Visa Office Responses to AILA Questions (April 9, 2014)

Attendees

For DOS

Donald Heflin, Managing Director
David Newman, Director, Office of Legal Affairs
Vincent Beirne, Deputy Director, Office of Legal Affairs
Jennifer Guilfoyle, Attorney Advisor, Office of Legal Affairs
Jeff Gorsky, Chief, Advisory Opinion Division
Marcia Pryce, Chief, Waiver Review Division
Rebecca Passini, Chief, Post Operations Division
Joel Nantais, Visa Specialist, Post Operations Division
P. Matthew Gillen, Chief, Coordination and Screening

AILA DOS Liaison Committee

Jerome (Jerry) Grzeca, AILA DOS Liaison Committee Chair
Maria Isabel Casablanca, AILA DOS Liaison Committee Vice Chair
Jane Carroll, Member
Catherine Haight, Member
Mary Kramer, Member
Jennifer Minear, Member
Daniel Parisi, Member
Steven Pattison, Member
Sandra Sheridan, Member
Kenneth Harder, AILA CBP Liaison Committee Chair
T. Douglas Stump, AILA President
Leslie Holman, AILA President Elect
Robert Deasy, AILA Deputy Director for Programs
Laura Lynch, AILA Liaison and Information Associate

1. Visa Wait Times

At the very top of this agenda, we congratulate the Bureau of Consular Affairs for its remarkable success in meeting, and even exceeding, the visa processing milestones set forth by President Obama in Executive Order 13597. One of the top priorities in this EO was that 80 percent of nonimmigrant visa applicants worldwide be interviewed within 3 weeks of the receipt of the application. We note that today, of the 222 U.S. visa-issuing embassies and consulates, only a small handful report visa wait times of more than 3 weeks. On behalf of our members and their clients, please accept our thanks and appreciation for accomplishing this vital mission.

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We thank AILA for its appreciation of our efforts to reduce wait times and its acknowledgement of our success in this area.

2. Electronic Applications, Forms DS-160 and DS-260

One of the main obstacles our members encounter with Forms DS-160 and DS-260 is the general inability to enter additional explanatory information. With the old paper version of the forms (DS-156 and DS-230), applicants were able to enter explanatory information into the form fields or simply provide an overflow sheet with any additional information that was relevant to their applications. With the online forms, there is no opportunity to provide such information. Therefore, we suggest adding either a tick box next to each question that allows for the provision of more information, similar to that which is now provided for disclosure of criminal history, etc., or a stand-alone final page that allows the applicant to enter any additional information he or she deems necessary to fully explain the answers to the questions solicited by the form. Would State consider implementing this or similar changes to the electronic DS-160 and DS-260?

In our view, the application forms work well for the vast majority of applicants. In those rare cases in which further information helps clarify the situation, consular officers can choose to accept additional documentation. The capacity to attach documents to visa applications is under development, but it has proven technically challenging and we do not expect to deploy such a system in the near future.

3. Endorsement of the I-129S for Blanket L Cases

We would like to discuss the practical challenges related to the endorsement of the blanket I-129s by consular officers and a possible solution for your consideration. Please refer to the attachment labeled Appendix A.

Thank you for your concern regarding these issues. We are updating FAM guidance in regards to proper endorsement of the I-129S to include an exemplar for consular officers to ensure consistency and clarification regarding the petitioner's requested length of validity. We hope to have this published soon. On the proposal to change the policy on I-129S validity, as you note we will have to discuss this at length with our interagency partners and public stakeholders.

4. U.K. Cautions

For the past several months, visa applicants at the U.S. Embassy in London who have received a police caution in the U.K. have had their applications refused under 221(g) and have been told that their applications would be held in abeyance while State reviewed its policy to determine whether a caution will be treated as a conviction. Though there has not been a formal pronouncement on the issue by the Embassy in London, we have heard

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anecdotally that some of these cases have now been refused. When inquiring on the status of this situation, which affects hundreds of applicants, Embassy officials state that cases remain in abeyance while the matter is under review. Please provide an update on State's policy on the treatment of U.K. cautions.

Additionally, at Appendix B, we have attached a position paper outlining why the long-held policy that U.K. cautions should not be treated as a conviction for immigration and visa eligibility purposes should not change.

VO appreciates the well-researched paper AILA has provided on this issue. The question of how to treat police cautions is a complicated issue that has been the subject of extensive study by Post, and consultation with both the Visa Office and CBP.

The Visa Office agrees with AILA that such cautions do not constitute convictions for the purpose of making INA 212(a)(2) ineligibility determinations. INA 101(a)(48)(A) defines a conviction as a formal judgment of guilt entered by a court, or a finding of guilt by a judge or jury. Since no court or judge is involved in police cautions, they would not be convictions for this purpose.

Even if a caution does not constitute a conviction, however, the existence of a caution could provide the basis for an ineligibility finding as an admission to either a crime involving moral turpitude, or to a violation relating to a controlled substance. In Matter of K, 7 I&N Dec. 594 (BIA 1957) and other administrative and judicial decisions have established factors that must be met for an admission to provide a basis for a 212(a)(2) ineligibility determination. These factors are cited in 9 FAM 40.21(a) N5.

This FAM Note includes a provision requiring that: "The applicant is given a full explanation of the purpose of the questioning, is placed under oath and the proceedings are recorded verbatim". This provision is a long-standing internal administrative requirement that applies only to consular officer adjudications. The requirement that the applicant be placed under oath and that the proceedings be recorded is not required by In Matter of K or other administrative or judicial decisions. Therefore, police cautions can form the basis for an ineligibility determination based on an admission even if there was no taking of an oath or record made of the proceedings.
There are different types of cautions, including conditional cautions and cannabis warnings. U.K. authorities have issued different guidelines over the years governing procedures for cautions, conditional cautions, and cannabis warnings. Therefore, the determination as to whether a police caution would have constituted an admission for 212(a)(2) purposes has to be made on a case-by-case basis after the consular officer weighs all the evidence available in that case. A consular officer can find an applicant ineligible on the basis of an admission only if there is evidence that the criteria established in U.S. administrative and judicial case law were satisfied. That evidence may reflect the procedures followed by U.K. authorities at the time as well as any relevant information subsequently collected.

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5. NVC Fee Bills

Over the past six months, members have reported numerous inconsistencies with regard to when the NVC triggers the issuance of fee bills. For beneficiaries who are subject to the visa backlog, our understanding has always been that the fee bill would be issued when the NVC had knowledge that the beneficiary's priority date was close to being current – in some cases almost one year in advance. However, we are now hearing from members who report instances where the beneficiary's priority date is clearly going to be current within the next 2-3 months, and the NVC has yet to issue the fee bill and/or upon attorney inquiry to the NVC, refuses to issue the fee bill. What is the NVC's current policy on the timing and procedure for fee bill issuance?

In response to member requests to avoid starting the NVC process too early, the NVC has set a goal of sending fee bills roughly six months before a visa is available. Over the past six months, the NVC has worked diligently to reduce the lead time between when the NVC sends fee bills and when a visa is available. While this is the NVC's goal, it is not a strict rule. There are visa categories for which we have initiated processing more than a year in advance based upon our previous goals and cutoff date movements. As a result, there have been lead time discrepancies between visa categories. We appreciate your patience as we realign our processing lead times.

You also mention hearing from members who report "instances where the beneficiary's priority date is clearly going to be current within the next two to three months, and the NVC has yet to issue the fee bill and/or upon attorney inquiry to the NVC, refuses to issue the fee bill." We are dedicated to providing you sufficient time to prepare your clients for their interviews and would like to address these concerns. Please send us some specific case examples so that we can investigate these situations.

Finally, as you are all aware, USCIS has reprioritized its workload and as a result, we have seen an increase in the number of approved petitions at the NVC. Therefore, in some cases, it is not that we are refusing to send the fee bill, but instead that we have not yet processed the case in question. Please note that we process all cases in the order in which they are received, and we send processing instructions as soon as we have processed the case.

6. Official Government Identity Documents

At some posts, such as Nairobi and Addis Ababa, there have been significant delays in the issuance of family-based immigrant visas and K visas, as well as recommendations for revocation of such visas. In many of these cases, the applicants are refugees who do not have official government identity documents, or whose identity documents were recently issued. Members report that some posts will not grant the immigrant visa, despite confirmation of parentage through DNA testing and/or secondary evidence as reflected in the FAM. Furthermore, some posts do not take into consideration the fact that such documentation may be unavailable, particularly if the country has had no competent

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government authority in place for decades. For example, a member reports that in Somalia, the post insisted that the applicant obtain a refugee document issued more than three years prior despite the fact that it is impossible to obtain such a document, and the attorney has done everything in accordance with the FAM, the country reciprocity schedule, and other guidance and regulations. While we understand that posts must guard against fraud, refusing to issue a visa solely based on the fact that a government identity document is not old enough seems unreasonable when it is accompanied by other evidence or evidence that it is impossible to acquire. How can members address these roadblocks and what can be done so that these cases do not languish in the adjudications queue for years?

The Department has determined that Somali passports are not valid for visa-issuance purposes. Most Somali immigrant visa beneficiaries will not be required to present a passport under the subsections of 22 CFR 42.2 and will be issued visas using Form DS-232 per 9 FAM 42.64 PN1. Diversity visas for Somalis may require individual passport waivers per 22 CFR 42.2(g) and will be issued using Form DS-232 per 9 FAM 42.64 PN1. Somali nonimmigrant visa beneficiaries, including K1 visa recipients, will also require a passport waiver per guidance in 9 FAM 41.113 PN2.2. Please contact LegalNet (LegalNet@state.gov) if you have a specific case where a Somali applicant's final adjudication is pending solely because of a travel document request.

7. H-1B End-Client Letters

For H-1Bs involving IT consultants working at end-client sites, posts in India often require letters from end-clients which set forth the job duties of the beneficiary-consultant. Where the consultant is supervised by the petitioner, such a requirement is inappropriate in that it wrongly presumes the end-client is the actual employer. Where the approved underlying petition involves a long-term placement at a third-party worksite, USCIS has already concluded that the petitioner is the actual employer and that the case meets the requirements of the 2010 Neufeld memorandum.[1] Such requests inappropriately force the end-client to attest to the duties of an individual over whom the end-client has no supervision or control, while giving the false impression that the end- client, rather than the petitioner, is supervising the worker. Would State please remind posts that end-client letters should not be requested where the approved H-1B petition involves long-term placement at a third-party worksite since USCIS has already determined that a valid employer-employee relationship exists?

Thank you for your concerns. As you are aware 22 CFR 41.105 gives consular officers the authority to require any documents considered necessary to establish the alien's eligibility to receive a nonimmigrant visa. In the context of the H-1B applicants in Mission India, we have worked very closely with our consular management and DHS to ensure we are consistent in our view of employer-employee relationship. We can assure

[1] *See* "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Jan. 8, 2010) at p. 5.

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you that if an end-client letter is requested by a consular officer in Mission India, the intent is not to use that letter in any manner to make a determination regarding employer-employee relationship that USCIS already adjudicated. However, if your members have a reason to believe that a client's H-1B visa has been denied because of the employer-employee relationship after an end-client letter was requested, they should contact the Visa Office via LegalNet@state.gov.

8. ART Policy Change

We applaud State's recent policy change related to children born abroad through Artificial Reproductive Technology (ART) that was announced via the January 14 unclassified cable 00010952. This will be of great help to U.S. citizens living abroad who are the gestational parents of children born through ART. While we understand that State is unable to re-open previously denied applications for immigration benefits that would now be approvable under the new policy, we respectfully request that the Visa Office instruct all posts to place a notice on their individual websites announcing the policy change so that U.S. citizens resident within a particular consular district will be aware of the option to re-submit an application under the new policy. Please also provide an estimate as to when the new policy will be formally incorporated into the Foreign Affairs Manual (FAM).

As State has acknowledged, this policy change, while significant, still leaves unaddressed additional scenarios in which U.S. citizens may become parents to children born abroad through ART. We therefore ask that State provide an update on the efforts it is taking to further review and update State policy and the FAM to recognize parent-child relationships created through non-biological means. For example, in a situation where a surrogate is used to carry the child to term, the child will not be recognized as a U.S. citizen by birth in the absence of a genetic connection to a U.S. citizen, even if a non-genetically related U.S. citizen is recognized as the legal parent of the child in the country of birth. AILA's areas of concern with regard to current FAM policy on this subject, and suggested FAM revisions, were included in a memorandum sent to USCIS (and copied to State) in July 2013. Another copy is attached for your reference here as Appendix C. Please provide an update regarding State's further thoughts and analysis regarding the additional ART-related issues raised in this memo.

The letter provided by AILA in Appendix C is entitled "Modernizing the Treatment of U.S. Citizenship Acquisition for Children Born Abroad after Conception through Assisted Reproductive Technology". Because this letter, and the example raised above, relates to citizenship status, the issues raised in this letter would be better addressed to USCIS and CA/OCS than to the Visa Office.

In regard to the recent policy change, VO will take AILA's suggestion for posting this information under advisement. VO cannot give an estimate of when FAM guidance may appear, but can note that the new policy will primarily impact citizenship claims. Claims to visa eligibility on this basis will principally relate to USCIS approved petitions. Only

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a few cases relating to derivative NIV applications will involve direct applications for visas.

9. E-2 for Israelis

In June 2012, President Obama signed into law legislation that adds Israel to the list of countries eligible for E-2 treaty investor visas. In April 2013, the Visa Office informed us as follows:

> *The Department does not yet have a basis for determining that Israel offers equivalent status to U.S. investors in Israel – a statutory prerequisite for issuance of E-2 visas to Israeli nationals. Through our Embassy, we have been working with Israeli government officials to facilitate Israel's development of a visa status similar to the E-2.*

a. What is the current expectation regarding when Israel might offer equivalent status to U.S. investors in Israel?

Although press reports indicate that the Israeli government has approved an E-2 equivalent visa status for U.S. investors, the Department must confirm that Israel will provide reciprocity, insofar as practicable. Also, we do not have an expected timeframe regarding when Israel will offer this status to U.S. investors.

b. Are there additional statutory or other prerequisites, or will Israelis become eligible for E-2 visa issuance immediately after this equivalent status is offered by Israel?

No. Once the Department determines that the Israelis offer U.S. investors a visa status similar to the E-2, we will be able to issue E-2 visas for qualified Israeli applicants.

10. BECA Status Inquires

Contact information for J-1 program sponsors and sponsor applicants is available at http://eca.state.gov/about-bureau/contact-us and http://j1visa.state.gov/contacts/. AILA members representing companies and organizations that apply for J-1 program sponsor status with the Bureau of Educational and Cultural Affairs (BECA) report difficulties in obtaining responses to inquiries and an escalation path appears to be needed. Please provide us with contact information for the officer(s) responsible for J-1 program designations for the various programs and the protocol for contacting them. Specifically, how long should a member wait for a response after contacting jvisas@state.gov, faxing (202) 632-2701 or calling (202) 632-2805 before escalating to the designation officer(s)?

We regret that your members and their clients are enduring longer than expected waits for responses from the Department of State on inquiries pertaining to Exchange Visitor Program sponsor designation/redesignation. The Bureau of Educational and Cultural Affairs (ECA), State Department bureau responsible for the designation of U.S sponsors

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who wish to engage in one or more of the thirteen Private Sector categories in the J-1 Exchange Visitor Program, informs us that they are clearing the backlog of designation applications/redesignation requests and look forward to processing incoming requests. We refer you to Diane Culkin, Acting Director, ECA/EC/D Office of Designations at culkinde@state.gov, 202-203-7803 for more information. General contact information for Private Sector Exchanges: jvisas@state.gov, telephone 202-632-2805.

11. J-1 Site Inspections

The Department recently announced that it will soon begin on-site inspections of J-1 internships and training programs to verify whether they are in compliance with agency rules and meet the overall goal of providing exchange visitors with exposure to American culture.

a. Has State commenced on-site inspections of J-1 programs at this time?

b. Please provide an overview of the inspection process and any guidance regarding J-1 inspection procedures that will allow us to better understand the nature and scope of the inspections.

The Bureau of Educational and Cultural Affairs (ECA) has begun a comprehensive review of the regulations covering the J-1 intern and trainee programs categories, following recent in-depth reviews of the teacher, au pair and high school exchange categories. Site visits and monitoring visits to designated U.S. sponsors administering intern and trainee programs are intrinsic to ECA's program review and regulatory activities. ECA will contact U.S. sponsors with guidance on planning and preparing for the visits. ECA is solely responsible for initial designation and bi-annual re-designation of U.S. sponsors administering exchange visitor programs. The Bureau of Consular Affairs (CA) has no role in the Department's on-site monitoring or compliance visits of individual J-1 internship and training programs. Please contact ECA for further information on the scheduling of visits, the nature and scope of the visits, and how the information gained during a visit is utilized. We refer you to Nicole Deaner, ECA/EC Managing Director; email DeanerN@state.gov, telephone 202-632-9292.

12. List of Active IGA Programs

While we understand that any federal agency may act as an "interested government agency" (IGA) for J-1 waiver purposes, there are some agencies that have active J-1 waiver programs. The Department of State website provides a link to a list of "Designated Officials for Signatures" within the IGAs that have active programs. However, the content of that link does not contain a list of active IGA programs, their contact information, or the names

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of the appropriate signatories for a J-1 waiver recommendation.[2] Can State please update its website to include this important information?

Any U.S. government agency potentially may act as an "interested government agency" for J-1 waiver purposes, and so the Department is not able to provide a list of agencies that might act as interested government agencies, nor of contact information for the designated signatories at each agency.

13. E-signed Employment Contracts at WRD

Please confirm that the Waiver Review Division will accept e-signed employment contracts, in addition to photocopies of original signatures, in support of clinical J-1 waiver applications filed by international medical graduates pursuant to INA §214(l).

The Waiver Review Division will accept e-signed employment contracts, in addition to photocopies of original signatures from the State Department of Health in support of clinical J-1 waiver applications filed by international medical graduates pursuant to INA §214(l).

14. Visa Reciprocity Tables

Members report that the limitation on the duration of visa issuance in many work-authorized categories required under the visa reciprocity tables imposes a financial and administrative burden on consulates, applicants and employers. For example:

- **Mexico**: 12 months for E, H-1B, L, O, P, TN
- **Brazil**: 24 months H-1B and L-1; 3 months O and P
- **China:** 12 months H-1B; 24 months L-1; 3 months O and P
- **Russia:** 24 months H-1B, L-1, O and P

This limitation has had several negative consequences:

1. Substantial additional work for the U.S. consulates.
2. Additional costs for employers.
3. Inconvenience and disruption to the professional employees (including the need to renew visas, driver's licenses, and spouses' work authorization).

Can State please confirm whether negotiations are underway to revise the reciprocity table to expand the visa issuance period for these work-authorized visa categories? What steps must occur for such a change to take place?

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[2] *See* http://travel.state.gov/content/visas/english/study-exchange/student/residency-waiver/request-by-federal-government-agency.html.

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We appreciate your bringing those specific examples to our attention. As you are aware, U.S. visa validity is determined on the basis of reciprocity. U.S. law requires the validity of visas, including the number of entries and fees, to be based – insofar as practicable – on the treatment accorded to U.S. citizens. The goal of visa reciprocity is to obtain progressive visa regimes while encouraging international travel that benefits U.S. citizens and the U.S. economy. Our overseas missions always are looking for opportunities to advance these objectives, but as a matter of policy and respecting the confidentiality of bilateral exchanges, we cannot comment on any pending negotiations.

15. Administrative Processing

AILA members continue to express concern about the many hardships and difficulties created by the increasing delays in visa adjudication due to administrative processing. In our experience, the large majority of individuals who experience administrative processing delays are ultimately approved for their visas, which makes the delay – and the lack of a clear explanation as to why it occurs – particularly difficult to understand. We recognize that most administrative processing delays arise because interagency clearance is required and we know that these delays are also frustrating for you and your colleagues in the field.

a. Are interagency discussions currently underway with DHS and other Washington stakeholders to develop a more efficient clearance process for these cases? AILA would welcome the opportunity to participate in such discussions if it would be helpful.

We are constantly engaging with our interagency partners as shown by sustained improvements in processing times. We will continue working with our partners at the working and policy levels.

b. Are visa applicants provided an explanation of what "administrative processing" means and the possible reasons as to why a case may be held for such processing in the form of a handout or e-mail?

Applicants are provided a sheet showing the section of the law applicable to their refusal. Administrative processing cases are refused under INA section 221g. Posts will elaborate either on the form or orally and explain that the refusal is the result of necessary further "administrative processing" for the visa application. If any information or action is required of the applicant, that would be clearly explained.

c. Administrative processing sometimes involves deliberation at post rather than the need for interagency clearance. In our experience, issues that need to be resolved at post take less time than those that need to be resolved at headquarters. Would State be willing to instruct consuls to advise applicants when administrative processing means action to be taken by the post that will be resolved rather quickly, as opposed

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to action required by headquarters which may result in a lengthier delay?

Many cases involve repeated interactions between headquarters and posts. It is not possible to say when any individual case may be resolved less quickly than another case. It is not possible to give a time frame for resolution on any individual case.

d. Members report that consular sections continue to retain applicants' passports/travel documents while the application is under administrative processing. This practice contravenes the recommendations of the DOS Inspector General in the May 2013 "Inspection of Embassy Baghdad and Constituent Posts, Iraq," which advises posts not to retain travel documents for indefinite periods of time.[1] Please provide an update as to whether a mechanism exists for the return of a visa applicant's passport where the visa application is subject to lengthy administrative processing?

Any applicant may request return of his or her passport while the visa application is being processed. The passport will be returned via the normal method for that post. The applicant may also request the passport at the time of interview

e. Immigrant visa applicants subject to lengthy administrative processing would benefit from being able to schedule a subsequent medical examination during the administrative processing period and prior to the expiration of the current medical results in order to minimize delays when the case is ready to move forward. However, some posts (Yangon, Myanmar) do not allow this, which results in a gap in medical examination results and additional delays. Is the decision to prevent an immigrant visa applicant from scheduling a subsequent medical examination during administrative processing discretionary or Visa Office policy?

There is no law prohibiting an immigrant visa applicant from scheduling a subsequent medical examination. The Immigrant Visa (IV) unit in Rangoon assured VO that it does not forbid applicants from scheduling medical examinations while a case is undergoing administrative processing. Posts sometime advise applicants to wait to repeat the medical examination if other issues may prolong processing. It is not advantageous for the beneficiary to repeat the medical if there is uncertainty that the case will be otherwise issuable during the new medical examination validity period. Medical examinations are valid for a maximum of six months. If an applicant insists on repeating a medical examination, despite other encumbrances to issuance, the processing post will not prohibit them from doing so.

16. Consular Review of Documents

We continue to receive communications from AILA attorneys voicing concern over reports from clients that supporting documentation is not routinely accepted or reviewed at the visa

[1] http://oig.state.gov/documents/organization/210403.pdf

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interview. This is particularly frustrating when the visa is denied and examination of the documents could have addressed or resolved the consular officer's concerns that led to the denial. We recognize that applicants can and do bring voluminous or irrelevant documents to their interview and that many applicants mistakenly believe that the documents alone make the case for visa issuance. However, while some officers will review documents the applicant brings to the interview, others will not, leading to inconsistent adjudications.

a. What guidelines does the Visa Office provide to consular officers in the field concerning the discretionary review of documentation presented by visa applicants?

The Visa Office provides guidance that adjudicating officers are responsible for forwarding supporting documents that pertain to the applicant's specific ineligibility to help support a waiver request. 9 FAM 40.301 N2 instructs consular officers to "scan all supporting documents into the NIV case. Depending on the ineligibility, this may include police/court records, OF-194, panel physician evaluation, copy of an approved petition, etc."

b. AILA would like to ensure that well-prepared documentary submissions or summaries of relevant facts and law in complicated visa cases are given thoughtful review and consideration. Would State be willing to authorize consular managers to set up procedures by which attorneys could request review of visa denials where documentary submissions were not reviewed by the adjudicating consular officer?

Consular Sections abroad all have mechanisms for attorneys or members of the public to use to inquire about visa decisions. Additionally, the Department of State has established LegalNet (LegalNet@state.gov) as a dedicated email channel limited to legal inquiries related to the denial of a visa. As you are aware, all visa refusals made by consular officers abroad based on ineligibilities for which there is a 212(d)(3)(A) waiver are reviewed by a supervisory consular officer to ensure the correct application of visa law.

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