THIRD-COUNTRY NATIONAL CONSULAR PROCESSING OF NONIMMIGRANT VISA APPLICATIONS IN CANADA AND MEXICO

updated by Andrew J. Stevenson, Jan Pederson, Fausta M. Albi, and Laurie Snider[*]

***Editor's Note*:** As this book was going to press, the Department of Homeland Security (DHS) issued a notice stating that it has removed all currently designated countries from the listing of countries whose nationals and citizens are required to comply with NSEERS registration requirements: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. Effective upon publication of the *Federal Register* Notice, nonimmigrant nationals and citizens of these countries are no longer required to comply with the requirements of 8 CFR §264.1(f), including the requirement that they exit through designated ports of entry. Accordingly, nationals and citizens from these countries are no longer subject to the NSEERS registration requirement. DHS will no longer register aliens under NSEERS effective April 28, 2011.[1] Where you find references to NSEERS in this article, please read the DHS notice cited below, as changes have occurred.

Consular processing of nonimmigrant visas (NIVs) for Third Country Nationals (TCNs)[2] at posts in Canada and Mexico presents complex and highly specialized issues. Attorneys and visa applicants should be aware of the potential benefits as well as the risks relating to re-entry to the United States subsequent to a visa application in a third country.

Potential benefits include that proximity of a Canadian or Mexican consular post to the United States may reduce travel cost and time away from U.S. responsibilities. Also, security checks may actually take less time to clear in a third country with fewer applicants requiring clearances than the same application made at home (for example, a Pakistani citizen applying in Ottawa may face a shorter wait than he or she would face in Islamabad). Finally, if there is an issue at the post, it may be easier for counsel to effectively communicate with a Canadian or Mexican post than with a more distant post in a different time-zone.

Most risks of applying at a Canadian or Mexican post as a TCN involve potential delays due to varying types of security clearances. Clients must be advised that if their visa is denied or delayed, they may not be

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[1] 76 Fed. Reg. 23830 (4/28/11, effective 4/28/11).

[2] A "Third Country National" is an applicant who is neither a citizen of the United States nor of the country in which the consular post is located. For example, a French citizen (who is not a citizen of the U.S. or Mexico) who seeks to apply for a nonimmigrant visa at a U.S. consular post in Mexico, would be considered a Third Country National.

able to return to the United States until they obtain a valid visa stamp.[3] TCNs waiting on security clearances or other delays may need to extend a visa granted by the host country in order to remain there to await visa issuance. Given the unpredictability of "administrative processing" times, it is often easier for an applicant to make arrangements for an unexpected extension of stay in their home country as opposed to a third country. Finally, keep in mind for cases in Mexico that consular operations may be suspended from time to time due to local violence if the Department of State (DOS) deems the situation unsafe for U.S. consular personnel or visitors to the post. Applicants should carefully consider the local situation at the time of the prospective application, and their comfort level in traveling or bringing family members to such locations.

Assuming these potential benefits and risks are understood and accepted, there are many options for consular posts in Canada and Mexico. The posts in Canada, which accept NIV applications from TCNs, include the U.S Consulates in Vancouver, Calgary, Toronto, Montreal and Halifax, and the U.S. Embassy in Ottawa. In Mexico, there are several consulates that are just a few miles from the U.S. border in Tijuana, Nogales, Nuevo Laredo, Ciudad Juarez, and Matamoros. Additional U.S. consular posts are located in in the interior of Mexico, including Hermosillo, Merida, Guadalajara, Monterrey and the U.S. Embassy in Mexico City. These posts vary in terms of policies regarding the categories of visa application they will accept, scope of attorney representation, use of interpreters, and visa issuance processing times.[4]

Given the diversity of choices between these posts, prior to recommending that a TCN client apply at for a visa in Canada or Mexico, you should carefully research the policies of the specific consular post at which the client intends to apply. Be sure to also thoroughly review your client's immigration history and status to identify any potential grounds of inadmissibility, potential reasons for delays in visa issuance, or potential grounds for the consulate to deny jurisdiction of the case. Then, you must assist your client in properly preparing the visa application forms and recommended supporting documents, and prepare your client to present their case at the consular post and at the border to apply for re-admission to the United States.

To assist your TCN clients, this practice advisory addresses the following topics:

- How to Strategically Present NIV Applications for TCNs in Canada and Mexico
- An Overview of Security Advisory Opinions (SAOs)
- The Role of the Attorney and Communicating with the Post
- Dealing with TCN Admission Issues at the Port of Entry
- Common Attorney Pitfalls and Ethical Considerations

HOW TO STRATEGICALLY PRESENT NIV APPLICATIONS FOR TCNS AT BORDER POSTS IN MEXICO AND CANADA

Question: May any TCN applicant apply for a NIV in Mexico or Canada?

Answer: No. While the acceptance of TCN applicants by the border posts has become significantly more flexible, there are still many restrictions that attorneys should consider. These restrictions are usually listed on

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[3] Effective April 1, 2002, as a result of a number of enhanced security measures implemented in the aftermath of September 11, 2001, the U.S. Department of State amended the automatic visa revalidation provision found at 22 CFR §42.112(d). This provision specifies that for trips to Canada or Mexico of less than 30 days, an expired visa stamp, or a valid stamp in a visa category the individual no longer holds, is deemed automatically revalidated and/or converted to the proper category, so long as: (1) The individual held a valid I-94 admission document in the proper category prior to departure from the United States; (2) The individual did not apply for a visa while abroad; and (3) the individual is not a citizen of a country designated by the U.S. State Department as a State Sponsor of Terrorism. Currently, Iran, Cuba, Sudan and Syria hold such a designation.

[4] Visa issuance processing times for all U.S. consular posts worldwide are posted at http://www.travel.state.gov/visa/temp/wait/wait_4638.html. Note that with the introduction of the new DS-160 Nonimmigrant Visa Application Form, the process now requires the applicant to submit the application first, and then determine when and where appointments are available. While frustrating for some applicants, this change in procedure seems to have made many more appointment slots available, especially in Canada. It appears that individuals were scheduling "back-up" appointments in Canada, thus taking up more than one slot per applicant. Now that the process requires submission of the DS-160 and payment of the fee before the consular post can be selected, it has reduced the number of redundant appointments.

the Department of State (DOS) Internet sites for each post,[5] but should be confirmed through direct attorney communication with the NIV section at post. Even if a TCN applicant is eligible to apply for a visa in Canada or Mexico, you may choose to strategically discourage some applications.

Who May Apply in Mexico?

As currently outlined on consular websites,[6] the U.S. Consular Posts in Mexico will accept the following types of NIV applications from TCN applicants:

- Applicants seeking to *renew* their C1/D, D, E , F, H (except H-2), I, J, L, M, O, P and R visas, *regardless of where the original visa was issued.*[7]

Consular websites also specify that Mexican posts will *not* accept jurisdiction in the following TCN scenarios:

- Applications for B1/2 and H-2 visas, including renewals, are not accepted from TCNs who are not resident in Mexico.
- Applicants who entered the United States with a visa issued in their home country and either changed status or obtained petition approval from USCIS who seek a new visa in the new visa category.[8]
- Applicants who entered the United States in one visa category and are seeking to re-enter the United States in a different visa category.[9]
- Applicants who have been out of status in the United States after violating the terms of their visas or overstaying the validity indicated on their I-94s.
- Applicants who entered the United States under the Visa Waiver Program.
- Applicants who were informed when they obtained their original visa in their home country that they were subject to the National Security Entry and Exit Registration System (NSEERS). [In practice, this restriction also applies to male applicants from the "List of 26" countries. While not officially stated, such individuals are subject to a Visa Condor clearance and should not apply for a visa in Mexico. It may also apply to certain female applicants who may be subjected to NSEERS at the discretion of an Immigration and Customs Enforcement officer, U.S. Customs and Border Protection officer, or Consular officer.]
- Male and female nationals of the T-4 countries: North Korea,[10] Cuba, Syria, Sudan or Iran.

Who May Apply in Canada?

U.S. consular posts in Canada are generally not as restrictive as those in Mexico. For example, applicants from the "List of 26" and nationals of State Sponsors of Terrorism can schedule their NIV appointment in Canada.[11]

While able to schedule a visa appointment in Canada, TCN applicants who initially entered the United States on a B-1/B-2 visa and subsequently were approved for a change of status application by USCIS to a student or employment category may be denied in Canada. In addition, TCN processing in Canada is risky for first-time H-1B visa applicants who do not hold a U.S. or Canadian university degree. Consular officers in Canada tend to refuse such applicants due to a perceived concern with fraudulent educational documents.

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[5] *See* DOS consular websites, particular to each post, at http://usembassy.state.gov.

[6] See for example, http://ciudadjuarez.usconsulate.gov/nivtcns.html.

[7] Note that this is an example of increased flexibility in TCN processing. Previously, posts in Mexico required TCN applicants to have been issued their initial visa in their home country or country of residence before a same-category renewal application would be permitted. This policy changed before the notice was actually published on the consulates' websites.

[8] There are some exceptions for physicians and in exceptional circumstances.

[9] *Id.*

[10] Note that while the website lists North Korea as one of the designated State Sponsors of Terrorism, North Korea was in fact removed from the list by the Bush Administration in 2008. The official list of the "T-4" currently consists of Iran, Syria, Cuba and Sudan. Libya, formerly a member of the notorious "T-7" was removed from the list in 2006; Iraq was removed in 2003.

[11] *See* http://www.consular.canada.usembassy.gov/canada.asp.

Also, unlike Mexican posts, Canadian posts do not accept TCN E visa applications (whether first E application or a renewal). They only accept E visa applications from Canadian citizens or Landed Immigrants (*i.e.*, Canadian permanent residents). Mexican TNs, Australian E-3s, Chilean and Singaporean H-1B1s can apply at posts in Canada, but consular officers may not be knowledgeable about these unique visa categories. It is recommended that you provide your client with a copy of regulations/FAM, and a letter that clearly explains how your client qualifies for the visa. It is imperative to manage client expectations by informing clients of these risks and discouraging TCN processing where appropriate.

Generally, only "clearly approvable" TCN cases should be processed in Canada or Mexico. Cases with complex admissibility issues are usually not suitable for TCN processing at a border post. In addition, applicants should be prepared to address why they are applying for a visa in Canada or Mexico rather than in their home country. Consular officers often ask this question to see if the applicant is forum-shopping or whether they will be traveling home in the near future.

Visa Appointment Scheduling and Application Fees

In both Canada and Mexico, appointment scheduling can be accomplished online, on national websites particular to each country.[12] It is now required to pay the Machine Readable Visa (MRV) fee online and fully complete the DS-160 application prior to scheduling an appointment date and time online. Reciprocity fees may be paid at the consular post after the interview is completed and if the visa is approved. Be sure to begin working with your client early on to prepare the DS-160 application, to ensure you are able to schedule the visa appointment when desired.

Entry Requirements to Canada and Mexico

Depending on the applicant's citizenship, it may be necessary for the applicant to obtain a visa to enter Canada or Mexico in order to apply for a U.S. visa. If you are accompanying your client to the Consulate, you may also require a Canadian or Mexican visa authorizing your employment in the country where your client will apply for their visa. It is advisable to contact a Mexican or Canadian Consulate[13] or review their respective websites for information on visa and entry requirements. Some Canadian consular posts in the United States are restrictive in issuing visas to TCNs seeking to enter Canada for the sole purpose of applying for a U.S. visa, although others are accommodating. Mexican consular posts have been more generous in issuing visas to TCNs requiring visas for entry to Mexico. However, keep in mind that TCN applicants may be issued a special permit at the Mexican border limiting their stay to 72 hours to apply for a U.S. visa. U.S. attorneys representing clients at U.S. posts in Mexico are advised to obtain an FM-3 work visa from a Mexican consular post with jurisdiction over their place of residence. FM-3 visas are simple to obtain and can help avoid unpleasant encounters with Mexican immigration officials. In order for an FM-3 visa to be valid, it must be shown to Mexican immigration officials upon entry into Mexico.

Routine Delays and Trip Planning Logistics

TCN visa applicants should be prepared to wait several days in Mexico or Canada while their visa is being processed. If applying in Canada, applicants from the "List of 26" and nationals of State Sponsors of Terrorism should be prepared to wait either in Canada or outside of Canada (if they have a multiple-entry Canadian visa) while security checks are pending. Also, remind these applicants that they must have complied with NSEERS registration and departure control requirements.[14] Other, more lengthy security clearances may be required in some cases, as discussed in a later section of this article.

Visa applicants in Mexico, as of January 2011, must have their biometrics taken at least one day prior to their visa appointment and must wait to pick up their passports at the DHL offices after visa issuance. Accordingly, even a seamless visa trip to Mexico can take four to five business days to complete. Applicants in Canada must now also pick up their passports at a DHL office, which adds a day or two onto the trip.

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[12] *See* http://canada.usvisa-info.com (Canada) and http://mexico.usvisa-info.com (Mexico).

[13] For a list of Mexican consulates in the United States, *see* http://www.mexonline.com/consulate.htm. For a list of Canadian consulates in the United States, *see* http://www.canadainternational.gc.ca/new_york/imm/visa_temp.aspx?lang=eng

[14] 8 CFR §264.1.

Attorneys report that DHL offices in some Canadian cities are do not update information regarding receipt of passports in a timely manner on their website. Thus, it is advisable to suggest to clients that they go to the DHL office every afternoon to inquire if their passport is ready for pickup. Passports in both Canada and Mexico can be sent by DHL to the applicant within the country only.

Out-of-Status Cases and INA §222(g)

It is critical for attorneys representing TCN applicants to understand INA Section 222(g).[15] As a general rule, Section 222(g) prohibits a visa applicant who is unlawfully present in the United States from applying for an NIV at a border post. While similar to the concept of "unlawful presence," §222(g) has exceptions for certain categories. Section 222(g) stipulates that the visa of a foreign national who has overstayed a date-certain Form I-94 is automatically cancelled by operation of law. Further, the individual subject to Section 222(g) must apply for all future nonimmigrant visas in their home country. A mere one day of unlawful presence results in ineligibility for application for a visa as a TCN. The law permits minor exceptions for "extraordinary circumstances." Apart from physicians who fell out of status because of delays in obtaining a J-1 waiver, these exceptions are almost impossible to obtain. Applicants in J or F status with D/S (Duration of Status) are not subject to §222(g) *unless* USCIS or an Immigration Judge has made a formal finding that the foreign national has violated his or her visa status. However, even if there has not been a formal finding that an individual in F or J status is subject to §222(g), many border posts will not approve TCN NIV applications for clients outside their grace period (*i.e.*, 60 days beyond program completion for Fs, and 30 days for Js). In this regard, it is advisable to prepare with copies of all current and prior I-94s, visas, I-20s, IAP-66s/DS-2019s, and I-797s to prove they have never been out of status or explain that the unlawful presence time was due to no fault of their own. Any unlawful presence issue must be handled with care. Although posts will not pre-adjudicate any visa application, it is best to communicate with the post before your client applies for the visa, and if possible before your client departs the United States.

What Are the Risks with TCN Border Processing?

As per 22 CFR §42.112(d), automatic revalidation does not apply to individuals applying for U.S. visas in Canada or Mexico, nor does it apply to individuals from the DOS designated list of State Sponsors of Terrorism.[16] Therefore, any TCN visa applicant at a border post must have a valid U.S. visa or travel document to re-enter the United States. As a matter of practice, many consular posts cancel prior visas in an applicant's passport if their visa application is denied or subjected to administrative processing for a pending security clearance or any other reason. Under these circumstances, applicants must now await U.S. visa issuance in the third country, or travel back to their home country directly from Mexico or Canada. Rejected visa applicants must travel back to their home country directly from Mexico or Canada. Depending on the reason for rejection, they may have the option of applying for the visa again in their home country.

Notwithstanding these difficulties, a visa applicant whose passport has been returned and who has alternative documentation for entry to the United States, such as an unexpired visa stamp or a valid advance parole document, may be able to re-enter the United States. Although U.S. policy clearly appears to bar individuals whose pending security checks have not yet cleared from entering the country, re-entry may be possible under a previously issued document, presumably obtained after approval of a prior security clearance. However, you should advise your clients that if they seek re-entry under such circumstances, it should be with full disclosure to U.S. Customs and Border Protection (CBP) that they have a visa application pending abroad. If CBP then grants admission, the applicant has a valid argument that the decision to admit was purposeful and with the officer's full knowledge of the applicant's case.

AN OVERVIEW OF SECURITY ADVISORY OPINIONS

Question: My client has been subject to administrative processing or a security check. Why? What is that? Is there anything I can do?

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[15] A list of scenarios under which INA §222(g) is applicable can be found at 9 FAM 40.68 Exhibit I - Summary Chart INA §222(g) Scenarios.

[16] *See* http://www.state.gov/s/ct/rls/crt/2006/82736.htm, including Iran, Cuba, Sudan, and Syria.

Answer: Security checks or Security Advisory Opinions (SAOs) are initiated by consular officers at NIV interviews and often are the result of "hits" based on information in the government/consular databases. The post will not disclose the type of SAO to which the individual is subject, but the three main security checks affecting NIV processing are the Visas Condor, the Visas Donkey, and the Visas Mantis. How long the clearance takes varies based on the facts of the case and the type of clearance required. Once a security check is initiated, clearance can take anywhere from a few days to several months to resolve as there is no statutory completion time; however, most are completed within 60 days. The SAO request is sent to the Visa Office in Washington DC. Counsel can follow-up with the post and the Visa Office once 60 days from the date of the interview have passed.

The Visas Condor

The criteria of the Visas Condor are classified, but appear to be based on several factors, including:

- A name check which results in a possible terrorist match;
- Profile information disclosed on Form DS-160 (including travel to predominantly Muslim countries in the last 10 years, prior employment, military service for certain countries, and specialized skills or training); and
- Country of Birth, Citizenship, or Residence.

A Condor clearance is mandatory for males or females over 14 years of age born in T-4 countries, or males over 14 born in the "List of 26" countries. Generally, someone who is or was subject to NSEERS will be subject to this type of SAO.

DOS reports that most Visas Condor clearances are completed within three days, though some can average three to six weeks. It appears that most "List of 26" applicants who are subject to Condor clearances in Canada are issued NIVs within approximately 10-15 business days.

The Visas Donkey

A Donkey SAO is a name "hit" based on non-criminal issues and is not nationality-specific. Often this type of SAO is based on a common name or similar date of birth. For instance, a U.K. citizen with the name "Mohammad Khan" will very likely be subject to a Donkey clearance. Most Donkey clearances average two to three months to process, while a few take substantially longer.

The Visas Mantis

The Visas Mantis security check, also known as the "sensitive technology" clearance, is based on whether the NIV applicant is involved in activities in any of the 15 categories found on the Critical Fields List (CFL) of DOS' Technology Alert List (TAL). The TAL includes a vastly expanded list of technologies with potential "dual-use" applications of seemingly benign technologies that may have potential military applications. The last list made available to the public was extremely comprehensive in that it included almost every possible associated technology or skill involving chemistry, biochemistry, immunology, chemical engineering, urban planning, computer technology and pharmacology.[17] Visas Mantis clearances may also be required for students in these fields.

With such an all-inclusive list, nearly every research scientist, physician, academic, and engineer who is involved in any of these fields is at risk of being subject to this SAO. According to previous DOS guidelines, a Mantis clearance is generally not warranted if the technology falls within the public domain (e.g., widely available to the public, such as patented information) or if the technology involves information that would generally be taught in an academic course.

On October 1, 2003, DOS substantially revised the guidelines issued to consular posts regarding the TAL. Since the cable is classified, the full effects are unknown (although it appears that an increasing number of applicants are subjected to Mantis security clearances and lengthy processing delays). Applicants from China, India, Russia, Pakistan, and Israel seem to be more likely to be subject to a Mantis SAO.

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[17] *See* AILA InfoNet at Doc. No. 03030449 (*posted* Mar. 4, 2003).

Most Visas Mantis processing times are reportedly completed within 2-8 weeks. Mantis clearances are now valid for 2 years for H, L, or O visas, 4 years for F and J visas, and 1 year for B-1/B-2 visas, but if there is a change in duties a new Visas Mantis can be requested. While Chinese or Russian F visas may be restricted to only one year validity, the process of obtaining a re-issuance is now substantially quicker as a second Mantis is not required if the visa application is made within the 4 year period, unless there is a new course of study which may require another clearance.

To help facilitate a Mantis clearance, the applicant can provide their resume and a letter from the employer explaining in laymen's terms why their job does not involve sensitive or military technology or licenses.

NCIC Criminal Hits—Criminal Database Checks

Millions of records from the FBI's National Crime Information Center (NCIC) have been incorporated into the Consular Lookout and Support System (CLASS) name check database. The information, which is constantly updated, contains information on terrorists and foreign warrants. The database also has extensive records about the occurrence of criminal convictions or arrests, including in the United States.

As DOS is not a law enforcement agency, consular officers do not have access to the specifics of an arrest or a conviction and cannot tell whether the person before them is a murderer or jaywalker. Accordingly, if there is a "hit" in the system for a prior arrest and/or conviction or a false hit, the consul is required to submit the applicant's full set of fingerprints to the FBI to request the record or to confirm that there is no record. Applicants must present certified final court dispositions (as well as arrest records at some posts), and may provide a legal brief at the time of the interview. However, the consular post will not issue the visa until it has received the record from the FBI.

False hits occur with regularity, particularly for those with common names (*e.g.*, John Smith or Juan Gonzalez). As many as half of the names recently entered into the CLASS system are Latino. This has resulted in an alarming number of false hits and delays for persons with common Latino names. Posts have now implemented an electronic fingerprinting program which runs the fingerprints against the FBI's Interagency Fingerprint Identification System (IAFIS). This allows the post to process clearances on false hits in the same day, while clearances for positive hits are often received within two days.

Cases with complex admissibility issues involving criminal convictions, especially from other countries, are generally not suitable for TCN processing in Canada or Mexico.

Drunk-Driving Incidents

It is critical to ask all clients if they have alcohol-related incidents in their background involving arrests and convictions. It is important to note that the DOS changed the mandatory panel physician referral requirements for applicants with alcohol-related incidents.[18] Under current guidance, NIV applicants who must be referred to a panel physician include:

- Those with a single alcohol-related arrest or conviction within the last five years;
- Those with two or more alcohol-related arrests or convictions within the last 10 years; or
- If there is any other evidence to suggest an alcohol problem.

Applicants who are referred to a panel physician due to alcohol-related offenses must receive a full medical exam evaluation, less the vaccination requirements for NIV applicants. Chest X-rays and any other necessary testing must be conducted for the exam to be considered complete. The panel physician may refer the client to a psychologist for a mental status evaluation, even for DUI cases. It is important that counsel have extensive documentation of treatment and rehabilitation in the application packet. Processing times to clear these checks vary, but are usually not lengthy (two to four days, based on recent reports).

[18] 9 FAM 40.11 N11 for a complete discussion on physical and mental grounds of inadmissibility based on updated CDC guidance.

SAO Expedites and Follow-Up Procedures

DOS can expedite SAOs only if there is a dire medical emergency, significant U.S. government interest, or a humanitarian concern.[19] The expedite request must be approved by the Chief or Deputy Chief of the Coordination Division in the Visa Office (VO). It is advisable to submit an expedite request letter from the petitioner or sponsor, detailing the emergent reasons for the applicant's entry to the United States, to the consular officer at the post where the application was submitted at the time of the visa interview. It becomes burdensome for a consular officer to upgrade a case to expedite after the clearance has left the consular post. Attorneys report that security clearance delays have increased in recent months at all posts.

If a security check has been pending for over 60 days, attorneys may call the Visa Office Public Inquiries line at (202) 663-1225. Alternatively, attorneys can also send an inquiry via e-mail to legalnet@state.gov. The subject line caption should state "overdue SAO".[20] Additionally, you should follow up with the post directly to see if anything further can be done to expedite the SAO. Keep in mind that if a visa applicant is subject to a security check at one post, he or she will be subject to such clearance at every other post until the SAO is completed. However, the applicant does not have to return to the original post of application to obtain the visa stamp once the security check has been completed.

Unfortunately, it is impossible to pre-adjudicate, preempt or avoid an SAO, as the check is not triggered until the visa interview. However, preparation with your client in advance of the interview can help to alleviate the inconvenience and delays resulting from SAOs. Discussions about the possibility of administrative processing should take place before the client leaves the United States and backup measures should be discussed in the event the applicant is subject to an SAO. The location of the consular post may be critically important if the applicant needs a place to stay long-term or a location where their employer has another office where they can work while waiting for visa issuance. Nevertheless, you and your client may choose to apply in Canada on purpose—assuming they have authorization to remain there for an extended period—expressly hoping that an SAO will be processed faster there than in the applicant's home country. Regardless of your choice, be sure to thoroughly explain all risks in writing to adequately set client expectations.

Although it is impossible to avoid SAOs, certain steps can be taken in advance of the interview to prepare a client for the interview process. Have the client carefully review the application and supporting documentation to understand what they are presenting to the post and to ensure they can discuss the materials. Ensure the client is familiar with the particular procedures of the post where they will be applying as each post has small variances in their processes and procedures. Provide the client with possible interview questions to they know what to expect once they are in front of the officer. If applicable, provide the client with a legal brief, expedite request or waiver application. Finally, discuss the possibility of an SAO and what measures have been put in place in the event of a security check. If the applicant is ultimately subject to administrative processing, follow up with the NIV section chief and the VO once 60 days have passed. The contact information for the post can often be found on the consular website. When communicating with the post it is important to understand that once the applicant is subject to a security check, it is out of the post's hands and they are often waiting on the VO to return a clearance so they can issue the visa.

ROLE OF THE ATTORNEY AND COMMUNICATING WITH THE POST

Question: How important is it to research the consular post before sending my client? Aren't all posts all basically the same?

Answer: Not only are all consular posts not the same, their policies, procedures and adjudicatory practices vary, even sometimes within the post. It is your job as competent counsel to research the policies and procedures at the post where your client will apply.

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[19] *See* AILA Liaison/DOS Meeting Minutes (10/22/2009), *published on* AILA InfoNet at Doc. No. 10020230 (*posted* Feb. 2, 2010).

[20] *See* DOS VO Inquiry Procedures, *published on* AILA InfoNet at Doc. No. 08121971 (*posted* Dec. 19, 2008).

The prepared attorney will know to whom inquiries should be directed to at a particular post, as well as the local procedures for doing so. Does the post prefer email, phone, fax, or use of a specific online inquiry system? The post in Ciudad Juarez, for example, prefers use of an attorney online inquiry system. Fax and email communication from attorneys are rarely reviewed timely enough to resolve issues. The attorney should also be aware of possible variations to accepted mission policy for the country the applicant might expect to see at a particular post for the particular nonimmigrant visa sought.

Question: My clients complete the visa application and then discuss the information with my paralegal. I make sure they understand the series of documents and the overall application process. Isn't that enough preparation? It is just a visa stamp, isn't it?

Answer: No. Understand from the beginning that even an immaculate petition and instant approval from USCIS are worthless without a visa. Don't let your efforts in securing the petition approval go to waste at the post for failure to finish your job as the attorney of record. Always have a preparation interview with the client. Omission of this step can result in disasters and very unhappy clients.

The experienced attorney will ask their clients the right questions and insist on truthful and complete answers. This may only be accomplished by taking the time to discuss the questions on the visa application forms and the legal requirements for the visa category sought. If a client does not understand, for example, the difference between her legal intention to seek a nonimmigrant TN visa and her future hope of someday obtaining permanent residence, she may inadvertently make a statement during the consular interview that leads the consular officer to deny her application for failure to have nonimmigrant intent under INA Section 214(b). Similarly, does the applicant have a criminal arrest or conviction he is reluctant to discuss? If no arrest, has the applicant been hospitalized or sought help for substance abuse? If the consular officer were to ask the applicant, "have you ever used any illegal drugs," would you as the attorney know the answer? Understanding what grounds of inadmissibility your client may have already trigged or is about to trigger is a key aspect of consular practice and a starting point for proper client preparation. To make your communications with your client more effective, try to review questions and documents in person. If a personal meeting is not possible, you can use Skype and a webcam to make sure your client understands all aspects of his or her application and effectively uses non-verbal communication in presenting their case.

Question: The petition was approved by USCIS, the visa application is complete, and the client is prepared for the consular experience; am I done yet?

Answer: No. Having an approved USCIS petition is no guarantee of visa issuance. Most attorneys are not able to physically accompany clients to Canada or Mexico due to geographic, scheduling, or other limitations. And many clients are unwilling to pay for this additional representation. Some clients, however, may need your assistance in Mexico or Canada during the consular application process. While not all clients will choose this level of service, where it is possible and appropriate to offer it, doing so can make a big difference in the visa application process. If you are not going in person to the interview, make sure you have a mock interview with the client to prepare him or her to present the case as effectively as possible.

Attorney Assistance at Post (to the extent allowed)

For the past few years, consular posts in Canada and Mexico have not permitted attorneys to be physically present during consular interviews of clients. AILA leadership is working diligently to restore the right to counsel to visa applicants. The harm to U.S. family members and U.S. businesses by deprivation of this fundamental right is incalculable. In the authors' experience, many consular adjudication errors and visa issuance mishaps could have easily been avoided with a word or two of clarification or explanation from an immigration attorney. As attorney in-person representation is not currently permitted at the border posts, the next best position for the attorney is to accompany the client to the post and remain on stand-by (near the consulate) should there be a problem at post or during issuance of the visa. The applicant should feel free to indicate to the consular officer that the attorney is standing by to address any and all concerns the consular officer or NIV chief might have about the application. It is also a good idea to have a representative of the petitioning employer ready to answer any questions via telephone in employment-based cases.

A word of caution is warranted here. No consular officer or NIV chief wishes to be lectured on the law. The politic attorney will present the legal argument, if asked, in a courteous, diplomatic, and professional

manner, always leaving the post officials a way to save face and correct the error all at once. It is well-advised to keep in mind the attorney's goal is timely visa issuance, not governmental acknowledgment or an error, or that the attorney or applicant was right.

Question: The petition was approved, the visa is issued, and the client is happy; am I done yet?

Answer: No. You must advise the client on what to expect from CBP at the border. Most attorneys are not able to accompany clients to the port of entry due to geographic, scheduling, or other limitations. Also, many clients are not willing to pay for additional representation at the port of entry. Some clients, however, may need your assistance just a bit longer for the CBP admission process. And again, while not all clients will require this level of service, where it is possible and appropriate to offer it, doing so can make a big difference.

Attorney Assistance at Port of Entry (to the extent allowed)

Often, a client will need attorney assistance with the consular filing, as well as at the port of entry when seeking admission to the United States under the newly issued visa. As there is no right to counsel at a port of entry,[21] the practice point above applies in full. The role of the attorney at the port of entry following consular issuance of a visa is to be ready to provide any information, clarification, or assistance the CBP admissions officer might require, and to communicate with the shift supervisor or port director should the officer make an egregious legal error that prejudices or limits your client's admission in any way. Relatively common admissions errors include issuing a form I-94 with the incorrect expiration date, charging an inapplicable fee (Mexican TN charged $50 as required of Canadians), or requiring documentation that does not exist (I-797 approval notice naming the L-1 visa holder entering under an approved Blanket L petition).

COMMON ATTORNEY PITFALLS AND A FEW ETHICAL CONSIDERATIONS

The prudent, dare we say even experienced attorney, will forever keep these common pitfalls and ethical considerations in mind:

- Failure to recognize post's peculiarities or understand the adjudicatory time line/possible delays;
- Lack of substantive (or current) understanding of visa classification sought;
- Inadequate client interview/preparation;
- Assuming port of entry is a rubber stamp following visa issuance;
- Ethics go hand in hand with the role of the attorney;
- Maintain client control: Don't be pushed over the line even if it costs you your best client;
- Truth and nothing but the truth;
- A good reputation is yours to lose, so don't; and
- Maintaining the image of your practice group, firm, and AILA is your responsibility. Don't squander your good name/reputation for any client.

CONCLUSION

Despite the potential risks, TCN processing in Canada and Mexico continues to be a desirable option and clients are especially appreciative of attorneys who accompany them to the often intimidating NIV consular interview/post and with the admission process at the CBP port of entry. For most TCN applicants who are successful in their visa application, their visas are generally issued within several days of the interview. For over 10 years, the DOS TCN program has been operating successfully and the TCN posts in Canada and Mexico are experienced with processing NIV applications, appointments are usually available, and attorneys are often able to assist their clients in this complex area of practice.

[21] *See* 8 CFR §292.5(b).