AILA Rome District Chapter

When In Rome...

Chapter Newsletter Volume 4 - Q4/2010

Spotlight on Paris

**Daniel Parisi, RDC Consular Liaison Committee*

Following a spectacular conference in Paris in October, the senior consular staff of the Paris Embassy continues to provide a wealth of information. On December 9th I had the pleasure of attending "Recent Developments in United States Immigration Law and Visa Processing at the American Embassy", hosted by the American Chamber of Commerce in France. The event was moderated by AILA RDC member Richard Goldstein and featured Mark O'Connor (Visa Chief), William Swaney (NIV Chief) and Thomas Moore (Treaty Visa Officer) who provided an update on current procedures and an overview of future developments that are intended to make visa processing in Paris more "user friendly". The points that may be of particular interest to our RDC members are:

Blanket L Petitions:

The attestation must list the employees working for the petitioner in H and L status as the consular officer will need to know if the beneficiary/applicant will be required to pay the enhanced petition fee. For existing blanket petitions, this information can be faxed to the consular section on +33 (0) 1 42 66 97 83.

Petition Information Management System (PIMS):

The consular officers verify that petition approvals have been entered into PIMS up to 48 hours before the interview. If the case is not in PIMS 48 hours before the interview, the consular officers will email the Kentucky Consular Center to verify the approval. However, if the approval is not in PIMS at the time of the interview, the visa cannot be issued and the application will be refused under INA § 221(g) until PIMS verification is successful.

Refusals Under INA § 221(g):

The NIV Chief confirmed that a "221(g) refusal" (even when issued for cases that involve PIMS issues) is considered a refusal and will have to be disclosed on all future visa applications and when making an application for registration with ESTA. The NIV Chief clarified that, although the refusal must be disclosed, it should not result in a subsequent refusal. When a 221(g) refusal is disclosed on an application for ESTA registration, the application should be manually reviewed by a DHS officer and, once the previous refusal is determined to have been issued under 221(g) (assuming there are no other issues) the ESTA registration should be approved. Likewise, when the applicant makes a subsequent visa application, once the previous refusal is determined to have been issued under 221(g) (again, assuming there are no other issues) the visa should be issued.

Treaty Trader/Investor (E) Visas:

The US Embassy in Paris has launched a pilot program to expedite the renewal of corporate E visa registrations. Under this program, large multinational companies that have been incorporated and doing business in the US for 2 years or more and that have either 500 US employees or total annual sales (including those of affiliate companies) exceeding $10 million may submit an abbreviated application which, in most cases, can be approved in approximately 2 weeks.

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Upcoming Important Dates

Rome District Chapter Spring Conference
May 12-13 in Frankfurt, Germany

AILA National Conference
June 15 - 18 in San Diego, California

CONGRATULATIONS!!!

The RDC wishes to congratulate our Chair, Anastasia Tonello, on the birth of her daughter. Giovanna Elle McDonald was born on January 4, 2011 at 2:52 am in New York. We wish Anastasia, and her husband Robin our most heartfelt congratulations!

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In addition, employees of companies participating in this program can submit the renewal applications at the time they apply for their individual E visas. There are currently 82 companies participating in this program and the Paris Embassy intends to work with other embassies to develop this program at other posts. For more information on this program please refer to http://france.usembassy.gov/corporations2.html

The Paris Embassy will also issue B-1 visas with the annotation "Prospective Treaty Trader/Investor" to those potential E visa applicants who wish to travel to the US to make preliminary arrangements for their potential E visa enterprises. While this does not guarantee that an E visa will ultimately be granted, it can be beneficial when the potential investor is disclosing his or her reason for travel to a CBP officer on arrival in the US.

Visa Waiver Program:

French emergency passports do not meet the criteria for travel to the US on the Visa Waiver Program and a number of full-validity French passports do not meet these criteria as France did not implement the necessary equipment to produce compliant passports until after the deadline imposed by the US. Therefore, many French nationals require B-1/B-2 visas before visiting the US. As many people are unaware that their passports do not comply with the requirements of the VWP and the ESTA registration application does not check to ensure that the passports being registered are compliant, a number of French nationals attempt to check-in for their flights to the US at the airport and are denied boarding by the airlines. When this happens, there is an emergency procedure in place at the Embassy. Would be VWP travellers can call the Embassy's call center, explain the situation and, in some cases, even be given visa interview appointments on the same day. Of course, they will have to be able to demonstrate eligibility for a B visa and complete the application; however, if this can be done, visas can sometimes even be issued on the same day and collected directly from the security officers outside the Embassy so that the travellers can take a later flight to the US. It is more typical that the visas are issued the next day; however, the Embassy does strive to make every accommodation for travellers in this situation.

ESTA Registration and DS-160 Data Collection:

When entering information into the ESTA application system or on the DS-160 it is important to enter information exactly as it appears on the passport. For example, married French women's passports are always issued in their maiden names (and sometimes are annotated with their spouses' last names (i.e. Anne DUMAS épouse LAGRANDE). Therefore, as a rule, the name should be entered exactly as is stated on the passport, especially as (according to the consular staff) more on-line and electronic systems will be implemented in the near future and these will be reliant on accurate and complete data being issued by the applicant. Moreover, the Embassy noted that French passport numbers follow the format 12XX34567 and there are sometimes issues relating to applicants entering a zero in place of the letter "o" as well as the letter "l" in place of a the number "1". The officers caution that care should be taken as, once the on-line systems are in more common usage, applications may be rejected if information is not entered accurately.

Visa Re-Issuance and Fingerprint Recapture:

The last relevant issue that the officers noted is that the Paris Embassy has expanded visa re-issuance and fingerprint recapture (for visa applications by mail) to a number of visa categories, provided that the applicant meets certain criteria. Detailed information on visa re-issuance by mail can be obtained by emailing ParisVisabymail@state.gov or by consulting the Embassy's webpage on the subject at http://france.usembassy.gov/niv_mail_in_applications.html.

** Daniel Parisi is an Associate at ASG Immigration in London, UK*

Consular Liaison Committee Update

**Anastasia Tonello, Rome District Chapter Chair*

The Consular Liaison Committee's primary goals in 2011 include continuing our liaison question and answer sessions with US Embassies and Consulates in the UK, Greece, Brazil, South Africa, Germany, Lebanon and Nigeria and to developing ongoing two way post liaison communications within the Rome District. We are also aiming to promote cooperation with US consular posts in Africa, with the idea of providing AILA with one of its first in-depth resources for the special visa and anti-fraud issues presented at African posts.

The Consular Liaison Committee had a successful meeting with the Visa Chiefs at the US Embassy in London and the liaison report was recently published on Infonet and sent through our chapter listserve. The committee is also organizing a tour of the London Embassy which may take place in February 2011. Committee members were scheduled to meet with Consular staff at the US Embassy in Athens in December and hope to have liaison report published on Infonet in early 2011.

In order to develop our liaison links with Embassies and Consulates abroad, the Committee is also developing a list of Consular contacts. If you have frequently dealt with individuals at a particular US Embassy or Consulate and have the contact details you would like to share with the Chapter please forward the contact details to Anastasia Tonello at anastasia.tonello@lauradevine.com.

DHS Liaison Committee

Maria Çelebi, Istanbul, Turkey - Committee Chair

As most are aware, RDC's liaison work is divided between the CLC committee for DOS efforts and the DHS Committee. The newly formed DHS Liaison Committee has formulated goals and projects that harmonize with CLC.

Our primary goals include conducting liaison meetings with overseas DHS offices, becoming engaged in CBP issues and coordinating with the AILA National CBP and International Operations Committees, as well as assisting in DHS issues globally (like re-entry permits and fingerprinting).

In Q4 of 2010, the committee has issued a report of the DHS Stakeholder's Teleconference re: Overseas filing of I-130. The committee also issued our first liaison report with none-other than the Rome District Director himself, Mr. John Lafferty. In that report you will find very useful information on communication and approval rates for waivers. Please see the RDC webpage for those reports. Lastly, the committee has coordinated with CLC committee to conduct a joint liaison at Athens post (Embassy and CIS operations). Please look for this report in upcoming RDC announcements.

If you have a particular issue with a USCIS overseas office or CBP issues that you would like to bring to the attention of our committee, please contact Maria Çelebi at maria.celebi@bener.av.tr.

Global Migration Committee

Jacqueline Bart, Toronto, Canada - Committee Chair

The RDC Global Migration Committee as been working for our chapter on various initiatives.

Global Migration Forum Meeting on June 15, 2011: Plans for the Global Migration Forum Meeting, to be co-hosted by the Global Migration Action Group and the Rome District Chapter, are underway. The proposed date for the joint Forum is June 15, 2011, and we anticipate securing a location for the event at the Manchester Grand Hyatt in San Diego, where the 2011 AILA Annual Conference will be held. Do plan to attend this advanced global immigration program. All RDC chapter members are encouraged to attend. Be sure to book your tickets to arrive in San Diego on June 14 in order to enjoy the forum and the networking We will provide additional and more specific updates to the membership shortly. If you have any topic or speaker suggestions, please contact Linda Lau at linda@globallawgroup.net, Maria Celebi at maria.celebi@bener.av.tr or Jacqueline Bart at bart@bartlaw.ca.

Outbound Immigration List: We have collected the names of all the individuals who would like to be placed on the outbound list and have been waiting for evidence of licensure from all of the individuals. In early January, we will compile the final list based on the evidence received. For inclusion on the list, please forward your licensure information to Heather Segal at heather@ggbilaw.com or Maria Celebi at maria.celebi@bener.av.tr.

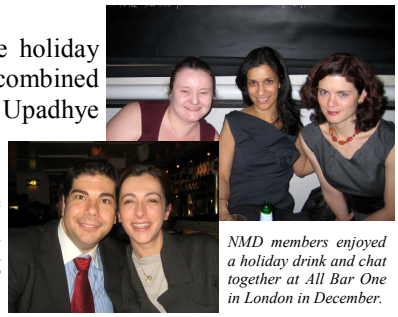
Our Committee of the RDC and the Global Migration Action Group are collaborating to create "country profiles" of the immigration laws and procedures of as many countries and jurisdictions as possible. These country profiles will be hosted on the RDC website and can be a great source of information and reference. We strongly encourage members to contribute, and to encourage contributions from lesser-known jurisdictions, especially Africa, Asia and Latin America. Please send contributions to any of the following: Poorvi Chothani (poorvi@lawquestinternational.com, Marco Mazzeschi (mm@mazzeschi.it) or Jane Carroll (jscarrol@thoughtworks.com).

If you have any suggestions regarding agenda items or ideas for the RDC Global Migration Committee, please contact Jacqueline Bart at bart@bartlaw.ca.

New Members Division/Practicing Abroad Committee

Daniel Parisi, London, UK, Committee Member

Our committee is pleased to announce that we held our first social event during the holiday season. Several of our members gathered in London of an evening of food and drink combined with great conversation, which was organized by my fellow committee member Nita Upadhye and me. Our group met at All Bar One in central London and spent several hours getting acquainted with new members and better acquainted with those of us who have been members for a bit longer. We aim to have several of these social events during the year around the Rome District as well as in connection with our formal meetings and conferences, which we hope will encourage those new to the RDC and to practicing abroad to establish personal as well as professional connections.



NMD members enjoyed a holiday drink and chat together at All Bar One in London in December.

In addition to our social event, the NMD has worked to publicize the many benefits of RDC membership by sending out a specially tailored bulleting to the AILA National NMD listserv. This bulletin highlighted the work that the RDC does to foster relationships with US consular posts around the world and the high calibre of speakers we have at our conferences as well as providing information on the RDC mentor program and resources that may be particularly relevant and beneficial to new AILA members or those new to practicing outside the US. We have had a very positive response from members of the AILA National NMD as well as from the AILA National NMD Liaison for Canada, Ellen Kief, who is very excited about our chapter and the work we do and who looks forward to working with us.

Quick NIV Pointers for the US Consulate in Guangzhou

*by *Jared Leung*

The Consular Section of the US Consulate in Guangzhou is located on the 5th floor of a mixed use commercial and residential building. The address is 5th Floor, 2nd Annex of Tianyu Garden, 136-142 Linhe Zhong Road, Guangzhou, China, 510133. It is within 5 minutes walk from the Guangzhou East Railroad Station, and next to IKEA.

If you have not been to the Consular Section before, it is quite a unique setup. Before you get to the 5th floor by escalator, you will go through at least a dozen or two immigration consulting companies that have set up shops in the same building occupied by the Consular Section. The barrage of local immigration consulting companies flanking the Consular Section has led to the following warning on the Consulate's website:

> "The U.S. Consulate General does not endorse or have a "special relationship" with any individual or business that offers advice or assistance with the visa process. No one can guarantee the issuance of a visa to you. The only U.S. consular office in Guangzhou is located on the 5th floor at Tianyu. All U.S. government forms are free. Beware: many visa applicants lose money or are permanently barred from the United States as a result of misleading information and fraudulent applications provided by visa consultants."

All IV cases for China are processed in Guangzhou. There is also a USCIS office onsite at the same location.

The current visa wait time for an interview is approximately 10 days. The wait time may increase in the upcoming holiday travel seasons. All visa applicants are well advised to apply for their visas at least 90 days before their anticipated departure date from China.

Expedited visa appointments are considered on a case-by-case basis. However, the person making the request must first obtain a visa appointment through the Visa Call Center, prior to making the expedited request through the Consulate's website at: http://guangzhou.usembassy-china.org.cn/niv-inquiry-form.html. Generally, expedited appointment request will be granted only in the following categories:

- Humanitarian request for immediate family members traveling to meet and assist a seriously ill relative or to assist with a family emergency.
- Students who have not been refused a visa in the current academic year whose classes will start before their current visa interview date.
- Qualified Asia-Pacific Economic Cooperation (APEC) Business Travel Card holders.

As of November 15, applicants who schedule visa appointments in any US consulate in China must have first paid for the visa application fees and obtained the receipt from the CITIC bank. The Visa Call Center will require the applicant to provide the receipt number prior to scheduling an appointment.

The Consulate has a CITIC Bank Drop-off Renewal System. See: **http://guangzhou.usembassy-china.org.cn/citic-bank-drop-off-service.html.** Applicants using the CITIC Bank drop-off service are only required to come to the Consulate to provide their fingerprints. Most of these applicants will not be interviewed, although the Consular Section does reserve the rights to call in applicants for interview if it deems it necessary. Applicants applying for the J, F, H and L visas are eligible to use the CITIC Bank drop-off service if they meet the following requirements:

- Their current visa must still be valid or has expired within the last 12 months
- The applicant is applying for the same type of visa
- The applicant is applying at the same US Consulate or Embassy
- The applicant is returning to the same school or same employer

Please consult with the Consulate's website for the most current information and additional details.

The Guangzhou Consulate accepts application from third country nationals for NIV processing. However, the post reserves the rights to require any applicants to apply in their home country. The third country national applicant should have a valid reason to be in China and in valid Chinese immigration status.

There are no an E-1 or E-2 treaties with China. Therefore, we do not recommend the submission of E visa by a third country national in China because of the extensive nature of an E visa application. Further, it would be more difficult for the Consulate to verify the veracity of some documents unique to the applicant's home country.

Dependent parents have the same burden of proof as other applicants to overcome 214(b), which requires them to demonstrate that they have sufficient ties in China to compel them to return to China after their visit to the U.S. For a parent who is dependent on the support of often their only child living in the U.S., he/she may have difficulties demonstrating that they will return to China after their brief visit. Therefore, dependent parents applying for a visitor visit must explain to the consulate officer at the interview why they would return to China.

Although B-1 in lieu of H-1B or H-3 is a valid visa category, it does not seem that the Post likes them very much. It appears that the Post would rather see individuals applying for either the B visa or the H1B visa. However, an applicant meeting the criteria for the B-1 in lieu of H-1B category should not be discouraged to apply, but should be prepared to document their cases carefully as outlined in 9 FAM 41.31 N.11.

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We recommend petition-based applicants to have a copy of the underlying petition available at the interview, in the event that the visa officer would like to see it, especially given that Guangzhou is considered by some as a high fraud post.

It should be noted that if during the course of the interview, the applicant reveals information that is inconsistent with the approved underlying petition, or if the applicant does not appear to understand his/her proposed position in the US or his/her employer's business, the Post may require additional time to determine the legitimacy of the employment offer. If it discovers that there is misrepresentation in the underlying petition or by the applicant, it will recommend the case for revocation.

The post has an NIV Inquiry Form on our website for all case inquiry. See: http://guangzhou.usembassy-china.org.cn/niv-inquiry-form.html

** Mr. Leung practices in the area of immigration law at Fennemore Craig in Phoenix, Arizona. He works frequently on US consulate matters and was stationed in Hong Kong from 2006 to 2008 working closely with the US consulates and embassies in Asia Pac.*

Ethics - Candor or Confidentiality, Which is Paramount?

**Victoria Slater Giambra, London, UK - Ethics Committee Member*

At the recent Rome District Chapter Conference in Paris, a hypothetical was posed during the ethics panel that garnered significant interest and debate. As a participant on that panel, I presented one part of hypothetical that generated spirited discussion during the panel. It had also been actively debated in the panel's preparation, and given the level of interest, we felt that a more thorough written analysis might be useful for the bar.

The fact pattern of the hypothetical dealt with a lawyer who is licensed in New York but practicing in Paris. This lawyer's client is a corporation who is expanding into the US market. The client engages the lawyer to obtain a B-1 visa for an employee who is a citizen of Kazakhstan and wishes to attend a training program in the US.

The lawyer duly prepares the necessary paperwork, based on the client and employee's information and asserting the need for a B-1 visa to attend the training program, and arranges for the employee to have his NIV interview at the US Consulate on Astana, Kazakhstan. However, on the day of the employee's NIV interview, the lawyer is contacted by the client, who tells the lawyer that the employee is now being sent to the US to perform emergency welding work on one of the client's construction sites, and not for training. Although the lawyer explains to the client that the employee is not allowed to enter the US on a B-1 visa to do this work, the client is insistent that the employee enter the US on the B-1.

What then are the ethical requirements of the practitioner in this situation? What are the lawyer's responsibilities, ethically speaking, if the B-1 visa is issued, but the employee is intending on entering the US with it to do the welding work? The textbook answer is that the lawyer should tell the client that the employee should be prevented from attending the interview, and the lawyer, if instructed by the client, should immediately start the process of obtaining the correct nonimmigrant visa that will allow the employee to perform the required work for the client in the US.

However, it is rare that the textbook answer fits the real world situation that this scenario reflects. Such an answer imbeds several assumptions. One such assumption is that the employee can be reached to notify him or her not to attend the interview. Another is that the client will obediently follow the advice of his or her counsel and pull the employee, when it could be equally likely that they tell the employee to attend the interview in any event. On a separate, but no less important, front, the client is likely to be very unhappy with the lawyer, due to the very possible delay to their construction project while the correct immigration paperwork is obtained and the additional difficulty, cost and expense that will be incurred to obtain the correct documentation.

Given that none of us operate in the textbook world, we want to explore briefly what are the sources of the lawyer's ethical obligations and how do they inform and form the ethical obligations?

As a preliminary matter, the lawyer has an obligation to explain to the client the full consequences of entering the US on a B-1 visa while intending to do work that is not permitted under the B-1.

Primarily, the lawyer should explain that if the employee were to use a B-1 visa to enter the US, the employee would misrepresent the purpose of his trip to both the consular officer who interviews him and the border patrol officer who admits him at the airport. That would result in a deprivation of the employee's much needed services to the client in the US, as the consequence for such a misrepresentation is a permanent bar, rendering the employee inadmissible. A waiver would be required to overcome such a bar, and seeking to obtain a waiver will impose an additional cost and time delay for the client. In addition, as waivers are discretionary, there is no guarantee it will be granted. Therefore, it is in the best interest of the client to try for a different visa for his employee.

As many of us know from practical experience, however, there is rarely an ideal situation. As the employee is in Kazakhstan, it might be difficult to contact him to tell him not to attend the interview. Or, the client could choose to ignore your advice and tell his employee to attend the interview anyway. What are the lawyer's responsibilities, ethically speaking, if the B-1 visa is issued, but the employee is intending on entering the US with it to do the welding work?

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As the lawyer is licensed in New York, although practicing in Paris, she has ethical obligations that are dictated by the rules of professional responsibility promulgated by the New York State Bar Association. Every US licensed lawyer practicing abroad is still bound by the ethical rules of his or her state of admission and may even be bound by the ethical rules of the foreign jurisdiction in which they are practicing. Practically speaking, the lawyer should follow whichever ethical rule is the most stringent, as he or she will then be sure to have complied with both, putting aside for the moment any direct conflicts in ethics regimes.

In this hypothetical, the lawyer is bound by several ethical provisions that seem to be conflicting. The first is the lawyer's duty of confidentiality to the client. As the lawyer is licensed in New York, she would be bound to follow the ethics rule relating to confidentiality that has been set out by the New York State Unified Court System. The model rule on confidentiality set forth by the ABA only allows a lawyer to reveal confidential information to prevent certain death or substantial bodily harm, or to prevent, mitigate, or rectify substantial injury to financial interests or property of another as a result of a client's intended or prior crime or fraud. However, in New York, the ethical rule states that a lawyer may reveal confidential information to prevent a client from committing a crime (no exception for substantial injury) or "to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."

Separately, under the INA § 212(a)(6)(C), a person who, by fraud or willful misrepresentation of a material fact, seeks to procure an immigration benefit is inadmissible. However, under INA § 215(a)(3) it is "unlawful" for any person to "knowingly make any false statement in application for permission to…enter the United States with intent to induce or secure the granting of such permission." This unlawfulness can be considered to be made criminal under 18 U.S.C. § 1546, where it can carry a sentence of up to 10 years for the first offense if a person uses (or attempts to use) a visa procured by means of a false statement. In this case, if the employee goes to the consulate to get a B-1 visa, stating that he will not be doing any work prohibited by this type of visa, yet fully intending to do welding work that would not be permitted by statute, he would be making a false statement which could not only amount to fraud under the New York ethical rules, but also could very well be considered criminal.

Regardless of the criminality of the employee's actions under US immigration law, the lawyer may have the obligation according to the New York ethical rules to disclose the client's confidential information because the application for a B-1 visa she submitted and any accompanying letter or brief she may have drafted that described or explained the client and employee's situation would fall into the category a representation given by the lawyer based on materially inaccurate information (and being used to further fraud) that will be relied upon by a third party, the consular officer. However, as is clarified by the comments to Rule 1.6, this provision only allows the lawyer to withdraw the documents that the lawyer submitted; it does not allow disclosure of the client's past acts unless they were criminal, and therefore authorized under another provision of the rule.

New York's ethical rule 1.6 on confidentiality also establishes that a lawyer may also disclose confidential information regarding a client "when permitted or required under these Rules." Rule 3.3 of the New York Rules of Professional Conduct addresses a lawyer's conduct before a tribunal. The definition of tribunal would appear to encompass a situation where a lawyer assists a client with applications before USCIS and the Department of State. As such, "[i]f a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." The rule further states that the lawyer must take remedial measures, "even if compliance requires disclosure of information otherwise protected by Rule 1.6." Consequently, at least under the New York ethical rules, it looks as though the lawyer in the case at hand may have an ethical duty to inform the consulate that the employee is not going to use his B-1 visa for the purpose intended.

Yet, it would still be incumbent on the lawyer, as is demonstrated by the comments to Rule 3.3, to confer with the client regarding the situation. After fully informing the client of the consequences of the course of action the client is bent on, as discussed above, the lawyer should inform the client of the lawyer's duty of candor towards the tribunal and ask the client to cooperate in correcting the misrepresentation to the consular official. The lawyer would be well advised to note to the client that the lawyer may be required to take certain actions, and to detail what those may be. This may be sufficient to deter the client from their course of action. However, if the client will not cooperate, the ethical rules require that the lawyer take further remedial action, such as withdrawal, but if that will not remedy the situation, the lawyer must reveal to the tribunal as much as necessary to correct the problem, even information protected by attorney-client confidentiality.

Nevertheless, it is necessary to stress that these are the requirements for the lawyer in this situation who is licensed in the state of New York. The ABA Model Rules make it somewhat difficult to make a clear determination as to whether the lawyer would be required to disclose to the tribunal. The ABA model rule 3.3 covering candor towards the tribunal is the same as the New York rule. However, as mentioned above, the ABA model rule 1.6 covering confidentiality is different, only allowing disclosure to prevent a crime or fraud that would result in substantial injury to the financial interests or property of another. Yet in the comments to the ABA model rule requiring candor to the tribunal, it mentions that a lawyer must take all remedies necessary to correct false statements to the tribunal, including, when reasonably necessary, disclosing client information normally covered by model rule 1.6. A brief overview of the ethical rules in Texas, where the author is licensed, reveals this same discrepancy.

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In such a situation, the lawyer may be forced to turn to ABA model rule 1.16 and withdraw from the representation of the client. A lawyer is required to withdraw from representation if the client demands the lawyer do something criminal or against the rules of professional conduct. If, after consulting with the client and informing him of a lawyer's duty of candor towards the tribunal, the client insists that the lawyer persist with the B-1 visa for the employee and not re-do the paperwork for the correct visa, the lawyer would likely be obliged to withdraw. Upon withdrawal, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests," which probably would be interpreted to mean that the lawyer must simply inform the consulate that she is withdrawing from the representation of that client, but may not inform the consulate why.

The reality with cases such as these is that we all have been and will be faced with difficult and demanding clients, and various practical problems, such as far-flung and out of touch clients (in more than one sense). It may be tempting to try to appease the client and therefore not attempt to correct the problem with the employee's visa. However, as a profession we are bound to follow our ethical rules and the consequences of inaction in this case would not only ultimately damage your client's ability to bring talent to the US, but damage your professional relationship with the consulate. You may also be subject to disciplinary proceedings. Both would threaten your future career and livelihood, but with skill and finesse, and most importantly open and direct communication with your client as we have outlined here, such painful consequences can be avoided.

**Victoria Slater Giambra practices US immigration law in London, UK. For more information on this issue or for the source information for this article, please contact Victoria at vlsgiambra@gmail.com*

Blanket L Admissions: How Long is Too Long?

*by *Kenneth J. Harder*

There are two schools of thought concerning the correct interval of time that beneficiaries of a blanket L petition should be admitted to the United States. One camp believes that blanket L beneficiaries always should be admitted for a uniform period of three years. The other believes that such beneficiaries should be admitted for the period indicated on Form I-129S, Nonimmigrant Petition Based on Blanket L Petition. The position of the first camp appears to be supported by governing regulations and various statements of policy. As discussed below, however, current regulatory language contains an ambiguity about the correct period of time a blanket petition beneficiary should be admitted. Existing policy statements and agency manuals do not provide clarity.

This article examines the appropriate period of time that an intracompany transferee may be admitted to the United States when presenting a blanket L visa at a port of entry. The article assumes familiarity with the qualifications for L-1 intracompany transferee classification and the requirements for blanket petition eligibility. As discussed below, the rules governing admission of intracompany transferees differ depending on whether the alien worker is presenting an L visa based on an individual petition or a blanket petition. Understanding the distinction focuses the ambiguities concerning the period of time that a beneficiary of a blanket petition may be admitted.

The period of time an alien may be admitted to the U.S. when presenting an individual L-1 visa is determined by the petition's period of validity. *See*, 8 CFR §214.2(l)(11). Accordingly, an alien presenting an individual L-1 visa should be admitted in L-1 status through the petition's expiration date, provided that his passport is valid for the requisite period of time. *See,* INA§212(a)(7)(B)(i)(I), 8 CFR §212.1.

Note that the L-1 *petition*, not the L-1 *visa*, dictates the permissible period of admission. *See,* 22 CFR §41.112(a), 9 FAM 41.112 N1. An L-1 petition may be approved for an initial period of up to three years. 8 CFR §214.2(l)(7)(i)(A)(*2*). The validity of a nonimmigrant visa may be limited to a shorter period of time than the underlying petition due to U.S. Department of State (DOS) reciprocity rules. For example, a citizen of Brazil may be the beneficiary of an individual L-1 petition valid for a period of three years but may receive an L-1 visa valid for no longer than two years. Upon presenting his L-1 visa at a port of entry, however, a Brazilian citizen may be admitted to the U.S. up to the expiration date of the underlying three year petition.

Determining the appropriate period of admission for an alien with an individual L-1 visa, then, should be an uncomplicated matter for a Customs and Border Protection (CBP) inspector. Assuming there are no passport validity issues, the nonimmigrant alien should be admitted in L-1 status through the expiration date indicated on his Form I-797, Notice of Action approving the petition.

The interval of time for which a nonimmigrant alien may be admitted to the U.S. when presenting a blanket L visa, however, is determined neither by the *visa*, nor by the underlying blanket L *petition*. A blanket L petition may be approved for an initial period of three years and may be extended indefinitely. 8 CFR §214.2(l)(7)(i)(B)(2). The beneficiary of a blanket petition, however, is admitted neither through the initial petition expiration date, nor for an indefinite period of time.

If blanket L workers could be admitted to the U.S. only through the initial petition expiration date, a blanket L petition would be of diminishing value as it approached the end of its initial three period of validity. Blanket L petitioners, confronted by the prospect of ever shorter periods of admission for its blanket L workers, might be inclined to file individual L petitions instead, obtaining a full three-year period of admission for its L-1 workers. Governing regulations avoid this undesirable

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outcome by permitting a beneficiary of an initial blanket L petition to be admitted to the U.S. for three years even though the petition may expire before the end of that period. *See*, 8 CFR §214.2(l)(11).

Eligibility for L-1 status, however, is premised on the existence of a valid, unexpired underlying petition, whether individual or blanket. If the blanket petition will expire while the alien is in the U.S., the petitioner bears the burden of taking action to support the alien worker's continued L-1 status. *id.* Two possible courses of action are available to preserve the worker's L-1 status. The petitioner may file either a blanket petition extension, or an individual petition on behalf of the L-1 worker. *id.* Logically, once the blanket L petition is approved indefinitely, the petitioner is relieved of this burden.

Regulations provide that the beneficiary of a blanket petition *may* be admitted for three years. *id.* This language appears to form the basis for current CBP and U.S. Citizenship and Immigration Services (USCIS) policy adopting (what appears to be) a universal three year period of admission for all nonimmigrant aliens presenting a blanket L visa issued pursuant to a currently valid petition. *See,* CBP Inspector's Field Manual 15.4 (l)(1)(C), USCIS Adjudicator's Field Manual 32.4(c). These statements of CPB and USCIS policy appear to follow Legacy INS on this issue. *See,* INS Thomas Cook Memo, AILA InfoNet Doc. No. 01022003 (posted Feb. 20, 2001). Accordingly, the CBP instructs officers to admit an alien seeking readmission as a blanket L nonimmigrant for an additional three years provided that the blanket petition is valid and the alien is otherwise admissible. CBP Inspector's Field Manual 15.4 (l)(1)(C).

This CBP admissions policy appears similar to the approach taken for nonimmigrant aliens applying for admission with an E visa. Such aliens may be admitted for a uniform period of two years. 8 CFR §214.2(e)(19), CBP Inspector's Field Manual 15.4 (e)(1)&(2). The intracompany transferee and the treaty visa categories have significant differences, however, that affect their eligibility for admission. Intracompany transferees are eligible for no more than five or seven consecutive years of L-1 status (depending on whether they are specialists or managerial or executive employees). INA §214(c)(2)(D), 8 CFR §214.2 (l)(12)(i). Nonimmigrant aliens applying for admission with treaty based E visas have no such limitation. Compare, 8 CFR §214.2(l)(12)(i) with 8 CFR §214.2(e)(19). Treaty based nonimmigrant workers admitted for uniform two year periods of time, therefore, never risk remaining beyond the period time authorized by statute or regulations. Conversely, admitting blanket L beneficiaries for uniform three years period does present this risk.

Since an L-1 alien may not be admitted for a period of time that exceeds the statutory limitation on L-1 stay in the United States, uniform three year admission for nonimmigrant aliens applying for admission with a blanket L visa presents unique administrative challenges for the CBP. The CBP Field Inspector's Manual reminds officers that L-1 nonimmigrant aliens may not be admitted in excess of the statutorily determined period. CBP Inspector's Field Manual 15.4 (l)(1)(B). The Manual, however, does not reconcile this limitation with the separate instruction to admit such aliens for a three year period of time.

The Legacy INS Thomas Cook Memo instructed immigration inspectors to determine the amount of time that a blanket L beneficiary has previously been present in L-1 status in the U.S. Immigration inspectors following this guidance would determine the amount of time that the individual has previously been present in the U.S. in L (or H-1B) status and admit the alien for either a three year period or for a period of time consistent with the limit applicable to his or her L-1A or L-1B classification. It is far from clear, however, that CBP officers currently make such determinations. If CBP inspectors routinely authorize a three year period of admission for beneficiaries of a blanket petition without calculating the amount of time previously spent in L-1 or H-1B status, both the alien beneficiary and the petitioner are exposed to risks.

For an alien worker, the risks include inadvertently remaining in the U.S. beyond the five or seven year limit. Presumably, such an alien would be in possession of an unexpired Form I-94, Arrival/Departure Record and, therefore, should not be accruing unlawful presence. See, INA §212(a)(9)(B) and USCIS Adjudicator's Field Manual 40.9.2(b)(1)(E). It is possible, however, that such an alien, having remained past a statutorily mandated time limit, would be found to be present in the U.S. in violation of his status and could be placed in removal proceedings. Even if his presence in the U.S. in excess of the statutory limit on L-1 status is not discovered until a later date, such as when filing a visa application or adjustment of status application, it could have lasting repercussions on his ability to obtain a new nonimmigrant visa or other immigration benefits.

A blanket L employer, relying on entry documents issued pursuant to uniform three year periods of admission, risks inadvertently continuing to employ a blanket L worker beyond his statutory L-1 status limit. In the current immigration enforcement environment, such an employer may be found to be knowingly employing an alien not authorized to accept such employment in violation of INA §274A(a)(2). Immigration and Customs Enforcement may infer knowing conduct where a blanket L petitioner has information available (e.g., employment records indicating how long the worker was employed in L-1 status) indicating that the alien employee is not authorized to work in the U.S. because he has exceeded the permissible five or seven year statutory limit.

Clearly, a vigilant employer, having maintained scrupulous records of each entry and exit of its peripatetic blanket L workers, would not find itself in this position. Indeed, development of an effective immigration compliance program is essential for any employer, especially blanket L petitioners. In practice, however, blanket L petitioners may have imperfect records of admission as L-1 employees working in geographically diverse areas may frequently travel without notifying corporate record keepers.

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The CBP policy of uniform three year admissions for all blanket L workers, then, presents significant risks for the unwary. Developing employer immigration compliance programs and training workers to count days present in the U.S. in L-1 status in order to avoid the risks associated with inadvertently exceeding the five and seven year limits due to uniform three year blanket L admissions is essential. Finding a permanent solution to these risks, however, requires reexamining the regulation from which the uniform three year admissions policy is derived.

The language in 8 CFR §214.2(l)(11) authorizing a three year period of admission for blanket L nonimmigrant aliens, regardless of the petition expiration date, holds the key to this conundrum. Specifically, the regulation states, in part: "The beneficiary of a blanket petition may be admitted for three years *even though the initial validity period of the blanket petition may expire before the end of the three-year period*." (Emphasis added.) This choice of words may be interpreted to authorize a uniform three year period of admission exclusively during the validity of the *initial* blanket petition. This language allows CBP to avoid the undesirable outcome identified above where blanket petitioners would experience an ever shorter period of admission for its blanket L workers during the validity of the initial petition. If the three year period authorized by this language was intended to apply to all blanket L admissions, including those supported by a petition extended indefinitely, the language italicized above would be superfluous. Once a blanket petition is extended indefinitely, beneficiaries would have a petition supporting their L-1 status throughout their intended stay. Accordingly, it is possible that the original drafters of this language did not intend it to apply once the *initial* validity period of the blanket petition was extended and it became valid indefinitely.

It is noteworthy that the language quoted above is permissive not mandatory. The regulation does not state that a beneficiary of a blanket petition *shall* be admitted for three years. Instead, such a beneficiary *may* be admitted for three years. This language clearly contemplates the possibility that a blanket L beneficiary may be admitted for an interval of time less than three years, where appropriate.

If this interpretation of the regulation is correct, the appropriate period of time to admit a blanket L alien is not dictated by the petition, the visa, or the apparent three year admissions policy suggested by agency manuals. The question remains: what does, or should, govern the appropriate period of time to admit an alien with a blanket L visa? The better approach may be for CBP officers to admit beneficiaries of blanket petitions for the intended period of employment indicated on Form I-129S (provided that is not greater than three years).

Using this method to determine the appropriate interval to admit blanket L workers would be no more complex than adhering to an expedient uniform three year standard. CBP inspectors already should be examining L-1 petition expiration dates as their guide for admitting individual intracompany transferees. Examining Forms I-129S as a guide to the appropriate period to admit a blanket L worker should be no less reliable or inefficient. Anecdotally, CBP officers already frequently admit blanket L workers for the period of time indicated as the intended period of employment on Form I-129S.

In addition, adopting this approach for beneficiaries of blanket petitions should relieve the CBP inspectors of the burden of calculating the number of days that an alien has previously been present in L-1 or H-1B status in order to determine if he should be admitted for three years or something less in order to comply with the statutory five or seven year limits.

Finally, adopting the Form I-129S as the determinant also would more accurately align the period of admission with the intended period of the worker's temporary assignment in the U.S. Such an approach would minimize the opportunities for a beneficiary of a blanket petition to incorrectly assume that he is authorized to remain in the U.S. through the expiration date of a uniform three year period of admission even after the temporary work assignment has ended. Blanket petitioners also may be less likely to inadvertently continue employing a blanket L worker whose employment authorization, having reached the statutory limit, has ended.

Unless and until CBP perceives a reason to reevaluate its policy determining the appropriate period of time to admit beneficiaries of blanket petitions, the current ambiguous policy will continue to govern such admissions. A uniform three year admissions policy for blanket L nonimmigrant aliens appears to be an unalloyed benefit. Blanket L workers, however, need to remain attentive to the number of days they accumulate in L-1 status to avoid violating nonimmigrant alien status by inadvertently remaining beyond their five or seven year limit. Blanket petitioners will need to develop effective compliance strategies to avoid allegations of knowingly continuing to employ blanket L workers who have been incorrectly admitted beyond their statutory L-1 limit.

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Consular Q&A

**Liam Schwartz, Vice Chair, Rome District Chapter*

O-1 Re-adjudication in London?

Question:

We have a British O-1 who applied for his visa in London. He was handed a 221g letter and told to go home. Yesterday morning London emailed saying that they're currently reviewing the file with a view toward returning it to the CIS with a recommendation for revocation because, and I quote, "your client has been unable to demonstrate his eligibility for the O-1 visa classification, in that he is an alien of "extraordinary ability."

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No further explanation or basis for their position was provided. They're clearly re-adjudicating.

Fraud is not an issue and neither is our client's extraordinariness - client and his firm have been featured in the NY Times, in Forbes, and if you Google him/company, you'll find mainly reviews of stunning success.

My question is: have you had 221g situations like this before where the conoff re-adjudicated? If so, how did you handle them? At this time we are considering various options including re-filing an O-1 petition with full 221g disclosure and if approved send client to a different post fingers crossed.

Anyway, I would love it if you could provide your 2 cents on this issue.

Answer:

Indeed, we have seen various cases in which the consular officer has tried to reach behind the I-797 approval notice and reconsider the facts of the original I-129 petition. 9 FAM 41.55 N8.4 (a) and 9 FAM 41.55 N8.5 discourage consular officers from second-guessing USCIS's adjudication of these petitions. Meanwhile, 9 FAM 41.55 N8.4 (b) points out that petition approval "does not relieve the alien of the burden of establishing visa eligibility in the course of which questions may arise as to his or her eligibility to O classification."

If the consular officer considers that the visa interview revealed derogatory information that was not available to USCIS at the time of petition adjudication ("lack of qualification on the part of the beneficiary" is one of the categories specifically enumerated), then the embassy is within its rights to refer the petition back to USCIS for reconsideration (or reaffirmation).

If, however, the consular officer's concerns relate to a "disagreement with DHS interpretation of the law or the facts," then the FAM categorically states that submitting a petition for revocation is inappropriate.

Your first course of action should be to contact the Embassy and encourage them to give your client a chance to rebut before they submit the petition for possible revocation. Once the petition has been sent back, it will be impossible for the applicant to obtain a visa, at least until the petition is reaffirmed – which could take months, if not years. Assuming the Embassy is willing to delay its revocation request, then you should see if it's possible for your client to present further evidence of his extraordinariness. This may be accomplished by submitting additional documentation, or perhaps by appearing again in person. If necessary, you may want to consider phoning the call center to schedule another visa application appointment for your client.

If the Embassy isn't willing to see your client again, or if they have already submitted the petition for revocation, then your suggestion about refilling may be an appropriate course of action.

Special Handling for Administrative Processing?

Question:

A client of mine is stuck abroad awaiting an H-1B visa stamp. He is an Indian national with a pregnant wife waiting for him in California. Today he received the following email:

"Upon review of your application for an H1B visa, the consular officer has determined that your visa application should be submitted for additional administrative processing. The decision was based on the State Department regulation, according to which persons who work or study in certain sensitive scientific and technical fields may be subject to additional processing. The process, in average, takes approximately three to four weeks to complete. Once we have more details, we will inform you immediately.

Sincerely,
Nonimmigrant visa unit"

Do you have any suggestions for contacting the US Embassy to request specially handling of this matter?

Answer:

Regrettably, there is little that can be done to achieve special handling of administrative processing. As you know, once the request for this processing is made the matter is no longer in the hands of the Embassy. A statement that the request for additional processing is "pending" means that a clearing agency in Washington has internally indicated that it is still processing the matter.

Administrative Processing and Visa Validity

Question:

My client received his passport back from the Embassy with the H1B visa he'd applied for. The visa was issued after a 4 week period of "administrative processing" (Mantis/TAL clearance, I think). The visa expiration date is earlier than the expiration date of the petition which was approved by DHS. Can you clarify the situation?

Answer:

Visas issued subsequent to the type of processing your client underwent have limited validity periods. The maximum validity period for an H-1B visa with this type of clearance is two years. For further details, you may want to read the State Department's press release on this topic: http://2001-2009.state.gov/r/pa/prs/ps/2005/42212.htm.

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