

**Department of State/AILA Liaison Committee Meeting  
December 11, 2020**

**Introduction**

The Office of the Assistant Legal Adviser for Consular Affairs (L/CA) welcomes the opportunity to discuss issues of mutual interest with AILA's Department of State Liaison Committee. L/CA believes these discussions can provide clarity to the public on current visa-related policies and procedures, which is a benefit to all involved. Following are responses to issues raised by AILA in anticipation of this meeting. Following the meeting, these questions and answers will be published on the website of the Bureau of Consular Affairs at Travel.State.Gov, possibly with clarifications based on discussions at the meeting.

**Kentucky Consular Center**

1. AILA would like to congratulate KCC on celebrating its 20<sup>th</sup> anniversary! AILA last met with KCC in the Spring of 2019 and was impressed by the operation, which manages the DV lottery and provides research and investigative support relating to employment-based petitions. It appears that KCC has been enlisted to assist with reviewing H-1B LCAs to determine eligibility for PP 10052 exceptions. Are there plans to leverage KCC further to support posts as they transition to routine consular operations?

KCC stands ready to assist posts with non-adjudicatory processes and research. KCC is currently providing pre-interview information on applications in the H, L, and E visa categories. There are no specific plans to report at this time.

**Visa Fee Payment Method**

2. An increasing number of consular posts accept nonimmigrant visa application fees only through a debit card drawn on a local (i.e., non-U.S.) bank. This creates significant challenges for U.S.-based beneficiaries who seek an appointment to renew an expiring visa and who may not have access to such a payment method.
  - a. Is DOS willing to require its vendors to accept corporate debit cards or personal credit or debit cards drawn on U.S. financial institutions to better serve impacted individuals?

The Department strives to present the vast majority of nonimmigrant visa applicants with an array of fee payment options through the Global Support Strategy (GSS). Arrangements vary according to conditions in each country, and agreements with GSS vendors depend on numerous considerations, including market conditions, financial regulations, and cost of service. DOS negotiates with its vendors on fee

payment options by balancing these considerations with customer service needs.

- b. Are these vendor agreements negotiated by DOS, by the posts, or does it vary?

For posts included in the Global Support Strategy (GSS), vendor agreements are negotiated by DOS. Non-GSS posts do not have arrangements with vendors on any aspect of fee collection, and are not authorized to negotiate with vendors on such matters.

- c. AILA understands from prior conversations on similar issues that DOS is bound by contractual terms with its vendors. Is there a mechanism by which the public can provide feedback on the user experience for DOS' or the posts' consideration as part of its vendor procurement process?

GSS vendors are required to elicit customer service feedback, and to pass relevant information on to post and the Department. Posts may also informally elicit feedback on customer service and make recommendations for adjustments to GSS services. DOS is always willing to take any feedback on the user experience

### **Proffered wages in PERM-based IV cases: Manila**

- 3. AILA members again report that the U.S. Embassy in Manila is requiring employment-based immigrant visa applicants to provide a letter from the intended employer confirming that the salary to be paid is equal to or greater than the current prevailing wage amount listed by the Department of Labor (DOL), rather than the wage rate certified by the DOL in the Foreign Alien Labor Certification process. Please reconfirm that the certified wage rate is the amount that should be requested in support of employment-based immigrant visas, rather than the current prevailing wage amount. Would State be willing to remind U.S. consular authorities in Manila of the appropriate legal standard?

The interviewing officer should not ask for evidence that the employer will pay the current prevailing wage, but post can request an updated employment letter to show that the job offered is still available. In the Schedule A context, DOL by regulation has certified certain occupations as overcoming market tests, but employers are still required to submit an Application for Prevailing Wage Determination which in turn needs to be submitted to USCIS with the I-140. Although Schedule A petitioners don't need a labor certification per se, in essence when USCIS approves the I-140, it is completing the labor certification process. Labor certifications are valid for an indefinite period and as a consequence, officers should not revisit prevailing wage determinations.

At the same time, officers can – must in certain cases – verify that the job offer is still available. The visa applicant is required to obtain a written statement from the employer that the employment offered to the alien is still available if the instruction packet was mailed to

the alien more than nine months after the date of certification (which for Schedule A cases is the date the application was certified by the USCIS Immigration Officer). There could also be situations where even though the instruction packet was mailed within nine months of the date of certification, post may want to verify that the employment offer is still available, e.g. based on responses during the interview.

The Department has reviewed this issue with consular managers in Manila.

### **Legal Office Reorganization**

4. AILA understands that the attorneys who were working as advisers in the Bureau of CA have now moved to the Office of Legal Adviser (L) and would like to understand how this might affect issues arising at post.
  - a. Please provide an update on the current oversight structure for legal issues arising from consular posts.

In September, the legal offices within the Bureau of Consular Affairs, including the Legal Affairs Office within the Visa Office, were realigned to become part of the Office of the Assistant Legal Adviser for Consular Affairs, within the Office of the Legal Adviser (L/CA). Certain functions considered non-legal remained in CA, but CA/VO/L staff handling legal advisory opinions before the reorganization have moved to L/CA and will continue to handle AOs, under the leadership of Matt McNeil and Jennifer Landside.

- b. What will be the process for reviewing advisory opinion requests? How will any changes affect the timing and availability of advisory opinions sought by officers at post?

The process for reviewing advisory opinion requests has not changed, but consular officers now send requests for legal advisory opinions directly to L/CA staff. We do not expect the reorganization of the legal offices to negatively impact review of advisory opinion requests.

- c. Do the attorney advisers who were consular officers working for CA still have direct oversight of legal issues at posts? If so, are they responsible for posts within a specific geographic area or subject matter?

Just as CA/VO/L did, L/CA now handles all legal functions related to consular affairs, including legal issues arising in the course of visa adjudications abroad. There is an advisory opinions and litigation team within L/CA, designated with

the acronym L/CA/V/AL. Portfolios may vary among team members, but L/CA/V/AL staff generally have a geographical aspect to their portfolio.

- d. With the shift of attorney advisers from VO/L/A to L/CA, what kind of duties will remaining personnel in VO/L/A have that impacts visa processing, issuance, or denial?

There no longer is an Office of Legal Affairs (VO/L) or VO/L/A division, within the Visa Office.

5. Given the recent reorganization in which attorneys from the Visa Office became part of the Office of the Legal Adviser, please confirm the following:
  - a. Have the current recommended protocols changed for seeking LegalNet review when disagreeing with a legal issue taken by a post or the post fails to respond to inquiries?

No. The process has not changed for requesting review of legal questions relating to a specific visa application. The LegalNet inbox continues to be managed by the team that previously handled such requests.

- b. What is the current response time for LegalNet inquiries?

LegalNet is currently providing a response to in-scope inquiries within 4 to 6 weeks. For complex legal inquiries that require additional attorney review, an initial response is sent informing the inquirer that the case is under review and a substantive reply will be forthcoming. The timeframe for providing a final response to complex legal inquiries varies on a case by case basis.

## H-2Bs

6. Presidential Proclamation 10052 (PP 10052) Section 2(a)<sup>1</sup> suspends the issuance of enumerated NIVs, including H-2B visas, unless an exclusion or exception applies. Please provide answers to the following questions: Pandemic-related delays in H-2B visa issuance have in many cases surpassed the seasonal or temporary need for which those visas were intended. The H-2B is a numerically limited category and any unused visas could potentially be recaptured for utilization by subsequent petitioners.
  - a. Does DOS communicate with USCIS regarding the number of H-2B visas that are issued at post? If so, how is this done and with what frequency?

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<sup>1</sup> See Presidential Proclamation Suspending Entry of Individuals Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak, available here: <https://www.aila.org/infonet/presidential-proclamation-suspending-entry>

- b. Does DOS notify USCIS when they are informed that an approved H-2B petition will no longer be used due to the temporary or seasonal need having expired?
  - c. What is the estimated processing time for H-2B National Interest Exceptions (NIEs) in Monterrey, Mexico?
1. We send a bi-monthly spreadsheet to USCIS showing issuances by post.
  2. State cannot cancel or revoke an approved petition. If a petitioner requests withdrawal of an approved petition, State would return the petition to USCIS for action.
  3. The standard processing time is three days. More complicated cases can take up to a week. However, the COVID pandemic has the potential of extending that time further.

### **Effect of President's Executive Order on Hong Kong Normalization**

7. The President's Executive Order on Hong Kong Normalization<sup>2</sup>, issued on July 14, 2020 raises questions with regard to whether, and if so in what contexts, Hong Kong will be treated as part of Mainland China for immigration purposes.
  - a. Is it DOS's legal opinion that the president's authority as expressed in the EO does not alter the clear legislative text in IMMACT 90<sup>3</sup>, which carves out separate chargeability for Hong Kong as it relates to the immigrant visa preference categories? If so, and Hong Kong born persons continue to be chargeable separately from mainland China, has guidance on this issue been communicated to the NVC and to consular posts abroad?

The Department continues to review and implement Executive Order 13936, the Executive Order on Hong Kong Normalization. Any change in current procedures will be reflected in the Visa Bulletin.

- b. The instructions for the Diversity Visa (DV) 2022 Lottery<sup>4</sup> treat Hong Kong as part of Mainland China for purposes of the DV Lottery, thus rendering individuals from Hong Kong ineligible to participate in the DV lottery. This change to the DV Lottery instructions suggests that DOS has concluded that, as a result of this Executive Order, individuals from Hong Kong are legally considered as being from Mainland China for purposes of the DV Lottery. Please explain why Hong Kong's treatment in the DV Lottery context differs from its treatment concerning IV chargeability?

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<sup>2</sup> See President Trump Issues Executive Order on Hong Kong Normalization, available here: <https://www.aila.org/infonet/president-trump-issues-executive-order-hong-kong/>

<sup>3</sup> See IMMACT 90, available here: <https://www.govinfo.gov/content/pkg/CFR-2015-title8-vol1/xml/CFR-2015-title8-vol1-part236-subpartB.xml>

<sup>4</sup> See Diversity Visa Instructions, Important Notices, available here: <https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry/diversity-visa-instructions.html>

The Department continues to review and implement Executive Order 13936, The President's Executive Order on Hong Kong Normalization. Any change in current procedures will be reflected in the Visa Bulletin.

## NAM et. al v. DHS

8. The judge in *NAM et. al v. DHS* enjoined the NIV restrictions in section 2 of the NIV ban, PP 10052, concerning plaintiffs and members of plaintiff member company. Please confirm:
  - a. How is DOS making consular appointments available to members of this class? AILA members report that, notwithstanding the injunction, employees of plaintiff member company are not being granted visa appointments.  
Posts continue to be restricted in their ability to provide visa services due to local health restrictions and resource limitations due to the COVID-19 pandemic. As posts are able to increase visa services, priority is given to cases involving humanitarian emergencies, applicants contributing to COVID-19 eradication, diplomatic visas (which do not require in person interviews), and other cases deemed to warrant special consideration. To comply with the *NAM* Court's order, J-1 intern, trainee, teacher, camp counselor, au pair, or summer work travel program applicants are considered for interview scheduling after those categories of cases, along with petition-based work visas (including H's and L's).
  - b. DOS posted [guidance](#)<sup>5</sup> dated October 9, 2020 appears to indicate that pandemic-related constraints that prevent routine visa operations are an independent factor unrelated to the applicability of PP 10052 that might impact an individual's ability to obtain a visa appointment. Is it DOS's policy that that unless a plaintiff member company can demonstrate eligibility for an expedited appointment under a consular post's published expedite criteria, they may not be granted a visa appointment until routine visa processing resumes?
- c. Since the above-referenced injunction only applies to section 2 of PP 10052, please confirm that employees of plaintiff member companies who have been present in a COVID health-related ban country (*i.e.*, Brazil, China, Iran, Ireland, the Schengen Area countries, and the U.K.) within 14 days must still establish eligibility for an exception under the applicable COVID health-related ban in order to obtain a visa appointment or to be issued a visa.

Any applicant who is found to be covered by the *NAM* Court's order, and who a consular officer determines meets the NIE criteria under PP 10052, may also be

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<sup>5</sup> See Court Order regarding Presidential Proclamation 10052, available here: <https://travel.state.gov/content/travel/en/News/visas-news/court-order-regarding-presidential-proclamation-10052.html>

deemed excepted under a regional COVID proclamation, should one apply. However, if an applicant is covered by the NAM Court's order but would not have met the PP 10052 NIE criteria, any applicable regional COVID proclamation will apply.

## **Mission China**

9. On July 27, 2020, the U.S. Consulate in Chengdu closed. What is the preferred U.S. consular post in China for U.S. citizens and nonimmigrant visa applicants who otherwise would have received consular services in Chengdu?

U.S. Embassy Beijing assumed responsibility for the Consulate Chengdu's consular district, which includes Guizhou, Yunnan, and Sichuan Provinces, Tibet Autonomous Region, and Chongqing Municipality. We remain committed to our mission to protect the welfare and safety of all U.S. citizens abroad. Nonimmigrant visa applicants in Chengdu's consular district may apply at any of our other posts in China.

10. The U.S. Consulate in Guangzhou, which is the exclusive post for processing immigrant visas in China, suspended routine visa processing in January 2020. Despite the overall reported COVID-19 cases in China dropping in March to the low hundreds and continuing at that level or to double or single digits through the date of this writing, the Consulate has not shown signs of reopening similar to what we have seen in some European countries that are consistently reporting COVID-19 cases in the thousands and where cases are increasing. While AILA recognizes that additional factors are likely contributing to the sustained nature of the closing, can DOS advise whether there is a plan for a phased reopening of IV processing in China? If so, can DOS share any details as to what the priorities might be as they relate to the various types of IVs, K-1s, and Returning Resident Visas?

U.S. embassies and consulates are working to resume routine visa services on a location-by-location basis, following the suspension of routine visa services due to COVID-19. We are unable to provide a specific date for when each mission will resume specific visa services, or when each mission will return to processing at pre-COVID-19 workload levels. See each U.S. embassy or consulate's website for information regarding operating status and which services it currently offers. Applicants who need to travel immediately should follow the guidance provided on the nearest embassy or consulate's website to request an emergency appointment. As post-specific conditions permit, and as noted in our general guidance, when posts are able to phase in processing of some routine cases, we expect posts that process immigrant visa applications will prioritize Immediate Relative family members of U.S. citizens, including intercountry adoptions (consistent with Presidential Proclamation 10014), fiancé(e)s of U.S. citizens, and certain Special Immigrant Visa applications.

## **Mission China EB-5**

11. Due to a number of factors, EB-5 number usage in China has steadily decreased from 2015 through the present (FY 2015: 7616, FY 2016: 7516, FY 2017: 6,833, FY 2018: 4,642, FY 2019: 3,894). With the late January 2020 suspension in routine visa processing in China, we would expect the EB-5 issuances to have declined even further in FY 2020. Based on DOS published statistics, the seven EB-5 investor visas that were issued in Guangzhou in January 2020 were the last EB-5 visas to be issued at that post for FY 2020.<sup>6</sup> Please advise if DOS has plans to resume EB-5 processing in Guangzhou in the foreseeable future.

As post-specific conditions permit, and after meeting demand for services to U.S. citizens, our missions will phase in processing some routine immigrant and nonimmigrant visa cases. Posts that process immigrant visa applications, such as Consulate General Guangzhou, will prioritize Immediate Relative family members of U.S. citizens, including intercountry adoptions, fiancé(e)s of U.S. citizens, and certain Special Immigrant Visa applications. Consulate General Guangzhou will resume adjudicating all routine nonimmigrant and immigrant visa cases only when adequate resources are available, and it is safe to do so.

12. Presidential Proclamation 10014 (PP 10014)<sup>7</sup>, which was issued on April 22, 2020, specifically exempted EB-5 visa issuance, presumably because investor visas create jobs for U.S. workers and therefore aid in the U.S. economic recovery. We recognize that the post in Guangzhou has been operating on a mission critical basis since late January 2020, and thus has reduced IV processing capacity. Although Phases Zero to One of the Diplomacy Strong framework reference that posts should prioritize cases that are exceptions to PP 10014 for prioritization, EB-5s are not specifically called out as a priority until Phase Three.<sup>8</sup> How has the stated priority of encouraging EB-5 visa issuances acknowledged in PP 10014 manifested itself in Guangzhou in FY 2020? Has the COVID-19 health related ban for China impacted the prioritization of EB-5s in Guangzhou?

Although Presidential Proclamation 10014 excepts EB-5 applicants, Presidential Proclamation 9984 does not. To limit the expenditure of limited consular resources on categories of applicants who are not eligible for visas, posts, including Consulate General Guangzhou, consider the Presidential Proclamations and prioritize services for applicants not subject to or excepted from these P.P.s, making allowances as appropriate for emergency and mission critical visa interviews for applicants who may also qualify for national interest exceptions.

## Visa Bulletin

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<sup>6</sup> See Monthly Immigrant Visa Issuance Statistics, available here: <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/immigrant-visa-statistics/monthly-immigrant-visa-issuances.html>

<sup>7</sup> See Presidential Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak, available here: <https://www.aila.org/infonet/proclamation-suspending-entry-immigrants>

<sup>8</sup> See DOS Provides Administrative Record Materials in 2020 Immigration Bans Litigation, available here: <https://www.aila.org/infonet/departement-of-state-provides-administrative-record>



13. For many years, the Visa Bulletin was issued around the 10<sup>th</sup> of each month. In recent years, the Visa Bulletin has not been released to the public until around the 17<sup>th</sup> to the 19<sup>th</sup> of the month. In our March 2020 liaison meeting<sup>9</sup>, the Visa Office informed AILA that while there were no plans to revert to the historical release schedule, DOS would explore ways to more effectively communicate the Final Action Dates and Dates for Filing to the public. Since then, delays have worsened with the October Visa Bulletin not being released until September 24<sup>th</sup> and the November Visa Bulletin not being released until Thursday, October 29<sup>th</sup>.

a. **Were there specific reasons behind these unprecedented delays in the release of the October and November Visa Bulletins?**

**We understand the importance of the Visa Bulletin and every effort is made to make the bulletin available as soon as possible each month.**

b. **Are the October and November Visa Bulletin releases an aberration, such that AILA and the public should expect future Visa Bulletins to be released mid-month?**

**Those release dates should not be considered the new norm.**

c. **Is DOS able to share any information at this time regarding its plans discussed in the March 2020 liaison meeting to more effectively communicate the Final Action Dates and Dates for Filing to the public?**

**We do not have any information to share at this time.**

### **“Reason to Believe” Determinations**

14. The phrase “reason to believe” appears in several sections of the INA in the context of inadmissibility determinations. Please confirm:

a. the legal standard for “reason to believe” is a preponderance of the evidence, i.e., more likely than not;

**Guidance in the Foreign Affairs Manual does not expressly define “reason to believe” as a preponderance of evidence or more likely than not. It does, however, provide that, in order for a consular officer to find reason to believe, there must exist a probability that is more than a mere suspicion.**

b. a determination that there is “reason to believe” an applicant is inadmissible must be based on a finding of facts;

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<sup>9</sup> See AILA DOS Liaison Q&As (3/5/20), available here: <https://www.aila.org/infonet/aila-dos-liaison-qas-3-5-20>

A determination of “reason to believe” must be supported by evidence. In making that assessment, consular officers consider all relevant facts and evidence, including the credibility of any assertions made by the applicant.

- c. absent national security or law enforcement sensitive reasons, an applicant found to be inadmissible based on an officer’s “reason to believe” should be informed of the factual basis for that belief.

INA section 212(b)(1) provides that, when a consular officer determines that an alien is ineligible for a visa under a health- or criminal-related ground of inadmissibility in INA section 212(a), the officer must provide the alien with notice of that determination, and the specific provision of law under which the alien is inadmissible. Officers are instructed to explain the law and the refusal in clear terms, in addition to providing a citation of the legal provision relied on for the refusal. While officers may provide additional information in explaining the refusal, they are not required to do so.

15. To make a finding ineligibility for admission under INA 212(a)(3)(A) does an officer solely evaluate past conduct or is it necessary to make a determination about the likelihood of prospective behavior?

INA section 212(a)(3)(A) provides that an alien is inadmissible if the consular officer knows, or has reasonable ground to believe that the alien seeks to enter the United States to engage solely, principally, or incidentally in certain enumerated activities. In implementing this ground of inadmissibility, consular officers must make a determination about the likelihood of prospective behavior based on all relevant evidence, including any pattern of, or recent past conduct.

## **COVID-19 Health-Related Travel Restrictions**

COVID-19 health-related travel restrictions remain in place for the Schengen Area, the U.K., Ireland, Brazil, China and Iran until affirmatively rescinded. The presidential proclamations creating these restrictions provide for several exceptions, including aliens whose entry would be in the national interest.

### *Criteria for COVID-19 Country-Specific Health Bans*

16. While DOS has articulated specific criteria by visa type for NIEs in the context of Ireland, the Schengen Area, and the UK, there does not appear to be similar guidance in place for Brazil, China or Iran.<sup>10</sup> Please confirm if any of the guidance articulated for Ireland, the Schengen Area, and the UK applies to Brazil, China and/or Iran? If not, please further confirm that prospective applicants for NIEs in Brazil, China and Iran would need to establish eligibility by arguing eligibility based on the wording of the respective proclamation.

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<sup>10</sup> See National Interest Exceptions for Certain Travelers from the Schengen Area, United Kingdom, and Ireland, available here: <https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exceptions-from-certain-travelers-from-the-schengen-area-uk-and-ireland.html>

Guidance applies only to the regional proclamation(s) for which it was articulated and each proclamation establishes its own scope.

*NIE Determinations Under the COVID-19 Related Bans*

17. AILA members report apparent inconsistencies with regard to how consular officers make NIE determinations<sup>11</sup> under the COVID-19 Presidential Proclamations. Are NIE determinations approved by each post's Consular Section Chief, or are officers advised to refer the issue back to DOS for a decision? Can DOS please clarify the circumstances in which posts are authorized to make NIE determinations as opposed to when the decision must be deferred to the DOS, as well as what DOS office is responsible for making these determinations?

The Assistant Secretary authorized consular section chiefs to approve National Interest Exceptions (NIE's) under the regional and labor proclamations to applicants whose travel falls within one of the categories described in the Assistant Secretary's determination. These criteria are available on [travel.state.gov](https://travel.state.gov). The Assistant Secretary may, in limited circumstances, approve cases that fall outside of what consular section chiefs are authorized to approve.

18. Section 3 of the COVID health related travel bans authorize both DOS and CBP to issue NIEs, and many consular post websites encourage individuals to apply for an NIE at post even when they already possess a valid visa or are otherwise eligible to travel under the Visa Waiver Program (VWP). AILA members report diverse experiences with regard to the interplay between DOS and CBP. In some cases, CBP has referred NIE cases to posts for adjudication, while in other cases, CBP has issued NIEs when an answer from post has not been timely.

- a. Are there any situations, such as tight timing, in which DOS would encourage applicants to approach CBP to request an NIE as opposed to a consular post?

We defer to DHS/CBP on the matter of requesting NIE's due to extreme time considerations. Embassies and consulates remain poised to consider NIEs and always accord precedence to the most urgent travel.

- b. Are there any other factors that impact the actions or recommendations that a particular post or port of entry will take?

While the Department has provided guidance to posts, NIEs are discretionary and posts are expected to take into account all relevant circumstances. We defer to DHS for questions related to ports of entry.

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<sup>11</sup> See DOS Provides Administrative Record Materials in 2020 Immigration Bans Litigation, available here: <https://www.aila.org/infonet/department-of-state-provides-administrative-record>

- c. Have DOS and CBP reached a formal understanding concerning how the agencies will share jurisdiction over the adjudication of NIEs. If so, would State be open to sharing that information publicly?

DOS and DHS/CBP work closely together to facilitate legitimate travel while assuring the highest consideration for the safety of our staff and of the traveling public. Embassies and consulates remain poised to consider NIEs and always accord precedence to the most urgent travel.

19. AILA has received reports of ESTA registrations being cancelled where the prospective traveler booked a flight prior to being granted an NIE. Please confirm:

- a. Is that consistent with DOS' experience?

The Visa Office defers to DHS/CBP which has purview over the Visa Waiver Program.

- b. Does DOS recommend that travelers wait until their NIE is approved by the consulate before booking flights to the U.S.?

Yes. This is consistent with our visa guidance also.

- c. If the post discovers that the ESTA registration has been cancelled at the time it intends to approve the NIE request, is the post able to intervene and resurrect the ESTA registration, or must the traveler reapply and receive ESTA approval before the post can approve the NIE?

Posts actions do not affect ESTA registration, as that is a function of DHS/CBP. Applicants without ESTA approvals, but with urgent travel needs may consider applying for visas.

#### *Evidence of the NIE*

20. Please address the following concerning evidence required to demonstrate qualification for an NIE?

- a. What documentation, if any, will an individual approved for a NIE receive from the post to demonstrate eligibility to board an aircraft to the U.S.?

All NIE's approved by DOS posts overseas are entered into an electronic database. The NIE can be viewed by CBP at ports of entry and is used to facilitate safe travel to the United States. The Visa Office has not instructed posts to provide documentation confirming an approved NIE however we are aware of some posts providing letters earlier this year to assist with airlines.

- b. Does this evidence vary depending on whether the individual already possesses a valid visa or intends to travel under the Visa Waiver Program (VWP) as opposed to when they are granted an NIE as part of an application for a visa?

If the NIE was approved in conjunction with visa issuance, the database will likely contain more notes regarding the case.

- c. Where a new visa is issued in conjunction with the NIE request, should the visa always be annotated to reflect the NIE approval?

Yes. The text for the annotation is included in the Visa Office field guidance.

- d. Regardless of whether a new visa is issued or not, is an entry regarding the NIE made in the Consular Consolidated Database (CCD)? If so, is that entry accessible to CBP?

Yes. See response to question 20a

- e. How do air carriers and CBP verify the existence of an NIE granted by a consular post?

The Visa Office defers to DHS/CBP.

- f. Recognizing that CBP makes the ultimate determination of whether to admit an individual to the U.S., is it anticipated that CBP should normally defer to NIE determinations made by consular officers absent other grounds of inadmissibility unknown to the consular officer at the time of the NIE adjudication?

The Visa Office defers to DHS/CBP.

21. Under what circumstances, if any, will consular posts entertain NIE requests under the COVID health-related bans for individuals currently in the United States in advance of travel overseas? For example, will consulates entertain NIE requests for individuals in the U.S. who have an emergent need to travel to a country subject to a COVID health-related travel restriction and an equally urgent need to return to the U.S. within 30 days? Such individuals may be afraid to depart the U.S, unless an NIE that will allow them to return has been granted.

We cannot identify any circumstances in which consular officers overseas should be expected to consider NIE requests from aliens in the United States, unless there were circumstances under which a relevant proclamation might apply to a diplomat renewing a visa in the United States.

#### *Validity of National Interest Exceptions (NIEs)*

22. It is AILA's understanding that NIEs issued under the COVID-19 health related travel restrictions are generally valid for a single entry within a period of 30 days, with the

exception of students, scholars, treaty traders and investors in Ireland, the Schengen Area, and the UK, whose NIEs apparently allow for multiple entries and do not have a limited duration. Please confirm whether this understanding is correct.

**Per CBP, all NIEs are valid for 30 days and for one entry to the United States.**

23. AILA members have experienced inconsistencies with regard to NIE visa annotations and communications regarding the NIE's limitations. Some posts provide individuals with a notice indicating that the NIE is limited to 30 days and a single entry, whereas others do not. Similarly, some posts annotate the visa to indicate that an NIE has been granted, whereas others do not. Please confirm:

a. Is there a uniform protocol that consular officers are asked to follow with regard to providing notices regarding the limitations of the NIE and/or annotating the visa to reflect the NIE?

**Visa Office field guidance instructs posts regarding annotations and informing travelers of their exceptions.**

b. Outside the student/scholar/treaty trader/investor context discussed above, are COVID health-related NIEs limited in validity to 30 days and a single entry, irrespective of whether a notice or annotation was provided or whether the visa was issued for full-validity and multiple entries?

**See answer to 22a above.**

c. For visas granted with NIE approval under a COVID health-related ban that do not bear an annotation and for which there is no other written confirmation of the NIE, does the applicant need to confirm that CBP and the RCLG (Regional Carrier Liaison Group) are aware of DOS' NIE approval to avoid any difficulties boarding the plane or at a CBP port of entry? Can DOS please explain the mechanism by which CBP and the RCLG are made aware of the DOS NIE approval?

**See the answer to 20a above.**

24. Are there any distinctions in terms of an NIE's validity and number of entries depending on whether the NIE is based on a COVID-19 health-related ban as opposed to the NIV ban, PP 10052? Specifically, are NIEs issued under PP 10052 similarly restricted to 30 days and a single entry?

**See answer to 22a above.**

### **Immigrant Visa Issuance Processing by NVC and Consular Posts**

25. Please confirm the following:

- a. 20 STATE 30920 (March 30, 2020) (6)<sup>12</sup> mandated that NVC and KCC “suspend most immigrant/diversity visa pre-processing” but that NVC would “continue to process age-out and adoption cases for action at post as resources are available” and that post could request expedited treatment of urgent medical or humanitarian matters.<sup>13</sup> Following the enumeration of exceptions to PP 10014 and the announcement that posts be allowed to reopen as the situation permits, does this continue to be the practice? What types of IV cases are currently being actioned by NVC? By posts?

NVC continues to prepare age-out and adoption cases for action at post, as well as cases involving expedite requests for urgent medical or humanitarian matters. Depending on posts’ local restrictions and capacity posts may also process other IV classes that are excepted from PP 10014.

During all phases of the Diplomacy Strong framework, NVC attempted to maintain normal operations. NVC continues to process age-out cases, intercountry adoptions, family-based Immediate Relative visa categories considered mission-critical (IR1, CR1, IR2, CR2), certain Special Immigrants (SQ, SI), fiancé(e)s of U.S. citizens applications, other family-based IVs, and employment preference categories.

U.S. embassies and consulates continue to prioritize services for applicants not subject to, or excepted from, the various Presidential Proclamations, making allowances for emergency and mission-critical visa interviews for applicants who may also qualify for national interest exceptions (NIEs).

- b. AILA understands that NVC has limited ability to differentiate which age-out cases are eligible for CSPA protections. How does NVC identify mission critical and age-out cases? Are these identified to NVC by post? If an attorney believes that a client’s IV matter is “mission critical” or is an age-out case without CSPA protection, what is the most effective way to communicate this to NVC?

Posts identify mission critical cases and notify NVC for scheduling purposes, so legal representatives should contact the relevant U.S. embassy or consulate regarding any case that may merit “mission critical” consideration. For age-out cases, legal representatives may contact NVC by sending email inquiries through our online Public Inquiry Form; this is the best mechanism for bringing these issues to NVC's attention.

- c. Per 20 STATE 54966 (June 12, 2020)<sup>14</sup> we understand that the NVC has been prioritizing document review of IR/CR 1/2 cases for spouses and children of U.S. citizens as they spouses and minor children are exempt from all of the COVID

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

related proclamations and to prioritize aging out children in these categories. Have any other categories of IVs, such as the EB-5 categories, been similarly prioritized, given that EB-5 applicants are exempt from PP 10014?

Posts that process immigrant visa applications will prioritize Immediate Relative family members of U.S. citizens including intercountry adoptions (consistent with PP 10014), as well as fiancé(e)s of U.S. citizens, and certain Special Immigrant Visa applications.

- d. AILA understands that although EB-5 applicants are exempt from the restrictions in PP 10014, they may still be subject to a COVID health-related travel restriction, including applicants present in China. What is the process by which EB-5 applicants who believe they qualify under the NIE to the COVID health-related bans can have their eligibility for an NIE examined by a consular officer? Does NVC play any role in assessing eligibility under the national interest exception or other exceptions?

NVC does not play a role in assessing eligibility under the national interest exception. Applicants who are subject to any of the Presidential Proclamations, but who believe they may qualify for a national interest exception or other exception, should follow the instructions on the nearest U.S. Embassy or Consulate's website regarding procedures necessary to request an emergency appointment and should provide specific details as to why they believe they may qualify for an exception. While a visa applicant subject to one or more Proclamations might meet an exception, the applicant first must be approved for an emergency appointment request and a final determination regarding visa eligibility will be made at the time of visa interview.

- e. Given the policy favoring EB-5 issuance articulated in PP 10014, would DOS consider allowing Chinese EB-5 applicants to process at a third country consular post in the region, assuming that they be present in that country for at least 14 days prior to the interview to ensure appropriate quarantine requirements are satisfied?

In general, applicants may request, and other posts may consider, transfer requests on a case-by-case basis. Applicants seeking to transfer a case should be willing to process the case completely at the other post, including conducting a medical examination there too. If the applicant has spent fourteen days in a country not covered by a COVID regional proclamation, before attending a visa interview in that country, and the applicant satisfies the consular officer that s/he will travel to the United States directly from that country, then the COVID regional proclamation would not be a bar to visa issuance.



To change the processing location, the most effective way to notify NVC is to send the request through NVC's online Public Inquiry Form, along with proof of residency and an address in the new country of jurisdiction.

In the event the residency of an applicant remains in question, NVC will forward the request to the appropriate U.S. embassy or consulate for their consideration. The consular officer makes a factual determination depending upon the case's unique circumstances and may deny a transfer request if the applicant's legal residency in the new jurisdiction is not established.

### **CSPA and PP 10014**

26. AILA understands that spouses and minor children of U.S. citizens are exempt from the immigrant visa restrictions of PP 10014.

- a. Does this exemption only apply to children who are under 21 years of age at the time of the IV interview?

PP 10014 excepts "any alien who is under 21 years old and is the child of a United States citizen, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications." A child of a United States citizen seeking an immigrant visa under this exception to PP 10014 must be under 21 years old.

- b. If the exception only covers children who are under 21 years of age at the time of the IV interview, does it necessarily follow that while PP 10014 remains in effect, children 21 years of age or older at the time of the visa interview will not be issued an IV under the age out exception, despite being otherwise eligible for an IV due to CSPA protections, absent eligibility under another exception to PP 10014?

The exception for applicants who are subject to aging out does not include those individuals protected by the Child Status Protection Act ("CSPA") as a "child" and thus would not actually age out of visa eligibility if not granted a national interest exception. An applicant who is protected as a "child" under CSPA is already excepted from P.P.s 9984, 9992, 9993, 9996, 10041 as an "alien who is the child, foster child, or ward of a U.S. citizen or lawful permanent resident." However, under P.P. 10014 an applicant must be under 21 years old and the child of a United States citizen to be excepted from the Proclamation. An applicant with a biological age of 21 or over or who is protected as a "child" under CSPA is unlikely to age out, and therefore does not qualify for a national interest exception under P.P. 10014 on the basis of aging out; these applicants may qualify for a different exception under P.P.

10014 or may qualify for a national interest exception on some basis other than aging out, in order to be issued a visa while the Proclamation is in effect.

27. PP 10052 exempts from the IV restrictions in PP 10014 “alien children who would” as a result of the proclamation “age out of eligibility” for an immigrant visa. Please confirm AILA’s understanding that children whose ages are locked in under CSPA such that they “would not age out” due to the proclamation, are ineligible for the age out exception, and that they will not be issued an IV while the proclamation remains in effect unless they can establish eligibility under another exception.

Please see answer to Question 26.

28. We understand from 20 STATE 61886 (2)<sup>15</sup> that “there is no easy way for NVC to differentiate a CSPA case in the system” from a case that does not have CSPA protection. We further understand that NVC is prioritizing for processing cases that appear that they may age out during the validity of PP 10014 or for two weeks thereafter. Please confirm:

- a. What is the best way to bring a CSPA case to the attention of the NVC?

NVC schedules based on visa category and not based on CSPA.

Legal representatives may contact NVC by sending email inquiries through our online Public Inquiry Form; this is the best mechanism for bringing these issues to NVC's attention.

- b. As a result of the current limitations in ability to track whether CSPA protections apply, is it possible that AILA members and IV applicants may be asked to appear for a visa interview on the basis that a child might age out while PP 10014 remains in effect, but that their visas may be denied if they have CSPA protections and are ineligible for another exception to PP 10014?

Yes, it is possible a visa interview may be scheduled on that basis.

- c. If otherwise eligible for an IV issuance, will these cases be placed in a “pending demand” file or otherwise be pulled for automatic approval once the restrictions of PP 10014 are lifted? If not, will these applications be placed in a queue to be called for re-interview?

IR2 cases may be scheduled and interviewed. If, at the time of interview, it is determined the applicant is ineligible for issuance based on one of the Proclamations, it may be denied under that Proclamation and approved when the Proclamation is lifted. There is not necessarily a need for re-interview to overcome the ineligibility.

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<sup>15</sup> *Id.*

- d. What, if any action, do applicants or their attorneys need to take to “reactivate” the application after the restrictions are lifted?

There is no action that needs to be taken; however, applicants and their attorneys may always reach out to either NVC or the Embassy/Consulate for case specific questions including status updates.

29. CSPA determinations are admittedly complex. AILA understands from prior conversations with DOS that consular officers and not NVC determine whether CSPA applies. We further understand that officers have frequently requested LegalNet’s guidance as to whether CSPA protections apply. Please confirm:

- a. Would DOS consider examining its current process to assess whether it might be beneficial for consular officers stationed at NVC to play a role in assessing the applicability of CSPA?

While NVC typically does assist posts with CSPA computations, consular officers adjudicating the cases must make the final determination.

- b. Given the recent reorganization in which attorneys from the Visa Office became part of the Office of the Legal Adviser, where do posts send legal inquiries regarding the applicability of the CSPA?

Requests for Advisory Opinions are sent to the same team of attorneys, now in L/CA.

### Security Advisory Opinions

30. Please confirm the following concerning Security Advisory opinions (SAOs):

- a. To what extent has the administrative processing of SAOs continued during the pandemic, both at State and other agencies?

Administrative processing continues. State and interagency partners are all working through the pandemic, albeit with occasional delays due to COVID-related staffing patterns.

- b. What is the current average processing time for an SAO?

We aim to process each case without undue delay, but the many case-dependent variables make it difficult, and generally unhelpful, to try to calculate an average processing time.

- c. Is there a process by which individuals with humanitarian situations, such as nonimmigrants who are stranded abroad and separated from their U.S. citizen family members, may ask post to request an expedite of the SAO?

Yes, and posts may reach out to request expedited processing based on

humanitarian concerns.

- d. If an individual applied for a visa in the past and has a pending a SAO, at what point should they instead simply reapply for a visa?

While an applicant undergoing administrative processing is always welcome to reapply, the new application will undergo all of the required checks and may also be subject to administrative processing.

## Consular Post Reopening and Resumption of Visa Services

This next section of questions pertains to DOS's plans for the reopening of consular posts and the resumption of visa services.

### *Budgeting*

31. AILA recognizes the tremendous efficiency with which Consular Affairs (CA) has been able to effectively conduct operations over the years with minimal staffing and budget and admires CA's creativity and ingenuity. The pandemic has likely only exacerbated these longstanding pressures. Does CA foresee budgetary constraints that might impede its ability to execute its functions as it transitions beyond the pandemic to normal operations? If so, what is DOS' timeline to propose fee increases, as signaled on the Unified Agenda,<sup>16</sup> to assist in the resumption of routine services?

The Department continues work on addressing the longstanding budgetary constraints that were exacerbated by the pandemic. Changes to consular fees are the result of annual reviews of the cost of service and biannual reviews of the fees charged.

### *Repository of Post-Related Information*

32. Please confirm AILA's understanding that the decision whether and to what extent a post may reopen is a joint decision made by post with DOS's approval?

The level of visa services a post is able to provide during the ongoing pandemic--amidst staffing shortages and local restrictions-- is determined by post itself (see #34).

33. Does DOS maintain a centralized repository of the status of approved consulate re-openings by post? If so, would DOS consider making such a document publicly available to reduce confusion among stakeholders?

Each post describes on its website what categories of visa applications it is currently able to accept appointments for and provides instructions regarding how certain other applicants can request emergency appointments. For NIV categories, the centralized "Visa Appointment Wait Times" page (at <https://travel.state.gov/content/travel/en/us->

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<sup>16</sup> See Unified Agenda, Schedule of Fees for Consular Services, available here: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=1400-AE15>

[visas/visa-information-resources/wait-times.html](#)) also provides actual appointment wait times for visa categories that are being processed. As the page indicates, a result of “999 calendar days” or “emergency appointments only” indicates the post has not yet resumed processing routine applications for that category.

### *Diplomacy Strong Framework*

34. It is AILA’s understanding that consular posts will reopen in phases based on the following Diplomacy Strong Framework included in Appendix A. Please confirm:
- a. Are the phases and priorities listed in Appendix A still accurate, or have there been any modifications to the Diplomacy Strong framework?
  - b. Are the phases in Diplomacy Strong standard across posts or are they merely guidelines within which posts have some flexibility in terms of setting priorities?
  - c. Please confirm whether a post will always be at the same phase for both IV and NIV processing, or whether it may be at a certain phase for IV processing and a different phase for NIV processing (*e.g.*, If Sydney is at phase 3 for IV services, must it also be at phase 3 for NIV services?).
  - d. While we see references to Diplomacy Strong on a variety of post websites, it is not clear what phase the post is operating under. Would DOS advise posts to share their current operating phase on their websites in order to better inform the public of what they are prioritizing?

Although phased reopening of routine visa services originally corresponded with phases of Diplomacy Strong, posts were instructed on November 12 that they are no longer obligated to be in a specific Diplomacy Strong phase before providing additional categories of visa services. Posts will determine the volume of visa services that they can provide while prioritizing the health and safety of consular staff and applicants and provide that volume to prioritized categories of visa services.

Posts that process immigrant visa applications will prioritize Immediate Relative family members of U.S. citizens including intercountry adoptions (consistent with Presidential Proclamation 10014) fiancé(e)s of U.S. citizens, and certain Special Immigrant Visa applications. Posts processing non-immigrant visa applications will continue to prioritize travelers with urgent travel needs, foreign diplomats, and certain mission critical categories of travelers such as those coming to assist with the U.S. response to the pandemic, followed by students (F-1, M-1, and certain J-1) and temporary employment visas (consistent with Presidential Proclamation 10052). We expect the volume and type of visa cases each post will process to depend on local circumstances. An embassy or consulate will resume adjudicating all routine nonimmigrant and immigrant visa cases only when adequate resources are available, and it is safe to do so.

35. Given the backlog of demand created by the embassy closures, is DOS examining ways in which interagency cooperation can create efficiencies to avoid unnecessary processing

and to enable DOS resources to be focused on higher priority services? And if so, is there a way for stakeholders to provide feedback?

The type of interagency cooperation envisioned by the inquirer is not clear, but the Department is always reviewing our processes for improving efficiencies and welcomes pertinent feedback.

#### *Resumption of IV Appointments*

36. 20 STATE 41350 (10)<sup>17</sup> indicates that “(s)cheduling of any appointments by NVC or KCC will resume only when a post is authorized to resume routine services.” Please confirm:

- a. Since a limited number of IVs have been issued during the pandemic, please confirm that these visa appointments would have been scheduled by post rather than NVC or KCC.

Per 9 FAM 504.4-6 (U) upon visa availability, NVC scheduled immigrant visa appointments in the chronological order of documentarily complete applicants, prioritizing appointments for applicants not subject to or excepted from the various Presidential Proclamations, based on a post-by-post capacity basis, consistent with host country and Department of State guidance on operating safely during the pandemic. However, in certain circumstances - such as a medical emergency - applicants who may have qualified for a national interest exception or other exception may have had their emergency appointment scheduled directly by the Immigrant Visa Unit based on adequate resources.

- b. Have any posts resumed routine immigrant visa services?

Yes, some of our missions have phased in processing some routine immigrant visa cases, as post-specific conditions permit. Three (3) Immigrant Visa Units are in the process of resuming routine visa services, based on the availability of their resources; and 89 Immigrant Visa Units have made substantial progress.

- c. Does CA plan to resume routine immigrant visa services at any posts in the second quarter of the government’s fiscal year?

The resumption of routine visa services, prioritized after services to U.S. citizens, will occur on a post-by-post basis, consistent with the Department’s guidance for safely returning our workforce to Department facilities. We expect the volume and type of visa cases each post will process to depend on local circumstances. An embassy or consulate will resume adjudicating all routine nonimmigrant and immigrant visa cases only when adequate resources are available, and it is safe to do so.

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<sup>17</sup> *Id.*

### *Returning Resident Visas*

37. Although U.S. Lawful Permanent Residents (LPRs) are exempt from all of the COVID health-related travel bans, many LPRs on expat assignments abroad have been afraid to return to the U.S. given the much higher COVID infection rates, have had difficulty obtaining flights and/or would be banned from returning to the country of their expat assignment due to pandemic-related restrictions of those countries. Would DOS consider establishing a policy, in coordination with other agencies, that would allow LPRs to remain abroad for an additional year without worrying that they will be considered to have abandoned their green card status, such that they could apply directly to CBP for admission without having to first obtain a Returning Resident Visa?

Defer to USCIS on this question; our practices have not changed regarding SB-1 returning resident applications.

### *Expansion of Visa Interview Waivers*

38. AILA acknowledges and appreciates the recent reinstatement of visa interview waivers at posts to allow for “contactless” visa issuance.<sup>18</sup> Would State consider the COVID-19 pandemic “unusual or emergent circumstance” under INA 222(h)(1)(C) warranting expanded use of the visa interview waiver program, to add additional visa classifications and/or visas which expired within a broader window of time? Can any aspects of these visa issuances be supported by stateside personnel?

In August of 2020 the Department of State, with concurrence from the Department of Homeland Security, temporarily provided for consular officers to waive the in-person interview requirement for individuals applying for a nonimmigrant visa in the same classification within 24 months of the expiration of their prior visa, rather than just the 12 months renewal period described in the INA. This policy is in effect until December 31, 2020.

### *Domestic Visa Reissuance*

39. Is consideration being given to domestic visa reissuance and/or pre-adjudication of applications, pursuant to 22 CFR § 41.111(b), for visa holders who are in the United States with visas that will be expiring shortly? If so, please share for which classifications and under what circumstances this may be possible.

Aliens and their immediate family members who are in the United States in A-1, A-2, G-1, G-2, G-3, G-4, or NATO-1 through NATO-6 nonimmigrant visa status may apply to have their visa(s) renewed domestically. No consideration is being given at this time to commence domestic visa reissuance or pre-adjudication of applications in the United States, pursuant to that regulation.

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<sup>18</sup> See Expansion of Interview Waiver Eligibility, available here: <https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html>

*Rescheduling Cancelled NIV Appointments.*

40. Is there a unified departmental policy for rescheduling cancelled visa appointments or is this left to the discretion of each post? Please also confirm:

- a. If an appointment is/was cancelled, does the applicant effectively go "to the back of the queue" or is the applicant given priority to reschedule the interview at the earliest available date?

When GSS posts must cancel an interview, the applicant receives an automated notification and offered an opportunity to reschedule for the next available appointment slot. Posts, per Department guidance, make an effort to ensure that there is availability within a reasonable amount of time, but also operate an emergency appointment function that would facilitate an adjudication for applicants in urgent need of travel. The criteria and procedures to request an emergency appointment are outlined on GSS websites.

- b. Are cancelled appointments automatically rescheduled by post or must applicants reschedule the interview themselves?

Applicants typically reschedule themselves to ensure that they are able to choose a time and day that suits their schedule. Applicants may also receive additional assistance by contacting a call center operated by a GSS vendor.

- c. If there is no unified departmental policy, how do DOS' appointment scheduling vendors address these rescheduling issues? Is this information published in a publicly available location?

All GSS posts follow the same basic procedure. All information related to the visa process is published on websites specific to each post that are accessible for all visa applicants. These websites include notifications of publicly-announced policies and guidance.

41. AILA understands that the MRV fee generally remains valid for up to one year for an application in the country where it was paid, and that this has now been extended for posts that use AIS until December 2021 in light of the COVID-based cancellations. Unlike posts that use AIS, where appointments can be rescheduled an unlimited number of times, post that use U.S. Travel Docs only allow an applicant to reschedule a visa appointment three times.

- a. Will visa appointment cancellations by State (and any subsequent reschedules made by the applicant due to COVID-19) count toward the three reschedules before the MRV fee must be paid a second time?



We are working diligently to restore all routine visa operations as quickly and safely as possible. In the meantime, CA extended the validity of applicant payments (known as the MRV fee) until December 31, 2021, to allow all applicants who were unable to schedule a visa appointment as a result of the suspension of routine consular operations an opportunity to schedule and/or attend a visa appointment with the already paid fee. For an applicant who has reached the cap on appointment cancellations/rescheduling, post will manually intervene to reschedule, and the applicant would not be required to pay the MRV fee again before December 31, 2021.

- b. Is the U.S. Travel Docs vendor able and willing to apply valid MRV fees to any appointments scheduled before December 31, 2021 and allow an unlimited number of reschedules during this period to bring them in line with posts that use AIS?

See above response.

#### *Treatment of IV Applications with Approved I-601A Provisional Waivers*

42. When posts reopen for resumption of routine visa services, will DOS prioritize applications for immigrant visa applicants in possession of an approved I-601A provisional waiver who departed the U.S. to attend an interview before routine visa processing was suspended and travel restrictions were imposed?

In general, posts that process immigrant visa applications will prioritize Immediate Relative family members of U.S. citizens, including intercountry adoptions, fiancé(e)s of U.S. citizens, and certain Special Immigrant Visa applications. Posts will resume adjudicating all routine nonimmigrant and immigrant visa cases only when adequate resources are available, and it is safe to do so.

#### *Pandemic-Related Delays in Obtaining Documents*

43. Applicants report having difficulty obtaining supplemental documents requested during a visa interview, such as criminal record clearances for particular countries, because of COVID-19 related closures. These applicants are concerned that the delay will result in a denial if the documents cannot be produced within a year. Is DOS aware of these issues, and if so, what is the agency's policy to deal with these COVID-19 related delays?

Consular officers may determine on a case-by-case basis whether a document is considered unobtainable using the guidance set forth in 9 FAM 504.4-4(F).

## Presidential Proclamation (PP) 10052

### *PP 10052 Enumerated Exceptions*

44. PP 10052 indicates that an NIE is available to applicants “involved with the provision of medical research at United States facilities to help the United States combat COVID-19”

- a. How does DOS define “United States facilities” for the purpose of this exception?

**We have not defined facilities.**

- b. Does DOS interpret this term loosely to incorporate any medical research facilities located within the United States, whether public or private, or is DOS’s interpretation limited to U.S. national laboratories and similar federal government research facilities?

**We have generally defined the term as any medical research facility located inside the United States.**

PP 10052 specifically states that NIEs are available to individuals “involved with the provision of medical care to individuals who have COVID-19 and are currently hospitalized.” Please confirm that prospective H-1B physicians intending to participate in a U.S. medical residency or fellowship program who can demonstrate that they will treat COVID patients are included in this exception.

**The proclamation excepts aliens from the proclamation who “are involved with the provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized”**

- a. The wording of PP 10052 and the DOS’ August 12, 2020 guidance<sup>19</sup> underscore that the categories of individuals who may be granted national interest exceptions under this proclamation are non-exhaustive.

Please confirm whether consular officers have discretion to approve NIEs under PP 10052 for situations which fall squarely within the exception criteria enumerated in the August 12<sup>th</sup> guidance.

**The Assistant Secretary for Consular Affairs made determinations that authorize consular section chiefs to approve national interest exceptions under PP10052 to applicants whose travel falls within one of the categories described in the Assistant Secretary’s determination.**

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<sup>19</sup> See National Interest Exceptions to Presidential Proclamations (10014 & 10052) Suspending the Entry of Immigrants and Nonimmigrants Presenting a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, available here: <https://travel.state.gov/content/travel/en/News/visas-news/exceptions-to-p-p-10014-10052-suspending-entry-of-immigrants-non-immigrants-presenting-risk-to-us-labor-market-during-economic-recovery.html>

- a. Please advise whether consular officers are required to obtain approval of NIEs from DOS headquarters in situations which fall outside the enumerated criteria from the August 12<sup>th</sup> guidance.

Officers do not have authority to approve NIEs for case that fall outside of the enumerated criteria.

- b. Given that a few months have passed since the August 12<sup>th</sup> guidance was issued, has DOS granted any NIEs in situations that fall outside the specifically enumerated August 12<sup>th</sup> criteria? Would DOS be willing to provide examples of those situations, or be willing to update its August 12<sup>th</sup> guidance?

No, posts have not submitted cases falling outside the stated NIE criteria for the Department's consideration.

- c. The August 12<sup>th</sup> guidance indicates that H-1Bs who are returning to resume employment with the same employer are eligible for a NIE. In making this determination, the consular officer is advised to refer to Part II, Question 2 of the approved Form I-129 to determine if the applicant is continuing in "previously approved employment without change with the same employer." Please confirm that this example was meant to be merely illustrative and that those who have yet to file for an extension of their valid H-1B status may be eligible for an NIE. Similarly, please confirm that someone with an approved amendment and/or extension of stay based upon a change of previously approved employment with the same employer would also be eligible for this exception.

Applicants seeking to resume ongoing employment in the United States in the same position with the same employer and visa classification would be covered by the exception. Consular officers can refer to Part II, Question 2 of the approved Form I-129 to determine if the applicant is continuing in "previously approved employment without change with the same Employer." In addition, individuals who were inside the United States on the date the Proclamation went into effect are not subject to the Proclamation..

#### *Process for Requesting an NIE under PP 10052*

- d. It is AILA's understanding that individuals who believe they qualify for an exception to PP 10052 should follow the instructions on the post's website with regard to how they should communicate their perceived eligibility to the post, and that typically this is done by communicating with the scheduling vendor or to a post-designated email address. Is this accurate?

If an applicant believes they meet an exception, they should follow the instructions on the post's website.

- e. It is AILA's understanding that at certain posts, a scheduling vendor may be responsible for assessing potential eligibility based upon criteria provided by the post. Is that the case? If so, given that the list of national interest exceptions is non-exhaustive, to the

extent that an individual believes they qualify based for the exception based on compelling facts that do not fall within the specifically enumerated criteria, what is the best way to ensure that the request is reviewed by a consular officer rather than a scheduling vendor?

All requests for national interest exceptions are reviewed by a consular officer.

## Presidential Proclamation (PP) 10014

### *Expired Immigrant Visas Due to COVID-19 Global Pandemic*

- f. The PP 10014 suspension of entry by certain immigrants does not apply to individuals in possession of an immigrant visa (IV) on April 23, 2020. Other pandemic-related travel restrictions or risks associated with international travel may preclude travel to the U.S. before the visa expires. Will State issue a new visa to such persons if their IV expires?

The applicant should contact the Immigrant Visa Unit of the U.S. Embassy or Consulate that issued the visa. The applicant does not need to file a new petition with USCIS, but may need to submit a new application (DS-260) and pay another immigrant visa application processing fee. In addition, the applicant may need to submit new supporting documents, such as a new medical examination and police certificate. The applicant should be prepared to return the unused, expired visa and visa package (if applicable). Requests to reissue or replace visas are considered on a case-by-case basis, and all applicants are required to re-establish their eligibility; there is no guarantee that the applicant will receive a new visa.

- g. Pursuant to INA 221(c)(1) an immigrant visa can have a maximum validity of up to six months with some exceptions. INA 221(c)(3) authorizes replacement of an immigrant visa where the original visa was not used due to circumstances beyond the control of an immigrant provided that the individual remains eligible for an immigrant visa and the applicant pays a new application fee. Please confirm:
- a. Does DOS still consider the COVID-19 global pandemic to be “circumstances beyond the control of an immigrant” such that a new immigrant visa can be issued upon payment of a new fee?

Yes, potentially, but requests to reissue or replace visas are considered on a case-by-case basis, and all applicants are required to re-establish their eligibility; there is no guarantee that the applicant will receive a new visa.

- b. Given that INA 221(c)(3) limits replacement of a visa to the fiscal year within which the original visa was issued, assuming that visas remain available under the applicable quota, what process will be available to individuals who were unable to obtain a new visa or enter the U.S. on or before September 30, 2020?

Applicants should follow the process set forth in the answer to Question 51.

- c. Will DOS delegate to each consular post authority to create application processes for individuals whose immigrant visas expired during the health-related travel restrictions? If so, is it anticipated that posts will provide on their website guidance defining its procedures for requesting replacement of an immigrant visa?

The guidance for requesting replacement of an immigrant visa is set forth here: <https://travel.state.gov/content/travel/en/us-visas/immigrate/national-visa-center/immigrant-visas-processing-general-faqs.html#NQ> Applicants should contact the Immigrant Visa Unit of the U.S. Embassy or Consulate that issued the visa.

- d. Assuming that replacement visas will be issued, will replacement of expired immigrant visas be prioritized over issuance of new immigrant visas?  
Posts that process immigrant visa applications will prioritize Immediate Relative family members of U.S. citizens, including intercountry adoptions, fiancé(e)s of U.S. citizens, and certain Special Immigrant Visa applications, which may include the issuance of replacement visas for these visa categories.
- e. Will determinations of continuing eligibility for an immigrant visa pursuant to INA 221(c)(3)(B) be limited to verification of previously submitted documents and examination of replacement documents, such as medical examinations that expired while waiting to travel to the U.S.? If not, what will be included in the scope of review?

Requests to reissue or replace visas are considered on a case-by-case basis, and all applicants are required to re-establish their eligibility for the visa. There is no guarantee that an applicant will receive a new visa.

- f. We understand that State has reaffirmed that visa foils can be reprinted where underlying documents have not expired. Given the current level of difficulty obtaining new documents from closed government offices, would State be willing to reprint visa foils if underlying documents (other than medical examinations) have expired, assuming that there are no indications of national security or law enforcement risks, or otherwise extend the validity period of these documents in order to be able to process these visas?

If a required document cannot be procured without causing the applicant or a family member actual hardship, other than normal delay or inconvenience, the consular officer may consider it unobtainable, and permit the applicant to submit other satisfactory evidence in lieu of such document or record, per 22 CFR 42.65(d).

*Reconsideration of IVs denied after PP 10014 Suspension of Entry by Certain Immigrants expires or is terminated*

h. 20 STATE 41350 (10)<sup>20</sup> discusses appointment scheduling of IV cases which were denied based on PP 10014 and indicates that “(o)nce the proclamation is no longer in effect, an applicant . . . may be considered for reconsideration of the refusal.” Please confirm:

a. Do IV applications denied based on PP 10014 stay at post or are they returned to NVC?

IV cases that have been interviewed and denied based on PP 10014 stay at post.

b. What is the anticipated process for reconsideration following termination of PP 10014?

If a case is only refused based on PP 10014; once the Proclamation is no longer in effect, consular officers may overcome the refusal. If any documents have expired, the applicant will be required to take action to submit new records such as a new medical as well as provide the passport if a case is otherwise able to be approved.

c. Are these cases being held in a “pending demand” file for automatic approval after the proclamation’s restrictions end (and assuming their priority date remains current for final action)?

There is no “automatic approval”; applicants whose cases were denied due to PP 10014 will need to be determined to be eligible for their visas after PP 10014 expires.

d. Will these cases be automatically reinitiated by either NVC or post? If not, please confirm if there are any actions that attorneys or applicants will need to affirmatively take to prompt reconsideration.

No action will be required on the part of the applicant or attorneys.

*Procedure for Requesting an Exception to PP 10014*

i. What is the procedure for requesting an NIE to PP 10014?

Applicants who are subject to PP 10014, but who believe they may qualify for a national interest exception or other exception, should follow the instructions on the nearest U.S. Embassy or Consulate’s website regarding procedures necessary to request an emergency

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<sup>20</sup> See DOS Provides Administrative Record Materials in 2020 Immigration Bans Litigation, available here: <https://www.aila.org/infonet/department-of-state-provides-administrative-record>

appointment and should provide specific details as to why they believe they may qualify for an exception. While a visa applicant subject to one or more Proclamations might meet an exception, the applicant must first be approved for an emergency appointment request, and a final determination regarding visa eligibility will be made at the time of visa interview.

- j. Should documentation in support of an IV NIE be presented to the NVC or at the visa interview? Are consular officers required to accept documentation presented at a visa interview in support of a national interest exception request? If not, why not?

Applicants who believe they may qualify for a national interest exception should contact the nearest U.S. Embassy or Consulate to request an emergency appointment and should provide specific details as to why they believe they may qualify for an exception, which may include documentation in support of the request. Consular officers may request documentation in support of a national interest exception before, during, or after the visa interview, or otherwise accept documents at the interview, as needed.

### **Blanket L Adjudications**

On June 16, 2020 the Foreign Affairs Manual (FAM) guidance for adjudication of blanket L applications was amended for the second time in three months.

- k. Please confirm, what is the evidentiary standard that must be satisfied to demonstrate eligibility for blanket L classification?

Under INA 291, the burden of proof is on the applicant to establish to the satisfaction of the consular officer that he or she is eligible for blanket L classification.

- l. The FAM refers to the phrase “clearly approvable” but it has no statutory, regulatory or common law definition. 9 FAM 402.12-7(E)(a). The FAM instructs that applications should be denied if officers have “any doubt” which suggests a higher evidentiary standard than “beyond a reasonable doubt” used in criminal proceedings. 9 FAM 402.12-7(E)(b). Is that the intended standard of review based on the current wording in the FAM?

The standard is the satisfaction of the consular officer. An officer who has a reasonable basis for believing that a particular applicant has not provided sufficient proof that his or her application should be approved may refuse the application.

- m. Under 9 FAM 402.12-7(F)(c) if a blanket L application is denied a petitioner must file an individual petition indicating the reason for the blanket L denial. Yet, 9 FAM 402.12-7(F)(b) suggests that the reason given for refusal may consist of three letters “NCA.” Will a separate written explanation of the perceived documentary deficiency be provided to petitioners or applicants?

Consular officers are aware of the general refusal procedures for all NIV applications

outlined in 9 FAM 403.10-3, and which apply to blanket L applications. The procedures outlined in 9 FAM 402.12-7(F) are intended to highlight the additional steps officers must take when adjudicating blanket L applications, on top of the general procedures and requirements.



## **Appendix A: Diplomacy Strong Phases**

### **IVs Phases Zero to One:**

- Suspension of routine visa services, with only mission critical or emergency IV processing, which may include prioritizing cases that are eligible for exceptions to PP 10014
- SQ and SI SIVs
- Certain employment-based healthcare professionals
- Age-outs
- Other emergencies or mission critical situations as determined by post management.
- Prior refusals under INA 221(g) that are excepted under PP 10014
- Replacement visas for applicants whose IVs were valid on April 23, 2020.

### **IV Phase Two:**

- Posts starting to reopen; require 2 months pre-planning for NVC to schedule appointments
- Prioritize Immediate Relatives (IRs) excepted from PP 10014
- IRs should be processed according to their percentage of backlog
- Posts can accept NIV cases while waiting for their IV appointments to be scheduled

### **IV Phase Three:**

- Resumption of routine services for all IVs (those excepted under PP 10014 if still in effect)
- Posts start to reschedule cancelled appointments, including EB-5s, IVs for members of the Armed Forces and their families, and Ks: cancelled appointments, age-outs, humanitarian cases, SIVs, V92s/V93s, SB-1s, and other cases as raised by VO, IRs/CRs, Ks (4-month validity so posts may need to follow revalidation guidance), followed by family-based preference cases, employment-based preference cases and DV cases excepted under PP 10014.

### **NIV Phases Zero to One:**

- Emergency and mission-critical NIVs only
- Exceptions to the proclamations may be a guide for what constitutes emergency/mission critical
- Interview waiver cases, as resources and public health conditions permit
- Completing prior 221(g) denials that do not require a new interview

### **NIV Phase Two:**

- Open routine appointments for F/M/J (excepted from PP 10052; use expedite appointment queue)
- Open E, I, O, P appointments for urgent cases if resources permit

### **NIV Phase Three:**

- Continue to prioritize emergency/mission critical cases
- F/M/J (excepted from PP 10052)
- E/I/O/P
- Routine B-1/B-2 are lowest priority absent emergency circumstances