

Consular Corner
April 2012
by: Liam Schwartz*



Embassy Bucharest and the RDC – As Good as it Gets

The Rome District Chapter (RDC) of the American Immigration Lawyers Association (AILA) held a conference in Bucharest earlier this month at which Foreign Service Officers and immigration attorneys came together to share information, exchange viewpoints and deepen their appreciation for one another's roles in the visa application process.

Many thought this conference was one of the best immigration law events ever held.

The enormous success of the conference came, in large part, thanks to the United States Embassy in Bucharest:

Ambassador Mark H. Gitenstein and wife **Libby** warmly welcomed the visiting attorneys to their home, captivating them with stories of the Gitenstein family's historic roots in BotoSani, Romania and eventual immigration to the United States in the late 19th century.

Deputy Chief of Mission Duane C. Butcher labored behind the scenes to ensure that the AILA visit to the new embassy facility and the Ambassador's residence went off without a hitch.

Consul General Stephen Vann hosted the embassy tour and spoke on the opening panel of the conference about issues such as the nonimmigrant visa application process, the differences between his current posting and his last (Mexico City Visa Section Chief), and best practices for attorney communications with consular posts.

Deputy Consul General Tyler Mason, who joined the Foreign Service the week before the terrorist attacks of September 11, 2001 spoke of the significant technological improvements which have been made to the visa system in the past decade. ("I can no longer imagine doing this job without being able to run real-time checks at the interview window.")

Nonimmigrant Visa Chief Robert Gatehouse patiently explained why consular officers frequently have no need for supporting documentation from visa applicants, and described the "luxury" of a small post like Bucharest to undertake pre-screening of certain applicants prior to their visa interviews.

Vice Consul (and FPU Manager) Martin Lahm spoke about the ethics of consular practice on a panel organized by the RDC Ethics Committee. After the

panel, Mr. Lahm, a former corporate attorney and business executive, gave an engaging synopsis of life on the visa line at Embassy New Delhi, his previous posting.

The **locally employed embassy staff members** were the epitome of Romanian warmth and hospitality. The visitors readily agreed with Deputy CG Mason, who described his local staff as "fantastic" and "invaluable."

In addition, the event was made successful by DOS and USCIS officials who flew in to Bucharest for the conference:

Eric Alexander, Consul General at U.S. Embassy Sofia, spoke about looking for the "bright light" behind the eyes of E-2 visa applicants. According to CG Alexander, the approach of the consular officer in interviewing an E-2 visa applicant should be somewhat similar to that of a bank loan officer: "Ask yourself, would I give this person a loan?" Mr. Alexander also engaged AILA members in some blue-sky analysis about the future of the E-2 visa application process on the continent, as companies focus more on a European Union corporate identity. In addition, he contributed to the panel program on international adoptions, lending his considerable knowledge of the topic from a previous posting in Vietnam.

Pamela Hutchings, Director of the USCIS Field Office at the United States Embassy in Vienna, Austria clarified the role of a USCIS overseas office, described the immigrant visa waiver process and depicted the manner in which USCIS Vienna assists with Iranian refugee processing. Ms. Hutchings also proudly related her experiences in giving the oath of citizenship at special naturalization ceremonies arranged for foreign-born members of our armed forces on active duty in Afghanistan and elsewhere.

The success of the event was also down to the RDC itself, including:

Conference Chair **Cory Caouette**, who in his previous life as a professional tennis player had fallen in love with Romania. Cory initiated the idea for this first-ever AILA event in Eastern Europe, and worked night and day over nine months to see the idea come to fruition.

Former Bucharest Consul General – and now incoming RDC chair - **Stephen Pattison** liaised with his former colleagues in setting up the conference. For Steve and wife Carolyn – herself a former Foreign Service Officer at Embassy Bucharest – this was truly a homecoming.

Former Romanian J-1 exchange visitor **Ruslan Bocancea**, now one of AILA's proudest new members, was the RDC's eyes and ears on the ground, conferring, arguing, negotiating, wrangling, bargaining and collaborating with an endless number of service providers and castle owners to ensure that the conference attendees were pampered and spoiled during their stay in Romania.

AILA National President **Eleanor Pelta**, together with fellow AILA Executive Committee members **Leslie Holman** and **David Leopold**, whose presence and participation in the conference honored the RDC and marked a milestone in the chapter's four year development.

In the minds of many of those in attendance, the RDC conference may have done as much to raise the level of discourse between foreign service officers and immigration attorneys as any single event ever has. While a great many people contributed to this event, Consul General Vann was the key to its success: It was his call to welcome the AILA visitors to the embassy (and warmly so!) and to have his officers participate on the conference panels. When Mr. Vann retires at the end of his current assignment the Foreign Service will lose one of its more special people.

Ambassador Mark H. Gitenstein in Focus

Some of the RDC attorneys who attended the reception at Ambassador Gitenstein's residence might be surprised to learn that this impressive diplomat is, like them, a career lawyer. Here are things you may not have known about Ambassador Gitenstein:

- Earned a Bachelors of Arts degree from Duke University and a Law degree from Georgetown University.
- Began a career as a legal staffer for the U.S. Senate in 1975, serving as a counsel on the Senate Intelligence Committee. Later named chief counsel and staff director of the Senate Judiciary Committee's subcommittee on criminal laws and procedures. Eventually rose to chief counsel for the Judiciary Committee, working closely with Senator Joseph Biden.
- Joined the Washington office of Mayer Brown LLP in 1989. Selected by his peers several times for inclusion in "Best Lawyers in America."
- Author of *Matters of Principle*, an award winning book on his experience managing the Judiciary Committee staff during the confirmation battle over the nomination of Robert Bork to the Supreme Court in 1987.
- Following the November 2008 election, served as a key adviser to incoming Vice President Biden during the transition.
- In 2009 became the first U.S. Ambassador in Bucharest of Romanian heritage.

References: U.S. Embassy Bucharest Website and AllGov.Com

Vietnam Revisited

The Department of State's Office of Inspector General (OIG) recently published an Inspection Report of Embassy Hanoi and Consulate General Ho Chi Minh City, Vietnam which brought back memories of a bitter war in which 58,000 valiant Americans lost their lives. Along with the memories, the OIG report also shows how much welcome progress has been made in normalizing the post-war relationship between the United States and Vietnam.

We're pleased to provide a number of findings and tidbits from the report:

(1) Traces of mutual suspicion still linger from the Vietnam War– which the Vietnamese call the "American War." Still, U.S. – Vietnam trade has increased 17-fold in the past decade.

(2) Interest in the United States is high: A televised broadcast of an interview with the Ambassador was watched by an estimated 20 million viewers in Vietnam.

(3) In the academic year 2010-2011, 14,800 students from Vietnam studied at U.S. colleges and universities – ranking Vietnam as 8th worldwide in absolute numbers of students in the United States.

(4) Consulate General Ho Chi Minh City serves a region that largely equates to the territory of the former South Vietnam.

(5) The Consulate General handles all immigrant visa cases (except for adoptions) processed in Vietnam, and consistently rates as one of the five busiest immigrant visa posts. In FY 2011 Consulate General Ho Chi Minh City adjudicated 52,000 immigrant visa applications.

(6) The consulate general has a high level of fraud, particularly marriage fraud, which makes work difficult. Between 50 and 60 percent of all immigrant visa applicants are refused under Section 221(g). Not all of these refusals were due to suspected fraud: the OIG found that officers have somewhat differing views on which immigrant cases should be approved and which should be returned to DHS for revocation. Indeed, one of the inspection's recommendations was that regular adjudication meetings should be held in the IV unit with the goal of ensuring more consistent adjudications and fewer Section 221(g) refusals.

The OIG Inspection report can be accessed here:

<http://oig.state.gov/documents/organization/187095.pdf>

Adoptions in Hanoi

The United States suspended its adoption agreement with Vietnam in 2008 due to suspicions of fraud and baby selling. Lingering, heartrending paperwork

problems have delayed final processing of adoption cases out of Bac Lieu Province. Just last September, Ambassador Shear remarked as follows:

"There's a group of orphans in Bac Lieu Province in particular who were caught in between systems, you might say, in a very heartbreaking situation for the children and for the prospective adoptive parents. I want to work with the Vietnamese government and with provincial officials and with the families to do what's best for these children, to unite them with their adoptive parents, and to resolve this issue as quickly as possible."

<http://vietnam.usembassy.gov/ambremarks-090911.html>

The Consular Section at Embassy Hanoi is led by Deborah Fairman, who arrived at post last July. In evidence of the Ambassador's commitment to resolving Bac Lieu adoption issues, Ms. Fairman estimated to the OIG inspectors that she spends 60 percent of her time on issues related to the Bac Lieu cases.

A Record of Compassion

It's perhaps not surprising that Ms. Fairman would bid for the Hanoi Consular Section Chief and then devote herself so completely to children's issues. She has a record of compassion. For example, while serving as the Immigrant Visa Chief in Bogota, Colombia, Ms. Fairman helped organize a project for providing nutritional lunches for especially disadvantaged children at a school attended by children from the poorest families in the city. This project was recognized by the J. Kirby Simon Foreign Service Trust, which supports projects initiated and carried out by Foreign Service personnel or members of their families, or by other U.S. Government employees stationed abroad.

<http://www.kirbysimontrust.org/grants2005.html>

The VWP and Prospective Job Losses in Taiwan

The DOS OIG also published an Inspection Report of the American Institute in Taiwan ("AIT") this month.

For those who are unaware, AIT reflects the unofficial relationship between the United States and Taiwan which arose after we established diplomatic ties with the People's Republic of China. Per the OIG report:

"AIT is unique within the Department. It is a private, nonprofit organization that operates under a formal contract with the Department to handle the day-to-day relationship between the U.S. Government and Taiwan.... In many ways, AIT resembles an embassy. It is headed by a director who functions as chief of mission."

The report contains an interesting description of the atmosphere in a consular section shortly before the home country's admission to the Visa Waiver Program:

"The consular section, which provides a full range of services, is preparing for the possibility of Taiwan's acceptance to the Visa Waiver Program, which would drastically reduce consular operations and staffing. AIT/Taiwan expects that, if Taiwan is accepted into the program, its nonimmigrant visa workload would drop from 160,000 to 32,000 applications per year."

In light of the expected drop in workload, local employees realize that if Taiwan is accepted to the VWP, many of them will lose their jobs.

The OIG notes that the consular section chief "has kept staff informed of the procedures for designation into the Visa Waiver Program and has provided regular updates on the status of Taiwan's efforts to meet program requirements. She and other officers have encouraged local staff to apply for other jobs within the mission."

The AIT consular section chief is Julie Kavanagh, whom the OIG called "outstanding" at her job.

<http://oig.state.gov/documents/organization/187093.pdf>

Disappointing Discipline in Vienna

The OIG also published an inspection report of Embassy Vienna, Austria in April. While some of the findings were extremely positive (Consular Chief Heather Guimond heads a section which is "well-run" and "provides excellent service") others were less so.

The report depicts a case of abuse by the Austrian chef who holds the license for providing food in the Embassy's restaurant facility. According to the inspection report:

"The OIG team noticed that some food prepared in the chancery's basement kitchen was not on the menu and not served in the chancery restaurant. According to restaurant staff, this food was destined for the chef's public restaurant. The public restaurant's Web site also had a picture of the present Ambassador to Vienna with an endorsement of the chancery restaurant. This juxtaposition created an implication that the Ambassador was endorsing the public restaurant."

In other words, the OIG inspectors caught the Austrian red-handed using American taxpayer-funded facilities to cook food which he then sold to the Austrian public at his privately-owned restaurant. The chef has also been intimating to the public that the United States Ambassador endorses the chef's privately-owned restaurant.

How should this chef have been disciplined?

Require him to pay back the reasonable value of his use of embassy facilities for private commercial purposes, and to publish a disclaimer about the Ambassador's supposed restaurant endorsement?

Terminate his license and demand that he leave the embassy on an immediate basis?

In fact, this chef barely received a slap on the *Dobostorte*. Again, the OIG inspection report:

"Embassy management discussed these issues with licensee, who agreed to stop using the chancery's basement kitchen to prepare food for his public restaurant and immediately remove the Ambassador's photograph and endorsement from the public restaurant Web site."

How disappointing.

<http://austria.usembassy.gov/ambassador.html>

FS Officials Called to Task

One of the OIG's primary missions is to investigate whether internal management controls at a U.S. embassy or consular post are being carried out.

This month's OIG inspection reports contain two instances in which Foreign Service Officials were called to task when management controls failed.

Vienna, Austria:

The Deputy Chief of Mission (DCM) was admonished for the following:

"Until July 2011, the DCM had not been performing regular reviews of the consular section chief's cases. Between May 2010 and May 2011 the DCM performed no reviews at all. Nevertheless, in a March 2011 telegram the DCM certified compliance with consular management controls, which includes performance of adjudication reviews."

As a result, the OIG recommended that a schedule be implemented for the DCM to perform regular reviews of the consular section chief's nonimmigrant visa adjudications, as required by 9 FAM 41.113 PN17d.

Ho Chi Minh City, Vietnam:

The OIG inspectors had some words of caution for Consul General in Ho Chi Minh City. According to the report, the Consul General is fluent in Vietnamese

and has a deep understanding of Vietnam's culture and norms. Perhaps as a result, he has not always included other officers in all meetings with Vietnamese officials. The OIG: "In a closely controlled political environment such as Vietnam, no post official, including the consul general himself, should meet with Vietnamese officials unaccompanied."

Reconsideration of Visa Refusals

A consular officer looking to the FAM for guidance on the reconsideration of an immigrant visa application will find this:

9 FAM 42.81 N4 ("Reconsidering Refusal")

9 FAM 42.81 N4.1 ("Applicant has 1 Year to Overcome Refusal to Avoid New Fee"):

"Under 22 CFR 42.81(e) a refused alien need pay no new application fee if evidence is presented overcoming the ground of ineligibility within 1 year of the date of refusal."

What's missing in the above FAM provision is guidance to consular officers as to how to act (if at all) upon receipt of a request for reconsideration. This is the substantive provision of 22 CFR 42.81(e) which for some reason is absent from the FAM Note. This week, a federal court reminded the defendant Department of State of this substantive provision in a case involving an immigrant visa consul in Ciudad Juarez who took no action on an applicant's request for reconsideration.

The case, *Rivas v. Napolitano et al* (United States Court of Appeals for the Ninth Circuit) clarifies that if the applicant presents evidence which could overcome the ground of ineligibility within one year of the date of refusal, consular officers have "a nondiscretionary, ministerial duty" to reconsider the denial. This finding was based on the use of the word "shall" in 22 C.F.R. 42.81(e):

"Reconsideration of refusal. If a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered. In such circumstance, an additional application fee shall not be required."

<http://cfr.vlex.com/vid/81-procedure-refusing-individual-visas-19720880>

The Ninth Circuit's decision in *Rivas v. Napolitano* can be accessed here:
<http://www.ca9.uscourts.gov/datastore/opinions/2012/04/25/09-56843.pdf>

Stay tuned for a change to 9 FAM 42.81 reflecting the substantive guidance provided by the Ninth Circuit.

Out of curiosity, is an applicant barred from seeking reconsideration if more than a year has passed since the date of immigrant visa refusal? Definitely not. According to 9 FAM 42.81 N4.3, "reconsideration may be given to a case at any time." If more than a year has passed since the initial refusal, a new application and fee must be provided.

<http://www.state.gov/documents/organization/87917.pdf>

Changes to the Foreign Affairs Manual (FAM) Monthly Report

DHS-Issued Documents (9 FAM Appendix N, 300)

The Department has completely rewritten 9 FAM Appendix N, 300 including finally updating its title from "INS-related Documents."

The rewritten guidance includes the "LPR boarding foil," a visa-like document which can be issued to a Legal Permanent Resident (LPR) by a consular section when the LPR's "Green Card" has been lost, stolen or has expired. The new "boarding foil" procedures apply only when there is no DHS office physically located at the Embassy or Consulate.

Some of the highlights of this new-look FAM Appendix follow, below:

"If an LPR's Form I-551 is lost, stolen, or expires while the alien is temporarily outside of the United States, a transportation company may refuse to board the alien...A consular officer, where there is no DHS counter presence, may issue a secure boarding foil to facilitate the boarding of an in-status LPR on a U.S.-bound flight and the application for admission to the United States."

Parenthetically, Form I-551 refers to the document commonly known as a "Green Card."

The new boarding foil procedures involve the following elements:

The LPR schedules an interview using local post procedures to report his/her lost, stolen, or expired I-551 and request a boarding foil.

Prior to the interview, the applicant should complete and submit pages 1-3 of Form I-90 ("Application to Replace Permanent Resident Card"). This form is required only for consular data collection purposes; it will not be sent to USCIS and no USCIS filing fee will be collected.

The applicant appears for his/her personal interview, bringing one photograph matching current visa photo standards. Fingerprints are collected for all LPRs age 14-79.

The consular officer uses the personal interview to achieve the following goals:

Verify the applicant's identity: For these purposes, the applicant should present a valid passport, driver's license, or other Government-issued photo I.D.

Verify the applicant's status: The consular officer will check the Central Index System (CIS) via the USCIS Person Centric Query Service (PCQS) to ensure that the applicant is in fact an LPR.

Verify that the applicant has not abandoned LPR status: The consular officer will check the time in which the applicant has been outside the United States, ensuring that he/she has not been absent for one continuous year or more. This check can be made with the help of passport entry and exit stamps, but must also include a check of entry/exit record through the DHS Arrival Departure Information System (ADIS). The new FAM guidance emphasizes that if the applicant has been outside the United States for a year or more and did not obtain a Reentry Permit, he/she has lost LPR status and is not eligible for a boarding foil.

Verify that the "Green Card" was lost or stolen: The applicant must generally present a police report documenting when the Form I-551 was lost or stolen.

Verify that the applicant is admissible to the United States: The consular officer must run all regular visa screening checks for possible inadmissibilities.

If all the above verifications are made, the consular officer may issue the boarding foil. As a general rule, the foil itself may be valid for no more than 30 days, single entry. When placing the LPR boarding foil in the applicant's passport, the consular office must cancel without prejudice any prior U.S. visas present in the passport to avoid confusion at the port of entry.

<http://www.state.gov/documents/organization/88020.pdf>

Consular Corner Quiz

1. Which major U.S. embassy in Western Europe has just been added to the Department of State's list of posts with limited or no US visa services?
2. True or false: A K-1 visa applicant is generally exempt from the public charge requirement of INA 212(a)(4).
3. A consular officer contacting the American Embassy in Berlin and requesting document summaries from the Berlin Document Center would likely be concerned that a visa applicant is subject to which ground of inadmissibility?
4. From what age must applicants for visas at U.S. consular posts in Mexico provide fingerprints?

5. What is the essence of the Department of State's "No Double Standards" policy?

6. True or false: Foreign Service Officers need to formally resign from the Department of State to serve at the American Institute in Taiwan (AIT).

7. Which of the following two circumstances constitutes an exception to the rule that Federal courts are without power to review the actions of consular officers:

(a) A court reviewing a consular officer's actions when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision within the consul's discretion.

(b) A court reviewing a consular officer's actions when the officer denies a visa without a facially legitimate and bona fide reason.

(c) Both (a) and (b)

(d) Neither (a) nor (b)

8. True or false: The holder of an APEC Business Travel Card (ABTC) is entitled to enter the United States without a visa under a special provision of the Visa Waiver Program.

9. A legal permanent resident applies for a reentry permit and requests that it be sent to a specified consular post abroad. The reentry permit is duly sent to the consular post, but is never claimed and eventually expires. What should the post do with the unclaimed expired reentry permit?

(a) Retain it in the event the legal permanent resident needs proof of issuance.

(b) Destroy it.

(c) Send it back to USCIS in order to provide DHS with information that is germane to any future dealings with the LPR.

10. This American Consulate is located in a city on the Rhine river which has served as an active port for almost 2000 years. The first American Consulate in this city was opened in 1866 in the building where the French national anthem,

"the Marseillaise", was composed some 70 years earlier. Which United States Consulate is this?

Top Ten Visa Wait Times at U.S. Consular Posts, April 2012*

Summer is approaching and wait times at a number of consular posts are soaring. The surge in wait times was nowhere as dramatic as at Belfast, which went from just 2 days at the beginning of March to 30 days at the start of April. Thankfully, by the end of the month Belfast wait times settled down at 7 days.

#	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	264 days	Unchanged	2
3	Nigeria	Abuja	122 days	+32 days	3
4	Nigeria	Lagos	78 days	+ 12 days	4
5 (tie)	Yemen	Sanaa	57 days	+ 22 days	5 (tie)
5 (tie)	Canada	Montreal	57 days	+ 29 days	7 (tie)
6	Colombia	Bogota	43 days	+ 23 days	New Listing
7	Ecuador	Guayaquil	38 days	+ 9 days	6
8	Brazil	Sao Paulo	35 days	+ 11 days	9 (tie)
9	Mexico	Guadalajara	33 days	- 2 days	5 (tie)
10	UK	Belfast	30 days	+ 28 days	New Listing

** Updated to April 6, 2012 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	(264 days)
Africa	Nigeria/Abuja	(122 days)
Middle East and North Africa	Yemen/Sanaa	(57 days)
Europe and Eurasia	UK/Belfast	(30 days)
Central and South Asia	Pakistan/Karachi	(29 days)
East Asia and Pacific	Thailand/Chiang Mai	(25 days)

Answers to Consular Corner Quiz

1) London, UK (the Olympics are coming!)

http://travel.state.gov/visa/temp/info/info_1302.html#limited

2) False. 9 FAM 41.81 PN2

<http://www.state.gov/documents/organization/87393.pdf>

3) INA 212(a)(3)(E) (Participants in Nazi Persecution)

<http://www.state.gov/documents/organization/86979.pdf>

4) 7 years of age.

<http://nuevolaredo.usconsulate.gov/faqs.html>

5) The "No Double Standards" policy applies to important security threat information, including criminal information. Under the policy, if the Department of State shares information with the official U.S. community, it should also make the same or similar information available to the non-official U.S. community if the underlying threat applies to both official and non-official U.S. citizens.

<http://www.state.gov/documents/organization/86560.pdf>

6) False.

7) (c)

8) False. Possession of an ABTC does not exempt travelers from normal visa requirements.

http://canberra.usembassy.gov/abtc_faqs.html

9) (c) 9 Appendix N, 302.2

<http://www.state.gov/documents/organization/88020.pdf>

10) U.S. Consulate General Strasbourg.

http://strasbourg.usconsulate.gov/consul_general.html

Quote of the Corner

"The Obama administration is growing more confident that the screening measures it has in place are capable of identifying and stopping entry by terrorists and serious criminals. And expanding tourist and business travel to the United States is low-hanging fruit for an economy undergoing a weak recovery. Better security, an economic boost, and the diplomatic results that would result from expansion of the Visa Waiver Program make a powerful trifecta that should be hard for the administration to resist."

Edward Alden, "If You Extend the Visa Waiver Program, They Will Come"
(Foreign Affairs, April 9, 2012).

<http://www.foreignaffairs.com/articles/137390/edward-alden/if-you-extend-the-visa-waiver-program-they-will-come>

***Liam Schwartz** is a principal in Liam Schwartz & Associates, a corporate immigration and consular law firm. He can be reached on [Facebook](#), and at Liam@lsa-law.com

All rights reserved to the author.