

**Department of State/AILA Liaison Committee Meeting  
April 11, 2019**

**Introduction**

The Department of State's Visa Office (VO) welcomes the opportunity to discuss issues of mutual concern with AILA's Department of State Liaison Committee. VO shares the view that these discussions can provide clarity to the public on current immigration policies and procedures, which is a benefit to all involved.

**Public Charge Issues**

1. Please confirm that when a public charge finding is made under INA §212(a)(4), that consulates should provide a notice to the applicant of the basis of the finding in order to allow the applicant the opportunity of overcoming the determination.

**Yes, consistent with INA 212(b) and 22 CFR 42.81 and 41.121, officers are required to give the applicant a statutory basis for the refusal in writing.**

AILA Follow Up: How much detail must consular officers provide when refusing an applicant for public charge?

Answer: Consular Officers must provide the basis for the refusal, here that the refusal is because the consular officer is not satisfied that the application overcomes public charge. Although they may provide more detail than that, but are not required to.

More AILA Follow Up: Will you amend your guidance based on the DHS public charge regulation?

Answer: We will review the regulation when finalized and determine if amended guidance is warranted.

More AILA Follow Up: Have you considered whether to suggest consular officers could provide more detail about the reason why an applicant is refused for public charge? Perhaps an amended refusal form?

Answer: We have not had that discussion, but will take it under consideration.

2. Please confirm that an applicant for an employment-based immigrant visa under the employment third preference unskilled workers category is not, *per se*, subject to a 212(a)(4) public charge finding.

**Third preference unskilled workers are not exempt by statute or regulation from a public charge finding. INA section 212(a)(4)(D) does not require an affidavit of support for all employment-based immigrant visa cases, but does not exclude any**

from the public charge grounds of inadmissibility. Each applicant will be evaluated consistent with applicable law, regulations and guidance.

3. How does the National Visa Center (NVC) prefer that Form I-864, Affidavit of Support documents be submitted electronically? Would the NVC prefer that supporting documents such as Form W-2 be submitted separately, or together in one document? Are there any circumstances in which the NVC would prefer documents be submitted separately?

Documents submitted electronically in support of the Affidavit of Support should be submitted separately according to document type (i.e. Form W-2, tax transcripts, I-864As) or will be rejected.

AILA Follow Up: It is difficult to submit documents electronically.

Response: We have added instructions, including instructional videos, to assist.

4. On July 10, 2018, 9 FAM 302.8-2(C)(4) was amended to state that sponsors must submit with Form I-864 a photocopy of an IRS generated transcript of the most recent tax return filed by the sponsor prior to the signing of the Affidavit of Support. The Department of State's [website](#) contradicts this provision and indicates that those who complete Form I-864, I-864A, or I-864EZ must submit an IRS tax transcript from the most recent tax year. Alternatively, the website indicates that petitioners may submit a copy of a tax return from the most recent tax year. AILA has received multiple reports that consulates are requiring production of tax transcripts rather than allowing applicants to present a signed copy of a tax return. Please confirm:
  - a. Per the July 10, 2018 version of this provision of the FAM, the Department of State's policy is that either a copy of a tax return **or** an IRS transcript is acceptable when submitted alongside a Form I-864, Affidavit of Support, absent factors that raise doubts about the accuracy of the tax return copy. If yes, would the Department of State be willing to remind consular posts of the permissible documents to support an I-864 Affidavit of Support?

The Department will accept either a copy of a tax return or an IRS transcript. However, note that NVC strongly recommends the submission of tax transcripts since they typically provide the information necessary for an evaluation of completeness of the Affidavit of Support and result in more efficient processing.

AILA Follow Up: Noted inconsistent wording regarding what is required ("must" versus "may").

- b. Would State be willing to further amend 9 FAM 302.8-2(C)(4) to state, in relevant part: "...submit with Form I-864 a photocopy of the most recent income tax return, or the Internal Revenue Service (IRS)-generated transcript for the most recent tax filing year ...", in order to clarify for stakeholders what documents are acceptable?

The Department will take the suggestion under consideration.

- c. U.S. citizens living abroad have an automatic extension until June 15<sup>th</sup> to file their taxes, and can apply further for an extension to October 15<sup>th</sup> of a given year to allow for filing in their country of residence. Can State please confirm that expectations under this FAM provision for “most recent income tax return” will be adjusted accordingly for these individuals?

The Department expects sponsors to submit tax records related to the most recently filed tax return. If no tax return has been filed for the current tax year due to extensions, sponsors should submit records for the most recent tax year available. If you believe that sponsors who have obtained extensions for filing related to the most recent tax year, an explanatory statement may be helpful.

AILA Follow Up: How can individuals make known to NVC the reason why the most recent tax year is unavailable?

Answer: Please provide a clear note of explanation along with the I-864.

5. During our October 2018 meeting, the Department of State noted that it would consider whether to supplement or revise guidance concerning documentary requirements related to §212(a)(4) found on travel.state.gov on the “Immigrant Visa Process; Step 4: Collect Financial Documents” and “I-864 Affidavit of Support FAQs” webpages. Is there an update on the status of this additional and/or revised guidance?

We have not updated that guidance and there have been no changes in the documentary requirements, as a result of the 2018 FAM update on public charge eligibility and no changes to the referenced sections of travel.state.gov.

6. Based on data provided by the Department of State, it appears that there were four times as many §212(a)(4) refusals in [2018](#) as compared to [2017](#). However, approximately the same proportion of initial refusals were overcome in both years. Thus, it appears that the total number of applicants unable to overcome the initial refusal rose significantly in 2018. Please confirm:
  - a. Aside from guidance provided in the FAM, has State issued new or additional guidance in 2018 concerning how consular officers should evaluate eligibility under §212(a)(4)?

State hosted a series of webinars in 2018 and 2019 for consular officers reviewing the update to public charge eligibility, but other than the FAM update in 2018, there has been no additional formal guidance released on how to evaluate eligibility under §212(a)(4).

- b. Would it be possible for State to release statistics showing refusals issued by each consular post, as well as the reason for these refusals?

The Department is not currently considering providing statistics of refusals on a post by post basis.

## Presidential Proclamation 9645

Presidential Proclamation 9645 (PP 9645) imposes restrictions, limitations and exceptions on the entry to the U.S. of foreign nationals from 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, as well as the waiver process.

### 7. PP 9645 Waiver Approvals

- a. What is the process for notifying consulates of the approval of a PP 9645 waiver request?

The Proclamation permits consular officers to grant waivers and authorize the issuance of a visa on a case-by-case basis when the applicant demonstrates to the officer's satisfaction that:

- a) Denying entry during the suspension period would cause undue hardship;
- b) His or her entry would not pose a threat to national security or public safety of the United States; and
- c) His or her entry would be in the national interest.

Consular officers determine whether an applicant qualifies for a PP 9645 waiver, therefore there is no process for notifying consulates of the approval of a PP 9645 waiver request. If the consular officer determines, after consultation with consular management and the Visa Office, and after any required administrative processing, that an applicant does not pose a threat to national security or public safety and has met the other two waiver requirements, a visa may be issued. There is no separate application for a waiver.

- b. What is the average amount of time that it takes to send notice of a waiver approval to a consulate?

As noted in 1b, the consular officer determines whether or not an applicant qualifies for a PP 9645 waiver. Therefore, no notice of a waiver approval is sent to a consulate.

- c. What is the average amount of time that it takes for consulates to issue a visa to the recipient of a PP 9645 waiver approval?

The time varies for a broad range of reasons and will vary based on the individual circumstances of each case.

- d. To date, how many waiver requests have been approved?

As of January 31, 2019, 2,673 applicants were cleared for waivers after a consular officer determined the applicants satisfied all criteria and completed all required processing.

- e. What is the number of non-exempt visa applicants subject to PP 9645, who have received a visa following approval of a waiver request?

As noted in 1d, as of January 31, 2019, 2,673 applicants were cleared 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.

Additional input: VO noted that a congressional report will be forthcoming and updated data regarding waivers will be published on TSG.

#### 8. Supporting Documentation for PP 9645 Waivers

- a. Has State provided guidance to consular posts regarding the acceptance of materials supporting a waiver request and, if so, is State willing to make this guidance public? If no such guidance has been provided to consular posts, would State consider issuing guidance concerning the acceptance of supporting documents in this context?

The Department has provided guidance to consular officers on how to assess waiver eligibility. The Department has no plans to make its internal guidance public at this time.

- b. During the October 2018 liaison meeting with AILA, State explained that visa applicants seeking a PP 9645 waiver are afforded the opportunity to explain why they qualify for a waiver and that consular officers may ask for additional information to determine eligibility. Based on this discussion, AILA understands that when consular officers find that applicants satisfy the first two prongs of the three-step waiver analysis, the officers are not required to request or accept additional documents. However, could State clarify the following for applicants that have not been determined to have met the first two prongs:
  - i. Are consular officers required to accept and review supporting documentation presented by a visa applicant before denying the waiver request?

Consular officers automatically assess each applicant's eligibility for an exception or a waiver at the time of the interview. If additional supporting information is deemed necessary for the consular officer to determine eligibility, the consular officer will request it.

- ii. What steps are available to visa applicants if their applications are refused under 212(f) following a refusal by the Consulate to accept waiver supporting documentation?

NIV applicants may submit a new application and explain to the consular officer in the interview the reasons that they believe that they are now eligible for a waiver. IV/DV applicants should clearly and succinctly articulate in their communications with consular officers how they believe that their circumstances support their waiver eligibility.

- c. Please explain the reasoning underpinning [guidance](#) provided by the DOS to consular officers, dated January 23, 2018, indicating that home country or third country conditions should not be a factor to be considered when evaluating undue hardship for a visa applicant requesting a PP 9645 waiver?

The Department does not comment on its internal guidance.

9. Consular Post Communication with Individuals Impacted by PP 9645 Represented by Legal Counsel

AILA members report that consular officers at posts in Abu Dhabi and Dubai routinely tell their clients impacted by PP 9645 that legal counsel is not required when navigating the waiver process. While AILA acknowledges that legal counsel is not mandatory, some visa applicants who are impacted by PP 9645 prefer to be represented by legal counsel and retain the right to hire legal counsel. Would DOS be willing to remind consular officers that an applicant's decision to retain legal counsel is not appropriate subject for comment?

Consular officers are permitted to inform visa applicants that the retention of legal counsel, while ultimately the decision of the applicant, is not required. It is our understanding that officers are neither encouraging nor discouraging applicants from seeking representation; they are merely informing them that they are not required to have representation to obtain a waiver.

## J-1 Exchange Visitors

10. The Department of State's [website](#) was recently updated with substantially increased processing times for J-1 waiver applications. These new processing times are likely to have a detrimental impact on J-1 exchange visitors, particularly those seeking to change status, physicians urgently needed in medically underserved areas, and those

seeking exceptional hardship waivers. Many exchange visitors are unable to extend their J-1 status after starting the waiver process and the timely processing of their waiver requests is critical not only to their ability to maintain lawful status, but to the U.S. employers and family members who depend on them. Will State please confirm:

a. What led to the substantial increase in posted adjudication times?

The increase in the waiver processing times is due to both a realignment of VO staffing for other priority projects and an increase in the volume of the waiver applications received.

b. Have the resources been allotted to adjudicate J-1 waivers changed?

The Visa Office has realigned staff consistent with the overall Department reduction of personnel begun in January 2017.

c. How many staff are assigned to the Waiver Review Division (WRD) and how many of those staff are attorneys?

We do not share staffing information, but believe the current staffing is appropriate, in light of resource constraints. WRD staff also are supported by by Visa Office attorneys and the Office of the Legal Adviser, as needed.

d. Have there been any changes to the adjudication process of J-1 waivers within WRD?

No, there have not been any changes to the Waiver Review Division adjudication process.

e. Have there been any changes, of which State is aware, to the adjudication process related to USCIS processing of J-1 waiver requests?

The Department is not aware of any changes that are related to the USCIS processing of the J-1 waiver requests, but refer you to USCIS.

f. Would a change in available resources or policies allow a return to the previous processing times?

The Department is constantly reviewing our policies and procedures to gain efficiencies. We do not expect any changes to available resources. We encourage applicants to be aware of our processing times and to apply sufficiently early as to allow us to process their case within the needed time frame.

11. At the October 2018 meeting with AILA, State indicated that it reached out to the Department of Health and Human Services regarding the possibility of recommending a J-1 waiver under INA §214(l) on behalf of a physician who will

be treating patients remotely via telemedicine. Can State provide an update on the results of this initiative?

We do not have a final determination on permitting a waiver under Section 241(l) for a physician who would treat patients remotely – or whether that would be acceptable to the Department of Health and Human Services. You might consider reaching out directly to HHS for its views.

12. Current USCIS policy allows for the filing of an application for adjustment of status with just a copy of a Department of State recommendation letter for a J-1 waiver. Would NVC be willing to forward immigrant visa application files to consular posts while the applicant is awaiting their final J-1 waiver approval notice?

NVC does not routinely hold immigrant visa cases pending a waiver of 212(e). These cases will be scheduled for interview if otherwise documentarily complete.

13. In order to apply for a J-1 home country residence waiver case number, the DOS website requests the A-number of the individual seeking a waiver. However, the DOS online form only recognizes A-numbers with 8 digits, and not those with 9 digits. When attempting to enter an A-number with 9 digits, an error message is received. Members have utilized workarounds including, leaving the section blank, and handwriting the correct A-number on the hard copy of the application. Would State be able to address this software limitation, or alternatively confirm that a hand-written entry on the application is acceptable?

A hand written entry on the DS-3035 will be acceptable.

14. There are instances when an Exchange Visitor seeking a J-1 waiver is unable to obtain copies of their IAP66 or DS-2019 forms, or where the copies are so old that they are illegible. Additionally, AILA has received reports that program sponsors will often decline to provide a copy of Form DS-2019 when the 3- year retention period has elapsed, even though they may still access the electronic forms in SEVIS and provide that to the Exchange Visitor for inclusion with the Form, DS-3035. Lastly, in some cases the IAP66/DS-2019 may pre-date the SEVIS system such that no record is available at all to the program sponsor. Given the issues described above, please address the following:
  - a. Would the Bureau of Educational and Cultural Affairs (ECA) be willing to direct J-1 program sponsors to make a copy of the inactive DS-2019 record available to Exchange Visitors for the purpose of understanding whether they are subject to INA 212(e)?

We would refer you to ECA. It is our understanding that in order to direct sponsors to make a copy of the inactive DS-2019 available to Exchange Visitors, the Department would have to formally propose this step by adding it to a regulation (Subpart A).



- b. In situations where there is no SEVIS record of the J-1 program documentation and the IAP66/DS-2019 is either lost or illegible, is this data accessible to State in another way?

No, there are no additional resources available to obtain information regarding the SEVIS record, and the lost or stolen IAP-66/DS-2019 forms.

- c. Please confirm that the WRD will accept and process a J-1 waiver request based upon as much documentation as the J-1 Exchange Visitor has available to them, in the event that they do not have access to a complete copy of all IAP66/DS-2019 forms.

In the event that the J-1 Exchange Visitor is unable to obtain copies of their IAP-66/DS-2019 forms a letter from their previous sponsor will suffice to complete the adjudication of the waiver applications.

AILA Follow Up: What information should the letter contain?

Answer: Program number, funding source, and program dates.

- 15. AILA has learned that there is a moratorium on designating new J-1 exchange visitor programs across categories. Can the ECA please explain the motivation for this moratorium? Does ECA have a plan as to when it may start accepting new designation requests?

ECA has deferred designating new exchange visitor programs across some categories. On September 26, 2017, in response to the Executive Order on Buy American and Hire American issued April 18, 2017 (E.O. 13788), ECA/EC imposed a temporary deferral of decisions on requests for program expansions in four private sector categories – Camp Counselor, Intern, Trainee, and Au pair. This deferral included new applications for designation decisions. The Department has not made a decision about lifting the deferral on these categories.

AILA Follow Up: What is the status of the no objection regulation?

Answer: We have kept it on the Unified Agenda, but have had to prioritize other efforts, so have no update on timing or substance.

## **Prudential Revocation**

- 16. During the October 2018 liaison meeting, AILA brought examples of DHS refusing extension or change of status requests for beneficiaries whose visas had been prudentially revoked. State indicated that it would consider updating the FAM to clearly indicate that prudential revocation of a nonimmigrant visa becomes effective only upon departure of a nonimmigrant from the United States. However, AILA

members continue to report adverse benefits determinations from USCIS and enforcement actions by ICE. In the absence of a clearly articulated policy statement from State, these actions are extremely difficult to overcome.

- a. Please confirm that State's policy position remains that prudential visa revocation is effective only upon the departure of a nonimmigrant from the U.S.

State has authority to revoke visas with immediate effect and exercises that authority as warranted, even when the subject is in the United States, but its general policy position remains that prudential visa revocations will be made effective upon the subject's departure from the United States, when the subject is physically present in the United States at the time of revocation.

- b. Please confirm that State is still in dialogue with DHS on this issue.

State is still in dialogue with DHS on this issue.

- c. Based on previous discussions with State, AILA understands that DHS is in accord with State's policy position that prudential visa revocation is effective only upon departure. Is State aware of any change in DHS policy concerning its position on when prudential visa revocation becomes effective?

As noted, some revocations are made effective immediately, even when the subject is in the United States, but State is not aware of any change in DHS policy concerning its position on when visa revocations are effective.

- d. Please confirm that State will indicate its policy in the FAM in order to provide clarity on this issue.

State is working on FAM updates to provide clarity on the effective date of revocations.

AILA Follow Up: The attorneys claimed that the revocation notices they've seen do not state when the revocation is effective, if the alien is in the United States.

Response: VO will consider stating in the notice to the alien when the revocation is effective if the alien is in the United States (immediately or upon departure).

### **DS-160/DS-260 Time Out Issues**

17. AILA members continue to report ongoing challenges with submitting Form DS-160 and DS-260 in terms of the forms timing out when open for even short periods of time. A common example is the system timing out when an individual has many addresses to be listed. Would State be willing to re-visit this technical issue?

A time-out problem with the forms DS-160/260 was identified in January 2019, and a fix was implemented at that time. Our technicians are reviewing this issue again. If a new problem is identified, they will work to correct it.

### **INA §212(a)(6)(B)**

- b. In the October 2018 meeting with AILA, State indicated it would consider adding guidance about INA §212(a)(6)(B) *in absentia* removals for children to the FAM. Please confirm the status of this initiative.

Guidance at 9 FAM 302.9-3 was updated on April 1, 2019.

AILA Follow Up: Although the FAM was updated on April 1, it does not mention *in absentia* or children.

Note: VO is considering whether to specifically mention *in absentia* removals involving children.

### **Visa Processing and Adjudication**

- 18. Processing times for immigrant visas vary from 2 to 8 months. This is understandable given fluctuations in workload at individual consular posts. Is State willing to compile and publish average wait times for immigrant visa processing by post, similar to what is done for nonimmigrant visa processing?

The Department does not have any plans to compile or publish IV processing time information.

- 19. USCIS currently estimates processing time for I-601 applications to be in excess of one year. Beneficiaries of each such qualifying application are required to remain abroad while their waiver applications are pending. Beneficiaries of approved I-601 applications each have a U.S. citizen or resident alien relative experiencing extreme hardship due to the beneficiary's absence from the U.S. Exceptionally lengthy delays have been reported at the U.S. consulate in Ciudad Juarez. Please confirm:

- a. Does State have a target timeframe within which immigrant visa application appointments should be scheduled following approval of an I-601 application?

No we do not.

- b. Is there any step that a beneficiary of an I-601 waiver is required, or recommended to take to facilitate the scheduling of the immigrant visa interview?

The applicant should contact the U.S. Embassy or Consulate where their case is pending.

- c. Please confirm if State is able to develop a system to minimize the wait for a visa appointment following approval of an I-601 waiver.

The Department has no plans to create such a system.

AILA Follow Up: Several members reported months-long delays and lack of response from posts in trying to schedule a comeback IV interview for posts that use direct scheduling.

Response: VO agreed to accept, via LegalNet, emails from individuals who have an approved I-601, and who have tried repeatedly (3 attempts over 90 days) to schedule a comeback IV interview, with no response. LegalNet agreed to accept these to potentially facilitate communication with post, but cannot assist in scheduling the appointment.

20. In what circumstances may a consular officer require someone who has previously filed and received approval for an I-601A waiver to request a I-601 waiver at his or her immigrant visa interview? Must a consular officer consult with USCIS or other agencies before imposing such a requirement?

Per DHS regulations, an I-601A is automatically revoked if the alien is found ineligible under any additional ground of inadmissibility. In addition, an I-601A is revoked if the petition is withdrawn or if the applicant attempts to reenter the United States without being inspected and admitted or paroled. Consular officers will consult with other agencies as needed under the same guidelines as any other IV application.

## NVC Processing

21. According to the [NVC website](#), if a U.S. citizen has petitions for their spouse and children concurrently in process at the NVC, a second affidavit of support (AOS) fee is not required. However, NVC reportedly sends a fee bill for each family member. If the bill is not paid, then the DS-260 screen is not available.

- a. Please confirm whether it is necessary to pay a separate AOS fee for each dependent of a U.S. citizen.

The DS-260 is dependent on the IV fee required for each person. This is a different fee than the affidavit of support fee.

- b. If it is not necessary to pay a separate AOS fee for each dependent of a U.S. citizen, please confirm the current process for requesting NVC to allow the immigrant visa application process to continue in the absence of such payments.

It is not necessary. The system recognizes grouped cases for which an additional AOS fee is not required. Questions about technical issues related to NVC processing may be raised directly with NVC staff via <https://nvc.state.gov/inquiry>.

- c. What is the current processing time for NVC to issue fee bills after receiving the petition from USCIS?

As of April 1, 2019, NVC completes case creation between 1 and 24 business days after receipt from USCIS, depending on visa type. Upon completion, notifications and instructions are sent to case parties, including those related to fee payment where applicable.

22. Can State please confirm the correct procedure for payment of a fee bill for a Form I-601A provisional waiver for a beneficiary who is currently in the U.S. and is following to join the principal. It appears that NVC will not issue a fee bill in such cases because the immigrant visa file is now at the consulate as a following to join case. Please confirm:

- a. In this scenario, is the consulate required to return the immigrant visa file to the NVC in order to allow for payment of the fee bill?

If the case has been adjudicated or the principal applicant on a case has been issued a visa, the file may not be returned to pre-processing status at NVC and the fee must be paid to the consular cashier.

- b. Alternatively, is the NVC able to issue a fee bill for an I-601A provisional waiver for a follow to join beneficiary after the immigrant visa file has already been sent to the consulate? If so, what is the procedure for making such payments?

As noted above, follow-to-join beneficiaries in immigrant visa cases that have been adjudicated must pay fees to the consular cashier.

23. Are all consulates now utilizing the CEAC system for receiving documents required to support immigrant visa applications?

Yes, but only in part. I-130s are the only petition type processed fully electronically. Legacy cases that were current in paper form prior to a post moving to full electronic processing also continue in paper form.

24. While the CEAC document submission process generally works well, it appears that occasionally uploaded documents are rejected for reasons that are unclear. Is it possible for NVC to add a short annotation in the rejection notice noting the reason, so that the problem can be more efficiently addressed?

NVC functionality in this area will be improved with planned updates to related software.

AILA Follow Up: When a principal and derivative are of different nationalities, processing at different posts, what is the best way to normalize the process?

Response: An I-824 comes with additional cost, but is the best way to normalize the NVC pre-process.

### Visa Denials Based on “Reason to Believe” Drug Trafficking

25. An immigrant visa application may be denied based on a "reason to believe" the applicant is involved in drug trafficking. Absent the disclosure of the factual basis for such a finding, applicants have no ability to refute erroneous information. Are consular officers required to disclose to the applicant the facts that form the basis of this finding?

Guidance at 9 FAM 403.10-3(A)(2) and 504.11-3(A)(1) provides that consular officers must provide all visa applicants and their attorney of record a written refusal explicitly stating the provision of law under which the visa is refused. Per INA 212(b)(3), a consular officer is not required to provide notice of a denial to an applicant who is found ineligible under INA 212(a)(2) or (3). Consular officers are encouraged to orally inform the applicant of both the legal provision under which the visa is refused and the factual basis for the refusal, in most cases. Per 9 FAM 403.10-3(A)(1), explanations of why a visa could not be issued need not be lengthy.

AILA Follow Up: Would you consider changing guidance to require the consular officer to notify the application of event that triggered the ineligibility finding?

Response: VO is not inclined to pursue that recommendation.

### Unlawful Presence

26. Please confirm that an individual does not accrue unlawful presence under the following conditions:
- As of the date the individual files an application for Temporary Protected Status, when the application is ultimately approved;
  - As of the date an individual is granted stay of removal by ICE; and
  - As of the date an individual is granted deferred action (e.g., for U visa situations).

Guidance at 9 FAM 302.11-3(B)(1)(b) defines periods of authorized stay during which unlawful presence will not accrue. Paragraph 7 of that section provides that for aliens seeking or granted Temporary Protected Status (TPS), the period a prima facie eligible application for TPS is pending is considered a period of authorized stay, provided the application is ultimately approved, and the period of time during which the TPS grant is in effect. Paragraph 8 provides that for aliens granted deferred action, the period during which deferred action is authorized is considered a period of authorized stay. The FAM does not reference stays of removal, but notes that the list is not exhaustive and instructs officers to seek an advisory opinion if they encounter a situation not specifically addressed in the FAM guidance. We agree that an alien does not accrue any unlawful presence during the period of the grant of the stay of removal.

27. On August 9, 2018, USCIS issued a final Policy Memorandum that directed its adjudicators to deem nonimmigrants in F, J and M status who engaged in an “unauthorized activity” to have begun accruing unlawful presence from the date after the activity began, or as of August 9, 2018, whichever was later, even in the absence of any affirmative finding by a judge or adjudicator. The FAM was similarly revised at section 9 FAM 302.11-3(B)(1)(d). Members report that, based on this new guidance, consular officers have found that visa applicants, who previously participated in Curricular Practical Training (CPT) programs that were approved by the applicants’ school and properly registered in SEVIS, are ineligible for admission under 212(a)(9)(B) on the grounds that they accrued more than 180 days of unlawful presence because—unbeknownst to the students, the school or the CPT employers—the CPT should not have been granted and this was deemed a status violation under the new guidance. Please confirm that an F, J or M nonimmigrant who remained present in the U.S. while participating in a CPT or OPT program approved by the applicants’ school and properly registered in SEVIS, in absence of any other adverse factor, is not accruing unlawful presence.

The guidance at 9 FAM 302.11-3(B)(1)(d) provides that aliens who previously were in F, J, or M status will start to accrue unlawful presence the day after the applicant ceased engaging in the activities for which he or she was in the United States in F, J, or M status, such as when the alien “stopped attending school, engaging in authorized practical training, or participating in (an) exchange program.” In the scenario described it does not appear that an alien who is participating in a CPT or OPT program approved by the alien’s SEVP-approved educational institution would start to accrue unlawful presence if the applicant continued engaging in the approved status-compliant activity without other violations of student status.

## **Consular Processing**

28. AILA continues to receive reports concerning the U.S. Consulate in London requiring a copy of an O-1 principal’s visa before issuing related O-2 visas. There are several reasons why an O-2 beneficiary may require an O-2 visa, prior to an O-1 being issued to the principal. As essential support personnel, O-2 beneficiaries may need to be in the United States to build the stage or scout locations for principal shooting.

- a. Please confirm that an O-2 visa may be issued before an O-1 principal’s visa.
- b. Additionally, the O-1 principal’s visa may be valid for an additional period of time or they may currently be in the United States and thus be filing an O-1 extension petition. Please confirm that if an O-1 worker is present in the U.S. maintaining O-1 status, that an O-2 visa may be issued to supporting personnel while the O-1 extension is pending and before the extension is approved.

Per 9 FAM 402.13-4(B) an O-2 alien must be petitioned for in conjunction with the services of the O-1 alien to whom he or she provides support and is not entitled to work separate and apart from the O-1 alien. The CFR specifically mentions that pre-production is allowed in the case of an O-2 alien. However, the O-2 “classification does not entitle him or her to work separate and apart from the O-1 alien to whom he or she provides support.” 8 CFR 214.2(o)(4)(i). Just as the USCIS requires the O-2 alien be petitioned for in conjunction with the services of the O-1 alien, the Department procedures require consular officer be satisfied that the O-2 alien will be accompanying or joining an alien who has a valid O-1 visa or who is maintaining O-1 status, and satisfied the alien will enter the U.S. to support that O-1 alien.

This is somewhat akin to the relationship between a H4 and a H1B visa holder. Per 9 FAM 402.10-14(B), “when an alien applies for an H-4 visa to follow to join a principal alien already in the United States, you must be satisfied that the principal alien is maintaining H status before issuing the visa. There will be certain circumstances when the principal does not have a valid visa (i.e., the principal changed to H-1B status in the United States, extended status without seeking a new visa, or is exempt from visa requirements) but is nevertheless maintaining status.” Consular Officers have a similar duty to ascertain that the O-1 alien has a valid O-1 visa or is otherwise maintaining O-1 status before issuing the O-2 visa holder. The USCIS adjudicator’s field manual says at section 33.4, “a beneficiary may be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may engage in employment only during the validity period of the petition.” Accordingly, visa adjudicators should ensure that an O-2 visa applicant will be providing support to an O-1 alien during the period of the petition is valid.

29. It was recently announced that only three posts in China will accept H and L visa applications: Beijing, Shanghai and Guangzhou. Can applicants apply at any of these three posts or will there be any geographic restrictions based on an individual’s province of residence?

There are no restrictions regarding where applicants may appear for an interview. An applicant can schedule appointment with Embassy Beijing, or Consulates General Guangzhou or Shanghai.

30. AILA has received reports that consular officers frequently request that petition based nonimmigrant visa applicants present a copy of either the petition filed with USCIS, or the Form I-797 approval notice. Please confirm that State’s policy remains that neither document is required at visa interviews, unless explicitly required for a particular case. Acknowledging that individual cases may require the production of these documents, would State be willing to remind officers of this policy?



Copies of the approved petition or Form I-797 Approval Notice are not required at the time of interview to confirm petition approval. Consular officers verify Form I-129 petition approval through databases in the CCD. Confirmation through the CCD is the only sufficient evidence for a visa adjudication.

However, consular sections will frequently request that applicants provide the Form I-797 approval notice in order to schedule an appointment with a consular section for an interview. This provides the section with another means by which to associate an applicant with an approved petition during pre-processing. Please note that Blanket L-1 applicants are required to provide copies of the I-129S at the time of interview.

AILA Follow Up: CBP in Canada has begun refusing to admit Canadian blanket L-1s who have a prior L. AILA asked if posts in Canada would process otherwise-visa-exempt individuals for blanket L-1s.

Response: VO was unaware of the issue and agreed to look into it.

31. AILA members report a wide range of challenges with submitting Form DS-5535, Supplemental Questions for Visa Applicants. The process for submission varies by consulate, with some accepting paper applications and others refusing paper applications. In addition, some consulates require submission in the form of a PDF, while Saudi Arabia, requires a previous version of Microsoft Word. Recognizing that consulates have different operating conditions, please confirm that applicants required to present Form DS-5535 may do so in any electronic or paper format.

Applicants required to present the Form DS-5535 must submit it in accordance with the procedures set out by the specific post.

32. AILA members are again reporting that the U.S. Consulate in Manila is requiring employment-based immigrant visa applicants to provide a letter from the intended employer confirming that the salary be paid is equal to or greater than the current prevailing wage as determined by DOL, rather than the wage rate certified by the DOL in the Foreign Alien Labor Certification process. Please confirm that the certified wage rate is the amount that should be requested. If yes, would State be willing to remind U.S. consular authorities in Manila of the appropriate legal standard?

VO has reached out to U.S. Embassy Manila regarding your concerns. Consular managers in Manila will work with staff members to ensure compliance with FAM guidance in these cases.

## Scope of Review

33. During the October 2018 meeting with AILA, State indicated that LegalNet reviews inquiries involving 214(b) refusals that raise questions about legal standards and that

it would consider LegalNet's capacity to review questions about applicant eligibility for the requested visa classification, for visa classes other than B. What is the status of this initiative?

LegalNet continues to review inquiries involving 214(b) refusals on a case-by-case basis. LegalNet reviews each inquiry and the associated visa case to determine whether there is a question of law that requires additional review. Once this determination is made, LegalNet provides a response if appropriate, given the scope of LegalNet's role. LegalNet, like the Visa Office as a whole, does not review factual determinations made by the adjudicating consular officer. The majority of 214(b) refusals that LegalNet substantively review involve questions about the applicant's qualification for the visa classification sought, particularly with respect to nonimmigrant treaty-trader (E-1) or treaty-investor (E-2) cases.

### **Suspension of Visa Processing at U.S. Consulate in Caracas, Venezuela**

34. Following the designation of the Embassy in Bogota as the post to process immigrant visa applications for citizens of Venezuela, please confirm the following:

- a. What is the process available to follow up on visa applications filed in Caracas that are subject to 221(g) administrative processing?

Cases that were pending with Embassy Caracas at the time that routine consular services were suspended have been transferred to Embassy Bogota. Applicants and petitioners can email [IVBogota@state.gov](mailto:IVBogota@state.gov) for case status inquiries.

- b. Has State issued any guidance to other posts in the region concerning acceptance of nonimmigrant visa applications filed by citizens of Venezuela?

Venezuelan non-immigrant visa applicants may apply at any Embassy or Consulate in the world, provided they are physically present in the consular district. Posts in the region are aware of this policy.

- c. Have any additional resources been allocated to other posts in the region to allow acceptance of a greater number of nonimmigrant visa applications from Venezuelan citizens?

Yes, some consular staff already have been temporarily reassigned to Embassy Bogota and other actions are being considered.

- d. Would State be willing to request that consular posts in the region publish on their websites their policy regarding third country immigrant and nonimmigrant visa applicants?

We are encouraging posts that articulate restrictions regarding third-country national NIV applicants on their websites to update their language to include Venezuelan applicants.

### **Communication with Consular Posts: Public Facing E-mail Addresses**

35. AILA appreciates the Department of State's recognition that consular email communication with the public is often necessary to address unique questions or situations that are not addressed in general FAQs on the consular website. AILA further appreciates the Visa Office encouraging consular posts in the past to have a readily accessible public-facing email address.

Following the brief discussion on this topic during the October 2018 liaison meeting, AILA's DOS Liaison Committee undertook a study over the winter of 2018-19 to determine which consular posts have public-facing email addresses and how accessible those addresses are to the members of the public. The study yielded several interesting facts. Of note, some of the largest consular posts in the world (i.e. Mexico, Brazil, France, Italy, etc.) were unreachable by email. The study also raised the following questions:

- a. At the time of the survey, approximately 230 of the 270 posts surveyed appear to have public facing email addresses. As most consular posts have public-facing email addresses, would the Visa Office consider encouraging the remaining posts to offer a public-facing email address?
- b. Accessibility of these email addresses varies across posts. Many posts that have public facing email addresses, do not have them readily accessible, by placing them, for example, on the "Contact Us" page. For example, London is one of the busiest posts in the world and has an extensive website, but it is rather difficult to locate its public facing email addresses. After one clicks "Contact Us", it leads to more "Contact Us" buttons, and an FAQ page. To find the public facing email address, applicants must navigate all the way to the bottom of the FAQ page. Would it be possible for VO to direct posts to move public-facing email addresses to the "Contact Us" page for each post or embassy so that it can be more easily located?
- c. Among the posts that have public-facing email addresses, the format of the email addresses differs greatly. For example, some consulates are arranged by section (i.e., "NIV" or "IV"), followed by the name of the city, and @state.gov. Others, have the city, followed by the section, and then @state.gov. These stylistic discrepancies make it very difficult to guess an email address when it is not readily available. Would State consider creating a standard format for email addresses convention and rolling it out to posts?
- d. Some consulates that do not currently allow for direct email communication have an electronic visa inquiry form. In AILA's experience, the fields of the form do not fit every situation. Is there a reason why certain posts prefer this method over a public facing email address?

The Visa Office works diligently to provide informative, consistent material on our websites. We encourage applicants to explore these resources prior to contacting an embassy or consulate with case-specific questions, ensuring our resources are first allocated to adjudication.

Travel.state.gov's "U.S. Visa" page provides general information applicable to all posts (i.e., determining the appropriate visa type, application and fee instructions). It also includes a link facilitating applicants' contact with all U.S. embassies and consulates – [www/usembassy.gov](http://www.usembassy.gov) – where applicants can find public-facing email addresses for case-specific inquiries. The contact information provided depends on the services provided, the visa processing system at post, and whether or not post is supported by General Support Services (GSS).

For GSS posts (175 posts in 120 countries), responses to general visa inquiries are sent through the GSS provider. The GSS provider contact information is easily accessible on the U.S. embassy or consulate website, as well as the GSS visa appointment service website. GSS providers ensure inquirers receive timely responses, while allowing consular units to dedicate their time to adjudication and review of case specific questions.

The "Visa" page found on each U.S. consulate and embassy website is standardized and 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 contact information to our applicants.

Should AILA provide the list of 40 posts appearing not to have public facing email addresses, the Visa Office will follow-up. We acknowledge, however, that some posts provide an email contact form, rather than an email address. The form is designed to manage and sort inquiries to better ensure efficient responses from the public inquiry unit.

## **Visa Annotations**

36. AILA members report a wide range of practices in visa annotation. Various provisions in the FAM instruct, or recommend, annotating B visas with information relating to the basis for classification as a visitor (i.e. 9 FAM 402.2-5(D); 9 FAM 402.2-5(F); 9 FAM 402.2-4(B)(5)). CBP has confirmed in prior liaison meetings with AILA that it finds annotations to be helpful information for its officers at ports of entry. Given the benefits in making annotations and that the FAM encourages it, would State be willing to remind posts of these policies?

All adjudicators receive instruction in proper use of annotations during their training. Apart from instances where annotations are required due to the intended purpose of travel or other reasons, officers have the discretion to annotate visas with information that may be relevant at the port of entry. However, we are also cognizant of the fact that such annotations can be counterproductive, in particular

for longer-term, multiple-entry B visas that may be used for a variety of different types of travel. It is also worth noting that, while helpful, annotations are not the only information available to CBP about the visa adjudication.

37. Pursuant to 9 FAM 302.2-7(B)(3), where a finding of Class “B” or no physical or mental condition is determined by CDC, a visa applicant is no longer required to undergo a repeat medical examination for future visa applications. Although AILA understands that CCD will contain notes on the CDC findings and the FAM does not specifically require visa annotation in this situation, would State consider amending the FAM to include this as a recommendation?

9 FAM 302.2-8(D)(2) states that officers are only required to annotate nonimmigrant visas for applicants with Class A (with approved waiver) or Class B, TB and Class B, leprosy, non-infectious, medical conditions. We will consider amending the FAM to include additional language stating that an annotation is not required for nonimmigrant visa applicants for “no class” or any of the other Class B conditions.

### **Visa Issuance for Cubans After Major League Baseball Agreement with Cuba**

38. Has the Major League Baseball (MLB) agreement with Cuba, signed on December 19, 2018, had any impact on visa issuance for baseball players of Cuban nationality? Have any steps been taken to alert posts of this agreement and its terms for visa adjudication? Given the limited visa operations at the U.S. Embassy in Cuba, have provisions been made to adjudicate such applications at other posts?

We are aware of an agreement between Major League Baseball and the Cuban Baseball Federation. We refer you to MLB for further details of that agreement. Cuban nationals, like nationals of other countries, may apply for visas at any U.S. embassy or consulate around the world, but must be physically present in that country. The only nonimmigrant visa applications processed at U.S. Embassy Havana are diplomatic or official (category A or G) visas, or extremely rare emergency cases in which the applicant has a life-threatening illness requiring treatment in the United States. Posts worldwide have been informed that they should accept Cuban visa applicants when possible due to the limited visa operations at the U.S. Embassy in Havana.

### **H-2 Visas for Countries Removed from H-2A and H-2B Programs**

39. Recently, the Philippines was removed from the list of designated countries eligible to participate in the H-2A and H-2B program. Has removal from the list of approved countries for H-2A and H-2B visas had any effect on visa applications for such petitions that were approved before the Philippines was removed from the list?

Consular officers can still issue H-2 visas to Philippine nationals who are the beneficiaries of I-129 petitions USCIS approved before the Philippines was removed from the H-2 eligible country list on January 18, 2019. In fact, since that date, Philippines nationals have been issued hundreds of H-2 visas. Many of these individuals were beneficiaries of petitions approved before January 18, 2019.

40. AILA understands that USCIS may allow a national from a country not on the list of eligible countries for the H-2A and/or H-2B visa to be named as a beneficiary of an H-2A or H-2B petition based on a determination that such participation is in the U.S. interest. Once an individual from a non-approved country has an H-2A or H-2B petition approved by USCIS, is there anything further documentation that must be submitted to a consulate post demonstrating that such participation is in the U.S. interest in order to demonstrate eligibility for the classification?

No, the “U.S. interest” determination is purely evaluated by USCIS at the time of petition filing. The manner in which consular officers adjudicate H-2 applications submitted by the nationals of the Philippines based on a petition approved by USCIS remains unchanged.

### **Treaty Visa Issues**

41. When a 214(b) refusal is made for a treaty investor visa application on the grounds that the applicant failed to satisfy the eligibility requirements for the E-2 visa category, are posts required to specify which element(s) the applicant did not satisfy?

No. INA 212(b)(1) requires officers to provide applicants with timely written notice that states the determination and lists the specific provision or provisions of law under which the alien is inadmissible. While this section explicitly applies only to applicants refused under INA 212(a), the Department’s guidance at 22 CFR 41.121 and 9 FAM 403.10-3(A)(1) extends this notice requirement to any NIV refusal. The FAM also instructs officers to inform the applicant of both the section of law and the factual basis for the refusal (with certain exceptions). Written notice that the applicant failed to satisfy the eligibility requirements for the category and is thus refused under INA 214(b) would be sufficient to meet this requirement. A detailed description of the required elements for E-2 classification is not required, but is typically provided orally to the applicant at the time of visa refusal.

If an attorney believes that the applicant does in fact satisfy the eligibility requirements, he or she may write to Legal Net.

42. Per 9 FAM 402.9-6(A)(b), investor applicants do not require a DS-156E; however, this appears to conflict with posts’ instructions to submit a DS-156E for investor applicants. See for example the following pages for [Mission France](#) and [Mission United Kingdom](#). Please clarify whether investors are required to submit a DS-156E and, if not, could State remind posts that DS-156E is not required?

9 FAM 402.9-6(A)(b) specifies that E-2 investor applicants and E-2 derivatives are not required to submit a form DS-156E, but all E-2 essential employees are required to submit a form DS-156E. The Department has asked Mission France and Mission United Kingdom to clarify on their respective websites.

## **9 FAM 402.9-6 REQUIREMENTS FOR E-2 TREATY INVESTOR VISAS**

### **9 FAM 402.9-6(A) Evaluating E-2 Treaty Investor Applications**

b. E-2 investor applicants and E-2 derivatives do not need to submit a form DS-156-E. All E-2 essential employees and managers are required to submit a DS-156-E, together with the DS-160. The DS-156-E must be scanned into each applicant's record.

43. AILA understands that the Form DS-160E is still under construction. Is there a target date for its release? Once released, will it be a stand-alone application or triggered by responses entered on the DS-160?

The Department does not have and is not aware of a Form DS-160E.

44. 9 FAM 402.9-2(e) directs consular officers to an E visa portal for available training resources and adjudication tools. Can State please elaborate on this portal, and confirm if the information contained may be (whether all or in part) released to the public?

The E Visa Portal is a resource to support consular officers abroad. The information includes training materials, such as case studies and webinars, and process management tips. These materials are not appropriate for FAM guidance, but are helpful to ensuring officers have resources available to them to appropriately adjudicate an E NIV application.

45. Current business practices enable an individual or team of individuals to manage a significant volume of trade without the need to incur the cost of maintaining business offices. The FAM is silent on whether physical premises are required. Please confirm that there is no requirement to demonstrate business offices have been leased or purchased to demonstrate eligibility for a treaty visa.

While there is no explicit requirement that an E-1 visa applicant have physical premises in which to conduct business, the burden is on the applicant to demonstrate that he or she qualifies for the classification sought. A trader or particularly a team of individuals without a physical business office in the United States could face difficulty in demonstrating to the satisfaction of the consular officer that the enterprise is engaged in substantial trade. It could be even more difficult for an E-2 applicant without a business

office to demonstrate that the enterprise is more than marginal. Further, both E-1 and E-2 applicants must demonstrate that engaging in substantial trade or developing and directing a qualifying enterprise is his or her primary purpose of travel to the United States.

AILA Follow Up: Would VO consider a new policy to treat the “nationality” of venture capital or private equity investments tantamount to publicly traded companies?

Response: VO will evaluate this, but cannot promise that it will be a priority.

### **Visa Waiver Program Refusal Statistics**

46. The Department of State website includes a document entitled *Calculation of the Adjusted Visa Refusal Rate for Tourist and Business Travelers Under the Guidelines of the Visa Waiver Program*. This document provides yearly statistics on refusal rates by nationality, with statistics available from FY2006. Members find this information invaluable as it identifies high risk B visa applications by nationality. In reviewing the document, it appears that statistics for FY2018 are not available. Similarly, it appears that the link for FY2017 is broken. Can State please address the broken link, and provide an update on statistics for FY2018?

Thank you for bringing this matter to our attention. We recommend that your members utilize the following link for the document: <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/refusal%20rate%20language.pdf>

We have verified that all of the links within the document are functional, including the FY 2018 statistics. When you click on the item, it appears as a .pdf file in the bottom left of the computer screen, which then needs to be opened.

### **USCIS International Operations Closure**

47. Based on news media reports, AILA understands that the Department of Homeland Security is planning to close all international offices of U.S. Citizenship and Immigration Services (USCIS). What impact, if any, does State anticipate this move will have on the demand for State Department resources at consular posts in the countries where USCIS currently maintains offices?

CA has formed a working group with the relevant offices to review and assess workload implications, relative to USCIS closures. CA and USCIS will work together to ensure that closures do not negatively impact services for applicants and that the work will either be able to be conducted electronically or absorbed by consular staff overseas.

AILA Follow Up: How will the exceptional circumstances cases work?



Response: USCIS will determine whether a case involves exceptional circumstances and, if so, will permit overseas adjudication.

End