

Consular Corner
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by: Liam Schwartz*

Blankets in Chennai

Effective December 1, 2011, Consul General Chennai will be the only consular post in India authorized to adjudicate Blanket L visa applications.

<http://chennai.usconsulate.gov/temporary-employment-holp.html>

The centralization of Blanket L processing is aimed at developing a level of subject matter expertise which can create consistency in the adjudication of these cases, particularly those involving specialized knowledge workers.

The critical need for this expertise is described in the June 2011 Inspection Report of Mission India by the Department of State's Office of the Inspector General (OIG). According to the OIG:

"Some of the most complicated NIV cases involve L and H visas. Mission India processes more such cases than any other mission in the world. Many applicants work in the information technology sector. Because the law is complex, consular officers need more time to adjudicate such cases and need to exchange ideas with their colleagues who are working on similar cases."

Tasking dozens of consular officers with applying complex law in complicated cases is bound to lead to inconsistent decisions. As per the report:

"One of the biggest challenges consular managers face in India is ensuring consistency in the standards of adjudication on H and L visas. The inconsistencies arise from the complexity of these visa categories and create public relations problems, as large companies note different decisions for employees in similar circumstances."

Granted, petition-based L-1 cases are complicated, but why have Blanket L visa cases been singled-out for centralization? The OIG: "Blanket L visas are an even greater challenge for consular officers." Per the report, Blanket L cases involve employees of companies "having multilayered structure and numerous related business entities. One consular officer estimated that, because of the complexity of these cases, adjudicating Blanket L visa applications takes five or six times longer than it takes to adjudicate a tourist visa."

In order to develop the kind of subject matter expertise which will lead to greater consistency, the OIG recommended centralizing Blanket L visa processing at a single consular post in India. This post should be Consulate General Chennai, the

OIG said, given that Chennai already processes more L cases than any other post in Mission India.

The OIG report on Mission India can be accessed here:

<http://oig.state.gov/documents/organization/169305.pdf>

Specialized Knowledge: A Relative and Empty Idea

America's [highly trained corps of consular officers](#) deal with complex visa cases every day – so why are Blanket L visa cases such a challenge?

The answer probably lies in the procedural differences between petition-based and Blanket cases. In the former, a consular officer sees the case only after a USCIS adjudicator has approved an underlying L visa petition for the applicant. In the latter, consular officers are the adjudicators of first instance, since there is no prior USCIS approval on behalf of the applicant.

Speaking to the American Immigration Lawyers Association (AILA) last month, two senior officers from the Bureau of Consular Affairs (CA) suggested that applying L-1 standards in Blanket L cases involving executives and managers wasn't a major issue. Instead, the Blanket L cases which consular officers find especially challenging are those involving workers with specialized knowledge.

Indeed, CA issued a cable earlier this year entitled "Guidance on L Visas and Specialized Knowledge." CA describes the goal of this cable as follows:

"The following guidance is in response to a request...for specific guidelines for L visa adjudications, particularly in regard to evaluating claims for 'specialized knowledge'...There is a concern about the potential for inconsistent adjudicatory standards at different constituent posts and clear standards would allow for more consistent adjudication."

Why does CA see the potential for inconsistent adjudication of these cases? As per the cable:

"Unfortunately, the statutory language defining 'specialized knowledge' is not simple or clear."

CA notes that this statutory definition of specialized knowledge has been called "tautological" and contains "undefined, relativistic terms and elements of circular reasoning." CA even cites to a court decision which concluded that "simply put, specialized knowledge is a relative and empty idea..."

Given all the relativity and emptiness, there really was no way to come up with specific guidelines and clear standards for evaluating claims for "specialized knowledge." In the end, CA's guidance simply offers some uninspiring

generalities: There are no "simple, bright-line criteria," and evaluations of specialized knowledge "often depend on the consular officer's expertise in the context of the specific case's circumstances."

The "Guidance on L Visas and Specialized Knowledge" cable can be found here: http://travel.state.gov/pdf/Guidance_on_L_Visas_and_Specialized_Knowledge-Jan2011.pdf

Specialized Knowledge: The Real Concern

If a bit fuzzy on specific guidelines, the CA cable on L visas could not have been clearer on why inconsistent adjudications of specialized knowledge cases are such a concern.

It's not, as the OIG suggested, a matter of bad public relations. It's job shops.

A common "job shop" situation involves a foreign company transferring specialized knowledge workers to the U.S. for purposes of outsourcing these workers' professional services to unrelated businesses for a fee. Sending these workers to the U.S. as "intracompany transferees" could be seen as an abuse of the L-1 visa category.

Worse still, statements made in the visa application about the L-1 "employer-employee" relationship may be perceived as misrepresentations. The "employer-employee" relationship requires the US office of the foreign firm to exercise the right of control over L-1 employees, overseeing and directing them in the rendering of their services. In the "job shop" scenario, the worker's services are typically controlled by the unaffiliated company.

To emphasize the depth of its concern, CA reminds consular officers of the provisions of a 2004 law which provides, in part, that specialized knowledge workers who will be outsourced to an unaffiliated US firm in what is essentially an arrangement to provide labor for hire are ineligible for L-1 status.

CA concludes its L-1 visa guidance with a warning about possible "job shops" in the IT industry:

"An off-site employee working in the IT section of an unaffiliated company who is not under the direct supervision of the petitioner or working on a proprietary project involving knowledge and skills to the petitioner would probably not qualify for L status based on job shop concerns."

CA's concerns about possible abuse of the L visa category in specialized knowledge cases is hardly new. In February 2004, CA issued a cable entitled "L Visas and the H-1B Cap." This cable provides:

"DHS advises that the 65,000 cap on H-1bs will soon be reached. This has led to speculation that applicants may increasingly turn to other visa categories, particularly L-1, as a way to evade the H-1B limitations."

The cable continues:

"The inability of aliens to obtain H-1b visas can lead to increased fraud and abuse of the L and other categories, and posts need to be sensitive to this possibility."

How will this increased fraud and abuse of the L category appear? You guessed it:

"Two areas of concern over potential L abuse relate to 'job shops' and to abuse of the 'specialized knowledge' criteria."

It is of course entirely coincidental, but centralized Blanket L processing in Chennai begins just days after the USCIS announcement that this year's 65,000 cap on H-1bs has been reached. Timing aside, by creating a Chennai-based team with specialized knowledge about specialized knowledge, CA and Mission India have taken a welcome step towards ensuring prompt, accurate and uniform decisions in these complicated Blanket L cases.

India Factoid: ACS

According to the same OIG report, the growing trade and investment between the United States and India has led to a significant rise in the number of Americans who are moving to India for business and work. In particular, there is a growing surge of U.S. citizens of Indian origin who are returning to live and work in India. At any one time, almost 234,000 Americans are in India as residents or visitors.

Not surprisingly, there has been a parallel rise in the number of people seeking assistance from the American Citizens Services (ACS) units at our consular posts in India. Indeed, despite the swell in nonimmigrant visa (NIV) applications, consular managers have had to reassign officers from NIV to American Citizens Services (ACS), since the latter has the higher priority.

India Factoid: Surrogacy

The OIG notes that surrogacy is a growing part of India's medical tourist industry. Over 350 clinics in India offer commercial surrogacy services. Clients range from infertile couples to single parents and same-sex partners. In most surrogacy cases adjudicated at posts in India, a U.S. citizen male provides sperm for in vitro fertilization of a donor egg, usually provided by an anonymous Indian donor. The resulting embryos are implanted into a gestational surrogate. As long as at least one genetic parent is a U.S. citizen, a child can qualify as a U.S. citizen.

Adjudication of citizenship in these cases is more difficult than in traditional Report of Birth Abroad cases. The potential for fraud is clear, and documentation may be unreliable. Clinics have mishandled donated eggs and sperm. Forged legal documents such as birth certificates and medical records are available for purchase. Consular officers therefore often require DNA testing to verify the biological relationship of the child to at least one of the parents.

India Factoid: Cacophony in Hyderabad

The OIG describes the noise in the consular work area in Hyderabad as "cacophonous." Indeed, in the collective memory of OIG team members, the Hyderabad noise level was the worst they had ever heard.

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

Sample Refusal Letter for 214(b) Denials (9 FAM 41.121 Exhibit IV)

In order to assist consular officers in providing written notification of a nonimmigrant visa refusal under INA 214(b) the Department published, many years ago, a sample refusal letter at 9 FAM 41.121 Exhibit IV.

Up to now, this sample refusal letter has taken a passive, diplomatic tone:

"We regret to inform you that you have been found ineligible for a nonimmigrant visa based on section 214(b) of the U.S. Immigration and Nationality Act (INA)."

A recent change to this sample letter abandons subtlety in favor of a more "in your face" approach:

"We regret to inform you that you have failed to establish your eligibility for a nonimmigrant visa based on section 214(b) of the U.S. Immigration and Nationality Act (INA)."

Ouch. Talk about rubbing salt on the wound...

<http://www.state.gov/documents/organization/87512.pdf>

MRV Photos and "Photoshop" (9 FAM 41.113 PN 1.2)

New guidance has been issued on whether consular officers may accept Machine Readable Visas (MRVs) photos which have been "photoshopped."

"On occasion, you will encounter visa applicants whose appearance varies slightly from that of the photographs they submit with their NIV applications. In many instances, the Visa Office attributes these variances to recent advances in digital photography software programmed to flatter the

subject of the photograph. You may use the photograph if it otherwise appears to be of the applicant. "

<http://www.state.gov/documents/organization/87503.pdf>

Household Members Not Eligible for Derivative Status (9 FAM 41.31 N14.4)

The B-2 visa category may be appropriate for foreign nationals who are members of the household of another foreign national in long-term nonimmigrant status. The FAM's list of examples of when B-2 status is appropriate in this context has included cohabiting partners or elderly parents of temporary workers, students or diplomats posted to the United States. In an update to this FAM provision, the Department has added "accompanying parents of a minor F-1 child-student" to the list of examples.

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

Diversity Visas (9 FAM 42.33 Notes)

The Diversity Visa Notes have been redrafted in a manner which re-emphasizes a number of important points:

Death of Principal DV Applicant: The death of the principal Diversity Visa applicant must result in the automatic revocation of the application. Thereafter, derivative beneficiaries are no longer entitled to the DV classification.

High School Education or Equivalency: An applicant need not meet this requirement at the time of registration for the DV program – but must do so at the time of the DV visa application.

Waivers: There are no special provisions for a waiver of any grounds of ineligibility for DV applicants. The regular ineligibility waiver provisions of the INA still apply.

<http://www.state.gov/documents/organization/87838.pdf>

Personal/Domestic Employees of USC's Residing Abroad (9 FAM 41.31 N9.3-1)

"Personal or domestic employees of U.S. citizens residing abroad" is one of the standing exceptions to the general prohibition against the performance of skilled or unskilled labor in the United States by B-1 nonimmigrants.

Previous guidance on this exception was short and to the point:

"Personal or domestic employees who accompany or follow to join U.S. citizen employers who have a permanent home or are stationed in a foreign country and who are visiting the United States temporarily. The employer-

employee relationship existed prior to the commencement of the employer's visit to the United States."

This guidance has now been expanded to include new requirements for determining a pre-existing relationship between the American citizen and the personal/domestic employee. According to this expanded guidance, a consular officer may not find a personal or domestic employee of a U.S. citizen residing abroad eligible for a B-1 visa unless satisfied of the following:

- The visa applicant has been employed by the U.S. citizen ("USC") as a personal or domestic servant for at least six months prior to the date of the USC's admission to the United States; or
- The USC can show that while abroad he or she has regularly employed a domestic servant in the same capacity as that intended for the visa applicant;
- The visa applicant can document at least one year experience as a personal or domestic servant; and
- The visa applicant provides a signed contract of employment covering his or her proposed activities in the U.S. This contract must contain certain guarantees from the USC that the visa applicant will be paid minimum or prevailing wages, whichever is greater.

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

Mexican Border Crossing Cards (9 FAM 41.32 N1.5)

The B-1/B-2 Mexican Border Crossing Card (or foil) is intended to be used in place of a B-1/B-2 visa. A new addition to the pertinent FAM provisions emphasizes the point:

"Applicants may not be issued concurrently valid B1/B2 foils and B-1/B-2 BCC cards or foils."

<http://www.state.gov/documents/organization/87208.pdf>

DS-160 and Biometric Signature (9 FAM 41.103 N16)

Nonimmigrant visa applicants required to appear for a personal interview must provide a biometric (currently fingerprints), which will serve to authenticate identity and additionally verify the accuracy and truthfulness of the statements in the application at the time of interview.

In order to clarify this biometric signature requirement, the Department has added new text to the FAM regulation relating to nonimmigrant visa application

forms. As per this addition, consular posts utilizing Form DS-160 must take the visa applicant's fingerprints immediately preceding the interview and not at the conclusion of the interview.

Additionally, consular managers must post a written "verification statement" in front of or above the fingerprint scanner:

“By submitting my fingerprint, I am certifying under penalty of perjury that I have read and understood the questions in my visa application and that all statements that appear in my visa application have been made by me and are true and complete to the best of my knowledge and belief. Furthermore, I certify under penalty of perjury that I will tell the truth during my interview and that all statements made by me during my interview will be complete to the best of my ability.”

Consular officers are urged to "make sure that each applicant is aware of what he/she is agreeing to" by submitting the fingerprints. No guidance is offered as to how exactly officers should ensure this awareness, other than the suggestion that "you are not required to repeat the posted text word for word."

<http://www.state.gov/documents/organization/87428.pdf>

Consular Corner Quiz

1. What percentage of international visitors used visas to enter the United States in 2010?
2. According to the FAM, what U.S. legal status was "not designed for use as an insurance policy to protect an alien against the possibility of political or economic vicissitudes in the future?"
3. May a visa applicant be refused under INA 221(g) without an interview?
4. In general, what is the maximum validity period of an immigrant visa?
5. The number of international students enrolled in colleges and universities in the United States reached a record high this year. Approximately how many international students are there now in the U.S.?
 - (a) 725,000
 - (b) 2,500,000
 - (c) 5,000,000

6. What is the visa application form prescribed for K visa applicants?

7. Until what age may a child's visa application be executed on his or her behalf by a parent?

8. Can a consular officer find a visa applicant inadmissible if the applicant, during a previous stay in the U.S., falsely claimed to be an American citizen in order to get a job flipping burgers at a McDonald's restaurant?

9. Are there more male or female "illegal aliens" in the U.S.?

- 10) According to the just-released DOS Background Note on Russia, which people make up the largest ethnic group in Russia?

Top Ten Visa Wait Times at U.S. Consular Posts, November 2011*

In Congressional testimony earlier this year, Edward Alden of the Council on Foreign Relations had this to say about visa wait times: "It is time to move past worn-out notions that delays in visa processing are necessary for security. They are not. Delays are simply costs with no benefits."

<http://judiciary.house.gov/hearings/pdf/Alden5112011.pdf>

#	Country	Consular Post	Visa Wait Time	Increase/decrease from Last Month	Top 10 Position Last Month
1	Cuba	Havana (U.S. Interests Section)	999 days	Unchanged	1
2	Venezuela	Caracas	202 days	+ 12 days	2
3	Nigeria	Abuja	163 days	-22 days	3
4	Nigeria	Lagos	120 days	Unchanged	4
5	Brazil	Brasilia	105 days	- 5 days	6 (tie)

6	Brazil	Sao Paulo	98 days	- 12 days	6 (tie)
7	Brazil	Rio de Janeiro	92 days	-21 days	5
8	Brazil	Recife	81 days	- 15 days	7
9	Mexico	Nuevo Laredo	45 days	- 12 days	9
10	Haiti	Port Au Prince	41 days	+ 5 days	10

** Updated to November 2, 2011 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	(202 days)
Africa	Nigeria/Abuja	(163 days)
Middle East and North Africa	Tunisia/Algiers	(35 days)
Europe and Eurasia	Italy/Milan	(25 days)
Central and South Asia	Pakistan/Karachi	(18 days)
East Asia and Pacific	Thailand/Bangkok	(14 days)

Answers to Consular Corner Quiz

- 1) 35%. <http://www.state.gov/r/pa/prs/ps/2011/10/176049.htm>
- 2) Special immigrant status (SQ1). 9 FAM 42.32(d)(11) N10
<http://www.state.gov/documents/organization/106197.pdf>
- 3) Yes. If an applicant fails to appear for an interview, he or she should be refused under INA 221(g). 9 FAM 41.103 N10.3
<http://www.state.gov/documents/organization/87428.pdf>
- 4) Six months. <http://www.state.gov/documents/organization/87914.pdf>
- 5) (a) <http://www.iie.org/en/Who-We-Are/News-and-Events/Press-Center/Press-Releases/2011/2011-11-14-Open-Doors-International-Students>
- 6) It's still the DS-156. 9 FAM 41.103 N1
<http://www.state.gov/documents/organization/87428.pdf>

7) Sixteen. 9 FAM 41.103 N8.1

<http://www.state.gov/documents/organization/87428.pdf>

8) Yes. 9 FAM 40.63 N14

<http://www.state.gov/documents/organization/87011.pdf>

9) Males comprised an estimated 57% of the unauthorized alien population in 2010.

<http://fpc.state.gov/documents/organization/174245.pdf>

10) Russians (who knew?)

<http://www.state.gov/r/pa/ei/bgn/3183.htm>

Quote of the Corner

U.S. Department of State Daily Press Briefing:

"MS. NULAND: Good morning, everybody. Happy Monday. I have nothing at the top, so let's go right to what's on your minds.

QUESTION: Okay. It's actually afternoon now.

MS. NULAND: It's afternoon because I'm late. I apologize.

QUESTION: No, no. It would've been afternoon anyway even if you were on time."

<http://www.state.gov/r/pa/prs/dpb/2011/10/174949.htm>

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