Chapter 3

Immigrant Visa Processing: A Roadmap

Michael H. Davis
Davis and Goldfarb PLLC
Minneapolis

TABLE OF CONTENTS

§ 3.1 INTRODUCTION

This chapter provides an overview of the immigrant visa application process, with a particular focus on the Department of State National Visa Center (NVC) and specific legal issues arising at the United States Consulate General in Ciudad Juarez, Mexico (the largest immigrant visa processing post in the world, accounting for a high percentage of all United States immigrant visa cases due to the high volume of Mexican applicants who seek and require immigrant visa processing). It should be read carefully in conjunction with other chapters in this manual, particularly those relating to immigrant visa petitions, adjustment of status applications, and waiver applications with the Department of Homeland Security (DHS).

While beyond the scope of this chapter other than as discussed below, attorneys representing clients in immigrant visa cases should also be familiar with all relevant issues relating to grounds of inadmissibility, preference categories, priority date determination and chargeability, and the Child Status Protection Act (CSPA). Given the severe consequences that may result from a finding of inadmissibility at a consular interview, and given new potential avenues of relief available under the recent administrative deferred action programs for clients who are currently in the United States without lawful status, practitioners must be more prepared than ever to carefully evaluate all issues and options to help determine the best course of action to be followed.

A. What is Immigrant Visa Processing?

Immigrant visa (or "consular") processing refers to the process of a prospective immigrant applying for permanent residence with the United States Department of State (DOS) at a United States consulate abroad (as opposed to applying for adjustment of status with DHS from within the United States). In most cases, applicants are required to apply at the designated United States consulate in their country of nationality, although they may also usually apply in a third country where they are lawfully residing on a permanent or extended basis. In certain cases, the DOS may allow discretionary processing in another country based on compelling circumstances (however, such requests are often declined at the busier United States consulates based on workload constraints).

B. Sources of Applicable Law

The overall immigrant visa process is governed by the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101–1178, and the Department of State Foreign Affairs Manual (FAM), 22 C.F.R. §§ 40–42. (The entire FAM may be accessed at <www.state.gov/m/a/dir/regs/fam>). However, many specific issues are governed by various legal and policy memoranda issued periodically by the DOS and DHS concerning key procedural and legal issues including, but not limited to, the CSPA and unlawful presence. These memoranda are usually available through the various agencies' respective websites, organizations such as the American Immigration Lawyers Association (AILA), and various treatises including *Kurzban's Immigration Law Sourcebook*.

§ 3.2 IMMIGRANT VISA PROCESSING: A ROADMAP

A. How Does Immigrant Visa Processing Differ From Adjustment of Status?

While immigrant visa (IV) processing and adjustment of status (AOS) are each processes for applying for permanent resident status in the United States, they differ dramatically in several important ways. AOS refers to undertaking the entire application process from within the United States before DHS (more specifically, the United States Citizenship and Immigration Services or USCIS) or, for persons who are in removal proceedings, before the United States Immigration Court (which is part of the Executive Office for Immigration Review (EOIR) of the De-

partment of Justice (DOJ)). Most clients strongly prefer to apply for adjustment of status, when possible, for several reasons, including:

1. **Convenience and Savings.** By applying within the United States, the applicant may avoid having to travel a long distance outside the U.S. to attend a consular interview.

2. **Right to Counsel.** Attorneys may be present at AOS interviews or hearings, whereas few United States consulates allow attorneys to be present at IV interviews. Also, the record of proceedings in adjustment cases is typically available via the Freedom of Information Act (FOIA), whereas most consular visa files are not pursuant to the INA § 222(f) and 9 FAM 40.4.

3. **Right to Judicial Review.** AOS applicants generally have the right to have their case reviewed by an immigration judge if placed in removal proceedings, appeal adverse decisions to the Board of Immigration Appeals (BIA) and United States Court of Appeals, and/or challenge certain adverse decisions in United States District Court. Conversely, most IV applications are not subject to direct appeal or judicial review based on the concept of "consular absolutism."

4. **Avoid Triggering the Unlawful Presence Grounds of Inadmissibility.** The vast majority of immigrant visa applicants who are deemed inadmissible are those subject to the three- and 10-year bars for unlawful presence pursuant to INA § 212(a)(9)(B)(i)(I) and (II). However, since the unlawful presence inadmissibility grounds are usually triggered only by a departure from the United States, persons who are eligible to adjust status are usually able to avoid this problem since they are not required to depart the United States.

Given the above considerations, why does everyone not apply for AOS? First, to apply for AOS, the applicant must be physically in the United States. Second, in most cases, unless INA § 245(i) applies, the applicant must have been inspected, admitted, and/or paroled into the United States, so persons who entered without inspection are normally barred from adjusting status. Third, unless INA §§ 245(i) or 245(k) apply, or unless the applicant is the immediate relative of a United States citizen, persons who have not always maintained lawful status in the United States are also ineligible for AOS.

COMMENT

The newer or beginning lawyer is bound to be consulted by a client who entered without inspection. In fact, many potential clients have entered without inspection. As mentioned above, they will usually be barred from adjusting status, making it essential that the lawyer understand the immigrant visa processing options explained in this chapter.

B. How Does Immigrant Visa Processing Get Started?

The IV process begins with the NVC, located in Portsmouth, New Hampshire, following its receipt of an approved immigrant petition from USCIS. The NVC, which opened in 1994 for the purpose of centralizing IV processing, processes approved I-130, I-140, I-730, I-129F, I-600, I-600A, I-800, I-360, and I-526 cases.

Once USCIS approves the petition, it typically takes approximately one month for the file to be transferred to NVC, to be opened and assigned a case number, and for the applicant and/or attorney of record to be contacted

concerning the case (where an email address has been provided, all contact is via email). It is important to note that the NVC case number, which begins with the three-letter code for the consulate to which the case is assigned, is different from the USCIS receipt number (it is important to explain this to clients, who may wish to track case status and are often confused by the differing case numbers and their significance). However, as of March 2015, practitioners and their clients should be aware that the NVC is extremely backlogged due to a substantial increase in case volume and is commonly taking considerably longer (at least two months) to open files, review documentation, schedule interviews, and respond to inquiries. Practitioners should closely monitor the potential impact of the new administrative action programs on NVC processing, as it is anticipated that many IV applicants may opt to apply under those programs rather than risk departing the United States to consular process.

In immediate relative (spouse, parent, or child of U.S. citizen) cases, where there is never a quota backlog for visa numbers, and in preference category cases where visa numbers are immediately available or close to being available, the initial contact by NVC involves issuance of fee bills for the immigrant visa fees (currently $325 per applicant in family-based cases and $345 in employment-based cases), together with payment of the affidavit of support review fee (currently $120) in family cases. While it is strongly recommended that the fee payment be made by credit card to avoid delay, it is also possible to send payment by mail to the NVC by check or money order. The NVC will then typically send a payment receipt within two days and request that the applicant then submit "Packet 3" (see *infra*).

In preference cases involving a significant wait for visa number availability, NVC will send a form letter advising that the case is being put on hold until visa numbers are closer to being available. To track visa number movement and availability, practitioners should refer to the monthly Department of State *Visa Bulletin* at: <www.travel.state.gov/content/visas/english/law-and-policy/bulletin.html>. *See* Chapter 1, An Introduction to Immigration Law, and Chapter 2, Permanent Residency Through Family-Based Applications, *supra*, for further discussion of the *Visa Bulletin*. Since the anticipated waiting period in preference cases may be several years, it is important the NVC be promptly advised of any address changes for the applicant, petitioner, and/or attorney of record.

C. Preparing and Submitting "Packet 3"

"Packet 3" is the term commonly used for the immigrant visa application and supporting documentation submitted to the NVC. In virtually all cases, the electronic Form DS-260 application must now be used and it is important that all information be fully and accurately submitted. While the NVC previously required that original documents be submitted in all cases, the DOS is now transitioning to requiring only copies, with the originals presented by the applicant at the visa interview. In such cases, while it is advisable to file Packet 3 electronically with NVC by scanning and emailing the documents to nvcelectronic@state.gov, the documentation may also be mailed (if mailed, NVC will still require that original Form I-864 affidavit of support signature pages be provided). It is strongly recommended that all of the required Packet 3 documentation be filed with the NVC at one time and not on a piecemeal basis to avoid confusion and request for evidence delays.

To verify which countries currently qualify for electronic submission of the Packet 3, please visit: <www.travel.state.gov/content/visas/english/immigrate/immigrant-process/documents.html>. For Ciudad Juarez, cases that begin with the MEP prefix may be filed electronically, whereas cases that begin with the CDJ prefix are governed by the old system and must be filed by mail.

In addition to the electronic Form DS-260, the Packet 3 documents normally required include:

1. Applicant's passport ID page (should be valid for at least six months beyond the submission date).

2. Birth certificate.
3. Marriage certificate.
4. Proof of prior marital termination. Note: If the application is based on marriage to a United States citizen or permanent resident, proof of that person's prior marital termination(s) is also required.
5. United States citizen spouse's birth certificate (if born in the United States; please see the practice tip below concerning persons born in Texas or other states to midwives).
6. Police clearances for any country where the applicant has resided outside the United States for over six months since age 16.
7. Certified court disposition records for any arrests, convictions, and related criminal charges.
8. Military records.
9. Form I-864 affidavit of support and supporting financial documentation in family-based cases from the petitioning relative and, if required, from one or more joint sponsors.
10. Two current passport-sized photographs (2" x 2", with white background).

Once the documents received by NVC are deemed complete, NVC schedules the visa interview for all consular posts (other than Guangzhou, China) and transfers the physical and electronic files to the post (the visa appointment notice and accompanying instructions are commonly referred to as "Packet 4").

PRACTICE TIP

It is strongly recommended that the practitioner determine and advise the client from the beginning of the case what specific documents will be required for IV processing and carefully consult the FAM at <www.travel.state.gov/content/visas/english/fees/reciprocity-by-country.html> with respect to the availability of specific documents and the method of requesting them from specific countries. This is particularly important where the client does not have a registered (or timely-registered) birth certificate or other required civil document, has resided as an adult in several countries and is required to obtain multiple police clearances, and in related circumstances. Since the USCIS petition adjudication process is currently taking several months to complete, it is generally a good idea to use that time to begin collecting the Packet 3 documents so they are ready to send to the NVC once the visa processing stage of the case is reached.

For cases involving the United States consulate in Ciudad Juarez, it is critical that the practitioner pay special attention to whether the United States petitioner's birth certificate indicates that he or she was born in Texas or another border state with the assistance of a midwife (not in a hospital), as the DOS carefully scrutinizes such cases due to the high rate of fraudulently registered births. In such cases, the United States petitioner should be asked whether he or she has received (or ever applied for) a United States passport, since the DOS conducts a similar inquiry in passport cases. If he or

PRACTICE TIP CONTINUED

she has not received a passport, the petitioner should verify with close relatives the true place of birth and whether he or she also has a birth certificate registered in Mexico; collect supporting documentation such as United States medical and school records and other proof of residence in the United States at a young age (including similar documents for any siblings); and apply for a United States passport long before the visa applicant departs the United States to attend the consular interview. If a passport is issued by the DOS, the United States consulate will normally consider it to be conclusive evidence of United States citizenship; if not, the consulate will conduct its own inquiry and the applicant may be "stuck" outside the United States for an indefinite period.

D. Preparing Form DS-260

The electronic Form DS-260 immigrant visa application is accessed via the NVC's webpage at: <www.travel.state.gov/content/visas/english/immigrate/immigrant-process/documents/Submit_Visa_Application.html>. To access the form, the applicant or attorney must first input the specific NVC case number, together with the invoice ID number located on the fee bill. Since the DS-260 may take a considerable amount of time to complete due to its length, and even though the information is generally saved in the system once input, the "save" button should be frequently clicked to avoid potential information loss.

It is extremely important that all information on the Form DS-260 be carefully verified prior to submission, particularly with respect to key issues such as entry date(s) to the United States and periods of stay. All dates should be carefully verified with the applicant and should be compared against the dates listed on the I-130 or related petition, as well as any prior immigration applications filed with DHS or DOS, as the consular officer will closely analyze this information, together with the applicant's testimony, to determine whether there exist any grounds of inadmissibility, particularly as relating to unlawful presence or related grounds.

Once the Form DS-260 has been electronically submitted, if any data needs to be changed, the applicant or attorney must contact the NVC and request that they re-open the form to make corrections; otherwise, the applicant will need to notify the consular officer during the immigrant visa interview of any errors/corrections. The NVC request should be made via email to nvcattorney@state.gov.

E. Requests for Evidence

While the DOS advises that the NVC does not "adjudicate" cases, it often seems otherwise when a request for additional evidence (RFE) is issued, particularly when multiple RFEs are issued in the same case (unlike RFEs issued by DHS, the NVC's RFEs are typically in checklist format). Because RFEs from the NVC are so common, it is often a good idea for the attorney to advise the client prior to submitting Packet 3 of the likelihood one will be issued so that the client does not panic upon receipt. There are many different reasons why RFEs are issued, including perceived deficiencies in affidavits of support (probably the single most common reason; see below practice tip), documents that are truly missing, documents the NVC has simply ignored, documents that were submitted but which the NVC has lost or misplaced, and other reasons. If an RFE has been issued and the attorney believes all required information has in fact been submitted (or in cases where a document is still lacking, but will soon be received by the

applicant), the response should address the deficiency, request that the case be scheduled for interview, and advise that the applicant will bring any additional documents to the visa interview.

PRACTICE TIP

Examples of Typical Erroneous NVC RFE Situations

Police Clearances. As noted above, the FAM should be carefully consulted concerning the availability of specific documents from specific countries, including the method for requesting them. While police clearances, where available, are usually provided directly to the applicant, certain countries (such as Israel) require the local police to forward the document directly to the DOS. In certain other countries, the FAM states that police clearances are unavailable to persons currently residing outside that country. Even where attorneys include a copy of the relevant FAM instructions as to why a police clearance is either not required or is not being included with the Packet 3 filing, it is common for NVC to issue an RFE for the missing document(s).

Affidavits of Support. The NVC has been particularly strict with respect to proper completion of Form I-864, requiring that the financial information on the form precisely match the information in the applicable tax return (even where there are proper reasons for discrepancies) and frequently issues RFEs for new or corrected forms (even where the financial information and documentation provided clearly meet the applicable income requirements). While the DOS reported in November 2014 that it is attempting to eliminate such RFEs where the information submitted is objectively complete and if taken as true would satisfy the affidavit of support requirements, the case should still be prepared as carefully as possible with these concerns in mind.

While the focus of the affidavit of support review is supposedly the petitioner's current annual income (as evidenced by documentation such as current payroll records, job offer letters with salary information, etc.), please note the NVC has historically also issued RFEs where the petitioner's income on the past year's income tax return does not meet (or barely exceeds) the minimum income requirement, even where the current income level is clearly sufficient. Accordingly, in such cases it is strongly recommended that the practitioner encourage the client to make every effort to submit an additional affidavit of support from a joint sponsor to avoid delays.

F. Avoiding Termination of Approved Petitions

The NVC may terminate a petition if it is not contacted about a case within one year of notification that a visa is available. The consequences of termination may be serious, particularly in long-pending preference cases where the priority date and many years of waiting will be lost. To avoid termination, the NVC must be contacted about the case by the applicant, petitioner, or attorney of record (even if the applicant has decided to put the case on hold temporarily), with each contact renewing the "point of contact" for one year. Practitioners are strongly advised to renew points of contact in writing (not merely by telephone) to avoid erroneous termination by the NVC and make it easier to have the petition reinstated where termination has occurred erroneously. In such cases, the NVC encourages

attorneys to use the NVCAttorney@state.gov email address to request reinstatement and to include specific evidence of the dates and methods of contact that were used.

G. Interview Scheduling, Rescheduling, and Expedite Requests

As noted above, IV interview scheduling is normally done by the NVC once the case is deemed complete for all documents. In most cases, applicants are provided one to two months of advance notice of the interview.

It is important that the attorney or client determine as far in advance as possible the specific medical examination procedures for the country in question, including the location of the panel physician(s) and how long it will take to process the medical results, which are typically placed in a sealed envelope and given to the applicant to bring to the visa interview. The required processing times vary widely from country to country—while medical examinations in Ciudad Juarez are typically processed on a same-day basis (one or two days before the interview) because the panel physicians there have in-house laboratories, medical results in other countries may require over two weeks to process (and much longer if certain conditions such as tuberculosis are discovered). Please note that children ages two through 14 applying in Ciudad Juarez should have their medical examinations taken at least four business days prior to the interview because of longer required processing.

To schedule the biometrics appointment and select the DHL courier office to which the applicant's passport will be returned on visa issuance, a user account must first be created to register the applicant online with the CSC Visa Information Service at <https://ais.usvisa-info.com/en-mx/iv> and each step should be carefully followed.

To request rescheduling of the visa interview and/or biometrics appointment, or to change the DHL courier location, the applicant or attorney must log back into the CSC Visa Information Service website, cancel the existing appointment or DHL location, and follow the steps to reschedule.

Expedite requests may be made via the NVC (by email or letter), which forwards the request to the specific consular post, which makes the decision. Alternatively, the attorney of record may contact the post directly to see if it will accept the case early and, if it agrees, NVC will be contacted to transfer the file. The most common reasons for granting expedite requests are urgent medical circumstances, upcoming military deployment by the United States petitioner, and child age-out situations. For cases being processed at the United States Consulate in Ciudad Juarez, practitioners should make the expedite request through the consular website at <www.ciudadjuarez.usconsulate.gov/feedback-form.html> (scrolling down to the "Attorney Inquiry" section and clicking on the online legal inquiry form).

H. Case Inquiries With the NVC

Attorneys may submit case inquiries to the NVC via the designated attorney email address at NVCAttorney@state.gov, via the public email address at AskNVC@state.gov, or by calling (603) 334-0700 (Monday through Friday, 7:00 a.m. to midnight, eastern time). Email inquiries should include the specific case number in the subject line (inquiries about multiple cases should not be sent in the same email).

§ 3.3 PREPARING THE CLIENT FOR THE CONSULAR INTERVIEW

As with any important legal case, it is absolutely essential that all clients be carefully prepared in advance of their visa interview, including their medical examinations (see below for Ciudad Juarez-specific issues), and know precisely what to expect in terms of questions and logistics (remember—in many cases, the client will be traveling thousands of miles to attend an interview in a city that is as foreign to him or her as to the attorney).

If the client is able to come to the attorney's office prior to departing the United States for the visa interview, there is no substitute for a detailed face-to-face preparatory meeting. If the client is unable to do so because of timing, distance, or presence outside the United States, the preparatory meeting should be conducted by telephone or Skype. The latter, when possible, is often helpful to assess the client's "body language" when answering questions, as well as related issues such as manner of dress, grooming, etc. It is a good idea to remind the client of the importance of arriving early, dressing appropriately, making eye contact with the consular officer, and related issues.

Some of the most critical issues or areas that require careful review and preparation, which are the focus of most visa interviews, are covered in the following sections.

A. Marriage and Family Cases

If the IV application is based on marriage to a United States citizen (USC) or lawful permanent resident (LPR), the client must be prepared to answer any questions concerning the history of the marital relationship and present as much documentation as possible showing the couple's life together (birth certificates of children born to the marriage, joint financial and residential accounts, wedding and family photographs, etc.).

PRACTICE TIP

In many cases, particularly those arising at high fraud profile posts in Africa, Asia, and Eastern Europe, it is strongly recommended that the spouse attend the interview with the applicant or be nearby the consulate (as many posts will only allow the applicant to enter) in case any issues arise concerning the bona fides of the marriage. This is particularly important in cases where the couple has lived apart for a considerable period or met only once or a few times in person prior to the consular interview. In such cases, the applicant should also provide copies of letters, emails, social media communications, telephone bills, and related evidence to show how the couple communicated during their courtship and during any periods of separation.

Because of the high incidence of fraud in many parts of the world, it is also a good idea for applicants in non-marriage cases to present additional evidence confirming the family relationship such as photographs of the applicant and petitioning relative, written correspondence between them, etc. While such cases may usually be resolved through DNA testing to prove the qualifying biological relationship if required by the consular officer, such tests are often costly and time consuming, and can often be avoided through proper pre-interview preparation and documentation.

B. Employment-Based Cases

If the IV application is based on an employment offer in the United States, the applicant must be prepared to confirm his or her intention to immediately assume the offered position on arrival in the United States and must be familiar with the specifics of the offer including job title, duties, employer location, and requirements. The applicant should also be prepared to present credible documentary evidence of his or her qualifications, even if this evidence was already submitted to USCIS in connection with the employer's Form I-140 or related petition. If the applicant has already been employed in the United States with the petitioning employer, it is usually a good idea for the appli-

cant to present payroll documentation to avoid any doubt concerning legitimacy of the job offer. In cases where the applicant is not fluent in English, it is essential that he or she be prepared to explain how they will be able to perform the relevant duties despite the language barrier.

C. United States Immigration History

The client must be prepared to answer all questions concerning his or her prior United States immigration history including dates, places, and manner of entry; any contact with DHS at either the border or in the interior; any prior visa applications (whether or not the visa was issued); any applications made to the USCIS; and any immigration court proceedings, including proof of compliance with voluntary departure orders. Questions about the applicant's immigration history are relevant to potential inadmissibility for unlawful presence, misrepresentation, prior removals, alien smuggling, and other grounds, and these issues should be discussed at length with the client with these concerns in mind. Since the burden is on the applicant to prove eligibility, all relevant immigration documentation such as passports, visas, USCIS approval notices and decisions, employment authorization documents, immigration court documents, etc., should be presented (and, if possible, arranged in chronological order).

PRACTICE TIP

In certain cases, particularly those involving long immigration histories, it is often helpful for the attorney to provide a brief written timeline or concise legal summary to clearly illustrate the client's immigration history. In most cases, this is most effective when presented directly by the client to the consular officer at the beginning of the visa interview. Since the main area of concern will often be unlawful presence, practitioners should specifically demonstrate why any specific incident or time period tolled unlawful presence pursuant to the statute and/or DHS/DOS interpretation. To draw the consular officer's attention, any such briefs should be as concise as possible (rather than lengthy treatises on unlawful presence or related topics).

§ 3.4 CIUDAD JUAREZ PROCESSING

A. General Considerations – What to Expect

As noted above, the United States Consulate General in Ciudad Juarez (CDJ) has a particularly prominent role as the centralized IV post for all of Mexico, accounting for an extremely high percentage of the Department of State's overall annual IV caseload, including cases involving unlawful presence and related issues given Mexico's close proximity to the United States.

Understandably, many clients are particularly concerned for their personal safety in CDJ as a result of the much-publicized violence in recent years. Fortunately, the security situation has improved dramatically of late and clients should be able to avoid problems by using common sense and staying in close proximity to the United States consular compound, an area that includes several hotels, shopping centers, restaurants, and coffee shops.

The entire United States consular process—including the visa interview, medical examination, and biometrics processing—takes place within adjoining buildings in a compact area. In most cases (unless the visa interview is scheduled for a Monday or involves children ages two through 14), it is possible to have both the medi-

cal examination and biometrics appointments completed the day before the visa interview. It is important to advise clients appearing for visa interviews at CDJ (and, for that matter, in any other country) that the entire interview process normally takes place standing, in a booth, across a bullet-proof window from the consular officer, who speaks through a microphone. Because of the relative lack of privacy, background noise, microphone distortion, and potential language issues (most consular officers are not native Spanish speakers), it is important that the applicant listen carefully to all questions; request clarification if he or she does not understand; and speak slowly and clearly (whether in English or Spanish). Unless the case involves an unusual issue such as a complex prior United States immigration history, potential gang affiliation, suspected fraud, etc., most immigrant visa interviews are relatively brief and do not last more than 15 minutes.

Most typical immigrant visa interviews at CDJ focus on the following issues:

1. In marriage-based cases, the history and bona fides of the marriage. In cases based on approved I-601A waivers, make sure the client has a complete copy of the provisional waiver application to show the consular officer, as it will normally contain substantial documentation concerning the marital relationship;

2. The applicant's prior United States immigration history. It is essential the client be able to clearly and confidently articulate his or her entry and/or departure date(s), as an incorrect answer could lead the consular office to believe that he or she is inadmissible pursuant to INA § 212(a)(9)(C) for multiple illegal entries (see additional discussion of this issue below).

B. Additional CDJ-Specific Legal Issues

While the following issues may arise in any case and in any country, they are particularly prevalent in CDJ and careful preparation for them is essential.

1. Medical Inadmissibility Issues

The panel physicians at CDJ typically examine all blood samples for evidence of any unlawful controlled substance use and routinely question applicants about all current and prior drug and alcohol use and abuse. (In contrast, most DHS-authorized civil surgeons within the United States and DOS-authorized panel physicians abroad advise that such testing and questioning is only performed where there is reason to believe this may be an issue.) If an applicant tests positive for any illegal substance, it is virtually certain the panel physician will determine he or she has a Class A medical condition for having a disqualifying physical or mental disorder and the visa application will be automatically refused pursuant to INA § 212(a)(1)(A)(iii).

Similarly, virtually any positive answer to any drug history, including any arrest relating to alcohol abuse (including driving while intoxicated, careless driving involving alcohol, and underage alcohol possession, as well as domestic assault and other charges involving alcohol but not resulting in a conviction), will result in the applicant being given a mental status (psychological) examination to determine whether he or she is admissible. In such cases, clients should be prepared to discuss their history of substance use/abuse including date of last use, the substance involved, the amount and frequency of use, and any history of treatment (with documentation, if available). Clients should be aware that unlike a typical medical examination with one's family physician, the panel physicians are agents of the DOS, their questions may be asked in a coercive manner, and none of the information provided is confidential or discoverable via the Freedom of Information Act (FOIA).

The current immigration guidelines (as determined by the Department of Health and Human Services) require that any history of drug or alcohol abuse be in remission for at least one year to establish admissibility. While such inadmissibility findings may technically be appealed, given the amount of time appeals typically take, the significant cost involved, and the small likelihood the inadmissibility determination will be overturned, it is usually recommended that the applicant simply wait until the remission period has passed and then reapply, since this is typically no more than one year. In such cases, it is advisable for the applicant to submit periodically to drug testing where the inadmissibility finding is based on drug abuse or, in cases involving alcohol abuse, attend Alcoholics Anonymous meetings or undergo related counseling, and then present proof of the same at the new medical examination to demonstrate convincingly that the condition is indeed in remission.

2. Tattoos and Gang Activity

During the medical examination, the panel physician is also required to note whether the applicant has any tattoos on his or her body to help the consular officer determine whether the applicant may be inadmissible pursuant to INA § 212(a)(3)(A)(II) for gang or other illegal activity. While the consular officials at CDJ advise that a tattoo (even one with potential gang significance) does not in and of itself create inadmissibility, it is a possible indicator and they will carefully examine the totality of circumstances including the presence of tattoos, the applicant's testimony, and his or her previous personal, criminal, and immigration history to arrive at a decision.

Accordingly, all clients applying for immigrant visas, particularly young males applying at consular posts in Mexico and Central America, should be questioned carefully about tattoos and potential gang activity as early in the case as possible to determine whether this may be an issue. Clients should be questioned about the significance of any tattoos and, where possible, should be advised to provide documentation showing the tattoo in question is not gang related. In some cases, it may be possible to have the tattoo medically removed; in others, it may be possible to request a letter from local law enforcement confirming that, to their knowledge, the client has not been involved in gang or related criminal activity.

3. Alien Smuggling

Practitioners and clients should be aware that the consular officers at CDJ routinely question applicants in detail about alien smuggling to assess potential inadmissibility pursuant to INA § 212(a)(6)(E). Any perceived act of alien smuggling will result in a finding of inadmissibility and the applicant is eligible to apply for a waiver only if the person smuggled was (at the time of the action) the applicant's spouse, parent, or child (note, smuggling one's girlfriend will not create waiver eligibility if the couple subsequently married). As such, clients who entered the United States without inspection must be carefully questioned about who was with them at time of entry, their relationship and respective ages, and related circumstances. Similarly, applicants whose spouse or children entered the United States without inspection after them should be prepared to answer questions as to whether they provided any assistance, encouragement, funds, etc., to help their relative enter.

It is important to note that applicants with approved Form I-601A provisional unlawful presence waivers will have the approval revoked if the consular officer determines he or she engaged in alien smuggling. While persons in this situations are typically granted I-601 waivers (if eligible to apply) based on the same evidence as used for the I-601A application, the waiver may take several months to be approved and the applicant will be required to remain outside the United States the entire period.

4. INA § 212(a)(9)(C) – Inadmissibility for Multiple Illegal Entries (including Minors)

Applicants must be carefully questioned from the beginning of the case concerning their entire United States immigration history including all entries to the United States (this includes attempted entries), all periods of stay in the United States, and any contact with DHS (as well as any other law enforcement agency).

If the applicant entered (or attempted entering) the United States without inspection after being unlawfully present for over one year or after being formally removed by DHS (pursuant to any type of removal order), he or she is permanently barred from the United States pursuant to INA § 212(a)(9)(C)(i) and is ineligible to apply for any form of waiver until he or she has remained outside the United States for a continuous period of at least 10 years.

Practitioners should be aware that this issue is carefully scrutinized in all cases at CDJ and is strictly construed. Generally, entry without inspection after a simple border stop (where the applicant was apprehended at or near the border attempting to enter without inspection and was promptly sent back to Mexico without issuance of a formal removal order) will not result in section 212(a)(9)(C) inadmissibility. (Note: Such border stops do not typically appear on requests for FBI fingerprint checks; however, they almost always show up in the consulate's inter-agency databases.)

One of the most troubling issues relating to this section of law which frequently arises at CDJ involves prior illegal entries/periods of stay for minors based on the different statutory wording of the unlawful presence provisions of INA § 212(a)(9)(B) and (C). Specifically, the former contains at clause (iii)(I) the exception that states, "No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i)." INA § 212(a)(9)(B)(iii)(I). However, whether by design or mistake, that same language is conspicuously absent from the latter statute. As such, a person who, for example, was brought to the United States by his or her parents for two years as a toddler, then returned to Mexico for a brief time, and was then brought back to the United States without inspection, is permanently inadmissible and may not apply for a waiver until he or she first departs the United States for 10 consecutive years.

PRACTICE TIP

If the applicant entered the United States without inspection only once and departed prior to the 180th day after turning age 18, he or she is not inadmissible because section 212(a)(9)(B)(iii)(I) makes clear that unlawful presence only begins at age 18 (please refer to the statute for additional exceptions to unlawful presence and related actions which toll its counting period). The consulate at CDJ generally honors this concept, but since the burden of proof is on the applicant to prove admissibility, clients should be prepared to present documentary evidence such as passports, airline tickets, and other evidence such as USCIS receipts and approval notices and other evidence to show that they fall within this or one of the other definitional exceptions.

PRACTICE TIP

Telling a client he or she is ineligible to apply to immigrate because of section 212(a)(9)(C) is often the most heartbreaking part of an immigration lawyer's day. Frequently, the client will respond, "But there is no record I was here before, so nobody will know if we say I only entered once." No matter how sympathetic the situation, it is essential for legal and ethical reasons that clients be advised not to do this, and should be warned that such situations are carefully scrutinized by the consulate and that a finding of misrepresentation could permanently damage his or her chances of immigrating in the future.

5. False Claims to United States Citizenship Pursuant to INA § 212(a)(6)(C)(II)

Since there is no waiver available for persons who have falsely claimed to be United States citizens (the statute applies to all false claims made after September 30, 1996), it is critical this issue be carefully evaluated from the beginning of the case and that clients be prepared to address questions relating to it at their visa interview. False United States citizenship claim issues arise in a number of contexts including, but not limited to applications for admission at the border, United States passports, employment, higher education, mortgages, public benefits, driver's licenses, and other settings. The case law within the Eighth Circuit and virtually all other federal courts of appeal is extremely strict and it is firmly established that a false United States citizenship claim made merely to gain employment is usually a disqualifying act. *See Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008).

Accordingly, it is extremely important the client's entire immigration, employment, and personal history be carefully examined. Virtually any attempted illegal entry involving a false United States citizenship claim will result in a finding of permanent inadmissibility (unless it can be shown the applicant lacked the legal and mental capacity to make a false claim due to young age). Further, CDJ carefully scrutinizes arrests and other incidents that occurred under an alias to determine whether the false name and accompanying documents used were those of a United States citizen. As such, clients should be carefully questioned whether they have ever applied for a driver's license or state identification document by using a false or other person's United States birth certificate, particularly given the advent of facial recognition technologies that presumably allow federal databases to interface with state department of motor vehicles offices.

It is important to remember that a false claim to permanent resident (or some other immigration) status does not result in inadmissibility under the statute. Many persons who have purchased counterfeit permanent resident cards and/or employment authorization documents do not understand the difference between false United States citizenship claims and false claims to other immigration statuses (often believing it is worse to use false green cards). In preparing such persons for their IV interviews, it is important they be prepared to confirm they have not made a false United States citizenship claim and, in many cases, it is advisable they have a copy of the false immigration document to show the consular officer in case the issue arises. Clients should be aware that even if they tell the consular officer *in error* that they falsely claimed United States citizenship, it may be impossible to later reverse the inadmissibility finding since the decision will have been based on their own testimony.

Another issue that frequently arises in CDJ cases involves persons who entered the United States as children or teens in the backseat of a vehicle. In such cases, it is essential the applicant be prepared to explain the specific circumstances, including who was driving the vehicle (and who else was in the vehicle) and confirm that

at no time did the applicant speak with the United States immigration inspector or present any documents relating to United States citizenship. It is important that the practitioner fully understand the unlawful presence exceptions relating to minors and, if the applicant is currently in the United States, explore the possibility of having him or her apply for adjustment of status with USCIS (if otherwise eligible), since this is generally considered to be a lawful admission/inspection to the United States (where the immigration inspector had the opportunity to inspect the child), with the biggest issue typically being the lack of objective immigration documentation proving the place, time, and manner of admission.

§ 3.5 ADDITIONAL PRE & POST INTERVIEW PROCESSING ISSUES

While many of the above-referenced issues relate to technical legal matters arising under the Immigration and National Act, equally important are the many administrative procedural issues that arise in virtually all immigrant visa cases. Failure to understand or properly undertake these processes may result in significant frustration for the practitioner and client, including potentially significant delays at key stages of the case. Since many of these processes involve online processing, and since many clients may not have access to email or have a sufficient understanding of these highly technical processes, it is usually advisable for the attorney to handle them on behalf of the client.

A. Creation of Applicant User Account with Department of State

Once the immigrant visa interview has been scheduled by the NVC, the applicant (particularly for cases at CDJ) is required to establish a user account to enable scheduling of his or her biometrics appointment at the application support center or consulate (depending on the country), as well as with DHS (or whichever courier service is used in the specific country) for return of passports and other documents. Practitioners should go to the website and follow the prompts, which include selection of the applicable country and DHS address to which the passport should be sent, to create the client's online profile for this purpose. *See* <www.usvisa-info.com>.

B. ELIS Fee Payment

All successful immigrant visa applicants are now required to make a final fee payment to DHS (USCIS) in the amount of $165 to process their permanent resident card. While the fee may be paid before or after the client's admission to the United States as an LPR, it is highly advisable to pay the fee prior to admission to avoid delays in issuance of the card. Since many clients have a difficult time navigating the ELIS system, the attorney may wish to pay the fee by credit card on behalf of the client, but will need to use the client's email to do so. ELIS will then send an email to the client, who must then forward it to the attorney to continue with the fee payment. Alternatively, the attorney may wish to create a new client email address for this specific purpose so that the attorney already has the applicable user ID and password to complete the ELIS fee payment on behalf of the client.

§ 3.6 PRACTICE TIPS FOR RESOLVING POST-INTERVIEW PROBLEMS

Post-immigrant visa interview issues may range from basic requests for additional documents to more serious issues such as findings of inadmissibility, and should be dealt with in the following manner.

A. Follow Post Instructions

Virtually every United States IV post worldwide has detailed information on its website concerning its specific visa processing procedures, including information on how to submit additional documents that are requested at the visa interview. It is very important that these instructions be followed carefully to ensure timely delivery and consideration by the consulate.

B. Email the Post

Virtually every United States IV post also has a designated email address that can also be found on its website and this should generally be the first method used to try to address a problem. Some of the major U.S. consulates, such as CDJ, have specific online attorney inquiry forms that should be used for specific case inquiries (see the "Interview Expedite" request section, *infra*, for the CDJ online legal inquiry address). In most cases, it is recommended that attorneys wait at least one week for a response given typically heavy consular caseloads. If no response is received within that timeframe, a follow-up email is appropriate. If the issue can be addressed through one or a few documents, it is appropriate to attach them to the email (otherwise, it is usually best to send them by courier to the consulate).

C. Phone or Email the Immigrant Visa Section Chief at the Post

If no response is received to the general attorney inquiry, or if the issue is still not resolved, it is normally appropriate to try calling or emailing the immigrant visa chief at the post. The name and email address of key consular officers may be obtainable from various sources such as the Department of State's online publication *Key Officers of Foreign Service Posts*, the Department of State Visa Office, organizations such as AILA, or other attorneys who have experience with the specific consular post.

If the issue can be resolved through submission of additional documents, this should be discussed as an option for resolving the problem. If the issue relates to a question of applicant credibility, or if there is a dispute as to what was specifically stated during the visa interview (the "he said, she said" scenario), it may be possible to request that the applicant be given a follow-up interview (however, from experience, such second interview requests are seldom granted, which underscores why careful interview preparation is required).

D. Advisory Opinion Request to the DOS Visa Office

If efforts to resolve the problem directly with the consular post are unsuccessful, an advisory opinion request may be submitted to the DOS visa office by emailing the request to Legalnet@state.gov. Please note the visa office will normally only consider advisory opinion requests for issues of law, not the factual assertions of consular officers, so it is important the practitioner determine whether the issue meets this requirement and structure the advisory opinion request accordingly.

E. Congressional Requests

Requests for assistance by congressional representatives can help in certain situations. While typically not helpful with respect to disputed issues of fact or law, congressional requests may help resolve cases that have been pending review or awaiting resolution for an extended period of time, because the consulate will normally be required to review the file to respond to the congressional inquiry. As with advisory opinion requests, congressional requests should only be used in appropriate situations.

§ 3.7 CONCLUSION

As in any area of lawyering, common sense should be used in attempting to resolve IV problems. If the case involves an erroneous interpretation of law on the part of the consular officer, the relevant legal authority should be cited, but without "rubbing it in the officer's face." Similarly, abusive language should never be used in communications with the consulate, even if the decision appears completely mistaken or unsupported, as this may only encourage the consular officer to ignore the request. Also, there is a fine line between being zealous and being obnoxious,

so repeated email requests within a short time are not advised—even though the case at hand may be most urgent to the attorney and the client, consular posts are normally busy and an adequate time to process a response should be allowed. Finally, and as noted above, written legal arguments should be as brief and direct as possible, as the objective is to capture the busy consular officer's attention and show him or her why the case merits attention and a fresh look. Please remember that as in any legal case, the optimal way to avoid problems and delays, and to ensure client satisfaction, is through careful preparation at all stages of the case.