AILA DOS Liaison Committee Liaison Meeting with the Department of State

April 26, 2023

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, followed by 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 for consideration at today's meeting.

Stateside Visa Renewal Pilot Program

1. According to Bloomberg Law, DOS will launch a pilot program later this year offering visa renewal options in the US for H-1B specialty occupation workers and other temporary visa holders currently required to travel abroad. Since DOS has not yet issued a formal announcement, can DOS confirm the anticipated timeline for this pilot program? Recognizing that it has not yet been implemented, can DOS share any information regarding the scope and implementation of this pilot program, including which visa categories are under consideration?

Response: For certain petition-based nonimmigrant work visa categories, we are planning to launch a small-scale domestic renewal pilot program later this year. This would only be for applicants eligible for interview waivers and generally would eliminate the need for eligible applicants to travel abroad to renew their visas. Once the details are finalized, we will publish a timely notice with the information needed by the public.

Administrative Processing

2. During our Roundtable with DOS leadership in October 2022, AILA reported an uptick in the number of 221(g) refusals and the length of time those applicants were pending final adjudication. DAS Julie Stufft confirmed that a new system was being implemented for administrative processing, which would help ameliorate lengthy administrative processing delays. Has this new system been implemented? If so, how is the new system different from the previous 221(g) processing? Prior to the pandemic, DOS advised visa applicants "except in cases of emergency travel" to "wait at least 180 days" before making a status inquiry about a case in administrative processing. What is the current guidance?

Response: Yes, in the autumn of 2022, nonimmigrant visa vetting was incorporated into the National Vetting Center. ***See*** **https://www.cbp.gov/border-security/ports-entry/national-vetting-center for more information. As a result of this change, vetting of nonimmigrant visa**

applications is more efficient and, in many cases, may now be conducted without the need for additional administrative processing. The guidance for cases in administrative processing remains the same.

General Consular Processing Issues

3. Members report an ongoing trend of U and T visa applicants abroad being unable to complete biometrics and/or schedule interviews, with consulates stating there are no appointments available, not responding, or giving appointments so delayed that the petition validity will have expired by the time of the interview. Many of these applicants have waited over five years for initial adjudication of their underlying visa claims and, in some cases, are being denied due to the inability to complete requirements at consular posts. In all cases, the unavailability of biometrics appointments or consular interviews prolongs family separation and increases hardship for those eligible for humanitarian protections. AILA has provided examples to the agency via email. For these U and T visa applicants, is there a mechanism for requesting resumption of visa processing at post? Is there a specific email that attorneys may contact for long-pending U and T cases? In light of USCIS's announcement of the Humanitarian, Adjustment, Removing Conditions, and Travel Documents (HART) Service Center to focus on humanitarian cases, is DOS considering implementing a similar prioritization process for humanitarian applicants?

Response: We acknowledge the delays that U and T visa applicants face in scheduling biometric appointments abroad. Like most of our operations, the COVID-19 pandemic impacted this process as biometric collection requires in-person fingerprinting on ink cards. DOS is working closely with USCIS and overseas posts to provide this much needed service and we are making progress in reducing these delays. 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. We are not aware of any posts that are not conducting T and U visa interviews.

4. Russian nationals are currently being designated for IV processing at the US Embassy in Warsaw, Poland. Russians cannot enter Poland and are reporting that they are either being denied or receiving their interview notifications so close to the interview date that there is no time to attend the medical examination and reschedule the interview at another post. Therefore, many Russian applicants either miss their interviews or are forced to request a postponement or transfer to a post in a country where they can travel at the last minute. This creates chaos and potentially considerable delays in the process and keeps families separated. While AILA understands that DOS cannot request Poland to issue Schengen visas to Russians just to allow them to attend an IV interview, would DOS consider designating alternative posts where Russians can travel visa-free, such as Albania, Armenia, Azerbaijan, Georgia, Moldova, Montenegro, Serbia or Turkey, many of which already have Russian speaking staff?

Response: The Department regrets that the actions of the Russian government, such as prohibiting the U.S. Embassy in Moscow from employing local staff in any capacity, have made it impossible for the Department to offer visa services at the U.S. bilateral Mission to Russia. After being forced to suspend visa services in Moscow, the Department concluded that the embassy in Warsaw was the best option available to designate as an alternate processing post for Russian nationals. However, in February 2022 the government of Russia launched a brutal and unprovoked invasion of Ukraine, a consequence of which was that it became harder for Russians to travel to Poland.

While we regret that the actions of the government of Russia have resulted in making it so much harder for Russian nationals to make visa applications, the Department is still actively looking for ways to accommodate Russian applicants where it is able. It is important to keep in mind that our visa units are part of a bilateral mission to a specific country, and our consular sections are there to serve the residents of their consular districts. Accommodating third country nationals at other posts always requires a delicate balancing of the objectives of our bilateral missions with our desire to assist applicants who are prevented from applying in their home country for reasons beyond their control and beyond the control of the U.S. government.

With that background in mind, we were proud to announce in March 2023, the Department designated U.S. Consulate General Almaty and U.S. Embassy Tashkent as the processing posts for Russian immediate relative applicants who are parents of U.S. citizens (IR-5). Embassy Warsaw remains the processing post for Russian applicants applying for other IV categories. Other Russian IV applicants may request a discretionary transfer from Embassy Warsaw to another IV processing post. The Department is continuously evaluating further expansion of visa services for Russian applicants.

5. AILA is aware of the incredibly volatile and politically sensitive situation in Haiti. We also understand that due to security concerns, the Embassy in Port-au-Prince must periodically shut down and that predictable and consistent visa adjudication may not be possible for the time being. Due in large part to the situation, AILA members have shared examples of, among other challenges, extended waits for both IV and NIV interviews, parolees, and derivates of asylees, as well as cancelation of interviews without prior notice and lack of response to urgent expedite requests via the USTravelDocs portal. One AILA member shared an example of an F2B applicant with a visa priority date of Sept 29, 2014, whose interview has yet to be scheduled. Considering the difficulties faced in Haiti, including the security challenges of physically appearing at the Embassy, please address the following:

    a. Would DOS provide exceptions and accommodations for minors, students, asylee derivates, or incapacitated persons? For example, would the Embassy consider interview waivers for these individuals? Could the Embassy provide a responsive emergency email for compelling humanitarian or national interest requests?
    b. To increase transparency and information sharing, would the Embassy consider posting closures/re-openings or security issues to Facebook and/or other social media platforms?

Response a and b: The Embassy in Port-au-Prince has a dedicated inbox for all inquiries. We support its management of that current inbox and do not believe setting up a separate emergency email for certain applicants is advisable, under the circumstances. The Embassy fully considers utilizing existing interview waiver authorities, where appropriate. For immigrant visas, the INA and the Department's implementing regulations require an in-person appearance for all applicants with no exceptions. The consular team regularly communicates with scheduled applicants regarding operating status.

6. AILA appreciates that DOS is allowing Iranian, Afghan, Russian, Ukrainian, and other homeless nationals to be seen at posts around the world and that visa applicants can request to transfer their case to another embassy or consulate. In these cases, notwithstanding administrative processing delays, significant hurdles continue to plague these applicants applying outside of their home country (*e.g., travel is expensive, documents are unavailable or difficult to obtain from the home government, etc.*) Members report instances where Form DS-5535 is requested after the interview, which causes administrative processing delays for these applicants who are lawfully present in a country but without the means to remain for long periods of time. Where possible, taking ameliorative steps regarding homeless nationals will help reduce 221(g) refusals and save the time and resources of consular officers by having this information prepared by the applicant before the interview.

    a. Does DOS have ameliorative measures to be used at the post's discretion in the visa process and documentary requirements for homeless nationals to preempt unnecessary administrative processing delays?
    b. Would posts be willing to include Form DS-5535 in the public-facing list of required documents for visa applications made by homeless nationals to prepare in advance of the interview with the assistance of counsel?
    c. Would posts allow the applicant to present the DS-5535 in person at the interview? Members report that some posts require that Form DS-5535 may only be submitted via email after the interview.

Response: A consular officer will request the DS-5535 only when necessary to determine eligibility. Many posts request the DS-5535 to be submitted electronically to avoid data entry errors. We will consider whether to post a version of this form on travel.state.gov so that applicants may opt to have the information ready to submit promptly, if needed.

7. AILA members have reported that consular officers provide conflicting information to visa applicants regarding TRIG, with many often misstating when and whether an IV or NIV applicant may be eligible for a TRIG waiver or exemption or not at all. If possible, applicants would greatly benefit from publicly standardized information and requirements. Would DOS consider language such as: "*You have been found inadmissible under INA 212(a)(3)(B). In certain circumstances, a visa applicant may be deemed eligible for a waiver, exception, or exemption to this refusal. If you believe that a waiver, exception, or exemption may be*

applicable to you, then you must file a request with supporting evidence within 365 days of your interview for reconsideration based on those grounds."?

Response: We appreciate your suggestion and will consider whether updated, standardized language would be appropriate for consular officers to use when notifying an applicant of an INA 212(a)(3)(B) inadmissibility. The Department notes that waivers and exemptions are discretionary authorities that are considered during the course of the visa application process, regardless of whether an applicant requests a waiver or exemption.

Panel Physicians and Medical Issues

8. AILA members report instances in which visas applicants are determined to be inadmissible under INA§212(a)(2)(A)(i)(II) (conviction of a controlled substance offense) based solely on a positive test for marijuana during a drug test administered by a panel physician despite no formal admission to the essential elements of a crime and no prior arrest/conviction. This is inconsistent with 9 FAM 302.4-2(B)(4) and 9 FAM 302.3-2(B)(4) regarding the standards upon which an admission to an offense can be the basis for a finding of inadmissibility. Is testing positive for marijuana during a medical examination with the panel physician, on its own, deemed an "admission" to a controlled substance violation?

Response: The Department appreciates AILA raising this issue and always welcomes AILA providing specific examples so that the Department can research this issue further. As a general matter, panel physicians are required to follow the CDC's Technical Instructions, which include criteria for cannabis use disorder. Where cannabis use is detected through testing, and such use meets the diagnostic criteria for a substance-related disorder, then the proper inadmissibility ground is INA 212(a)(1)(A)(iv) rather than 212(a)(2)(A)(i)(II). Additionally, L/CA agrees that if an applicant tests positive on a drug test administered by a panel physician, then that provides a basis for further review to determine whether other grounds of ineligibility, such as 212(a)(2)(A)(i)(II) or 212(a)(6)(C)(i), might be appropriate.

9. The FAM follows the Controlled Substance Act (cite) and defines marijuana as .3 THC content. However, the CDC Manual's Preface relies on statements from the U.S. Food and Drug Administration, stating that "applicants will meet criteria for cannabis use disorder with the use of cannabis and/or any of its derivatives, including CBD or THC; they are inadmissible and must be in sustained remission to be classified as Class B for travel clearance purposes. " Is there any way that the CDC's definition can be reconciled to match the definition of marijuana defined by the INA and FAM, which follow the federal Controlled Substance Act?

Response: With respect to AILA's statement that "[t]he FAM follows the Controlled Substance Act . . . and defines marijuana as .3 THC content," the Department notes that 9 FAM 302.4-2(B)(2), the section that AILA appears to reference, adopts this definition in relation to crimes involving controlled substance violations pursuant to INA 212(a)(2)(A)(i)(II) (see also 9 FAM 302.5-4(B)(4), adopting the same definition with respect to INA 212(a)(3)(A)(ii)). Additionally, the Immigration and Nationality Act references the Controlled Substance Act in two places, the

ineligibility grounds for a violation of law related to a controlled substance (INA 212(a)(2)(A)(I)(II)) and for illicit trafficking of a controlled substance (INA 212(a)(2)(C)(i)). For further questions on the use of this term in the context of substance-related disorders pursuant to INA 212(a)(1)(A)(iv), which are assessed in accordance with CDC rules, we refer you to the Department of Health and Human Services.

10. AILA members report cases of applicants being denied for Alcohol Use Disorder in CDJ and El Salvador when the applicant may have had a past DUI but has not consumed alcohol in over a year. In some situations, the DUI arrest was many years ago. Members report Panel Physicians requiring random testing throughout the following year. Still, in the interim, Form I-601A is voided, and the foreign national must wait outside the country for two years to get a new Form I-601. AILA members observe arbitrary and inconsistent conclusions. Would DOS allow foreign nationals to complete their medical exam with a Panel Physician (or designated US Civil Surgeon) in the US? In the alternative, can there be a method for attorneys or applicants to communicate with panel physicians to mitigate and resolve this medical concern?

Response: A person who is applying for an immigrant visa overseas must receive a medical examination from a panel physician designated by the consular section at the overseas post. Such individuals may not submit a medical examination conducted by a civil surgeon in the United States. For communication with panel physicians, please see the response to the question below. The Department invites AILA to share specific examples of applicants receiving the treatment described.

11. AILA understands that panel physicians communicate directly with visa applicants via email about medical exam issues, often asking questions and requiring follow-up visits for additional issues or outside services. This can sometimes create confusion or apprehension in the visa applicant. Where an attorney represents the applicant, and there is a Form G-28 on file, can the applicant request at the medical exam to have their attorney copied on future correspondence from the panel physician to the applicant regarding the exam's results?

Response: Panel Physicians are not part of the Department or DHS, and Form G-28 is therefore not the appropriate vehicle to seek attorney inclusion in communications with the panel physician. Additionally, panel physicians may be subject to local requirements for sharing medical information with third parties, which are not generally met via Form G-28 or Department-authorized forms. Applicants may continue to share their own information with their attorneys and may request that the panel physician include their attorneys in future correspondence.

FAM Issues

12. 9 FAM 202.2 describes the procedure for issuing a boarding foil to an applicant whose I-551 (green card) has been lost, stolen, or destroyed. USCIS's I-131A instructions say that a foreign national who is not yet a lawful permanent resident (LPR) may also obtain a boarding foil

from a consulate abroad if they have received a form I-512/I-512L, Advance Parole (AP) Document, or I-766, Employment Authorization Document (EAD) (with travel endorsement) that has been lost, stolen, destroyed or damaged. The FAM does not provide guidance to the consular officer on what to do if a foreign national is not yet an LPR who has been granted a travel-endorsed EAD or AP and has lost either of these documents and needs a boarding foil. The FAM only discusses the procedure the officer must follow to verify the foreign national is an LPR. In a recent case in Abu Dhabi, the consular officer correctly determined the individual was entitled to a boarding foil even though she was not yet an LPR. Still, the lack of FAM guidance caused delay and frustration. Would DOS consider adding language in the FAM to cover this type of boarding foil applicant?

Response: DOS will consider amending the FAM. The FAM was recently amended twice regarding this section to ensure it is clear with respect to both non-TPS and TPS advanced parole applicants.

13. While 8 CFR 214.2(l)(5)(ii)(A) still requires employers to provide an original and two copies (three total) of Forms I-129S and I-797 to applicants, AILA notes that the FAM has been updated to indicate that applicants must present "the required number of copies of Forms I-129S and Form I-797" (see 9 FAM 402.12-7(B)). The FAM does not confirm the number of required copies for individuals applying for an L visa under an L-Blanket, but 9 FAM 402.12-7(E) does suggest that only two copies are needed. Members are reporting that consular officers in Chennai and London are instructing applicants that only two copies of Forms I-129S and I-797 are required when applying for an L-1 visa using a blanket L approval. How many copies, including the original, of Form I-129S and I-797, must an applicant present when applying for an L visa under an L-Blanket?

    Response: Two copies of the I-129S and the I-797 (or the original and one copy) are required. An original, photocopied, faxed, or scanned copy are all valid, provided they show the handwritten signature on the form. Please see 9 FAM 402.12-7(E). After the adjudication, the consular office returns one copy to the applicant for their records. An original, photocopied, faxed, or scanned copy of the handwritten signature on the form are all valid (9 FAM 402.12-7(C)).

J Visas

14. At some posts, J-1 applicants for G Exchange programs are required to pay the MRV fees. This is not required for G-1, G-2, and G-3 programs. At several posts, including Abuja and Erbil, there is no option to indicate the MRV fee is not required, so no appointment can be made without contacting the post. Would DOS please ensure the NIV systems can accommodate J-1 visitors in G programs to avoid the MRV fee?

Response: The Visa Office will continue to work with posts to establish scheduling options that accommodate no-fee appointment requests.

CSPA Guidance

15. USCIS has updated its policies and now considers a visa available to calculate CSPA age at the same time it considers a visa immediately available for accepting and processing the adjustment of status application. This update resolves any apparent contradiction between different dates in the visa bulletin and the statutory text regarding when a visa is "available." USCIS has also indicated that the change in policy constitutes grounds to reopen a denied application. Will DOS implement guidance consistent with the new USCIS guidance, including the ability to apply the provision retroactively to cases where the applicant was precluded from making a case for CSPA eligibility?

Response: We are aware of USCIS's policy change regarding when an immigrant visa number "becomes available" for the purpose of calculating Child Status Protection Act (CSPA) age for noncitizens seeking lawful permanent resident status in a preference category when adjusting status in the United States. The Department of State, however, has not changed its policy regarding when a visa number "becomes available" for purposes of CSPA calculations.

E Visas

16. Delays and suspension of accepting new applications continue to plague E visa processing. Previously, DOS had indicated that the Kentucky Consular Center (KCC) was enlisted to support E visa processing. At the AILA Liaison meeting with KCC in March 2023, KCC indicated that, although they had provided some E visa support in the past, they are not currently providing any E visa processing support. What is DOS doing to address the E visa backlogs and to resume E visa processing at posts such as Bogota (where processing of previously filed applications has resumed, but acceptance of new applications remains suspended) or Istanbul and Toronto, where some appointment wait times are approaching one year to accept new applications?

Response: While each Post determines its processing priorities, the Department has longstanding guidance to posts to make appointments available for at least six months in advance for all nonimmigrant visa classifications, including E visas. Posts may choose to set up dedicated appointment slots for E visa applicants.

17. In December 2022, President Biden signed the Fiscal 2023 National Defense Authorization Act ("NDAA") into law. The E visa provision of the NDAA found in section 5902 adds Portugal as a treaty country. However, it modifies the eligibility criteria for E visas by limiting E visa eligibility for foreign nationals who: *"...gained relevant nationality through a financial investment and who has not previously been granted status under this subparagraph, the foreign state of which the alien is a national and in which the alien has been domiciled for a continuous period of not less than 3 years at any point before applying for a nonimmigrant visa under this subparagraph".* The E visa section of the FAM has not yet been updated,

Portugal has not yet been added to the list of E Visa Treaty Countries, and the U.S. Embassy in Portugal has not published guidance for its E visa application procedures. For the benefit of our members, please clarify the following:

a. When will this provision be implemented to allow Portuguese nationals to apply for E visas, and when will it take effect?

Response: The AMIGOS Act makes Portuguese nationals eligible for E-1 and E-2 nonimmigrant visas if the government of Portugal provides similar nonimmigrant status to U.S. nationals. Implementing the provisions of the AMIGOS Act therefore requires undertaking a similarity analysis of Portuguese immigration laws to ensure there is a similar visa available. The time it takes to complete the analysis varies. For example, the Kiwi Act, which made E visas available to nationals of New Zealand, was passed in 2018, but was not fully implemented until June 10, 2019.

b. Does this new provision requiring domicile not apply to E visa renewal applicants who gained nationality with a treaty country through investment and have previously been issued an E visa or granted E visa classification?

Response: INA 101(a)(15)(E) applies to applicants who acquired the relevant nationality through a financial investment and who have not previously been granted status under INA 101(a)(15)(E). We are working on providing further guidance on the implementation of the new language.

c. Are E visa applicants who have filed their E visa applications at post and are currently waiting for their E visa interviews not subject to the new domicile provision of the NDAA?

Response: We are working on providing further guidance on the implementation of the provisions of the NDAA.

<u>Visa Bulletin Updates</u>

18. The discussions provided in the monthly visa bulletins are helpful and give some insight into the factors and information used to make determinations of visa availability. Before Charlie Oppenheim's retirement, these discussions had been supplemented with monthly "Chats with Charlie." As these follow-up discussions provided invaluable insight to thousands of visa applicants in the preference categories, would DOS be open to reinstating some kind of monthly public discussions with a representative from the Numerical Controls Division?

Response: The Visa Office continually evaluates the best way to provide publicly available statistics and appreciates your suggestions.

19. To the extent that the Numerical Controls Division has calculated or anticipated these figures, and there is no public engagement on visa bulletin projections planned for the near future, what type of movement is expected for the remainder of this fiscal year (FY2023), and looking ahead for FY2024, for: Family-based categories, especially F2A and F2B and Employment-based categories, EB-2, EB-3, and EB-4? Are the Final Action chart dates expected to reach the Dates for Filing chart dates in FY2023?

Response: For FY23, there will be some advancements in the family preference categories, and as a result, some of the Application Filing Dates will also advance to prepare applicants for processing in FY2024. Number use between State and USCIS has been robust through the first half of the fiscal year in the employment categories, and retrogressions are possible as the annual numerical limits are approached. It is too early to say what to expect in FY2024.

20. AILA acknowledges and appreciate the removal of the special category for Northern Triangle countries under the EB-4 category and the reincorporation of those nationalities with the Rest of World (ROW). We also note the significant retrogression impacting the EB-4 category with very little notice, which has adversely impacted religious workers. Our members are concerned that this abrupt recalibration will jeopardize the continuation of ministerial duties and force applicants maxing out on their R-1 visas to unexpectedly depart the U.S., among other things. For example, consider the situation faced by a minister in the US on an expiring R-1, maxing out with no option to extend their R-1 with USCIS based on the 5-year limitation on an R-1s period of stay, who has a February 2022 Priority Date on an EB-4 (current in March, but not in April), who is unable to adjust status and must depart the U.S. immediately. Does DOS anticipate providing any ameliorative provisions for individuals in this situation? Given the above uncertainty surrounding the EB-4 category, can R-1 wait times be added to the travel.state.gov visa wait times page? Alternatively, can DOS encourage posts to share these timelines on their websites?

Response: We recognize the importance of the special immigrant visa program for religious ministers and workers as well as their U.S. employers who lead faith-based institutions. Such nonimmigrant religious ministers and workers may be able to utilize other existing pathways to lawfully remain in the United States while they wait for an available EB-4 visa.

21. While the case creation and document review timeframes provided on the travel.state.gov website are helpful, there is currently no information regarding the timeframes for immigrant visa (IV) processing following a case becoming documentarily qualified at NVC. AILA understands that these processing times are based on interview availability at the relevant consular post, which can change monthly. However, having an average IV processing time per post would be useful. Would DOS consider encouraging posts to public-facing information regarding IV processing times? This would lessen inquiries made to the NVC and posts regarding processing times for IV cases that have been documentarily qualified. As an example, AILA notes that Mission Canada provides language on its website.

Response: The Visa Office is not currently able to provide a post-by-post breakdown of IV processing times, although we are exploring avenues for sharing information about IV interview wait times with the public. Please refer to: https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visas-backlog.html, which is updated monthly with current numbers.

EB-5

22. The EB-5 Reform and Integrity Act (RIA) allows for the "reserved" 6,396 visa numbers of FY 2022 to be "made available to qualified immigrants" in the unreserved visa category in the subsequent fiscal year (FY 2023). If USCIS' online processing times are accurate, and if it will take nearly 58.5 months for Form I-526 adjudication, unless DOS allocates them now for general availability and to the unreserved (C5, T5, I5, R5) visa categories, thousands of the "reserved" visa numbers could potentially go unused causing significant harm to investors in the backlog, extending the investment risk not contemplated by the statute, and creating a lack of protection for spouses and children should an investor die. When will DOS make the determination that reserved visa numbers will be made available to the unreserved visa category to help reduce EB-5 backlogs?

Response: Per the RIA, "reserved" visas from FY2022 that remained at the end of FY2023 were made available for use in the same reserved categories in FY2023. At the end of FY2023, any remaining visas from the FY2022 reserved carryover pool of visas will carry over to the "unreserved" category in FY2024.

Criminal Issues

23. Consular officers and law enforcement worldwide often treat INTERPOL red notices and diffusions as conclusive evidence of criminality, leading to arrests, visa denials, visa revocations, and/or lengthy administrative processing. While INTERPOL plays a critical role in global policing, as recognized in the Transnational Repression and Accountability Prevention provision (TRAP Provision) of NDAA FY 2022[FW1], INTERPOL is, unfortunately, subject to abuse and manipulation by authoritarian regimes to "silence and/or exact reprisals against individuals outside of their sovereign territory, including human rights defenders, civil society activists, critics, journalists, and political opponents." Disproving allegations in a red notice that was issued to further transnational repression within the context of a consular interview is an extremely difficult proposition.

    a. If INTERPOL deletes a red notice or other colored notice or diffusion, will DOS automatically receive notice of this deletion through CLASS or some other law enforcement database?

Response: INTERPOL Washington provides notice-based information that is used in screening visa applicants and the transfer of this information to CLASS is automated. If INTERPOL Washington removes notice-based information, it gets deleted from CLASS automatically.

b. When a red notice, other colored notice, or diffusion exists on an applicant's record, will consular officers review the entire red notice and underlying arrest warrant, if one exists, to evaluate the allegations made by the charging government?

Response: Consular officers review and evaluate the notice information prior to making a decision. Existence of an INTERPOL notice does not constitute a visa ineligibility in and of itself. Based on entirety of information available to the consular officer, including any additional information available to them at post, they can submit an advisory opinion request to the Department for help with determining whether an ineligibility exists.

24. 9 FAM 302.3-2(B)(3)(i) says a conviction is a conviction, regardless of any post-conviction relief (e.g. suspended sentence, probation, parole, etc.), even if the record was expunged. In the United Kingdom, an individual may receive a "Conditional Discharge" under which the court will remove the record of conviction for a minor offense after the passage of a prescribed period of time. Recently, the UK Government revised reporting requirements in relation to criminal cases that have been discharged by the courts. In the past, a conditional discharge would appear on an ACRO Police Certificate as "NO LIVE TRACE." Changes in UK law now require the complete removal of discharged cases, so an individual who had been charged with a crime in which the court has issued an order of Discharge will receive a police certificate that says "NO TRACE." Please confirm:

    a. If the police certificate says "NO TRACE", but the applicant affirmatively admits to a prior conviction via the DS-160 or during interview, what documentation should the applicant provide to post since this information no longer appears in the required police certificate?

Response: If an applicant affirmatively discloses a past conviction that is no longer required to be reported on their ACRO police certificate, the consular officer may request whatever evidence or documentation they deem necessary to determine whether or not a conviction amounts to a CIMT or other offense that would render the applicant ineligible for a visa. This might include any court documents related to the discharged offense or a copy of the statute that the applicant admits to being convicted of violating. However, there is no specific set of documents that may be requested, and the consular officer determines which documents or other evidence should be submitted by the applicant.

    b. On the other hand, if an applicant fails to disclose a prior conviction that has been discharged based on the honest belief that a police certificate that states "NO TRACE" means the conviction need not be reported, does DOS agree that absent other factors, such an omission would not constitute a willful misrepresentation for purposes of 212(a)(6)(C)?

Response: 9 FAM 302.9-4(B)(4)(a) is clear that a 'willful' misrepresentation is one that is made knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. However, the decision as to whether an applicant's claim that they honestly believed that the facts were otherwise is a decision reserved to the consular officer, based on the totality of the circumstances before the officer.

25. AILA has received reports that there may have been a change in the interpretation of foreign criminal statutes that include both intent and recklessness as the *mens rea* for a conviction but where the FAM requires intent for a finding that the offense is a CIMT. For example, Section 1(1) of the UK Criminal Damage Act 1971 provides that "[a] person who without lawful excuse destroys or damages any property belonging to another, intending to destroy or damage any such property, or being reckless as to whether any such property would be destroyed or damaged, shall be guilty of an offense." and 9 FAM 302.3(B)(1)(c)(1)(c)(I) provides that "damaging private property (where intent to damage is not required)" is not a CIMT. Intent to damage is not required under the UK statute, so we have always seen this offense treated as a non-CIMT. In recent months, however, we have seen this and other offenses with a dual *mens rea* of intent or recklessness treated as CIMTs, which seems inconsistent with the FAM requirement of intent. Has there been a change in the interpretation of these offenses and FAM provisions? If not, will an offense that carries an alternative *mens rea* to intent be construed not to be an intentional offense and, where appropriate, not a CIMT?

Response: Whether a crime is considered a CIMT depends on the statutory language. There has been no change in the Department's interpretation of foreign criminal statutes that include both intent and recklessness as the *mens rea* for a conviction. We believe the case of *Diaz Esparza v. Garland*, 23 F.4th 563 (5th Cir. 2022) and its discussion of Gomez-Perez v. Lynch is a helpful example of how to analyze statutes that includes recklessness amongst other intent provisions. With regard to Section 1(1) of the UK Criminal Damage Act, 1971, the Department has previously concluded that a conviction for violating Section 1(1) of the UK Criminal Damage Act, 1971 is not a crime involving moral turpitude and therefore does not give rise to ineligibility under Section 212(a)(2)(A)(i)(I) of the INA. If you have specific examples of cases involving this statute that have been found to be a CIMT, please provide us with those specific examples.