Anticipated attendees for AILA:
Yeu Hong, Committee Chair
Anastasia Tonello, Committee Vice Chair
Committee Members:
Marisa Casablanca
Jerome G. Grzeca
Kehrela Hodkinson
Laura Lichter
Elizabeth Ann Quinn
Liam Schwartz
Aimee Clark Todd
AILA Staff
Betsy Lawrence

Anticipated attendees for DOS:
Jim Pritchett, Director CA/VO/L
Vinnie Beirne, Deputy Director CA/VO/L
Nancy Altman, Chief CA/VO/L/R
Jeff Gorsky, Chief CA/VO/L/A
Marcia Pryce, Chief CA/VO/L/W

1. Following to join procedures

Members report problems with the I-824 processing between the USCIS and NVC, which are resulting in significant delays in reuniting families. In our fall 2009 meeting, VO advised there would be a new process for FTJs for adjustment cases and the process would begin at NVC and then transfer to posts but in March 2010, we were advised that the new procedures were still in the development stage. Please advise when the new (and very welcome!) procedures will be implemented.

We are in the process of finalizing an information collection that will allow VO to collect the information necessary to process FTJs for adjustment cases and reviewing the costs associated with this function. Once that form is finalized and we have a cost determination, we will decide whether to begin the process of obtaining OMB approval for the collection and establishing the appropriate procedures for process. At this juncture there is not a firm timeline as to when these new procedures will be implemented.

2. Denials

a) Denial rates

Does DOS have statistical data of denial rates and specific grounds for nonimmigrant and immigrant denials at consular posts? Would DOS be willing to share this data with AILA?
Please see attached chart “Immigrant and Nonimmigrant Visa Ineligibilities.”

b) 221(g) and ESTA

AILA requests that uniform and clear wording on 221(g) letters which clearly state an application has been denied be instituted. 221(g) letters continue to state that a case is suspended and do not explain anywhere that the case has been denied, and in fact, imply the opposite. This continues to cause confusion primarily as it relates to visa free travel and Customs and Border Protection’s interpretation of a denial and material misrepresentation. Following on that same issue, if the applicant overcomes a 221(g) denial within the prescribed one year period, should the applicant still consider a visa application to have been denied for future applications before DOS or CBP (ESTA)?

We are aware of this particular issue involving ESTA and our treatment of 221(g) cases. We have drafted guidance to the field asking posts to make clearer to applicants, both verbally and in writing, that 221(g) is a refusal under U.S. law.

As the application has in fact been denied, an applicant must answer “yes” to this question, even if his visa is subsequently issued. CBP manually reviews all ESTA applications in which the applicant marks “yes” to question F and has access to our consular database to determine whether any previous refusals are relevant to the applicant’s ESTA application.

c) Boilerplate denial letters in India

In our previous meeting on March 24, 2010, we noted a growing trend of boilerplate requests for additional documents via 221(g) letters for H-1B and L visa applicants at the posts in India. You indicated that consular officers request only those documents necessary to adjudicate the individual application. However, member reports indicate that the “boilerplate” or “kitchen-sink” requests have grown in number during past months, and in fact are included on the consulates’ web sites as necessary initial documents without regard to the specific case circumstances. For this reason, we would like to bring this to your attention as a repetitive issue or trend, as individual requests to Legalnet will not reveal the extent of the issue.

In particular, officers are issuing these letters without reviewing the petition copy (and RFE response copy, where applicable) the applicant carries to the interview. Another related issue is that some of the documentation, such as payroll information, is highly confidential, and petitioners do not know how to get that information securely into the hands of the consular officer without the visa applicant having access to it. In addition, information is requested that is simply not relevant to the applicant’s job or employer, further indicating that the requests are being made in a blanket manner without regard to the specific circumstances of the case.
Would you instruct these posts to avoid overbroad requests for additional documentation and to issue requests that are more finely tuned to the applicant/petitioner and the information they are actually seeking?

We have contacted Mission India about AILA’s concern and received the following response: Each case is different. We request only those documents necessary for us to adjudicate the individual’s application.

d) Another member reported that blanket L-1Bs in Chennai were being denied for reasons such as that the project could be completed in India, which is not a consideration for L-1B qualification. In other cases, the attorney attempted to contact the post in Chennai to obtain reasons for blanket L-1B denials and has been unable to obtain a response. This makes it difficult to escalate matters on grounds of legal argument through Legalnet. (Please note that a chart reflecting specific case issues can be provided if needed/helpful.)

Problems in specific cases such as these should be raised through Legalnet. The FAM encourages post to provide applicants with as much information relating to the reasons for a refusal as is practicable. If an attorney is unable to obtain information from the post directly, the inquiry can still be directed through Legalnet. Please note that consular officers in India generally focus on whether the L-1B blanket applicant clearly meets the definition of “specialized knowledge professional,” and will often ask a series of questions to make that determination, and no single question or factor should necessarily be considered a dispositive reason for refusal.

e) Notice of intent to revoke

Based on that same concept, when a Consulate denies the visa application and returns the petition to KCC with a request for revocation, would you instruct posts to issue a letter to the applicant with specific information as to why the revocation request is being made? As the application is based on an I-797 approval, which is prima facie evidence of entitlement to that classification, the Consulate should articulate the specific reasons that revocation is being requested. Without this information, the attorney is unable to address disputes regarding legal issues through Legalnet. (9 FAM 41.53 N2.3 and 9 FAM 41.54 N3.4-3 both state “Refer cases to USCIS for reconsideration sparingly, to avoid inconveniencing bona fide petitioners and beneficiaries and causing duplication of effort by USCIS. You must have specific evidence of a requirement for automatic revocation, misrepresentation in the petition process, lack of qualification on the part of the beneficiary, or of previously unknown facts, which might alter USCIS’s finding before requesting review of a Form I-129, Petition for a Nonimmigrant Worker, approval.”) Can VO remind consular officers of their role in the visa application process and that the choice of visa and merits of a petition approved by USCIS should not be re-adjudicated?

If the case meets the criteria for return as described above, the adjudicating officer may request information he/she feels could answer any eligibility
questions via the interview and 221(g) letter prior to returning the petition. If the applicant is unable to provide the requested information to the satisfaction of the adjudicating officer, the petition may be returned to USCIS. The adjudicating officer is not obligated to request more information prior to returning a petition. Once the decision has been made to return a petition to USCIS for reconsideration, there is no forum through Legalnet to question the decision.

CA will remind officers of their obligations regarding approved petitions.

f) Fraud prevention unit re-adjudicating petitions

We would like clarification on the function of the FPU. We understand that they are involved in a review process rather than being an adjudicatory unit. However, members noticed that since these units are up and running they are taking a new role in adjudication. For example the Embassy in Caracas recently denied an O-1 visa application, providing a boilerplate letter and citing 9 FAM 41.54 N3.2-3 (which references L visas). When the attorney inquired with the consulate, she received an e-mail from the Fraud Prevention Unit stating that the reference from the FAM should have been 9 FAM 41.55 N2.1 O-1(3)(b), 9 FAM 41.55 N8.4(b) and/or 9 FAM 41.55 N8.5. The FPU Manager went on to say that he was curious as to why the attorney had chosen to process an O visa instead of an L or H visa. The applicant in question has since been nominated for a Grammy and will now have to wait many months to return to the U.S. The specific case number is 360-1/209. On another case in Caracas, the applicant was told that they believed that the company did not need someone to fill his position and that the company could not prove ability to pay. We can provide additional examples.

FPUs collect and verify data for use in identifying fraud trends and analyzing specific cases. We use this information to improve officers' adjudications of visa and citizenship applications. Tools utilized in fraud assessments vary from post to post, but may include document examination, facial-recognition review, phone calls to verify data, internet searches, and site visits. The Fraud Prevention Manager (FPM) at each post ensures that fraud assessments are limited to providing factual information and do not include opinions or recommendations on the adjudication of a pending application.

In Caracas, for example, a summary of the FPU’s findings is attached to the case for use by the NIV officer, who ultimately interviews the applicant and adjudicates the case. FPUs do not re-adjudicate cases, but develop further information about the individual and the qualifications - information that may not have been available to USCIS when it adjudicated the petition. The decision to revoke a petition is made by USCIS, not by the officer at post.
It should be noted that the majority of O cases in Caracas are issued. In addition, consular officers in Caracas maintain regular correspondence with immigration attorneys who ask to review a particular case or have questions.

3. Mexico reciprocity

In February 2010, the Mexico reciprocity schedule underwent significant changes with regard to many of the nonimmigrant work categories. Notwithstanding the far-reaching impact of these changes, little or no advance notice was provided to the public. Will you please advise what, if any, are the standard operating procedures for notifying the public of impending changes to a country reciprocity table?

The Mexico reciprocity schedule was changed in February 2010 to reflect the elimination of a reciprocity or issuance fee, and again in July 2010 to reflect the increase in the validity of visas issued in several petition-based categories. These updates were communicated to the public via changes to the reciprocity page on travel.state.gov. In the future, we also will add updates to the Reciprocity “What’s New” page on travel.state.gov: http://www.travel.state.gov/visa/fees/fees_3732.html.

4. NVC processing

a) Please clarify what causes NVC to refuse processing applications for which priority dates are current? Please see the attached example. The letter does not state the Priority Date, but it is June 1, 2001 in the Family 4th preference, chargeable to India. It was current for August and will be current in September also.

The qualifying dates are administered by the NVC based on the requirement and cut-off date charts provided by the Chief of Immigrant Visa Control and Reporting Division at the Department of State’s Visa Office in Washington. Non-current petitions that become current by qualifying date need to be ahead of the priority dates (6 to 9 months is a rule of thumb). This allows NVC to begin processing these cases. Without a receipt number, it is difficult to determine the status of any specific case. However, during the noted period, the dates were drastically moved because the required numbers of applicants were not entering the pipeline. The number of cases needing review by the NVC was significantly increased by the movement of these dates. The increased volume of work increased normal processing time at the NVC.
There are situations where information may be missing from a petition. NVC sends such petitions back to USCIS for clarification. For example:

- No petitioner signature
- No approval stamp
- Approval stamp not signed
- Approval date is earlier than priority date

b) How is NVC coping with the extra workload caused by the recent progression in the Family 2nd and 4th Preferences (especially India Chargeable)? Members report a slower response of late.

The NVC has seen an increase in workload across all of the categories over the past year, including the recent movement of the Family 2nd and 4th preference categories in July and August. To continue to provide responsive and timely service, NVC has added staff in all processing areas, revised existing processes to achieve maximum efficiencies, and continued with its intensive monitoring/analysis efforts. NVC’s normal response rate has increased by about ten business days on average. We are confident that the changes mentioned above will move the response rate back towards the NVC’s historical norms.

c) A member reports that the NVC has, upon request, changed the immigrant visa post from what was requested on the petition to a new post, but then once the case was transferred, the consulate would not process the case. The specific matters concerned two refugee cases where the NVC changed the post for IV interviews in Montreal but on the day of their appointments the applicants were told that Montreal could not process their cases (Montreal’s website clearly states that they will not process refugee immigrant visas). Does the NVC have any guidance for changing posts or will it simply change as requested without any authority leading to these types of issues?

NVC needs a written request asking for the post to be reassigned. In addition, the principal applicant must have an address in the country in which he or she is requesting an interview, and must present proof of legal status for the requested country.

Without a case number, we are unable to comment on the specifics of any case. However, with the information provided in this question, NVC would not normally process a post assignment change where the proof of legal status provided is refugee immigrant status since that is outside Montreal’s guidelines for accepting a case.
d) In our Spring meeting questions, we raised the issue that members reported that NVC had been losing or misplacing original documents. The VO requested specific case numbers. Two examples are: [Redacted] and companion case [Redacted] (which we understand were eventually found), [Redacted] (where the NVC had not matched up original documents sent with a principal applicant’s case to the dependents cases).

- We received two mail packets on this case. One of the mail packets was received on 7/12/10 and reviewed on 7/20/10 (6 business days). The second mail packet was received on 8/11/10, but not reviewed until 9/7/10 (18 business days). Mail volume at NVC increased significantly during this latter time period.

- We received three mail packets on this case. Two of those packets processed quickly: 9 business days and 8 business days. The third mail packet was received on 9/23/09, entered into our system on 9/25/09, processed through the file room, and routed to be reviewed on 9/30/09. Unfortunately, the case was returned to the NVC file room without the mail being reviewed. This mail was reviewed on 2/4/10 when additional mail was received on this case.

– Companion case – This case received four mail packets and all were processed quickly: 6 business days, 6 business days, 5 business days, and 8 business days.

- Although this case had mail received on 4/20/10, that mail was not reviewed until new mail was received and reviewed on 8/24/10. This was an oversight in our mail review process.

e) Can the VO provide us with any updates on e-mail/electronic processing of IV applications whereby applicants are able to send pdf copies of documents to the NVC instead of originals? We understand this is currently in place for all applications at Ashgabat, certain applications at Ciudad Juarez and is optional in Guangzhou and Montreal. Is there a timeline for this program to be rolled out for other posts?

Electronic processing is currently available as follows: Montreal (optional for all visa categories), Guangzhou (optional for all family-based categories), Ashgabat (required for all visa categories), Ciudad Juarez (required for all IR1/CR1 and IR2/CR2 applicants.)

We are working to roll this process out to other posts, but do not have a specific time frame.
5. Visa bulletin

a) Can you give us predictions for the upcoming year for family and employment based immigrant visa numbers especially Family 2A and India and Chinese EB2 and EB3?

b) NVC uses a "Qualifying" Date for NVC processing to start for consular processing. The Priority Dates are published in the Visa Bulletin. Would it be possible to publish the "Qualifying" date so that applicants can plan better?

Many of the Employment categories were “Unavailable” for much of September. As a result the demand from USCIS has been extremely high, making it difficult to make predictions at this time. We will take a closer look at the demand situation in early November, and provide projections in the December Visa Bulletin. The predications being provided below should be considered preliminary and are subject to change.

**Employment Cut-off Date Movement**

**China**
First: Current
Second: One to two weeks
Third: One to two weeks

**India**
First: Current
Second: One week maximum
Third: One to two weeks

**Mexico**
Third: Return to the July 2002 date in December. Then it may be necessary to hold the date if it appears that USCIS demand will be heavy.

**Worldwide**
Third: Up to one month at a time.

6. Haitian applications

What, if any, special treatment is being given to Haitian IV applicants by the NVC or consular posts outside of Haiti?

The IV section in Port-au-Prince is fully staffed and was augmented by temporary help in order to eliminate any IV backlog in Haiti. NVC is processing all Haitian IV cases as quickly as possible. Other posts will
accept Haitian IV applications if the beneficiaries are resident in the consular district.

7. DS-260

What is the current timeline for the rollout of the DS-260?

The DS-260 is live in a pilot program at seven posts: Amman, Athens, Baghdad, Ciudad Juarez (for CR/IR-1/2 cases), Islamabad (for Afghan SIVs), Lima, and Montreal. We expect to run the pilot for about six months, at which point (mid-April at the earliest) we will evaluate the program and determine how best to deploy the DS-260 to the field.

8. Electronic signatures

Following the recent Biometric Signature and Affirmation of DS-160 NIV Application cable (STATE 053483, 05/10) which states that by providing their fingerprints, an applicant for a nonimmigrant visa is in effect signing the application form and agreeing to its contents, would the Department consider removing the electronic signature language from the DS-160 (and not adding it to the DS-260) to enable applicants’ representatives to complete and submit the applications for them? Or through these questions and answers, confirm that the attorney or other representative may submit the application on behalf of the applicant? As the system is now, the application must be prepared by a representative and sent back and forth for the applicant to submit and with the timing out issues, has created frustrations which could be eliminated by removing this requirement.

By regulation, the Department is required to capture the “signature” of an applicant at the time of the interview to evidence their familiarity with the contents of the application and their intent to be bound by the statements, deemed to be current, accurate and true by the applicant at the point closest in time to the actual issuance/refusal of a visa. The Department has determined that applicants themselves must review and attest to responses attorneys or other third party representatives have drafted in response to questions on the application. This ratification/affirmation/confirmation of a third-party response to questions has been determined important for enforcement actions/prosecutions. We will be following up with posts to ensure that they understand the regulation and are not giving contrary advice to applicants.

9. Non-Canadian dependents of Canadian NIVs

In our October 2009 meeting, we discussed the issue with non-Canadian dependents of Canadian citizens who are unable to be issued visas because the Canadian principal applicant
processed his or her petition at the border and the information was not in PIMS. AILA suggested that in light of NAFTA and our special relationship with Canada that some accommodation be made to issue visas to these dependents based on entry of the principal applicant such as the I-94. DOS responded that it was in discussions with DHS/CBP regarding a possible mechanism for expediting entry of CBP date into PIMS. What progress on this issue been made?

VO and CBP are establishing a procedure intended to reduce the time for CBP petition approvals to be reflected in PIMS. Once this procedure has been implemented, CBP at designated ports of entry or preclearance facilities will be authorized to fax the approved Form I-129 or I-129S directly to the Kentucky Consular Center (KCC) in the event a citizen of Canada applying for admission notifies the adjudicating CBP officer that the applicant has a spouse or minor child who is a national of a third country and will be applying for a derivative nonimmigrant visa. KCC will scan the faxed copy into PIMS, which will be accessible by the consular officer at the post where the dependent applies for a visa. We anticipate having this procedure in place by the end of November.

10. NIV waivers under 212(d)(3)

a) In our March 2010 minutes, VO confirmed that ARO determinations are made on consular officer recommendations because the consular officer recommendation is submitted electronically and COs do not have the facilities to scan and send lengthy attorney submissions to the ARO.

In this regard, please advise what the typical CO recommendation letter includes in terms of information. Is there a template for summarizing the nature of the ground of inadmissibility and the positive equities which led the CO to a favorable recommendation? Do CO recommendation letters include a recitation of the primary evidence submitted in support of the application?

Consular officers submit recommendations for waivers to ARO via the Admissibility Review Information System (ARIS), an application in the CCD. The template includes space for the consular officer to describe the visa type requested/purpose of trip, the ineligibility code and ineligibility comments, the reasons for recommending the waiver, and other comments. ARO will respond to post directly through ARIS, with either a decision or a request for more information. ARO can access all of the information from the DS-160 and consular officers can scan in other relevant documents. Waiver requests for applicants convicted of Crimes Involving Moral Turpitude (CIMT) under 212(a)(2)(A)(I) must include scanned copies of Foreign court documents in English or an English translation. If the
documents no longer exist due to passage of time, consular officers are instructed to write detailed notes of the crime, judgments, and convictions. ARO will respond to post and request more information if it feels it does not have enough information to accurately and appropriately adjudicate a case.

b) While 9 FAM 40.301 N6.2 provides a mechanism for the applicant or his/her attorney to request that the CO refer the application to the Department for review in instances where the CO has determined that a waiver is not warranted, AILA remains concerned that in cases where the CO does recommend the waiver to the ARO, the ARO is not receiving highly relevant documentary evidence and/or legal arguments that bear upon the ultimate decision.

Although the ARO approval rate is quite high, the ARO does not approve all cases recommended by COs, notwithstanding the fact that we must assume that COs only recommend those they believe to be meritorious. (If a CO is not so convinced, s/he would submit the application to the Department instead, per 9 FAM 40.301 N6.2-1). Thus, it would appear that the cases that ARO does not approve, notwithstanding CO recommendation, are some of the most factually and/or legally complex. If the ARO receives only the CO recommendation letter, without any of the primary evidence submitted to and reviewed by the CO when making his/her recommendation, the end result is that the ARO lacks extremely relevant information and evidence when making the ultimate decision on the case.

Moreover, it is our understanding that in 212(d)(3) waiver applications submitted by Canadians at the POE, the POE forwards the application directly to the ARO for adjudication. In these cases, the ARO is receiving the entire submission of documentary evidence and any legal argument, while consular cases consist only of the CO recommendation letter. The consulates not forwarding the entire submission creates a disparity among applicants, depending on where one must apply.

For both of these reasons, AILA reiterates the request that the Department develop a mechanism to forward the complete 212(d)(3) submission of documentary evidence and attorney legal arguments to the ARO at the time the CO issues his/her recommendation letter.

Consular officers should be familiar with the judicial documents from their respective regions. If local documents are no longer available or do not provide sufficient information, consular officers are instructed to provide detailed notes regarding the ineligibility to be waived per the facts from the interview and available documentation. If ARO believes it is missing documentation/information that may affect its decision, it will respond to the waiver request from post with “Information Required.” Consular officers scan all relevant material into the CCD.

c) On a related note, we also reiterate our request that VO remind COs to at least read and review the attorney submission and supporting documentation in such cases, as members continue to report specific examples in Australia, London and other posts, where consular officers refuse to even accept the attorney submission or if they do, it is returned without even a cursory review.
All visa applicants must qualify for a visa based on their own merits. Consular officers will review documents they determine are relevant to making that determination.

11. SAOs

a) Is it possible to provide current processing times for Mantis, Condor, Donkey and Eagle checks?

We endeavor to complete processing of all cases in a timely manner. However, U.S. border security always comes first, and there are some cases that take longer than others. As a matter of policy, we do not publish processing times for SAOs.

b) When can attorneys now submit an inquiry to Legalnet to follow up on a pending SAO (after 30, 45 or 60 days)?

For administrative processing cases, attorneys may submit a follow up inquiry after 60 days. Please see this Internet page http://travel.state.gov/visa/a_zindex/a_zindex_4353.html.

c) A member reports an increase in administrative processing at Sana’a Yemen and particularly for minors, some as young as 10 years old. Are there any procedures or possible alternatives to consular officers to waive background checks for young children?

If you have specific cases, we ask that you bring them to the Department’s attention via LegalNet.

12. Bonds

In what circumstances would the VO consider approving the use of a bond pursuant to 9 FAM 41.11 N8 and 9 FAM 41.11 PN1? Are posts provided with specific guidance on the procedures for requiring and accepting a bond? The Embassy in Haiti has reportedly refused to consider the use of bonds based on lack of guidance on procedures.

As stated in 9 FAM 41.11 PN1 these bonds are to be used “rarely, if ever”. There are several reasons for this long-standing guidance. This bond only relates to “maintenance of status”. Because an application for adjustment of status is not a violation of status, it is possible for an alien to apply for immigrant status after admission without forfeiting the bond. Applicants for “B” or “F” visas are required to maintain a residence outside the US. Therefore, the maintenance of status bond does not protect against all legal concerns relating to whether an alien is ineligible for the visa. The above cited note cites other reasons why a bond is not normally an effective
mechanism for visa adjudication: “The mechanics of posting, processing and discharging a bond are cumbersome, and many Department of Homeland Security (DHS) offices are reluctant to accept them. In addition, the nature of the bond can often lead to misunderstanding and confusion, especially in countries where surety bonds are uncommon. The result can be a public misperception that the consular officer has actually requested a bribe in order to issue the visa……In an era when some potential migrants are willing to pay thousands of dollars for false documents or smugglers’ services, possible forfeiture of a bond is little deterrence, and sometimes might be cheaper than other means of illegal entry.”

13. KCC

a) FPU/FDNS coordination

Is the KCC Fraud Prevention Unit coordinating with DHS’s FDNS with regard to FDNS site visits and FPU telephonic audits of H-1B petitions? We understand that similar to FDNS site visits, FPU telephone audits are not limited to the employer. A member reports that a client/petitioner’s customer was contacted by the FPU directly to verify the terms of an assignment based upon information contained in the assignment confirmation letter provided to the USCIS as part of an H-1B petition. Will this information be sent to DHS?

KCC’s calls to petitioners or client companies are typically in response to requests from posts for additional information to support an expeditious interview process. KCC provides support in cases where it would be more difficult for posts to make the contact, when additional information related to visa applications is required that is not immediately available to consular officers abroad. KCC’s location in the United States overcomes the limitations of time and distance faced by many posts throughout the world. Consular officers do not have direct access to FDNS site visit reports; however, an FDNS officer has recently been assigned to KCC and it is anticipated that this will improve information sharing. In many cases, KCC is able to resolve areas of concern to post, resulting in more rapid adjudications and avoiding unnecessary consular returns.

b) Audits

AILA understands KCC is conducting audits of nonimmigrant visa petitions, including unannounced telephonic contact of employers. Does this process have any bearing on the timing of PIMS? For example, if the employer was unavailable or unable to answer the questions during the call, will this simply be noted for the consular officer to review or will the case be held and not put into PIMS until the audit is completed? Is there a standard list of questions or can VO provide us with areas of inquiry or concern that arise most frequently?
KCC telephone contacts of employers are conducted after cases are already entered in PIMS. If an employer does not respond to KCC’s efforts to verify information, the adjudicating post is informed of that fact. Questions are tailored to address the specific issues that require additional clarification.

c) Attorney representation

It is clear that if an employer is represented and a G-28 is on file, the attorney or record, not the employer, should be contacted directly. This is the protocol followed by the NVC. Why then is the FPU contacting the employer/petitioner and/or client/customer directly?

It is important here to distinguish between correspondence with applicants and fraud investigations. When we correspond with the petitioner or applicant and they identify an attorney representative involving the status of the case or actions to be taken the State Department will in accordance with 9 FAM 40.4 Note 12 provide a copy of correspondence to the attorney of record. However, investigations are not correspondence relating to statuses or actions, and there is no legal requirement that we give an attorney of record notice or opportunity to respond to an investigation. If a petition is returned to DHS for further proceedings, there will be an opportunity for the attorney to obtain notice and an opportunity to respond at that time via either an RFE or NOIR.

d) PIMS

Please provide an exact list of what documents the KCC inputs into PIMS for petition based cases.

KCC currently inputs all documents received with the I-129 with the exception of items such as catalogues, playbills, menus, etc.

14. Legalnet

How long is legalnet taking to provide substantive responses to attorney questions?

Our target is to reply to all Legalnet inquiries within seven working days. In practice, most Legalnet inquiries are answered well within this time frame. In those few cases that require legal research necessitating a longer timeframe, we will send an interim reply to the attorney in the meantime.

15. Surviving beneficiaries

USCIS regulations promulgated in 2006, 8 CFR 204.2(i)(1)(iv), allow for the automatic conversion of an I-130 to an I-360 upon the petitioner’s death in the case of an immediate relative spouse (now widow) of a U.S. citizen. Such a case requires no USCIS action to
automatically convert the petition, nor does any revocation and reinstatement need to be performed. With the passage of the 2010FY DHS Appropriations Act, Pub. L. No 111-83, Sec. 568(c), widows married less than two years can also self petition, and are therefore included in the auto conversion regulation. Children of the widow are also included on the widow’s I-130/I-360 converted petition without the need for a separate I-360 or I-130 petition. Since the passage of the auto conversion regulation in 2006 and the DHS Approps act in 2009, no update to the FAM has taken place to give consular officers or the NVC any guidance on dealing with such auto converted petitions.

To illustrate, the U.S. Consulate General in Ciudad Juarez has the following incorrect information on the website:

http://ciudadjuarez.usconsulate.gov/hivfaqs.html

**What happens if the petitioner dies before the principal beneficiary has immigrated to the United States?**

*If the petitioner dies before the principal beneficiary has immigrated to the United States, the petition is automatically revoked pursuant to 8 CFR 205.1(a)(3). This means that the consular officer will not be able to issue a visa to any of the beneficiaries of the petition and will be required to return the petition to the Department of Homeland Security (DHS). If there are compelling humanitarian circumstances, the consular officer may recommend that DHS reinstate the petition. Alternatively, the applicant may contact directly the DHS office that approved the petition to request that it be reinstated for humanitarian reasons. If DHS reinstates the petition, the Consulate will contact the applicant(s) soon thereafter.*

**What happens to the derivative beneficiary’s case if the principal beneficiary dies?**

*If the principal beneficiary dies at any time before the derivative beneficiary immigrates to the United States, the consular officer will not be able to issue a visa to the derivative beneficiary. Humanitarian reinstatement does not apply in such a case.*

Given the enactment of Sec. 204(l) of the INA, this is inaccurate for those who can show a U.S. residence at the time of the death, even where they are proceeding abroad for the sole purpose of consular processing, which would not interrupt residence. As Sec. 204(l) has been in effect for nearly a year, we request that guidance be provided to posts to prevent further misapplication of law.

We should soon be able to provide an update to the FAM notes to clarify this concern. Thank you for bringing this to our attention.

16. H-1B one year extensions

May we suggest a minor change to Subsection (c) of 9 FAM 41.53 N12.1? Currently, this subsection seems to indicate that a one year extension of H-1b status requires: 1. an employment based immigrant petition or an adjustment of status application and 2. a labor certification that has been pending over 365 days. USCIS has indicated that a labor certification that remains valid and was filed 365 days prior to the H-1B applicant exhausting his total H-1b period is sufficient to obtain a one year extension of H-1B status. (See USCIS AFM Update AD 08-06) Currently, some labor certifications are pending over one year due to audits and
therefore many H-1B visa applicants are obtaining one year H-1B petition approvals without a pending employment based immigrant petition or an adjustment of status application. We have received reports that certain posts are interpreting this section to require evidence of a pending employment based immigrant petition or an adjustment of status application to obtain a one year H-1B visa even with a one year petition approval from the USCIS.

We will follow up with post and provide clarification in the FAM.

17. E-3 visas

There has been confusion on the part of some Customs and Border Protection officers regarding the length of admission for E-3 visa holders. Despite the fact that E-3 employment is only authorized during the validity of the E-3’s labor condition application, CBP often admits E-3 holders for two years (as is appropriate for E-1s and E-2s). Would it be possible for E-3 visas to be annotated with wording that makes it clear that employment is only authorized until the end date of the LCA (which is normally the visa expiration date)?

Yes, it would be possible for E-3 visas to be annotated to make clear that employment is only authorized until the end date of the LCA. We can instruct posts to do this.

18. Waiver Review Division Questions

a) A WRD round-table discussion

In receiving questions from AILA members for this liaison meeting, a number of recurring issues arose, as well as new questions never before addressed. We believe that this reflects the complexity of J waiver issues in general, the increasing number of attorneys practicing in this area, and perhaps, too, a perceived lack of transparency into the decision-making process at WRD. Based just upon the number and complexity of some of the questions raised, we would like to propose organizing a “round table” of key members from relevant AILA committees – DOS, Students Scholars, Healthcare – to meet with working level and more senior DOS representatives specifically about J and WRD issues. In past years, such opportunities for dialogue proved to be mutually beneficial to all involved, and AILA believes that arranging such a “round table” on exchange visitor issues would serve to address and hopefully resolve recurring questions. We would like to discuss this possibility with those involved at the upcoming DOS meeting.

We are happy to discuss with you the possibility of a roundtable discussion.

b) Corrections to the DS-3035

What is the best way to submit corrections to the DS-3035 form that was submitted online when an error is discovered after submission?

Continue submitting DS 3035 corrections to WRD. The WRD will update the information in our database system.
c) Filing fee

Will WRD accept attorney/law firm checks for the $215 waiver processing fee? If so, will the DOS update its website to reflect this change.

   The bank accepts checks and money orders for the waiver processing fee. We will note this on our website.

d) Advisory Opinions

Some members report that they have submitted an exchange visitor’s entire J-1 history, including all IAP-66 and/or DS-2019 forms, but that the resulting Advisory Opinion did not clearly specify which program subjected the individual to 212(e). Please advise whether the WRD reviews the waiver applicant’s entire J-1 history when issuing Advisory Opinions as to whether or not the applicant is subject to 212(e), and if such is the case, that the Advisory Opinion will specify which program or programs rendered the exchange visitor subject to 212(e).

   The exchange visitor’s entire J-1 visa history is required in order to render an advisory opinion. We review the history to make a decision and explain in our opinion whether it is government funding or skill(s) that make a person subject to 212(e). We believe this is sufficient information for the applicant to know why he or she is subject.

e) Submission of supporting documents

In a DOS Practice Advisory from July 2003 (AILA doc # 03072543), it was reported that then-Acting Chief of the Waiver Review Division Jinny Chun “requests that in no objection cases, where possible, copies of all IAP-66 (DS-2019) forms should be attached to the Embassy’s official no objection statement (if the Embassy is willing to do so).” If supporting documents (e.g., agency letters, confirmation of U.S. job offer) are forwarded to the home country embassy for the embassy to issue a no objection letter, should the exchange visitor also send a copy of the same supporting documents to WRD in case the home country does not forward the supporting documents and the EV believes that the supporting documents should be reviewed by WRD before making a decision on the waiver?

   The exchange visitor should not send extra copies of supporting documents to WRD. If necessary, WRD will request the documents.

f) Security Checks

Please describe the current process/procedure for security checks of J-1 waiver applications. The DOS website in June 2008 reported: “Please be advised that all J-1 visa waiver recommendation applications are subject to security checks prior to the Department of State issuing its recommendation to the United States Citizenship and Immigration Services in the Department of Homeland Security. This may cause delays in processing times.” What is the
current practice/procedure? What is the usual processing time (delay) for any such security checks?

DOS will not comment on internal security procedures.

g) One waiver per applicant

Can you please clarify the Visa Office’s current policy on accepting and on adjudicating more than one waiver application for an exchange visitor?

We stand by our long established policy of adjudicating only one favorable waiver application per applicant. Since the waiver nullifies the 212(e) requirement, it is not necessary to adjudicate another waiver case for the same applicant.

We understand that in the past, the VO has had an unwritten policy (sometimes termed “One Waiver to a Customer”) that it will adjudicate only one waiver per person and if a favorable recommendation has already been issued on one waiver application, irrespective of category, any subsequent waiver applications will be rejected and marked “Not Required to Adjudicate.” Prior meeting minutes have confirmed that while WRD would not enforce a one application at a time limitation, it would adhere to a policy of processing to completion the first waiver ready to be processed and making only one favorable recommendation.

i) What is the rationale and legal basis for not permitting more than one application under the “no objection” and IGA categories where the first waiver is not recommended (but rather refused/declined), while allowing multiple applications under the persecution and hardship categories? In such cases where DOS collects a separate (second) processing fee for the subsequent application, how can it not perform the service requested and instead respond that DOS is “not required to adjudicate”? If the DOS does not have such a policy, can the DOS update its website which as written appears to restrict the ability to reapply to persecution and hardship waivers only.

Discuss at the meeting. The Interested U.S. Federal Government Agency (IGA) waiver request is meant for furtherance of a particular program that is of interest to a U.S. Federal Government Agency. Because of U.S. government interest involved in the IGA requests, federal government agencies are allowed to re-apply for IGA waivers if the agency has additional relevant information that was not presented previously. For no objection waivers, applicants are informed via our website that the DOS does not reconsider no objection waivers once a decision has been made in the case, and that the fee is non-refundable.
ii) What about physicians who complete the 3 years of medical service for the Conrad waiver, then do a fellowship on a J-1 that re-subjects them to 212(e)? Might such a physician re-apply under the Conrad-30 program after the completion of the fellowship?

Pursuant to Public Law 103-416, in the case of an alien who is a graduate of a medical school pursuing a program in graduate medical education or training, a request for a waiver of the two-year home country residence and physical presence requirement may be made by a State department of Public Health. It is our understanding that only an alien physician pursuing graduate medical education or training, who has signed a statement of need with his/her home country, and is sponsored by Educational Commission for Foreign Medical Graduates (ECFMG), is eligible for a Conrad waiver. Since the physician already received a 212(e) waiver, has completed the 3 year Conrad service, and is currently in H1B status, he/she would not be eligible for another J program under ECFMG sponsorship nor another Conrad waiver.

iii) What about an exchange visitor with an IGA recommendation that DOS declines to recommend, where the exchange visitor later changes U.S. employer and the new employer wishes to pursue a new IGA application? If the IGA forwards a favorable recommendation for a waiver on behalf of the same exchange visitor who is now with a different institution, will the DOS accept, review and adjudicate a second application based upon another IGA recommendation?

The WRD would adjudicate another IGA waiver request.

h) Waiver Review Board

Earlier liaison minutes noted that the Waiver Review Board would function in the same way at DOS as it did previously at the USIA. The same minutes also noted that all cases involving conflicting interests of two U.S. government agencies were referred to the Waiver Review Board, and that therefore in such cases, decisions are made “independently of the Waiver Review Division.”

i) What are the situations which result in automatic referral of a waiver application to the Waiver Review Board?

There is no situation that would result in automatic referral to the board. The waiver board regulation states that waiver cases are referred to the board on case-by-case bases, and at the discretion of the Chief of the Waiver Review Division.
ii) Please describe the composition of the Waiver Review Board. How many members does it include? From what DOS divisions?

Here is the composition of the board: The Waiver Review Board ("Board") shall consist of the following persons or their designees: (i) The Principal Deputy Assistant Secretary of the Bureau of Consular Affairs; (ii) The Director of Office of Public Affairs for the Bureau of Consular Affairs; (iii) The Legislative Management Officer for Consular Affairs, Bureau of Legislative Affairs; (iv) The Director of the Office of Exchange Coordination and Designation in the Bureau of Educational and Cultural Affairs; and (v) The Director of the Office of Policy and Evaluation in the Bureau of Educational and Cultural Affairs.

A person who has had substantial prior involvement in a particular case referred to the Board may not be appointed to, or serve on, the Board for that particular case unless the Bureau of Consular Affairs determines that the individual's inclusion on the Board is otherwise necessary or practicably unavoidable.

The Principal Deputy Assistant Secretary of Consular Affairs, or his or her designee, shall serve as Board Chairman. No designee under this paragraph (g)(3) shall serve for more than 2 years.

Cases will be referred to the Board at the discretion of the Chief, Waiver Review Division, of the Visa Office.

iii) How can an attorney or applicant learn if his/her case has been referred to the Waiver Review Board? In such cases, how can an applicant "update" the application with any information that may be relevant to the decision-making by the Board, including information not previously available?

Applicants and attorneys can learn if a case has been referred to the Board via our status checking system on travel.state.gov. Attorneys and applicants may submit additional information for board cases to the WRD. The information will be included in the case file for board review.

iv) May an applicant specifically request that his/her case be forwarded to the Waiver Review Board if s/he believes that there are "conflicting interests" and/or other considerations warranting such review?
Cases are referred to the board on case-by-case basis, at the discretion of the Chief of the Waiver Review Division.

i) Decision-making process

Earlier DOS liaison meeting minutes (AILA InfoNet Doc. No. 01041804) included discussion of the typically brief and uninformative explanations of waiver refusals – i.e., that the decision is based on “program, policy and foreign relations considerations.” This practice has continued, and AILA thus continues to have concerns that the lack of information in a refusal letter fails to inform the applicant and attorney of the substantive basis for the refusal and moreover, leaves the impression that a truly substantive review and often-cited balancing of factors have not occurred. In responding to the question posed at the March 22, 2001 meeting, DOS noted that for the time being, it would retain the “current formulation of refusals in individual cases, but we will keep your request in mind.” AILA would like to revisit this issue, as we continue to believe that reasoned, clear answers regarding the basis for decisions would be helpful both in informing applicants of the underlying considerations at play in that case and in providing assurance that the process itself was deliberative, considered and involved a balancing of the relevant factors against legitimate policy concerns. Please advise whether the DOS is willing to revisit this issue, keeping in mind AILA’s earlier request and ongoing concerns.

The DOS has reviewed this issue. We believe that it is not appropriate to comment on the program, policy and foreign relation considerations in any waiver case. Each application is reviewed on a case-by-case basis and weighed on its individual merits. There are no rigid guidelines or standards that can be applied across the board in 212(e) waiver cases. Particularized explanations for denial are not required. The courts have consistently supported our position in this respect.

j) Physician work locations

i) Physicians working in hospital systems are often employed by third-parties and the physicians not only work at one facility but often at least two (2) – the office where they see patients and the hospital(s) where surgery is performed. Would DOS be willing to update their recommendation letters to reflect the multiple entities involved with a physicians’ Conrad employment? Would it be helpful for AILA to provide DOS with a sample intake sheet that could be used by all state department of health offices when submitting Conrad waiver applications to WRD for review? We understand that the instructions to state public health departments indicate the employment information but that only works for physicians directly employed by and working at the named facility.

ii) When the Department of State’s Waiver Review Division (WRD) issues recommendation letters in support of J-1 waiver applications filed on behalf of physicians committed to work for three years in a medically underserved area (commonly referred to as "Conrad waivers") the letters indicate the name of the facility where the physician will complete his/her J-1 waiver commitment. The letters do NOT indicate the name of the sponsoring employer, which is often different than the facility.
name. Further, where there is more than one facility at which the physician will work as part of his J-1 waiver commitment, the letter only lists one. Only the data listed on the WRD recommendation letter is incorporated into the I-612 J-1 approval notice ultimately issued by USCIS. The J-1 waiver sponsoring employer must file an H-1B petition to authorize the physician to begin work at the underserved area facilities listed on the J-1 waiver approval notice. The formatting of the WRD recommendation letters is causing problems in H-1B adjudication where the actual employer (i.e., H-1B petitioner) has a different name from the facility and/or in cases where the physician will be employed at multiple facilities by the J-1 waiver sponsor, but not all facilities are listed on the WRD recommendation letter. This confuses the USCIS Service Center as to which sites and/or employer are covered by the J-1 waiver recommendation, resulting in the issuance of Requests for Evidence and Notices of Intent to Deny that could be avoided if all relevant data needed to adjudicate the H-1B petition were included on the WRD recommendation letter.

We request that WRD alter the format of its J-1 waiver recommendation letters in Conrad waiver cases to include (1) the name of the sponsoring employer; and (2) the name(s) and addresses of the facility or facilities where the physician will be employed as part of his J-1 waiver commitment. We ask for special consideration from WRD on this issue in view of the fact that the current format of these letters has the effect of delaying the provision of urgently needed medical care in medically underserved areas.

This is a DHS/USCIS issue. Once WRD makes a decision in a 212(e) waiver case and forwards its recommendation to USCIS, any further action on the case falls under the jurisdiction of USCIS, who makes the final decision in waiver cases. The WRD is working, however, to modify the waiver recommendation letter to include both the employer and the facilities where the doctor will serve. This requires a change in the database, and will take some time to complete. CIS advised WRD that attorneys may submit a copy of the state letter and contract which include the employer and facility information to the USCIS for change of status purposes.

k) Conrad waivers

i) The USIA Final Rule on Foreign Medical Grads published on October 12, 1995 noted the following with respect to waivers under Public Law 103-416 and the issuance of a letter of no objection:

The No Objection Letter--Procedures and Format

Current regulations set forth the procedure for obtaining “no objection” letters from the home country and the manner in which such letters are to be sent to the Agency. 22 CFR 514.44(d). With one exception, this final rulemaking provides for the same procedures to be followed with respect to applications for waivers under Public Law 103-416. In order to avoid confusion with other applications for waivers based on no objection from the home country (hitherto unavailable to foreign medical graduates), when required, the no objection letter submitted under Public Law 103-416 should note clearly that the request for the no objection letter was made
pursuant to Public Law 103-416. The Agency does not require that a no objection letter be of or on a particular form. The following or similar language will suffice:

"Pursuant to Public Law 103-416, the Government of ____________________ has no objection if (name and address of foreign medical graduate) does not return to ____________________ to satisfy the two-year foreign residency requirement of Section 212(e) of the Immigration and Nationality Act."

Will the DOS update its FAQs to include the statement highlighted above? i.e., In order to avoid confusion with other applications for waivers based on no objection from the home country (hitherto unavailable to foreign medical graduates), when required, the no objection letter submitted under Public Law 103-416 should note clearly that the request for the no objection letter was made pursuant to Public Law 103-416. Or will an additional Third Party Barcode page be added to the waiver packet that the exchange visitor may provide to the home country to include with the no objection statement?

We do not believe that it is necessary to include the statement above for physician no objection statements because the majority of J-1 foreign medical graduates are not subject to 212(e) based on home country government funding, and do not need to submit a no objection statement. On the rare occasion when a physician must submit a no objection statement, the applicant should request that the embassy put his/her waiver case file number on the no objection as the case file number is the primary identifier of a waiver case file. Putting the case file number on the NOS assists WRD in associating the NOS with the physician waiver case when we receive it from the embassy. This is standard operational procedure for submitting a NOS, and the embassies are aware of this so we do not see this as an issue for your clients.

ii) Under what circumstances will the WRD consider a request to “expedite” a Conrad waiver (or other waiver on behalf of a physician who will be working in a medical shortage area)? AILA understands that all such waivers involve a community in great need of a physician and yet, even among all such cases, some do stand out as truly compelling where each day waiting for a recommendation to proceed has a huge and negative impact upon patients awaiting a physician. Would WRD consider issuing guidelines for requesting “expedited review” of such waiver applications, along the lines of those in place at USCIS service centers? Such guidelines might serve to streamline such requests, and thus avoid WRD receiving multiple faxed and emailed inquiries and phone calls, including those from congressional offices, seeking expedited processing.

We treat all Conrad waivers as priority cases. The vast majority of physician waivers are processed within 4-6 weeks. We encourage applicants and attorneys to apply as far in advance as possible.
l) On-line survey tool

Can the DOS update its FAQs to advise individuals that they may complete an online survey at https://j1visawaiverrecommendation.state.gov/ to help clarify whether they may be 212(e) subject?

Thanks for the suggestion. We will keep this in mind.

m) On-Line Case Status Reporting

Would DOS consider upgrading the J-1 waiver status online reporting mechanism to specifically state what documentation has not been received? This would be especially helpful to unrepresented applicants, and perhaps result in a decrease in inquiries to the WRD for such information.

The online status checking system does this now. It lists the specific documents (sponsor views, medical views, fee, DS 2019 forms, etc) that were requested (in red under “action requested”) and it tells you the documents have been received and the date that the documents were received.

n) EU national compliance

In prior meetings, and as recently as October 2009, DOS indicated that the issue of whether a Fulbright exchange visitor may fulfill his/her two-year home residence requirements in any EU country is still under discussion with ECA. Has this issue been reviewed further? Please advise on the status of DOS’s decision and/or thinking with regard to EU national fulfillment of 212(e) in any EU country.

We cannot permit fulfillment of the two-year return home residence requirement in any EU country. The EU is comprised of sovereign member states. Each state individually chooses whether or not to have a Skills List requiring the services of persons engaged in fields of specialized knowledge or skills. As a result, those individuals are required to fulfill their residence requirement in their home country, where their skills are needed.

o) Staffing / Organizational Chart

Can you provide an update on the current staffing of the WRD division and an organizational chart?

The WRD has eight adjudicators with four of them working on no objection applications, two on exceptional hardship and persecution, one on Conrad
waivers and one on advisory opinions as to whether an exchange visitor is subject to the two-year home residence requirement. The division also has four waiver assistants and one data entry clerk.

p) Workload

We would appreciate receiving the latest figures for the number of waiver applications by category and the number recommended for the most recent fiscal (or calendar) year. At the October 2009 meeting, WRD indicated that it would likely make statistical information on recommendations available to the public. What is the status of the implementation of a system to disseminate this information?

We’re working on this, and hope to provide the numbers shortly.

q) Fulbright funding

i) How many waiver applications does DOS receive each year (fiscal or calendar) from exchange visitors with Fulbright funding? Of this number, how many were recommended? How many declined?

We are not planning to provide statistics on individual programs.

ii) When adjudicating a waiver application from an exchange visitor who received U.S. government funding, in particular from DOS or Fulbright, does the WRD still consider the amount of funding received along the lines of what was commonly known as the “de minimis rule”? Is there a threshold dollar figure that will trigger a waiver refusal or push the “balance” to the refusal side? Or alternatively, cause WRD to conclude that such funding was “de minimis” and thus not a reason to refuse a recommendation? In short, does the de minimis exception still exist and if not, why the change?

The “de minimus rule” which stated that waivers of the two-year home residence requirement could be recommended to exchange visitors, who received less than $2,000 in Fulbright financial support, was abolished in January, 1996. Since this rule is no longer in effect, it is not considered in waiver decisions. Waivers are reviewed on a case-by-case base. The WRD considers all factors in the case and makes recommendations based on policy, program and foreign relations considerations in the particular case.

r) Skills List Issue

Members have reported instances involving Indian nationals working as systems analysts who have been sponsored for J-1 visas who are receiving DS-2019 annotations from consular officers indicating that they are subject to 212(e) (e.g., Chennai) on the basis that they fall under Group 14.09-Computer Hardware and Software Engineering. Some of these applicants have
degrees in Mechanical or Electrical Engineering but their professional experience and the training / specialist exchange program they are coming to in the U.S. is in the field of Computer Systems Analysis. The Computer Systems Analyst and Computer Information Systems classifications were removed recently from the J-1 Skills List recognizing there was no shortage of those skills in India. Can DOS provide guidance on whether the applicant is subject to 212(e) based on their degree only, or should their work experience and the program in which they are coming to participate be considered? What evidence should be provided to a consular officer to demonstrate that the person’s work is in the field of Computer Systems Analysis / Computer Information Systems and thus satisfy the consular officer that the individual is not subject to 212(e)? Obtaining a correctly annotated DS-2019 and visa stamp would serve to avoid the need for requesting an Advisory Opinion at a later date.

While background information, such as degrees earned, and prior work history are certainly part of the review, subjectivity to 212(e) is determined by the exchange visitor’s actual program activity.