

Consular Corner
July 2010
by: Liam Schwartz*



HRC on Promoting American Values via Social Media

Secretary Clinton has a vision: American values can be promoted by humanizing and personalizing her employees in the social media. This vision was expressed in the following passage from a [recent New York Times Article](#) on digital diplomacy in the 21st century, which begins with the author, Jesse Lichtenstein:

"One apparent paradox of 21st century statecraft is that while new technologies have theoretically given a voice to the anonymous and formerly powerless (all you need is a camera to start a movement), they have also fashioned erstwhile bureaucrats into public figures...But Secretary Clinton seemed neither troubled nor bewildered. 'I think it's to some extent pervasive now,' she told me in March. 'It would be odd if the entire world were moving in that direction and the State Department were not.' Half of humanity is under 30, she reminded me. 'Much of that world doesn't really know as much as you might think about American values. One of the ways of breaking through is by having people who are doing the work of our government be human beings, be personalized, be relatable.'"

Let's hope that a bit of Secretary Clinton's vision gets sprinkled over the densely bureaucratic rules on the use of social media by DOS employees which were recently published at [5 FAM 790](#). (For an excellent discussion on these new rules see [Diplopundit](#)).

MLC on Consular Education at the Other End of the Leash

[Madam Le Consul](#)'s blog is proof positive of the wisdom of Secretary Clinton's vision for promoting American values via the social media. Here's one of her latest postings:

"[The Other End of the Leash](#): This is the title of a justly popular best-seller among dog people, a book that - uniquely at the time it was written - looked at peoples' behaviors from dogs' point of view.

Completely unlike dogs, Madam hastens to begin, immigrants also have points of view, needs, desires, misunderstandings and impulses that differ wildly from those parts of the immigration process that consular officers know or believe they know. To be able to see the entire complex tapestry (sorry) of immigration is not only extremely helpful for consular officers, it can prove extremely helpful, as well, for the customers those officers serve. In fact, consular officers' knowing how immigration works in its entirety can keep them out of embarrassing situations, and keep well-intended customers from being inadvertently led down

the garden path to the PTS room. Once upon a time, a jockish young man was teased by his football team mates when he was caught with a dogeared copy of "Glamour" magazine. Undisturbed, the young man answered, "Look at it this way; it's like capturing the other team's playbook."

Gaining access to on-line forums ('fora' for us purists) that sometimes or solely address immigration issues works that way, too. Not only is one able to see more clearly what immigrants or intending immigrants were thinking of when they did whatever they did, or tried whatever they tried - many of them believing that those actions were perfectly legal under US immigration law - but a well-run forum in which hysterics and wild accusations are not tolerated and in which skilled experts answer questions sensibly and simply can be a powerful learning tool for a consular officer. (Can you explain the H1B cap? Know what an EAD is? Know that many individuals who enter the US on the VWP ARE allowed to adjust status under several different circumstances? Well then.)

Consular officers overseas are encouraged to join such forums, both to listen for problems and to help resolve them. Domestically, one of the best can be found among Yahoo Groups. It is owned and run by two immigration attorneys who do not permit whining and mud-slinging, and who give their answers in quick, clear bites. One must be a member to read the questions and answers, but signing up is easy and learning about the rest of US immigration - that is, what happens before, during and after the parts that consular officers are familiar with - is extremely useful and even eye-opening. There is no need to feel obliged to answer forum questions; the owners do that. And they appear to understand consular processing far better than consular officers understand domestic processing, to our detriment. By simply following the Qs and As, consular officers can gain a broader and extremely useful understanding of the process they thought they knew well; the other team's playbook; the other end of the leash."

You be the Judge

In the spirit of Madam's above posting, we are pleased to present a new feature which highlights recent immigration law cases of interest to the Consular Corner community. Following a description of the case we ask how you think the case was decided; answers are provided later in this column. The cases discussed below were all decided in April or May of this year.

We hope you enjoy this new initiative and welcome your feedback!
(consularcorner.feedback@gmail.com)

The Case of the Intoxicated VWP Traveler

Does an intoxicated Visa Waiver Program (VWP) traveler make a knowing and voluntary waiver of his or her rights to a removal hearing?

Foreign nationals entering the United States under the VWP are generally considered to have waived the right to contest a removal order if they are later found to have violated the terms and conditions of their 90-day admission.

Heathcliffe John Bradley, a VWP traveler from New Zealand, was admitted to the United States in August 1996 and never left. Almost ten years later to the day, Heathcliffe married Cheryl Losee, a United States citizen, who then filed an I-130 petition on behalf of her new husband. After the couple failed to appear for a marriage interview, the government arrested Heathcliffe and ordered that he be removed without a removal hearing pursuant to the waiver he had made back in 1996.

But Heathcliffe claimed that a waiver of due process rights under the VWP is not constitutionally enforceable unless it is knowing and voluntary; and that because he had been intoxicated when completing the I-94W he had not known that he was making the waiver.

What do you think – did Heathcliffe prevail?

Does Crime Pay?

Can a foreign national who used fraud to gain admission as a legal permanent resident later claim eligibility for a 212(h) waiver on the grounds that his fraud meant that he was not "lawfully admitted?"

INA 212(h) provides for a waiver of certain criminal grounds of inadmissibility but expressly bars this waiver relief from a foreign national who was admitted to the U.S. as a lawful permanent resident (LPR) and is later convicted of an aggravated felony. Some ten years after his admission as an LPR, Yin Hing Sum was convicted of conspiracy to produce, use or traffic in counterfeit access devices. Faced with removal from the U.S., Yin contended he was not barred from 212(h) waiver relief because he had not been "admitted" as a permanent resident. Why wasn't he legally admitted you ask? Because he had procured his admission by fraud by failing to disclose a prior criminal conviction which would have made him ineligible for permanent residence in the first place.

What do you think – can Yin's initial crime save him from the immigration consequences of the second crime?

Born Into Hardship

Is a fetus a "qualifying relative?"

The INA [provides](#) for the cancellation of removal of an otherwise inadmissible nonimmigrant if the removal would result in exceptional and extremely unusual hardship to the nonimmigrant's USC spouse, parent or child.

Rana Partap, a pregnant nonimmigrant from India, claimed that she should not be removed because of the hardship this would bring to her then-unborn child.

What do you think – can an unborn child serve as a "qualifying relative" for purposes of cancelling a pregnant mother's removal from the U.S.?

Consular Miracle

How Rob, a foreign service officer at the U.S. Consulate General in Sydney saved the day for a young Mom and became her "boo." And oh yeah, Mom thought Rob was "hot!"

"Crappity crap crap. An hour before the flight is due to go, and daughter Ava has an expired passport. I started scouring the US Consulate website, wondering what we could do if they wouldn't let her through. How fast can I get her a new passport? Do they extend them? Can she travel on Jason's? Maybe I should pray for a Consular Miracle? We'd take what we could get at this point.

Ten minutes later, Jason calls. I answer, and before he even speaks, I can hear Ava crying in the background. "They're not going to let us through," he said. "Call the US Consulate and let's see what we can do."

I had a huge pit in my stomach. I ran over to the computer and started looking for a contact number on the Consulate website. While looking, I read that they would only process passport applications from 8:30-11:30am Monday through Friday. It was now 10:30 on Friday morning. I rang the number and talked to a guy named Rob. I explained our situation and then expected to be told, "Too bad, come in Monday, there's really nothing we can do right now." Something like that, you know? But you know what? *He was helpful*. God bless us every one, Rob came to the table. "If your husband and daughter can get here from the airport by 11:30, and you can come in too, we can process an emergency passport for her." He told me he'd let security know that we were coming. Gotta love a can-do spirit! I thanked him and called Jason. "Get on the train and head to the Consulate! I'll meet you there. You have to be there in 50 minutes!"

I should add at this point that the Consulate offices are in the middle of downtown. A part of the city that I've never driven to by myself. It's a good 40-45 minutes from our house, surrounded by one way streets, snarly traffic, with nearly impossible parking. All the way down, Jason and I are calling each other. He and Ava were on the train. Ava was still crying, bless her. We were giving status reports. You have to get new passport photos taken when you get there, I told him. There's a photo place on Level 6 in the same building. You can't turn right on King Street, he told me. It's one way. Later he called me. "We got the photos done, but it's a 10 minute wait. We've got to get upstairs to the consulate. You'll have to pick up the photos when you get here."

Meanwhile, I am in the city, doing a giant, convoluted circle around the building we need. I can't turn the way I need to, cause all the streets are either "no right turn" or "no left turn" or "too bad, sucker!" or "one way" going the *other* way. I impose a vow of silence on Nate and drive like a maniac. I get honked at a few times. But finally, FINALLY, I find the entrance to the underground parking and we get a spot. Pause and reflect. This in itself is a miracle.

It's 11:30 now. I can't call Jason, cause he's already in the consular offices and you can't take your phone in there. Nate and I run--and I mean *run*--into the building and take the elevator to Level 6. This is a huge office building, and Level 6 is a food court with lots of stores on the fringes. We run from one side to the other, pick up the passport photos. We run back through the food court and go up two different sets of elevators until we get to the security check for the Consulate.

The security check is on a separate floor from the rest of it. They take your name, you walk through a metal detector and leave your bags, and then you get on *another* secure elevator that takes you up to, like, the eleventy hundredth floor to the Consulate.

Nate and I join Jason and Ava in there, and we are the only people there. I guess they'd closed for appointments already. Jason had already filled out the application, I handed Rob (I *think* it was *the* Rob) Ava's birth certificate and photos, and I signed the application. I was still waiting for something to go wrong. But they said, "Okay this will take about 30 minutes, and then we'll give you guys the passport." Really? You do not require a lock of my hair or something? No eye of newt, or a goose that lays golden eggs? Nope. They were *actually* going to do it for us.

I took the kids downstairs to eat lunch while Jason waited for the passport. And sure enough, 20 minutes later he came to join us, new passport in hand.

I am so grateful it worked out. I got my Consular Miracle after all. Imagine if I'd called a little later--they would've been closed to appointments already and then we would've had to wait out the weekend. It was just such a pleasant surprise to find a bureaucratic organization that actually helped us. When we needed help. Woo to the hoo!

Now, I don't know if the US Consulate in Sydney has Google Alerts, but guys? You rock. You saved our bacon. And Rob? You're my boo. I just want you to know that.

COMMENTS :

Marie said: God Bless the USA and ROB!

Becky said: Rob is hot! (was he hot?)

Amy said: yes, Beck, Rob was kind of hot. But I didn't tell him to his face that he's my boo. I wish I had, though. CAUSE HE TOTALLY IS."

<http://matrondownunder.blogspot.com/2010/07/my-fellow-americans-dont-fail-me-now.html>

You be the Judge - Answers

The Case of the Intoxicated VWP Traveler

[The Third Circuit rejected](#) Heathcliffe's due process claim on the grounds that he could not show prejudice:

"The consequence he now faces — summary removal — is the same consequence he would have faced had he known of the waiver and refused to sign. He has failed to demonstrate how his knowledge of the waiver realistically could have changed this outcome."

Does Crime Pay?

Indicating that it was not persuaded by Yin's "curious position," [the court wrote](#) as follows (note the great quote in the final sentence):

"Contrary to Sum's position, the previous "admission" to LPR status in § 212(h) does not refer to an admission in substantive compliance with the immigration laws, but rather an admission that is procedurally regular in nature. Because Sum was "admitted" as an LPR in the sense of being inspected and authorized at the port of entry, but later convicted, he is barred from § 212(h) relief. It may seem, at first blush, an oxymoron to be "admitted" to the United States and yet "inadmissible" at the same time. But such is the text of the INA and the often opaque world of the immigration statutes."

Born Into Hardship

[The court summarily dismissed](#) Rana's claims, saying as follows:

"The term "child" for purposes of cancellation of removal is defined in 8 U.S.C. § 1101(b)(1).... (This) section simply does not contemplate the cancellation of removal based on the hardship to be suffered by a 'de facto' child.

In addition, § 1229b(b)(1)(D) requires that the qualifying relative be "a citizen of the United States." Citizenship status requires birth in the United States or naturalization, under both the Constitution and the governing statute." (Emphasis added.)

Changes to the Foreign Affairs Manual (FAM)– Monthly Report

Substantive updates to 9 FAM (Visas) of the Foreign Affairs Manual (FAM) have been few and far between these past few months. We thus offer a survey of updates to a variety of FAM volumes which we hope will be of interest to the readers of this column.

[Language Incentive Pay](#) (3 FAM 3910)

Updated information on the monetary incentives paid by the Department of State for proficiency on the part of its officers in designated hard and extremely hard languages. According to the Department, language incentive pay helps foster the development and use of foreign language skills deemed critical to America's foreign policy interests. Special payments are available to foreign service officers who extend or repeat tours which require proficiency in difficult languages. If you've always wanted to know what an "asymmetric language" is, this update to 3 FAM 3910 is definitely for you!

[Privacy Act](#) (5 FAM 460)

The FAM's provisions relating to the Privacy Act of 1974 have been substantially revised. The newly formulated guidance includes information including the following:

All "workforce members" must safeguard personal information about "individuals" when collecting, maintaining, using and disseminating information.

"Workforce members" include all employees, contractors, and any other personnel who perform work for or on behalf of the Department of State. The term "individuals" is defined as a United States citizen or permanent resident (sorry, no F-1 visa applicants here). Rules of behavior for protecting personally identifiable information (such as social security numbers and biometric records) are set forth in detail.

Workforce members are reminded that the Privacy Act imposes both civil and criminal penalties for failure to strictly abide by the provisions of the Act.

[Acquisition of Non-Citizen U.S. Nationality by Birth](#) (7 FAM 1142)

Updated chart describing the circumstances in which non-citizen U.S. nationality may be acquired through birth abroad.

[Human Trafficking and Crimes Involving Moral Turpitude](#) (9 FAM 40.21[a])

A new regulatory update clarifies the applicability of the 212(a)(2)(H) ("Significant Traffickers in Persons") grounds of inadmissibility. Consular officers are advised that the inadmissibility applies to the following individuals:

"Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General, knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons."

[Summary Chart INA 222\(g\) Scenarios](#) (9 FAM 40.68)

INA 222(g) generally renders void the visas of nonimmigrants who remain in the United States beyond the period of their authorized stay.

Prior to this update, a busy consular officer relying on the summary 222(g) chart could have easily been misled as to the supposed application of 222(g) where a foreign national departed the U.S. after expiration of his or her underlying Form I-94 but prior to a USCIS decision on a timely filed application to extend or change status. (See the [November 2009 Consular Corner](#) for a discussion of this issue.)

The summary chart of 222(g) scenarios has now been updated to clarify that 222(g) does NOT apply in the following situation:

"Alien admitted until specified date; submits a timely and non-frivolous application for extension or change of status; departs U.S. after expiration of Form I-94, but before a decision on the Form I-94 extension/change of status application."

[Per Diem for Domestic Partners](#) (14 FAM 572.3-4)

Clarification that family members who are eligible for per diem pay include both spouses and domestic partners (as the latter term is defined in [3 FAM 1610](#)).

Are You Smarter Than A Consular Officer?

- 1) Name one of the U.S. consular posts currently closed for routine consular services.
- 2) On average, how many Americans apply for passports each year?
 - (a) 1 million
 - (b) 5 million
 - (c) 15 million
 - (d) 25 million
 - (e) 50 million

- 3) Under U.S. immigration law, who has the burden to demonstrate that a qualifying marriage was entered into in good faith – the married couple or the U.S. government?
- 4) Consular posts should waive the I-864 Affidavit of Support requirement where an immigrant visa applicant can be credited with how many qualifying quarters of Social Security coverage?
- 5) The State Department's Waiver Review Division is primarily concerned with which one of the following INA provisions?
- (a) 101(a)(15)(e)
 (b) 212(d)(3)
 (c) 212(e)
- 6) Name one of the two consular services that were previously free of charge but now carry a price under the new Schedule of Fees that went into effect on July 13, 2010.
- 7) What must accompany a mental disorder in order for a foreign national to be found medically inadmissible?
- 8) True or false: An LPR can file an I-130 petition for his or her spouse at an overseas consular post.
- 9) What is the purpose of the "cap-gap"?
- 10) This American President spent much of his childhood in Europe as the son of a diplomat; as an adult, he served as envoy to Berlin and married one of the seven daughters of the U.S. Consul to London. Who was this President?

Top Ten Visa Wait Times at U.S. Consular Posts, July 2010*

[Beijing's concerted efforts](#) to reduce its wait times (instituting weekend interviews and allowing applicants to "forum shop" around the country's consular districts) have paid off in spades: The post's wait times have dropped from 98 to 36. Unfortunately, Shanghai, which is the beneficiary of at least some of this in-country forum shopping, has seen its own wait times soar by 38 days. Parenthetically, a [new initiative by Embassy Beijing](#) provides daily estimates of next available tourist and student visa appointment dates at the U.S. consular posts in China.

#	Country	Consular Post	Visa Wait Time	Increase/decrease from Last Month	Top 10 Position Last Month
1	Cuba	Havana (US	999	Unchanged	1

		Interests Section)	days		
2	Venezuela	Caracas	172 days	+ 18 days	2
3	Nigeria	Lagos	71 days	+16 days	6
4	China	Shanghai	68 days	+38 days	New Listing
5	Mexico	Guadalajara	63 days	+ 15 days	8
6	Uganda	Kampala	60 days	+ 32 days	New Listing
7	Egypt	Cairo	56 days	Unchanged	5
8 (tie)	Brazil	Buenos Aires	52 days	+ 28 days	New Listing
8 (tie)	Haiti	Port au Prince	52 days	+ 28 days	New Listing
8 (tie)	Ecuador	Quito	52 days	+ 25 days	New Listing
9	Burma	Rangoon	45 days	Unchanged	10 (tie)
10 (tie)	Saudi Arabia	Dhahran	42 days	- 7 days	7
10 (tie)	Canada	Montreal	42 days	Unchanged	New Listing
10 (tie)	Canada	Toronto	42 days	Unchanged	New Listing
10 (tie)	Canada	Vancouver	42 days	+ 26 days	New Listing

** Updated to July 6, 2010 and based on published Department of State data. The "visa wait time" is the estimated time in which individuals need to wait to obtain a nonimmigrant visa interview appointment at a given consular post.

Top Wait Times by Region:

The Americas (excluding Cuba)	Venezuela/Caracas	(172 days)
Africa	Nigeria/Lagos	(71 days)
East Asia and Pacific	China/ Shanghai	(68 days)
Middle East and North Africa	Egypt/Cairo	(56 days)
Europe and Eurasia	Russia/Moscow	(40 days)
Central and South Asia	India/Kolkata	(21 days)

Answers to "Are You Smarter Than A Consular Officer?"

- 1) Asmara, Eritrea; and Minsk, Belarus
- 2) (c)
- 3) The married couple (OK, its summer, you deserve an easy question).
- 4) [40](#).
- 5) (c)
- 6) Addition of visa pages to a U.S. passport (\$82); and renunciation of U.S. citizenship (\$450)
- 7) "Behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others." INA 212(a)(1)(A)(iii)
- 8) False, unless "is in the national interest or if an emergent or humanitarian situation exists," according to [9 FAM Appendix N, 201.2](#).
- 9) [To fill the gap](#) between expiring F-1 status and incipient H-1B status
- 10) John Quincy Adams

Quote of the Corner

"[For their heroic actions on July 9, 2008, we owe these brave policemen a debt of gratitude we can never fully repay and will never forget.](#)" U.S. Consulate General in Istanbul marking the second anniversary of the terrorist attack on the consulate. Three Turkish National Police officers – heroes all - were killed while saving the lives of countless consulate employees and visa applicants.

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