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Consular Processing in the Era of Enforcement

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ILW

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Advanced Consular Processing

General Seminar Overview:

- 1. Expanded attorney vulnerabilities in international practice.
- 2. A New Universe of Risks – "Random" Audits and Federal Document and Benefits Fraud Task Forces
- 3. Consular Posts: Know Your Red Flags and At-Risk Clients. Do Your Due Diligence Like Your Career Depends on It.

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Introduction:

- **In an era of massive corporate and financial fraud, *there are no "safe" clients*. All visa applications now go through a partially-automated, interagency screening process.**
- **Applicants are now scrutinized closely for fraud, criminal backgrounds, and terrorist association. *Company documents and resumes are data-mined*, names are cross-checked, and clients and their attorneys subject to potentially severe penalties for errors, omissions, or false information.**

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SESSION 1. Expanding Attorney Vulnerabilities in International Practice

- **The Loss of Attorney-Client Privilege and Diminished Expectation of Privacy.**
- **Presumption of Fraud for small companies, start-ups, and consulting firms. Anti-fraud programs part of DHS restructuring.**
- **Information Gathering** – USG Monitors Attorney-Client International Communications and Data-mines Visa and USCIS Applications.
- **Data-mining** now Treated as:
- Routine Intelligence Gathering;
- Counter-Terrorism;
- and a Shared Law-enforcement Function with Other Federal Agencies

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Elaborate on the Shared Database between USCIS and USDOS and what Attributes "Articulable Fraud"

- **FDNS-DS -- The Fraud Detection and National Security Data System** (FDNS-DS) is a data base and case management system developed by DHS to track and analyze benefit fraud, criminal activity, public safety and national security concerns. Information developed by USCIS and ICE shared with DOS.
- USCIS Adjudicators' decision to refer a petition to FDNS-DS is based on 21 criteria listed as indications' of "Articulable fraud" on a referral sheet.
- Several of these criteria are common to small companies, start-ups and consulting firms.
- In addition, "100 percent referral" is mandated for petitions "that possess 2 of the 3 10/25/10 criteria." DHS has not yet revealed exactly what that criteria includes.

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"Articulable Fraud" Indicators and Strategy

- **21 "Articulable Fraud" indicators inadvertently disclosed in March 2009 release of USCIS internal fraud referral sheet. Instructions on that document read:**
- **Internal fraud referral sheet redacted in April 2008 DHS IG Report, *Review of the USCIS Benefit Fraud Referral Process,* criticizes "100 percent referral" policy cases as counter-productive misuse of ICE resources needed to catch major frauds.**
- **Anti-Fraud program part of overall DHS effort to reduce USCIS caseload? *Review,* p. 7:"As DHS restructures its process, USCIS has an opportunity to focus more of its efforts on having a measurable effect on the immigration benefit application caseload, whether it is fewer applications, more denials for fraud, or a shift in application patterns."**

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21 Indicators of "Articulable Fraud" in Petitions

- (Petitioner) Gross annual income less that $10 million.
- Company claims less than 25 employees.
- Company established for less than 10 years.
- Contracts for consultants or staffing agency show no end-client (no work description or itinerary).
- Not paying the claimed wage.
- Suspect documents - altered, counterfeit, or boilerplate, etc. (i.e., All employment letters have virtually the same text and signatures with letterheads being the only difference)
- Location on the Labor Condition Application (LCA) ETA 9035 differs from the place of employment.
- H-1B Dependent – Claims not to be dependent but check of CLAIMS mainframe reveals may not be true.
- Attorney listed in "FID" – (Fraud Identification Database)
- Abandonment or withdrawal after Request For Evidence issued.

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Is There Still a Reasonable Expectation of Privacy When Communicating With Overseas Clients?

What are some Specific Changes in FISA Law Impacting International Lawyers

- **Highlights of New FISA Law**:
- **Blanket Authorizations for surveillance of international Communication** where attorney calls and computers may be open to warrantless NSA and other agency surveillance. See, FISA Act Sec. 1801(h) and 1806
- **Exception to "minimization" requirement for "evidence of a crime" –** most information collected by intelligence agencies through domestic surveillance may be retained indefinitely and used for domestic law enforcement matters. (Sec. 1806)

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Highlights of New FISA Law (2):

- **Information obtained without a specific warrant** may also be **disclosed to law enforcement agencies** for use in trials, hearings, and by state and local authorities and courts, if the Attorney General certifies that it was legally collected.
- Furthermore, there is **no requirement to destroy (i.e., minimize) "inadvertently acquired" information between or about U.S. persons** if either the sender or any intended recipient was outside the U.S. **[Sec. 1806]**

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- **What FISA rules are most relevant to U.S. persons, who communicate internationally: please specify:**

- **Exception to "minimization" requirement for "evidence of a crime" –** most information collected by intelligence agencies through either warrantless international or lawful domestic surveillance may be retained indefinitely and used for domestic law enforcement matters. (Sec. 1806)
- Information collected by intelligence agencies through FISA warrants **may be disclosed to law enforcement** for use in criminal proceedings (*United States v. Isa*, 923 F.2d, 1300 (8th Cir.) (1991)
- Surveillance targeted at communications between two U.S. persons inside the U.S. require Title III or FISA warrants, as under old FISA (pre-USA Patriot Act, pre-Protect America Act of 2007). One change in the new law is that targeted surveillance against a U.S. person abroad now also requires a FISA or Title III warrant, regardless of the target's location.
- Electronic communications coming from abroad, or going abroad, are subject to "vacuum cleaner" collection under blanket authorizations. The standard for issuance of such a program authorization is that the "primary purpose" of data collection is the acquisition of "foreign intelligence." No judicial probable cause finding is necessary for blanket programs. Collection sources may now be inside or outside the U.S. – the new FISA law removed that distinction.

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FISA rules that are most relevant to U.S. persons, such as attorneys who communicate internationally (2):

- No specific FISA warrant is required for blanket collection.
- USG agencies have access to all "open source" information – consumer and credit reports, real estate, tax records, telephone billing records, ISP/internet search information -- all commercially available data vendors.
- Exact minimization procedures for US person data remain classified, set by US AG and DNI with FISC sign off. There is a statutory exception to minimization of US person data collected under blanket programs and other warrantless interception when analysis reveals evidence of serious criminal activity or terrorism. See, Sec. 1806.
- All data indicating serious illicit activities may be retained and shared by domestic and foreign intelligence and law enforcement agencies with Memos of Understanding (MOUs) in place.
- Foreign-to-foreign e-mail exchanged between foreigners will no longer require a FISA warrant, even if acquired from a storage facility, router, or switching node located in the United States. Your firm's computer files or records system containing information of this type may be subject to warrantless remote search, data retention/analysis and sharing.

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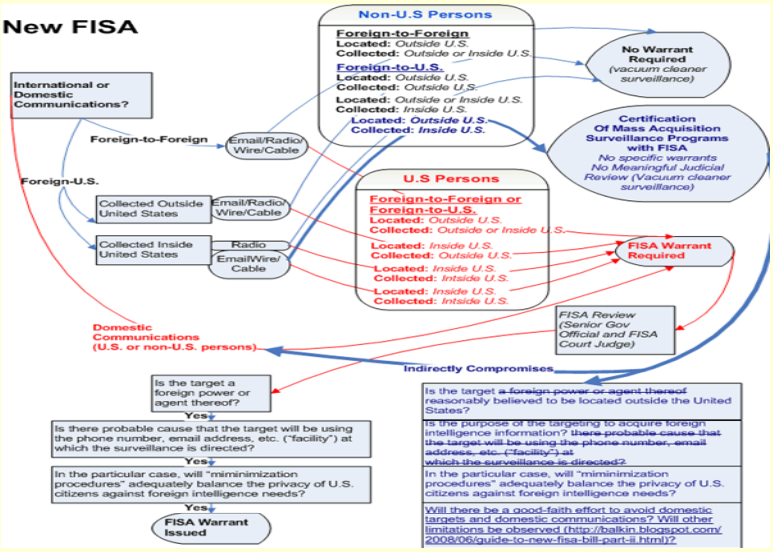

- **Like Old FISA (pre PATRIOT Act and Protect America Act of 2007), information gathered by intelligence programs without a Title III warrant may still be used as evidence in a criminal trial, provided that its origins are disclosed as such. TITLE 50, CHAPTER 36, SUBCHAPTER I , § 1806 is the controlling statute.**

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Implications of Total Information Awareness Data Acquisition and Mining

- **L-1 Visa Reform Act of 2004 prohibited "outsourcing" of L-1B temporary workers.**
- **H-1B worker outsourcing assignments other than short-term now restricted and ICE on-site inspections taking place.**
- **Data related to L-1 and H-1B prohibited activities collected overseas by DOS**
- **Jurisdiction and worksite enforcement over L-1B issues rests with DHS/ICE. However, Federal Document and Benefit Fraud Task Forces (DBFTF) work in concert with a number of agencies, including DOL,Treasury, USPS, DOS.**
- **H-1B worksite enforcement now subject to DHS/ICE and DOL inspections. H-1B worker assignments other than short-term now largely banned. Inspectors may determine whether worksite assignments violate terms of the LCA and I-129 petition.**
- **DOS/DHS/DOL investigators have access to:**
  - **tax records**
  - **variety of public records, such as motor vehicle, and**
  - **open source private sector data aggregation services, such as credit agencies.**
  - **Many transactions that leave electronic records allow investigators to determine work and living locations of individuals in near real-time.**

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Targeting of Attorneys in Terrorism, Money Laundering, and Document & Benefits Fraud **Investigations**

- Lawyers listed in FID database contained in FDNS-DS.
- Immigration Attorneys targeted as accomplices by federal **Document and Benefits Fraud Task Forces (BDFTF),** including DOS. **(**since 2006)
- The DBFTF is now the mechanism by which USCIS and its law enforcement partner, ICE, combine investigative resources with traditional partner agencies, the U.S. Department of State, Bureau of Diplomatic Security (DS) and the U.S Department of Labor, Office of Labor Racketeering and Fraud Investigations (OLRFI)

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The expanded the Visa Waiver Program (VWP) and the Electronic System for Travel Authorization (ESTA)

The new ESTA background check system, what gets checked; derogatory information in DHS and foreign govt data banks may complicate, delay or eliminate visa waiver travel for some.

- **Expansion of Visa Waiver program entails a new background check system that requires advance prior approval before boarding. First-time applicants should apply well in advance.**
- **VWP and B-1/B-2 applications are now both subjected to background checks and reviewed for 9 FAM grounds of inadmissibility.**
- **VWP denial may be based on mere arrest or derogatory information imported from foreign country data bases and local police arrest or encounter records. Factors beyond 9FAM legal inadmissibility may lead to denial.**

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Electronic System for Travel Authorization (ESTA)

- The **new VWP background check** system, **Electronic System for Travel Authorization (ESTA),** is operated by **DHS to pre-screen VWP applicants abroad – ESTA contains criminal and security information gained from foreign governments, perhaps of dubious quality.**
- Questions on ESTA application mirror visa application.
- Anti-globalization and other political activists have been denied Visa Waiver travel and entry at U.S. ports.
- Denial may indicate other security concerns that could lead to a Security Advisory Opinion (SAO) and attendant investigation and delay.
- No appeal of ESTA decision.
- No means to check or challenge basis of denial or records. ESTA records exempt from FOIA/PA.
- **Denied VWP applicants must apply to DOS for visa.**

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Visa Applicants Now Go Through FBI Name Check and Subject to Security Advisory Opinion (SAO)

- DOS now performs fingerprint and name checks on all **visa** applicants, except those falling within a narrow range of exceptions.
- Fingerprints are now required of all **visa** applicants, except those under the age of 14 or over the age of 79 and certain diplomats and officials.
- As of January 2008, DOS began “paying fees to the FBI for checking the fingerprints against the FBI's Integrated Automated Fingerprint Identification System (IAFIS) and for running visa applicant names through **Security Advisory Opinion (SAO)** processes."

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Denial situations

- worldwide by consular officials, ICE/USCIS and Border Protection personnel. Any All visa refusals are placed in the “lookout book” in **the CLASS system** that is accessed previous visa refusal may complicate subsequent entry or application for benefits. **Important to overcome visa denial, if possible**.
- **Record of past ESTA denial may not be so problematic.**

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Grounds of Inadmissibility-

- The **Foreign Affairs Manual (9 FAM)** defines numerous legal issues related to criminal and other **grounds of inadmissibility** that may arise in a visa background check. 9 FAM is also an authoritative citation in Visa Advisory Opinion requests to the State Dept. Visa Office.
- **Review clients closely for 9 FAM grounds.**
- Not all grounds of inadmissibility present serious, lasting problems – differentiate the routine from the permanent – distinguish Category 1 and Category 2 visa denials.

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How would an Atty Deal With Visa Denial(s)

- Many findings of ineligibility based on criminal activity may be overcome by showing that alleged offense does not match 9FAM definitions.
- Legal standards and definitions vary widely between jurisdictions
- Obtain and review original record of conviction – DHS/State Dept records may be inaccurate or misinterpreted. Copy of original record will be required as part of brief or written appeal of visa denial.
- Review and cite 9FAM, and state or foreign case law for rebuttal of alleged convictions, such as Crimes Involving Moral Turpitude (CIMT).
- Consult foreign law expert for any matters of interpretation of non-US offenses.
- **Category 1 (permanent bar to admission) and Category 2 (temporary ground for visa refusal/inadmissibility) require different approaches.**

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Category 1 and Category 2 Visa Denials

Category 1 (permanent bar to admission) and Category 2 (temporary ground for visa refusal/inadmissibility) require different approaches.

- **Category 1 grounds include:**
  - **Criminal: Aggravated felony, CIMT, 2 serious crimes, traffickers**
  - **Fraud**
  - **Terrorism, Espionage, Genocide, Totalitarian Party, Foreign Policy**
  - **Some medical/communicable diseases/substance abusers**
  - **Foreign Medical Grads**
- **Category 2 grounds include:**
  - **Intending Immigrant (Sec. 214(b))**
  - **Some past Immigration violations (222(g))**
  - **Inadequate documentation (Sec. 221(g)) – may also be Cat. 1**

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Grounds of Inadmissibility (cont.) what is a Sec. 214(b)

- ***INA Section 214(b) Inadmissibility*** - The most common reason for a denial of a non-immigrant visa is failure to overcome the "**intending immigrant presumption" (IIP)**. This is a **Cat. 2 denial** that may be overcome by a showing of additional equities and strong ties to the home country.
- 214(b) refusal may be based on profiling of overstays by similar applicants.
- 214(b) solution: reapply with substantive new evidence to address implicit profiling, or apply in alternative visa category where IIP not applicable. Identifying and dealing with profiling issues addressed in Chapters 8 and 9 (specific posts).

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Sec. 221(g) Visa Denials

- ***INA Section 221(g)*** is a catch-all basis for denial, involving **insufficient evidence of eligibility**.
- Often used when consuls have mere suspicion of other grounds of inadmissibility, either profile-based or individualized. Determine whether profile may apply, and address issues involved.
- 221(g) m**ay be Cat. 1 or Cat 2**.
- In 221(g) refusals Consul will ordinarily issue a notice stating the types of additional evidence required along with instructions.
- Most problematic – a 221(g) refusal that fails to state the factual basis for denial, or the consular officer does not suggest substantive steps the applicant can take to obtain the visa, and it is communicated that there is no legal basis for a waiver of the ground(s) for denial.
- Such a refusal would be a **Category 1 denial**, one which indicates that the U.S. State Department has concluded that the applicant is permanently inadmissible. Likely serious criminal or security issue or ongoing investigation.
- Furthermore, refusal to specify a specific factual basis for denial indicates that those grounds are related to national security concerns. [See, 9 FAM 41,121 Note 1.2-5]

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Sec. 222(g) Visa Voidance

- Section 222(g) provides that an alien who was admitted on a nonimmigrant visa and who remains in the United States beyond the authorized period of stay becomes subject to 222(g).
- When the alien is found subject to section 222(g), his or her nonimmigrant visa is automatically void at the conclusion of the authorized stay.
- Remaining beyond the authorized period of stay also accrues unlawful presence towards the **three and ten year bars under Section 212(a)(9)(B) of the INA.**
- USCIS/ICE and DOS consider as a period of stay *authorized* by the Attorney General the entire period during which a timely filed and **non-frivolous extension or change of status application** has been pending with the Service, provided the alien has **not engaged in any unauthorized employment**. This authorized period of stay will continue until the date USCIS issues a decision approving or denying the application.

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Effects of 222(g) Visa Voidance Determination and 3/10 year "Unlawful Presence" Inadmissibility

- 222(g) determination may be made by either USCIS/ICE or DOS. Stay beyond date certain on I-94 may be made by DOS, while D/S overstay determination must have been made by IJ or USCIS/ICE prior to departure.
- 3/10 year period of 212(a)(9)(B) inadmissibility determination must be made by IJ or USCIS/ICE. Additional 120-day "tolling period" before 3/10 bar comes into effect for persons who made non-frivolous application for COS/EOS and had no unauthorized work.
- Range of 222(g) scenarios described at 9 FAM 40.68 EXHIBIT I. Guidance at R 071654Z JUN 99, Sec State, copies to US consuls, INS, NSA
- Non-immigrant visas must be thereafter applied for in his/her country of nationality, unless the alien qualifies for a 222(g) "Extraordinary Circumstances" exemption. Foreign Officials automatically benefit from exemption, as do asylum applicants who applied while in status, along with TPS beneficiaries.
- Extraordinary Circumstance recommendations made by Consul and forwarded to State Department Advisory Opinion Branch for Approval.
- Grant of VD does not impact 222(g), but "unlawful presence" for 3/10 year 212(a)(9)(B) does not accrue during period of VD.
- 9B may also applies to EWI, and VWP or parole overstays, as well as NIV cases.

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Extent of 222(g) Inquiry by Consul

- Original DOS Guidance (1999) states:
- ". . . CONOFFS SHOULD NOT ROUTINELY UNDERTAKE IN-DEPTH QUESTIONING OF VISA APPLICANTS CONCERNING POSSIBLE APPLICABILITY OF 222(G) UNLESS, IN THE NORMAL COURSE OF PROCESSING A PARTICULAR VISA APPLICATION, THE POSSIBILITY OF A PREVIOUS OVERSTAY BECOMES APPARENT THROUGH OTHERWISE ROUTINELY AVAILABLE INFORMATION (E.G., INSPECTION OF THE PASSPORT, ANSWER TO QUESTIONS ON OF-156, ETC.)."
- However, Consuls now routinely run all visa applicants through FBI check and DHS records. A previous overstay, particularly if in recent years, is likely to show up. Misrepresentation may lead to permanent bar.

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Security Advisory Opinion (SAO)

- The Visa Security Program issues **Security Advisory Opinions (SAOs)** for visa applicants who are red-flagged, usually because of nationality or a profile match.
- Certain categories of applications are automatically considered to present a security risk. Some nationalities, occupations, and areas of study automatically set off an investigative process that can lead to denials, delays or severe limits on visa issuance.
- These special category cases result in the consulate cabling the State Department Consular Bureau Visa Security Program Office in Washington, DC to request clearances such as **Visas Condor, Visas Donkey, and Visas Mantis checks.**

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Dealing with SAOs

- **Several Types of SAO are routine**, include the **Visas Donkey** cable for foreign technology workers and scholars
- If routine SAO, Consul will normally specify all required steps, additional requested documents, processing times and potential issues.
- Several agencies may be involved in formulating an SAO, and DOS does not have the power to override negative findings by other agencies.
- **SAO inquiry procedures** – attorneys may access the Visa Office through LEGALNET.gov if the SAO process is delayed or the attorney needs to communicate with the State Department about the case.
- SAO Inquiry form is attached to this session handout

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Routine SAO Triggers

- Visa background checks have produced notorious delays for many applicants seeking to enter the U.S. to carry out **studies or research in militarily-sensitive fields**, and these checks may also impact persons who were born or spent **time in countries listed as terrorist-sponsoring or sending states**.
- 9FAM reciprocity table addendum will indicate if an SAO is categorically required for nationals of any particular country.
- Even routine visa applications are subject to delays if they trigger a "hit" in the Department of State's name-check system.
- Most "**false hits**" are triggered by a name shared or similar to that of someone already flagged as a security risk in the Department of State's name check system.
- Differing spellings or iterations of same name will also trigger hit. Use care to maintain consistency – documents should reflect name as listed in passport.
- SAOs, "security investigations, increasingly required with NIV renewals.
- Security investigations have delayed USCIS approvals for years. Filing fees, such as $1000 premium processing fee may not be refunded while SAO pending.
- Mandamus suits have resulted in issuance of NOID in same case.

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SAO -Trigger Further Investigation?

- SAO subjects undergo an **FBI name check** – an intensive background check -- and potential further investigation through other national security agencies, including analysis of communications intercepts.
- A non-routine SAO may trigger an investigation of social relationships and associations, including the petitioning employer, attorney, and other third-parties.

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Non-routine SAO or Unexpected Visa Denials)

- Any non-routine SAO or unexpected delay or denial of visa issuance should trigger a case risk assessment by the attorney.
- Due Diligence – client background checks and careful attorney procedures - can avoid adverse, non-routine SAOs and mitigate potential risks associated with clients.

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Requesting an Visa Advisory Opinion (VAO)

- The Advisory Opinion Branch will entertain appeals and status request inquiries in cases of visa denials and delayed or adverse Security Advisory Opinions (SAOs).
- About one-third of the inquiries received deal with SAOs.
- A request for a Visa Advisory Opinion from the Visa Office is the sole form of administrative appeal once the consul has issued a final visa denial after a request for reconsideration or resubmission.
- A VAO may only be sought in cases of manifest error or legal misinterpretation in visa denials. The Visa Office generally will not entertain VAO requests based on contested findings of fact.

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VAO Appeal Legal Authorities

- Legal authorities considered authoritative are federal statute, agency regulations (particularly 20, 9 and relevant 8CFR). Also, cite US federal decisions, BIA/Commissioner/AAO precedent decisions. There is no published body of VAO precedent decisions, but reference to available past decisions may be persuasive.
- Well-founded public interest/policy arguments may be decisive. May be accompanied by approach to Department by interested governmental agencies, Congressional offices, collateral appeal to other DOS offices.
- Frivolous VAO appeals are not rewarded. VAO staff attorneys who actually write opinions are few in number, but they are the primary holders of institutional memory at the visa office, Foggy Bottom.

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Waivers of Inadmissibility

- Fraud and some other Category 1 denials may be overcome by specific waivers.
- Finally, practically any and all grounds of inadmissibility may be waived upon a showing of compelling public interest or outstanding equities. The 212(d)(3) non-immigrant waiver is available whenever there is a compelling public interest to admit someone. Special waivers are available to interested law enforcement and intelligence agencies.
- A substantial percentage of visa denials are eventually overcome where resources are committed to obtaining waivers.

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Advanced
Session 1 Discussion

- Discussion of select consular posts
- Hot topics update