

**Meeting between the American Immigration Lawyers Association (AILA)
Department of State Liaison Committee and the Visa Office
of the U.S. Department of State, Bureau of Consular Affairs
October 19, 2017**

AGENDA

Highlighted below are Visa Office responses to issues raised by AILA in preparation for the meeting.

1. **FAM Guidance for Mexican TNs.** On April 20, 2017, 9 FAM 402.17, NAFTA Professionals – TN and TD Visas, was revised. Several of the current subsections of 402.17 raise questions as listed below.
 - a. **9 FAM 402.17-4(A)(c).** This section instructs consular officers to “make sure that the alien’s *job title* is listed” in Appendix 1603.D.1 of NAFTA, Chapter 16. (Emphasis added.)

The use of the term “job title” is likely to cause confusion about the requirements for TN classification. The individual job title used by companies varies greatly amongst workers performing the same job duties. Quite frequently, the job title bears little or no resemblance to the actual professional-level occupation in which the worker will be employed. If consular officers focus on job title rather than occupational category, qualified applicants may be refused TN classification.

Governing regulations at 22 CFR §41.59(a) indicate that an alien is classifiable as a TN nonimmigrant if, *inter alia*, he will be employed in a “professional capacity consistent with NAFTA Chapter 16 Annex 1603 Appendix 1603.D.1.” DHS regulations at 8 CFR §214.6(c) indicate that applicants for admission in TN status must “demonstrate business activity at a professional level in one of the professions set forth in Appendix 1603.D.1 to Annex 1603.” Neither DOS nor DHS regulations require applicants to have a “job title” found in NAFTA. Instead, the regulations refer to professional-level occupational categories. The job duties rather than the job title determine eligibility for TN classification.

To avoid unnecessary confusion, would State consider revising 9 FAM 402.17-4(A)(c) to remove reference to the term “job title” and replace it with the term “occupation?” This change would more accurately reflect the regulatory requirements by allowing for a variety of job titles utilized by employers for a given occupation.

- b. **9 FAM 402.17-5(A)(5).** Anecdotally, the wording of 9 FAM 402.17-5(A)(5) has caused confusion for U.S. Customs and Border Protections (CBP) officers who have cited language appearing in this section to refuse TN classification. Specifically, this section states: “TN visa holders cannot primarily work in Mexico or Canada and visit the United States on occasion for a work trip.” The use of the word “work” is understood to refer to activities that constitute “employment.” This creates confusion since “employment” in the United States is normally impermissible for B-1 visitors. An alternative phrasing that would avoid confusion

would be: “Mexican or Canadian professionals who are primarily employed outside the United States cannot utilize the TN visa category to occasionally visit the United States for activities that do not constitute employment.” Would State consider revising the FAM to clarify this section?

- c. **9 FAM 402.17-5(A)(7).** 9 FAM 402.17-5(A)(7) discusses “Changing or Adding [TN] Employers or Status.” The information provided, however, is incomplete. 9 FAM 402.17-5(A)(7)(b) states: “A Canadian citizen wishing to change or add employers may also depart the United States and apply for readmission with DHS at the port-of-entry (POE).” However, 8 CFR 214.6(i)(2) states: “Nothing . . . precludes a citizen of Canada *or Mexico* from applying for readmission to the United States for the purpose of presenting documentation from a different or additional . . . employer.” (Emphasis Added). The omission of citizens of Mexico from this section invites misinterpretation of the DHS regulations. AILA respectfully suggests adding a reference to Mexico in this subsection. Would State consider this revision?
- d. **9 FAM 402.17-5(A)(7)(c).** This section states, in part: “each employer should be annotated on the [TN] visa.” This suggests that a worker would not be authorized for employment with an employer whose name is not annotated on his or her visa. Yet, a Mexican citizen who has obtained authorization to engage in employment for a new employer after a Form I-129 was filed on his or her behalf, or who has reapplied for admission at a port of entry pursuant to 8 CFR §214.6(i)(2) would not have a TN visa annotated with the name of each employer. AILA respectfully recommends either deleting the phrase “each employer should be annotated on the visa,” or adding a sentence that confirms that a TN visa remains valid for a different or additional employer even if the name of the new employer does not appear as an annotation on the visa. Would State consider either of these revisions?

State appreciates the comments and concerns that AILA has raised regarding the guidance set forth in 9 FAM 402.17 (NAFTA Professionals – TN and TD Visas). State regularly reviews the Foreign Affairs Manual for accuracy and clarity. When State identifies inaccurate or unclear guidance, we seek to revise that guidance, with input from the Department of Homeland Security when appropriate. State will review these comments from AILA and give them due consideration in determining whether to revise the identified sections of the FAM.

- 2. **Visa Issuance and ESTA Cancellation.** Based on reports from AILA members, it appears that issuance of a nonimmigrant visa may trigger cancellation of the individual’s Electronic System for Travel Authorization (ESTA). It is our understanding that an individual can maintain nonimmigrant visas in multiple categories provided that the individual qualifies for each visa category. The nonimmigrant visa presented at a port of entry must be appropriate to the purpose of the intended activity in the U.S. Similarly, it is our understanding that an individual may lawfully maintain a nonimmigrant visa as, for example, a temporary worker while continuing to remain eligible to travel to the U.S. for tourism or business as a visitor without a visa provided that he or she is from a qualifying country and is otherwise eligible for classification as a visitor under U.S. immigration laws.
 - a. Is State aware that there now appears to be a specific correlation between the issuance of a nonimmigrant visa and the cancellation of the individual’s ESTA authorization?

Thank you for raising your concerns with us. We are not aware of any issues in this regard. We request that AILA provide case examples so that we can assess the matter and consult DHS, as appropriate.

- b. If so, has State discussed this issue with CBP?
- c. If so, would State be willing to share the substance of those discussions with AILA?

3. Contacting Consular Posts

a. Guangzhou

- i. The IV inquiry form for the U.S. consulate in Guangzhou now limits the message to 280 characters.¹ While we understand that communication with posts is largely determined by workload and staffing, this limitation frustrates meaningful exchange. We suggest that the post either raise the character limit (Ex: 1,000 characters), or implement a contact form such as the one used by the U.S. Embassy in London to improve communications between the IV section and applicants and their representatives. Would State facilitate this recommendation to the post?

Applicants wishing to submit inquiries in excess of the character limit may submit a message through the IV inquiry form requesting to submit a longer inquiry. The communications team in Guangzhou will reply with an email address the applicant may use.

- ii. Members have reported that the consulate in Guangzhou has advised paralegals who have submitted G-28 forms for clients that, by law, they can only correspond with the attorney of record. As the G-28 is not a Department of State form, our understanding, from our meeting on October 8, 2015, is that the applicant must only show consent for the attorney or his/her office to correspond with post, which may be done by email or letter. Has the Department recently issued new guidance concerning the use of Form G-28 and with whom the officer may correspond?

No. The guidance at 9 FAM 603.2-9 is controlling and largely unchanged.

- b. **San Salvador.** It appears that San Salvador has a public email (congensansal@state.gov) that is monitored. However, it is not listed on the main consular webpage and must be obtained by contacting ustraveldocs. Could VO ensure that the post includes this information on its website?

Post has been notified of the requirement and is in the process of adding their new mailbox (SanSalVisaInquiries@state.gov) to its website.

¹ See <https://china.usembassy-china.org.cn/visas/immigrant-visas/contact-us/immigrant-visa-unit-question/>

- c. **Costa Rica.** It appears the there is no public facing email address or web portal for Costa Rica. Will VO please provide an email address for Costa Rica and ask that the post publish this information on its website?

Post has been notified of the requirement and is the process of establishing an email address to be published on its website.

- d. **Budapest.** It appears the there is no public facing email address or web portal for Budapest. Will VO please provide an email address for Budapest and ask that the post publish this information on its website?

Post maintains general guidance on its website to direct inquiries to the GSS provider's email (<https://hu.usembassy.gov/visas>); unfortunately guidance to submit case-specific questions dropped after post recently migrated to a new web platform. Post has re-added the following email address: usconsular.budapest@state.gov.

4. **Visa Applications in Venezuela.** Please advise on the status of scheduling immigrant visa and nonimmigrant visa appointments in Caracas. Specifically:

- a. Given post limitations, have other posts been designated to take jurisdiction over immigrant visa applications?

No, not at this time.

- b. We understand that for nonimmigrant visa applications, Venezuelan citizens may apply as third country nationals (TCNs) wherever they may be lawfully present. We also understand that such applicants may be subject to 214(b) issues that are more easily resolved in their home country. However, AILA has received reports that posts in the region will only take jurisdiction over an application if the applicant can show ties to that country. Has VO designated any specific post(s) in the region to assist with Venezuelan nonimmigrant visa applicants?

Venezuelan applicants for nonimmigrant visas may apply at another U.S. embassy or consulate overseas in the country where they are physically located. The Department of State does not designate an embassy/post to handle nonimmigrant visa applications.

- c. If a designation has not yet been made for immigrant and/or nonimmigrant visa applications, are there plans to revisit this issue if the situation in Venezuela deteriorates further?

The Department takes into account a number of factors in determining which embassy/consulate should receive and adjudicate immigrant visa applications when services are suspended at any given location. We are constantly monitoring the situation, and if necessitated we will revisit this decision. As noted in the FAM:

9 FAM 403.2-4(B) Alien Who is Physically Present But Not Resident in a Consular District

22 CFR 41.101(a) gives you the discretion to permit an alien who is physically present in your consular district to apply for a nonimmigrant visa (NIV) outside his or her resident district. While 22 CFR 41.101(a) gives consular officers discretionary authority to reject applications by persons who are physically present in but not residents of the consular district, the Department expects that such authority will seldom, if ever, be used.

5. **Alternate Post for Turkish Citizens.** Due to the uncertain political climate in Turkey, more and more Turkish citizens are not able to safely travel to their home country in order to attend a visa interview. Though we understand that for nonimmigrant visa applications, TCNs are able to apply wherever they may be lawfully present, has VO designated any specific post(s) in the region to assist with Turkish visa applicants? If such a designation has not yet been made, are there plans to revisit this issue should the situation in Turkey deteriorate further?

The designation of alternative posts happens when a post is closed, or we have no presence in a country, like Syria, Iran, and now, Cuba.

For NIVs, the absence of any designation generally allows applicants to apply wherever they are physically present.

6. **Russia.** We appreciate that VO is working to address the significant reduction of personnel at posts in Russia as a result of the temporary suspension of consular services at the end of August. We understand that the suspension of visa processing at posts other than Moscow will continue for the foreseeable future. These steps will likely result in long delays for visa appointments. Is VO planning to designate certain posts within the region (or have certain posts volunteered) to accept Russian TCNs for visa processing? If so, which post(s), and will those posts be provided with additional intelligence assistance specific to Russia to avoid delays due to scrutiny and increased likelihood of SAOs that frequently occur with TCN applicants?

We do not limit NIV applicants to a particular post; rather, we generally allow NIV applicants to apply at any post where they are physically present.

7. **Revocations and Removal.** AILA has received reports of visa holders whose visas were prudentially revoked for DUI arrests while they are in the United States being charged by ICE as removable under INA §237(a)(1)(B), for being physically present in the United States with a revoked nonimmigrant visa. Based on our previous conversations, it is our understanding that a prudential revocation only becomes effective once the alien departs the United States. Has VO discussed this issue with DHS? If prudential revocations are now leading to the initiation of removal proceedings, would VO be willing to revisit the issue to ensure that the prudential revocation only precludes future travel to the United States?

We've discussed this with ICE, and there has not been a policy change. ICE would be happy to see the specific cases where you believe this has occurred. If you have specific cases, we can pass them on to ICE/OPLA.

8. **Actual Bodily Harm (ABH) in London.** The Embassy in London previously has not considered ABH offenses to be crimes involving moral turpitude. Recently, adjudications on this issue have been inconsistent, and it seems that the embassy may be reinterpreting this concept. ABH appears to fall under the definition of assault at 9 FAM 302.3-2(B)(2)(c)(3)(b)(i) as an offense that does not have a depraved motive or evil intent and thus does not involve moral turpitude. The U.K. statute for ABH, Section 47 of the Offences Against the Person Act, provides that ABH may be caused intentionally or recklessly by the same conduct that would lead to Common Assault. The only difference between Common Assault and ABH are that ABH must result in injuries that are more than “transient or trifling.” Given that neither Common Assault nor ABH *require* intent (evil or otherwise), we understand that, unlike Grievous Bodily Harm, which does require intent and is a crime involving moral turpitude, ABH is not. Would State be willing to review this point of law with post and advise how ABH should be treated to ensure consistent adjudications?

Based on our present understanding of UK law, the Visa Office agrees that the crime of assault occasioning actual bodily harm (ABH) under Section 47 of the UK's Offences Against the Person Act 1861 is not a CIMT. We would encourage any attorney representing a visa applicant who was refused under INA 212(a)(2)(A)(i)(I) solely for a conviction under Section 47 to reach out the post that made the finding. If that does not resolve the matter satisfactorily, then the attorney may submit the case to LegalNet for review.

9. **PIMS Delays.** We are seeing increasing reports of petition-based cases put into Administrative Processing [221(g)] because the petition/approval notice is not entered into the Petition Information Management System (PIMS) even several weeks after the petition has been approved.

- a. Has there been a change in the PIMS uploading procedures?

There were delays entering approved petitions into the PIMS system from April through July of this year due to unprecedented volume as USCIS cleared backlogs of EOS/COS cases. Those delays have been eliminated, and the Kentucky Consular Center (KCC) introduced new service standards on September 1 that reduce processing times. Approved petitions for O, P, T, and U visas are now processed into PIMS within one business day of arrival at KCC, and all other categories within three business days. To calculate when a petition should be in PIMS, add the KCC processing time to the transit time from the adjudicating USCIS service center: five days from I-797 issuance for cases from California and three days for petitions from Vermont or Nebraska.

- b. Are there any means available to a visa applicant to determine whether petition data has been entered into PIMS before the date of a visa appointment?

The vast majority of petitions are available in PIMS within the timeframes outlined above. If a beneficiary will interview before the petition would normally be in PIMS, you can alert the interviewing post who can in turn request that KCC expedite processing. Keep in mind that that standard processing times apply ONLY if a Department of State copy of the petition was filed with USCIS. We recommend submitting a Department of State copy with all petition filings, even if you do not anticipate an immediate need for consular processing. Plans change

and visas expire. If you do not include a duplicate copy of the petition with the initial filing, the case will not be in PIMS if and when the beneficiary or any derivatives need a visa.

- c. If a petition/approval is not in PIMS at the time of the interview, are there any other mechanisms available to a post to verify the approval of a petition?

With few exceptions, post should contact KCC when they encounter a case not in PIMS. KCC can generally create the missing PIMS record within one business day, or work with USCIS to resolve any problems.

- 10. Third Country National Wait Times.** At the AILA-DOS Liaison Meeting on April 7, 2016,²² VO stated that a suggestion to add Third Country National wait times to the general visa wait times on the [Visa Appointment & Processing Wait Times web page](#) was “under consideration.” Better visibility into TCN appointment availability will significantly help attorneys advise their clients. Is this suggestion still under consideration?

No plans exist at this time to add wait times for third country nationals.

- 11. NIV Waiver and Reciprocity.** We understand from the CBP Admissibility Review Office (ARO) that waivers under INA §212(d)(3)(A) may be valid for up to five years when granted.
 - a. If an applicant receives a five-year waiver, but due to reciprocity, the visa is valid for only one year (for example, TN Mexico), will the applicant need to seek a new waiver prior to applying for another visa of the same type, or can the post apply the previously-granted five-year waiver to the new visa?

Waiver approval is inseparable from the underlying NIV application and as such, the decision, including any terms and authorizations, is not portable to a different NIV application under any circumstances. This is a question that we anticipated and addressed during FAM recertification in the previous years and expounded upon in 9 FAM 305.4-3(G)(2) (U) *Cases with Number of Entries and/or Period of Validity Authorized by Waiver Exceeds Reciprocity*.

- b. We understand that, in order to apply for admission to the U.S., an applicant must be in possession of a waiver approved by ARO. If, under the reciprocity schedule, a B visa may be issued for 10 years but a waiver may be issued for only five years, does the visa remain valid after the expiration of the waiver?

The validity period of a visa cannot exceed the validity period of the ARO waiver. If the consular officer erroneously issues a visa for a duration longer than the terms of the waiver, post should rectify this once it is brought to their attention by spoiling the visa and reissuing for the appropriate duration, if possible, or seeking a new waiver for the applicant.

- 12. Pakistani J-1 Physician Applicants.** Earlier this year, AILA members saw an unprecedented rise in denials and SAOs for J-1 physician candidates applying in Pakistan, including 34+ denials

²² Available at <http://www.aila.org/infonet/dos-liaison-q-and-a-04-07-16>.

and 17 SAOs, where the physicians had previously been in the U.S. doing observerships in B-1 status. AILA understands that the denials were based on the consular officer's belief that physicians cannot legitimately pursue observerships while in B visitor status. The medical residency match process is highly competitive, and selected candidates can lose their coveted positions if they are unable to start the residency program timely due to visa delays. Ensuring officers are well-versed on this topic can prevent unwarranted denials and delays that harm the residency program and can jeopardize the physician's career.

The FAM provides that a B-1 is legally appropriate for "(a) medical doctor otherwise classifiable as H1 as a member of a profession whose purpose for coming to the United States is to observe U.S. medical practices and consult with colleagues on latest techniques, provided no remuneration is received from a U.S. source and no patient care is involved. Failure to pass the Foreign Medical Graduate Examination (FMGE) is irrelevant in such a case."³

Can VO please confirm that this FAM section is still current policy? If so, to avoid a similar situation prior to the start of the 2018-19 residency season, would VO remind posts that the following activities are appropriate for B-1 physicians as a precursor to commencing a U.S. medical residency program: (1) sitting for the USMLE exam, which is only offered in the U.S.; (2) interviewing with or visiting residency programs; and (3) participating in observerships?

The FAM guidance at 9 FAM 402.2-5(F)(3) is correct. VO emphasizes that this note addresses a medical doctor coming to "observe" U.S. medical practices; any hands-on activities beyond merely observing is not authorized under this note. In addition to participating in an observership, sitting for the USMLE exam, and interviewing with or visiting residency programs would be permissible in B-1 status.

Under INA Section 291, the burden of proof is on the applicant to establish that he or she qualifies for the visa. As per 9 FAM 302.1-2(B)(6)(b), to overcome the presumption of immigrant intent in INA 214(b), the applicant must make a credible showing to the consular officer that all activities in which the applicant is expected to engage while in the United States are consistent with the claimed nonimmigrant status for which the applicant is applying. Therefore, if the applicant previously engaged in activities outside of the permitted scope of a B-1 observership, such as tending to patients and other hands-on activity, it may lead to a factual finding by the consular officer that the applicant will engage in activities inconsistent with the current nonimmigrant visa class he or she is applying for.

Some visa applications require administrative processing. Most administrative processing is resolved **within 60 days** of the visa interview, although the exact timing will vary based on the individual circumstances of each case. We do our best to ensure administrative processing for J-1 exchange visitor applicants is completed to allow timely travel before program start dates. However, keeping administrative processing in mind, visa applicants are urged to apply well in advance of the anticipated travel dates and to ensure they provide any missing documentation quickly.

³ See 9 FAM 402.2-5(F)(3) (U) Medical Doctor.

13. Administrative Processing and Returning to the U.S.

- a. Upon applying to renew a nonimmigrant visa and being placed in administrative processing, may the applicant return to the U.S. on a previously issued nonimmigrant visa that remains valid?

An applicant may continue to use a valid visa to apply for admission to the United States, even if an application for a new visa in that same category is pending administrative processing. However, DHS/CBP has independent authority to determine admissibility to the United States and information is shared widely throughout the U.S. government. A visa case can go into administrative processing for a number of reasons, some of which may lead CBP to deny entry. Thus, we do not recommend travel until all pending issues have been resolved.

- b. Would the valid visa be cancelled at the time the new application is made?

While valid visas would not, as a rule, be cancelled at the time of any new application for a visa, consular officers may revoke or cancel an applicant's valid visa at any time if they believe the applicant is potentially ineligible for a U.S. visa. Note that an applicant is not permitted to possess more than one valid visa of the same classification in the same type of passport (i.e., tourist, official, or diplomatic) at the same time, and that consular officers will physically cancel one of the duplicate visas whenever they encounter them, including cancellation of the previously-held visa upon issuance of a new visa in the same category.

- c. Is the answer different if the currently valid visa is in another visa category?

No.

14. Credit Cards as Method of Payment in Mexico. Effective August 29, 2017, credit cards will no longer be accepted to schedule appointments at U.S. consulates in Mexico.⁴ Unfortunately, the inability to schedule a visa appointment online using a credit card creates logistical and security concerns. Requiring applicants to bring cash to pay the fee at a local bank is inconvenient, and puts visa applicants at risk of being robbed and/or physically harmed. In addition, since nonimmigrant visas are limited to one year for citizens of Mexico, requiring the applicant to be physically present to pay a visa application fee significantly disrupts the U.S. businesses that employ these applicants. The alternative is to coordinate through colleagues, family members, or friends, which can be logistically difficult and inconvenient to multiple parties. As a practical matter, requiring cash payment in advance of scheduling a visa appointment effectively precludes

⁴ **Important Information regarding credit card payments - 21 August, 2017**

Effective August 29, 2017, we will stop accepting credit card payments for non-immigrant visa application fees. All payments must be submitted in cash to any Citi Banamex or Scotiabank location across Mexico. See <https://ais.usvisa-info.com/en-mx/niv/information/fee> for more information about making a bank payment. https://ais.usvisa-info.com/en-mx/niv/information/announcements#294-important_information_regarding_credit_card_payments_20170821203524

Third Country National (TCN) visa applications at U.S. consulates in Mexico as such applicants may not have local resources available to make such payments.

While we understand from our conversation in October 2016 that third party vendors have some latitude with regard to the payment options offered, it is surprising that a vendor cannot successfully process credit card payments in 2017, especially when the visa application is electronically filed. Please confirm:

- a. Is the reason for this change a technical issue, a vendor issue, or some other issue?

Due to the high rate of credit card chargebacks, the U.S government decided to eliminate the credit card payment option for machine readable visa (MRV) fees for most single service users in Mexico. The Global Support Strategy (GSS) vendor supporting Mission Mexico stopped accepting credit card payments from self-service applicants effective August 29, 2017. Group appointments, in particular the H-2A and H-2B temporary worker nonimmigrant visa (NIV) applicants, and the K fiancé NIV applicants are not affected by this change.

- b. If the change is due to a technical problem, are steps being taken to correct it?

The change is not due to a technical problem.

- c. If the issue is not technical, does the vendor have the prerogative under the terms of its contract to suspend receiving credit card payments?

No, the vendor does not have the prerogative under the terms of its contract to suspend credit card payments. The U.S. government suspended credit card services for most NIV applicants. H-2A and H-2B temporary worker and K fiancé NIV applicants can still pay with credit cards. The GSS vendor also provides NIV applicants the option of paying cash at 2,078 banks across Mexico.

- d. Is the vendor engaged to perform services only in Mexico, or does it also provide services in other countries?

The GSS vendor currently performs services in 49 countries.

15. Discrepancies in I-129S Endorsement Practices. We would like to clarify our understanding of the current State policy governing endorsement of Forms I-129S by consular officers. For example, the U.S. consulate in Milan endorses two copies of the form and provides applicants with one. Our members also report that, in recent months, various posts in Latin America have been issuing I-129S approvals where the classification is not checked, the duration of the L classification is not noted on the form, and the I-129S approvals are not being returned to the applicants.

On April 7, 2017, the FAM provisions containing DOS policy on endorsement of Forms I-129S was revised. In relevant part, the revised guidance provides:

9 FAM 402.12-8(F) Procedure for Issuing Blanket Petition L Visas
(CT:VISA-322; 04-07-2017)

b. The consular officer must also be sure to properly endorse all three copies of the alien's Form I-129S, Nonimmigrant Petition Based on Blanket L Petition, scan one copy into the case in NIV, and return two copies to the applicant for their recordkeeping. (Emphasis added.)

When this FAM provision was brought to the attention of the consulate in Milan, the consular staff replied as follows:

Effective 31 January 2017, officers are only required to endorse **two** copies of the I-129S, Nonimmigrant Petition Based on Blanket L Petition. For visa approvals and denials, the officer must provide the applicant with **one** endorsed copy for his/her records, and keep one copy to scan into the applicant's NIV record in the CCD. USCIS and CBP may access the scanned copy via the CCD if necessary.

- a. Please confirm that the April 7, 2017, FAM revision reflects current DOS policy on endorsement of Forms I-129S.

The 9 FAM guidance at 402.12-8 reflects current policy on Blanket L visa adjudications. If an applicant brings fewer than 3 copies of Form I-129s to the interview window, the officer will endorse as many forms as the applicant brings. The Department is currently awaiting forthcoming amendments to 8 CFR regarding the required number of Forms I-129S a consular officer must endorse. Upon publication of the final rule, the Department will update the guidance in the 9 FAM regarding I-129S endorsements.

- b. Has there been any recent guidance on how to endorse the I-129S form? If so, can that guidance be shared with AILA?

Current guidance on endorsing Forms I-129S is available at 9 FAM 402.12-8(F), which is publicly available.

16. **EO 13788.** On August 9, 2017, new text was added to the FAM provisions providing guidance on the H-1B, L-1, O-1, P, and E nonimmigrant visa classifications.⁵ These changes are tied to the [Presidential Executive Order \(EO\) 13788 issued on April 18, 2017, Buy American and Hire American](#). Section 5(a) of the EO instructs the Secretary of State to “propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.”

The language added to each of these provisions states a version of the following: “*The goal of E.O. 13788 is to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse, and it is with this spirit in mind that cases ... must be adjudicated.*”

⁵ See 9 FAM 402.10-2(b), 9 FAM 402.12-2 (e), 9 FAM 402.13-2 (c), 9 FAM 402.14-2(b), and 9 FAM 402.9-2.

- a. How does the inclusion of this new language impact the adjudication of these visa categories?

The new language clarifies for consular officers the Administration's goals.

- b. Have any new substantive or procedural adjudication requirements been introduced in association with this new FAM language?

No. Additional FAM changes will be published as needed if policy or regulations governing employment-based visa programs are changed as part of the Department interagency reviews of these programs in furtherance of the Buy American Hire American Executive Order.

- c. Was any guidance provided to consular officers about the meaning of the changes to these FAM provisions? If so, is VO willing to share that guidance with AILA?

We do not disclose internal guidance to our overseas posts.

- 17. E-2 Refusals.** AILA has received reports of E-2 adjudications where officers, especially in London, are refusing applicants under INA §214(b) and opining that the job could be done by Americans. This seems to stem from the provisions of EO 13788 (note: Question 16), however, we are unaware of any substantive changes to the requirements for treaty investor visas. Can VO please confirm that, as the E-2 visas are based on treaties between the United States and the applicants' countries of nationality, no FAM changes under the EO should reflect substantive changes to E-2 eligibility requirements, and do not permit visa refusal if the consular officer concludes that a U.S. worker might be available to fill the position?

The requirements for E-2 visa classification have not changed. For purposes of determining whether an applicant is an "essential employee," consular officers must consider the availability of U.S. workers in assessing the degree of specialization the applicant possesses. See 9 FAM 402.9-7(C)(g-h). This is not a new FAM provision.

- 18. E-2 for Israelis.** We understand that the treaty supporting E-2 visa classification for Israelis was scheduled to come into force in the 4th quarter of 2017. Please provide an update on the status of this agreement and a timeline as to when Israeli citizens can begin applying for E-2 visas.

There is no treaty with Israel providing a basis for E-2 visa classification for Israelis. Public Law 112-130 authorized E-2 visa classification for nationals of Israel if that government provides similar status to nationals of the United States. Israel is in the process of making certain regulatory changes, requiring approval by three Ministers and two Knesset committees that we expect will provide a basis for the Department of State to make a determination that Israel meets the similarity of status requirement. We anticipate that E-2 visas will be available for nationals of Israel by the first quarter of calendar year 2018. This is only an estimate.

19. Termination of IV Cases in Abu Dhabi. AILA has received reports of immigrant visa applications in Abu Dhabi being placed in administrative processing (usually Iranians) with no request for additional documents and then being terminated under INA §203(g) and 9 FAM 504.13 after one year. Although we understand that a termination would be appropriate after one year if additional documents were requested and the applicant does not provide them, in these reported situations, administrative checks/advisory opinions beyond the control of the applicant are taking more than one year, and the applications are then being cancelled.

Thank you for calling this to our attention. We reached out to Embassy Abu Dhabi to confirm that its application of INA 203(g) is in accordance with the following responses.

a. Is this an appropriate application of INA §203(g)?

INA 203(g) applies to inactive cases as defined by 22 CFR 42.83(b), which provides, “An alien’s registration for an immigrant visa shall be terminated if, within one year following the refusal of the immigrant visa application under INA 221(g), the alien has failed to present to a consular officer evidence purporting to overcome the basis for refusal.” INA 203(g)’s focus is on whether the applicant takes steps to apply for the visa. Time pending solely government action is not considered a period of inactivity for the purposes of 203(g), and case should not be terminated. Therefore, in cases where an applicant is refused under INA 221(g) solely for U.S. government action, the case should not be terminated. The Visa Office will follow up with Abu Dhabi regarding this question.

b. What is the procedure for reinstating applications that are delayed solely due to administrative processing when no additional documents were requested?

When it comes to your attention that a case that was pending U.S. government action rather than applicant action was terminated while the government action was pending, you should first contact post by email to request review and reinstatement. If you still believe there was legal error after communicating with post, you may write to legalnet@state.gov to request a review of the case.

20. Assets for I-864. Recently, members have reported cases where either the sponsor or joint sponsor have reported income below the federal poverty guidelines, but they were not permitted to cure this by submitting evidence of assets. Instead of permitting evidence of at least 5 times the difference between the sponsor’s income and minimum income requirement, per 8 CFR §213a.2(a)(1)(v)(B) and 9 FAM 302.8-2(B)(3)(U)(g)(2), posts have issued final processing letters and have required either a Form I-864A or a joint sponsor. Please confirm that providing evidence of assets to post is a permissible way to cure a shortfall between the sponsor’s income and the federal poverty guidelines.

Yes, pursuant to 9 FAM 302.8(B)(4) paragraph g, providing evidence of assets is a permissible way to make up any shortfall toward meeting the Federal poverty guidelines.

g. (U) Additional Assets Evidence:

- (1) (U) The Form [I-864](#) does not require sponsors to submit evidence of assets, if income alone is sufficient to meet the minimum Federal poverty guidelines income requirement described in paragraph a(2) above. The mere fact that the petitioner and/or sponsor have met the minimum requirement, however, does not preclude a finding of inadmissibility under INA 212(a)(4). You may request evidence of assets and liabilities, if such information is necessary to determine the applicant's eligibility. If a sponsor or joint sponsor uses assets to prove the ability to support the sponsored immigrant, he or she may not use the Form [I-864-EZ](#).
- (2) (U) The sponsor or joint sponsor may include his or her assets (and offsetting liabilities), and/or the assets of any household members signing Form [I-864-A](#), as income to make up any shortfall toward meeting the Federal poverty guidelines. The assets (bank accounts, stock, other personal property, and real estate) must be available in the United States for the applicant's support and must be readily convertible to cash within one year. In most cases, the sponsor must present evidence as described in [9 FAM 302.8-2\(B\)\(4\) paragraph g](#), establishing location, ownership and value of each asset listed, including liens and liabilities for each asset listed. The combined cash value of all the assets (i.e., the total value of the assets less any offsetting liabilities) must total at least five times the difference between the total household income and the minimum Federal poverty income requirement.
- (3) (U) Sponsors of immediate relative spouses and children of U.S. citizens, however, must only show combined cash value of assets in the amount of three times the difference between the poverty guideline and actual household income. In addition, sponsors of alien orphans who will acquire citizenship after admission to the United States need only prove a combined cash value of assets in the amount of the difference between the poverty guideline and actual household income.
- (4) (U) Sponsors of alien orphans who will acquire citizenship after admission to the United States based upon either adoption in the United States subsequent to admission, or a need to obtain formal recognition of a foreign adoption under the law of the State of proposed residence because at least one of parents did not see the child before or during the foreign adoption, need only prove a combined cash value of assets in the amount of the difference between the poverty guidelines and actual household income.
- (5) (U) If assets of the sponsored applicant are being used in such a fashion, the sponsored applicant is not required to submit Form [I-864-A](#), but must show the same kinds of evidence as described in and show that the assets can be converted into cash within one year.

21. FAM and Students. A new version of 9 FAM 402.5-5(E)(1) became effective on August 8, 2017. The new FAM language removes prior guidance that encouraged consular officers to take into account the “natural circumstances and conditions of being a student” when determining residence abroad for applicants for F-1 visas. The previous FAM guidance also provided a discussion of factors that consular officers should consider when evaluating the differences in connections to a country of residence for F-1 students as compared to short-term B visitors. The FAM provision for determining residence abroad for F-1 students now appears to apply the standard guidance found at 9 FAM 401.1-3(F)(2). However, 9 FAM 401.1-3(F)(2) refers

consular officers back to the discussion of how to evaluate residence found in the F visa section of the FAM. Specifically, in relevant part, it instructs officers: “...to view the requirement within the nature of the visa classification ... the relevant sections will provide guidance.”

Clearly, each applicant for a visa bears the burden of demonstrating eligibility for the visa category. The previous FAM guidance, however, did not appear to change the material requirements for the visa category but merely provided guidance on factors relevant to “the nature of the visa classification.”

- a. What was the reason for the change in the factors consular officers should consider when evaluating whether an applicant for an F-1 visa satisfies the residence abroad requirement?

Consistent with the March 6 Presidential Memorandum “Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry into the United States, and Increasing Transparency among Departments and Agencies of the Federal Government and for the American People” to the Secretary of State, Secretary of Homeland Security, and Attorney General, the Department of State conducted a review of existing grounds of inadmissibility in coordination with interagency partners. The President’s mandate requires us to rigorously enforce all existing grounds of inadmissibility and to ensure subsequent compliance with related laws after admission.

Is there a new evidentiary standard applicable to F-1 visa applicants to demonstrate that they maintain a residence abroad that they have no intention of abandoning? If so, how has the evidentiary standard changed?

These FAM changes do not represent a new evidentiary standard. We have revised this FAM guidance to emphasize that student visa applicants, like other visa applicants, must establish for the consular officer that their present intent is to leave the country at the end of their period of authorized stay, in order to qualify for a visa. We do not believe our changes are a significant change from the prior guidance. The previous FAM guidance stated, “you must be satisfied at the time of application for a visa that the visa applicant possesses the present intent to depart the United States at the conclusion of his or her approved activities.” The new guidance states, “if you are not satisfied that the applicant’s present intent is to depart the United States at the conclusion of his or her study or OPT, you must refuse the visa under INA 214(b).” We see these as providing the same guidance about a student’s departure after his or her course of study. We note that the FAM continues to emphasize elsewhere that “it is essential to view the requirement [of residence abroad] within the nature of the visa classification.” (9 FAM 401.1-3(F)(2)).

22. **DS-5535.** Can VO provide guidance as to when it will require applicants to submit Form DS-5535? Are there certain nationalities or subgroups that will be required to provide this information as a matter of course? Are there certain professions or backgrounds that make it more likely to require a DS-5535? Is it possible to furnish this information to the post proactively to allow applicants to avoid delays?

Department of State consular officers at visa-adjudicating posts worldwide will ask the additional questions to resolve an applicant's identity or to vet for terrorism, national security-related, or other visa ineligibilities when the consular officer determines that the circumstances of a visa applicant, a review of a visa application, or responses in a visa interview indicate a need for greater scrutiny. Consular posts worldwide regularly engage with law enforcement and intelligence community partners to identify such applicants who may warrant increased scrutiny. Collecting the additional information from visa applicants whose circumstances suggest a need for further scrutiny will strengthen our process for vetting these applicants and confirming their identity. Consular officers will determine, based on the factors above, whether an individual visa applicant will be required to submit this additional information. Consular officers will only use this additional information to vet applicants for potential visa ineligibilities under existing U.S. law. There are no visa ineligibilities under U.S. law on the basis of race, religion, ethnicity, national origin, political views, gender, or sexual orientation. Individual visa applicants are permitted to bring the information with them to the consular interview in the event it is requested by the consular officer.

- 23. Performance Showcases.** Following issues reported last year by performers travelling to the United States on the visa waiver program to appear at festivals like South by Southwest, we have noted an increase in B visa refusals for artists who seek to travel to the U.S. to showcase their talent when they will not be paid for their performance. Please confirm that a B-1 visa is appropriate for foreign artists to travel to the United States for unpaid showcase performances.

The Visa Office has advised posts in the past that it may be permissible for an individual or group of performers to appear in a showcase, such as South by Southwest, on a B-1 visa provided the activity is more akin to an audition than a public performance before a paying audience and provided the applicant will not perform in any other capacity outside of the showcasing event. All B visa applicants, regardless of purpose of travel, must still overcome the presumption of immigrant intent and be able to demonstrate that he or she has a residence in a foreign country that the applicant has no intention of abandoning.

- 24. Possible Reduction and/or Suspension of Certain J-1 Exchange Programs.** According to recent media reports, certain J-1 visa programs may be suspended or curtailed.⁶ AILA members represent residency and fellowship programs, educational institutions, companies, and organizations who are program sponsors or who use umbrella J programs, as well as J-1 exchange visitors. We are aware that ECA is holding a meeting with sponsors of J-1 Alien Physician, Au Pair, Camp Counsellor, Intern, Trainee and Summer Work Travel programs on October 26, 2017. Are there any updates on upcoming changes that ECA can share with AILA? If not appropriate to do so until after the scheduled meeting with program sponsors, would ECA be willing to engage with AILA on this issue following that meeting?

The Department continues to implement J-1 exchange visitor programs at the same levels we have for the past few years. We are aware of the support that American businesses have shown

⁶ See for example <https://www.wsj.com/articles/trump-administration-considering-cuts-to-summer-work-visas-1503857856>.

for the program and its value to their local communities. We refer you to the White House regarding any potential changes in policy that could impact J-1 visa programs.

The Alliance for International Educational Exchange may also be of assistance if AILA has questions about any efforts that group is making regarding J-1 exchange visitor programs. The Department is not aware of individual activities the Alliance has undertaken in this regard.

AILA may attend the October 26 meeting with sponsors. Bureau of Educational and Cultural Affairs could address any additional questions AILA has on the sidelines of this meeting.

25. J-1 Processing at U.S. Embassy in Toronto. Members have reported J-1 visa denials at the U.S. Embassy in Toronto for interns and trainees based on the applicant's wage being too high. 9 FAM 402.5-6(H)(1) provides that an exchange visitor may receive compensation for employment when such activities are part of the exchange visitor's program.

- a. Can VO confirm whether there is a wage standard that officers use when reviewing J-1 visa applications?

Toronto officers do not use a wage standard when reviewing J-1 visa applications.

- b. If so, what is the legal basis for that standard, and is there any guidance provided to posts that VO can share?

Not applicable, as Toronto officers do not use a wage standard when reviewing J-1 visa applications.

26. Staffing in Chennai. We understand that the NIV section in Chennai lost nine officers through attrition this past summer, and that an additional five officers are expected to join the post towards the end of this year. Does VO have any plans to temporarily increase staffing in the meantime, given that October is traditionally a high volume processing month at that post?

Summer is our usual transfer season for Foreign Service officers, so it is not unusual to have this kind of turnover. The Bureau of Consular Affairs closely monitors staffing levels, with the goal of fully staffing consular sections. If there is insufficient assigned staff to meet workload, CA would consider temporary staffing support.

27. Proof of Non-Citizenship. In previous AILA-DOS liaison meetings, we have discussed the difficulties that people born to U.S. citizens outside the U.S. face when trying to prove they are not U.S. citizens because the U.S. citizen parent was not able to transmit citizenship. We expressed our concern for those who need to prove that they are not a U.S. citizen for tax purposes. Has there been any consideration of our recommendation to provide a certificate of non-citizenship in these cases? If not, is VO willing to revisit the issue?

CA/Passport only issues citizenship documents and does not document people as "non-citizens" (except non-citizen nationals who get appropriate nationality documentation). CA is not

willing to consider issuing a “non-citizenship” document. It is the responsibility of the individual to use personal facts, evidence, and applicable law to prove why they are not a citizen.

28. Police Certificate Requirement – Mexico. In March 2017, State provided guidance on a revision to the reciprocity schedule for Mexico in which IV applicants are required to obtain police clearances. The current reciprocity schedule states that a police certificate is required for all IV applicants (Mexican and Third Country Nationals) who are 18 and over AND who have resided in Mexico for more than six months since the age of 18.

The guidance goes on to state that it is the state police (Fiscalia General del Estado) of each state in Mexico that can provide a police record.

The explanation of this requirement on both Travel.State.Gov and the NVC sites is ambiguous. In the past, the NVC and consular officers reviewing IV cases always required a police certificate from every city in Mexico in which an applicant lived for more than 6 months after the age of 18 (previously it was after the age of 16). Is this still the requirement?

If this is correct, would VO consider changing the language of the police certificate requirement specifying that a police certificate is required from each city an IV applicant has lived in for more than 6 months after the age of 18?

No, a police certificate from every city in Mexico is generally not required for an IV application. A single police certificate is sufficient. Only when an IV applicant has lived in Mexico for six months or more and after the age of 18 is any police certificate required.

However, consular officers may request a state police certificate, rather than a city police certificate, where an individual was resident for more than six (months) on a case by case basis. For instance, if the applicant has lived in various cities throughout the same state, then the consular officer will request a state police certificate. A state police certificate is generally the most appropriate one to obtain and this is outlined in the reciprocity schedule.

Police certificates were previously unavailable from many Mexican states. The Department of State, through its embassies abroad, periodically reviews the availability and reliability of the documents used in the immigrant visa process.

Mission Mexico has been studying this issue for some time and now has found that Mexican police certificates meet our availability standards as of May 2017. After consultation with the Mexican government (both federal police and states), we notified applicants of the requirement and have worked with the National Visa Center to begin the inclusion of police certificates as one of the required forms.

29. LegalNet Follow-Up

- a. Our previous discussions led to an understanding that following up with LegalNet 30 days after submitting an inquiry is appropriate. Is this still the case? If not, can VO provide guidance on the current anticipated response time and recommend how much time should elapse before our members should follow-up?

Thirty days from LegalNet's most recent communication remains the appropriate time frame for attorneys to follow-up with LegalNet on a pending case.

- b. We understand that LegalNet cannot respond to factual inquiries and that only legal issues will be reviewed and receive a reply. Given the current response times, members report waiting months to receive a response and being told after several follow-up requests that the issue is factual and will not be reviewed. Would it be possible to send a template response to any factual inquiry briefly explaining that the inquiry is not appropriate for LegalNet? AILA anticipates that this would lead to fewer follow-up inquiries and would manage expectations as some attorneys are currently waiting months only to find that no action can be taken.

Factual inquiries regarding a visa refusal are outside of LegalNet's scope and should be directed to post. LegalNet provides an auto-response message that indicates LegalNet will only provide a substantive response to legal questions. That means LegalNet will not send any response other than the initial auto-response. If the inquiry is out of scope (e.g., a factual question), the auto-response is the only reply the inquirer will receive from LegalNet. This allows our staff to dedicate more time to working on in-scope inquiries to which we can provide substantive review and personalized responses.