

Consular Corner
November 2010
by: Liam Schwartz*



Visa Refusal Statistics: Winners and Losers

The Department of State has released its statistics for B visas in fiscal year 2010, which ran from Oct. 1, 2009, to Sept. 30, 2010. The results, when compared to data from the previous fiscal year, reveal which countries are making gains in their citizens' access to the United States – and which nations are falling behind.

B-visa refusal rates for many of the Caribbean countries skyrocketed between 2009 and 2010. Antigua and Barbuda, Belize, Grenada, and St. Vincent and the Grenadines saw their refusal rates jump by more than 50 percent. Increases of over 30 percent were experienced by Barbados, Dominica, St. Kitts and Nevis, and St. Lucia. One Caribbean country with a significant *drop* in its refusal rate represents one of the biggest surprises in the data set: Haitian nationals were 20 percent more successful at obtaining B visas in 2010, a year in which their country was rocked by a devastating earthquake.

Haiti's neighbor Cuba also benefited from a precipitous drop in its refusal rate (down 35 percent). Other Communist countries were similarly blessed: The refusal rate for applicants from both Vietnam and the Chinese mainland dropped by 15 percent. Meanwhile, refusals for North Koreans more than *quintupled*, soaring from 4 percent in 2009 to 23 percent in 2010.

Refusal rates for two countries that are prominent in America's foreign relations increased significantly: Nationals of Saudi Arabia were refused B visas at a rate of 6 percent in 2010, nearly 60 percent higher than the 2009 figure of 3.8 percent. Russians, meanwhile, saw their refusal rate shoot from 4.9 percent to 10.1 percent – an increase of 106 percent.

One country stands out on list with the dubious distinction of the only state with a perfect refusal rate: All Andorrans who applied for a B visa in fiscal year 2010 were denied. Of course, this statistic is simply indicative of the atypical population that is left standing in line at the embassy in Visa Waiver Program countries. A further illustration of this phenomenon is offered by the meteoric increase in refusal rates for states that recently joined the VWP, such as Hungary (up 64 percent), South Korea (up 71 percent), Latvia (up 74 percent), Lithuania (up 81 percent), Malta (up 229 percent), and Estonia (up 373 percent).

For a table comparing all the 2009 and 2010 data, [click here](#).**

American Citizens and Same-Sex Partners

In the not-too-distant past, same-sex foreign couples often faced lengthy periods of separation when one partner traveled to the U.S. for studies or for work assignments. And then, in 2001, [Secretary Powell issued policy guidelines](#) facilitating use of the B-2 visa classification by the cohabiting partners of longterm nonimmigrants. In practice, these guidelines led to a dramatic liberalization in the ability of a same-sex partner to accompany a foreign student or temporary worker to the U.S. for the duration of the principal nonimmigrant's authorized stay.

The immigration situation for the same-sex partners of U.S. citizens remains frozen in time due to the [Defense of Marriage Act](#) ("DOMA"), which defines the word "marriage" as "only a legal union between one man and one woman as husband and wife." That said, Secretary Clinton may now have affected a thaw of sorts. A new addition to 9 FAM 41.31 N14.4 (the same FAM provision that Secretary Powell liberalized nine years ago) provides that the B-2 classification "is also an appropriate classification for aliens who are members of the household of a U.S. citizen who normally lives and works overseas, but is returning to the United States for a temporary period."

<http://www.state.gov/documents/organization/87206.pdf>

Playing *Con Fuoco*

A compelling new decision by the USCIS Administrative Appeals Office (AAO) involving a pianist from Tbilisi, Georgia, provides enhanced guidance for immigration attorneys and their clients seeking to avoid unintended involvement with document fraud. In addition, the decision offers valuable practice pointers for pianists around the world hoping to immigrate to the United States under the employment-based Extraordinary Ability category. The underlying message: musicians – and any other petitioners – who tinker with evidence are playing with fire.

Document Fraud Guidance

The thrust of the AAO decision is this: There's no such thing as "document fraud lite." Petitioners may not *ad lib* on evidence submitted in support of a petition under any circumstances.

False Signature

To support his claim to the EB-1 Extraordinary Ability classification, the Georgian pianist provided USCIS's Nebraska Service Center with a signed letter from a professor of music confirming many of the pianist's accomplishments. When contacted by investigators, the professor said that the signature on the letter was not his, but indicated that he had given permission to the pianist to sign on his behalf.

The AAO decision clarifies – *fortissimo* and clear – that it is inappropriate to provide USCIS with a document containing a false signature. Granted, the professor had consented to the pianist signing his name to the letter – but it is still unacceptable for a petitioner to alter evidence submitted in support of a visa petition to facilitate its approval. To hold otherwise, the AAO said, would "make a farce of the immigration system and the evidentiary requirements set up by statute and regulations."

The AAO continued:

"While all of the required elements for finding the petitioner culpable of committing fraud or misrepresenting a material fact... are not present with respect to the false signature in this letter," the false version of the signature submitted by the pianist "seriously compromises the credibility of the petitioner and the authenticity of the remaining documentation submitted in support of the petition."

Practice Tip: Attorneys and paralegals who sign immigration forms or supporting documents in someone else's name in order to save time and expense prejudice the client's credibility and place their own reputations and livelihoods on the line.

Falsified Webpage

In documenting the credentials of the music professor, the pianist submitted a print-out of the professor's internet homepage. With a large stoke of *bravura* and arrogance, the pianist changed certain dates and other information about the professor that the pianist believed to be incorrect. (These alterations conveniently matched certain facts the pianist was attempting to prove.)

The AAO: "Once again, we note that a petitioner cannot simply alter documents submitted in support of his petition to facilitate its approval."

Practice Tip: Word to the Wise – the arrogant will stumble and fall. *Arrogance* in this context is modifying the text of published documents so as to put a better face on "The Truth." There's really no choice but to rely on the good sense of the adjudicator: submit the original text as is, and attach an explanation of any errors therein.

False Claims to a Prize

The pianist, on three separate occasions during the petition and appeals process, falsely claimed a prize he did not receive at an international piano competition.

The pianist's legal counsel argued that the false claim to a prize was not tantamount to misrepresentation, because the petitioner is not fluent in the

English language; thus, it would be wrong to attribute misrepresentation to the pianist, given that he was unaware of what was being submitted on his behalf.

Counsel's line of reasoning didn't pass the AAO laugh test. In its decision, the AAO stressed that the pianist had signed the Form I-140, certifying under penalty of perjury that "this petition and the evidence submitted with it are all true and correct." On that basis alone, he must be held responsible for any material misrepresentations contained within the record of proceeding.

To quote the AAO:

"If the petitioner was unaware of the documents and information submitted in support of his own petition, then this failure to apprise himself constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. The law does not recognize deliberate avoidance as a defense to misrepresentation. To find otherwise would have serious consequences for USCIS and the administration of the nation's immigration laws."

Practice Tip: Attorneys augment harmony and do themselves *and* the client a favor when they review submissions with the petitioner, page by page, prior to filing.

Guidance for "Extraordinary Ability" Pianists

As a coda to its discussion of the evidence submitted with the Georgian pianist's case, the AAO took the opportunity to review the criteria by which musicians may qualify as Aliens with Extraordinary Ability in the EB-1 category. The following is a summary of the guidance provided regarding a number of the eligibility criteria set forth at 8 C.F.R. 204.5(h)(3) :

(v) Evidence of the alien's original artistic-related contributions of major significance in the field.

The pianist submitted letters of recommendation singing his praises as a talented musician. Examples of these letters included a recommendation from a professor of music at DePaul University indicating that our pianist had played in masterclasses at DePaul and was even selected to perform Chopin's Polonaise in A-flat Major, Op. 53, in the final piano gala at Klavierhaus in New York City.

Another recommendation states that our pianist is "brilliant," and that his performance of Liszt's Mephisto Waltz brought him "a major ovation and admiration."

Notwithstanding this high praise, the AAO ruled that our pianist had not met the requirements of this criterion. Per the AAO, "talent in one's field is not necessarily indicative of artistic contributions of major significance."

Practice Tip: In order for pianists to meet the criterion of "original artistic-related contributions of major significance in the field," petitions must specify original contributions made in music, and how these contributions are of major significance. Discuss the extent of the pianist's influence on other pianists nationally or internationally, and show how the field has changed as a result of his/her work.

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The AAO clarifies that this specific criterion is wholly irrelevant to pianists.

According to the decision,

"The plain language of this regulatory criterion indicates that it is for visual artists such as sculptors and painters rather than for pianists. In the performing arts, national or international acclaim is generally not established by the mere act of appearing in public."

(x) Evidence of commercial successes in the performing arts.

The Georgian pianist failed to meet this criterion: the evidence he submitted was limited to his participation in various concerts and music programs. Per the AAO, the criterion specifically calls for evidence in the forms of sales or receipts.

Practice Tip: A pianist would be best advised to show that his or her performances consistently draw large crowds, are sell-out performances and result in larger audiences than other similar performances that did not feature the petitioner.

(i) Evidence of receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The Georgian pianist submitted evidence of having won a prize in the "up to 32 years of age" category. This struck a dissonant chord with the AAO, which ruled that prizes won in age-restricted or student competitions do not indicate that a pianist is one of "that small percentage who have risen to the very top of the field."

Practice Tip: Evidence that a pianist has won a prize in competition will not lend much support to your case unless you can show that the competition was open to a full range of contestants, rather than being limited to a given age group.

The AAO's Twin Decision

The AAO upheld the Nebraska Service Center's denial of the petition, stressing that the EB-1 Extraordinary Ability classification is "highly restrictive," intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time.

The AAO also found that our pianist from Tbilisi knowingly submitted documents containing false claims in an effort to mislead USCIS on elements material to his eligibility for a benefit sought under the immigration laws of the United States.

And what of our Georgian pianist, whom one source declared to be "one of the best musicians of his generation"? With a finding of material representation of a material fact on his record, it's reasonable to assume that the remainder of his career will be spent on foreign stages.

The AAO decision to which this text relates can be found here:

http://www.uscis.gov/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2010/Apr092010_01B2203.pdf

Terrorism and Visa Ineligibilities

The Department has issued a nearly complete rewrite of the Notes to 9 FAM 40.32, which deals with visa ineligibilities related to terrorism under INA 212(a)(3)(B).

General Guidance

This new 25-page guidance includes the following points:

1. Visa ineligibilities related to terrorism hinge on terrorism-related definitions – and under post-9/11 legislation, the phrase "engage in terrorist activity" is broad.
2. Even if an applicant's visa application has been denied under INA 214(b), consular officers must request a Security Advisory Opinion (SAO) on all applications involving a possible INA 212(a)(3)(B) inadmissibility.
3. The collection and assessment of information relating to a possible terrorism-based inadmissibility is characterized as "a collaborative process" between the consular post, the Department and other agencies in Washington, DC.
4. DHS as referee between DOS and other agencies: If the Department of State and the FBI or another agency cannot agree on whether the available information supports a visa denial, DHS will step in and make the decision.

Terrorist-related Definitions

The new guidance sets forth an expansive "Definitions" section that explains, in alphabetical order, the terms used in INA 212(a)(3)(B).

"Clear and Convincing Evidence" – This provision emphasizes that a visa applicant must demonstrate by "clear and convincing evidence" that he or she did not know, or should not have reasonably known, that an organization is, in fact, a terrorist organization, despite the fact that it has not been designated as such by the State Department.

"Endorsing or Espousing Terrorism" - An individual is inadmissible if he or she endorses terrorist activity or persuades others to endorse terrorist activity. Fair enough, but then there's this: "This provision does not require a finding of specific intent nor does it require any indication that the alien might be in a position to influence the actions or others." In other words, if someone not in a position of influence says something that inadvertently causes someone else who is likewise not in a position of influence to say something that persuades someone *else* to support terrorist activity, then that first someone is inadmissible (as are the other two).

"Incitement of Terrorism" - An applicant is inadmissible if he or she has incited terrorist activity with intent to cause bodily harm. "Incited" refers to speech that is not merely an expression of views but rather induces another person to undertake terrorist activity, "typically in a volatile situation."

A specific example provided by this new guidance underlines the thin line between political protest and incitement to terrorism:

"Widespread opposition to Country A's policies and actions lead to a series of protests, some violent, outside Country A's embassy in Country B. The applicant goes to the embassy, stands on a box, and shouts to the crowd to join him in standing up to Country A and humiliating it. Shortly afterwards, when he sees an embassy vehicle approaching, he yells: 'Don't let them in! Make them pay for what they've done!' The crowd blocks the car and removes occupants (including a diplomat working at Country A's embassy) from the car, beating them severely and taking them hostage.

Analysis: Diplomatic hostage-taking and violent attacks on diplomats are terrorist activities. Given the alien's urging the crowd to stop the embassy vehicle and 'make them pay,' you would have reasonable ground to believe that the applicant's speech incited terrorist activity. The alien's 'make them pay' statement, when viewed against the backdrop of previous violent protests and his general comments about standing up to Country A and humiliating it, would provide you with reasonable ground to believe that the applicant intended to cause death or serious bodily harm."

Family-based Ineligibilities

If a visa applicant who has been found inadmissible under these provisions is married and/or is a parent, then his or her "spouse and children" are themselves inadmissible, if the activity causing the applicant to be inadmissible occurred within the last five years.

Presumably this family-based inadmissibility does not apply to the same-sex husbands and wives of terrorists, given that DOMA defines "spouse" as "a person of the opposite sex."

Waivers for Presumptive Immigrants?

For the third time in a year the Department has attempted to modify the FAM's summary chart on the grounds of inadmissibility by "cleaning up" the text and adding to the substantive descriptions of available waivers. Even after all the tinkering, the chart still refers to an INA 214(b) visa refusal based on a presumption of immigrant intent as "an inadmissibility" for which "no NIV waiver is available."

In fact, a 214(b) refusal is not a ground of inadmissibility, and presumptive immigrants are not in need of waivers. An applicant who has failed to meet his or her burden of overcoming the presumption of immigrant intent set forth in INA 214(b) is not *inadmissible* to the U.S. As per the provisions of 9 FAM 40.7 N1.2, the applicant has simply been found ineligible for a particular visa classification and may still be admitted to the U.S. if eligible for a different visa classification. The classic example is the applicant who has been denied a B-1/B-2 visa for failing to overcome 214(b)'s presumption of immigrant intent but who may still be admitted to the U.S. as an H-1B temporary worker.

The chart is an appealing shortcut for understanding the law, but inadmissibilities are serious business. The concern is that the chart serves as a disincentive to the highly intelligent cadre of consular officers to study the actual FAM guidance or INA provision when they deal with decisions of inadmissibility, which invariably have a substantial impact on the direction of an applicant's life.
<http://www.state.gov/documents/organization/86933.pdf>

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

Changes to Volume 9 (Visas) of the FAM this month include crystal-clear elucidation for O-1 extraordinary ability visa applicants, disappointing information for foreign online students, and questionable instructions relating to J-1 SWT applicants.

O-1 Extraordinary Ability (9 FAM 41.55)

<http://www.state.gov/documents/organization/87233.pdf>

Modified FAM guidance emphasizes the expansive nature of the O-1 visa classification – and clarifies, in no uncertain terms, that the O-1 is a "dual intent" visa.

The new guidance informs consular officers that DHS interprets the INA as including "any field of endeavor" in the O-1 category, including "craftsman and lecturers, as well as the culinary arts." Whereas prior FAM guidance indicated that the O-1 visa applicant must have the intention "to perform services in his or her area of expertise," the new text characterizes the current DHS position as follows:

"The O-1 visa holder must seek to enter for the purpose of continuing the same kind of work but there is no requirement that the position to be filled is one that would require a person of O-1 caliber."

For example, there would be no problem with an extraordinary foreign executive filling the position of CEO at an ordinary small-to-medium sized business.

In a new section entitled "Application of INA 214(b) to the O Visa Classification," the new guidance drops the following "old" text:

"...consular officers shall not apply any standard of temporariness or immigrant intent, unless there are specific indications or evidence that the alien does not intend to comply with the terms of the petition approved on his or her behalf"

in favor of text that couldn't be more crystal clear:

"Dual intent is permissible for O-1 visa holders."

Online Students (41.61 N9.2)

<http://www.state.gov/documents/organization/87373.pdf>

The Department has modified the FAM provision relating to tourists who seek engage in short term studies, in order to emphasize that the B-2 visa is generally inappropriate for foreign online students traveling to the U.S. for a seminar or exam connected with completion of their internet-based course of study.

Under the modified rule, a B-2 nonimmigrant may engage in studies if the following conditions are met:

1. The individual's principal purpose of travel is tourism.
2. The course of study is less than 18 hours per week.

B-2 status is inappropriate (and the individual must apply for an F-1 or M-1 visa) under the following circumstances:

1. The individual plans to spend a week or more in full-time study; or
2. The individual will earn academic credit; or
3. The individual will complete an academic course of study in the U.S.

Circumstance #3 above refers primarily to individuals who, sitting in their homes in Tokyo, Paris or Cape Town, are engaged in an online course of study offered by a U.S. educational institute. Often, these individuals are required to make short visits to the U.S. to take an exam, participate in a seminar or engage in academic consultations as part of their primarily internet-based programs. The FAM now makes it clear that the B-2 visa is inappropriate for these purposes:

"Currently, aliens traveling to the United States to attend seminars or conferences that are required to earn a degree are not eligible for B visa classification. This category includes students engaged in an on-line course of study traveling to the United States for academic consultations or to take examinations."

This FAM provision further clarifies that in lieu of the B-2 visa, these foreign on-line students are required to apply for an F-1 or M-1 visa, and need to obtain a Form I-20 indicating the program dates for their limited period of school attendance.

Summer Work Travel Exchange Visitors (9 FAM 41.62)

<http://www.state.gov/documents/organization/87379.pdf>

Enhanced guidance has been issued with regard to participants in J-1 [Summer Work travel \(SWT\) programs](#). In the scope of these programs, foreign students pursuing post-secondary education abroad may be eligible to work and travel in the U.S. during their summer vacations.

Consular Officers are advised to be vigilant in identifying previous SWT participants who failed to return home in time for the start of their university classes, even though they observed the terms of their visas and maintained legal status at all times. Why, you might ask, should consular officers be on the lookout for people who have done nothing wrong under U.S. law? The answer, according to this new FAM provision, is that some foreign university and government officials might become upset when SWT participants return home late for classes and may end up blaming the Department of State. This in turn could bring the J-1 Exchange Visitor Program or the Department into notoriety or disrepute.

Accordingly, officers are told, the fact that a previous SWT participant failed to return in time for the start of classes may call into question his or her eligibility for future J-1 exchange program visas – even when the applicant departed the U.S. on time and did not incur a U.S. immigration violation.

Yikes: this can't be right. Isn't the visa application process all about ensuring that people who are eligible for visas are issued visas? If we start conditioning the issuance or denial of visas on the possibility that some educational official in Sofia might be upset with us for issuing a visa to someone who is otherwise an eligible applicant, shouldn't we just pack it in right now?

Are You Smarter Than A Consular Officer?

This month's quiz focuses on the performing arts.

- (1) Individual artists can qualify for which of the following visa classifications?
 - a) O-1
 - b) P-1
 - c) P-2
 - d) P-3
- (2) O-1 or P-1: Which visa classification requires qualifying artists to have “been recognized internationally as being outstanding in the discipline”?
- (3) Complete the analogy: O-1 is to O-2 as P-1 is to _____.
- (4) Unless waived by DHS, what percentage of a P entertainment group must “have had a sustained and substantial relationship with the organization for at least one year”?
- (5) Whose responsibility is it to determine whether group members applying for P visas are individually qualified to fill the position described in the I-129 petition?
- (6) True or false: Essential support workers in the P classification are required to have experience working with the “principal” performer.
- (7) In which P visa classification is there no requirement that the performing group existed prior to its trip to the United States?
- (8) True or false: In both the O and P categories, the “-3” visa classification suffix indicates the spouse and/or children of a performer or support worker.
- (9) True or false: Professional entertainers can use a B-1/B-2 visa to perform in the United States, as long as the show is for a private audience or a charitable organization.
- (10) David Bowie said, “Every time I've made a radical change it's helped me feel buoyant as an artist.” If there's a shakeup in the staffing for an artistic performance after DHS has approved the work petition, which types of workers can benefit from substitution procedures?

- a) P performers
- b) P support workers
- c) O performers
- d) O support workers

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

Mission China's decision to become a single consular district for visa purposes has proved hugely successful in evening out disparities in appointment wait times among the different points. At the start of the summer, Beijing's wait times were close to 100 days and Shanghai's were nearly 70. Recent reported wait times included the following: Beijing 20 days; Shenyang 17 days; Guangzhou 12 days; and Chengdu 4 days. Shanghai is the only post still reporting relatively lengthy wait times in excess of 30 days.

#	Country	Consular Post	Visa Wait Time	Increase/decrease from Last Month	Top 10 Position Last Month
1	Cuba	Havana (US Interests Section)	999 days	Unchanged	1
2	Venezuela	Caracas	170 days	Unchanged	2
3	Brazil	Rio de Janeiro	114 days	- 3 days	3
4	Brazil	Sao Paulo	109 days	+ 11 days	4
5	Brazil	Recife	82 days	- 8 days	5
6	Mexico	Guadalajara	80 days	+ 48 days	New listing
7 (tie)	Argentina	Buenos Aires	70 days	+ 36 days	New listing
7 (tie)	Nigeria	Lagos	70 days	+ 5 days	7
8	Brazil	Brasilia	67 days	- 17 days	6

9	Nigeria	Abuja	45 days	Unchanged	8
10 (tie)	Canada	Montreal	42 days	Unchanged	9 (tie)
10 (tie)	Canada	Vancouver	42 days	+ 2 days	10 (tie)

** Updated to November 2, 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	(170 days)
Africa	Nigeria/Lagos	(70 days)
Europe and Eurasia	Montenegro/Podgorica	(34 days)
Middle East and North Africa	Yemen/Sanaa	(32 days)
East Asia and Pacific	Jakarta/Shanghai (tie)	(31 days)
Central and South Asia	Pakistan/Karachi	(28 days)

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

- 1) a, c, and d.
- 2) P-1. 9 FAM 41.56 N3.1 (2)
- 3) P-1. (The support worker for an O-1 performer is classified as O-2, while P-1 is the visa classification for both the performers and the workers who support the performers.)
- 4) 75 percent. 9 FAM 41.56 N7.4
- 5) The consular officer's. 9 FAM 41.56 N7.4
- 6) True. 9 FAM 41.56 N2 (3)
- 7) P-3. 9 FAM 41.56 N3.3
- 8) False -- The O-3 visa is for the spouse and children of O-1s and O-2s, but derivative family members of P performers receive a P-4 visa.
- 9) False -- 9 FAM 41.31 N11.3
- 10) a. 9 FAM 41.56 N8.8 and 9 FAM 41.55 N10.2

Quote of the Corner

"Tens of millions of people around the world look to us as a symbol of what is best in humanity. And that gets me up and going every day."

Secretary of State Clinton in her interview with the National Geographic channel.
<http://still4hill.wordpress.com/2010/11/12/secretary-clintons-interview-with-steven-hoggard-of-national-geographic/>

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**Thanks to Brian Bolton for contributing this item and for his overall encouragement and support of *Consular Corner*.

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