GOING GREEN - U.S. CONSULAR PROCESSING ENTERS THE ELECTRONIC PAPERLESS ERA IN 2008

by Bernard Wolfsdorf and Tien-Li Loke Walsh Copyright © 2008 Wolfsdorf Immigration Law Group (**WWW.WOLFSDORF.COM**) (all rights reserved). **Bernard P. Wolfsdorf** is the national President Elect of the American Immigration Lawyers Association and he is the founding partner of the Wolfsdorf Immigration Law Group. **Tien-Li Loke Walsh** previously served as the Vice-Chair on the American Immigration Lawyers Association (AILA) Department of State (DOS) Liaison Committee.

Since 9/11 numerous measures designed to enhance security and streamline visa processing have been implemented to identify and eliminate vulnerabilities in the visa processing system. The passage of the USA PATRIOT Act, 2001, followed by the Enhanced Border Security and Visa Entry Reform Act, 2002, and the Homeland Security Act, 2002, accelerated these efforts by mandating increased coordination of law enforcement and intelligence agencies, inter-agency data sharing, implementation of an integrated entry and exit control system, establishment of terrorist lookout committees, foreign student monitoring, biometric collection, mandatory interviews, and intensified security check measures. These procedures created a rigorous framework, making the U.S. consular application a daunting exercise. The combination of these statutory provisions together with the steady stream of changes including the introduction of additional security clearance procedures for "List of 26" nationals from predominantly Muslim countries, restrictions on the nationals from countries deemed state sponsors of terrorism, changes to the automatic revalidation provision, increasing applicability of the Technology Alert List (TAL), enforcement of export controls, and a growing scrutiny of visa violations including overstays and unauthorized employment issues, as well as minor criminal convictions, completely changed the playing field.

While many of the security measures were expected after 9/11, U.S. visa applicants have experienced an entirely new visa framework. U.S. visa applicants routinely encounter completely unpredictable surprises that cause unexpected and lengthy delays in visa issuance. These initial difficulties associated with visa issuance have adversely impacted U.S. interests in business, trade, tourism, scientific research, academics, and entertainment.

Recently, the consular framework has recently shifted to a more balanced approach. While the focus is still on security, there is a recognition of the need to balance national security interests with other strategic interests, such as promoting U.S. business interests, tourism, academic and scientific education and exchange, and the overall health of the economy, the Department of State has now fully embraced its "Secure Borders, Open Doors" policy. Following a restrictive and frustrating period, there has been an attempt to create a balance with the application of a more rational and focused approach in consular processing. As a result, increased coordination between government agencies, streamlined visa application procedures and improved security check processing times have increased efficiency and provided practitioners, visa applicants and employers with a degree of predictability to the consular framework. This includes substantial progress

with the Department of State's electronic Consular Application Center concept with the new DS-160 Smart Form, E-signatures, and inter-agency data sharing. As the consular processing enters the new paperless era, the ability to share and store date has improved. However, some of the recent visa issuance procedures are more cumbersome and same day issuance is rare with most visa issuances taking at least two to five days.

Security measure enhancements include piloting off-site biometric collection via State Department maintained, ASCs or, Application Support Centers. The introduction of PIMS, the electronic Petition Information Management System, together with FR or facial recognition, an analysis from photographs, and the mandatory 10-Prints, which are now being collected at both consular interviews, ports of entry, and if a current proposal goes though, upon exit as well. This new comprehensive system creates an interlocking network of data sharing between, consular posts, and the three branches of the Department of Homeland Security (DHS) that handle immigration matters including Customs and Border Protection (CBP), U.S Citizenship and immigration Services (USCIS), and Immigration and customs Enforcement (ICE) . On the positive side, with all this new data, consular posts will be able to reduce the number of false National Crime Information Center (NCIC) hits because of common names. It is also possible we will see expanded PAWs or Personal Appearance Waivers specifically for persons from countries with limited reciprocity schedules seeking visa re-issuance at home posts. These extensive new biometrics make it easier and faster to re-issue certain visas at consular posts.

The new Consular Application Center concept starts with an online application that also collects the fee, schedules the appointment, and most importantly allows the post to have an earlier look at the application.

The new DS 160 electronic application form combines the current DS 156, DS 157 & DS 158 forms and it is lengthy. It is currently being piloted in Nuevo Laredo and Monterey, Mexico. Both posts are testing off-site biometric collection. This new framework sets up a rules-based analysis of applications that can differentiate clearly approvable cases, including cases with prior visa issuance, and it also allows the DOS to plan ahead regarding its caseload. Hopefully, this way it can handle workload assignments and reduce lengthy wait times at some posts. While the PIMS rollout was less than perfect in that it failed to collect data on many types of applications causing unexpected delays for some work authorized visa applicants. The other positive development regarding this new paperless era is less reliance on having to present the original approved forms I-797, as the petition approval has to be verified electronically in all cases. Unfortunately, even as the system becomes more familiar, the consular processing framework still provides numerous challenges to practitioners and visa applicants.

Security concerns have become pivotal as the United States grapples with the dilemma of balancing legitimate international travel needs with the ever-present security risks facing the nation. While globalization has increased the frequency and necessity of travel to the United States by foreign nationals, the minefield of immigration practice is now complicated by the complexity of consular practice. Knowledge of immigration petition

filing procedures is not sufficient to ensure visa issuance at consular posts abroad. Involvement with a visa case merely starts with the filing of a petition with USCIS and the issuance of an I-797 Notice of Action approval. The practice of U.S. immigration law now requires a thorough analysis of an alien's entire employment and immigration history all the way through to the final stages of the visa application process. The government now has access to far more data, and moreover this data is stored eternally. This data is also being shared with other government agencies. Visa practice now goes beyond mere work authorization and travel issues. The focus on foreign nationals and their activities has also generated significant government investigation and enforcement of export control violations. Complete familiarity with nonimmigrant consular processing procedures and an in-depth understanding of the maze of security measures and related issues is vital to assisting clients in navigating the complex consular process. While DOS has softened its approach from a "zero-tolerance" policy to a more open, "Secure Borders, Open Doors" policy, the government's attempt to balance national security concerns with legitimate travel needs still leaves many visa applicants facing unpredictable delays and a myriad of potential pitfalls. Attorneys and visa applicants are therefore advised to plan ahead, research the requirements of the consular post and be ready to present documentation and explanations regarding the purpose of their proposed travel, and explanations relating to their past activities. With the primary goal of enhancing security, the consular framework has changed dramatically over the past few years. The new rules, regulations, and procedures, together with increased scrutiny and the enhanced use of biometrics and security advisory opinions, together with increased database sharing between the Department of Homeland Security affiliate agencies, and other government including intelligence agencies, both locally and internationally, has changed the playing field. These new developments, when combined with unpredictable differences between consular posts, have dramatically changed the consular visa issuance framework. As the U.S. consular system enters the electronic paperless era, there is no doubt that security measures will be substantially enhanced, and the ability to save mountains of paper will be an environmental benefit.