Department of State/AILA Liaison Committee Meeting

October 18, 2018

Introduction

The Visa Office (VO) welcomes AILA's Department of State Liaison Committee for discussions aimed at providing greater clarity to the public on current visa-related policies and procedures. Following the meeting, these notes will be published on the website of the Bureau of Consular Affairs at travel.state.gov, with any appropriate revisions. Following are questions posed by AILA with VO responses.

Presidential Proclamation 9645

Presidential Proclamation 9645 (PP 9645) imposes restrictions, limitations and exceptions on the entry to the U.S. of citizens of certain countries seeking immigrant or certain nonimmigrant visas. AILA members representing clients from impacted countries continue to have many questions concerning the scope of the exceptions to the travel restrictions and the waiver process.

Exceptions under Section 3(b) of PP 9645

1. Department of State FAQs provide that "nationals covered by an exception will not be subject to ***any*** travel restrictions listed in the Proclamation" and includes in the groups of individuals covered by an exception, "[a]ny national who was in the United States on the applicable effective date … regardless of immigration status" as well as "[a]ny national who had a valid visa on the applicable effective date…."[1] Based on the plain reading of PP 9645 and the accompanying FAQs, please confirm that the following individuals from Section 2 countries who were present in the U.S. on the applicable effective date would not be subject to any travel restrictions per PP 9645:

    a. Individuals who were present in the U.S. on the applicable effective date in one nonimmigrant visa category, who depart the United States and apply for a nonimmigrant visa in a different category or an immigrant visa.

    A: Yes, such individuals are subject to an exception. If an individual otherwise subject to the Proclamation was physically present in the United States on the applicable effective date for that nationality, then in future visa applications (in any visa classification), the applicant would be eligible for an exception to PP 9645's travel restrictions.

    b. Individuals who were present in the U.S. after the expiration of their nonimmigrant status on the applicable effective date who depart the United States and apply for a nonimmigrant visa in a different category or an immigrant visa.

[1] *See* https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/june_26_supreme_court_decision_on_presidential_proclamation9645.html

A: Yes, such individuals are subject to an exception. If an individual otherwise subject to the Proclamation was physically present in the United States on the applicable effective date for that nationality, then in future visa applications (in any visa classification), the applicant would be eligible for an exception to PP 9645's travel restrictions.

a. Individuals who were in possession of a valid visa on the applicable effective date, but not present in the United States, who apply for a different nonimmigrant visa or an immigrant visa.

A: Yes, such individuals are subject to an exception. If an individual otherwise subject to the Proclamation was in possession of a valid visa on the applicable effective date for the relevant nationality, then in future visa applications (in any visa classification) the applicant would be eligible for an exception to PP 9645's travel restrictions.

b. Individuals who were not in the United States on the applicable effective date, but were issued a visa during the period the government was enjoined from enforcing PP9645.

A: Such individuals would not be covered by an exception.

2. Department of State FAQs also confirm that "[a]ny national who qualifies for a visa or other valid travel document under section 6(d) of the Proclamation" is exempt from the travel restrictions. Section 6(d) of PP 9645 pertains to individuals whose visas were cancelled or revoked under Executive Order 13769 and provides that such individuals are entitled to a travel document allowing them to seek entry into the United States using the cancelled or revoked visa. Please confirm that individuals with visas that were cancelled under Executive Order 13769, may apply for a new or different nonimmigrant visa or immigrant visa without being subject to the travel restrictions imposed by PP 9645.

A: Yes, such individuals are subject to an exception.

Waivers under Section 3(c) of PP 9645

3. Section 3(c) of PP 9645 provides that the Secretaries of State and Homeland Security "shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate…." Toward this end, have State and DHS adopted any additional guidance on waivers, beyond that which is provided on the travel.state.gov website?

A: The Department of State published guidance in 9 FAM 302.14-10 and continues to coordinate/consult with DHS on PP waiver implementation. We refer you to DHS for information on any additional guidance they have developed.

4. At the April 12, 2018 liaison meeting with AILA, State indicated, "[t]here is no waiver

application" associated with the travel restrictions introduced by PP 9645.[2] While we understand that there is no waiver application ***form***, we would appreciate any information you can provide regarding general waiver procedures across posts. For example:

a. Are waiver applicants provided an opportunity to present oral testimony or written documentation to support their request?

A: At the time of the interview, applicants have the opportunity to explain why they qualify for a waiver of PP 9645's travel restrictions. A consular officer then may ask additional questions or ask for additional information to determine whether the applicant qualifies for a waiver.

b. In NIV cases, if supporting documentation can be submitted, what is the preferred method for submitting such information (i.e., should documentation be presented prior to the interview, during the interview, after the interview, etc.)? **(**

A: While individual posts may vary, generally, the applicant may present documentation supporting waiver qualifications at the time of the interview.

c. In IV cases, does the NVC play a role in the waiver process, or will the applicant be permitted to provide supporting documentation at the interview?

A: NVC does not play a role in the waiver process. While individual posts may vary, generally, the applicant may present documentation supporting waiver qualifications at the time of the interview.

d. If an NIV or IV applicant appears at an interview with supporting documentation, is the consular officer required to accept it?

A: No. While the consular officer is required to review each applicant's waiver qualifications, the officer is not required to accept additional documents unless he or she deems them necessary.

5. Has State adopted a definition of any of the terms set forth in Section 3 of PP 9645, including, but not limited to "undue hardship" "significant contacts," "national interest," "special circumstances," etc.? If so, can State make this guidance public?

A: Redacted versions of the Department's guidance for consular officers regarding the waiver, in addition to other information about the waiver process, have been produced in response to FOIA requests and may be found on the Department's Virtual Reading Room.

6. We understand that the Visa Office makes the determination as to whether the applicant presents any national security or public safety concerns. What is the average time it takes for VO to make this determination?

[2] *See* https://www.aila.org/infonet/aila-dos-liaison-qas-4-12-18

A: The national security and public safety assessment is made by the consular officer and involves extensive interagency coordination. Each individual case is considered on its own merits and takes as long as necessary to complete.

7. We would appreciate any statistics that State might be able to provide regarding waiver applications, including updated data on the number of waivers that have been approved to date, and if possible, the countries of origin of waiver recipients and categories of waivers granted.

   A: As of September 30, 2018, the Department cleared 1,836 applicants for waivers after a consular officer determined the applicants satisfied all criteria and completed all required processing. Many of those applicants already have received their visas.

Visa Processing while a Waiver is under Consideration

8. CEAC case status currently provides a variety of messages for applicants including notice that the application is in administrative processing, was refused, etc. What is the normal progression of CEAC case status messages when a visa application is under review for waiver eligibility?

   A: Any application being reviewed for waiver eligibility under P.P. 9645 is refused under 212(f), as such, CEAC will report that the application has been refused.

9. The current version of 9 FAM 302.14-3(D)(1) & (2) indicate that no waiver is available for visa applicants found inadmissible under 212(f). Are there any plans to update these provisions to reflect the waiver process created by PP 9645?

   A: There are currently no plans to update 9 FAM 302.14-3(D) as that section addresses 212(f) in general. 9 FAM 302.14-10(D) addresses waivers under PP 9645.

10. Is a uniform procedure followed by consulates when an IV application is placed in administrative processing pending a decision on a waiver under PP 9645? For example, if a medical examination expires while waiver eligibility is under review, should consulates be directing applicants to attend a second medical examination? Can the applicant postpone the need for a second medical examination until the waiver is granted, and still ensure the preservation of the pending visa application?

    A: In order to be issued a visa, an applicant must have a valid medical examination. While there is no uniform procedure governing when consular sections may request an updated medical examination, generally, consular officers wait until they are in a position to approve the waiver before requesting an updated medical examination.

Public Charge Issues

11. AILA appreciates the time State has spent with us and other interested organizations discussing the issues that have arisen following the January 2018 changes to the FAM public charge provisions. For example, over the past several months, AILA received significant reports of immigrant visa refusals under INA §212(a)(4) where an affidavit of support was completed by a joint sponsor who was not a blood relative of the applicant. As a consequence to a refusal on public charge grounds, approved Form I-601A provisional unlawful presence waivers were

deemed automatically revoked even when the applicant subsequently provided sufficient documentation to overcome the initial public charge concerns. The following questions are intended to confirm State's position on these issues and provide additional clarification to AILA members and the public:

a. Please confirm that a joint financial sponsor is not required to be a blood relative of the immigrant visa applicant.

   A: A joint sponsor does not have to be related to the petitioning sponsor or the intending immigrant. Consular officers must consider an applicant's age, health, family status, assets, resources, and financial status, and education and skills when making a public charge determination. A properly filed, non-fraudulent Affidavit of Support in those cases where it is required is a positive factor in the totality of the circumstances. Consular officers may consider the likelihood that the sponsor will support the applicant in determining public charge, and the sponsor's motives in submitting the affidavit, the sponsor's relationship to the applicant, the length of time the sponsor and applicant have known each other, the sponsor's financial resources, and other obligations and expenses of the sponsor.

b. Acknowledging that a consular officer may inquire about the nature of the relationship of any joint financial sponsor, please confirm that an otherwise eligible acquaintance of an applicant may provide a qualifying affidavit of support.

   A: A joint sponsor who meets the citizenship, residence, age, domicile, and household income requirements may execute a separate Form I-864 on behalf of the intending immigrant. The joint sponsor can be a friend or third party who is not necessarily financially connected to the sponsor's household.

c. Please confirm that if initial evidence is insufficient to find an applicant satisfies the requirements of §212(a)(4) but that additional evidence could establish sufficient financial resources to demonstrate that an applicant is unlikely to become a public charge, the application should be refused under §221(g) and not §212(a)(4).

   A: Whether INA 221(g) or INA 212(a)(4) is the appropriate ground of refusal is determined by whether or not the consular officer has decided that he or she has enough information to make a finding of whether the applicant is likely to become a public charge under INA 212(a)(4). For example, if a Form I-864 is submitted without a copy of the latest Federal income tax return filed prior to the signing of the Form I-864 and the applicant otherwise appears to overcome public charge, a refusal under INA 221(g) would be appropriate. In contrast, an Affidavit of Support that does not satisfy the consular officer that the applicant has sufficient financial resources, even after any possible joint sponsors have submitted an Affidavit of Support, would result in a refusal under INA 212(a)(4).

d. Please confirm that a visa application that is refused under §221(g) solely because of a documentary deficiency does not trigger automatic revocation of a Form I-601A provisional waiver.

   A: A refusal under INA 221(g) does not result in automatic revocation of the

provisional unlawful presence waiver.

e. Will State post additional, publicly available information alerting visa applicants of documentary requirements currently necessary to satisfy §212(a)(4)?

A: Pursuant to INA 291, the burden of proof to establish eligibility for a visa is on the applicant. The current documentary requirements related to INA 212(a)(4) are set forth at travel.state.gov on the "Immigrant Visa Process; Step 4: Collect Financial Documents" and "I-864 Affidavit of Support FAQs" webpages, and additional information can be found at the "INA Section 212(a)(4) – Public Charge" section of the "Visa Denials" webpage. In individual cases, consular officers may request additional evidence from an applicant or sponsor in order to make a public charge determination. The Department is considering whether to supplement or revise this guidance.

Domicile of Financial Sponsor

12. The I-864 FAQ that appears under the "Domicile" section of State's website confusingly states "[i]f the sponsor establishes U.S. domicile, he or she must return to the U.S. to live ***before*** the sponsored immigrant may enter the United States. The sponsored immigrant must enter the United States with or after the sponsor."[3] Although contradictory as written, the suggestion that the sponsor must return to the U.S. before the immigrant may enter is not consistent with 9 FAM 302.8-2(C)(5)(b) which provides, "[t]he sponsor does not have to precede the applicant to the United States but, if he or she does not do so, he or she must at least arrive in the United States concurrently with the applicant." Please confirm that the sponsor does not need to precede the applicant in entering the U.S., and that concurrent entry is acceptable.

A: A petitioner-sponsor may meet the domicile requirement by establishing that he or she intends in good faith to establish his or her domicile in the United States no later than the date of the intending immigrant's admission. The sponsor does not have to precede the applicant to the United States but, if he or she does not do so, he or she must arrive in the United States concurrently with the applicant. We will review the language on travel.state.gov to ensure consistency.

Prudential Revocation

13. Based on information shared during past meetings, AILA understands that it is State's policy that the prudential revocation of a nonimmigrant visa following an individual's DUI arrest becomes effective only upon the departure of the individual from the United States. Based on prior discussions, AILA further understands that State has engaged in discussions with DHS to confirm a mutual understanding concerning when prudential revocation becomes effective. AILA members continue to report that USCIS is denying benefits to nonimmigrants, such as extension or change of status, and that ICE has initiated removal proceedings against nonimmi-

[3] (Emphasis added). *See* https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/collect-and-submit-forms-and-documents-to-the-nvc/establish-financial-support/i-864-affidavit-faqs.html

grants whose visas have been prudentially revoked. AILA has provided State with examples of these actions by DHS entities. Would State be willing to continue or resume a dialogue with DHS to ensure that its components are aware of when prudential revocation becomes effective? In addition, would State provide written, publicly available guidance in the form of a FAM update, FAQ or similar format that clearly indicates that a prudential revocation becomes effective only upon the departure of a nonimmigrant from the United States?

A: Generally, the Department makes its visa revocations effective upon the departure of the individual from the United States, if revocation is based on a DUI. State has maintained a consistent dialogue with DHS to ensure that its components are aware of when prudential revocations become effective. We are also considering updated FAM guidance.

Consular Post Email Addresses

14. AILA appreciates State's commitment to ensuring that posts have public facing @state.gov email addresses or web portals to allow direct communication and reduce the reliance on third party contractors to respond to substantive questions intended for consular officers. However, without any uniformity as to where the email addresses are posted, it is sometimes difficult to locate them. For example, some posts have their email addresses on their home pages, some include them with their street addresses and telephone numbers, while others may list them in their FAQs, etc. While we recognize that each post is responsible for the content of its own website, it would be helpful if there was a uniform location of these contact addresses/web portal links. Would State consider establishing a uniform format for posts to list their email address or web portals meant for direct communication with the respective Consular Information Unit?

A: Travel.state.gov's "U.S. Visa" page includes a link facilitating applicants' contact with all U.S. embassies and consulates. Each U.S. consulate and embassy website has a standardized "Visa" page which includes a "Contact Us" button, designed to provide applicants the most expedient means to find answers to their questions. Given the variance in posts' size, workload, and capabilities, this is the most efficient way to provide information to our applicants.

Petition Revocations

Could State please provide a breakdown of the number of employment-based IV applications that have been returned to USCIS for revocation for each of the past three fiscal years, as well as the number of cases that were reaffirmed by USCIS in each fiscal year?

A: CA and USCIS work closely to align adjudication standards in the petition-based visa context and maintain procedures for consular officers to flag petitions which should be re-reviewed by USCIS. We do not release these types of metrics to the public.

12. The "Consular Return" section of the FAM at 9 FAM 601.13 has been updated and all information is now listed as "unavailable." Can State provide a general overview of the process for consular returns including the timeline for completion by post and how and whether additional materials can be provided prior to the consular return being finalized and sent to USCIS?

A: There is no set time period for consular returns; however, posts do strive to ensure petitions are returned in a timely manner once that determination is made. A petition can be returned for a number of reasons. For example, a consular return is warranted if a petitioner withdraws the

petition, the petitioner or beneficiary is deceased, or if information is uncovered at the time of the interview that does not support the facts in the underlying petition. Once a consular officer at post determines that a petition should be returned to USCIS, the consular officer drafts a petition return memo, clearly stating the reason for return, and returns the case to USCIS via NVC.

Upon receipt of a consular return, NVC conducts a quality review to ensure basic case information is accurate. NVC identifies the approving USCIS Service Center and within 10 business days forwards the consular return to USCIS. NVC will not accept any additional information on consular returns while they are quickly passing the cases back to USCIS for review.

KIWI Act

13. On August 1, 2018, the President signed into law S. 2245, the "Knowledgeable Innovators and Worthy Investors Act or the KIWI Act," which makes New Zealand nationals eligible to enter the United States as nonimmigrant traders and investors, provided that New Zealand grants reciprocal treatment to U.S. nationals. Please provide an update on the status of discussions for granting reciprocal visa rights and, if available, an estimated timeline for implementation of the legislation.

    A: Under the KIWI Act, the status of New Zealand as a foreign state described in INA § 101(a)(15)(E) is contingent on its providing nonimmigrant status similar to E-1 and E-2 to U.S. nationals. The Department has been in communication with New Zealand regarding visa opportunities its laws provide for U.S. traders, investors, and their employees. We are conducting a review of how that country's existing visa categories compare with E-1 and E-2 status. It is too soon to provide a timeline for implementation, as this will depend largely on whether changes to New Zealand's visa provisions would be needed to provide the necessary nonimmigrant status for U.S. nationals. It is conceivable that implementation could occur in two stages, with similarity achieved for one of the two INA § 101(a)(15)(E) classifications listed in the KIWI Act based on existing New Zealand provisions, but legislative or regulatory changes needed to establish similarity for the other classification.

Ecuador Treaty Visa Eligibility

14. Ecuador terminated its investment treaty with the U.S. as of May 18, 2018. Footnote 14 to 9 FAM 402.9-10 provides that: "Ecuadorian nationals with qualifying investments in place in the United States by May 18, 2018 continue to be entitled to E-2 classification until May 18, 2028." Please provide additional details as to what is meant by "qualifying investments in place." For example:

    a. Can an enterprise that was in the process of investing as of May 18, 2018 demonstrate eligibility for E-2 classification?

        A: The only nationals of Ecuador (other than those qualifying for derivative status based on a familial relationship to an E-2 principal alien) who may qualify for E-2 visas within the period of time from May 18, 2018 to May 18, 2028 are those nationals who

are coming to the United States to engage in E-2 activity in continuance of investments established or acquired prior to May 18, 2018. Acquired investments and "in the process of investing" may be used interchangeably when the latter meets the definition at 9 FAM 402.9-6(B) (d) and (e) which explains that, to be "in the process of investing" for E-2 purposes, (1) the funds or assets to be invested must be committed to the investment, and the commitment must be real and irrevocable such as the investor must have entered into an agreement and have committed funds, and (2) the alien must be close to the start of actual business operations, not simply in the stage of signing contracts (which may be broken) or scouting for suitable locations and property.

b. Can an enterprise that was an established and operating as of May 18, 2018 demonstrate eligibility for E-2 classification, even if the investor had not yet applied for an E-2 visa?

A: Yes, nationals of Ecuador (other than those qualifying for derivative status based on a familial relationship to an E-2 principal alien) may qualify for E-2 visas within the period of time from May 18, 2018 to May 18, 2028 if they are coming to the United States to engage in E-2 activity in continuance of investments established or acquired prior to May 18, 2018.

c. Can an initial E-2 visa application filed on or before May 18, 2018 that remained pending on that date be approved?

A: Only if the national that applied for the visa is coming to the United States to engage in E-2 activity in continuance of investments established or acquired prior to May 18, 2018.

d. Will key Ecuadorian employees, as well as owner-investors, qualify for an E-2 visa based on a qualifying investment in place as of May 18, 2018?

A: Assuming that "key Ecuadorian employees" meet the definition of "essential employees," as stated in 9 FAM 402.9-7(C), and possess specialized skills necessary for the firm's operations in the United States, or qualify as executive or supervisory employees, then those key Ecuadorian employees may qualify for E-2 visas within the period of time from May 18, 2018 to May 18, 2028. The aforementioned would also apply to owner-investors that have a qualifying investment, if all applicants apply for a visa within the specified time and qualify for the visa under statute and applicable federal regulations.

Visa Application Payments in Mexico

15. AILA members continue to report significant difficulties arising from the requirement that NIV fees for applications filed with Mission Mexico be paid in cash at a bank in Mexico. From our discussion at the October 19, 2017 liaison meeting, we understand that credit card payments have been suspended in Mexico due to a high volume of charge-backs.[4] To address both this

[4] [4] *See* https://www.aila.org/infonet/aila-dos-liaison-qas-10-19-17

concern and facilitate the visa application process, would State consider implementing a "trusted company" program by which applicants from reputable organizations that are least likely to abuse a payment system, may qualify to submit fee payments via credit card.

A: Credit cards payments are possible in Mexico for those applying for H2 temporary worker visas and K fiancé visas. Other applicants can pay their MRV fees in cash at one of the 2,078 fee collection locations across Mexico. The Global Support Strategy (GSS) contract provides the only authorized offsite fee collection mechanism for Mission Mexico. For more information on payment options and scheduling available in Mexico, please visit https://ais.usvisa-info.com/en-mx/niv.

Regarding debit cards, the high rate of credit card chargebacks prompted the Department to limit the credit card MRV-fee payment option to H2 temporary workers and K fiancé visa applicants. Other applicants can pay their MRV fees in cash at one of the 2,078 fee collection locations across Mexico. The Global Support Strategy (GSS) contract provides the only authorized offsite fee collection mechanism for Mission Mexico. For more information on payment options and scheduling available in Mexico, please visit https://ais.usvisa-info.com/en-mx/niv. The current umbrella GSS contracts expire in February 2020. Fee collection methods will be reviewed during the successor GSS task order contract development process.

E-1/E-2 Processing

16. The E-1/E-2 visa application process varies by consular post, with differences evident even in posts located in the same country. For example, in Ciudad Juarez applications are submitted in hard copy binders with page number limits. In Mission Australia, Perth only accepts hard copies of the submission while Sydney and Melbourne only accept electronic copies. Data sizes for electronic submissions around the world are not consistent or clearly articulated in instructions. Some posts like London and Japan have E-2 registration programs, while others do not. Recognizing that technology and security issues dictate different considerations that may affect application requirements at each consular post:

    a. Would State consider a minimum, universal standard for E-1/E-2 document submission requirements including formatting, electronic submissions and document sizes, as well as email confirmation of submission?

        A: Because of challenges encountered by posts on a number of fronts, chiefly infrastructure and security, each embassy and consulate has discretion to determine what procedures are sustainable regarding document intake for these applicants.

    b. In addition to the topics listed above, does State have any plans to address variances in process and procedure amongst different consular posts such as those related to scheduling visa appointment times or the implementation of an E-registration system?

A: We work with our embassies and consulates to achieve uniformity, however individual post constraints and workload dictate appointment times and implementation of new programs.

Scope of Review

17. In previous meetings, we have discussed a range of issues for which consular officers may or should refuse visa applications under INA §214(b), as well as the extent to which such refusals may be reviewed by VO when legal issues are presented. However, there remain a variety of questions concerning these issues including:

    a. Would LegalNet review a legal argument that the application of facts to the law by a consular officer was arbitrary and capricious, where a finding of fact made by a consular officer is clearly contradicted by the record?

    A: LegalNet reviews all incoming inquiries that raise legal issues to ensure that visa adjudications were completed consistent with the requirements of U.S. immigration law. This includes taking into consideration a consular officer's factual findings to ensure that there is a sufficient factual predicate for the ground of refusal cited. For example, if a consular officer found an applicant ineligible on 212(a)(6)(C)(i) grounds, the Visa Office's review of that case would include ensuring that all four elements of that ground of ineligibility were satisfied.

    b. If a legal issue is presented in a 214(b) determination, will LegalNet review the issue or are all 214(b) determinations considered unreviewable "factual determinations"? If LegalNet will review certain 214(b) refusals, what is the best way to alert the officer to the legal basis for reviewing the 214(b) determination?

    A: LegalNet reviews inquiries involving 214(b) refusals that raise questions about legal standards (e.g., whether the applicant met the requirements for an E-2 nonimmigrant visa classification presents issues regarding legal standards where a consular officer's determination regarding immigrant intent does not). We will consider LegalNet's capacity to review questions about applicant eligibility for the requested visa classification, for classes other than B. As in all LegalNet inquiries, the attorney should provide a clear and concise legal argument in the body of the email.

18. Under 9 FAM 303.3-5(E)(1)(c), consular officers should not "look behind a definitive DHS finding or re-adjudicate the alien's eligibility … described in the DHS lookout entry." Furthermore, 9 FAM 303.3-5(E)(2)(3) states that aliens who believe such a finding is erroneous should contact DHS directly to request reconsideration of the finding. What is the procedure for reconciling a conflict when a consulate states that a prior inadmissibility finding by CBP exists, but CBP says that no such finding exists? If a visa application is refused based on a purported CBP finding but CBP denies such a finding exists, would LegalNet review the visa refusal?

    A: LegalNet is not the appropriate venue to inquire when there is a discrepancy between the Department and DHS regarding a DHS inadmissibility finding. Any information or evidence regarding your client's case obtained from DHS can be provided to the U.S. embassy or consulate where your client's case was adjudicated for review and consideration.

19. In cases where a visa is refused based on national security grounds following a Security Advisory Opinion (SAO), what is the process through which an applicant may provide evidence to rebut the presumed activity?

    A: Before issuing any visa, consular officers must be satisfied, based on available information, that applicants do not pose a security risk to the United States and otherwise are eligible for a visa. Ultimately, it is the applicant's burden to establish his or her eligibility. Immigrant visa applicants who are refused visas may submit further evidence tending to overcome the ground of ineligibility on which the refusal was based, to post within one year of the visa refusal without a new application. If a nonimmigrant applicant believes a finding was made in error, he or she may reapply. We recommend that individuals reapply only if new evidence to overcome the previous grounds of refusal is available.

CEAC

20. Does State anticipate any additional outages of the CEAC system in the immediate future such as those experienced in the summer of 2018? Are there any continuing maintenance issues that may require future outages?

    A: We do not anticipate additional lengthy outages of the CEAC system in the near future. There may be occasional short term outages as we update and maintain the CEAC system.

Panel Physicians

21. What is the selection process for evaluating the suitability of panel physicians? In addition, are panel physicians subject to oversight by the U.S. government and is there a process for reporting irregularities in the performance of medical examinations, questionable determinations regarding an applicant's physical or mental health, or possible ethical issues?

    A: Posts select qualified panel physicians using the criteria in 9 FAM 302.2, which notes there are no specific regulations governing the selection or termination of panel physicians, but references CDC- provided guidelines on how to select a panel physician at 9 FAM 302.2-3(E)(3) paragraph f. These criteria include, but are not limited to, English language proficiency, medical degree, full unrestricted local license for at least four years, an official governmental certificate of good standing, and two independent professional references. Posts require panel physicians to submit a CV which is often shared with CDC for their review. Posts are responsible for panel physician oversight in consultation with VO and CDC. CDC also conducts site visits to a certain number of panel physicians each year and reports its findings to posts. When issues arise, posts work with VO and CDC to investigate the issue and determine whether termination or non-renewal of the agreement is appropriate. Panel physician agreements are only valid for one year at a time. As specified in the agreements between posts and panel physicians, Post may terminate agreements immediately for cause or with 30 days' notice for any reason. Posts have full discretion not to renew, when an agreement ends after 12 months. Applicants, petitioners, or attorneys are welcome to report issues or irregularities with panel physicians to posts or the Visa Office.

22. Do panel physicians have authority to cancel a beneficiary's scheduled interview at post and if so, under what circumstances?

AILA members report an unusually high number of immigrant visa applicants that are being referred by panel physicians in San Salvador for psychiatric evaluations and treatment, often lasting months. What criteria and/or guidelines do panel physicians use when determining if an applicant will be referred to a specialist, such as a psychiatrist? Has State received other reports of a high frequency of referrals for psychiatric treatment in San Salvador?

A: Panel physicians do not have the authority to cancel a beneficiary's scheduled interview at post, but posts may choose to cancel or reschedule appointments pending the results of a completed medical examination. For example, if an applicant is suspected of having tuberculosis and referred for further testing, posts may reschedule the interview until the results return.

In the context of psychiatric evaluations, panel physicians may defer a final classification for three to six months. Posts may choose to wait until the medical examination has been fully completed to interview the applicant. CDC's *Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-related Disorders for Panel Physicians* state that, "When a panel physician defers diagnosis and classification, the panel physician should explain to the applicant what the panel physician would like to see during the next 3-6 months (in order to classify the applicant) to show abstinence. This may include but is not limited to requiring clinical reports from health care professionals for applicants with possible substance-related disorders to demonstrate participation in a drug treatment program. For applicants with deferred diagnosis and classification, the panel physician should consider documenting in a statement signed by the applicant the information he or she is providing to the applicant; the statement should specify what is required during the next 3 to 6 months to show abstinence. The panel physician should also consider requiring clinical reports from health care professionals for applicants with possible substance-related disorders to demonstrate participation in a drug treatment program."

Consultations with post indicate that the panel physicians and consultant psychiatrists are adhering to CDC's guidelines.

INA §212(a)(6)(B)

23. What guidance is used to determine whether an individual's failure to appear at a removal hearing might be considered "reasonable cause" under INA §212(a)(6)(B), such that they would not be considered inadmissible? State has previously stated that consular decisions on this issue "will be informed to the extent possible by BIA decisions." 63 Fed. Reg 64626, 64627 (Nov. 23, 1998). 9 FAM 302.9-3 provides limited examples of situations that do not constitute "reasonable cause." Is there additional guidance beyond this?

A: Guidance regarding INA section 212(a)(6)(B) is provided at 9 FAM 302.9-3. Per 9 FAM 302.9-3(B)(2) paragraph a, "[r]easonable cause is defined as "something that is not within the reasonable control of the alien." The list of examples provided at 9 FAM 302.9-3(B)(2)(b) derives from federal court decisions of circumstances that were not considered "reasonable causes" for failing to attend removal proceedings, including the following:

1. Changes in venue;
2. The alien moving to a new residence;

3. Misplacing a hearing notice;
4. Claiming ineffective assistance of counsel without complying with the requirements of such a claim (e.g. filing a motion to reopen the proceedings claiming ineffective assistance, etc.); and,
5. Heavy traffic.

Additional guidance is available on a case-by-case basis by requesting an Advisory Opinion from the Visa Office.

24. How are individuals who were removed *in absentia* as a child evaluated for purposes of INA §212(a)(6)(B)? As many BIA decisions involving minors are unpublished, would State consider adding guidance to the FAM on this issue?

A: By its terms, INA 212(a)(6)(B) applies to "any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding." There is not an explicit exception for minors in the statute, but we will consider adding guidance to the FAM on this issue.

Mission India

25. AILA members report a significant increase in the frequency with which IT professionals are being refused visas under INA §221(g) at consular posts in India. Refusals reportedly are accompanied by questionnaires that seek to elicit information that either is already available in PIMS or does not appear to be material, such as project technical descriptions, budget, timeline, current status, the number and name of employees assigned to the project, along with title, salary, immigration status, and employment start and end dates.

    a. Are IT professionals and other NIV applicants being subjected to heightened scrutiny as a result of the Buy American/Hire American Executive Order?

    A: There have been no policy or regulatory changes as a result of the BAHA Executive Order that have altered the relevant adjudication standards, which remain unchanged.

    b. Is there any mechanism for a business to request expedited review of material sent to a consular post in Mission India response to a §221(g) refusal?

    A: No such mechanism currently exists for businesses or for visa applicants. Post workflow, combined with the heavy volume of cases, makes such a mechanism impossible to implement.

26. State appears to maintain and publish extensive statistics on visa issuances. Does State maintain statistics on 221(g) visa refusals (based on visa classification, including H-1B, L-1A, L-1B, etc.) and if so, would State make this information publicly available for Mission India, as well as all other posts?

A: The Visa Office currently is reviewing its policy, and potential harms, relating to the publication of visa statistics and we will take your request into consideration.

27. Are there any plans to expand consular representation in India either by opening new posts or increasing the number of officers at existing posts?

A: The Department of State has no current plans to open new posts in India, but is in the process of expanding capacity at several consular operations. The new Consulate currently under construction in Hyderabad, and the forthcoming new Embassy annex in New Delhi will both offer significantly expanded consular facilities capable of handling increased workloads. We will also soon commence a major renovation in Chennai that will increase the number of interview windows in that facility. Mission India, with the consent of the Government of India, has added 27 new adjudicator positions across the Mission since 2015, and we will continue to monitor staffing levels in India, as we do at all consular operations worldwide.

KCC

28. Please explain the role of the Kentucky Consular Center (KCC) in fraud review. How is a KCC fraud review initiated? Does the KCC have a required response time? If a fraud review has been initiated, can the post act on its own and approve a visa application following submission of additional documentation in response to a 221(g) refusal, or is the post required to wait for a response from the KCC?

A: KCC verifies H-1B third party placements and conducts other pre-adjudication screening of petitioning entities. This screening is completed prior to the scheduled interview for the vast majority of cases. When KCC prescreening results are not yet available at the time of interview, posts are encouraged, but not required, to wait for those results. In a small number of cases, posts may be required to refuse a case 221(g) pending KCC verification or exclusion of potentially derogatory petitioner information.

Posts may also request KCC conduct specific research. KCC completes most post research requests within 10 business days, however some requests take longer. When an applicant submits additional documentation in response to the 221(g) refusal of a case referred for KCC research, post determines if the new information mitigates the need for that research.

FAM Questions

33. It appears that beginning in March 2018, State began removing from public view, an increasing amount of material from the FAM. For example, 9 FAM 601.7-2, "Managing Correspondence Volume" is unavailable as of March 28, 2018; and 9 FAM 601-7-4 "Content of Written Correspondence" is unavailable as of July 24, 2018. What precipitated this change? What information can and should be provided to attorneys regarding administrative processing?

A: 12 FAM 541 provides that: Sensitive but Unclassified (SBU) information is information that is not classified for national security reasons, but that warrants/requires administrative control and protection from public or other unauthorized disclosure for other reasons. SBU should meet one or more of the criteria for exemption from public disclosure under the Freedom of Information Act (FOIA) (which also exempts information protected under other statutes), 5 U.S.C. 552, or should be protected by the Privacy Act, 5 U.S.C. 552a. 9 FAM 601.7 was originally marked as UNCLASSIFIED, upon further review it was determined that this material

should have been marked SBU. The material was remarked and removed from publically accessible FAM. With regard to administrative processing, consular officers will advise visa applicants at the time of refusal if the applicant is expected to provide any additional information to overcome a 221g refusal. The same limited information may be shared with the applicant's attorney.

34. It appears that 9 FAM 602.2-2(A)(2)(b)(2)(a) may include inaccurate information relating to fingerprinting at a consulate in connection with INA §319(b) expedited naturalization.

The FAM provides that:

> *USCIS only allows fingerprint capture abroad … for individuals who qualify for naturalization under Section 319(b) who provide a USCIS notice requesting they submit fingerprints and they provide compelling extenuating circumstances that travel back to the United States would cause undue burden. In rare 319(b) cases when compelling extenuating circumstances exist consular sections are authorized to take prints. Please confer with your CA/VO/F liaison before providing this service.*

This FAM section appears to describe USCIS policy inaccurately. The USCIS N-400 form instructions state, "if you are currently overseas," a USCIS notice will "instruct you to contact a U.S. Embassy, U.S. Consulate, or USCIS office outside the United States to set up an appointment." 9 FAM 602.2-2(A)(2)(b)(2)(d) also suggests that consular officers send the fingerprint cards to the USCIS Nebraska Service Center. Recent information, however, suggests that fingerprint cards should be sent by the applicant to the National Benefits Center. Please confirm whether 319(b) naturalization applicants residing abroad can have fingerprints taken at a U.S. Embassy or consular post, and the correct process/location for transmitting fingerprint cards to USCIS in the United States.

A: For Form N-400, a U.S. consular section may capture biometrics for active duty military personnel and their qualified spouses and children and U.S. citizens stationed abroad due to working for the U.S. government or other qualified employers under INA section 319(b). For these applicants, the required fingerprints may be captured by a USCIS international field office, a U.S. embassy or consulate, or a U.S. military installation. A U.S. embassy or consulate may only collect biometrics where DHS has no counter presence.

USCIS just informed the Department that the Nebraska Service Center is no longer processing military naturalization cases so they will no longer play any part in the military naturalization process. Further, it is the military applicant's responsibility to mail in the FD-258 cards to the National Benefits Center (NBC). However, for all other fingerprint requests, the language in the FAM is accurate and those cards will be sent to the Nebraska Service Center. We will update the FAM for military naturalization cases accordingly.

35. In June 2018, 9 FAM 302.9-4(B)(8) was amended to indicate that an NIV applicant who is a principal beneficiary or self-petitioner of an immigrant petition, who answers "no" in response to the Form DS-160 question concerning whether an immigrant petition has been filed on their behalf should generally be considered to have made a misrepresentation. The new information

further provides that dependent family members of the principal alien "…would not make a misrepresentation by answering "no" to this question."

a. Please confirm for the purposes of Form DS-160, that an individual who is a dependent family member of a beneficiary of an immigrant petition or a self-petitioner, is not considered to be a person who has ever had an immigrant petition filed on his or her behalf with USCIS.

A: "**9 FAM 302.9-4(B)(b) states that** "*[a]An applicant who is the spouse or child of the principal beneficiary of a petition, even when named in the petition, would not make a misrepresentation by answering "no" to this question*." Although the applicant would technically have a path to immigration as a derivative beneficiary, we do not believe that the petition was filed on a derivative beneficiary's behalf. **(**

b. Please confirm that consular officers should not draw any negative inferences solely because an NIV applicant, who is a dependent family member of a beneficiary of an immigrant petition or a self-petitioner, answers "no" to the Form DS-160 question asking "Has anyone ever filed an immigrant petition on your behalf with the United States Citizenship and Immigration Services?"

A: Please see the response to 35a.

Visa Bulletin Questions

36. At what point in the visa application process is the visa number allocated (at the time the interview is scheduled? At the time of interview?) How are visa numbers for "following to join" applicants reserved? Are these numbers considered when determining visa availability in the future? When are visa numbers allocated to adjustment of status cases?

A: The Department's allocation process is as follows: At the beginning of each month, the totals of documentarily qualified applicants in the numerically limited classes who have been reported to the Visa Office (VO) are compared with the numbers available for the next regular monthly allotment. Blocks of visa numbers are then allocated to posts for those applicants whose priority dates are before the relevant final action date, and therefore may be scheduled for interview. Numbers not used during that month are reincorporated into the pool of numbers available for later allocations during the fiscal year.

USCIS allocation process: USCIS requests visa authorization from VO for each adjustment of status case in the numerically limited classes. The USCIS officer submits an electronic request for visa authorization using an automated system. If the applicant's priority date is within that month's final action date, the system grants the USCIS officer immediate authorization via e-mail, thus allowing USCIS to proceed with the adjustment. If the applicant's priority date is beyond the applicable final action date, the system places the case in VO's "Pending Demand" file. Once the final action date has advanced beyond an applicant's priority date, the system automatically grants authorization for a specific month.

Following the Join applicants: Numbers are not "reserved" for such applicants. If they are not processed along with the principal alien, they risk numbers not being available at a later date.

37. For an individual "following to join" a principal applicant who consular processed in a conditional resident category, the family member is issued a conditional IV (for EB-5 this is I5) even where the principal has already had conditional status removed and has been issued a ten-year green card. The family member must then file an I-90 to convert the I5 conditional green card to an E5 permanent green card. Is there a process whereby consulates can issue follow to join dependents IVs in the permanent category in this situation?

    A: Response: As described in 22 CFR 42.11, there is no immigrant visa classification for "conditional" or "permanent" in the EB-5 category. The four classifications are: C5 (Employment creation outside a targeted area), T5 (Employment creation in a targeted area), R5 (Investor Pilot Program, not in targeted area), and I5 (Investor Pilot Program, in targeted area). This is in line with INA 216A(a)(1), which requires that alien spouses and children shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis. We must defer to USCIS on the requirements for lifting conditional status and the USCIS position is reflected in 8 CFR 216.6(a), which states that the entrepreneur's spouse and children should be included on this Form I-829 petition, and the I-829 Instructions, which include:

    > Who May File Form I-829?
    >
    > You may use this form to request the removal of conditions on your permanent resident status if you were granted conditional permanent resident status as an entrepreneur. You may include your conditional permanent resident spouse or former spouse and children in your petition. If your spouse and children are not included on this Form I-829 petition, each dependent must file his or her own petition separately. Your spouse and children cannot be included together on a Form I-829 petition if they are not filing with you, the principal entrepreneur, unless the principal entrepreneur has died.

Exchange Visitor Visa Questions

38. During our meeting with the Waiver Review Division (WRD) in October 2016, we asked for State's position on recommending a J-1 waiver under INA §214(l) on behalf of a physician who will be treating patients remotely via telemedicine. State responded that such an arrangement may not be permitted under federal regulation, but that it would confer with the Department of Health and Human Services (HHS) to determine whether the law might be interpreted to permit such an arrangement. We believe that this arrangement is permissible under existing law as a "flex waiver." An increasing number of physicians, prospective employers, and state Department of Health administrators, are interested in pursuing J-1 waiver applications on behalf of physicians who will spend some portion of their time working in a physical location that is not in an underserved area but treating patients via telemedicine who reside in underserved areas. Can State provide an update on the results of its consultation with HHS on this issue?

    A: We have reached out to the Department of Health and Human Services again and while we don't have an update at this time, we hope to have one soon.

39. Members report that the State's online J-1 waiver application system frequently times out. Since there is no mechanism to save a draft DS-3035 online, when the system jettisons the user, or

when a change needs to be made to an attorney-drafted application following client review, the entire form must be re-typed. State has previously indicated that it is working on developing capability to save draft forms. Could State please provide an estimated time frame within which it anticipates rolling out this update?

A: At this time, we do not have a timeframe for the roll-out of an updated DS-3035 form, but will inform AILA when the form has been updated.

The Department understands and appreciates the inconveniences caused by our current system. However, in response to the question raised by AILA, we note that submitting a paper copy of the DS-3035 form is not an option. We believes this is in everyone's benefit as the online system generates a barcode page that is used by the Waiver Review Division to create a case file in its case management system for the applicant. In addition, the data on the system generated barcode page is also uploaded into JWOL (J Waiver Online), our online status checking system which allows waiver applicants to track their cases on travel.state.gov.

40. When a Form DS-3035 must be re-typed to make a correction, usually the case number generated for the original form can be input and the same case number will attach to the new DS-3035. However, the online system does not always recognize the previously generated case number, thereby necessitating the assignment of a second case number to the same individual. Is it problematic for State to have two case numbers for the same person? If so, can State look into correcting this issue?

A: Yes, it is problematic for the Department to have two case file numbers for the same person because it could create case tracking issues that might delay the process. Therefore, please use the case file number generated for the form that you submit to the bank to process the fee. The issue will be corrected in a future systems release.

41. The DS-3035 instructions indicate that the applicant "must" place his or her social security number (if applicable) on the filing fee check.[5] Due to privacy concerns, some applicants prefer not to include this information. Please confirm that J-1 waiver applicants who possess a social security number are not required to include that number on the filing fee check.

A: It is not mandatory for a J-1 waiver applicant to include the social security number on the fee filing check. We updated the fee instructions on the website.

[5] *See* https://travel.state.gov/content/travel/en/us-visas/study/exchange/waiver-of-the-exchange-visitor/fee.html