

Department of State/AILA Liaison Committee Meeting June 9, 2022

The Department of State's Office of the Assistant Legal Adviser for Consular Affairs (L/CA), in coordination with the Visa Office in the Bureau of Consular Affairs, appreciates the opportunity to host these semi-annual meetings with the American Immigration Lawyers Association (AILA)'s Department of State Liaison Committee to provide insight and clarity concerning the Department's current immigration policies and procedures. Following are Department responses to issues raised by AILA in anticipation of this meeting. Consistent with past practice, after the meeting, we will publish the Agenda questions and answers on Travel.State.Gov, subject to any revisions we deem appropriate based on discussions at the meeting.

Update on DOS's Consideration of Resuming Stateside Visa Revalidation

1. In a policy brief entitled, [*Reopening America - How DOS Can Reduce Delays and Eliminate Backlogs and Inefficiencies to Create a Welcoming America*](#), and in a meeting with White House staff, AILA raised several common-sense proposals to address the backlog. AILA greatly appreciates that, since then, DOS has (1) expanded interview waivers to include certain first-time applicants and (2) reauthorized for an indefinite period (added to FAM) NIV interview waiver eligibility within 48 months of visa expiration. Thank you for these initiatives!

When AILA met with DOS in January 2022, DOS stated that Assistant Secretary Rena Bitter was driven to consider all initiatives which might alleviate the visa backlog. DOS also confirmed that it is actively considering "other measures in consultation with the Officer of the Legal Adviser," including reinstating stateside visa processing (visa revalidation) to encompass additional visa categories beyond the diplomatic categories." Is DOS continuing to review the stateside visa issuance proposal? Are there any updates that you can share?

Response: The Department continues to evaluate measures and initiatives that may assist in alleviating the visa backlog.

Effectiveness of NIV Interview Waiver Program in Alleviating Consular Backlogs

2. In our January 2022 meeting, AILA applauded the expansion of the NIV interview waiver program as part of DOS's plan to alleviate visa backlogs caused by the pandemic but expressed concerns that since its implementation was within the discretion of consular posts/officers, the expansion may not have its full intended effect of alleviating backlogs. At the meeting, DOS responded that many posts had enthusiastically embraced the initiative, including posts which previously had never participated in the interview waiver program (e.g., Lagos), and noted that it would continue to encourage the program's use and monitor adoption trends. Members have reported that some posts have still not implemented the interview waiver program. Is there any data available that DOS can share

about the adoption rate by posts of the NIV interview waiver initiatives and/or its impact on visa backlogs?

Response: The vast majority of posts worldwide use at least one interview waiver authority to process cases without an interview. We estimate 30 percent of all nonimmigrant visa applicants could benefit from interview waiver and not need to visit our waiting rooms.

Numerical Controls Division

3. Following Charlie Oppenheim's retirement late last year, AILA understands that an Acting Director is leading the Numerical Controls Division. Has DOS posted the position yet? If so, has someone been selected to replace Charlie in this role?

Response: The Visa Office does not comment on HR processes.

4. Given that consular posts are opening up and issuing IVs again, it seems likely that there will be significantly fewer unused family-based preference numbers added to FY 2023's employment-based visa number allocation than in the past two years. Based upon current data and processing trends, can the Numerical Controls Division please comment on how many family-based immigrant visa numbers it anticipates may go unused? What steps is DOS taking to ensure that immigrant visa numbers are fully utilized?

Response: The Visa Office cannot offer a reliable estimate at this time, as posts continually adjust their processing capacity per the established COVID protocols in their respective host countries; however, the Department has issued more family-based preference visas in the first half of FY 2022 than it did in all FY 2021.

5. AILA appreciates that DOS publishes monthly IV and NIV visa issuance statistics. IV statistics are currently published in a manner that requires significant manual calculation to determine the number of visas used each month in the various immediate relative and preference categories. Would DOS consider publishing aggregated data to enable the public to more easily see the number of immediate relative and preference number usage each month? Would DOS consider publishing data in a dashboard format that would allow the data to be presented in multiple formats?

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

6. AILA members' clients (especially EB-2 and EB-3 Indian and Chinese-born clients) are worried that the Final Action Dates may retrogress in October 2022. AILA and the public no longer receive information through the Chats with Charlie YouTube event. It is now more important than ever to open up avenues of communication with the public about what movements Numerical Controls is predicting in the final action dates and dates for filing. Is DOS's Public Outreach group considering any public engagement over the coming months to address this desire for information? Can Numerical Controls consider including

predictions more frequently in the Visa Bulletin as we approach the end of FY22?

Response: The Bureau of Consular Affairs will continue to engage with the public through its Travel.Gov social media platforms and is constantly evaluating the most effective ways to communicate with the public.

7. Has DOS issued guidance to posts on the reauthorization of EB-4 Certain Religious Workers and EB-5 Regional Centers, and have posts resumed scheduling IV interviews for these categories?

Response: Yes, posts have been advised that both programs are authorized and existing applicants may be processed.

E Visa Questions

8. In January 2022, AILA expressed concerns that some posts have stopped processing E visas, including Ankara, Bogota, and Bridgetown. DOS indicated that E visa processing was likely to improve through a combination of resumption of pre-COVID-19 processing and knowledge-sharing, which would allow personnel at other posts or in the United States to process E visa cases remotely. However, severe delays continue to be a problem. For example, the Embassy in Santiago, Chile posted that it is suspending E-1 and E-2 processing; Dublin, Ireland is posting backlogs of 8 months for E-2 applications for previously registered companies and 12 months for new registrations; and E-1 and E-2 applications in Toronto, Canada are delayed over 300 days. Also, Amman, Jordan informed an AILA member that it was not accepting new E visa applications, only renewals. As E visa processing remains extremely delayed and, in some cases, has stopped--at great expense to companies and individuals seeking to contribute to the U.S. economy--please confirm the following:

- a. What steps has DOS taken to creatively utilize its resources to address the situation?

Response: Exercising authority under INA section 222(h)(1)(C)(i), the Secretary determined that interview waiver for certain NIV applicants renewing in the same classification within 48 months of the prior visa's expiration is in national interest. This authority potentially is available for E visa renewals; however, while the Department encourages overseas posts to use this authority where appropriate, posts are primarily responsible for implementing that authority and we do not have information on the extent to which it has been exercised in this context. The Kentucky Consular Center also remains able to assist post with prescreening for cases, if domestic verification is needed to assist with adjudication.

- b. Are consulates sufficiently staffed to adjudicate E visa cases at pre-pandemic levels? Many of the embassies and consulates that historically adjudicate the greatest volume of E visa cases have resumed with processing.

Response: More generally, the Bureau of Consular Affairs continues to work with the rest of the Department to rebuild lost capacity and to fill positions left vacant during the pandemic. Despite the easing of the funding challenge, the processes for hiring, security clearances, training, and deployment for an overseas consular officer to arrive at an assignment takes over a year. Staffing resources are directed to posts with the most urgent needs, such as those processing Afghan Special Immigrant Visas, supporting Ukraine efforts, and high-volume immigrant visa posts.

9. Recently updated 9 FAM 402.9-10 serves as a centralized source and has an extensive list of the treaties and laws containing trader and investor provisions in effect between the U.S. and other countries (CT:VISA-1297: 06-04-2021) with footnotes on peculiarities in each treaty. Section 402.9-10 is followed by specific instructions on the required forms, and a suggested checklist of documents with tabs is provided. The FAM also refers officers to the E Visa Portal on CAWeb for training. Most recently, the FAM was updated to include a provision at 9 FAM 402.9-7 (D) on the E-Visa Company Registration Programs/Databases, specifically discussing the “utility and efficiency” of this program by consular posts that implement this program. In its totality, these combined resources are a comprehensive center of information for all foreign service officers regardless of their overseas post assignments. Moreover, DOS regulations at 22 CFR 41.101 (1)(ii) permit a consular officer to take jurisdiction over a foreign national’s nonimmigrant visa (NIV) application based on physical presence or as directed by DOS through the Deputy Assistant Secretary of State for Visa Services. Given the centralized nature of the resources and authorization to adjudicate cases in other countries, has DOS taken steps to train officers in multiple locations and jurisdictions to handle E visa applications from jurisdictions in which consular posts have been incapable of setting E visa appointments? If steps are being taken, please provide the specifics.

Response: Individual applicants, of course, can apply at any consular section at which there is appointment availability and in a country in which they are present. We also note that Transplanting an entire operation to another locale, is not always the most efficient way to process visas or reduce backlogs. As posts work through their two-year backlogs and the pandemic recedes, we are hopeful posts will return to normal operations and provide the full range of services that were provided prior to the COVID-19 pandemic.

EB-5 RIA Implementation

10. Has DOS liaised with USCIS regarding the visa set-asides for rural, high unemployment, and infrastructure projects established by the EB-5 Reform and Integrity Act of 2022 (RIA)? If so, how will these visas be allocated?

Response: DOS continues to liaise with USCIS on the implementation of the EB-5 Reform and Integrity Act of 2022 (RIA). The set-aside categories will be allocated visas as outlined by the RIA.

- a. When will DOS and USCIS publish joint guidelines on the visa set-asides created by the RIA? Will DOS add notes to the Visa Bulletin to provide guidance on the new set-asides?

Response: As noted above, DOS continues to liaise with USCIS on implementation of the RIA. The Visa Bulletin describes the new set-asides.

11. What process will DOS and USCIS adopt moving forward on newly filed cases to clearly designate I-526 petitions that fall into set-aside categories so that DOS can clearly distinguish which petitions receive the set-asides?

Response: New EB-5 visa categories were established to distinguish between the various set-aside categories as well as whether the I-526 petition is for a regional center project or a non-regional center project.

What process will DOS/NVC and USCIS adopt moving forward on approved I-526 petitions to clearly designate I-526 petitions that fall into one of the set-aside categories so that DOS can process them in accordance with the reserved visa set-asides for rural, high unemployment, and infrastructure categories?

Response: DOS cannot speak to the petition approval process and designation by USCIS, but DOS will process the application per the approved EB-5 visa category.

12. Have USCIS and DOS worked out a process to identify pending or approved petitions that may qualify for reclassification (or petition portability) under the RIA's new reserved visa set-aside rules? For example, if there is a Chinese national with a pending or approved I-526 petition filed under the 5th preference Unreserved (I5 and R5) category with a backlogged January 2017 filing date now seeking reclassification under the identical EB-5 Preference Set Aside: (Rural – 20%) category do DOS and USCIS plan to allow upgrades or reclassification of a prior rural-based unreserved regional center case to a rural-based reserved set-aside? This needs to be done in accord with DOS' general policy to give priority to those petitions that have already been filed, particularly when the definition of rural under the prior statute is identical to that under the RIA.

Response: Pending petitions filed prior to the enactment of the EB-5 RIA will be adjudicated under the law in effect at the time of filing. Petitions approved prior to the enactment of the EB-5 RIA will retain the classification set by USCIS at the time of approval.

13. Before the recent Congressional reauthorization of the EB-5 regional center program, AILA members reported being told that the NVC had no way of distinguishing between EB-5 regional center and non-regional center cases and, as a result, was not sending any EB-5 cases to post for adjudication.

- a. What efforts is DOS taking to ensure that these categories are separately reportable in its systems?

Response: NVC is able to distinguish between regional center and non-regional center applications and continued to process non-regional center applications during the lapse in the former regional center program. Since the passage of the RIA, new EB-5 visa categories were established in order to track all EB-5 categories throughout the application life cycle.

- b. Are there plans to classify EB-5 cases that were already approved and are pending at the NVC and consular posts?

Response: As stated above, petitions approved prior to the enactment of the EB-5 RIA will retain the classification set by USCIS at the time of approval.

- c. Can DOS confirm whether NVC is sending both types of EB-5 cases (regional center and non-regional center) to post for adjudication and interview?

Response: Yes, NVC is processing all EB-5 cases that were grandfathered-in by the EB-5 Reform and Integrity Act.

NVC Issues

14. NVC recently started requiring applicants to submit documents that are not required under the FAM or are inappropriate for that individual's particular circumstances. For example, contrary to 9 FAM 504.4-4(B), many IV applicants without a criminal record are receiving requests for police certificates for countries in which the individual previously resided for less than a year. Similarly, many IR/CR-1 applicants whose U.S. spouse has been regularly resident outside the U.S. and who, per 9 FAM 601.14-6 d, may be relying on assets to establish I-864 Affidavit of Support eligibility, are being told they must provide W-2s for periods of employment abroad and a joint sponsor. Can VO/LA please confirm whether there have been any changes to its policy regarding these requirements, and if not, could NVC please examine its processes and train its officers on these issues?

Response: NVC follows the guidance in 9 FAM 504.4-4(B) for collecting police certificates for countries in which individuals previously resided for a year. However, there is a known issue with CEAC requesting police certificates for some applicants who lived in a country for less than one year. Case parties should review <https://nvc.state.gov/document> for police certificate requirements. If you are not required to submit a police certificate that CEAC is asking for, instead submit an explanatory comment. Also, please refer to known issues at <https://nvc.state.gov/troubleshooting> for known issues and statuses.

NVC's processes for Affidavit of Support eligibility remain the same per 9 FAM 601.14-6 d. NVC will request W-2s for periods of employment if a sponsor submitted a copy of a tax return (1040) regardless of the filing status or if the sponsor submitted an original tax transcript and is using only his/her income to meet the poverty guidelines. Please provide NVC additional detail for any case where this procedure

has not been followed to enable supervisory review and additional training if necessary.

15. NVC recently declined to accept G-28s for U.S. barred attorneys where bar admission into a U.S. state was listed. The NVC states that they cannot accept the G-28 for someone who "...is practicing law outside the U.S. or U.S. territory." NVC quotes 8 CFR1.1(f) and states that NVC "can only add attorneys who are admitted to practice in the U.S." Can NVC please advise the contractors from LDRM that a U.S.-qualified/U.S.-barred attorney who happens to work outside of the U.S. are eligible to be designated as the attorney of record for an applicant?

Response: As part of its standard process, NVC follows the procedure in 9 FAM 603.2-9 for adding U.S. barred attorneys to cases. Please provide NVC any additional information you may have about the petitions with declined G-28s to enable supervisory review and additional training if necessary.

16. AILA members have seen multiple examples where USCIS approved a petition and the priority date is current, but no NVC case number has been issued, preventing the case from moving forward as no fee can be paid, no DS-260 can be prepared, and no documentation can be submitted to the NVC. Attorneys have followed up multiple times through the appropriate attorney form online, requesting the case number to be issued, and sent emails to the NVC research box. Unfortunately, responses from the NVC continue to state that "(I)t can take up to six weeks for an approved petition from USCIS to arrive at the NVC..." How can AILA members obtain a case number for cases where it has been more than six weeks or longer since the petition approval and efforts following the previously advised protocols have not seemed to resolve the issue?

Response: NVC is unable to create a case or issue a case number until it receives an approved petition from USCIS. There is a known issue with some approved petitions transferring from USCIS to NVC. USCIS has made changes to their system and is working with DOS to fix the remaining petitions. If it has been more than sixty (60) days after receiving an I-797 Approval Notice from USCIS, and NVC did not receive your client's approved petition, we recommend emailing NVCResearch@state.gov for assistance. Please provide a copy of your client's I-797 Approval Notice and any additional information you may have about the petition. NVC will work with USCIS on your client's behalf to locate the petition and have it transferred to NVC.

17. 9 FAM 504.4-4(B) includes an exception to the general rule that police certificates are required from any country of prior residence in which an IV applicant has lived for one year or more since attaining the age of 16. The exception reads: "If an applicant has presented a **comprehensive police certificate** fully meeting the requirements of 22 CFR 42.65(c) from the applicant's country of principal residence, you need not require a police certificate from other places of former residence, provided the applicant presents other satisfactory evidence of good conduct." What does the term "comprehensive police certificate" mean?

Response: Documents that meet the requirements of 22 CFR 42.65(c) are considered “comprehensive police certificates,” if issued by the police or other appropriate authorities and include all reporting information entered in their records relating to the alien.

CEAC Issues

Updating Form DS-260

18. Once Form DS-260 is submitted, it cannot be changed. Applicants submit DS-260s at the NVC stage for the case to become documentarily qualified and then wait for one to two years for an interview. In some cases, the information on the form becomes outdated during this time. However, given that the document is locked and there is no option to submit a new DS-260, please confirm how DOS prefers applicants update the information included to reflect updates from after submission but before the IV appointment?

Response: Our systems are not designed to allow a DS-260 to be reopened after it has been received and reviewed by NVC. Reopening would take the case out of the intended processing path and further, if NVC were to re-open a DS-260 after a case was documentarily complete, the case would lose its ‘spot in line’ for scheduling, as a new documentarily complete date would be applied to the case. Instead, once the case has been scheduled the post can be informed that there are changes that need to be made to the DS-260, and post can reopen the document to allow updates to be made through the CEAC portal. Likewise, the visa applicant can and should inform the officer at the interview of any information on the form that has become outdated so that the form can be annotated or reopened to be amended by the applicant, as appropriate (see 9 FAM 504.5-3(A) for more information).

Nomenclature Protocols for Uploading Documents to CEAC

19. It is in AILA’s, NVC’s, and the Consulates’ best interest to locate documents quickly and efficiently, and we would welcome tips on how to make this easier and more efficient for DOS. AILA recognizes that only a few characters of the uploaded file names are visible. When uploading documents to CEAC where there is a specific CEAC classification, does DOS have a preferred naming convention to facilitate recognition of the documents? Similarly, does DOS have a preferred naming convention for documents uploaded into the “other” category?

Response: The filenames that the case parties enter are not displayed in our systems - only the document type is displayed. What is most important is that the case parties:

- Upload multipage documents as one file.
- Upload documents ‘right-side’ up. See nvc.state.gov/scan for best way to scan documents to help NVC review efficiently.
- Select the appropriate document type label in CEAC.

- Upload only documents that are required for the case (i.e. no pictures or superfluous documents). See nvc.state.gov/fin and nvc.state.gov/document for document requirements.
- Ensure documents are uploaded under the right sponsor or applicant name.

Immigrant Visa Appointments

20. In January 2022, DOS noted that “(p)rocessing of immediate relative and K visa applications, and family preference cases consistent with Congressional direction remains a priority.” Have there been any changes to these priorities since January?

Response: Since the tiered prioritization for immigrant visa processing was rescinded in November 2021, the Department does not dictate any prioritization; however, posts are encouraged to strive to process immediate relative and K visa applications, and family preference cases, consistent with Congressional direction. NVC continues to schedule documentarily complete IV cases, working with posts to adjust for interview capacity.

21. The process of scheduling IV applications for interviews seems to be moving forward very slowly, especially for family-based applicants from the Middle East and North Africa who were affected by the travel restrictions for Muslim/African countries. DOS website posts monthly updates regarding how many applications are interviewed each month.

- a. Can data be provided regarding how many applications are waiting to be interviewed at each post?

Response: The Visa Office is not able to provide a post-by-post breakdown of documentarily complete cases. Please refer to <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visas-backlog.html>, which will be updated with current numbers every month.

- b. Is prior guidance related to prioritizing the processing of applications negatively affected by the EOs still in effect?

Response: Yes, posts that have a significant number of applications previously refused under Proclamations (P.P.) 9645 and 9983 have been reminded as recently as April 2022 to continue prioritizing these applications. IV applicants previously refused under P.P. 9645 or 9983 who want to reopen their application should contact the embassy or consulate where their application was refused to determine next steps for moving their case forward.

Administrative Processing

22. Members are reporting an uptick in administrative processing. AILA realizes that national security concerns may drive Security Advisory Opinions (SAOs) and that DOS is not at liberty to discuss SAOs or even indicate what triggered the SAO. Based on AILA's observations, much of the "administrative processing" may not be SAOs, but administrative delays in issuing the visas. Can DOS please comment on whether posts are experiencing delays in administratively issuing visas (not SAO-related) due to dual workstreams of visa interviews and nonimmigrant visa interview waiver cases? Being able to distinguish between "administrative processing" that is an SAO and a delay in printing the visa would be very helpful in terms of setting expectations. Would it be possible for posts to make this distinction and indicate that they are "X" weeks behind in printing the visa?

Response: Unfortunately, the Department is not always able to specify the cause for delays, nor can we typically specify the amount of time a case will take to resolve, whether for security advisory opinions or for operational issues like delays in printing. Typically, however, visas are printed within several days after a consular officer makes the issuance decision.

23. AILA members report some extremely delayed SAOs, dating back to before the COVID-19 global pandemic. It is disconcerting to AILA members and their clients when processing times are so open-ended that it appears a final decision may never be reached. Please address the following questions:

- a. While we realize that SAOs have different triggers and may involve multiple government agencies, making it difficult to provide an average timeline for resolution, can you please comment as to whether these cases are generally processed on a first-in, first-out (FIFO) basis or a last-in, last-out (LIFO) basis?

Response: The Department processes cases when all necessary interagency responses have been received. Whenever possible, the oldest cases are processed first, but that is not always possible.

- b. Does DOS (and/or other involved agencies) have a plan for resolving these matters and/or a goal to clear these long-pending matters by a particular date?

Response: The Department remains committed to resolving cases and continually seeks to improve efficiency while maintaining high standards. This summer we will implement new workflow processes for some cases that we anticipate will reduce the administrative processing volume, although we are unable to provide a more precise timeline for resolving long-pending cases. Applicants are advised to direct status-related questions to the post with which the case is pending.

- c. What is the best way that an attorney can confirm that an application is being acted upon and has not slipped through the cracks when an SAO has been pending since before the pandemic?

Response: Applicants are advised to direct status-related questions to the post with which the case is pending.

- d. What is the best way an attorney can request final action on a case that has been pending for this excessive amount of time?

Response: Please see our response to the preceding question.

24. Administrative processing delays continue to grow for clients from the Middle East and Africa. Former Deputy Assistant Secretary, Ed Ramotowski, testified before Congress about new automated processes for background clearances in relation to concerns about Muslim Travel Ban EO 9645. AILA is interested in understanding the current status of these cases. Please confirm the following:

- a. Have the automated processes improved the clearance process?

Response: Yes.

- b. How many of these cases remain in administrative processing?

Response: There are no cases pending administrative processing due to concerns associated with P.P. 9645, but some cases may be pending administrative processing for other reasons.

- c. What is the average time to resolve these cases?

Response: Applicants' circumstances are unique and there may be several factors hindering the application from being processed to completion, including additional administrative processing, difficulty updating the medical examination due to travel restrictions in country, unresponsive applicants, etc. We do not have statistics on the average time to resolve these cases, but some applicants were issued visas within days of P.P. 9645 and 9983 being revoked, whereas other applicants have never reached out to the embassy or consulate where their application resides to continue processing their case.

- d. Can you please provide statistics as to how many have been favorably resolved?

Response: These statistics are not available.

Transmission of I-612/I-613 Requests for Recommendation from USCIS to WRD

25. AILA members are experiencing a persistent problem with USCIS not transmitting Forms I-612/I-613s in hardship and persecution waiver applications from USCIS CSC to DOS

Waiver Review Division (WRD). In numerous instances, many months elapse between when USCIS indicates it has sought the recommendation from DOS WRD and the association of the I-612/I-613 with the waiver application. It appears to be DOS's perspective that there is a problem with how USCIS CSC is labeling the materials they transmit to WRD. Our members have reported that DOS WRD's email address, 212ewaiver@state.gov, is generally unresponsive to inquiries on this issue. When members communicate with USCIS CSC, they indicate that the case is pending with DOS WRD, and they do not have jurisdiction. AILA would much prefer an interagency channel that would assist with the resolution of these matters. Is DOS WRD in discussions with USCIS CSC on this issue? Would DOS be willing to designate an individual within WRD who can work with USCIS to help resolve these issues and ensure timely and accurate transmission of the I-612/I-613s?

Response: The Waiver Review Division has engaged USCIS on this matter in the past and will raise it with them again.

Interagency Issues: PIMS/KCC

26. In January 2022, AILA reported delays in USCIS approvals being uploaded into PIMS. DOS confirmed that the contractor's service level agreement (SLA) is between 1-3 days depending on the petition type and that "the contractor is currently meeting requirements for processing I-129 documents." Members continue to report delays of a few weeks to even a few months, even in cases where it has been verified that the duplicate KCC copy was filed with the petition and the visa appointment was scheduled after receipt of the approval notice. Is DOS aware of these delays? What could the reason(s) be for these delays? How can this be remedied by attorneys whose client's visa issuance is suspending due to PIMS delays? Does KCC expect to receive electronic notification of approvals from USCIS for any additional case types in the near future?

Response: Refer to USCIS on changes to their processes. We evaluate performance in this area of the SLA based on when approval notices and documents are delivered to KCC. The contractor continues to meet requirements on I-129 processing. KCC is contacted by posts if there is an applicant without an approved petition in PIMS. If there is an approval notice that has not yet been entered in PIMS, the contractor creates the PIMS record within one business day.

DOS's Equity Action Plan

27. AILA is heartened by DOS's April 14, 2022, pronouncement of an [Equity Action Plan](#) that "outlines specific actions, metrics, and accountability efforts to improve the efficiency and effectiveness to successfully integrate Executive Order (E.O) 13985 into all aspects of (DOS's) foreign affairs mission." While this is relatively recently adopted, is DOS able to comment on any specific plans to--
- a. "Update the interpretation and application of the Immigration and Nationality Act to reflect advances in Assisted Reproductive Technology"?

- b. “Offer U.S. citizenship products, such as passports, with inclusive gender markers”?

Response: On May 18, 2021, the State Department updated our interpretation and application of Section 301 of the Immigration and Nationality Act (INA), which establishes the requirements for acquisition of U.S. citizenship at birth. Children born abroad to parents, at least one of whom is a U.S. citizen and who are married to each other at the time of the child’s birth, will be U.S. citizens from birth if they have a genetic or gestational tie to at least one of their parents and meet the INA’s other requirements. Previously, the Department’s interpretation and application of the INA required that children born abroad have a genetic or gestational relationship to a U.S. citizen parent.

This updated interpretation and application of the INA takes into account the realities of modern families and advances in assisted reproductive technology (ART) unforeseen when the Act was enacted in 1952. The change allows an increased number of married couples, including those using ART, to transmit U.S. citizenship to their child born overseas, while continuing to follow the citizenship transmission requirements established in the INA.

- (b) “Offer U.S. citizenship products, such as passports, with inclusive gender markers”?

Response: As of June 30, 2021, applicants seeking to change the gender marker on their passport are no longer required to submit medical documentation. Applicants can self-select their gender (M, F, or X), and the selected gender does not need to match the gender listed on the applicant’s citizenship and identity documents or prior U.S. passports.

Furthermore, on April 11, 2022, the State Department began accepting applications for routine passport books with an X gender marker to reflect unspecified or another gender identity. In late 2023, once additional forms and IT systems are updated, X gender markers will become available for all Department-issued citizenship documents. The Department continues to work closely with its partners at other U.S. government agencies to ensure as smooth a travel experience as possible for all passport holders with this new gender marker.

Right to Counsel/Attorney Representation at Interview

28. With DOS undertaking historic hiring of Foreign Service Officers (FSOs), the attorney’s role in pointing the officers to the relevant law will foster improved understanding and more efficient adjudications. In our January 2022 meeting, AILA asked DOS whether it would be willing to circulate an FY99 cable from Steve Fischel which discussed the value

of the lawyer's contribution to the visa process. Can DOS confirm whether that cable was circulated to consular officers in the field?

Response: The Department has no comment.

29. Specifically, is DOS considering allowing attorneys to represent clients at consular interviews, similar to DHS, and as was previously permitted?

Response: Each post establishes its own policies regarding attorneys' physical access to the consular section and visa interviews.

30. AILA realizes that Form G-28 is a DHS form and not a DOS form, yet DOS routinely allows attorneys to submit this form to enter an appearance. With regard to visa applications filed at U.S. Consulates (*e.g.*, Es and Ls), what box does DOS prefer that attorneys check on page two of the G-28 on the upper left side? The question is "appearance related to immigration matters before" and it has three bureaucracies that do not apply: USCIS, ICE, or CBP. What box does DOS prefer that attorneys check (if any) or what should attorneys write in where the G-28 is being submitted to a consular post or embassy on behalf of an applicant for an L-1 or E visa?

Response: DOS does not have a preferred response for Part 3 of Form G-28. We refer you to 9 FAM 603.2-9 for further information.

Scanned Signatures

31. It is AILA's understanding that even before the pandemic all U.S. Consulates and Embassies were advised to accept scanned copies of wet ink signatures from employers and attorneys on employment-based forms and letters (*e.g.*, for blanket L-1s and E visas). AILA is aware that notwithstanding this being authorized by DOS, AMCHAM in some countries (*e.g.*, Mission China) refuses to accept scanned signatures. Would DOS be willing to instruct AMCHAM that it should accept documents with scanned signatures just as the Department would?

Response: The Department does not have authority over the document requirements set forth by AMCHAMs in certain countries. We would advise seeking guidance directly from the AMCHAM in question.

Pandemic Impact on Where Employees Work

32. The pandemic has fundamentally changed where employees work. Many companies and organizations that required employees to work exclusively in the office prior to March 2020 are now allowing remote and hybrid work options. Pre-pandemic, applicants for blanket L visas who had a remote work opportunity in the U.S. were routinely denied based on the rationale that if they could work remotely, they did not need to work in the United States. USCIS, in contrast, routinely approved employment-based petitions for individuals who worked exclusively from home, even pre-pandemic. Given how the world has

changed, and recognizing the value of employees who work remotely being available to come to the office if needed or to work from the same time zone as their colleagues, is DOS willing to considering approving L-1 applications for intercompany transferees who will work remotely while in the United States?

Response: There is no requirement that L visa applicants work exclusively in the office. Visa applications are adjudicated in accordance with the provisions of the INA. Consular officers examine each application individually to determine whether the applicant qualifies for visa issuance according to statutory and regulatory authorities. In reviewing an L visa application, consular officers will take into account all relevant factors related to the applicant’s employment.

Applicants Impacted by Large-Scale Disrupting Events

Direct I-130 Filings for Certain Afghan, Ethiopian, and Ukrainian Immediate Relatives of U.S. Citizens (USCs)

33. [DOS recently announced](#) and updated the [FAM](#), indicating that it will accept direct filings of I-130s for certain Afghan, Ethiopian and Ukrainian immediate relatives of U.S. citizens (USCs) due to the blanket authorization for large-scale disrupting events. AILA urges DOS to consider expanding the same for family members of U.S. lawful permanent residents to allow them to file F2A I-130 petitions directly at post. Would DOS be amenable to this expansion?

Response: This is a temporary blanket authorization that expires September 30, 2022. At this time, there are no plans to further expand existing authorizations for local filing of I-130 petitions.

34. The [FAM](#) appears to indicate that the petitioning USC does not need to live in the consular district to petition for their Afghan, Ethiopian, or Ukrainian immediate relative. The [press release](#) advises that the option is available to a USC “who is physically present overseas with [the] Afghan, Ethiopian, or Ukrainian immediate family member...” Based on these documents it appears that consulates will permit nonresident U.S. citizens who are visiting the consular district to also directly file Form I-130 consistent with the FAM. Please confirm.

Response: Posts may accept a Form I-130 filing by a petitioner who is not a resident of the consular district if they meet certain criteria, including physical presence requirements.

Ukrainian IV and NIV question

35. Is DOS considering adding staff to Frankfurt and Warsaw to accommodate the uptick in visa applications at those posts?

Response: Consular Affairs carefully considers all staffing decisions, taking all relevant considerations into account.

36. Is DOS planning to increase staffing at any other Eastern Europe posts due to the increased number of NIV and IV applicants?

Response: Please see our response to the preceding question.

37. With the limited reopening of the U.S. Embassy in Kyiv and understanding that consular staff is in Lviv, will IV or NIV processing resume in Ukraine in the foreseeable future, or do you anticipate that all consular processing and ACS services for Ukrainians will continue to be provided outside of Ukraine?

Response: At this time there are no plans to reopen consular services in Ukraine.

38. AILA understands that NIV applicants may apply at any post where they are physically present but that each post has the ultimate authority to entertain nonresidents' applications. Some posts, including those in Spain and Portugal, require proof that NIV applicants reside within their consular district. We realize that these restrictions are likely due to resource constraints which may include limited office space and COVID-related backlogs. In light of the current crisis in Ukraine, would DOS be willing to encourage these posts to consider expanding their policies to allow nonresident Ukrainian nationals who are physically present in their consular districts to apply for NIVs?

Response: We have encouraged our posts, both formally and informally, to accept third-country nationals to the extent that they can. All our posts are working to safely and efficiently process as many applicants from as many places as is possible given local conditions and seasonal priorities.

39. AILA understands that the Uniting for Ukraine, also known as U4U, process will go wholly through DHS via USCIS and CBP. Does DOS recommend potentially eligible individuals apply via Uniting for Ukraine, as opposed to via B or F visa applications, even if the applicant may be eligible under all options? Would anyone theoretically eligible be encouraged to process through Uniting for Ukraine at the outset? If a Ukrainian is denied an NIV, will they be encouraged to consider applying under the Uniting for Ukraine program?

Response: All applicants potentially eligible for the Uniting for Ukraine program may access information regarding the process on the Department of Homeland Security's website. Many of our embassy and consulates have this information linked on their own webpages and will provide it as appropriate to individual inquiries. Applicants are also advised to review the Department's guidance on the various visa categories for which they may be eligible, and to select the category that most closely corresponds with their intended activities. A denial in one category does not itself necessarily bar eligibility for a visa in another category.

40. Does the Ukrainian conscription of male citizens have any bearing on whether a U.S. consular post will issue a B visa to male applicants between the ages of 18-60?

Response: B visa applications from Ukrainian males of conscription age will be adjudicated in accordance with existing standards for all other applicants.

41. Has any other post been designated to help Frankfurt handle the large influx of IV applications?

Response: Frankfurt is designated for the majority of Ukrainian IVs. We designated Warsaw for Ukrainian adoption cases. These designations help us plan for staffing and also to assure the presence of necessary structures, such as ample panel physicians and document delivery options. Applicants may, however, request to have their case transferred to another embassy or consulate. Other posts will and are accepting these cases in as much as is possible given local conditions.

42. [The DOS website](#) advises that certain documents, including police certificates, remain available; however, the entities issuing those documents have verified that such items are not available. Will the NVC transfer a case and/or will DOS issue an immigrant visa (IV) where a document (such as a police certificate, birth certificate, etc.) is unavailable, even if the Reciprocity page for that country lists it as available? Will DOS update the website to reflect items that cannot be issued?

Response: We update reciprocity pages as warranted based on new information. For example, we have recently updated the Reciprocity page to reflect changes in police certificate procedures.

43. If an individual is unable to secure a Ukrainian international passport, will DOS instead accept a Ukrainian national (as opposed to an international) passport that has security features for IV issuance purposes?

Response: Visa applicants who do not possess a valid and unexpired international passport may qualify for a waiver of the passport requirement.

44. As the Ukrainian government is not issuing passports, some individuals (minors and adults) are experiencing difficulty in applying for a U.S. visa without possession of a passport. Is DOS willing to waive the passport requirement and issue a Transportation Letter, to allow for entry into the U.S.? If yes, would unaccompanied minors also be able to receive a passport waiver and Transportation Letter to allow for entry into the U.S.? Alternatively, would DOS prefer for unaccompanied minors to secure a different document to permit travel to the U.S.?

Response: The Government of Ukraine (GOU) has notified the Department that passport services are now available at Ukrainian Embassies and Consulates outside of Ukraine. The GOU advised that processing times will vary significantly depending on demand and supplies. Under certain circumstances, the applicant may seek a

waiver of the passport requirement, and the Department, acting jointly with DHS, may waive the passport requirement on a case-by-case basis. The waiver can only be requested as part of a visa application. The Department has utilized this process to facilitate visa issuance and travel for certain Ukrainian applicants.

45. If a minor cannot secure a passport, but a parent/legal guardian possesses a valid passport, please confirm that if the child is added to the parent/guardian's passport, it will satisfy DOS requirements for visa issuance, consistent with guidance provided by Ukrainian embassies around the globe that in lieu of issuing a passport, they are willing/able to add the child to the parent or legal guardian's passport.

Response: We confirm this satisfies the Department of State's requirement for placing a visa in a passport. We defer to the Department of Homeland Security for requirements for entry, but we understand they have admitted children under these circumstances, when the child is traveling with the parent in question.

Russian IV and NIV Questions

46. On January 21, DOS announced that Russian academic F/J/M applicants could apply for their nonimmigrant visas in Mission Kazakhstan and at U.S. Embassies in Belgrade and Yerevan. This is still posted on TSG. Does this remain accurate?

Response: Yes, Mission Kazakhstan and U.S. embassies Belgrade and Yerevan remain designated processing posts for Russian F, M, and academic or U.S. Government-funded J visa applicants.

47. Has Yerevan been designated with specific permission to accept B visa applications via interview waiver for Russian nationals over the age of 80? Can qualifying Belarussian nationals also utilize this process? Does the B visa interview waiver also extend to Russian and/or Belarussian nationals under the age of 14?

Response: Existing FAM guidance permits applicants under the age of 14 and over the age of 80 to apply for an NIV via IW even if they are not residents or nationals of the district in which they are applying. Consular sections may choose to implement some or all interview waiver authorities depending on the local conditions at their post.

48. Please confirm that Russian nationals vaccinated with the Sputnik vaccine will be required [to receive a CDC-approved vaccination](#) before the IV will be issued unless the visa applicant meets one of the blanket COVID-19 vaccination exemptions or exceptions, including not age-appropriate, contraindication, or not routinely available.

Response: This is correct, per our understanding. We refer you to CDC for specifics on COVID-19 vaccine and testing requirements.

49. Consular posts in Russia remain closed to non-diplomatic personnel. Additionally, Russian nationals cannot secure Schengen visas at this time, thereby making travel to Poland or other EU countries impossible. Applicants and their representatives must email posts throughout the region to determine whether a given location may be amenable to accepting a case. Is DOS considering designating additional posts to entertain Russian applicants, given that Warsaw is not an option for IV applicants who lack Schengen visas?

Response: Embassy Warsaw is the only post officially designated to process Russian IVs. Additionally, we have encouraged all posts to accept third-country nationals to the extent possible given local conditions and resources.

50. USC's living with their families in Russia are urgently trying to relocate to the U.S. due to the war with Ukraine. In normal times, USC's who could demonstrate an urgent need to return to the U.S. would be able to file an I-130 with the post directly.
- a. As the Embassy in Moscow is closed to non-diplomatic visa services, would State consider designating alternate posts (beyond Warsaw) where USC's may make direct consular I-130 filings?
 - b. Would DOS be willing to issue guidance to all posts to encourage them to accept direct consular I-130 filings for USC's recently living in Russia with Russian family members and who are physically present in their consular districts?
 - c. To the extent that DOS may be willing to entertain direct consular I-130 filings under these circumstances, would DOS require the petitioner and beneficiary have the right to live/work in the consular district in which they seek to apply, or would DOS consider valid entry as a visitor sufficient to permit a direct I-130 filing?
 - d. Are the answers to the questions above will be the same for Belarussians?

Response: U.S. citizen petitioners facing extremely urgent situations may request to locally file a Form I-130 petition on behalf of their spouse, child under 21, or parents at an immigrant visa processing post. Accepting the petition for local filing is at the discretion of the processing post, and post may direct petitioners to file domestically or online with USCIS instead. The case must meet certain criteria for local filing. Both petitioner and beneficiary must be physically present in the consular district, the petitioner must file the petition by personally appearing at the consular section with the original documents, and the beneficiary must be able to remain in the country for the time it takes to process the visa. The case must fall under exceptional circumstances criteria, and the petition must be clearly approvable. If the petitioner has already filed a Form I-130 with USCIS, then post is not authorized to accept a local filing and the petitioner should request expedited adjudication from USCIS.

Alternative Embassy/Consulate IV and NIV Processing

51. In our January 2022 liaison meeting, we discussed that the "homeless visa applicant" construct under 9 FAM 504.4-8(E)(1) is an IV construct that does not apply in the NIV context because NIV applicants can theoretically apply in any consular district where they

are physically present. AILA gave examples of Iranians and Syrians attempting to apply for IVs at their designated posts but not being scheduled for interviews. We also expressed how, due to pandemic constraints, many posts routinely prioritized residents of their jurisdiction over homeless nationals physically present there. Can DOS advise whether homeless nationals are getting better access to IV and NIV appointments?

Response: We assure there is access for IVs in cases where options have been restricted due to a variety of events. Accordingly, and for example, we have designated Frankfurt as the IV processing post for Ukrainians, and Warsaw as the processing post for Russians (as well as for Ukrainian adoption cases). In instances of extreme need or seasonal fluctuation, such as student visas for Russian applicants or official and diplomatic visas for Ukrainians, we have designated posts where there are language assets and resources sufficient to assist the relevant population. In general and as noted, NIV applicants may apply anywhere there are appointments available and as COVID restrictions ease and our posts make gains on the backlog, this will become exponentially easier.

Exemption of IV fees for Certain Applicants Previously Denied an IV under PP 9645 or PP 9983

52. On January 19, 2022, DOS [amended its regulation](#) governing immigrant visa fees to allow for the exemption from immigrant visa (IV) fees for certain applicants previously denied an immigrant visa pursuant to Presidential Proclamation 9645 or Proclamation 9983. Unfortunately, it has been impossible to reapply/reopen or to take advantage of the waived fee because the software that an applicant must use does not allow for a reapplication. After IV applications were denied by DOS based on these proclamations, the NVC case and invoice numbers were closed. The portal does not provide an option to reapply or request reconsideration of a case with a denial closure. Thus, even where applicants are entitled to a waived fee, it is logistically impossible in the system to apply for a waiver or to pay the fees again. Please confirm:

- a. Does DOS have plans to modify the software/CEAC portal to allow for the reopening of these impacted cases? If so, when will this feature be available?
- b. Does DOS have plans to affirmatively communicate with the impacted applicants through the portal or otherwise to advise them when/if their case has been reopened so that they can submit any necessary documents? If not, what are DOS's plans to ensure that these cases are reopened, and what practical steps can AILA members take to request the reopening of these cases?

Response: The Department informed the field of this amended regulation on January 19, 2022. The cases impacted would not be at the NVC, but would have been refused under the referenced Presidential Proclamations at posts. Therefore there is no need for any changes to the CEAC portal or other systems. Applicants who were refused under those grounds can contact the post where they applied to request an appointment to reapply, without fee. Posts can reopen the DS-260 so the applicant can update the form prior to the interview.

Hong Kong and the J-1 two-year home residency requirement

53. Following the [July 2020 Executive Order \(EO\)](#) ending preferential treatment for Hong Kong, DOS communicated that individuals born in Hong Kong remain chargeable to Hong Kong and not the People's Republic of China (PRC) with regard to the immigrant preference categories, but that Hong Kong is aggregated with PRC when determining eligibility under the Diversity Visa lottery. Has the EO impacted whether exchange visitors who are citizens or residents of Hong Kong may only comply with the two-year home residency requirement of INA 212(e) by residing in Hong Kong for two years? Can citizens or residents of Hong Kong now comply with INA 212(e) by residing in Mainland China for two years?

Response: Residents or citizens subject to Hong Kong may still only comply with the 212(e) requirement by residing in Hong Kong.

Manila

54. AILA members are again reporting concerns that the U.S. Consulate in Manila has resumed asking PERM employment-based applicants for proof that they are being paid the current prevailing wage as opposed to the I-140 wage, which must satisfy or exceed the prevailing wage obtained during the PERM process. In at least some of these cases, the petitions are returned to USCIS for revocation. We have included examples in Appendix B and respectfully ask that they be reviewed.

Response: Thank you for raising this issue to our attention again. The Department has reviewed this issue and provided guidance to consular managers in Manila.

55. Do consular posts and the Visa Office (VO) track and review cases sent to USCIS for revocation which USCIS later reaffirmed, to assist in training officers with the aim of avoiding unnecessary revocation requests? What oversight and quality control is in place to avoid erroneous requests for revocation?

Response: The Visa Office maintains regular communication with posts and provides training and guidance regarding specific cases as needed, including guidance regarding whether a case should be considered for return to USCIS with a recommendation for revocation. The Visa Office tracks the outcome of petition revocation requests and uses that information to inform our future petition revocation requests.

56. The embassy in Manila recently started requiring an "original" letter from the I-140 petitioner confirming the job offer. Sending an original letter by international courier is impractical, costly (over \$100 per envelope/package), time-consuming (at least 7 to 10 days) and seems excessive given that DOS even allows copies of signed forms in many instances (*e.g.*, I-129S). Applicants who provided a color copy of a scanned original notarized letter were told they had to reschedule their IV interview because they didn't

have the “original.” Nothing in the FAM requires a letter to be original, and requiring an original letter is impractical given that the interview notice is often received within 2 to 3 weeks from the interview date. AILA respects that consular posts reserve the right to request original documents when concerned about their authenticity. Given DOS’s broader policies that allow copies of original documents in most instances, would the post in Manila be willing to reconsider its policy on this issue to allow copies of the signed job offer letter in employment-based IV cases, except in situations where the authenticity of the copy is questioned upon review?

Response: We will consider your recommendation.

Vietnamese Names on Visas

57. AILA members report that both NVC and U.S. Consulates have been swapping Vietnamese citizens' first and middle names and listing them out of order on interview notices and immigrant and nonimmigrant visas. This is because Vietnamese passports list names in LAST, MIDDLE, FIRST order, and both NVC and U.S. Consulates claim that they are required to issue documents strictly based on the name order listed in the passport. In an [FAQ available on the U.S. travel docs website](#), DOS indicates in “Q.1” that this has been an issue since at least 2016. This acknowledges that DOS is aware of which name listed on the passport is the true First name and Middle name but that the names are still being intentionally listed incorrectly on visas. While this may be a matter of administrative convenience for DOS, it creates significant practical obstacles for Vietnamese citizens, particularly when drivers’ licenses and social security cards list an incorrect name.

In the context of F-1 visas and SEVIS records, an exception is made for Vietnamese citizens, as noted here under “Exceptional Situations --> SEVIS Name Order,” recognizing that Vietnamese passports list the passport holder’s name in the LAST, MIDDLE, FIRST order and allows SEVIS to use the individual’s correct name order. Can NVC and U.S. consulates employ a similar exception when issuing interview notices and visas to Vietnamese citizens to ensure that their correct legal names are listed and help them avoid needless hurdles when dealing with other federal and state agencies?

Response: According to updated guidance on a new name entry format that went into effect on March 16, 2016, Vietnamese names on U.S. visas are printed exactly as they are written in the passports to improve consistency in entry of Vietnamese names in visa systems. Other federal agencies, such as the U.S. Citizenship and Immigration Services (USCIS) and the Social Security Administration (SSA), are aware of this practice. If you have additional concerns regarding any of the applicable documents, please contact the agencies which issued them.

Mission Mexico Issues

58. The U.S. Consulate in Tijuana, Mexico recently announced a suspension of TN visa processing, noting a consolidation of all TN visa processing at posts in Ciudad Juarez,

Guadalajara, and the Embassy in Mexico City. (<https://mx.usembassy.gov/visas/>) DOS has previously used consolidation of visa processing, such as consolidation of all L blanket visas in Mission India at the post in Chennai. What motivated the consolidation of TN processing in Mission Mexico?

Response: The consolidation of TN visa processing to Ciudad Juarez, Guadalajara, and Mexico City shifts TN processing to posts that have the staffing resources to process these cases as efficiently as possible.

59. Does DOS anticipate it will be a temporary measure to deal with backlogs or a more permanent reorganization? Are similar initiatives being explored with other Missions? Are additional changes expected in the TN reciprocity schedule? If so, please elaborate.

Response: At this time, we do not plan to shift TN processing to other posts in Mexico. At this time, we do not have any changes to report regarding any change in the validity of TN visas, but any changes would be reflected on the reciprocity page.

212(d)(3) or I-212 Waiver After Removal for NIV Applications

60. AILA members have raised questions regarding the correct waiver process for nonimmigrant visa applicants who have been removed from the United States. Where an applicant seeks to apply for a visa after removal, the statutory period of inadmissibility may be five, ten, or twenty years. See INA § 212(a)(9)(A)(i) or (ii). Does the applicant need an approved form I-212? Or, does an INA § 212(d)(3)(A)(i) waiver cure the ground of inadmissibility in a nonimmigrant context? INA § 212(d)(3)(A) purports to waive all grounds of inadmissibility, yet the regulation at 8 C.F.R. § 212.2(a) appears to add the requirement of an I-212. In addition, the statute at INA § 212(a)(9)(A)(iii) states that approved consent to reapply (an I-212) is an exception to the required time period. We have reports of different posts handling the issues differently, and, with an ambiguous DHS regulation, can DOS please provide clear guidance?

As background, section 212(a)(9)(A) of the INA addresses inadmissibility for persons previously removed. Subsection (A)(i) sets the bar at five years for persons expeditiously removed [INA § 235(b)] or removed after § 240 proceedings before an immigration judge, where charged as an arriving alien. Subsection (A)(ii) dictates inadmissibility for ten years following § 240 proceedings for noncitizens who were charged in the Notice to Appear as lawfully admitted or who entered without admission or parole (the historical entrants without inspection, “EWI”).

However, the ten-year bar becomes twenty years where a person was removed for an aggravated felony or multiple removals.

After the applicable prescribed absence, a noncitizen is able to reapply for a nonimmigrant or immigrant visa without consent to reapply (I-212) or any other waiver – assuming there is no other ground of inadmissibility.

AILA is cognizant of 8 C.F.R. § 212.2(a), and specifically that section's last two sentences. The provision references the five or twenty-year absences, but not the ten. It states that an applicant must apply for permission to reapply for admission (form I-212). It further states a temporary stay in the United States under section 212(d)(3) does not interrupt the five or twenty consecutive year absence requirement. Subsection (b) appears to require Form I-212 and an INA § 212(d)(3) waiver. Confusingly, the paragraph utilizes a "however," and states:

However, the alien may apply for such permission by submitting an application on the form designated by USCIS with the fee prescribed . . . to the consular officer if that officer is willing to accept the application, and recommends to the district director that the alien be permitted to apply. (2) the consular officer shall forward the application to the district director with jurisdiction over the place where the deportation or removal proceedings were held.

Add to the above fact pattern an additional ground of inadmissibility, such as a criminal offense or record of fraud / misrepresentation, that in turn requires a waiver of inadmissibility under INA § 212(d)(3)(A)(i). In such a case, would the applicant apply for both an I-212 and an INA § 212(d)(3) waiver?

Response: Thank you for bringing these questions to our attention. The Department is unable to provide comment at this time, pending further consultation with DHS.

61. New fact pattern: Section 212(a)(9)(C)(i)(II) of the Act holds inadmissible for ten years the person who is removed and attempts to (or does) re-enter the United States unlawfully. Per statute, after ten years, this non-citizen requires an approved I-212 permission to reapply after removal. Will an INA § 212(d)(3)(A) waiver cure the ground of inadmissibility, obviating the need for an I-212?

Per the FAM, applicants for nonimmigrant visas "should not file an I-212," because a consular recommendation for consent to reapply need only be transmitted to DHS through the Admissibility Review Information Service (ARIS) via an "ARIS Waiver Request Form" (*i.e.*, the same manner in which an INA § 212(d)(3) waiver is requested). 9 FAM 302.11-2(B)(5)b. The FAM further instructs Consular Officers: "When submitting the ARIS request for a 9A ineligibility, post must clearly state, "Post recommends consent to reapply" and provide the reason for recommending in the written comments of the ARIS request." Per the regulation at 22 CFR § 40.91(e), the bars at INA § 212(a)(9)(A)(i) or (ii) do not cause ineligibility for a visa if the Secretary of DHS has consented to the noncitizen's application for admission.

Please advise as to the necessary requirements and procedures when a NIV applicant seeks a visa within the five-, ten-, or twenty-year time periods after removal. The INA § 212(d)(3)(A) waiver waives all grounds of inadmissibility, yet the regulations appear to add the requirement of an I-212. The statute presents the approved I-212 as an exception, not a waiver. We have reports of different posts handling the issues differently and, in light of a vague DHS regulation, would appreciate clear guidance from DOS.

Response: Thank you for bringing these questions to our attention. The Department is unable to provide comment at this time, pending further consultation with DHS. With respect to AILA’s statement that applicants need not file an I-212 “because a consular recommendation for consent to reapply need only be transmitted . . . via an ‘ARIS Waiver Request Form,’” the Department notes that this process applies only to those cases in which the consular officer determines it is appropriate to recommend the waiver in accordance with 9 FAM 302.11-2(B)(5)(b)(1). If the consular officer does not recommend a waiver, the applicant may submit the I-212 directly with DHS.

End