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BERNARD P. WOLFSDORF[#]
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FRIEDA WONG-DITTMAR
ALLISON-CLAIRE ACKER
OF COUNSEL

1416 2ND STREET
SANTA MONICA, CALIFORNIA 90401
TELEPHONE (310) 570-4088 X249
FAX (310) 570-4080
EMAIL: AFRIEDMAN@WOLFSDORF.COM
Website: [HTTP://WWW.WOLFSDORF.COM](http://WWW.WOLFSDORF.COM)

NEW YORK
641 LEXINGTON AVENUE
15TH FLOOR
NEW YORK, NEW YORK 10022
TEL 212.899.5040
FAX 212.899.5041

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NONIMMIGRANT VISA PROCESSING IN CANADA OR MEXICO REMAINS THE BEST OPTION FOR THIRD COUNTRY NATIONALS

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by Avi Friedman, Esq. & Bernard P. Wolfsdorf, Esq.

The Advantages Of Applying For A Nonimmigrant Visa At A U.S. Consular Border Post.

The Department of State (DOS) ended the visa revalidation program back in 2004, primarily due to the new requirement for biometric fingerprinting. Nonimmigrant (NIV) appointments at many consular posts worldwide are now severely backlogged as a result of the policy that requires applicants between ages 14 years and 79 years to have an in-person interview. Delays in obtaining visa appointments in the applicant's home country have increased as consular resources continue to be stretched thin. Therefore, the best option for a Third Country National (TCN) is to process a NIV application at a U.S. Consulate/Embassy in Canada or Mexico.

Appointments at border posts are generally available. Most visas (that do not require a security clearance) are usually issued within several days. Appointment scheduling and visa issuance times can be checked online at http://travel.state.gov/visa/temp/wait/tempvisitors_wait.php.

Demand for TCN processing is increasing and applicants are advised to plan well ahead. The other option for a TCN is to return to his or her home country. However, most TCNs would prefer to obtain a visa in Canada or Mexico to avoid the added cost and time delays in his or her home country.

The Benefits Of Attorney Representation.

The attorney can properly prepare the visa application forms and a legal brief for the consul and guide the applicant through the consular procedures. The scope of attorney representation at the consulate varies from full participation at the visa interview to having to remain in the waiting area. At some consular posts, attorneys are permitted to represent their clients at the visa interview and explain or clarify issues. As post policy often changes quickly and with little or no prior notice, attorney guidance and representation can be extremely valuable.

Visa Delays Caused By PIMS

In November 2007, DOS instructed consular posts (Cable No. 155679) that they must verify the details of approved nonimmigrant visa petitions via a report called "PIMS" (Petition Information Management Service). The Kentucky Consular Center (KCC) has ceased e-mailing scanned copies of approved petitions to posts. The electronic PIMS record created by the KCC will now be the primary source of evidence to be used in determining petition approval. This applies to all nonimmigrant petition-based visa categories (H, L, O, P, and Q). The PIMS Petition Report contains a record of all petitioners recorded by the KCC as having approved petitions since 2004. In addition, many of the records contain information from KCC's Fraud Prevention Unit.

This change has resulted in possible four-day delays at many posts from interview to visa issuance for these categories. This particularly impacts TCN applicants applying in Canada or Mexico, who must now wait up to four additional business days after the visa interview, in order to retrieve the "visa'd" passport.

Fortunately, most of the posts in Mexico and Canada permit applicants to submit their petition information in advance and will then attempt to undertake the PIMS clearance

procedure prior to the visa interview, thereby limiting the time applicants have to wait until the passport is returned.

Where To Apply?

There are various U.S. consular posts in Mexico and Canada. In Canada, the choices include U.S. Consulates in Vancouver, Calgary, Toronto, Montreal, Halifax, Quebec City, and the U.S. Embassy in Ottawa. In Mexico, there are border posts in Tijuana, Nogales, Nuevo Laredo, Ciudad Juarez, and Matamoros and other posts include Monterrey, Hermosillo, Merida, Guadalajara, and the U.S. Embassy in Mexico City. Each post varies in terms of their rules and policies regarding eligible visa categories, attorney representation, interpreters, and visa issuance processing time. Most of the posts in Canada and Mexico limit TCN visa applications to *renewal* of same category visas and often have restrictive policies on applicants who initially enter on a B-1/B-2 visa and subsequently wish to change status to student or a work category, regardless of whether they have a change of status approval issued by U.S. Citizenship & Immigration Services (CIS).

Also, depending on which post is chosen, as well as citizenship, an applicant may also require the appropriate visa to enter Mexico or Canada. It is therefore advisable to contact the Mexican or Canadian consulate and review their respective websites for information on visa/entry requirements and application forms.

Who Can Apply?

As a general rule, INA section 222(g) prohibits a TCN visa applicant who is out of status from

applying for an NIV at a border post. Accordingly, regardless of whether a TCN applicant is subject to the three or ten-year bar, one day of being out of status results in their ineligibility. Such applicants, who have overstayed a date certain Form I-94, must apply for all future visas in their home country. The law allows minor exceptions for "extraordinary circumstances." Applicants in J-1 or F-1 status with D/S (duration of status) Form I-94's are usually not subject to 222(g). However, while not subject to §222(g), many border posts will not accept TCN NIV applicants outside the grace period (60 day grace period for F; 30 day grace period for J).

TCNs from the "List of 26" countries, a classified list of predominantly Muslim countries, those subject to the National Security Entry/Exit Registration System (NSEERS), and nationals of North Korea, Cuba, Syria, Sudan, and Iran, are typically not allowed to apply in Mexico, but may apply on a case-by-case basis at certain posts in Canada. These applicants must be prepared to wait either in Canada or outside of Canada while the security checks are pending. Generally, they cannot re-enter the U.S. prior to the completion of the security clearance and the issuance of the visa. As mentioned above, the applicant must possess a proper Canadian visa to enter and remain in Canada or re-enter Canada. Also, the applicant must have complied with special registration and departure registration requirements.

When Is The Best Time To Apply For The Visa?

It is always best to apply before the current visa expiration date. Applicants should consider

applying for an extension within 60 days prior to the expiration of their current, valid multiple-entry visa. When applying for a change of status from F or J to either H, L, O, or P, applicants may enter the U.S. 10 days prior to the commencement of the start date listed on their Form I-797 Approval Notice. Policies regarding when an applicant may apply to renew a same category visa also vary by post. By applying as far in advance as possible, the applicant may have the ability to use his or her current visa to re-enter the U.S. should the application be rejected or a security check be initiated.

How To Book An Appointment At A Border Post?

Appointments for TCN's in Mexico can be made online at www.usvisa-mexico.com or by calling 1-900-476-1212. Appointments for TCN's in Canada can be made online at www.nvars.com or by calling 1-888-840-0032. Appointments are usually made at least 14 days in advance for posts in Mexico and 6-8 weeks in advance for posts in Canada; however, all posts have an emergency appointment request procedure and often provide priority to F and J visa applicants. If the procedure is not listed on the post website, call or email the non-immigrant visa section chief at the individual post.

What Forms And Documents Are Usually Required?

Form DS-156 - All posts now require the Form DS-156 be completed online (except those posts that require Form DS-160), printed by the applicant, and presented with the bar code page at the time of the application. This version of Form DS-156 is available online at

<http://evisaforms.state.gov> and at most posts' websites. This form is favored as it permits posts to scan the information directly into their database rather than having to manually input the data.

Form DS-157 – This form is required for all male applicants between the ages of 16-45 and at some posts female applicants are required to complete this form and other posts require all applicants regardless of age to complete this form. It requests information about the applicant such as employment and education history, military background, and countries visited in the last 10 years. This form is important for consular officers in determining whether certain applicants are subject to a security clearance.

Form DS-158 – This form is required for all J, F, and M visa applicants and details personal, employment, and contact information. Some posts also require all applicants to complete this form.

Form DS-160 –This is a new electronic form which is being piloted at posts in Nuevo Laredo, Monterrey, Matamoros, Nogales, Hermosillo, Ciudad Juarez, Vancouver, Montreal, Dublin, Tripoli, Hamilton, Podgorica, Melbourne, Perth, Sydney, and Hong Kong. At the posts in Ciudad Juarez, Nuevo Laredo, and Monterrey, applicants must also make a separate appointment at an off-site "Applicant Service Center" to submit biometrics. The form is available at <https://ceac.state.gov/genniv/> and allows the posts to begin the visa process prior to the interview.

Other Supporting Documents

At minimum, an applicant should have a complete copy of their

petition which was submitted to the immigration service, a passport valid for at least 6 months, and other supporting documents such as *original* approval notice(s) or Form I-20 or DS-2019, one passport size photograph, a current job verification letter, recent paystubs, tax returns and W-2's, and *original* education documents including diplomas and transcripts. It is recommended that the applicant check specific post policy and an experienced immigration attorney as to the required supporting documents for the visa interview.

How Do You Pay The Visa Application And Reciprocity Fees?

Posts in Mexico require the visa application fee to be paid in advance at a branch of Banamex. These bank offices usually open at 9:00 a.m. and they require the applicant's passport number. Banamex will issue a receipt (only valid for the individual applicant) to be submitted with the NIV application. Posts in Canada require the applicant to pay the visa application fee in advance at a branch of Scotiabank. Reciprocity fees in Mexico and Canada are usually paid in U.S. cash at the post after the visa has been approved (some posts also accept credit card payment or local currency for reciprocity fees).

Are There Risks With Border Processing?

On April 1, 2002, DOS changed the automatic revalidation provision of 22 CFR §42.112(d). Automatic revalidation applies for trips to Canada or Mexico of 30 days or less provided that the alien has not applied for a visa and is not from the DOS designated State

Sponsors of Terrorism ("T-4") which includes the following four countries: Iran, Cuba, Syria, and Sudan. Currently, if an applicant applies for a visa at a border post or is a national of "T-4", it is necessary to have a valid U.S. visa to re-enter the United States. Rejected visa applicants must now travel back to their home country directly from Mexico or Canada. Prior to this change, applicants who were denied a visa were able to return to the United States using an expired visa and a valid Form I-94 which automatically revalidated their visa.

What Are The Most Common Security Checks At Border Posts?

Security checks or so-called Security Advisory Opinions (SAO's) are initiated by consular officers at NIV interviews and often are the result of "hits" based on information in the government databases. The four main security checks affecting NIV processing are:

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

1. Information disclosed on Form DS-157 (including travel to predominantly Muslim countries in the last 10 years, prior employment, military service for certain nationals, specialized skills or training)

2. Country of Birth, Citizenship, or Residence and persons born in "T-4" or male applicants from "List of 26" countries will likely be subject to a Condor security check.

DOS reports that most Visas Condor clearances are completed within several days. Anecdotal

evidence suggests that most "List of 26" applicants who are subject to Condor clearances in Canada are issued NIV's within approximately 2-4 weeks.

B. The Visas Donkey: A Donkey SAO is a name "hit" based on non-criminal issues and is not nationality specific. For instance, a U.K. citizen with the name "Mohammad Khan" will very likely be subject to a donkey clearance. Most donkey clearances average 6 to 12 weeks to process while a few take substantially longer.

C. The Visas Mantis: Otherwise known as the "sensitive technology" clearance, this security check is based on whether an applicant is involved 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. This list is so comprehensive that it includes almost every possible associated technology or skill involving chemistry, biochemistry, immunology, chemical engineering and pharmacology to name a few. With such an all-inclusive list, nearly every research scientist, physician, academic and engineer involved in any of these fields could be subject to a consular post erring on the side of caution.

According to prior DOS guidance, 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 it involves information that would generally be taught in an academic course. There has been a substantial revision and guidance

regarding TAL which was issued by DOS to consular posts on October 1, 2003. Since the cable is classified, the full effects are unknown (although it appears that an increasing number of applicants are being subjected to Mantis clearances and lengthy processing delays). 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/J-visas and 1 year for B visas but if there is a change in duties a new 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 isn't 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. Clearly a transfer from engineering to nuclear physics would trigger a new mantis.

D. NCIC Criminal Hits: 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 and also extensive records about the occurrence of criminal convictions or arrests including relatively minor offenses such as shoplifting.

As DOS is not a "law enforcement agency", consuls do not have access to the specifics of the arrest or conviction. Accordingly, if there is hit in the system for a prior arrest and/or conviction or a false "hit", the consul is required to submit the

applicant's fingerprints to the FBI to request the record and/or confirm that there is no record. Applicants may present certified final court dispositions, arrest records, and legal briefs at the time of the interview, but the post cannot issue the visa until it has received the results back from the FBI.

False hits are occurring with increased regularity for those with similar names (e.g., John Smith or Juan Gonzalez) to someone with a prior arrest and/or conviction. As many as half of the names recently entered into the CLASS system are Latino, and 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 allows the post to process clearances on false hits in the same day, while clearances for positive hits are often received by the next day.

SAO EXPEDITES

DOS can expedite security clearances only if there is a significant U.S. government interest or humanitarian concern. The expedite request must be approved by the Chief or Deputy Chief of the Coordination Division of 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 visa application was submitted.

If a security check has been pending for over 90 days, you may call the Visa Office (VO) Public Inquiries line at (202) 663-1225. Universities inquiring on F-1/J-1 cases may contact VO at (202)

663-1851 or email
FMJVisas@state.gov.

Conclusion

Consular processing for TCN's at border posts is a complex and highly specialized field of immigration law. Applicants should be aware of the significant risks, including potential delays for security clearances, denials and most important, the inability to return directly to the U.S. if rejected (or delayed). The advice of an experienced immigration attorney is highly recommended as he/she will be able to research post policy, thoroughly review the applicant's immigration history and status, properly prepare the visa application forms and supporting documents, and be available to assist the applicant with the visa process. Despite the potential risks, TCN processing in Mexico and Canada continues to be a desirable option. Most TCN posts are experienced with NIV applications, appointments are readily available and attorneys are often able to assist their clients in this complex area of practice. The good news is visas are generally issued within two-three days of the interview.

Avi Friedman is a Senior Attorney with Wolfsdorf Immigration Law Group in Los Angeles, California. He is currently serving his third term on the American Immigration Lawyers Association (AILA) Department of State Liaison Committee and his seventh term as the Consular Affairs Liaison for AILA's Southern California Chapter. He has authored numerous immigration articles including several chapters for AILA's "The Visa Processing Guide" (Ottawa, Canada and

Nogales and Monterrey, Mexico) and has participated as a speaker on consular visa issues at AILA and NAFSA conferences. He has extensive experience with assisting applicants with interviews at U.S. consular posts worldwide with a focus on attorney/client representation at U.S. posts in Canada and Mexico. Mr. Friedman is listed in the 2008 California Edition of the Who's Who of Corporate Immigration Lawyers and the 2005-2008 Southern California Super Lawyers, Rising Stars Edition.

Mr. Friedman can be contacted at: afriedman@wolfsdorf.com or at 1-800-VISA-LAW.

Bernie Wolfsdorf is the National President of AILA. He is a California State Bar-Certified Specialist in Immigration and Nationality Law and has authored numerous publications on immigration law and frequently lectures on visa matters. Mr. Wolfsdorf is listed in The International and California Editions of the 2008 Who's Who of Corporate Immigration Lawyers, Best Lawyers in America 2008, Martindale Hubbell's Pre-eminent Specialist Directory, Southern California Super Lawyers 2008 (the only Los Angeles immigration lawyer listed in the top 100 lawyers in southern California), Chambers USA 2008 and The Chambers Global World's Leading Lawyers for Business 2008.

Mr. Wolfsdorf can be contacted at bernard@wolfsdorf.com or at 1-800-VISA-LAW.

Should you have any questions regarding the above or are interested in having attorney assistance with a nonimmigrant visa application in Canada, Mexico, or worldwide, please do not

hesitate to contact Avi (afriedman@wolfsdorf.com) at 1-800-VISA-LAW. We travel to the border posts in Canada and Mexico frequently to represent visa applicants.