The reports indicate a high number of the denials have occurred at the consular post in Islamabad, however, the issue of conflict in the home country also affects nationals from Ukraine, Russia, Iran, and others. Can DOS remind posts of its updated FAM guidance concerning F-1 students and demonstrating intent to depart the United States?

Response: The Department appreciates AILA raising this issue and always welcomes AILA providing specific examples so that the Department can research this issue further. The Department provides regular updates and periodic training to consular officers on student visas and has provided specific training for posts adjudicating applications from Afghan students. We will continue to reiterate to consular officers that students are not required to return to their home country at the completion of their studies, and that they only need to have the present intent to depart the United States.

Technical Issues with Forms DS-160 and DS-3035 and Contractor Booking Systems

14. When there is a change to an applicant's information after the DS-160 has been submitted, there seems to be a bit of confusion about the best way to alert posts of this change. Our understanding is that a second DS-160 can be prepared and submitted before or at the interview. Still, AILA has heard reports that some posts will only accept the original DS-160 used to schedule the appointment, and will not accept or review a revised DS-160, even if there are material changes to report. What is the best course of action to alert posts about such changes?

Response: Since a DS-160 is required to make an appointment, we are aware that sometimes applicants use old versions of the DS-160 to make an appointment and then bring a correct DS-160 to the appointment. In most cases the applicant can inform consular staff upon arrival.

15. Currently, J-1 waiver applicants must complete an online application, Form DS-3035, to obtain a waiver case number. Members report frustrations with the online application due to frequent technical glitches and the inability to save the form. The ongoing technical issues happen at various times and while using multiple browsers. For example, the website "times out" or refuses to allow an applicant to proceed past a particular page without warning, which causes the loss of all entered information. In addition, once the form is submitted online, the applicant must then print and mail it, along with supporting documentation and fee, to a St. Louis lockbox for processing. This mail-in procedure often leads to loss of filing fee checks or other submitted documents, as well as delays due to file transfer from St. Louis to WRD. Modernization of the Form DS-3035 would save time not only in completing applications but also by streamlining processing of the applications by WRD. Does DOS have plans to modernize or update the DS-3035 to enhance processing?

Response: We understand the stated concerns. There are no fixed plans to upgrade Form DS-3035 at this time.

16. Members report frustrations with many features of the visa appointment booking systems managed by GDIT and GSS. For example, a system may only allow a certain number of appointment reschedules before locking an account. This may result in an applicant losing an MRV fee or access to the account for several days. Another issue is that a system may not allow an applicant to pay the MRV fee until appointments are available or will not give access to the calendar of available appointments until after the MRV fee payment is made. Please confirm:

a. How are the contractors who run the visa scheduling process selected?
b. Why are there several different systems?
c. What checks are made on the contactors to monitor service and quality issues?

Response: Vendors are selected through the Global Support Strategy (GSS) indefinite delivery, indefinite quantity (IDIQ) contract. The GSS IDIQ is structured such that several selected "prime" vendors submit competing proposals to provide support services to different posts around the world. State Department contracting experts carefully monitor the performance of this and other contracts, and local vendor personnel collaborate closely with the posts they support.

17. AILA appreciates DOS leadership acknowledging the communication challenges our members and their corporate clients face. In particular, U.S. companies encounter unique challenges when trying to plan for their non-U.S. employees traveling abroad to attend to important business-related matters such as business meetings, negotiations, events, conferences, etc. To help facilitate legitimate business travel for foreign national employees who require visa services abroad, are there other mechanisms for U.S. companies, aside from contacting post, to address urgent business-related travel matters?

Response: Our posts' websites are the best source to seek guidance on urgent business-related travel. Each post has a process for applicants with urgent travel to request an expedited appointment. While the process varies somewhat from post to post, generally, the applicant needs to make an appointment for the first date available and then submit a request through the Embassy or Consulate's online scheduling system demonstrating an urgent business or humanitarian need for an earlier appointment date. Check the Embassy or Consulate website for specific details about how to schedule an expedited appointment at the post where you wish to apply.

Visa Annotations

18. Following the Windsor decision in 2013, at our liaison meeting AILA and DOS discussed designating safe third-country posts for LGBTQ+ applications who feared persecution or retribution based on their sexual orientation when making K of IV applications in their home countries. We also discussed having the visa foils annotated with only the first initial and surname of the petitioner, on request, so no one looking at the visa foil could tell the gender of the petitioner from the name. While venue selection continues to work well, members

have reported that posts are annotating visas with the petitioners' full names, despite a request from the application to use only the initial. Please address the following:

a. We note that at 9 FAM 504.10-3(B)(1) there is no requirement to annotate an immigrant visa with the petitioner's name. Is the petitioner's name one of the options in the IVO dropdown? If a visa is required to be annotated with the petitioner's name, is a first initial only permissible?
b. We note that at 9 FAM 502.7-3(C)(7)(b)(1), K visas must be annotated with the petitioner's first and last name. Is a first initial permissible? If so, would DOS consider amending the FAM to reflect that a first initial is permissible on request of the applicant?

Response: We appreciate your suggestion and have given it careful consideration, in consultation with CBP. Based on those consultations, we understand the proposed use of just a first initial along with the last name of the petitioner in visa annotations could result in delays for the traveler at the Port of Entry. For purposes of our further consideration and consultations with CBP, it would be helpful if AILA could provide any available information on instances where travelers have faced adverse action because of the first name of a same-sex petitioner appearing on a visa annotation, including the country in which it occurred, the adverse action, and the number of cases in which it occurred.

U & T Visas

19. Members have reported that Ciudad Juarez (CDJ) is requiring waivers of inadmissibility for individuals applying for immigrant visas (IVs) as qualifying family members of U-1 nonimmigrants through the I-929 process. This is inappropriate. I-929 beneficiaries immigrate under the provisions of INA 245(m), which does not require the intending immigrant to be admissible. The regulations at 8 CFR 245.24(d)(11) clearly state: "...U adjustment applicants are not required to establish that they are admissible...." However, 9 FAM 402.6 fails to acknowledge this fundamental element of processing I-929 beneficiaries. Would DOS consider revising the FAM to provide clarification on IV processing for I-929 beneficiaries?

Response: The Department is not aware that this is happening in Ciudad Juarez. Applicants experiencing this issue, or any other U visa processing issue, should contact the relevant post for more information on their particular case. Posts are aware that they should contact VO for guidance or clarification on visa regulations or policy. The Department appreciates this suggestion and will review 9 FAM for possible updates.

20. U nonimmigrant derivatives who are 14 or older must complete biometrics before USCIS will approve their I-918A petitions. Derivatives overseas are generally required to complete biometrics at their nearest U.S. consulate. During COVID, most posts stopped providing biometrics to U nonimmigrant derivatives for USCIS purposes and many have not resumed this service. This has caused derivative petitions to be delayed for almost 2.5 years, resulting in unnecessary family separation of noncitizen crime survivors. What is DOS doing to ensure that U nonimmigrant derivatives can obtain biometrics in a timely fashion?

Response: U nonimmigrant derivatives may contact their nearest U.S. Embassy or Consulate to make an appointment to have their fingerprints taken.

21. A number of U.S. consulates have designated email inboxes for U and T visa-related communications, but it can be challenging to find that information. Could DOS provide an updated list of all the designated U and T visa email addresses for U.S. consulates?

Response: Contact information for consular sections overseas can be found on the individual Embassy/Consulate webpages. Please visit https://www.usembassy.gov/ for websites of U.S. Embassies, Consulates, Diplomatic Missions, and Offices providing consular services.

Asylum/Naturalization INA §320

22. AILA has received reports that DOS has issued passports to asylee derivative children who were not eligible. Such children entered the U.S. as asylee derivatives, but had not yet obtained LPR status, and applied for U.S. passports under the mistaken belief that they became eligible upon the naturalization of their parents because they (the children) were under 18. Later, when these applicants submit U.S. passport renewal applications, DOS is issuing denial notices stating that the applicants were never lawfully admitted for LPR status in the U.S., and as such did not acquire citizenship under INA§320. The revocations are issued pursuant to 22 C.F.R. § 51.62(a)(2), which provides that a U.S. passport may be revoked when it has been determined that the passport was obtained illegally, fraudulently, or *erroneously*.

While the denial is legally sound and DOS erroneously issued the U.S. passports, the potential consequences of these erroneously issued passports to this sub-set of vulnerable applicants can be profound. Having received the benefit as children, and believing they were U.S. citizens for years, many of these applicants have since received other benefits as U.S. citizens, including voting in U.S. elections and receiving high level security clearances for jobs – all of which could potentially result in never qualifying for U.S. citizenship due to an allegation of false claims to U.S. citizenship.

a. Is the DOS aware that passports are being erroneously issued to this sub-set of derivative asylee children? If so, can DOS confirm what steps have been taken to ensure that these passports are no longer mistakenly issued and that guidance is clear?

Response: The Department is aware that there have been cases of passports erroneously issued. The Department continuously provides training and guidance to staff to ensure consistency throughout the adjudication process.

b. If yes, can DOS please review its internal guidance to ensure these passports are no longer mistakenly issued and that guidance is clear? In its internal guidance, can DOS include an exception for derivative child asylee applicants that were erroneously issued a passport based on DOS error? Such

an exception should be extended where it is clear that the applicant did not knowingly make false statements in their application to obtain such a benefit, and should state that these applicants should not penalized or charged with a false claim to U.S. citizenship in future applications.

Response: The Department continuously reviews and updates internal guidance in the **Foreign Affairs Manual (FAM)** to ensure it is clear and consistent with the law. We will flag this issue for review in the next update of the appropriate FAM section to ensure that our guidance is as clear as it can be.

The Department is unable to make any exception to INA 320 because citizenship acquisition is dictated by statute and not internal policy. INA 320 requires, among other things, that an applicant has resided in the United States pursuant to a lawful admission for permanent residence. The Department is sympathetic to the applicants' predicament and recognizes the impact of erroneously issued U.S. passports. However, upon discovery of such errors, the Department is required by law to ensure U.S. passports are only issued to U.S. citizens or nationals.

Afghan Immigrant Visas

23. AILA members report concerns that posts are not considering expedited processing requests for IV applicants from Afghanistan, despite comprehensive and compelling circumstances. Posts take many months to schedule an interview and only after multiple inquiries by counsel. Further, posts sometimes request additional evidence that would place clients at risk for their safety (for example, requesting police reports for the applicant from either Afghanistan or the third country in which they seek to consular process as a TCN, where they are currently residing without status due to the length of time it is taking to process their IV case). These requests do not seem to consider client circumstances by requiring the applicant to complete such difficult tasks risking the safety of themselves and their families. Please confirm:

a. What criteria is DOS using to determine whether to grant a request for expedited IV processing for Afghans? If an expedite request is granted, is there an estimated time frame of when an interview can be expected?

Response: Afghan Special Immigrant Visas (SIVs) are prioritized for interview scheduling worldwide; however, there may be wait times for priority interviews at certain posts because of, for example, COVID-19 and other capacity limitations. For non-SIV Afghan Immigrant Visa (IV) cases, applicants may request expedited interviews based on the specific facts that apply to their case. Such requests are decided on a case-by-case basis with consideration of their specific circumstances and the available capacity at post.

b. What can members do when dangerous conditions warrant expedient processing that will enable the applicant to reunite with family in the U.S.?

Response: Options for obtaining travel authorization will depend on an individual's specific situation. An individual that is eligible to be scheduled for an immigrant visa interview may contact the nearest immigrant visa processing U.S. embassy or consulate they are able to travel to and request an expedited appointment. Information on how to request an expedited appointment will be available on the embassy's website.

c. If an applicant cannot provide requested evidence because they have credible fear for their safety, would DOS consider client circumstances by temporarily waiving that requirement and accepting an explanation or an alternative document instead?

Response: The Department is aware that document availability is uncertain in Afghanistan and that procedures for obtaining government documents change with great frequency. Based on such assessments, a consular officer may determine that a document is unobtainable or unreliable in accordance with 9 FAM 504.4-4(F) and accept secondary evidence or substitute documentation.

d. Could DOS share its progress on the reunification program for those separated from immediate family during the evacuation?

Response: The Office of the Coordinator for Afghan Relocation Efforts (CARE) leads the intergovernmental effort to relocate and resettle our Afghan allies, including for eligible individuals that have been separated from their immediate family members.

Inadmissibility Issues and Visa Refusals

24. AILA has received reports of consular sections not providing visa applicants the factual basis of the IV or NIV denial, but simply writing "212(a)(6)(C)(I) fraud." In one case, when the applicant sought clarification, he was told "fraud in prior NIV application." As the applicant did not have the old visa application and could not recall what was said at the interview, he did not know what the fraud referred to or whether it was found by misrepresentation in the DS-160 or at the oral interview.

When receiving a new visa application with a prior refusal history, 22 CFR Sec. 40.6 requires the consular officer to consider evidence that the ground for a prior refusal has been overcome. To effectively operationalize this requirement, the applicant must be aware of the factual basis of the prior refusal to present information that the grounds have been overcome. We are aware of relevant guidance provided in 9 FAM 504.11, 9 FAM 403.10-3(A)(1), 9 FAM 302.9-4(B)(1) et seq., and INA§212(a)(6)(C). USCIS, in its instructions for completing the I-601 waiver, specifically requires the applicant to explain the underlying facts and circumstances of the misrepresentation. Board of Immigration Appeals (BIA) case law specifically requires balancing of the circumstances of the underlying misrepresentation.

Legal counsel cannot effectively assist their client in addressing a prior refusal if neither counsel nor applicant are informed of the underlying facts of the misrepresentation. In the IV

context, legal counsel cannot aid the USCIS adjudicator to conduct this balancing for an I-601 waiver; and likewise, in the NIV context, legal counsel cannot assist the applicant in presenting evidence to a consular officer when determining whether to recommend an NIV waiver. This clarity enables an applicant who will re-apply for a visa or who must apply for a waiver, to have a fair chance at addressing the criteria for the waiver. We also note, in rare instances, there may be an inadvertent error in the finding of inadmissibility in the first place, which can only be identified and resolved if applicant and counsel are advised of the facts forming the basis of the legal conclusion that the applicant is ineligible. In light of the above, would DOS consider instructing consular officers to provide more detailed information to the applicant when making a finding of fraud or misrepresentation, and any other ground of inadmissibility, where permitted by law and per DOS standards?

Response: Thank you for the suggestion. We certainly understand applicants' interest in having as much information as possible. As a general matter, visa applicants who are refused are notified of the specific provisions of law that apply, as required by INA 212(b), subject to certain exceptions. In most cases, consular officers also have discretion to provide additional information explaining the refusal and are encouraged to do so. Because the facts and potential sensitivities are unique to every case, however, the Department cannot dictate additional information that consular officers should provide.

With respect to AILA's statement that "22 CFR Sec. 40.6 requires the consular officer to consider evidence that the ground for a prior refusal has been overcome," the Department notes the regulation's specific focus on grounds for which a prior refusal "*may no longer exist*." While certain grounds of ineligibility may cease to exist following a material change in circumstances (such as an INA 221(g) refusal for missing documentation, subsequently provided, or the establishment of new ties sufficient to overcome a prior INA 214(b) refusal based on a finding of immigrant intent), the same generally is not true for a finding under INA 212(a)(6)(C)(i), because typically all events relevant to the ineligibility determination occurred prior to the adjudication. In most such cases, applicants would require a waiver, to be recommended in the NIV context at the discretion of the consular officer in reliance on the factors listed at 9 FAM 305.4-3(C), and subject to the applicant's eligibility for such a waiver under 9 FAM 305.4-3(B).

The finding of an ineligibility under 212(a)(6)(C)(i) also may be addressed in the context of future visa applications, where applicants may ask questions about their case during the interview. Also, if an applicant has a question on the interpretation or application of immigration law, relative to a pending or recently refused application, legalnet@state.gov may be a helpful source of information.

End