



**Consular Corner**  
**September 2010**  
by: Liam Schwartz\*

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**Shoe Diplomacy**

An entry-level foreign service officer takes stock towards the end of her second tour. Don't know how many shoes she has, but this conoff's inventory of personal values is inspiring! (Reprinted and slightly edited with permission.)

"Ok. I have a downfall (vice) in life and that is shoes. I'm putting this out here right now because the end result of the REST of this blog is that last week I went and bought two pairs of really nice shoes.

The context is this.... as in everyone's life and career, sometimes circumstances come together that makes one think and rethink about the choices one has made and what one is doing at that moment. I was having one of those times.

Here I am, in the Foreign Service, bidding and thus planning to move once again away from "home and family". I'm single (no secret there). Dating for me often goes in waves - this summer has included a decent amount of 'opportunities' per se but nothing that sparked any real feeling in me until a few weeks ago.

That event (not to be blogged) was a catalyst which welled up feelings and emotions that I normally keep pushed down. I do love my life and I love my job - but I'm also very human and wish for companionship as much as anyone. I am most assuredly NOT 'married to my job.'

I am not lonely in the sense that I don't have friends to spend time with. In fact, my social calendar has been incredibly busy lately. I am not lonely in the sense that I lack family or friends I can talk to. Loneliness as I define it here is the 'lack of companionship at 11pm when you're having a nuanced thought about bidding and you just need to share it with someone who really cares and has a vested interest in the process.'

So I'm working my way through all of this when I had a meeting with [insert Foreign Service individual here] and was asked about my bidding goals.

I shared my preferences. Now - what I got out of this person's response I readily admit is the FILTERED version of how I interpreted it - not necessarily how it was meant.

What I got out of this conversation was: 'You are way off base in your bidding, you're putting yourself behind in any promotion schedule, you should be doing a tour in Wash DC so you meet the people who can get you promoted, oh you foolish girl you! Oh, and by the way, since you seem to love the Middle East, you will probably be single forever.'

Here's where I'm at today:

*1.) I still love my job, what I do, and want to continue in it. I believe I do a good job and can really contribute to the State Department.*

*2.) If I wasn't in State that certainly doesn't mean that any relationship would actually work out.*

*3.) ..and I'm a restless soul - I would likely be unhappy at the fantasy desk job in one place living out my life in one city.*

*4.) I still have dreams, resurfacing now, of doing international humanitarian work in times of disaster. I should not lose sight of those.*

*5.) I want, more than anything, to be able to say [in the end of my days] that I have done 'good' and made a difference in people's lives.*

*6.) I would rather be single and being doing something worthwhile than married and with out purpose. (Not that they are mutually exclusive.)*

*7.) I am NOT on the Ambassador or Bust promotion plan - but have other life goals (see above) and thus, my bidding strategy still reflects my long term personal goals.*

*8.) If my promotions are delayed because of this it is OK.*

*9.) Isaiah 6.8 is still my "key verse" and it is what I reflect on.*

This is probably not the last time [in my career] that I'm going to have a moment or a couple of weeks of deflation and reflection. It *\*is\** good to reflect and not blindly go forward with out THINKING but merely sheep-following someone else's lead.

All of this stuff has been churning in my mind the past couple of weeks and so I've spent some time in serious self reflection. And bought shoes."

<http://sassandsweet.blogspot.com/>

(Note: The text of Isaiah 6.8 is set forth below as the "Quote of the Corner.")

### **Consular Court**

This month we focus on a single case in which the named defendants include (*inter alia*) the National Visa Center (NVC) and the U.S. Embassy in New Delhi, India. This case involves a slow-moving F-4 immigrant visa applicant application, and offers perspective on current NVC notification practices and DOS policy on communicating with attorneys.

### **Was This Visa Notice Reasonable?**

The year is 1991 and Dharam, a U.S. citizen, files an I-130 petition on behalf of his brother Sukhwinder, a citizen of India. The petition is filed with the assistance of Attorney Gordon Quan. (Although this was not part of the court record, we can attest that Gordon is one of the finest attorneys in the business.)

Fast forward nine years; it's now September 2000, Sukhwinder's priority date has been reached and the NVC needs to send him the initial instructional packet. Recall the provisions of INA 203(g) in this regard:

"The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to the alien of the availability of such visa."

The NVC sends the packet to Gordon's office address listed on the 1991 I-130 petition. Likewise, in 2001, 2002 and 2003, Embassy New Delhi sends follow-up notices to Gordon's 1991 address.

Both the NVC and the Embassy acted in the belief that sending the materials to the last known address of the attorney of record had the greatest likelihood of satisfying the 203(g) requirement of notification to the alien of the availability of the visa. The actions by the NVC and the Embassy were eminently reasonable, and show a degree of client care which could have been the basis for an agency "best practice."

Regrettably, Gordon, the attorney of record, did not receive any of the NVC or Embassy correspondence.

In 2004, DOS terminated Sukhwinder's visa registration for failing to apply for an immigrant visa within one year of notification. Several years later, Sukhwinder learns of these events and files for reinstatement under the Administrative Procedure Act.

What do you think – wasn't this visa notice more than reasonable? (See actual court outcome, together with a special epilogue on attorney communications, later in this column.)

### **Respect for Africa**

Someone asking "how are we doing?" in achieving [our goals in Africa](#) – and in meeting [China's aggressive push](#) across the continent – might be best advised to start with [this June 2010 report](#) on the consular section at Embassy Maseru:

"The 10-foot by 15-foot consular work space, directly off the chancery's main waiting area, is cramped and claustrophobic; the section presents a poor image of the United States. A single consular service window opens into the waiting room, so that the vice consul and LE staff member cannot 'work the window' at the same time. The window is adjacent to the chancery hard-line door, making it difficult to enter other offices while interviews are taking place. The lack of privacy and attendant noise levels inhibit applicant interviews. A computer terminal for consular client use will be installed in the waiting room. Persons in wheelchairs may enter the waiting area—after they negotiate the embassy main entrance and about 200 feet of internal sidewalk. The waiting area lacks toilets. Consular employees share the constricted, poorly ventilated office with their equipment and supplies. While the small space makes supervisory line-of-sight for controlled materials easy, the vice consul must conduct sensitive personal interviews in the general waiting area or borrow someone's office. Overall tight chancery space does not offer obvious opportunities to fix the consular space situation."

This report reminds us of [Madam le Consul's remarks](#):

"A consular officer might be the first American that a visa applicant meets. The experience of making and attending an interview appointment can be momentous; people dress up for that. They fret and worry. And then - without consciously meaning to - they sometimes can't help but judge the entire US by their treatment at the US embassy, just as we might do if the situation were reversed."

One of the keys to promoting our policy messages in Africa lies with the inherent values we evince as Americans. Accordingly, the context in which we place our values on display can impact whether hearts and minds will be won with these policy messages. If, in the U.S. consular section of one of Africa's smallest countries, visa applicants are made to feel claustrophobic and cramped, and are compelled to conduct sensitive personal interviews without privacy, can we really achieve lasting respect for American values across the larger continent?

We'd be willing to bet that Chinese consulates throughout Africa have toilets in the public waiting areas.

### **Enjoy the Moment**

Recent guidance has urged consular officers to routinely accept the "expertise" of DHS adjudicators in interpreting "complex" H-1B and other visa regulations. <http://www.state.gov/documents/organization/87226.pdf>

The anxiety which some officers experience when called upon to adjudicate visa applications based on less-than-sparkling I-129 petition approvals is nothing new. [The following account](#) by a consular officer at Embassy Paris dates back over fifty years and shows that sometimes the best thing to do is to simply "enjoy the moment."

"On Thanksgiving morning 1959, the embassy was closed for the holiday, but I found myself alone in the annex surrounded by a dozen or so excited, happy, and very attractive young women. These were the 'Lido Girls,' the main attraction of Paris's most expensive nightclub. I had been designated the Visa Section's duty officer for the holiday, expected to deal with emergencies. I suppose this qualified as an emergency; the cable authorizing work visas for the girls had arrived the night before, and they and their manager had airline tickets for Nevada the following morning. They were under contract to perform at one of the new casinos in Las Vegas.

At the Lido Club the nature of their act was to remove as much clothing as the law allowed (French law was quite generous on this point) and to sway about the dance floor displaying their anatomies to the customers – always tastefully, of course. How this satisfied the requirement that they possessed skills not available in the United States was not entirely clear to me. I concluded that it was not mine to question, but rather to enjoy, the moment. Therefore, I had opened the annex and retrieved my consular seal from the vault after calling the manager to have the girls appear with their passports at 10.

Much as I might have wanted to prolong the morning, my task was easy. We had already completed the name checks and other administrative requirements for issuance. All I had to do was assure myself that the woman before me was the same as the woman described in her passport. My work completed, I stood at the door and watched them as, blowing kisses and waving, they boarded the bus that brought them. Despite their line of work they seemed to be wholesome girls. I hoped they were ready for Las Vegas."

### **Consular Court - Decision**

#### **Was This Visa Notice Reasonable?**

This case, [Sukhwinder Singh v. Clinton](#), was heard by the U.S. Court of Appeals for the Ninth Circuit.

The Court ruled that the language of 203(g) unambiguously requires that the State Department send notice "to the alien." The court dismissed the Department's claim that it had acted reasonably with this pronouncement:

"Although reasonableness may color our interpretation of a law, it is not the sole inquiry before us." In the absence of ambiguity, the Department's position – that it had the discretion to send the notification through any channel reasonably calculated to reach the I-130 beneficiary – was "contrary to law."

The Court concluded by ruling that "an I-130 beneficiary cannot be faulted for failing to receive notice that never reached a former attorney." Accordingly, any notice sent by the State Department to Gordon concerning Sukhwinder's visa eligibility cannot serve as the basis for termination of registration under 203(g). The government's decision to terminate Sukhwinder's visa registration would be set aside.

### ***Epilogue: DOS Practice Following *Sukhwinder Singh v. Clinton****

#### Agent for Receipt of Notices:

Following initiation of this lawsuit, the State Department revised its regulations and now requires I-130 beneficiaries to designate an agent for receipt of notice and application materials or to affirmatively decline to utilize an agent. See Form DS-3032, [here](#) and the related Procedural Note at 9 FAM 42.63 PN3.1 (<http://www.state.gov/documents/organization/87882.pdf>). Moreover, the provision that was formerly at 9 FAM 42.63 PN 4.1(b) ("When a case has legal representation in the United States, NVC will send the Packet to the lawyer") has been deleted.

#### Attorney Communications:

While the road to a very hot place is paved with good intentions, the *Singh* case may have created a chill in DOS communications with attorneys.

Consider this: The NVC and the Embassy acted in total good faith and in a manner aimed at maximizing the chances that the visa applicant would actually receive the visa notices. The "reward" for these actions was a rebuke from a Federal Appeals Court, which scolded DOS as follows: "This case illustrates the substantial and unnecessary risk that notice sent to the attorney who prepared the I-130 will not reach the beneficiary."

After this kind of reprimand, what would you do?

Let's have a look at how DOS has now modified its guidance on attorney communications at 9 FAM 40.4 N12):

1. Correspondence received from an attorney of record **may** (not "must") be treated with "the same courtesy as provided to the visa applicant."
2. Consular officers **may** (not "must") correspond directly with an attorney of record.

3. Consular officers **must** notify an attorney of record of the action taken at the final immigrant visa appointment.

<http://www.state.gov/documents/organization/86926.pdf>

Bottom line for attorneys: It's frustrating when some consular posts seemingly ignore a filed G-28 and communicate directly with a client – but regrettably, it's also a bit understandable.

### **TAL is A Blessing**

Like the rest of us, the drafters of 9 FAM are not immune from the perils of the computerized spell check. A spell check can be a grate, it plane lee marks four yore revue miss steaks you can knot sea.\* One of the downsides to a spell check is when a computer application program inadvertently alters a carefully composed explanation of a technology-security program:

#### **"TECHNOLOGY ALERT LIST**

##### **Background**

In response to concern over the illegal transfer of controlled technology, a process evolved during the Cold War to screen suspect visa cases. In January 1998, the VISAS MANTIS program was developed due to law enforcement/ intelligence community concern that U.S.-produced goods and information are vulnerable to theft on a worldwide basis.

The primary program security objections are:

- (1) To prevent the proliferation of weapons of mass destruction and missile delivery systems;
- (2) To restrain the development of destabilizing conventional military capabilities in certain regions of the world;
- (3) To prevent the transfer of arms and sensitive dual-use items to terrorists and states that sponsor terrorism; and
- (4) To maintain U.S. advantages in certain militarily critical technologies.”

<http://www.state.gov/documents/organization/86964.pdf>

(\*with thanks to Paul Hensel: <http://www.paulhensel.org/teachspell.html>)

### **Consular Menagerie**

In his first week of foreign service training, A. Juan Hundread has made a horrible mish-mash of things. When asked to match the animal name with the appropriate type of consular request it connotes, A.J. offered up the following:

Condor	A method of submitting to Washington derogatory terrorism-related information concerning one or more individuals.
Donkey	Screens individuals who seek to access or export controlled equipment, technology, or information.
Mantis	A counter-terrorism screening designed to ensure that nationals of certain countries of concern meeting certain criteria are subject to a security review.
Bear	A request for an additional allocation of immigrant visa numbers.
Frog	A message returning unused immigrant visa number allocations.
Viper	Requested when there is a security-related "hit" on the visa applicant's name in the CLASS system.
Giraffe	Requested when there is a security-related "hit" for an applicant seeking to embark on official travel.

Take pity on poor A.J. and correctly rearrange his responses to the consular menagerie (answers appear later in the column).

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

Substantive updates to 9 FAM (Visas) of the Foreign Affairs Manual (FAM) this month include procedural guidance regarding the new electronic immigrant visa application form; a revision to the definition of “purely political” offenses; and a gentle reminder to consular officers concerning the Technology Alert List. A summary of these updates and other recent changes to 9 FAM is offered below.

#### **[CLOK Requests](#)** (9 FAM Appendix E, 300)

A "CLOK" is a request to enter, update, or delete a lookout in the Consular Lookout and Support System ("CLASS"). The general criteria by which consular posts send CLOK requests to the Department are set forth in 9 FAM Appendix D, 200. An example of the use of a CLOK cable is given at 9 FAM 40.6 N3.3:

"If you refuse an application based on a definitive DHS/USCIS lookout entry and DHS/USCIS subsequently determines that the finding was erroneous and deletes its entry, then you may process the case to conclusion and should send in a Visas CLOK cable requesting deletion of any post-originated CLASS entry which may have been made as a result of the DHS/USCIS entry."

In an apparent effort to minimize “false positive” hits, the Department now strongly discourages consular officers from requesting the addition of CLASS entries with incomplete identifying information. In addition, the FAM now states that CLOK requests should not be sent to correct data-entry errors; instead, a new entry should be created, and then the old entry should be marked for deletion.

### [Form DS-260](#)

Procedural updates have been made to immigrant-visa related provisions of 9 FAM in order to pave the way for the eventual implementation of the DS-260 web-based immigrant visa application. These updates are meant to address technical issues such as the manner in which consular posts should [assemble immigrant visa application materials](#) in cases where the applicant has submitted Form DS-260.

The updates also address the taking of the [oath and signature](#) from an immigrant visa applicant who has submitted the electronic DS-260:

"The application shall be subscribed to or affirmed and biometrically signed by or on behalf of the applicant before a consular officer. You must have the applicant recite the following contemporaneously with the biometric signature: 'By submitting my fingerprint, I, (name) certify under penalty of perjury both that I have read and understood the questions in my immigrant visa application and that all statements that appear in my immigrant 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 all statements that I have made in this interview are true and complete to the best of my knowledge and belief.'"

Additionally, the DS-260 Updates update the provisions relating to the [Diversity Visa Lottery](#):

"You must deny the applications of registrants who list on their Form DS-230, Application for Immigrant Visa and Alien Registration, or their Form DS-260, Online Application for Immigrant Visa and Alien Registration, a spouse or child who was not included in their initial entry, unless such spouse or child was acquired subsequent to submission of qualifying DV entry."

### [Official Visas](#) (9 FAM 41.27 N1)

Until now, the FAM has provided the following guidance with regard to official visas:

"Consular officers shall issue a diplomatic visa rather than an official visa."

The phrasing of this instruction was woefully unclear. Without any kind of context, it was impossible to know what this sentence was supposed to mean. Were officers to refrain from issuing official visas altogether? If an applicant qualifies for an official visa (but not a diplomatic visa), was the officer to read 9 FAM 41.27 N1 as instructing him or her to give the applicant a free upgrade?

A new FAM update clarifies this instruction as follows:

"Consular officers should issue a diplomatic visa rather than an official visa when possible."

The main innovation of the new language is the clarifying remark "where possible." So, now officers know that if an applicant qualifies for an official visa **and/or** a diplomatic visa, they should default to the higher grade.

The change from "shall" to "should" is perhaps a tip of the hat to the general principle that decision-making about visas is supposed to happen at posts, not in Washington (*cf.* consular non-reviewability).

#### [Organized Crime Affiliations](#) (9 FAM 40.31 PN1)

Perhaps motivated by the deteriorating security situation in Mexico that has been fueled by the warfare between rival drug cartels, the manner in which consular officers process information relating to a foreign national's organized crime affiliations has been modified. Officers are now instructed to always report a subject's crime group affiliation and his or her position therein since "this information is particularly valuable for identification, adjudication, and threat assessment purposes."

#### [Political Offenses](#) (9 FAM 40.22 N1.4)

In September 2006, DOS inserted a definition for the term "political offenses" in 9 FAM 40.22 N1.4, which relates to inadmissibility under INA 212(a)(2)(B). This definition provided as follows: "Political offenses are generally considered to be acts taken with others as a part of war, insurrection or rebellion in an attempt to replace the legal authority."

Exactly four years later, the Department has removed this definition from N1.4.

Removal of this definition is welcome: The 2006 text "generally" defining political offenses seems to imply that "freedom fighters"/terrorists (take your pick) would not be excludable on this ground of ineligibility. This certainly didn't jibe with the definition of "political offenses" for the purposes of an INA [212\(a\)\(2\)\(A\)\(i\)\(I\)](#) ineligibility; furthermore, it definitely ran afoul of the FAM's definitions of terrorism at [9 FAM 40.32 N2.1](#):

- (2) The seizing or detaining, and the threat to kill, injure, or continue to detain any person in order to compel a third party to act or to refrain from acting as a condition for releasing the detained individual
- (3) A violent attack upon an internationally protected person (as defined in 18 U.S.C. 1116(b)(4)) or upon his or her liberty
- (4) An assassination

[Technology Alert List](#) (9 FAM 30.31 Exhibit I)

It stands to reason that a consular officer should communicate to Washington what specifically motivated him or her to send a Visas Mantis SAO, but it's also quite likely that officers would be too busy to do so from time to time. This month's FAM updates show that a timely reminder is never out of place: "You must include the reason for the Mantis submission in the SAO request."

[Visa Referrals](#) (9 FAM Appendix K, 202)

New language clarifies that while the NIV section is to follow its normal issuance or refusal procedures in a case involving a visa referral, the consular chief must provide the referring officer with "feedback" in case the application is refused.

**Answers to Consular Menagerie**

Condor	A counter-terrorism screening designed to ensure that nationals of certain countries of concern meeting certain criteria are subject to a security review.
Donkey	Requested when there is a security-related "hit" on the visa applicant's name in the CLASS system.
Mantis	Screens individuals who seek to access or export controlled equipment, technology, or information.
Bear	Similar to a Donkey, but for official travel.
Frog	A request for an additional allocation of immigrant visa numbers.
Viper	A method of submitting to Washington derogatory terrorism-related information concerning one or more individuals.
Giraffe	A message returning unused immigrant visa number allocations.

**Are You Smarter Than A Consular Officer?**

- 1) As a general rule, may a consular officer issue a diplomatic visa to a diplomat of a country not having diplomatic relations with the United States?
- 2) True or false: American citizens who take an oath of allegiance to a foreign country automatically lose their U.S. citizenship.

3) Of the following, which country has the most American citizens residing there?

- (a) Australia
- (b) Germany
- (c) Ireland
- (d) Israel
- (e) United Kingdom

4) 9 FAM specifically prohibits consular officers from "grooming." What does this prohibition relate to?

- (a) Entering into a romantic relationship with a married foreign service national.
- (b) Requiring immigrant visa applicants to undergo unauthorized genetic testing.
- (c) The compiling of documents in a certain manner.

5) To whom does the Assistant Secretary for Consular Affairs directly report?

- (a) The Secretary of State
- (b) The Under Secretary for Management Affairs
- (c) The Counselor of the Department

6) Four nations are currently on the Department's list of state sponsors of terrorism; which of the four has been on this list the longest?

7) True or false: An American citizen in possession of a valid U.S. passport may be issued an additional, second U.S. passport if she will be traveling to a foreign country which will deny her entry because the first passport contains visas to certain other countries.

8) True or false: A-1 foreign government officials are exempt from the provisions of the Immigration and Nationality Act relating to aliens ineligible to receive visas.

9) A K-3 visa applicant is ineligible to receive a visa because of a 212(a) inadmissibility; which waiver process will he be required to go through, NIV or IV?

10) True or false: An applicant applying for an extension of her Blanket L visa is required to again pay the \$500 fraud prevention and detection fee.

### **Top Ten Visa Wait Times at U.S. Consular Posts, September 2010\***

Nine of the consular posts with the longest reported visa wait times are from the Americas region. Indeed, wait times in the Americas rose so dramatically that Lagos, which was #3 last month, fell to #7 this month – despite a two-day increase in its wait times.

This uptick in wait times in countries like Brazil and Argentina may be due to seasonal fluctuations in demand – both countries have their summer vacation

during our winter. In addition, there may be a rush on U.S. visas in Brazil, as travelers there seek to take advantage of the [new 10-year visas](#) that were reciprocally agreed to in May 2010.

#	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	-2 days	2
3	Mexico	Guadalajara	96 days	+ 33 days	4
4	Brazil	Sao Paulo	91 days	+ 40 days	10
5	Brazil	Brasilia	90 days	+ 40 days	New Listing
6	Brazil	Rio de Janeiro	87 days	+ 30 days	6
7	Nigeria	Lagos	70 days	+ 2 days	3
8	Argentina	Buenos Aires	60 days	+ 15 days	New Listing
9	Brazil	Recife	58 days	+ 46 days	New Listing
10	Colombia	Bogota	52 days	- 1 days	8 (tie)

\*\* Updated to September 14, 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:**

<b>The Americas (excluding Cuba)</b>	Venezuela/Caracas	(170 days)
<b>Africa</b>	Nigeria/Lagos	(70 days)
<b>East Asia and Pacific</b>	China/ Shanghai	(49 days)
<b>Middle East and North Africa</b>	Israel/Jerusalem	(35 days)

**Europe and Eurasia**  
**Central and South Asia**

Russia/Moscow  
India/Mumbai

(21 days)  
(21 days)

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

1. No. 9 FAM 41.26 N3
2. False. 7 FAM 083
3. (d) [https://www.overseasvotefoundation.org/files/OVF\\_NL\\_July-Aug2010.pdf](https://www.overseasvotefoundation.org/files/OVF_NL_July-Aug2010.pdf)
4. (c) 9 FAM 42.73 PN4.5
5. (b) <http://www.state.gov/documents/organization/99588.pdf>
6. Syria (since 1979) <http://www.state.gov/s/ct/c14151.htm>
7. True. 7 FAM 1300 Appendix R
8. True. 9 FAM 41.21 N1.1
9. IV. 9 FAM 41.81 N9.3
10. True. INA 214(c)(12)(B).

**Quote of the Corner (Per "Shoe Diplomacy," Above)**

"Then I heard the voice of the Lord saying, 'Whom shall I send, and who will go for us? And I said, 'Here am I; send me!'" Isaiah 6.8

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